



ST JOHNS  
BUILDINGS  
BARRISTERS CHAMBERS

## Insolvent Defendants

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## Insolvent Defendants

The continuing impact of the Covid-19 pandemic is slowly but surely beginning to cast a shadow over personal injury claims. As the months have rolled on, viable businesses, starved of custom, are facing the prospect of being forced to cease trading. Those same businesses are the Defendants in many ongoing and pending claims. So, what happens when a Defendant becomes insolvent?

When faced with an insolvent business, but one that has, or had, the benefit of insurance cover, the most straightforward way to obtain a judgment that will be satisfied is to pursue the claim using the UK Third Parties (Rights Against Insurers) Act 2010. Provided the claim fits within the Act's criteria, the Claimant can simply sue the Defendant's insurers directly in order to obtain a declaration from the Court as to both the liability of the Defendant and the enforcement of that liability against the Defendant's insurer. This can be accomplished in a single set of proceedings.

The 2010 Act only applies to a person/entity whose insolvency status falls within the definition of a "relevant person" under the Act. It is necessary for either the index accident or the insolvency event to occur after 1st August 2016. The Claimant does not need to restore a defunct company to the register to proceed with a claim under the Act nor is the right to claim affected by the statutory moratorium in actions against companies in administration.

Another benefit of the 2010 Act is that it permits a Claimant to serve notice upon the Defendant, or its insolvency practitioner, to require disclosure within 28 days of information relating to the Defendant's liability insurance. Such information includes the identity of any insurer, whether cover was in place, whether indemnity has been declined, policy terms including the extent of any cover, and deductibles. Court sanctions can be imposed in the event that the Defendant fails to comply.

As such, where a claim has already been issued against a Defendant's company who is subsequently declared insolvent, immediate steps should be taken to add the Defendant's insurer to the proceedings and to amend the proceedings to include a claim under the 2010 Act. The amended proceedings should make it clear that a declaration from the Court is sought to confirm the insurer's liability to pay the Defendant's liability.

Once included in proceedings, insurers can rely upon any defence that their insolvent insured would have had against the Claimant. Such arguments include limitation and contributory negligence. The insurer can also rely upon any policy defences or limits on cover (including breaches of conditions precedent, deductibles and self-insured retentions) it would have had in a claim brought against it by the insolvent Defendant. This issue is worth bearing in mind, particularly in low value claims, because policy deductibles may exceed the value of the claim and costs thereby leaving the Claimant having to join the ranks of unsecured creditors of the insolvent Defendant. It is worth noting however that, notification of the claim by the Claimant may satisfy policy conditions in relation to the insured's duties to notify the insurer of any claim.

It is important to bear in mind, particularly in ongoing cases with infant Claimants, that where both the insolvency and index accident arose prior to 1 August 2016, The UK Third Parties (Rights Against Insurers) Act 1930 will apply. That act permits a Claimant to pursue an action directly against insurers but only once the Claimant has first pursued the defunct (insured) Defendant to a successful outcome (establishing liability by agreement, award or judgment). As such, two separate sets of proceedings are needed to succeed.

In relation to corporate Defendants, in the event that a claim does not fall within the scope of the 2010 or 1930 Act or in circumstances where the insurer has a valid policy defence or relevant limit on cover, any judgment is unlikely to be satisfied. While the Claimant may be able to pursue any assets the company holds, they are likely to sit at the back of a long line of creditors. Even with a Court order, a Claimant is not entitled to recover any sums ahead of other unsecured creditors. The reality is likely to be a percentage-based payment of perhaps a few pence in the pound or nothing.

The position is the same in relation to insolvent individuals; however, in such cases there is perhaps a better chance that the individual will own property or other assets against which any judgment could be enforced; however, experience suggests that Claimants are often left pursuing men, or women, of straw.

In such circumstances, the Claimant may find salvation in their own home insurance. Certain household policies have a section which will pay unrecovered, awarded damages and assessed costs. Such 'Unsatisfied Judgment Cover', even taking into account any policy excess, is likely to be far more generous than recovery as an unsecured creditor.

## Practical Steps

- Review ongoing cases, particularly those involving child Claimants, to review the position on solvency of the Defendant.
- Where a Defendant is insolvent, check that the claim falls within the terms of the 2010 Act or the 1930 Act.
- Seek details of the Defendant's insurance provision including policy terms, whether an insurer provided cover and whether it has declined indemnity, and the extent of cover and deductibles.
- Review the value of the claim (including costs) to ensure that the claim will be covered by the insurance product in question.
- In the event that neither the 2010 or 1930 Act apply or if the insurer has a valid policy defence, review the Claimant's own home insurance policy for any Unsatisfied Judgment Cover.
- Where the Defendant is an individual it is worth performing a land registry search in order to establish how property with which they are connected is held.

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