# Simple guide to ATE insurance

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## Harbour Underwriting

## A simple guide to ATE insurance for brokers

*Insurance Age says we are on the cusp of a "boom time" for the After the Event (ATE) insurance market fueled by a post-pandemic spike in litigation. Here's our guide to ATE insurance for brokers who want to get involved in this growing market.*

**What is ATE insurance?**

After the Event (ATE) insurance provides cover against the costs incurred in bringing or defending legal or arbitration proceedings. It protects the insured from the potential exposure of having to pay the other side's costs ('adverse costs').

Under the 'loser pays' principle in English law, the losing party in a dispute is usually ordered to pay the successful party's costs. ATE insurance mitigates against this. It is also possible to obtain ATE cover in respect of a party's own costs ('own side costs' cover).

ATE insurance can be taken out however a case is funded, whether the party is paying all of its own bills, has involved a litigation funder, or asked their solicitors to act on the basis that they are paid from the recoveries in the case under a conditional fee agreement (CFA) or a damages-based agreement (DBA).

**When is ATE insurance taken out?**

ATE insurance can be purchased by either the claimant or defendant at any time after a legal claim has started. This is in contrast to Before the Event cover, which must be in place before a claim begins.

**When did the ATE insurance market start?**

The market for ATE insurance grew on the back of CFAs becoming lawful in England and Wales in 1995. It was not until April 2000 that it came into its own, however, when successful parties were able to recover ATE premiums from the losing party. But this changed following the civil justice reforms in April 2013, and insured parties must now (subject to a few exceptions) bear the cost of any premium themselves.

**What types of cover are available?**

The following types of cover can be provided (subject to the circumstances of each case):

/ **Adverse costs cover** – this covers the insured's potential liability for their opponent's solicitor's fees and disbursements (including counsel's fees) up to the limit of indemnity.

/ **Own side disbursement cover** – this covers the insured's own disbursements such as expert's fees and counsel's fees.

/ **Own side solicitor's fees** – this covers the insured's own solicitors' fees less a deductible, usually 25%.

- **Anti-avoidance/deed of indemnity** – this is an extension to an existing adverse costs policy and is used to reduce the financial impact of having to provide security for costs. It is a cost-effective way of avoiding paying money into court as the premium is typically about 10% of the value of the requested security. Where an insurance policy may not provide adequate security, a deed of indemnity will invariably be accepted as adequate security for costs.

- **Appeals insurance** – this is available where a case is going to appeal for (a) existing insureds where we provided cover for the first trial and (b) claimants or defendants who were successful at the first trial.

- **Contingency agreement cover** – this enables law firms operating under a CFA or DBA to manage their risk exposure while maximizing the profitability of their success fee. By sharing the risk with insurers, law firms have greater flexibility to offer alternative fee arrangements in a financially controlled manner.

**What premium options are there?**

Premiums for ATE insurance can be paid in several different ways. These include:

- **Deposit and contingent premiums**. Part of the premium (the deposit) is paid upfront – typically 18% to 20% of the limit of indemnity. A further sum, for example, 30% to 40% of the limit of indemnity, is due only if recoveries are made in the case (the contingent).

- **Staged premiums**. The premium is paid at specified stages during the dispute, with each instalment only paid if the relevant stage is reached. Typically, the overall premium is 30% to 40% and is paid in three stages. For example:
  - Stage 1: 12% payable on the inception of the policy
  - Stage 2: a further 8% payable on exchange of disclosure lists
  - Stage 3: a final 10% to 20% payable 60 days before trial

- **A single one-off premium** paid at the inception of cover.

**What are the standard underwriting requirements?**

Underwriters will assess the merits of a case before agreeing to provide cover. To go ahead, they will usually require a likelihood of success of around 60%.

This can be advantageous to parties who take out cover as it shows the other side that the merits of their case have been independently verified. It also demonstrates a commitment to pursuing the litigation.

**What type of cases can you provide ATE cover for?**

The ATE market has moved from bodily injury cases to all types of commercial disputes and arbitration claims. Although some insurers continue to cover bodily injury cases, many ATE providers (including Harbour Underwriting) now only cover commercial cases.

ATE insurance is especially useful for administrators or liquidators in insolvency cases. Where the insolvent company has insufficient funds to pursue a claim, it can be used together with litigation funding to bring a claim and mitigate against adverse costs.

**What role do lawyers play?**

Litigation lawyers have a personal responsibility to advise their litigation clients on the availability of ATE insurance and litigation funding options. They have a duty to put the client in an informed position about their fee liabilities. Failure to advise a client about the availability of ATE can amount to a “gross breach” of that duty, something many lawyers are unaware of.

Lawyers play an important role when putting policies in place and will usually work closely with ATE underwriters (many of whom are lawyers themselves).

**Why should brokers get involved?**

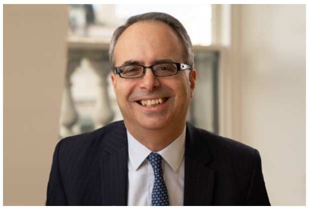
ATE insurance should be thought of as part of a broker’s arsenal to cover all of their business client’s insurable risks. If a broker deals with every other aspect of a client’s insurance, why leave it to someone else to provide ATE insurance when a client needs it?

**To discuss how brokers can work with Harbour Underwriting to provide ATE to their commercial clients, please contact us now.**

# Our team

We are committed to listening to you and delivering the products and services you need. Our underwriters are seasoned commercial litigators with a wealth of experience that they are waiting to share with you.

**Underwriting team**



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