

complaint

Mr H's complaint is about SCOR UK Company Limited (SCOR) declining claims under his Professional Indemnity Policy.

background

Several patients made claims against Mr H following breast enhancement surgery. The patients alleged that the implants used were defective. Mr H notified SCOR but his insurance claims were declined because SCOR said they related to product liability and his policy was for professional indemnity.

In my provisional decision I said that the natural meaning of the language used in the policy was to cover claims relating to an alleged breach by Mr H of contractual terms or conditions as to the quality of implants he used in breast enhancement surgery.

My provisional decision was to uphold the complaint and that SCOR should deal with the claims in accordance with the remaining policy terms and conditions.

my findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

In its response, SCOR said that I had confused the provision of services with the sale or supply of goods. It said the legislation from which the claims against Mr H derived was the Sale of Goods Act 1979 rather than the Supply of Goods and Services Act 1982. In fact I hadn't said which legislation I thought was being used to support the claims against Mr H. I don't think it is clear but, given the language used in the policy, I don't think it matters much for our purposes.

SCOR seems to be arguing that if the terms were implied under the Sale of Goods Act it must be under a separate contract of sale independent of the surgery and so any breach would not be '*in the provision of professional services*'. SCOR points out that in many breast implant cases the surgeons were only contracted to carry out the surgery and the implants were supplied by a clinic indicating that the surgery and the sale of the implants are separable.

That may be the case but here the allegation against Mr H is that he was in breach of an implied term or condition as to the quality of the implants. To me that implies he is regarded as the supplier. Even if it were established that the term Mr H was alleged to have breached was implied under the Sale of Goods Act, I still think the claims would be covered. Whatever the operative legislation, if Mr H is sued because a patient alleges there was something wrong with the implants he used in her surgery, I think that would be a liability arising from an alleged '*breach of contractual duty in the provision of professional services*'. Professional services are defined in the policy to include the '*treatment*' or '*care*' of a patient '*in a professional medical capacity*'. I can't see any serious argument that the implants weren't sold or supplied in the course of providing '*treatment in a professional medical capacity*'.

If Mr H didn't supply the implants (because, for example, they were supplied by the clinics) those allegations against him would presumably have difficulty. But if those allegations are

mis-founded, because he was not the supplier of the implants, I think they're still allegations against which he's entitled to be indemnified under the policy.

SCOR has also argued that I have misconstrued the exclusion for the '*sale of products outside the proper course of the provision of professional services*'. It said that the exception to the exclusion only applies where products (such as plaster casts) are modified by the surgeon. It said otherwise the policy is turned from an indemnity for professional negligence into an indemnity for strict liability for the supply of products, not services. And it says I can't use the exception from the exclusion fundamentally to alter the nature of the policy in this way.

I don't think that's what I'm doing. I don't think I'm turning the policy into anything it isn't already. I think I'm giving effect to the natural meaning of the language SCOR has used in its policy. To the extent there is any ambiguity in that language, normal principles of interpretation provide that it should be construed in the policy-holder's favour but I don't think there is ambiguity here.

The language SCOR has chosen to use in its policy covers liability for breach of contractual duty in the provision of professional services and only excludes liability for the sale of products outside the proper course of the provision of professional services. A surgeon being sued for breach of an implied contractual term as to the quality of the implants he used on his patients seems to me to fit that language precisely.

I don't see any reason to alter my provisional decision.

I think SCOR was wrong to decline these claims on the basis it did and SCOR should now deal with them in accordance with the remaining policy terms and conditions. SCOR has only been prevented from approving any costs or other liabilities incurred or any settlement entered into to date by its own unwillingness to accept the claims and so will have to indemnify Mr H for them in full. It's up to SCOR to decide how it wants to conduct the claims in the future.

There is some uncertainty about when some claims against Mr H were made or reported. The policy covers claims made against Mr H during the insurance period or made against him after the insurance period but arising out of circumstances reported to SCOR during the insurance period.

SCOR has suggested that some claims were not made against Mr H until after the insurance period. And Mr H has said that there were some claims which he did not report to SCOR because it had already made clear it was not accepting the claims he'd made previously. I don't have enough information about the individual claims to decide which ones might or might not have met the policy requirements on timing and reporting.

The decision I've made is that SCOR should deal with Mr H's claims in accordance with the remaining policy terms and conditions. That will involve SCOR looking at when claims were made and reported. If the only reason a claim was not reported was because SCOR had already indicated it was not accepting claims of that type, I do not think it would be fair for SCOR to continue to decline it on the basis that it was not reported on time.

I said in my provisional decision that If SCOR wished to decline cover for any of the claims made against Mr H on the basis that they were not notified in time, it should identify them in its response to my provisional decision. And it should explain whether it believes the

relevant claim was made against Mr H after the insurance period or during the insurance period but not notified in time. It hasn't, so I think the conclusion is that all the claims were notified in time or only not notified because SCOR had indicated that it wasn't accepting claims of that nature and all of them should be dealt with now.

my final decision

My final decision is to uphold the complaint. SCOR UK Company Limited should deal with the claims in accordance with the remaining policy terms and conditions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 26 February 2016.

Jonathan Coppin
ombudsman