

## **The complaint and background**

Mr L, a healthcare professional, complains Travelers Insurance Company Limited mis-sold him professional indemnity insurance. He took out professional indemnity insurance with Travelers in 2000 which ran until 2002. He's recently been presented with a claim concerning work he carried out between 1999 and 2003. Travelers said his policy only covered claims made against him during the period of insurance.

This led Mr L to complain. He said this feature of cover hadn't been brought to his attention during the sale. He said he'd told the adviser that he wanted cover equal to the cover he'd had in place since 1995, but this evidently wasn't what had been provided. He didn't know he wouldn't be covered in the event of a retrospective claim.

He said the organisations who provided him with indemnity before and after the Traveler's policy had agreed to contribute towards his legal costs and any awards made against him. But he'd now be personally responsible for any legal costs and awards made relating to the period between 2000 and 2002. His solicitors are estimating this will be in the region of £1,000 and are negotiating settlement on that basis.

Travelers said it didn't carry out advised sales, and felt it had given Mr L enough information about how the policy would work to enable him to have made an informed decision about whether it suited his demands and needs. Our investigator didn't think there was sufficient evidence to show the policy was mis-sold. Mr L didn't agree, so I need to make a final decision.

I issued a provisional decision on 4 October 2021. I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

The nature of Mr L's profession means he's at risk of negligence claims from patients. These can involve legal costs and damages awards, so it's always been desirable to have indemnity cover. From 2005, it became a requirement for healthcare professionals in Mr L's field to have appropriate arrangements in place for patients to seek compensation if they suffer harm. And from 2015, it became a legal requirement. The policy Travelers sold Mr L was designed exclusively for healthcare professionals.

Patients generally have three years from the negligent treatment to begin court proceedings. But in some cases the limitation period runs from the date the patient became aware that treatment was negligent. This means there's an ongoing risk to healthcare professionals, in that they may be presented with claims well after treatment has been administered.

Indemnity cover tends to be underwritten on a 'claims occurring' or 'claims made' basis. The former covers claims relating to treatment provided while the policy was in force, irrespective of when the claim is made against the policyholder. The latter typically covers claims made against the policyholder during a specific period (usually the duration of the policy), so the protection offered can come to an abrupt end if the policy isn't renewed.

Bearing the context about Mr L's profession in mind, it's clear to see that this creates potential pitfalls. If someone moves away from a claims made policy and makes new arrangements on a claims occurring basis, they aren't covered for any new claims made against them relating to treatment provided while the claims made policy was in force. That's unless they have arranged 'run off' cover for that period. Under the Travelers' policy, this cover was only provided automatically if Mr L permanently ceased practicing or retired.

I think the issue for me to decide here is, to what extent was it Traveler's responsibility, in a non-advised sale, to explain the nature of claims made cover to Mr L. I know this sale took place in 2000, at which point the regulatory landscape looked very different. But it was still expected that firms selling insurance would highlight any key features of cover.

For example, the Association of British Insurers (ABI) Code of Practice said intermediaries should *"draw attention to any restrictions and exclusions applying to the policy."* Travelers isn't an intermediary, but the code is nonetheless a helpful indicator of what was considered to be good industry practice when selling insurance policies at the relevant time.

I can also see that, at the time of the sale, Travelers was a member of the General Insurance Standards Council ('GISC'), who had recently published its code of practices. The GISC code for commercial customers said brokers and intermediaries should:

*"...advise Commercial Customers of the key features of the insurance proposed, including the essential cover and benefits, any significant or unusual restrictions, exclusions, conditions or obligations, and the period of cover. In so doing, Members will take into consideration the knowledge held by their Commercial Customers when deciding to what extent it is appropriate for Commercial Customers to have the terms and conditions of a particular insurance explained to them."*

This wasn't prefaced with *"If they are acting on behalf of the Commercial Customer..."* in the same way that the point above it in the code was, but does repeat some of the same guidance. So, I'm satisfied it likely applied to both advised and non-advised sales. Again, I recognise Travelers isn't an intermediary or broker, but I think the code is still a helpful indicator of what was considered to be good industry practice at the relevant time.

Due to the significant period of time that's passed since the policy was sold, it isn't possible to know for certain what was discussed during the sale. Mr L says the policy was discussed over the phone. Understandably, recordings or transcripts of those conversations don't exist. So, I have to reach my findings based on what I think's most likely to have happened.

Travelers hasn't tried to persuade me the relevance of cover being 'claims made' would have been discussed during these calls, as part of the sales script, for example. It's said it was for Mr L to read the policy booklet, make sure he'd understood it and decide if the policy was right for him. I've considered whether the policy literature in itself was clear enough.

The proposal form and welcome letters didn't mention that the policy was claims made. Travelers sent Mr L a policy booklet and told him to read it carefully. This said the policy was *"on a 'Claims Made' basis"*, and claims would be paid *"provided that the claim is first made while this Policy is in effect"*.

But I don't think Travelers did enough to draw Mr L's attention to this restriction, or advise him of the fact it was significant. He was just presented with the policy booklet as a whole, so they look like standard features of cover.

I'm not satisfied he'd have recognised their significance for himself (which was that he'd need to make specific arrangements to avoid being left with a gap in his cover for claims

about historic treatment if he switched professional indemnity arrangements later on).

Even if Travelers had drawn Mr L's attention to the claims made restriction, and advised him of the fact it was significant, it should also have considered to what extent it was appropriate to explain the terms and conditions to him, considering his level of knowledge. As recently as 2018, Mr L's professional body noted the implications of having claims made cover is *"not always made clear nor fully understood by those taking out a claims-made policy."*

This shows there are still issues with those in Mr L's field not appreciating the pitfalls created by taking claims made cover unless they're made clear. There was likely to have been even less guidance about this available to Mr L in 2000, before it became a requirement for those in his field to have professional indemnity arrangements. This supports that it would have been appropriate for Mr L to have had this feature of the policy explained to him, considering the knowledge he held. I think any future providers were entitled to expect that Travelers would have followed good industry practice in this regard.

Had Travelers done what I think it should have, I think the most likely scenario is that Mr L would have continued to make arrangements on a claims occurring basis (bearing in mind he made such arrangements at a cost which was evidently agreeable to him for five years before this policy started, and another 17 years after it ended).

Failing that, I'm satisfied Mr L would have taken some other steps to ensure he remained fully covered, either by continuing to renew this policy until automatic run off cover kicked in, purchasing run off cover if the policy ended before that, or ensuring any further policies were also claims made (until he could obtain automatic run off cover). In all these scenarios, there would have been valid arrangements under which he could have submitted his recent claim.

### **My provisional decision**

I intend to uphold this complaint and direct Travelers to accept the share of the claim against Mr L relating to the period while its policy was in force. That's predicted to be around £1,000, though negotiations are ongoing. Travelers may want to liaise with the other indemnity providers and Mr L's solicitors for further updates. Should these negotiations break down and the matter proceed to court, I think Travelers should continue to fund its share of the legal costs, and any damages awards made against Mr L.

### **Responses to my provisional decision**

Mr L said my decision didn't reflect that, due to the issues complained of, he's now open to potential future losses if further claims relating to the same period are made against him. He reiterated that he wouldn't have purchased claims made cover in the first place if the nature of such cover had been made clear. And he said Travelers should accept a larger proportion of the contribution towards the legal costs and damages against him to reflect that it mis-sold the policy.

Travelers responded to say the following:

- There wasn't any further documentary evidence it could provide given how long ago the policy was taken out.
- As it has never carried out advised sales, it's imperative that its customers take reasonable care to understand the policies they're purchasing.
- It would have provided sufficient information to meet its regulatory obligations at the time. The type of cover being provided was made clear in the policy booklet, and it

likely would have explained it either during the sales call or in the membership pack (but it couldn't produce a copy of either due to the time that's passed).

- Mr L could have called back (or spoken to a colleague) if he had any questions, and it was his responsibility to ensure the suitability of any future arrangements. If he'd maintained claims made cover, or purchased run off cover (as I suggested he would have done had the nature of claims made cover been explained) this issue would not have arisen.
- The comment I'd made reference to from Mr L's professional body was a sweeping generalisation.

### **What I've decided – and why**

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

To recap, I set out guidance from the relevant time in my provisional decision, and explained why I thought it applied to non-advised sales. I said that, whilst it made specific reference to intermediaries and brokers, I thought it offered an insight into what was considered to be good industry practice at the relevant time. I also set out why I thought the fact that cover was claims made was a significant feature of cover (especially to a healthcare professional).

Travelers highlights that, ultimately, in a non-advised sale, it's for the customer to decide whether the policy they're taking out is suitable for them. But any decision a customer makes should be informed by an appropriate level of information from the seller. The guidance I've referred to makes clear that this should include advising commercial customers, not of the suitability of the product (importantly), but of:

*“... the essential cover and benefits, any significant or unusual restrictions, exclusions, conditions or obligations, and the period of cover. In so doing, Members will take into consideration the knowledge held by their Commercial Customers when deciding to what extent it is appropriate for Commercial Customers to have the terms and conditions of a particular insurance explained to them.”*

The comments of Mr L's professional body are at odds with Travelers' statement that the nature of claims made cover should be *“reasonably obvious to professionals requiring indemnity insurance.”* Travelers has also argued that it *would* have explained the nature of claims made cover, separately from the policy booklet, which seems to acknowledge that this would have been appropriate given the knowledge held by Mr L.

I still don't think a reasonable person would have appreciated the implications of having claims made cover (and therefore, its significance) from the policy booklet alone. So, I've thought about Travelers' assertion that it would likely have explained the nature of claims made cover separately, either in the membership pack or during the sales call.

I acknowledge the time that's passed since the sale. If evidence is unclear or incomplete, I need to reach my decision based on what's most likely to have happened. I do note though that Travelers previously emphasised that it was up to Mr L to review the policy booklet, which it felt was clear in itself, and to have queried anything he was unsure about.

It hasn't provided evidence which leads me to conclude, on balance, that as a matter of standard practice, it would have given a separate explanation of the nature of claims made cover to Mr L. It hasn't, for example, shown me that the oldest versions of its membership pack and / or sales script that are still available contain such an explanation, or directed me

towards any other information or data which might support a finding of this nature.

Unless Mr L received an appropriate level of information about the nature of claims made cover when the Travelers policy started, I don't think he'd have appreciated the implications of moving away from claims made cover (without any run off cover) when the policy ended. I'm satisfied Mr L wouldn't willingly have left a hole in his otherwise continuous indemnity arrangements had Travelers done more to explain the nature of claims made cover in 2000.

Mr L says Travelers should accept a larger proportion of the contribution towards the legal costs and damages against him to reflect that it mis-sold the policy. I don't agree. The loss Mr L has realised as a result of the issues addressed in this decision is the proportion of legal costs and damages relating to the period during which this policy was in force. It's that loss Travelers needs to account for to put Mr L back in the position he should be in.

Mr L also highlights that he may, in the future, incur further losses, if he receives another claim relating to the same period. Given the passage of time since the policy expired, potential future claims are likely to be limited in numbers. The Dispute Resolution ('DISP') rules in the regulator's handbook require Travelers to ensure that lessons learned as a result of determinations by the ombudsman are effectively applied in future complaint handling.

So, in the event Mr L is presented with another claim against him, and which relates to the period during which he was insured with Travelers between 2000 and 2002, he should present the claim to Travelers for consideration under the terms of the policy. If a complaint arises as a result of Travelers' handling of the claim, I'd expect it to keep in mind my determination of this complaint (i.e. that Mr L would otherwise have had valid arrangements under which he could have submitted such a claim).

### **My final decision**

I uphold this complaint and direct Travelers Insurance Company Limited to accept the share of the legal costs and damages relating to the period its policy was in force. I understand from Mr L that, since I issued my provisional decision, progress has been made in the negotiations with the other party and his contribution to the settlement may be lower than previously anticipated. Travelers should liaise with Mr L's solicitors and the other indemnity providers for further updates.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr L to accept or reject my decision before 25 March 2022.

Mike Walker  
**Ombudsman**