

# BULLETIN

INS 1117

## ATE Premium Recoverability

Access to justice is the underlying purpose of legal expense insurance. Even the strongest of claims has litigation risk and may not be successful depending on how a judge or jury perceives the evidence. With coverage like Redress After the Event (RATE) insurance, the fear of a significant adverse costs award is removed, and plaintiffs can seek the compensation they deserve without financial risk.

The defense personal injury bar has relied on a 2015 decision by Madam Justice Milanetti that ATE premiums are not recoverable as an assessable disbursement of successful settlement outcomes. Madam Justice Milanetti found in *Markovic v. Richards* that the ATE premium was “nothing more than a discretionary expense” and as such was not recoverable.

### New Decision

Recently, in *Armstrong v Lakeridge Resort Ltd.*, Ontario Superior Court Justice Salmers rejected the existing case law, ordering the defendant to pay the After the Event insurance premium.

*“In this case, the costs of advancing even the claims on which the plaintiffs were successful were extremely large. Also, in general, even the strongest claim of a plaintiff may not be successful depending on how the evidence comes out and how it is perceived by a trier of*

*fact. It is in the interests of justice that plaintiffs be able to pursue meritorious claims without fear of a potentially devastating adverse costs award. Additionally, I am satisfied that it was reasonable for the plaintiffs to have advanced their claims as they did because there were genuine triable issues on all claims that were advanced. Accordingly, the claim for the costs insurance premium will be allowed.”*

The decision in *Armstrong* has not yet been appealed. However, in our opinion, Justice Salmers correctly identified that trial cost exposure denies many plaintiffs the right to pursue their legal claims, giving insurers the upper-hand to obtain results based on a plaintiff’s fear of costs exposure. RATE insurance promotes and ensures a plaintiff’s ability to reject unreasonable offers.

### Best Practices

1. Keep abreast of the court’s ruling related to the ever-changing landscape of how ATE is impacting civil litigation practices,
2. Understand the program that you have in place for your clients and how to best utilize the coverage to negotiate from strength,
3. Contact us with any questions when you are uncertain as to the policy and we will assist where possible.

Our team at Redress Risk Management is here to make it easy to protect your firm and your clients. Contact us to learn more.

Call us today at **1-844-400-4388** or visit us at [redressrisk.com](http://redressrisk.com) for more information!

Offices in Toronto, Edmonton, Vancouver



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