



Client Care Options

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## After The Event (ATE) Options Explained

### Introduction

ATE insurance is constantly evolving and changing in response to new regulation and every insurer has a different approach to their pricing and level of cover. The following is a summary of some of the current insurance and premium payment solutions. These are in no way exhaustive; therefore we recommend you contact us about your individual case. By understanding the exact nature and the stage of your proceedings, we can advise swiftly on the options that best meet your requirements, some which may not be shown below.

### What do ATE Policies Cover?

Policies vary but the most common form of cover will provide an indemnity for adverse costs and own disbursements (in other words the opponent's costs for which you may be liable, and your own recoverable expenses for running the case).

A number of insurers will not indemnify counsel's fees, while others are more relaxed and will include such fees as part of the cover.

Policies that cover own solicitor's fees are available but are more difficult to obtain. Only a few insurers are willing to offer this, and when they do, take a very cautious approach.

### Premium Rating Methods

The insurer determines premium rates by reviewing a summary of information case by case and takes a 'underwriting view' of the financial risk they may face (using loading factors such as their own historical claims experience, opponent's financial security, likelihood of settlement, etc.) The level of the information required by underwriters will vary according to the complexity and juncture of the dispute.

Premiums are often assessed according to an underwriter's personal opinion of the prospects and their previous experience of similar cases.

Premium rates are then multiplied against how much cover you buy (i.e. the exact costs and expenses included), and when you agree to pay - as shown below.

It is important therefore to provide insurers with a clear and concise application and presentation of your case. A well-presented application with the correct enclosures can result in the insurers agreeing to offer terms in the first instance, and in more competitive premium levels should they decide to do so.

At CCO we use our extensive brokering and underwriting experience to review your application before forwarding it to carefully selected underwriters, ensuring a “well-presented application” on your behalf.

## **Examples of Premium Calculations and Payment Options**

### **A Deferred Premium**

A deferred premium is payable when the case is concluded. Premiums for a deferred premium policy are usually more expensive than if the premium is paid up front. There are two reasons for this: first the cash-flow implications for insurers (waiting several years to be paid); also because the risk assessment is usually made at the beginning of a claim and insurers will err on the side of caution.

### **A Deferred and Contingent Premium**

These are premiums that are paid only if the claim is successful. This is an attractive option for many clients, particularly the most impecunious. Since the premium due is contingent (or conditional) on a successful outcome, it is not necessary to pay for the premium until the case has concluded, although provision must be made to pay it from the damages should you win the case.

### **An Insured Premium**

Similar to “contingent premiums” above, the premium itself is insured so if your action is lost no premium will be payable. Insurers deal with the mechanics of this feature by adding the value of their premium to the sum to be insured for legal costs, so policies containing a “Premium Indemnity” provision will, by definition, cost more than a policy that does not offer this additional protection.

## **Premium as a Percentage of Damages**

Some insurers offer a premium rate as a percentage of any damages you receive, thereby taking a share of what you win. This is also a “Contingent Premium” arrangement because should you not receive any settlement/damages (such as losing your case) they cannot receive their share.

## **Staged Premium**

Insurers can offer staged premium arrangements where additional premiums are triggered as pre-specified points in proceedings are reached. The total premium payment is normally “deferred” to the conclusion of the case but options that allow you to pay upfront to trigger each pre-reserved stage are available. The level of cover provided is determined by the stage at which a claim has progressed when it settles. The closer the stage is to trial the higher the premium will be. Staged premiums are advantageous if an early settlement is anticipated.

Typically the stages (or ‘premium trigger points’) could be:

Stage 1 Pre-issue of proceedings

Stage 2 Post proceedings and up to 45 days of trial date

Stage 3. Inside 45 days of Trial or Trial commenced

## **Premium Paid Up-Front**

This is usually the most economical way of buying ATE insurance, because a claim can take several years to reach a conclusion. By paying up front you avoid a loss of interest charge that may otherwise be built into a “Deferred Premium”. In addition, it improves accounting and cash flow for insurers, meaning they will compete more aggressively for up-front funded policies with possible lower premiums. We currently estimate that up-front premium levels are 15-30% cheaper than policies that have premiums deferred to conclusion.

## **Accumulator Policy (Purchasing Cover Month by Month)**

Under this arrangement a pre-agreed monthly premium will buy a fixed amount of cover each month. The protection provided thus builds-up over a specified period, e.g. 10 or 12 months. The idea is that the’ cost protection grows at a similar rate as the level of exposure to the other-side’s costs. Premium payments stop immediately the case is settled.

This type of policy is particularly attractive for strong cases that are likely to settle early and where there is a requirement to spread the cost of the premium (rather than paying in full from the outset). This means that during negotiations you will know the exact cost of cover and the limit in place; a useful advantage.

## **Top-up Cover**

This is a policy issued where the level or amount of cover under another policy (such as a "Before the Event" BTE legal expenses policy or another ATE policy) has been exhausted, or is likely to be insufficient to cover the potential cost exposure of losing at trial.

It is important to avoid having to arrange "top-up cover" over existing ATE policies by ensuring the correct level of ATE cover is purchased from the outset. Premiums for ATE top-ups are expensive and insurers are extremely cautious about offering additional cover. Premiums for topping up BTE policies are much more competitive.

## **Return Premium Contracts (and no claim refunds)**

Occasionally it might be difficult to secure cover because the legal action may be at an early stage and all evidence and reports have not been obtained. The underwriter, because of this missing information, may offer a higher premium at inception and compliment this with substantial reductions (sometimes 60% or more) if the case settles early where the underwriter does not have to meet a claim.

## **Solicitor Own Cost Cover**

Although many insurers will not provide cover for either counsel's fees or solicitor's own costs Client Care Options has access to markets that can cover these. These insurers are more particular about the risks they take on but CCO can arrange full cover for own costs, or even partial own costs in combination with cover for the opponent costs and disbursements

## **Insurance Premium Tax**

All insurance policies, including ATE policies, are subject to Insurance Premium Tax (IPT) - currently at 6%. This is levied by HMRC and is payable at the time the premium is paid – not when invoiced. Consequently different rates of tax could apply to premiums i.e. when a policy is issued and when it settles

## **How Much Cover to Buy?**

It is clearly impossible to know in advance which cases will settle and which will run to a full trial. It should always be anticipated that a case may go all the way to trial and that the level of indemnity (the limit the insurers will pay) should reflect this. The prime consideration is deciding how much cover to buy and when to prefer to pay for it.

This is done by determining a worst-case scenario of your opponent's costs and expenses will be. In addition if cover is required for own disbursements or own solicitors / counsel costs not covered by a CFA arrangement, these need to be estimated within the requested policy limit.

Some policies can cover costs and expenses already incurred prior to the inception of the policy. The amount of any retrospective cover must be accounted for in the total policy limit being requested.

We also need to take account of the specific details of the type of claim, cost exposure against timeline, the opponent's attitude to settling and what would constitute an acceptable sum offered, to determine the type of cover and most suitable premium payment options.

### **Security for Costs**

The courts can accept ATE as security for costs but this is not guaranteed. You may wish to refer to the case for Geophysical -v- Dowell where Stuart Smith J that held that an ATE policy was suitable security for the defendant's costs, if provided by a reputable ATE insurer and where there was no allegation of fraud.

However, simply evidencing the existence of an ATE policy may not be deemed adequate as it can be argued that a policy can be avoided if there is a breach of terms by the policyholder (such as non-disclosure or fraud). Some insurers can offer a non-avoidance policy assignment or irrecoverable bond to act as additional security but will apply an addition cost.

### **In Conclusion**

There is no one definitive policy solution or premium rate for legal actions, and underwriters' opinions can vary enormously - even within the same insurance company. It is extremely important, therefore, that the most efficient and well-presented application is submitted.