Financial Services Authority

Tracing employers' liability insurers- historical policies

A response by the Association of Personal Injury Lawyers

September 2012

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a 20-year history of working to help injured people gain access to justice they need and deserve. We have around 4,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which 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.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

We are pleased to see the FSA recognising that significant detriment is experienced by those who have contracted work related illnesses but because of the lapse of time are unable to, or have difficulty in tracing the appropriate insurers[1]. We are not convinced that the proposals within the paper go far enough to eliminate the significant detriment suffered. Where liability exists, it is the insurance industry's duty to pay fair compensation to injured or often dying individuals.

The proposals in the paper will not ensure that insurers will be compelled to conduct full and exhaustive searches of their records for historic policies. There is also the question of accountability and sanctions for non compliance. Nowhere in the paper is there any mention of how the FSA will police, enforce and penalise firms that do not introduce a tracing policy and fail to conduct effective searches. This is unacceptable. If the changes are to be effective and taken seriously it is essential that they are robustly enforced and there are penalties for non compliance.

Even with the most effective searches and efficient databases not every historic employers' liability (EL) insurance policy will be able to be traced. There will always be some policies that have been lost, meaning that some injured people will have no avenue for redress. Whilst we accept that the Government has recently made a commitment to introduce a fund of last resort for people with mesothelioma, who were exposed to asbestos through their employer's negligence and where a liable insurer or employer cannot be traced, the proposals do not go far enough. The fund will fall short of providing victims with the full compensation they need and would have received through the courts if insurers had properly preserved insurance details. There is also a much wider range of people with very serious asbestos-related diseases who will not be compensated because policies have not been kept by insurers.

The paper and the draft regulation refer to injured people as consumers. They are not consumers like those using a super market, nor are they consumers of an insurance product in the employers' liability insurance market. They are victims of another person's

[1]Tracing employers' liability insurers- historical policies, paragraph 2.1, page 7

negligence and this must not be forgotten. These individuals have often contracted fatal diseases simply because they went to work.

Question one- Do you agree with our proposal requiring all firms with actual or potential liability for UK commercial lines employers' liability (EL) insurance claims to take reasonable steps to conduct effective searches of their records for historical policies?

It is essential for all firms to conduct full and exhaustive searches of their records. All firms must look at all records they hold. Anything less than this will mean that some policies are not traced and injured people do not recover the compensation they rightly deserve.

The FSA must recognise that there is a fundamental conflict of interest for an insurer being, on the one hand, the body that is required to carry out a search for policies and on the other, the body that may have to pay compensation. It is in an insurer's interest not to carry out a search. Some measures must be put in place to ensure the steps are being taken by insurers to conduct full and proper searches.

Question two- Do you agree with our proposal requiring firms to put in place and operate in accordance with a tracing policy?

We agree that every firm should put in place a tracing policy. It is important that the rules compel insurers to act. We question how firms will be audited to ensure that they have an appropriate tracing policy in place and how the FSA will police firms to ensure that they are complying with search requests.

The consultation paper is silent on enforcement, auditing and sanctions for non compliance. For the FSA to establish and maintain a requirement of firms to put in place a tracing policy, those failing to comply should suffer serious sanctions. Any failure to comply should result in the sanction imposed being made public. Only then will any requirement be taken seriously.

We also believe that all firms should be made to be more publicly accountable. The FSA or ELTO via DWP should report yearly on the number of searches conducted and the success of those searches. This will ensure a transparent appraisal of these changes so the success or otherwise of these reforms can be evaluated.

We have repeatedly expressed concern, based on the FSAs current practices, that the FSA are not robust enough with regulation to protect injured people.

Question three- Do you agree with our proposal requiring searches to be returned within one month of receipt of the request?

We agree with the suggestion that search requests should be returned within one month. It is essential however, that there are changes to the content of the search response if these reforms are to be seen as positive steps. See our response to question four.

Question four- Do you agree with our proposals on the contents of the response?

We agree with the proposed content of the response in which the firm is contacted directly by the injured person or their representative. In addition to these requirements, firms should be required to publish details of all successful searches for historical policies that they have conducted on their website. All successful results should also be held centrally on a searchable database. Insurance companies must be compelled to send any search results to a central database. Claimants and their representatives should then be given access to the database, which could then be searched directly. The database will only deliver the best possible service to claimants if it has the maximum amount of information stored. Searching such a database before requests are made directly to firms will, over time, save considerable time and expense for firms as fewer direct search requests will be submitted.

Paragraph 3.12 of the consultation paper suggests that where the request to search comes from the ELTO and not directly from the injured person or solicitor, then if no

historic policy is traced, the firm does not need to respond to ELTO. This is unsatisfactory. The firm **must** be required to respond to ELTO to confirm it has conducted a search, how that search was conducted, including information about what records were searched in the same way as they are being required to do under the new rules[2] for direct requests. ELTO should then forward that information to the person who made the request so it knows with certainty, which firms have responded and those that have not. To not insist on the same requirements will mean multiple searches.

Currently, when ELTO circulates a request to member firms, those that do not respond to the request within the specified timescale are assumed to have searched, but to have not found a policy. This may not be the case. Firms not responding may not be carrying out the search at all. There is nothing holding them accountable. Without reporting requirements, how would an injured person know that a search has been conducted at all? There already exists a suspicion amongst claimants that insurers do not want to assist them with pursuing a claim. This only exacerbates matters further.

Question five- Do you agree with our proposal for the timing of the implementation of our requirements?

An improved tracing service is long overdue. The voluntary code of practice introduced in 1999 has consistently delivered poor search results for historic policies. The most successful search period during the eleven years was in 2008 with only a 50 per cent success rate[3]. Whilst ELTO has introduced some improvement for current policies, we would hope to see improvements implemented as soon as possible for historic policies.

Question six- Do you have any comments on our cost-benefit analysis?

For years insurers have benefited from taking insurance premiums from employers, whilst failing to keep proper searchable records of the policies written. This has resulted

[2] Tracing employers' liability insurers- historical policies, paragraph 3.15, page 12
[3] Code of practice for tracing employers' liability insurance policies review statement 1 January 2008 - 31 December 2008

in genuine claimants being unable to trace the relevant insurance company. In these cases, genuine claimants are denied the compensation they deserve because of insurer's failings.

The costs benefit analysis does not, in our view, put any substantial financial burden upon firms. They have benefited from a windfall on EL policies for years with poor tracing rates. Any cost to the insurers is far outweighed by the benefit for injured people.