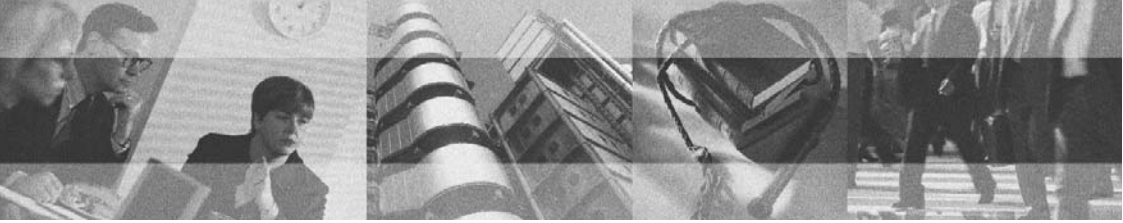


THE RIGHT TO CHOOSE YOUR OWN LAWYER

by Jonathan Goodliffe, Solicitor

The importance of the right to choose your own lawyer

The client's right to choose his own lawyer is an important issue. There is no correct way to manage this professional relationship. Its success depends on a wide range of factors. These include the expertise and commitment of the lawyer, how well lawyer and client communicate, the expectations of the client, how active a role he wants to adopt in the transaction or dispute, the merits of his case, and how the relationship is financed.

It is also best to avoid undue imbalance of power as between lawyer and client. An all powerful lawyer may be tempted to dictate the way the matter is run or to put his interests before those of the client. A powerful client may put pressure on the lawyer to give the advice that the client wants to hear (whether it is appropriate or not) or to behave unprofessionally.

Another danger arises when a third party is in a position to influence the relationship. This may arise where the third party too is instructing the lawyer in a related matter, and/or paying his fees, and his interests do not always coincide with those of the client.

So the client/lawyer relationship needs to be carefully managed. It should not be imposed on either party. When it breaks down there needs to be an ability to opt out. The existence of that ability encourages both parties to behave reasonably.

How the right is expressed in UK law

For the same reason it seems right in principle that, where a person is insured against legal expenses, he should have the right to choose his own lawyer. Moreover there is often a conflict of interests between insured and insurer, particularly when the insured wants to pursue a difficult or controversial claim.

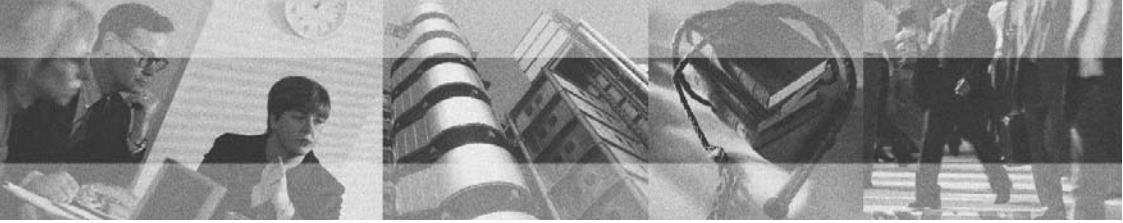
A full recognition of the right to choose would have been an option for the UK in implementing the EU Legal Expenses Insurance Directive[1]. Instead, however, Regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 provides:

> "(1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person). (2) The insured shall also be free to choose a lawyer (or other person having such qualifications as may be necessary) to serve his interests whenever a conflict of interests arises."

This is subject to an exception in regulation 7 for breakdown insurance.

When the right arises

It is not clear in law when the right to choose one's lawyer arises under a legal expenses insurance (LEI) policy. My own experience may shed some light.



In 2000 I had an accident on a skiing holiday in France. I broke my wrist when I slipped on the ice on the path from my chalet to the road. It was raining and nothing had been done to clear the ice. The chalet reps who were there at the time had tried to guide me across the ice instead of encouraging me to use the back exit. The tour company, however, denied liability.

My LEI insurer appointed a firm of solicitors in the West End to represent me. The person at that firm assigned to deal with my case, who was not legally qualified, wrote to me to inform me how the claim would be dealt with without showing any interest in my own views. I claimed to exercise my right to appoint my own lawyer, but the insurer maintained that the right would not arise until the claim form had been issued.

So I instructed the (provincial) firm of my choice privately and the insurer duly accepted that it was on cover when proceedings had been issued. This was not until over a year later, as the pre-action protocol provided for in the Civil Procedure Rules had to be followed first. The tour company, or its insurers, finally paid up about a month before the trial was due to take place.

I made another claim on LEI cover a few years later when a car ran into the back of mine causing me a minor whiplash injury. The insurers assigned a firm of solicitors to me. They again informed me how the matter would be handled. Their performance was competent. They managed to settle the case, so my right to choose did not, on any view, arise. There was no "inquiry or proceedings" or any immediate prospect of proceedings.

If they had not managed to settle there might have been problems, as I live in Wimbledon and the assigned solicitors practise in Yorkshire. Despite the usefulness of electronic communications it often helps for a lawyer and his client to meet up with each other from time to time.

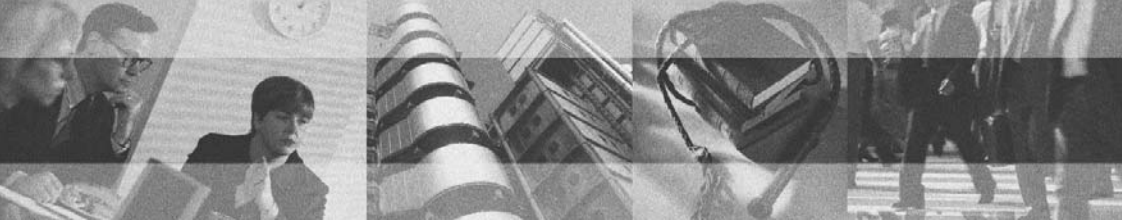
The Financial Ombudsman Service's approach

The Financial Ombudsman Service (FOS) resolves disputes between regulated financial services firms and their retail and small business customers. Such disputes may arise in relation to LEI cover, among other financial products. In *Sarwar v Alam*[2], Lord Phillips MR, giving the judgment of the Court said:

> "It appears that the Insurance Ombudsman [now FOS] has consistently interpreted regulation 6(1) as meaning that the obligation to permit the insured to select a lawyer of his choice is triggered at the time when efforts to settle a claim by negotiation have failed and legal proceedings have to be initiated."

The Court itself, however, made no determination on this issue.

In 2003 I wrote an article[3] supporting the Ombudsman's interpretation as reported in this case. It surely accords with common sense. It is possible to instruct a lawyer "in any inquiry or proceedings" before the proceedings are issued, if there is an imminent prospect of proceedings. This principle has always been recognised in England and Wales, when the costs of civil proceedings were awarded to the successful party, even when costs were taxed on



the old, and less generous, "party and party basis", which required that costs should have been "necessarily and properly incurred".

To treat the right to choose as arising only when the proceedings have been issued has perverse consequences. It requires, when the right is exercised by a claimant, one solicitor to issue the claim form and another to take over thereafter, or for the work undertaken before issue to be excluded from the cover.

Yet the more practical approach reported in *Sarwar v Alam* is is not actually expressed on the FOS website[4]. Perhaps FOS has changed its mind. The website states rather unhelpfully:

> "We considered arguments that the policyholder's 'freedom of choice of solicitor' (as provided for, at the point when proceedings commence, in the Insurance Companies (Legal Expenses Insurance) Regulations 1990 – 'the Regulations') should be interpreted more widely than is traditionally the case. Should it perhaps include any significant legal enquiry (for example at the time when the claimant's solicitors embark on the 'pre-action protocol')? We concluded that, in the absence of clear guidance from the courts in support of this alternative interpretation, we would not require an insurer to offer the policyholder a choice of solicitor at the start of the claim."

Nonetheless it is clear from the FOS website that FOS may sometimes require LEI insurers to allow the insured to use his own lawyer where, for instance, the lawyer is already familiar with the case and it would be inappropriate to take a matter away from him.

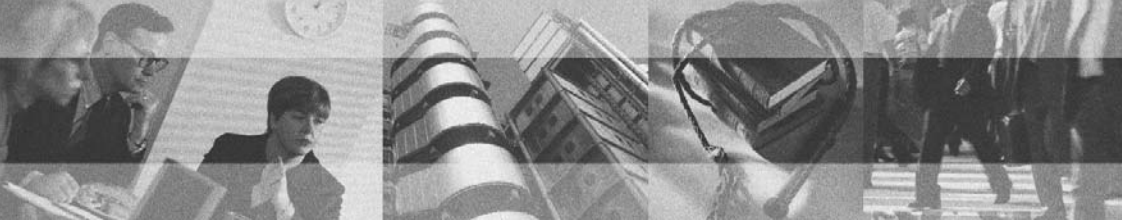
FOS has, it seems, thus rejected the "rights" approach within the directive in favour of exercising its own discretion as to whether the client should be able to choose his own lawyer at any time before the issue of proceedings. Apart from this approach being inconsistent with the directive, it is questionable whether FOS is the right body, or has the appropriate expertise, to exercise such a function.

The approach of the Financial Services Authority

The Financial Services Authority regulates insurance in the UK. Until 2010 it provided information to consumers about financial products on its "Moneymadeclear" website. Moneymadeclear stated in relation to LEI:

> "… it is often the case that you may not be able to use a solicitor of your choice until legal proceedings have started. So contact your insurer before choosing a solicitor and incurring any costs."

Here the FSA appeared to be endorsing the industry line that the right to choose arises when proceedings have been issued. This may not have been the intention, but it might have been better at least to make clear that the industry line is controversial, or that the FSA agrees with the industry, if that be the case. Responsibility for the Moneymadeclear web site was taken over in 2010 by the Consumer Financial Education Body, an independent body established by the FSA. No changes were made to the FSA guidance quoted above on LEI[5].



The *Eschig* case

The European Commission seems also to be be uncomfortable with the client's right to choose his own lawyer under the Legal Expenses Insurance Directive. In the recent case of *Eschig*[6] it supported an LEI insurer in a case in the European Court. The insurer and the Commission argued that the insurer was entitled, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned. They relied on the German version of the recitals to the Directive. They argued that this supported a restrictive interpretation of the right to choose as only arising when there was a conflict of interests.

The Court, however, rejected these arguments. It commented:

> "even supposing that new situations, at Member State level, were to lead to an increase in the number of actions seeking to protect the collective interests of members of a group of persons, such situations cannot, as Community law currently stands, restrict the freedom of persons with legal expenses insurance to either participate or not in such an action and to choose, where appropriate, a legal representative."

This decision followed the advice of the advocate-general, Dr. Verica Trstenjak. She had observed:

> "… the drafting history of the directive can just as much support the conclusion that even though the original objective of freedom to choose one's legal representative was limited to inquiries and proceedings, it is not dependent, as so limited, on the occurrence of a conflict of interests."

The Court's conclusion was based on an interpretation of the directive, but viewed from a wider policy perspective, it was also surely right as a matter of policy. There may be a good case in a class action for one lawyer to represent the collective interests of litigants. In such cases, however, the better course is for the lawyer to be appointed by the court and not by an insurance company. Insurance companies are in the business of managing risk, not running litigation.

Recording the right to choose in the policy

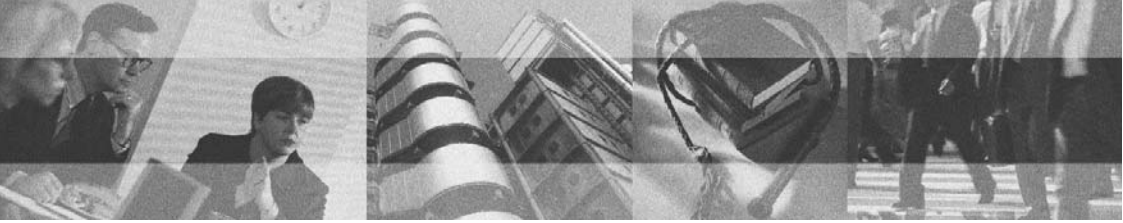
The Legal Expenses Insurance Regulations 1990 require the insured's right to choose his lawyer to be expressly recognised in the policy. In this respect the regulations follow word for word the Directive.

In the UK retail sector, LEI is usually provided in conjunction with household or motor insurance. Few if any such policies, or "key facts" provided with such policies, fully comply with this requirement, particularly in the light of the strict interpretation of the right to choose applied in *Eschig*.

Examples of LEI policies

My household insurance policy makes it clear that the insurer will appoint the lawyer. It states:

> "If it becomes necessary to appoint a lawyer to assist you before the issue of Civil Proceedings we will choose the Appointed Solicitor. If by the date when it is



> necessary to issue Civil Proceedings we have not already chosen an appointed lawyer, you can nominate one by sending us the name and business address of a suitably qualified person. We may choose not to accept your nominee if they are unable to agree terms with us. If there is a disagreement over the choice of Appointed Solicitor another suitably qualified person can be appointed to decide the issue."

My motor insurance mentions that the insurer ("Insurer B") has a "panel of legal firms to provide legal services to our policyholders. The firms make a monthly payment to use for panel membership". It also provides:

> "Where legal proceedings are required you may nominate the lawyer of your choice to act for you … We may refuse to accept your choice of lawyer if we consider that there are reasonable grounds for doing so and we will tell you the grounds for our refusal".

A dispute resolution procedure is then provided for and it is stated that:

> "in nominating the lawyer you must have regard to your obligations to keep the costs as low as possible".

These wordings apply significant limitations to the right to choose. They seem inconsistent with the strict approach to the Directive adopted in *Eschig*.

Inappropriate practices

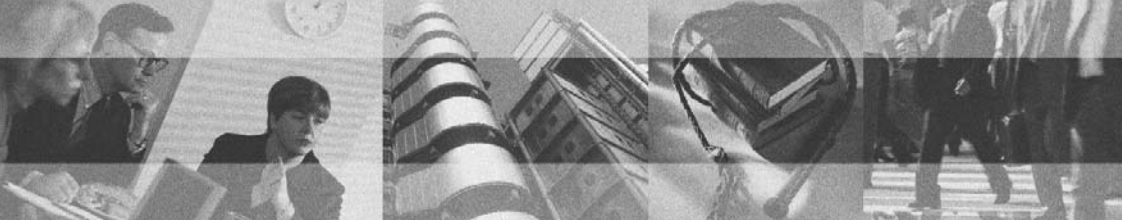
Jon Robins of Legal Action[7] quotes an anonymous "costs expert" as saying that:

> "Now the ban on referral fees has been lifted, insurers still take their £20 premium [for the legal expenses cover] but they also make £600 for selling the claims on to a lawyer. They sell it on a "no win no fee basis". There are no success fees and the insurers do not want to know if people lose. So all that cost is absorbed by the law firm."

There are other references on the Internet[8] to LEI insurers requiring lawyers to enter into conditional fee arrangements.

Even if referral fees are permitted in cases not involving LEI, in the absence of full disclosure they may be inconsistent with the insurer's post-contractual duty of good faith[9], and champertous[10]. The same may apply to panel charges and requirements that solicitors should enter into conditional fee agreements. They raise regulatory issues which are discussed below. They are also surely undesirable as a matter of policy since they reduce the resources available to finance the proceedings and to encourage lawyers to provide a first class service to the insured client.

Requiring lawyers to enter into conditional fee agreements is also arguably inconsistent with a basic purpose of LEI which is to give the insured the security of knowing that legal fees will be paid, win or lose. If a lawyer is required to enter into a no win no fee agreement which has no or an insignificant success fee element, it will surely discourage him from taking anything other than the easiest cases to trial.



On the other hand there is also a risk of the solicitor overcharging. An agreement between lawyer and client as to charges will not, however, be binding on the insurer. The insurer can apply for a taxation of the lawyer's bill under the Solicitors Act 1974.

It is hardly surprising, then, that many clients prefer not to claim on "before the event" ("BTE") LEI. Instead they enter into a conditional fee agreements with their lawyer on terms which do not involve giving the LEI insurer a share of the costs or allowing it to interfere in the conduct of the case.

This practice has been approved in the courts[11]. Another reason for following it is that after the event (ATE) LEI may be taken out in conjunction with a conditional fee agreement to protect the client against the possibility of losing and having to pay the successful party's costs. Before the event LEI is usually limited in retail policies to £50,000 or less. It is thus not enough to cover both sides' costs of anything other than the smallest cases taken to trial.

Where a qualification of the right to choose may be appropriate

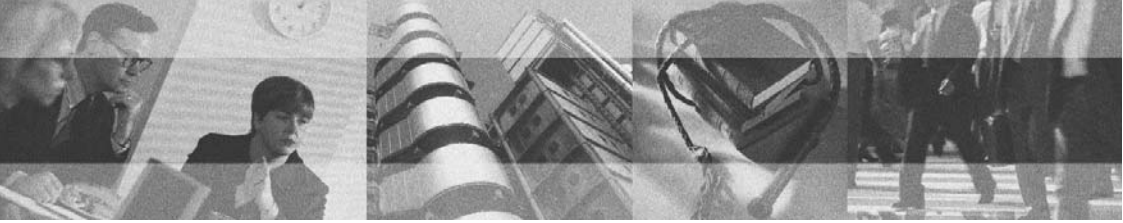
It seems that the FSA does not object in principle to LEI insurers applying some restrictions to the right of the insured to choose his own lawyer, despite the terms of the Directive.

One of its regulatory functions is to identify contractual terms which are used by its regulated firms and which are considered to be incompatible with the Unfair Terms in Consumer Contracts Regulations 1999. It will then seek to persuade the firm to change the terms. Failing that it may take enforcement action under the Financial Services and Markets Act 2000 (FSMA).

In one such case, determined before the *Eschig* judgment,[12] it agreed with the LEI insurer concerned on a new clause reading as follows:

> "An insured person is free to choose a representative (by sending us a suitably qualified person's name and address) if:
>
> (i) we agree to start court proceedings and it becomes necessary for a lawyer to represent the interests of an insured person in those proceedings or
> (ii) there is a conflict of interest.
>
> We may choose not to accept an insured person's choice, but only in exceptional circumstances. If there is a disagreement over the choice of representative in these circumstances, the insured person may choose another suitably qualified person.
>
> In all circumstances except those … above, we are free to choose a representative."

This clause is arguably inconsistent with the judgment of the Court in *Eschig*. On the other hand it is also perhaps arguable that an "exceptional" disapplication of the right to choose should be treated as *de minimis*, particularly if it is applied reasonably. A reasonable application of the exceptional power might prevent claimants from instructing a lawyer who has no expertise or experience in the legal subject matter of the proceedings.
A case could be made, however, that if the insurer is to have an exceptional right to object to the insured's choice of lawyer, that should apply on a reciprocal basis. This might entitle, for



instance, an insured living in Wimbledon (as I do) to object to being assigned (as I was) a lawyer practising in Yorkshire in a case where the insured's own right to choose has not yet arisen.

The FSA principles and rules

Such a provision would also be consistent with one of the primary principles within the FSMA regulatory regime, namely that:

> "A firm [i.e. an FSA regulated firm including an insurance company or authorised insurance intermediary] must pay due regard to the interests of its customers and treat them fairly."

This Principle 6 of the FSA's "Principles for Businesses" is also referred to as the "TCF principle".

Other FSA principles for businesses which might be relevant in this context include:

7 "A firm must pay due regard to the information needs of its clients, and communicate information to them in a way which is clear, fair and not misleading."

8 "A firm must manage conflicts of interest fairly, both between itself and its customers and between a customer and another client."

9 "A firm must take reasonable care to ensure the suitability of its advice and discretionary decisions for any customer who is entitled to rely upon its judgment."

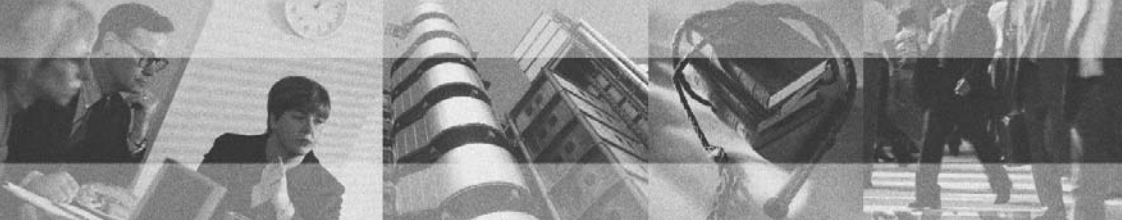
6 and 7 represent additional reasons why firms should disclose the full extent of the insured's right to choose and the fact, if such be the case, that legal representatives are being required to enter into conditional fee agreements, especially if there is no success fee, or if they are being required to pay a panel or referral fee. Nor would it necessarily be adequate that disclosure should be buried in the small print. If LEI insurers are offering a "no frills" service they should perhaps make a much more prominent disclosure of the fact, just as mortgage intermediaries are expected to warn customers that if they do not pay the instalments they may lose their house.

9 might apply to an LEI insurer choosing a legal representative when the insured's right to choose has not arisen. Compliance with the principle would require it to have regard to the insured's needs and wants as well as to the fact that the legal representative may have quoted the lowest price or paid a referral fee.

The limitation of the FSA principles is that they are only enforceable at the suit of the FSA[13] itself and LEI is not a product on which the FSA is currently focusing and thus likely to take enforcement action.

Rule 8.1.1R of the FSA's Insurance Conduct of Business Sourcebook (ICOBS), by contrast, is enforceable at the suit of private individuals under section 150 of FSMA. It provides:

> "An insurer must:
>
> (1) handle claims promptly and fairly;
>
> (2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;



(3) not unreasonably reject a claim (including by terminating or avoiding a policy); and

(4) settle claims promptly once settlement terms are agreed."

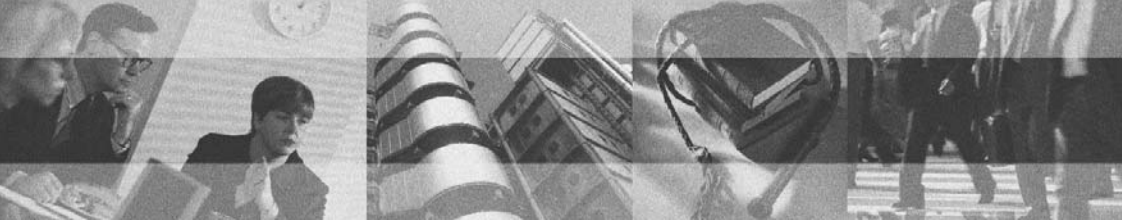
In determining what amounts to "fair handing of claims", it is appropriate to have regard to the FSA's principles for Businesses. So an LEI insured whose claim against the LEI insurer had been unfairly rejected might recover damages for the delay in progressing his proceedings and/or the amount of any payment he might have been required to make to his legal representative, including interest on those amounts[14].

Plugging the justice gap

In his article, quoted above[15], Jon Robins of Legal Action points out that "before the event" LEI has the potential to "plug the justice gap" created by reductions in the scope of legal aid. In the long term this may benefit the insurance industry as well as people seeking legal advice and representation. Restrictions on legal aid have created opportunities for the LEI market to be be extended. If it meets the needs of people better than it does now, people may be willing to take it out more often and to pay more for it. In the longer term if the market proves profitable it might extend into new areas of legal advice and representation, such as family proceedings, and be subject to more realistic financial limitations on claims.

If, however, LEI is indeed to plug the justice gap, better standards are needed to ensure that it meets the needs of customers and is consistent with TCF. These standards might also protect from unfair competition insurance companies and insurance intermediaries who provide a good value service. I suggest the following measures might help to achieve this:

- a best practice guide for LEI, possibly sponsored by the Association of British Insurers and developed in conjunction with the Law Society, the Bar Association and consumer groups[16],
- the FSA and FOS should develop and publish a meaningful view on when the insured's right to choose arises and the extent to which it may, consistently with European law, be qualified. They should not be too scared by the prospect that their view may not ultimately be upheld by the courts,
- a robust approach to the right to choose should encourage insurers to provide a better service through their panel solicitors and employed lawyers, since they will know that if the service is inadequate the insured will be more confident about going elsewhere,
- to the extent that the right to choose can and should be qualified, it may be appropriate for the Civil Procedure Rules to be expanded to enable either party to apply to the Court to override the other's choice. This is a function that could be exercised at district judge level,
- LEI insurers within the retail market should accept that they make their profits out of underwriting and not by imposing financial charges on legal representatives. If agreement on charging levels cannot be arrived at this should not be a reason for objecting to the insured's choice of lawyer. Such disputes should be resolved by the taxation process.



The European dimension

Finally, it is probable that a European retail insurance market will eventually emerge. The FSA may not always be able or willing to regulate insurers providing LEI into the UK market on a cross border basis. It tends to be conservative in applying its rules extra-territorially[17].

There may therefore be a case for reviewing the LEI Directive. Currently the Directive is due to be consolidated without significant changes into the Solvency II Directive[18]. This is due to come into force at the end of October 2012. Experience since the LEI directive was adopted in 1987 may indicate a need to qualify the right to choose or regulate practices by LEI insurers which operate against the interests of policyholders and discourage them from making claims. This could be provided for by giving the Commission power to adopt delegated legislation at level 2 of the Lamfalussy legislative process.

It would, however, require a new amending Directive. This is unlikely to be a legislative priority for anyone, except possibly for the legal procession itself. The profession has much progress to make in marketing its services and getting issues such as these onto the European political agenda.

1 87/344/EEC

2 [2001] EWCA Civ 1401

3 "The right to choose your own lawyer" *Solicitor's Journal* 13th June 2003

4 Ombudsman News March 2003 issue 26.

5 http://www.moneymadeclear.org.uk/

6 Case C?199/08

7 "Can the insurance industry plug the gap", *Legal Action*, January 2009

8 See, for instance, the page on conditional fee agreements on the website of Bermans http://www.bermans.co.uk/content.php?content.206

9 *Drake Insurance plc (In provisional liquidation) v Provident Insurance plc* [2004] QB 601

10 *R on the application of Factortame v Secretary of State for Transport* [2003] QB 381; *Re Trepca Mines* [1963] 1 Ch. 199; *Giles v Thompson* [1994] AC. 142.

11 *Kilby v Gawith* [2008] EWCA Civ 812; *Peel v Beasley*, unreported, 3 December 2007.

12 http://www.fsa.gov.uk/pubs/other/undertaking_das.pdf

13 See Schedule 5, paragraph 5.4 to the Principles.

14 Interest is not usually recoverable as of right on claims against insurers, but there seems no reason why this principle should extend to actions under section 150.

15 "Can the insurance industry plug the gap", *Legal Action*, January 2009

16 Such guides exist for other insurance products, e.g. medical insurance and motor insurance.

17 "The long arm of FSA insurance jurisdiction", BILA Journal, no 117 July 2009.

18 Directive 2009/138/EC