

## Conditional fees in England

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Some twelve months after the conditional fee system was introduced in New South Wales, a similar scheme has been brought into force in England (*Conditional Fee Agreements Order 1995 (No. 1674 of 1995) made on 4 July 1995 coming into force 5 July 1995*). The Order follows Section 58 of the Courts and Legal Services Act 1990. In the Solicitor's Journal of 14 July 1995, Paul Balen said:-

"For the first time lawfully, therefore, plaintiff's solicitors have a financial interest in the outcome of the proceedings they are bringing on behalf of their clients."

### Success Fee and Cap

One significant difference between the existing NSW Scheme and the English Scheme is the quantum of the success fee. The NSW Scheme limits the success fee to 25 per cent, whereas the English Scheme allows a success fee of up to 100 per cent. Having said that, the Law Society's Code of Conduct introduces a recommended (but voluntary) *cap of 25 per cent of recovered net damages* in any particular case.

There was some debate as to whether the voluntary cap should be incorporated in the Order. However it was doubtful that the legislation gave power to impose such a limit and difficulties were seen in its operation in respect to matters such as structured settlements.

### Proceedings covered

The NSW Scheme allows conditional fees in a wide range of matters. The English Conditional Fee Agreements Order applies only to:

- (a) Claims for damages for personal injury or death.
- (b) Certain insolvency actions.

- (c) Cases before the European Commission or the European Court of Human Rights.

### Content of the agreement

The Regulations require a conditional fee agreement to state:

- (a) The proceedings to which the agreement relates.
- (b) The circumstances in which the fees and expenses are payable.
- (c) What if any payment is due:-
  - (i) Upon partial failure of the specified circumstances to occur.
  - (ii) Irrespective of the specified circumstances occurring.
  - (iii) Upon termination of the agreement for any reason.

The agreement must also state that, immediately before it was entered into, that the legal representative drew the client's attention to the following matters:-

- (a) Whether the client might be entitled to legal aid in respect of the proceedings, the conditions upon which legal aid is available and the application of those conditions to the client in respect of the proceedings.
- (b) The circumstances in which the client may be liable to pay the fees and expenses of the legal representative in accordance with the agreement.
- (c) The circumstances in which the client may be liable to pay the costs of any other party to the proceedings.
- (d) The circumstances in which the client may seek taxation of the fees and expenses of the legal representative and the procedure for so doing.

The agreement must be in writing, signed by the client and the legal representative.

"Despite the fact that the Order does not establish a legislative cap on recovery of the success fee, there is a requirement that the agreement state whether or not there is to be a voluntarily agreed cap on recovery of fees from damages."

#### **Insurance against defendants' costs**

The English Law Society has at the same time negotiated an insurance arrangement. For a flat fee premium which may be as low as 100 pounds sterling, the client can obtain cover against costs awarded against the client in the event of a loss, including disbursements and counsel's fees. Initially the Scheme will exclude medical negligence and some other complex cases.

The policy is only available to the firms who are members of "accident line" and decide to operate the new arrangements under which they must agree that all clients with conditional fee agreements take out the policy. It has been suggested by Professor Michael Zander, *London School of Economics New Law Journal* - 23 June 1995, that the remarkably low premium shows clearly how little risk the underwriters perceive exists.

"There are about 1,300 firms in the above category. The balance of about 8,500 firms can obtain insurance through Litigation Protection Limited. Their premium is 175 pounds for an indemnity up to 10,000 pounds increasing to 1,500 pounds for an indemnity up to 100,000 pounds."

#### **The future**

It seems that the eventual plan is to extend the Scheme to other areas, if it appears to be working in practice. Given that it took some five (5) years from the enactment of the legislation to the proclamation of the Order, extension of the Scheme may not be on the immediate horizon.

## **Global Mass Torts and The Rights Of Foreign Claimants**

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(Paper given at the 1995 ATLA Annual Convention)

### **Introduction**

United States corporations play a significant role in the economies of many countries. The development, manufacturing, marketing of and selling of their products has a significant impact on the lives of many people outside the United States. When such products prove to be defective and injurious to non-American citizens, those claimants are increasingly seeking legal redress and compensation for their injuries in the United States.

Indeed, over the past 15 years, there has been an increase in number of foreign claimants pursuing claims in United States courts, particularly in the area of mass tort litigation. Examples are Agent Orange, Dalkon Shield, Bjork-Shiley heart valves, and most recently, breast implants.

This paper will discuss problems faced by foreign claimants in pursuing their claims in the United States courts, with reference to their access to, and participation in, settlements arising out of mass tort litigation and with a particular focus on the recent breast implant class action settlement.

### **II. Reasons Why Foreign Claimants Pursue Claims In United States Courts**

Reasons given by foreign lawyers for seeking to bring their clients' claims in the United States are as follows:

1. Problems with United States defendants appearing in the foreign jurisdiction and with executing orders for recovery of any monies awarded in cases against United States defendants in foreign jurisdictions;
2. The defendant(s)' place of incorporation is in the United States;
3. Access to extensive pre-trial discovery procedures in the United States, such as the taking of depositions, are not available in many foreign jurisdictions;
4. More causes of action, such as strict products liability laws, which may not be available in foreign jurisdictions;
5. Access to greater damages awards for their clients;
6. The potential to enter into contingency