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Keoghs Response to Provisional Remedies

Overview

Keoghs acts for more than 20 insurers in credit hire claims and more widely two thirds of the motor market across all services. This breadth of service allows us to hear first-hand insurer opinions on concerns over where we may become involved in the process going forward if circumvention prevails.

At this point therefore we feel that the response from Keoghs to the provisional remedies should focus on the areas of unintended consequence and risk of circumvention in relevant aspects.

It is our view, at this stage, that the document in its current form lacks clarity of application in order to allow interested parties to make an informed response; but we are able to speculate that if we do not get such clarity, the view from the CMA that circumvention risk is low, is grossly unfounded.

We will concentrate on remedy 1C as this is the area Keoghs are able to apply our specific experience in this sector most appropriately, and in the knowledge that our views on other remedies are incorporated in our clients and ABI responses.

Keoghs understand the proposals to be the following;

- Cap credit hire rates to 2 tiers, 'low rate' and 'high rate'
- The low rate is proposed to be 50% of current GTA rate, high rate to be a multiple of the low rate, probably double
- This applies to claims when presented to an insurer by all vehicle replacement providers in the industry (present GTA and Non GTA)
- An insurer qualifies for the low rate if they accept liability in 3 days of FNOL from the credit hire organisation (CHO)
- CHOs are proposed to recover late payment penalties as they do in GTA today
- Motorcycles, taxis, commercial vehicles are exempt from rate cap
- A claimant who manages their own claim is exempt from the cap
- Financial inducements to encourage the above claims are prohibited
- Litigated claims will still be assessed on grounds of 'reasonableness'
- There is no ban on referral fees

Our response deals with the areas of common risk in turn.

Liability

We see the proposed duration to assess liability in support of 1C is at odds with established market process and one that does not encourage the reduction in costs. Currently within the MoJ Portal insurers have 15 days to advise of their stance on liability, and within the current GTA an insurer has 5 days to acknowledge a claim, with a liability stance 21 days from receipt of the invoice (in real terms 5-6 weeks).

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The CMA recognises in their dismissing of remedy 1B, *"Practical difficulties where liability is uncertain or split. At-fault insurers would be required to make quick and uninformed decision on whether to accept liability without the benefit of any detailed evidence".*

At a point when the CMA is proposing a more complex FNOL procedure for insurers, it may be wise to extend this period for them to make liability decisions. The remedy in its current form could have the unintended consequence of CHOs increasing the volume of claims notified to insurers in a bid to, a) make it more difficult to respond to all claims in this timeframe and b) endeavour to have liability admitted on claims where ordinarily an insurer may argue split liability.

If notifications do increase, insurers could be left with claims that are lower in value but are dealing with more of them as a consequence.

We are also of the view that clarity needs to be provided around the impact on other heads of claim of a liability admission in relation to credit hire. The CMA deals with this section as follows;

"If the at fault insurer accepts liability within a short period (we propose a period of 3 days from being informed a replacement vehicle is being provided to the non-fault claimant) a low rate cap will apply. In this scenario the at-fault insurer is committed to paying for the replacement vehicle regardless of any subsequent change to liability (e.g. with relevance to a repairs claims or a personal injury claim)".

The above would suggest that you do not propose the decision to be binding, or at least an insurer can reverse a liability admission (as the document does discuss). However, where an insurer is unaware of a personal injury claim for instance, at the time of admitting liability for the purposes of credit hire, claimants may argue that a reversal of the liability admission is prohibited by established case law and legislation.

To avoid this we would suggest it is clarified whether the CMA proposes to allow insurers to simply pay a claim without an admission of liability on a without prejudice basis. This does pose some practical issues however for the application of the dual rate, as it will be a point of contention for hire providers.

A final observation with this restrictive period is that it has been recommended that insureds are given more information in respect of the impact to any no-claims discount they may hold. What would happen in the circumstances where the insured is unavailable in those first 3 days, the insurer admits and it turns out that they are not at fault?

The insurer is therefore committed to make a payment and this payment could impact any no claim discounts through no fault of the insured. How does this work alongside any "treating customers fairly" policy?

Duration

It seems to be the case that the CMA's understanding of where disputes fundamentally come from in the market is wrong. Keoghs handles approx. 18,000 pre litigated (GTA / Non GTA) claims per annum, 85% of which are GTA claims. In those cases the rate is set and agreed by subscribing parties and so the only frictional cost incurred on rate is where we (or an insurer) argues the vehicle provided is not in-keeping with a hirer's need or mitigation statement and therefore the rate is inherently too high.

In our experience almost 70% of disputes, and therefore frictional cost, are over duration of hire.

The CMA view that an insurer is responsible for the period of hire where they have admitted liability is therefore a risk.

The CMA appear to be of the view that much of the frictional cost in duration is the 'off hire' period after a total loss payment or completion of repairs. This is not the case. Under the current GTA the application of these timescales are reasonably clear and binary.

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The areas that are most contested are those that can be open to interpretation e.g. delays during the period caused by different parties such as the hirer themselves, the engineer, the repairer, the CHO, a solicitor, a broker, the non-fault insurer or the at-fault insurer.

Under the current wording these costs will remain, and in the worst case the CMA is suggesting, "…*In this scenario the at-fault insurer is committed to paying for the replacement vehicle regardless of any subsequent change to liability".*

Definition of subrogated claim

The CMA suggests the rate cap applies "at the point of subrogation to the at-fault insurer". The CMA's own definition of subrogation is as follows from the Provisional Findings in December (footnote 4 page 45);

"*We note that, although not the technical legal meaning, the industry uses the terms subrogated bills, invoices or claims to refer to the documentation sent by subrogated parties (eg non-fault insurers who have indemnified a non-fault driver on the basis of their comprehensive policy) to fault insurers. We have used this shorthand terminology throughout the report*".

This definition does not apply to credit hire in its current form as it is not an insured loss in the vast majority of circumstances, and it is therefore not subrogated. We would strongly urge the CMA to qualify this statement.

The CMA at sections 2.62 and 2.63 considers that this could be under pinned by capping the rate charged to a claimant by a hire provider. There are likely to be pitfalls in tort law and legislation to do this, we would recommend the CMA addresses the wording of subrogation as opposed to looking for an alternative.

Definition of commercial vehicle

The CMA has confirmed that 'taxis, motorcycles, and commercial vehicles' are excluded from the proposed cap. The first two are fairly clear in understanding but the third is not.

Is a commercial vehicle defined by the vehicle, the policy that covers it, or both? Below we have given some examples of where there could be ambiguity;

- A transit van that is insured by a building company on their fleet seems clear
- A car that is insured as part of the same fleet for a salesman to use?
- A transit van that is insured by an individual on a private policy?
- A law firm such as Keoghs that insures 50 cars owned by senior management on a commercial fleet as part of a benefits package?

Clarity is required on this point or else insurers will be asking staff taking FNOL calls to decide on these points and disputes could arise, increasing costs? This is at a time when FNOL may increase due to the 3 day liability timescales, and where those calls are more complex to cover off an individuals' legal entitlement.

Areas for clarity to avoid circumvention

Individuals pursuing a claim themselves will be unaffected by the proposed cap. The CMA believes that with a ban on financial inducements (which we have not seen widely in the past) the risk of circumvention in this area is low.

One common scenario is where an individual becomes aware of a hire company by a solicitor and then that solicitor is appointed after the hire had ended to recover the hire charges. Would this fall under this exemption?

If so, one can see claims being presented in this manner through the increasingly prevalent ABS model. Consideration of the impact of this is necessary.

In addition, the CMA believes there is a low risk that funding arrangements could be put in place in order to facilitate such claims. The CMA should be aware that in the late 1990s and early 2000s significant volumes of credit hire came precisely from this source.

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The CMA therefore needs to clearly articulate what is meant by claims managed *"directly by non-fault claimants".*

In addition to the areas we have raised on the subject of FNOL, we would ask how it is envisaged a CHO / CMC are to notify an insurer. Currently this can be done by post, fax, email etc.

Insurers are based at multiple offices in multiple locations. As a consequence there could be an incentive for notifications to be sent to varying insurer offices to disrupt the ability of making a prompt liability decision. Insurers will therefore argue the necessity of a portal for credit hire in order to time and date stamp incoming notifications.

We foresee on many of the above points we have raised that without any method of dispute resolution and appropriate clarity from the CMA, insurers' lawyers such as ourselves, will spend significant time and expense defending satellite litigation around the interpretation of proposed remedies.

We can envisage a situation where rafts of claims from individual providers, or common issues across a number, remain unsettled by insurers in the absence of clear direction. The frictional cost of such a situation would be significant.

Keoghs have first-hand experience of such scenarios under the creation of the MoJ Portal, further Jackson reform, and changes to the small claims track limit. We would urge the CMA to learn the lessons of these predecessors and engage with the insurance legal fraternity on these points.

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