Three's company

Third party claims against insurers—a new era, or more of the same, asks **Alison Padfield**

IN BRIEF

- The Third Parties (Rights Against Insurers) Act 2010 introduces new procedures for claims against insolvent defendants and their insurers.

The Third Parties (Rights Against Insurers) Act 2010 (TP(RAI)A 2010) finally made it onto the statute book on 25 March 2010, almost nine years after publication of the Law Commission draft Bill and report. Not yet in force, TP(RAI)A 2010 will repeal the 1930 Act of the same name, and, where liability insurance is in place, introduce new procedures for claims against insolvent defendants and their insurers.

The key concept remains the same: the transfer to the claimant of the rights of the insolvent defendant under any policy of liability insurance. The aim is to ensure that any insurance monies payable in respect of the claim do not form part of the defendant's assets to be shared between its creditors. TP(RAI)A 2010 is an improvement on the 1930 Act, although significant changes had been brought about by the courts in the period after the draft Bill was published, when it seemed that statutory reform would never arrive—in particular, the decision of the Court of Appeal in *Re OT Computers (in administration)* [2004] EWCA Civ 653, [2004] Ch 317, [2004] All ER (D) 361 (May). Overruling earlier first instance decisions, this decided that the claimant's entitlement to information, in relation to the insurance position, arose as soon as the insured became insolvent, even before its liability for the claim had been established.

Summary of key changes

The key changes include:

- Liability of insured can be established in proceedings brought directly against the insurer.
- Notification of the claim to insurers can be made by a claimant even if policy requires notification by the insured itself.
- Claimant's right to information about the insurance policy is strengthened in various ways, including a new time limit of 28 days for provision of information, and a wider range of people obliged to provide it, including former office holders of a defunct insured company.

Commentary

Although changes brought about by the Companies Act 2006 mean that restoring a company to the register has become much more straightforward, the ability to bring a claim directly against the insurer to establish the liability of a defunct insured company finally brings the law into the 21st century. This has long been recognised as a problem: in *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, Lord Templeman complained that: "To restore the...company...could do no more than authorise...[the claimant] to make use of a name carved on a tombstone. The use of the name could not restore life to the skeleton."

> "Significant as the reforms are, all is not rosy in the garden of claimants"

However, significant as the reforms are, all is not rosy in the garden of claimants. The position remains that insurers may not be liable to pay a claim even where a policy is valid and the liability of the insured is established. For example, the insurance policy may be subject to an aggregate limit of liability which has been exhausted (this is a limit of liability which applies not to a single claim, but to all claims in the same policy year); or the claim may fall within a large policy excess.

Further, pursuant to TP(RAI)A 2010, s 10 the insurer is entitled to set off against the claimant's damages any unpaid insurance premiums owing to it from the insured. In rare cases, a claimant may recover little or nothing, while later, luckier claimants, are able to recover. This reverses the position under the 1930 Act: see *Murray v Legal & General Assurance Society Ltd* [1970] 2 QB 495, [1969] 3 All ER 794. To this extent, David Hertzell and James Sharpe were incorrect to state, in their article "Streamlining Liability", that the Third Parties (Rights Against Insurers) Bill "does not alter substantive rights between the parties" (see 159 NLJ 7397, p 1734).

These points highlight the importance of seeking the right information under TP(RAI)A 2010: basic details only, such as the limit of liability applicable to each claim under the policy, are not enough. Similarly, it may be in insurers' interests to provide more information than is asked for, if that would reveal that a claim is unlikely to be met even if liability is established.

Allowing a claimant to notify a claim removes what was seen by many as a technical defence previously available to insurers. Other than this, TP(RAI)A 2010 does not alter the insurer's right to rely on contractual notification provisions, which may include short time limits. The new (28-day) time limit for the provision of information will assist claimants, but in some situations a series of requests for information will be necessary. This may result in a late notification, allowing an insurer a valid defence to a claim. TP(RAI)A 2010 provides no remedy for this, unless a failure to provide information in accordance with its provisions gives rise to a cause of action for breach of statutory duty. NLJ

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