COVINGTON

Policyholder Right to Damages for Late Payment Comes Into Force in England

May 4, 2017

Insurance

With effect from today, policyholders may recover damages from insurers for late payment of some insurance claims.

For insurance contracts agreed or renewed on or after May 4, 2017 and governed by English law, the UK Enterprise Act 2016 introduces an implied term, affording the policyholder the right to recover losses caused by the insurer's failure to pay valid claims within a reasonable time. The insurer has the burden to prove reasonable grounds for a delayed payment. The parties to business insurance contracts may agree to exclude damages for delayed payments that are neither deliberate nor reckless; but the insurer must specifically notify the policyholder of any such provision before entering the contract.

Policyholders should be alert to this new right, both at renewal and in future claims under UK insurance contracts.

Background to the Legislation

Prior to the introduction of the Enterprise Act, English law did not recognize the right of a policyholder to recover damages for late payment of an insurance claim. For example, in the 1999 case of *Sprung v Royal Insurance*, a policyholder who had been forced out of business while his insurer delayed payment of his claim for four years was unable to recover damages from the insurer for the losses he suffered as a result of the delay.

The English law position was the subject of widespread criticism, and the Law Commission therefore included a right to recover damages for late payment of an insurance claim in the Insurance Bill that it drafted, most of which became the Insurance Act 2015. This right was omitted from the Insurance Bill when it was introduced into the House of Lords in 2014, however, because the Law Commission considered it too contentious, and hence capable of jeopardizing the planned unopposed passage of the Bill under the special procedure for uncontroversial Law Commission Bills prior to the May 2015 General Election.

Despite the Insurance Bill's omission of this right, the UK Government expressed support for the principle that insurers should make payments for valid claims within a reasonable time and that they should be liable for compensation if they failed to do so. Consequently, the originally drafted provisions were included in the Enterprise Bill when it was introduced in the House of Lords in September 2015. During the Bill's passage through the House of Lords, insurer interests proposed various amendments to weaken its effect; but the only material change that the legislators accepted was a one year time limit for the policyholder to bring claims.

The Policyholder's Right to Damages for Late Payment

The Act introduces an implied term into every insurance contract governed by English law that the insurer must pay the sums due in respect of a policyholder's claim within a "reasonable time," which means a reasonable time to investigate and assess the claim.

- The Act gives some examples of factors that a Court will take into account in assessing whether the claim was paid within a reasonable time. These factors include the type of insurance, the size and complexity of the claim, compliance with statutory or regulatory rules or guidance and factors outside the insurer's control. The measurement of a "reasonable time" for paying a claim may vary from case to case. For example, if an insurer has not paid an undisputed claim within several months, a policyholder should consider whether a reasonable time has already gone by.
- The burden is on the insurer to prove reasonable grounds for disputing the claim. Even if it does assert such grounds, the court will look at the insurer's conduct to determine whether in fact it acted in breach of the implied term.
- The Act also makes clear that the policyholder's remedies (including damages) are in addition to its right to enforce payment of the claim and interest. The policyholder can recover the actual loss that it has suffered as a result of the late payment.

Contracting Out

The parties to a business insurance contract can agree to exclude the insurer's liability to pay damages for late payment if its breach of the implied term is neither deliberate nor reckless. However, an insurer must take steps to draw any such exclusion to the policyholder's attention before entering the contract, failing which the exclusion has no effect. Parties to a consumer insurance contract cannot contract out of this liability.

Time for Bringing the Claim

The policyholder must bring a claim for damages for late payment within a year of the date on which the insurer has paid all the sums that were due in respect of the insurance claim; otherwise the claim for damages is time-barred.

Comment

It will take time to see how effective the new right will be, and in what circumstances policyholders will use claims for damages for late payment. With the Act now in force, policyholders should:

- be vigilant for attempts by insurers to exclude damages for late payment in all new or renewal policy wordings; and
- be alive to the existence of the new right to help compel prompt payment of the claim if an insurer attempts to delay payment without good reason.

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