

This Bulletin summarises a proposal by the Action Group for Life Settlements to take legal action against the UK Financial Conduct Authority (FCA) in relation to their Announcement dated 28th November 2011 which triggered the suspension of the EEA Life Settlements Fund on 30th November 2011. To participate fill in the [web form here](#).

This has been **updated** to include the announcement that a "No win, no fee" agreement has been secured, at least for Stage One of the proposed Action. These updates are indicated by the red bar in the right margin.

A **further update** relates to an announcement that registration for Stage One will close on 14th February 2015. These updates are indicated by the Green bar in the right margin.

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A. Action Group for Life Settlements

This Action Group was formed by Peter Lihou in February 2014 ([See Video](#)). The differences between Peter's Group and the EEA Investors' Group was summarised in a [Bulletin](#) at the time.

The Action Group was set up as a focal point for those who believe that the actions of the then FSA constituted unprofessional behaviour and a serious failing in the regulator's duty of care towards investors. In [his blog](#) Peter said that

"...The principle duty of care and the professional conduct of any regulatory authority must be the protection of consumers, but what recourse is there when the regulator itself is the source of the damage to consumers? Those organisations entrusted with the role of governance over an entire industry must be seen to follow the highest standards of best practice. If they fail, they and those who give them their authority must be held accountable..."

In [another blog](#), Peter said :

"...During 2011, the FSA instigated a consultation to investigate their concerns about the operation of Traded Life Policy Investments (TLPs) in general.

"The publication is guidance for consultation. The closing date for the consultation period is 23 January 2012." Joyce Chan, Associate-Products Team, Conduct Policy, The Financial Services Authority

However, on the 28th November, 2011, almost two months before the consultation period closed, the FSA made an announcement that TPLs were

'...high risk, toxic products that are generally unsuitable for the majority of UK retail investors and should therefore not be promoted to them...'

In relation to this statement, and following a complaint, the FSA confirmed

'...We acknowledge that the publication of our guidance consultation may have prompted a number of investors to request redemption from funds...'

The independent Complaints Commissioner, Sir Anthony Holland, stated on 12th January, 2012;

'... the FSA is currently undertaking a consultation exercise on the future 'distribution' of TLPs, and the announcement could be, as you suggest, premature...'

Directly arising from the actions of the FSA and subsequent correspondence with the FSA and Sir Anthony Holland, a number of facts were confirmed :

- 1) Harm was done to investors whose interests the FSA had a statutory duty to protect
- 2) The FSA was guilty of unprofessional behaviour and a lack of care by publishing a guidance announcement before the conclusion of their consultation period, in fact the announcement was made on the same day as the consultation began
- 3) The consultation failed to warn or seek the views of those who would be most affected by their proposed guidance (ordinary investors) despite the fact they claimed that one of their aims was for it to be accessible to ordinary investors.
- 4) Inadequate complaints procedures were in place to oversee the FSA which was supposed to be a standard bearer of best practice. Their response to the complaint relating to the above was,

'Unfortunately this type of complaint is excluded from our Complaints Scheme.'

And from the Complaints Commissioner,

'I have no power to enforce any decision or action upon the FSA. My power is limited to setting out my position...I can make recommendations.. Such recommendations are not binding on the FSA and FSA is at liberty not to accept them.'

The Commissioner goes on to confirm that

'his investigations are structured around a desk based review ... and [he] would not normally feel it necessary to contact a provider to obtain further information.'

In other words he relied upon the FSA's statements when conducting an investigation into the FSA.

- 5) The Human Rights Act 1998 Section 6(1) states that

'it is unlawful for a public authority to act in a way which is incompatible with a Convention right.'

Under Article 1 of the First Protocol,

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions.'

- 6) In making the announcement that TLPs were 'high risk, toxic products' without reference to the leading fund that had demonstrated the contrary beyond reasonable doubt over a sustained period, and without completing their own consultation period, the FSA acted unprofessionally and failed in its duty of care to investors. This directly led to the suspension of at least one fund and caused investors to be denied the peaceful enjoyment of their possessions.

The FSA was a public authority that obtained its mandate and corporate governance directly from the UK Government. The UK Government is therefore responsible for the consequences of actions taken by the FSA and it falls upon them to compensate investors for the financial and emotional distress caused by its actions.

But can this action succeed?

B. E-Petition

In April 2014, Peter submitted an [e-petition to the UK Government](#) calling for

"... a truly independent Complaints Commissioner [to be] appointed, and the business practices of the FCA [to be] reformed."

The Petition closes at midnight on 30th March 2015 and is open to all UK residents.

C. Initial Legal Consultation

Peter issued this [Summary of the case against the FCA](#) as briefing for a meeting with a solicitor on 2nd January 2015. The solicitor indicated that

"... on the basis of the information shown, he felt there was a case to answer, either with respect to the legality of the Consultation documentation published by the FSA in 2011, which failed to comply with the Financial Services and Markets Act 2000; with respect to the Human Rights Act 1998, or both. In the event that a case is taken forward under the Human Rights Act, the services of a specialist in Human Rights law may be necessary. "

Further meetings and discussions are taking place during January, but the solicitor also suggested that

"... a class action may be a reasonable approach and I [Peter] should endeavour to subscribe a significant number of claimants. All claimants must notify [Peter] ... Every subscribing participant in the class action must sign an undertaking that they will be bound in all respects to every decision taken on their behalf in the action, whether found to be right or wrong, and they fully indemnify [Peter] from any and all consequences of such actions. "

Peter is now creating a list of all those who, in principle, may wish to participate in a class action against the FCA. The action will be restricted to investors in the EEA Life Settlements Fund, either directly or via platforms and other intermediaries.

D. Litigation Proposal

- a. **Stage One** : The solicitor will fully research the case and write to the FCA setting out the Claim in legal terms. The FCA response to his letter should provide an indication of the merit of further action whether by an out of court settlement or full legal case. The cost of researching and sending the letter to the FCA is likely to be around £8,000 plus VAT and this will be shared by all participants. It is estimated that this work will be completed within the next three months.

Update : In a [blog post](#) dated 20th January 2015, Peter announced that

“... a conditional fee agreement for the initial action has been agreed. This means investors will not be asked to make an advance contribution towards the costs of the initial action and no contribution will be requested if this is unsuccessful.”

Update : In a [blog post](#) dated 25th January 2015, Peter announced that

“...The initial action will not require any advance payments (as previously stated it is a 'no win, no fee' agreement), to cover the legal costs for research, case preparation, legal opinion, consultations, and a formal letter to the FCA setting out the alleged illegalities and the claim on behalf of participants. It is our opinion that the legal basis for the claim under the Human Rights Act remains compelling. If, and only if, an acceptable settlement is forthcoming, costs may be deducted from the compensation paid to each individual claimant up to a maximum of £126.98 plus VAT. In the unlikely event that a response is received that persuades the steering committee to drop the case and the claim [at the end of Stage One], there will be no charge to participants in the Class Action.”

- b. **Stage Two** : Depending on the FCA response and assuming the legal advice continues to support the merit of the action, this will involve a negotiated settlement or a full legal case. The details of the full legal action will be disclosed to all registered participants at a later date and participation in this stage will be entirely optional prior to the commencement of any Stage Two activity or costs.

The legal costs for an action under FSMA2000 can only be estimated but could be £1-2m, or more if an action under the Human Rights Act in the European Courts is required. [We] should also anticipate defendant costs of around £100k if the case is lost and costs are awarded against [us]. The award of costs (either winning or losing) might be affected by whether or not the judge awards exemplary damages. No timeframes have been discussed so far.

Update : It is possible that the contingency fee agreement mentioned under stage One above might be extended to include Stage Two.

Update : In his [blog post](#) dated 25th January 2015, Peter announced that

“...Costs for the second phase of activity will depend upon the number of participants, the route through the courts, and our funding arrangements (we may recommend accepting funding from a cohort of funders). But as an example, 500 participants would result in anticipated costs of around £400 per participant. Any costs incurred in prosecuting the action will be included in the claim and it is usual for a judge to award these against a defendant found to be guilty.”

An alternative is 'after the event' insurance which would cover costs in the event of the case going to court and failing. This would require an up front premium paid to a specialist insurer (normally a Lloyds syndicate).

c. Estimated Compensation

Depending upon the agreed method of apportionment, it's likely that any settlement will be based upon the return of original investment plus compensation for lost "income" etc (currently viewed as 5-8% pa from the date of investment to date of settlement) and that this will be apportioned back to each investor (claimant). Participation in Stage One will not oblige you to participate in Stage Two (you will get that choice later, based on the FCA response). However, if you do not participate in Stage One then you might not be eligible to participate in Stage Two and therefore you would also not benefit from any eventual settlement.

On 12th January 2015 Peter reported that

"...Last week (the first full week after the launch) claims in excess of £4m have been registered in the class action against the FCA. Skandia has also confirmed that they will be notifying all impacted policy holders and we are hoping that EEA will similarly ensure their investors are made aware of the action..."

Members of the EEA Investors' Group account for more than £50m of original investment. The total outstanding original investment in EEA is around £500m at current exchange rates.

E. Participation

Any person or company in the World that has remaining investments in the EEA Life Settlement Fund can be deemed to have suffered as a result of the 2011 FSA announcement and subsequent suspension of the EEA Fund, and is therefore eligible to join the Class Action, regardless of whether their investment is direct with EEA or via platforms such as RL360, Old Mutual (previously Skandia), Meteor, Way, Transact, Nucleus etc. Where the investment is held within a Trust, Pension Wrapper or ISA Wrapper (or similar) then the claim would eventually have to be made by the relevant Administrator or Trustee. Where the investment is held within an Insurance policy or Bond then it will depend on the terms and conditions of the Policy or Bond as to who has the beneficial ownership to participate in the claim or instruct their intermediary to participate.

Update : In his [blog post](#) dated 25th January 2015, Peter announced that

*"...A deadline of 14th February 2015 has been set for all investors in the EEA Life Settlement Fund wishing to register their participation in the Class Action for compensation against the FCA. Only those who have registered will be eligible for compensation resulting from the Class Action... Participation in the initial phase will not automatically register investors in the second phase (we will ask you again before that phase commences) but **you***

must register before the deadline, unless you have already done so, to be included in the initial action."

If you are invested via a Trust, Pension, ISA or Insurance wrapper, then register anyway and mention the details on the registration form or an associated email to Peter. You'll be able to sort out the details later. DON'T MISS THE DEADLINE for want of some details.

F. Alternatives (in suggested priority order)

a) "Mis-selling" claims against UK IFAs

If you are able to make a successful claim against a UK IFA (or similar actions outside the UK – where possible) then this should get you 100% of your original investment plus compensation at 5-8% per annum from the date of original investment. The IFA should respond within eight weeks of your complaint.

If the IFA rejects the claim and you take it to the UK Financial Ombudsman Service (FOS) then it will add a year to the process, and enforcement will be limited to a maximum of £150k (with a possible recommendation to voluntarily compensate more than this when applicable)

If the IFA cannot pay to settle the claim (no longer trading, or no longer insured for UCIS claims etc) then you can take the claim to UK Financial Services Compensation Scheme (FSCS). Again this will add a year to the process and the FSCS limit is £50k with no additional recommendations. The FSCS will also only make an interim payment until the EEA Fund has completed its redemption process (5 -10 years, or more) unless someone can persuade the FSCS to deem otherwise.

b) Participation in "Peter's" Class Action

If successful, then this should get you 100% of your original investment plus compensation at 5-8% per annum from the date of original investment. Timeframe is unknown and will depend on the FCA response in Stage One and whatever actions are taken in Stage Two. Given the conditional fee agreement mentioned above, your costs will be zero for Stage One.

Stage Two costs (if any) will be advised before committing to Stage Two expenditures, and you will have the opportunity to withdraw from the proposed Action at that point.

c) Wait for EEA Maturities and Redemptions

Based on EEA predictions, it will take more than ten years to receive (on average) 100% of your remaining original investment, but none of the "promised" or "expected" 8-10% per annum growth ¹

Based on our predictions ² it will take more than fifteen years for you to get back 70% of your remaining original investment (on average).

¹ Because of the way that EEA's NAV process works, investors prior to 2010 will receive 0 - 20% more than the "average" and investors in 2010 and 2011 will receive 0 - 20% less than the average.

² See Working Paper WP7A

d) Administration or Liquidation of EEA Fund.

We are currently estimating this scenario in more detail. Our current view is that it might take 1 – 5 years to get back 50 – 70% of your remaining original investment (on average)

G. Recommendation

- i) If you are able to make a successful claim against a UK IFA then you should probably do so. This will get you more money in the shortest timeframe with the highest probability of success and lowest (zero) cost. If you have to use the FOS or FSCS then you might suffer from the claim limits (£150k or £50k respectively) and other conditions that apply.
- ii) Even if you are pursuing a Claim under (i) above (or have already settled for less than the potential full amount), then you should immediately sign up to participate in Stage One of Peter's Class Action.

Please let me know if you sign up so that I can update my own records. This does not oblige you to participate in Stage Two. That choice will come later, together with more details about the proposed action, the lawyers involved plus their written advice and opinions.

To participate in Stage One, fill in the [web form here](#). If you have questions or need help then contact Peter Lihou

Email : peter@peterlihou.com

Tel : +44 (0) 1566 786755.

Update : In his [blog post](#) dated 25th January 2015, Peter announced that

"...The form has been amended to allow those with a legal power of attorney to register on behalf of others who for any reason are unable to register themselves. The person holding such power in this matter must give their email address on the form as the Investor's Representative and send documentary evidence of the grant of power of attorney by same email address to poa@peterlihou.com

- iii) If you don't pursue (i) or (ii) above then you will have to wait and see what we can resolve with EEA about the differences in our predictions for the future run-offs and any potential litigation to recover some of the past overpayments.

We shall also continue to determine whether to press for Administration or Liquidation of the EEA Fund. If Peter's Class Action is successful then we will probably cease to pursue EEA – most of the shares will by then have been transferred to IFAs or their insurers and/or the FCA and they can fight it out with EEA themselves.

H. Due Diligence

I have not carried out any due diligence on Peter or his associates³ on the "Steering Committee" of the Action Group, although I have exchanged several emails with them over the past year and raised a number of questions which Peter answered promptly over the past two weeks.

I have been unable to establish whether their proposed solicitor or barrister has any track record of successful class actions. There is currently no written advice from the solicitor and no mention of Counsel's (QC) opinion anywhere in the proposed process.

There are also some currently unanswered questions about how the FCA would fund any awarded damages and whether or not the Treasury could intervene to claim Crown indemnity. These would all have to be addressed by the lawyers before commencing Stage Two.

David Trinkwon
Director – Medley Systems Ltd
Coordinator, EEA Investors' Group

³ Action Group Steering Committee :

Peter Lihou is a published author who runs a book publishing organisation and provides literary services such as editing and proof reading. Peter is also a business consultant specialising in demand creation and management.

Terence P O'Halloran, Retired IFA, former Senior Partner at O'Halloran & Co.(Lincoln) See [LinkedIn Profile](#)

Ian Coley, IFA – Partner at [Medical Investment Services](#) (Godalming). See [LinkedIn Profile](#)