



Northamptonshire County Council

PRIMARY AUTHORITY ADVICE

Primary Authority Company: M A Assist Ltd

ADVICE REQUESTED

MA Assist Ltd wish to provide a surveying service for the insurance industry in the event of claims made by consumers concerning insured damages caused to property. The briefing paper produced by MA Assist Ltd entitled 'Surveyor Led Model' provides some description of the perceived consumer related issues that may arise in the industry when an insurer wishes to evaluate and settle an insurance claim made by a consumer.

MA Assist would like an evaluation of the application of consumer legislation and regulations concerning consumer rights and information that should be provided to consumers by the various professional parties that may be involved in an insurance claim. The evaluation is to include any redress that consumers may have or possible sanctions against professionals that may have been involved with the insurance claim and subsequent reinstatement of property. Particular regard is to be had to the following:

- 1) The effect of any mis-leading or omitted statements by professionals associated with an insurance claim.
- 2) The information that must legally be provided to the consumer by the surveyor and the implications should the consumer rely on that information
- 3) Policyholders' rights to change their mind and seek an alternative solution from the insurer.
- 4) What does reasonable skill and care mean for a surveying service under the new Consumer Rights Act?
- 5) Is there anything that needs to be addressed around the undervaluation of cash settlements – i.e. making sure the policyholder is given sufficient cash to reinstate their home to the state it was before the insurance event. What are an insurer's legal obligations in this area?

ADVICE PROVIDED

With regard to the above question there are, broadly, 4 parties involved, namely:

- The insurance company
- A loss adjuster who may be directly employed by the insurance company or by an independent surveyor sub contracted by and acting on behalf of the insurer to act as loss adjuster.
- A building contractor who will carry out repair work and in some instances may also provide a loss adjusting function on behalf of the insurance company.
- The consumer

Also there are two scenarios to be considered –

- A) A consumer enters into a contract of insurance and subsequently makes a claim following an insured event that has caused damage to their private residence or property. A loss adjuster (or surveyor acting in a loss adjusters role) visits the consumer's residence to assess whether the damage is indeed covered by the contract of insurance and if so the extent of the damage. An estimate of cost of repair is produced by the loss adjuster who then advises the insurance company of his findings. Based upon the loss adjuster's estimate the insurance company engages a contractor to complete the required repair works to the consumer's residence.
- B) The second scenario differs from the first where, following the loss adjusters evaluation, the consumer is offered a cash alternative to the repair of their property by a contractor engaged by the insurance company. The consumer is free to keep the cash offered and may choose to engage a contractor of their choosing free of any condition imposed by the insurance company, carry out the repair themselves or make no repair and simply keep the money offered by the insurance company.

It has been stated that the loss adjuster is to determine the prospective builder that a policy holding consumer may use in the event of a cash settlement or whether the consumer will attempt the repairs themselves. The value of the cash settlement will also take this into account and be reduced from a base line cost that would have been paid to an approved contractor that would have been contracted by the insurance company had they been required to complete repairs. In the event of the consumer opting for a cash payment the insurance company will not carry out any inspection to ensure the repair work has been completed or confirm the quality of any work that has been carried out.

The legislation and regulations that have the most significant bearing on the matters in question will be –

(As from the 1st October 2015) The Consumer Rights Act 2015.

The Consumer Protection from Unfair Trading Regulations 2008.

The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

Advice:

Scenario A

With regard to scenario A given above there is a single contractual arrangement between the consumer and the insurance company. With regard to the exercise of any consumer rights the consumer may only seek redress against the insurance

company.

Insurance contracts are specifically exempted from the provisions of **The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013** by Regulation 6(1)(b).

The Financial Conduct Authority (FCA) are the relevant Regulator for Insurance firms and it is noted that the published Financial Conduct Authority Handbook contains provisions similar to those given in the 2013 Regulations – such as at sections **ICOBS 3 – Distance Communications, ICOBS 6 – Product Information** and **ICOBS 7 – Cancellation**.

In particular with regard to ICOBS 6 Annex 2 contains a list of the information that is expected to be provided to consumers in a prominent way and clearly identified as containing key information that the consumer should read.

Part of the required information listed includes ‘significant or unusual exclusions or limitations and cross – references to the relevant policy document provisions.’ It may be argued that any provisions relating to cash settlements for claims as described above might, from the outset, be required to be brought to the attention of potential customers of the insurance company. However, it would be for the FCA as the Regulator, to decide if that was the case or not and whether failure to disclose the information would have a repercussion upon the insurance company.

As the only contract entered into by the consumer in scenario A would be the contract of insurance the only provisions with regard to cancellation would be the 14 days provided for in the FCA Handbook.

With regard to the **Consumer Rights Act 2015** as both the Loss Adjuster/Surveyor and Builder/s are subcontractors appointed by the insurance firm it is the insurance firm that will be contractually liable for any infringements of consumer’s rights contained within the Act.

It therefore follows that as Loss Adjuster/Surveyor and Builder/s will be providing a Service in the insurer’s name the insurance firm should be able to ensure that any work undertaken by the subcontractors is performed in line with the terms of the contract and with reasonable care and skill. (for instance if the insurance contract is to restore a consumer’s property to the condition that it was in prior to an insured event and a survey had not included all the damage and the consumer relied on the surveyors expertise, which had in turn led to the work undertaken being substandard – the insurance company would be in breach of contract with the consumer while the surveyor may be in breach of contract with the insurance firm if he did not fulfil the remit he was given).

Although the term reasonable care and skill is not defined in the Sales of Goods Act 1979, Sale of Goods and Services Act 1982 or within the Consumer Rights Act 2015 (which supersedes the two prior Acts from the 1st October 2015) the meaning of the term has been explored by previous case law. The term is currently accepted to mean work done by a person engaging in their profession that is carried out to the same standard that another reasonably competent member of their profession would have met, or put another way, it does not mean that the work has to be perfect, but that it should be done to the standard of a reasonably competent trader or professional.

Presumably, with regard to subcontractors this may mean the insurance firm ensuring that a Loss Adjuster/Surveyor is

permitted suitable time etc. to sufficiently evaluate the scope of repair works required and a specification for adequate works to be provided to the builder to be carried out. If this is not done then it might be argued that work carried would be less likely to be deemed to be carried out with reasonable care and skill if an adequate evaluation could not be undertaken owing to the instructions of the insurance firm restricting the time permitted to the surveyor.

Additionally, with regard to statements made by subcontractors on behalf of the Insurer it is worth noting that Section 50 provides that 'every contract to supply a service is to be treated as including as a term of the contract anything that is said or written to the consumer, by or **on behalf of** the trader, about the trader or the service, if it is taken into account by the consumer when making any decision about the **service after entering into the contract.**' However, this provision is also subject to anything that qualified the statement either said to the consumer or given in writing on the same occasion and any change that had been expressly agreed between the consumer and the trader (either before entering into the contract or later).

With regard to the provision of Services there are two main provisions for redress by the consumer, namely a right to a repeat performance, if possible, of the service at the cost of the trader which must be provided within a reasonable time and without significant inconvenience to the consumer.

Or,

Perhaps, much less likely in the scenarios considered above owing to the cost of the insurance premium likely to be far below that of any work that has been carried out, the right to a price reduction by an appropriate amount, in the event that a repeat performance has not been carried out in a reasonable time or without significant inconvenience or is impossible. The reduction in price could be the full amount paid.

However, these two remedies do not prevent consumers seeking other remedies that might be more suitable (but not as to recover twice for the same loss). Other remedies include, claiming damages, recovery of money paid, seeking specific performance, seeking an order for specific implement, relying on the breach against a claim by the trader under the contract, exercising the right to treat a contract as at an end.

In the event that the remedies open to the consumer have not been satisfactorily carried out or are unjust a consumer may have recourse to the court which has various powers under the Act including the ability to make an order 'unconditionally or on such terms and conditions as to damages, payment of the price and otherwise as it thinks just.'

The Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

These Regulations apply to commercial practices before, during and after a contract is made. It contains criminal offences in relation to unfair commercial practices. A commercial practice is any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product (includes goods and services) to or from consumers whether occurring before, during or after a commercial transaction (if any) in relation to a product. A product can be any goods or service and includes immovable property, rights and obligations.

A **commercial practice** is unfair if it contravenes the requirements of professional diligence and it materially distorts or is

likely to materially distort the economic behaviour of the average consumer with regard to the product.

Professional diligence means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either – honest market practice in the trader's field of activity, or the general principle of good faith in the trader's field of activity.

Trader means any person who in relation to a commercial practice is acting for purposes relating to his business, and anyone acting in the name or on behalf of a trader.

The Regulations contain a number of prohibitions on unfair commercial practices which include the following :

- A general prohibition on an unfair practice if it contravenes the requirements of professional diligence and it materially distorts or is likely to distort the economic behaviour of the average consumer with regard to the product.
- A prohibition on misleading actions if it contains false information and is therefore untruthful in relation to any of the matters listed within the Regulation in question, which includes the price or the manner in which the price is calculated, the existence of a specific price advantage or the consumers rights or the risks he may face, or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters listed, even if the information is factually correct and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.
- A prohibition on misleading omissions if, in its factual context, the commercial practice omits material information, hides material information, provides material information in a manner which is unclear, unintelligible, ambiguous or untimely or fails to identify its commercial intent, unless already apparent from the context and as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

Material information means the information which the average consumer needs, according to the context, to take an informed transactional decision and any information that the trader is obliged to provide to the consumer by law.

In relation to the above the following limitations are to be taken into account –

All the features and circumstances of the commercial practice, the limitations of the medium used to communicate the commercial practice (including limitations of space or time) and where space and time are limited, any measures taken by the trader to make the information available to consumers by other means.

In essence, the above prohibitions require that a trader acts in a sufficiently professional way as is commensurate with that recognised within that industry and that a consumer is given sufficient information in a clear and concise manner in order to be able to make a considered decision whether or not to accept that which is offered by the trader. It is also, perhaps, worth noting that, with regard to misleading actions and omissions, there is no requirement for the trader to intentionally breach any of the prohibitions, it is sufficient that they only be breached for an offence to have been committed.

Also, in the event of a breach of any of the prohibitions the Insurance firm, being the entity in whose name an offence would have been committed as the trader supplying the service to the consumer, would, in the first instance, be liable unless they could show they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence, either themselves or any person under their control.

The trader may also put forward that an offence was due to the default of some other person, however, they would still

have to show that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

In straight forward terms, what this means is that simply blaming the commission of an offence upon someone else would be ineffective if it can not be shown that reasonable precautions and diligence were not taken to avoid an offence being committed. Case law has indicated that the extent of the measures undertaken should be consistent with the resources available to the business. For instance a small business may be expected to instigate fewer measures in order to show reasonable precautions and due diligence than one which is a large multi million pound concern.

What may constitute reasonable precautions and due diligence may mean employing properly qualified persons, issuing specific instructions and taking some measures to ensure that they are carried out to an acceptable standard. It might also be arguable that restricting the time for a reasonable survey that leads to a misleading description of works required etc. could be a lack of diligence by the Insurance Firm, particularly if they were aware if such restrictions may lead to a defective report that is then communicated to the consumer to make a decision on.

It is also possible for each trader involved, be it the insurance firm or subcontractors to be charged with an offence concerning the same misleading description if it can be shown that suitable reasonable precautions or diligence were not employed by any.

However, as indicated above reasonable precautions and due diligence may differ from case to case depending upon all the circumstances involved.

With regard to scenario B and the cash pay out the details for scenario A remain the same up to the point that the consumer accepts the cash payment. This will mean that, for the purposes of the **Consumer Protection from Unfair Trading Regulations 2008**, the consumer should be provided with sufficient information to take an informed transactional decision. This is likely to mean that, whether it is the surveyor/loss adjuster or Insurance firm directly, who makes the cash payment offer and knows it is reduced to such an extent that the consumer is unlikely to be able to have any repairs for which they were insured satisfactorily carried out it is arguable that the consumer should be made aware of this as it is likely to influence his decision. Failure to do so may be a misleading omission.

There are also repercussions for the consumer with regard to where the consumer's rights will lie if the consumer accepts the cash payment and engages their own builder. In this instance the consumer will have no further rights against the insurance firm in the event that any problem arise with the work and would have to pursue their rights directly against the builder they employed. The consumer may be at a disadvantage compared with an insurance firm when doing this. For instance the consumer may be less able to identify a suitable builder to carry out the work, may be susceptible to loss of money in the event the builder goes into liquidation and then have insufficient funds to complete the work, is less likely to have available sufficient funds to pursue their rights through the courts in the event that a builder refuses to correct substandard work or fails to complete the work. Failure by the Insurance firm to ensure that the consumer has an awareness of such matters may also be a misleading omission.

The FCA in their Thematic view document TR14/8 – Insurers’ management of claims – household and retail level of May 2014, page 26 under the heading ‘Use of own builder’ makes a comment with regard to the use of a consumer’s own builder or one approved by the insurer and the subsequent loss of up to 24 months guarantee of the work if the approved builder is not chosen that appears to be broadly in accordance with the above, namely –

‘However, we did not see many documented examples where the insurer had set out for consumers the implications of using their own builder or one approved by the insurer. This may be important for consumers in allowing them to make an informed choice.’

With regard to the provision of cash payments to consumers the FCA’s predecessor, the FSA, has considered some elements under the provisions of the Unfair Terms in Consumer Contracts Regulations 1999. Particularly in the Notice of Undertaking relating to AXA Insurance UK plc published 29th February 2012.

The FCA considered it unfair for an insurer to pay a discounted settlement when it was unable to meet its obligation under a contract to replace or repair an item and this would cause detriment to consumers by not providing for consumers to be fully reimbursed for their insured loss.

The undertaking continues –

However, it was not likely to be unfair in instances where consumers request a cash settlement even though they could have received a repair or replacement because the insurer has offered an option that allows the consumer to be fully reimbursed.

It has been noted that the FCA has made comment that it is likely to review some of its decisions in light of the new Unfair Terms provisions contained in the Consumer Rights Act 2015 which will supersede the Unfair Terms in Consumer Contracts Regulations 1999 in October 2015. In the first instance it does not appear that the provisions contained in the new Act differ greatly in their effect to those in the preceding Regulations.

The provisions relating to unfair terms in the new Act provide that an unfair term in a consumer contract is not binding on the consumer and that a term is unfair 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. In order to determine the fairness of a term account should be taken of the nature of the subject matter and to all the circumstances existing when the term was agreed and to all the other terms of the contract and any other contract upon which it depends.

Any builder employed directly by the consumer would have to comply with the requirements of **The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**.

Conclusions in relation to the questions 1 to 5.

- An omission from information or misleading statements given to consumers can be a criminal offence under the provisions of the Consumer Protection from Unfair Trading Regulations if it causes or is likely to cause the average consumer to take a transactional decision they would not have taken otherwise.

A surveyor employed by the insurance company would be under no obligation to provide pre contract information or

cancellation notices under **The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013** as they would be providing services in conformance with an existing contract with the insurer. However, when information is provided to a consumer it should be sufficient for the average consumer, according to the context, to take an informed transactional decision.

The Policyholder would normally be held to the terms of the contract of insurance and their choices would be governed by the conditions within the contract once it had been made. However, if a contract term is unfair it is not binding upon the consumer or if the insurer is in breach of the contract the consumer may seek a repeat performance of any work undertaken or a reduction in price or is free to negotiate with the insurer to reach a mutually acceptable resolution. In the event that an acceptable resolution can not be achieved the consumer may have redress to court (or possibly in a case involving an insurance company, the Financial Ombudsman).

Reasonable care and skill for a surveying service will mean work that is carried out to the same standard that another reasonably competent surveyor would have met. Essentially the context of the work and expectations of professional bodies who represent the surveying profession would have some considerable bearing on this generally expressed expectation.

In relation to cash settlements there does not appear to be anything that prevents them as such. However, if they are given to a consumer who has not been provided with sufficient information to make an informed decision a criminal offence may have been committed under the Consumer protection from Unfair trading Regulations 2008, particularly where the consumer may have been disadvantaged to a material degree. In addition, consumers have now also been given the right to pursue breaches of the CPRS and may be able to obtain compensation for losses suffered owing to a trader's failure to comply with the Regulations. Further, if the consumer is obliged to accept a discounted cash settlement owing to an unfair contract term, the term will not be binding on the consumer who, presumably, would be entitled to claim for the full cost of repair work or for the insurance company to engage a builder to carry out the work under the terms of the existing contract.

A further consideration for the consumer, that has not formed part of the discussion above, might also be if their property is subject to a mortgage as the mortgagor may require that the consumer maintain any property to a reasonable standard as part of terms of the mortgage.

In addition to the advice given above it has been requested that the following questions be considered:

1. Whether a cash settlement agreed in the consumer's home is an off-premises sale or not? And does the Consumer Contracts Regulation 2013 apply? I suspect the answer is no, but I would like that clear.

A cash settlement agreed in the consumer's home would not fall under the **The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013** if the person making the cash settlement offer was doing so under a contract of insurance that the consumer had previously entered into. The reason for this is that contracts of insurance are explicitly excluded from the remit of the Regulations. In addition, if the contract was applicable under the Regulations it

would not have been made in the consumer's home as the offer of a cash payment would be made under the existing contract of insurance which, presumably, would have been made on a earlier occasion.

2. The Consumer Rights Act 2015 states that a service must be done for a "reasonable price". Could this be applied to the valuation of a cash settlement?

In order for the 'reasonable price' provision of the **Consumer Rights Act 2015** to be applied the following conditions have to be met:

- a) That the consumer has not paid a price or other consideration for the service,
- b) The contract does not expressly fix a price or other consideration, and does not say how it is to be fixed, and
- c) Anything that is said or written to the consumer, by or on behalf of the trader, about the service if it is taken into account by the consumer when deciding to enter into the contract, or it is taken into account by the consumer when making any decision about the service after entering into the contract if it did not fix a price or other consideration.

Given the said conditions it does not appear that the 'reasonable price' provision would apply to the circumstances under which a valuation for a cash settlement would be offered. The reason being that it is assumed the price for the insurance policy would normally have been fixed at the outset prior to the consumer's entry into the contract. It is also assumed that the valuation of the cash settlement itself would, in the normal course of events, have no effect on the price paid by the consumer to the insurance company under the contract. In effect, the valuation of a cash settlement appears to fall outside of the conditions required under the Act.

3. In the section about the Consumer Protection from Unfair Trading Regulations 2008, you state: "the consumer should be provided with sufficient information to take an informed transactional decision". Would that information include an explanation of the insurance policy wording, or is sufficient to assume that the consumer has read his/her policy and understands it?

The answer to this is, perhaps, rather more involved than it might first appear. One of the reasons for this is because what may be considered to be an average consumer will depend on all the circumstances. For instance, if an insurance product was aimed at specific groups of people, for example, the over 60's or, perhaps, first time home buyers the **Consumer Protection from Unfair Trading Regulations 2008** would look at the effect on an average consumer within those groups. The over 60s may be more trusting and less able to read small print than the general population whereas first time buyers may be expected to be younger and less experienced with the purchase of home insurance policies.

The criteria for determining an average consumer is given in the Regulations as follows:

In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.

(3) Paragraphs (4) and (5) set out the circumstances in which a reference to the average consumer shall be read as in addition referring to the average member of a particular group of consumers.

(4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.

(5) In determining the effect of a commercial practice on the average consumer —

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.

the commercial practice omits material information,

(b) the commercial practice hides material information,

(c) the commercial practice provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or

(d) the commercial practice fails to identify its commercial intent, unless this is already apparent from the context,

In addition, the Regulations create an offence for a misleading omission if, in its factual context the commercial practice omits material information, hides material information, provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or fails to identify its commercial intent, unless this is already apparent from the context and as a result it causes or is likely to cause the average consumer to make a transactional decision he would not have taken otherwise.

As discussed above, in the earlier section under **Consumer Protection from Unfair Trading**, a misleading omission may occur at any point where the trader deals with the consumer, not just when entering into the contract.

Given the above it is foreseeable that if a consumer is offered a cash settlement without first ensuring they are aware of the relevant circumstances that may inform their transactional decision the trader may be at risk of breaching the said Regulations. However, it is likely to depend on all the circumstances, for instance whether the insurance policy was marketed to a particular group of consumers, the size of the print on the conditions, the language used in the policy terms etc.

Unless the trader is certain that the information already provided to a consumer will sufficiently inform them when making a decision to accept what the trader is offering or otherwise it could be arguable that it may be prudent to ensure that the consumer is given sufficient information prior to making a decision. This may include an explanation of the policy, as you have suggested, or a further document explaining what is actually being offered to a consumer, such as in the event they are being asked to consider accepting a discounted cash offer.

4. Also, under Consumer Protection from Unfair Trading Regulations 2008, would the imposition of a cash settlement be an "aggressive practice"? There are several examples of cheques being sent to policyholders even though they have not agreed to a cash settlement.

In order for a commercial practice to be aggressive **The Consumer protection from Unfair Trading Regulations 2008** provide that it must, in its factual context and taking account of all its features and circumstances:

Significantly impair or is likely to significantly impair the average consumer's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence and it thereby causes or is likely to cause the consumer to take a transactional decision he would not have taken otherwise.

For the purposes of the above 'coercion' includes the use of physical force and 'undue influence' means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way that significantly limits the consumer's ability to make an informed decision.

In deciding whether it is harassment, coercion or undue influence that has been used there are a number of factors that have to be taken into consideration, these are –:

- Its timing, location, nature or persistence,
- The use of threatening or abusive language or behaviour
- The exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product.
- Any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under a contract, including rights to terminate a contract or switch to another product or another trader; and
- Any threat to take any action that cannot legally be taken.

Given the criteria contained in the Regulations for an aggressive commercial practice it does seem possible that an insurance company that effectively forces an unwanted cash settlement on a consumer when there are urgent repairs that are required to a consumer's property (particularly where the contract of insurance allows for other remedies that should be open to the consumer) might be engaging in an aggressive practice. However, determination of whether that was indeed the case would have to take into account all the circumstances. In such a scenario there are also likely to be other considerations which could include a misleading representation as to the contract of insurance and a civil breach of contract.

5. Finally, I refer to your comment "in the event of a breach of any of the prohibitions the Insurance firm, being the entity in who's name an offence would have been committed as the trader supplying the service to the consumer, would, in the first instance, be liable unless they could show they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence, either themselves or any person under their control." What would reasonable precautions look like? E.g. insurance policy wording usually use words to the effect that the policyholder will not be detrimentally affected by a claim and solutions including cash settlement will be available to the policyholder. If a surveyor does not act in accordance with those policy wordings, by offering a range of solutions and fair price for the settlement in line with the insurance policy terms, then is he on the hook rather than the insurer? Or should the insurer be making every effort to ensure that its suppliers are applying the terms of the policy through its contracts with the supplier, performance management etc?

Essentially you are correct in your interpretation in that due diligence and reasonable precautions, certainly for sizable insurance companies, would, most likely, have to include the insurance company adopting various measures to ensure that

the requirement was met. Reasonable measures might be ensuring that :

That the surveyor/loss adjustor was suitably qualified/able to carry out the task

The instructions are adequate for the purpose intended

That suitable systems are employed to ensure that the contractor has adhered to them.

A system employing a mix measures employed into a system is most likely to be able to fulfil the requirement and can also include elements such as checking on a percentage of a contractors work, use of complaints procedures etc.

However, for a company to simply have an adequate 'manual' documenting a system would not in itself be sufficient, it should also be able to show that the system is being used.

A scenario that illustrates this point could be as follows - if it can be shown that a contractor has been given adequate instructions and has either gone against them or acted inappropriately the contractor themselves may be liable for any offence under the Consumer Protection from Unfair Trading Regulations 2008. However, if a contractor had been used by an insurance company who it was known by them had previously not followed instructions, despite warnings, and was the subject of a number of justified complaints it would be likely that a due diligence defence would not be made out by the insurer, no matter the adequacy of their documented systems (which in reality would be likely to say such contractors should no longer be employed or be subjected to strict control measures). In such circumstances both insurance company and contractor may be liable for any offences committed.

ADDITIONAL INFORMATION

Note

This advice is based on the information you have provided and any interpretation is based on current understanding of the law and may be revised in the light of new information. New legislation and interpretation by the courts or tribunal may alter the applicability of this advice. The responsibility of complying with the legislation rests with you as the Business Operator.

This advice may only be communicated to other businesses if it is quoted in its entirety.

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