
The Enterprise Act 2016 - Time Really is Money

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The Enterprise Act came into force on 4 May 2017 and implies a term into every contract of insurance incepting after this date that an Insurer must pay any sums due in respect of a valid claim within a "reasonable time". An Insurer will be liable to the Insured in damages in respect of a breach of this term.

The new Act amends the previous position in English Law which is that the redress for late payment is limited to additional interest, and brings English insurance law closer to the position in other major jurisdictions. It will not be possible to contract out of the new implied term for consumer contracts but will be, subject to limited exceptions, for non-consumer contracts.

This change in the law significantly alters the landscape and is particularly the case for policies such as D&O insurance where claims against Directors are complex and the coverage investigation often takes time. Whilst the new implied term allows an Insurer "a reasonable time to investigate and assess the claim" one of the key issues will be what constitutes a reasonable time in which to pay a claim. The statute lists some examples which include the type of insurance and complexity of the claim.

Under the new regime this may lead to Insureds seeking to put pressure on Insurers by making reference to the implied term and damages for late payment in their correspondence with Insurers. This is particularly the case in D&O policies where the Insureds normally expect their defence costs to be advanced promptly.

We anticipate that Insureds will be quick to raise the point of damages for late payment with their Insurers and it is apparent that Insurers will have to consider documenting the reason for any delay and communicating this clearly to Insureds in order to avoid incurring a liability for additional damages. Insurers will also have to ensure that external advisers (lawyers, cover-holders, adjusters) are also aware of the risks of unreasonable delay. It will be necessary to keep a close eye on how things develop to see how many, if any, claims for damages for late payment are intimated.

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