Rebels Without a Cause (of Action) *Emerald Supplies v. British Airways PLC:*

Class Actions and Litigation Funding Present Opportunities for and Threats to Insurers

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The UK litigation landscape is changing and arguably heading West. Developments in the ways to share the risks of litigation and fund actions are providing both opportunities and also threats to insurers. Opportunities are there for insurers who want to enter this litigation market. Threats arise in increased exposure to liability cover, particularly D&O cover, in the form of multi-claimant actions of the type historically the preserve of the US, but also simply through an increased appetite for litigation. The recent decision of Emerald Supplies v British Airways Plc acts as a reminder of how the traditional differences between the UK and US approaches to litigation are disappearing. This article examines different aspects of this changing landscape with particular reference to their impact on the insurance and reinsurance industry.

Class actions - Emerald Supplies v British Airways Plc

This recent decision of the High Court (neutral citation [2009] EWHC 741) related to an attempt by a firm well known for representing claimants in class actions to use the English Civil Procedure Rules (CPR) to launch a class action style claim against British Airways. The attempt failed, but the firm has announced its intention to appeal the decision.

The claim which the firm wanted to bring was on behalf of air freight customers of British Airways and other airlines. The customers were said to have been affected by an alleged cartel, which is the subject of an ongoing investigation by the European Commission. It was a classic example of the type of claim regularly pursued in the US, but which, to date at least, has not often been run in the UK.

The named claimants were importers of cut flowers from Columbia and Kenya, but their claim was brought on behalf of all direct or indirect purchasers of air freight services from BA (and the other airlines who were alleged to be part of the cartel). The claimants brought their claim using CPR Rule 19.6, which allows a claimant to bring claims on behalf of a number of claimants who have the same interest.

On BA's evidence the potential class of claimants was "not only unidentified, but unknowable, potentially comprising every conceivable so-called direct and indirect purchase worldwide who at one stage or another were arguably affected – directly or indirectly – by the cost of air transport shipping services during the relevant period (1999-2006)." However, the judge, Mr Justice Morritt, Chancellor of the High Court, found that there was no limit to the number of persons who could be represented. However, as a result of CPR 19.6(1) and previous case law, the identity of interest of the persons had to be present at the time the claim was begun and the relief sought had to be beneficial to all the class. It was not sufficient, as the claimants argued, for the common interest to be present simply by the time of judgment.

The judge found that the way the class was defined in the claim, being "direct or indirect purchasers of air freight services the prices for which were inflated by the agreements or concerted practices", meant that the class with the common interest could not be properly ascertained until the judgment of the court decided which prices had been inflated. He stated that the "criteria for inclusion in the class cannot be satisfied at the time the action is brought because they depend on the action succeeding."

Although this action has so far failed, it seems to have done so in large part because it was brought prematurely. This type of representative action could be successfully brought on behalf of a very large number of claimants, so long as the identity

of the class can be properly formulated and pleaded. It seems appropriate, for instance, to product liability actions of the type which are common in the US, where many claimants make similar complaints, often where each individual complaint is of small value.

Before the Event and After the Event Insurance

Clearly the growing market for BTE and ATE insurance presents the insurance and reinsurance industry with significant opportunities for development of new products and becoming involved in new areas of risk. The growth of this market, however, also increases the likelihood of litigation being brought and the propensity of certain parties to litigate in circumstances where they might otherwise have found alternative solutions. This affects the potential exposure of other insurers and reinsurers, perhaps particularly in the liability context, but certainly not exclusively so.

BTE insurance usually covers a party's own legal costs as well as the opponent's legal costs in the event of an unsuccessful action. It is a feature of domestic insurance policies (for example in household insurance) and also commercial policies (for instance D&O policies).

ATE insurance is a funding arrangement which can be put in place to facilitate specific litigation. It usually covers a party in the event that its action is unsuccessful and it has to pay the costs of the other side, but it can also cover a party's own costs. A peculiarity is that the premium for the ATE insurance can be a cost in the action, so that if the party is successful, it can recover that premium from the losing party. Accordingly, ATE insurance can take the other side's costs out of the equation, bringing the costs dynamic close to the usual US position, at least for the party with the ATE insurance. Couple ATE insurance with a CFA (see below) and a party may find itself protected (in part at least) on costs liability on both sides.

Conditional Fee Agreements

CFAs were the UK's answer to the US contingency fee arrangements and have been employed in the UK for more than ten years. A lawyer under a CFA is entitled to charge an uplifted fee in the event of "success" and a corresponding reduced fee (even nothing) in the event that the action is unsuccessful. Although the lawyer therefore shares in the success or loss of the action, the fees are not explicitly linked to the size of recovery, as they are in a contingency fee arrangement. The uplifted fee can be recoverable from the losing party. Also, as highlighted above, a CFA can be usefully combined with ATE insurance to try to protect a party from costs liability generally.

Although UK lawyers cannot share in the proceeds of an action through a contingency arrangement in the same way as US lawyers can, this particular role is being filled instead by the third party funder of litigation.

Third Party Litigation Funding

The UK has recently experienced a remarkable growth in professional funders of litigation. The attitude of the UK courts to third party funding has mellowed over the years and there are now many sources of funds available, whether they are hedge funds, accountancy firms or insurance companies. Allianz has been a notable insurance industry entrant into this market.

This type of funding has certainly enabled some actions to take place, in circumstances when they would otherwise not have got off the ground. As people become more and more aware of the funding available, the growth of this market is set to increase. Third party funders are also becoming more astute at seeking out opportunities or marketing themselves for specific types of action to increase profitability or to be able to offer more competitive arrangements or both.

Third party funders are adopting in the UK context part of the role of the plaintiff bar in the US as they are able to share fully in the proceeds of a successful action in a way that UK lawyers currently cannot. Again, the dynamics of UK litigation are moving towards the US model.

Summary

The growth of CFAs, BTE and ATE insurance, third party funding and multi-party actions in the UK should be of concern to some insurers and reinsurers and be closely monitored, as they do represent movement towards a litigation climate akin to that in the US. However, insurers and reinsurers should also be alive to the opportunities that these changes offer in terms of new markets and new products. If you are going to suffer in some areas as a result of a growing litigation market, at least take advantage of that growing market.