

The complaint

Mr C's complaint is about the refusal of his claim under his pet insurance policy with Casualty & General Insurance Company (Europe) Ltd ("C & G").

What happened

I issued a provisional decision on this matter earlier this month, the main part of which is copied below:

"In April 2021, Mr C dog suffered a cruciate ligament injury. Mr C submitted a claim to C & G for the treatment costs but it refused the claim, as it said the dog had first shown signs of a cruciate ligament problem in 2017 and as Mr C had not disclosed this when he took out the policy in January 2020, it considered this to be a case of careless misrepresentation. C & G applied a retrospective exclusion to the policy for any claims relating to the stifles, hip, pelvis, back and spine, as it said this is what it would have done if it had known the dog's history when Mr C took out the policy.

Mr C is very unhappy about this... as he says he is being accused of lying on the claim form and in the application for the policy. Mr C says he did not misrepresent any conditions or fail to disclose any conditions, as the dog didn't have any. The dog had a sore leg in 2017 which lasted a few days and the vet told them it was nothing to worry about. The vet has said this incident is not linked to the claim in 2021. Mr C wants the claim met and compensation for the upset caused to him.

One of our Investigators looked into the matter. She didn't recommend that the complaint be upheld, as she considered that C & G was entitled to take the action it did.

Mr C does not accept the Investigator's assessment, so the matter has been passed to me.

What I've provisionally 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.

Is the claim excluded on the basis it is a pre-existing condition?

Mr C's policy, like most other pet policies, does not cover pre-existing conditions. It says:

"What is not insured? Any claim for Illness or Accidental Injury that relates to a Pre-existing Condition.

Any claim for Illness or Accidental Injury that showed Clinical Signs or Symptoms before Your Policy Start Date or within the Waiting Period."

"Pre-Existing Condition means any diagnosed or undiagnosed Condition and/or Associated Condition which has happened or has shown Clinical Signs or Symptoms of existing in any form before the Policy Start Date or within the Waiting Period."

So it is not necessary for any condition to have been diagnosed for it to fall within this definition and exclusion but the symptoms which occur before the start of the policy must be a clinical sign or symptom of the condition claimed for. So in this case, this means that C & G must establish that the problems in 2017 are linked, were a clinical sign of, the later problem in April 2021.

Mr C's dog was seen by the vets in August 2017 when she presented with left hindlimb lameness. The vet's notes of the attendance in 2017 record that the dog had been lame for two/three days and while it was improving she'd yelped when her hip was touched and she was reluctant to jump up. The vet records show he recommended rest and intended to arrange an x-ray of the stifles, hips and spine.

C & G says that this attendance in 2017 was a clinical sign of a cruciate ligament problem and it was therefore a pre-existing condition and excluded from cover. It also says that Mr C should have disclosed this in answer to questions put to him when he took out the policy.

However, the dog was seen a few days later and the vet records "*dog now moving very well and cannot elicit any stiffness. spasm or pain in hind legs or lumbar, o aware as on metacam may recur and still need xray in future*". It seems therefore the x-rays were no longer thought necessary and there's no reference to any recurrence of any issues in her hind limbs until this claim four years later.

Mr C's vet also wrote in relation to the claim and said:

"there was neither actual nor perceived evidence that the stifle joints were in anyway damaged either at the time of the initial condition or at inception of the policy. The period of time (years) of normal leg function between the two incidents in time and the difference in clinical presentation is so marked as to make a causal link impossible, and to judge that my client is guilty of misrepresentation is scandalous."

The vet that saw the dog in 2017 is adamant that there is no link and that the period of time between the two incidences of lameness is enough to rule out a link between them.

It seems to me that the evidence from the time and the recent evidence from the vet support Mr C's position that the visit in 2017 was for a one-off lameness and I do not consider that C & G has established that the dog was suffering from a cruciate ligament issue before Mr C took out the policy. I do not therefore think it is entitled to refuse the claim on the basis that it was pre-existing.

Can C & G apply retrospective exclusions that mean the claim is not met?

Our approach is in line with the relevant law on this issue, The Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA). This requires consumers to take reasonable care not to make a misrepresentation when taking out a consumer insurance contract (a policy). The standard of care is that of a reasonable consumer. If a consumer fails to take reasonable care, the insurer has certain remedies provided the misrepresentation is, what CIDRA describes as, a qualifying misrepresentation.

For it to be a qualifying misrepresentation the insurer has to show it would have offered the policy on different terms or not at all if the consumer hadn't made the misrepresentation. CIDRA sets out a number of considerations for deciding whether the consumer failed to take reasonable care. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless, or careless.

I've considered the circumstances of this case to consider whether C & G fairly added the

exclusions given our approach, in line with CIDRA.

When Mr C bought the policy online he was taken through various questions and options. The part relevant to this complaint is the following:

“Any medical conditions, illnesses or accident that happened before his new policy starts will not be covered.

Do you want to cover any pre-existing medical conditions?

Yes / No”

There is also a statement on the same page which says that *“a pre-existing condition is any illness, injury, symptom, or sign of a condition that happened before your new policy begins”*.

C & G says this was enough to elicit disclosure of the 2017 issue. I do not agree. There is no clear question about any previous symptoms, whether resulting in a diagnosis of a condition or not. In my opinion, it is not clearly asking an applicant about any symptoms or issues the dog has had but rather asks if cover is wanted for pre-existing conditions.

I do not think it was clear that Mr C was aware that his dog had what C & G would have considered a condition. His vet has said there was no evidence (actual or perceived) that the stifle joints were damaged in 2017 and that Mr C was told it was likely to just be a temporary injury. I don't think Mr C failed to take reasonable care when answering the question he was asked about his dog on the application form, so I don't think C & G can alter the contract it entered into on the basis it's now found out about an episode of lameness in 2017.

I appreciate that C & G might have applied the exclusions if it known about the 2017 episode of lameness but as Mr C didn't fail to take reasonable care, it's not though any fault on his part that he didn't let C & G know. CIDRA only allows C & G to alter the terms of the policy if a qualifying misrepresentation has been made. And as explained, Mr C didn't fail to take reasonable care, so, there is no qualifying misrepresentation.

So, to put things right I think C & G should continue to offer cover on the terms the contract as it was entered into.

Compensation

I can understand that the wrongful refusal of this claim and the suggestion that Mr C had not taken sufficient care when applying for the policy has caused Mr C unnecessary trouble. I therefore consider that the sum of £150 should also be paid as compensation for this.

My provisional decision

I intend to uphold this complaint and require Casualty & General Insurance Company (Europe) Ltd to do the following:

1. pay Mr C's claim, in line with the policy limit and any applicable excess. If Mr C shows that he has paid the vet's bill it must add simple interest at the rate of 8% per year to the claim payment from the date of claim until the date of settlement;
2. remove the exclusions it retrospectively applied to the policy; and
3. pay Mr C £150 compensation for the distress and inconvenience caused by its incorrect refusal of his claim.”

Responses to my provisional decision

I invited both parties to respond to my provisional decision with any further information or arguments they want considered.

Mr C has confirmed he accepts my provisional decision and has nothing more to add.

C & G does not accept my provisional decision. It says:

- It disagrees that the occurrence of lameness in 2017 cannot reasonably be associated with the cruciate ligament rupture in 2021.
- The lameness started in July 2017 and did not resolve until August 2017, so was over a month not a few days.
- No diagnostic tests were done in 2017, therefore it cannot be proven that the lameness is not related to the 2021 cruciate ligament injury. Lameness will often be the initial sign and symptom of an underlying cruciate problem.
- The dog was given Metacam which can mask any ongoing signs of lameness and “we could not possibly know how long this was for if it was an early onset”.
- There was no injury to cause a sudden onset of lameness and this is consistent with a degenerative disease dating from 2017.
- It is unreasonable to expect an insurer to cover a condition which clearly exhibits the same signs and symptoms of an illness that has recurred after the policy started.
- The application process is industry-standard, as is the pre-existing exclusion, and has been found to be adequate in previous Ombudsmen decisions.
- A clear misrepresentation (not a lie) occurred when Mr C took out the policy and he is bound by CIDRA. The Investigator’s assessment was in line with CIDRA and previous Ombudsmen decisions. The review which has taken place is one that is totally subjective and a difference of opinion between the adjudicator and an ombudsman.
- Mr C also misrepresented the breed of dog when applying for the policy and said the dog was a medium mongrel, when it is a mixed breed. This was identified at the claim stage. As a gesture of goodwill as there was no claim payment, this was overlooked. However, it clearly shows Mr C is capable of making a misrepresentation and has on two occasions.

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.

C & G says that Mr C’s dog’s lameness started in July 2017 and didn’t resolve until August 2017, so lasted around a month and not just a few days. The vet’s notes record that in July 2017, the dog had inflamed back feet, particularly the left hind foot. The vet recommended a special shampoo to use. Around a month later, on 12 August 2017, the dog was taken back to the vet and it was recorded that she had been lame on the left hind for two to three days. It was the same limb affected but the July 2017 consultation was for a specific issue with the feet. On 16 August 2017 the lameness and joint pain had apparently resolved. It seems to me therefore that the lameness is recorded as having lasted a few days and there’s no evidence of any other joint issue until 2021. If the July 2017 foot problem was linked to the lameness in August 2017, it seems to me that this supports that this was unrelated to the cruciate ligament, as there is no evidence as far as I am aware that a cruciate ligament problem would cause swelling in the feet.

As C & G has said, the dog was still on Metacam when she was seen by the vet in August 2017. The vet suggested the issue might reappear after the metacam was stopped and there

might still be the need to investigate further if that happened but there is no evidence it did. The fact remains that it seems the vet didn't think any X-rays or further treatment was required at that stage and there is no evidence that there was any further lameness until 2021.

I do not agree that the fact there were no x-rays taken in 2017 that would rule out a cruciate ligament issue, means it cannot be said that they are not linked. Mr C doesn't have to prove that the 2021 injury is not linked to the 2017 lameness, rather it is for C & G to establish (on the balance of probabilities) that the two are linked.

C & G says that lameness is often the first sign of a degenerative cruciate ligament issue. That might be the case but I do not think it can be assumed that an incidence of lameness – which the evidence shows resolved within a few days and it seems did not recur – is more likely than not linked to a cruciate ligament injury four years later. The vet has said the time between the two incidents is enough to rule out a link. I therefore remain of the opinion that C & G has not done established that this was a pre-existing condition.

I also remain of the opinion that there was no misrepresentation by Mr C during the application for the policy. He was asked when applying for the policy whether he wanted cover for pre-existing conditions. For the reasons set out in my provisional decision and above, I do not think it was clear that Mr C was aware that his dog had what C & G would have considered a condition. His vet has said there was no evidence (actual or perceived) that the stifle joints were damaged in 2017 and that Mr C was told it was likely to just be a temporary injury. I don't therefore think Mr C failed to take reasonable care when answering the question he was asked about his dog on the application form, so I don't think C & G can alter the contract it entered into on the basis it's now found out about an episode of lameness in 2017.

I have not criticised the application process itself, but have concluded it was not sufficient to have elicited disclosure to the 2017 lameness from Mr C.

C & G says Mr C is capable of misrepresentation as he also misrepresented the breed of dog. This has not been raised before and C & G has not provided any evidence as to why this is relevant and whether it would have made any difference to the claim or the cover it provided. I do not think this adds anything to my determination of this complaint.

C & G also says I have made a subjective assessment and my provisional decision is not in line with the Investigator or other Ombudsmen's decisions on similar cases. Each complaint is considered on its own merits. If an Investigator is unable to resolve the complaint, both parties are entitled to an Ombudsman's decision, which is what happened here. It is only an Ombudsman's decision that is binding. Having received this complaint, I am required to determine it by reference to what is, in my opinion, fair and reasonable in all the circumstances of the case. I have determined that the complaint should be upheld for the reasons set out above. I recognise it can be disappointing for the 'losing' party if the outcome has changed but this is our process. And my decision on this case is in line with our approach, and CIDRA, on these issues generally.

My final decision

I uphold this complaint and require Casualty & General Insurance Company (Europe) Ltd to do the following:

1. pay Mr C's claim, in line with the policy limit and any applicable excess. If Mr C shows that he has paid the vet's bill it must add simple interest at the rate of 8% per year to the claim payment from the date of claim until the date of settlement;

2. remove the exclusions it retrospectively applied to the policy; and
3. pay Mr C £150 compensation for the distress and inconvenience caused by its incorrect refusal of his claim.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr C to accept or reject my decision before 22 April 2022.

Harriet McCarthy
Ombudsman