NO WIN NO FEE - LIABILITY INSURERS BEWARE

By F N Eaglestone

This article attempts to outline and comment on the latest information concerning conditional fee agreement insurance, although this is a fast - moving subject.

The insurance practitioner cannot afford to ignore this so-called "after the event" insurance, if he is involved in motor, employer's liability and/or general public liability insurance.

In 1995 when solicitors were first encouraged to run no win no fee schemes, or conditional fee agreements to give them their correct title, it was clear that the unsuccessful no win no fee client would need insurance to cover the successful side's costs. His own solicitor would by virtue of the agreement not be charging his costs. However, the vast majority of insurers showed no interest in providing "after the event" insurance - in a way a misnomer as no insurer will issue cover after an event has occurred and the event insured is not the accident or even the bringing of the action, it is the possibility of losing the case, which is, of course, a contingency.

The outcome was that the Law Society offered the Lexington Insurance Company, in the shape of Accident Line Protect, a near monopoly although restricted to firms of solicitors employing members of the Law Society's Personal Injury Panel.

Theoretically an insurer who is guaranteed a block of business like this should not have any trouble in getting a flat premium right for motor and non-motor risk, once claims records are established. Once solicitors join Accident Line Protect they must insure all relevant conditional fee cases even though other insurers offer a better deal in a particular case. Prior to the 1st October 1997 the premium was £85 per case for all accidents covered. This gave cover of £100,000 with no excess. However, it was evidently found that non-motor accidents developed a higher risk of losing and at the same time the insurance premium tax appeared together with an increase in court fees. All this resulted in increased premiums of £95.68 for motor cases and £161.20 for all other eligible persona injury cases.

The latest information is startling. Lexington has withdrawn and Lloyd's have taken their place. Now the premiums have shot up and they vary between motor, occupational disease, and all other eligible risks. There are other variations but the premiums range from over £300 to over £2000 which is a tremendous difference from the £85 of five years ago. More recently, it was reported in The Times on 30 November that Claims Direct, the personal injury compensation intermediary which

uses television advertising to invite accident victims to pursue claims, requires clients to take out a £1315 insurance policy to cover potential legal costs.

Sections 27 and 29 of the Access to Justice Act 1999, which came into force on 1 April 2000, allow recovery of the solicitor's success fee and the insurance premium by the solicitor's client if he wins. An article appeared in The Times on the 4 November 2000, reporting the President of the Law Society at the solicitors' annual conference as saying that the courts were facing a potential explosion of litigation between insurance companies locked in wrangles over the liability for legal costs. In one court centre alone at Macclesfield, apparently there were 800 hearings pending over costs. Across the country the number would run to 250,000. It was reported that the crisis arose over a central plank of the government's civil justice reforms, the "no win no fee arrangements."

Thus it seems that motor insurers, employers liability insurers and general public liability insurers have been called upon 'by a back-door' to pay among other costs this 'after the event' premium for an insurance they originally wished to have nothing to do with. The Law Society President is also reported as saying that insurers have said they will challenge costs in all cases where settlement is reached before the dispute goes to trial. This, it is said, would sabotage Lord Woolf's civil defence reforms that encourage early settlement, bearing in mind that it is widely reported that for personal injury cases the success rate is 95%.

From an insurance viewpoint one wonders how the courts will assess premiums on these cases. In order to decide whether the level of premium is fair and reasonable when the policy was taken up the court should hear some evidence on the point. Who is going to give this evidence? As this insurance is not commonly transacted presumably Accident Line Protect will have to produce their records.

All this leads to three points : -

1 It may not be certain that the winning client will recover the whole premium.

2 The courts will be in some difficulty in assessing the correct premium. Even more so in areas outside personal injury cases where it can be high.

3 The courts may become overwhelmed with the challenges. It has been suggested that so far as personal injury cases are concerned a maximum premium per pound of cover could be agreed throughout the insurance industry for this insurance, subject to annual review by the ABI, thus avoiding the challenges of the premium.

The success of conditional fee arrangements and, therefore, a key element of access to justice, depends upon the ready availability of insurance. It would be in the general interest to protect that and, in my view, now is the time to question the assumption that insurance companies will continue to meet demand.

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