

The complaint

Mr A complains about how esure Insurance Limited settled a claim made on his motor insurance policy. He wants esure to cover the financial costs he would have pursued.

What happened

Mr A made a claim on his policy, but we was unhappy that esure settled it as a fault without fully investigating the claim. esure upheld this complaint and changed the claim to non-fault. But Mr A was unhappy that it hadn't settled the claim on a "without prejudice" basis. Mr A said this prevented him from pursuing his losses. And he provided a legal opinion that a court would likely have settled the claim as split liability.

Our Investigator recommended that the complaint should be upheld. He thought esure had agreed that it had conceded liability prematurely. He thought Mr A's legal opinion that a 50/50 settlement could have been achieved was persuasive. So he thought esure should cover 50% of the claim costs Mr A lost out on, in line with policy terms.

esure replied that it didn't think it could have achieved an outcome on the claim where Mr A wasn't found liable. It asked for an Ombudsman's review, so the complaint has come to me for a final decision.

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.

Mr A's solicitor said esure had prejudiced Mr A's claim against the other driver because it had accepted liability and paid his costs without stating that this was on a "without prejudice" basis.

Mr A made an earlier complaint to esure about its communication and its settlement of his claim. esure accepted that it had insufficiently investigated the claim and didn't question the other driver's account. It said the claim may have been settled as split liability as it was one driver's word against the other's with no independent evidence.

But after further review esure later said that as Mr A was making a manoeuvre whilst the other driver was proceeding correctly, then the greater duty of care lay with Mr A. So it thought it wouldn't have been able to defend liability. And so it said that settling the claim not on a "without prejudice" basis hadn't caused Mr A any loss as he wouldn't have been able to recover any costs from the other driver in court.

The investigator has already explained that it isn't our role to decide who was responsible for causing the accident. This is the role of the courts. Instead, our role in complaints of this nature is simply to investigate how the insurer made the decision to settle the claim. Did it act fairly and reasonably and in line with the terms and conditions of the policy?

esure is entitled under the terms and conditions of its policy with Mr A to take over, defend, or settle a claim as it sees fit. Mr A has to follow its advice in connection with the settlement of his claim, whether he agrees with the outcome or not. This is a common term in motor insurance policies, and I do not find it unusual. Insurers are entitled to take a commercial

decision about whether it is reasonable to contest a third party claim or better to compromise.

But we also expect an insurer to reasonably investigate a claim and consider the evidence available before making its decision. And I'm not satisfied that esure, by its own admission, did this. Its further review of the claim was made by its claims team, but it didn't address the further evidence that esure has admitted it should have collected before accepting liability. And I can't see that esure requested a legal opinion about the likely chances of a successful defence if the matter went to court.

However, Mr A has provided a solicitor's opinion that the claim could have been settled as split liability as it was one driver's word against the other's. But it isn't now possible to pursue this in court as esure didn't settle the claim without prejudice.

Our approach is that where an insurer deals with a claim, then it should be made without an admission of liability. This is so that the drivers can still pursue the matter at their own cost if they feel strongly about it and so try to recover any uninsured losses, such as personal injuries costs and policy excesses.

Mr A said he made it clear to esure at the start of the claim, before liability was accepted, that he would want to make a claim against the other driver. And esure then directed him to its solicitors. So I think esure was reasonably aware that Mr A wanted to pursue the other driver for costs, and I think it should have settled the claim on a without prejudice basis.

As I've said above, I'm not persuaded that esure has justified its decision that it wouldn't have been able to achieve a split settlement if it had fully investigated the claim. So I think esure's actions have prejudiced Mr A's position.

Because of esure's actions, Mr A is no longer able to pursue the other driver for his costs. So I think esure should consider Mr A's claim costs in keeping with the policy's terms and conditions and cover 50% of the costs he would have realistically recovered from the other driver, on provision of reasonable evidence for these.

Putting things right

I require esure Insurance Limited to consider Mr A's claim costs in keeping with the policy's terms and conditions and cover 50% of the costs he would have recovered from the other driver, on provision of reasonable evidence for these.

My final decision

For the reasons given above, my final decision is that I uphold this complaint. I require esure Insurance Limited to carry out the redress set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 6 June 2023.

Phillip Berechree
Ombudsman