

The complaint

A limited company, which I will refer to as H, complains about the handling and decline of its medical professional liability claim by CNA Insurance Company Limited.

What happened

The following is intended only as a summary of the events. Additionally, whilst other parties have been involved, I have largely just referred to H, CNA and a third party I'll refer to as D.

H is a medical service provider, specialising in diagnostics. It held a commercial insurance policy, underwritten by CNA. The policy included cover for medical professional liability. D worked for H as a sonographer. There is some dispute over whether D was an employee of H or was self-employed.

In 2019, D performed a diagnostic test on a third party. Following this test, the third party was referred for surgery. The third party then issued a letter of claim, addressed to H. This alleged that D had acted negligently when carrying out the diagnostic test.

H contacted CNA. CNA advised that sonographers were not covered by the policy, and that H should redirect the claim to D and D's own insurer. H responded, saying that D was its employee and that the claim had been brought against H, so it felt it needed to deal with this. CNA said that it was possible that there might be some vicarious liability on H if D was its employee, but that D's own insurer ought to respond to the claim in the first instance. And reiterated that H should redirect the claim, providing some suggested wording for this. CNA also warned H that if this did not happen, and its position was prejudiced, CNA would not be liable for any costs that were incurred as a result.

D did apparently contact their professional body, which provided some secondary liability insurance. But there is no evidence that D had their own primary insurance or that, if they did, this insurer was contacted.

H ultimately settled the claim with the third party. And then returned to CNA seeking to claim for the costs of this. CNA responded, saying that H's failure to follow its advice, keep CNA updated with the claim, and seek CNA's consent to settle the claim had prejudiced its position. And so, CNA declined the claim.

H complained about this, bringing its complaint to the Financial Ombudsman Service. However, our Investigator did not recommend the complaint should be upheld. He said that the policy had not been set up in a way that was intended to cover sonographers working for H. And that, by failing to follow CNA's instructions, H had prejudiced CNA's position.

H remained unsatisfied, saying that CNA had not formally withdrawn indemnity, had failed to defend H against vicarious liability, and failed to pursue D's insurer. As our Investigator was unable to resolve the complaint, it has been passed 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.

Having done so, I am not upholding this complaint. I've explained why below.

Firstly, I will just reiterate that the above is intended only as a summary of the events. Additionally, whilst I have considered all of the submissions from both parties, I have not commented on each point that has been made. Instead, I have focussed this decision on what I consider to be the key issues. This is not intended as a discourtesy, but rather reflects the informal nature of the Financial Ombudsman.

There is some dispute over whether cover under the policy was limited to H or also covered D. H has said that the application form for the policy set out that it had sonographers as part of its staff. So, it feels it was clear that these individuals were covered by the policy.

Although CNA made it clear in communications with H prior to the claim that the policy only provided cover for H, the wording of the policy does provide cover for H and its employees. There is some dispute over whether D was an employee of H. When the policy was originally set up though, the application form said:

“All our clinical staff come from locum agencies and they already have both professional and clinical negligence insurance. They will not require additional coverage. Only the company, [H] will require the clinical negligence and professional indemnity insurance as additional coverage.”

So, at this point, H had said that sonographers like D were not its employees. If D was always an employee of H, H appears to have given a false statement when the policy was originally set up. I note that a broker was involved in this process, but H was ultimately required to ensure the information provided to CNA was correct.

The forms for later years do not appear to have included the statement above. But it does not seem that H ever told CNA that D was its employee prior to the claim. So, if D became an employee after the policy was initially set up, H ought to have informed CNA of this. As a commercial customer, H was required to inform its insurer of anything that would influence the judgement of a prudent insurer in determining whether to take on the risk and, if so, on what terms. I consider that a prudent insurer would consider a business like H employing medical professionals to be such a material circumstance.

In 2018, H did try to add a different medical professional to the cover provided. But CNA did not agree to this. And I think that if H had told CNA about D's employment status, it would not have agreed to provide D with cover either. At this point in time, CNA also reiterated that the policy required employed sonographers to have their own insurance in place.

This requirement was set out in an endorsement in the policy schedule which said, in part:

“all Registered Medical Practitioners and Sonographers must be members of a Medical Defence Organisation or hold adequate and suitable insurance covering the scope of their services including their own malpractice, and any acts, errors or omissions, and the category of such membership or insurance must apply and provide coverage for all services offered or provided by the Registered Medical Practitioners and Sonographers to or on behalf or at the request of the Insured.”

The endorsement doesn't actually act to remove cover. And if D was an employee of H,

technically the policy would provide cover for liabilities arising out of D's actions. The endorsement just requires that D hold their own insurance that would provide their own cover for their liability.

It seems D was a member of a professional body which provided some insurance. However, this was secondary insurance, intended to provide cover only where the financial limits of the primary insurance were exceeded. This secondary insurance did not, by itself, cover D's potential liabilities, so wouldn't meet the requirements of the endorsement. It isn't clear that D had their own primary insurance.

It was the primary insurer, that D ought to have had a policy with, that CNA asked H to redirect the claim to (along with the professional body). If this insurer did not exist, this would not have been possible. This may be why H ultimately did not comply with this request. Not ensuring that D had their own cover in place would be a breach of the above policy condition though.

Not following the directions provided by CNA would be a breach of other conditions. These include the general conditions in the policy to:

“...provide all information and assistance required by the Insurer.”

And:

“...provide such assistance as the Insurer may reasonably require in subrogation ... and the Insured shall take all steps necessary to preserve the rights of subrogation...”

The policy also includes a condition that says:

“No Insured shall make any admission of liability nor make any offer and / or promise of payment and / or payment without the prior written consent of the Insurer.”

However, rather than follow the directions given by CNA, H proceeded to settle the claim. CNA only appears to have been notified of this after the event.

Not informing CNA that D was an employee and not ensuring D had their own, suitable, insurance cover in place would be a breach of the conditions of the policy. And this would mean CNA's liability was increased beyond what it seemingly would have been willing to provide. Such a breach would clearly be prejudicial to CNA.

Not following CNA's directions to redirect the claim to D and their insurer, and then proceeding to settle the claim without the agreement of CNA would be a breach of the conditions of the policy. And this also would increase the potential liability CNA had. Similarly, this would clearly be prejudicial to CNA.

H has argued that CNA did not withdraw liability. However, CNA did decline the claim on the basis of the prejudice to its position that it experienced as a result of H's actions. H has also said that CNA did not defend it against a vicarious liability claim. But the reason this did not happen is because H did not follow CNA's directions and then dealt with the claim itself. Finally, H has said that CNA did not pursue D's insurer. But it does not seem H has ever confirmed whether D had a primary insurance policy, or who the insurer of this policy was.

In the circumstances of this complaint, I consider that CNA's request that H redirect the claim was appropriate. And that CNA's decision to then decline the claim was fair and reasonable, given the prejudice to its position that had been created by H's actions. It follows

that I cannot fairly and reasonably require CNA to do anything further.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask H to accept or reject my decision before 1 September 2025.

Sam Thomas
Ombudsman