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The future for DBAs?

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Litigation lawyers have given a cautious welcome to the Civil Justice Council's (CJC) recommendations on damages-based agreements (DBAs).

DBAs, a "no-win no-fee" funding option under which the lawyer takes a percentage of the damages if the case is successful, were one of the key civil litigation funding reforms set out by Lord Justice Jackson in his 2009 report. However, take-up has been low due to uncertainties surrounding their use.

In a major report published this week, the CJC sets out 45 recommendations on their use. These include technical amendments to clarify their use, increasing some of the caps on payment, and allowing lawyers and clients to agree the 'trigger point' at which a DBA becomes payable, and the circumstances under which it can be terminated.

John Bramhall, President of London Solicitors Litigation Association (LSLA), says: "Although the technical changes and clarifications that are being recommended by the Working Group are to be applauded, it is far from clear that DBA take up will be that much higher even with those changes made."

"Whilst there was not a consensus, they have at least tackled some of the technical issues which will hopefully now be addressed in draft legislation later this year. They have also seriously questioned the government's policy objections to hybrid DBAs and indicated that the policy against should be revisited, and more carefully considered.

"Take up of DBAs thus far has been disappointingly low because in large part, most law firms are reluctant to act for clients in large scale litigation over a period of years without some form of cash flow. It is also painfully obvious that the current government approach to hybrid DBAs was certainly not what LJ Jackson and Dyson had foreseen."

Nick Parsons, partner at Browne Jacobson and president of the Forum of Insurance Lawyers (FOIL) who was a member of the CJC's working party, said:

"If the recommendations made by the CJC are accepted then the amendments to the regulations will make the whole regime clearer, and ought to give solicitors more confidence in using DBAs.

"Whether they will be regarded as sufficiently financially attractive to the claimant market remains to be seen. A significant change in the drafting of the regulations would for the first time allow a defendant solicitor in a personal injury case to enter into a DBA with their own client. An amount up to 50% of the financial benefit obtained by the client in a claim might be recovered by the solicitor as payment for their services.

"Potentially, this could introduce a fresh dynamic into the relationship between insurers and their panel solicitors. It will be interesting to observe the market's appetite for such an arrangement."

In the report, the CJC distinguishes between sequential hybrid DBAs and concurrent hybrid DBAs. For the former option, the CJC suggests the government clarify whether the solicitor can retain the monies recoverable under the non-DBA funding agreement, or whether that sum should be offset against the DBA fee. The CJC recommends that the government revisit the arguments in favour of the latter option.

Part 1 of the report considers the technical issues, and part 2 looks at the wider questions of government policy.

David Greene, partner at Edwin Coe and *NLJ* consultant editor, says: "The DBA regime has, thus far, not been a success.

"Few practitioners are offering them as an alternative to other methods of funding, such as CFAs. The two parts of the Report offer first an immediate fix to the Regulations to overcome various technical difficulties but it is the second part that really addresses the issues for making the regime work.

"The key is the introduction of hybrid DBAs i.e. being able to use a DBA as part of a package of funding for clients. The Committee has proffered the view they should be introduced but the government has been hesitant. The government has said it will deal with the Committee's Part 1 recommendations so we expect draft legislation in the Autumn. Part 2 will have to wait but it should open up the debate on the policy issues raised."

Professor Rachael Mulheron, who chaired the CJC working party which produced the report, says: "The working group was commissioned to explore the uncertainties which surround the current regulations, and to make recommendations to reduce or to eliminate uncertainties. The group canvassed 20 drafting issues, and 10 policy issues, which it considered would be relevant in the operation of DBAs.

"The CJC hopes that the work undertaken in this report will help to inform, in a useful and constructive way, the redrafting of the DBA Regulations, to render DBAs a useful funding option in suitable cases."

Lord Dyson, Master of the Rolls, welcomed the report and urged the government to "consider further modifications to the regulations to help promote confidence in them as one of the funding arrangements available to those involved in a personal injury or commercial dispute".

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