

Use of After the Event Insurance in Asset Recovery Cases (updated version of article originally published in Recovery Magazine)

More and more commercial enterprises contemplating litigation are realising the need to manage their exposure, both to their own and their Opponent's costs. For some firms it is an astute option and for others obtaining some form of funding or after the event cover is a necessary pre-condition to progressing a claim.

Pre-existing cover

Care has to be taken in taking out the policy where there is already a "before the event" policy in existence. Recovery may also be denied if cover is taken out before the opposition has really had a chance to consider their position and decide whether or not they are opposing the claim.

ATE Cover

After the event policies are written by a relatively small market, particularly in the commercial field.

Where the claimant has limited funds at his disposal or wishes to allay concerns of his bankers or shareholders, then two alternative possible routes beckon. The first is to find a legal expense insurer who offers a conditional premium, i.e. one which will not be payable unless the case succeeds at trial. In such cases the claimant's own lawyer and possibly Counsel work on a conditional fee agreement. Buying such a policy offers a good chance of recovery with limited exposure. The second choice is to find a provider who is prepared to fund the premium and possibly the lawyers' costs on a commercial basis.

A problem often arises in that there are limited funds available to pursue claim and the defendant's assets themselves are limited. There is no real prospect of recovering additional costs from any third party. Such cases offer very limited prospects of recovery. A solution to this problem may rest in insuring both sides' costs and arranging funding both for the premium and the lawyers' fees which can then get paid along the way. If the insurance premium is less than the success fee that would be charged by the lawyer, there will be more money to go round at the end of the day.

The gearing effect offered by after-the-event insurance, where there are limited funds available, can be highly beneficial. Take as an example, a case where the claimant has only £250,000 of assets. Both sides' costs are estimated to be £500,000. Clearly the action will not succeed unless the claimant is prepared to take the risk not only of losing the £250,000 in the pot but also an additional £250,000 should the case be lost. Buying say £500,000 of cover at a premium of £125,000 means that there would still be £125,000 shareholders funds, left in the pot at the end of the day. If the premium itself is insured as a disbursement [which does of course have the effect of eroding the limit of indemnity offered] then yet greater gearing and protection can be achieved.

Where there is a limited sum available for pursuing an asset, the ability to insure the premium is very beneficial. Not only costs and disbursements are met but the claimant can recover the premium under the insurance policy. Thus, the insurance cost just becomes a matter of funding. There may be an interest payment in respect of the lender's fee but otherwise for a very limited amount of money, substantial cover can be had.

For some larger cases protection can be obtained through the use of hedge funds or through assigning a claim to a third party who is prepared to fund the action in exchange for a not inconsiderable slice of any recovery. The advantages of such a system are obvious. The claimant should hopefully be able to make some recovery for his creditors without incurring any exposure himself. However:

- assignments are potentially open to allegations of maintenance or champerty: (the old laws preventing disinterested parties from running or supporting cases or from profiting from a litigation in which they had no financial interest)
- the product providers will tend to "cherry pick";

- although because of the champerty issue. control as to whether a matter is pursued or not must rest with the assignor there will inevitable be tensions with the party who has agreed to meet the cost of running the case.
- lastly, such arrangements may not be available for the run of the mill claim.

One big question is whether or not premium will be recoverable.

Section 29 of the AJA specifies:

"Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

A receiving party will be entitled to place evidence before the court from their insurer to demonstrate costs reasonably covered by the premium. The circumstances in which the whole premium will be recoverable will have to be determined by the courts when dealing with the individual cases.

The Courts seem to have ruled that premiums, which cover the following elements, are potentially recoverable from the paying party:

- Both sides costs cover
- Risk of failing to beat Part 36
- Losing an interim application
- Any adverse costs order
- Own disbursements
- The premium itself
- Any shortfall of premium on assessment
- Deferred premiums
- Retrospective cover
- The Ashworth case
- Policy offered 6 months before trial
- £125,000 cover BSI proposed
- Premium of £46,000
- Opportunity given to other side to settle
- On assessment, held that retrospective premium could be recovered in full.

Section 11.10 of the relevant practice direction provides a five-part test as to whether the cost of insurance cover is reasonable:

- The level and extent of the cover
- The availability of any existing LEI cover
- Any rebate for early settlement?
- The amount of commission payable to receiving party or his solicitor of agents
- Where the insurance cover is not purchased in support of a conditional fee agreement with a success fee, how its costs compares with the likely cost of funding the case with a CFA with a success fee and supporting insurance cover.

Depending on the manner in which the policy is written, premiums should therefore be recoverable.

There have been some judicial criticisms of policies where the basis of the underwriting was a percentage of own costs, which might not bear much relation to the actual risk being run. However, as long as they are reasonable, premiums payable in respect of policies where there is a fixed limit of indemnity and staged premiums should, all being well, be recoverable.

Security

On security for costs, the existence of an after the event policy may persuade a Court that it is inappropriate to award security for costs. However, security may nonetheless be ordered. Some product providers are in a position to provide security. Where that is the case that obviously gives the provider an advantage, albeit it may provoke a request for an indemnity from the Insolvency Practitioner or his lawyer in the event there is some vitiating event that means that the underlying policy of insurance is no longer valid.

Summary

To summarise, as can be seen, there are a number of providers in the insurance market place. Those with valid claims should not simply ignore the prospects of making asset recoveries on the grounds that there are no funds available to do so. Where insurance is used, claimants can take comfort from the fact that at the end of the day there may still be some money left and that not all will have been blown on keeping the lawyers happy at their expense.
