

ADVISER

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

Passed on 4 May 2016, the Enterprise Act 2016 (the “Act”), now gives policyholders a potential right to claim damages in the event of late payment of claims. The provisions will come into effect on **4 May 2017** and will apply to every (re)insurance 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 will be an amendment to the Insurance Act 2015.

CURRENT LAW

Under current law¹, damages for late payment of claims are not recoverable from insurers. An insured can only recover what it is owed under the policy and cannot recover from insurers any additional losses it has suffered due to delay in payment by them.

NEW ACT

Under the Act, it will be 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; however, 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.
- Compliance with relevant statutory or regulatory rules or guidance.
- Factors outside the insurer’s control.

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.

CONTRACTING OUT

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

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 claim. After the expiry of that one-year period, any claim for damages against the insurer will be time-barred.

1 Except in Scotland.

COMMENT

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 will give 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:

- The insured had a valid claim under the policy; and
- The insurer failed to pay within a reasonable time; and
- The insured had suffered loss, which was caused by the insurer's breach of the implied term; and
- The loss suffered by the insured 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 a number of 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 very 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.

If you have any questions about this subject, please do not hesitate to contact your usual Marsh representative.



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