Best Practice in Presentation of Engineering Risks to Underwriters

IMIA Working Group 117 (19)

Part 2

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Chapter 5 - Duty of Disclosure

  • An insured must now make a fair presentation of a risk to an insurer before entering into a contract of insurance.
  • Disclosure of every material circumstance which the insured knows or ought to know.
  • or, failing that, disclosure which gives the insurer sufficient information that would put a prudent insurer on notice that it needs to make further enquiries in order to reveal the material circumstances.
  • Disclosure must be made in a manner which would be reasonably clear and accessible to a prudent insurer.
  • Codified the old common law position that the insured was obliged to provide a fair and accurate presentation of material facts that enabled a prudent insurer to form a proper judgment.
Chapter 5 - Duty of Disclosure

• What is a material representation / circumstance?
  • One that would influence the judgement of a prudent insurer

• What constitutes insurers' knowledge?
  • Carve out for insured if known or should be
  • If known by the underwriting team
  • Ought to know if employee or agent knows

• What constitutes insureds' knowledge?
  • For corporations known to senior executives or risk and insurance team
Chapter 5 - Duty of Disclosure

• How does this differ from the Old Regime?
  • Previously insured had to present every material circumstance and not misrepresent
  • Now replaced by fair presentation of risk

• Law and Jurisdiction
  • All insurance contracts should have a law and jurisdiction clause
  • Have looked at other territories e.g.
    • India – utmost good faith and old regime still apply
    • France – onus to answer all insurer’s questions truthfully at outset
    • Brazil – duty of disclosure as under old regime

• But please review the paper for the detailed legal analysis!
Chapter 6
What are the Consequences of a Failure to Disclose

• Failure to disclose, or 'Non-Disclosure'
• Proportional Remedies
• Breach of Duty of Fair Presentation falling into either of the following two categories:
  • Deliberate or Reckless – which preserves the rights of Insurers
  • Neither Deliberate nor Reckless – which preserves the rights of Insureds
• If the qualifying breach is established to be Deliberate or Reckless the Insurer:
  • May avoid the contract and refuse to pay all claims; 
  • Need not return any of the premiums paid
Chapter 6
What are the Consequences of a Failure to Disclose

• If the qualifying breach is non-Deliberate or Reckless the new proportionate remedies will be applied:
  • If the Insurer would not have entered the contract under any terms the Insurer may avoid the policy and refuse to pay all claims but must return all premiums
  • If the Insurer would have entered the contract under different terms other than relating to premium, then the claim would be dealt with by applying the terms the Insurer would have entered into at the start of the contract (i.e. certain new exclusions or sub limits may apply to the claim). The policy cannot be avoided however
  • If the Insurer would have entered the contract at a higher premium, then the Insurer is entitled to reduce the amount of any claim proportionally by the amount of additional premium it would have originally charged.

• Case Law
Chapter 7

The Impact of Commercial Relationships between Broker and Underwriters and Market Conditions

- Brokers’ role and targets
- Insureds’ wishes
- Underwriters targets
- Perception of risk presentation
- Actions in face of lack of information
- Hard market v soft market
- Understanding of the risk
- Regional variations
- No need for conflict
Chapter 8 - Conclusions

Heard at the conference so far touching on risk presentation:-
• IOT and Digitilization from Corrux
• IMIA data
• Workings of local markets
• Tailings facilities
• Photogrammetry
• Impact of new works on existing property
• This is not just for engineering insurance contracts

It is in every parties interest to ensure that there is a full and fair presentation of a risk in a structured way and that the resulting insurance contract should be structured to reflect the facts of the risk presented