

General Assessment of Consumer Insurance Contracts Bill 2017

(Private Members Bill)

The Joint Oireachtas Committee has requested a general assessment of the Private Members Bill Consumer Insurance Contracts Bill 2017 (the “Bill”), to include the Department’s views on the policy rationale/implications in the context of the Government’s own legislative programme and the various technical, legal and drafting aspects of the Bill. The purpose of this general assessment is to inform the Committee in its decision-making regarding scrutiny of the Bill.

Policy Rationale and Implications

In principle, we support the objectives of the Bill and are willing to engage constructively on it. We understand the objective of the Bill is to reform and modernise the law of consumer insurance contracts and can agree with the aim of providing an appropriate balance between the bargaining powers of insurers and consumers, given that most insurance contracts are concluded between large corporate bodies with vast resources and expertise versus consumers with limited financial, technical and other resources. The scope of the Bill is wide-ranging and covers many issues which the Government acknowledges have caused an immense amount of frustration for many ordinary policyholders, including small businesses, when dealing with insurance companies.

One of the key issues which the Law Reform Commission addresses in its 2015 Report on Consumer Insurance Contracts, and which is recognised in this Bill, is that the current law imposes an onerous requirement on a consumer to disclose information that a hypothetical “prudent insurer” might rely on in deciding whether to insure the consumer. This by definition requires the consumer to try and anticipate what the insurance company needs to know, even where they are not sure what information is relevant. Consequently, it puts the insurer in a position to refuse a claim when it has not received a full and complete disclosure, even in a situation where if this information had been disclosed, it would have had minimal or no impact on the decision to provide cover in the first place. The Bill proposes to replace the current pre-contractual duty of disclosure imposed on consumers with a statutory duty to answer carefully and honestly specific questions posed by an insurer that identify the material risks and the relevant information actually relied on by the insurer. Directly related to this is a provision which proposes to provide for proportionate remedies for innocent or negligent mistakes by a consumer, but continues to allow insurers to be able to repudiate liability completely in cases of fraud.

While we appreciate that the Bill is laudable from a consumer perspective, it must be noted that some of the proposed measures constitute fundamental change. At this stage, the implications of the changes being introduced are unclear. What is clear is that the Bill is legally complex and cuts across a number of fundamental and well-established legal principles such as, for instance, subrogation and insurable interest.

It will be necessary to develop a better understanding of the Bill’s potential impact on consumers and insurers. Gaining this understanding will require engagement with several

Government Departments and Agencies, including obtaining the perspective of the Department of Jobs, Enterprise and Innovation on consumer protection matters and the Department of Justice and Equality on general contract law-related matters. In addition, the Central Bank will play a central role given their expertise in the area. Further consultation will have to take place with the Law Reform Commission, as original authors of the Bill, as well as the Financial Services Ombudsman and the Personal Injuries Assessment Board, who will both be impacted by the Bill.

Other provisions in the Bill include:

- (i) its application to insurance contracts between insurance companies and individual consumers or SMEs with a turnover of less than €3million.
- (ii) the replacement of the concept of insurance warranties with statutory provisions allowing insurers to include provisions that precisely identify or define the risk insured but which also protect consumers from unfair and unjust outcomes. The Law Reform Commission gives an example of a consumer wrongly “warranting” that a particular type of burglar alarm has been installed (or states will be the “basis of the contract”) and the premises subsequently burns down as a result of faulty electrical wiring. In such a case the insurer will likely be able to repudiate liability under the policy, even though there is no connection with the breach.
- (iii) the abolition of the requirement that a consumer must have an “insurable interest” in the risk insured to be replaced with legislation that (a) requires a consumer, when making a claim, to prove actual loss, and (b) applies the principle of indemnity (that is, that a policyholder cannot make a profit on any claim).
- (iv) permitting third parties intended to benefit under an insurance contract to make a direct claim against the insurer.
- (v) reforming and modifying the current laws governing subrogation in order to avoid unintended consequences for family and employer-employee relationships (subrogation is the means by which an insurer can “step into the shoes” of its policyholder after it has paid out a claim in order to take action to recover the compensation from the person responsible for the claim being paid out in the first place).
- (vi) the replacement of the post-contractual duty of good faith with specific statutory duties, including a duty on consumers to pay premiums within a reasonable period and a duty on insurers to handle claims and complaints promptly and fairly.
- (vii) adapting the existing legislation on unfair terms for insurance contracts.
- (viii) the consolidation and reform of existing legislation to ensure that policyholders receive clearly written information on the essential terms of the insurance contract, including policy documents.

The Department would need time to closely review the Bill in order to ensure that there is no unnecessary replication of existing provisions and no unintended consequences arising from its implementation. The Department has a range of other competing insurance priorities ongoing, including amending the insurance compensation fund legislation, implementing the Cost of Insurance Working Group’s motor insurance recommendations, working on phase 2 of the Working Group’s project in relation to employer and public liability insurance, flood insurance, and transposing the Insurance Distribution Directive.

Technical, legal and drafting aspects

The Joint Committee has asked for the Department's views on the various technical, legal and drafting aspects of the Bill. As mentioned above, the substance of the Bill will require an in-depth review by all relevant stakeholders to understand the implications of the changes being introduced. As part of this review, the following work will have to be undertaken to determine what technical, legal and drafting issues arise as regards the Bill:

- 1. A review of the Central Bank's Consumer Protection Code** to determine what elements of the Bill are currently catered for in the Code. The Code is an important tool in the protection of consumers and needs to be considered in full as a number of the provisions concerning pre-contractual and post-contractual information and claims handling may already be addressed in whole or in part in the Code. Without such a review, overlapping or contradictory provisions could be introduced which will muddy the waters as regards insurance requirements. For example, provision 4.1 of the Code states that a "*a regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information*". This provision is directly relevant to Section 6(5) of the Bill.
- 2. A review of current Irish legislation.** An analysis of Acts and Statutory Instruments is required to determine the compatibility of the Bill with current law. There are potentially overlapping or conflicting provisions in existence that may require to be repealed or amended. This review is essential to prevent superfluous, possibly overlapping or contradictory provisions, on the statute book. For example, there may be some repetition between the Bill and SI 74 of 2007 (Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) Regulations 2007. In addition, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (SI 27/1995) addresses the issue of unfair terms in consumer contracts which is dealt with in section 17 of the Bill. The Unfair Terms Regulations include a power for the Central Bank to apply to court for a term to be declared unfair. The proposed changes in the Bill must be considered also in conjunction with the Consumer Rights Bill published by the Department of Jobs, Enterprise and Innovation in May 2015, which we understand is stalled while concurrent European legislative developments are finalised.
- 3. A review of EU legislative developments and Directives due to be transposed.** There are EU legislative developments, which whilst not specifically aimed at the regulation of insurance contracts, address some of the reforms being introduced by the Bill. The Insurance Distribution Directive ("IDD"), for example, was agreed in 2016 and includes strong disclosure requirements. This Directive will replace the Insurance Mediation Directive 2002/92/EC, which was transposed by the European Communities (Insurance Mediation) Regulations 2005. It applies to the entire insurance distribution chain which includes both undertakings and intermediaries (intermediaries being distributors who are not (re)insurance undertakings selling directly). The main aim of the Directive is to facilitate market integration by the enhancement of retail insurance regulation and increasing the level of policyholder protection. It also seeks to identify and mitigate conflicts of interest in particular in the area of commissions, and to strengthen administrative sanctions. The IDD seeks to upgrade consumer protection in the insurance sector by creating common standards across insurance sales and ensuring proper advice. The Directive includes mandatory pre- and post-contractual disclosure requirements for

insurance distributors and specifically a requirement to provide a standardised Product Information Document for non-investment-based insurance products. The Department of Finance has commenced its transposition work which is required to be done by February 2018, with some transitional provisions applying until February 2019. The content of this Directive needs to be taken into account.

- 4. A comparison between the recommendations of the Report of the Cost of Motor Insurance and the Bill.** There is potential for the recommendations contained in the Report of the Cost of Motor Insurance to overlap with the provisions of the Bill. If this is the case, the work will need to be streamlined to avoid duplication or conflict. For example, the Report contains recommendations in relation to providing additional information on premium breakdowns to consumers and an extension of the notification period for renewals.
- 5. A review of the Bill as regards appropriate legal drafting.** The Chair will be aware of the role of the Office of Parliamentary Counsel in drafting legislation. Given the length of the Bill and the complex legal principles it seeks to fundamentally change, time is required for an examination to ensure the text achieves its stated aims. For example, section 8 lays out what pre-contractual information the insurer should provide to the consumer. The specifics of what is to be provided to consumers is currently found in a number of different legislative instruments. Section 8 aims to consolidate those requirements into a single legislative framework. However, the Bill as drafted does not repeal or replace the relevant statutory provisions. Therefore, without appropriate Committee Stage amendments there would be a myriad of legislative overlapping provisions on the statute book which insurers would be required to follow, even if contradictory. Such a situation must be avoided.
- 6. Consultation with industry.** While it is not disputed that many of these changes are necessary, a proper consultation needs to be carried out with industry in order to fully understand their likely impact. For instance some provisions may possibly add unnecessary legal complexity which may result in higher litigation costs. In particular, we need to establish how the Bill, if enacted, is likely to change the way insurers conduct their business, how it impacts their systems, the timescales for them to implement any new legislation, and most importantly whether it has any consequences for cost and availability of particular products in the future. In our view, if a proper assessment is not given to these issues, we run the risk of adding a further cost burden onto industry with the result that premiums will increase.
- 7. A cost-benefit analysis:** The outcome of the consultation process with industry will feature in any cost-benefit analysis exercise. It is essential for the reforms which would be introduced by the Bill to be considered in terms of their cost and the benefit to be gained, including having regard to other jurisdictions where similar reforms have been made. It is also essential to consider the impact on the Personal Injuries Assessment Board and the Financial Services Ombudsman.

Conclusion

In summary, therefore, the Bill involves substantial reform of contract law as it currently applies to insurance. It is evident that there is a need to analyse the provisions of the Bill for unintended consequences and the effect it will have on industry. Due to the complex legal nature of the Bill, its wide ranging nature and the breadth of its impact, the necessary in-depth review of the Bill will take a substantial amount of time and involve a number of relevant stakeholders.