

IMPROVED RIGHTS AGAINST INSURERS



Changes to insurance law in the UK used to be few and far between but the law is now being transformed following guidance from the Law Commission. We previously wrote in this newsletter about the Insurance Act 2015, which strengthens the position of policyholders by making it harder for insurers to reject claims. More recent changes include new rules on damages for late payment of an insurance claim and the long awaited coming into force of the Third Parties (Rights against Insurers) Act 2010 (**2010 Act**).

These changes will result in improved rights for policyholders and third parties seeking payment from insurers. This is good news for the R&C sector, given how important an insurance payment can be when disaster strikes.

Damages for late payment of an insurance claim

The Enterprise Act 2016, which received Royal Assent in May 2016, includes a section giving rights to policyholders to claim damages against insurers who delay payment of a valid insurance claim. This change, which is drafted as an amendment to the Insurance Act 2015, will come into force on 4 May 2017.

From that date, new contracts of insurance will automatically contain an implied term requiring the insurer to pay sums due within a reasonable time. A reasonable time includes time to investigate and assess the claim and an insurer will not automatically be in breach if he can show it had reasonable grounds for disputing the claim.

Much will depend on what is a "reasonable" time and the Enterprise Act states that this will depend on the circumstances of each claim, including for instance its size and complexity, the type of insurance involved, whether some factors are outside the control of the insurer, etc.

Policyholders will have one year to bring a claim under this new section, and time will run from the date the insurer has paid the claim. The Enterprise Act 2016 also allows for contracting out of the implied terms if the policyholder is not a consumer. This is subject to restrictions, which are in line with the provisions of the Insurance Act 2015.

Why are these changes significant?

Insurance aims to protect businesses against the costs of dealing with an adverse event; such as the costs of recalling defective products (and related PR), the costs of property damage and lost stock caused by floods, the costs of dealing with a cyber attack, etc. In such circumstances, it is crucial for policyholders, particularly in the R&C sector, to receive payment as soon as possible so mitigate their loss and resume business. Until now, insurers could not be penalised for dragging their feet when paying valid claims, even if their delay caused additional loss or even insolvency. This was because of an old legal fiction that payment of the indemnity under an insurance contract constitutes payment of damages, and English law does not allow payment of 'damages on damages'.

The changes brought by the Enterprise Act 2016 will not only provide an incentive for insurers to investigate and pay claims swiftly. They will also provide an additional argument to policyholders negotiating payment of a claim with insurers.

Third Party Rights under the 2010 Act

The 2010 Act allows third parties to bring proceedings directly against insurers when the policyholder is insolvent but liable to the third party. It was enacted back in 2010 but it was only recently updated by regulations and it will come into force on 1 August 2016.

The 2010 Act was enacted to address some of the shortcomings of the Third Parties (Rights against Insurers) Act 1930 (**1930 Act**). Once it is in force, third parties with a valid claim against an insolvent policyholder will be in a better position to obtain compensation from insurers. This is for the following reasons.

Firstly, the 2010 Act allows third parties to pursue the insurer as soon as the insured is subject to an insolvency event. Under the 1930 Act, the liability of the insured has to be established first, which can be costly and time-consuming.

Secondly, the 2010 Act allows a third parties to obtain specific information concerning the insurance from the insurer or another person (e.g. a broker) at an earlier stage, once he "*reasonably believes*" an insolvent insured has incurred a liability to him.

Finally, some of the more "technical" defences that could be raised by insurers under the 1930 Act will not longer be readily available even though the general rule remains that claims from third parties are subject to defences the insurer had against its policyholder.

Why are these changes significant?

In the R&C sectors businesses rely on suppliers and other providers to produce their own goods or services. One insolvency in the chain could cause serious loss to others. Insolvencies do happen in the R&C sector, as evidenced by the recent demise of Austin Reed and BHS. Insurance may not always be available (for instance public liability insurance does not usually cover losses caused by breach of contract). However, if there is insurance to cover the liability of the insolvent policyholder to third parties, these will be better placed if they can find out about the insurance more easily and seek payment from insurers more quickly.

Comment from us...

The amendments summarised above, together with the Insurance Act 2015 (which comes into force on 12 August 2016) represent a significant change in English insurance law. These were made with the commendable aim of re-adjusting the balance between insurers and those seeking protection under insurance policies. It will be interesting to see whether that aim comes to fruition. In any event, with such dramatic changes being made, an interesting period awaits as parties adjust.

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