

## Insurance & Reinsurance Industry Group: Corporate Insurance & Regulatory Bulletin

### Introduction

It is that time of year again when we look back over the past 12 months and we also look forward to the new year and what opportunities may lie ahead.

Looking back at 2009 brings to mind the Chinese proverb “may you live in interesting times” – we certainly do live in interesting times. The global financial system has had a serious cardiac arrest, and even though it may now appear to be off the critical list, a period of long convalescence still lies ahead.

Given the unprecedented financial turmoil over the past year, it is with some trepidation and hesitancy that any predictions about the year ahead are made. Nevertheless, throwing caution to the wind, in a very uncustomary legal fashion, it is suggested that we may see the following in 2010:

- an increase in mergers and acquisitions activity as there is a sense that we may have reached the “bottom” of the downturn and there is more visibility over the pricing of M&A deals;
- as the countdown to the implementation of Solvency II in October 2012 gets even closer, the development of the detailed implementing rules will be closely followed and there will be increased focus on risk management;
- partly in response to Solvency II, certain carriers may consider putting in place sidecar or other structured finance arrangements as they seek to mitigate risk and/or obtain capital relief;
- a more “hands-on” and intrusive supervision by the FSA and a continued focus on prudential issues (such as counterparty or credit risk and whether a capital loading on the carrier will be required to mitigate such risk);
- longevity risk (i.e. the risk of people living longer than expected and the associated cost to businesses, pensions schemes and society at large of this) working its way higher up the list of risks to be managed and which the insurance market will continue to seek to find solutions to; and
- continued balance sheet management, including, in some cases, diversifying business platforms so that more capital can be moved to support whichever platform delivers the best returns on capital at any given time.

Whatever happens in 2010, we would like to take this opportunity to wish you all a merry Christmas and we hope that you all have a successful new year. We would also like to thank you for your support over the past year.

## The Law Commission's and Scottish Law Commission's review of insurance contract law

One prediction which can be made about 2010 is that we may get closer to an overhaul and modernisation of certain aspects of insurance law in the UK.

On 15 December 2009, the English and Scottish Law Commissions published their report on pre-contract disclosure by consumers entering into insurance contracts. Currently, consumers are required to volunteer all information which a "prudent insurer" would consider relevant. The two Commissions' review of this area of insurance law concludes that this duty should be abolished and replaced with a requirement for insurers to ask questions regarding what information they would want to have. The two Commissions have also produced a draft bill to implement their suggestions.

The two Commissions' report highlights the problems with the application of the principles in the Marine Insurance Act 1906 to consumer insurance contracts as follows:

1. *"The duty to disclose may operate as a trap for consumers.* Consumers are usually unaware that this duty exists or, even if they know that they should disclose facts, they may have no idea of what is relevant to the insurer.
2. *Policyholders may be denied claims when they have acted honestly and reasonably.* If the untrue statement is deemed to be one of fact rather than belief, it does not matter that the consumer tried his or her best to get it right.
3. *The remedy for misrepresentation and non-disclosure may be overly harsh.* The law entitles the insurer to "avoid" the policy. This means that the insurer may refuse all claims, even claims which the insurer would have paid had it been given full information. This is appropriate where consumers are deliberate or reckless, but not appropriate where they are merely careless.
4. *A statement on a proposal form can be converted into a warranty using obscure words that most policyholders do not understand.* If a prospective policyholder signs a statement on the proposal form stating that the answers form "the basis of the contract", this converts all the answers into warranties. If any statement is incorrect, the insurer may refuse all claims, even if the mistake is of no importance to it."

The draft bill proposed by the two Commissions, following a consultation paper published in July 2007, would make numerous amendments to this area of law. Key changes include abolishing the duty on consumers to volunteer material facts and creating a new duty on consumers to take reasonable care to answer the relevant insurer's questions fully and accurately and not to make a misrepresentation. The draft bill would create a new scheme for how insurers and the courts should deal with claims:

- where a consumer has acted honestly and reasonably, the insurer must pay the claim;
- where a consumer has acted carelessly, the insurer would have a compensatory remedy based on what it would have done had it known the information; and
- where a consumer has acted deliberately or recklessly, the insurer may be able to avoid the policy and treat it as not existing.

To view a copy of the full report and draft bill, please click [here](#).

If you have any query in connection with anything in this Bulletin, please do not hesitate to get in touch with your usual Mayer Brown contact or one of the contacts referred to below.

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