



Insurance Act 2015

23 September 2015

Amendment to include Law Commission's proposals on damages for late payment of claims

- Clauses on late payment of insurance claims, previously considered unsuitable for inclusion in the Insurance Act 2015 (the Act), are due to be introduced into the Act as part of the Enterprise Bill (the Bill).
- An amendment to the Act (if the Bill is passed) will include provisions requiring insurers to pay insurance claims within a reasonable time. Failure to do so will provide grounds for a claim in damages. This would have no retrospective effect and would only apply to insurance contracts entered into after the Act come into force.
- This is a potentially unwelcome development for insurers. In order to claim, an insured would need to show that an insurer has been unreasonable and that the insured has suffered identifiable loss. The inevitable risk is that insurers can expect to see the issue raised when an insured is not content with the claims process it has experienced.
- The meaning of "reasonable time" is not defined. Section 13A(2) and (3), simply states that what is reasonable will depend on "all the relevant circumstances". This includes time to investigate and assess the claim. A non-exhaustive list of factors which might be taken into account include – (i) the type of insurance involved, (ii) the size and complexity of the claim, and (iii) factors outside the insurer's control (e.g. the policyholder failing to provide relevant information in a timely manner).
- Insurers are given a defence under section 13A(4) where it can show that it had reasonable grounds for disputing the claim (both as to quantum and liability).
- Section 13A(4)(b) provides that the insurer's conduct in handling the claim may be a relevant factor considered in deciding whether the implied term was breached and, if so, when. As a result, an insurer could be in breach of the implied term where, for example, it conducts its coverage investigation unreasonably slowly.

The substantive provisions are as follows:

- Clause 20(1) of the Bill inserts a new section 13A into the Act. This implies into insurance contracts an obligation to pay insurance claims within a reasonable time.
- According to the Explanatory Notes to the Bill, breach of the implied term will give rise to the usual remedies for breach of contract, meaning damages for the loss caused by the breach.

Any comments or queries?

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- Remedies available for breach of the term are distinct from (i) the substantive insurance claim namely what sums are due under the insurance contract and (ii) claims for interest on the sum payable (whether contractual, statutory or otherwise).
- Insurers should be quick to raise concerns and work in partnership with the Lloyd's Market Association to ensure their interests are heard. This aspect of reform was originally considered too controversial to be put before Parliament. It is now being presenting without any further consultation and the potential damages would be uncapped.

Restrictions on contracting out are:

- A new section 16A of the Act, inserted by clause 21(1) of the Bill, restricts the scope for contracting out of the provisions of the Act. A term "contracts out" of the implied term if the insured is put in a worse position than it would be in by virtue of the implied term.
- In relation to non-consumer contracts, insurers are prevented from using a term which contracts out of the implied term so far as relating to deliberate or reckless breaches of it. Otherwise, an insurer is able to contract out of the implied term provided that it can satisfy the requirements under section 17 of the Act, which include taking sufficient steps to draw the term to the insured's attention and ensuring that the purported term is clear and unambiguous as to its effect.
- In relation to consumer contracts, an insurer cannot contract out of the implied term.

What can insurers do?

There are a few measures insurers can take:

- The first reading of the Bill (usually a formality) took place in the House of Lords on 16 September 2015. A second reading of the Bill is set to take place on 12 October 2015, which will provide members of the Lords with the first opportunity to debate key principles and flag any issues. After the second reading the Bill then goes to the committee stage where a detailed line by line examination and discussion of amendments takes place.

Practical consequences

As it stands, English law does not recognise a claim for damages for the late payment of insurance monies. This is due to the unique position under insurance contract law in England and Wales, by virtue of the legal premise that an insurer's primary obligation is not to pay claims but to prevent loss from occurring in the first place.

The reform would bring English law into line with other jurisdictions. In Scotland, courts have already acknowledged that an insurance contract is subject to the implied term that the insurer will assess a claim reasonably quickly and with diligence. Damages are similarly available in most other major common law jurisdictions.

If the Bill is passed, insurers should ensure that their speed and efficiency in handling claims is reasonable. However, they should also expect arguments to be raised by disgruntled insureds that there have been unreasonable delays.

If the insured can show that there has been unreasonable delay and this has caused tangible loss, there will be a potential additional claim against insurers. That claim might not be covered under the insurers' reinsurance and would be uncapped. As such, it could potentially affect insurers' attitudes towards settlement.

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