Memorandum by the Association of Personal Injury Lawyers

APIL (the Association of Personal Injury Lawyers) was established in 1990 by a group of lawyers working on behalf of personal injury victims and now has over 5,000 members. It is an independent, not for profit organisation.

APIL’s objectives 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 improvement in personal injury law.
- To promote safety and alert the public to hazards wherever they arise.
- To promote a communication network for members.

APIL’s experience of the economic regulators is limited to dealing with the Financial Services Authority, from the consumer’s perspective. Our response to this call for written evidence therefore focuses solely on this regulator.

Summary

- The FSA appears to interpret its remit broadly, and has said it regulates areas which do not apparently fall within its remit. This can however prevent other, perhaps more appropriate regulation from being put in place and means that different regulators are responsible for one activity (e.g. selling claims), depending on who is carrying out the activity.

- The public can have no confidence in the FSA unless its regulation of firms is transparent and the investigations that arise as a result of complaints are carried out in the public domain.

- The FSA’s principled approach to regulation makes it difficult in practice to point to breaches of the rules. In our experience the lack of specific rules has certainly given the impression that the FSA is not an effective regulator.

- The FSA has not thus far effectively regulated practices which limit competition between solicitors.

1. How do regulators interpret their statutory remit? Do they set themselves aims and objectives that take their work beyond fulfilling their statutory obligations? And, if so, why?

1 In our limited experience, the FSA seems to interpret its remit broadly. It has taken responsibility for regulating areas of work which statute does not apparently impose upon it.
2 It has, for example, recently confirmed to the Department for Constitutional Affairs that it regulates the practice of ‘third party capture’ by insurers. This is the process of an insurer approaching a person it knows has been in an accident and who may make a claim for personal injury against it. The insurer often offers a sum of money to settle the claim up front, or offers to arrange a medical report with one of its approved providers. If the injured person refuses these offers, the insurer often appoints a solicitor from its panel to represent the injured person in the claim against it. In short, third party capture is a process which results in an insurer managing a personal injury claim, on behalf of an injured person, on which the insurer is liable to pay out.

3 The FSA has said that it regulates third party capture on the basis that this is “effecting or carrying out contracts of insurance”, which is an activity that the FSA is bound to regulate. We view this as a very wide interpretation of its statutory obligations, because there cannot be said to be a contract of any sort between the liability insurer and the injured party whose claim is captured.

4 One of the FSA’s statutory objectives is though, to protect consumers, and this may be why it has chosen to take such an expansive view of the legislation which details its particular duties. This, however, may be counter productive as the Government strives to avoid double regulation. In the case of third party capture, for example, the claims management regulator would need to authorise insurers if they were not regulated by the FSA. We believe in this instance the claims management regulator would have been a more appropriate regulator which could better protect consumers.

6. Are regulators sufficiently clear in presenting the reasoning and financial models that underpin their decisions? Are regulated companies given early warning before enforcement action to allow for self-correction?

5 From the consumers’ perspective, the FSA is not at all clear in presenting the reasoning behind its decisions. In fact, the FSA has said in correspondence that its enabling legislation does not permit it to tell the complainant whether an investigation is taking place, let alone any details about such an investigation or the outcome of it.

6 This restriction on publishing details of the FSA’s investigations is not only frustrating for those who make a complaint: it means the public can have no confidence in the FSA’s role as a regulator. The FSA could be doing a very good job as a regulator behind the scenes, but no-one would know
about it. Public confidence in the FSA as a regulator will not ensue unless it is seen to be effective.

7. In summary, how successful have the economic regulators been? What changes, if any, could improve their effectiveness?

7 APIL has had dealings with the FSA in two specific areas, both concerned with the sale of claims: third party capture and legal expenses insurance. We believe there is a clear need to regulate these areas for the following reasons:

- Third party capture
  There is an inherent conflict of interests between the insurer as the paying party and the injured person as the receiving party in any potential claim. The overwhelming majority of people who are injured through someone else’s negligence will only ever claim compensation once in their lives, and so they will be unfamiliar with the procedure involved. This makes them especially vulnerable and open to influence from those established in the business.

- Legal expenses insurance
  In order for this insurance to be of benefit to the policyholder, he must be able to choose his own solicitor; the arrangements between the insurer and solicitor should allow the solicitor to properly pursue the claim on behalf of the policy holder; and the level of indemnity provided is sufficient to cover the costs of investigating and pursuing any claim to trial, if necessary.

8 Despite the apparent need for effective regulation in these two specific areas, and particularly with regard to insurers’ behaviour, we do not believe that the FSA has provided this. The FSA’s rules are particularly difficult to deal with, as they are not specific. Instead, the FSA takes a ‘principled’ approach to regulation. We understand that this approach can prevent loopholes in rules being exploited. We have found, however, that this rather broad brush approach means that it is difficult to predict with any certainty the point of view that the FSA will take on a particular issue, or to point to any breaches of the rules by regulated firms.

9 Showing, for example, that an insurer targeting an injured person, in an effort to get them to use their services, is not “acting with integrity” (principle 2.1.1) is very difficult. The insurer will no doubt argue that it has the injured party’s interests at heart in getting him a quick medical report and solicitor. In reality, however, the insurer has an obligation to its shareholders to preserve profits. By taking control of the process and potentially taking advantage of a vulnerable individual who has had no
independent advice, the insurer is acting with anything but integrity. This, however, is difficult to prove because the concept is so broad.

10 APIL therefore believes that the FSA would be a more effective regulator if specific rules were made. The claims management regulator has a code of conduct that those authorized must comply with. There is no similar code for insurers, who are carrying out the same activity of selling claims as the claims management companies. We should point out that the FSA has in fact undertaken to consider whether additional rules are necessary relation to third party capture, and we have asked it to clarify that this work will be in the public domain.

9. Have regulators been effective in protecting consumers from firms abusing their dominant positions in markets and restricting practices between firms that reduce competition? Have regulators successfully promoted the ability of consumers to switch firms at reasonable costs and without undue restrictions?

11 APIL’s experience of restricted competition in an area which the FSA regulates relates to the legal expenses insurance market and sale of ‘after the event insurance’ products.

12 Legal expenses insurers, which are regulated by the FSA, provide insurance to customers who may make a claim on the policy for the payment of legal fees in certain circumstances. Most legal expenses insurers, however, refuse to instruct solicitors who are not on their panel. The requirement that policyholders use a particular solicitor restricts freedom of choice for clients, in contravention, we believe, of the Insurance Companies (Legal Expenses Insurance) Regulations 1990. This in turn restricts competition as solicitors are not able to compete fairly in an open market.

13 We have not seen the FSA take steps to try to prevent this practice.

9 February 2007