

Checklist: After the event insurance

What is ATE insurance?

- ATE insurance is a type of legal expenses insurance policy that provides cover for the legal costs incurred in the pursuit or defence of litigation and arbitration. The policy is purchased after a legal dispute arises
- It is distinct from pre-purchased before the event insurance policies which are commonly purchased with, for example, house insurance
- ATE insurance can be purchased for nearly all areas of litigation, with the exception of matrimonial or criminal law
- ATE insurers offer a variety of cover tailored to the specific needs of the client. It typically covers your:
 1. business' own disbursements; and
 2. liability to pay an opponent's legal costs if the opponent wins.

When is ATE insurance available and appropriate?

Not all cases are appropriate for ATE insurance, nor will insurance always be available (at least not at a sensible price). ATE insurance is:

- Available to claimants and defendants
- Generally only available where there is no fixed recovery rate
- Less frequently available for "big ticket" litigation or class actions
- Unlikely to be provided where the case involves novel issues (and if offered, premiums are likely to be very high given the additional risk)
- Limited to English court litigation and domestic arbitrations and tribunal work. It cannot cover matters in other jurisdictions because of recoverability and regulatory or licence requirements.

What are the main advantages of ATE insurance for a business?

- It removes the risk of your business having to pay the other side's costs (and if covered, your own costs and disbursements) if you lose the case. You will have a good idea of the downside in the form of the cost of the insurance premium as soon as a quote is obtained
- In most cases the insurance premium may be recoverable if the case is successful – save that from 2013 the Premium is **not** recoverable in Personal Injury and Clinical Negligence claims.
- It provides an incentive for the other side to settle, as they will know the insurer conducted a separate analysis of the merits of the case or defence. Having ATE insurance in place also sends the message that your business is in the litigation for the duration, having already minimised the litigation costs risk
- ATE policies can be arranged at any stage of the case, although they may be more difficult and expensive to secure later in the process.

What are the main disadvantages of ATE insurance for a business?

- Most insurers will require a separate assessment of your business' case. The cost of that assessment will initially be borne by you, although if the insurance goes ahead, it will usually be absorbed by the premium. Insurers will not fund cases that are unlikely to succeed
- If at any time during the course of the proceedings the likelihood of success falls below your insurer's minimum percentage (often about 60%), the insurer will probably withdraw the cover
- The policy will contain a list of exclusions which you should read with care. Standard exclusions include:
 1. misrepresentation or fraud;
 2. discontinuance due to lack of funds; and
 3. insolvency of your opponent.
- Some insurers may insist on agreeing an acceptable settlement figure at the outset. This means that permission from your insurer would be required if you wanted to accept a sum below that figure. If your business decided to settle without your insurer's approval, you may be forced to pay the full premium. Similarly, your insurer's approval would usually be required before abandoning proceedings by consent or discontinuing the proceedings
- Achieving settlement generally can be more difficult where ATE insurance is in place. In addition to requiring consent, your insurer will be keen to ensure their

interests are protected and may insist on being involved in the settlement process

- If your opponent is unable to pay the ATE premium or that premium is disallowed on taxation, your business will have to pay the ATE insurance premium; even if it is contingent and you won the case
- An ATE policy may not be sufficient to defeat an application for security for costs by itself.

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