

## ENTERPRISE ACT 2016 - FREQUENTLY ASKED QUESTIONS

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Griffin issued a Bulletin last year on a change being made to the Insurance Act 2015, which will entitle an insured to claim damages for late payment of an insurance claim. The Enterprise Act 2016 has been used as a vehicle to make this amendment, inserting a new clause 13A into the Insurance Act which provides that it is an implied term of all contracts of insurance that the insurer must pay claims "within a reasonable time". This change applies to all policies entered into on or after 4 May 2017. If an insurer breaches this separate contractual obligation, the insured will be entitled to claim damages for any additional loss that it suffers. This will be in addition to the existing right to seek interest on the claim payment itself.

Griffin has recently delivered presentations aimed at claims teams within Members outlining the practical implications of the changes. A number of issues relating to this amendment to the Insurance Act have been raised by Members in the course of those presentations and more generally, and these have been collated as a series of questions and answers in this Bulletin.

### GENERAL

#### **1. WILL THE CHANGES APPLY TO ALL BUSINESS WE HANDLE?**

This is an amendment to the Insurance Act 2015 and so applies to all insurance or reinsurance contracts, whether business or consumer, governed by the laws of either England & Wales, Scotland or Northern Ireland.

#### **2. WILL THE ACT AFFECT POLICIES WHICH ARE ALREADY IN PLACE WHEN IT COMES INTO FORCE ON 4<sup>TH</sup> MAY 2017?**

No. The change applies to policies entered into on or after 4 May 2017.

#### **3. WE MAY ALREADY HAVE PLACED TREATY BUSINESS TO WHICH CONTRACTS WILL ATTACH AFTER 4<sup>TH</sup> MAY. WILL THESE NEED TO BE ENDORSED?**

The situation may differ depending upon what sort of reinsurance is being placed. Where the reinsured must cede and the reinsurer must take all business of a certain class it is arguable that the contract would be regarded as concluded when it was first entered into (i.e. before 4<sup>th</sup> May). Subsequent declarations of risk may not give rise to new contracts and so the new rules may not apply. It will be important to look at each scenario on its individual facts but cedants/reinsurers may wish to negotiate endorsements where there is any uncertainty, making clear that the new provision is considered to apply or, alternatively, seeking to contract out.

**4. WHAT ABOUT RISKS DECLARED AFTER 4<sup>TH</sup> MAY TO A BINDING AUTHORITY WHICH INCEPTS BEFORE THAT DATE – WILL THE ACT APPLY?**

The Act would not apply to risks attaching before 4<sup>th</sup> May but we expect would apply to those risks bound on or after 4<sup>th</sup> May 2017, unless there has been some agreement to the contrary. The best course would be to agree with the market concerned that the Act is considered to apply or that they are contracting out, to avoid any uncertainty.

**5. WHO HAS TO PROVE WHETHER THE TIME TAKEN TO PAY A CLAIM IS 'REASONABLE' OR NOT?**

The insured. General contract law principles will apply in order to be able to claim damages. This means the insured will need to show that the insurer's payment was late (i.e. not paid within a 'reasonable time'), the delay caused the insured to suffer a loss and that the loss was reasonably foreseeable. The insured will have a duty to mitigate its loss.

**6. WHAT IS LIKELY TO BE CONSIDERED A 'REASONABLE' TIME?**

The Act does not define a 'reasonable time' although it does state that it includes "a reasonable time to investigate and assess the claim". The Act goes on to provide examples of things which may need to be taken into account in determining whether an insurer has handled a claim 'reasonably', as follows:

- the type of insurance;
- the size and complexity of the insured's claim;
- the need for compliance with statute or regulatory rules; and
- any factors which fall outside of the insurer's control.

**7. IF A POLICY INCLUDES A CLAUSE THAT INSURERS WILL ENDEAVOUR TO PAY A CLAIM WITHIN FOR EXAMPLE 180 DAYS, DOES THIS BECOME THE PRE-AGREED 'REASONABLE' PERIOD?**

This would constitute the starting point for considering what is reasonable but there may be other things to consider, particularly if, say, investigation is proving very difficult for any reason.

**8. CAN AN INSURED THREATEN TO BRING A LATE PAYMENT CLAIM TO PUT PRESSURE ON AN INSURER TO PAY A DISPUTED CLAIM?**

The ability to claim late payment damages is likely to impact on the tactics used by those involved in claims negotiations. Where attempts to reach agreement are stalling, it will be open to an insured to raise the issue of the insurer's delay as a means of putting pressure on the insurer to resolve matters.

**From a broker's perspective** this may be a useful tool where it appears that an insurer is dragging its heels unnecessarily.

**From an insurer's perspective** they will always be entitled to a reasonable time to properly assess the claim, and it will be important for an insurer/coverholder to have records supporting the steps taken in this respect.

#### **9. CAN AN INSURER TAKE AS LONG AS THEY LIKE TO PAY A CLAIM IF THEY HAVE A CONTRACTING OUT CLAUSE IN THE WORDING?**

No. They cannot rely on a contracting out clause if their behaviour is 'deliberate or reckless'.

#### **10. WHAT HAPPENS IF YOU KEEP CHASING ANOTHER PARTY TO PROGRESS A CLAIM BUT THEY DO NOT RESPOND?**

**From a broker's perspective** you simply need to ensure that you are not responsible for any delay and can show that to be the case. This means things must be passed on promptly, anything outstanding must be regularly chased and, **most importantly**, a record kept of steps taken. If the delay is caused by an agent of the broker, the broker will be responsible for the actions of the agent.

**From an MGA's/coverholder's perspective** whether the time taken handling a claim is 'reasonable' depends on a number of factors, one of which is any factors which fall outside an insurer's control. If a delay is due to the actions of a third party the insurer simply needs to be able to evidence the steps it has taken to try to progress matters. If the delay is caused by someone appointed to act on the insurer's behalf to handle any aspect of the claims handling process, and hence is their agent, this will not be considered outside the insurer's control and the insurer will be liable for their (in)action.

#### **11. WHAT ABOUT WHERE A REINSURER'S CONTROL OF A CLAIM EXPOSES THE REINSURED TO A CLAIM FOR DAMAGES FROM THE UNDERLYING INSURED?**

Again it may be difficult for the reinsured to argue that the actions of the reinsurer are outside its control, in circumstances where it has contractually ceded control of its own claims to the reinsurer. It remains to be seen how the courts will approach this sort of issue and, if the reinsured did have a liability to the insured, whether it would be entitled to recover that from the reinsurer. The position can be clarified at the outset by including one of the LMA clauses 5281, 5282 or 5283 in the reinsurance contract, which address the potential liability of a reinsurer for a late payment claim.

#### **12. HOW LONG DOES AN INSURED HAVE TO BRING A SEPARATE LATE PAYMENT CLAIM?**

The insured has 6 years from the date the implied term to pay within a reasonable time was breached **but** once the insurance claim itself has been paid, any action for late payment must be brought within one year of that payment date. This was added to the limitation rules to relieve insurers from the need to hold reserves for possible late payment claims for a lengthy period following payment.

**13. WILL BROKERS BE EXPECTED TO ADVISE INSURED'S WHETHER TO BRING A LATE PAYMENT CLAIM?**

No, but where an insured is concerned about a delay in the progress of a claim and it is clear that the claim is not progressing in accordance with usual time-scales for no apparent reason, the broker probably should suggest to the insured that they consider taking legal advice about the possibility of bringing such an additional claim.

Where a settlement has been agreed on a contentious claim the insured should be advised to take legal advice concerning the terms of any settlement agreement, since the wording of any release may preclude the right to bring any further claim against the insurer.

**14. WHY SHOULD INSURERS BE ABLE TO CONTRACT OUT OF THE OBLIGATION TO PAY CLAIMS WITHIN A REASONABLE TIME?**

Insurers cannot contract out of the Act's provisions when dealing with consumer insureds. When dealing with business insureds the parties are considered to be on a more equal footing and so should be free to contract on the basis they choose, subject to certain provisos. An insurer cannot rely on having contracted out if their behaviour is deliberate or reckless and any contracting out provision which is 'disadvantageous' to the business insured need to be clear and unambiguous, drawn to the business insured's attention and the business insured must agree to its inclusion.

**15. SHOULD A BROKER ACCEPT SECURITY THAT WANTS TO CONTRACT OUT OF THIS OBLIGATION?**

If other equivalent security is available that is not contracting out of this obligation then it would seem to be in the best interests of the insured to use that security instead, and so this should be offered as an alternative. Any contracting out provision must be drawn to the attention of the insured and it will be their decision ultimately as to how they wish to proceed.

**16. WHAT IS THE POSITION WHERE THE BROKER RECEIVES CLAIMS MONEY FROM THE INSURER WHICH IT DOES NOT PASS ON, AND THERE IS A RISK TRANSFER TOBA IN PLACE SO IT HOLDS CLAIMS MONEY AS AGENT OF THE INSURER?**

The position is unclear. The insurer may try to argue that the broker's actions are outside its control. However this is likely to be challenged since, under the risk transfer TOBA, claims monies will be held as agent of the insurer and the insurer remains responsible for the actions of its agents. It is essential that a broker's systems are robust to avoid this type of delay and potential dispute.

## 17. WOULD LIMITS NEED TO BE RAISED ON POLICIES TO CATER FOR DAMAGES AS WELL AS LIABILITIES?

Insurers may offer cover for damages for late payment or associated defence costs as a separate item rather than simply raising policy limits – this is really a question for the market.

## 18. CAN WE PROTECT OURSELVES FROM A POTENTIAL LIABILITY FOR LATE PAYMENT DAMAGES BY INCLUDING A LIMITATION OF LIABILITY IN OUR TOBA?

Yes, it is possible to agree a limitation of liability in a TOBA with another party if they are prepared to agree to it. Any claim for late payment damages will need to be made against the insurer but either a broker or MGA could subsequently end up with a potential liability which it can seek to limit.

**A broker may have a liability** to the insured where an insurer has successfully defended a claim for late payment damages on the basis that the delay was caused by the broker, or a third party acting on behalf of the broker, as agent of the insured.

**An MGA may have a liability** to the insurer where the insurer has been found liable to the insured but the delay was caused by the MGA, or a third party acting on the MGA's behalf, as agent of the insurer.

Care needs to be taken when entering into any TOBA or Service Level Agreement (SLA) with another party where any terms specify the consequences of breaching service levels for claims handling. Griffin is happy to review any such agreements from an E&O perspective.

## MGA/COVERHOLDER

## 19. WHAT HAPPENS WHERE A THIRD PARTY ADMINISTRATOR ('TPA') HAS BEEN APPOINTED BY THE INSURER?

Where a third party has been appointed by the insurer to handle claims, it is for the insurer to have in place suitable SLAs with the TPA. These should specify expected time-scales for handling certain types of claims and performance should be monitored by the insurer. If the TPA is the cause of a delay in a claim payment, that will be the responsibility of the insurer who cannot say that the actions of its agent were outside of its control. There remains a potential reputational issue for an MGA/coverholder where there is a problem with claims handling on one of its products, which clients may not appreciate is outside its control.

## 20. WHAT IF THE MGA/COVERHOLDER RATHER THAN THE INSURER HAS APPOINTED THE TPA?

The insurer will still be the party that is responsible for any late payment but will look to the MGA/coverholder to recover any damages it has paid. The MGA/coverholder in turn will look to recover any such sums paid from its agent, the TPA.

**21. DO INSURERS NEED TO ALLOW FOR POTENTIAL CLAIMS FOR LATE PAYMENT DAMAGES WHEN RESERVING?**

Insurers will need to decide whether and, if so, how to factor into their reserving the possibility of any additional claims for late payment.

**22. HOW WILL THIS WORK IN THE SUBSCRIPTION MARKET? FOR EXAMPLE, IF THE LEAD UNDERWRITER HAS CONTRACTED OUT, WILL OTHERS HAVE TO FOLLOW?**

They will probably choose to so that there is consistency but would not be obliged to.

**23. WHAT HAPPENS WHERE CLAIMS CONTROL IS CONTRACTUALLY TRANSFERRED TO A LEAD MARKET?**

If the following market has agreed to be bound by the leader's settlements, they will presumably be liable to the insured for their share of any late payment damages. It may prove difficult to successfully argue that the delay was outside their control, when they have contractually passed responsibility for claims handling to another party. Whether they can recover the share of any late payment damages they have to pay from the leader will depend upon the terms of any agreement amongst the market participants.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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