



# *Enterprise Act 2016 (Section 13A The Insurance Act 2015)*

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## Introduction

Historically, an Insured had no right of action against Insurers for the late payment of valid insurance claims (the common law position).

Following enactment of The Enterprise Act 2016, on 4<sup>th</sup> May 2017, insurance and reinsurance contracts written from that date will be subject to a statutory duty to pay claims to Insureds within a reasonable period of time. Failure to do so will enable Insureds to recover unlimited damages caused by the late payment of claims from their Insurer. However, the Insured will need to establish that any loss suffered by them was caused by the delay in the claim payment. Further, any claim for damages is subject to a time period limitation; namely, one year from the date of the alleged late payment being made.

## Option to contract out

The Act allows for Insurers to contract out of the provisions of The Enterprise Act 2016, but only insofar as non-consumer contracts are concerned. Section 17 of The Insurance Act requires an Insurer to draw an Insured's attention to any attempt to contract out of the provisions of The

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Enterprise Act and this must be done before the contract is entered into, with any advices being clear and unambiguous as to its effect. As in all matters, any ambiguity will be held against that party – Insurer, seeking to rely upon any exclusion/limitation.

### Questions for Liability claims

It is relevant to point out that the Act applies only between the Insured and Insurer – not with third parties. However, in a Products Liability scenario for example, could a “late” payment to a Claimant fuel commercial considerations leading to the Claimant ceasing to trade with an Insured? Could an Insured in such circumstances pursue their Insurer under the Act for any unreasonable ‘late payment’? A precedent will be required to determine this potential point.

### Interpretation of “reasonable”

The Act does not specify what a reasonable period will be. I anticipate that the “test” of reasonableness will reflect the type of insurance under consideration – Household/CAR/BI/Public Liability - and also the complexity of the claim, irrespective of its quantum. The particular circumstances will also take account of any factors outside of an Insurers’ control.

Coverage issues are also recognised when determining an Insurers’ position re: any alleged late payment and there can be no breach of the Act whilst the Policy indemnity dispute is continuing.

Insofar as fraudulent claims are concerned, then it is the Insurers’ responsibility to demonstrate that the fraud “trigger” is in fact justifiable (if challenged subsequently under the provisions of the Act).

### Impact on claims handling

Adjusters handling claims on behalf of Insurers will be an inevitable recovery target where their actions are found to have unreasonably delayed the claims process/payment. The provisions of the Act will find their way into Delegated Authority contracts, particularly in claims handling contracts generally.

Documenting claim files will be crucial to defending any allegation of late payment. From demonstrating ongoing investigations e.g. seeking legal advice on Policy coverage issues; to documenting any delays and detailing how and why they have originated e.g. in significant losses issues may arise between Co-Insurers. In this respect also, an Insurer will have no right of recourse





against a Re-Insurer if they have to pay out under the Act. However, this position could be overcome if there is evidence of a breach of contract as between Insurer and Re-Insurer.

Early interim payments of uncontested items should be encouraged to avoid/mitigate subsequent allegations of alleged losses due to unreasonable late payment.

Claims handlers should ensure that final settlement agreements on policies issued on or after 4<sup>th</sup> May 2017 include a waiver from the Insured of any right to claim damages for late payment (NB: non-consumer policies only).

### What then of damages?

An Insured has to overcome the causation hurdle and show that any unreasonable delays caused the alleged loss. If the evidence confirms the Insured would have ceased trading in any event, then there can be no loss. Equally, ordinary principles of loss apply; namely: remoteness; foreseeability and mitigation.

There will be, however, an ability to plead distress and inconvenience by any aggrieved Insured.

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