

After the Event Insurance



After the event (“ATE”) insurance is a type of commercially available insurance policy which provides coverage for legal costs, subject to an agreed limit of indemnity. It can be used as a tool by which a party to litigation or arbitration may limit its liability for the opposing party’s legal costs in the event that it is unsuccessful in its case.

When a party loses its case in the UK, that party may find itself liable to pay not only its own legal costs, but also those of the opponent, under the “loser pays” principle. These costs include the opponent’s solicitors’ fees, as well as other expenses or

disbursements associated with the legal action, such as court fees, barrister and expert fees, and copying/printing costs. The potential liability of the losing party can, therefore, be substantial and difficult to predict.

An ATE insurance policy can provide cover for legal costs incurred in pursuing or defending legal proceedings. It is essentially a risk management tool that allows parties to limit their exposure in the event that they lose their case. Unlike “before the event” insurance, when policies can only be called upon if they are in place prior to the insured event, ATE insurance can be obtained at any time after a dispute has arisen, and even after proceedings have commenced.

What does ATE insurance cover?

ATE insurance policies are provided by commercial insurance companies, and many insurers provide their own standard term policies. Some of these policies impose onerous terms and conditions on insureds (and their solicitors); the policy terms should therefore be carefully reviewed and negotiated. Cover can be obtained not only for the risk of having to pay the opponent’s fees and disbursements, but also for the insured’s own legal fees and disbursements.

Insurance companies typically will only provide cover under an ATE policy in the event that the insured has been unsuccessful. The definition of “success” (subject to individual negotiation, based on the facts) is usually broad enough to include cases that have been resolved by a favorable settlement, as well as those that have been resolved by a positive court judgment or arbitration award.

There is no cap to the level of cover potentially available for a given case, but the level of cover provided will affect the amount of premium that the insured is required to pay.

When can ATE insurance be used?

ATE insurance is available to both claimants and defendants and can be used in most civil litigation disputes. In our experience, although ATE insurance is most commonly used in UK legal proceedings, such policies have been issued for disputes involving international litigation and arbitration. Such policies are also often used in conjunction with other litigation funding arrangements, such as conditional fee agreements (“CFAs”).

CFAs can vary widely, but typically provide for a reduced standard fee in the event that the claim is not successful, in return for a higher one if it is. In this way, the lawyers share risk and reward

with the client. ATE is a useful tool in such cases because it can help the client and its lawyers manage the risk of losing a case in that it can cover the liability to the winning party for legal costs, and it also can cover the client's own costs or disbursements, if required.

How does the insured party pay for ATE insurance?

ATE insurance companies offer a range of different payment options. It is usually possible to arrange a "tiered" or "stepped" premium, whereby the liability for additional parts of the premium is triggered only if and when the case continues beyond certain defined stages. The other available option is a "deferred premium" whereby the insured is able to defer payment of the premium until the conclusion of the case, thereby providing an obvious cash-flow advantage.

Some insurers also offer contingent premiums, whereby the insured is only liable to pay the insurance premium in the event that it prevails in the litigation. This gives the fullest protection to the insured on a loss, in that no further liabilities remain to be paid. It used to be the case that a successful litigant in court proceedings in England and Wales was entitled to recover the cost of an ATE insurance premium as part of the cost of the legal proceedings, to be assessed by a court in the usual way. However, for ATE policies taken out after 1 April 2013, the premium is no longer recoverable, save for certain limited exceptions such as insolvency, defamation, and certain types of personal injury claim.

Because premiums are typically payable at the end of the litigation in the event of a win, insurers will only provide ATE cover where they consider that the insured has a good prospect of success. Insurers will consider various criteria when making this assessment, including the merits of the case and the capability and/or experience of the insured's legal team. Insurers will also take more practical considerations into account, such as the ability of the opponent to pay a judgment in the event that the insured is successful.

Tactical benefits of an ATE policy

Parties to litigation in England and Wales are required by English court rules to disclose to their opponents the existence of an ATE policy; parties to arbitration may, with their insurer's consent, disclose the existence of a policy. Such disclosure may have a considerable tactical benefit because: (i) it sends the message that an ATE insurer has reviewed the case and considers it to have a good prospect of success; and (ii) it shows that the party is insured against an adverse order assessing costs, and so that party's risk in continuing the case and losing is reduced.

English court rules also require a party with a "tiered" or "stepped" premium to notify its opponent of the staged nature of its risk. This notification can have a tactical advantage in driving early settlement, because the opponent is put on notice of the increasing liability for reimbursement of ATE premiums as the case progresses.

Conclusion

In summary, ATE insurance has the potential to provide a highly effective mechanism by which parties involved in litigation or arbitration can manage their financial risk. K&L Gates is very experienced in dealing with this insurance product and can advise clients regarding the benefits and cost of obtaining such insurance. K&L Gates can also assist clients in negotiating the terms of ATE policies with insurers with a view to reducing the scope for insurers to withdraw or limit the cover available.