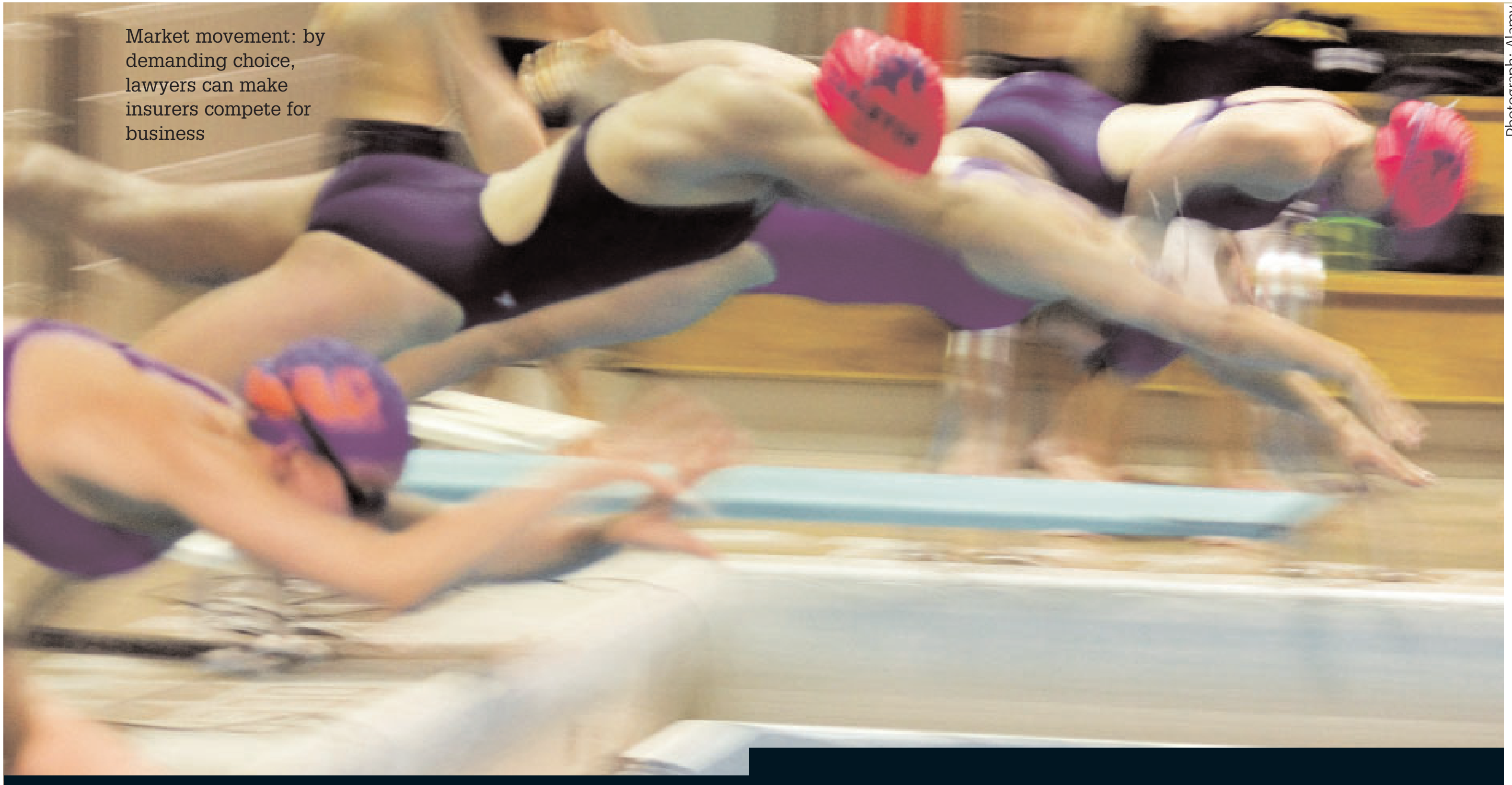
# Taking the plunge

Solicitors will drive ATE market competition, writes **James Delaney**, whether they work on CFAs or not



Market movement: by demanding choice, lawyers can make insurers compete for business

Photograph: Alamy

In his article in April, Peter Smith responded to a piece by my colleague Matthew Amey in a previous edition, who said that some insurers' approaches to writing non-injury after-the-event (ATE) insurance was out of touch because of the insistence on there being a conditional fee agreement (CFA). With most commercial dispute resolution teams typically seeking to limit their CFA book to under 20% of their caseload, such underwriters are arguably failing to develop the market as swiftly as they could by accommodating those non-CFA cases which represent the vast majority of non-injury litigation in the UK. Before I continue, I must stress that there is a very live and competitive insurance market aimed at the wider pool of non-CFA cases.

The article maintained that insurers need to recognise that law firms are not insurance companies and it is not realistic to expect them to carry out the majority of their work on a CFA.

## THE MARKET WILL DICTATE

Peter Smith's response, while making some fair points, also contained a large number of inconsistencies. He said the blame for the slow take-up of ATE insurance in the non-injury sector should be laid firmly at the door of lawyers who had failed to embrace CFA.

Given lawyers are the conduits for the insurers' products, it seems odd to blame them for not embracing a product which, until a few years ago, had failed to accommodate the vast majority of their cases. Don't get me wrong – I actually believe CFAs are going to become increasingly commonplace throughout the spectrum of commercial litigation, but it will be market forces which drive that move.

Yet the fact remains that just because a firm accepts instruction on a standard fee-paying basis, it does not mean that case has any less merit than one where a CFA is in place. I can understand underwriters taking comfort from there being a CFA, but to be so dismissive of the wider pool of cases, in my view, shows a distrust of the solicitor community.

I work with eminent firms where fee-earners never offer CFAs as a matter of policy. Again, I am sure their approach will change in time, but notwithstanding their approach to retainers, less than 2% of their commercial cases ever reach trial, with the vast majority settling favourably for the client.

I put the point to one such firm, that there is a perception by some that their risk assessment is not wholly reliable absent a CFA. Their response, other than saying that their statistics speak for themselves, was: 'We have a number of institutional clients by whom we are instructed repeatedly to handle their litigation work. Do you think we would receive repeat instruction if we were anything but robust in our risk assessment? Our clients instruct us for our litigation skills, not our retainers.'

This is a fundamental point. Finding a firm willing to act on a CFA for a piece of commercial litigation is not difficult, but is there any point if, ultimately, that client puts interim cash flow before the skills of the law firm?

## DIFFERENT STROKES

Notwithstanding the premise of Peter Smith's response, his company, FirstAssist Legal Protection, has now, in fairness and to its credit, finally started considering some non-CFA applications, in the same quarter as publishing its response to the article. As a business model it appears FirstAssist has now recognised, as others have, that it needs to respond to the needs of the market and not the other way round, which

was precisely the point my colleague was making.

The second key point raised by my colleague was that it would be dangerous for underwriters to seek to charge different premium rates depending on whether or not a firm was acting on a CFA. The principal reason for this is that, were there to be variable rates, it would, in effect, mean underwriters do not accept that solicitors act impartially where they are instructed on a standard fee-paying retainer. We believe this would be a difficult argument to sustain in the eyes of a costs judge. Peter Smith wrote: 'Matthew Amey suggests insurers should offer the same premium regardless of whether a CFA is being used, but we would argue that the solicitors should do more to explain the benefits of CFAs to their clients – as the rules require.'

With respect, I think this has missed the point. Matthew Amey is absolutely *not* questioning the solicitor's duty to advise under rule 2.03 or otherwise, but this is a completely separate issue. The question is whether an insurer, with all else being equal, can legitimately charge a higher premium simply because the solicitor is not instructed on a CFA. While the point has not been tested, we doubt it can and would expect a defendant to mount a robust challenge to any such contention. I should also stress that this was not a discussion about the various risk factors underwriters consider – which are, of course, numerous – but was rather a specific and finite point.

The next inconsistency I want to flag up – to me, the most striking of all – is that on the one hand to implore lawyers to share in the risk and yet on the other to say that is why for many years they have offered to underwrite up to 90% of solicitors' costs where a CFA is used is quite remarkable.

To more than imply a scepticism of risk assessments where standard fee-paying retainers are used, and then to move to a stance of saying they are more than happy to insure up to 90% of solicitors' fees provided firms take 10% of their risk on a CFA, is such a colossal shift in the opposite direction that it does not add up.

Surely insuring 90% of a lawyer's own fees in addition to other costs is vastly less attractive to insurers than the firm being instructed on a standard basis with insurers limiting their risk to adverse costs and own disbursements?

We actually put this to the test after the article appeared by making a request to FirstAssist on a number of cases for dual quote considerations – one including own solicitor's fees cover and the other on a standard basis. Needless to say, not one came back in the affirmative as far as own solicitor's fees are concerned.

But, in addition to a move towards considering non-CFAs, there is a demonstrable willingness to insure a proportion of own solicitor's fees. I am confident this would be welcomed by a number of law firms. As risk transfer brokers, we are regularly securing cover for clients who require insurance for own solicitor's fees in addition to adverse costs and their own disbursements. Fortunately there are already insurers willing to offer this cover, with deferred and self-insured premiums. But, of course, more capacity and competition can only be positive.

## THE SILENT 'NO'

With third-party funders entering the litigation risk transfer market, it is imperative that ATE insurers continue to advance on their previous offerings. The good news for the market is that we are aware of new insurers looking to come in with a view to doing things somewhat differently. We believe part of the difficulty, historically, is that some of the current market has developed its principles from the personal injury/clinical negligence sector and is seeking to impose these principles in the non-injury sector, which in many respects is vastly different and thus requires a change of approach.

In the non-injury sector there is such an evolution occurring so far as risk transfer is concerned that relying on one supplier is not advisable unless, of course, that supplier is guaranteeing to insure everything you send them. The cases are often vastly harder to underwrite than straightforward rear-end shunts and thus, irrespective of recoverability arguments, the first hurdle is actually to obtain a viable offer in the first instance.

We have statistics on a large portion of the insurance community. The rejection rates for different categories of risk can vary widely between underwriters. This need not necessarily be an outright 'no' – rather, failing to obtain an offer in a reasonable timeframe. Everyone has had cases where they have received prolonged questions and requests for further information, with underwriters never sounding more affirmative despite each point having been addressed. This can often be a way for underwriters to avoid actually saying 'no' for fear of any hostile reprisals.

Some underwriters reject over 70% of the cases they see. That's not to say it is not worth making an application to them, because when they do offer terms they tend to be more attractive than their nearest rival. The risk of dealing with just one supplier is that the client can unquestionably be prejudiced if ultimately that supplier does not step up to offer terms. I make this point not as a plug, but simply because, as an independent broker, we approach multiple markets simultaneously to avoid this problem. Our advice is the same to any client wishing to explore the market themselves. We know that certain markets will not consider a case that has already been rejected by another provider(s).

> Certain markets will not consider a case that has already been rejected by another provider

This point is equally relevant to the third-party funding market. We have seen some funders take months to reach a stage where they decide they do not want to offer terms. Were it not for the fact we were simultaneously liaising with other funders, the client would have had to start all over again, not to mention being faced with a duplication of costs.

In summary, while some of the points raised by my colleague may have sparked a reaction from some underwriters, ultimately this is no bad thing where those underwriters respond positively to mounting competition. The fact remains that insurers/funders will not seek to amend their products unless they feel they need to in order to capture new business. Lawyers have the opportunity to push the market by demanding choice and thereby making insurers/funders compete for your business.

*James Delaney is a director of independent risk transfer broker TheJudge (www.thejudge.co.uk)*