

ATE insurance and litigation funding

Two sides of the same coin or: why and when does the combination of these coverage concepts make sense?

By Tanya Lansky and Thomas Kohlmeier

Transferring cost risks of legal disputes in the corporate context

It is a constant song among insurers and litigation funders to point out to companies that enforcing and defending claims usually involves considerable costs, and that these costs are better placed with external risk carriers than kept on companies' balance sheets. The following article aims to briefly outline the possibilities of structuring a modern and cost-optimized risk transfer product in the field of high-end litigation by combining ATE insurance and litigation funding.

Risk Transfer via ATE Insurance

ATE Insurance is an agreement between a litigant and an insurance provider, under which the insurer agrees to indemnify the litigant for specific legal costs. An ATE policy can protect a litigant from paying opponent's fees as well as its own costs of pursuing the claim if their matter is unsuccessful. Unlike traditional forms of legal-expenses insurance, ATE Insurance is purchased once a dispute has arisen. ATE Insurance offers litigants the benefit of a safeguard against the financial risks associated with dispute resolution. A unique feature of this class of insurance is that the majority of the premium can be deferred



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and contingent on the success of the case, i.e. only be payable if the insured is successful in their dispute and recovers damages – this type of premium is the most expensive of models, and if the insured pays some or all of the premium upfront, the overall cost of the premium will be considerably lower.

Risk Transfer via Litigation Funding

Litigation funding is an agreement between a litigant and a third-party whereby the latter provides the financial resources required to pursue a claim in exchange for a share of the damages. Litigants can obtain fi- ▶

nancing from funders to cover all or part of their legal fees. In most cases the funding is provided on a 'non-recourse' basis, meaning, if the matter is unsuccessful the funder loses its investment and the litigant owes nothing. Litigation funding can cover any costs associated with the claim, with Continental Funders typically including an indemnity for the adverse cost risk. In the UK on the other hand, litigation funding will not necessarily indemnify a litigant for their opponent's legal fees if the claim is unsuccessful. In fact, UK case-law dictates that adverse cost orders can be enforced against both the funded party and its third-party funder. Therefore, most funded disputes will also require an ATE policy that covers adverse costs, whether sourced by the funder or client.

The cost of the Litigation Funding type of risk transfer usually reflects that the invested capital is subject to a total loss risk. This leads to a correspondingly high return requirement in typically the same amount as for Private Equity investment rates, which are usually calculated as multiples of the invested capital. The results are hefty price tags for claimants.

Cash-Flow Assistance vs. Cost-Guard – or the best of two worlds?

When compared with ATE insurance, litigation funding is by far the more expensive of the two, costing usually at least three times more than ATE Insurance. While ATE Insurance usually costs a percentage of the sum insured, funders usually charge a multiple on the invested amount. The obvious difference between the two prod-

ucts however, is that while a funder offers cash-flow assistance to finance the claim, ATE Insurance offers a cost-guard in the event of an unsuccessful outcome in the dispute. It seems only logical then to combine both instruments, to achieve a state of the art solution, as the following – simplified – example might show.

Let us assume a claim in the amount of 100 mEUR, requiring a budget for claimant's counsel of 5 mEUR, and an adverse cost risk in the same amount. In our example (right column) the Funder pays the ATE premium upfront (the "Nivalion-Solution"). Let us further assume the claim will be settled for 50 mEUR. Applying a typical waterfall scenario, where the funder gets back his invested capital first, the claimant's part of the proceeds are more than 40 % higher in a combined LF / ATE solution, than in a stand-alone LF solution:

	mEUR	mEUR
claim size/volume	100	100
claimants budget	5	5
ATE premium	–	1,6
respondents costs	5	–
total risk (capital invested)	10	6,6
proceeds	50	50
cost reimbursement	5	6,6
remaining	45	43,4
multiple (on capital invested)	2.75	2.75
success fee	27,5	18.15
remaining for claimant	17,5	25.25

Which cases qualify for litigation finance or ATE and how are these assessed?

To determine whether a case is suitable for funding or insurance, providers will undertake a process of due diligence to ascertain whether the claim meets their criteria. Though the finer points of the process will vary from provider, they focus broadly on:

- The merits of the case (the odds of a successful outcome for the applicant);
- Settlement prospects;
- The ratio of litigation costs to potential damages;
- The reputation and specialism of the lawyers instructed; and
- The prospects of enforcing or monetising an award.

In what we call the Nivalion solution, there is only one due diligence carried out, since the insurers backing Nivalion with ATE are relying on Nivalion's underwriting, which speeds up the process greatly.

While the criteria may seem objective, case assessment can be a very subjective process. It is therefore always best to conduct a market-search when seeking litigation finance. Specialist brokers can save time and money for law firms and their clients and increase the chances of securing terms by assisting with the preparation of the application, approaching multiple providers simultaneously, and ensuring that lawyers can stay focused on the claim.

Understanding a client's liquidity position and risk tolerance are key starting points to any discussion re- ▶

garding legal expenses products. For example, well capitalised clients may not necessarily have any cash issues, yet nonetheless seek ATE insurance to mitigate the risk of their case losing or judgment proving unenforceable.

ATE insurance, litigation finance and various forms of law firm retainers are not mutually exclusive and can interplay in different ways depending on the case circumstances and client objectives. Based on brief details of the case, an experienced broker ought to be able to provide an imminent overview of the likely products available. ◀



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4. November 2019

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15:00–19:00 Uhr

Kooperationspartner: **Bird & Bird**

6. November 2019

Loan-to-own-Strategien als Chancen und Herausforderungen in der Restrukturierung von Schulscheindarlehen

15:00–18:00 Uhr

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