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The findings of Legal Week Intelligence's latest *Benchmarker* report on litigation funding was the main topic under discussion at a recent roundtable discussion. **Des Cahill** reports

Funding the fight

As the economic climate engenders more litigation, so in turn the number of cases being considered for insurance-backed litigation funding are on the rise. However, while the upper end of the market is beginning to reap the benefits of third-party funding and after-the-event (ATE) insurance, the uptake has yet to filter down to smaller market players.

At a recent roundtable to discuss the findings of *Legal Week's* Benchmarker report on the future of litigation funding, senior litigators noted that there was still a high level of ignorance about litigation funding in the legal market as a whole.

If the litigation or dispute is self-funding with an insurance policy backing, then from the insurer's point of view, why are there not more litigators prepared to pursue their rights in court?

According to managing director of FirstAssist Legal Protection Peter Smith: "It's a free go at litigation, I cannot understand why more lawyers are not advising their clients to insure their risk."

Participants believed a number of reasons contribute to the historic low uptake of funding to date. "Litigation funding used to be regarded as a bit 'sniffy' in cartel cases," said Hausfeld competition and financial services litigation partner Anthony Maton. He believes clients generally were a little mistrusting of litigation funding because they were used to being told that litigation was expensive and risky.

"Now you are telling them it's a no-win, no fee arrangement they think 'it's too good to be true,'" he says.

Lovells disputes partner Neil Mirchandani added: "One of the main questions that clients are concerned with is 'how much is the premium going to cost me?' And if the normal premium is 30% then they tend to baulk at that."

There is concern that an insurance premium is an extra complication that lawyers do not



want to raise with clients and can lead to a potential conflict of interest at the settlement stage.

However, Smith counters: "If the premium is 30% then as long as their lawyers tell them they have a 70% chance of winning, then what is holding them back?" He adds: "The courts have accepted that there is a rule of proportionality that the insurance premium payable should be proportional to the risk undertaken in the case... and in 10 years we have never had a serious premium challenge."

Other participants attributed an inherent lack of trust in insurers as another reason why many clients and advisers have yet to see the light. Many litigation partners have based their views of funding on a series of negative experiences from the late 1990s and early 2000s.

'The English market is not very conducive to third-party funding because of the risks involved'

David Greene, Edwin Coe

According to one participant: "We tried to push CFAs in early 2000. We took on 15 to 20 cases without insurance but found that the hidden administrative costs proved problematic and ended up wiping out any profit we might have made"

Delegates discuss the report's key findings on litigation funding

Some of these market views may be changing, but slowly. "Clients are now much more choosy and knowledgeable about funding and firms must have 'more skin in the game' in the current economic conditions", said Maton.

The attitude of finance directors will be critical in how the area develops over time. Calunius Capital chairman Leslie Perrin said: "The commercial guys see it as a hedge and get it much quicker than the in-house counsel."

A further disincentive to the success of new funding initiatives was concern over the use of discounted CFAs when it comes to discussing costs with clients when a case is in the process of settling.

"Law firms may end up running a case on a CFA with a discount of say 25%-50% on their normal fee rates, on the basis that this discount can be recovered on conclusion of the case, together with a success fee uplift," said Davies Arnold Cooper dispute resolution partner John Bramhall. "The problem that can then arise is that there may well be pressure applied by the client to the law firm, and an expectation that the law firm will give up all or part of that success fee as part of the settlement discussions, to get the commercial deal done."

Added to this is the worry over the presence in the market of some less-than-blue-chip players and the existence of 'ghost policies' which would never pay out.

Although initially third-party funding looks like a straight competitor for ATE insurance, they can work together and it is an increasing trend for third-party funders to hedge their liabilities in a case by taking out an ATE insurance policy. However, there are issues over whether the model works well for more than a small proportion of cases.

"The English market is not very conducive to third-party funding because of the risks involved and unless you have a pretty simple case with a good chance of success – 70% plus – there is limited interest from third-party funders" said Edwin Coe litigation partner David Greene.

It is clear litigation funding is here to stay. "Firms that are culturally disposed to this kind of work will make it happen," said Perrin, however, it is likely to be a far easier sell to the claimants.

Mirchandani summarises: "The market will develop, but it will be a bumpy ride, with the barriers not just being solicitors feeling their way but also testing the quality of the insurers."