Adverse costs cover

The policyholder insures against the risk of adverse costs, i.e. their potential liability for the opponent's legal costs if the case is discontinued or lost at trial. A costs award is made against the policyholder.

This product covers the policyholder's potential liability for 100% of their opponent's solicitor's fees and 100% of their opponent's disbursements (including barristers' fees) up to the limit of indemnity provided under the terms of the policy.

This cover can be purchased standalone, or in conjunction with our own side solicitor's fees cover and/or own side disbursements cover.

Case Study

The claimant, a global wine merchant, brought an action in the High Court against a well-known London firm of solicitors for negligence for circa £50 million.

What happened?

The action was brought with the benefit of litigation funding, and Harbour Underwriting provided cover for adverse costs. In addition, as the claimant was based overseas, security for costs was given to the defendant by way of a deed of indemnity.

The claimant's solicitors and barristers, including Queen's Counsel, agreed to reduce their usual hourly rate in return for a share of the monies recovered illustrating their collective confidence in the action succeeding. The action proceeded to trial.

Outcome

Despite receiving witness training before the trial, the claimant undermined his own case when being cross-examined. Given it was clear that the court would reject the claimant's evidence, the action was settled on the basis that the defendant's costs would be paid. We were kept advised of developments throughout the hearing and agreed to the claimant discontinuing the action on this basis, and adverse costs were paid out under the ATE policy.

Summary

Despite the confidence in the action from the litigation funder, insurers and the claimant's legal team, this action demonstrates the inherent risks of going to trial. In this case, the witnesses did not perform well on the day - one of the many risks of litigation. Winning at trial can never be taken for granted, and this is why ATE insurance should be obtained even in the cases where parties are confident about their chances of success.

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Anti-avoidance endorsement (AAE)

An AAE is an extension of existing cover (for adverse costs only). It ensures that the insurer cannot avoid or cancel the policy and will always pay claims up to the limit of indemnity. The motivation for purchasing this type of cover is to avoid paying money into court when the defendant is seeking security for costs. Security for costs orders can frustrate the pursuit of even the most meritorious commercial disputes as defendants seek to stifle claims by insisting on the payment of security into court that can tie up the claimant's capital. Forcing the claimant to pay money into court:

1. Could put them under financial pressure
2. Reduces the return on capital

An AAE enables the claimant to satisfy the defendant and the court that adverse costs will be paid in the event of an unsuccessful outcome. It is a more cost-effective way of providing the required security, as the premium payable would be approximately 10% of the value of the requested security. In circumstances where an insurance policy is deemed to be inadequate security, Harbour Underwriting can advise on alternatives to satisfy an order for security for costs, such as a deed of indemnity, which has been accepted as adequate security for costs in a number of common law jurisdictions.

Case Study

The liquidator of an avionics company sought damages from its former auditors for professional negligence.

What happened?

The challenge for the joint liquidators was that any action would be heavily defended by the auditors and their professional indemnity insurers. Harbour Underwriting provided an adverse costs policy to the liquidators. As is common to discourage claims from being made, the defendant applied for and received a security for costs order requiring the liquidator to pay a significant sum into court to cover the defendant's costs should the claimant lose. The order was for a sum significantly in excess of the limit of indemnity under the policy, putting the liquidators under financial pressure to top up the existing adverse costs policy. At the same time, the defendant made a 'low ball' offer to settle the action. If the liquidators could not address the security for costs ordered, then they would have no choice but to accept the low offer.

Harbour Underwriting agreed to more than double the limit of indemnity. In addition, we agreed to provide an anti-avoidance endorsement such that the liquidators would not need to pay the substantial security for costs into court. Instead, they paid a fraction of that by way of the anti-avoidance premium, thus overcoming the defendant's attempt to stifle the claim.

Outcome

Once security for costs had been provided, the defendant had no choice but to focus on the merits of the claim, and eventually agreed to a mediation. At the mediation, the action was settled when the defendant offered to pay a sum which was 20 times higher than the original 'low ball' offer.

Summary

Harbour Underwriting is experienced in providing solutions to address security for costs, and provides this security by way of an anti-avoidance endorsement and/or a deed of indemnity, which have been accepted by both opponents and courts over the years as an alternative to paying much larger amounts into court.

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Own side disbursements cover

Disbursements can frequently become a major cost in any case, particularly one that requires reports from experts to obtain evidence.

This product covers the cost of the policyholder's own disbursements for 100% of the disbursements paid to own side advisers (other than solicitors) and experts. It provides reassurance that in the event that the policyholder is unsuccessful, they are covered for those fees up to the limit of indemnity provided under the terms of the policy.

The cover can be purchased as a standalone insurance product, or in conjunction with our adverse costs cover and/or own side solicitor's fees cover.

Case Study

A long-established family-run business fights for its right to use its name, which is shared with that of a global brand.

What happened?

The two firms initially operated in different industries. However, the global company subsequently sought to utilise their name on products which were directly in competition with the smaller family-run business.

A trademark dispute ensued regarding the use of their common name. The family business succeeded in protecting its trademarks. Various attempts to resolve this dispute followed, including negotiations for a licence.

When these negotiations ultimately failed, the family business brought proceedings for breach of their trademarks. Knowing that the disbursements involved in the action would be high, given the heavy involvement of specialist counsel and experts, they sought to limit their financial risk.

Harbour Underwriting provided disbursement only cover to the family business so that they could manage their exposure if they were unsuccessful at trial. If this happened, the disbursements incurred would be covered under the policy.

Outcome

Despite various attempts by the family business to engage in settlement discussions, the defendant decided to run the action to trial, knowing that they were in a stronger financial position. Indeed, they launched multiple court applications causing the family business to spend more on disbursements than they had initially bought the cover for. To further protect themselves, they increased the limit of indemnity under the policy provided by Harbour Underwriting. The family business was successful at trial though the defendant has obtained permission to appeal to the Court of Appeal.

Summary

Harbour Underwriting initially provided own side disbursement cover, and as the costs increased, Harbour Underwriting agreed to increase the level of cover. Following the family business's success at trial, Harbour Underwriting agreed to extend the policy to cover the disbursements incurred during the appeal.

Own side solicitor's fees cover

This product covers the policyholder’s own solicitor’s fees less a deductible payable by the policyholder which is usually 25%.

It provides reassurance that in the event that the policyholder is unsuccessful, they are covered for those fees up to the limit of indemnity provided under the terms of the policy.

The cover can be purchased as a standalone insurance product, or in conjunction with our adverse costs cover and/or own side disbursements cover.

Case Study

A large construction company was claiming damages for a breach of contract

What happened?

Though the merits of the claim were strong, the board of the claimant were concerned that in the event of an adverse outcome the company would not only have to write off their own legal costs but also have to pay the defendant's costs.

Harbour Underwriting, via the claimant's law firm, provided a comprehensive insurance policy covering own side solicitor's fees and disbursements, as well as adverse costs.

Outcome

The case went to court and the claimant was successful in receiving damages for the breach of contract and an award for its costs.

Summary

Had the claimant lost at trial the board had the peace of mind that the comprehensive insurance policy from Harbour Underwriting would have paid out up to the individual limit of indemnity under each section of cover: 100% of the defendant's cost award, 100% of their own disbursements and, after a 25% risk-sharing deductible, 75% of their own solicitor's fees.

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Additional covers

Appeals insurance

Adverse costs, own side disbursements, own side solicitor's fees and Anti-avoidance endorsement are not just available for new disputes but also for appeals, i.e. mitigating the financial impact of a decision being 'reversed'.

Existing policyholder

Available for claimants and defendants where we provided cover for the first instance trial. The policy can be extended by an endorsement to cover the appeal of a successful or unsuccessful claim.

New policyholder

Available for claimants or defendants that were successful at the first instance trial and the case proceeds to appeal.

Retrospective cover can be made available to cover the first instance trial.

Contingency agreement cover

This product enables law firms who are operating under a damages based agreement or contingency fee arrangement to manage their risk exposure while maximising the profitability of the success fee for the law firm. By sharing the risk with insurers, law firms have greater flexibility to offer and grow their alternative fee portfolio in a financially controlled manner.

It is important to note that very few law firms provide contingency fees in England and Wales. This may be requested for other common law jurisdictions - those who do often seek to combine their funding with a professional funder.

Adverse costs, own side disbursements, own side solicitor's fees and anti-avoidance endorsements are available to purchase under this cover.

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