

Delivering Justice in an Age of Austerity

A Report by JUSTICE

Chair of the Committee
The Rt. Hon Sir Stanley Burnton



ANNEXE. SUMMARY NOTE ON LEGAL EXPENSES INSURANCE

Introduction

This note summarises the key points from several papers on legal expenses insurance (“LEI”) in a range of jurisdictions. These papers were commissioned by JUSTICE to assist the Working Party in developing its report on *Delivering Justice in an Age of Austerity*.

England and Wales

The take-up of LEI in England and Wales is relatively low in comparison with other European countries such as Germany. Market share of legal expenses premiums in Europe in 2012 was 7.9%. The total legal expenses gross written premiums for England and Wales in 2012 were €592 million.

The LEI available in England and Wales can be categorised as “before the event” (“BTE”) or “after the event” (“ATE”).

BTE insurance can be “stand-alone” in nature. More commonly, however, it is sold as a subsidiary “add-on” to some other insurance or service such as motor insurance, house or contents insurance and travel insurance and cover provided as an incidental benefit of certain credit cards, bank accounts, under a contract of employment or trade union membership.

According to a 2007 report commissioned by the Ministry of Justice on LEI in England and Wales, acquisition of LEI as an add-on to motor insurance was the most common means of ownership (48%), followed by as an add-on to household insurance (35%) and travel insurance (17%). A very small minority (2%) had stand-alone LEI.

ATE insurance is usually taken out by the insured after he/she knows that they will be involved in a particular piece of litigation e.g. following an accident or once a legal dispute arises. ATE covers a litigant against future liability for an opponent’s costs and, depending on the policy, may cover other costs risks such as liability for counsel’s fees, expert fees, court fees and disbursements in the event that they are not recoverable from the other side.

ATE insurance became much more widespread after April 2000, when it became possible for a winning party to recover the ATE premium as a disbursement. However, from 1 April 2013, where parties fund their litigation via conditional fee agreements (“CFAs”) and/or ATE insurance, the CFA success fee and ATE premium are no longer recoverable from the losing opponent if the case is successful. Parties can still enter into CFAs and take out ATE insurance to fund their litigation, but have to bear the additional costs of doing so.

BTE insurance as an add-on to motor insurance provides cover in connection with road traffic accidents. It typically enables an individual to recover any uninsured losses from a third party or compensation for personal injury following a motoring accident.

BTE insurance as an add-on to household insurance typically covers death or personal injury (including clinical negligence); contract disputes arising out of the sale, purchase or hire of goods or services (including holidays); property disputes such as boundary disputes, noisy neighbours, sale of property and tenancy disputes; and employment disputes and related tribunal proceedings. ATE insurance is commonly used in personal injury cases.

The cost of annual BTE insurance premiums ranges from £15-29 per annum where it is purchased as an add-on to motor or household insurance. The cost of an ATE premium will depend on the amount of cover required. Generally speaking, the higher the risk, the larger the premium.

Germany

LEI has become increasingly popular in Germany. This is due to the fact that the annual costs for premiums have become very affordable as a result of greater competition amongst LEI providers. Around 42% of the German population are LEI policy holders. Uptake is particularly high amongst people aged 30-59.

LEI offered in Germany can be defined as simply a product to provide insurance coverage, upon payment of an annual premium, for costs that are necessary for the policy holder to protect his/her legal interests.

German LEI providers only offer BTE services. In other words, individuals are only insured if they have purchased LEI before the occurrence of events that trigger a legal response. For some events, coverage only begins three months after the LEI contract was concluded.

LEI is generally not offered as an add-on to other insurance policies. LEI providers, however, offer a large range of products which can either be purchased as a stand-alone policy or in conjunction with other LEI products. LEI can thus be adapted to the policy holder's personal preference.

Providers offer various LEI packages that can be comprised of different services including insurance for tax, property, labour, contractual, traffic, criminal and administrative offences law disputes.

The annual cost of LEI premiums strongly depends on the various services of LEI providers. For a reasonable stand-alone LEI policy for traffic law disputes, for example, policy holders must pay an annual premium of around €55 if they agree to pay an upfront excess of about €150 per insurance claim. Without an upfront excess, the annual premium can rise to more than €200.

LEI providers do not compulsorily require payment of an upfront excess but if the policy holder agrees to it, the annual costs for the LEI premium become more affordable. In general, the upfront excess amounts to €150 or €200 per insurance claim.

LEI does not cover all areas of legal dispute. Disputes relating to house building, copyright and trademark law, gambling and betting contracts, capital investments and penalties for parking violations are generally excluded.

In Germany, LEI is not supposed to fill gaps in legal aid and legal aid is not granted to LEI policy holders. However, if policy holders have agreed to an upfront excess they may ask for legal aid with regard to the upfront excess if they are not able to pay for this.

The Netherlands

In 2012, 38 LEI providers operated in the Netherlands. The ten largest providers cover over 88% of the LEI market.

LEI covers two functions, namely, insuring legal costs and providing legal services. The legal services provided include both giving legal advice as well as providing representation in disputes. Specific policies are available for consumers and also for businesses (including corporations, partnerships and sole traders).

As regards insurance policies for individuals, basic coverage differs significantly from provider to provider. It usually includes travel matters (e.g. delays in air travel and traffic accidents), disputes regarding consumer contracts and/or tort claims against third parties. Tax disputes, criminal law matters, divorce, commercial litigation and cases concerning intellectual property rights are typically not covered. As regards insurance policies for businesses, basic coverage usually covers disputes arising from purchases, sales and collection. In both cases, basic coverage can be extended by adding supplements.

LEI in the Netherlands only covers events that take place after the conclusion of the policy and is therefore BTE event insurance. The majority of LEI policies in the Netherlands are stand-alone policies. Some add-on LEI policies do exist but these relate mainly to motor vehicle insurance or trade union membership.

By default, most LEI providers do not require the insured to pay an upfront excess or a percentage contribution except in certain circumstances.

On the basis of their terms and conditions, LEI providers have a right “not to initiate litigation” where they consider the chances of winning a case are too small to justify pursuing it. If the insured does not agree with this decision, providers can call upon an independent arbitrator – usually a lawyer – who will give a binding opinion. This is in line with regulatory requirements. When a case is feasible but the interest is lower than the expected costs of litigation, LEI providers may reserve the right to compensate the damage of the insured instead of providing legal services or compensating legal costs. Buying out claims is common practice in the Netherlands.

LEI usually covers unlimited internal advice and/or representation in matters if these services are provided by employees of LEI providers. Most LEI policies cover only limited external advice and/or representation by lawyers in private practice.

The Dutch LEI model functions both as a supplement to governmental legal aid for citizens in the lower income group and as a substitute for governmental legal aid for middle and high income groups.

Sweden

The main LEI providers in Sweden are the same insurance companies that provide household insurance. LEI is included in comprehensive household insurance; however, taking out comprehensive household insurance itself is optional. The estimated percentage of the population in Sweden holding comprehensive household insurance cover, including LEI, is 95% of people aged 16-84.

LEI appears to be included in all basic comprehensive household insurance policies in Sweden and there is no specific premium for it. It can therefore neither be regarded as a stand-alone policy nor an add-on policy. Most insurance companies require continuous insurance cover for two consecutive years prior to the event resulting in a dispute in order to grant LEI compensation.

The average cost of LEI depends on what type of home the insured has, as this will determine the household insurance policy required. The insured has to pay an excess of approximately 20-25% of the costs when making use of LEI (depending on the particular policy terms).

LEI does not cover the cost of legal advice and minor assistance unless it is in connection with a dispute which is covered by LEI.

Most insurance companies have very similar conditions with regard to what is covered by and what is excluded from LEI. Areas excluded from LEI include: criminal matters; low value minor disputes; disputes which are to be handled in accordance with the Swedish Act on Class Actions; disputes with someone to whom the insured is or used to be married or with someone whom the insured lives or used to live together with in a marriage-like relationship; any disputes in connection with the insured's profession or official duties; disputes where the insured does not have a reasonable interest in getting their case tried; and disputes arising outside of the Nordic countries unless the insured was travelling (on vacation) when the dispute arose.

Legal aid may not be granted if the person applying holds LEI covering the matter at hand.

Australia

LEI is not common in Australia and insurance companies have not been committed to the development of this insurance to the same extent as in other jurisdictions. However, the Federal Government is currently considering "access to justice" issues and there is the potential for a change in the LEI landscape in the future.

There are presently very few private providers of LEI in Australia. Although available, legal expenses insurance is not common. This is likely to be for four reasons:

- Because a significant amount of LEI has not been underwritten historically, there is limited underwriting expertise in Australia;
- Other than large LEI schemes, or bespoke policies for significant claims, there is limited underwriting profit to be made from such policies;

- Many plaintiff law firms offer “no win, no fee” arrangements whereby the law firm will absorb the cost of those fees during the course of the matter in return for a modest uplift on their usual fees in the event that the plaintiff is successful; and
- Australia has an active litigation funding market for larger claims, particularly representative proceedings (class actions).

The available LEI products are generally structured as BTE policies. These can be included as part of general consumer insurance policies such as home and contents insurance, and are rarely underwritten on a stand-alone basis.

ATE policies are likely to only be available in cases with a high prospect of success (otherwise insurers will not be prepared to take on the risk). Due to the higher likelihood of significant litigation expenses being incurred, ATE products are generally substantially more expensive.

Those LEI products which are available in Australia generally provide coverage for either personal injury or professional liability claims and do not cover expenses incurred in conveyancing, criminal or family law matters.

There is speculation that the growth of class action litigation and the deregulation of litigation funding may increase market appetite for LEI. Furthermore, the reduced availability of legal aid, particularly for civil disputes, may generate greater demand for LEI coverage.

Canada

As of 2011, Canadians purchased \$11-12 million of LEI coverage each year. LEI has mainly taken hold in Québec, due to a campaign by Barreau du Québec encouraging people to take advantage of LEI. However, despite the success of this campaign, only 225,000 families in Québec, or 10% of Québécois, have purchased LEI.

LEI is currently marketed towards the middle class. LEI advertisements are aimed at people who make too much money to qualify for legal aid but too little to comfortably afford legal representation.

Generally, Canadian customers can purchase LEI either before an event triggers a legal response or following such events. Purchasing LEI after an event has occurred is more expensive.

Coverage provided by LEI in Canada is policy-specific. LEI coverage can include stand-alone policies (which are more expensive) or add-on policies, which are offered in conjunction with other insurance products (i.e. home or auto insurance). LEI is also offered as part of some group insurance policies or employee benefit plans.

The scope of coverage depends on the specific terms of each LEI policy. However, providers generally offer customers a forum for summary legal advice and information on a wide range of legal issues, as well as an intake mechanism for referrals to other services. Whether or not payment of an upfront excess or percentage contribution is required depends on the specific terms of each LEI policy.

Many LEI policies do not cover family law issues. In Québec, LEI coverage does not include family or criminal law matters.

Spain

LEI cover is not standard in Spain. It takes the form of (a) stand-alone LEI and (b) legal expenses coverage included in liability insurance policies (i.e. liability insurance add-on coverage). LEI is not normally purchased by individuals. It is aimed primarily at associations, professional collectives, trade unions, etc.