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Temple Guide to Funding Litigation

The experts in funding and legal expenses insurance

www.temple-legal.co.uk

About this Guide

Is there a difference between ‘funding litigation’ and ‘litigation funding’?

In our view there is.

The third party funding market is rapidly developing and is now an established option for clients. However it is not the only option for clients who wish to pursue a case through the legal system, but don’t have the financial means.

As one of the leading underwriters of legal expenses insurance and acknowledged experts in funding litigation, we have developed this guide to help you.

Written for solicitors, barristers, costs draughtsmen and in-house legal counsel – amongst others the Guide aims to help you advise your clients on the options available to them and improve your client care and compliance obligations.

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A Guide to Funding Litigation that gets to the heart of what you need to know.

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Introduction

The Jackson reforms introduced in April 2013 have had a dramatic impact on the litigation costs landscape and have led to a number of developments in the After The Event (ATE) insurance/litigation funding market. At Temple, we are conscious that it can be difficult for litigators to stay up to date and so have produced this Guide to summarise the current position as we see it.

As all lawyers should be aware, it has long been the case that there is a strict duty to advise clients at the outset about the various methods of funding their claim. Whilst all lawyers will state that they adhere to this strict obligation, there is growing concern that, in a constantly changing litigation market, it can be difficult for lawyers to keep pace with the current funding options.

Duty of Solicitor to advise on funding options

Outcome 1.12 of the Client Care section of the SRA Code of Conduct clearly requires that lawyers ensure 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". It is important to note that this obligation exists even if the client, be they an individual or large plc, could apparently "afford" to pursue or lose the litigation.

We believe that the client care requirement is not met by an obscure paragraph in a lengthy letter of engagement and that solicitors need to be more open with their clients about the possibility of certain types of retainer or funding arrangements.

However, whilst it is necessary for lawyers to ensure that their clients are aware of what funding methods exist, the Code of Conduct does not require lawyers to act like a broker by searching the market themselves for ATE insurance and funding quotations for each individual case. Indeed, lawyers need to be careful to avoid assuming the duties of an insurance broker by behaving like one.

Retainer Options

When dealing with the question of funding, the best place to start is to look at what type of arrangements a law firm is able to enter into with their client without the need to involve third parties. There are many firms across the country that have developed a range of funding options and, in our view, third party funding should be used in conjunction with the funding options of a law firm, to complement, not replace them.

In years gone by, many firms of solicitors simply worked on the basis that a client would be charged on an hourly basis for time spent, regardless of the client's financial situation. Whilst there are still many firms working on this basis, there are now many others who recognise the need to offer clients alternative ways of accessing their services.

As with most things, there are pros and cons with each type of retainer, the nature of which depends on the facts of the case and whether you are looking from the perspective of the law firm or the client.

The main retainer options currently available can be summarised as follows:

Private Paying Client (hourly rate)

This is the traditional arrangement (as above) where a solicitor simply charges their client for the time they have spent on the case. These charges become due for payment when work has been done and are due regardless of the outcome of the case.

Conditional Fee Agreement (CFA)

Commonly known as a 'no win no fee' arrangement a CFA typically works on the basis that a law firm will not charge a client its fees until the case has concluded and only in the event that the case is successful.

If the case is ultimately unsuccessful, the client will not usually be required to pay the lawyer's fees so the law firm will not be paid. If the case is successful the client's base costs will be recovered from the unsuccessful defendant. In addition, the client will need to pay a success fee (a fee to reward the law firm for taking the risk) out of any damages recovered. The maximum success fee that can be charged by a law firm is a sum equal to 100% of the base costs. This is further restricted by being no more than 50% of the damages for commercial litigation matter or 25% of the damages for injury related litigation.

Discounted Conditional Fee Agreement (DCFA)

A DCFA works in exactly the same way as a standard CFA except that, under this arrangement, the law firm charges a reduced hourly rate as the case progresses instead of nothing at all. By way of example, the law firm might charge 30% of its fees as the case progresses with the balance of the fees deferred until the conclusion of the case and contingent on success.

Damages Based Agreement (DBA)

Under a DBA a law firm does not charge its client unless it recovers damages for them. If damages are recovered, in recognition of the risk that the law firm has taken on the client's behalf, the amount that the client pays will be determined by reference to a percentage of the damages recovered in the claim.

The costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the client to any shortfall between the costs recovered and the DBA fee. The use of DBAs is of strong interest to the commercial litigation sector but, in practice , they are rarely used due to concerns about the clarity of the regulations.

Fixed Fee Arrangement

Fixed-fees packages work on the basis that a fixed price is agreed for a particular case, or part of a case, with the law firm and client sticking to this price regardless of how much time is actually spent. This type of retainer is more widely used in non-contentious work.

Retainer Options

The following tables summarise the advantages and disadvantages of certain retainer types from both the client and solicitor's perspective.

Retainer	Solicitor		Client	
	Pros	**Cons**	**Pros**	**Cons**
Private paying (hourly rate)	✓ Solicitor is paid for work done as the case progresses ✓ Client will be conscious of wasting solicitor's time as they are paying for it ✓ Risk of making a recovery is the client's concern ✓ Avoids cash flow issues for the law firm	✗ Other firms may offer more attractive options ✗ Meritorious claims may not proceed due to client's lack of funds ✗ Clients may soon become tired of paying bills	✓ Client gets to keep all of their damages ✓ Client has certainty about what they are paying ✓ Client can budget for fees due	✗ Litigation is expensive and will be a financial strain ✗ Client may not be able to afford access to justice ✗ Client will be conscious of the time the solicitor is spending on case
Conditional Fee Agreement (CFA)	✓ A successful claim should be more profitable for the law firm due to the success fee ✓ The ability to pursue cases for "free" will help retain existing clients, generate new business and enable meritorious cases to proceed	✗ Firm does not get paid as case progresses which can lead to cash flow issues ✗ There is a danger that the client loses commercial sight of the case as they are not paying for the time spent ✗ If a case is successful but a recovery cannot be made, the client may not have funds to discharge fees due	✓ The client can run a meritorious claim regardless of financial means ✓ Peace of mind that they can afford to fight their case to trial if necessary ✓ Success fee is linked to time spent on the case rather than a percentage of damages	✗ This retainer tends to be less appropriate for low damages claims/ risky cases ✗ Deductions will be made from any damages awarded to pay for the solicitor's success fee
Discounted Conditional Fee Agreement (DCFA)	✓ Solicitors get paid something as the case progresses which reduces most cash flow issues ✓ The ability to offer a discounted rate for fees will help retain existing clients, generate new business and enable meritorious cases to proceed for the law firm	✗ Solicitors will not receive their full fee as the case progresses and will only receive the reduced fees if the case fails ✗ The firm will be risking a substantial amount of their fees on the successful outcome of the case ✗ If a case is successful but a recovery cannot be made, the client may not have funds to discharge the balance of the fees due	✓ Litigation becomes more affordable due to the payment of reduced rates ✓ Client will be pleased that the law firm is showing confidence in the claim ✓ Risk of potential cash flow issues is reduced ✓ Success fee is linked to time actually spent by solicitor, rather than a percentage of damages	✗ Client still has to find funds to pay for the reduced fee rate ✗ Deductions will be made from any damages awarded to pay for solicitor's success fee ✗ This retainer tends to be less appropriate for low damages claims/ risky

Retainer	Solicitor		Client	
	Pros	Cons	Pros	Cons
Damages Based Agreement (DBA)	✓ A large damages claim that settles quickly will result in a large success fee for the solicitor with little time being spent ✓ It enables the solicitor to share in their client's success ✓ The ability to run cases with no hourly rate will attract new clients	✗ A case that does not settle as quickly as anticipated could result in the firm not receiving fees for time spent on the case (the indemnity principle applies for DBA success fee) ✗ Law firm does not get paid as the case progresses which can lead to cash flow issues ✗ There is a danger that the client loses commercial sight of the case as they are not paying for the time spent ✗ If a case is successful but a recovery cannot be made, the solicitor may not get paid	✓ The client can obtain access to justice regardless of financial means ✓ Peace of mind that they can afford to fight their case to trial if necessary ✓ The client will not encounter cash flow problems	✗ Solicitor's success fee is not linked to time spent - potential to result in windfall for solicitor ✗ Client could end up sacrificing a significant amount of damages for little time spent by the solicitor ✗ Large proportion of damages likely to be deducted for success fee
Fixed Fee	✓ Guaranteed income for law firm ✓ Solicitor will be paid up front for work done ✓ Allows firm to give accurate cost budget to client ✓ Solicitor may earn more than they would on an hourly rate if they spend time productively ✓ Fixed fee can promote customer loyalty	✗ Can be hard to predict how much case will cost/time needs to be spent ✗ Solicitor may need to spend more time on a case that they have factored into fixed fee ✗ Size of fixed fee may deter clients	✓ Client will have certainty over what their case will cost ✓ Client will be able to budget for certain phases of litigation	✗ The fixed fee could end up being more expensive than an hourly rate if the case is concluded quickly/ time efficiently ✗ Client has to have cash available to pay for fixed fee ✗ Not all law firms will be prepared to offer this retainer type

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What's best for your firm v what's best for your client?

As the tables show, each type of retainer will benefit the law firm and the client in different ways. It is, of course, important to ensure that the pursuit of litigation is financially viable for the law firm but this should not be to the detriment of the client. The difficulty with solicitor and client retainers is that there are effectively two extremes; the private paying client is at one end of the spectrum, as the law firm will be getting paid the full fee they want. The full CFA at the other end of the spectrum is where the law firm will usually get paid nothing at all unless the case wins. In practice, the retainers which fall between the middle of these two extremes are likely to be most even-handed for both parties.

One of the most effective retainers that Temple regularly encounters is the Discounted Conditional Fee Agreement (DCFA). The clear advantage of this arrangement is that it enables law firms to offer a discounted hourly rate to new and existing clients whilst still receiving some contribution towards their fees as the case progresses. The other benefit of this model is that the solicitor will still recover the balance of their fees upon the successful conclusion of the case. They will also recover a success fee on the element of the fees that was at risk - meaning that the end result is more fees for the law firm than on a traditional retainer.

Some lawyers might take the view that "if the client cannot afford to pay me that is their problem" but this is, in our view, a short-sighted view and there are many firms offering this model that is becoming increasingly popular for clients. Clearly, there is an element of risk to this model as the return to the lawyer depends on a successful outcome, but this risk is mitigated by the reduced rate being paid as the case proceeds.

Damages Based Agreements (DBAs) were expected to be widely used following the implementation of the Jackson reforms and are regularly featured in the legal press. DBAs have the potential to be attractive to both clients and solicitors if used in the correct way. There may still be potential cash flow issues for the lawyer but the intention is that this risk is mitigated by a significant return, by way of the success fee, on successful claims. The obvious attraction for the client is that, much like a CFA, with a DBA they will not be paying their solicitor for the time spent as the case progresses. Our concern, however, is that DBAs can create more of a conflict for solicitors than CFAs, as the success fee on the DBA is not linked to the time the solicitor spends on the case.

Whilst DBAs should, in principle, work for both the client and the lawyer on the "right case", the issue is that the perception of what is the "right case" will be different from each perspective. Pursuing a big damages claim which settles very quickly on a DBA basis will be attractive to the lawyer as it will result in them being paid a significant sum for less work. In this situation, a client is not going to be particularly happy. A client, however, will benefit from a DBA in a situation where a case takes longer than expected and the solicitor will then be limited to charging the DBA success fee which is less than the solicitor would have charged on an hourly rate basis.

Lord Justice Jackson recommended in his "Review of Civil Litigation Costs Report 2009", that, if a DBA is entered into, the client should seek independent views on the terms of the DBA from another law firm. It is clear why Lord Jackson made this recommendation, as he was obviously concerned about clients being charged excessive success fees. This proposal was not actually introduced, presumably because of the practical difficulties in a client going to another law firm to advise on a retainer that the client has with a rival firm.

Of note is the fact that Lord Jackson did not make this same recommendation for other methods of funding, such as finance from third party funders. This is very curious given that the cost of funding via this method could end up costing much more than a DBA success fee and the existence of the potential for other conflicts where funders become involved – *see information on third party funding*.

What is clear is that, regardless of whether a law firm is prepared to offer a particular retainer, that firm still has an obligation to advise the client that there are other retainer options available and that other firms may be prepared to offer such a retainer.

The Parent Test

When it comes to evaluating our own range of products, Underwriters at Temple have always taken the 'Parent Test' approach. That is, to ask "Would we be happy recommending this product to one of our parents if they had a case?" If the answer to that question is "no" then it is clear that our product would be too expensive or not suitable for that case.

A law firm's existence is the same as any business in that the aim is to generate profits for its owners. There is obviously nothing wrong with this but the big difference is that, often, the client (customer) of the law firm is not well-informed and will be relying on their solicitor to advise them what constitutes a fair deal or what the best funding option is.

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Third Party Funding

The development of the third party funding market appears to be becoming the "go to" option for law firms in a situation where a client does not have the funds to pay that firm's fees. At Temple we would encourage firms to consider what they can offer their clients before carefully looking into the costs and terms of the varied offerings of third party funders.

Whilst fee funding is an attractive option for the law firm because it results in their fees being paid on an hourly basis, this will not necessarily be so attractive for the client when it results in them having to pay, on average in the current funding market, three or four times the amount they borrow. It is in this situation that a solicitor should ask themselves "Would I recommend third party funding options to one of my parents?" The likely response would be to consider alternative, less costly options, such as a discounted CFA, offered by many commercially minded firms. A law firm's attitude to taking risk can make a funder offer alternative solutions, as opposed to funding the entirety of the firm's fees which would be the most costly option to the client and potentially lead to the firm losing that client to another firm.

If the firm links with a funder that takes a partnership approach with law firms, is commercially minded, values access to justice and isn't restrained by outside investors, then sensible funding solutions can be achieved, that are fair to the law firm, the funder and the client.

The third party funding market has become more prominent since the introduction of the Jackson reforms, which abolished the ability to recover success fees from a losing party.

An increase in the use of third party funding combined with low interest rates for investors has resulted in a number of new entrants in the market. As it currently stands a third party funder does not have to be FCA regulated to become a litigation funder, despite calls by many for this to be changed. Insurance companies and other financial institutions have an obligation to follow the FCA code of "Treating Customers Fairly" but funders are not yet obliged to do the same. Given the size of the funding market, it is remarkable that the market is able to self-regulate and that clients are left with very little remedy if a funder does not treat them appropriately. This concern was expressed by Lord Jackson in his 2009 report where he stated that:

"I accept that third party funding is still nascent in England and Wales and that in the first instance what is required is a satisfactory voluntary code, to which all litigation funders subscribe… In the future, however, if the use of third party funding expands, then full statutory regulation may well be required, as envisaged by the Law Society".

It is clear that the funding market has expanded significantly since 2009 and Temple Funding, since its inception, has been regulated by the FCA, as we have always strongly felt it is important to be regulated by an independent body.

Most litigation funders are companies which have had money invested in them by individuals and another area for concern is that it is not always clear where the money has actually come from. There is a strict onus on solicitors to conduct money-laundering checks on any new clients and so it follows that it is important for practitioners to do their research into any third party funder that they plan to do business with.

Litigation funding from third parties normally falls into two categories:

- Funding used specifically for disbursements or
- Fee funding used to finance a client's own legal costs.

Each of these markets have has their own intricacies to be aware of.

Disbursement Funding

Whilst there are many firms of solicitors prepared to conduct litigation on a retainer which does not entail the payment of hourly rates, there are still other costs that need to be paid throughout the life of a case. Court fees are now at an all-time high (as much as £10,000) and the general cost of disbursements, such as expert fees, is on the increase. Disbursement funding is a product that is available to meet these costs in a situation where the client is unable to meet the cost themselves.

In the past, many law firms would fund disbursements for clients who could not afford to pay them as their cases progressed. This is no longer viable for most firms as the cost of disbursements has rocketed and, since the Jackson reforms were introduced, claimant law firms are not able to make the same level of profit as they once were.

Several funders provide similar products which can essentially be split into two different types.

The first is where the lender provides a fund to the law firm who pays back the amounts drawn down at an agreed rate of interest. The law firm may choose to be responsible for the interest or decide to pass all or some of that cost on to the client. The disadvantage of this model to the law firm is that any loan it takes on will be added to the firm's liabilities on its balance sheet, which could be substantial depending on the number of cases running at any one time.

The other alternative is for the client to take out a loan under a Consumer Credit Agreement (CCA) after which the lawyer, on the client's behalf, draws down the necessary monies to pay for disbursements. With this model, the law firm is not taking on any debt and there is a transparent agreement between lender and client. Some providers charge interest to the client as the case progresses - others, like Temple, defer interest until the end of the case when any irrecoverable interest can be deducted from any damages awarded. Most providers offer this facility on a one-off basis so that the firm completes an application for funding for every client.

Temple provides a facility to enable a law firm to self-issue loan agreements to its clients once ATE is in place. Some funding products also offer loans to clients to pay off debts or fund rehabilitation. What must be remembered at all times is that all borrowing comes at a cost.

The lawyer has a very important role to play as the client will find disbursement funding very difficult to obtain on the open market. There are few if any truly independent brokers and there is not yet a comparison facility on the internet for this type of borrowing. The lawyer must make sure the client fully understands the cost of borrowing and what, if anything, is protected by insurance or other guarantees. There are also other considerations that the client may not consider without guidance.

For example, it is most unlikely to be in the best interests of any client to borrow money for disbursements where any charges accruing may disproportionately erode the estimated damages to be obtained.

Funders in this market are often not regulated. Some, like Temple, are fully authorised by the FCA. Others self-regulate as members of the Association of Litigation Funders of England and Wales and follow their Code of Conduct.

It is most important that all other funding options are considered as it may be possible to borrow money more cheaply from the client's own bank or use personal savings. What is even more important is to ensure there is ATE insurance in place to make sure the client is protected if the claim is unsuccessful.

This part of the market continues to develop and some ATE insurers have introduced hybrid products which include the funding of court fees as part of the insurance cover.

The problem with these products is that the actual cost of borrowing can be unclear as it is 'rolled up' in the increased insurance premium payable by the client.

In order to advise a client upon the best funding option for them it is necessary to fully explore the client's means and to explain clearly what the potential cost of the disbursement funding product is.

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Common Themes in the Market

Fee Funding

In the personal injury and clinical negligence market the use of full CFAs is still the most common method of retainer. The main advantage being that clients are often unable to work following the injury and do not have sufficient money at their disposal to fund legal fees. In addition the lower level of damages involved prohibits the use of other funding methods such as DBAs or third party funding.

For litigation outside of the personal injury/clinical negligence world (the "commercial market"), the legal landscape is very different. Firstly, there are many law firms that are used to being paid their hourly rates and do not see why they should have to change when they have clients that are prepared to pay them. This is especially the case if client is seen to be wealthy or is a business with funds. In addition the commercial market can often involve legal actions worth substantial amounts of money and this opens up a whole host of retainer/ funding options not available to clients with smaller claims.

The combination of law firms wanting to be paid together with sizeable claims is a perfect storm for third party funders, who can be seen to bridge the gap where a client does not have the funds to pursue their claim.

Whilst fee funding should be a viable option, the cost of most products in the current market preclude its use in all but the substantially high damages cases.

Perhaps unsurprisingly, the main players in the third party funding market are not particularly open about what the cost of their funding is. There is however more clarity when it comes to the case criteria that funders are looking to invest in. Having met with a number of law firms conducting various types of work and carried out our own research, the common themes in the market appear to be:

- The vast majority of funders are looking to fund cases where the **damages are likely to be in excess of £1million.**
- The value of the funded claim must be substantially more than what the estimated legal costs are – some funders in **the market state that the damages must be a minimum of ten times the potential costs of the claim.**
- Upon the successful conclusion of a case, a funder typically requires the repayment of their loan together with the payment of a success fee - set at a multiplier of the "funded amount". This success fee multiplier can vary dramatically but we have seen examples where the funder is charging up to six times the amount that has been invested. **The average return a funder in the current market requires is around three times the funded amount.**
- With every funder we have encountered, **the success fee is not based on the amount of funding actually used by the client but the amount of money a funder sets aside when funding is applied for.** For example, if a client applies for £500k of litigation funding but only uses £50k of it because the case settles early, the client will still have to pay interest on the £500k. In our opinion, this is grossly unfair in light of the level of interest payable.
- **Funders will usually insist on the use of their preferred ATE insurer** to provide adverse costs/ disbursement cover. Whilst Temple agrees that ATE insurance should obtained as a matter of course, our concern is that funders often insist on the use of an insurer that charges an upfront premium when this is not necessary (see below).

- Feedback from lawyers we work with shows that the application process when applying for funding is painstaking slow. Application forms are very lengthy, funding commonly needs to be approved by a committee of people and the acceptance rate of funders is very low.

Based on the issues identified, it is clear that there are a number of reasons why the current market is unattractive. Many issues appear to stem from the level of success fee being sought by funders. If a funder is looking for as much as six times their ring-fenced investment on a case, it is obvious why the level of damages needs to be so large and why the damages must be substantially more than the costs on a case.

In our experience, the vast majority of the litigation in the UK is for claims less than £1million and so there are a huge number of claimants who will look to their lawyers to advise on suitable retainers and introduce responsible funders who do not charge extravagant success fees.

One of our main concerns about the current funding market is the situation where a funder insists on the use of a particular ATE insurer that charges an up-front premium. The funder will insist on this course of action for two reasons.

- Firstly, the funder will want to ensure that they are protected in the event that the case they are funding is lost and adverse costs are awarded as per the decision in Excalibur Ventures LLC v Texas Keystone Inc and Ors.

- Secondly, and perhaps more opportunistically, a funder will want to pay an up-front premium as this adds to the amount of funding they are providing and increases their ultimate return. If for example an up-front ATE insurance premium is £500k and the funder applies their standard success fee of three times the funded amount, the funder will ultimately receive an extra £1.5million in profit for simply funding the premium alone. This leaves the client in a situation where they are paying £2million (£500k premium plus £1.5million funder's success fee) for insurance that originally cost £500k.

To make matters worse, there is often no need to even pay an up-front premium. To this day there are many insurers, including Temple, who do not insist on the payment of up-front premiums. From the client's point of view this means they do not need to pay a large amount at the time insurance is taken out.

This approach to insurance can only be viewed as a way for funders to make more money. If third party funding is going to be obtained for a case, the law firm acting should seriously question what the ATE insurance arrangements are going to be and explore whether insurance is available on a deferred basis.

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What to consider and what to avoid

Given the current cost of third party funding, many of the different retainer options offered by a law firm will be much more attractive to client. Even if a law firm charges a 100% success fee on their legal fees under a CFA (i.e. double its fees on success), this is still going to be more attractive than the at least three times success fee that a funder would be looking for. For this reason, we recommend that the following retainer questions are asked at the outset:

Retainer Questions

- What can a client afford to pay in terms of legal fees, if anything?
- How would the different retainer options work for this particular client and what would the different financial outcomes be in the event of success?
- As a law firm, are you prepared to offer one of the different retainer options and if so, will the deal be fair to both the client and to the firm?
- If your law firm is not able to offer a particular retainer to the client, is it likely that another law firm may be prepared to and should you advise the client of this?
- Even if your firm's legal fees are taken care of, how are disbursements going to be funded?
- Take a step back from the case and apply the "parent test" referred to previously. Would you be happy recommending the proposed deal to a member of your own family?

If, having explored all of the options with a client, the conclusion is that a case cannot be pursued without the assistance of a third party, the following questions should be asked:

Funding Questions

- What are the funder's risk appetite and funding criteria? It may be that you can find out very easily whether your client's case will even be considered.
- What is the application process and how long does it take to receive a decision?
- Who is the funder? How long have they been trading and where does their fund originate from?
- Is the funder regulated in any way or part of a professional body?
- What level of return and/or success fee is the funder looking for upon success and what is this return based on - is it the amount of funding actually used or the amount initially requested?
- What are the proposed ATE insurance arrangements?
- Ask the funder whether you as a law firm are able to seek ATE insurance from a provider that does not charge an up-front premium
- What control does the funder have over the case and on what grounds is the funder able to stop providing funds?

ATE insurance

Back in April 2013, when the Jackson reforms were introduced, it was unclear what the future would hold for the ATE insurance market. Prior to the implementation of the reforms, in the event of a successful outcome, ATE insurance premiums were recoverable from the unsuccessful party to the litigation. In the event that the case was unsuccessful, the insurance premium would be insured and so not usually payable by the client. These two factors combined meant that whilst a client had to be conscious of how much the premium was going to cost, it was not them that inevitably had to pay it.

The Jackson reforms put an end to this recoverable regime for nearly all types of litigation - with the exception of defamation/privacy, mesothelioma and in respect of expert reports for clinical negligence matters. Overnight the client had to pay the premium themselves.

Four years on, the ATE market continues to be buoyant and there is a good reason for this. Whilst ATE insurance premiums now need to be paid by the client, the inherent risks involved with litigation still exist and so does the need for ATE insurance. From speaking to many litigants and their law firms, what we have learnt is that there are two main things which clients want to know at the start of the case:

1) How much is my claim worth?

2) How much is this all going to cost me?

The surprising thing that we found, however, is that it is the answer to question 2 that clients are often more concerned about. Whilst a client is able to control their own legal spend to some degree, it is not possible to control what the other side will spend and so the only way to allay a client's concern is to obtain insurance to cover this risk.

ATE insurance does not cover a client's own legal fees but covers the risk of having to pay the defendant's legal costs. It also covers a client's own disbursements which has become even more important following the dramatic increase in court fees.

As with the funding market, what the ATE insurance market can offer is different depending on the type of litigation. The market is broadly split into three areas being personal injury, clinical negligence and commercial (non-injury related litigation). Although there are differences across these three areas, Temple's ATE product has some common aspects regardless of the case type:

- No ATE premium up front
- Premiums are always contingent on the successful outcome of the case
- Disbursement cover is included as standard
- The payment of interim cost awards is covered by every policy

It is important when considering ATE insurance to make sure that these core areas are included within the ATE policy a law firm obtains for its clients.

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Commercial litigation ATE market

The commercial ATE market concerns cases where there is a full liability for adverse costs in the event that a claim is unsuccessful. The consequences of a loss could be disastrous for many clients who could not afford to pay such a significant liability. ATE insurance is put in place to indemnify adverse costs and own disbursements in the event of a loss.

ATE insurance is available for a wide range of cases - the most common litigation types are:

- Professional Negligence
- Contract Disputes
- Insolvency Proceedings
- Subrogated Rights Recoveries
- Defamation/Privacy Claims
- Partnership Disputes
- Inheritance Act/Contentious Probate Matters

From an ATE Insurer's perspective, there are two other main considerations in addition to the case type:

1) Are there good prospects of success?

2) Are there good prospects of making a recovery?

Subject to both of these questions being answered positively, there is a strong chance that insurance cover will be available.

In a costs regime where ATE insurance premiums are no longer recoverable, consideration must also be given as to how insurance is going to be paid for and whether the damages are going to be sufficient to meet this cost. As a rule of thumb, our attitude to this is that if the costs/damages are roughly the same or if the damages are more than the costs, most cases should be insurable.

Cases where the costs are going to be significantly more than the likely level of damages are more difficult to insure. This is because the premium that would need to be charged for the anticipated level of adverse costs risk may become uneconomical. This problem is less common now that costs budgeting is being used as a matter of course but there still needs to be some flexibility in the pricing models that an insurer offers.

As referred to previously, Temple's premiums remain payable on the basis that they only become due at the end of the case and only in the event of success. Law firms should always explore whether ATE insurance is available on this basis, as many insurers post-Jackson have reverted to charging sizeable up front premiums. For a number of reasons - including proportionality, financial viability and a competitive market - ATE insurers have had to develop different ways in which to price insurance. It is no longer possible to have a one-size-fits-all approach for the commercial market.

The premiums themselves can be structured in different ways to meet the dynamics of a particular case. The two main structures are:

Staged Premiums

- These premiums are structured on the basis that the premium payable gradually increases as the case reaches later stages. If a case therefore settles early the premium is substantially less than if the case had to proceed to trial. This model ensures that the client retains commercial reality throughout the case, and will consider early offers of settlement rather than simply wanting his day in court. In addition, each premium reflects the risk to the insurer at that stage of the case.

Fixed Premiums

- This model works on the basis that the same premium is payable regardless of what stage the cases reaches. The main benefit of this model is that the client will know exactly what they are paying for their insurance. In contrast to the staged model the premium will usually end up more expensive for those cases that settle early but cheaper for those cases that need to be pursued for longer.

In addition to the two premium structures there are different ways in which the premium can be calculated. The main premium options are:

- Premium calculated as a percentage of the damages recovered
- Premium calculated as a sum equal to the client's own legal costs
- Premium which is set at fixed amount(s) regardless of what the costs or damages ultimately end up being

In the commercial ATE market, the most common method of obtaining insurance is via the submission of "one-off" applications to insurers. The main reason for this is due to the variation of the types of cases being insured. Temple is, however, one of the only insurers able to offer delegated authority schemes for the commercial market. 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 those that may compromise the ATE premium) are delegated to the solicitor.

There are number of advantages of having ATE insurance for commercial cases:

- It 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.
- There is no obligation to inform a defendant about the ATE insurance. 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.
- It "levels the playing field" and enables meritorious litigation to proceed that otherwise would not be pursued.
- It enables a client to fix, or at least have much better control over, their costs exposure to the litigation.

Temple Guide

Clinical Negligence Market/Catastrophic Injury ATE Market

In the last four years, the personal injury and clinical negligence market has changed dramatically and it now concerns cases where, although there is still in principle a full liability for adverse costs, the Government imposed "Qualified One way Costs Shifting" (QOCS) as a method of removing the adverse cost risk from the client. Whilst this has significantly reduced the chances of a substantial loss, there still remains the risk of having to pay their own disbursements. So the risks covered by ATE insurance policies in this market are the own disbursements risk (which could be substantial in a catastrophic injury case) and an adverse cost risk where the client fails to beat a Part 36 offer. Here the adverse cost risk is limited to the amount of damages that have been awarded, but one which could be a very expensive consequence for the client.

Personal Injury

Since 2013, the ATE premium for personal injury cases can no longer be recovered from the losing party and so is usually paid out of the damages recovered.

It is usual for the insurer to grant a delegated authority to the law firm to incept polices and to report the status of a risk online for straightforward personal injury risks. The insurer should demand that the risk assessment process is robust and consistent; also that the case handlers have the appropriate experience and are properly supervised.

Because the adverse cost risk has reduced so have the ATE premiums. There is a wide variance of levels of indemnity available in the market but pricing is reasonably consistent, with some premiums being staged and others with one fixed premium. Premiums on the whole remain deferred and self-insured. It has largely been possible to retain a 'one size fits all' approach to personal injury premiums but where volumes are low higher pricing may prevail.

Clinical Negligence

ATE insurance is available for a wide range of cases - the most common litigation types are:

- Birth Injury
- Hospital negligence
- Dental negligence
- Negligent misdiagnosis
- Negligent nursing

Much of what of what is stated in respect of personal injury applies to clinical negligence, except that the costs and disbursements involved are substantially higher due to both sides being significantly reliant upon expert evidence on the issue of liability.

From an ATE insurer's perspective, there are three main considerations when underwriting a case:

1) Are there good prospects of success?

2) Are there good prospects of recovering damages?

3) Is the client in time to make a claim?

Further, given the specialist nature of clinical negligence litigation, from the ATE insurer's perspective, the expertise of the law firm is key. The degree of judgment exercised when carrying out the initial risk assessment and reviewing the evidence throughout the case needs to be high and very consistent. There is no place for speculation or "leaving it to the expert" as this usually leads to high discontinuance rates which will not leave the ATE insurer with sufficient margin.

Even with all due diligence being carried out there remains the risk that the judge will prefer the opponent's expert, or your own expert could change his view. Using a trusted ATE provider that understands these issues will transfer that risk away from the client.

In clinical negligence cases it is still necessary to inform the opponent about the ATE insurance which is a positive factor to let the other side know the case is financially supported.

As with personal injury, ATE premiums in clinical negligence cases are usually payable at the end of the case and only if damages are awarded. However, unlike ATE in personal injury litigation, part of the premium that relates to cover for the cost of certain experts' reports - the "recoverable element" - continues to be paid by the losing party.

The remaining premium, which applies to the cost of other reports, court fees and medical record fees, is paid by the client at the end of the case. As such, it is necessary to divide the policy into two sections with separate premium pricing.

Many ATE insurers prefer to insure risks on a one-off basis, but this can be time consuming and requires completion of proposal forms for every case. Other insurers offer delegated authority schemes but delegation of underwriting authority is often limited. The significant advantage of having a delegated scheme with Temple is that if the case meets the pre-agreed criteria with Temple the lawyer is entitled to issue the policy of insurance, without referring the matter to Temple. In addition, all decisions about the progress of the case (except those that may compromise the ATE premium) are delegated to the lawyer.

Given the significant disbursements that can be incurred in clinical negligence and catastrophic injury cases, disbursement funding is a viable option for clients. ATE insurance will indemnify the client's disbursements in the event of a loss so this provision is attractive to funders. It may also indemnify fees and interest incurred under a CCA loan.

Temple Legal FAQs

How do I determine what retainer to use for my client?

Your firm may offer a variety of retainers but it is essential to fully explore your client's means and the potential cost to them (and your firm) of each option.

When would funding be inappropriate?

When the client is seeking a non-monetary remedy, or the damages sought would be insufficient to cover the cost of the funding and would not leave the client with a respectable sum in his pocket.

What are the main types of litigation funding?

Fee funding is for the client's own costs; disbursement funding is solely for the disbursements incurred. ATE insurance covers the disbursements and opponent's costs on the event of an unsuccessful claim.

Do funders need to be regulated by the Financial Conduct Authority?

Currently there is no requirement, but Temple Funding is fully authorised so it owes strict regulatory duties to its clients.

Who is the money loaned to?

This depends on the provider. Money can be loaned to the solicitors' firm, though this would be shown as a liability in the firm's accounts. Money can be loaned directly to the client to keep if off the firm's balance sheet and a consumer credit loan would offer transparency and protection to the client.

Can funding be used to pay for the ATE insurance?

There are many ATE providers, including Temple, that still offer deferred premiums, so this should not always be necessary. Funding an upfront premium is attractive to funders who can increase the loan facility (and therefore their return) to pay a large premium.

We hope this guide has gone some way to explaining the differences, options and pitfalls in the ever-changing world of litigation funding.

Ultimately, a solicitors' firms is a business and the funding decisions must be made on the basis of a full understanding of what is being offered to clients and why. Client retention, reputation and above all, professional duties to put your clients' interests first cannot be undervalued.

Temple's responsible lending principles, market-leading insurance and funding solutions and our underwriting support are there to enhance the prospects of a successful claim and your ongoing relationship with a satisfied client.

We take a partnership approach to our business and have long-standing commercial relationships with many leading law firms. Working with us gives our clients direct access to our team of specialist underwriters, and the benefit of our experience at the forefront of the legal expenses insurance and litigation funding market. This gives us insights into the challenges faced by solicitors and the industry, and helps us to anticipate needs and adapt our products to suit.

Temple Legal
Notes

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Funding Litigation with Temple Funding

Expert lawyers using our "A" rated ATE insurance can access funding and strengthen their litigation fee-earning capabilities.
a Disbursement Funding Facility with Temple is transparent and straightforward.

- Loans are provided directly to clients so there is no liability on your firm's balance sheet.
- Interest as low as 10% on the amount borrowed.
- Loans are issued by your firm, as and when clients require them.

Temple Funding Limited is a subsidiary of Temple Legal Protection.

Temple ATE insurance for Commercial, Clinical Negligence and Catastrophic Injury Litigation

We provide protection for commercial and personal clients from the risk and costs associated with litigation. We cover all types of clinical negligence and catastrophic injury claims. For commercial the types of cases we insure include:

- Professional Negligence – for individuals and lenders
- Subrogated rights
- Contract disputes
- Insolvency
- Defamation / Media Litigation
- Partnership disputes
- Contentious probate
- Property disputes

Contact Us

To find out more about how our Funding and ATE insurance provision can help you and your clients:

Call: 01483 577 877
Email: info@temple-legal.co.uk
Visit: www.temple-legal.co.uk

Temple Legal Protection is one of the country's leading underwriters of legal expenses insurance. We provide a wide range of competitive ATE (After the Event) and BTE (Before the Event) insurance solutions to law firms, brokers and insurers in order to help people reduce their financial risks in litigation.

Temple Funding offers straightforward, affordable funding that gives claimants the freedom to pursue their claim without having to pay expenses along the way. Our facility provides law firms with a solution to the significant cash flow burden that comes with funding litigation.

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