

Statement on using the words 'consequential loss' in general insurance contracts

We have considered terms which use the phrase 'consequential loss' in general insurance contracts. These are terms commonly used to exclude firms' liability for loss that is remote or indirectly caused by the insured event. Here we set out why we believe that reference to 'consequential loss' in a standard consumer contract is not plain and intelligible and why some of these terms may, therefore, be unfair.

Concerns about plainness and intelligibility

Under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations) firms must ensure that they express any written term of a standard-form consumer contract in plain, intelligible language. In our view, a term which excludes 'consequential loss' is not written in plain, intelligible language, as it refers to an expression that has a legal meaning. We do not believe that the average consumer would understand the terminology, and therefore what they are not covered for under the policy.

The Office of Fair Trading (OFT), the primary enforcer of the Regulations, has indicated similar concerns regarding the use of the term 'consequential loss' in consumer contracts, stating '*...the technical meaning of "consequential loss" is unknown to most people*'.¹ Furthermore, it has stated '*The OFT takes the view that contracts must be intelligible to ordinary consumers without legal advice. Therefore a drafting style which might be normal in a commercial contract is wholly inappropriate. This means using normal words in their normal sense, and avoiding jargon such as "consequential loss" and "time of the essence". Such phrases should preferably not be used at all, and certainly not without explanation*'.²

Concerns about fairness

We think a term which excludes 'consequential loss' may be unfair under Regulation 5. This is because a term that is so unclear and ambiguous that it leaves the consumer not knowing what they are covered for may, in our view, constitute 'a significant imbalance in the parties' rights and obligations to the detriment of the consumer'.³

The risk for firms

¹ OFT. Unfair Contract Terms Guidance. 2001. At 2.3.9.

² OFT. '*Unfair contract terms bulletin 3*'. March 1997. At 12.2.

³ Regulation 5(1) Unfair Terms in Consumer Contracts Regulations 1999
[\[http://www.opsi.gov.uk/si/si1999/19992083.htm\]](http://www.opsi.gov.uk/si/si1999/19992083.htm)

The risk to firms of having terms in their consumer contracts which do not comply with the Regulations does not stop with us taking a view that the term may not be in plain and intelligible language or may be unfair.

If a court deemed that a term was not written in plain and intelligible language, the term would be construed, by the court, in favour of the consumer.⁴ This might result in the firm being liable to make payments for loss it had sought to exclude.

If a court deemed the 'consequential loss' exclusion unfair, it would not be binding on the consumer; similarly, the firm may be liable to make payments for loss it had sought to exclude.

Next steps for firms

We expect firms to comply with the Regulations. This includes ensuring that their terms are plain and intelligible, so those consumers to whom they are targeting their products can understand what they are and are not covered for under the policy. To help you, we have provided some examples of terms that we think are written in more plain and intelligible language and are less likely to be regarded as unfair (see below).

We encourage firms to consider the undertakings we publish or court decisions, when reviewing their terms and conditions.⁵ Firms should regularly assess whether their terms and conditions in standard-form consumer contracts meet the standards of fairness set out in the Regulations and consider what steps they need to take to comply with them.

Examples

We have set out below examples of terms which exclude 'consequential loss' without using that particular terminology. Please note that these are illustrative only and are not directive or prescriptive. Firms should ensure that these examples are considered appropriately, in line with the wording of their own policies. We are keen that firms do not seek to specifically exclude losses that are directly associated with the incident that caused the consumer to claim.

'We will only pay costs which are incurred as a direct consequence of the event which led to the claim you are making under this policy'.

'We will not pay for any indirect losses, which result from the incident that caused you to claim. For example replacing locks if you lose your keys'.

'We will not pay for any losses that are not directly associated with the incident that caused you to claim. For example, loss of earnings due to being unable to return to work following

⁴ Regulation 7(2) Unfair Terms in Consumer Contracts Regulations 1999
[\[http://www.opsi.gov.uk/si/si1999/19992083.htm\]](http://www.opsi.gov.uk/si/si1999/19992083.htm)

⁵ Unfair Contracts Terms Regulatory Guide 1.5.1(3)
[\[http://fsahandbook.info/FSA/html/handbook/UNFCOG/1/5\]](http://fsahandbook.info/FSA/html/handbook/UNFCOG/1/5)

injury or illness happening while on a trip or the cost of replacing locks in the event that keys are lost while on a trip'.

'We will not pay for any losses which are not directly covered by the terms and conditions of this policy. Examples of losses we will not pay for include loss of earnings due to being unable to return to work following illness or injury happening while on a trip'.

'We will not pay for any losses that are not directly associated with the incident that caused you to claim, unless expressly stated in this Policy'.

'You are not covered for any other costs that are indirectly caused by the event which led to your claim, unless specifically stated in this Policy'.