

Review of firms' approach to time barring mortgage endowment complaints (MECs)

Key Messages

The Financial Services Authority recently undertook some focused thematic work to test whether the approaches being taken by firms to time barring mortgage endowment complaints were appropriate and fair.

This specific work, which included visits to a number of firms and results from our wider desk-based monitoring, found that:

- In the great majority of 'time barred' complaint rejections, the firms decisions are based on procedures related to 'red' ABI code letters and appeared to be fair and in accordance with the Dispute Resolution: Complaints handbook¹ (DISP);
- In a small number of time barred cases, firms are seeking to time bar complaints on a basis other than the ABI code letters procedures. Some of these rejections are based on misinterpretations of our time barring rules or rely on unsustainable assumptions. We are asking firms who have time barred on these bases to re-open relevant cases;
- Given the increasing proportion of complaints that may be time barred over the next year, firms need to ensure that their procedures and approach to time barring are appropriately resourced, accurate and fair. Where firms continue to exercise the time bar from a point other than the issuance of a 'red' ABI code letter, specific attention should be given to the detailed findings set out in the annex to this paper.

Annex

Background

The rules in the DISP sourcebook set out the ‘time barring’ provisions for complaints. In February 2003 and June 2004, we made rules to cover the specific and special features of mortgage endowment complaints. These rules linked the time barring of a complaint to receipt of a letter issued by firms, in accordance with the ABI Mortgage Endowment Rejection letters procedures² (ABI Code letters), warning of the increasing possibility of a shortfall in the targeted sum at the end of the policy term.

Under our rules, a consumer must generally complain to a firm within six years of the event complained of, or if later, within three years from the date on which they became aware (or ought reasonably to have become aware) that they had cause for complaint.

Now (and since 1 June 2004), (assuming time-barring under the six-year provision is not an issue), broadly a firm can usually only time bar a complaint case if the consumer complains:

- more than three years after they first received a letter warning that there is a high risk that the policy will not achieve the target amount at maturity (usually a ‘red’ rejection letter); and
- they received at least six months’ notice of the date of the approaching time bar.

The passage of time and the issuance by now of millions of ‘red’ ABI Code letters, (and latterly specific warnings of imminent time bar ‘final dates’), means that by the end of 2007 up to two-thirds of live endowment policies could be time barred by firms where consumers made subsequent complaints. And in the last 15 months, firms have rejected 100,000 endowment complaints as being out of time.³

It is particularly important that we are confident that firms which are time barring endowment complaints do so fairly, so as not to disadvantage complainants.

We tested this in a small sample of firms that, our figures showed, had time barred a comparatively high proportion of endowment complaints and/or whose time-barring practices had otherwise come to our attention through supervisory work.

We found that in the great majority of time barred complaint rejections, the firms’ decisions were based on procedures related to ‘red’ ABI Code letters and appeared to be fair and in accordance with DISP. In a small number of cases, some firms sought to time bar complaints on a basis other than the ABI Code letter. It was in our review of this smaller number of cases that we found rule breaches and practices which challenged the principle of treating the customer fairly. In light of this information all firms dealing with mortgage endowment complaints will no doubt wish to consider whether their own complaint handling is treating their customers fairly.

2 http://www.abi.org.uk/Display/default.asp?Menu_ID=1140&Menu_All=1,946,1140&Child_ID=392

3 Based on data collated from firms covering 90% of the market between 1 July 2005 and 31 October 2006.

Rule breaches and poor practices found

1. Non ABI Code letter time bars

For most endowment policyholders, the point when they ought reasonably to have been aware of their potential cause for complaint is likely to be the point when they received an ABI Code letter warning of a high risk of shortfall at policy maturity (a ‘red’ letter). Consequently, most firms have sought to time bar complaints from the dates such letters were received by the consumer, recognising that the DISP rules provide for firms to time bar if they choose. Some firms have chosen not to time bar complaints.

In certain individual circumstances, a firm may be able to show that the complainant had in fact been aware, or ought reasonably to have been aware, of these matters earlier. We saw cases where the files showed this to be true. However, we also saw cases where firms have claimed such ‘early awareness’ based on circumstances unsupported by the facts of the case. Some key examples follow.

a. Warnings that were not high risk ‘ABI code letter’ warnings

In some cases, certain firms dated the policyholder’s awareness from various kinds of correspondence other than the ‘red’ ABI reprojection letters (such as premium review letters, standard illustrations and contractual review letters). These letters generally predated, and so did not reflect, the information concerning projections and associated warnings agreed later by the ABI.

We consider that adequate non ‘ABI Code’ correspondence would require a clear, customer-specific warning of a high risk of shortfall including a personal illustration of the policy’s shortfall, in cash terms, at all the projection rates cited. But most of the examples we saw did *not* provide this information to the consumer. Further, they did not include any other information likely to make the policyholder aware (for the purposes of the more general rule concerning time limits for complainants at DISP 2.3.1(c)) that they had potential cause for complaint.

Also, some examples specifically included a countervailing message suggesting the policyholder need *not* be unduly concerned. These firms could not substantiate their claims that these communications were triggers to the policyholder’s awareness.

In some cases, firms sought to bolster their claim that such communications (or indeed ABI Code letters that were ‘amber’ or ‘green’) were sufficient to trigger policyholder awareness, by reference to additional written or telephone exchanges in the wake of those communications between adviser and the policyholder. But in these cases the adviser’s comments typically repeated the meaning of the original communication and the options open to the policyholder. In our view, the communications in these cases do not appear adequate to trigger awareness.

b. Consumer or firm actions

In some cases, firms dated the policyholder’s awareness to ‘actions’ the policyholder took (including in response to the kinds of communications described above). But in the examples of this we saw, the actions were not relevant to, or sufficient for evidencing that the

policyholder was aware they had potential cause for complaint. For example, we saw cases where firms sought to start the time bar clock merely because the policyholder had:

- telephoned or written to the provider or adviser to ask about the meaning of a ‘non red’ ABI Code letter, or other communication; and/or
- acted on the suggestion from provider or adviser that they increase premium, otherwise top up, or extend the maturity date; and/or
- converted their interest only mortgage wholly or in part to repayment.

In the cases we reviewed, in our view, a firm would need stronger grounds than just reference to such actions to reasonably claim the policyholder was aware of the cause for complaint at the time of such action.

c. Complaints about sales into retirement or other particular features of the sale

Some firms we reviewed sought to date awareness about any complaint about an endowment maturing during retirement back to the point of sale. They did this on the grounds that the policyholder ought to have known when they bought the product that they would be retired at the policy’s maturity.

In some cases, this may be an acceptable approach. However, in our work we found many such complaints in fact alleged (albeit sometimes implicitly) the fact that the risks specific to a policy maturing in retirement were not explained at the point of sale and/or alleged assurances that there would be sufficient value in the policy for an early surrender to pay off the mortgage. So it would not be fair or appropriate to automatically time bar these complaints back to the point of sale.

Rarer cases include complaints about whether insurance cover applied to one or both of a mortgaged couple, complaints in respect of alleged churning, or complaints where there has been a long standing error in the premia levied. In these instances there will generally be a less clear link to the ABI Code letters. So, a firm wishing to time bar these complaints will need to think carefully about when and how, in the circumstances of the case, the policyholder might reasonably have been expected to become aware of their potential cause for complaint.

2. Time barring multiple policies

In some cases, we saw firms seeking to date a policyholder’s awareness for all their policies back to a date when they received a high risk ABI Code warning in respect of any *one* of them. In our view this is not a fair or appropriate approach, since it fails to address the essence of such complaints about the suitability of *each* sale.

3. Process issues

Some firms make simple errors, including:

- citing an ABI Code letter to start the clock that was not high risk (‘red’);
- citing the wrong date of relevant correspondence;
- failing to check relevant evidence is available before claiming a complaint is time barred;

- failing to check systems used to recreate letters which the firm claims *would have been* sent produce an accurate representation of what was *actually sent* to consumers;
- failing to check it was likely the consumer was likely to have *received* the relevant letters (eg checking the letter was sent to the correct address);
- claiming a time bar applies (on the grounds of the date of awareness) even though the consumer complained within six years of the original sale (in which case the date of awareness is irrelevant);
- relying (as triggers to awareness) on letters where irrelevant wording and/or missing key words or paragraphs in fact diluted the necessary messages; and
- failing to apply the correct rules and/or transitional rules. For example, not giving evidence of the requisite six-month advance warning of the time bar ‘final date’. This is needed for policyholders who had received two high-risk ABI Code letters before 1 June 2004 but who had not received the second by 1 December 2003 (or two months notice of the ‘final date’ where the transitional rules apply).

Procedures and quality control should be made sufficiently robust, and regularly reviewed, to minimise the risk of such basic errors.

We also expect firms to treat claims of exceptional circumstances fairly and sensitively, and to recognise that individuals may be affected by difficult circumstances in different ways. Some firms determined that decisions on these cases could routinely be made without referral to a senior staff member or designated expert in the subject area. In contrast, we saw an example where every exceptional circumstances case was referred to a senior manager, independent of the complaint handling function, who accessed internal and external expertise, when considered appropriate. Whatever the processes involved, firms need to ensure that such cases are treated fairly.

4. The Limitation Act 1980

In addition to our recent on-site work, we recently reviewed 52 firms’ replies to endowment complainants⁴. We noted some firms who in such replies refer to the Limitation Act 1980 (the Act), typically citing it as justification of their time barring the complaint.

The limits sets out in DISP derive from the provisions in FSMA⁵ not the Limitation Act 1980. We consider that it is inappropriate and misleading to cite the Act in the firm’s final responses. Equally, firms should not, as some have sought to do, reject endowment complaints handled under DISP on the basis of the 15-year ‘long stop’ in the Act.

30 January 2007