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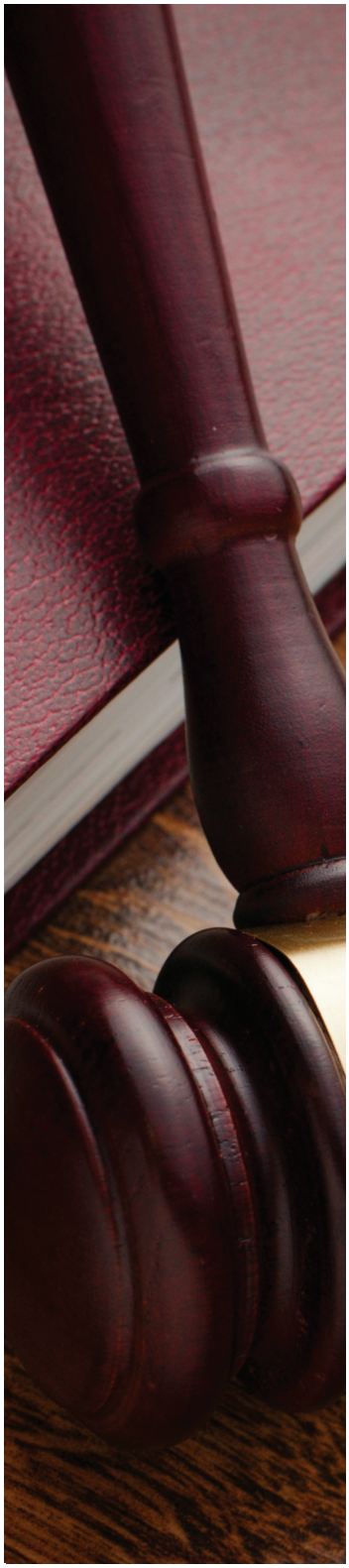
COULD AFTER THE EVENT (ATE) INSURANCE REDUCE NEGLIGENCE RISK IN COMMERCIAL LITIGATION?

Although not often credited, insurance can improve best practice in the areas it touches – mainly due to hard lessons being learned and then being shared more widely leading to firms choosing better, or more appropriate, cover in the future.

JOHN KUNZLER, HEAD OF FINPRO NATIONAL, GIVES HIS THOUGHTS ON AFTER THE EVENT (ATE) INSURANCE.



Historically ATE insurance, which covers adverse costs in litigation, was a concern for professional indemnity (PI) underwriters, due to a considerable number of claims in the personal injury area made against law firms, which arose out of the closure of The Accident Group.

However, underwriting sentiment in the current ATE market for commercial litigation remains positive following the Jackson reforms. The Solicitors Regulatory Authority's Outcome Focused Regulation also has a significant bearing on ATE insurance.

Apart from helping to show that your "clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them" (Outcome 1.12), the SRA also requires that clients receive the best possible information, both at the time of engagement, and when appropriate as their matter progresses, about the likely overall cost of their matter (Outcome 1.13).

ATE insurance may also have a role in reducing the risk of negligence in commercial litigation matters.

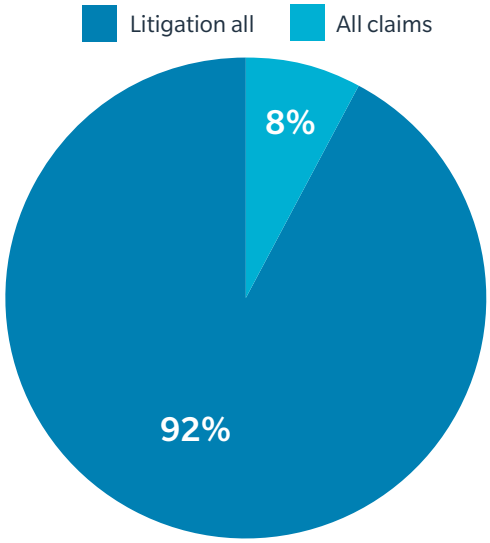
As Clyde and Co's recent briefing note indicates, not exploring litigation funding options (including options such as ATE) may lead to allegations of fault:

> "There is a likelihood that we will see claims relating to the failure of litigation lawyers to advise claimants on all of the funding options in relation to a claim."
>
> CLYDE & CO UK: LAWYERS' LIABILITY BRIEFING – SUMMER 2015.

Litigation claims (excluding injury cases) feature strongly in most insurers statistics relating to solicitors' professional indemnity losses. In a recent Marsh survey (April 2015), which encompassed over 3000 solicitors' PI claims; litigation claims represented 8% of the claims, and 12% of the total value.

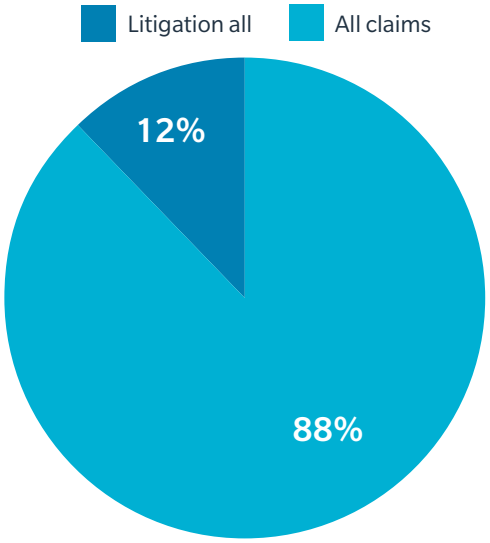
Litigation frequency as % of all claims

(April 2015 sample 3000+ claims)



Litigation incurred as % of all claims

(April 2015 sample 3000+ claims)



So what are the frequent issues arising in litigation negligence? These generally fall into three main areas:

- Time limits – a key time limit for starting or taking other steps in the litigation was missed.
- Poor advice on merits or quantum, and under, or over settlement.
- Inappropriate action – this is often vague, but generally relates to failing to do something, or failing to realise the impact of evidence or not obtaining evidence in the first place.

Many claims have similar features:

- Poor organisation or too large a caseload with too little support contributes strongly as an underlying factor, especially relating to time limits.
- Mistakes involving difficult clients for whom the fee earner didn't find it easy to work.
- As a result of poor client management, the case became a problem file which the fee earner avoided, or seemed distracted from dealing with properly.
- In many of the cases there was no overall goal or plan, nor was the cost versus benefit of proceeding with the case discussed with the client.
- Often the fee earner lacked the confidence to have an open conversation with the client about the realistic merits of the case. I appreciate however that some clients react badly to a dispassionate assessment and more than once when practicing I remember being asked "how can I trust you to pursue the case if you are not 100% behind it?"

As an aside (and surprisingly) there have been cases where the cost versus benefit was explicitly considered by the fee earner on internal notes, which were not then shared with the client.

So, things can go wrong in litigation, but is there any reason why cases which are paid for by funders, or which involve ATE insurance might run better?

Whilst there is no categorical proof, commercially-backed ATE cases may be run to a better than average standard due to the following:

- The independent third party view of the ATE underwriter may help with managing (sometimes difficult) clients expectations (leading to a better service for clients).
- Overall cost analysis is likely to be more accurate, as a rough estimate given to a client at the start of a case is a different process to specifically choosing a limit of cover. I would expect firms to err on the side of caution when selecting a limit (leading to fewer surprises on final costs).
- Underwriters are likely to raise queries about weaknesses or issues they see independently in the cases, which can then be addressed or become part of the cost versus benefit and risk discussion with the client. (This ensures an additional neutral assessment of the litigation as a potential asset).
- If an insurer has been prepared to take a risk on the proceedings, or has refused to do so, it will be difficult to argue the solicitor was wrong about the merits of the case afterwards. (More weaknesses and weak cases are likely to be spotted and considered earlier).
- ATE insurers are expert at litigation selection and whilst neutral, are looking to select the best cases in order to make a profit. Cases which attract cover are thus inclined to be higher quality and more likely to succeed (Cases which proceed with cover should be better quality overall).
- An underlying issue in claims is often claimant cash flow. If the case is lost then many cash-strapped clients, having paid the other side's costs, baulk at paying their own lawyer's fees as well, feeling they have been ill-advised. (ATE mitigates the downside here as there are fewer surprises in terms of the volatility of costs exposure for clients).

In my view these factors added together may reduce the risk of negligence claims being made. I am not suggesting litigation firms rush out and try to claim rate reductions on their professional indemnity premiums since, as mentioned above, historically there have been negligence problems for solicitors relating to ATE in the personal injury market. As a consequence, underwriters may not be easily convinced of the argument that use of ATE would reduce risk. However, in the long term I expect ATE insurance may improve practice by reducing negligence claims in the area of litigation.

While not necessarily negligent, an inference from the Clyde & Co article previously referenced might be that failure to explore all funding options (of which ATE is one approach), could be leaving firms open to criticism.

For cases where the costs to trial are likely to reach GBP250,000 or more, and damages are significant, ATE can make a big impact on the risk/reward as it reduces the downside risk. It is in law firms' interest that their clients are aware of the insurance options available. Appropriately applied, more clients could consider litigating meritorious cases if the downside risk of losing and paying the opponents costs was mitigated, and the balance sheet was less at risk. In the long term this approach is likely to grow litigation fee income, in a climate where litigation spending by customers has been fairly flat or falling (as reported in the Law Society Gazette (15th May 2015 "Commercial litigation spending slumps in UK").

Additionally, from a purely defensive standpoint, it is not ideal if another firm suggests the use of ATE insurance to one of your clients, but the opportunity has not been explored by your firm.

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For more information about ATE insurance and other solutions for solicitors from Marsh, please visit marsh.com, or contact one of our experts.

JOHN KUNZLER
0207 178 4277
john.kunzler@marsh.com

ROBERT MURRANT
0207 357 3808
robert.murrant@marsh.com

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