

The complaint

T, a company, complains that Arthur J. Gallagher Insurance Brokers Limited ('AJI') missold it an office and surgeries policy.

T says AJI should have drawn a particular policy exclusion to its attention and ensured the cover it sold protected it for the type of claim that has recently been made against it.

T wants AJI to fund its legal costs in defending an action against a former patient.

What happened

In 2012 T took out an office and surgeries policy with AJC. The policy was renewed annually.

In 2017 a surgeon for T inserted a lens implant into a patient's eye. The implant subsequently went cloudy. T says this was a fault in the lens which required the patient to have corrective surgery. T's former patient brought a claim against it under the Consumer Rights Act 2015. T says the claim was not for any medical negligence but rather in relation to their liability for the lens itself.

When T claimed on their office and surgeries policy, they found the product liability section didn't provide cover for medical use. T says that had this been brought to its attention when it took out and renewed the policy, it would have ensured it had adequate insurance to protect it against this type of situation. T feels AJI failed to highlight a significant term which caused it detriment.

AJI says that whilst T took out the policy on an advised basis, the instruction it received was that T only wanted cover for the administrative side of its business as it had other cover in place to protect it in relation to claims for the medical procedures it carried out. AJI also says that T said it didn't want legal expenses insurance cover, which might have engaged here. Because of this AJI says it didn't sell T an unsuitable policy.

Our investigator considered T's complaint and didn't uphold it. T doesn't agree so the matter has been passed to me to determine.

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 don't uphold T's complaint. I'll explain why.

T's policy was sold on an advised basis. That means that AJI needed to ensure the policy was suitable for its needs and circumstances and provide T with enough information to allow it to decide whether to take it out.

The issue here is whether AJI sold T a policy that was unsuitable because the product liability section of cover excluded medical procedures.

I can see that T took out the insurance in 2012 and renewed it thereafter. I can't tell exactly how the policy was sold in the first instance (whether in person or by phone) but thereafter it renewed by telephone and by email, with AJI sending out renewal invitations requesting that T confirm whether anything has changed or whether it wanted anything different.

The claim that's the subject of this complaint was for a surgery that took place in 2017 so I have looked specifically at the sale of the policy for that year because that would be the one that would have engaged for that claim. I can see a call note that AJI has recorded which says:

"Call recieved from (T). Confirmed DPA

Has said that shes looked through quote schedule that was provided with terms. A few amendments need to be made.

They only want to be covered for die office and surgeries, no legal expenses or business assist required, needs updating."

So, I'm satisfied that T did make clear that they did not want legal expenses insurance, which might have engaged here to cover the situation they found themselves in after the claim was made by the former patient. It's also clear from that phone note that T had reviewed the renewal documentation sent to it.

Turning now to the term T is unhappy with, the Public Liability and Products Liability section of the policy covers:

*"a accidental Bodily Injury to any person other than an employee;
b accidental Damage to Property not belonging to You or in Your charge or under Your control or
that of any Employee;
c accidental obstruction, trespass, nuisance or interference with any easement of air, light, water or way;
d wrongful arrest, detention, imprisonment or eviction of any person, malicious prosecution or invasion of the right of privacy."*

It's clear to me that this section of cover wouldn't engage in the circumstances of the claim made against T. The claim made against it isn't for accidental bodily injury- but rather pursuant to the Consumer Rights Act 2015 in respect of the product inserted into the former patient's eye. So even though T has said the exclusion relating to this section should have been drawn to its attention, I don't think this would have made a difference because this section doesn't in any event cover the type of claim made against it. Because of this I've gone on to consider whether this section of the policy was so significant that it should have been drawn to T's attention on a standalone basis.

When thinking about the significant terms applicable to an office and surgeries policy, I'm not convinced that this particular section is so significant, in T's particular circumstances that it should have been highlighted by AJI when selling the policy. I say so because T's business is an eye clinic. It's clear to me from the documents I've seen that T didn't want cover for the medical procedures it was carrying out. This would have been because T had insurance in place to protect it against claims arising out of that. Given the nature of T's complaint, it's likely that that cover didn't engage here because the claim wasn't for medical negligence but rather for liability for the product inserted into the patient's eye. I think this is fairly unusual. And I'm not persuaded that either T or AJI could have predicted this kind of eventuality when the insurance was being sold. So, I don't think this was a significant term of the policy that needed to be brought to T's attention. For the same reasons I also don't think that AJI should

reasonably have been able to predict the possibility of such a claim, such that it needed to ensure that some other alternative cover needed to be in place to cover T for this kind of claim being made. And given T had clearly reviewed the policy terms and decided what type of cover it wanted, I don't think it was aware of this kind of possibility either, otherwise I think it would have asked for cover to ensure it was protected in this specific situation.

But even if I take it that AJI failed in their duty to sell T a suitable policy, I would need to determine that T would have done something differently and taken out a different sort of insurance that would engage in these circumstances. As I've said above, I think the claim made against it is fairly unusual for the sort of business T does, otherwise T would have specifically sought cover for this. The policy doesn't cover these sorts of claims, irrespective of the exclusion for medical procedures. The question is whether T could have obtained cover for this sort of claim elsewhere. It's possible that a legal expenses insurance policy might have covered it, but T didn't want that sort of insurance. And even if I accept that T might have asked for legal expenses insurance if it had understood that the product liability section wouldn't engage here, I'm not persuaded that this sort of claim would necessarily have been covered as standard as legal expenses insurance policies aren't generally designed to cover these sorts of situations. Indeed, T hasn't supplied details of any alternative policies that might have engaged in these circumstances. It's possible that special insurance could have been taken out for this unique type of claim, but T would have had to have been able to predict it wanted cover for this and for the reasons I've set out, I don't think it could have, otherwise it would most likely have asked for insurance for it.

Taken together, I'm not satisfied that AJI missold this policy to T. I know this will be disappointing, but I hope I've provided T with a thorough explanation of why this is.

My final decision

For the reasons set out above, I don't uphold T's complaint against Arthur J. Gallagher Insurance Brokers Limited.

Under the rules of the Financial Ombudsman Service, I'm required to ask T to accept or reject my decision before 27 May 2024.

Lale Hussein-Venn
Ombudsman