

The complaint

Mr B is complaining Markerstudy Insurance Company Limited has declined a claim he made for the theft of his motorcycle on his motorcycle insurance policy.

Mr B has been represented by a representative in this complaint. But, for ease of reference, I shall refer to anything the representative has provided as being provided by Mr B.

What happened

Mr B's motorcycle was stolen so he claimed for the loss on his motorcycle insurance policy. Markerstudy declined his claim because it said the motorcycle was parked outside his place of work. But it said the policy only covered social, domestic and pleasure (SDP) and didn't cover commuting – i.e. for when Mr B drove to and from a place of work.

Mr B didn't think Markerstudy's decision was fair. He disputed he'd applied for the insurance policy online and was adamant it was done on the telephone. And he said he wasn't given an option to include commuting. He said it's widely considered SDP includes commuting. He thinks Markerstudy should have made it clearer he wasn't covered for commuting.

I issued a provisional decision in November 2020 upholding this complaint. And I said the following:

"I do not dispute that, under the strict interpretation of the policy, Mr B isn't covered for the theft of his motorcycle. But I have to think about whether this is fair and reasonable. Markerstudy sets out this is simply a matter that Mr B chose to only have SDP cover and didn't choose to be covered for driving to and from work. So it says the insurance policy wasn't covering him at the time of the theft. However, I think this matter is in actual fact a question of whether Mr B misrepresented how he used his motorcycle. So I think the key question I have to think about here is whether the Consumer Insurance (Disclosure and Representations) Act 2012 ('CIDRA') applies in this case. I think it does and I'll now explain why.

CIDRA says it's the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer if it asks a question about facts relevant to the proposed risk it's covering. If a consumer doesn't take reasonable care and misrepresents something which affects whether the insurer would've offered the policy or its terms and conditions, it's known as a 'qualifying misrepresentation'.

Markerstudy doesn't think it asked Mr B a question about facts relevant to the proposed risk. It says it asked him to decide what level of cover he wanted. But I don't agree. Mr B was initially asked when he first applied for the policy what the motorcycle's usage was. And he was given three different options.

I also note that the proposal form Markerstudy sent Mr B at renewal asks "nature of this driver's use of the vehicle?" I think the way someone uses a motorcycle is clearly relevant to the proposed risk Mr B was asking Markerstudy to cover.

I appreciate that it may have been Markerstudy's intention to ask Mr B to choose the type of cover he wanted. But Mr B wasn't asked to choose a level of cover but he was asked a question on two separate occasions – at initial application and again at renewal – about how he used his car. I think this is different to choosing a level of cover and is worded in a way to get a material fact. So I think CIDRA does apply in the specific facts of this case.

I've now thought about what CIDRA says in these circumstances. CIDRA 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 – a qualifying misrepresentation. For it to be a qualifying misrepresentation the insurer 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. One of these is how clear and specific the insurer's questions were. And the remedy available to the insurer under CIDRA depends on whether the qualifying misrepresentation was deliberate or reckless or careless.

I've looked at the online application Mr B initially completed and he was clearly given an option to include commuting. There was also an explanation option if he wasn't sure what this meant. But he said he didn't use the motorcycle for commuting. So I'm satisfied he gave incorrect information at the initial application. I don't think he did this deliberately – it seems to have been a simple mistake – but CIDRA would consider this to be a careless misrepresentation.

CIDRA sets out what an insurer can do where the misrepresentation was careless:

- *It can cancel the policy back to the beginning if it wouldn't have offered insurance had it known all the facts, but it has to return the premium paid;*
- *If the insurer can show that it would've entered into the policy on different terms then it can apply those terms;*
- *If there's an existing claim – like in Mr C's case – and the insurer can show that it would've charged a higher premium it can proportionately reduce the claim, i.e. if the policyholder only paid 50% of the correct premium, he only gets 50% of the amount claimed.*

I've seen Markerstudy's underwriting criteria and I'm satisfied it would have insured Mr B had he said he intended to use the motorcycle for commuting, but it would have charged more. I'm conscious that the terms of the policy Mr B took out didn't cover him for commuting. But I'm also conscious CIDRA sets out:

“Careless misrepresentations—claims.

6. *If the insurer would have entered into the consumer insurance contract, but on different terms (excluding terms relating to the premium), the contract is to be treated as if it had been entered into on those different terms If the insurer so requires.”*

Essentially, where we find a misrepresentation to be careless, we will look at what the terms of the policy would've been had the correct information been given - i.e. if Mr B had said he used the motorcycle to go to and from work. And, had he done that, the policy would have covered him for commuting – i.e. he would have been covered for the theft – albeit at a higher premium.

That said, I'm also conscious Markerstudy has raised concerns about the where Mr B kept the motorcycle overnight. And it hasn't investigated this issue yet. I think it's entitled to investigate this issue before deciding on how to settle the claim.

So I intend to say Markerstudy should reconsider this claim on the basis that Mr B carelessly misrepresented how he used the motorcycle and, if it considers the claim should be settled taking into consideration the other issues raised, it should settle this claim in line with the remedies set out under CIDRA.

While I'm not directing Markerstudy to settle the claim, but reconsider it, I do think its handling of this claim has caused Mr B some unnecessary distress and inconvenience. So I think it should also pay him £150 in compensation for this.

Markerstudy didn't accept my provisional decision as it maintained it should have the right to decline the claim because it fell outside of the level of cover specified on the policy. It said Mr B had asked for cover for SDP purposes only, but the claim then occurred while he was using the bike outside of this coverage.

Markerstudy referred to the help box on the online application which it said set out that the consumer was selecting a level of cover, rather than this being a question about how they would "typically use the vehicle" or similar.

It maintained that, as Mr B was actively selecting the level of cover, it's distinct from a misrepresentation issue such as the misrepresentation of overnight location that also occurred in this case where Mr B was asked "*Where is the vehicle normally kept at night?*"

Markerstudy considered this to be similar to where a consumer chooses to have driving other cars cover on their policy. However, if they choose to not take this and did drive another car, they simply wouldn't be covered to drive that car rather than it being classed as a misrepresentation.

Mr B maintains that the policy in question wasn't taken out online. And he said he wasn't offered a choice of usage categories and in particular, he wasn't told that the SDP category would exclude everyday local commuting.

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.

I've taken into account everything both parties have provided in response to my provisional decision. But I've come to the same conclusion as I did in my provisional decision.

I'm satisfied Mr B initially took the policy out online and it's fair to consider the online application he undertook. Markerstudy has said the explanation box makes it clear that Mr B was choosing a level of cover. But I don't agree. The explanation box gives a description of which option to select means. But it doesn't say he's choosing a level of cover. I'm satisfied my provisional decision sets out clearly why I think the way the application is worded is done in a way to find out a material fact as opposed to asking "*what level of cover would you like*".

I think there is a clear distinction between asking whether a consumer wants a specific level of cover (such as asking if they wish to have driving other car cover) and how a vehicle is used. I think it's fair to say the first option is worded in a way to choose a level of cover and the second is worded in a way to ask for a material fact pertinent to the risk Markerstudy was being asked to insure.

So, taking everything into account, I still think the remedy I set out in my provisional decision is fair. And Markerstudy hasn't given me anything to make me think my provisional decision is unfair.

My final decision

For the reasons I've set out above, it's my final decision that I uphold this complaint. And I require Markerstudy Insurance Company Limited to reconsider this claim on the basis that Mr B carelessly misrepresented how he used the motorcycle and, if it considers the claim should be settled taking into consideration the other issues raised, it should settle this claim in line with the remedies set out under CIDRA. It should also pay him £150 in compensation for this.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 18 January 2021.

Guy Mitchell

Ombudsman