Browne Jacobson

General insurance claims part 3: evidence of the insurance markets' learnings from the consumer duty

30 August 2024 Jeremy Irving

First published by Thomson Reuters.

This article is the third in a series looking at the implications for the Consumer Duty ("CD") of the Financial Conduct Authority's ("FCA's") "Findings of [a] multi-firm review into insurers' valuation of vehicles" (the "Review").

Our previous articles considered the need to understand the customer's perspective, and to develop policies and procedures which produce operational outcomes which the FCA will regard as "good". The last article highlighted a long-running line of pronouncements from the FCA as to shortcomings in general insurers' approach to the fair treatment of customers making claims.

Part 1 →

Part 2 →

Below we consider the extent to which complaints recently decided by the Financial Ombudsman Service ("FOS") might help the insurance market meet more precisely the FCA's aims in relation to the CD.

A day in the life: CD pre-history?

A snapshot as to the insurance market's position, at least in pre-CD terms, is available from the FOS decisions database. The 35 decisions involving (non-PPI) insurance claims which were published on 24.06.24 (the most recent available at the time of writing) show that 16 were upheld. A 'failure' rate of nearly 50% 11 months after the CD incepted might not persuade the FCA that firms have successfully adjusted to the new regime.

Putting aside questions of whether the complaints relate to policies technically subject to the CD (see for guidance the FCA's letter of 03.02.23), and also bearing in mind the different reasons why a firm might take a particular position in relation to a particular claim, the fact that the market is causing or allowing complaints to reach an adverse outcome – when redress has been an option – merits careful reflection.

Two decisions are notable for relating to products which are high risk in view of previous FCA activity: motor (as covered by the Review) and mobile phones (see for instance, The Carphone Warehouse Limited, 2019).

Higher regulatory risk: motor

One finding from the Review was:

*"... firms ... used ... valuation[s] from ... trade guides ... [which] is consistent with the **FOS' published approach** ... However, the [FOS] would compare prices in multiple guides. If there is significant difference ... the [FOS] would rely on the highest value in the guides unless*

[otherwise fair] ... Accordingly, [the FCA] would not generally expect firms to rely on a single trade guide ... [unless they can] demonstrate how relying on ... [one] guide ...allows them to handle claims fairly."

However, in the decision numbered DRN 4750573, involving a claim made in November 2023 a damaged car was treated as a total loss and the insurer based its valuation on the average of two of the industry trade guides plus additional market research.

The insurer did not use the higher of the valuations, and the policy terms simply said that market value in the case of a total loss was:

"The cost of replacing your car with another of the same make and model, and of a similar age and condition at the time of the accident or loss."

The insurer was unable to provide evidence of why its methodology was fair: there was nothing in the policy terms to justify its approach.

Higher regulatory risk: mobile phone

DRN 4753499 related to a claim for the theft of a mobile phone from July 2023. The complainant provided the insurer with a copy of the report he made to the police.

The insurer said that the phone needed to be blocked by the network before it would proceed with the claim.

The complainant said he had tried to have the phone blocked but his network provider would not do so without proof of the IMEI number appearing on a purchase receipt for the phone. The complainant provided the receipt but the IMEI number was not given on it.

The insurer said the policy stated clearly that the customer has to have the IMEI number of any stolen phone blocked and refused to proceed with the claim, saying that the complainant needs to complain to the network provider.

The relevant policy term was:

"How to make a claim

Claims for theft (mobile phones only)

1. Contact the appropriate police authorities as soon as possible, requesting a crime reference number or police report. If you are unable to do this, we will still consider your claim but it may affect whether we accept your claim.

2. Contact your airtime provider and *report the theft in order to have the IMEI number blacklisted*." [emphasis added]

An FOS investigator recommended the complaint be upheld, as he was satisfied that the complainant had done what he could to have the phone blocked and as there was no evidence that the claim was not otherwise valid, so it was not reasonable to refuse the claim.

The insurer said it would be a "slippery slope" if it accepted the outcome – that it was industry standard to require the IMEI number to be blocked, and there are apparently other ways of doing so.

The FOS said:

"rules about how insurers ... handle claims include that they should handle claims fairly, provide reasonable guidance to help a policyholder make a claim and not unreasonably reject a claim.

The relevant insurance practice rules also state that the rejection of a claim for breach of a condition or warranty is unreasonable unless the circumstances of the claim are connected to the breach [ICOBS 8.1.2B R]. So in this case, this means that [the insurer] would have to establish that the fact [the complainant] has not been able to block the phone is connected to the loss in some way ...

[The complainant] has tried to have the IMEI number blocked by his network but it has refused to do so without a receipt with the IMEI number on it. ... The Investigator has obtained evidence that this is not an uncommon issue with the retailer and the network concerned. Given the particular circumstances of this case and that there is no reason to doubt [the complainant] has suffered the loss he has claimed for, I do not think it is reasonable for [the insurer] to rely on this policy condition to refuse the claim."

Learning lessons

The FOS is, in short, only required to determine complaints "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case" (see ***Financial Services and Markets Act 2000, s228(2)***).

In the complaints analysed above, insurers denied claims by reference to the insurer's own, or industry, practices which were not fully spelt out in the policy terms.

These arguments may have been seen by insurers as fair and reasonable because the interpretation of a policy is not confined to the specific words it uses but must be interpreted objectively, asking what a reasonable person with all the background knowledge reasonably available to the parties when they entered into the contract would have intended the language to mean (see eg ***Brian Leighton (Garages) Ltd v Allianz Insurance Plc [2023] EWCA Civ 8***).

Nevertheless, the FOS' decisions have implications for CD compliance. In particular, is it 'acting in good faith' or 'enabling customers to pursue their financial objectives' (see PRIN 2A: .2.1 R - .2.7 G; .2A.14 – 2.22 G) to deny a claim for a reason not fully addressed in any policy (or pre-policy) materials?

Key contact

Jeremy Irving

Partner

jeremy.irving@brownejacobson.com

+44 (0)20 7337 1010

Related expertise

Financial services and insurance advisory

Financial services regulation

Insurance claims defence