Fair Civil Justice

Claimant law firm advertising in the United Kingdom

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Contents

Fair Civil Justice works to promote a balanced legal environment in the UK, that protects the interests of consumers, businesses and the British legal system. Access to justice is a fundamental right.

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Introduction and Executive Summary

The UK is becoming increasingly litigious. This is in part being driven by advertising by claimant law firms that encourage consumers to join "no-win/no-fee" claims. Advertising from claimant law firms can assist access to justice, which is a public good and should be encouraged. Where consumers have been wronged, they should be able to easily seek compensation.

However, as explained in this paper, advertising by claimant law firms can be inaccurate and problematic. It often overstates potential recoveries that may be achieved. Of greater concern, is where it understates the risks to consumers in joining the litigation. Worse still, some adverts inaccurately state that there is "zero risk" in joining a claim. Inaccurate adverts can lead to consumer harm. The claimant law firms operate in a competitive environment and are financially motivated to persuade consumers to join claims. But they should always provide accurate information and a transparent picture of the risks. This paper examines behaviours in advertising by claimant law firms including how adverts can encourage litigation and expose consumers to significant risk.

Consumers often see adverts to join litigation alongside adverts for more traditional goods and services, and so may consider them equivalent. However, unlike buying an advertised item, litigation is an unpredictable process that brings risks for the participants. Litigation in court is expensive, both in terms of the financial burden and time commitment. It can also require active participation by the consumer who may need to provide evidence. If the claim goes to trial, the consumer may need to give oral evidence under oath. The consumer owes duties to the court, and it is not easy to unilaterally stop proceedings once they are issued. In addition to the commitment, litigation also comes with risks. If the claim fails, the claimant may be ordered to pay the defendant's legal costs, leaving them worse off than if they had not joined the litigation. It is very important that consumers are aware of these risks before they enter into litigation.

Advertising for litigation is not a new phenomenon. It has been permitted since 1986 in one form or another. But recent years have seen a significant increase in this practice. Furthermore, the tone and content of adverts have become far more direct and emotive. Like many businesses, claimant law firms are increasingly using social media for highly targeted adverts based on browsing history. Claimant law firms may also encourage "rapid onboarding", whereby consumers contractually agree to join a claim in a very speedy interaction where the consumer may not have had a proper opportunity to consider risks.

The patchwork of regulation that exists in the legal advertising space is not always diligently enforced and the existence of multiple regulators has created an environment in which it is difficult for the public to know who can take action on their behalf if they are misled into joining a claim. Unlike with buying goods and services, litigation is a process that imposes duties on the participants. Moreover, and unlike most other goods and services that are advertised to consumers, it comes with significant risks. Accordingly, not only should consumers have statutory protection to ensure that advertising is not misleading, but those protections should also be at least as strong, if not stronger than for purchasing other goods and services.

Access to justice is a good thing. There is no doubt that legal advertising has the potential to alert the public to wrongs about which they might otherwise not be aware and can present a route to recovery that might otherwise be inaccessible. When law firms and claims management companies ("**CMCs**") advertise claims in a way that oversells the "justice" and undersells the inevitable risks, they put consumers in a perilous position. Law firm advertising should be accurate and transparent. In an environment where a greater number of consumers are being exposed to the risks of litigation through joining claims, it is important that they are aware of the risks that come with joining a claim and that there are clear regulations and consistent enforcement. This is especially so where consumers are increasingly responding to adverts that "sell" inflated recoveries, understate risks and where no advice (beyond a brief FAQ page on a website) is generally being given at the point the individual is onboarded.

Chapter II of this paper will explore the state of law firm advertising in the UK; Chapter III will look at the changing focus of law firm advertising; Chapter IV will describe the problem of advertising that understates and conceals risk and overstates potential benefits; Chapter V will dive into messaging tactics used to attract claimants; and Chapter VI will discuss regulatory action taken in response to concerns about advertising. Chapter VII will include a series of recommendations to ensure that law firm advertising is conducted responsibly, and consumers are protected.

The state of law firm advertising in the UK - key dynamics

It is impossible to miss claimant law firm adverts across a range of media: TV, radio, and targeted social media adverts. The advent of class actions has made claimant law firm advertising more pervasive and aggressive, as claimant law firms seek profits and attempt to increase class sizes.

Claimant law firms advertise for the same reason as any other business: to sell their services and increase income. Without clients, they cannot make money. Some of the key dynamics in claimant law firm advertising are explored below.

Law as a Business Model

Prior to legal advertising becoming prevalent, individuals would either have had a pre-existing relationship with a lawyer—the same lawyer who drafted their mother's will or arranged the conveyancing for their first home—or they would approach a lawyer because they had a specific need –they had suffered an injury or desired inheritance tax planning advice. On that dynamic, business "comes in" to the lawyers; the service is provided by a lawyer where there is a trusted established relationship, and the service is provided in response to the demands of a client.

Proactive advertising by the law firm reverses this dynamic as the lawyer overtly seeks to contact new potential clients and is "selling" his or her services or a particular recovery opportunity. A further type of advertising is for a specific claim, rather than for more generic services. Increasingly, the claim being advertised, or "sold", may not relate to an alleged loss that the person was even aware of having suffered. The most obvious example of this is a data or cookie policy breach claim where the "loss" event may not be obvious, nor the damage "felt" in the traditional way.

Consumers in this scenario will typically have had no prior experience with litigation and so will often have no background knowledge of the process, potential unpredictability, and risks involved. In these circumstances, there is a power imbalance and informational asymmetry between the advertising lawyer or CMC and the customer. Legal services are increasingly depersonalised, further reducing the likelihood of a pre-existing trusted relationship between the consumer and the law firm. The approach in these claims can be a considerable distance from the traditional lawyer / client relationship which is the backdrop to the current regulatory system. Accordingly, tensions can arise and the customer is even more reliant on adverts being accurate, as explored more fully below.

Much of the advertising by claimant firms is consumer-facing, and -- like other industries -- claimant law firms put careful thought into making the adverts enticing.

Consumer Protections in Other Areas

As noted in the introduction, consumers have statutory protection in a range of areas, including when purchasing products from retailers. Those basic statutory protections are further enhanced for certain products and services: insurers, banks, lenders, and financial advisers dealing with retail clients/consumers are held to a higher standard than when dealing with business-to-business and must clearly explain to consumers the risks associated with their financial products.[1] This is done by way of a brief key information document which, in the case of packaged retail and insurance-based investment products (essentially any financial product where the amount repayable to the retail investor is subject to fluctuations in the performance of assets not directly purchased by the retail investor) must be no longer than three sides of A4, contain certain basic information and be provided to the retail customer in "good time" before any transaction is concluded. Detailed rules apply to the content and presentation of the key information document. Some financial products are prohibited from being sold to consumers altogether.

[1] PRIIPs disclosure: Key Information Documents, FCA (https://www.fca.org.uk/firms/priips-disclosure-key-information-documents)

The Financial Conduct Authority's ("**FCA**") new "Consumer Duty", came into force in July 2023 and imposes a duty on market participants to put "customers in a position where they can make informed decisions; where they are presented with suitable products and services for their individual needs; and where they receive fair value for those purchases." The FCA acknowledges that consumers are increasingly "making complex choices about debt, mortgages, pensions, investments, and other products, often on a smartphone" and so "it's more important than ever to ensure they have the key product information, such as its features and charges, easily accessible and understandable."[2] Similarly, joining a claim is a complex choice. That choice is increasingly being made online, often in a casual way at the same time as scrolling through Instagram or Twitter. The choice to join a claim should be treated with similar seriousness as investing in a fund. It gives rise to arguably greater consumer protection issues and should therefore attract similar consumer protections. In principle we consider that law firms and CMCs should owe equivalent duties to their consumer clients as is set out in the new Consumer Duty.

The "selling" of claims through claimant law firm advertising is not subject to the same level of prescriptive legislation, even though consumers can be exposed to direct risks through litigation.

Consumer protection legislation safeguards consumers by giving them enhanced rights vis-à-vis their corporate counterparts. But consumer protection legislation is not just about protecting the consumers: a clear framework of safeguards gives consumers confidence to make purchases, thereby encouraging trade and helping sellers. Many sellers would not engage in practices that are prohibited in any event, and so a properly regulated environment assists reputable businesses by pushing out unscrupulous players and improving perception of the sector. Put differently, proper regulation of claimant law firm advertising would benefit the claimant law firms as well as consumers.

A key finding in our research is that consumers are not adequately protected from misleading claimant law firm advertising. Furthermore, and significantly, there is inconsistency in regulation as between different types of market participant in the claims sector. These two facts point to a clear need for bespoke legislation to protect claimants and rationalise the regulatory environment for claims advertising.

CMCs, regulated by the FCA, are subject to prescriptive rules when it comes to selling/advertising their services.[3] However, law firms and solicitors are subject to different rules and enforcement by the SRA and the Advertising Standards Authority (the "ASA"). Those rules are principle-based and are not generally prescriptive. There is no obvious reason why the same underlying conduct should be subject to different regulation merely owing to whether performed by a CMC or a law firm. Why should advertising an investment fund which involves potential downside risk and long-term exposure be more onerously regulated than advertising a claim which also brings significant risks?

"Access to justice, ... is a public good and should be encouraged".

Types of Litigation Advertising

In the context of litigation and mass claims advertising, adverts concern either litigation services generally or advertising for a specific incident. This is a key distinction and is worth delving into. When "selling" litigation for a specific incident, the informational asymmetry between the claimant law firm and the consumer is exacerbated as the claimant law firm will have investigated the claim. In contrast, the consumer may be hearing of the "opportunity" for the first time. Furthermore, as the adverts entice consumers to join court proceedings, which come with risks, it is even more important that advertising is accurate.

[2] What firms and customers can expect from the consumer duty and other regulatory reforms, FCA (https://www.fca.org.uk/news/speeches/what-firms-and-customers-can-expect-consumer-duty-and-other-regulatory-reforms)
[3] CMCs: how we will authorise and regulate firms, FCA (https://www.fca.org.uk/news/speeches/what-firms-and-customers-can-expect-consumer-duty-and-other-regulatory-reforms)

America is thought of as the home of lawyer advertising. But it has not always been that way. It wasn't until the late 1970s that the U.S. Supreme Court upheld the right of lawyers to advertise their services in *Bates v State Bar of Arizona*[4]. That ruling identified several concerns and detrimental effects caused by lawyer advertising. Although a U.S. case, the policy concerns apply equally to the UK.

The lead appellant, John Bates, argued that he needed to be able to advertise for his business model to be viable, primarily because his business focused on low-value uncontested claims that relied on volume to be profitable. At the time, Arizona state law banned lawyers from advertising. Mr. Bates advertised his services, leading to disciplinary proceedings, and the matter went all the way to the Supreme Court in 1977.

The State Bar of Arizona argued that lawyer advertising:

— undermined professionalism;
— was inevitably misleading because of the individualised nature of legal services;
— adversely affected the administration of justice by stirring up litigation;
— would increase overhead costs of the profession which would be passed onto consumers in the form of increased fees; and
— would adversely affect the quality of legal representation.

The Bar also argued that that there would be difficulties enforcing anything other than a ban.

It was argued that advertising would "undermine the attorney's sense of dignity and self-worth", "erode the client's trust in the attorney" by exposing an economic motive for representation, and "tarnish the dignified public image of the profession". Ultimately, the state bar argued then -- as many might still today -- that "the hustle of the marketplace" would "irreparably damage the delicate balance between the lawyer's need to earn and his obligation selflessly to serve". The court looked to the UK and stated that – at that time – "Early lawyers in Great Britain viewed the law as a form of public service, rather than a means of earning a living" and that they "looked down on "trade" as unseemly."

The court ruled in favour of Bates, holding that adverts were commercial speech and therefore protected under the First Amendment.

[4] Bates v State Bar of Arizona 433 U.S. 350 (1977)

Litigation Services Generally

Claimant law firms will frequently advertise their expertise in particular types of claims, such as employment disputes or data breaches. These adverts are selling a "service"; they do not relate to a particular incident. The aim is that persons in need of those services—now or in the future—will remember the advert. The advertising also helps to build a brand that will influence consumer choices. Advertising also has a role in creating demand—this is essential to the profitability of claimant law firms and CMCs. The examples given here are representative of this type of advertising which details services to be provided, but does not refer to specific incidents.

'No win no fee Employment solicitors' / Tom Street & Co / Do I Have A Case? / (https://www.doihaveacase.co.uk/employment-law/)

'Specialist Personal Injury Lawyers' / Slater + Gordon / Slater and Gordon UK Limited / (https://www.slatergordon.co.uk/personal-injury-claim/employers-and-public-liability-campaign /)

'Flight Delay Compensation' / Bott + Co / Bott and Co Solicitors Ltd / (https://www.bottonline.co.uk/flight-delay-compensation/claim-guides/how-much)

'Data Breach Cases' / Evans Hughes Ltd / Data Breach Claims / (https://data-breach.com/)

Advertising for a Specific Incident

A different type of advertising, and one that brings higher risks for consumers, is where a claimant law firm or a CMC advertises in relation to a specific incident. These are typically large incidents where multiple people may have been affected, such as a significant data breach, a product recall, or allegations that a particular company paid employees unequally.

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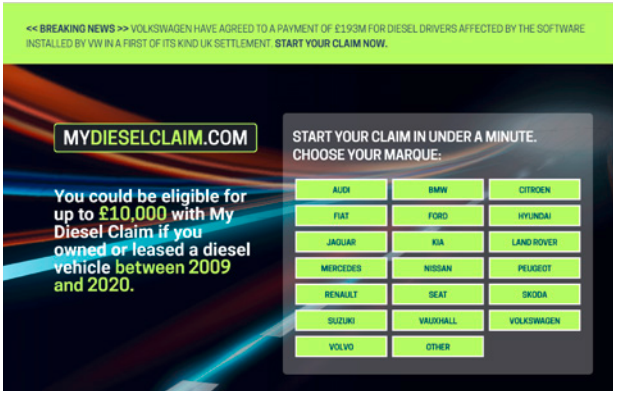
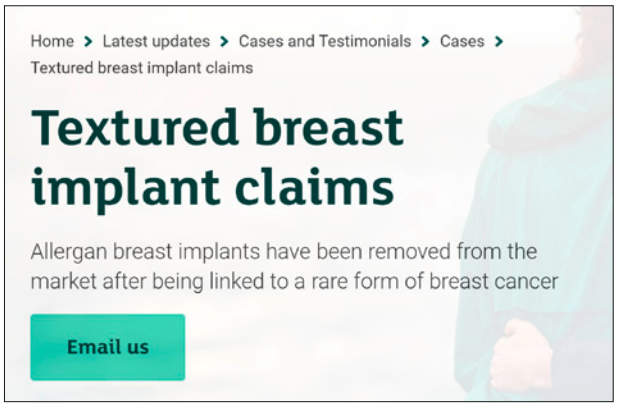
Consumers are drawn into a claim which is being sold as a valuable "opportunity". They may not be told about the downside. On the other hand, the law firm has spent a lot of time looking at the potential claim, the circumstances giving rise to it, and the potential to derive a financial benefit from running it.

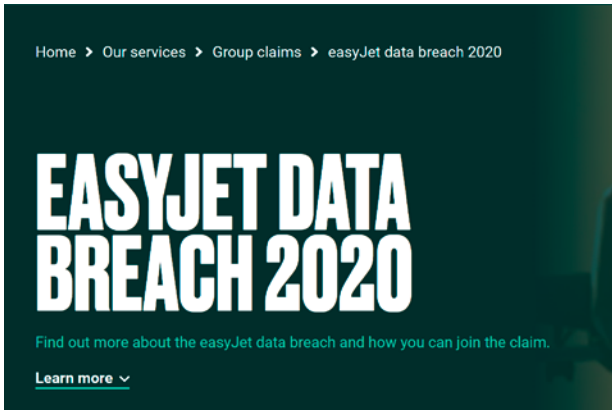
Examples of this sort of advertising are visible below. The bold capitalised text, often written in a colour in high contrast to the background, grabs attention and draws the potential claimant in. The use of a specific (and frequently unsubstantiated) figure, and the opportunity to receive that sum by "starting your claim in under a minute" is enticing. Many of the claims will be sold as a chance to "join others like you" which creates a sense of community and purpose beyond the potential for a financial recovery. Some claims "sell" the chance to "make a difference" to the "environment" or "our children".[5]



'MyDieselClaim – Start Your Claim in Under a Minute' / Pogust Goodhead (a trading name of PGMBM Law Ltd) (https://mydieselclaim.com/)



'Textured breast implant claims' / Leigh Day (https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/textured-breast-implant-claims/)



'easyJet Data Breach 2020 – Find out more and join the claim' / Leigh Day (https://www.leighday.co.uk/our-services/group-claims/easyjet-data-breach-2020/)

[5] My Diesel Claim, Pogust Goodhead (https://mydieselclaim.com)

Claimant Law Firm Advertising: The Conflict Between Duties and Incentives

Behaviour is driven by incentives. Lawyers must comply with their ethical rules, but they are also businesses with profit motives.

There is a clear tension between, on the one hand, the duties that the advertising claimant law firm[6] or CMC[7] owes to potential clients, and, on the other hand, their incentives to make profits. If the advertising claimant law firm or CMC cannot win new clients and attract potential claimants into a group claim, then their business will not be viable. Informing a potential client of risks in litigation may discourage them from joining a claim to the financial detriment of the claimant law firm. This conflict risks encouraging misleading adverts and consumer detriment until claimant firm advertising is bounded by appropriate safeguards.

Tension Between Ethical Duties And Incentives

The tension between duties and commercial incentives is particularly acute where claimant law firms are advertising in relation to a specific incident rather than advertising litigation services. Adverts for the former seek to persuade potential clients to join a specific claim. The advertising claimant law firm or CMC is incentivised to "sell" the claim; **the claim is the product**. This tends towards:

- **overstating the positives,** such as the sums that are likely to be recovered, or perhaps overemphasising the potential culpability of the proposed defendant, or even stating that the defendant is "guilty" where there has been no finding on liability;
- **understating the difficulties in the process,** for example, that the defendant may have a valid defence, that the financial security of the defendant cannot be guaranteed, that the consumer claimant may need to personally give evidence under oath, or that the court process is unpredictable and can take many years;
- importantly, **underemphasising that there may be risk in joining the claim,** in particular, if in the event the claim fails the consumers who join the claim may be ordered to pay the defendant's legal fees—sums which can run to many millions of pounds; and
- **omitting key information** such as the details of the insurance policy that is intended to protect against the risk of paying the defendant's legal fees (known as ATE insurance).

The overstatement of benefits and understatement of challenges and risks may not be deliberate, but the profit-making environment creates incentives to try and persuade consumers to join a claim, and incentives drive behaviour.

An individual who sees the advert is told that he or she is "entitled" to receive money. The advert will often specify a figure that could be recovered in order to encourage uptake; a figure may be included in the advert even if the scope of the recovery is unclear. Words like "scandal" are used to describe the facts giving rise to the claim. The "you are entitled" message can be supported by use of the term "guilty" to describe the potential defendant and "victim" to describe the potential claimant before a trial on liability has even begun. Regulated professionals should be slow to use hyperbolic language, but sometimes claimant firms use such language as part of their regular advertising. Ascribing "guilt" is acceptable where it has been admitted or proven, but not otherwise.

These dynamics are even more acute when there has been an incident whereby claimant law firms and CMCs are competing to persuade consumers to join a specific claim (e.g., a large data breach or product recall event). The prospect of significant returns in bringing a class action combined with competitive pressure from other claimant law firms incentivises even more enticing adverts that understate risk and overstate reward. These dynamics put consumers at increased risk of harm.

> Competition with other law firms and CMCs encourages "rapid onboarding" of clients. This process generally begins with what is advertised as an "eligibility check", performed entirely online and facilitated by a bot, with no human interaction. Rapid onboarding encourages quick sign-up without the consumer having the opportunity to ask questions that would be answered by a lawyer or experienced claims professional. Onboarding may even be outsourced to another business which may not be regulated (whether by the FCA or the Solicitors Regulation Authority ("**SRA**")). These businesses brand themselves as "litigation support services"; while SRA-regulated law firms and solicitors are subject to specific client engagement rules, these unregulated businesses are not.

[6] SRA, Principle 7 (https://www.sra.org.uk/solicitors/standards-regulations/principles/)
[7] FCA Claims Management Conduct of Business Sourcebook ("CMCOB") 2.1.1 (in addition to the high-level FCA Principles, particularly PRIN 2).

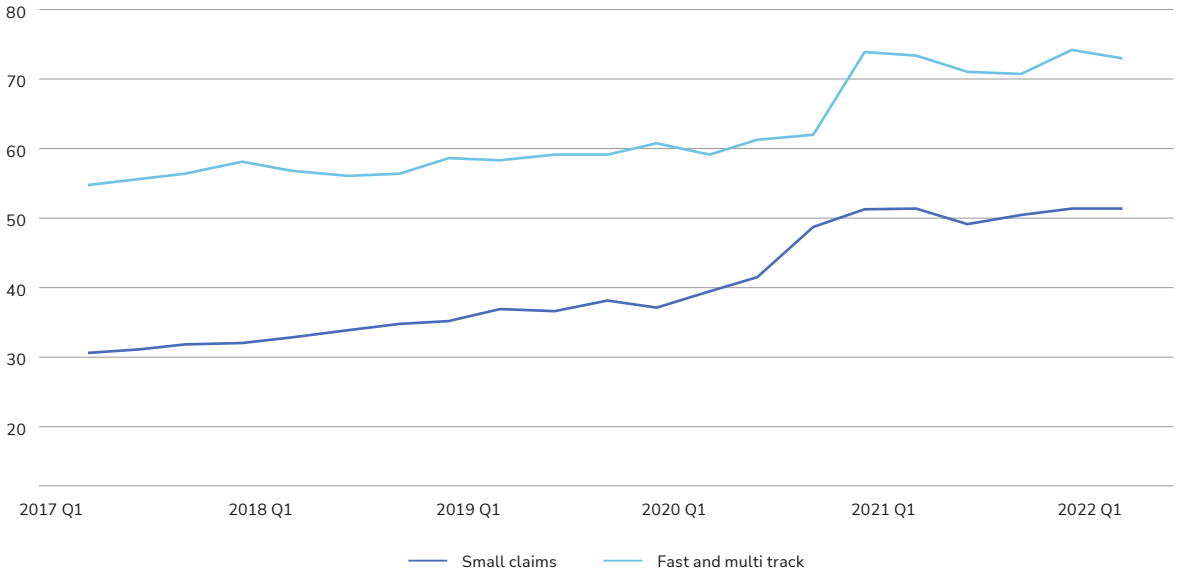
The Changing Focus of Claimant Law Firm Advertising

Advertising by claimant law firms and CMCs is driven by the market: what services can they sell in order to drive income and make profits? Market forces and the consumer response to them are natural and important elements of a functional economy. However, as noted above, financial incentives can discourage claimant law firms from acknowledging risks; an advert that identifies risks will be less enticing than one that does not. This paper in later sections, identifies examples of adverts that do not properly acknowledge the risk of paying the defendant's legal fees if the claim fails, illustrating that consumers are suffering from inaccurate information. Risks may be identified in the small print of documents subsequently provided by the claimant law firm, but they should also be identified in the advert or the advert is potentially misleading.

In recent years, much advertising by claimant law firms and CMCs has focussed on Payment Protection Insurance ("**PPI**") recovery, personal injury claims, and whiplash claims, with familiar wording like "Have you had an accident at work that wasn't your fault?" Recent procedural changes have reduced the number of personal injury claims being brought. For example, the payment of referral fees in claims for damages following personal injury or death has been banned since April 2013.[8] Furthermore, a self-service online portal was introduced for claims seeking less than £5,000 to encourage resolution without legal representation. Potentially the most significant change is that under the new law the insurer of the at-fault vehicle will only have to pay for the claimant's legal representation if: (i) the total compensation amount for pain, suffering, and loss of quality of life exceeds £5,000; or (ii) the total compensation amount for pain, suffering, and loss of quality of life together with lost wages exceeds £10,000. Thus, low-value whiplash claims will effectively be unsupported by insurance.

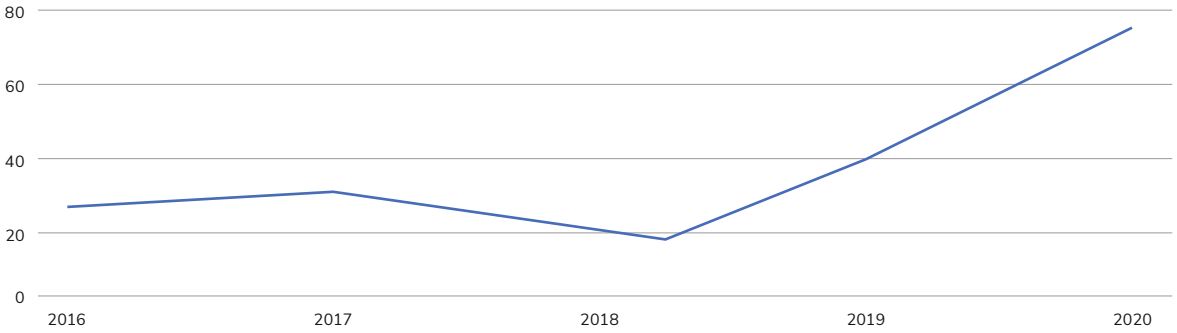
These changes have contributed to a very significant reduction in the number of personal injury and whiplash claims. That said, the UK's civil courts are increasingly stretched.

Figure 1: Average number of weeks from claim being issued to initial hearing date[9]



[8] Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 56.
[9] Civil Justice Statistics Quarterly: January to March 2022, GOV.UK, Table 1.5 (https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2022/civil-justice-statistics-quarterly-january-to-march-2022)

Figure 2: Group claims filed in the UK, 2016-2020



In Q1 2017 it took an average of 55 weeks for a fast/multi-track case to proceed to trial. By Q1 2022 the timeline had increased to 73 weeks, an increase of 33%. COVID likely had an impact, but there was a clear upward trend before COVID, and there has not been a significant reduction post exit from lockdown. Delays in the period to trial frustrate all parties and degrade the utility of our civil justice system.

While certain types of claims are in decline, the UK is also seeing an increase in the number of U.S.-style class actions being filed. Group litigation of all types has the potential to impact significant percentages of the public. The competition class action against Mastercard seeks damages of c. £10bn, being roughly £220 for some 45 million British adults; far more than half of all people in the UK. These group claims are typically claims brought on behalf of consumers. In the Mastercard claim, the class representative is Mr. Merricks CBE, former chief ombudsman of the Financial Ombudsman Service.

As of June 2023, it was estimated that around 340 million UK adults had been joined to competition class actions filed in the Competition Appeal Tribunal, around five times the total UK population.[10] Competition class actions are only one of several types of collective action available in the UK that are being used to bring claims across a suite of sectors from financial services to the automotive industry.

The above graph shows the increasing number of group claims (defined as being any claim including 5 or more claimants) filed in the UK over the 5 years to 2020. In 2020 there were 3 times the number of group claims filed as in 2016, and between 2018 and 2020 the number of claims filed increased by c. 370%.

Meanwhile, lawyers who earn their living from litigating are increasingly busy. According to the UK Litigation 50 2020 Report published by The Lawyer, "The top 50 litigation firms in the UK generated £4.23bn from disputes in 2019/20, up 7 per cent from the previous year's total of £3.95bn". "The average amount of revenue derived from litigation among the top 50 firms was £84.6m, and 20 of the top 50 was larger than average"; "Revenue per partner varied from £400,000 at the bottom end to £6m at the top. Last year, we estimated that eight firms boasted average RPP for their litigation partners of over £4m[11]".

"Where consumers have been wronged, they should be able to easily seek compensation."

[10] CMS European Class Actions Report 2022, page 20-23 (https://cms.law/en/media/international/files/publications/publications/european-class-action-report-2022?v=3)
[11] The Lawyer UK Litigation 50 2020, pages 15, 16 and 19 (https://www.thelawyer.com/reports/uk-litigation-50-2020/)


Advance Warning
ROAD CLOSED

Advertising that Understates and Conceals Risks and Overstates Potential Benefits

Our research has shown that claimant law firm advertising consistently understates and conceals the risks of litigation and overstates the potential benefits. In brief, litigation is risky. You can rarely be certain that you will succeed, and if you lose you face the risk of paying the other side's legal costs. In large cases those costs can run to millions of pounds. The non-financial downsides may include the stress associated with giving evidence under oath in court and the many hours one may have to spend liaising with the legal team, potentially rehashing traumatic personal events, albeit these factors can be reduced in a group litigation scenario.

The benefits too are uncertain. There are no guaranteed returns. But claimant law firms sometimes suggest recovery is all but a certainty in circumstances where the defendant denies any wrongdoing – this is to attract claimants to join the litigation.

Adverse Costs

As noted above, the UK generally applies a cost-shifting regime, whereby if a case proceeds to trial the losing party will typically be ordered to pay the majority of the winning party's legal costs. When consumers join a claim,[12] they face the risk of having to pay the defendant's costs if the claim fails. For large class actions, the defendant's legal costs may run into many millions of pounds. The claimant class members are in-principle at risk to have to pay most of these costs. The examples below illustrate that this is not merely a potential outcome in the abstract.

[12] Under the UK's competition class action regime, where a claim is brought on an opt-out basis, the adverse costs risk is primarily borne by the class representative rather than the class members.

[13] Sharp v Blank [2020] EWHC 1870 (Ch) (https://www.bailii.org/ew/cases/EWHC/Ch/2020/1870.html)

[14] A third-party provider of capital to fund litigation. The individual or corporate would generally expect a return on the "investment"

Case Study 1: *Sharp v Blank* – class members being unaware of adverse costs risk

A claimant law firm brought a claim on behalf of a large group of shareholders in Lloyds TSB against five former directors of Lloyds seeking damages of £385m concerning the role of those directors in Lloyds' 2008 takeover of HBOS plc. The claim failed and the court ruled that, following the normal rule, the claimants were in-principle liable for the defendants' legal costs.

At a hearing on 29 January 2020, the court heard argument on the funding arrangements and the ATE insurance cover which had been purchased on behalf of the claimant group, which was supposed to meet any adverse costs order should the claim fail.

As is detailed in the judgment,[13] the claimants had primary ATE cover of £6.5m which could help to meet the defendants' costs. Further, the litigation funder[14] that supported the claim had provided an indemnity in favour of the claimants for adverse costs exposure in excess of £6m for a further £14.95m, bringing the aggregate cover to £21.45m. However, and underlining the scale of potential legal fees and therefore the risk in joining these claims, the defendants' legal costs exceeded £30m. In understated terms, the judge, Sir Alastair Norris, commented that "In these circumstances there is a (most regrettable) risk that individual Claimants may face a several liability for costs to the extent that it overtops their direct ATE cover."

In a striking comment, the judge also said, "It may well be that many of the 5800 Claimants never foresaw this as a real question because they thought that they were litigating risk-free. But most unfortunately that is not the case".

The parties to the litigation bear the primary adverse costs risk.[15] Those risks can be ameliorated through the use of ATE, an indemnity, or other financial products that seek to meet the claimants' exposure. As is common with insurance products, these measures are subject both to exclusions set out in the contractual language and also limits on the level of the cover. Sharp v Blank illustrates two concerning points:

— first, the ATE and indemnities may be inadequate to cover the claimants' adverse costs;
— second, claimants may not even appreciate that they faced an adverse costs risk.

Even following *Sharp v Blank*, claimant law firms and CMCs often do not draw specific attention to the risk of adverse costs. In fact, while claimant firm adverts may—in very brief language—acknowledge that adverse costs exist, they often say that the risk will be completely addressed by ATE (a common refrain of "you will not pay a penny" is used to disguise the risk). In other words, they fail to acknowledge the risk that insurance may be inadequate, or at the very least, qualified. Examples of language from adverts that fail to acknowledge the risk of adverse costs, or assert that there is no such risk, are included below.

These adverts state that the insurance products eliminate the risk of the claimants having to pay adverse costs, but this can be inaccurate. Where a consumer seeks to join a group, they normally receive a pack of information – sometimes in hardcopy, but increasingly online – stating the terms and conditions with the law firm, with the litigation funder and with the ATE provider as appropriate. These documents set out detail on the level of cover and should acknowledge that the cover to be provided may fall short of the risk. But at the point of advertising – which is when many consumers make an in-principle decision to join a claim – it is suggested that there is low or no risk.

"Advertising consistently understates and conceals the risks of litigation".

HOW DOES THE CASE WORK? HOW IS IT NO-WIN, NO-FEE?

You will receive the legal documents and the terms and conditions upon signing up. We are intending to run this case as a **group action,** meaning that we bring all our clients' cases forward together.

Should the Ford Emissions Group Litigation not be successful, as long as you have stuck to the **terms and conditions** set out, you will **not pay a penny**.

We take out an insurance policy to **protect you** against the defendants' legal costs if the case is unsuccessful.

'MyDieselClaim – FAQ – How does the case work?' / Pogust Goodhead (a trading name of PGMBM Law Ltd) / (https://fordclaimlawyers.com/)

WILL I HAVE TO PAY EASYJET'S COSTS IF THE CLAIM IS LOST?

No. You will not have to pay anything if we don't win the claim, provided that you keep to the terms of our sign up documents. This is what we mean by No-Win, No-Fee.

'EasyJet Data Breach – FAQ – Will I have to pay EasyJet's costs if the claim is lost?' / PGMBM (a trading name of PGMBM Law Ltd) / (https://theeasyjetclaim.com/)

[15] There are exceptions to this general rule, including claims brought by employees in the Employment Appeals Tribunal and in certain personal injury claims where Qualified One-Way Cost Shifting applies. There is also a general rule of no adverse costs system for "Small Claims" (claims under £10,000) in England and Wales, unless covered by the list of limited circumstances within CPR Rule 27.14.

"No-Win/No-Fee": A Misleading Term

The term "no-win/no-fee" is frequently used by claimant law firms and CMCs. It is a catchy term and suggests that there is no downside to joining a claim: i.e., "no-win/no-risk": if there is no recovery then the claimant will not need to pay the claimant law firm any money. However, the term can be misleading as it only addresses the relationship between the consumer and the claimant law firm. It does not acknowledge that the claimants may need to pay the defendant's costs if the claim fails.

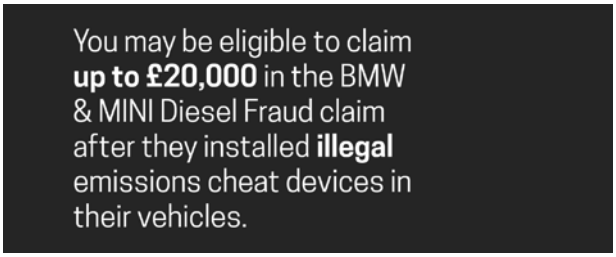
The potentially misleading nature of this term was acknowledged by the FCA's introduction of prescriptive rules to control its use by CMCs. CMCs using the term "no-win, no-fee" are required to adhere to the strict rules in the FCA's Claims Management Conduct of Business Sourcebook ("**CMCOB**").[16] They may not use the term without prominently displaying the fees that the firm charges. Where the fees are not fixed or are not ascertainable in advance, the method by which the fees would be calculated should be prominently displayed. They must also disclose where there are fees payable if the customer terminates including, the level of those fees. Details on referral fees where a third party makes payment to the advertising CMC must also be disclosed. However, even these prescriptive rules only address the customer's liability to pay the CMC's fees. They don't relate to the risk of paying the defendant's costs under the adverse costs rules, for example, by requiring the CMC to clearly explain this risk and any lacunae in the proposed ATE cover. Solicitors are subject to different—less prescriptive—rules. They are under a general duty not to mislead and are required to act with honesty and integrity in line with the SRA Principles.[17] That said, adverts by claimant solicitors frequently use the term "no-win/no-fee".

We consider that, to protect consumers: (i) the same prescriptive rules for CMCs should apply to claimant law firms; and (ii) consumers should be prominently informed of adverse costs risk, specifying anticipated defendant legal costs, ATE cover secured, and key exemptions in the ATE policy. The latter obligation should also be extended to CMCs. Without this clear information, consumers are agreeing to participate in litigation while subjecting themselves to risks of which they are unaware.

A further area of potential consumer harm is in the terms and conditions of the law firm or CMC, which can require a consumer claimant to make a payment to the claimant law firm and/or funder if they choose to leave the claim. Typically, that payment will be by reference to the claimant law firm's hourly rates and could be a significant sum of money. It seems unlikely that persons joining an advertised group claim will appreciate that there is effectively a fee in those circumstances. This is something about which a CMC must specifically warn a customer at the outset. Again, to protect consumers, similar rules should apply to claimant law firms.

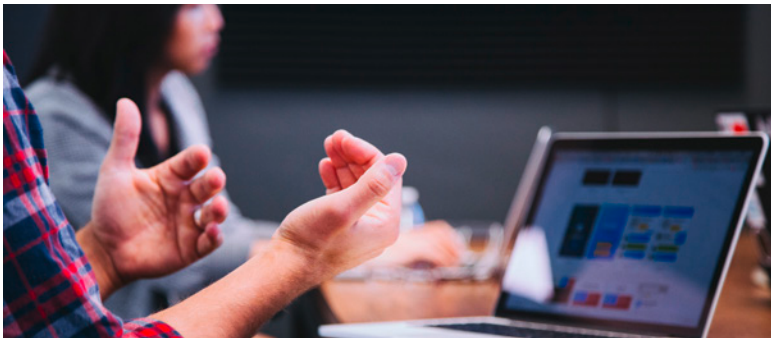
Overstating Likely Recoveries

Adverts by claimant law firms and CMCs for a specific incident are "selling" the potential claim. In order to lure in potential claimants, they may be tempted to overstate the likely recovery. Those adverts should acknowledge that litigation is inherently unpredictable, the outcome is uncertain, and any sums recoverable are also uncertain. That said, adverts typically will state a specific financial figure for the proposed recovery. The figure may be couched as "up to…", but the reason these adverts use a precise figure is obvious: the customer will see a large number and potentially be incentivised to join. This has far more impact than not specifying a figure as the potential claimant can visualise receiving a specific sum of money and possibly even what they might spend that sum on.



'BMW & Mini Emissions – compensation up to £20,000' / Pogust Goodhead (a trading name of PGMBM Law Ltd) / (https://bmwclaimlawyers.com/)

'Uber Drivers Claim – compensation up to £12,000' / Leigh Day / (https://www.driversclaim.co.uk/)[18]



[16] CMCOB 3.2.9

[17] SRA Principles, Solicitors Regulation Authority (https://www.sra.org.uk/solicitors/standards-regulations/principles/)

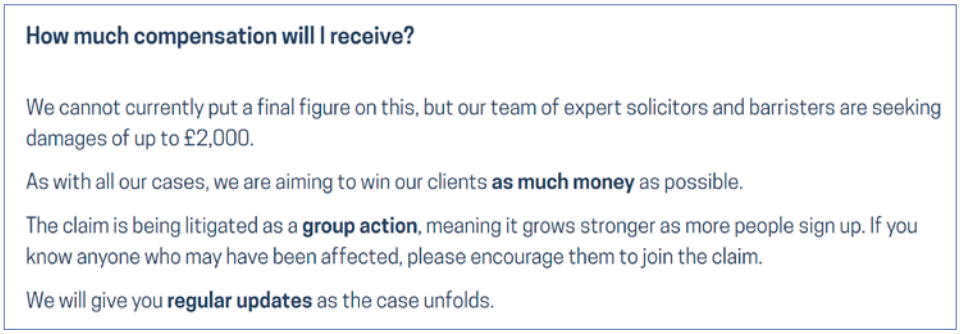
[18] Advert retrieved via The Wayback Machine (Wayback Machine (archive.org))

Case Study 2:
British Airways Data Breach – Inflated Recovery and Dissatisfied Claimants

Between June and September 2018 more than 400,000 British Airways customers had their personal data compromised or stolen. It was found that customers' full names, credit card details, and addresses were compromised during a cyber-attack.

Several claimant law firms advertised to encourage people to join a claim against British Airways, then they issued proceedings. In advertising the claim, the law firm in question suggested that those eligible for compensation would be entitled to up to £2,000.

Despite the claimant law firm positing damages of to up to £2,000 comments from clients after the conclusion of the claim suggested much dissatisfaction, at pay-outs for lower figures. The claimant law firm responded requesting that the claimants remove these comments, on the basis that the settlement agreement is confidential.



How much compensation will I receive?

We cannot currently put a final figure on this, but our team of expert solicitors and barristers are seeking damages of up to £2,000.

As with all our cases, we are aiming to win our clients **as much money** as possible.

The claim is being litigated as a **group action**, meaning it grows stronger as more people sign up. If you know anyone who may have been affected, please encourage them to join the claim.

We will give you **regular updates** as the case unfolds.

'BA Data Breach – FAQ – How much compensation will I receive?' / PGMBM (a trading name of PGMBM Law Ltd) / (https://www.badatabreach.com/)

[redacted]
2 reviews GB

3 Feb 2022

I received £130 for the BA data breach...

I received £130 for the BA data breach from these scammers! Stay away they are con men!

Reply from PGMBM 28 Feb 2022

Hi [redacted]

We are sorry you are not happy with the resolution of your claim.

Firstly, we must strongly remind you of your obligations under the terms of the settlement, in particular that you must not disclose the amount of your compensation award to anyone. We would ask that you please remove any reference to any settlement figure from your comment to protect yourself from any further action.

Trustpilot / PGMBM / complaint and reply from February/November 2022 / (https://uk.trustpilot.com/review/pgmbm.com?page=2&stars=1)

"Consumers are drawn into a claim [and] are not told about the downside".

Claimant law firm advertising will frequently state the figure being sought (i.e., the damages) but even if the claim is successful, consumers only receive the sum after payment to the claimant law firm, litigation funder and potentially others. For adverts to inform the consumer fully, they should provide a realistic worked example of the net sum the consumer is likely to receive.

Even leaving aside their own fees, claimant law firms know that they will not always achieve the potential recoveries advertised. However, where a specialist claimant law firm has brought numerous claims of a particular type such as data breaches or a particular type of personal injury, they will likely have a fairly accurate view of the likely recovery. To advertise "potential" or "optimistic" recoveries of significantly higher sums is misleading where the claimant law firm, in its experience, knows that those figures are very unlikely to be recovered.

Separately, strongly worded "reminders" from law firms on public forums not to disclose disappointing levels of recovery may chill public displays of dissatisfaction with claimant law firm conduct more generally. Claimants may be slow to criticise or complain on public forums where law firms are publicly warning of "further action". Confidentiality terms in settlement agreements are intended to protect settling parties that have been advised on those specific terms; they are not intended to stifle complaints from disappointed consumers, particularly where transparency can assist other consumers with their decisions.

Messaging and Targeted Ads

Advertising Uses Non-Financial Messaging to Encourage Claims

In addition to pointing to monetary recovery, claimant law firm advertising uses other sophisticated messaging to encourage people to join group litigation. Those messages touch upon ethical issues, such as alleged wrongdoing by the defendant. Sometimes those messages are plainly pertinent, such as where wrongdoing is clear, has been admitted, or has been proven. At other times the messages are more questionable.

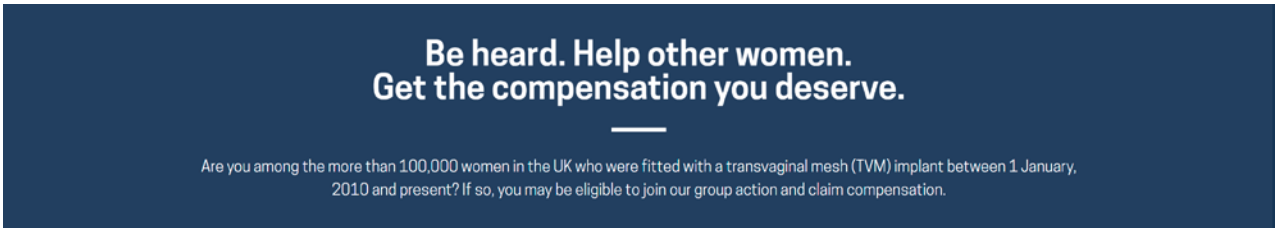
Case Study 3:
Dieselgate – Emotional Messaging

Following investigations by U.S. regulators, Volkswagen admitted the use of "cheat devices" in vehicles containing its EA189 diesel engine. A "cheat device" is able to detect when a vehicle is subject to laboratory emissions testing and operates the vehicle in a lower emissions mode when it detects a test. Several other vehicle manufacturers have also been the subject of regulatory scrutiny.

Claimant law firms sued Volkswagen in the UK relating to these allegations. They also brought claims against several other manufacturers. In their advertising to persuade people to join these claims, claimant law firms suggest that those other manufacturers have been engaged in the same conduct as Volkswagen. By suggesting that other manufacturers have acted as Volkswagen did, and that that behaviour is potentially leading to thousands of excess deaths each year, the claimant law firms hope to maximise the number of people that will join these claims in order to increase profits.

In some scenarios, claimant law firm advertising even suggests that there is a moral duty to join a claim:

An example from TVM advertising:



'Transvaginal Mesh (TVM) Action Group - Headline' / Pogust Goodhead (a trading name of PGMBM Law Ltd) / (https://tvmclaimlawyers.com/)

'Transvaginal Mesh (TVM) Action Group – Reasons to take action' / Pogust Goodhead (a trading name of PGMBM Law Ltd) / (https://tvmclaimlawyers.com/)

Examples from the Dieselgate claims:

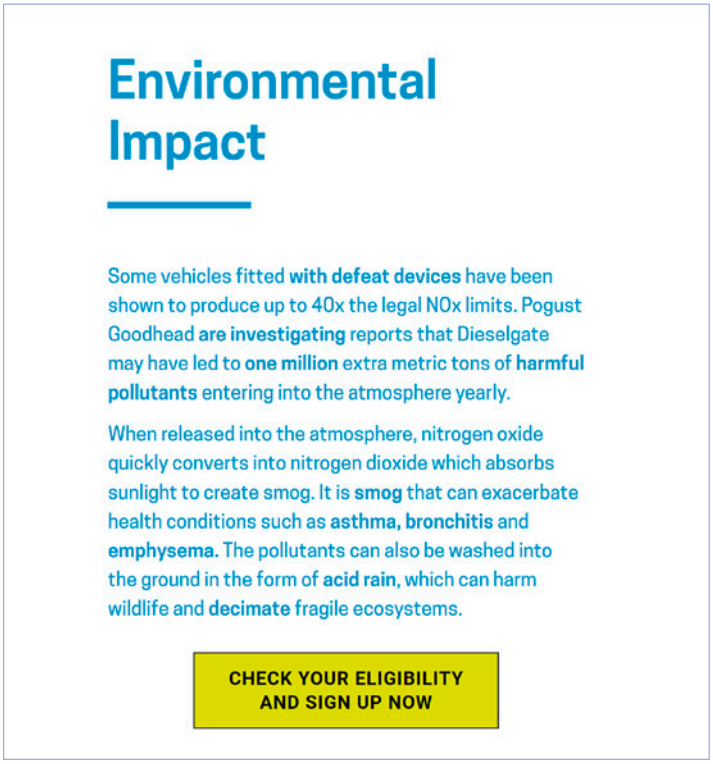
WHY IS IT IMPORTANT TO CLAIM?

We believe customers have been deliberately misled about the amount of emissions their vehicles were producing, and think customers should be compensated for the following reasons:

1. The increased Nitrogen Dioxide levels are harmful to children, adults, and the environment
2. Customers may have experienced higher fuel bills and maintenance costs
3. The performance of these vehicles was negatively affected.

You can help the environment while making money by claiming back from your vehicle manufacturer. Input your vehicle model at the top of this page and start your claim in under a minute.

'MyDieselClaim - FAQ – Why is it important to claim?'/ Pogust Goodhead (a trading name of PGMBM Law Ltd) / (https://mydieselclaim.com/)



'MyDieselClaim - Environmental Impact of defeat devices' / Pogust Goodhead (a trading name of PGMBM Law Ltd) / (https://fordclaimlawyers.com)

"Regulated professionals should be slow to use hyperbolic language".

Advertising on Social Media

Claimant firms are sophisticated users of social media. The big players have had Twitter, Facebook and Instagram accounts for many years. Like many businesses, claimant law firms and CMCs are attracted to social media because it enables highly targeted advertising, reaching the precise people that they seek.

In this connection there is regulatory inconsistency. Lawyers may not make unsolicited "cold-call" approaches to members of the public (except for current or former clients).[19] Although social media advertising is attractive precisely because it can be targeted, the SRA's Guidance in this area treats social media advertising in the same way as billboard or radio advertising,[20] i.e., that it is not targeted and is therefore permitted. Claimant law firms and CMCs are clearly permitted to use social media in this targeted way, but it is counterintuitive to bracket social media with old media which operates indiscriminately.

Certain members of the public choose to "follow" or "like" a law firm's account. In such cases, it would appear that the individual has invited the approach/notice of a new claim which they may be eligible to join. Law firms engaging in this sort of social media advertising is perhaps less problematic than firms deploying unsolicited, algorithm-driven adverts that appear in a person's "feed" based on their specific characteristics, or vulnerabilities, but it does not come without risk. Social media ads are designed to be brief and "clickable", not to advise or inform. This character limit makes it more difficult to explain risks. The FCA's guidance in this space is seven years old[21] but does acknowledge that "following" and "liking" ought not to constitute "an established client relationship" for the purpose of their Conduct of Business Rules, for example. We have not identified guidance from the SRA on this issue.

Advertising Through Search

Claimant law firms, like other advertisers, bid to display their ads in an advantageous place among Google search results for a target word or phrase. The ultimate goal is for a firm's ad to land at the top of the first page of results. Google sells space on a pay-per-click pricing model.

Using a tool developed by Semrush (a platform used for keyword research and online ranking data), we performed a snapshot analysis of how claimant law firms were using this system. Conducted in May 2022, the analysis revealed that certain claimant law firms in the UK are paying for ads on hundreds of different search terms relevant to their business offering, such as "no-win/no-fee" or "accident claims lawyers". At the time of the analysis, firms were paying c.£20 per click on terms such as "personal injury claim", "personal injury lawyer", "bicycle accident claim" and c.£15 per click for "asbestos claims", and "mesothelioma claims", and between c.£1 and c.£5 for "data breach claim", "MyDieselClaim", DieselGate scandal", "textured breach implants", "whiplash injury", "easyJet data breach" and "Essure". The data shows that the search term "data breach claim" had the highest "competitive density" (the level of competition between advertisers bidding on the analyzed keywords) among a list of approximately 40 sample search terms.

There is nothing improper in an advertiser paying per click, but our Semrush exercise showed that surprisingly large sums are paid for certain clicks, illustrating how lucrative the legal work can be and therefore the importance of the advertising.

[19] SRA Rule 8.9
[20] SRA Guidance, Solicitors Regulation Authority (https://www.sra.org.uk/solicitors/guidance/unsolicited-approaches-advertising/)
[21] Finalised Guidance 15/4: Social media and customer communications, FCA (https://www.fca.org.uk/publication/finalised-guidance/fg15-04.pdf)

Advertising Claims can Divert Money From Compensation Schemes Away From Consumers

The recent decision of *Bott + Co Solicitors v Ryanair*[22] applied a low threshold for imposing a "solicitor's lien". A solicitor's lien allows a solicitor to deduct monies owed by its client from sums recovered in litigation even where sums are recovered without formal recourse to court). Where a defendant pays a sum direct to the claimant, bypassing the claimant law firm and the claimant fails to pay its law firm, the law firm can seek its fee from the defendant. As explained below, this can lead to perverse incentives in advertising "claim recovery" services and cause problems with voluntary redress schemes.

There is regulatory inconsistency on this issue. CMCs are required to inform customers where they can make claims to a statutory ombudsman independently and for free.[23] There is no such explicit obligation on claimant law firms. By majority, the Supreme Court in Bott stated that it could be "strongly argued" that a reputable lawyer should inform prospective clients of free alternatives for seeking compensation, but there is no clear rule to that effect. The Bott court noted that "in so far as it is thought that a system of online compensation is being abused by solicitors to charge unnecessary fees, this would be a matter for the Solicitors' Regulation Authority to investigate."[24]

Applying a low threshold to the "significant contribution" test (detailed below) encourages claimant law firms to advertise for claims in the hope that they will make a windfall if the corporate decides to impose a voluntary direct redress scheme. Given the impact of this financial incentive, it is very important that consumers are made fully aware of any voluntary redress scheme and don't unnecessarily use the services of a claimant law firm or CMC that will charge a fee in circumstances where the corporate will make a full payment to the consumer without deduction of any fees.

When Lawyers Abandon Claims

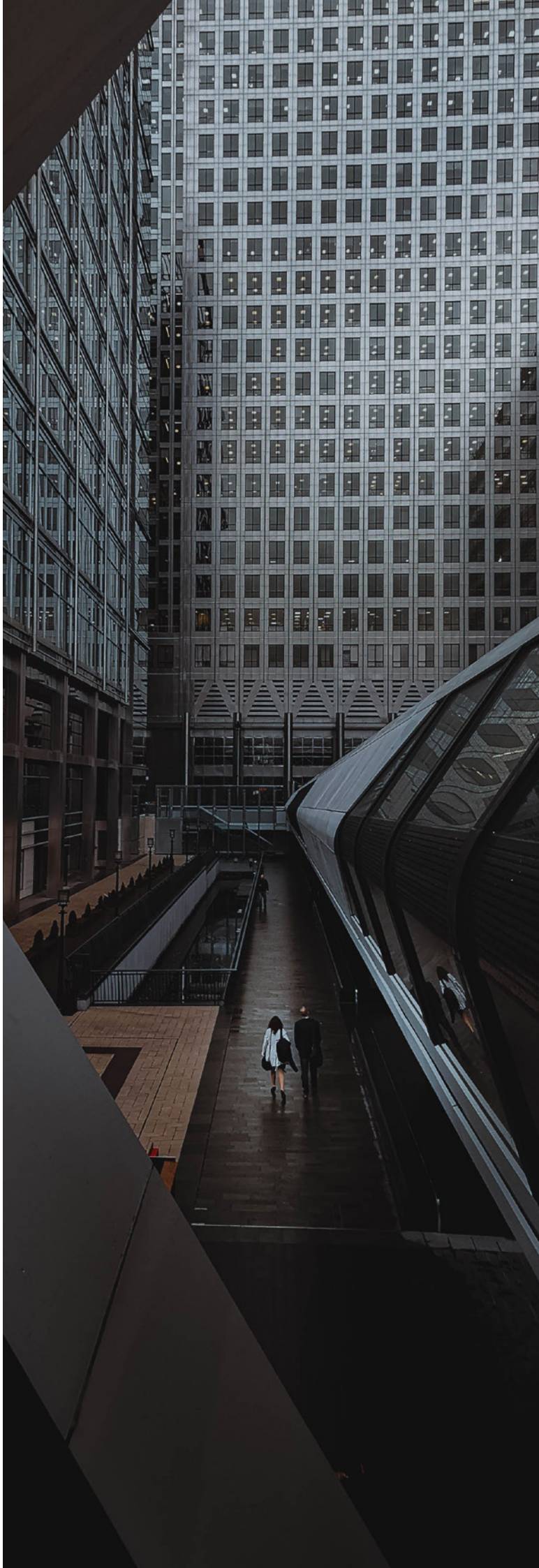
Another risk facing claimants when they join a claim on a "no-win, no-fee" basis, is that the lawyers who drew them in may subsequently decide to abandon its claim. In that situation, claimants who thought they had joined a claim with no risk, may find themselves in a perilous position, either to continue unrepresented or withdraw from the litigation and potentially face the adverse costs.[25]

[22] [2022] UKSC 8 ; Case Comment: Bott + Co Solicitors v Ryanair DAC [2022] UKSC 8 – UKSCBlog (http://ukscblog.com/case-comment-bott-co-solicitors-v-ryanair-dac-2022-uksc-8/)

[23] CMCOB 3.2.7

[24] Bott + Co, para 98

[25] claimants do not bear adverse cost risk for personal injury claims.



Case Study 4:
Primodos

The recent High Court judgment in *Sarah Jane Wilson & Others v Bayer*[26] highlighted the very significant disappointment that claimants can experience when reality falls short of expectations.

The case concerns a hormone-based pregnancy test called Primodos that was widely used in the UK in the 1960s and 70s until it was withdrawn from the market in 1978. Proceedings were initially brought in 1977 by women (and on behalf of children) who suffered injuries. Those proceedings were later discontinued with leave of the court and left open to claimants to reraise the actions where subsequent scientific developments or significant changes in circumstance occurred. The Wilson proceedings progressed again in the last three years by two lead claimants on behalf of 231 others. The claimant laws firm attracted people to the claim using emotive language such as the following:[27]

> "We are committed to doing everything in our power to make sure those responsible for pain and suffering caused are held to account.
>
> "This is not just about compensation for the victims; this has been a fight for recognition and redress for people who have suffered heartbreak for decades."

A High Court hearing in March 2022 addressed procedural issues relating to the claimant law firm withdrawing from the claim. Forty-eight of the claimants chose to "discontinue", i.e., unilaterally terminate their claims. In contrast, 183 claimants wished to continue with their claims and the claimant law firm was terminating its retainer with them. The court permitted the claimant law firm to step back from representing these parties. In doing so, the court commented that the firm's "initial enthusiasm for pursuing the litigation" had "since waned".[28] The court observed that as a consequence of its decision, the claimants (some of whom were disabled) who wished to continue with the litigation would "find themselves in the invidious position of facing the challenge of progressing their claims in person unless and until alternative representation can be found and funded". Indeed, many individual claimants expressed "acute and well-articulated disappointment" with the firm who many perceived had actively encouraged them to join the litigation "only to be let down and abandoned at a late stage".[29]

The costs order in these proceedings confirms that the discontinuing claimants were held liable for the defenders' costs. This result is a reminder that in the class action context, when a law firm's enthusiasm for the litigation wanes[30] (and presumably where the clients were represented on a "no-win/no-fee" basis), clients can be left unrepresented and on the hook for adverse costs that they were not told were possible, and the court with the challenge of case-managing dozens of litigants in person.

[26] [2022] EWHC 670 (QB) (https://www.bailii.org/ew/cases/EWHC/QB/2022/670.html)
[27] Advert retrieved via The Wayback Machine (Wayback Machine (archive.org))
[28] The court was unable to explain the reasons, observing that they were protected by legal privilege.
[29] We do not suggest that the claimant law firm did not do their best for their clients, but the comments from the judge highlight a very real difference between client expectation and outcomes.
[30] As described by The Hon Mr Justice Turner of PGMBM at paragraph 6 of the judgment Wilson & Ors v Bayer Pharma AG & Ors [2022] EWHC 670 (QB) (23 March 2022) (bailii.org)


Tolbooth
Music & Arts Venue
Tourist Information
Smith Art Gallery
Cowane's Hospital
Back Walk

Regulatory Action

Regulation of advertising by claimant law firms and CMCs is piecemeal and evidence of regulatory enforcement is limited. Regulators should take a more proactive and robust approach to mitigating the potential for harm, especially the potential financial harm, to which claimants are exposed when they join claims on a "no-win/no-fee" basis.

Current Scope of Regulatory Action

The Advertising Standards Authority (the "ASA") is the UK's independent advertising regulator. It monitors and responds to complaints regarding adverts. The ASA has the power to ban adverts that are misleading, harmful, offensive or irresponsible, including "no-win/no-fee" advertising by solicitors ("no-win/no-fee" advertising by CMCs is regulated by the FCA[31]).

The most recent public guidance published by the ASA on this topic is from January 2010, more than a decade ago and long before the FCA assumed regulatory authority for the use of the term by CMCs.[32] The guidance states that the term "no-win/no-fee" can misleadingly imply that "No Win, No Fee" means "No Win, No Cost" as under such schemes clients may be required to pay some costs such as disbursements, the taking out of ATE, or the other side's legal costs if they lose, and that "the ASA has upheld complaints against firms claiming '"No Win, No Fee"' because, unqualified, it implied the client would be liable for no costs whatsoever."

In 2014, the ASA published a news alert following a report published by the Legal Ombudsman ("**LeO**") which revealed that over the prior year it had ordered almost "£1m to be paid out to resolve disputes where a consumer has received poor legal services for a 'no win, no fee' claim." The ASA went on to note that:

"In some instances, law firms have failed to conduct thorough assessments and as such have overestimated their chances of winning [a] case. As a result some lawyers have exploited loop holes in agreements with customers to offset their own financial risk, which in practice has meant that some customers, upon losing their claim, have been struck with unexpected fees.

While 'no win, no fee' arrangements are useful in helping people get access to justice, we have, in the past dealt with concerns about how they're advertised. We've banned a number of ads where the advertiser has failed to make clear and upfront where a no win no fee claim actually comes with other costs, such as a requirement to pay insurance or even the other side's legal costs, if they should lose their claim.

No-one should be misled into paying for a service. That's why the rules require that advertisers that are making no win no fee claims ensure that the commitment is genuinely without cost, or if that's not the case then they must ensure that they make clear that fees could apply."

The LeO report noted that;

"The Legal Ombudsman has begun to see cases where the fundamental promise which underpins the marketing of both CFAs and DBAs – that the consumer will not have to pay for losing cases – is being broken. Our cases show that people who have entered into 'no win, no fee' agreements have been hit with significant and unexpected costs when cases have failed. On occasions, we have also seen consumers who have won their case end up out of pocket."[33]

[31] ASA Advice Online: No win, no fee claims (https://www.asa.org.uk/advice-online/litigation-no-win-no-fee-claims.html)
[32] ASA Guidance on the use of "no win, no fee" claims in ads for claims management companies (https://www.asa.org.uk/resource/no-win-no-fee-claims.html); ASA non-broadcast advertising guidance on no win no fee claims (https://www.asa.org.uk/static/uploaded/4f1f9b87-5e6c-4dbc-a7d9b4e7847109a6.pdf)
[33] Complaints in focus: No Win, no fee arrangements, Legal Ombudsmen (https://www.legalombudsman.org.uk/media/5zon1hb1/250121-complaints-in-focus-cfa-report-v3-140103.pdf)

We have seen no recent public evidence of the SRA, the LeO, or the ASA[34] taking enforcement action for misleading use of the "no-win/no-fee" term.[35] But these issues clearly persist. *Sharp v Blank* shows that claimants were not litigating "risk free" despite thinking otherwise.

The LeO is considering complaints regarding "no-win/no-fee," albeit the way in which it publishes its enforcement activity makes it challenging to identify the scale of enforcement addressed to this type of advertising. The LeO's 2019/2020[36] and 2020/2021 overviews of annual complaints data are broken down into 5 high-level categories of complaint: (1) failure to advise; (2) delay and failure to progress; (3) poor communication; (4) cost; and (5) failure to follow instructions. The 2020/21 report summary reads: "The complaint types have remained consistent, with delay and failure to advise being the top causes of complaint, followed by poor communication, costs and a failure to follow instructions."[37] It is difficult to identify what sorts of behaviour are caught by each broad category. For example, whether "failure to advise" includes complaints regarding inflated expectations, or if "cost" means complaints that solicitors' fees are too high or if it includes complaints that solicitors have failed to advise about adverse costs risk. Based on a review of the words in the context of the reports it would seem that "costs" concerns relate simply to "high costs" rather than "hidden costs". The last time the LeO appeared to set out substantively concerns on "no-win/no-fee" arrangements was in 2014."[38]

The FCA assumed regulatory responsibility for CMCs in April 2019. In the first "Dear CEO" letter to CMC temporary permissions holders in June 2019,[39] the FCA stated:

> "There has recently been an increase in the volume of cases where:
> - CMCs are acting for their customers without getting their appropriate consent or completed letters of authority
> - CMCs are submitting letters of authority and claims in fictitious customer names
> - There is no relationship between the customer and the financial service provider receiving the claim, and
> - CMCs' financial promotions do not comply with our rules."

[34] The FCA are an exception. There is evidence of the FCA showing concern re misleading advertising by CMCs. FCA: "Widespread poor practice" in CMC advertising - Legal Futures (https://www.legalfutures.co.uk/latest-news/fca-widespread-poor-practice-in-cmc-advertising); Porfolio letter: Claims Management Companies (CMCs), FCA (https://www.fca.org.uk/publication/correspondence/claims-management-companies-portfolio-letter.pdf)

[35] ASA Advice Online, Litigation: Specious claims – (https://www.asa.org.uk/advice-online/litigation-specious-claims.html) Note – advice published in February 2020 refers to the ASA "previously" investigating complaints about solicitors who "advertised in a way that irresponsibly generated specious litigation". Nothing is explicitly said about the term "no-win/no-fee" being misleading. The notice also reiterates that the FCA is responsible for no-win/no-fee advertising by CMCs.

[36] Legal Ombudsmen Annual complaints summary 2019-20 (https://www.legalombudsman.org.uk/media/vcrpshl4/200924-overview-of-complaint-summary-final.pdf)

[37] Legal Ombudsmen Annual complaints summary 2020-21 (https://www.legalombudsman.org.uk/media/235poj2y/211129-annual-complaints-summary-2020-21-final.pdf)

[38] Complaints in focus: No Win, no fee arrangements, Legal Ombudsmen (https://www.legalombudsman.org.uk/media/5zon1hb1/250121-complaints-in-focus-cfa-report-v3-140103.pdf)

[39] Dear CEO letter: expectations of claims management companies when they act for customer, FCA (https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-expectations-cmcs.pdf)

The letter went on to note concerns around the use of the term "no-win/no-fee". Notwithstanding the rule against using the term without the appropriate caveats (that termination fees and any other charges be disclosed with the same prominence as the words "no-win/no-fee"),[40] CMCs were failing to set out the fees that the firm actually charged.

More recently, the FCA's October 2020 "Dear CEO" letter[41] to CMCs noted that misleading, unclear and unfair advertising remained a key driver of harm in the sector. Examples of this sort of advertising are said to include "consumers being given the impression they are due compensation simply because they have purchased a particular product, regardless of how the product was sold." The FCA states that "it is important for consumers to understand such information, which includes fees and the details of an ombudsman scheme where appropriate, so that they can make an informed decision whether to proceed with making a claim via that CMC, or indeed through a CMC at all." The FCA goes on to state the importance of clear pre-contractual information to ensure that consumers are aware of free alternatives. This information, in accordance with FCA Rules, should be provided to consumers in a clear single page summary. This is not an obligation that applies to law firms.

So, while the "no-win/no-fee" term risks misleading customers, the most recent public notices we have been able to find from the ASA on "no-win/no-fee" advertising is from February 2020[42] and states that the "ASA has previously investigated complaints about solicitors who advertised in a way that irresponsibly generated specious litigation."

As far as we can tell, there have been no recent enforcement activity/rulings from the ASA (or indeed the SRA) in relation to "no-win/no-fee" advertising. The most recent published advice on "misleading advertising" (which generates 70% of complaints received by the ASA each year, or about 32,000 complaints in 2021 alone) does not mention law firms, solicitors, claims management companies, or "no-win/no-fee" claims.[43]

The ASA complaints data summarises the types of complaint but only at a very high level. Complaint type is broken down into: (a) misleading advertising; (b) offensive advertising; (c) harmful advertising; and (d) "no issue". Misleading advertising is defined to include "over-exaggerations, omits key information or makes ambiguous or unclear claims in a way that's likely to confuse or mislead into making a purchase that would not otherwise have been made". It includes "pricing issues, hidden costs, and exaggerated claims." We presume that complaints related to the misleading use of the term "no-win/no-fee" would fall within this definition but it is not clear. Without more granular data being made publicly available, it is not possible to know the number of complaints generated specifically by "no-win/no-fee" claimant law firm advertising in the UK.

The most recent public reference to these topics in the ASA's annual reports is in their 2016 report, which includes a one-page section on helping claims management companies stick to the rules[44] and does not address the potential for the "no-win/no-fee" term to mislead.

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[40] FCA CMCOB 3.2.9

[41] Portfolio letter: Claims Management Companies (CMCs), FCA (https://www.fca.org.uk/publication/correspondence/claims-management-companies-portfolio-letter.pdf) (Note: at the time of writing the FCA had not published the anticipated summer 2022 Dear CEO letter.)

[42] ASA Advice Online, Litigation: Specious claims (https://www.asa.org.uk/advice-online/litigation-specious-claims.html)

[43] ASA Advice Online, Misleading Advertising (https://www.asa.org.uk/advice-online/misleading-advertising.html)

[44] ASA Committees of Advertising Practice Annual Report 2016 (https://www.asa.org.uk/static/uploaded/033eafe0-ba78-4ccf-9cbb17f7e83ec7db.pdf)

Inconsistent Regulation and Underenforcement

CMCs and law firms are subject to different rules on advertising.[45] CMCs must identify themselves as CMCs[46], prominently include information about a customer's right to make a claim themselves for free, and name the relevant ombudsman or compensation scheme.[47] As stated above, CMCs may not use the term "no-win/no-fee" without expressly disclosing the fees or termination fees that may be applicable. They also must not suggest that a more favourable outcome would be obtained by using the CMC in instances where the claim falls within the province of a statutory ombudsman and an individual can bring the claim themselves. In addition, CMCs must not claim that they can deliver a better prospect of success compared to alternatives unless that statement is true and can be substantiated, and they are prohibited from promoting the idea that it is appropriate for compensation to be used in a way not consistent with the basis of the claim, e.g., by suggesting that pursuing the claim is a way to make money as opposed to compensating for loss. None of these obligations apply expressly or explicitly to law firms (and there are examples of law firms advertising claims on a "financial gain" as opposed to "financial compensation" basis)[48]. The result is a regulatory environment with gaps and differing standards based not on behaviour but on regulatory status.

Where rules do exist, there is only sporadic enforcement. As we have noted above, we have seen limited evidence of the SRA, LeO, or the ASA recently sanctioning firms for misleading advertising even where there appears to be an appreciation for the inherently misleading nature of the term "no-win/no-fee". On the CMC front, it is difficult to assess the level of enforcement. The Claims Management Ombudsman ("**the CMO**") (which forms part of the Financial Service Ombudsman) is responsible for addressing complaints about CMCs across the UK. Data published by the CMO is at a high level and does not specify the nature of the complaints received, but rather lists the CMC product about which there have been complaints.[49] The "Data and insight" section of the website includes no public notice, advice, or warning about the potentially misleading use of the "no-win/no-fee" term.

Similarly, the FCA, which assumed general regulatory responsibility for CMCs in April 2019, has not published anything in this space recently beyond the Dear CEO letters cited above.[50] The FCA's guidance on social media financial promotions dates to March 2015[51] and the decision/warning and supervisory notices regarding CMCs do not generally address the issue of misleading advertising (albeit it is difficult to be certain as the FCA does not publish enforcement data in relation to breaches of specific rules/sections of the FCA Handbook as far as we can assess.)

Wide-Scale Problem

Given the rise in class actions, which almost exclusively run on a contingency fee basis, the proportion of the public potentially exposed to "no-win/no-fee" advertising and the risks associated with being joined to such claims, it is surprising to see a lack of recent regulatory activity in this space. This is especially so following judicial comment in *Sharp v Blank* that despite the 5,800 claimants thinking they were litigating "risk free" that was in fact not the case when they found themselves exposed to adverse costs when the ATE fell short. Class actions have the potential to affect significant percentages of the UK population. The risk of misleading advertising in this space is obvious.

[45] Since April 2019, CMCs have been regulated by the FCA. Regulation of CMCs included in the CMCOB. Law firms are regulated by the Solicitors Regulatory Authority in England and Wales.
[46] FCA CMCOB 3.2.4
[47] FCA CMCOB 3.2.7 and 3.2.8
[48] See adverts on pages 8, 9 and 18 of this report.
[49] CMC annual complaints data, Financial Ombudsmen (https://cmc.financial-ombudsman.org.uk/data-insight/cmc-annual-complaint-data)
[50] We expect there to be a further Dear CEO letter published shortly.
[51] Finalised Guidance 15/4: Social media and customer communications, FCA (https://www.fca.org.uk/publication/finalised-guidance/fg15-04.pdf)

"When a law firm's enthusiasm for the litigation wanes … clients can be left unrepresented".

Case Study 5:
Uber Compensation Claims – Claimants Joined to Litigation Without their Knowledge

On 19 February 2021 the UK Supreme Court dismissed Uber's appeal against a ruling of the Court of Appeal which had held Uber drivers were "workers". The result is that Uber drivers were found to be entitled to certain benefits that flowed from that status such as holiday pay, national minimum wage, access to a pension scheme and certain other job protections – rights and benefits that other self-employed people don't receive.

On the day the decision was handed down, Uber commented to say that the UKSC decision "ruled that a small group of drivers using the Uber app in 2016 should be classified as workers". It took a few months for Uber to start making back pay compensation offers to its drivers. Almost immediately, however, following the UKSC decision, claimant firms established bookbuilds claiming that eligible drivers could recover up to £12,000 in compensation from Uber because of their "worker" status.

Drivers were generally onboarded on a "no-win/no-fee" basis. If a claim for compensation against Uber was unsuccessful, the driver would not be required to pay the law firm anything. If successful, the firm would deduct its fees from the winnings. An Uber driver who instructed a law firm to recover the compensation from the company would receive approximately £7,680 on an award of £12,000 after a deduction of £3,600 in legal fees and VAT, approximately a 64% recovery for the driver.

Conduct of the Uber compensation claims has generated 28 complaints to the LeO as at September 2022, and LeO is currently investigating those matters.

LeO has provided the following explanation of the allegations in the complaints. In some cases, claimants were onboarded to the claim without their knowledge. The firm would then approach Uber with the claim and seek payment into their client account so fees could be deduced before paying the balance onto the driver. When Uber sought to make direct contact with its drivers to settle in full, the law firm would assert its lien and the driver would seek to disinstruct the firm. At that stage the firm would levy a "termination fee" notwithstanding the fact that the arrangement had been "no-win/no-fee". The onboarding appears to have happened further to an eligibility check.


HOME
Dashboard
Budget

Recommendations

Legal advertising is becoming more prevalent and aggressive in the UK. These behaviours are being driven by factors including an increased availability of class action mechanisms and the increasing number and activities of specialist claimant law firms. Other factors include the availability of new technologies which allow for rapid onboarding, a fundamental shift in the culture, which is more tolerant of unsolicited approaches and increased comfort with sharing personal data online, and a regulatory framework that is increasingly failing to keep pace with these changes.[52]

A patchwork of regulation, not always diligently enforced, and the existence of multiple potentially responsible regulators have created an environment in which it is difficult for the public to know who can take action on their behalf if they are misled into joining a claim. In fact, it is even quite difficult for the public to know whether a given regulatory agency has acted in response to a complaint that has been transmitted to them.

We consider that in the interests of consumer protection, the following recommendations ought to be implemented.

Key information document

Every consumer considering joining a group claim should be provided with a key information document that describes the risks associated with joining the claim including the risk of an adverse costs award if the claim fails prior to onboarding. As noted above, that should be the case even where ATE is in place. Risks should be explained in terms as prominent as opportunities to avoid their being hidden in small print.

Standardised regulation

The regulation of legal advertising should be standardised across the sector such that SRA-regulated law firms and FCA-regulated CMCs are subject to the same regulations for advertising claims. Behaviour and not regulatory status should be the driver of regulation.

Stricter regulation around the use of the term "no-win/no-fee"

At present, only CMCs are subject to prescriptive rules around the use of this term. The rules that currently apply to CMCs regarding the use of the term should apply equally to SRA-regulated law firms and solicitors and all groups using this term should be required to clearly inform potential claimants of adverse costs risk. Furthermore, where there is a risk that the claimant may have to pay the defendant's legal costs if the claim fails, that risk should be identified in the advert and given equal prominence to the potential recovery that the claimant might achieve.

Claimant law firm and CMC advertising on social media

To the extent that law firms and CMCs use social media platforms to advertise claims (and where that advertising is driven by algorithms and targeted towards individuals because of their personal characteristics, as opposed to because a person has requested contact by "liking" or "following" a social media account), it should be treated as a targeted and unsolicited form of advertising and be prohibited by the SRA and the FCA.

Rapid onboarding and cooling off periods

Claimants onboarded should be given a period of 60 days to "cool off" and terminate the retainer without penalty.

Confidentiality terms

Confidentiality terms that prohibit consumers from talking publicly about the conduct of the litigation and the level of settlement/recovery should be prohibited, in the interests of transparency and open justice.

The above recommendations will better protect and inform consumers who are recipients of claimant law firm advertising. If all these recommendations were implemented advertising would continue, but it would be more balanced and informative for consumers. Access to justice would not be impeded. In fact, it would be improved as misleading adverts would decrease which would improve the reputation of market participants.

[52] Data & Marketing Association, UK Data Privacy Report 2022, especially page 8 (https://dma.org.uk/uploads/misc/dma---uk-data-privacy-2022.pdf)

Conclusion

Advertising by claimant law firms and CMCs is increasing. The adverts themselves are becoming more aggressive. They increasingly play down the risks and play up the potential benefits of litigation.

In the UK, the market conditions for claimant firms are increasingly favourable to claimant law firms. Class actions are gaining steam (increasingly on an opt-out basis), litigation funders are becoming more sophisticated, the public are increasingly more tolerant of unsolicited approaches and existing regulation is increasingly outpaced by modern advertising techniques, especially on social media. While some of these trends support access to justice, they also present significant consumer risk. Stronger safeguards should be put in place to protect the public from aggressive and misleading law firm advertising. Advertising is of course a natural part of any functional economy, but the fact is that regulated professionals should not be able to advertise risky products and services to consumers without robust consumer protection legislation and regulation in place. Currently, regulation is either inadequate or underenforced. Our recommendations would go a long way to correcting the power imbalance, addressing the conflicts, and protecting consumers from the inevitable risks that arise from claimant law firm advertising and "no-win/no-fee" litigation.

For more information visit: www.faircivilljustice.org

Fair Civil Justice works to promote a balanced legal environment in the UK, that protects the interests of consumers, businesses and the public sector. Access to justice is a fundamental right.