Financial Services Authority

Notice of Undertaking

Introduction

As a qualifying body, we, the Financial Services Authority (the FSA), can challenge firms using terms that we view as unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). So we review contract terms referred to us by consumers, enforcement bodies and consumer organisations. This has led to Direct Line Insurance Company Limited, Churchill Insurance Limited and UK Insurance Limited ('the RBS Insurance firms') undertaking for all the pet insurance policies they underwrite to not use the terms identified in the pet insurance policy of Direct Line, which we consider may be unfair.

We have a duty under the Regulations to notify the Office of Fair Trading (OFT) of the undertakings we receive. The OFT has a duty to publish details of these undertakings, which it puts on its Consumer Regulation Website. We also publish the undertakings on our website. Both publications will name the firm and identify the specific term and the part of the Regulations which relate to the term's fairness.

Even if firms have not given an undertaking or been subject to a court decision under the Regulations, they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These will be of potential value in showing the likely attitude of the courts, the FSA, the OFT or other qualifying bodies to similar terms or terms with a similar effect. Ultimately, only a court can determine the fairness of a term and, therefore, we do not recommend terms that have been revised by a firm to address our concerns as being definitely fair. We cannot approve terms for the purposes of the Regulations; it is for firms to assess the fairness of their terms and conditions under the Regulations and in the context of the product or service in question. It is important to bear in mind that wording that is fair in one particular agreement is not necessarily fair in another. When we accept an undertaking given to us from a firm to revise a term, this means that, on the evidence available at the time, we consider the term to be improved enough so that further regulatory action is not required.

RBS Insurance firms undertaking in relation to Direct Line and all other pet insurance policies which they underwrite

Name of business	Direct Line Insurance Company Limited; Churchill Insurance Limited and U K Insurance Limited	**Lead organisation**	FSA
Trading sector	Insurance	**Contract identifier**	Direct Line Pet Insurance – your essential policy cover

Original Terms

‘**General Exclusion 14**

…

We will not pay for the following:

…

14. Any costs that we do not consider reasonable or necessary. To help us determine what is reasonable or necessary we may seek guidance from other veterinary practices or independent loss adjusters and we will only pay for costs that we consider reasonable or necessary.’

‘**Section 1, Vet fees**

What is not covered

We will not cover

…

- any diagnostic laboratory fees, such as (but not limited to) histopathology that originate outside your usual vet practice that we do not consider to be within a reasonable and customary amount
- any fees for treatment or complementary therapy that we do not consider reasonable or necessary

…

Special conditions relating to claims under this section

…

- Where we regard the vet fees charged are greater than the fees usually charged by a general or referral practice in a similar area we reserve the right to only pay what we consider to be reasonable or necessary.’

Application of the Regulations (Schedule 2 paragraph or as indicated)

Under the Regulations, we are generally permitted to assess for fairness terms in standard consumer contracts, but not those that relate to the definition of the main subject matter of the contract or to the adequacy of the price or remuneration as against the goods or services supplied. However, there is an important carve out, under the Regulations, in that if such terms are not in plain and intelligible language then they may be assessed to determine if they are likely to be unfair.

Clauses 14 and Section 1 (Vet Fees) (the ‘Original Terms’) are clearly exclusion clauses in an insurance policy. Exclusion clauses limit the risks that the insurer is prepared to insure, and therefore *may* ‘relate to the definition of the main subject matter of the contract’. The Council Directive 93/13/EEC (which was implemented in the UK by the Regulations), has a preamble that has been used by the courts in the UK to interpret the purpose and meaning of the law, and, in this regard, Recital 19 provides useful guidance on this point. It states that terms describing the insured risk and the insurer's liability should be regarded as coming under the heading of ‘main subject matter of the contract’ and therefore not subject to assessment provided they clearly define or describe the risk or liability.

For ease of reference we set out the preamble in the Council Directive 93/13/EEC, which states:

> 'assessment of unfair character shall not be made of terms which describe the main subject matter of the contract...whereas it follows inter alia, that in insurance contracts, the terms which clearly define or describe the insured risk and the insurer's liability shall not be subject to such an assessment since these restrictions are taken into account in calculating the premium paid by the consumer.' (emphasis added).

We also set out Regulation 6(2)(a), which states: 'In so far as it is in plain and intelligible language, the assessment of a fairness of a term shall not relate-… to the definition of the main subject matter of the contract' (emphasis added).

In our view, the Original Terms are not drafted in plain intelligible language because the terms 'reasonable and necessary' are vague and potentially subjective concepts in this context and the insurer and insured are likely to have different views on this. The Original Terms also reserve the meaning of 'reasonable or necessary' to that which the *insurer considers* 'reasonable or necessary' which, in the absence of more information from the insurer, the insured can never be certain of. There is no evidence of any explanatory material provided to the insured at the time of the conclusion of the contract. Any material provided afterwards is irrelevant to an assessment of the intelligibility of a term in the contract as entered into.

According to the above Recital, clearly described exclusions to insured risk should not be subject to assessment for fairness on the basis that 'these restrictions are taken into account in calculating the premium paid by the consumer'. However, in this case, the insured risk and the insurer's liability are not clearly defined; they are left to the discretion of the insurer. In the absence of a clear definition we do not consider that this risk could have been properly quantified or taken into account by the insurer when calculating the amount of the premium.

Since, in our view, the Original Terms are not clearly defined, and they are not in plain and intelligible language, they are therefore subject to assessment for unfairness, so we set out Regulation 5(1):

> 'A term is unfair under the Regulations if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.'

i) Significant imbalance to the detriment of the consumer

Under the Regulations, a term will be judged according to how it is drafted in the contract, namely its *potential* for unfairness (not its application in practice). In our view, the General Exclusion 14 'We will not pay for …any costs that we do not consider reasonable or necessary…' creates a significant imbalance between the parties in that it gives the insurer an unfettered discretion to refute a claim or pay only a small amount of it. We note that the wording provides that in determining what is reasonable or necessary the firm 'may seek guidance' from other veterinary practices, but this does not mean that it will.

We consider that reserving such an unfettered discretion to the firm could potentially lead to detriment for consumers by limiting the cover they receive. Further, although the consumer is paying the premium from the beginning of the contractual arrangement, he or she has no clear idea of what is / is not covered by the insurance policy, which is also to his or her detriment.

Section 1, Vet fees, contains similar wording about covering only costs that 'we consider to be reasonable or necessary' and our assessment is that they are likely to be unfair for the same reasons. The effect of the wording is to give the firm a seemingly unrestricted discretion to determine what costs or fees are reasonable or necessary and thus what it will pay for.

ii) Good faith

We understand from our correspondence with the firm that, in practice, it provides information on the limits to cover and treatments when the customer calls to make a claim. In our view, this is likely to be contrary to the requirement of good faith, as at the claims stage it is likely to be too late for the customer to switch to another insurer if he or she is not happy with the cover provided. The fact that the firm may want to change the limits from time to time should not prevent it from making such information available at the time the consumer enters the contract.

How the term has changed

The Original Terms will be deleted from all RBS Insurance firms' underwritten pet insurance policies. They will be replaced with New Terms set out in the table below. The insurer no longer has the discretion to decide what costs or how much to pay and the consumer has clear information as to what is/is not covered by the policy and the maximum limits of cover for each type of treatment from the outset of the contractual arrangement.

The new table of limits will be incorporated in all the pet insurance policies of the firms listed below, apart from the Royal Bank and NatWest policies, where no limits for treatments will be given as all eligible claims will be met in full (unless another fair and clearly drafted exclusion applies).

The RBS Insurance firms have confirmed that new customers will receive a policy with the new terms from 1 November 2011, and existing policy holders will be notified of the changes at their annual renewal falling due after 1 November 2011. In the interim, the RBS Insurance firms will honour all valid claims on existing policies and not apply any limits.

The RBS insurance firms giving the undertaking to change the terms of their pet insurance policies are **Direct Line Insurance Company Limited; Churchill Insurance Company Limited and UK Insurance Limited.**

In addition, UK Insurance Limited has a number of partnership relationships which are not part of the RBS insurance group of companies but where UK Insurance underwrites and is responsible for the policy wording. These policies have the same or similar wording as the ones identified under the Original Terms and this undertaking applies to them as well:

Lloyds TSB Pet Insurance
NatWest Pet insurance
Royal Bank Pet Insurance
Virgin Money Pet Insurance

New Terms (to be placed in Section 1, Vet fees)

We will refund vet fees that you have had to pay for treatment or complementary therapy providing the condition occurred during a period of insurance and the treatment arose during a period of insurance when the premium has been paid, under the following conditions:

The most we will pay for each condition is £xx. This amount includes:

- up to £40 towards consultation fees for each separate visit to the vet as a result of the condition;
- up to £100 towards additional out of hours fees for each separate out of hours visit needed as a result of the condition;
- up to £45 towards hospitalisation fees for each 24 hour period your pet requires hospitalisation;
- up to £65 towards histology fees including any handling and interpretation fees;
- up to £70 towards cytology fees including any handling and interpretation fees; and
- up to £25 per session towards hydrotherapy and physiotherapy fees.

Other information

- We remind firms of the Insurance Conduct of Business Rule 6.1.5, which states that:

  'A firm must take reasonable steps to ensure a customer is given appropriate information about a policy in good time and in a comprehensible form so that the customer can make an informed decision about the arrangements proposed.'

- The RBS Insurance firms have also confirmed that:
  - the significant treatment limits will also be included in the Key Facts document; and
  - the treatment limits are exhaustive, and the customer's claim will otherwise be covered in full subject to the terms and conditions of the remaining policy documentation.

The RBS insurance firms were fully cooperative in providing this undertaking to us.

Undertaking published on 25 November 2011