Channel Islands Financial Ombudsman

Ombudsman determination
CIFO Reference Number: 16-001211
Complainant: [The complainant]
Respondent: [Company X]

> It is the policy of the Channel Islands Financial Ombudsman (CIFO) not to name or identify complainants in any published documents. Any copy of this determination made available in any way to any person other than the complainant or the respondent must not include the identity of the complainant or any information that might reveal their identity.[1]

The complaint relates to insurance claims for an Oncotype DX test and adjuvant chemotherapy which were both declined by [Company X].

Background

On 17 June 2016, consultant clinical oncologist [redacted for anonymisation purposes] wrote to [the complainant] to explain the additional treatment options available following the successful surgical removal of her breast cancer.

[The consultant clinical oncologist] confirms in this letter that a course of radiotherapy and a course of antioestrogen therapy had been recommended by him and agreed by [the complainant] at their previous meeting.

[The consultant clinical oncologist] further mentions that chemotherapy was discussed, but was not confirmed on the basis that chemotherapy has more severe side effects and it was unclear whether the risk of recurrence was sufficient to justify the treatment. [The consultant clinical oncologist] states that [the complainant] had agreed to an Oncotype DX test in order to assist in making this decision.

[The consultant clinical oncologist] wrote to [Company X] accordingly on 20 June 2016 to advise that [the complainant] was deciding whether to proceed with adjuvant chemotherapy and to request authorization for an Oncotype DX test.

On 22 June 2016, before receiving a response to his letter of 20 June 2016, [the consultant clinical oncologist] wrote to [Company X] again to advise that he had recommended chemotherapy to [the complainant] and to request authorization for this treatment.

On 4 July 2016, [Company X] responded to [the complainant] to advise that her claim for an Oncotype DX test and adjuvant chemotherapy had been declined, on the basis that it was preventative treatment and was excluded under the following policy clause:

> *2.18.46 Preventative treatment: we do not pay for preventative treatment, routine monitoring, routine medical examinations, or health screening.*

[1] Financial Services Ombudsman (Jersey) Law 2014 Article 16(11) and Financial Services Ombudsman (Bailiwick of Guernsey) Law 2014 Section 16(10)

[Company X] distinguished the chemotherapy from [the consultant clinical oncologist's] recommended treatment plan as an additional preventative measure, because the decision to proceed would be dependent upon the results of an Oncotype DX test and [the complainant's] future risk of recurrence.

[The complainant] disagreed with this decision and raised a formal complaint on the basis that she had been forced to obtain the treatment through the public healthcare system in the UK. As resolution of her complaint, [the complainant] sought compensation in the amount that [Company X] would have paid for the treatment privately, estimated to be £40,000. [Company X] did not uphold the complaint, and so the matter was referred to CIFO for further review.

The case handler initially assigned to the case established that Oncotype DX was a diagnostic test of 16 genes taken from a sample of tissue at the cancer site. The sampled genes are strongly associated with cancer recurrence, and their analysis is used to determine whether the risk to the patient is low, intermediate, or high. The results of this test are used to decide which adjuvant treatments, if any, should be recommended to the patient.

Adjuvant means 'in addition to', and is used to describe treatments which are administered after the primary treatment, such as surgery or radiotherapy. The case handler reviewed advice published by various medical authorities on adjuvant chemotherapy, and these authorities were consistent in describing the treatment as being designed to reduce the risk of cancer coming back.

The case handler applied a standard definition to [Company X's] exclusion on preventative treatment, and determined that it referred to treatment which was designed to keep something undesirable such as illness or harm from occurring.

On the basis of the evidence viewed, the case handler concluded that the adjuvant chemotherapy suggested in this case met the definition of preventative treatment.

In addition, the case handler noted that there were inconsistencies between the two letters sent to [Company X] by [the consultant clinical oncologist] . In the letter dated 20 June 2016, it is stated that [the complainant] is considering additional chemotherapy and so authorization is requested for an Oncotype DX test.

However, in the letter dated 22 June 2016, [the consultant clinical oncologist] requests authorization for chemotherapy on the basis that he has recommended it, and does not make reference to an Oncotype DX test. It was therefore unclear whether the chemotherapy formed part of the recommended treatment plan, although it appeared from the initial letters of 17 and 20 June 2016 that it did not.

On the basis of these findings, the case handler concluded that the recommended treatment plan was surgery followed by radiotherapy and antioestrogen therapy, and that the chemotherapy would have been an additional preventative measure not covered by the policy.

[The complainant] did not agree with the case handler's conclusions, and provided two letters of support for her claim from her medical practitioners. The case was escalated to me for a final determination, and I have reviewed these letters as part of my review.

Findings

I have considered all the available evidence and arguments to decide what is fair and reasonable in the circumstances of this complaint.

I have taken note of further representations made by each party following the case handler's initial conclusions.

Letters of Support

I have reviewed the two letters sent in support of [the complainant's] case by her medical practitioners. The first letter, sent by [redacted for anonymisation purposes] a consultant breast and endocrine surgeon, appears to assert that the case handler had incorrectly concluded that chemotherapy was not adjuvant treatment.

I do not consider that this was the conclusion reached by the case handler. The case handler acknowledged adjuvant chemotherapy as a treatment, but considered it to have been a preventative measure in this case. I have therefore discounted [the consultant breast and endocrine surgeon's] letter from my review on the basis that it appears to have misconstrued the case handler's conclusions.

The second letter, sent by [the consultant clinical oncologist], states that prevention in regard to cancer relates to treatments which are intended to prevent cancer from occurring in the first place, such as a restriction on smoking to prevent lung cancer. [The consultant clinical oncologist] distinguishes adjuvant chemotherapy on the basis that it is intended to treat microscopic cancer cells which may or may not be present.

Oncotype DX

Following a review of the relevant clause within the [Company X] policy, I note that there is an exclusion for routine monitoring, routine medical examinations, and health screening.

I would consider the Oncotype DX test to fall within the definition of health screening. I therefore find that the Oncotype DX test would not have been covered by the insurance policy in any event.

Adjuvant Chemotherapy

[The complainant's] primary treatment was intended to remove all traces of visible cancer, and so the adjuvant chemotherapy would have been administered in the absence of any detectable cancer cells. The purpose of the treatment was to destroy cancer cells which could metastasize and cause a recurrence in the future. However, it cannot be confirmed whether any such cells existed.

The treatment would have been administered in response to the risk of cancer, rather than the actual presence of cancer. I am therefore not satisfied that it could be described as a strictly curative treatment for the purposes of the insurance policy.

In addition, major health authorities such as the UK's National Health Service (NHS), Cancer Research, and the American Cancer Society, all appear to distinguish adjuvant chemotherapy from curative chemotherapy on the basis that it is intended to reduce the risk of cancer coming back when cancer cells are no longer clinically detectable.

The original post-surgery treatment plan recommended by [the consultant clinical oncologist] and accepted by [the complainant] was a course of both radiotherapy and antioestrogen therapy. While these treatments are also adjuvant, I accept that they could be considered part of the overall curative treatment plan when considered together with the primary surgical treatment.

However, the adjuvant chemotherapy was not included in the original treatment plan and was suggested only as an additional optional treatment to further reduce [the complainant's] risk of recurrence. The decision to proceed would have been based solely on the risk profile assigned to [the complainant] by the Oncotype DX test.

I therefore find that the adjuvant chemotherapy can be distinguished from the other adjuvant treatments as a preventative measure.

I note that [the consultant clinical oncologist] later advised [Company X] that he recommended adjuvant chemotherapy for [the complainant] along with the other therapies, but this conflicted with his previous advice sent two days earlier.

In his response to CIFO's initial view, [the consultant clinical oncologist] stated that his two letters were not contradictory:

> *"The first letter is absolutely correct in that grade 3 cancers are conventionally recommended to have adjuvant chemotherapy as part of a standard therapy. However, in the modern era the Oncotype DX test allows us to further refine risk predictions, and give us a better idea for patients whom the benefit of chemotherapy is so small that the risks may be avoided. These letters are therefore not contradictory they simply represent a way of getting more information about the former situation."*

However, it was the first letter dated 20 June 2016 which requested authorization for an Oncotype DX test before a decision would be made regarding adjuvant chemotherapy. The second letter then overrides this, and requests immediate authorization for all three treatments – radiotherapy, antioestrogen therapy, and chemotherapy.

I do not consider this to have been a fair and reasonable request when the previous letter advised that the decision to proceed with the chemotherapy would only be taken after the results of the Oncotype DX test were known.

On the basis of the above, I do not consider that it was unreasonable for [Company X] to decline the claim under the policy.

Decision

My final decision is that I do not uphold this complaint.

Next steps for the complainant, [redacted for anonymisation purposes]

You must confirm whether you accept this determination either by email to ombudsman@ci-fo.org, or letter to Channel Islands Financial Ombudsman, PO Box 114, Jersey, Channel Islands JE4 9QG, by **14 January 2018**. The determination will become binding on you and [Company X] if it is accepted by this date. If we do not receive your email or letter by the deadline, the determination is not binding. At this point you would be free to pursue your legal rights through other means.

If there are any particular circumstances which prevent you confirming your acceptance before the deadline of 14 January 2018, please contact me with details. I may be able to take these into account, after inviting views from [Company X], and in these circumstances the determination may become binding after the deadline. I will advise you and [Company X] of the status of the determination once the deadline has passed.

Please note there is no appeal against a binding determination, and neither party may begin or continue legal proceedings in respect of the subject matter of a binding determination.

Douglas Melville
Principal Ombudsman and Chief Executive

Date: 14th December 2017