

Notice of Undertaking

Introduction

As a qualifying body, we - the Financial Services Authority (the FSA), can challenge firms using terms which we view as unfair under the Unfair Terms in Consumer Contracts Regulations 1999 (the Regulations). We review contract terms which we come across in our supervision of firms that are referred to us by consumers, enforcement bodies and consumer organisations. This has led to Card Protection Plan Ltd (CPP) undertaking not to use the terms identified in its Card Protection Terms and Conditions which we consider may be unfair.

We have a duty under the Regulations to notify the Office of Fair Trading (OFT) of the undertakings we receive. The OFT has a duty to publish details of these undertakings, which it puts on its Consumer Regulation website. We also publish the undertakings on our website. Both publications will name the firm and identify the specific term and the part of the Regulations which relate to the term’s fairness.

Even if firms have not given an undertaking or been subject to a court decision under the Regulations, they should remain alert to undertakings or court decisions concerning other firms as part of their risk management. These will be of potential value in showing the likely attitude of the courts, the FSA, the OFT or other qualifying bodies to similar terms or terms with a similar effect.

Ultimately, only a court can determine the fairness of a term and, therefore, we do not recommend terms that have been revised by a firm to address our concerns as being definitely fair. We cannot approve terms for the purposes of the Regulations; it is for firms to assess the fairness of their terms and conditions under the Regulations and in the context of the product or service in question.

It is important to bear in mind that wording that is fair in one particular agreement is not necessarily fair in another. When we accept an undertaking given to us from a firm to revise a term, this means that, on the evidence available at the time, we consider the term to be improved enough so that further regulatory action is not required.

Card Protection Plan Ltd undertaking in relation to its Card Protection Terms and Conditions

Name of business	Card Protection Plan Ltd	Lead organisation	FSA
Trading sector	Insurance	Contract identifier	Card Protection Terms and Conditions
Original terms			
“Data protection notice – your personal details			
<i>We will collect the payment from the card or account that the main policyholder has identified as the paycard or paying account. Following a loss report, or if a payment is rejected from your paycard, payments will be collected from any other card you have registered on your policy.”</i>			
“A3: Length of policy and premiums			
<i>3. CPP will collect the premium (together with its fee) from a card or account which the main policyholder has told us to use. If you no longer want your policy to cover this card, CPP will collect payments from any other card registered for the main policyholder.”</i>			

Background

Under CPP's Card Protection Terms and Conditions a consumer may be eligible for certain benefits provided by an insurer in the event of the loss or theft of their credit or debit cards, mobile phones, house or vehicle keys and certain other personal possessions. CPP acts as an intermediary and carries out other functions in respect of this arrangement, including collecting payments from the consumer.

In this contract CPP had reserved a power to itself that in the event that the card or account which the consumer had nominated for payment was lost or if a payment from it was rejected, or if the consumer no longer wished for a card that was the original method of payment to be covered, then payment would be taken from another card that was registered for protection under the contract.

Application of the Regulations

Generally, a term is regarded as unfair under Regulation 5 of the Regulations, if contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract, to the detriment of the consumer.

In our view, the terms created a significant imbalance in the parties' rights and obligations arising under the contract because they reserved to the firm too much discretion to collect payment from any registered card in the event of loss or payment being declined from a consumer's nominated card or account or if the consumer withdrew the nominated card, without the consumer's consent.

We believe the terms had the potential to cause consumers detriment if payment was taken from a registered card without the consumer's consent, which had been registered only so that it was covered under the contract. In our opinion, there was the potential for consumers to suffer loss if for example, they incurred extra interest under a credit agreement. We were also of the view that loss could also arise if payment was taken from a registered debit card and a charge was subsequently levied by a bank if the transaction made the account overdrawn.

The requirement of 'good faith' means that a supplier should deal openly and fairly with a consumer. In our view, the terms in question contravened the requirement of good faith as they took advantage of consumers who registered their cards with the firm for the purpose of protection. In our opinion, the firm should not have, through its stronger bargaining position, taken advantage of the registered card details they received from consumers and reserved the right to use that information to take payment.

How the terms have changed

The firm has informed us that the terms which allowed it to take payment from the cards registered solely for the purposes of protection have been deleted from all new policies entered into with consumers from 31 January 2012 and from its website terms and conditions on 16 February 2012.

Any consumer whose card protection policy is due to end in 2012 will upon renewal receive new a new policy that does not include the terms in question.

Any consumer whose policy is due to end later than 2012 will shortly receive a replacement policy that does not include the terms in question.

The firm has informed us that for new and renewing consumers it will not take payment from any

card solely registered for protection under the policy. The firm has informed us that it has not relied upon the terms in question in existing policies from June 2012 and will instead treat these consumers as though the terms have been removed unless it has obtained the explicit prior consent of the consumer to the use of that card for the purposes of collecting payment.

New terms

Not applicable.

Other information

The firm has informed us that it has relied on the terms in the past and the firm has agreed to take the appropriate steps to remedy this.

The firm has also informed us that upon renewal it used the same process to take payment from any card registered for protection under the contract if the consumer's original payment method of a direct debit mandate instruction failed. CPP acknowledges that this action was likely to represent a breach of contract as it did not have the power to take payment in this manner. The firm has agreed to take the appropriate steps to remedy this.

For details of these steps please see:

<http://www.fsa.gov.uk/register/firmPermissions.do?sid=124198>

CPP is also responsible for the policy wording for several firms that are not part of CPP. The following policies are therefore also affected by the changes: Barclaycard Card Protection, Barclays Cardholder Protection, Egg Emergency Cover, HSBC CardGuard, M&S Cardsafe, NatWest Card Protection.

The firm was fully co-operative in providing this undertaking.

Undertaking published 15 November 2012