Beware penalty interest on insurance claims in Norway

Lars Albert Jøstensen
Lead Lawyer

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The Norwegian Insurance Contracts Act (the "**ICA**") is of mandatory application to most non-marine insurance contracts governed by Norwegian law. Only in certain circumstances – like where the insured is a large commercial company - can the parties contract out of the ICA. Since the ICA has developed largely along consumer lines, there are some provisions which foreign insurers writing commercial risks in Norway should be aware of. One of these is section 8-4 of the ICA under which an insured is entitled to penalty interest on any covered claim from as early as two months after notification under the policy.

The interest rate that applies is the penalty rate, which is fixed every 6 months by statutory instrument and currently stands at 8 % per annum. This amounts to a significantly higher rate of return on capital than a commercial insured could hope to get elsewhere, and consequently may not encourage cooperation from insureds in the claims handling process. To make matters worse for insurers, section 8-4 also provides that the penalty interest is payable over and above the limits of indemnity of the policy. By way of illustration, in the case of a complex policy limits claim of say USD 50 million that takes one year from notification to investigate, insurers run the risk of paying USD 3.33 million in addition to the policy limit if the claim is covered (and a court finds that the insured has cooperated sufficiently).

In theory, the insured need not even present a quantified claim under a policy for penalty interest to start running. It is sufficient that the insured notifies an "insurance event". There is little case law on section 8-4 but in our experience of one recent case, an arbitral tribunal found that penalty interest applied 6 months before the insured had even quantified its loss let alone presented anything resembling a proof of loss.

All is not lost, however, and the arbitration award we refer to would not, in our view, have led to the same outcome in the Norwegian courts. The fundamental position in Norwegian insurance law is that an insured has the burden of proving its loss – both that an insured event has occurred and the extent of its loss. To balance the interests of insureds and insurers, paragraph 4 of section 8-4 provides that penalty interest will not accrue for the period of time that an insured "fails" to provide the information and documents available to it which insurers need to assess policy liability and calculate any insurance indemnity. An insured is separately obliged to provide such information under section 8-1 of the ICA. This obligation is not limited to providing documents and information in the insured's possession but also encompasses information the insured can obtain from a third party.

The word “fails” indicates that the insured must to an extent have been to blame for not providing the information and documentation that insurers need or have requested. There is some discussion as to whether "fails" implies negligence or a whether a simple failure to provide the information that insurers need is enough to suspend interest under section 8-4.

Our view is that an insured's failure to cooperate and provide information does not require negligence but is of itself blameworthy, and this appears to be supported by the very limited case law that exists on section 8-4 interest. For public policy reasons, we consider that this must be correct to avoid a situation where a commercial insured either fails to cooperate or is extremely slow in providing information at the same time as it earns a handsome rate of interest on its claim (to the extent it is covered). The case law that exists is largely limited to decisions of the Norwegian Financial Complaints Board - a quasi-judicial body staffed by industry experts, leading academic lawyers and consumer body representatives. This case law appears to suggest that negligence by an insured is not required to suspend penalty interest from running (FSN-7190 and FSN-3023). However, the law is not completely clear and insurers should be aware that penalty interest may still be awarded unless the insured has been negligent or at least blameworthy in not providing the information insurers require or have requested. This constitutes a significant risk for insurers writing risks in the Norwegian market and, in our experience, leads to considerable pressure on insurers to settle claims that perhaps should not be covered.

Pressure to settle covered claims and to speed up the claims handling process is clearly a good thing if it ensures an efficient and businesslike insurance market. However, our view is that while section 8-4 may have the desired effect in consumer lines, it is unsuited to large, complex claims by commercial insureds where there is often a considerable amount of information to review and where facts may only begin to emerge later in the claims handling process. One obvious option would be to pay the claim and demand it paid back later if it transpires not to be covered. However, this will be unpalatable to most insurers. Another option that, in our experience, is increasingly used by insurers is to contract out of insurance terms implied by the ICA that are inappropriate in commercial relations, such as section 8-4. This is possible where the insured satisfies the large commercial insureds exception in section 1-3 (2) (a) of the Act, which requires that the insured fulfils two of the following three requirements: (i) it has more than 250 employees; (ii) it has sales income of at least NOK 100 million according to the latest annual accounts; and/or (iii) it has assets according to the latest balance sheet of at least NOK 50 million.

Where the commercial insured’s exception is not applicable, the provisions of the ICA are mandatory and cannot be contracted out of. It should also be noted that, even if the insured is a commercial insured, the provisions of the ICA will still apply albeit only to the extent an issue is not regulated under the terms of the policy. In other

words, the ICA will "fill in the gaps" where the policy is silent. Also not all of the ICA's provisions can be contracted out of even where commercial insureds are involved.

Default interest on insurance compensation is a well-established principle under Norwegian insurance law so that any attempt to contract out of this obligation must be very clearly drafted. It may also meet resistance from insureds and brokers in the Norwegian market. An alternative to contracting out of section 8-4 may therefore be to link its application to a carefully specified duty to cooperate and provide information in connection with a claim that goes beyond the scope of the duty provided for by section 8-1 of the ICA.

Bearing in mind that handling large, complex claims tends to take significantly longer than two months from notification, insurers should consider introducing alternative wordings in their policies to avoid hefty penalty interest claims, which could potentially be payable over and above the policy limits.

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