

Summary

Over recent months, the Legal Ombudsman has become increasingly concerned about the operation of 'no win, no fee' legal services. We have made conduct referrals to regulators about the way some law firms have handled these agreements. Our scheme has also made financial remedies to consumers of almost £1 million in the past year.¹

'No win, no fee' agreements promise customers a way of funding litigation at minimal financial risk to themselves. They are usually formally referred to as conditional fee agreements (CFAs), and are sold on the understanding that a lawyer will not take a fee if the claim fails. In most cases, if the claim is successful, the lawyer will charge an uplift (known as a success fee) in addition to their base costs.

These agreements can offer customers an affordable and simple solution. Not all the time though - we are seeing examples of very poor service in some of the cases that come to us and have made conduct referrals where service providers have failed to honour agreements with customers or have exploited loopholes in the contracts, with serious consequences for their clients.

These raise questions about the way that such agreements are structured and sold. There are signs that these cases may be representative of a wider problem with 'no win, no fee' agreements which, if unaddressed, may lead to significant market issues arising. Some, such as the Committees of Advertising Practice (CAP), have previously warned that the phrase 'no win, no fee' is "potentially misleading, because it can imply that the client will be liable for no costs whatsoever"². Its guidance note advises that generally, these agreements should not be used unless the service is genuinely free of cost to the claimant. The Advertising Standards Agency has upheld complaints against firms claiming 'no win, no fee' because, unqualified, it implied the client would be liable for no costs whatsoever.³

This short report sets out our concerns and includes six cases that illustrate what can go wrong. We conclude that:

- The use of 'no win, no fee' agreements should be monitored and reviewed by regulators to ensure that they do not lead to consumer detriment.
- It is essential that lawyers take care in explaining the conditions attached to 'no win, no fee' agreements and make clear the circumstances where the customer may end up incurring legal costs, and
- Lawyers should also exercise due care before agreeing to take on a case to ensure that the cases are well founded, minimising risk to themselves and their customer.

Finally, we raise the question as to whether the 'no win, no fee' descriptor of the agreement should be used at all.

¹ The total amount of financial remedy awarded on CFA cases between 1 November 2012–30 Nov 2013 was £944,177. This includes compensation, fees reduced, and costs associated with putting things right for consumers.

² See CAP advice at <http://www.cap.org.uk/Advice-Training-on-the-rules/Advice-Online-Database/Litigation-No-win-no-fee-claims.aspx> as at 17 December 2013

³ http://www.cap.org.uk/~media/Files/Copy%20Advice/Help%20Notes%20new/No_Win_No_Fee.ashx at paragraph 3 as at 17 December 2013

Report from the Ombudsman

The last decade has seen responsibility for funding legal services move further away from state provision towards commercial funding mechanisms. As a result we now have more complex methods of addressing the cost of legal services, including directly marketed services like 'no win, no fee' agreements.

With access to legal aid diminishing in many areas of law, these services enable people who otherwise might not be able to, afford to make personal injury claims, fight unfair dismissal or seek compensation for medical negligence. For these reasons then, these agreements are to be welcomed.

The Government has endorsed the 'no win, no fee' model and has recently introducing damages based agreements (DBA) – where a lawyer takes a percentage of any damages awarded to their customer – alongside CFAs. Both offer lawyers the means to make a fundamental promise to their customer: if you don't win the case, you won't have to pay.

But the advent of 'no win, no fee' has not been without its problems. The 'no win, no fee' model has played its part in fostering a culture of 'ambulance chasing' and fraudulent claims, which has inadvertently driven up insurance premiums. The Government has been so concerned about this that it has begun to make moves to rein in the burgeoning personal injury market by banning referral fees. As noted above, there have been warnings from regulators about the marketing of the agreements and strong concerns that the phrase 'no win, no fee' is "potentially misleading".⁴

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.

The six cases included here raise questions both about how the agreements are structured and how they are marketed and explained.

continued over.

⁴ See CAP advice as above.

Report from the Ombudsman



We are not claiming that these sorts of problems are widespread. Only about 8% of the complaints we resolved last year related to CFAs. But the cases we have seen show that when things go wrong with these agreements, impact on the people involved is heavy. So we wanted to highlight these potential issues now and seek action to address them before they become prevalent within the industry. This is particularly important for ‘no win, no fee’ agreements as there are two areas of specific concern we wish to highlight :

- Transfer of risk – there is a structural weakness in the nature of the agreements which allows some lawyers to pass the risk of unrecovered costs onto the consumer.
- Unclear terms and conditions - the agreements are sometimes complex and there is evidence of some lawyers failing to make clear to consumers the financial risks that come with entering into a ‘no win, no fee’ agreement.

Transfer of risk

The financial risks of going to court are huge. Lawyers’ fees for both sides, insurance, court fees, disbursements (expenses incurred by a law firm on behalf of a client) and, sometimes, a success fee can be involved. Litigation lawyers have to find ways of making their services accessible and affordable for consumers, while ensuring all of these costs are paid for.

Because of this, ‘no win, no fee’ agreements are attractive both to lawyers and consumers. For the consumer, the attractions are obvious: they can take their case to court with no upfront fees and at no apparent risk to their purse. For the lawyer, there is, in theory, greater risk: if the case loses, they are left responsible for the other side’s costs as well as their own. So long as lawyers are careful in their selection of cases, the downside of the occasional loss will be more than swallowed up by the success fees generated by the winning cases.

But, if a lawyer is under financial pressure, has a run of bad luck, or, for whatever reason, has poorly judged his or her selection of cases, even a single ‘no win, no fee’ agreement gone wrong can threaten their business model. We have seen cases where, faced with these circumstances, lawyers are tempted to try and pass the risk onto a customer or to simply go back on the terms of their agreement to get out of a problem that they created.

Miss A’s case study demonstrates this problem clearly. She was asked to pay almost £15,000 to cover her firm’s mistakes – they had proceeded with her case despite knowing it had less than a 50% chance of success. And her case was unsuccessful. As a result the terms of agreement with the insurer were broken and it refused to pay out, leaving Miss A with the bill.

Our investigation showed that the firm had made it quite clear to Miss A that she wouldn’t have to pay anything if she lost the case. We found that the firm had contradicted its fundamental promise to her – that she wouldn’t need to pay as she was using a ‘no win, no fee’ agreement. In this case, the firm failed to stick to its terms and conditions and in doing so provided a poor service. The Ombudsman’s investigation concluded the agreement had been mis-sold to Miss A, and, because of our involvement, the firm agreed with Miss A that it would honour its promise and pay the other side’s costs.

Similarly, **Ms B was asked to pay more than £30,000** when her firm decided to stop her case - citing reasons that the firm had known about right from the start. Our investigation showed that the firm failed to take out an insurance policy on behalf of Ms B, despite telling her that they would do so, leaving her to pay the other side’s considerable costs as there was no safety net of insurance.

The Ombudsman’s investigation concluded that the firm had sought to end the agreement due to its failure to gain insurance cover (and not for the reasons it said). We concluded that the firm should be required to waive the other side’s costs and pay Ms B £600 as a way of recognising the considerable anxiety the matter had caused her.

Then there is **Mrs C’s case**. She was asked to pay the other side’s costs of £6,000 when her firm withdrew from the case, saying that new information had changed the firm’s assessment of success. Our investigation found that although the ‘no win, no fee’ agreement allowed the firm to withdraw if the customer had concealed an important fact, the firm, when first taking on the case, had never asked her about previous accidents, even when it had the chance to do so. Our investigation concluded that it seemed likely that the firm’s assessment of its own risk had changed as the case progressed. The balance of evidence suggested that the firm used the new information as an excuse for withdrawing from a case with less than a 50% chance of success. In this case, we concluded that the firm had exploited a loophole in its terms and conditions to end the agreement and seek to ensure it faced no financial liability. We ordered the firm to pay the costs involved, together with a sum for the inconvenience caused.

These cases raise an important question: what outside pressures are prompting firms to take on cases that have no or very little chance of succeeding, requiring them to resort to exploiting loopholes in the agreements?

Report from the Ombudsman

Market forces

The 'no win, no fee' market has become increasingly aggressive, with many law firms competing for cases and sometimes prioritising sourcing a large number of customers over a careful selection process. In the case of personal injury claims (which account for almost 70% of the complaints the Ombudsman sees about CFAs) many service providers now use national advertising and marketing campaigns to generate leads. It may be that firms are forfeiting a robust vetting process in favour of a high risk approach that sees them taking on cases with a low chance of success.

Other explanations may lie in the necessarily risky nature of litigation. Cases that may have looked like winners at the beginning can turn out to be turkeys by the end. This again cries out for lawyers to be more thorough in their preliminary investigations. A business model which consistently overvalues the chances of success can drive lawyers into unethical practice in order to avoid financial meltdown. It is for these reasons we have made referrals to regulators; to assist them in looking for patterns and risks so they can inform future action to prevent market distortions and consumer detriment.

Unclear terms and conditions

Understanding the fine print

The manner in which such agreements are marketed and explained is also causing problems. The headline marketing mechanic is the phrase 'no win, no fee', which directly implies that the consumer will not have to pay unless the claim is successful. However, that is not necessarily true: there are circumstances where the consumer will have to pay for losing cases. This raises real questions about whether the phrase 'no win, no fee' should continue to be used.

The agreements themselves are not simple to understand. And if CFA agreements are complex documents, the new DBAs are even more impenetrable to all but the most sophisticated and literate consumer. In our view, this places a strong obligation on lawyers to explain the way the agreements operate to their clients - and a particular obligation to highlight the potential risks. Alongside this report we have published [an overview of the terms and conditions](#) found in a 'model' agreement - we have used this to highlight areas where, from our experience in resolving complaints, problems can emerge if they are not explained properly.



In many of the cases we see, there is little evidence that this sort of explanation of complex terms and conditions has taken place. This is hardly surprising; with many firms sourcing volume customers via advertising or using claims management companies, there may be little incentive or opportunity to ensure that the complex nature of the agreement is fully explained.

Lawyers must explain the circumstances in which a losing case can incur a cost for a consumer and the limitations of the 'no win, no fee' promise must be properly set out before a customer signs up. And it isn't just at the start that problems from unclear terms and conditions can arise. We have seen cases where people have been hit with surprise costs after winning their case. Usually, this entails confusion around the amount payable towards a success fee, but can also involve payment of disbursements and the other side's costs. Our [interactive contract](#) shows how these problems can arise.

Recent changes to CFA contracts, introduced as part of Lord Justice Jackson's reforms to seek to better control costs, mean that the majority of success fees and after the event (ATE) insurance premiums are now no longer recoverable from a defendant and are instead payable by the customer. This means the customer will pay costs from any damages they recover. However, the Ombudsman's experience of the cases we see is that many customers are not aware of the detail of agreements and what this means for costs in winning cases under 'no win, no fee' agreements.

Take Mr D's experience. His relief at winning his personal injury claim was short lived after the firm informed him that almost a third of the damages awarded would be taken as a success fee and to cover disbursements. Upon investigation it became clear that the firm had not explained its costs under the contract, and particularly how its success fee would be recovered. Mr D believed his costs would be recovered from the defendant.

The rules have only just changed regarding recovery of costs. So many people will still be in the dark about what is payable under the terms of their agreement unless this is explained to them clearly by their lawyer, including in any written contracts or agreements.

Good practice

The Law Society has produced a model conditional fee agreement for use in personal injury and clinical negligence cases, which sets out clearly what is covered by the agreement, what is not covered, how payment works if a customer wins, what expenses and disbursements are payable and what a customer pays if they lose. The model agreement also includes additional information about success fees and the calculation of basic charges.

As well as calling for lawyers to give their work due care then, lawyers can help themselves by drawing up clear, easy to follow contracts. The Law Society's template seems like a great example of how to do this and is available from their website.

This is particularly important for customers considering whether or not to invest their time and energy into pursuing a claim. If the success fees and additional charges leave them with very little of their damages they may decide it's not worth the effort. Claims can take years to resolve and involve much anguish for the people involved – they deserve to know what is ultimately going to be in it for them.

'No win, no fee' in practice

Having said all of this, **Mr E's case** shows that even where a contract has been well written, it might not stop a firm from behaving contrary to the agreement.

Mr E entered into a 'no win, no fee' agreement with a firm, which then decided some way into the case that his chance of success was slim and stopped doing any further work on the case. However, Mr E continued with the claim, represented himself in court - and won. When the firm then learned of Mr E's success it pursued him for costs in excess of £24,000. In essence, the firm wanted a success fee despite leaving their customer to fend for himself.

In this case the firm had drawn up a 'no win, no fee' agreement using a template very similar to the Law Society's model agreement, and it had been clear about its costs in the event of the case winning or losing. The paperwork was clear that if the firm ended the agreement and Mr E won his case anyway, the firm would be able to claim disbursements, nothing more. Our investigation found that the firm was being completely unreasonable pursuing Mr E for additional costs. The Ombudsman decided that the firm was not entitled to claim anything other than disbursements and that they should pay Mr E £200 for the distress and inconvenience it had caused him. Mr E accepted our decision.

In our final example, **Mr F instructed a firm on a 'no win, no fee' basis** to represent him in a medical negligence claim. The firm began the work and commissioned medical reports. However, eighteen months after the case began, the firm ceased trading, leaving Mr F to pay a number of costs associated with his case. Following an investigation we found that the firm was wrong to leave Mr F to pick up its costs; the agreement made no reference to him having to do so. When our investigation concluded, we suggested that Mr F liaise with the firm's indemnity insurers to see if he could recover the £10,000 he had paid out.

Though we are able to help people who find themselves in this kind of situation, dealing with lawyers that behave in this way - and contrary to their code of conduct - may require a robust regulatory response to ensure they do

not make a habit out of it. We have reported some of the cases in this report to the relevant regulatory bodies and trust that they will now consider how to respond in due course.

Conclusion



Legal Services Board research suggests that the increase in 'no win, no fee' agreements, "has brought the profession closer to the consumer" since people find lawyers offering these services less formal and more accessible in terms of cost.⁵ Additionally, this research has shown that consumers find 'no win, no fee' firms more approachable than 'traditional' practices. So we are likely to see continued use of these agreements – and more of the risks we have outlined here.

We want to see legal service providers and regulators taking heed of this report and proposing responses to bring greater consistency in standards across the industry. This could be achieved by standardising due care on the part of firms, perhaps by enshrining it into regulatory codes of conduct, while universalising CFA and DBA contracts, to make sure the ones used set out terms and conditions clearly.

We will continue to watch closely to see if changes to 'no win, no fee' agreements under the Jackson reforms have an impact on numbers of complaints that come to the Ombudsman. The aim of these changes is to make legal services more accessible while managing costs – if this aim is achieved it should bode well for consumers.

Finally, we would like to see service providers handling complaints professionally, and any issues raised by customers taken seriously. The fact that some of the cases in this report were resolved informally suggests that the firms could have dealt with the complaints themselves had they been willing to try.

Additional resources

for lawyers

Handling complaints competently can only enhance a lawyer's reputation. To this end, we now offer the benefit of our experience in resolving complaints through our complaint handling courses. Available to all legal professionals, they are continuous professional development (CPD) accredited by the Solicitors Regulation Authority, and help attendees to clarify the process and principles followed by the Ombudsman when it investigates complaints. They also look at implications for best practice and internal complaint handling procedures.

Additionally, we have made a **package available on our website** to help lawyers direct customers to us if they can't resolve a dispute internally.

⁵ <http://www.litigationfutures.com/news/consumers-more-no-win-no-fee-firms-more-approachable-traditional-practices>

Case studies

No win, high fee:

case study one



Miss A was hit with a bill for the other side's costs of nearly £15,000 by her law firm after her personal injury claim was unsuccessful, despite proceeding under what should have been a 'no win, no fee' agreement.

The bill came as something of a shock to Miss A. Not only did the firm agree to such terms, it had taken out after the event (ATE) insurance on her behalf to cover any costs – she thought all financial risks had been protected against. However, our investigator discovered that the firm had broken the conditions it had agreed with Miss A and her insurer by proceeding with the case despite it having less than a 50% chance of success. When the case lost, the insurance company refused to pay out. As a result the firm then tried to make Miss A pay for its mistakes.

Miss A was extremely upset. As far as she was concerned the firm had made it quite clear she wouldn't have to pay anything if she lost the case. She was also worried about how she would afford it. She complained to the firm in the first instance but the firm claimed it had done nothing wrong. Miss A then contacted the Legal Ombudsman for help.

We resolved the dispute informally by asking the firm to honour its agreement and pay the other side's costs. Miss A told us that she was happy and relieved that we could help.

PPI pain: case study two

Ms B instructed a firm to assist her with a claim for the mis-selling of a payment protection plan on a debt consolidation loan. At the outset she informed the firm that she had been declared bankrupt, meaning she couldn't pay any fees. As a result the firm agreed to act for her on a 'no win, no fee' basis, taking a success fee if they won the case.

Upon agreeing the case, the firm noted that Ms B did not have any suitable insurance to cover her in the event that the other side wished to recoup its costs. The 'no win, no fee' agreement specified that a suitable insurance policy should be in place to protect her and so, having discussed this with Ms B on the phone, the firm agreed to put one in place.

As far as Ms B was aware matters with her claim were progressing and she provided information when requested by the firm. However, some time later

the firm told Ms B that due to various circumstances she should discontinue her claim. This was confirmed in an email. Though disappointed, Ms B took their advice and thought that this was the end of the matter.

The firm then wrote to Ms B a short while later to say that the court had issued an order for her to pay the other side's costs, which were in excess of £30,000. They asked if she had any means to pay them. Ms B responded raising concerns that she had not been made aware of any liability for costs and had only discontinued the matter on their advice.

After failing to sort the matter out with the firm directly, Ms B brought her complaint to the Legal Ombudsman.

Our investigator found that there had been poor service on behalf of the firm. It had failed to take out an insurance policy on her behalf, despite saying it would do so, did not advise her of the risks her bankruptcy would cause, and also failed to advise her about any costs associated with discontinuing her claim. Given this, we decided that the firm should waive the other side's costs and that it should pay Ms B the sum of £600 in recognition of the considerable anxiety the matter had caused her.

Withdrawal woes:

case study three

Mrs C had instructed a law firm via a claims management company in making a 'no win, no fee' personal injury claim following a road traffic accident.

Initially, the case had progressed well. However, the firm suddenly told Mrs C that they were withdrawing from the case as she had not told them that she had previously been involved in a similar accident four years before, leaving her to pay the other side's costs of £6,000.

On investigation, we found that although the CFA agreement allowed withdrawal if the customer had concealed an important fact, the firm had never asked her about previous accidents and, on the balance of evidence, appeared to have used the issue as an excuse for withdrawing from a case with less than a 50% chance of success. The firm was ordered to pay the costs involved, together with a sum for the inconvenience caused.



Case studies

Cost controversy:

case study four



Mr D's firm helped him to make a personal injury claim under a CFA based 'no win, no fee' agreement, which he understood to mean that he would not have to pay any costs - win or lose. He told us that he was delighted with the outcome of his case until he found out that the firm were keeping almost a third of the damages awarded to him to cover their costs as well disbursements. At that point he complained and came to the Ombudsman.

Our investigation found that the CFA had been written in such a way that it meant costs couldn't be recovered from the defendant. However, we found that this wasn't made clear to Mr D when he first instructed the firm. The firm may have been confused as a result of taking over an existing case – since the original firm had ceased business. Nevertheless, it should have been clearer about its costs and how Mr D should pay them. Our investigation concluded that Mr D had not been given a thorough explanation of how the firm's costs would be recovered.

As a result, an investigator recommended that it would be fair for the firm to reimburse Mr D; returning an additional £7,500 of the compensation originally awarded. Mr D accepted the decision.

Money for nothing:

case study five

Mr E instructed a firm to represent him in his litigation claim for unpaid contractual work.

The firm agreed to act on his behalf under a 'no win, no fee' agreement but withdrew representation two weeks prior to the court hearing. As a result, Mr E had to act as litigant in person. He was successful with his case and received an award of around £5,000.

However, despite it being the firm's decision to sever ties with Mr E two weeks before the hearing, they contacted Mr E claiming that they had carried out £24,000 worth of work and that he should settle with them. Mr E felt that this was completely unreasonable as no such costs had been outlined in the contract he signed at the start of the case.

The firm threatened Mr E with legal action and so he brought his complaint to the Legal Ombudsman. When we looked at it we found that the agreement he signed stated only that he should pay disbursements in the event of winning, should the firm withdraw its services. We decided that they were not entitled to claim anything other than disbursements and that they should pay Mr E £200 for the distress and inconvenience it had caused him. Mr E accepted our decision.

Closure calamity:

case study six

Mr F instructed a firm on a 'no win, no fee' basis to represent him in a medical negligence claim.

The firm began the work and commissioned medical reports to support his case. However, eighteen months after the case began, the firm ceased trading, leaving Mr F to pay the medical experts' costs and the work carried out by the other side.

Mr F had nowhere else to turn and so he brought his problem to the Legal Ombudsman.

Following an investigation we found that the agreement Mr F had entered into made no reference to him having to pay costs in the event of the firm ceasing to trade. Unfortunately he had already paid out £10,000, having been uncertain where he stood on the matter. We therefore suggested that Mr F liaise with the firm's indemnity insurers to see if there was any way in which he could recover his costs.

