

complaint

The executors of Mrs D's estate are unhappy that a claim for subsidence damage to her home has been declined. The buildings insurance policy is provided by The National Farmers' Union Mutual Insurance Society Limited (NFU).

One of the executors, Mrs W, is dealing with this complaint. The other executor has consented to the complaint.

background

Following Mrs D's death, her executors put her house up for sale. It was then discovered that some of the walls were cracked. It was thought that the cracks had been caused by subsidence. Mrs W contacted NFU and made a claim.

NFU appointed a firm of loss adjusters to look into the claim. The loss adjusters examined the property and noted that there was damage to the front and right-hand side of the house. It concluded that the level of damage was severe. Also that it had been caused by downward movement to the right-hand side of the property. This had happened because the soil beneath the foundations was weak and had consolidated (compressed). The loss adjusters went on to explain that the cracking had happened fairly recently. However, it thought that the distortion of the building was historic. The loss adjusters confirmed that the movement causing the damage was gradual and ongoing.

NFU rejected the claim. It said that the policy only covered damage that had happened during the time it was in place. The assessment made by its loss adjusters confirmed that the damage had been caused by the ground under the house consolidating under its own weight following it being built in the 1930s. As this was historic, the damage wasn't covered because there was an exclusion that defeated the claim.

Mrs W didn't accept this decision. She arranged for a firm of structural engineers to look at the house. The engineer came to the same conclusions about the cause of the damage as NFU's loss adjusters. It also confirmed that the movement was ongoing.

The exclusion that NFU has relied on states that 'existing damage' is excluded from cover. It defines existing damage as:

'Any DAMAGE, ACCIDENT, ILLNESS or liability which begins before the start of cover under the relevant cover of this POLICY'

Under the subsidence section of the policy it explains that damaged '*caused by poor workmanship, materials or design*' is not covered under the policy.

I issued a provisional decision on 20 November 2015. In this I set out my conclusions and the reasons I had reached them.

I confirmed that both the technical experts agree that the damage to Mrs D's home had been caused by the gradual consolidation of the soil beneath its foundations. It was also accepted that this has been happening since the house was built. However, it was only recently that the movement had caused noticeable damage in the form of cracking. Both experts agreed that the house was still moving, if very slowly.

The policy covers Mrs D's home for damage caused by subsidence, including consolidation subsidence, if it happens after the house has been standing for 10 years. So, it seemed to me that the damage - the distortion and cracking - was covered by the policy. However, NFU had said that there are exclusions in the policy terms that mean that the claim wasn't covered.

NFU mentioned the poor workmanship/materials exclusion that is detailed above. However, it didn't explained how it considered this applied to the claim. As such, I didn't think that it had evidenced that it would defeat the claim.

The other exclusion NFU relied on is for existing damage. It said that because the damage started before the policy was in place, this exclusion meant the damage was not covered.

I explained that it's normal for an insurer to exclude damage that happened before its policy existed. This isn't unreasonable in most situations. However, in some circumstances an insurer will choose not to apply the exclusion. This is usually for subsidence claims and comes about because of an industry agreement.

I went on to confirm that insurers understand that subsidence claims can be ongoing for some time before the homeowner notices damage. If a consumer has in the meantime changed insurers, potentially some of the damage would not be covered. The industry agreed that in such a situation, as long as the damage has all occurred during the time the consumer owned the property, one of the insurers that had covered the house would deal with all of the damage. Which insurer does that depends on the timing of the claim in relation to the change of policy. However, the agreement doesn't apply to damage that occurred before the consumer owned the property. Mrs W has said that NFU has insured the house since Mrs D bought it in the 1990s. This means that NFU wouldn't be expected to cover the damage that happened before the policy was in place.

I considered the wording of NFU's exclusion. I thought that was slightly different to most pre-existing damage exclusions. I said this as it not only excludes damage that happens before the policy was in place, but also damage that happens afterwards, if it started to happen before. This means that it could potentially reduce the available cover significantly. Indeed, given the nature of subsidence, it could have the effect of defeating many such claims. In such cases it seemed to me that it would be at odds with the industry agreement. In this particular case a lot of the damage is distortion of the house. This started happening when the house was built and has continued throughout. However, because it started before the policy was in place, technically, the exclusion means that NFU has no liability for any of the distortion that's happened.

I considered this exclusion to be unusual and it could significantly restrict the cover provided by the policy. As such, I thought it should have been specifically pointed out to Mrs D at the time of the sale of the policy. Whilst I had not seen the documentation provided to Mrs D in 1999 when the policy was originally arranged, the later documents I had seen didn't highlight the exclusion.

In the situation where NFU didn't highlight this exclusion at the time of the sale, I had to consider what position the consumer would likely have been in had it done so. That is, if NFU had made Mrs D and her husband aware that it had an exclusion in the policy that meant the policy could provide less cover than most of its counterparts; would they have still taken it? I wasn't convinced that most consumers would.

Overall, I decided that unless NFU could provide evidence that the exclusion was highlighted to Mrs D at the time she took the policy, it wouldn't be fair or reasonable for NFU to apply the exclusion to defeat this claim.

Mrs W accepted the provisional decision on behalf of Mrs D's estate.

NFU didn't respond. I have taken this to mean that it can't provide any evidence that the exclusion was pointed out at the time of the sale.

my findings

I have considered all the available evidence and arguments from the outset to decide what's fair and reasonable in the circumstances of this complaint. As no new comments or evidence have been provided, I see no reason to alter my conclusions.

my final decision

I uphold this complaint. I require The National Farmers' Union Mutual Insurance Society Limited to accept the claim from Mrs D's estate and deal with it accordingly. If, in order to repair the damage that has happened since its policy has been in place, it has to repair some damage that occurred before that, it must do so.

Under the rules of the Financial Ombudsman Service, I am required to ask the executors of Mrs D's estate to accept or reject my decision before 29 January 2016.

Derry Baxter
ombudsman