Insurance/
Reinsurance

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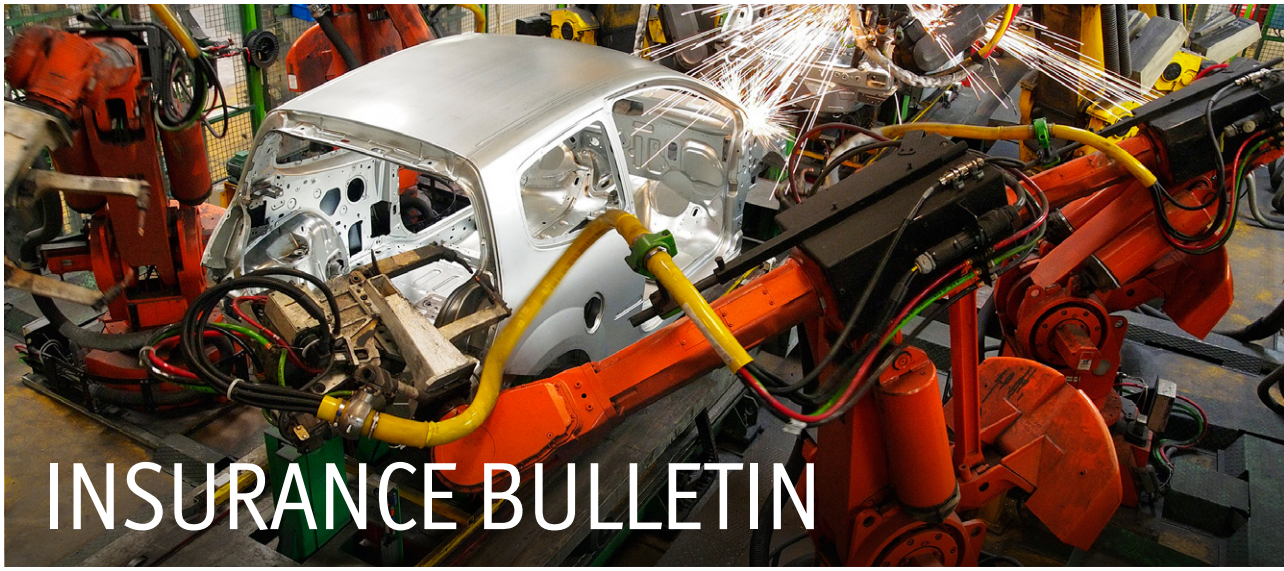

INSURANCE BULLETIN





Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

This will be the last edition of the Bulletin until September 2016, when we will include a summary of the key developments which occurred during late July and August. In the meantime, you can keep up to date with developments on www.hfw.com or by contacting any of the people listed below.

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2nd Middle East Insurance Industry Awards 2015
LAW FIRM OF THE YEAR

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1. Regulation and legislation

Europe: EU plans compulsory robot liability insurance

Robot liability insurance may become compulsory in the future under new plans by the EU to classify robots as "electronic persons" with their own legal liability.

The recent draft European Parliament motion calls for an *"obligatory insurance scheme"* in order to solve the complex problem of allocating responsibility for damage caused by increasingly autonomous robots. Comparison is made with compulsory motor insurance, although rather than an insurance covering human acts and failures, the proposed obligatory scheme is primarily envisaged to compel robot manufacturers to take out insurance for the autonomous robots that it produces. The draft also calls for the creation of a fund to ensure claimants are adequately compensated for damage in cases where no insurance cover exists.

The key issue identified by the report is its suggestion that the current understanding of legal liability may become insufficient in future, as robots become more autonomous and no longer "*simple tools in the hands of other actors*". In this regard, the report suggests that robots could be held liable for damages caused when they malfunction. The draft also calls for the creation of a central register of autonomous robots and even suggests that robots should be have intellectual property rights and make pension and social security contributions.

Some of these more far-fetched ideas have led to the report being criticised by some commentators as "lunacy", "too early" and "too

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complicated". There are also fears about unemployment and wealth inequality and concerns that the development of robotics could be stunted by overly intrusive EU legislation. The report certainly uses bold language, declaring that *"humankind stands on the threshold of an era when ever more sophisticated robots, bots, androids and other manifestations [AI] seem poised to unleash a new industrial revolution". It even suggests that Isaac Asimov's "Three Laws of Robotics"* as developed in his short story Runaround should be given some kind of legal basis. These laws state that *"A robot may not injure a human being or, through inaction, allow a human being to come to harm. A robot must obey orders given it by human beings except where such orders would conflict with the First Law. A robot must protect its own existence as long as such protection does not conflict with the First or Second Law."* However, the report fails to explain how the Three Laws of Robotics might actually be incorporated into the legal systems of EU member states.

The report was filed by the Luxembourg MEP Mady Delvaux and is available at http://tinyurl.com/grqzxsw. In the short term it is unclear whether the motion will pass. In the medium term it is also uncertain whether and when EU legislation will cease to apply to the UK when 'Brexit' goes ahead. However potential developments such as these will need to monitored regularly, since the UK insurance market is the largest in Europe.

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UK: FCA fines Towergate Underwriting Group £2.5 million for failings in its protection of insurer and client money

The FCA has imposed a fine of £2,632,000 on insurance intermediary Towergate Underwriting Group Ltd for failings in its protection of client and insurer money.

The FCA found that between June 2005 and December 2013, Towergate failed to comply with rules in the Client Assets sourcebook (CASS), as well as breaching Principle 3 (which concerns management and control) and Principle 10 (which concerns clients' assets) of the FCA's Principles for Businesses.

In particular, the FCA found that:

- Towergate accumulated a shortfall of £12.6 million in its client and insurer money bank accounts.

The penalties imposed by the FCA are a reminder of the importance for insurance intermediaries of dealing properly with client and insurer money and the serious consequences that can follow if the applicable standards are not met.

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- The shortfall went undetected for over eight years due to systems and controls weaknesses.
- The shortfall was first identified by Towergate in May 2013, but was not made good until October and November 2013, in contravention of CASS rules.
- Towergate also failed to report the shortfall immediately to the FCA.

Despite the failings, no client or insurer had in fact lost money, and the shortfall was eventually rectified. However, had Towergate become insolvent during the period of shortfall, insurers were at risk of losing money and may have experienced complications and delays in recovering it.

The FCA has also imposed penalties on Towergate's former client money officer and director, in particular:

- Imposing a fine of for breach of Principle 6 (due skill, care and diligence in managing the business) of the FCA's Statements of Principle for Approved Persons (APER).
- Banning the individual in question from having direct responsibility for client or insurer money in relation to any regulated activity carried on by any authorised or exempt person or exempt professional firm.

The penalties imposed by the FCA are a reminder of the importance for insurance intermediaries of dealing properly with client and insurer money and the serious consequences that can follow if the applicable standards are not met. This extends not only to the company itself but to its senior management. The final notice issued to Towergate's former client money officer and director referred specifically to the "great deal of emphasis" that the FCA places on the responsibilities of senior management.

The final notices issued by the FCA to Towergate and its former director may be found here[1] and here[2].

For more information, please contact Ben Atkinson, Senior Associate, London, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

1 http://www.fca.org.uk/static/documents/final-notices/towergate-underwriting-group-limited.pdf

2 http://www.fca.org.uk/static/documents/final-notices/timothy-duncan-philip.pdf

2. Market developments

France: A new federation of French insurers

A new federation of French insurers was born in July 2016: the French Federation of Insurance (Fédération Française de l'Assurance – FFA) resulted from the merger between the French Federation of Insurance Companies (Fédération Française des Sociétés d'Assurances – FFSA) and the Pool of Mutual Insurance Companies (Groupement des entreprises mutuelles d'assurance – GEMA).

The FFA is an association of around 280 French insurance and reinsurance companies which represents approximately 99% of the market.

The insurance industry had been awaiting this merger for more than 25 years. Mutual Insurance Companies, which are non profit organisations, had previously been reluctant to merge their professional federation with the French Federation of Insurance.

The FFA aims to enhance the influence of French insurers, notably when dealing with French and EU authorities. One of the purposes of this new federation is to provide support to insurers in relation to the implementation of EU regulations.

In this respect, since the Brexit vote, the role of the FFA appears in a new light. The FFA's new President, Mr. Bernard Spitz has said that he does not want Brexit to create discrepancies between UK and EU insurers. He has stated that the FFA will take an active part in defending "the interests of the European insurance market" (http://tinyurl.com/jjmnrt8) and has declared that the FFA will closely monitor the

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negotiations between Great Britain and the European Union.

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3. Court cases and arbitration

England & Wales: *Versloot Dredging BV and anr (Appellants) v HDI Gerling Industrie Versicherung AG and ors (Respondents)* [2016] UKSC 45

In a marine judgment handed down this week the Supreme Court found, by a four to one majority, that the 'fraudulent device' rule does not apply to collateral lies told by an insured that are immaterial to the insured's right to recover.

The decision is important as from at least 2003 (per the judgment of Lord Justice Mance (as he then was) in *Agapitos v Agnew (the AEGEON*[1]*)* the law has proceeded on the basis that there was no distinction between the following situations:

1. The claim was fabricated.
2. The amount of a valid claim was dishonestly embellished.
3. The entire claim (both substance and quantum) was valid but the information given in support of the claim, albeit ultimately immaterial, was dishonestly embellished.

In all three cases the result was that the insured was not able to recover from the insurer in respect of that claim and the insurer was entitled to terminate the policy.

However, the Supreme Court has in this respect set new law and found that where an insured tells "collateral lies" – lies that ultimately turn out to have no relevance to the insured's right to recover as per situation (3) above – the insurer is not entitled to repudiate the claim (and, by definition, is not entitled to terminate the policy). If a collateral lie is to preclude the claim then it must be material and, importantly, the test for materiality is to be determined on the true facts as found by the court. Materiality is not determined at the time the lie was told. In this regard, it does not matter that the collateral lie was told with the aim of improving the position of the insured, nor, according to Lord Sumption, that the lie *"set a hare running in the insurer's claims department"*.

The justification for the decision seems to be that whilst the lie is dishonest, the claim is not and the fundamental character of the valid claim is not tainted by what turns out to be an

The justification for the decision seems to be that whilst the lie is dishonest, the claim is not and the fundamental character of the valid claim is not tainted by what turns out to be an irrelevant or immaterial lie. In telling the lie the insured has not obtained something that he was not otherwise entitled to.

ADAM STRONG, PARTNER

1 [2003] QB 556 2003

irrelevant or immaterial lie. In telling the lie the insured has not obtained something that he was not otherwise entitled to, therefore according to Lord Clarke, *"public policy does not require that the insurer should have a defence"*.

The obvious question to ask is will the Insurance Act 2015 (IA 2015) alter any of the above when it comes into force on 12 August. The simple answer is, no. Whilst the IA 2015 codifies the remedies available to the insurer in the event of a 'fraudulent claim' (see section 12), it does not seek to define what a 'fraudulent claim' is, instead this is left to the common law. Consequently, in carving out claims involving collateral lies the Supreme Court has restricted the scope of what amounts to a 'fraudulent claim'.

It is perhaps worth noting that at the time the IA 2015 was being prepared, the common law position was that claims involving collateral lies amounted to 'fraudulent claims'. An interesting, but now wholly academic, question is had the common law been different, (and it is now, following this judgment), would the Law Commission have proposed to define 'fraudulent claims' to expressly include those involving collateral lies. The answer is probably "no" but we will never know.

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4. HFW publications and events

UKTI in Nigeria event

On Wednesday 13 July, HFW hosted a seminar for the UK Trade & Investment (UKTI) detailing our expertise in the Mining, Ports and Terminals, Logistics and Construction sectors in Nigeria. The UKTI is working on a campaign to utilise the UK's capacity and experience in Public Private Partnerships (PPPs) in driving Nigeria's agenda to develop key sectors of the economy through private sector investment. They are being hosted by a number of law firms this week in order to meet a UK audience of business leaders, investors and entrepreneurs interested in investing in opportunities in Nigeria; key UK government agencies (UK Export Finance, Infrastructure and Projects Authority) and multipliers. The delegation is led by the Minister of Trade & Investment, Mr. Okechukwu Enelamah and attendees to our event included The Special Adviser to the Vice President, the Executive Secretary of the Nigerian Investment Promotion Commission (NIPC), Representatives of the Ministries of Agriculture, Power, Solid Minerals, Transport and Representatives of the Niger State Government. We also had attendees from JLT, Eaglestone Advisory and Willis Towers Watson. Joseph Botham, Katherine Doran, Catherine Emsellem-Rope, Paul Wordley, Graham Denny and Tunde Adesokan gave a presentation to the delegation, and received high praise for the comprehensive overview given on our capabilities and work in Nigeria.

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5. Editor's note

UK: Insurance Act 2015 and Third Parties (Rights against Insurers) Act 2010 to come into force shortly

We're taking a short summer break and our next bulletin will be published in September. By that time, a brace of insurance reform statutes will be in force.

On the Glorious Twelfth (of August) the Insurance Act 2015 will bring in policyholder-friendly changes to the remedies available to insurers for breaches of warranty (introducing a quasi-causation test), and non-disclosure and misrepresentation of material facts (introducing proportionate remedies). For a fuller description of the changes please see our briefing[1] on the Act, our Bulletin of 22 April 2016[2] or our Dispute Resolution Bulletin of July 2015[3].

Also in August, the Third Parties (Rights against Insurers) Act 2010 (the Third Parties Act) (as amended by the Insurance Act 2015 and the Third Parties (Rights against Insurers) Regulations 2016) will make it much easier for claimants to pursue liability insurers where their insured defendant is insolvent. Cumbersome separate proceedings will no longer be necessary to establish the insured party's liability before the insurer can be sued, and insurers will be obliged to give full disclosure of policy terms to claimants within 28 days of request. This will make it cheaper and easier for claimants to assess whether an action against an insured insolvent defendant is worthwhile, and to proceed accordingly if so. The Third Parties Act will apply from 1 August 2016, although

1 http://www.hfw.com/The-UK-Insurance-Act-2015-June-2015

2 http://www.hfw.com/Insurance-Bulletin-22-April-2016

3 http://www.hfw.com/Dispute-Resolution-Bulletin-July-2015


the 1930 Act will still apply in situations where the insured became insolvent, and the event giving rise to the liability happened, before 1 August 2016.

For more information, please see our previous bulletins of 25 February 2016[4] and 13 May 2016[5].

No mention of insurance law reform would be complete without The Enterprise Act 2016, which will permit an award of damages for late payment of insurance claims from 5 May 2017. For further details, please see our Bulletins of 22 October 2015[6], 20 November 2015[7] and 13 May 2016[8].

Have a great summer!

For more information, please contact Andrew Bandurka, Partner, London, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

4 http://www.hfw.com/Insurance-Bulletin-25-February-2016

5 http://www.hfw.com/Insurance-Bulletin-13-May-2016

6 http://www.hfw.com/Insurance-Bulletin-22-October-2015

7 http://www.hfw.com/Insurance-Bulletin-20-November-2015

8 http://www.hfw.com/Insurance-Bulletin-13-May-2016

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