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7 June 2024

Consultation Paper on Consumer Protection

Dear Central Bank of Ireland,

Owens McCarthy Limited T/a OMC Claims is a firm of policyholder representatives and advocates. We handle property and business interruption claim on behalf of our client policyholders. The majority of our clients are classified as 'consumers' for the purposes of the Code and the CICA, 2019.

We have striven, since our establishment, to create, foster and uphold a culture that puts our clients at the centre of everything that we do. At the same time, we apply our technical expertise and our adherence to ethical standards to elevate the level of professionalism that attached to public loss assessing (as a service). We contend that professional, regulated, reliable and expert public loss assessing can be a foundational pillar of Consumer Protection in the context of insurance claims.

Since the advent of Financial Regulation in Ireland, we have seen several cultural and behavioural changes within Insurance Companies. Not all of these have had positive outcomes for policyholders. When the Consumer Insurance Contract Bill became law, it was described in the Dáil as shifting "*the balance in favour of policyholders, by increasing transparency and strengthening the hand of the policyholder during their insurance contract.*"

Evidently, and notwithstanding the important Consumer Protection frameworks developed by the Central Bank of Ireland, the Legislature felt the need to intervene in order to rebalance what was an unbalanced relationship between the Insured and their Insurers. This relationship has not been helped by the advent of direct-selling and the propensity to purchase insurance without recourse to an independent specialist, i.e. and insurance broker.

Sections 7.6 to 7.21 of the Consumer Protection Code have made a profound difference to the manner in which first party insurance claims have been handled by Insurers.

Per 7.7(f) we know that the regulated entity must, while the claim is ongoing, provide the claimant with updates of any developments affecting the outcome of the claim within ten business days of the development. When additional documentation or clarification is required from the claimant, the claimant must be advised of this as soon as required and, if necessary, issued with a reminder on paper or on another durable medium. It is our experience that inertia has oftentimes crept into the claim handling functions of insurers and their adjusters alike. The settlement timelines are often unsatisfactory, and this is borne out by the absence of capacity (on the Insurer side) during times of surge or catastrophe, e.g. floods, storms. In a functioning claim market, the claimant should take precedence and every effort should be made to bring the matter to a resolution without any delay.

Section 7.9 provides that where a regulated entity engages the services of a loss adjustor and/or expert appraiser it must notify the claimant of the contact details of the loss adjuster and/or expert appraiser it has appointed to assist in the processing of the claim and that such loss adjuster and/or

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expert appraiser acts in the interest of the regulated entity and the regulated entity must maintain a record of this notification. The Central Bank – in its subsequent **guidance** – clarified that: for the purpose of provision 7.9, loss adjustors and/or expert appraisers are viewed as independent professionals who provide a service to regulated entities when assessing a claim. We have the utmost respect for Loss Adjusters and Adjusting as a profession. Many of our colleagues have trained and practiced as Loss Adjusters. However, in this age of 'delegated authority' agreements we would respectfully query whether Loss Adjusters – in 2024 – can truly ever be considered to be 'independent' of the Insurance Company that has employed them?

Insurance policies are designed to provide financial protection and peace of mind to policyholders in times of need. However, when a claim arises, the process can become adversarial. Insurers, aiming to minimise payouts, employ loss adjusters to represent their interests. These loss adjusters are compensated by the insurance companies, using funds pooled from policyholders' premiums. This creates an inherent imbalance, as policyholders must bear the cost of hiring their own public loss assessors to ensure fair treatment and proper settlement of their claims. **Section 7.10** makes plain that in the case of property insurance claims, the regulated entity must notify the claimant that the claimant may appoint a loss assessor to act in their interests but that any such appointment will be at the **claimant's expense** and the regulated entity must maintain a record of this notification. It can be argued that it is inequitable for claimants to bear the cost of their own representation while the insurer's representation is covered by funds derived from policyholders' premiums. Policyholders' premiums are the primary source of funds for insurance companies. These funds are used to pay claims, cover administrative costs, and compensate insurer-employed loss adjusters. Since policyholders' money is already being used to pay for the insurer's representation, it is only fair that the same funds be available to cover the cost of public loss adjusters. This would ensure that policyholders are not doubly burdened by having to pay additional fees for fair representation. This change would reflect the principles of justice and fairness that should underpin the relationship between insurers and policyholders.

On a related point, i.e. the engagement of a loss assessor, the Central Bank might explore whether some insurance intermediaries could be reluctant to be seen by Insurers to be recommending public loss assessors to their clients, on the basis that they fear push-back or active discouragement from Insurers by way of less favourable terms for the placement of cover/commissions paid or rebates offered. If so, then this cannot be in the best interests of the consumer.

The Central Bank might care to review the efficacy of **Section 7.13**, specifically: where an insurance undertaking appoints a third party to undertake restitution work in respect of a claim, the insurance undertaking must provide the claimant in advance and on paper or on another durable medium, with details of the scope of the work that has been approved and the cost. There is a wealth of common law that has arisen as a result of an Insurer electing to indemnify their Insured via 'reinstatement'. That law is well-known and settled. Electing to reinstate places myriad onerous duties upon the Insurer. We have encountered some Insurers that have sought to take a 'third way', i.e. to introduce to the claim process their 'builder', and then allege that their 'builder' can undertake the repairs for a set amount – and therefore that represents the extent of their liability. All the while this will fall short of them actually electing to reinstate, a decision that they cannot subsequently rescind. As part of negotiating the best outcome for our clients, we find that the Insurers are often unwilling to break down the scope and cost – on an item-by-item basis – referring

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merely to a lump-sum that is incomprehensible in and of itself. The Code might potentially be extended to close this lacuna and to level the playing field for consumers and their representatives.

Following on from the item above, **Section 7.14 insists** that where a method of direct settlement has been used, a regulated entity: a) must not ask the claimant to certify any restitution work carried out by a third party appointed by the insurance undertaking; and b) must certify, on paper or on another durable medium, to the claimant that the restitution work carried out by the third party appointed by the insurance undertaking has been carried out to restore the claimant's property at least to the standard that existed prior to the insured event. We have handled claims (for consumers) where the Insurer ultimately uses a 'direct method of settlement' but that they do not offer any **professional** certification of these same repairs, in the form of an engineer, architect, surveyor or other design team professional.

In more general terms, away from the specific 'claims' provisions, we offer the following observations:

Acting in the best interests of consumers:
Incorporating conditions precedent to liability in the General Conditions section of a policy is NOT acting in the best interests of consumers and is potentially in conflict with the Consumers Insurance Contracts Act 2019. This practice should be banned unless the requirement is specifically drawn to the attention of the proposed by requesting the required documentation to be submitted as a requirement for placing the cover. i.e. the onus should be put on the Provider if they are setting the terms.

When a fire or other serious incident occurs in a property the first thing any loss adjuster acting on behalf of an insurer does is to request written proof that all warranties and conditions precedent to liability have been complied with. Traditionally these warranties or conditions were endorsed on the policy schedule and were highlighted as requirements to be complied with at the outset of the inception of the policy. However, in recent years a number of commercial property underwriters have introduced Conditions Precedent to Liability requirements into the "small print" of the General Conditions. The first time the policyholder (and sometimes their broker) becomes aware of them may be when a fire or other incident has occurred.

Definition of Consumer:
The definition of a consumer in relation to companies having a 'turnover' up to €3m should potentially be amended to having a 'Gross Profit' of up to €3m. This is because the limit has not been reviewed in over 12 years, and secondly because the rate of Gross Profit differs from business to business.

Underinsurance:
The issue of underinsurance and the effect this can have on claims is a hot topic, and it has received ample attention in the national media. The Central Bank's thematic review of domestic policies identified several risks, and the actions now required of Insurers, in order that they can clearly and effectively communicate with their household policyholders around underinsurance and its effects. These risks are indeed real, and they often have devastating consequences for consumers; generally householders who are typically unsophisticated buyers of insurance.

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The consumer carries the full burden of unilaterally accurately selecting a value at risk but also carries the full risk of underinsurance in the event of an insured loss.
As policyholder claim representatives, we, far too frequently, see the punitive and damaging effects of the underinsurance clause. We make plain that no-one benefits from insuring their property for less than its full reinstatement value. For domestic policyholders, who are insuring what is likely to be their most valuable (or only) asset, getting the sum insured right should be fundamental to the contract.

However, and specifically in the context of domestic insurance policies, we do not believe that the incorporation of average clauses is appropriate and that there has been little or no debate around this contention. These policyholders are not sophisticated buyers of insurance, and the Central Bank's review effectively acknowledges this fact. Why then penalise consumers with a clause that was designed for commercial insurances?

It is our experience that most property insurance claims are not total or near-total losses. Instead, the majority of valid claims are characterised as being of small or medium value in terms of ultimate payments. The application of the 'underinsurance clause' to even small or medium sized losses often has a disastrous effect for policyholders - who are then compelled to fund the difference with recourse to savings or borrowings. If they are able to secure loans, then they can be faced with the real prospect of being unable to carry out repairs in full.

In times of run-away construction inflation and general inflation (leading to a 'cost of living crisis') it is extremely difficult for buyers of domestic insurance policies to: (1) accurately project forward the reinstatement cost of their home over a 12-month period and, (2) fund any shortfall caused by the application of the 'underinsurance clause' when a claim does arise. Savings are now being used to backfill day-to-day expenditure and the cost of borrowing is increasing steadily to combat inflationary pressures.

Background

It appears that the first record of the 'average' principle in relation to insurance was from a minute of the Fire Committee of the Royal Exchange Assurance Corporation in January 1722 where it was ordered: "If in case of loss...it appears that there was a greater value than the sum insured hereby and part thereof is saved, then this loss...shall be taken and born (sic) in an average."
We all know that payment subject to average means payment limited to the proportion of the actual loss which the sum insured bears to the actual value of the property insured at the time of loss. In such circumstances the Insured is deemed to his own 'insurer for the residue' – British & Foreign Ins Co Limited v Wilson Shipping Co Limited [1921] 1 AC 188.
Average, of course, is not required by law except in the case of Marine Insurance, see S.81 of the Marine Insurance Act 1906.
One of the problems is that homeowners, as a cohort, are not necessarily sophisticated buyers of Insurance. The Consumer Insurance Contract Act (CICA) was an attempt by the legislature to counterbalance the expertise and resources of the Insurers. However, in the context of underinsurance, CICA offers no succour to policyholders and Insurers remain unfettered in their reduction of their liabilities in respect of property claims that are not total losses.

The UK Position

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One wonders whether this is exclusively an Irish phenomenon. Or instead, is it perhaps evidence of the dearth of goodwill within the Irish Insurers' claims departments? John Birds in his 'Modern Insurance Law' [Sweet & Maxwell], notes that: "Commercial policies generally contain average clauses, and it has been suggested that the principle of average would be implied, if not expressed, in commercial policies on goods. However, average policies are unusual, it seems, in (UK) household policies, except those issued by Lloyds Underwriters, and there is clear authority that the principle of average will not be implied to such a case." *Birds'* analysis of 'average' in the UK household insurance market appears to be borne out by even a cursory glance at the covers available. A trawl through the household policy booklets of UK insurers (that also have an Irish imprint) shows that 'average' will not be applied where the cost of rebuilding the property is less than the sum insured. It could be said that the policy 'reverts to indemnity' - although this is probably a poor choice of words. It reflects the fact that the (UK) Insurer will not settle the claim on a 'new for old' basis and will instead apply deductions to reflect wear and tear.

Average in Practice

One must wonder then, why have Irish Insurers adopted a clause that really only belongs in commercial insurance contracts? As will be appreciated, trying to determine an accurate rebuilding cost for any domestic premises is somewhat a fool's errand at this point – akin to trying to hit a moving target. The application of the average clause also raises very serious issues in and of itself,

namely: The calculation of the rebuilding cost of any premises is never an exact science. There will be a range of values Underinsurance and Domestic Insurance Policies appropriate. In truth, the rebuilding cost of an insured property can only ever be conclusively determined in the event of a total loss, i.e. the actual rebuilding cost, not the 'notional' rebuilding cost. The Society of Chartered Surveyors Ireland do attempt to provide some guidance to homeowners around this subject. However, they make plain that their advice can never be conclusive as it deals only with estate type houses built since the 1960s' and even then, only within the geographical areas of the main metropolitan population centres in the State. The published rates of the SCSI are guideline only and are qualified accordingly. Caution should be exercised, particularly in the case of one-off bespoke dwellings, existing dwellings that have substantial energy retrofits and upgrades as well as new properties with significant A energy ratings. Insurers (and their adjusters) treat the SCSI rebuilding rates as 'gospel' allowing little deviation or negotiation. You will note that the SCSI guide does not form any part of the insurance contract/policy and that there are no insurers that we are aware of, who provide a formula or analysis as to how 'underinsurance' is to be determined.

The experience at the claims end has and continues to be conflicting in the Irish market. In the event of a domestic buildings claim, the market rates applied by insurers to the buildings value at risk calculation will typically be based on published rates, e.g. SCSI House Rebuilding Guide, but many insurers continue to instruct their adjusters or claim handlers, inhouse and otherwise, to value the actual buildings losses sustained based on outdated, unrealistic rates, valuations and schedules, which have not been reviewed or updated for many years and which are not commensurate with the real world value at risk, or indeed the premium paid for same.

Conclusion

We think the UK approach is instructive. We can see that, legally, the UK Courts will not import/imply an average clause into a household insurance policy. There must be a reason for this reticence to do so – i.e. that a domestic policyholder cannot be an expert in determining the

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building sum insured. Accordingly, the UK Insurers, typically, have not sought to punish their policyholders in the same way that most Irish Insurers now do. In these times of Consumer Protection Codes, Consumer Insurance Contracts Acts and the like, the prevalence of the average clause in Irish household insurance policies appears to be an anomaly. The issue may have been less contentious during times of a settled construction market and modest construction inflation that mirrored the general rate of inflation. However, the issue has now become the key factor that limits claim payments, often with catastrophic effects for the policyholder. It means that non-average policies must now represent premium, sought-after, products. It goes without saying that every domestic policyholder has a manifest interest in insuring his or her property for full value. We work with our clients and their brokers to encourage precisely this behaviour. No-one will truly ever know how much it will cost to rebuild their home until it has been completely destroyed. Thankfully, this is a rare event, making the calculation (for most policyholders) a purely hypothetical one. However, this notional estimation is being used by Insurers to reduce the level of payments for ordinary or run-of-the-mill domestic claims undermining the value of insurance generally and causing real hardship for consumers.

We respectfully suggest that, *if* the Consumer Protection Code cannot be amended to make 'underinsurance' clauses solely applicable to non-consumer policies, then the Central Bank might consider supporting the Legislature in making the Consumer Insurance Contracts (Amendment) Bill 2023 law. This Bill - [No. 49 of 2023] – would amend Section 15 of the Principal Act to read:

The Principal Act is amended by the insertion of the following section after section 15: "15A. (1) From the commencement of the Consumer Insurance Contracts (Amendment) Act 2023, any average clause incorporated into a contract of non-life insurance shall be null and void, and of no effect.

We trust that these insights might be of some interest to the Central Bank of Ireland and, as always, we stand ready to offer any other information which could be of some interest or value.

Yours faithfully,

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