Financial Services Authority

Tracing Employers' Liability Insurers

Comments on a draft consultation paper from the Association of Personal Injury Lawyers (APIL)

May 2010

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they need and deserve and to which they are entitled. Our members are mostly solicitors, with some barristers and academics, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

The aims of the Association of Personal Injury Lawyers 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:

Karl Tonks	APIL Executive Committee Member
Mark Turnbull	APIL Executive Committee Member
Cenric Clement-Evans	APIL Executive Committee Member
Martin Bare	APIL Past President

Any enquiries about this response should be addressed to:

Lorraine Gwinnutt, Head of Communications, APIL
Tel: 0115 938 8707; email lorraine.gwinnutt@apil.org.uk

Russell Whiting, Parliamentary Officer, APIL
Tel: 0115 938 8727; email russell.whiting@apil.org.uk

Introduction and key principles

1. We are grateful for the opportunity to provide initial comment on this draft for pre-consultation, and understand that the FSA's aim is to publish a formal consultation in June.

2. APIL has responded in full to the Department for Work and Pensions consultation 'Accessing Compensation' and some of the arguments made in that paper are repeated in this response.

3. We welcome the FSA's acknowledgement of the current situation in paragraph 70 of the draft that "Currently we face a situation where insurers are subsidised by claimants that are unable to trace the relevant insurance company and/or are not aware of the existence of potential coverage." This is a situation which clearly cannot continue. It is against all the principles of natural justice that people who are injured through no fault of their own are denied compensation, to the benefit of insurance companies who have received premiums from employers. The same paragraph outlines the possible amount which would be 'transferred' from insurance companies to claimants and states that the industry could bear this level of transfer without risk of failure. This appears to miss the point of principle that where liability exists it is the insurance industry's duty to pay fair compensation to injured, sometimes dying, individuals whose only 'crime' was to turn up for work.

4. We also note in paragraph 10 of the draft that the FSA's proposals "are intended to secure improvements in consumer protection in the longer term..." Unfortunately the proposals as set out in this draft are likely to have a negative impact on consumer protection, for reasons outlined later in this paper.

5. APIL has always argued for a compulsory database of insurance information to be established by statute, rather than by FSA rules, and to be overseen by the Government, to ensure its complete independence and longevity. We have fundamental concerns, based on current experience of how the FSA operates, that principles-based regulation is not robust enough to protect injured people. We also have grave concerns about the prospect of what is effectively an insurance-based solution to a serious insurance-led problem, and about the level of policing, transparency and strength of sanctions which may be imposed, as they are set out in this paper.

6. We note that the paper is not concerned with arguments relating to the need for a fund of last resort for EL cases. We submit, however, that if the proposals in this paper were to be implemented, the need for a fund of last resort to provide proper protection for injured workers would be even more pressing than it is now.

7. We have experienced some difficulty with the technical language used in this paper and have, therefore, stated where clarification would be helpful.

8. Our answers to specific questions asked follow below.

Question 1: Do you agree that our proposal to require all insurers that have permission to carry out contracts of general insurance in the UK to publish a statement of potential liability (SPL) for UK commercial lines EL cover is necessary and sufficient to identify all relevant insurers and that it is practicable?

9. We are unclear about the terminology used in this question but if, as we believe, it means that insurers have to declare that they have written EL insurance, then it is clearly necessary. In fact, this is the very minimum we would expect if obligations to consumer protection are to be met, and it is arguable whether this step provides very much information over and above the information which is currently available.

10. In relation to paragraph 15 of the draft consultation, we do welcome the fact that the proposals will cover both compulsory and voluntary EL cover, although it is unclear how far-reaching this proposal will be in light of subsequent proposals to provide policy information for potential liability after 1999.

Question 2: Do you agree with our proposal for the policy information to be included in an Employers' Liability Register?

11. As we have said in our response to the DWP consultation 'Accessing Compensation', in order to ensure a database fulfills its purpose of providing details of insurers who wrote EL insurance it must be flexible enough to be effective with no compulsory fields. It should be possible to return a trace from a small amount of information. We are unclear whether the reference in paragraph 25 to 'policies that cover more than one employer' is a reference to the need for information about subsidiaries. Clarification on this would be appreciated, as information on subsidiaries will be a very important aspect of any database.

12. It is extremely important that allowances can be made for potential human error when entering information into search fields. A search for a company including the word 'Davis', for example, should also return results for 'Davies', ensuring that there is the best possible chance of receiving a successful tracing result.

13. It is important that the database includes details of the previous names of companies, and the dates the changes took place, where appropriate. This is important because searches are often made for companies which have changed names since the claimant was employed. Including the details of any name changes will ensure the best possible chance of a successful search.

14. The database must include all available past information including information relating to subsidiaries and group companies. Only by having the maximum amount of information stored will the database be able the deliver the best possible service to claimants. While we appreciate that many older records may be in paper form, modern technology is more than capable of transferring these records into an electronic format.

15. The database will need to contain more information than simply the past searches of the current tracing code, as its success rate has been consistently unsatisfactory since it was created in 1999. It is also vital that insurance companies are compelled to send all policy details to the database, so that the information can be placed on the database. Only a compulsory database will, in the long term, help to provide injured people with the compensation they need, as well as reducing the burden on the ELIB.

16. Paragraph 27 refers to the need for screening to ensure the information is only used for the purpose of tracing insurers, but offers no explanation of how this will work,or what agency will undertake such screening, or even why this is felt to be necessary. Clarification of the FSA's views on this would be helpful.

17. Similarly, paragraph 29 refers to the possibility of the FSA's proposed information requirements being modified if they become 'unduly onerous in particular circumstances' if this would not 'represent undue risk to consumers'. We are very concerned about what criteria will be set to judge the modifications required, how 'unduly onerous' will be defined and how decisions will be reached about what represents 'undue risk to consumers'. Further clarification on this point would be welcome.

Question 3: Do you agree with our proposal to require insurers that effect Employers' Liability cover to keep a record of the Employers' Reference Numbers provided by Her Majesty's Revenue and Customs for employers covered by a new or renewed policy?

18. We have no objection to the inclusion of the HMRC's employer's reference number, but the experience of our members tells us quite clearly that it will not, on its own, work as a unique employer identifier. The Companies House Unique Identifier must also be included because the vast majority of employers whose insurers need to be traced were limited companies.

19. There are also many examples of companies which have taken on the trading names of other companies, through various business arrangements. Such arrangements can lead to wholesale changes in the make up of the company, but the Companies House number cannot be changed. The Companies House number will also be simple to search for historically, as numbers are stored even after companies have gone out of business. The HMRC number would not be effective in these circumstances.

Question 4: Do you agree that the ELR should include all policies for which insurers have potential liability that were new, renewed or for which claims were received on or after 1 November 1999?

20. APIL fundamentally disagrees with this proposal which will not serve to protect injured people and which is a retrograde step even from the highly flawed voluntary system currently in place.

21. The fact that 'historical information becomes increasingly difficult to capture over time' does not make it reasonable to expect insurers only to provide policy information as set out in the question. Under the current voluntary scheme there is, at least, still an onus on insurers to search for policy information irrespective of the date, and there is a very real danger that, under this proposal, insurers will simply shut down their own archaeological libraries. This would be disastrous for people bringing claims arising from employment before 1999, under these proposals. Nor should it be forgotten that, despite the undertaking made by insurers to keep records for 60 years after 1999 (as part of the current code of practice) the success rate for post-1999 searches is still woefully low.

22. We must also register our serious concern about the reference in paragraph 39 of the draft to the possibility of modifying requirements if they prove to be unduly burdensome. This is the second such reference so far in the draft (see our answer to question 2) and, again, is made without any definition or explanation of terms. The FSA really must be more transparent about its intentions in this respect, if its stated aim of consumer protection is to remain credible.

Question 5: Do you agree that the Statement of Potential Liability and Employers' Liability Register should be updated at least quarterly?

23. Yes.

Question 6: Do you agree with our proposal that the SPL and ELR should be certified by a director each time they are updated and that they should be audited annually?

24. Yes. Due to the seriousness of the issues at stake, it is important that this is overseen at director level.

Question 7: Do you have any comments on our description of potential penalties for non-compliance?

25. We are extremely concerned that the penalties have no real 'teeth'. Use of the word 'may' for example, in paragraph 44 is hardly enough to make insurers comply with FSA rules, especially when the rules do not compel insurers to submit data in the first place.

26. We also know from previous experience that disciplinary action taken by the FSA against an insurer does not always reach the public domain, and this raises again concerns about a lack of transparency and clarity about levels of compliance.

Question 8: Do you have any comments on our proposals for submission of information to tracing offices and the conditions that would apply to the firm and the tracing office?

27. We have fundamental concerns about the proposals in this section of the draft which can be summarised as follows:

28. Paragraph 48 states that the FSA should be provided with a full copy of its database on request but, for the sake of transparency, the database should be open and available for use by anyone who wishes to use it. We understand that arguments about data protection have been raised in relation to this, but it should be remembered that, if there is a legal requirement to display an insurance certificate, the information is generally in the public domain in any event: the database simply provides further and easily accessible detail.

29. The proposal in paragraph 50, that tracing offices meeting the FSA's requirements will not be regulated, will not provide adequate safeguards for consumers. Any new system must be properly policed, and be seen to be properly policed. Sight of the database on request and the annual report is simply not robust enough.

30. The suggestion that the proposed ELTO 'may' continue the current industry tracing service is not acceptable. The seriousness of this situation calls for a cohesive approach with one central, compulsory database at its core, storing all EL insurance information available.

31. We were also very concerned to read in this paper suggestions that there could be many individual tracing offices set up by different insurers when, to our knowledge, the Government has suggested only one, central tracing office. Such fragmentation will only lead to increased cost and the likelihood that not all data will be recorded, leaving injured people in a worse situation than at present.

32. Finally, paragraph 52 states that the economics of a tracing office will determine its optimum level of service. This, surely, flies in the face of the stated objective of proper consumer protection, which demands that the purpose, rather than the economics, of the database should determine its level of service.

Question 9: Do you have any comments on our cost benefit analysis?

33. Paragraph 55 sets out what are considered to be 'serious practical difficulties in achieving the ideal of providing appropriate information in respect of all policies for which insurers have potential liabilities for UK commercial lines EL cover.' Paragraph 56 states that the answer to these problems is to require the provision of historical records from processing since 1999 only. This, we submit, is not an answer to the difficulties, it simply circumvents them at the expense of injured people.

34. In addition, paragraph 57 refers again to the option of modifying requirements which are unduly onerous, and we have already made our concerns clear about this in previous answers.

Question 10: Do you have any comments on our compatibility statement?

35. We do not believe the statement is compatible with proper consumer protection, especially in this context, when some people are dying without receiving the compensation to which they are entitled.

36. The 'light touch' approach of rules, guidance and principles is simply not robust enough to deal with all the concerns we, and others, have raised about the need for a full and flexible database, available to all, which is transparent, subject to independent oversight, compulsion and proper policing.