DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

REGULATION OF CLAIMS MANAGEMENT SERVICES

CONSULTATION ON PART 2 OF THE COMPENSATION ACT 2006
SCOPE ORDER UNDER CLAUSE 3(2)(e);
REGULATIONS UNDER CLAUSE 8 AND THE SCHEDULE;
AND THE CONDUCT RULES

CP(L) 12/06

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL 06/06)

SEPTEMBER 2006

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 5,000 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 prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

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

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Introduction

APIL welcomes the opportunity to be included within the DCA Regulatory Consultative Group and the opportunity to raise issues directly with the Head of Regulation.

Rather than answering each individual question in the consultation paper, in this response APIL sets out its views on the issues covered by the consultation, and specifically deals with the following, before addressing issues of drafting:

1. Types of work
2. Third Party Capture
3. Professional Indemnity Insurance
4. Tied Agents
5. Distinction of Definition
6. Cold Calling
7. Advertising

1. Types of Work

APIL believes that further consideration needs to be given to types of work in relation to personal injury and the regulated claims that may be handled by claims management companies (CMCs).

Claims that may be handled by CMCs which should be regulated should extend to wrongful arrest, death and false imprisonment.

APIL would like confirmation that claims relating to uninsured or untraced drivers are included within personal injury claims generally, as we believe that CMCs dealing with these types of claims should be regulated.

2. Third Party Capture

Capture of claims by third party liability insurance companies needs to be regulated to ensure transparency and protection for the consumer and to avoid conflicts of interest between shareholders and the injured person. Insurance companies, such as Norwich Union, are actively setting up units to capture claims.

Whilst APIL recognises that provision of earlier rehabilitation and settlement of claims can be a positive step, where this is achieved without independent legal advice there is a real danger of this being at the expense of the injured person who may settle a claim for significantly less than its true value.

In addition, APIL does not accept that there is no evidence of consumers receiving poor service from liability insurers once they have been 'captured' as a third party. There is a clear conflict of interests in liability insurance companies appointing advisers for third parties who have been injured by the company's policy holders, which means that the injured person's interests may not be paramount.

APIL has anecdotal examples of injured people receiving a poor service from liability insurers. One such example is as follows: A woman was injured in a road accident through no fault of her own. The insurers of the person who was at fault passed her details to solicitors on their panel who contacted her and told her they had been appointed to act on her behalf. They also said that as long as the claim was settled without having to issue court proceedings her legal costs would be taken care of. She later consulted other, independent solicitors, who advised her that the panel solicitors were advising her to under settle, and that they considered that the medical evidence obtained was incomplete.

This example shows that poor service which can be received from panel solicitors appointed by the liability insurers can include:

- Taking instructions from a third party (rather than from the client) to act on the client's behalf and contacting a client without her asking them to do so
- Not discussing whether the client has any pre-event cover that she can use to pay her legal costs (and therefore potentially have access to other solicitors)
- Not telling the client she has the right to seek independent legal advice of her own accord
- Obtaining incomplete medical evidence
- Advising client to settle for an amount that is too low
- Not advising client on how the case could be funded if it is necessary to issue proceedings (and therefore defendant insurers will no longer pay)

The referral of personal injury claims following third party capture is a massive business, generating a huge turnover, employing companies and individuals which, in past experience, are highly capable of ongoing exploitation of the market. To exempt from regulation those insurers who capture third parties and press them to use their own services rather than seek independent advice would be a missed opportunity to provide injured people with much needed safeguards and leave a gaping hole in consumer protection.

APIL wishes to stress once again that the overwhelming majority of people who are injured through someone else's negligence will only ever claim compensation once in their lives, which means that they will be unfamiliar with the procedure involved and this makes them especially vulnerable and open to influence from those established in the business (for example liability insurers). In order to protect the public, APIL must, on behalf of the injured people its members represent, try to ensure that the rules governing the conduct of claims management companies and their relationship with solicitors are robust.

It seems entirely proportionate and achievable for these very well resourced insurers to be required to submit to regulation. As they are already regulated by the FSA in relation to other areas of their business, it should not be unduly onerous for them to be regulated in accordance with the Compensation Act in respect of their dealings with third parties and would provide the consumer with protection against unscrupulous practices.

Paragraph 7 of this consultation paper states "An exemption from the need to seek authorisation…will only be granted where an individual/organisation is either already subject to appropriate regulation in the provision of claims management services, or there are clear reasons for doing so." As the DCA is aware, liability insurers are not regulated by the FSA in respect of their dealings with third parties, and APIL submits that there are no good reasons to exempt them from regulation.

Liability insurers capturing third party claims need to be regulated to ensure the consumer is aware how a claim has been handled and who it has been sold to, and to create a system which is completely transparent, open and as rigorous as the rules governing solicitors, complete with strict sanctions for non compliance.

3. Professional Indemnity Insurance

All claims management companies must be required to hold professional indemnity cover to ensure full protection for the consumer in relation to dishonesty of staff, negligence, etc. By way of example of negligence, a claims management company may fail to pass a claim to solicitors in a timely manner, with the consequence that the time within which the client may make a claim expires before the client receives legal advice. The consumer needs protection against this and other forms of negligence.

APIL believes that requiring all regulated claims management companies to have proper professional indemnity insurance (which is the requirement for solicitors) is crucial. To allow companies to be under-insured would mean that the consumer would be left without redress and this would undermine the protective purpose of the Compensation Act.

4. Tied Agents

APIL believes that any individual or business which provides claims management services should be authorised in its own right.

As the day to day work of CMCs is carried out by tied agents, in the main, at the very least regulation must ensure that CMCs are fully responsible for the conduct of these persons. There can be no exemption for tied agents because they have a small turnover.

5. Distinction of Definition

Clear and understandable distinction is needed between companies which manage claims and those that do not.

APIL is concerned that some organisations which provide claims management services in addition to their primary business, for example, motor rescue/repair organisations, will slip below the radar. APIL believes that all organisations which provide claims managements services should be regulated, and distinctly recognisable as such.

6. Cold Calling

APIL welcomes the ban on cold calling on the doorstep but wishes to see it extended to texting / e-mailing and 'leaflet dumping'. Cold calling for personal injury claims is entirely different from cold calling in, for example, the retail sector. The implications of a personal injury claim are far more profound to claimants than those of installing double-glazing and so APIL believes any cold-calling (eg by text, e-mail or leaflet dumping) is wholly inappropriate. If the public's trust and confidence in personal injury legal services is to increase, the standards of the whole sector must be set at the very highest level.

Any code designed to govern cold calling must be strict. If one "cold" text or phone call is permitted, the consumer actually receives many such, as each of many CMCs make one such contact.

7. Advertising

A cooling off period is essential and APIL is pleased that regulation now includes a 14 day cooling off period to allow the consumer to consider the contract.

In March 2005, the Lord Chancellor, Lord Falconer, said in a speech about advertising at a Health and Safety Executive seminar on the compensation culture: "Much is now from solicitors, some is from claims management companies, but it's not always clear to the consumer which is which and what they are entitled to". We are very pleased indeed to see that part 2 of the model rules says that expressions such as 'no win, no fee' should not be used without qualification , and that the name of the advertiser should be clearly identified, but we would wish to see this taken further to address the point raised by the Lord Chancellor.

It is imperative that advertising makes it clear to claimants exactly what kind of organisation is undertaking the advertising; its legal qualifications, if any*;* and how that organisation is regulated and remunerated (and in particular whether that organisation will sell the case to solicitors or another third party). To fail to control this area risks the possibility of a perceived "government stamp of approval" to CMCs undertaking the advertising.

Moreover the Law Society's referral code requires solicitors not only to ensure they disclose to their clients the fact that their claim has been purchased, but also to ensure so far as they can that the referral source has made a similar disclosure. Recent research by the Law Society suggests that referral sources are less than diligent about complying with such disclosure requirements. This is not surprising bearing in mind the referral code cannot be enforced directly against them. In APIL's view it must now be part of the new regime that advertising and other literature, including first point of contact literature between the referral source (CMC) and its customer, carries a "health warning" to the effect that the customer's case will be sold to a solicitor for a disclosed fee and that the CMC as such is not qualified to give any legal advice.

ANNEX A

Compensation (Regulated Claims Management Services) Order 2006

Clause 4(2)(d)

APIL believes that the words "including to …..conduct litigation" should be deleted so as to leave a very clear and bold statement.

Clause 4(e)

APIL considers that "making arrangements for the provision, or direct sale, of after-the-event insurance to claimants (to any extent not covered by an authorisation of the Financial Services Authority)" may not cover certain circumstances where companies make referrals to advisers, and those advisers are required as part of the referral arrangement to advise their client to buy the claims management companies' after the event insurance.

APIL believes that this clause therefore needs to be more widely drafted to include such activities and suggests the following wording: "making arrangements for the provision, direct sale or otherwise being involved in the acquisition of after-the-event insurance, or recommending that such insurance be acquired (to any extent not covered by an authorisation of the Financial Services Authority)"

Clause 4(2)(f)

APIL recommends replacing "to claimants or to persons having the right to conduct litigation" with "to claimants or to any other person". This would then include 'claims assessors' and similar businesses, which are prevalent in lower value personal injury cases, and the employment sphere.

ANNEX B

The Compensation (Claims Management Services) Regulations 2006

Part 3 (Grant of authorisations)

Clause 11(4)(b)

Currently reads "any other person who is able to exert significant influence on the applicant's policy or management". APIL is concerned that every person who has significant influence on an applicant should be included within this section and suggests that it reads "any other person who is able to exert significant influence on the applicant's policy, management or activities".

Clause 11(5)(g)

Currently reads "the applicant's practice or proposed practice in relation to providing information to clients about fees". APIL believes that referral fees should be specifically included in this clause so that the applicant's practice is completely transparent.

Clause 11(6)

APIL recommends the insertion of a new clause (a) to read "all matters at 11(5) above" to introduce consistency. Consequently the additional provisions at clause 11(6) may then need to be revised to take this amendment in to account.

Clause 13(5)(g)

The final phrase reads "showing the turnover of that business for the previous year". APIL believes it should be amended to read "which should include the turnover of that business for the previous year" in order to emphasise that the accounts are not just required so that the regulator can see the turnover and therefore judge the fee payable.

Clause 22(2)

APIL believes the final line, should read "and such consumer organisations or other relevant stakeholders (including but not limited to solicitors organisations and the TUC) as he considers appropriate". Solicitors have regular contact with claims management companies; indeed they are the only purchasers of their services and as such the regulator should consider consulting them before prescribing rules in relation to these companies. APIL would like to be involved in any future consultation concerning case management companies.

ANNEX C
Conduct Rules

Part 1

Rule 5

APIL recommends a new sub paragraph (e), which adds bankruptcy as a ground on which a person should be disqualified from working in claims management.

Rule 7

APIL strongly supports the inclusion of paragraph 7 as the organisation believes that sub-contractors can be some of the worst offenders in terms of conduct and therefore need to be regulated. Please also see APIL's views regarding tied agents at point five above (page 7).

Part 2

Rule 6

APIL wholeheartedly supports the inclusion of clause 6(b), about controlling the use by CMCs of phrases such as "no win, no fee" in their advertising. This is important to ensure that potential clients are not given misleading information.

APIL reiterates its views given at point seven above (page 8), with regard to advertising.

Rule 15

APIL believes that sub paragraph e) should specifically refer to “trade union assistance” before the words “any other support for pursuing a claim”.

APIL strongly supports the inclusion of sub paragraph f). In order for solicitors to act in their clients’ best interests, it is vital that solicitors remain independent and are not influenced by outside sources.

Rule 20

APIL believes that as trade union cover is not “insurance”, this rule needs to read “ BTE, other insurance cover or entitlement to trade union assistance”.