

Damages for late payment revived by the Enterprise Bill

Published 24 September 2015

On 17 September the Enterprise Bill was published, including within it the provisions on damages for late payment which were first set out in the Law Commission's draft Insurance Bill released in July 2014.

Under the existing law in England and Wales, there is no obligation on insurers (beyond the Financial Conduct Authority's rules on claims handling) to pay valid claims within a reasonable time. The proposals in the Enterprise Bill amend the position, creating an obligation on insurers and a remedy for insureds to claim damages for any additional loss they suffer because of an insurer's late or non payment.

Key provisions

The measures:

- Introduce into every contract of insurance an implied term requiring the insurer to pay sums due within a reasonable time.
- Recognise the need for insurers to be given a reasonable time to investigate and assess the claim and also include a non-exhaustive list of matters which may be taken into account in determining what amounts to "a reasonable time".
- Provide a defence where the insurer has reasonable grounds for disputing the validity or value of the claim.
- Permit contracting out in non-consumer insurance contracts (where the breach is not deliberate or reckless) provided that the transparency requirements set out in the Insurance Act 2015 are satisfied.

These provisions would be inserted into the Insurance Act 2015 as clauses 13A (implied term) and 16A (contracting out).

Progress of the Bill

Commenting on the publication of the Enterprise Bill, Lord Hunt of Wirral, Chairman of the Financial Services division at DAC Beachcroft advised:

"This Government Bill, not being a Law Commission Bill subject to the special shortened procedure, starts in the House of Lords with a Second Reading on 12 October. Having completed all stages both there and then in the House of Commons, Royal Assent is anticipated in March 2016. The commencement provisions state that the relevant sections would then come into force one year later, so that the implied term would apply to insurance contracts entered into from March 2017."

Commentary

Whilst there has been wide support for the principle of requiring insurers to pay claims within a reasonable time, the same queries over the detail of the drafting remain for consideration.

Nick Young, partner at DAC Beachcroft, commented:

"What amounts to "a reasonable time" for payment will certainly be a flashpoint for dispute between the parties. The Bill and explanatory notes provide further detail on what should be taken into account, including the type of insurance, size and complexity of the claim and factors outside insurers' control. For example, business interruption (BI) claims usually take longer to value than other claims and a BI insurer's decision as to whether to pay a claim will usually be dependent on the stance taken on the underlying property damage claim."

The contractual trigger for when a payment is due will also be key - interim payments now on first party property claims are very often voluntary. Insurers may be reluctant to allow these to become a contractual entitlement."

Similar queries are inevitable over what amounts to "reasonable grounds for disputing the claim". There will also be limitation issues that arise out of the fact that time will only start to run on this element of the claim after the "reasonable time" has expired (as opposed to the date of the loss for the underlying insurance claim).

Practical impact

Looking forward, James Deacon, partner at DAC Beachcroft, advised:

"Times are changing and the market needs to stay alert to the ongoing fundamental developments to insurance contract law, assessing the potential practical impact of these measures now. Existing policy wordings require amending and insurers will need to think carefully about the degree to which they may wish to contract out of the proposals. New clauses may be required, for example limiting the insurer's liability for damages for late payment. Procedures around reserving and settlement of claims will also need review. Clear internal guidance and training may also be necessary, including on how best to evidence claims handling processes and the voluntary use of interim payments to minimise the prospect of a claim for damages for late payment. "

A further issue is whether damages for late payment will be recoverable under reinsurance protections. Some treaties will deal with this expressly through inclusion of an extra-contractual exclusion clause or positive statement of cover. It may also be linked to the extent of a reinsurer's knowledge and control of the claims handling and settlement. It is unlikely that one approach will fit all and consideration will need to be given to what is appropriate for a particular class of business.

Authors



Nick Young

London - Walbrook

+44 (0)20 7894 6100

nyoung@dacbeachcroft.com



James Deacon

London - Walbrook

+44 (0)20 7894 6698

jdeacon@dacbeachcroft.com