

First choice

A deal to offer ATE for cartel cases shows it works for group actions, says Peter Smith

The number of group actions is growing as they acquire greater official sanction at both national and European level. A key debate is around how they should be funded. Group actions are where a collection of individuals or companies have similar legal claims against a defendant which the court would like to hear together because of the common issues involved.

Claims often occur in respect of pharmaceutical products, environmental issues, or instances of anti-competitive behaviour - where they frequently follow regulatory investigation into a company or cartel of companies. Until recently funding issues tended to hinder bringing these actions.

Perception Problem

By their nature, group actions tend to be large-scale, complex cases with much at stake for the defendants. Inevitably, one of the major impediments to getting cases off the ground is finding a way to fund such claims through what can be a long and expensive process.

This situation is not helped by the widespread perception amongst lawyers that funding for group actions – and indeed other forms of commercial litigation - with 'after-the-event' (ATE) insurance is difficult, expensive and frequently not available. Furthermore, a myth is growing that group actions cannot happen at all if third party funding (TPF) is not in place.

This attitude was typified by the “Small is Beautiful” article in the August edition of *Litigation Funding*, which suggested that ATE insurance was difficult to find for commercial cases and that instead TPF is the only viable option for funding group and other commercial actions. I do appreciate that the authors are sharing their experience and that the article was somewhat abridged. This perception is further fuelled by the comments made last year by the Civil Justice Council in its paper on future funding of litigation which referred to perceptions of the ATE market as; “fragile, and ... beset with complexity causing additional cost and uncertainty”

Perhaps this is the time to nip such perceptions in the bud. At FirstAssist, we have been writing an increasing number of group action cases, across a range of claims including environmental, pharmaceutical and competition.

Key to Funding

One example of the supposed insurance funding drought cited by Clarke Willmott was competition cases, but we have just announced a new product, Cartel Key, in conjunction with US class action specialist firm Cohen Milstein Hausfeld & Toll, that specifically targets this area. Cartel Key combines a 'CFA Lite' with comprehensive ATE insurance to produce the same benefits for claimants in competition actions that have long been enjoyed in personal injury and other cases. This means that the claimants enjoy full protection against both own and opponents' costs should the case fail.

That said, putting together a package for this type of litigation is complicated. Group actions have their own peculiarities and challenges. Defining what constitutes a win is

more difficult when there are multiple claimants, as is determining what to do if a proportion of claimants accept an offer from the defendant, or withdraw before the case is concluded. This makes it all the more important that solicitor, insurer and claimants work closely together and that the insurer is experienced in handling group litigation.

ATE premiums are not expensive, contrary to what is claimed. As the ATE premium is both deferred and conditional clients do not need to shell out before the case is concluded and indeed do not need to shell out at all unless the case succeeds, at which point the premium is recoverable from the other side. Therefore to all intents and purposes the ATE premium is free. This is especially important when trying to assemble claimants in group actions.

For clients, this is essentially cost-free, risk-free litigation, while the solicitor acting on a conditional fee arrangement (CFA) can claim up 100% uplift as a success fee, which is again payable by the losing side and can additionally insure against losing his or her fees if the case is lost. By contrast, third party funders typically charge between 20% and 50% of the winnings in return for advancing money up front. The rates charged by Third Party Funders can be hard to justify when measured against the risk. In effect, they may be asking for a return which is disproportionate to the value of their investment. Even if the solicitor cannot act under a CFA the cost to the client of third party funding should be carefully evaluated against the cost of normal fees plus ATE.

If you ask the clients if they would prefer to receive all or little more than half of their damages, you will only receive one reply. How anyone can claim that ATE is expensive when it is, to all intents and purposes, of no cost to the client, is beyond me.

Go with the flow

For these reasons, not only is ATE a viable alternative to funding group actions, it should be offered to clients as a first resort because it allow claimants to retain all their damages. Many solicitors, however, appear not to suggest ATE as an option for their clients. One disadvantage for solicitors of using ATE insurance and a CFA is that they have to defer their fees until the case concludes and many prefer to play it safe - using TPF means that the lawyer can be paid in the traditional way, as the case progresses rather than waiting for the end.

Some law firms claim that their balance sheets can't stand up to working on a CFA, so rather than getting an overdraft, they see TPF as a way of keeping the cash flowing.

Even if this is true, there is no reason in principle why law firms could not get a loan to cover disbursements. The cost of the overdraft may well be lower than the cost of the TPF charges to the client. And in our view, the aim of both the solicitor and the insurer should be to provide the client with the most cost-effective funding solution for their case.

When CFAs were introduced in the UK almost a decade ago, the uplift for solicitors was deliberately capped at 100% to prevent the worst aspects of unlimited contingency fees being replicated over here. Preventing the spread of US-style litigation culture has also been a key part of the European Commission's approach when encouraging the careful growth of group actions, so it is somewhat ironic that while the European Commission and the UK Government are keen to avoid the problems connected with contingency fees in the United States, the growth of TPF is effectively introducing contingency fees by the back door.

I should add that there are circumstances where TPF is the best option or part of the solution. For example, where ATE is not available due to the exposure being too great, or if funding is needed for disbursements or working capital and the firm cannot otherwise raise the funds. However, it should always be considered as part of a solution alongside ATE. Indeed some TPF providers have recognised this by arranging ATE to hedge their exposure.

Whether group actions or not, ATE insurance and CFAs should be offered to clients as the first option, if for no better reason than it is in the clients' best interest to do so.

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