Response of Liverpool Law Society to the Competition Commission Private Motor Insurance Market Investigation Notice of Possible Remedies dated 17th December 2013

Liverpool Law Society

Liverpool Law Society (LLS) represents over 2500 members of the legal profession in the Merseyside area. Members are solicitors, barristers and academics. This response has been produced by canvassing the views of members. Most of the information provided is based upon the opinions and experiences of solicitors who are predominantly engaged in the work of personal injury and credit hire litigation. Contributors include solicitors acting for both insurers and Claimants. At all times LLS has sought to express an impartial view without preference. The views expressed are not necessarily those of the author.

Response

As a neutral body LLS does not suggest that it has within its direct knowledge detail of the motor insurance market and in particular it does not have access to the statistical data of which an independent analysis would be necessary to verify the assumptions made by the Competition Commission in determination of the Theories of Harm. To this extent the response prepared by LLS is one concentrated upon the impact the possible remedies would have upon access to justice and the public interest generally against the backdrop of whether there might be considered a genuine adverse effect on competition that is proportionate to the cost involved and that requires remedial action in any event. For this reason LLS will respond only to the Remedies that come within its remit and not those that would necessitate considerations of an economic nature.

Remedy A: Measures to improve Claimant's understanding of their legal entitlements

LLS strongly agree that all consumers should have a better understanding of their legal entitlement following involvement in an accident whether they are at fault or not. It is fundamental in terms of access to justice that consumers have improved awareness if they are to successfully avoid being misdirected in terms of any claim they pursue and indeed settlement of the same. LLS do therefore endorse the aim expressed by Remedy A as an informational remedy that would improve the current position.

In responding to this Remedy LLS assume that the legal position and in particular the individual's rights in Tort would remain unchanged. Should there be adoption of other proposed remedies and in particular 1A and 1B this response would require amendment.

(a) - (c) LLS consider that it would be inappropriate for any organisation involved with the provision of an accident related service to be responsible for the drafting of the document envisaged by point 18 of the Notice. Any body representative of insurers, brokers, CMC or CHC must be considered to have a vested interest in the consumer adopting certain behaviours post accident. The combination of tort and the requirement for compulsory insurance results in the distribution of fault based loss between these bodies and once a question arises as to which must finance any compensation payable the need to spread risk or generate referral or commission based revenue may, in the view of LLS, override the public interest.

The Law Society of England and Wales exists as a body that represents Claimant and Defendant interests and works to advise the consumer from a neutral and independent position that ensures they are provided with access to information that will guide them through a complicated process. The website contains a number of guides in contentious and non contentious matters including the making of a personal injury claim.

It is therefore proposed by LLS that there be a document drafted by The Law Society for inclusion on its website in the first instance but in addition within policy documentation, client care letters, and websites of all bodies involved with accident related services at the time of policy inception but more importantly at the point of FNOL. It is at the time of the accident that consumers, be they at fault or not, are at their most vulnerable and any susceptibility on their part would therefore be combated by the provision of immediate and relevant information to them by a body they were able to trust as being non-partisan.

LLS have given consideration to the content of such a statement and it is their intention to set up a working party to develop this further. It is envisaged that the document will be simple and to the point in its language so that it is able to stand out from the plethora of other documents received by consumers in respect of their insurance policies and any accident in which they might be involved. It may take an FAQ type format. Consideration would be necessary as to the mediums in which the information would be provided and if in some cases the information would be by way of link only to a website through an app or wallet sized card/ tax disc holder and QR code. It is also clear that collaboration may ultimately be required with all interested parties to ensure agreement as to content before the terms of any enforcement order about the placing and provision of the statement were enacted.

Issues do arise however in terms of compliance in full with point 18 of the CC Notice. Each individual will be subject to the specific contractual terms of their insurance policy and the methods adopted by the bodies involved. It would not be possible to provide generic advice that adequately dealt with all aspects of for example the loss of a NCB. The statement must therefore ensure that the consumer is at least advised as to where they might find a particular answer that will assist them in the decision making process post accident in order that the potential effectiveness of the remedy is not undermined.

Briefly the statement would include the following information:

- **What are your basic legal rights?**
  This would include a description of the rights available contractually through the provision of insurance and in tort as far as being put back into the position they would have been but for the accident.

- **What should you do next?**
  The consumer must be advised with regard to the need to report an accident, provide their details and ensure that they do not prejudice their insurer's position.

- **Is the accident your fault?**
  Information would be included for both fault and non-fault drivers and in particular consumers would be directed to collection of information and cooperation with their insurers to avoid the difficulties that arise when liability is not clear cut.

- **Am I entitled to a replacement vehicle?**

Advice here would be detailed and link to PAV and repairable aspects of accident management, like for like and credit hire issues including need and impecuniosity.

- **What do I do about repairs?**

This should explain the process of vehicle recovery, engineer inspection, repair authorisation and the repair work itself with advice relating to choice of repairer, quality of repair and storage during repairs. The need to consider temporary repair should be mentioned. This should possibly refer to diminution.

- **What do I do whilst my car is being repaired?**

The responsibility to mitigate must be explained to the consumer including the ways in which mitigation might be effected such as use of a CMC or CHC who would be able to monitor the process in entirety. Information about period must be included and the need for example to return a vehicle if it cannot be driven due to injury or time away for example.

- **What will happen to my insurance?**

As indicated above it would not be possible to predetermine this point and advice must therefore be linked to the questions the consumer can ask of their insurer in respect of fault, excesses and their recoverability and NCB protected or otherwise. Reference might be made to the fact that initially the responsibility is to report only and not make a claim on their policy if they are not at or there are queries as to fault.

- **Where do I get advice?**

The consumer must be provided with advice about the types of bodies that would or could be involved and directed to independent legal advice as appropriate with reassurances about the costs involved in making a claim.

(d) If consumers are more aware of their legal entitlements they may seek to pursue a claim and request a TRV on a more frequent basis. The extent to which this would distort the market is uncertain since it would depend upon whether their making contact with an insurer would also increase the possibility of capture. It would therefore be entirely dependent upon the body to whom the consumer made the report or was referred but ultimately an increased incidence of claims may increase premiums.

(e) It is assumed that circumvention relates to capture or intervention that would arise only in the event of the consumer not having available to them the appropriate advice upon which to base their choice. In consequence the key factor will be to ensure that the statement is provided at the earliest possible point post accident and that attention is drawn to it even within the FNOL telephone conversation.

(f)The creation of an audit scheme in respect of use of the statement would be potentially costly unless it was included within existing audits by relevant bodies. The Mitigation Questionnaire could however be used as a reference point to confirm that there had been referral to the statement.

(g) Beyond the initial development costs LLS do not consider that the cost to the industry would be high. There may be a requirement to make payment of a licence fee in respect of links through the TLS website.

(h)No - provided the terms of the order are unambiguous and applicable to all relevant parties. LLS would however suggest that this remedy might be achieved by less stringent methods such as undertakings or industry agreements.

(i) No - the Theory of Harm relating to legal entitlement is separate and the remedy is informational.

(j) No - the driving test should be concentrated upon issues of safety at the wheel and beyond the learner understanding the need for insurance and implications of not having insurance it would seem an over provision of information at that stage.

Remedy 1A: First Party Insurance for replacement cars

(a) Most of the principles that govern the recovery of damages following an accident are governed by the Law of Tort which is mainly enshrined in Common Law, in other words the legal principles that have developed over several hundred years, with additional provisions under statute and subordinate legislation. Duties of care are set out under Common Law and under certain statutory provisions. Actionable claims for damages arise when those duties are breached and the breach causes a loss. Damages are awarded on the basis of restitution, namely that a party is put back into the place he or she would have been if the accident had not occurred.

The role of insurance is crucial to the operation of the tort system in that it spreads the risk of loss amongst all premium payers. First party insurance is that which protects the insured against damage to himself irrespective of whether the loss was caused by him. Third party insurance protects the insured against his liability for causing damage to others. Thus liability insurance currently serves to spread risks amongst potential Defendants and meet the compensation objective of the Law of Tort. By making third party insurance compulsory the Claimant is protected and will receive the restitution to which they are entitled.

Claims for the cost of hiring a temporary replacement vehicle are common law claims for the loss of use of a vehicle. Claims for that type of loss may comprise of:

- Cost of hiring a temporary replacement vehicle;
- Cost of using public transport;
- Cost of using taxis;
- Consequential losses such as loss of earnings or loss of profit particularly in the case of those who rely upon their vehicle for work.

Changing the law to allow a non-fault party to claim some aspects of his loss of use of vehicle claim but to prevent him from claiming another aspect such as the cost of hiring a car would be complicated and require a detailed examination of the Common Law. Primary legislation by statute would be required to bring about the required changes to the Law of Tort. Such legislation would be difficult to draft and would require extensive consultation and impact assessment before passage through Parliament. The Remedy suggested must therefore be considered draconian to an extreme and one which would give rise to the dismantling of a system that has been established over time and which exists in accordance with relevant EC Regulation. The costs of implementing even the review process necessary to make amendments would be significant and the lead in time lengthy. It is the view of LLS that this is entirely disproportionate in overcoming the AEC and will give rise to resulting

detriments to the consumer that must be taken into consideration in compliance with s134(6) of the Enterprise Act 2002. The CC are respectfully referred to paragraph 67 of the Notice in which they confirm a view that first party insurance would have an impact beyond the scope of their investigation. Given that view LLS find it difficult to reconcile the inclusion of the proposed Remedy within the Notice.

We do in any event question whether it is possible to accurately define when and in what circumstances the right of recovery of part of a loss of use claim could be restricted. Would it only apply to moving traffic incidents, stationary vehicle incidents, or any incident involving a vehicle? So, for example, would it include a claim for damages arising out of damage to a vehicle lawfully on private land caused by the collapse of a building?

Care would be required to ensure that any changes to the Common Law in relation to the law of subrogation would be brought about so as to clearly define the circumstances in which an Insurer's right to bring a subrogated claim against the at fault party is restricted.

We would mention at this point that there is nothing in the public interest in having " compulsory" insurance with no right of subrogation on the part of the insurer. This will have the effect of reducing frictional cost to the insurer but could potentially drive up the cost of insurance premiums overall. The right of a non- fault party to enforce a judgment directly against the at fault insurer under Part 4 of the Road Traffic Act 1988 would also need to be modified to limit the extent to which the judgment could be enforced. Given that a substantial number of such judgments are obtained by default without any examination of the detail of the claim it would be extremely difficult to enforce particularly in the context of specified small claims track judgements.

(b) We do not agree that there should be any degree of "compulsion" brought about by a restriction on recoverability. If this remedy were to be implemented then the choice offered to policyholders should not be restricted in any way. There should be freedom of choice to purchase such cover as either an add on to a motor policy or stand -alone from another insurer direct, via brokers or PCW. Current market costs appear to be in the region of £45 per annum. LLS do however point out that the CC data confirms that at the current time there is a low incidence of consumers taking out optional courtesy car insurance presumably in an effort to reduce cost and because they are aware that they have the potential to obtain a replacement vehicle at the cost of the at fault insurer. LLS are therefore of the view that this remedy would be prejudicial to those without the benefit of additional protection.

(c) LLS would point out that there has been no data that proves that premiums would be reduced made available and as such it is not within our direct knowledge. We do however make the observation that it would not be a case of simply transferring risk at a lower level from one insurer to another. Insurers would still have to price premiums based on higher consequential loss claims (particularly commercial claims) and inconvenience / enjoyment claims. In addition the CC must take into account within their analysis that the number of claims currently made to first party insurers for provision of a TRV is likely to be much lower than it would be in the event that the proposal is enacted due to the existence of direct hire, commission arrangements and credit hire companies. Their inability to subrogate the claims they would become liable for will therefore potentially increase the cost of premiums such that there is no alteration to the identified AEC. Insurers are additionally less likely to be able to manage hires as efficiently as specialist CHC meaning that there would

not be any benefit gained from transfer of control. In terms of overcoming the AEC identified in respect of frictional costs whilst the removal of CHC would have this impact there has been no analysis by CC as to the transfer of those costs to the Claimant who in dealing with the at fault insurer direct would bear costs in time and money that ultimately reduce their access to justice and result in detriment to them by under provision of service.

(d) LLS consider that there is a market expectation that NCB should be protected and there be an avoidance of premium loading but it is not clear how this would be followed through in the context of Remedy 1A. If the non- fault party were able to recover the excess paid to their first party insurer from an at fault insurer it would give rise to a legislative difficulty since it would amount to permitting part of a claim that shouldn't be recovered to be pursued. This would potentially increase small claims litigation and give rise to premium cost trade off between excess and premium such that there would be a false market in respect of TRV.

(e) To some extent LLS are of the view that the Remedy would be unlikely to make any difference. We understand that credit hire organisations with large market share tend to have handling arrangements with major insurers taking referrals of non-fault parties. Such CHC will already be subject to stringent service standards dictated by the insurer on a contractually bound basis. Those same standards would be imposed by a first party insurer in a direct hire scenario. This is however subject to the caveat that should the terms of the policy not entitle the no fault Claimant to a like for like vehicle or give adequate consideration to need the margins of the hire company would be reduced and the Claimant in being provided with a lesser vehicle would suffer a prejudice.

(f) Repair networks as well as CHC are, we understand, well established and benefit from sophisticated electronic management systems – controlling cost, duration of repair and quality of work. Whether these organisations work as part of the same organisation or as separate entities makes little difference to these essential controls now and is unlikely to make any difference in the future even if some of the proposed remedies were adopted.

(g) LLS are concerned primarily with the concept of removing the right of a citizen to claim for certain items that may arise in a loss of use claim following a motor accident. We believe that the proposed remedy 1A will cause significant confusion to members of the public. With the greatest of respect to the Commission we believe that it is naive to believe that the possible remedy will work in isolation other heads of claim and such distortion does not therefore deal with the AEC.

It is in our view, fundamentally wrong to attempt to restrict a citizen’s rights in a way that will cause an adverse impact on a non-fault party’s freedom of choice to resolve and mitigate the consequences of his loss in a way that is reasonable to him. That freedom and duty to mitigate is in the interests of both parties on each side of the claim. There is an even greater impact when the citizen is told that he may be able to “reinstate” those benefits by purchasing insurance. The proposed remedy involves giving the citizen the right to choose whether to purchase no cover, like for like cover or “courtesy car” cover. Such cover would have to be paid for by the insured. In many cases the insured would choose not to purchase the cover through lack of funds but would be faced with an irrecoverable cost of hire or potentially irrecoverable consequential losses such as loss of earnings due to an earlier decision not to purchase the cover in the first place and because of an accident they did not choose to have and which is not their fault.

LLS consider that possible consequences arising out of Remedy 1A are:-

- A non-fault and pecunious motorist who chose not to take out cover for a temporary vehicle but after a road accident, hired a car on a non-credit basis and paid for it would be able to claim the same back as part of his claim for damages. It is anomalous that an impecunious claimant who could not afford to fund paying for a hire vehicle upfront or paying for the required First Party insurance in the first place would be left in a less advantageous position.
- In the same situation described above, the impecunious non fault driver without insurance cover or the means to pay immediately for vehicle hire is forced to do without transport to get him to his place of work and incurs a loss of earnings claim himself which could be greater than the cost of hire. The legislation would also provide him with the perfect defence to any allegation that he had failed to mitigate his loss by staying away from work.
- The same driver who finds it possible to take a taxi service to work every day would, on the face of it incur charges which he could claim from the at fault driver that would be similar to the cost of hire but which would limit him to a specific daily journey and would increase his claim for inconvenience and loss of enjoyment in relation to social domestic and pleasure activities. The same would apply equally to a driver who decided to travel to work by train or other means of public transport.
- Operators of commercial vehicles and members of the public who use their vehicles in connection with a business but who had decided not to take out insurance cover: There would be the potential for very large consequential loss claims caused by lost earnings and lost profits.
- The remedy generally shifts the burden from the at fault insurer where it properly lies given that the accident was caused by the negligence of their insured to the non fault insurer and this benefits the riskier driver who would normally be penalised through the claims made against him because of his negligence at the cost of the safer driver who may be his victim.

Overall we believe that this approach would leave the most vulnerable members of society worse off than those who could afford the additional cost of insurance or who had the ability to pay cash up front for a hire vehicle. Those individuals would be left without mobility and this would have social and economic impacts. LLS also express concern that without appropriate controls the first party insurer could seek to minimise the cost by not offering like for like, limiting the hire period, raising issues such as liability or need and imposing high excess or low mileage allowances.

The corresponding benefit appears to be that the current system keeps loss of earnings and inconvenience claims to a minimum and does not interfere with a citizen’s right to set up his own solution to his restricted mobility subject to his duty to mitigate which protects both the non-fault party and the at fault insurer.

In the view of this Society the present law in relation to mitigation is highly developed through the Common Law, particularly in relation to this specific area, and affords protection to the claimant and at fault insurer alike. No further measures of the type suggested will make an appreciable difference and could very well increase cost and therefore premiums through lack of experience on the part of the insurer in managing temporary vehicle hire or in their need to outsource its management.

(h) The required primary legislation required to partially abrogate a citizen's basic right to be compensated for his losses would require extensive consultation and impact assessment such would be the extent of the changes and the comparative anomalies that would occur, some of which we have illustrated above. The Compensation Act of 2006 made minor changes to the Common Law in relation to tort and took an 18 month passage through Parliament to date of implementation. Overall we could anticipate a lead in time of 3 years from the point at which policy had been formulated.

(i) Since the Notice of Possible Remedies was published there has not been sufficient time to consider in detail whether supporting measures would be required. Reaching a view on that would be time consuming due to the wide ranging impact on the Law of Tort, hence the need for an impact assessment preceded by consultation with parliamentary draftsmen.

Remedy 1B: At-fault insurers to be given the first option to handle non-fault claims.

LLS recognise that the CC has not given consideration to personal injury claims in their analysis of private motor insurance. This may be considered erroneous particularly in respect of the proposed Remedy 1B. The original basis for investigation of the claims market was an alleged increase in premiums which the Transport Select Committee have proven is not in fact the case. The TSC also put forward strong criticism of insurers who adopt third party capture models and make offers of compensation to individuals who have not had the benefit of independent legal advice or been medically examined. This practice perpetuates fraud and contributes to arguments in respect of premium increases generally. LLS believe that Remedy 1B lends itself to what amounts to a mandated capture in respect of more than the TRV and must therefore in the interests of access to justice disagree with the proposal on the grounds that it would erode the legal right of the no fault Claimant to freedom of choice at all levels.

(a)(i) It is unclear how the Claimant would be expected to consider cost aspects of TRV provision to them in their decision making process unless there was a cost to them personally for example by way of any applicable excess on the vehicle. Generally it must be assumed that the Claimant would be more concerned with the type of vehicle available to them and the quality of service which may include factors such as whether the vehicle is delivered to them or limitations to the mileage or period of hire. To this extent the larger insurer with greater bargaining power and well established direct hire relationships may be able to exert an influence upon the Claimant's choice unavailable to a smaller CMC or CHC. It is our view that this does not therefore overcome the AEC and more to the point the remedy fails to take into account the provisions of s134(4) of the Enterprise Act 2002 and requirement to ensure that any solution is reasonable, practicable and that there has been consideration of any of resulting detrimental effects. In particular it seems clear that if the at fault insurer is able to obtain a TRV at a lower cost they will always be incentivised to make an offer to the Claimant that will be accepted which would be anti competitive to the point of permitting a monopolisation of the market by larger insurers.

(ii) We are of the opinion that irrespective of Remedy 2A and the audit of repairs the at fault insurer would have no or little motivation to act in the interest of a Claimant

who is not their customer. It is the concern of LLS that the at fault insurer absent the competition provided by CHC and CMC will work to drive down costs only and ultimately in providing a vehicle may use arguments of need against the Claimant to prevent them from receiving a TRV at all or prevent like for like provision. LLS do not see that a Claimant would be able to deal with the intricacies of hire arguments without the assistance currently available to them. It is notable that CC recognises at paragraph 53 of the Provisional Findings that the quality of service currently available to Claimants is high. LLS would contend that this is because of the separation of control between the paying at fault insurer and claims manager. If the Claimant is put into the position that they cannot access a vehicle this effectively removes their rights in tort to be put back into the position that they would have been but for the accident purely as a result of market forces and LLS are unable to endorse a Remedy that poses such a risk.

(b) Provided that choice was not determined entirely by reference to cost the effect would be to potentially maintain the status quo. However if the Remedy were imposed any such "freedom" would be questionable particularly if the chosen provider were only able to charge the price that the at fault insurer would have paid.

(c) and (d) We are of the view that the Remedy proposed entirely disregards the existing structures and in particular the CHO and ABI and the adoption by a majority of insurers of the GTA. As an inter partes agreement this has already been assessed by the OFT in terms of whether it fell within the Chapter 1 prohibition of the Competition Act 1998 by appreciably preventing, restricting or distorting competition and it was found that there would be no consumer benefit in continuing the case. LLS would therefore suggest that the correct mechanism for control of provision of vehicles to Claimants is the GTA and specifically point 3 of the agreement deals with time scales and contact with the Claimant. This is further enforced by way of the precedent system and enshrined within the specific case of Copley and Lawn (2009). A number of later cases including Sayce -v- TNT have expanded upon the point such that there are already circumstances in which the only amount payable by the at fault insurer would be the amount that they would have paid had they arranged the TRV. LLS note with some interest the low success rate on the part of Insurers in making Copley compliant offers and believe that this does give rise to questions as to whether Insurers are generally in a position that they are either able or motivated to provide early intervention of appropriate TRV. Both the GTA and case precedent currently ensure that the consumer and provision of a vehicle to them as soon as possible after the accident is a priority and LLS are concerned that there will not be the same degree of expediency following implementation of the Remedy. We respectfully suggest that the CC may wish to review the GTA and extent to which being a signatory to the same should be considered mandatory.

(e) As discussed previously within this response LLS do not consider it likely that the intervention would be limited to the TRV. Were the provision of services divided in this way hypothetically it could give rise to disparity in quality of service particularly if there is an audit system applied to the repairs under remedy 2A.

(f) These have been discussed in response to points (a) and (b) in particular the creation of a monopoly by those insurers able to drive down the cost of direct hire through large scale contracts which may remove CHC from the market and result in a poorer quality of service to the Claimant in contravention of their legal right to restitution.

(g) It is suggested that the remedy would apply only in those cases where liability was admitted. The use of a portal for RTA PI claims has already shown the ease with which a rule that relates to admissions only might be circumvented namely by raising issues of contributory negligence, denial or LVI and causation. It is our view that similar efforts will be made under the terms of this Remedy which will in turn create difficulties in setting the extent to which it would apply.

(h) This reverts back to the informational remedy of a statement and use of the mitigation questionnaire. Any other form of audit would be costly and onerous to implement. In terms of circumvention in liability admitted cases however even if the Claimant used their own choice of provider under the terms of the remedy the at fault insurer would have the ability to challenge the invoice and reduce it to the amount that they would have paid in any event.

(i) On the basis that the remedy does possibly override legal entitlements to freedom of choice and access to justice LLS believe that consideration would be required in respect of alteration to the statutory and common law position. Those changes would be significant, contrary to EC regulation and entirely disproportionate to the currently perceived cost increase to premiums because of credit hire of allegedly £6 per policy per annum but which it is suggested on true analysis may be less than £3 per policy. In this regard LLS would express their disappointment that there has not been access afforded to the data held by the CC and an explanation as to the justification for that decision is requested.

Remedy 1C: Measures to control the cost of providing a replacement car to non-fault claimants

LLS consider that this remedy relates to the operation of a CHC and is not a public interest point beyond the fact that should it result in exit from the market of CHCs there would be a reduction in choice of TRV provider and corresponding reduction in insurer incentive to provide a quality service as discussed above. We would however express our concern that a remedy has been proposed that effectively amounts to price fixing by the capping of recoverable rates. This would seem to be anti-competitive and the necessity to establish an independent body able to set those rates and administration of the scheme generally would seem disproportionate in cost when there are already GTA groupings agreed between the relevant bodies that result in settlement in over 75% of cases. We have indicated a view already that the GTA in combination with the Law of Tort act as an adequate control and in this instance refer the CC to the concept of basic hire rate and fact that in accordance with decisions such as Pattini and Bent there is a framework in place that limits the amount recoverable and involves review of spot rate for equivalent vehicles within a specific geographical area. LLS would also remind the CC that OFT did not find that there were any Chapter 1 failings within the GTA and in fact determined that it would not be in the interest of the consumer to continue their investigation any further.

We would further point out that in seeking to put in place guidance relating to hire periods the CC appear to have gone beyond the remit of their own identified AEC. This Society is however able to support point 46 of the Notice and agree that improved communication channels would have a potential to reduce frictional costs with the note of caution that the RTA portal must be analysed carefully in terms of the costs of its establishment before any decision is made as to the proportionality of such a remedy in this instance bearing in mind the currently very low portion of the annual premium that pays for TRV.

Remedy 1D: Measures to control non-fault repair costs

This Society does not have within its direct knowledge sufficient information to make comment in respect of the economics of subrogated claim mark up. We are however of the view that fixed standardised repair costs cannot be considered to be in the public interest if in attempting to achieve a profit margin the repairing body shop reduces quality and service. Price control of this type is in itself anti competitive.

LLS would also direct CC to the recent decision of Coles Ors -v- Hetherton Ors (20/12/2013) which dealt with the recoverability of repair costs by RSA under the RSAI repair scheme. The Court assessed the position by reference to a measure of loss, reasonableness of repair charges and what amount would be recoverable and noted that within the industry factors are at play that result in savings and rent generation. Overall it was the Court's finding that the benefits obtained under an insurance policy are irrelevant since it is not the cost of repairs that constitute loss but rather the diminution in value to the vehicle and this is a question of fact and general damages such that Remedy 1D may constitute an alteration to the Law of Tort.

Remedy 1E: Measures to control non-fault write off costs

LLS are unable to comment directly in respect of these issues but would suggest that in their analysis of the issue CC have failed to adequately assess the impact upon the Claimant and the informational issues namely how does the Claimant know that they have been offered a reasonable salvage value and how do they make a decision about retention of that salvage.

Remedy 1F: Improved Mitigation in relation to the provision of replacement cars to non fault Claimants

LLS are concerned that in giving consideration to this remedy the CC have overlooked the existing mechanisms in place to control provision of TRV to the non fault Claimant it being a long established principle per Giles v- Thompson that " need is not self proving". Point 4.3 of the GTA specifically imposes upon signatories an obligation to advise their customers of the need to mitigate loss at the start of and during the hire period and at Appendix C includes a draft Mitigation Questionnaire for completion as part of the Payment Pack. Mitigation is further a legal principle within the law of tort that has been part of any consideration as to reasonableness since the case of Liesbosch Dredger -v- SS Edison (1933). The concept has been regularly tested and key decisions handed down in the specific area of credit hire most recently in Opoku -v- Tintas (2013) and the Northern Ireland case of Clarke -v- McCullough (2013) when in both instances the amount that the Clamant could recover by way of credit hire charges was significantly curtailed due to a failure on their part to mitigate their loss. It is our view therefore that the remedy is not required given the existence of existing controls. Indeed it does not in any way overcome the AEC of separation of control and is unlikely to reduce frictional and transactional costs any more than mitigation as a concept already keeps them in check. As such its implementation would seem disproportionate to the stated aim although provided the document were not to burdensome it is clear that the public interest would not be unduly disadvantaged.

In consideration of this response LLS have reviewed the existing mitigation questionnaire as a precedent document and do believe that it potentially requires update and amendment. It is the view of the Society that any draft document should

be produced by a neutral body in the same way that a statement as to legal entitlement would be created with collaboration thereafter with all relevant bodies before adoption of it under the GTA or in the absence of membership a relevant undertaking.

A new questionnaire must be limited to one page and be easily understood and explained to the Claimant before it is signed and include possible reference to information provided during the FNOL call.

It should include information that encompasses the issues of need and in particular need for like for like vehicles and availability of alternate vehicles, impecuniosity and the obligation if any to overcome that through use of own insurance or obtaining funds in the event of a dispute or extended hire, the responsibility to undertake temporary repair work to render the vehicle roadworthy, betterment and storage. The Claimant must be specifically reminded of their obligation to not unreasonably extend the hire period through retention of the vehicle when it is not required for example due to holiday or incapacity or because of dispute in respect of value after an interim has been paid.

In response to the questions posed by the Notice LLS would strongly object to an assertion that monitoring notes should be made available. This would be contrary to the principles of privilege and as such may cause prejudice to the Claimant. Period statements are routinely exchanged within credit hire litigation and a well drafted mitigation questionnaire should suffice by way of dealing with this point in any event.

Remedy 1G: Prohibition of referral fees

Referral fees form part of the revenue stream between insurers, repairers, CMC and CHC and as such do not fall within the remit of this Society save that we would express a concern that their removal would effectively reduce the marketing tools available to companies to secure work which may ultimately drive CHC from the market. For reasons discussed above this would be to the detriment of the consumer in terms of the quality of service that may then be available to them. We are further concerned that the generation of this income to insurers indirectly serves to check insurance premiums and that in its absence premiums may then raise as Insurers seek to redress the balance and their profitability. Removal of referral fees within the PI market has not been entirely successful and the SRA resource has been burdened by the requirement to investigate various models that have been established in an effort to circumvent the ban. It is the view of LLS that CC must undertake a more in depth analysis of this potentially anti-competitive remedy and the extent to which it is proportionate given that currently it would not appear to cause any adverse impact to the consumer.

TOH 4 : Add Ons and TOH 5: Most Favoured Nation Clauses in PCW and Insurer Contracts

LLS are unable to comment upon the specific points relating to actual cost of premiums and the advantages or otherwise of wide and narrow MFN and their impact. We do however welcome any review that gives consideration to asymmetries in the provision of information to the consumer and believe it to be entirely in the public interest to re-examine this issue. It is the view of LLS that the consumer commonly misunderstands the concept of comprehensive insurance as opposed to a fully comprehensive policy that includes all the add ons such as roadside recovery, courtesy vehicles, LEI, and NCR. Should those consumers be single homing in their

use of PCW this problem is exacerbated and ultimately it may not be until an accident has occurred that they become aware of the deficiencies within their cover. LLS would therefore welcome consideration as to an informational remedy at the point of sale that provided for a more detailed premium breakdown and the options available to the consumer.

Conclusion

Pursuant to section 134(1) of the Enterprise Act the CC are required to investigate the private insurance market and determine whether "any feature, or combination of features, of each relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services" In undertaking that review they have identified a number of adverse effects on competition most importantly the separation of control and liability in that the party managing the claim is not paying for the claim and high frictional and transactional costs. Should it be deemed that such AEC do exist remedial actions may be recommended and imposed although section 134 (8) in particular requires consideration as to any resulting detriment to the consumer that would occur because of a remedy for example by way of higher premiums, lower quality and less choice.

Having given consideration to the specific AEC in the context of the remedies LLS are not convinced that they do exist at a level that causes distortion to the market. Separation of control clearly has positive customer benefits in that it protects the market, ensures quality of service and enables access to TRV provision in line with the principles of restitution in the Law of Tort. If that separation were removed this Society has serious concerns as to the appropriateness of placing control with the at fault insurer who has a vested interest in driving down cost and not access to justice. Separation of control is therefore a mechanism by way which in accordance with Tort the Claimant's position is protected and their freedom of choice is maintained not worsened by the conduct of the Defendant. Such protection is the rationale behind legislation that makes insurance against third party liabilities compulsory within both the UK and EC.

It is the opinion of LLS that CHC as businesses must be already incentivised to reduce frictional costs given that to do so increases their ability to pay rents and generate work and also improves their profit margin. If remedies were enacted that resulted in the removal of CHC from the market the CC must consider where the frictional costs would be transferred to and the serious impact this could have to the consumer either on a financial level or by the under provision to them of a service due to their inability to deal with the Insurer directly.

S134(6) specifically requires the CC to "have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on consumers" which must include their effectiveness and whether they are proportionate. It is the overall view of LLS that aside from the supported informational remedies even if it is deemed that an AEC exists the proposed remedies involve so fundamental a change to legal principles that to implement them would be contrary to the access to justice by the individual and entirely against consumer interests.

LLS also wish to express concerns as the lack of empirical data that has been disclosed particularly in support of the assertions made that the provision of TRV results in a cost of £6 being added to every policy. Bearing in mind that the proposed remedies are likely to give rise to both a significant cost in their construction and implementation and for reasons discussed above also raise premiums that cost renders the remedies entirely disproportionate. LLS would seek better disclosure from the CC generally and consider that data room access should be afforded beyond the MXSI findings.

Prepared by Liverpool Law Society
17th January 2014