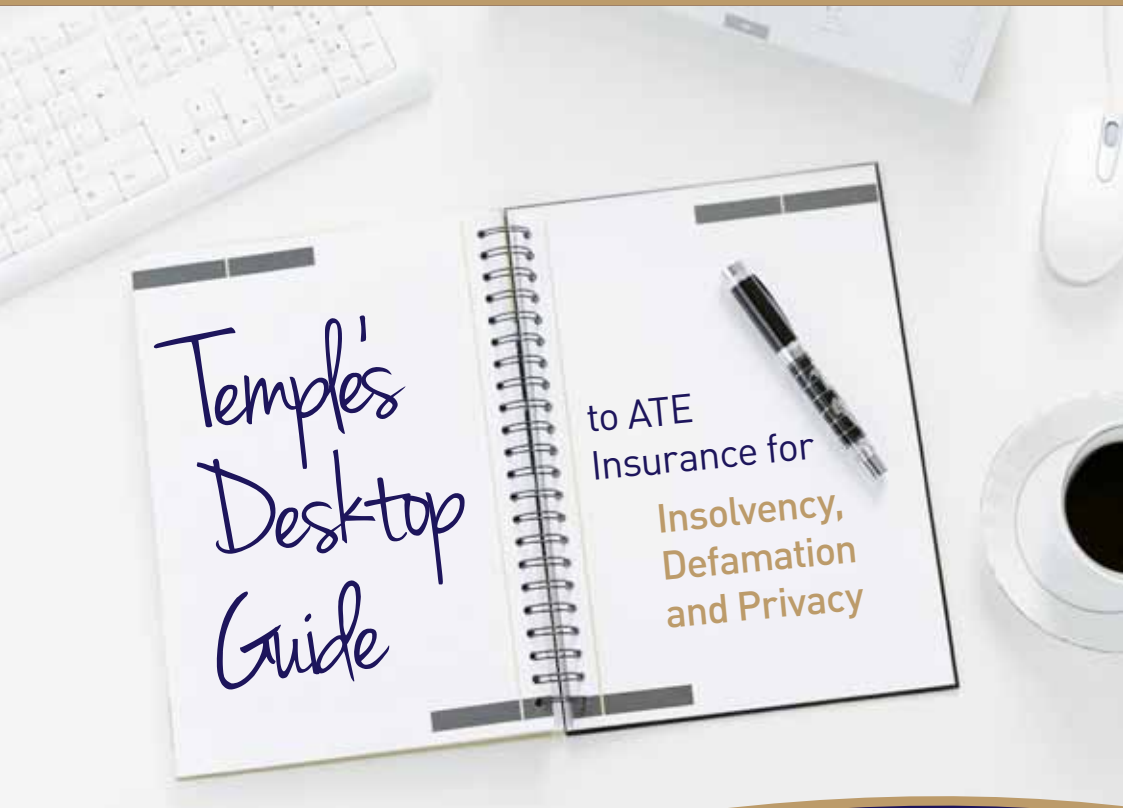


ATE Legal Expenses Insurance Commercial Litigation

April 2013 onwards



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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 Section 29 Administration of Justice Act 1999 (AJA), the premium for an ATE policy can be recovered from the paying party.

Following the introduction of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012, with effect from 1st April 2013, the recoverability of success fees and ATE premiums was abolished except for claims by Liquidators, trustees in bankruptcy, administrators and companies being wound up or in administration; further, claims for publication and privacy proceedings are also excluded from the effects of LASPO (see LASPO (Commencement No.5 and Saving Provision) Order 2013 18th January 2013) and therefore the ATE premiums can be recovered from the unsuccessful opponent.



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ATE – Relationship with CFA's

It is not essential to have an ATE insurance policy when a party enters into a CFA with a recoverable success fee. The two are entirely separate. However, the reality is that in most litigation, they usually go together because the ATE policy provides protection to the client if the case is unsuccessful. Most ATE insurers will only provide cover if the solicitor conducting the case is prepared to risk their work in progress by working on some form of CFA.

By combining a “no win – no fee” CFA with an ATE policy, the client can be granted complete protection from any costs orders – the CFA covering the costs of the client’s solicitor, and the ATE covering the costs of the opponent’s solicitor. In most commercial cases solicitors tend to work on a discounted or “no win- low fee” CFA. This means that the client has to pay some element of the fees as the case progresses. Temple routinely insures cases conducted on this basis.

Temple can and does insure cases where the solicitor is conducting the case on a conventional retainer. However, Temple will want to know why your firm is conducting the case on a conventional retainer, if the prospects of success are so good!

Solicitors Code of Conduct

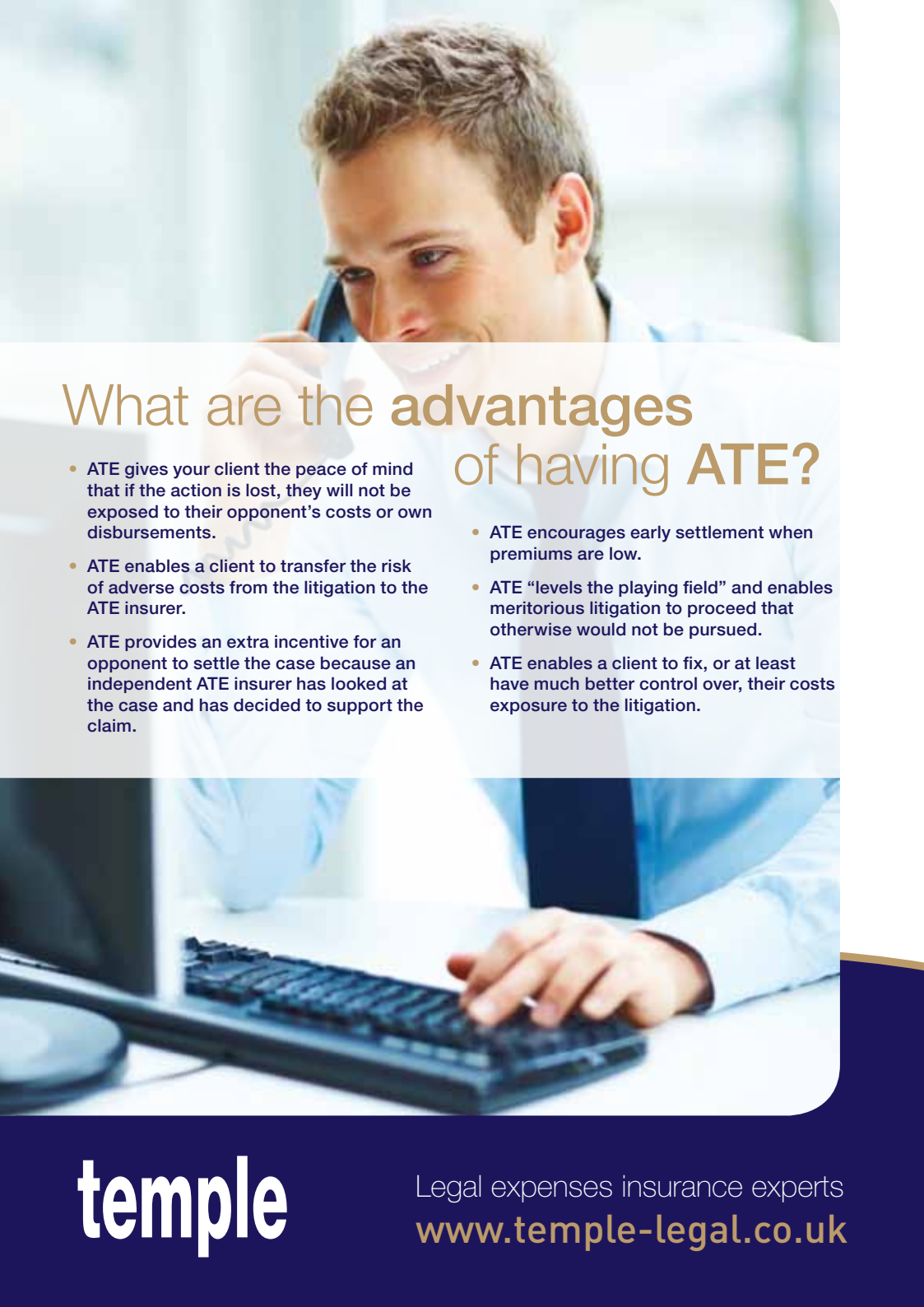
Outcome 1.12 of the Client Care section of the Code requires that “clients are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them”. This is a different way of expressing the pre-existing requirement that Solicitors 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.
- ATE provides an extra incentive for an opponent to settle the case because an independent ATE insurer has looked at the case and has decided to support the claim.
- ATE encourages early settlement when premiums are low.
- 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 has become 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 opponent's 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 costs have been agreed.
- **Offering up to seven stage premiums** where prior to the commencement of litigation smaller premiums apply. These are replaced by an increase in the premium in stages after the start of litigation until completion of the trial.

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

- **The Premium is payable at the end of the case** and is recovered from the opponent as an "additional liability". If the case settled prior to judgment, the premium to be paid is the premium applicable at the time when the action settled. Therefore, premiums are stepped rather than cumulative.
- **If the case is lost, the premium is not payable** since it is insured as a disbursement under the policy.
- **When a policy is written it is not known if any premium will be received** but it may result in a claim payment for the insurer.
- **It is open to an opponent to challenge the premium.** However they should have expert evidence if they are to claim that the premium is too high (Kris Motors v Fox Williams 2010 EWHC). If the paying parties' arguments are successful, the Court will adjust premium downwards but not disallow it (see RSA Pursuit Case).
- **Temple's policies have a premium guarantee.** If the premium is reduced on assessment Temple will accept that premium and will not look to your client to pay any shortfall in the premium.



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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 at the same time as, or shortly after, entering into a CFA. Solicitors often worry that they will be criticised for entering into an ATE policy too early but the case of *Callery v Gray* approved the purchase of insurance at the commencement of a claim.

The key issues for us are the prospects of success of the case and the prospects of recovery of costs 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 subsequently the case is presented to be insured. The efforts to settle the case without ATE insurance being in place amount to adverse selection since if they had succeeded, Temple would have been denied a premium.

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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.

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

Any type of claim for a liquidator, administrator, trustee in bankruptcy or company that is in the process of being wound up or in administration. This exception to LASPO will continue until at least 31st March 2015.

Alternatively any defamation or privacy claim. For example, Temple has extensive experience in insuring defamation cases and phone hacking litigation. This exception to LASPO will continue until the Civil Justice Council has reported to the Government with recommendations as to how the current system can be reformed.

The litigation or arbitration must be conducted in England and Wales since the AJA only applies to claims conducted within this jurisdiction.

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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 insolvency, 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.



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.

If you take out a one-off policy with Temple You will need our permission to commence proceedings if the case has been insured prior to that stage. 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.

If you have delegated authority scheme with us you use Temple's online policy system (TOPS) (which has been comprehensively praised for its simplicity and ease of use)to issue insurance policies and update progress.

You account to us for the premium within 14 days of it having been obtained from the paying party.

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What happens if the case is won and the opponent becomes insolvent?

Temple, in common with other ATE insurers, does not insure the liquidity of the opponent. Therefore, the insured retains the contractual liability to pay the premium. Such an event is very rare in our experience, since the litigators with whom we work are very good at avoiding litigation against parties who cannot pay.



What happens if the insurance premium is challenged?

Temple has received comparatively small numbers of such challenges and has an excellent record of recovering premiums in full.

Our experienced team of underwriters provide a technical support service to assist with any challenge to the premium. This includes providing notes and other information to allow the solicitors or costs draftsman to respond concisely and with authority to the paying party. We share our knowledge of the leading case decisions including Callery, Sarwar and Tilby, which have established helpful principles. As a result, the Courts have given approval to the Temple model of stepped premiums.

Some of the standard challenges argue that policies:

- Were taken out too soon or too late.
- Were taken out after an admission of liability.
- The premium was too high.
- The level of indemnity was too high.
- The solicitor should have shopped around for alternative quotes.

Temple has successfully defeated such arguments and we believe our premiums are competitive and proportionate to the risk.

Can ATE be used by defendants?

Theoretically yes, but they are much more difficult to insure because:

- (i) A potential defendant cannot be insured prior to the issue of proceedings since there is no entitlement to recover costs if the claimant can be dissuaded from pursuing their claim.
- (ii) Once proceedings are issued, there is a need to be confident that either the defendant has a complete defence or that there has been a Part 36 offer that affords proper protection to the defendant that will not be improved upon at some later date.

If a defendant already has professional indemnity insurance then they will not be entitled to obtain ATE insurance, nor would their insurers be entitled to obtain it since they are not a party to the action.

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?

Call us now on **01483 577877**
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“Unlock the potential of your firm”



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