

BULLETIN

INS 16-001

Impact of “set-off” provision on Rule 49 Formal Offers and Insufficient Own Cost Coverage

The implementation of a set-off provision could materially impact the effectiveness of coverage.

Impact of Set Off Provision

If a client is in the position of assessing a Formal Offer under Rule 49 and the likelihood of successfully beating the offer at trial, it is imperative that your client has appropriate coverage to mitigate the risk. The implementation of a set-off provision could materially impact their coverage.

Non-insurance products may contain a clause that states “Adverse Costs Awards are subject to set off for any Costs, Interim Costs, Damages or any other compensation paid or payable to You (indemnity holder) or Your Legal Council during the pursuit of Your Claim.” The application of this clause can materially reduce and / or completely eliminate any settlement award your client receives.

Redress After the Event (ATE) Insurance does not contain any set off provisions in a situation where adverse costs are awarded. If your client fails to beat a Rule 49 offer, they will have access to the full ATE Policy to assist with Adverse Costs Awards and Own Costs (up to policy coverage of \$100,000), meaning they will retain considerably more of their settlement.

Consider the impact of a set-off clause in this example.

Recap:

Client in serious MVA and there are some issues
Client retains lawyer on CFA, 33% Success fee
Rule 49 Formal Offer of \$200,000
Client declines Formal Offer
Court Award \$175,000
Adverse Cost Awarded - \$55,000
Own Costs - \$59,000

	Redress ATE	Non-insurance with Set off
Settlement Award	\$175,000	\$175,000
Costs		
Own Legal Fees	\$57,750	\$57,750
Own Costs	\$59,000	\$59,000
ATE Premium*	\$0	\$0 (Indemnity Fee)
Awarded Adverse Costs	\$55,000	\$55,000
Total Costs	\$171,750	\$171,750
Add Insurance Protection	\$100,000	\$0 (Set off provision)
Net to Client	\$103,250	\$3,250

*No ATE Premium owing as the premium is self insured.

In this example, because the client's settlement is sufficient to cover the Adverse Cost Award and Own Cost, the set off clause included in non-insurance indemnity agreement effectively eliminates the client's settlement award. Under Redress' ATE insurance program these costs are covered and the client is left with substantially more of the settlement proceeds.

The lack of a set off clause under Redress ATE Insurance is a significant "value difference."

Insufficient or Inadequate Coverage

Non-insurance providers may market a program that offers lawyers Disbursement Protection only, often with very low coverage and sometimes with protection on a percentage of Own Costs only.

For example, consider what might happen in the event that the client loses at trial, assuming the court awards similar adverse cost and that the firm entered into a program for 50% of disbursement protection only up to \$10,000.

	Redress ATE Insurance	Non-insurance Disbursement protection Only – 50% up to \$10,000
Settlement Award	\$0	\$0
Costs		
Own Legal Fees	\$0	\$0
Own Costs	\$59,000	\$59,000
ATE Premium*	\$0	\$0
Awarded Adverse Costs	\$55,000	\$55,000
Total Costs	\$114,000	\$114,000
Add Protection	\$(100,000)	\$(10,000)
Net to Client	\$(14,000)	\$(104,000)

This time, the client is exposed to \$104,000 of unprotected Adverse Costs and Own Costs. Non-Insurance programs, provided on a "no client signatures" basis, can expose your client to liability for Adverse Costs Awards and the unprotected portion of Own Costs.

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

Is there risk exposure for you?

The answer is potentially. If your client has entered into a non-insured contract on your recommendation, there could be risk of liability if the non-insured contract exposed the client. The exposure is that the client, had they been made aware, could have secured sufficient insurance at reasonable rates, with better terms and conditions from a licensed Canadian insurer. Thus, the risks surrounding non-insured agreements could have been avoided.

The bottom line: protect yourself.

Best Practice Solutions:

1. Investigate and understand the similarities and differences between non-insured programs and licensed Canadian insurance protection.
2. Consider the Provincial Registered Insurance Brokers Act as a guideline. The RIBA provides oversight to licensed insurance brokers:

Document that you have made the client aware of the following:

- a. That an indemnity provider is not subject to regulation or oversight under the Insurance Act,
- b. Orderly payment of claims may be more difficult than with an insurer licensed under the Insurance Act,
- c. The Superintendent of Insurance has no authority under the Insurance Act with respect to an Indemnity agreement,
- d. That sufficient insurance can be obtained at reasonable rates from a registered insurance broker.

Learning about licensed ATE Insurance products and putting in place a proper program now will protect you, your firm and your client 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.