DRN-4572195

The complaint

Mrs B and Mr B complain that Zurich Assurance Ltd avoided their life and critical illness policy and refused to pay a claim.

What happened

In brief summary, in February 2021, Mrs B and Mr B took out joint decreasing term life assurance and critical illness cover with Zurich, through a broker. The policy was to run for 17 years.

Most unfortunately, in June 2022, Mrs B was diagnosed with Multiple Sclerosis. She subsequently claimed on the policy. But Zurich declined the claim, saying Mrs B hadn't given full and accurate information during the application process. Zurich said Mrs B had failed to disclose that she'd previously smoked.

Zurich considered this to be a qualifying misrepresentation. It said that, had Mrs B answered correctly, it would have charged a higher premium. Zurich treated the misrepresentation as deliberate and refused to pay the claim. Mrs B and Mr B's policy was cancelled, but Zurich refunded the premiums paid.

Mrs B complained but Zurich maintained its stance, so Mrs B and Mr B brought the complaint to the Financial Ombudsman Service. Mrs B said she'd answered the questions put by her broker honestly and sought to clarify with Zurich discrepancies in the information provided. But our investigator didn't uphold the complaint. He thought Zurich had acted fairly in declining the claim, treating the misrepresentation as deliberate and refunding the premiums.

Mrs B and Mr B didn't accept our investigator's opinion and asked for an ombudsman to review the complaint and issue 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.

Having done so, I'm not upholding this complaint. I know this will be disappointing news for Mrs B and Mr B and I'm sorry about that. I'll explain my reasons, focusing on the points and evidence I think is material to the outcome of the complaint. So if I don't mention something specifically, it's not because I haven't read and thought about it. Rather, I don't consider it changes things.

The relevant law in this case is 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.

And if a consumer fails to do this, 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.

When applying for the policy, Zurich said Mrs B failed to take reasonable care not to make a misrepresentation when she answered a question about her tobacco and nicotine usage, giving the answer that she'd never used tobacco or nicotine. Mrs B says she completed the application form over the phone, with her broker inputting answers online. She recalls being asked if she smoked, to which she replied, no. She didn't recall being asked if she'd ever smoked.

Zurich has shown that a simple yes or no answer was not an option for the tobacco and nicotine question. A number of options were available for selection, as follows:

- Regular, occasional or social use
- Completely stopped within 12 months
- Completely stopped between 1 and 3 years ago
- Completely stopped between 3 and 5 years ago
- Completely stopped more than 5 years ago
- Never used

Zurich says Mrs B should've answered this question differently, based on information she subsequently provided on her claim form. In that form, completed in November 2022, Mrs B was again asked about her use of tobacco and nicotine products. She disclosed smoking cigarettes from around the age of 30 years, saying that she'd last smoked in November 2019.

I've reviewed the evidence provided. I can't know exactly how the question was put to Mrs B by her broker, but based on the answer options available, I think the question was clear in seeking information about an applicant's smoking status. I can also see that Zurich sent Mrs B a personal details confirmation document, which recorded all the answers given in her application. Mrs B acknowledges she received this document, but says she didn't sign and return it.

I've listened to a call between Zurich and Mrs B in January 2023, in which Zurich asks Mrs B to help clarify the discrepancies between the information provided on application and at claim. Mrs B explains the circumstances of the application process with the broker and on more than one occasion agrees that she last smoked in November 2019.

Mrs B has since said that the phone call from Zurich came out of the blue and she wasn't able to prepare for it. But she's also said, after having her claim declined, that the information on her claim form wasn't right and that she last smoked in December 2014, when she was pregnant. She thought the stress and strain of her diagnosis may have led to the claim form being filled out incorrectly.

Mrs B was responsible for answering questions accurately. She had the opportunity to check the basis of her application when Zurich sent her the personal details confirmation document, showing all of the answers submitted. The cover letter stresses the importance of checking that the information is correct and the potential consequences of not doing so. And it explains that Mrs B only needs to do something if the document contains incorrect information. The form clearly states that the answer given regarding tobacco and nicotine use is 'never smoked' – a status that Mrs B has subsequently acknowledged wasn't correct. So in light of this and the inconsistencies in Mrs B's accounts of her smoking history, I think Mrs B failed to take reasonable care when taking out the policy.

Zurich has provided information about its underwriting criteria to show what would have happened, had Mrs B answered the smoking question accurately. Relying on Mrs B's claim form and the January 2023 call, Zurich would've classed Mrs B as an ex-smoker – that is, someone who had smoked within five years of taking out the policy. And as such, Mrs B would've been charged a higher premium. Given the non-disclosures would've made a difference to Zurich's underwriting decision, I'm satisfied Mrs B's misrepresentation was a qualifying one.

Zurich has treated Mrs B's misrepresentation as deliberate. The Association of British Insurers' Code of Practice – Misrepresentation and Treating Customers Fairly, says that for a misrepresentation to be deliberate or reckless, on the balance of probabilities, the customer knew, or must have known, that the information given was both incorrect and relevant to the insurer, or the customer acted without any care as to whether it was either correct or relevant to the insurer.

Relying on the evidence, I think this was a fair categorisation. I say this because Mrs B has said that she's disclosed her smoking status accurately in previous insurance applications, so I think it likely she understood the relevance of the question. And Mrs B hasn't been able to provide a credible explanation for the discrepancies in the information she's given about her smoking history.

As I'm satisfied Mrs B's misrepresentation should be treated as deliberate, I've looked at the actions Zurich can take in accordance with CIDRA. In these circumstances an insurer can avoid a policy, treating it as if it had never existed, and keep the premiums. It's not obliged to pay any claim. Zurich has declined Mrs B's claim and cancelled the policy, but refunded the premiums paid. This is more than Zurich is required to do, so I think it's acted fairly in this regard. I don't think Zurich needs to do anything more in respect of this complaint.

My final decision

For the reasons given above, my final decision is that I'm not upholding this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs B and Mr B to accept or reject my decision before 8 March 2024.

Jo Chilvers
Ombudsman