

ADVISER

DAMAGES FOR LATE PAYMENT OF CLAIMS – PROPOSED BY THE ENTERPRISE BILL

One of the provisions originally included in the Insurance Bill was for insurers to have a contractual liability to pay damages for late payment of claims. Although Marsh supported this, some in the insurance market had concerns about it. This provision was therefore removed from the Insurance Bill, so that it could continue through Parliament by the uncontroversial route, and it was reserved for consideration at a later date.

This provision has now been included in the “Enterprise Bill”, which is currently before Parliament.

If the Enterprise Bill is passed, it will amend the Insurance Act 2015, although the amendment would not be effective until some time after 12 August 2016, when the rest of the Insurance Act 2015 comes into force.

CURRENT LAW

Under current law, damages for late payment of claims are not recoverable from insurers. An insured can only recover what it is owed under the policy, and there is no provision for the insured to recover any additional losses it has suffered due to delay in payment by insurers.

NEW PROPOSAL

The Enterprise Bill proposes that it will be an implied term of every contract of insurance (both consumer and non-consumer) that, if the insured makes a claim under the policy, the insurer must pay any sums due in respect of the claim within a reasonable time. In addition, any breach of this implied term will give rise to a claim in damages.

The Enterprise Bill provides that a “reasonable time” includes a reasonable time to investigate and assess the claim. What is a “reasonable time” will depend on what the Enterprise Bill describes as “the relevant circumstances”.

The Enterprise Bill contains guidance on what factors may need to be taken into account when considering what is reasonable in each specific case, namely:

- The type of insurance.
- The size and complexity of the claim.
- Compliance with any relevant statutory or regulatory rules or guidance.
- Factors outside the insurer’s control.

The Enterprise Bill also provides that, if an insurer can show that 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. However, the conduct of the insurer in handling the claim may be a relevant factor in deciding whether the implied term was breached and, if so, when.

CONTRACTING OUT

The Enterprise Bill does contain provisions to allow parties to a non-consumer policy to contract out of the implied term, provided the “transparency requirements” in the Insurance Act 2015 are met. However, 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.

CURRENT STATUS OF THE ENTERPRISE BILL

Some insurers are concerned that the proposals in the Enterprise Bill could lead to a rash of unmeritorious claims for damages. They have therefore suggested some amendments to the Bill, mainly that the proposed reform should not apply to certain larger insureds or to reinsurance, and limiting the provisions only to an insurer's "deliberate or reckless" failure to pay within a reasonable time. We do not agree with these proposed amendments and are monitoring the progress of the Enterprise Bill through Parliament.

To learn more, contact your Marsh client representative.

Visit our [website](#) for information on the Insurance Act 2015 and actions you can take now to prepare your business, or to register for our webinar series on the Insurance Act 2015.

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