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*Restructuring &
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Third Party (Rights Against Insurers) Act 2010

By Sarah Turpin, Jonathan Lawrence and Sarah Emerson

The Third Party (Rights Against Insurers) Act 2010 (the “2010 Act”) finally comes into force on 1 August 2016.

The 2010 Act makes it easier for a third party to bring a claim against an insurer when the insured party has become insolvent. The 2010 Act will replace the Third Parties (Rights Against Insurers) Act 1930 (the “1930 Act”) and is designed to extend and improve the rights of third party claimants.

Whilst the 2010 Act received Royal Assent in March 2010, its implementation was delayed pending certain additional changes. The proposed changes will all now take effect from 1 August 2016.

The original 1930 Act allowed third parties to pursue a claim against the insurer of a person, company or entity which had commenced insolvency proceedings, and protected the proceeds of a claim from being distributed, together with the insured’s other assets, to pay its creditors upon insolvency. However, there were difficulties with the practical application of the 1930 Act which needed to be addressed. In particular, under the 1930 Act, the third party had to obtain judgment against the insured in respect of its claim before proceeding against the insurer.

Summary of the key changes

The 2010 Act will result in a number of key changes:

1. The third party will only have to issue one set of proceedings against the insurer seeking declarations both as to the insured’s liability to the third party and the insurer’s liability under the policy.
2. The automatic transfer of rights to the third party is retained but the legislation enables the third party to pursue its claim in a single set of proceedings. It also makes it easier for the third party to find out information about the insurance policy from an early stage.
3. The insurer can no longer rely on the defence that the insured failed to notify them of the claim when the third party has notified them.
4. The 2010 Act reflects changes in insolvency law by widening the definition of insolvent companies to include, for example, companies subject to voluntary arrangements or schemes of arrangement.
5. Removal of the requirement for the third party to have an insolvent company which has been completely dissolved restored to the register of companies before the third party can bring proceedings.

Transfer of rights to Relevant Person

Under the 2010 Act, the rights of the insured under the policy are transferred to the third party if the insured is already a relevant person when it incurs the liability to the third party, or the insured has already incurred the liability when it becomes a relevant person.

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The insured is or becomes a relevant person if there is in force one of the specified insolvency procedures. For individuals, these include a debt relief order, an administration order, an individual voluntary arrangement or a bankruptcy order. A limited company or an unincorporated organisation (such as a partnership) becomes a relevant person where, for example, a voluntary arrangement or administration order is in force, a receiver, manager or a provisional liquidator has been appointed, the body is (or is being) wound up voluntarily or by order of the court, the company has been dissolved or a scheme of arrangement has been sanctioned.

The Insurance Act 2015 introduces an amendment to the 2010 Act by providing the Secretary of State with the power to change the meaning of 'relevant person' by regulation. The aim of this provision is to ensure the 2010 Act keeps up to date with future changes in insolvency law.

Establishing liability

Under the 1930 Act, before the third party could start an action against the insurer, it had first to "establish" the insured's liability by judgment, settlement or arbitration award. If the insured company had been dissolved, the third party would also have to apply to the court to restore the company to the register.

Under the 2010 Act, once rights have been transferred, the third party may bring an action against the insurer "without having established the relevant person's liability". The insured's liability must still be established before those rights can actually be enforced, but this can be achieved by a declaration of the court, as well as by judgment, settlement or arbitration award.

This means that the third party only has to issue one set of proceedings against the insurer (and, optionally, the insured), asking the court to make declarations both as to the insured's liability to the third party and the insurer's liability under the policy. Where the claim is brought in arbitration, the tribunal can be asked to make the same declarations as the court.

The declarations will bind the insurer but not the insured, unless the insured is a party to the proceedings. New court rules will require the third party to notify the insured about the action against the insurer, giving the insured the option of applying to be joined as a defendant.

Defences

As under the 1930 Act, the transfer of rights under the 2010 Act will not put the third party into any better position than the insured.

The insurer can, therefore, rely on any defence the insured would have had against the third party had the action been brought against the insured, such as limitation or contributory negligence.

Similarly, in its claim against the insurer, the third party will be subject to the same policy terms, indemnity limit and excess as would have applied to the insured. The insurer will, for the most part, have the same policy defences against the third party as it would have had against the insured.

Consequently, if the insured made a material non-disclosure or misrepresentation when taking out the cover, or if it breached a warranty or a condition precedent in the policy, the insurer may have a defence to the claim. However, if the third party is able to fulfil

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the policy terms in place of the insolvent insured, for example in relation to claims notification, the insurer cannot rely on non-performance by the insured as a defence.

Obtaining Information

Under the 1930 Act, one of the main difficulties for third party claimants was obtaining information about the insurance cover, or even the identity of the insurer. Insolvency practitioners could be slow to respond to requests and might not be able to provide any information at all if records had been lost or badly filed.

The 2010 Act attempts to mitigate these problems by widening the category of people who can be asked to provide information and by setting a time limit on their response.

The third party can now request information by notice in writing on the insured or from any person who is able to provide such information. This might include insurers, brokers and anyone else authorised to hold policy documents or information. A person is able to provide information if he can do so "without due difficulty" from a document within his control or from his own knowledge.

Before requesting information from the insured, the third party must reasonably believe the insured has incurred a liability and is a relevant person, i.e. is subject to one of the listed insolvency procedures.

Before requesting information from anyone else, the third party must also reasonably believe an insurance policy was in place, that rights under the policy have been transferred to it and that the person in question is able to provide the information.

The information the third party is entitled to request includes:

- whether there was a policy in place that might cover the supposed liability;
- the identity of the insurer;
- the policy terms;
- whether the insurer has denied liability;
- whether any proceedings have been issued (and if so, relevant details);
- whether there is an aggregate limit of indemnity and, if so, how much (if anything) has been paid out on other claims; and
- whether there are any fixed charges which would apply to any sums paid out.

Comment

The changes introduced by the 2010 Act should prove beneficial to third parties looking to pursue claims against the liability insurer of insolvent parties. In particular, third parties should find it easier to obtain relevant information regarding the insurance and the process for pursuing the claim should be less cumbersome. The 2010 Act has also been updated to reflect current insolvency legislation.

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Authors:

Sarah Turpin

sarah.turpin@klgates.com

+44.(0).20.7360.8285

Jonathan Lawrence

jonathan.lawrence@klgates.com

+44.(0).20.7360.8242

Sarah Emerson

sarah.emerson@klgates.com

+44.(0)20.7360.8268

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