

ADVISER

THE ENTERPRISE ACT 2016 COMES INTO FORCE — NEW RIGHT FOR POLICYHOLDERS TO CLAIM DAMAGES FOR LATE PAYMENT OF INSURANCE CLAIMS

The Enterprise Act 2016 (the “Act”) came into force on 4 May 2017 and gives policyholders a right to claim damages in the event of late payment of claims. The Act applies to any (re)insurance¹ policy placed or renewed on or after that date, if it is subject to the laws of England and Wales, Scotland, or Northern Ireland. The provisions making the changes are an amendment to the Insurance Act 2015.

PRIOR TO THE ENTERPRISE ACT

Under the old law (except in Scotland), damages for late payment of claims were not recoverable from insurers. An insured could only recover what it was owed under the policy and could not recover from insurers any additional losses it had suffered due to delay in payment by them.

THE ENTERPRISE ACT

Under the Act, it is an implied term of every contract of insurance that, if the insured makes a claim under the policy, the insurer must pay any sums due within a reasonable time. Breach of this implied term may give rise to a claim against the insurer for damages.

The Act provides that a “reasonable time” includes a reasonable time to investigate and assess the claim. What is a “reasonable time” will depend on the relevant circumstances, and the Act provides examples of matters which may need to be taken into account, including:

- The type of insurance.
- The size and complexity of the claim (for example, a court would be likely to allow an insurer more time to investigate a complex business interruption loss than a simple first-party property loss).
- Compliance with relevant statutory or regulatory rules or guidance (for example, if insurers had to comply with certain sanctions regulations before making payment).
- Factors outside the insurer’s control (for example, if a third party has delayed in providing essential information to insurers).

The Act also provides that, if an insurer can show there were reasonable grounds for disputing the claim (whether in relation to liability or quantum), the insurer will not be in breach of the implied term merely by failing to pay the claim while that dispute is continuing.

The Act is not intended to prevent insurers from taking robust positions on claims, or from thoroughly investigating claims before making payment, and insurers will still be able to dispute claims in good faith.

However, the insurer’s conduct when handling a claim may be relevant when assessing whether there has been unreasonable delay (for example, if an insurer deliberately ignores fresh evidence, or unreasonably delays in responding to developments).

CONTRACTING OUT

The Act does contain provisions to allow parties to a non-consumer policy to contract out of the new implied term, provided the insurer meets the “transparency requirements” of the Insurance Act 2015. “Contracting out” means that the insurer inserts a “disadvantageous term” into the policy, which is a term that puts the insured in a worse position than it would be in under the Act. In order to satisfy the “transparency requirements”, before the insurance contract is concluded the insurer must take sufficient steps to draw the insured’s attention to the disadvantageous term, and that term must be clear and unambiguous as to its effect. Contracting out will not be valid where there has been a deliberate or reckless breach of the implied term by the insurer, and insurers will not be permitted to contract out in respect of consumer insurance policies.

¹ References to insurance/insured/insurer also apply to reinsurance/reinsured/reinsurer, save for consumer insurance references.

TIME LIMITATION

It is very important for insureds to be aware that, under the Act, claims against insurers for breach of the implied term must be brought no later than one year from the date on which the insurer has paid all the sums due in respect of the loss. This means that, if the insurer has only made an interim payment(s), time will not start to run until the final payment has been made. However, after the expiry of that one-year period, any claim for damages against the insurer will be time-barred.

PRACTICAL POINTS FOR POLICYHOLDERS TO CONSIDER

In order to preserve the right to claim late payment damages, we recommend, in particular, that policyholders take the following steps:

- Before the policy is placed, inform the insurer if there are any special circumstances (for example, financial vulnerability, inability to obtain alternative finance, or dependence on a particular item of equipment) that could give rise to further losses if claims are not paid promptly. This will strengthen the argument that the consequential losses were foreseeable.
- Liaise with your broker and, where possible, resist any attempts by insurers to contract out of the Act or to insert any cap on their liability for late payment damages.
- When a claim under the policy has been notified, ensure prompt provision of information to insurers and prompt responses to any queries raised by insurers, to avoid causing any delay in the processing of the claim.
- Keep a written record of all communications with the insurer, and of the dates that information was provided.
- Ensure the insurer is fully aware of the consequences of delayed payment. Inform the insurer, in writing, as soon as you become aware that any delay in paying the claim is likely to cause you financial or commercial difficulty (for example, inability to fulfil your contractual obligations due to loss of a key piece of machinery).
- Take reasonable steps to prevent any loss being caused by late payment.
- Take reasonable steps to mitigate any loss being caused by the delayed claim payment (for example, by obtaining loan finance where appropriate).
- Remember that the limitation period for suing insurers for late payment damages is only one year from the date the insurer has paid all sums due in respect of the loss. In effect, this is one year from the date of the final payment.

COMMENT — DOES THE ACT OPEN THE FLOODGATES TO CLAIMS FOR LATE PAYMENT?

In some circumstances, damages for late payment of claims may offer an important remedy for insureds and may provide an incentive for insurers to process and pay claims promptly. The Act is certainly a useful weapon in the insured's armoury, and gives insureds and their brokers an additional negotiating point with insurers. However, there are significant hurdles to a successful claim for late payment. In order to recover damages for late payment, an insured would have to show that:

- It had a valid claim under the policy; and
- The insurer had failed to pay within a reasonable time; and
- The insured had suffered a loss, which was caused by the insurer's breach of the implied term; and
- The loss suffered by the insured as a result of the delay was foreseeable (that is, the loss suffered was the type of loss that would have been contemplated by the insurer and the insured at the date the insurance contract was entered into, had thought been given to the issue).

Furthermore, the insured will not be able to recover any loss that could have been avoided by taking reasonable steps.

As such, the Act does not give insureds carte blanche to claim or recover damages from insurers in all cases. The Act contains several defences for insurers, and the courts would no doubt take into account the fact that claims – particularly complex ones – can often justifiably take considerable time to investigate.

While the Act is a positive step forward for insureds and should encourage insurers to increase the efficiency of their claims-handling processes, we do not see it as opening the gates to a flood of successful litigation against insurers.

CONTACT

If you have any questions about the Enterprise Act or the Insurance Act 2015, please do not hesitate to contact your usual Marsh representative, or email us at insurance.act@marsh.com, and/or review the information on our dedicated Insurance Act site at www.marsh.com/uk.



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