

Chapter 7

Assignment, subrogation,
variation or creation of rights

7.1 Application

Application and Purpose

7.1.1 **R** This chapter applies to the *FSCS*.

7.1.2 **G** It is also relevant to claimants.

Purpose

7.1.3 **G** The *FSCS* may (and in some cases must) make an offer of compensation conditional on the assignment of rights to it by a claimant. The *FSCS* may also be subrogated automatically to the claimant's rights. The purpose of this chapter is to make provision for and set out the consequences of an assignment or subrogation of the claimant's rights.

7.1.4 **G** In relation to *claims* in connection with *funeral plan provision activity*, the *FSCS* may:

- (1) vary existing rights and obligations in connection with *trust arrangements* and *contracts of insurance* relating to the relevant *funeral plan contract* entered into or carried out by the *relevant person or successor*; and
- (2) create new rights in favour of, or obligations to, the *FSCS* that override such existing rights or obligations.

This chapter also makes provision for and sets out the consequences of such a variation or creation of new rights and/or obligations: see **COMP 7.7**.



7.2 How does the assignment of rights work?

7.2.1 **R** The FSCS may make any payment of compensation to a claimant in respect of any *protected claim* or, where applicable, may make a payment to secure continuity of *funeral plan contracts* in accordance with **COMP 3.3**, conditional on the claimant assigning the whole or any part of their rights against any one or more of the *relevant person*, any third party, or, where applicable, a *successor*, to the FSCS on such terms as the FSCS thinks fit.

7.2.2 **R** If a claimant assigns the whole or any part of his rights against any *person* to the FSCS as a condition of payment, the effect of this is that any sum payable in relation to the rights so assigned will be payable to the FSCS and not the claimant.

7.2.3 **R**

- (1) Before taking assignment of rights from the claimant under **COMP 7.2.1 R**, the FSCS must inform the claimant that if, after taking assignment of rights, the FSCS decides not to pursue recoveries using those rights it will, if the claimant so requests in writing, reassign the assigned rights to the claimant. The FSCS must comply with such a request in such circumstances (see **COMP 7.4.2 R**).
- (2) [deleted] [*Editor's Note: The text of this sub-paragraph has been moved to new **COMP 7.4.1 R**.*]
- (3) [deleted]

7.2.3A **R** [deleted]

Electronic assignment

7.2.3AA **R** Where the FSCS has paid compensation in respect of a *claim*, this has the effect that:

- (1) an assignment completed and signed electronically in a form prescribed by the FSCS will be deemed to satisfy the formalities for a valid legal assignment;
- (2) production of a hard copy of the electronically signed assignment form is conclusive evidence (or, in Scotland, sufficient evidence) that the formalities of a legal assignment have been complied with and that a legal assignment has occurred; and

(3) an assignment completed electronically in the prescribed form is to be treated as having been made by writing under the hand of the assignor for the purposes of section 136 of the Law of Property Act 1925 and any other formal requirement.

7.2.3B **R** [deleted]

7.2.3C **G** [deleted]

7.2.3D **G** [deleted]

7.2.3E **R** [deleted] *[Editor's Note: The amended text of this provision has been moved to new **R** COMP 7.6.1 R.]*

7.2.4 **R** [deleted] *[Editor's Note: The amended text of this provision has been moved to new **R** COMP 7.6.2 R.]*

7.2.4A **R** [deleted] *[Editor's Note: The text of this provision has been moved to new **R** COMP 7.6.3 R.]*

7.2.5 **R** [deleted] *[Editor's Note: The amended text of this provision has been moved to new **R** COMP 7.6.4 R.]*

7.2.6 **G** [deleted] *[Editor's Note: The text of this provision has been moved to new **G** COMP 7.6.5 G.]*

Claims arising under COMP 3.2.4R

- 7.2.7 **R**
- (1) For the purposes of compensation paid under **R** COMP 3.2.4 R, FSCS may require any *firm* (including, but not limited to, the claimant *firm*) to assign to FSCS any rights the *firm* may have to claim against the *relevant person* in relation to the amount of the *shortfall* in *client money* arising out of the *failure* of the *relevant person*.
 - (2) A *firm* required by FSCS to assign its rights in (1), must assign those rights as requested, unless it has a reasonable excuse for not doing so.



7.3 Automatic subrogation

General

7.3.1

R

[deleted]

7.3.2

R

The FSCS's powers in this section may be used:

- (1) separately or in any combination as an alternative and in substitution for the powers and processes elsewhere in this sourcebook; and/or
- (2) [deleted]
- (3) in relation to all or any part of a *protected claim* or class of *protected claim* made with respect to the *relevant person* (or, where applicable, a *successor*).
- (4) [deleted]

7.3.3

R

The FSCS may determine that the exercise of any power in this section is subject to such incidental, consequential or supplemental conditions as the FSCS considers appropriate.

Determinations by the FSCS

7.3.4

R

- (1) Any power conferred on the FSCS to make determinations under this section is exercisable in writing.
- (2) An instrument by which the FSCS makes the determination must specify the provision under which it is made, the date and time from which it takes effect and the *relevant person* (or, where applicable, a *successor*) and *protected claims*, parts of *protected claims* and/or classes of *protected claims* in respect of which it applies.
- (3) The FSCS must take appropriate steps to publish the determination as soon as possible after it is made. Such publication must be accompanied by a statement explaining the effect of ■ COMP 7.4.2 R.
- (4) Failure to comply with any requirement in this *rule* does not affect the validity of the determination.
- (5) A determination by the FSCS under this section may be amended, remade or revoked at any time and subject to the same conditions.

Verification of determinations

- 7.3.5 **R** (1) The production of a copy of a determination purporting to be made by the *FSCS* under this section:
- (a) on which is endorsed a certificate, signed by a member of the *FSCS*'s staff authorised by it for that purpose; and
 - (b) which contains the required statements;
- is evidence (or in Scotland sufficient evidence) of the facts stated in the certificate.
- (2) The required statements are:
- (a) that the determination was made by the *FSCS*; and
 - (b) that the copy is a true copy of the determination.
- (3) A certificate purporting to be signed as mentioned in (1) is to be taken to have been properly signed unless the contrary is shown.
- (4) A *person* who wishes in any legal proceedings to rely on a determination may require the *FSCS* to endorse a copy of the determination with a certificate of the kind mentioned in (1).

Effect of this section on other provisions in this sourcebook etc

7.3.6 **R** Other provisions in this sourcebook and **FEES 6** are modified to the extent necessary to give full effect to the powers provided for in this section.

7.3.7 **R** Other than as expressly provided for, nothing in this section is to be taken as limiting or modifying the rights or obligations of or powers conferred on the *FSCS* elsewhere in this sourcebook or in **FEES 6**.

Rights and obligations against the relevant persons, successors and third parties

7.3.8 **R** The *FSCS* may determine that:

- (1) the payment of compensation by the *FSCS*; or

- (2) a payment by the *FSCS* in connection with securing continuity of *funeral plan contracts*;
shall have all or any of the following effects:
- (3) the *FSCS* shall immediately and automatically be subrogated, subject to such conditions as the *FSCS* determines are appropriate, to all or any part (as determined by the *FSCS*) of the rights and claims in the *United Kingdom* and elsewhere of the claimant against the *relevant person* (or, where applicable, a *successor*) and/or any third party (whether such rights are legal, equitable or of any other nature whatsoever and in whatever capacity the *relevant person* (or, where applicable, a *successor*) or third party is acting) in respect of or arising out of the *claim* in respect of which the payment of or on account of compensation was made;
- (4) the *FSCS* may claim and take legal or any other proceedings or steps in the *United Kingdom* or elsewhere to enforce such rights in its own name or in the name of, and on behalf of, the claimant, or in both names against the *relevant person* (or, where applicable, a *successor*) and/or any third party;
- (5) the subrogated rights and claims conferred on the *FSCS* shall be rights of recovery and claims against the *relevant person* (or, where applicable, a *successor*) and/or any third party which are equivalent (including as to amount and priority and whether or not the *relevant person* (or, where applicable, a *successor*) is insolvent) to and do not exceed the rights and claims that the claimant would have had; and/or
- (6) such rights and/or obligations (as determined by the *FSCS*) as between the *relevant person* (or, where applicable, a *successor*) and the claimant arising out of the *protected claim* in respect of which the payment was made shall be transferred to, and subsist between, another *authorised person* (or, where a *successor* is not an *authorised person*, an *authorised person*) with an appropriate *permission* and the claimant provided that the *authorised person* has consented (but the transferred rights and/or obligations shall be treated as existing between the *relevant person* (or where applicable, a *successor*) and the *FSCS* to the extent of any subrogation, transfer or assignment for the purposes of (3) to (5) and ■ COMP 7.3.9 R).

7.3.9 **R** The *FSCS* may alternatively or additionally make the actions in ■ COMP 7.3.8R conditional on the claimant assigning or transferring the whole or any part of all such rights as they may have against the *relevant person* (or, where applicable, a *successor*) and/or any third party on such terms as the *FSCS* determines are appropriate.

7.3.10 **R**

- (1) The *FSCS* may determine that:
 - (a) if the claimant does not assign or transfer his rights under ■ COMP 7.3.9 R;
 - (b) if it is impractical to obtain such an assignment or transfer; and/or
 - (c) if it is otherwise necessary or desirable in conjunction with the exercise of the *FSCS*'s powers under ■ COMP 7.3.8 R or ■ COMP 7.3.9 R;

that claimant shall be treated as having irrevocably and unconditionally appointed the chairman of the *FSCS* for the time being to be his attorney and agent and on his behalf and in his name or otherwise to do such things and execute such deeds and documents as may be required under such laws of the *United Kingdom* or any other state or law-country to create or give effect to such assignment or transfer or otherwise give full effect to those powers.

- (2) The execution of any deed or document under (1) shall be as effective as if made in writing by the claimant or by his agent lawfully authorised in writing or by will.



7.4 Duty on FSCS to pursue recoveries

- 7.4.1** **R** If the *FSCS* takes assignment or transfer of rights from the claimant or is otherwise subrogated to the rights of the claimant, it must pursue all and only such recoveries as it considers are likely to be both reasonably possible and cost effective to pursue.
- 7.4.2** **R** If the *FSCS* decides not to pursue such recoveries and a claimant wishes to pursue those recoveries himself and so requests in writing, the *FSCS* must comply with that request and assign the rights back to the claimant.

7.6 Treatment of recoveries

- 7.6.1** **R** If the *FSCS* makes recoveries in relation to a *claim*, it may deduct from any recoveries paid over to the claimant under **COMP 7.6.2 R** part or all of its reasonable costs of recovery and distribution (if any).
- 7.6.2** **R** Unless compensation was paid under **COMP 9.2.3 R**, if a claimant assigns or transfers their rights to the *FSCS* or a claimant's rights and claims are otherwise subrogated to the *FSCS* and the *FSCS* subsequently makes recoveries through those rights or claims, those recoveries must be paid to the claimant:
- (1) to the extent that the amount recovered exceeds the amount of compensation (excluding interest paid under **COMP 11.2.7 R**) received by the claimant in relation to the *protected claim*; or
 - (2) in circumstances where the amount recovered does not exceed the amount of compensation paid, to the extent that failure to pay any sums recovered to the claimant would leave a claimant who had promptly accepted an offer of compensation or whose rights and claims had been subrogated to the *FSCS* at a disadvantage relative to a claimant who had delayed accepting an offer of compensation or whose claims had not been subrogated (see **COMP 7.6.4 R**); or
 - (3) where the *FSCS* has secured continuity of a *funeral plan contract*, to the extent that the amount recovered exceeds the cost of securing that continuity as estimated on a reasonable basis by the *FSCS*.
- 7.6.3** **R** For the purpose of **COMP 7.6.2 R** compensation received by *eligible claimants* in relation to *contracts of insurance* written at Lloyd's may include payments made from the *Central Fund*.
- 7.6.4** **R** The *FSCS* must endeavour to ensure that a claimant will not suffer disadvantage arising solely from his prompt acceptance of the *FSCS*'s offer of compensation or from the subrogation of his rights and claims to the *FSCS* compared with what might have been the position had he delayed his acceptance or had his claims not been subrogated.
- 7.6.5** **G** As an example of the circumstances which **COMP 7.6.4 R** is designed to address, take two claimants, A and B.
- (1) Both A and B have a *protected investment business claim* of £120,000 against a *relevant person* (or, where applicable, a *successor*) in

default. The FSCS offers both claimants £85,000 compensation (the maximum amount payable for such claims under ■ COMP 10.2.3 R). A accepts immediately, and assigns his rights against the *relevant person* (or, where applicable, a *successor*) to the FSCS, but B delays accepting the FSCS's offer of compensation.

- (2) In this example, the liquidator is able to recover assets from the *relevant person* (or, where applicable, a *successor*) *in default* and makes a payment of 50p in the pound to all the *relevant person's* or *successor's*, as appropriate, creditors. If the liquidator made the payment before any offer of compensation from the FSCS had been accepted, A and B would both receive £60,000 each from the liquidator, leaving both with a loss of £60,000 to be met by the FSCS. Both *claims* would be met in full.
- (3) However, if the payment were made by the liquidator after A had accepted the FSCS's offer of compensation and assigned his rights to the FSCS, but before B accepted the FSCS offer of compensation, A would be disadvantaged relative to B even though he has received £85,000 compensation from the FSCS. A would be disadvantaged relative to B because he promptly accepted the FSCS's offer and assigned his rights to the FSCS. Because A has assigned his rights to the FSCS, any payment from the liquidator will be made to the FSCS rather than A. In this case the FSCS has paid A more than £60,000, so the £60,000 from the liquidator that would have been payable to A will be payable in full to the FSCS and not to A.
- (4) B is able to exercise his rights against the liquidator because he delayed accepting the FSCS's offer and receives £60,000 from the liquidator. B can then make a claim for the remaining £60,000 to the FSCS which the FSCS can pay in full (see ■ COMP 10.2.2 G). B therefore suffers no loss whereas A is left with a loss of £35,000, being the difference between his claim of £120,000 and the compensation paid by the FSCS of £85,000.

7.7 Funeral plan contracts and related trust arrangements and contracts of insurance

Application

- 7.7.1 **R** This section applies:
- (1) in connection with any *trust arrangement* or *contract of insurance* that relates to *funeral plan contracts* entered into or carried out by a *relevant person* or *successor* who is *in default*; and
 - (2) irrespective of whether the *trust arrangement*, *contract of insurance* or related rights or obligations came into existence before or after the date on which this section comes into force.

- 7.7.2 **G** The *FSCS* is required to administer the compensation scheme in accordance with the European Convention on Human Rights (**COMP 2.2.1R**). This includes in accordance with Article 1 Protocol 1 of the Convention concerning the protection of property.

General

- 7.7.3 **R** The following provisions apply in relation to this section making any necessary changes:
- (1) **COMP 7.3.2R** and **COMP 7.3.3R** (General);
 - (2) **COMP 7.3.4R** (Determinations by the *FSCS*);
 - (3) **COMP 7.3.5R** (Verification of determinations); and
 - (4) **COMP 7.3.6R** (Effect of this section on other provisions in this sourcebook etc).

Rights and obligations in respect of trust arrangements and contracts of insurance

- 7.7.4 **R** If the *FSCS*:
- (1) has paid, or has decided to make a payment of, compensation; or
 - (2) has made a payment, or has decided to make a payment, in connection with securing continuity of *funeral plan contracts*,

the *FSCS* may make a determination with all or any of the following effects as set out in the determination:

- (3) to vary existing rights or obligations under or in respect of the *trust arrangement or contract of insurance*; such variation may, in particular, provide for the right to be transferred, or obligation to be owed, to a different *person* and, in either case, to subsist between that different *person* and the trustees or *insurer* respectively provided that the different *person* (if not the *eligible claimant*) has consented;
- (4) to create new rights under the *trust arrangement or contract of insurance* in favour of, or obligations by the trustees or *insurer* to, the *FSCS*; those new rights or obligations may, in particular, override existing rights or obligations;
- (5) to enable the *FSCS* to claim and take legal or any other proceedings or steps in the *United Kingdom* or elsewhere to enforce any such rights held by or obligations owed to the *FSCS* in its own name against the trustees, the *insurer* and/or any third party.

7.7.5 **R** Any right of recovery conferred on the *FSCS* by a determination under this section may not exceed the amount paid or (in the opinion of the *FSCS*) to be paid out by the *FSCS* in connection with the *funeral plan contracts* concerned.

7.7.6 **R** Any right of recovery conferred on the *FSCS* by a determination under this section is subject to the prior payment of those sums that the *FSCS* reasonably considers should be prioritised. Such sums may include: the legitimate fees and expenses of the trustee, *insurer*, actuary and *relevant person*, tax payable in respect of the *trust arrangement or contract of insurance* and existing funeral costs.

7.7.7 **R** A payment by the trustees pursuant to a determination will operate to discharge the trustees from all other obligations in relation to that part of the trust assets reflecting the payment made.

Duty to pursue recoveries

7.7.8 **R** If the *FSCS* has a right of recovery under this section, it must pursue all and only such recoveries as it considers are likely to be both reasonably possible and cost effective to pursue.

