

The complaint

Mr B complains that Admiral Insurance (Gibraltar) Limited charged him an extra premium for a previous claim it says he didn't disclose, even though he says he did.

What happened

Mr B holds a commercial motor insurance policy underwritten by Admiral, covering several vehicles. After Mr B reported an accident to Admiral in March 2023, it says it discovered Mr B had been in an accident in July 2021 which he hadn't declared in his April 2022 renewal.

Admiral charged Mr B an extra premium of £2,306.36, which it says is the correct amount Mr B ought to have paid from the 2022 renewal, had he declared the 2021 accident.

Mr B is unhappy with Admiral's actions. He says he did notify it about the 2021 accident, and that he didn't give consent for the additional premium payment to be taken from him. He brought his complaint to our service where it was looked into by one of our investigators. She was persuaded that Mr B hadn't declared the claim to Admiral. But she said the actions Admiral had taken were not in line with the remedies set out in the appropriate legislation for a breach of the duty of fair presentation. So, she felt the actions it took were unfair.

Admiral says the terms and conditions of the policy allow it to charge the additional premium in these circumstances, so it didn't agree with our investigator's opinion.

This point didn't change our investigator's view. So, as no agreement has been reached, the complaint has been passed to me to decide.

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.

The relevant law in this case is the Insurance Act 2015. This says that as a commercial customer, Mr B had a duty to make a fair presentation of risk to the insurer. And this means disclosing every material circumstance which the insured knows, or ought to know. Or failing that, disclosure which gives the insurer sufficient information to put a prudent insurer on notice to make further enquiries for the purpose of revealing those material circumstances.

Mr B has said he contacted Admiral to make it aware of the 2021 accident, and that he disclosed it during the 2022 renewal. But Admiral has provided its contact notes from around the date of the accident, and there is nothing to show that Mr B contacted it to make it aware. And similarly, the 2022 renewal documents do not support that Admiral was aware of the accident at that stage either. Based on this, on the balance of probabilities, I'm persuaded that Mr B didn't make Admiral aware of the accident and so failed in his duty to make a fair presentation of the risk.

I next need to consider whether Mr B knew, or ought to have known the information was material to Admiral.

I should be clear here that under the Insurance Act, there is no onus on Admiral to ask clear questions about every material circumstance. Rather, the onus is on the customer (Mr B) to make a fair presentation of the risk. But in this case, Admiral did ask a clear and specific question, about previous claims within the last three years. So, from this, I think Mr B ought reasonably to have known that the information Admiral was requesting was material.

Taking all the above into account, I'm satisfied that Mr B breached the duty of fair presentation by failing to disclose the 2021 claim at the point of the 2022 renewal (or before).

Under the Insurance Act, there are certain remedies available to insurers in the event of a breach of the duty of fair presentation. But only where the insurer can demonstrate that, but for the breach, it:

- would not have entered into the contract of insurance at all, or
- would have done so only on different terms.

A breach for which the insurer has a remedy against the insured is referred to as a 'qualifying breach'.

Admiral has provided evidence that had it been made aware of the 2021 claim at the 2022 renewal, it would have charged an additional premium. Therefore, I consider that Mr B failing to disclose the claim to Admiral amounts to a qualifying breach under the Insurance Act.

The Insurance Act explains that a qualifying breach of the duty of fair presentation is either:

- deliberate or reckless, or
- neither deliberate nor reckless.

A qualifying breach is deliberate or reckless if the insured –

- knew that it was a breach of the duty of fair presentation, or
- did not care whether or not it was in breach of that duty.

The remedies available to Admiral under the Insurance Act depend on whether it considers the breach of the duty was deliberate or reckless, or neither. And it is for Admiral (as the insurer) to show that the breach was deliberate or reckless if it seeks to apply any of the harsher remedies available for such breaches.

The remedies available for a breach that is deliberate or reckless state the insurer –

- may avoid the contract and refuse all claims, and
- need not return any premiums.

Admiral hasn't sought to apply either of the above remedies. Neither has it made any arguments to suggest it considers the breach as deliberate or reckless, or raised any dispute about our investigator's conclusion that the breach was neither deliberate nor reckless. So, in the circumstances, I consider it fair and reasonable to proceed with my decision on the basis that the breach was neither deliberate nor reckless.

The remedies available for a breach that is neither deliberate nor reckless state that where an insurer can show it would only have entered into the contract on different terms, the policy is to be treated as if it had been provided on those terms. And if the insurer would have charged a higher premium, it may take a 'proportionate' approach to any claims.

Admiral hasn't taken either of the above actions. Instead, it charged Mr B the additional premium it says it would have applied had the breach not occurred. It says the following policy term, on page 21 of the policy document, allows it to do this:

"9. Fraud and misrepresentation

You must always answer our questions honestly and provide true and accurate information.

If you, any other insured person or anyone acting on your behalf:

- provides us with false, exaggerated or misrepresented information*
- submits false, altered, forged or stolen documents.*

We will take one or more of the following actions:

- amend your policy to show the correct information and apply any change in premium*
- cancel your policy with immediate effect*
- declare your policy void*
- refuse to pay your claim or only pay part of your claim*
- only pay a proportion of your claim*
- keep the premium you have paid*
- recover any costs incurred from you or any other insured person.*

If we identify any fraud or misrepresentation, we will cancel or void any other EUI policies you are connected with."

Based on the above, it's clear that not all of Admiral's potential actions outlined in the terms (including the action it has actually taken) are in line with the available remedies under the Insurance Act. But the Act does allow insurers to 'contract out' of its requirements. This means to apply a term, or terms, which would put the customer in a worse position than they would be if the insurer followed the Act. But in order for an insurer to contract out, it must meet the following requirements:

"17 The transparency requirements

..

(2) The insurer must take sufficient steps to draw the disadvantageous term to the insured's attention before the contract is entered into or the variation agreed.

(3) The disadvantageous term must be clear and unambiguous as to its effect.

..."

I've thought carefully about the relevant policy term and the transparency requirements for contracting out of the Insurance Act. Having done so, I don't consider that Admiral has met the requirements.

I say this because the policy term it has sought to rely on gives several options for actions Admiral might take, rather than stating it will definitely take the action it has taken. I don't consider this meets the requirement for the term being unambiguous as to its effect. And I've seen no evidence to suggest that the term was sufficiently drawn to Mr B's attention either. I say this because it's not included within the IPID document, or prominently displayed on any of the other sales literature. Rather, it is only stated on page 21 of the policy terms and conditions booklet. I don't think this meets the requirements set out and so I'm satisfied that Admiral hasn't appropriately 'contracted out' of the Act.

The actions Admiral has taken aren't in line with the remedies available under the Act. And I've seen nothing to suggest that those actions would be more favourable to Mr B than had it applied the available remedies. So, I don't consider that Admiral has treated Mr B fairly or reasonably in the circumstances.

To put things right, Admiral should return the additional premiums it has taken from Mr B and pay interest on that amount from the point Mr B was out of pocket to the date he is reimbursed.

However, moving forward, Admiral can fairly and reasonably apply the remedy available under the Act for a breach that was neither deliberate nor reckless. This means that, hypothetically, should Mr B's attempts to recover his losses from the 2023 claim from the third-party driver fail, and he decides to claim under his policy with Admiral instead, it can proportionately reduce any settlement which might be due to Mr B. This would be based on the difference between the premium he has paid (after the direction in this decision has been implemented) and the premium he would have had to pay if he hadn't made the breach.

My final decision

For the reasons set out above, I've decided to uphold Mr B's complaint.

Admiral Insurance (Gibraltar) Limited must:

- Reimburse Mr B the £2,306.36 it took from him
- To that amount, add 8% simple interest* from the date Mr B was out of pocket to the date he is reimbursed.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 27 February 2024.

** If Admiral Insurance (Gibraltar) Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mr B how much it's taken off. It should also give Mr B a tax deduction certificate if he asks for one, so he can reclaim the tax from HM Revenue & Customs if appropriate.*

Adam Golding
Ombudsman