

ATE Legal Expenses Insurance Commercial Litigation

April 2013 onwards

Temple's Desktop guide to ATE Insurance for Irrecoverable premiums



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An Introduction to Legal Expenses Insurance

This type of insurance falls into two categories, Before the Event (BTE) and After the Event (ATE).

BTE policies are taken out to provide cover for the contingency that a dispute commences at some time in the future and during the currency of that policy. These policies are typically designed to insure the cost of pursuing and defending litigation, as well as any liability for damages up to a relatively low limit.

In contrast with BTE policies, ATE policies are issued after a dispute has arisen. The insurance provides protection to the insured for their potential liability to pay their opponent's costs and their own disbursements (usually excluding counsel's fees).

ATE policies have been in existence for some time. However, following the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2013, the premium for an ATE policy can not be recovered from the paying party unless the claim is for insolvency, defamation or privacy proceedings. Should your claim be likely to fall into this category, please see our other Desktop Guide for those classes of litigation at set out link.

“Welcome to Before the Event (BTE) and After the Event (ATE) Insurance”



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ATE – Relationship with CFA's

In the new regime introduced by LASPO, it is recognised that there are a wide range of retainers upon which claims can and will be pursued. We are not prescriptive about any particular form of retainer. However it is always encouraging for Temple to see that the solicitor acting in the claim has such faith in it that they are willing to share risk with their client.

Solicitors Code of Conduct

Outcome 1.12 of the Client Care section of the Code requires that “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”. This is a different way of expressing the pre-existing requirement that Solicitors must discuss with their client whether their potential liability for any other party's costs may be covered by existing insurance (BTE insurance) or whether specially purchased insurance (ATE insurance) may be obtained.

It is extremely important that solicitors fulfil their obligations in this regard because failure to do so could result in a claim for professional negligence. It is also important to note that this obligation exists even if the client, be they an individual or a large plc, could apparently “afford” to lose the litigation. The entitlement to insure is not limited to any type of claimant. Therefore it is not open to solicitors simply to ignore the subject altogether, or to conceal the possibility of ATE insurance in some obscure paragraph of a lengthy letter of engagement.

Temple does not consider that the Code of Conduct or case law requires solicitors to act like an insurance broker in trawling the market themselves for quotes or submitting every case for consideration. Indeed solicitors need to be careful to avoid assuming the duties of an insurance broker by behaving like one. As long as the solicitor/their firm has carried out some research of the market they are entitled to explain to the client on presenting a quote that they are not insurance brokers but that the client is free to appoint its own insurance broker to approach the market if the client so chooses.

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What are the **advantages** of having **ATE**?

- ATE gives your client the peace of mind that if the action is lost, they will not be exposed to their opponent's costs or own disbursements.
- ATE enables a client to transfer the risk of adverse costs from the litigation to the ATE insurer.
- There is no obligation to inform a defendant about the ATE. However it should assist in negotiations because, if informed, the defendant will know that an independent ATE insurer has looked at the case and has decided to support the claim.
- ATE "levels the playing field" and enables meritorious litigation to proceed that otherwise would not be pursued.
- ATE enables a client to fix, or at least have much better control over, their costs exposure to the litigation.

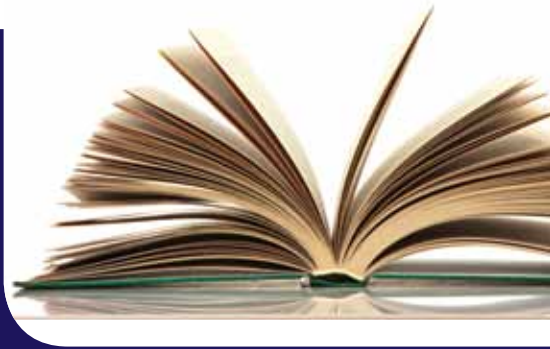


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How does ATE Work?

Temple was the first ATE insurer to introduce the deferred, stepped, and self-insured premium model. This became the standard model in the ATE market. If you have an insurer or broker who tells you that a premium needs to be paid up front then you are talking to the wrong people! At Temple our ATE policies work by:



- Providing cover for opponents costs and own disbursements (excluding Counsel's fees).
- Agreeing the policy limit at the outset of the policy which can be increased as further information becomes available about the opponent's costs, for example from Case Management Conferences or Costs Budgeting.
- Providing retrospective cover. Temple provides cover for opponent's costs and insured's disbursements incurred from the beginning of the dispute, not just when the policy commences.
- Deferring payment of the premium until the conclusion of the legal action. The premium is only payable once damages have been paid.
- The premium is fixed at the outset as a sensible percentage of the damages (or in some cases, percentage of the claimant's solicitors net fees). The percentage is fixed by reference to the merits of the case, the limit of indemnity required and the likely level of damages to be received.

ATE cover is unique within the insurance world, with a variety of unusual features:

- **Deferred** – The Premium is payable at the end of the case
- **Contingent** – If the case is lost, there is no premium to pay since it is insured as a disbursement under the policy.
- **Affordable** – Premiums are set at levels that should not deter claimants from insuring their case

A hand holding a sign with text.

“We can provide a wide range of competitive insurance solutions for your clients.”

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When should ATE Insurance be applied for?

As soon as you have sufficient information to take an informed view about the prospects of success of the case. Ideally this should occur as early as possible in the life cycle of the case and before sending the Letter of Claim. The longer you defer applying for ATE insurance the lower the chances of the case being insured or the higher the price of insurance.

Do not accept the myth that there is no costs risk prior to litigation. First there is the risk that your clients have in respect of own disbursements. Secondly there is Part 36 risk whereby your client can be liable for opponent's costs even if no proceedings have been commenced. Thirdly and most importantly if you do not insure early, your client runs the risk of not obtaining insurance at all.

The key issues for us are the prospects of success of the case and the prospects of recovery of damages from the opponent. If you do not think it is a very strong case – it is unlikely we will think it is either!

We make our own underwriting decisions based on the advice given by the solicitor or counsel conducting the case (occasionally we may seek counsel's advice at our own expense). We do not have a minimum required percentage chance of success. However, given that we receive nothing if the case loses and have to pay opponents' costs, we have to be convinced that the prospects of success are good.

Temple does not charge any assessment fee for considering cases and refusal to insure should not offend. It does not mean we think the case will be lost, simply that it does not meet our underwriting criteria, and inevitably, we have to take a reasonably cautious approach. Temple will not insure cases where adverse selection has taken place i.e. attempts are made to settle the case which are unsuccessful and only then is insurance requested.



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How is ATE cover obtained?

A proposal form needs to be completed and submitted to Temple, together with the most relevant information in respect of the claim. The Proposal form has a guide to the documents required. Please note that we do not generally require to be provided with all documents and that a well-prepared submission is always welcomed. A proposal form can be downloaded from Temple's website at www.temple-legal.co.uk.

Once the papers have been received by Temple, the case will be allocated to an Underwriter who will assess the merits of the matter and contact you within 5 – 10 working days, either to request some additional information, provide a quotation, or decline to offer terms.

What do underwriters look for in a case?

Temple prefers to insure all matters at the outset of the litigation. This provides the Underwriters with a fair spread of risks – some which will settle quickly, and some where liability will be disputed, perhaps all the way to trial.

Underwriters will always look to avoid 'adverse selection', whereby a solicitor chooses to insure only the more difficult cases.

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What types of litigation are suitable for ATE policies with irrecoverable premiums?

Any type of claim to which Qualified One way Costs Shifting does not apply or alternatively any insolvency, defamation or privacy claim.

The claim will have to be one where the level of damages to be recovered will be sufficient to be able to pay the premium and leave the claim to be worthwhile for the claimant to pursue.

Generally claims where levels of damages will be less than £25000 will be difficult to insure. Premiums are based on the merits of the claim, the limit of indemnity required and the level of damages likely to be recovered.



Litigation

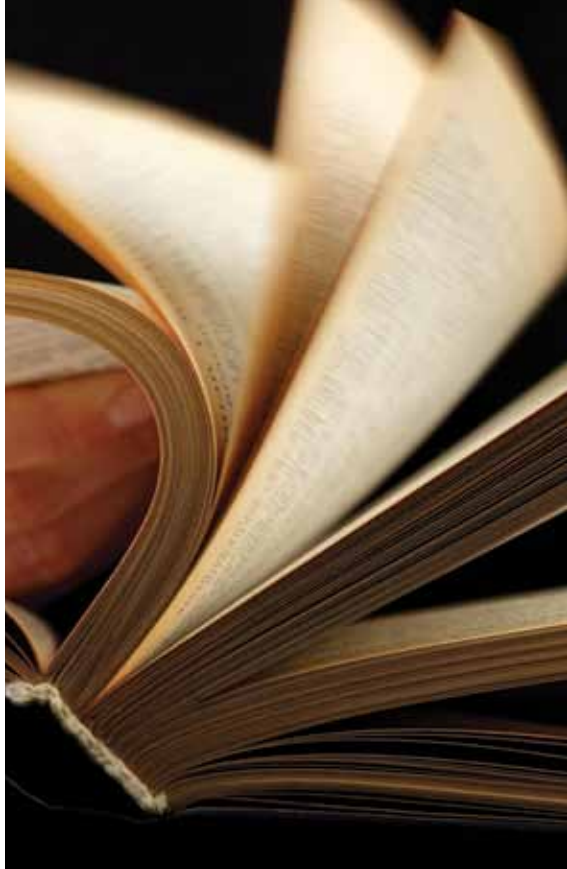
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STRATEGY

What happens after the policy is issued?

Temple is firmly of the view that a litigator's job is to litigate. Therefore, our reporting requirements during the life of the case are minimal and are done online through Temple's online policy system (TOPS), which has been comprehensively praised for its simplicity and ease of use, to update progress.

If you take out a one-off policy with Temple you will need our permission to commence proceedings. You need to inform us if the prospects of the case deteriorate materially and of any offers that are made to your client that they wish to reject on your advice, before doing so. We also need to know the trial date and obviously the outcome of the case.

You account to us for the premium within 28 days of receipt of damages having been obtained from the opponent.



Can Temple grant delegated authority schemes?

Yes, Temple can delegate authority to a firm to issue policies.

Cases should meet pre-agreed criteria for a particular class and value of litigation, or for commercial litigation, subject to reasonable volumes of cases. The significant advantage of having a delegated scheme with Temple is that if the case meets the pre agreed criteria the solicitor is entitled to issue the policy of insurance, without referring the matter to Temple. In addition, all decisions about settlement of the case (except for compromising the ATE premium) are delegated to the solicitor.

The process of delegated authority is made easy via, Temple's Online Policy System (TOPS). Quick, simple and convenient to use, TOPS allows you to issue and review insurance policies securely via our website.

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Is there any need to inform opponents of the ATE insurance?

No. Since the premium is irrecoverable, your client's insurance arrangements are irrelevant to the defendant. However we envisage situations where it may be helpful to disclose the fact of the insurance to an opponent, for example, if the defendant is trying to suggest that your client cannot afford to lose the litigation.



ATE as security for costs?

An ATE policy is not a complete answer to an application for security for costs because the policy is a contract between the insured and Temple. Further the Contracts (Rights of Third Parties) Act is excluded from the policy. Therefore a party seeking security can contend that if the insured or their solicitor acts in such a way as to vitiate the policy, there will be no cover under the policy to pay their costs.

Temple can assist in such circumstances by providing evidence that demonstrates that the number of cases that have been repudiated is very small relative to the number of policies written. This has been of considerable assistance in the past. However it will be appreciated that the grant of security for costs is in the discretion of the Court.

Can ATE be used by defendants?

It will be much harder, as it always was, to insure defendants. However it may be possible if defendants are prepared to pay a premium based on a percentage of the damages that they have saved in winning a case.



What next?

If you need any further information about ATE insurance or any of Temple's products contact our friendly and experienced Commercial team.

Call us on 01483 577877 or visit our website www.temple-legal.co.uk/products/ate-commercial.

A pdf version of this guide can also be downloaded from our website www.temple-legal.co.uk

products

Other market-leading products from Temple

We offer ATE Insurance schemes for many types of litigation, including:

- Clinical Negligence
- Defamation
- Commercial Litigation

Temple also offers the following legal expenses products:

- Employer Legal Protection
- Commercial Legal Expenses
- Tax & VAT Disputes Scheme
- Motor Legal Expenses
- Intellectual Property
- Group and Affinity Schemes

Want to learn more about how these products can benefit your firm?

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