The availability of ATE post-LASPO for DBA-funded cases

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Executive Summary

There is no material difference between CFA-funded and DBA-funded cases as far as ATE is concerned.

In the Personal Injury ("PI") market the introduction of QOCS will remove the main part of ATE cover. It is not clear whether ATE will remain available for disbursements-only cover. Uncertainty over the intended working of QOCS is currently hindering the ATE market's response. A reduction in market capacity seems likely.

Outside the PI market the key issue is the abolition of recoverability of ATE premiums. The ATE market is more confident of its ability to respond to the new environment. The commonly-held view that ATE premiums will fall is not one which ATE insurers regard as reliable.

The current ATE market

The ATE market may be subdivided into PI and non-PI. The PI market has the larger number of ATE participants and is also by far the larger by number of policies. It behaves like a "commodity" market, with little to differentiate products and providers. Whilst evidence of activity is hard to establish, policy volumes exceed 100,000 p.a.

The non-PI market has fewer players (most of which will also participate in the PI market to some extent). The policy volumes are much lower (probably a few thousand p.a.) but most policies involve individual underwriting and have premiums which are higher than for PI cases.

The subject matter of ATE is the insured's liability for opponents' costs and for own disbursements. The insurer's risk is not affected by the choice of CFA or DBA since the main drivers of risk are the probability of losing and the quantum of a loss. Neither of these risk factors should differ between CFA-funded or DBA-funded cases.

Post-LASPO

The PI market will be affected more significantly than the non-PI market. The PI market includes the clinical negligence market as well as the RTA, EL and PL segments.

Whilst the whole ATE market will be affected by the removal of recoverability of ATE premiums (and of success fees), the PI market will be affected by QOCS as well. This will remove the need for ATE cover for opponents' costs in most or all cases. This element of cover is the most weighty, so the subject matter of the policy is greatly reduced (perhaps by 75%). Cover in future will be restricted to own disbursements (and possibly to some form of cover in case eligibility for costs protection is lost).

The PI market also expects to see a reduction in the number of cases which solicitors are willing to run under CFAs, so the volumes which currently underpin a commodity market will reduce. This inevitably suggests that the cost of providing policies will rise per policy.

Some ATE insurers have indicated an intention to withdraw entirely from the PI market. Others await the details of the new regime, in particular the QOCS, proportionality and Part 36 elements of the reforms. Only when these details are known will the currently agnostic ATE insurers be able to decide whether it is viable or attractive to remain in the market.

ATE insurers will need to be satisfied that they can obtain adequate premiums for the risk they run. These premiums will not be recoverable, so in effect will need to come from the damages in successful cases. As solicitors will also need to take their success fee from damages, it is likely that lower value and/or higher risk cases will be harder to run. If either the solicitor or ATE insurer decides a case is unlikely to "pay its way" then the case will not proceed.

There is certainly a risk that there will be few, if any, providers in the PI market.

The non-PI market will only face the direct challenge of non-recoverability (on the assumption that QOCS is limited to PI cases).

Non-PI premiums can be high relative to PI premiums, though this is purely a function of the merits of the cases and the size of exposure which individual cases bring. If an insurer has a 40% chance of losing a case which has adverse costs of £1m, then it should be clear that a premium needs to at least £400,000 if it is paid upfront and not conditional, and nearer £670,000 if it is deferred and conditional. Premiums here only represent the burning cost of meeting claims, and contain no provision for the expenses of running the business or any element of profit.

It follows that the damages of a case, which will have to absorb both a solicitor's uplift under a CFA or DBA plus the ATE premium, will need to be seen by the client, the solicitor and the ATE insurer to be sufficient to leave the client with a meaningful benefit before the case can proceed.

This will tend to mean, as with PI cases, that lower value claims and claims with poorer prospects will become harder to pursue once recoverability is introduced.

It is suggested that the abolition of recoverability will improve competition and force down both legal costs and ATE premiums. In terms of ATE premiums, there is already competition on price (much non-PI ATE is arranged via brokers who create price competition). A number of ATE providers are known to have suffered underwriting losses and to have withdrawn from the market. It therefore seems unlikely that non-PI ATE premiums have much scope for reduction, despite the greater theoretical pressure.

It seems likely therefore that the number of cases available for ATE will initially fall back from current levels and this will discourage new entrants. The barriers to entry are also quite high, as the risk assessment skills, which are necessary for success, are scarce.

However, there is likely to be continuing demand for non-PI ATE and this may increase over time as law firms seek to meet their clients' needs. Ultimately a client will want to bring a

case which it believes has merits, and receiving part of the damages is better than receiving no damages.

It remains to be seen how much capacity remains in the non-PI market but we suggest that there is likely to be sufficient capacity from insurers to meet the demand.

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30th April 2012