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# Guidance Note After the Event (ATE) Insurance

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Costs Lawyer Standards Board



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## Purpose of this guidance

1. This guidance is for Costs Lawyers seeking to recommend and arrange After the Event (ATE) insurance for their clients.
2. The regulatory context for recommending and arranging ATE insurance is complex and sits within the broader context of the regulation of financial services. This guidance first explains the concept of ATE insurance and then sets out the circumstances in which ATE insurance can be recommended and arranged by Costs Lawyers.

## What is ATE insurance?

3. ATE insurance – sometimes referred to as litigation protection insurance – is a type of insurance policy that provides cover for certain legal costs and expenses incurred in the pursuit or defence of litigation or arbitration in England and Wales.
4. Unlike other forms of legal expenses insurance, an ATE insurance policy is purchased after a legal dispute has arisen. ATE insurance can be purchased for nearly all types of litigation with the exception of disputes relating to matrimonial or criminal law, although there are some situations in which cover might not be available for commercial reasons (such as in cases involving novel legal issues). It is normally arranged by lawyers on behalf of their clients.

## Are the costs of ATE insurance recoverable?

5. The general rule is that where an ATE insurance policy was taken out on or after 1 April 2013, insurance premiums are not recoverable from an opponent except in limited circumstances (for example, in disputes relating to clinical negligence, insolvency or defamation).
6. Also, as a general rule, claimants no longer have to notify defendants of the details of an ATE insurance policy that has been purchased in relation to a dispute. However, the court may order disclosure of such details in certain situations. For

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example, a claimant might be required to disclose the identity of a commercial litigation funder or insurer in the context of a security for costs application.

## Who can recommend or arrange ATE insurance for a client?

7. Certain activities relating to recommending and arranging insurance are regulated. The Insurance Distribution Directive (IDD) defines both the scope of the regulated activities and the requirements for carrying out those activities. The IDD was implemented by amendments to the Financial Services and Markets Act (FSMA), the Regulated Activities Order (RAO) and the Financial Conduct Authority's (FCA's) Handbook. Since the IDD has been implemented in the domestic law of England and Wales, the position is not affected by the UK's exit from the European Union.
8. The IDD defines "insurance distribution" as the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim. The detail of what constitutes a regulated activity is technical and is set out in the RAO. Guidance relating to general insurance (including ATE insurance) can be found in the [FCA Handbook](#), particularly chapter 5 of the FCA's Perimeter Guidance Manual (PERG) which contains specific guidance on insurance distribution activities.
9. Any person intending to conduct insurance distribution activities in relation to ATE insurance must either be:
  - exempt from the need to be authorised by the FCA; or
  - authorised by the FCA.

## Exemptions from the need to be authorised by the FCA

10. There are two exemptions from the need to be authorised by the FCA that might be relevant to a Costs Lawyer, namely the exemptions for:
  - certain regulated professionals; and
  - appointed representatives.

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## **Exempt professional firms**

11. Under Part XX of FSMA, firms and sole practitioners authorised by certain regulators can conduct insurance distribution activities (and other financial services activities) without the need to be authorised by the FCA. These regulators (which include the Solicitors Regulation Authority (SRA), the Council for Licensed Conveyancers (CLC) and the Institute of Chartered Accountants of England and Wales) are known as “designated professional bodies”.
12. Firms and sole practitioners authorised by designated professional bodies can conduct financial services activities without being authorised by the FCA provided that:
  - they fall within the scope of the exemption (which might not include a licensed ABS – see further below);
  - they comply with the rules of their designated professional body for the conduct of the financial services activity; and
  - the financial services activity arises out of, or is complementary to, the provision of a particular professional service to a particular client (section 332(4) of FSMA).
13. Firms, including law firms authorised by the SRA, that carry out insurance distribution activities on this basis are referred to as “exempt professional firms” (EPFs). Costs Lawyers who are regulated by the CLSB will not benefit from this exemption through their regulatory status, because the CLSB is not a designated professional body. However, they might be able to take advantage of the exemption if they work within an EPF. Paragraph 25 below provides further information about what this means if you are employed by an SRA regulated firm.

## **Appointed representatives**

14. A firm can also be exempt from the need for authorisation by the FCA if it is an appointed representative (AR) of a firm authorised by the FCA (such as an insurance company). Essentially, this means that the authorised firm – known as the principal – takes regulatory responsibility for the AR, and the AR conducts its

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financial services activities under the umbrella of the principal's authorisation. This is often an attractive option for a firm that does not want to apply for authorisation in its own right, bearing in mind the regulatory burden which that brings.

15. The principal must notify the FCA of its intention to appoint an AR and have undertaken due diligence to satisfy itself of the fitness and propriety of the intended AR. By the same token, you should undertake due diligence on the standing of any principal with whom you consider working, to ensure the firm's ethics and manner of doing business align with yours.
16. If you are an AR, you must comply with the FCA's Handbook. Your principal takes responsibility for ensuring that you have complied with these requirements in the context of the FCA's regulatory framework. However, if you are an AR, you will be responsible for demonstrating to the CLSB that you have met any regulatory obligations and professional standards relating to your own conduct if the need arises (for example, in the context of a complaint). You should inform the CLSB if you become an AR.
17. It is also possible to be an "introducer appointed representative", in which case your activities would be limited to:
  - effecting introductions to your principal; and
  - distributing certain types of marketing material (known as financial promotions) that relate to products available from your principal.Being an introducer AR means that you can do less, but in turn have fewer regulatory responsibilities.

## Authorisation by the FCA

18. A firm, including a sole practitioner with an unincorporated business, can apply to be authorised by the FCA. When the FCA receives a completed application, they have six months to decide whether or not to authorise the firm. If you apply for authorisation, you should notify the CLSB of the outcome.

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19. If you apply to the FCA and are authorised, you must comply with the relevant provisions in the FCA's Handbook, including conduct of business rules, capital resources and professional indemnity requirements, and reporting requirements. You will also need to pay annual fees.

### Is there an alternative to being authorised or exempt?

20. It is possible for you to explain to a client, in general terms, the nature and availability of ATE insurance. Indeed, it may be in your client's best interests that you do so. In such circumstances, you could suggest that your client investigates their options and takes the advice of an insurance broker authorised by the FCA if they are interested in purchasing a policy.
21. However, you must be careful not to recommend a specific product (that is, a product offered by a particular insurer) to your client. To protect yourself and your client, you should avoid providing any information about specific products. Conducting regulated insurance activities without the necessary authorisation (or a relevant exemption) is a criminal offence.

### I am a sole practitioner Costs Lawyer. Can I recommend or arrange ATE insurance for a client?

22. As a sole practitioner, you can recommend or arrange an ATE insurance policy for a client if you:
- act as an AR of an authorised principal; or
  - are authorised by the FCA to undertake insurance distribution activities.
23. Information about these options is set out at paragraphs 14 to 19 above.

### I am a Costs Lawyer working for a costs law firm. Can I recommend or arrange ATE insurance for a client?

24. Yes, if your employer is authorised by the FCA to undertake insurance distribution activities or is an AR of an authorised principal.

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I am a Costs Lawyer working for a firm of solicitors regulated by the Solicitors Regulation Authority (SRA). Can I recommend or arrange ATE insurance for a client?

25. As explained at paragraphs 11 to 13 above, the SRA is a designated professional body under section 326 of FSMA. This means that firms authorised by the SRA are permitted to undertake certain financial services activities – including the distribution of insurance policies – without being regulated by the FCA, although they still need to be registered with the FCA. The scope of permitted activities is governed by the SRA’s Financial Services (Scope) Rules. In addition, some SRA regulated firms, which conduct more extensive financial services activities, have opted to be dual-authorised by both the SRA and the FCA.
26. If you work for an SRA regulated solicitors’ firm and intend to offer ATE insurance, you must ensure that your firm has notified the SRA of its intention to conduct financial services activities, is registered with the FCA and complies with the SRA’s Financial Services (Conduct of Business) Rules, or alternatively is authorised directly by the FCA. You can check whether your firm is on the [FCA’s financial services register](#) by visiting the FCA’s website.

I am a Costs Lawyer working for a firm licensed as an Alternative Business Structure (ABS). Can I recommend or arrange ATE insurance for a client?

27. This depends on the application of FSMA to this type of entity, the approach of the body that regulates the ABS and the consequent terms of the ABS licence. Please refer to the regulator of your employer for further guidance.

What elements of the CLSB Code of Conduct apply to the offering of ATE insurance?

28. Although the CLSB does not regulate insurance distribution, including the recommending and arranging of ATE insurance, you should be mindful of your duties in the CLSB Code of Conduct when carrying out such activities.



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29. There are seven principles that you must uphold as a Costs Lawyer to ensure public confidence in you and the profession. The following principles are most relevant to recommending or arranging ATE insurance. You must:
    1. Act with integrity and professionalism.
    3. Act in the best interests of your client.
    4. Provide a good quality of work and service to each client.
  30. You must not allow any arrangement that you enter into for the purpose of offering ATE insurance to your clients – including an arrangement to act as an AR – to jeopardise your independence or the quality of your service.
  31. In offering ATE insurance to your clients, you must always act in the best interests of your client and avoid conflicts between your client’s interests and your own interests, as well as your client’s interests and the interests of your principal if you are acting as an AR. Clients should be given sufficient information to make an informed decision about their insurance options, including details of your relationship with a principal where relevant. If you are not confident that you can provide such information yourself, you should recommend that your client seeks independent advice before purchasing (or choosing not to purchase) an ATE insurance policy.
  32. While the CLSB does not directly supervise compliance with the FCA’s regulatory requirements that apply to individual Costs Lawyers from time to time, a material breach of the FCA’s rules is likely to demonstrate a lack of integrity and professionalism, falling short of the standards required under the CLSB Code of Conduct.

**END**