DAMAGES FOR LATE PAYMENT OF INSURANCE CLAIMS - GOOD NEWS FOR POLICYHOLDERS

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UK Insurance Coverage Alert

From 4 May 2017 it became possible for policyholders to recover damages from insurers who have not paid valid claims within a 'reasonable period of time'.

THE LAW

The change has been brought about by section 28 of the Enterprise Act 2016 which introduced a new section 13A into the Insurance Act 2015 (the Act). It states that insurers "*must pay any sums due in respect of the claim within a reasonable time*". Under the 'old' law there was no obligation on insurers to settle claims within a reasonable period and an insured's only remedy in the event that an insurer was late paying a claim was for interest on the sums due and payable under the policy. There was no right to damages even if the insured suffered significant losses as a result of the delay.

It is now an implied term of every insurance contract that an insurer must pay any sums due in respect of a claim made by the policyholder "within a reasonable time". A reasonable time includes a reasonable time to investigate and assess the claim. Reasonableness is likely to be assessed objectively and will depend on all of the relevant circumstances, including the size and complexity of the claim, the type of insurance and factors outside of the insurer's control.

Put simply, the more complex and significant the claim, the longer the period which is likely to be regarded as a "reasonable time". Moreover, the insurer will not breach the implied term merely by failing to pay the claim while a dispute is ongoing, if the insurer can show that there were reasonable grounds to dispute the claim. However, the conduct of the insurer in handling the claim may be a relevant factor in deciding whether the implied term has been breached and, if so, when.

The remedies for breach of the new implied term include damages (in addition to having the claim paid and any claim for interest). Normal contractual principles under English law will be applied, namely, that the purpose of contractual damages is to put the innocent party in the position it would have been had the relevant contract not been breached.

Any claim must be brought within one year of an insured receiving payment of the insurance claim. This is reflected in an amendment to the Limitation Act 1980.

WHAT MUST THE POLICYHOLDER DO?

In order to successfully pursue a claim for damages, the insured must prove:

1. The insurance contract was entered into on or after 4 May 2017

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2. There was a valid claim under the policy
3. The insurer has failed to settle the claim within a reasonable time (including a reasonable time to investigate and assess the claim)
4. Loss has been suffered which was caused by the insurer's delay in payment
5. The loss was reasonably foreseeable at the time the relevant contract was entered into (not at the date of breach). A key point will be whether the insurer was aware that the insured would be relying on the insurance monies, for example to reinstate its facilities and resume normal production etc. This is an issue which may be worth considering at the time of placement, with disclosure being made to the insurer of any unusual or exceptional damage which might result from any unreasonable delay in payment.

The insured should also keep in mind the importance of avoiding delays in pursuing the insurance claim (or in providing the insurer with relevant information to investigate the claim) to avoid any argument by insurers that they have caused or contributed to their own losses by reason of their delay. Similarly, the insured should take steps to mitigate any losses arising from the insurer's delay, where possible.

Given the one year limitation period, insureds should also ensure that any claim for damages is pursued within a year of the claim being settled.

CONTRACTING OUT

Finally, it should be noted that it is possible for insurers to contract out of these new provisions for non-consumer insurance, provided that the breach is not deliberate or reckless i.e. where the insurer knew it was in breach or did not care whether it was in breach. The insurer cannot exclude its liability in these circumstances.

For any contracting out, the insurer must satisfy the transparency requirements under the Act which require that the contracting out provision is clear and unambiguous as to its effect, and that the insurer has taken sufficient steps to draw the disadvantageous term to the insured's attention.

Policyholders may wish to think carefully before agreeing to contract out of the right to damages for late payment. The justifications for contracting out are less obvious than they may be for other provisions of the Act. Contracting out effectively means the policyholder is agreeing to bear the financial consequences of any unreasonable delay by the insurer.

For more information about damages for late payment or the Insurance Act 2015 more generally please contact Sarah Turpin or Sarah Emerson.

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