

## Legal expense insurance

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### ***What is it?***

Legal expense insurance (LEI) can be defined as simply a product to provide insurance coverage, upon payment of a premium, for specified legal services. Policy holders pay an annual premium for summary legal advice, legal information, legal assistance and legal representation in certain defined situations, according to terms outlined in their policies. Providers include a large range of services, most often for civil law matters other than family law, and sometimes for criminal or driving offences.

LEI is often compared to “prepaid legal expense plans”, a term commonly used in the United States. The distinction seems to be that prepaid legal expense plans cover specific anticipated events, like drafting a will, while LEI covers unforeseen events, like employment disputes, litigation, or criminal charges. However, LEI providers also commonly cover drafting of wills, and prepaid legal expense plans can provide some assistance with unanticipated legal problems.<sup>1</sup>

LEI operates like other forms of insurance, where the risk of liability is spread among policy holders, reducing each holder’s costs and generating profit for the insurer. Another distinction between LEI and prepaid plans is that the latter can involve “bulk purchases of legal services from private legal professionals, the employment of in house lawyers for a specified group of people such as the members of a trade union and their families, and the education of members of a group about legal matters”, so the plans rely on bulk savings, rather than insurance principles to be viable.<sup>2</sup>

Individuals can either purchase insurance before events trigger a legal response (before the event services), or following such events (after the event services). The latter is generally more expensive. It could allow someone without “before the event” coverage, who has, for example, been injured in an accident, to pursue a claim with some assurance that if unsuccessful, the policy would mitigate the financial blow. In addition, “after the event” LEI might be required as part of a contingency fee arrangement in a similar circumstance.

Coverage can be offered as a stand-alone policy, the more expensive option, or in conjunction with other insurance products, for example, home or auto insurance, which can be quite affordable. LEI is sometimes offered as part of other group insurance or under an employee benefit plans. For example, Canadian Auto Workers Union has offered its employees a comprehensive legal expense

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<sup>1</sup> [https://www.prepaidlegal.com/newCorp2/about\\_us/about\\_us.html](https://www.prepaidlegal.com/newCorp2/about_us/about_us.html)

<sup>2</sup> Regan, Frances, “Whatever happened to Legal Expense Insurance? Recent successes and failures of legal insurance schemes in Australia and overseas” (2001) 26:6 *Alternative Law Journal* 293.

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\* These Working Papers were drafted in preparation for the final Discussion Paper for Building Block 5, Underexplored Alternatives for the Middle Class.

insurance plan for more than twenty years,<sup>3</sup> as have certain other trade unions. Some occupational groups, such as lawyers or directors or officers of corporations, also have coverage for legal expenses related to professional liability.

### ***Experience with LEI***

In Europe, LEI has been a reality for decades and the industry now reaps about 11 billion dollars per year in premiums. In France, it was first offered in 1905, and in Germany, in 1928.<sup>4</sup> In 2003, LEI accounted for 25% of lawyers' fees in Germany<sup>5</sup> and today, about half of the German population holds a LEI policy. In the UK, the percentage of the population with LEI is even higher, as LEI is usually part of other household insurance policies. In Finland, LEI and legal aid are coordinated, "including financial assistance to those with insurance who are unable to afford the deductible when legal services are needed." And, in Sweden, an estimated 90% of households have LEI policies<sup>6</sup> where LEI is included at no additional cost with most household insurance.<sup>7</sup>

In the United States, prepaid legal service plans have also been popular for many years, and about 30% of the population now has a plan, or roughly 98 million people.<sup>8</sup> Policies vary in their coverage and cost.<sup>9</sup> One of the largest is an Oklahoma company called Prepaid Legal Services (now Legal Shield). It has operated in Ontario since 1999, and now operates in four provinces.<sup>10</sup>

In contrast to Europe, Canadians purchase only about 11-12 million dollars of coverage per year.<sup>11</sup> LEI has mainly taken hold in Quebec, attributable in large part to efforts by the Barreau du Quebec, which spent 2 million dollars on a campaign to encourage Quebecers to take advantage of LEI.<sup>12</sup> Their ads are explicitly aimed at people who make too much for legal aid, but too little to be able to comfortably afford counsel if they had a legal event. While the campaign saw the number of subscribers double, still, only about 10% of Quebecers have coverage, and only about 12 insurance companies provide the product.<sup>13</sup>

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<sup>3</sup> Kate Lunau, "How to pay for some justice: Legal expense insurance could be just what Canadian need" (March 5, 2009) <http://www2.macleans.ca/2009/03/05/how-to-pay-for-some-justice>

<sup>4</sup> Matthias Kilian, "Alternatives to Public Provision: The Role of Legal Expenses Insurance in Broadening Access to Justice: The German Experience" (2003) 30:1 *Journal of Law and Society* 31.

<sup>5</sup> *Ibid.*

<sup>6</sup> Luis Millan, "Legal Insurance" (May 2009) *Lawyers' Weekly* <http://www.lawyersweekly.ca/index.php?section=article&volume=28&number=48&article=5>

<sup>7</sup> *Supra*, note 2.

<sup>8</sup> *Supra*, note 1.

<sup>9</sup> *Supra*, note 2.

<sup>10</sup> <http://www.legalshield.com/cp/howItWorks.html#offer>

<sup>11</sup> Jeff Gray and Tara Perkins, "Go ahead, sue me – I have insurance" (July 12, 2011) *Globe and Mail*.

<sup>12</sup> <http://www.assurancejuridique.ca/> or <http://www.legalinsurancebarreau.com/>

<sup>13</sup> *Supra*, note 6; See also, Sujit Choudry, Michael Trebilcock, and James Wilson, "Growing Legal Aid Ontario into the Middle Class: A Proposal for Public Legal Expense Insurance", in Michael Trebilcock,

In 2010, the global leader of LEI brought its product to Canada, first in Ontario but now licensed across Canada, except in Quebec. DAS Group (DAS) is a subsidiary of ERGO, the primary insurer of the Munchin Re Group, and has operated in Germany since 1928. It operates in 18 countries in Europe, in North America and in Asia. DAS markets itself as providing “affordable” justice for the middle class.<sup>14</sup>

### ***Scope and Delivery***

Providers generally offer customers a call in “help line” for summary legal advice and legal information on a wide range of legal issues, and to vet situations for referral to other services.<sup>15</sup>

Policy holders may then be referred for further legal assistance (letter writing, for example) or legal representation, commonly subject to a deductible, a waiting period, and/or an assessment of the merit of the case by the providers’ lawyers.

Some providers have an in-house counsel team, or they may contract with several law firms depending on the type of legal work. DAS has recently contracted with Gowling Lafleur Henderson LLP, for example. Others allow policy holders to consult a lawyer of their own choice, and apply for reimbursement later.

Certain providers refer policy holders to law firms for services not covered, on the agreement that the firm will offer preferable rates. Law firms are motivated to do this given the quantity and certainty of the legal work, and because in some situations they are prepaid. Providers can insist on certain standards for legal work at reduced rates, given the volume of files involved.<sup>16</sup> Legal Shield for example, offers its policy holders legal representation for excluded services at a 25% reduction from the firms’ regular hourly rate. Mills and Mills LLP in Toronto has 10 lawyers devoted almost exclusively to plan members.

Many plans cover civil disputes, such as those pertaining to employment, tenancy, or between neighbours, and some also provide coverage for criminal matters or driving offences. Importantly, many do not cover family law issues, which is by far the area of greatest unmet legal need in Canada.<sup>17</sup> DAS CEO Barbara Haynes has said that conflict of interest concerns and anticipated volume of claims are the reasons why DAS does not cover family law issues.<sup>18</sup>

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Anthony Duggan, and Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto, 2012) 385 at 395.

<sup>14</sup> *Supra*, note 11.

<sup>15</sup> Note that some jurisdictions have similar telephone advice lines without the need for LEI.

<sup>16</sup> Pamela Abrams, “In Sure Hands? Funding Litigation by Legal Expenses Insurance: the Views of Insurers, Solicitors and Policy Holders (University of Westminster, 2002) at 9, cited in Choudry et al, *supra*, note 13 at 394.

<sup>17</sup> Roy McMurtry (Chair), *Listening to Ontarian: Report of the Ontario Civil Needs Project* (May 2010).

CAW Legal Services Plan, one of about 12 trade union sponsored plans, offers comprehensive coverage from property deals to litigation. Family law cases are covered up to 12 hours, and following, policy holders pay about half of the lawyer's normal hourly rate.<sup>19</sup> Lawyers on retainer handle about half the files, with another 25% through cooperating law firms. The final quarter of lawyers are chosen by policy holders, who then apply for reimbursement.<sup>20</sup>

DAS premiums are about \$360/year, and cover up to \$100,000 per claim. DAS has several different plans to choose from (DAS Drive, DAS Living, DAS Drive and Live, DAS Business, and DAS Group.) The "Living" option includes employment disputes, contract disputes, property protection, bodily injury, tax protection, employee legal defence, and court attendance expenses.<sup>21</sup>

Legal Shield includes basic services, such as document review, letter writing and phone calls, driving matters, and will preparation, and a reduction from its law firms' regular hourly rates for a wide range of services, including family law matters.<sup>22</sup>

In the UK where LEI is usually purchased as part of a broader insurance product, premiums are between 13 and 24 pounds a year. Similarly, in Quebec, premiums are as low as \$4/month and are usually offered as an add-on to other types of insurance. Coverage extends to \$5000 per dispute, and up to \$15,000 a year, and includes consumer rights, employment situations, wills, consumer contract disputes, personal injury apart from motor vehicle, property disputes, landlord/tenant matters, income assistance issues, etc., but does not include family and criminal law matters.<sup>23</sup> There is generally no deductible, but for some litigation, a contribution is required, with the plan covering 80% and the consumer the rest.

### ***Potential and Challenges of LEI***

As the scope and eligibility for legal aid has declined, and market rates for legal services continue to grow, growing numbers of people cannot afford legal assistance and representation, including those in the middle income bracket. The Barreau du Quebec website says that LEI can help if you are:

in a middle income bracket, which means that you aren't eligible for free legal services under Legal Aid.

your current financial obligations are such that you don't have much leeway, which means that you may have difficulty paying a lawyer to assert your rights or settle a dispute.

you would be in a very uncomfortable if not untenable financial situation if an unforeseen legal problem arose.<sup>24</sup>

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<sup>19</sup> *Supra*, note 3.

<sup>20</sup> *Supra*, note 6.

<sup>21</sup> <http://www.das.ca/Products-Services/Overview.aspx>

<sup>22</sup> <http://www.legalshield.com/cp/plans/consumerPlans.html>

<sup>23</sup> *Supra*, note 6.

<sup>24</sup> <http://www.legalinsurancebarreau.com/protection/index.html>

The LSUC has also acknowledged the potential for LEI to make legal services more affordable for the middle class, and endorsed legal expense plans as far back as 1993.<sup>25</sup> While the Globe and Mail reported in 2011 that the LSUC has “no plans to help coordinate or market insurance coverage”<sup>26</sup>, the LSUC website now refers the public with questions about LEI to the website of the largest LEI provider, DAS.<sup>27</sup>

In his review of legal aid in Ontario, Professor Michael Trebilcock recommended that “the Law Society of Upper Canada and Legal Aid Ontario should accord a high priority to promoting the role of legal insurance in Ontario”, though his vision of the product includes coverage for family law services.<sup>28</sup> He said:

I conclude that legal insurance may be one means to significantly improve access to justice in Ontario, particularly in civil matters, including family law. The Law Society of Upper Canada and LAO should accord a high priority to promoting the role of legal insurance in Ontario. For example, one idea worth exploring is to offer legal insurance as an optional rider on all mandatory third part liability auto insurance policies. In order to keep premiums to moderate levels, such coverage would require a significant deductible, e.g. \$5,000, to discourage frivolous actions, as well as a cap on coverage, e.g. \$50,000, to prevent protracted litigation.<sup>29</sup>

The report of the Civil Legal Needs project of Ontario also states that the product could enhance access to justice for low and middle income Ontarians. However, the report notes that a majority of people they surveyed weren’t particularly interested, either because they thought they wouldn’t need it or thought it would be too expensive.<sup>30</sup> Public education campaigns by justice system participants, similar to that undertaken by the Barreau du Quebec, could increase public awareness of the potential benefits of LEI.

In the UK in 2007, the Ministry of Justice found that while 59% of the population had some form of LEI, less than 25% were aware of it.<sup>31</sup> Two major UK reports have recently recommended LEI as a way to increase access to justice for the middle class. Lord Justice Jackson’s *Review of Civil Litigation Costs: Final Report*, January 2012 called for wider promotion of LEI insurance.<sup>32</sup> Lord

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<sup>25</sup> Oliver Bertin, “Lawyers see more work thanks to prepaid legal plans” (February 2005) 24:36 *Lawyers Weekly*.

<sup>26</sup> *Supra*, note 11.

<sup>27</sup> <http://www.lsuc.on.ca/faq.aspx?id=1034>

<sup>28</sup> Michael Trebilcock, *Report of the Legal Aid Review*, 2008 (prepared for Attorney General Chris Bentley) at 97.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Listening to Ontarians*, *supra*, note 18 at 39.

<sup>31</sup> <http://www.justice.gov.uk/news/newsrelease231007a.htm> London, UK: Ministry of Justice, 27 October 2007.

<sup>32</sup> The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (Norwich: The Stationary Office, 2010).

Young's *Common Sense, Common Safety*, October 2012 report on health and safety legislation said that broader use of LEI would be a fair solution to access to justice.<sup>33</sup>

A report from Consumers Focus, a UK watchdog, called, "In Case of Emergency" says improvements in terms of design and promotion will be required to achieve that potential. Again, 43% of those surveyed knew little or nothing about LEI, though 25 million UK households had policies at that time. As well as not taking advantage of coverage, this could result in customers paying for coverage through more than one provider. The report noted several challenges, including the lack of comprehensive coverage (notably for family law and mental health issues), consumers being confused and have difficulty in comparing products, consumers reporting wait times and coverage refusals without explanation, consumers being unable to choose their own lawyer, and the fact that independence of counsel is an issue when lawyers also act as gatekeepers for the providers' services.<sup>34</sup> The report warns that LEI needs to be more clearly explained, more consistent in its offerings, better promoted and offer customers more choice in terms of legal representation.<sup>35</sup> Further, it recommends an independent appeals system for rejected claims.

Other challenges that have been identified are a slight degree of increased litigiousness among those who have LEI,<sup>36</sup> though the possibility exists that could be offset by more expeditious resolution of disputes given the involvement of lawyers.

Kenning Marchant observes that people tend to overestimate more familiar events, both negative or positive, like being mugged or winning the lottery, but underestimate events that are less familiar but actually more likely, like divorce or wrongful dismissal. He suggests concrete steps to advance LEI, including meetings between the insurance industry and government representatives to discuss how to broaden service delivery, or favourable tax treatment of LEI as a private sector employee benefit. He also notes that current attention on triage of legal needs and proportionality in responding to legal issues fit well with insurers' interests in the Canadian market.<sup>37</sup>

Professors Choudry and Trebilcock, and lawyer James Wilson, have proposed another LEI option for Ontarians, in conjunction with the province's legal aid plan (LAO). A more inclusive approach would also benefit the poor by providing political incentives to maintain and possibly improve public funding, and would allow LAO to use the premiums paid by the middle class to subsidize other LAO services. Using a public/private cost sharing approach, premiums could be tailored to income.

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<sup>33</sup> Lord Young, *Common sense, Common safety* (A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture) (London: HM Government, 2010).

<sup>34</sup> <http://www.consumerfocus.org.uk/publications/in-case-of-emergency>

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Kenning Marchant, D Jur, "Resourcing Access to Justice: Legal Expenses Insurance", in *The Spectrum of Legal Services in Canada* (Spring 2009) Canadian Forum on Civil Justice.

A study about the German experience with LEI concluded that it had definitely increased access to legal services for people with middle incomes and higher, but importantly noted that most lower income Germans did not have LEI.<sup>38</sup>

It appears clear that LEI has potential to also improve access to legal services for Canadians who can plan for, and afford to pay additional monthly insurance premiums, either as an add-on to an existing policy or as a separate policy. While worthy of further attention for that reason alone, it is important not to overlook that LEI will not address the legal needs of the poorest, most marginalized or vulnerable Canadians, and, while important, should not be considered an innovation that would address or even relieve the need for adequate resourcing of legal aid plans.<sup>39</sup>

### ***Conclusion***

For those who can afford a modest premium, but not the full cost of hiring a lawyer when they need legal help, LEI has real potential to improve access to justice for certain Canadians. This expanded access to legal representation for the middle class could seriously alleviate some of the pressures on the justice system, encouraging expeditious resolution of disputes and allowing people who might have otherwise abandoned legitimate claims to pursue them. At the same time, hopefully addressing this one important part of the access to justice problem will allow for more focused, coordinated and well-resourced efforts to deal with Canada's remaining access to justice problems.

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<sup>38</sup> Kilian, *supra*, note 4.

<sup>39</sup> *Supra*, note 2.