



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to MOJ's Consultation Paper on Damaged Based Agreement

September 2009

About Consumer Focus

Consumer Focus is the statutory organisation that champions the interests of consumers across England, Wales, Scotland, and, for post, Northern Ireland.

We were formed through the merger of three organisations – energywatch, Postwatch and the National Consumer Council (including the Scottish and Welsh Consumer Councils).

Through campaigning, advocacy and research, we are the voice of the consumer in private and public sectors by working to secure fairer markets, greater value for money, and improved customer service.

Executive summary

Consumer Focus accepts that in order to facilitate access to justice, alternative means of funding litigation, such as damaged based agreements¹ (DBAs) are inevitable, particularly following the retraction of legal aid. We know that without these alternative means, many claimants will be unable to afford or pursue valid claims.

However, we are keen to ensure that consumers who use DBAs are afforded with adequate information, protection and safeguards. In our response to Lord Justice Jackson Review of Civil Litigation Cost, we supported the idea of DBAs but advocated their regulation if it was to be introduced in contentious civil cases.

We are concerned about recent evidence² which highlights poor consumer understanding of current complicated charging practices where DBA's are concerned. We are also concerned that consumers do not have relevant and important information before making a transactional decision.

We agree that DBAs should be regulated and note that information obligations are central to the proposals tabled. However, we are not convinced that thorough consideration has been given to the prerequisite for effective information, and urge the Government to take responsibility for this. Regulatory information should be designed with input from consumers and consumer organisations. We think that information requirement would only be effective if it is standardised across the sector.

Broadly regulation should focus on:

- provision of standardised, well designed, clear and transparent information. This information should make clear what the client should and should not be charged for. There should also be an obligation to inform clients of other forms of funding such as insurance and legal aid
- a cap on the maximum percentage that can be recovered in fees from the award
- rigorous conduct rules pertaining to the details of the contingency fee agreement

1 Damaged Based Agreements are often referred to as 'no win, no fee claims' or contingency fee agreements.

2 Something for Nothing – Claimants Perspective on Legal Funding and Employment Tribunal Cases, 2009.

Main issues

As a consumer organisation that campaigns for a fair deal for consumers across the whole economy, including the legal sector, we are concerned that there continues to be a number of regulatory gaps in our civil justice system. Aside from DBAs in employment or tax tribunals, there are regulatory gaps in mediation³ and third party capture⁴ markets. These regulatory gaps concern Consumer Focus not only because they result in inadequate protection for consumer, but because such markets are often not transparent or competitive. We welcome the decision to close the regulatory gap in DBAs, but hope that policy makers will take some responsibility for ensuring that the information requirement it proposes is standardised across the sector.

We are enthused by the emphasis the Government has placed on protecting consumers, but note that whether or not consumers benefit from this regulation will depend on the finer details. Putting consumers at the heart of this regulatory agenda requires a degree of consumer empowerment, which in turn requires policy makers to take responsibility for ensuring that proposals are effectively implemented across the sector.

The provision of information and education of consumers is important and should be central to these proposals. Careful consideration should be given to when and how information is provided, including sanctions for breach of information provision. In light of recent research, which highlighted complexities and consumer confusion over alternative funding, extra charges, and penalty clauses, we believe that more attention should be given to the details surrounding when and how information would be provided to consumers. At present, there does not appear to be a convincing framework for information provision.

³ We remain concerned that although the Government continues to promote the mediation industry as a credible alternative to court, this industry remains unregulated. Consumers do not have recourse to an independent or transparent complaint process, nor can they gauge the quality or standard of service on offer. We remain disappointed that the industry has failed to embrace self regulation.

⁴ This refers to the practice where insurers deal directly with members of the public who have for example, been injured in a collision with a motor insurance policy holder. Anecdotal evidence suggests that insurance companies under pay claimants in such cases.

Regulating Damaged Based Agreements

Alternative funding methods

Consumer Focus agrees that service providers should be compelled to provide consumers with information on alternative funding methods. It is important that this information is provided both verbally and in writing before the consumer makes the decision to transact with the service provider. Evidence suggests that consumers do not know that there might be other means of funding their case. It is important that this information is provided in a clear and intelligible manner, allowing consumers to make an informed choice about which method of funding would be suitable to their individual circumstances.

Termination of contract

We are concerned about the ability of lawyers to charge consumers substantial amounts of money (as penalty), for deciding not to continue with a case. There clearly needs to be a balance between the consumer's and lawyer's interest. At present, this balance is tilted in favour of service providers who bear no risk of termination when they take a case. This current state of affairs may lead to clients finding themselves locked into DBAs because of sums payable if they decide to terminate. We accept that there may be cases where a lawyer has done considerable amounts of work prior to the client deciding to terminate the contract. However, there may also be occasions where the lawyer has only carried out a limited amount of work; termination of which would result in the same substantial penalties. We believe that this area needs to be regulated to prevent unjust enrichment.

Cap on the percentage fee

Consumer Focus supports regulating the maximum percentage that a lawyer can deduct from their client's damages; in effect having a cap on the percentage fee. The arguments against a cap centre around the lack of evidence for overcharging, and fears that such a cap would curtail growth in the market, and have a knock on effect on access to justice. We have consistently supported alternative means of funding, specifically, so that those who cannot afford it can have access to justice. However, we believe that access to justice is not achieved if the fee for justice is grossly disproportionate or high. Access to justice should be achieved at a reasonable and fair cost.

Prohibiting extra charges

Consumer Focus thinks that knowing precisely what consumers will and will not be charged for is central to them making informed choices and decisions. The current situation where some service providers can charge VAT on top of the percentage fee, charge disbursement on top of the percentage fee (if the client wins, or regardless of a win), and charge barristers fee separate from the percentage fee, creates an overly complicated charging process which puts consumers at a disadvantage pre and post entering into a contract with a legal adviser. Moreover, this complicated charging process hinders transparency and in turn competition. Furthermore, for consumers who may be

using the services of a legal expert for the first time, it creates an unacceptable level of uncertainty and provides opportunities for abuse from unscrupulous service providers.

To protect consumers, we would like the proposed regulation to prohibit extra charges in DBA cases. Charges such as disbursement, VAT, and barristers fees should be prohibited, but included in the percentage fee. We are not persuaded by arguments that there may be some disbursement heavy cases, so that this may make some DBA cases uneconomic. In such cases, the legal adviser could simply charge a higher percentage rate. Prohibiting complex charging fees will give consumers a clear understanding of pricing and go some way in protecting consumers. It is however equally important that such charging approach is consistent across the sector; we therefore implore the Government to give this area considerable attention.

Settlement clauses

Consumer Focus is aware of clauses which require clients to accept a lawyer's reasonable advice. We have nothing against such clauses in principle, and accept that in limited cases there may indeed be clients who refuse the reasonable advice of a solicitor. However, we are concerned that such clauses are often backed by high financial penalties which we consider unfair.

Clients should be able to decline advice without the fear of substantial penalties. It should be noted that in some cases clients may have good reasons for rejecting their lawyer's advice and indeed may not be acting unreasonably. Lawyers in turn should have the right to terminate a retainer if a client persists or refuses to take reasonable advice. There ought to be a balance struck between both interests, therefore, we do not advocate a ban on such clauses, but rather, that the financial sanctions attached to such clauses be banned.

These financial penalties shift the entire risk of not accepting advice unto the client; the lawyer bears none of the risk. Indeed he or she may profit from a client not accepting his or her advice. This is compounded by the fact that clients (as evidenced in the research conducted by Moorhead and Cummings) are unlikely to be aware of the existence of such clauses and penalties.

It is unjustifiable that declining a lawyer's advice for settlement could lead to significant financial penalties. Particularly, when it is the lawyer who decides that his or her advice is reasonable. We have noted above that the lawyer should be able to terminate the contract; we consider this right and appropriate. We also share the view that the risk of termination could indeed concentrate the clients mind. Moreover, unreasonable or difficult clients are issues encountered in most service industries; these are generally risks borne by service providers.

Consumer Focus's response to MOJ's Consultation Paper on Damaged Based Agreement

If you have any questions or would like further information about our response please contact Lola Bello, Senior Policy Advocate, by telephone on 020 7799 7984 or via email: lola.bello@consumerfocus.org.uk

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