

## NEWSSTAND

# **Ringling the Changes: The Third Party (Rights Against Insurers) Bill and Proposed Reform of the Third Parties (Rights Against Insurers) Act 1930**

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On 23 November 2009, the Third Parties (Rights Against Insurers) Bill (the Bill), sponsored by Lord Bach, was introduced to the House of Lords. The Bill gives effect, with some minor modifications, to the recommendations set out in the Law Commission report on “Third Parties – Rights against Insurers” (Law Com No. 272). The report highlighted the deficiencies of the current regime under the Third Parties (Rights against Insurers) Act 1930 (the Act) and proposed a number of changes aimed at making it easier, quicker and less expensive for a third party claimant to recover compensation from the insurer of a defendant who is insolvent or subject to an insolvency procedure.

### **Background**

Under general legal principles, if a party incurs an insured liability to a third party, the third party usually will be able to sue the insured, and that liability be covered by the relevant insurance policy. However, if the insured is insolvent or becomes insolvent before the third party is paid, under insolvency law the insurance money becomes an asset in the insolvent estate of the insured and is instead used to increase the amount paid to other creditors. The purpose of the Act was to resolve this problem by transferring the insured’s rights against the insurer to the third party.

However, since 1930, both insurance and insolvency law has evolved and the Act now does not work as well as it should. The Bill seeks to address the Act’s shortcomings and create a system which does not place such onerous obligations on the third party.

### **Proposed Reforms**

Some of the key changes proposed by the Bill are outlined below.

### ***Proceedings***

Under the Act, a third party must first issue proceedings against the insured in order to establish its liability before being able to proceed against the insurer for payment. The Bill allows the third party to issue proceedings directly against the insurer and resolve all issues (including the insured’s liability) within those proceedings. It does specify, however, that before enforcing its rights, the third party must establish the insured’s liability but, as stated above, the liability of the insured and the insurer may be established in a single set of proceedings. This means that a third party will not be deterred by the prospect of initiating two sets of proceedings which can be costly and time-consuming.

### ***Where the Insured is a Defunct Company***

Under the Act, if the insured is a defunct body (that is, a company which has been struck off the register of companies), and was struck off before liability was established, the third party must first take steps to restore the company to the register before issuing proceedings against it. The Bill removes this requirement and in so doing, prevents further wasted time and cost for the third party.

### ***Rights to Information***

Under the Act, whether or not the third party is entitled to have access to certain information regarding the insured's policy has been the subject of some judicial debate. The Bill improves and clarifies this position by setting out a detailed procedure by which the third party can obtain information before commencing proceedings against the insurer. The third party will be entitled to request information from parties other than the insurer and the insured, which will therefore include, most significantly, brokers. This means that the third party will be able to make an informed decision as to whether or not to proceed with the claim and is therefore likely to reduce speculative and unfounded claims. This will, however, impact on the insurer who will, in all likelihood, take on the administrative burden of providing such information.

### ***Defences Available to Insurers***

The provisions of the Act ensure that the third party is not in a better position in relation to the insurer than the insured itself would have been. This means that the insurer can rely on the same defences in defending any claim by a third party as it would have done against the insured. The position remains the same under the Bill, with three notable exceptions which remove some of the more technical defences upon which an insurer may currently rely:

- Where there is a condition requiring the insured to take specific action (such as, for example, giving notice of a claim), it will be deemed satisfied if the third party takes that action.
- Where there is a condition requiring the insured to provide ongoing information and assistance to the insurer once the insurer has notice of the claim, if the insured is incapable of fulfilling such a condition (for example, because it is a company that subsequently has been dissolved, or a person who has died), the rights transferred to the third party will not be subject to that condition.
- Where there is a "pay first" clause, requiring the insured to pay sums due to the third party as a result of liability before any right to indemnity from the insurer can arise, the clause will not apply to the rights transferred to the third party.

### ***Preservation of Rights***

#### ***Limits on Rights Transferred***

The Bill preserves the limitation on the rights of the third party which prevent it from recovering any amounts in excess of the insured's liability. The rights of the insured are preserved in respect of any amount that is due under the insurance policy, but not payable to a third party – for example, where the insurer is obliged to indemnify the insured in full as well as to reimburse it for costs incurred in mounting a defence to the third party's claim or in seeking advice on

whether a third party's claim is likely to be successful. Such costs would be payable under the policy, but are not recoverable by the third party.

### ***Set Off***

The Bill preserves the insurer's right to deduct sums owed to it (for example, as a result of unpaid premiums) from the amount payable to the third party, to the extent that it would have been entitled to do so had the claim been brought directly by the insured.

### **Scope of the Bill**

The provisions of the Bill apply not only to cases where the insured has become insolvent, but also when it is facing financial difficulties and enters into certain alternatives to insolvency, such as voluntary arrangements between the insured and the insured's creditors. Such changes reflect the development of insolvency law since 1930.

The Bill clarifies the doubts surrounding coverage of voluntarily-incurred liabilities, such as legal expenses insurance, health insurance and car repair insurance. Under the Act it is unclear whether such liabilities are covered.

The Bill specifically states that it does not apply in cases where the liability is incurred under a contract of reinsurance.

### **Future of the Bill**

The Bill received its second reading in the House of Lords on 9 December 2009 and has now been committed to a Special Public Bill Committee. The Bill was scheduled to pass the committee stage and move to the report stage on 22 February 2010 and then receive its third reading in the House of Lords. Only then will it be sent to the House of Commons for consideration. There is some doubt as to whether the Bill will complete this process before the next general election and so the long-anticipated reform to the Act may well be waiting in the wings for some time to come.