

## *Jim's Perspective...*

### The Broad Spectrum of Insurance Products

As we can all appreciate, insurance is an invention of mankind designed for humans to organize collectively in a way that will allow an individual to recover from the collective group as a result of a fortuitous risk exposure that can affect any one of us at any moment. As I think about it, I am just overwhelmed at all of the possible risk exposures that are out there, and the ever-expanding types of insurance products that are developed to cover various risk exposures. I have always been impressed with the ability of insurance agents to have an understanding of, and a background of knowledge and information about, so many insurance products.

Recently, I ran across another insurance product (Discussed in an article originally published in the Practising Law Institute legal publication) that I had never heard of, and I had not considered that the risk exposure covered by this product might be insured in the way that it is. The risk management tool is “After the Event” (ATE) insurance. ATE coverage is purchased to manage a company’s exposure to litigation risk and the costs associated with litigation.

The ultimate liability for a party’s own, and its adversary’s, “costs” of engaging in litigation is not handled the same way around the world. In the United States, under the so-called “American Rule,” the prevailing party is generally able to recover from its adversary most of its out-of-pocket litigation costs such as court filing fees, expert witness fees, and litigation support vendors. But these court costs do not include the prevailing party’s attorney’s fee. [I note, however, that by state statute, an insurer must pay the attorney fee of the policyholder, if the policyholder prevails in a coverage lawsuit against the insurer and the amount awarded to the policyholder exceeds any amount offered by the insurer to settle the claim, Nebraska Statute, Section 44-359] In Europe, and the UK, the costs recoverable by the prevailing party include not only court costs but also that party’s attorney’s fees – the “English Rule.” So if you lose in a civil case in Europe, you pay the judgment, court costs and the winner’s attorney’s fee. As I know you can appreciate, this can involve a lot of money! It is this risk exposure that has prompted the development of ATE insurance. Also, because of the American Rule, in the United States most plaintiff civil tort attorney fees are managed under the “contingent fee” system. As you know, in the United States, the attorney for the plaintiff in a civil tort case, will take the case with the understanding that the plaintiff’s attorney fee will be a percentage of what the plaintiff recovers against the alleged negligent defendant. The percentage can vary depending on whether the case goes to trial or is settled.

ATE coverage essentially protects against specified economic consequences of unsuccessfully pursuing, or defending against, a legal claim. Those consequences mainly include:

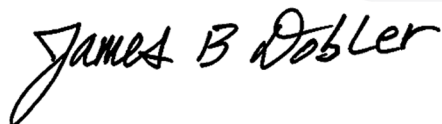
- ♥ The insured party suffering liability for the legal expenses of its adversary as a result of unsuccessfully asserting its claims or defenses; and/or
- ♥ The insured party’s obligations to its own attorney or other professionals in the event of an adverse outcome in litigation. Some policies only cover out-of-pocket costs and do not extend to the insured party’s own attorney fee.

When a person or business files a lawsuit against another person or entity, often, the court will require the plaintiff to post a bond to assure that court costs will be paid. An ATE policy can be accepted by the court as an alternative to posting a bond.

ATE insurance is not nearly as prevalent in the United States as it is in the UK and Europe, but still, I think there is some value in purchasing this product in certain situations. ATE insurance addresses a defendant's exposure to the adversary's legal expense in disputes that commercial coverage such as a CGL, products liability or a D&O policy generally do not cover. While the American Rule usually does not extend an award of attorney's fees to the prevailing party, I believe an attorney's fee can be awarded in some breach-of-contract claims, Intellectual Property disputes, antitrust lawsuits and copyright infringement. In these types of cases, for example, if a business, as a defendant, in a copyright case, is found responsible for copyright infringement, the court can require the attorney's fee of the prevailing party to be paid by the defendant. Granted, there may be a contingent fee arrangement in these types of claims, but if, in these types of cases, the successful plaintiff can be awarded an attorney's fee against the defendant, then that will no doubt limit the need to enforce the contingent fee agreement.

I recently saw an article about an antitrust lawsuit filed against Blue Cross Blue Shield in which Blue Cross companies settled the antitrust case by payment of \$2.67 billion which will be distributed to individuals and companies that purchased Blue Cross Blue Shield health insurance policies. Under federal antitrust law, the court can award an attorney's fee to the entity bringing a private antitrust lawsuit against another entity. In this case, the court awarded an attorney's fee that must be paid by Blue Cross in the amount of \$667 million. Certainly an excellent example of the value of ATE insurance, but I doubt any insurer would issue a policy with a coverage limit that high! I vaguely remember this litigation. It was filed about nine years ago. In general, this antitrust case centered around the Blue Cross Blue Shield business operation in which each state has its own Blue Cross Blue Shield insurer, such as Blue Cross Blue Shield of Nebraska. I don't know much else about it, but it certainly is an excellent example of a court award of an attorney's fee and the value of ATE insurance.

Obviously, this is primarily a commercial product. It's just something to keep in mind for perhaps some of your larger commercial customers. I am not sure which insurers offer this product. It looked like RLI might offer it, and I saw something that suggested MarshMcLennan handled this product, but that might just be for the European exposure. Perhaps a commercial underwriter might know more about the availability of this product in the United States. This is just another product to keep in mind for inclusion in the risk management tool box.



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