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Worth the wait?

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Francesca Kaye & Elliot Elsey herald the coming into force of the Third Parties (Rights Against Insurers) Act 2010

Knowledge is power and an important tool in the management of risk in litigation.

For the claimant, the ability to recover its losses is the ultimate validation of litigation and is at its most uncertain following recession. As recession recedes, a potential claimant will often only have an insolvent party (and more importantly its insurance policy) to pursue.

Typically these claims relate to negligent advice, and the injured party needs to know if the insolvent insured's professional indemnity policy will respond to the claim, or whether good money is being thrown after bad.

Insurers have long limited claimants' rights to access information about policies as an effective tool to increase the perception of risk and encourage the abandonment or settlement of claims on significantly reduced terms.

Third parties' rights to information about the insolvent insured's policies will increase significantly with the imminent introduction of long overdue legislation.

Good things come…

The Third Parties (Rights Against Insurers) Act 2010 (the 2010 Act) received royal assent in March 2010 and replaces the Third Parties (Rights Against Insurers) Act 1930 (the 1930 Act).

Delays have arisen as the 2010 Act required amendments to reflect changes in several specific insolvency situations (and the power for the secretary of state to legislate for further insolvency situations) since first drafted. The 2010 Act should come into force this October.

The 1930 Act and the 2010 Act are intended to protect third parties that suffer loss caused by an insolvent insured. The Acts enable third parties to exercise elements of the insolvent insured's rights under an insurance policy; and protects the proceeds of any such claim entering the general pot of assets for distribution to creditors.

Please mind the (information) gap

The 1930 Act requires third parties to establish the liability of the insolvent insured before they can pursue the insurer's liability. Additionally, third parties have to apply to restore dissolved companies.

A major difficulty for potential claimants under the 1930 Act is establishing (as far as possible) the prospects of ultimately recovering against the insurer.

The 1930 Act entitles third parties to obtain information about the insurance policy. However, it has generally been held that such rights only arise after establishing liability against the insolvent insured. Third parties risk pursuing proceedings against an insolvent insured with no guarantee a policy will hold.

Obtaining information from an unwilling insurer, notwithstanding some helpful court decisions transferring contingent rights to third parties over the years (in particular *First National Tricity Finance Ltd v OT Computers Ltd (in administration)* [2004] EWCA Civ 653, [2004] 2 All ER (Comm) 331), can prove expensive and frustrating.

For the claimant, the current dynamic of coverage being at risk can play a significant (and unwelcome) part in litigation against the insolvent insured. The insurer can supplement litigation risk with the spectre of coverage risk, even where (if full disclosure of coverage was provided), insurance will respond to the claim. The claimant does not know whether: coverage will hold; the insurer will raise a previously unknown defence; or cover could be exhausted.

The 1930 Act also permits policy terms where the insurer can attempt to void the policy by reason of the insolvent insured's non-compliance with obligations to assist and provide information under the policy.

Knowledge is everything

The 2010 Act will enable third parties to proceed against an insurer direct meaning that dissolved companies do not require restoration.

Although the insolvent insured's liability to the third party must still be established to gain access to their rights under the policy, it will be possible to achieve this through declaration of the court as well as admissions, judgment, settlement or arbitration award. This will reduce the time and expense injured third parties incur pursuing claims against insolvent insured.

The real shift in the dynamic between third parties and the insolvent's insurer under the 2010 Act will be clarification of third parties' rights to obtain information about the policy and its operation.

In addition to the insurer, third parties will now be able to obtain information about the policy from brokers; appointed insolvency practitioners; and former officers and employees of dissolved companies.

Third parties will have the right to receive confirmation of: the insurer's identity; the policy terms; whether cover has been declined previously; the existence of other proceedings; and the extent of funds to meet any claim. Strict time limits will apply.

The insurer will no longer be able to rely on policy terms entitling them to void the policy based on failure of the insolvent insured to provide information and assistance. Third parties will be entitled to assume the insolvent insured's obligations to ensure fulfilment of the policy terms.

Wait is almost over

Over a decade since revisions to the 1930 Act were first proposed the wait is almost over. The 2010 Act offers several benefits to third party claimants including the ability to make informed decisions about proceedings they intend to pursue.

Knowledge is power. We will have to wait to see how significant the change in third parties' rights to information (and the related balance of power) will prove.

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