

DOMESTIC SUBSIDENCE/HEAVE/LANDSLIP "CHANGE OF INSURER" CLAIMS AGREEMENT

Introduced wef 01 January 2011 and applying retrospectively for all claims, in line with the attached Guidelines (see, in particular, questions 7 and 22 on application).

Updated in May 2017 to recognise the removal of the ABI Disputes Committee.

This document has been produced by the ABI to assist members in their handling of a particular matter. Adoption by members of any terms, standards, guidance, recommendations or similar statement contained in this document is voluntary and entirely at the discretion of each individual member.

This Agreement relates to claims arising under policies covering domestic properties owned by an Insured in a personal capacity and situated in Great Britain, Northern Ireland, Isle of Man and the Channel Islands, where there has been a Change of Insurer (but not a change of ownership of the insured property), where the insured event of Subsidence and/or Heave and/or Landslip has/have occurred causing damage to the insured property.

Every Insurer subscribing to this Agreement undertakes to deal with such claims in the following manner:

- Option 1 Where the Date of Notification is eight weeks or less from the date of inception of the current Insurer's policy, any claim shall be accepted and dealt with by the previous Insurer and no contribution shall be requested from the current Insurer.
- Option 2 Where the Date of Notification is one year or more from the date of inception of the current Insurer's policy, any claim shall be accepted and dealt with by the current Insurer and no contribution shall be requested from the previous Insurer.
- Option 3 Where the Date of Notification is more than eight weeks but less than one year from the date of inception of the current Insurer's policy, any claim shall be accepted and dealt with by the Insurer to whom notification is given and the Cost of Settlement shared equally between the two Insurers. The handling Insurer shall keep the other Insurer advised of material developments, including the original reserve and any revision. Contributions shall be paid within 21 days subject to full details being supplied with supporting documentation (to include apportioned VAT invoices in respect of fees incurred on behalf of both Insurers). Interim contributions will not be collected for sums less than £5000.

Provided that:

- (i) Notification of the claim to the contributing insurer by the insurer to whom the claim is notified must be made as soon as possible and no later than twelve months after the date of notification.
- (ii) The contributing insurer shall be provided with copies of all relevant reports (including covering letters) from loss adjusters, engineers, surveyors and the like when available and kept fully advised of the progress of the claim for the purpose of maintaining an adequate reserve: (see guidance note 25).
- (iii) The contributing insurer shall abide by the decision of the handling insurer as to the method of investigation and the settlement of the claim. In circumstances where the handling insurer agrees to settle the claim on an ex gratia basis for commercial considerations no contribution should be sought from the previous insurer. In a case where the handling insurer is bound by the decision of the Insurance Ombudsman, the contributing insurer will also be bound by that decision.

- (iv) Nothing in this Agreement shall prevent any Insurer from voiding a policy for fraud, non-disclosure or misrepresentation, or from relying otherwise on any policy term or condition except that late notification of the initial claim by the insured alone shall not prevent the operation of this Agreement. Where one Insurer specifically excludes all or part of the damage, this Agreement will apply only to that part of the damage covered by both Policies.
- (v) In the event of any dispute arising under this Agreement, the parties should make every effort to resolve it between themselves having regard to the spirit of the Agreement.
- (vi) This Agreement shall apply to mortgage lenders' "block" policies unless the Insurers concerned have made separate arrangements when the block business changed hands.
- (vii) This Agreement shall not apply where expert evidence shows the damage to have been caused by a sudden subterranean event - eg swallow holes.
- (viii) Nothing in this Agreement binds any Insurer to adopt a similar approach to claims involving Insurers who are not parties to this Agreement nor does it affect in any way the contractual entitlement of any Insurer to reject or require contribution in relation to uninsured pre-inception damage.

Definitions

- Change of Insurer - A change of Insurer which maintains continuous cover to the Insured. For this purpose a gap in cover of less than 30 days shall be regarded as continuous cover.
- Cost of Settlement - The net cost of settlement of the claim together with professional fees (including loss adjusters and experts) incurred by the handling Insurer. This includes:
- alternative accommodation/loss of rent (net of any contributions available from Contents' Insurers)
 - professional fees incurred by the Insured and the handling Insurer (but excluding internally incurred expenses of the handling Insurer)
- but offset by:
- policy excess being the single excess applicable to the current Insurer's policy
 - any recovery for the benefit of Insurers.
- Date of Notification - The date on which the written or verbal communication notifying the damage and/or claim was first received by the current or previous Insurer or such Insurer's agent.
- NB Whilst this Agreement is written in terms applicable only as between two Insurers, it is expected that Parties to this Agreement will apply similar principles to those cases where three or more Insurers are potentially involved.

**ABI DOMESTIC SUBSIDENCE
AGREEMENT**

**GUIDELINES
TO
ASSIST IN THE APPLICATION
OF
THE AGREEMENT**

ABI DOMESTIC SUBSIDENCE AGREEMENT

Introduction

Since its inception the Agreement has been of positive benefit to policyholders in that they know from the outset of their claim which insurer will be handling it. Insurer signatories have benefited from more economic claims handling and the industry has achieved very positive media coverage for its handling of subsidence claims which was not always the case prior to the introduction of the Agreement.

Insurers are encouraged to look for ways of bringing cases within the ambit of the Agreement, rather than to look to escape their obligations by seeking to make use of any exceptions or exclusions – i.e. a subscribing insurer should look to comply with the “spirit” of the Agreement in any case which comes before it.

Question 1 - Definition of Premises Covered by the Agreement

What premises are covered by the Agreement?

Answer

The premises must be a domestic property owned by an insured in a personal capacity.

Question 2 - Cost of Settlement

Under option 3 the Cost of Settlement will be "shared equally between the two insurers". Is this irrespective of the sum insured?

Answer

The level of contribution by an insurer should be limited by the sum insured. In a situation where there is a shortfall, then that will be for the consideration of the insurers whose sum insured is not exhausted. By that time, the Agreement will have done its job and the dispute between the two insurers will be resolved. The attitude of the insurer with the adequate sum insured to the shortfall should be governed by the terms and conditions of the relevant policy and its own claims handling policy.

Question 3 - Block Policies

Under (vi) it is stated that the Agreement will not apply to mortgage lenders' "block" policies where the Insurers concerned have made separate arrangements.

Answer

The Agreement does apply where the insurers concerned have "block" policies unless they have already made separate arrangements when the block business changed hands. Where a block of business is changing hands then, if the insurers do not wish to be bound by the Agreement, it will be necessary for the two or more insurers to enter into separate binding arrangements.

Question 4 - Registering a Claim

Is it true that any delay on the part of the insured in notifying a claim will not affect the

application of the Agreement?

Answer

This is a correct statement of the position in that the date of notification will determine strictly which of the three options apply.

Question 5 - Date of Notification

Within provision (iv) it is stated that late notice alone shall not prevent the operation of the Agreement. This then suggests that where a policyholder is slow to notify a claim this could impact upon the need for contribution. Is this correct?

Answer

Consideration was given as to what should be the "trigger" date for the Agreement. The date of discovery was considered but rejected as probably being unworkable. The date of discovery is frequently imprecise and could be many years prior to the date of notification of the claim ie a policyholder may have noticed damage 10 years previous but only notified the claim when the damage became worse. While this may oblige an insurer to contribute (or avoid a contribution) due to late notification, the only practical solution is for the Agreement to be driven by the date of notification.

Question 6 - Application of Excess

What is the position where a policyholder feels they are being unfairly penalised due to the different levels of excess applied by insurers? For example, the original policy may have had a £500 excess and the current policy a £2500 excess. If there is evidence to suggest that the damage occurred in the period of the original policy the policyholder may be justifiably upset should an insurer seek to apply the excess.

Answer

There is no easy answer to this question but it should be remembered that the policyholder is receiving the benefit of two policies of insurance for the one claim. There are different levels of excesses and it is always possible that it might be more advantageous to claim under one policy than the other. In general terms, it is the current insurer who is handling the claim and it is the current insurer's excess which should apply. To fit in with the working of the Agreement, the line should always be maintained with a policyholder that his claim does lie against the current insurer rather than against any previous insurers but if he is to receive the benefit of both policies then it is the current insurers' excess which is applied to the loss.

It is recognised that an insured may insist on the insurer with the lowest excess dealing with their claim, and may well choose to do so if the available evidence indicates that substantial damage occurred in their period of cover.

Where this arises, insurers may have to agree only to deduct the lower excess and share the resulting net claim in accordance with the Agreement. Alternatively, the insurer with the lower excess should pay the difference between that and the other insurer's excess.

Question 7 - Application of Agreement to Retrospective Claims

Some insurers, while confirming they wish to subscribe to the Agreement have expressed concern about its application to retrospective claims without there being any limit as to how long a claim has been outstanding.

Answer

To avoid a potentially open-ended commitment, the Agreement will apply retrospectively to claims first notified to the insurer on or after 1.1.93, where:-

- (a) *there is a current dispute between the insurers over their respective liabilities for the damage, or*
- (b) *the handling insurers claim has not been re-opened for the purposes of the agreement, or*
- (c) *there has not been a previous sharing agreement reached between the current and previous insurer for the loss or damage.*

The Agreement shall not apply to claims notified to the insurer prior to 1.1.93, but insurers should be encouraged to apply the spirit of the agreement to cases where it is considered equitable to do so, except in cases where:-

- (a) *repairs to the policyholders property have been effected or*
- (b) *the claim has been re-opened for the purpose of the agreement or*
- (c) *there has been a previous sharing Agreement reached between the current and previous insurer or for the loss or damage.*

Question 8 – Application of Agreement to Flats

What is the position in respect of a single flat owned and occupied in a personal capacity if it is insured in an individual's name?

Answer

The Agreement has always applied in respect of property owned and insured in a personal capacity where a single flat is insured in an individual's name.

The Agreement also includes:

- *Individual flats insured on a block basis in respect of which each is owned and occupied by the insured in a personal capacity.*
- *Low-rise property such as a single flat above a shop owned and occupied by the insured in a personal capacity.*
- *Maisonettes or the part of any building owned, occupied and insured by a collection of private individuals.*

The Agreement does not cover:

- *Flats over shops where they are insured as part of the commercial insurance arrangements.*
- *Flats occupied by an individual which are owned by another person or property company and from which an income is derived on a commercial rental basis.*

- *blocks of flats let to tenants who pay rent eg Local Authorities accommodation, holiday flats, student accommodation, Housing Association's tenants and any other commercial lettings such as flats occupied by an individual which are owned by another person or property companies and from which an income is derived on a commercial rental basis.*

Question 9

Does the Agreement apply to Housing Association properties and are they to be classified as domestic residences, which fall within the scope of the Agreement, or commercial properties which do not?

Answer

The Agreement covers a policyholder in a personal capacity and as such, property owned by a Housing Association in a commercial capacity is deemed to be outside of the Agreement.

Question 10 – Holiday or Second Home

Does the Agreement apply to holiday or second homes?

Answer

The Agreement will apply to holiday residences or second homes owned and occupied by the insured in a personal capacity.

Question 11 - Definition of "cost of settlement" of a claim

Does the Agreement apply in cases reported as subsidence claims where fees are incurred by loss adjusters or other agencies when after a period of investigation it transpires that the claim

- **falls below the excess;**
- **the damage was caused by a peril not insured but alleged to have been subsidence;**
- **is caused by subsidence but one of the standard exclusions applies?**

Answer

In cases where the Agreement has been confirmed, between the insurers and the claim subsequently falls within the excess or is determined as not being caused by a subsidence peril then any investigation costs will be the responsibility of the investigating insurer and no contribution should be sought from a previous insurer.

Question 12 - Treasury Solicitor

What is the position under the Agreement where a policyholder dies and their property passes to the Treasury Solicitor?

Answer

In such circumstances, where a subsidence claim arises, it would be regarded as being outside the Agreement given that there had been a change of ownership of the property.

Question 13 – Executor Cases

Would a subsidence claim, arising under a policy covering a property in the hands of an executor, fall to be dealt with under the Agreement?

Answer

In such a situation where there was a change of policy interest in name only, from a policyholder to a trustee, a subsidence claim arising would be covered by the terms of the Agreement.

Question 14 – Does the agreement apply to a claim that arises under a policy covering a domestic property which is re-possessed by a mortgage lender?

Answer

Title to a repossessed property does not pass to the mortgage lender. The property can still be regarded as being “insured in a personal capacity” and so the agreement will apply to a claim notified after repossession IF the borrower’s policy subsists for the benefit of the mortgage lender.

Where a claim arose, and was accepted by an insurer, prior to repossession and prior to a change of insurer, it should be dealt with by the insurer on risk at that time.

Question 15 – Subsidence caused by Leaking Pipes

Where a claim arises as a result of subsidence caused by leaking pipes, at a domestic residence, would it not be appropriate for this to be dealt with under the Agreement?

Answer

It is acknowledged that traditionally such claims have been dealt with under the water peril. Given that the Agreement refers specifically to “... where the insured event of subsidence ... has ... occurred” it is accepted that where leaking pipes can be proven to have been the cause of the subsidence claim then it should be dealt with under the terms and conditions of the Agreement.

Question 16 – Alternative Accommodation

What is the position with regard to previous insurers contributing to alternative accommodation costs?

Answer

It is recognised that there is a diversity of approach with regard to the question of dealing with the alternative accommodation aspect of claims.

The Agreement operates as a “buildings insurer” arrangement with no provision being made officially for a contribution from the current or previous contents insurer.

Question 17

What is the position where the previous insurer might wish to challenge the chosen repair method of the insured handling the claim?

Answer

The contributing insurer will abide by the decision of the handling insurer as to the method of investigation and settlement of the claim. In doing so, the position of the previous insurer should not be prejudiced by any commercial relationship between the handling insurer and the policyholder or intermediary. In circumstances where an ex gratia method of settlement is used by the handling insurer, no contribution should be sought from the previous insurer.

Question 18 – Tied Housing

Do the terms of the Agreement apply to a claim arising from a domestic property occupied by a tied tenant?

Answer

Where the responsibility for arranging and buying insurance cover lies with the tied tenant, such an arrangement comes within the Agreement.

Where the provider of tied housing has the responsibility for arranging and paying for the insurance cover then such an arrangement would be outside the Agreement.

Question 19 – Sudden Subterranean event

Why does the Agreement not apply where expert evidence shows damage to have been caused by a sudden subterranean event? (e.g. swallow holes)

Answer

An event which is sudden and unexpected and happens while the current insurer is on risk is not regarded as an event covered by the previous insurer and is outside the terms of the Agreement.

Question 20 – Notification of material developments

Option 3 makes reference to it being the responsibility of the handling insurer to notify the previous insurer of material developments. Can in practice notification be given by the loss adjuster acting for the handling insurer?

Answer

It is acceptable for a loss adjuster to give such notice to a contributing insurer or their agent.

Question 21 – Inadequate repairs – Previous Insurer

What action should be taken where the present insurer is notified of a claim where it is evident that continued damage is due to inadequate repairs undertaken by a previous insurer?

Answer

Where it can be clearly established that inadequate repairs and / or design were undertaken and the previous insurer can be identified then the claim should be referred back to them. In circumstances where the previous insurer cannot be identified then the claim should be handled under the terms of the Agreement.

Question 22 – Operative Date of Agreement for New Signatories

What is the operative date from which new signatories should adhere to the Agreement?

Answer

Any new insurer wishing to join will automatically be recorded as adhering from 1 January 2000, the introductory date of the new Agreement.

Question 23 – Procedure for a Signatory who wishes to Cease Adherence to the Agreement

What is the procedure for an existing signatory to no longer be bound by the terms of the Agreement?

Answer

An existing signatory will be required to give a minimum of 3 months notice, in writing to ABI, that they wish to cease adherence to the terms of the Agreement. During the period of notice claims notified will continue to be dealt with under the Agreement.

Question 24 – Disputes

What happens if there is a dispute relating to the application of this Agreement?

Answer

This Agreement is entirely voluntary and should be construed as such. That said, subscribing insurers are encouraged to look for ways of bringing cases within the ambit of the Agreement and should interpret the Agreement widely in any case where its application is in doubt. Whilst the ABI will no longer mediate between the parties to seek to resolve a dispute (the former ABI Disputes Committee is no longer in existence), parties should make every effort to come to a resolution between themselves having regard to the spirit and objectives of the Agreement.

Question 25 – Provision of information to contributing insurer

How often does the handling insurer need to update the contributing insurer?

Answer

All insurers realise the need for accurate and timely reserves and to ensure this the contributing insurer must receive copies of all relevant reports, (including covering letters), and be kept fully advised of the progress of the claim at appropriate and reasonable intervals. A period of 6 months will be regarded as the “best practice” maximum interval between updates. The Agreement states:

- (vi) The contributing insurer shall be provided with copies of all relevant reports (including covering letters) from loss adjusters, engineers, surveyors and the like when available and kept fully advised of the progress of the claim for the purpose of maintaining an adequate reserve at intervals not exceeding six months.