

The complaint

Mr N is unhappy with what AXIS Specialty Europe SE did following a claim he made on his professional indemnity insurance policy.

What happened

Mr N is a solicitor and took legal action against a former client to obtain unpaid fees. The clients disputed the claim and counter claimed against Mr N for professional negligence. Axis instructed panel solicitors to act in relation to this (Mr N had his own solicitors acting in relation to the fees claim).

In 2016, with the agreement of Mr N's solicitors, the panel firm made a 'drop hands' offer in relation to both claims. This wasn't accepted by the other side. The following year the other side made a 'drop hands' offer in relation to the professional negligence claim only. Having obtained counsel's advice on that, which identified legal risk in continuing with it, Axis instructed the panel firm to accept the drop hands offer.

In response to the complaint Mr N subsequently made Axis said there was no cover under the policy for the claim relating to unpaid fees. In any case it had entered into a settlement with Mr N in February 2018 for any claim he might have under the policy in relation to fees or insolvency proceedings. In relation to the professional negligence claim the policy entitled Axis to settle this and it was reasonable of it to do so; a settlement covering both claims wasn't achievable. And a claim Mr N had made for his personal costs wasn't something the policy covered and it wouldn't be supporting recovery of these from anyone else.

Our investigator thought Axis had acted in line with the terms of the policy and treated Mr N fairly in settling the professional negligence claim. It was entitled to rely on advice from the panel firm about what costs had been incurred in relation to that. He agreed the policy didn't cover a claim for any costs Mr N had incurred. And even if the other side had sought to recover costs relating to the professional negligence claim as part of the fees dispute this wasn't something Axis were responsible for.

Mr N was unhappy our investigator hadn't sought to mediate the dispute between him and Axis. He said the investigator hadn't considered what he referred to as the "coverage position" and suggested Axis hadn't fulfilled its responsibilities under the policy to deal with the costs he'd incurred in relation to a counterclaim. He disagreed with Axis's decision to split the claims (by agreeing a 'drop hands' settlement on the professional negligence claim) and wanted assistance from it in pursuing £95,000 in costs he thought he was owed by the other side.

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.

Mr N has spent some time in correspondence with us arguing that we should have sought to mediate this complaint with Axis. And, as he's highlighted, our rules do require us "*to resolve complaints at the earliest possible stage and by whatever means appear to [the Ombudsman] to be most appropriate, including mediation or investigation*".

However, those rules also make clear it's for us to decide what means are appropriate to resolve the complaint. And in many of the complaints we see it's appropriate for us to investigate the circumstances of the complaint and then give our view on what a fair outcome should be. Of course, if there were nevertheless grounds to think a pragmatic solution might resolve matters without the need for investigation, that's something we could explore.

I don't think that is (or was) the case here. Axis was clear in its final response that it didn't agree with the complaint Mr N had made. And there was no suggestion in that response or in its other correspondence with Mr N or ourselves that it would be open to a mediated settlement of this complaint. So I think this is a complaint we needed to investigate. And, as Mr N didn't agree with the outcome our investigator reached, it's one on which I now need to reach a final decision.

The relevant rules and industry guidelines say Axis has a responsibility to handle claims promptly and fairly. It shouldn't reject a claim unreasonably. In considering how that applies here I've looked first at the terms and conditions of Mr N's professional indemnity policy. This covers claims resulting in a civil liability which arise from the insured's professional business and related defence costs. Claim is defined as "*the receipt by the insured of a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages*".

Defence costs are defined as "*legal costs and disbursements and investigative and related expenses reasonably and necessarily incurred on the insured's behalf with the consent of the insurer. Defence costs do not include any internal or overhead expenses of the insured or the insurer or the cost of the insured's time*".

So the policy wouldn't cover the claim Mr N pursued for unpaid fees against his former clients but would potentially cover the professional negligence claim made against him and defence costs relating to that. But the policy also contains a clause which says "*the insurer shall have the right to take over and conduct in the name of the insured, the defence, negotiation or settlement of any claim or circumstances...and shall have full discretion in the conduct of any proceedings and in the settlement of any claim or circumstances*".

In this case Axis decided in 2017 to accept the 'drop hands' offer from the other side in relation to the professional negligence claim. I appreciate Mr N disagrees with that decision but that's something it's entitled to do under the terms of the policy. And I think Axis acted fairly in doing so. Its decision followed correspondence the previous year with the other side in which it sought (with the agreement of Mr N's solicitors) to agree a 'drop hands' settlement on both claims. But the other side didn't agree to that. And in a subsequent email to Mr N it said "*our clients are not prepared to combine the two separate actions and will not discuss global settlement*".

Prior to agreeing the 'drop hands' settlement Axis obtained counsel's advice on whether to pursue costs incurred in relation to the professional negligence claim. That advice said while there was a possibility of making an application for costs there was a risk this would prompt the other side to issue fresh proceedings. In relation to that counsel advised "*it does seem to me to be a risk that the Insurer and Insurers would probably wish to avoid if at all possible*."

I appreciate Mr N's concern that the settlement meant the policy didn't provide funding for him to recover costs he says he incurred in relation to the professional negligence claim. However, prior to settlement being agreed the panel solicitors provided advice to Axis in relation to this and said "*given that we were instructed by Insurers to deal with the entirety of the claim I cannot see how any costs could have been incurred by [Mr N] which would be recoverable from the Claimants*". Taking into account the policy terms, the position of the other side and the legal advice it had received I don't think Axis acted unreasonably in agreeing to the 'drop hands' settlement.

Mr N has suggested his policy should cover the costs he incurred which he's calculated at £95,000. I appreciate the 'drop hands' offer meant that each side would bear their own costs but that would only be in relation to the professional negligence claim and cover defence costs as defined by the policy. I haven't seen evidence to show the costs Mr N is claiming would meet that definition. In fact from the breakdown he's provided they appear to be his personal time costs in dealing with the claims which is specifically excluded from cover by the policy wording. So I think Axis acted reasonably in declining to pay these.

Mr N has subsequently sought assistance from Axis in seeking to claim his costs relating to the professional negligence claim from the other side. But I don't think there's anything within the policy which would cover that claim. I agree if Mr N had lost out on those costs because of something Axis got wrong it might nevertheless be fair to expect it to fund a claim in relation to these but I've already concluded it acted reasonably in agreeing to the 'drop hands' settlement. As our investigator said if Mr N is unhappy with the legal advice from the panel firm Axis relied on when agreeing to that settlement that's something he'd need to raise with those solicitors.

Mr N has also made reference in correspondence to "coverage issues". It's not entirely clear what this relates to but in his most recent emails he's said this is about Axis not fulfilling its responsibilities under the policy to deal with the costs he'd incurred in relation to a counterclaim. I understand this was made in response to his fees claim.

But Axis says that claim was never properly articulated and was struck out by the courts as no fee had been paid. So it's not clear what costs would have been incurred by Mr N in relation to this that would be covered by the policy. It's also unclear why any claim in relation to this wouldn't be covered by the settlement Axis made in February 2018 which covered any claimed indemnity arising from or connected to the fees claim. So, based on the evidence presented to it, I don't think Axis did anything wrong in declining to consider these matters further.

My final decision

I've decided not to uphold this complaint. Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 2 August 2023.

James Park
Ombudsman