Firms should take care on compliance with correct regulatory regime

The different types of payment protection products are subject to different regulatory regimes; either the Financial Services and Markets Act 2000 or the Consumer Credit Act 1974. Firms must have regard to the guidance and meet their obligations under the relevant regulatory framework. A key distinction for determining which regime applies is whether or not the product constitutes insurance. There has been a significant focus on the legal nature of so-called debt freeze and debt waiver products and whether or not they amount to insurance.

These are products sold in association with credit agreements where, in return for payment, the creditor agrees to freeze or waive the requirement on a consumer to make periodic repayments, or to freeze or waive interest or other charges, when a specified event occurs, such as sickness or unemployment. The view of the FSA stated in the guidance is it is unlikely debt freeze/waiver will involve insurance. The FSA has based its view on an analysis of the relevant case law. Given the multiple forms new products may take and the complexity of the law in this area the FSA states it will ultimately be for the courts to decide whether a particular product constitutes insurance on the basis of the relevant facts and circumstances.

The guidance is far-reaching – it has implications for the design of the product throughout its lifecycle but also extends beyond the sphere of the product into governance and risk management.

The extent to which these claims may be subject to larger regime changes is also a matter of concern for businesses that negligently sold horsemeat as beef, although such claims will usually be contingent on proof of physical damage. The extent to which these claims affect liability policies greatly depends on whether the intermixture of horsemeat with meat or other ingredients amounts to physical damage. Insurers may legitimately take different views because the law is far from settled. The police, local authorities and the Food Standards Agency are taking an interest in businesses implicated in the supply of horsemeat. Insurers will need to consider whether their cover for defence costs extends to investigations and prosecutions under the Food Safety Act 1990, the General Food Law Regulations (EC) 178/2002 and the General Food Regulations 2004 and the Fraud Act 2006. Issues can arise if insurers have little or no exposure to civil damages – for example, if there is deemed to be no damage or a contractual exclusion applies.

Businesses that have received contaminated meat could claim for breach of the express terms of supply contracts and the implied terms of the English and Irish Sale of Goods Acts. The damages claimed will include contractual penalties, fixed costs and the costs of settling compensation claims. In exceptional cases businesses may seek to recover for damage to their reputation and even exemplary damages to punish behaviour which was calculatedly profit-seeking.

Rights reservation under scrutiny

A survey of the Association of Insurance and Risk Management (Airmic) membership in January last year found 62% of respondents felt they had received unfair reservation of rights letters from their insurers. The circumstances in which an insurer really needs to issue a reservation of rights letter and what an assured can and should do to avoid receiving one or after receiving one were the subject of a recent British Insurance Law Association (Bila) lunchtime lecture, given by John Lockey QC of Essex Court Chambers. The lecture considered the Airmic statement of principles on reservation of rights and the Airmic model reservation of rights clause, as well as the recent Aon proposal to include specific reservation of rights provisions in all London market slips.

The speaker expressed the hope the introduction of new claims standards by insurers and fuller claims presentations will lead to a fall in the number of reservation of rights letters issued.