

The complaint

The estate of Mr B is unhappy that Zurich Assurance Limited declined a claim under Mr B's life insurance policy ('the policy').

What happened

Mr B applied for the policy in 2022 through an insurance intermediary. When doing so, he was asked a number of questions – including about his health, medical history and lifestyle. And based on the answers given, Zurich offered Mr B the policy.

Very sadly, Mr B died a few months later and a claim was made on the policy for the life benefit. After reviewing Mr B's medical records, Zurich declined the claim as it concluded that Mr B hadn't accurately disclosed his smoking history when applying for the policy. It ended up cancelling the policy and refunding the premiums paid going back to the date it started.

Unhappy, the estate of Mr B complained to Zurich and when it maintained its position, the estate brought a complaint to the Financial Ombudsman Service.

Our investigator partially upheld the complaint. She didn't think Zurich had acted fairly by declining the claim in full and cancelling the policy. She recommended that Zurich proportionally settle the claim in line with the proportion of the premium Mr B paid for the policy together with 8% simple interest per year on the settlement amount.

Zurich didn't agree and requested an Ombudsman's decision. So, this complaint was passed to me to consider everything afresh to decide.

I issued my provisional decision in August 2024 explaining why I wasn't intending to uphold this complaint. I said:

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I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint. That includes the relevant ABI code of practice for managing claims for individual and group, life, critical illness and income protection insurance products.

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. 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 (in this case Zurich) 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 know the estate of Mr B will be very disappointed, but I'm currently satisfied that Zurich has acted fairly and reasonably by declining Mr B's claim and cancelling the policy. I'll explain why.

The application form that was completed by Mr B with his insurance intermediary reflects the following was asked:

Please provide accurate information about your client's use of cigarettes including roll ups, vapes and e-cigarettes containing nicotine, cigars, pipes or other tobacco or nicotine products including patches and gum. This is an important factor in our assessment and payment of claims. We carry out tests to confirm use.

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

I'm satisfied this was clear and it's reflected from the documentation sent to the insurance intermediary and Mr B that Mr B answered: "never used". It isn't disputed that Mr B answered, 'never used'.

I'm satisfied Zurich has fairly concluded that this answer was incorrect, and a misrepresentation had taken place. That's because Mr B had smoked, at least as recently as 2020 and his medical records reflect that:

- in October 2010 he was cigarette smoker "5 a day".
- he was an ex-smoker in November 2017.
- in September 2020, Mr B was smoking but "wants to stop". Cigarette "consumption" was said to be "4 cigarettes a day". It's also reflected that Mr B was reducing the number of cigarettes he smoked by himself and "feels he can quit alone".

Zurich has concluded that Mr B's misrepresentation was deliberate or reckless.

The estate of Mr B says that the misrepresentation should be considered careless. Mr B was health-conscious and had smoked for a brief period in 2020 due to a multitude of circumstances which they've explained, including being stranded in a different country due to the global Covid-19 pandemic and couldn't travel back to the UK. At the time of applying for the policy in 2022, the estate says that Mr B wasn't a smoker and hadn't been for an extended period.

I've taken into account section 7 of the ABI's Code of Practice which says that the remedy of avoiding a policy from the outset should be confined to the most serious cases of misrepresentation and that it's for Zurich, as the insurer, who has the initial burden of establishing whether there has been a deliberate or reckless misrepresentation.

Section 7 also says that since lifestyle information is usually more familiar and easier for customers to understand, it follows that customers should give a particularly credible and convincing explanation for clearly evidenced misrepresentation not to be classified as

deliberate or reckless.

Taking into account the explanations put forward by the estate of Mr B about why he answered the smoking question in the way he did, I don't think it's given a credible explanation supported by the facts for the misrepresentation having occurred when considered against the medical evidence, summarised above. Nor do I think there are any credible mitigating circumstances to explain why Mr B answered this question in the way that he did.

I'm satisfied that Zurich has fairly concluded that Mr B's misrepresentation about his smoking history when applying for the policy was deliberately or recklessly made.

Whilst he may have only been smoking for a period of time in 2020, he had smoked years before then too and had given up. So, I'm satisfied that in the circumstances, he knew or must have known that the representation he made was incorrect and knew or must have known that the information was relevant to the insurer as it says that the information was important to Zurich's assessment. Alternatively, I'm satisfied that Mr B had disregard for the question of the accuracy of the answer when completing the application and must have understood that the information was relevant to the insurer.

When making this finding I've taken into account the case studies around smoking and misrepresentation in the ABI code of practice. Whilst they provide relevant guidance, the examples aren't directly similar to the circumstances of this case. And I've taken into account the circumstances of this complaint when making my provisional decision.

Zurich says that if Mr B had answered the smoking question correctly, it would've still offered the policy but for a higher premium (around the double the price). I'm persuaded, based on my experience, that being a past smoker is likely to impact the price of the policy. So, I accept that the monthly premium would've been higher than Mr B paid. So, I'm satisfied that the answer to the smoking history question mattered to Zurich.

I've looked at the actions Zurich can take in line with CIDRA in such circumstances where there has been a deliberate or reckless misrepresentation. Under this legislation it's entitled to cancel the policy. Further, Zurich doesn't have to pay any claims as it can treat the policy as if it never existed. That's what Zurich has done here, and I think it's acted fairly and reasonably in the circumstances of this complaint by doing so.

Zurich is also entitled to keep the premiums paid for the policy. It didn't do that here; it refunded them. I think that was fair and reasonable.

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I invited both parties to provide any further information in response to my provisional decision. Zurich had nothing to add. The estate of Mr B replied. In summary it said:

- The error in the data collection form completed on behalf of Mr B is as a result of a miscommunication between Mr B and the intermediary (a third-party broker).
- It's unclear unclear what question was posed by the third-party broker to Mr B in relation to smoking, if at all.
- The misrepresentation of Mr B's smoking history wasn't deliberate. It remains the estate's case that the misrepresentation was careless.
- Mr B answered other questions correctly which suggests that he didn't have any intention to answer any of the questions put to him dishonestly. Had Mr B been

seeking to reduce the level of premium payable, it is likely that he would've answered other questions dishonestly.

- The smoking case studies contained in the ABI guidance are still important in considering the circumstances of this complaint.
- Mr B's smoking history had no impact on the cause of his death in this case.

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, and for the reasons set out below, I don't uphold this complaint.

- I'm satisfied that the intermediary was acting on behalf of Mr B so if there was any miscommunication between them which led to the smoking question not being answered correctly, I don't think it would be fair and reasonable to hold Zurich responsible for that. I'm satisfied Zurich can fairly rely on the answer given to the smoking question on the application form in the circumstances of this complaint. If the estate of Mr B is concerned about the way in which the intermediary acted, it is free to raise a complaint with the intermediary if it hasn't done so already.
- For reasons fully detailed in my provisional decision – an extract of which is set out above and forms part of this final decision – I still think that Zurich has fairly and reasonably concluded that there was a deliberate or reckless misrepresentation.
- Mr B may have answered other questions correctly, but I'm satisfied the smoking question wasn't answered correctly. And this impacted the terms on which Zurich offered the policy to Mr B.
- From what I've been provided with, I'm satisfied on the balance of probabilities that Mr B was sent the summary of the application submitted to Zurich setting out the information provided to it. It says: "if you think any information is wrong...let us know as soon as possible. If you don't tell us about something that's incorrect, we may have to cancel any policy you take out...or we may be unable to pay a claim". There's a section on tobacco and nicotine usage and next to that it's reflected "never used". And I've seen nothing which persuades me that Mr B sought to correct this answer which based on his medical records was incorrect.
- I explained in my provisional decision that I did take into account the case studies contained in the ABI guidance but why I've taken into account the individual circumstances of this complaint when making my decision.
- Mr B's smoking history may not have resulted in his death – which led to the claim being made. However, I've placed less weight on that when determining this complaint. Taking everything into account – including CIDRA and the relevant ABI guidance - I'm satisfied that Zurich has acted reasonably by declining the claim for life benefit and voiding the policy.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask the estate of Mr B to accept or reject my decision before 4 October 2024.

David Curtis-Johnson
Ombudsman