

Duty of care: the FCA's last stand?



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What *is* a duty of care?

(NB: layperson's version!)

A requirement on **party A**

to avoid causing reasonably foreseeable harm to **party B**

which, if breached, results in a right for

party B to sue party A

for losses caused

Who are A and B?

A requirement on **authorised persons**

to avoid causing reasonably
foreseeable harm to **consumers**

which, if breached, results in a right
for

consumers to sue authorised persons

for losses caused

What's the back story?

- FSA disappplied FSMA s138D(2)
 - 8-14 consultations - still no rules
 - Financial Services Act 2021 amended to oblige FCA to
 - Consult on a duty of care* and publish responses by 1 January 2022
 - Make rules by 1 August 2022
 - FCA published 'new Consumer Duty' [consultation](#) 14 May 2021
 - Proposes bold-sounding 'new Consumer Duty' (changes to its Principles for Business*)
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Is the 'new consumer duty' a duty of care?

	Duty of care	'New consumer duty'
Who would owe the duty?	Authorised persons (firms and individuals)	Probably just firms
To whom?	Consumers	Probably just customers/clients
What duty?	Avoid causing reasonably foreseeable harm	Act in best interests* or achieve good outcomes
Who'd have the power to enforce the right?	Consumers OR the FCA [presence of former right supercharges latter]	The FCA [unless a Private Right of Action is agreed]

Is the 'new consumer duty' paper misleading?

What constitutes a 'duty of care' may have different meanings, and our existing rules already create different duties of care for firms. The generally accepted legal meaning of a duty of care is an obligation to exercise reasonable care and skill when providing a product or service and this is, for example, reflected in Principle 2's requirement that a firm must conduct its business with due skill, care and diligence. In addition, section 49 of the Consumer Rights Act 2015 (CRA) implies into every contract for a trader supplying a service to a consumer a term saying that the trader must perform the service with reasonable care and skill.

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Why is the FCA opposed to a duty of care?

- Duty of care would empower consumers to bypass regulator
 - Feels like FCA protecting industry - not a good look!
 - FCA consultation is a classic bait-and-switch:
 - Hard sell push for regulatory, not legal, solution
 - Organisation stuffed with expensive lawyers misdirecting respondents about the meaning of key legal term
 - Statutory body charged with protecting consumers, trying to deprive consumers of rights
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- Parliament intends them to have

Is this the FCA's last stand? Context...

- [Complaints Scheme](#) consultation
 - Trying to avoid compensating victims of regulatory failure:
 - [Hiding behind defective Complaints Scheme](#) to evade LCF redress*
 - Falsely claiming Connaught victims are [not out of pocket](#)
 - ‘Crony hires*’ (Butler, Delfas, Parker)
 - Creates case for radical change:
 - Industry: duty of care
 - FCA: civil liability (inc. legacy cases), genuine complaints scheme
 - Consumer oversight, accountability
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What is TTF doing about this?

- Dialogue with Charles Randell
 - Reissue consultation
 - Genuine duty of care
 - Remove all misdirection
- Responding to the consultation
- Urging others to use our [draft response](#) as the basis of theirs:
 - ‘Authorised persons’
 - ‘Consumers’
 - Private right of action + regulatory
 - Prioritise consumer responses
- Briefing Parliamentarians
- Paving way for judicial review
_____and/or Parliamentary challenge

Questions

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