

To CFA or not to CFA?

Peter Smith hits back at claims that insurers are to blame for the low take-up of ATE insurance outside of PI

The article by Matthew Amey in the October 2007 issue of Litigation Funding (page 26) raised some interesting points about the role of insurers in the relatively low take-up of after-the-event (ATE) insurance policies in civil litigation. But the central assertion – that much of the responsibility for this situation should be laid at the door of ATE insurers – was firmly wide of the mark.

One of the main charges laid is that insurers are being unreasonable if they charge a higher premium in cases where the claimant's solicitor has chosen not to take the case on conditional fee arrangement basis (CFA). Insurers, he said, should just recognise that solicitors have their own reasons for not using CFAs and that insurers should not draw negative inferences from the absence of a CFA.

Covering all the bases

The existence or otherwise of a CFA is only one of a number of factors taken into account by the insurer when deciding whether to provide cover or when setting the premium. Others will include the integrity of the claimant and the merits of the case, the quality of the evidence, the strength of the defence, the precedents for the legal arguments in the case, and the experience and expertise of the firm and the lawyer handling the claim. Any of these may be the decisive criterion in determining the premium in a particular case, but the existence or otherwise of a CFA is often important.

Cases can fail for a number of reasons: a weakness in the case which is discovered late in the process, problems with the evidence or witnesses, failure by the lawyer to execute the case properly or simply a rogue judgment. Moreover, costs can be unpredictable and, in our experience, solicitors frequently underestimate actual costs to trial. The level of ATE cover, therefore, needs to be much higher than many solicitors estimate - as much as five times is not uncommon - and solicitors owe it to their clients to ensure that the level of cover is adequate.

The insurer has to take a substantial exposure against these risks purely on the basis of what the solicitor tells the insurer. Unlike the solicitor, the insurer rarely gets the opportunity to meet and assess the character of the claimant and is reliant on the information supplied by the solicitor. Therefore, if having met the client and heard the full details of the claim, the solicitor has not taken the opportunity to potentially increase his or her fee through the use of a CFA, the insurer has every right to enquire why and to reflect that in the premium if it is appropriate.

Cash Converters

Our experience suggests that some solicitors take a different view of their cases when it is their own money - rather than that of the insurer or their client - that is at risk.

When the solicitor does not take a case on a CFA basis, it is usually for a reason – either it is not a strong case or they do not have the cashflow to put a high number of cases on risk. We recognise that few solicitors have the cashflow to offer CFAs in every case, which is why for many years we have offered to underwrite up to 90% of the solicitor's cost

exposure where the solicitor uses a CFA. In these cases, the premium is deferred and conditional, which should go a long way to meeting solicitors' concerns about the effect of using CFAs on their cashflow. We, like some other insurers, have also offered ATE cover where the solicitor is acting under a partial CFA or not under a CFA at all.

The Government's Access to Justice reforms were not primarily designed to generate large profits for insurers, intermediaries or solicitors, but rather to enable people with meritorious claims to pursue their cases in the absence of legal aid or private means. The role of insurance in this process is to take some of the risk out of the process for the claimant.

The insurance industry responded to the Government's challenge with a range of innovative solutions and, indeed, some of the early entrants lost significant sums of money in the process. If such losses can be incurred in personal injury - the most predictable and high volume class of litigation - then insurers have a right to be prudent when risk assessing other types of case.

Ultimately, as commercial operations, we must be able to choose the cases that we provide cover for and use whatever information we have available to price the risk accordingly. We want to work in partnership with solicitors to deliver access to justice, but insurers should not be expected to support unmeritorious cases.

It has always been a bit of a mystery to me why so few CFAs are used when they are so clearly to the benefit of the client. Mr Amey suggests that insurers should offer the same premium regardless of whether a CFA is being used or not, but we would argue that solicitors should do more to explain the benefits of CFAs with their clients – as their professional rules require. The government asked the legal profession to become more commercial and the use of CFAs was part of that challenge.

If the pool of insurable cases is too small, as Mr Amey suggests, then the responsibility must also lie with those solicitors who refuse to take cases on a CFA basis. To those who regularly offer CFAs we say “well done”. To those who prefer to ignore the Government's challenge and the interests of their clients, we say “wake up”.

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