

BULLETIN

INS 14-001

AFTER THE EVENT INSURANCE IMPORTANT INFORMATION: Advise Your Clients Appropriately

In markets where After the Event (ATE) insurance is required, such as Great Britain, there is a risk of liability when lawyers fail to properly advise clients.

Great Britain's Code of Conduct for lawyers (SRA) requires lawyers to protect their clients' interests and sets out the compliance rules regarding ATE Insurance. These rules include: discussing the risk of the client having to pay someone else's legal fees and warning about payments which the client may be responsible for, as well as explaining the implications of a CFA and discussing the possibility of insurance.

The SRA Rules and indeed the SRA's views on ATE indicates that clients must be informed about ATE Insurance cover and be offered the opportunity to purchase an appropriate ATE Insurance policy. Jonathan Sachs, Partner with Irwin Mitchell Solicitors in the U.K., states "there are already cases which are presently being settled without proceeding to court on this basis", and one case, *Adris v Royal Bank of Scotland plc* (High Court – HHJ Waksman QC - 29/4/2010), which commented:

“the Code of Conduct requires solicitors to advise their clients of their potential liability for another party's costs and to discuss whether their liability for adverse costs is covered by an existing insurance policy or whether specially purchased insurance should be obtained. It therefore seems that there is a risk of a NPCO against a solicitor whenever they fail to properly advise and protect their client against the risk of adverse costs, and where they fail to do so, they may be deemed to have pursued an action without instructions.”

Is it good legal practice in Canada to inform clients about ATE Insurance?

None of the Canadian Provincial Law Societies have issued guidance on ATE yet, but LAWPRO (Lawyers Professional Insurance Company for Ontario Lawyers) has made comment on failure to bind Title Insurance product for client. The comparison is easily made between the two products.

CEO, Kathleen Waters wrote in *The Lawyers Weekly*, October 5, 2012:

“At the heart of most claims is the lawyer’s failure to deliver something the client has requested or expected”, and “When a lawyer is asked to secure title insurance and doesn’t, he or she effectively becomes responsible for everything the policy would have covered, even if the range of insurance protection exceeds the normal standard of practice...”

How can you protect yourself against this type of claim?

The solution is straightforward: to fulfill your obligations to your clients, it is good practice to:

- advise clients specifically about the potential risks of adverse costs of litigation
- inform them how ATE mitigates against some of the risk
- and to establish procedures to provide evidence that you have done so, especially in the case that a client chooses not to purchase ATE insurance.

What should you know about ATE insurance?

The time is now to learn all about After the Event Insurance, and the costs and benefits.

1. Become familiar with ATE insurance
2. Compare providers and know the vast difference between a licensed insurance product and an unlicensed indemnity product,
3. Have an arrangement in place with a broker to be able to offer ATE Insurance to clients,
4. At the same time as executing your CFA, have ATE materials available for your clients to educate themselves,
5. Send information about ATE to your existing clients,

6. Strongly recommend that your clients consider purchasing a policy,
7. If any of your clients do not wish to purchase an ATE policy, have them execute an Opt Out of Coverage Form, and
8. Meet with clients who fail to take out an After the Event Insurance policy to ensure they understand the risks of proceeding without ATE Insurance protection.

Meet with Every Client Who Refuses After the Event Insurance Cover

Please note – the last point may be the most important. Lawyers need to go further than simply handing out a brochure when it comes to evidencing their compliance with advising their clients about ATE Insurance. A client who is passively advised that ATE insurance is available (perhaps in a client care letter) and who declines to purchase an appropriate policy, but then faces an adverse costs order could reasonably argue: “I know that you offered me an ATE Insurance policy and I opted not to purchase it, but rather than simply leaving the choice to me, your professional obligation was to have clearly and strongly advised me that I needed an ATE policy to protect me in the situation which has occurred.” If the client complains to your Provincial Society, they may take the view that when faced with a client who risked losing a large sum, the lawyer’s obligation concerning ATE protection was to meet with the client, ensure that he or she fully understood the risks of not obtaining ATE insurance and to strongly recommend an ATE policy purchase.

Bottom line, learning about licensed ATE insurance products, and putting in a proper program now will protect you from unnecessary risk in the future.

We are here to help. Call us to find out more about the licensed ATE insurance products we offer, how they work and how they can protect you and your client.

Call us today at **1-844-400-4388** or visit us at **redressrisk.com** for more information!

Offices in Toronto, Edmonton, Vancouver



Specializing in Legal Risk Insurance