Insurance Newsbites

Updating you on insurance issues

The Third Parties (Rights Against Insurers) Act 2010

In this briefing we look at the introduction of the new Third Parties (Rights Against Insurers) Act, and the implications for insurers.

The Third Parties (Rights Against Insurers) Act 2010 received Royal Assent today (25 March 2010). It makes a number of changes to the Third Parties (Rights Against Insurers) Act 1930, with the aim of making it easier, quicker and less expensive for a third party claimant to recover compensation from the insurer of a defendant, without first having to institute proceedings against the insured. The changes brought in by the new Act are of relevance both to liability insurers and to insurers pursuing subrogated recovery actions.

In this issue:

Editor

Victoria Jordan
020 7648 9283
victoria.jordan@mills-reeve.com
www.mills-reeve.com

When and what applies

The formal commencement date for the new Act will be fixed by an Order in due course. When it is, the 1930 Act will be repealed save for cases where both the insured's insolvency and the liability to the third party occurred before the commencement date. Insurers therefore need to have an appreciation of both the old and the new regime.

Click here to view the Act.

The 1930 Act

Under the Third Parties (Rights Against Insurers) Act 1930, the rights of an insolvent insured to an indemnity from its insurers under a liability policy are transferred to a third party claimant. But the third party is required to establish the claim in proceedings against the insolvent insured prior to obtaining any rights under the insurance against the insurer. An important point to note is that the rights transferred are those of the insured and it follows that the third party's claim against insurers under the 1930 Act is only as good as the insured's claim to indemnity.

The 1930 Act (section 2(1)) was originally interpreted as giving a right to information about the insurance policy only when the liability of the insolvent insured to the third party had been established, with the result that a third party could pursue litigation against an insolvent insured, only to find that no effective insurance was in existence. This position was modified by the leading case of *OT Computers* (2004) in which it was established that as soon as an insured becomes insolvent the third party has a right to certain limited information about the insurance policy. However, issues remained with this and other provisions of the 1930 Act.

The need for change

Both the insurance market and the insolvency landscape have changed beyond recognition in the past 80 years. The result is that the application of the principles of the 1930 Act has in many cases become problematic, which has led to cumbersome and time-consuming court proceedings, with clear disadvantages both to legitimate third party claimants and to liability insurers.

The provisions of the new Act

The aim of the new Act is to bring the 1930 Act up-to-date, to improve the rights of third parties and to reduce litigation, expense and delay. The key changes introduced by the new Act are:

Right of action
The new Act will create a statutory transfer to third parties of the right to the benefit of a liability policy in the event that an insured subject to an insolvency procedure incurs a liability to that third party. The third party will thus be able to issue a claim against the insurer without first having to establish the liability of the insured. This removes the need for multiple sets of proceedings by allowing the third party to resolve all issues relating to its claim against the insurer within those proceedings. However, the liability of the insured to the third party will still need to be established before the rights under the insurance policy can be enforced against the insurers.

The third party can use either the new procedure of single proceedings established by the new Act, or follow the existing procedure of first establishing the liability of the insured and then suing the insurer under the insurance contract.

New rights to information
The new Act gives the third party new rights to obtain certain information relating to the insolvent insured's insurance both before and after the issue of proceedings. If it can be established that there is a contract of insurance that covers, or might reasonably be expected to cover, the supposed liability, information can then be obtained on, among other things, the identity of the insurer, the terms of the insurance, and whether there are (or have been) proceedings between the insurer and the insured in respect of the supposed liability.

A person who receives such a notice is obliged, within 28 days (beginning with the date of receipt of the notice), to provide as much of the information specified as they can and, if it cannot be provided, to state why and provide details of any other person who might be able to supply it. Failure to comply with a notice requesting information under Schedule 1 of the new Act permits the third party to apply to the court for an order compelling compliance.

Restriction on Insurers' defences
The general framework of the 1930 Act is followed so that the third party's claim against insurers is only as good as the insolvent insured's claim. However, the new Act introduces three exceptions to defences which were hitherto available to an insurer against an insured.

First, if after a transfer of rights under the new Act, the third party has satisfied a requirement under the insurance policy to meet a particular condition imposed on the insured, the insurer will not be able to rely on the non-performance of the policy condition. Secondly, the insurer cannot rely on breach of a policy condition requiring the insured to provide the insurer with information and assistance if the insured has been dissolved and has therefore been unable to fulfil the condition. And finally, if there is a pay-first clause before any right to indemnity from the insurer can arise, the new Act provides that such clauses do not affect the third party's rights. However, the new Act incorporates a saving for marine insurance contracts where pay-first clauses will continue to apply to third parties except in respect of claims for death or personal injury.

Other points to note

- The new Act removes the need for third parties to undertake the cumbersome step of restoring a defunct body to the register of companies to initiate proceedings against it. It does this by allowing the third party to bring proceedings directly against insurers and by allowing the third party to request information directly from persons related to the defunct body.
- The new Act updates the provisions of the 1930 Act to reflect the variety of insolvency procedures to which individuals, companies and other bodies are now subject.
- Under the new Act, a third party may claim directly against insurers even if the insurance covers liabilities voluntarily incurred by the insured.
- The new Act clarifies the position in relation to cases with a foreign element and provides that as long as a transfer of rights is triggered in accordance with its provisions, the Act will apply irrespective of whether the case has a foreign element.
- The new Act does not apply to reinsurance contracts.
- The prohibition on contracting out contained in the 1930 Act survives.

Conclusions

The new Act is designed to facilitate claims by third parties (or their insurers) against liability insurers in insolvency situations. It follows therefore that liability insurers should anticipate an increase in requests for information. Such requests will impose a significant administrative burden on insurers as most requests are likely to be directed to them and the 28 day time limit for compliance is relatively short.

Whilst the new regime is likely to result in more claims from third parties, as it will now be possible to bring proceedings first against insurers to resolve policy issues, if the policy defence is a good one costs should ultimately be saved. In addition, if the policy defence fails, insurers will now have ample opportunity to contest both liability and quantum of the third party's claim to indemnity under the policy rather than being presented with a monetary judgment obtained in default against the insolvent insured which simply has to be paid.