

## DAMAGES FOR LATE PAYMENT OF INSURANCE CLAIMS – A MAJOR ADVANCE FOR POLICYHOLDERS

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### Insurance Coverage Alert

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The late payment of insurance claims has been a particular problem for commercial policyholders for many years. Any business which is the target of multiple claims or criminal or regulatory investigations or proceedings, or which suffers a major catastrophe such as fire or flood, may be heavily dependent on insurance recoveries for its ongoing survival. Any meaningful delay in payment by insurers can have a significant impact on an organisation's cash flow and may adversely affect its ability to continue or re-start trading following an insured loss. However, under the current law, insurers are not under any obligation to pay damages for any losses suffered by insureds as a result of the failure to pay valid claims within a reasonable time. While Financial Conduct Authority (**FCA**) rules require insurers to handle and settle claims promptly, any failure to do so does not enable insureds to claim compensation. The insured is only able to claim the amount properly due and payable under the terms of the policy.

This is all about to change as a result of the Enterprise Act 2016 which received Royal Assent on 4 May 2016 and which includes provisions (drafted as an amendment to the Insurance Act 2015) providing that insurers must pay sums due within a reasonable time. The provisions, which will come into effect on 4 May 2017, will enable policyholders to claim damages if an insurer's unreasonable delay causes additional loss. The changes will affect all insurance contracts entered into on or after this date which are governed by English law, regardless of the insured's jurisdiction.

### DUTY TO PAY CLAIMS WITHIN REASONABLE TIME

The Act provides that it will be an implied term of every contract of insurance that, if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time, taking account of the time needed to investigate and assess the claim. What is reasonable will depend on all the relevant circumstances, but the Act refers to the following examples of things which may need to be taken into account:

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

In practice, it seems likely that the question of what is reasonable will also be influenced by the impact that the claim is having on the insured, particularly if any delay in payment is likely to prevent the insured from continuing or resuming its trade. In these circumstances, insureds may want to consider pressing for some form of interim payment.

Insurers will have a defence to any claim for late payment if they can show that there were reasonable grounds for disputing the claim, whether as to the validity of the claim or the amount payable. The insurer does not breach the implied term merely by failing to pay the claim (or the affected part of it) while the dispute is continuing. However, the conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached and, if so, when.

If an insurer breaches the duty by failing to pay within a reasonable time, the insured will be able to claim damages in addition to and distinct from any right to enforce payment of the sums due and any right to interest on those sums. In some cases, the damages may be considerable, particularly if the delay in payment has affected the insured's ability to continue trading. This should operate as an incentive for insurers to take positive steps to comply with the duty.

## CONTRACTING OUT

The Act does include provisions which allow insurers to contract out of the implied term. A distinction is made between consumer and non-consumer contracts. In the consumer context, any term which would put the consumer in a worse position is of no effect and will be treated as void.

In a non-consumer insurance context, a term which would put the insured in a worse position will be of no effect unless the insurer complies with the transparency requirements under the Insurance Act 2015. This means that the insurer must draw the insured's attention to the relevant term before the contract is entered into and the term itself must be clear and unambiguous as to its effect. If the insurer fails to meet these requirements, or if the breach of the implied term is reckless or deliberate, the contracting out provision will be of no effect. A breach is deliberate or reckless if the insurer knew that it was in breach, or did not care whether or not it was in breach.

## LIMITATION

The Act imposes an express time limit of one year within which any claim for breach of the duty must be brought. This one year period runs from the date on which the claim is settled. If the claim is not settled, then the one year period would presumably not start to run until the insured has obtained judgment against the insurer in respect of the amount due.

## COMMENT

While these changes will not come into effect until 4 May 2017, policyholders may want to consider pressing insurers to agree at this stage to the introduction of an express term requiring settlement of claims within a reasonable time. Some insurers may be reluctant to agree to this given the changes are still some way off. However, the aim of the changes is to ensure that insurers are incentivized to settle claims within a reasonable time and not to delay unnecessarily. This is something that many policyholders expect as a matter of course and

insureds should consider very carefully before agreeing to any provision whereby insurers seek to contract out of the implied term.

Many insureds have learned to their detriment that the absence of any contractual right to claim damages has put them at a considerable disadvantage. This latest change in the law is designed to put insureds on a more equal footing with insurers in the claims context and will be a welcome development for many insureds.

## KEY CONTACTS



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