



Insurance reform – redress when insurers pay late

We recently updated you on some significant changes to insurance law that will take place when the Insurance Act 2015 comes into force in August of this year.

Hot on its heels comes the Enterprise Bill 2015, which if enacted, will enable policyholders to claim damages from insurers for losses suffered as a result of insurers not paying claims within a reasonable period of time.

The misfortunes of Mr Sprung

Historically, if an insurer refused to pay or paid late, a business had no real remedy for any resulting loss suffered by it. The insurer would simply have to pay interest on the amount that should have been paid under the policy. This has long been seen as an unjust situation that could result in harsh consequences for policyholders, with the example of Mr Sprung being the most often cited.

Mr Sprung's factory was damaged by vandals and he made a claim on his insurance. The insurer disputed the claim on spurious grounds and did not make a substantive indemnity payment for three and half years. The delay in payment caused Mr Sprung's business to collapse.

But despite the obvious injustice, the court held "*with undisguised reluctance*" that Mr Sprung had no remedy against the insurer for the losses he had suffered as a result of the delay.

Damages for late payment

Currently, insurers are not legally obliged to pay valid claims within a reasonable time and policyholders are not entitled to recover losses resulting from the late payment of claims.

The Enterprise Bill 2015 is set to insert a new section 13A into the Insurance Act 2015 which will make it an implied term of every insurance contract that, if the policyholder makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.

In effect, this means a policyholder is able to claim damages for foreseeable losses resulting from the late payment of a claim. This is of particular importance to business continuity insurance or insurance of business critical operations.

This is also important in the context of the Insurance Act placing an obligation on the policyholder to give a fair presentation of risk to the insurer before the policy is entered

into. What is considered a 'foreseeable loss' is likely to depend, in part, on the content of the policyholder's presentation of risk and any subsequent responses received by the insurer to their follow-up questions.

What is meant by "reasonable time"?

What is a reasonable time for the insurer to pay a claim will depend on all the relevant circumstances, but may include taking into account:

- the type of insurance, for example business interruption claims can take longer to resolve
- the size and complexity of the claim
- compliance with any relevant statutory or regulatory rules or guidance, for example, regulatory rules require insurers to treat customers fairly when handling claims
- factors outside the insurer's control.

A reasonable time expressly includes a reasonable time for the insurer to investigate and assess the claim. Insurers will have a defence to a claim of late payment if there are reasonable grounds for disputing the claim. This places greater emphasis on insurers effectively managing investigations of claims, communicating any potential concerns with the insured and attempting to resolve them within a reasonable time and in a reasonable manner.

It is possible to contract out

It will only be possible for insurers to contract out of the implied term in business insurance contracts, not in consumer insurance contracts. This is subject to the requirements under the Insurance Act for an insurer to act with transparency when contracting out of the Insurance Act.

Also, it will not be possible to contract out when the breach to pay within a reasonable time is either "*deliberate or reckless*", which is where the insurer "*knew that it was in breach or did not care whether or not it was in breach*".

As the term is implied under an amendment to the Insurance Act, policyholders will need to check if the insurer has contracted out of the Insurance Act and has complied with the Act's transparency requirements.

Claims for damages must be brought within the year

The Enterprise Bill is also set to include an amendment to the Limitation Act 1980, inserting a limitation period on claims for damages for late payment of one year from the date the insurer made the full payment of the claim or otherwise settled the claim. Where insurers simply refuse to pay at all the usual six year limitation period applies.

Policyholders will have to be mindful of this short limitation period when attempting to settle any dispute with an insurer arising from an alleged late payment.

What policyholders can do

- Consider the risks to your business if payment of insurance claims is delayed
- Check whether insurers are proposing to contract out of any provisions of the Insurance Act and whether that includes contracting out of the implied term
- Make clear when taking out insurance what loss could occur should a significant claim not be paid within a reasonable time
- Document the claims process and communications with brokers and insurers
- Make sure you respond promptly to insurer requests for information and documents concerning the claim.

The Enterprise Bill 2015 is yet to be approved by Parliament but it is currently expected to become law in 2017.

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