

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out a number of requirements applying to success fee agreements.

The term “success fee agreement” is defined in section 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the “2018 Act”) and covers all types of speculative fee agreements and damages-based agreements. Both speculative fee agreements and damages-based agreements are types of “no win, no fee” agreements, entered into in connection with actual or contemplated civil proceedings. In both of these types of agreements, there is a fee to be paid in the event of success (the “success fee”), but no fee, or a lower one, if the action is lost. Success fee agreements concern “relevant services”, which are defined in section 1(2) of the 2018 Act to be one of “legal services” or “claims management services”. The definition of success fee agreement also includes speculative fee agreements that fall within section 61A of the Solicitors (Scotland) Act 1980 (c.46).

Regulation 2 caps the success fee which providers of relevant services can charge recipients of those services under a success fee agreement. In all cases, the cap is determined by reference to the financial benefit obtained by the recipient in respect of the matter. There are specific caps for matters which are or could become a claim for damages for personal injuries and for matters which are or could become proceedings before an employment tribunal. A single cap applies to all other matters to which these Regulations apply.

Regulation 3 prohibits the use of damage-based agreements in family proceedings.

Regulation 4 sets out a number of requirements relating to the terms of a success fee agreement, in order to ensure that agreements are offered on a relatively standard basis and can be readily compared by potential recipients of relevant services. For example, the success fee agreement must make clear the basis on which the amount of any fee potentially payable under it is to be determined. It must also set out the circumstances in which the provider may, as a consequence of the recipient’s conduct, terminate the agreement prior to the resolution of the matter to which it relates and require payment from the recipient for services provided prior to termination. Examples of circumstances the success fee agreement might include are where the recipient fails to provide adequate instructions, fails to attend any medical or expert examination without reasonable excuse or rejects the provider’s opinion about making a settlement with their opponent, such opinion having been arrived at objectively and in good faith.

It remains open to the provider and recipient of relevant services to agree further terms. To continue the above example, the success fee agreement may set out other circumstances in which the provider may terminate early and require payment from the recipient.

Regulation 5 provides that a success fee will be unenforceable to the extent that the requirements in these Regulations are not complied with. Non-compliance with these requirements may also have consequences for providers under the regulatory regime which is applicable to them.