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Lord Justice Jackson's final report
What will be the impact on insurers?

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On 14 January 2010, Lord Justice Jackson produced the final report into his review of civil litigation costs. The report runs to over 500 pages and contains a broad range of proposals for reform. We summarise below some of the most important aspects of the report for insurers.

Although there is a focus in the report on the costs of personal injury litigation, much of what is proposed will apply to, and could affect, all insurers.

Overview

The proposals which are likely to have the greatest relevance to insurers are:

- After The Event Insurance ("ATE") premiums should no longer be recoverable from the defendant as part of a successful claimant's costs;
- Similarly, the success fee under a Conditional Fee Agreement ("CFA") should no longer be recoverable from an unsuccessful defendant. CFAs would still be permitted, but the success fee would have to be paid by the claimant out of their damages;
- A 10% increase in general damages in personal injury cases and in other torts affecting individuals;
- Insurers should no longer be able to charge referral fees for directing their insureds to solicitors willing to take on the claim on a no win no fee basis;
- Before The Event ("BTE") legal expenses insurance should be more widely used and the cover available should be broadened; and
- Solicitors and barristers should be permitted to enter into contingency fee agreements for litigation.

We examine these proposals in more detail below by reference to their potential impact on different lines of business.

Liability Insurers

The report singles out the current type of CFAs in use as *"the major contributor to disproportionate costs in civil litigation"*. At present, claimants are entitled to recover the success fee which is payable under a CFA, from their opponent in the event that their claim succeeds. The success fee frequently takes the form of an uplift of up to 100% of the standard hourly rate. On top of this, they are entitled to recover the ATE premium that they have "paid." In fact, such premiums are often conditional – they are only payable if the claimant wins.

CFAs started life as a way of enabling Legal Aid funding to be withdrawn from personal injury claims. As the report points out, they have since spread to a range of commercial disputes, where the claimant is often insurance-funded. Many subrogated recoveries are now funded through a CFA. Such arrangements are strongly criticised in the report for allowing one party to a commercial dispute to shift the costs burden to another party, thereby producing a *"gross imbalance in the costs liability of the parties"* which may improperly pressurise the defendant into settlement.

The report recommends that success fees and ATE insurance premiums should no longer be recoverable under costs orders from losing parties. Instead, a return to *"old style"* CFAs is recommended. This refers to the type of CFAs in place prior to April 2000, whereby success fees and ATE premiums would be deducted from the client's damages, subject to a voluntary cap of 25% of the damages received.

These proposals are likely to be welcomed by liability insurers as they would greatly reduce their costs liability to claimants. This could see a reduction of 50% or more on the legal costs payable to a successful claimant on a typical CFA-funded case.

However, in an attempt to draw the sting of these proposals for claimants, the report recommends that the level of general damages in personal injury claims and for all torts affecting the individual should be increased by 10%. This is intended to help such claimants fund the payment of the success fee out of their damages award.

There is also a proposal for *"qualified one way costs shifting"* in personal injury claims. This is intended to remove the need for ATE insurance for personal injury claimants, presumably on the basis that deducting both the success fee and the ATE premium from a claimant's damages would leave them with very little for themselves. The proposal is that a personal injury claimant should be protected from having to pay the defendant's costs, should the claim fail. The rule would not be absolute – if the claimant has behaved unreasonably or is wealthy, he or she could be ordered to pay the successful defendant's costs.

Therefore, if Mr Justice Jackson's proposals are implemented, liability insurers would see a rise in the average quantum of a personal injury claim of around 10% and would, save in exceptional circumstances, be unable to recover their own costs if the claim is successfully defended. However, this may be seen as an acceptable trade-off for the substantial reduction in claimants' costs that the proposals would bring.

Legal Expenses Insurers

If the report's recommendation that ATE premiums should no longer be recoverable is implemented, this would most likely lead to a substantial reduction in the demand for such policies. However, the report presents opportunities for legal expenses insurers as well as threats.

Lord Justice Jackson sees a much expanded role for Before The Event ("BTE") legal expenses insurance. At present, such insurance tends to come as an add-on to household or public/employer's liability insurance. In the latter, the cover is just for defence costs. However, the report envisages an expanded role for BTE insurance to fund the insured as a claimant and protect against the adverse costs risk.

Mr Justice Jackson sees particular scope for BTE insurance for SME businesses to enable the funding of small commercial disputes such as claims against suppliers and defaulting customers. He recommends that both insurers and the Department for Business, Innovation and Skills should make serious efforts to draw the various forms of BTE insurance (and its costs) to the attention of SMEs.

The report does not recommend that BTE legal expenses insurance be made compulsory in any particular class of insurance. However, it does recommend statutory changes allowing insureds to choose their lawyer when a letter of claim is sent on their behalf. This is likely to be viewed as a negative development by legal expenses insurers as it would, if taken up widely by insureds, subvert the costs savings that central panels bring.

The report also proposes a ban on referral fees for personal injury claims. Legal expenses insurers would no longer be able to derive income from referring insureds to solicitors who will undertake the claim on a CFA.

Property Insurers

Many property insurers choose to fund their smaller subrogated recoveries through CFAs on a no win no fee basis. If the proposals on the recoverability of success fees are implemented, CFAs will still be permissible but the success fee will have to come out of the damages recovered.

However, the report opens up an alternative method of funding in the form of contingency fees, which are at present not permitted for contentious work. The report recommends that both solicitors and counsel should be permitted to enter into contingency fee agreements whereby they agree to take a share of any recovery instead of charging an hourly rate. If the contingency fee exceeds what would be chargeable under a normal fee agreement, the excess is borne by the successful litigant and would not be recoverable from the defendant.

The report recommends that contingency fee agreements should not be enforceable unless independent legal advice has been taken by the claimant. It is not clear why this should be required in a commercial context.

Other General Proposals

Fixed Costs: The report recommends that the recoverable costs in personal injury cases in the fast track (which deals with claims worth more than £5,000 but less than £25,000) should be fixed. An annual review would be required to ensure that those costs represent the current cost of doing the work. For non-personal injury cases, there should be fixed costs for specific categories of cases[1] in the fast track, and in all fast track cases there should be a financial limit on the costs recoverable (an upper limit of £12,000 for pre-trial costs is suggested). The report also recognises the need to control the cost of expert evidence if an overall cap is introduced. Lord Justice Jackson also recognises that it would be premature to embark on any scheme of fixed costs in respect of lower value multi-track[2] cases for the time being.

Third Party Funders: The third party funding market has seen an increasing number of participants (including insurers) in recent years. The report recognises that third party funding promotes access to justice and (unlike CFAs) does not impose additional burdens on opposing parties. It also tends to weed out weak claims, because funders will not take on the risk of such cases. It is likely to become even more important if success fees under CFAs become irrecoverable (see above).

Although the report does not recommend the abolition of the law of maintenance and champerty, it does propose that if funders comply with a voluntary code drafted by the Civil Justice Council (or some other form of regulation), funding agreements should not be overturned on the ground that they breach that law. It is also suggested that if the third party funding market expands significantly, the FSA might eventually regulate it.

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[1] Road traffic accident and housing cases.

[2] The multi-track deals with claims worth more than £15,000.

However, the report recommends that third party funders should be exposed to liability for adverse costs in respect of litigation which they fund (subject to the discretion of the judge). It is also recommended that funders should be obliged to continue to provide whatever funding they originally contracted to provide, unless there are proper grounds for withdrawal from the funding agreement.

Mediations: There is strong support for ADR (especially mediation) in the report as a means of reducing costs. However, it is felt to be under-used. For example, the Lloyd's Market Association informed Lord Justice Jackson that ADR is used in only a small percentage of cases. Although there is no support for making mediation compulsory in the report, a culture change is recommended. A single authoritative handbook explaining clearly and concisely what ADR is should be produced by a neutral body and there should be a *"serious campaign"* to raise awareness of the benefits of ADR.

Part 36 Offers: Two possible reforms are mooted: (i) *Carver v BAA*[3], whereby the court takes into account all the circumstances of a case (and does not just make a financial comparison) in order to decide whether an offer is "at least as advantageous as" or "more advantageous than" the amount awarded, should be reversed; and (ii) if a defendant rejects a claimant's offer, but fails to do better at trial, the claimant's recovery should be enhanced by an additional 10% on the damages awarded plus the financial value of any non-monetary relief awarded (bringing the potential benefits for claimants of making a Part 36 offer closer to those enjoyed by defendants).

Experts: The report recommends that (where the parties consent) the concept of experts giving concurrent evidence ("hot tubbing") should be piloted. It is also recommended that CPR 35 be amended so that a party seeking permission to adduce expert evidence must provide an estimate of the costs of that evidence to the court.

Comment

The Jackson Report presents both threats and opportunities for the insurance industry. One stated aim in the report is to reduce litigation costs by *"taking away the need for ATE insurance in the first place"*, so ATE insurers are unlikely to welcome the report. On the other hand, there is encouragement for BTE insurance to expand the take up and scope of their product (although BTE insurers will lose referral fees).

Liability insurers are likely to see a reduction in the cost of litigation, even with the suggested overall increase in personal injury damages of 10%.

It is widely believed that there is a strong appetite for reform of the costs of civil litigation and, accordingly, that many of the proposals produced by Sir Rupert Jackson will eventually be passed. However, the changes proposed are wide-ranging and much of the fine detail remains to be worked out. Nine changes to primary legislation would be required to implement the recommendations and this would require parliamentary time.

The Ministry of Justice has welcomed the report and said that it *"will look at Sir Rupert's package of recommendations in depth and will set out the way forward in due course."* This is not the language of urgency. As an interim measure, Jack Straw has proposed cutting the recoverable success fee in defamation cases from 100% to 10%. However, broader reform will probably have to wait and, with a general election looming in a few months, we are doubtful that we will see any of the reforms come into effect this year.

[3] [2008] EWCA Civ 412

Further information

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