Financial Services Authority

Discussion Paper

Transparency as a Regulatory Tool

A response by the Association of Personal Injury Lawyers

August 2008

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 4,500 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

- APIL welcomes the Financial Services Authority (FSA) intention to be an open and transparent regulator and believes that transparency is a legitimate regulatory tool.

- APIL's involvement with the FSA is primarily in the area of 'third party capture' (TPC) by insurers.

- APIL believes that the practice of TPC should be prohibited or be more robustly regulated for the full protection of consumers.

- Whether or not the FSA is an effective regulator in the area of TPC is not clear because the FSA is not currently transparent with the outcome of its investigations. We believe, therefore, that the FSA is not currently seen to be an effective regulator of insurers in this regard.

- APIL believes that the FSA should be more transparent with the outcome of its investigations into complaints about insurers' practices in relation to TPC and that complainants should be told about the outcome of their complaints and what regulatory action, if any, is being taken as a result.

- APIL believes that the protection of the consumer is paramount and the FSA must be seen to be an effective regulator if the public is to have any confidence in it as a regulatory body.

Introduction

APIL welcomes the opportunity to respond to this Discussion Paper (DP). APIL notes that the DP is an invitation to look again at what the FSA do and don't disclose (paragraph 1.2).

APIL's experience of dealing with the FSA is from a consumer's perspective and in particular in relation to the practice of 'third party capture' (TPC). Our response to this DP, therefore, concentrates on the issue of TPC by insurers, the FSA's regulation of this practice and the information disclosed (if any) by the FSA as a result.

TPC is the process by which an insurer approaches a person knowing that they have been involved in an accident with their insured and in the knowledge that they could be injured and may want to make a claim for personal injury. The insurer then offers a sum of money to settle the claim immediately or offers to refer the claim to their panel firm of solicitors. The insurer 'captures' the claim to deal with it, generally before independent legal representation can be obtained.

APIL has taken, and will continue to take, an active stance in vigorously opposing the practice of TPC by insurers. The FSA has confirmed to APIL that it regulates TPC by insurers on the basis that this is 'effecting or carrying out contracts of insurance', which is an activity that the FSA is bound to regulate.

Given APIL's limited involvement with the FSA we do not feel that it is appropriate for us to submit a response to every question posed. We therefore submit a general response on the following areas:

- Transparency as a Regulatory Tool
    - Prohibition / Regulation of TPC
- Transparency and the draft Code of Practice
- Complaints

- Protection of the Consumer
- Confidentiality and Disclosure
- Treating Customers Fairly

Transparency as a Regulatory Tool

The DP begins by asking whether transparency is a legitimate regulatory tool.

APIL believes that transparency is important but that prohibition of the practice of TPC is absolutely essential. It is APIL's contention that all TPC should be prohibited through more robust regulation. However, in order to achieve this the FSA need to be transparent in their investigation of this practice.

Prohibition / Regulation of TPC

APIL believes that the regulation of Claims Management Companies (CMCs) by the Claims Management Regulator (CMR) is far more robust and transparent than the regulation of insurers by the FSA.

CMCs are regulated by the Compensation Act 2006 and the overriding objective of regulation is to increase the protection of consumers. The Claims Management Services Regulation Impact of Regulation Initial Assessment in August 2007 states[1]: "The overriding objective has been to increase the protection of consumers of claims management services, in particular –

- To tackle practices that have led to misperceptions and false expectations of compensation claims.
- To improve the efficiency and effectiveness of the system for those who have valid claims

[1] http://www.claimsregulation.gov.uk/__wysiwyg/UploadedFiles/File/Impact_of_regulation_-_23_August_07.pdf

The Compensation (Exemptions) Order 2007[1] exempts, amongst others, insurers from being authorised under the Compensation Act as they are already regulated by the FSA. It is important, however, to compare obligations under the respective regimes to ensure that insurers are suitably regulated to the same extent as CMCs when involved in TPC.

The Conduct of Authorised Persons Rules 2007 (made by the Regulator pursuant to Regulation 22 of the Compensation (Claims Management Services) Regulations 2006[2]), by which CMCs are bound, includes some general principles, such as acting with honesty and integrity and acting responsibly.

Insurers are bound by similar rules which are contained within the FSA's 'Principles for Businesses.'[3] Principle 1, for instance, says that 'a firm must conduct its business with integrity.'

The Claims Management Regulations, however, go further. They contain some 'client specific rules' about how business must be conducted with clients. For instance, Rule 1 (d) says that a business 'shall…..avoid conflicts of interest'. CMCs, therefore, are effectively prohibited in engaging in TPC because they are obliged to avoid conflicts of interest which would preclude them from approaching the injured party at all.

Regrettably, the FSA's 'Principles for Businesses' do not go anywhere near as far in relation to insurers. Principle 8 says that a firm 'must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client'. This is an extremely vague and unhelpful principle depending on an interpretation in every case on what is 'fair'.

[1] SI 2007 No 209
[2] SI 2006 No 3322
[3] http://fsahandbook.info/FSA/html/handbook/PRIN/2/1

APIL believes, therefore, that insurers should be prohibited from engaging in TPC and/or be more robustly regulated in relation to the same. It is entirely right and proper that CMCs (and, indeed, solicitors, who are similarly regulated by the Solicitors Regulation Authority) are, effectively, prohibited from the practice of TPC. APIL contends that it is manifestly unjust that insurers are not similarly prohibited.

Transparency and the draft Code of Practice

APIL welcomes the FSA's commitment in the draft Code of Practice to being an open and transparent regulator.

APIL particularly welcomes rule 2(a), namely recognition that it serves the public interest that consumers are able to make informed judgments about firms and products, so reducing inefficient or unsuitable purchases. That is particularly important in relation to TPC where consumers are not being allowed the opportunity of an informed choice.

However, APIL is concerned about the implications of rule 3 in relation to the question of costs being proportionate. If disclosure of information is the right thing to do to protect the consumer, then APIL submits it is fundamentally wrong in principle that the disclosure should be limited by the question of cost. The protection of the consumer must be paramount.

Complaints

This section of the DP proposes that publication of complaints data, namely complaints received by individual financial services firms, would be in a tabulated format and the details would only cover those firms handling the largest number of complaints (paragraph 6.14). The DP suggests that limiting the number of firms in this way would reduce costs for the FSA and for those firms whose data was not being published (paragraph 6.15).

APIL believes this to be unacceptable. The number of complaints bears no correlation, necessarily, to the magnitude of the complaints, and limiting the number to reduce costs is fundamentally wrong.

However, APIL is particularly concerned about the situation where complaints are made to the FSA and the FSA is responsible for investigating them. Paragraph 2.17 of the DP makes it clear that regulatory transparency is as much about being transparent about the FSA in its role as regulator as it is about regulated firms or markets.

APIL submitted a detailed dossier of evidence, including many examples, to the FSA towards the end of 2007 to enable them to investigate the issue of TPC. No substantive response has yet been provided.

In correspondence to APIL the FSA has said:
'The Financial Services and Markets Act…..prevents us from disclosing the nature of our enquiries with individual firms and whether any regulatory action has been taken arising from a particular complaint'.

We would argue that this is unacceptable for a modern day regulator. This restriction is not only frustrating for those who make a complaint to the FSA but also undermines public confidence in the FSA as an effective regulator.

Protection of the Consumer

The DP makes it clear that one of the FSA's desired outcomes is to promptly identify mis-selling or other unfair or inadequate behaviours by firms towards consumers and to correct these where they are significant (paragraph 6.30).

TPC clearly falls within the definition of 'unfair or inadequate behaviour'.

Unfortunately, however, because of current practices consumers have no way of knowing when such behaviour is 'significant', nor what the FSA is doing, or intends to do, to 'correct' it.

One of the FSA's statutory objectives is the protection of consumers. If the FSA does not publish the results of its investigations then it is not only frustrating for those who make complaints but also for the wider public. The protection of consumers must entail the publication to the complainant of the outcome of any complaints made about a firm and publication to the wider public at large if the unfair or inadequate behaviour is deemed 'significant'. It follows that there must also be publication of what the FSA are doing to correct the behaviour.

This must be the bare minimum for the protection of the wider public too, otherwise the public can have no confidence in the FSA's role as a regulator. How can the public be protected from significant unfair or inadequate behaviour if they are not told about it?

Confidentiality and Disclosure

The DP discusses the issue of 'confidential information', and the FSA's restrictions on disclosure in section 4.

As the DP indicates at paragraph 4.14, there are safeguards built into the FSMA in order to prevent '…..the casual, rash or unchallenged use by the regulator of public statements that could damage a financial services firm's reputation and commercial standing'.

APIL supports any restriction on '….. casual, rash or unchallenged ….. statements' and fully supports any firm being given an opportunity to make representations about any complaints that have been made. The FSA, like any regulator, must follow due process.

However, once that due process has been carried out, the protection of the consumer must demand that a complainant is told the outcome of their complaint. If a complaint is upheld then the protection of the public demands that there be some form of public censure, otherwise how are the public to know that the regulator is properly regulating?

APIL would comment, here, that the issue of TPC does not raise any question of 'market sensitive' confidential information, which would enable advantages to be gained by competitors if they become aware of the information.

APIL therefore believes that the FSA should publish the results of their investigations into TPC and the outcome of any complaints that have been made. It is particularly unacceptable that a complainant is not told the outcome of their complaint or whether any action has been taken as a result of it. How can the public have confidence in a regulator who does not communicate its regulatory decisions?

Treating Customers Fairly (TCF)

APIL welcomes the TCF initiative referred to in paragraph 6.75 of the DP, namely consistent delivery of fairer outcomes for consumers.

We are extremely concerned, however, that '…there was still some way to go before the fair treatment of customers is embedded across the industry' (paragraph 6.77). For a regulator to admit this casts considerable doubt on their effectiveness as a regulator.

Additionally, '…senior management in firms have found it hard to turn commitment for change into coalface improvements' (Paragraph 6.78). It is fundamental for the protection of consumers, who are the recipients at the 'coalface', that this must change.

The FSA must be, and must be seen to be, an open, transparent and effective regulator.