The consultation closes on **Friday 31 January 2025 at 23:59**.

Consultees do not need to answer all questions if only some are of interest or relevance.

Answers should be submitted by PDF or word document to **CJCLitigationFundingReview@judiciary.uk**. If you have any questions about the consultation or submission process, please contact **CJC@judiciary.uk**.

Please name your submission as follows: 'name/organisation - CJC Review of Litigation Funding'

You must fill in the following and submit this sheet with your response:

Your response is (public/anonymous/confidential):	Public
First name:	John
Last name:	McElroy
Location:	London
Role:	Solicitor
Job title:	Vice President
Organisation:	London Solicitors Litigation Association
Are you responding on behalf of your organisation?	Yes
Your email address:	[redacted]

Information provided to the Civil Justice Council:

We aim to be transparent and to explain the basis on which conclusions have been reached. We may publish or disclose information you provide in response to Civil Justice Council papers, including personal information. For example, we may publish an extract of your response in Civil Justice Council publications or publish the response itself. Additionally, we may be required to disclose the information, such as in accordance with the Freedom of Information Act 2000. We will process your personal data in accordance with the General Data Protection Regulation and the Data Protection Act 2018.

Consultation responses are most effective where we are able to report which consultees responded to us, and what they said. If you consider that it is necessary for all or some of the information that you provide to be treated as confidential and so neither published nor disclosed, please contact us before sending it. Please limit the confidential material to the minimum, clearly identify it and explain why you want it to be confidential. We cannot guarantee that confidentiality can be maintained in all circumstances and an automatic disclaimer generated by your IT system will not be regarded as binding on the Civil Justice Council.

Alternatively, you may want your response to be anonymous. That means that we may refer to what you say in your response but will not reveal that the information came from you. You might want your response to be anonymous because it contains sensitive information about you or your organisation, or because you are worried about other people knowing what you have said to us.

We list who responded to our consultations in our reports. If you provide a confidential response your name will appear in that list. If your response is anonymous, we will not include your name in the list unless you have given us permission to do so. Please let us know if you wish your response to be anonymous or confidential.

LSLA

Civil Justice Council Consultation on Litigation Funding

RESPONSE OF THE LONDON SOLICITORS LITIGATION ASSOCIATION

The LSLA was formed in 1952 and currently represents the interests of a wide range of civil litigators in London. It has almost 4,000 members throughout London among all the major litigation practices, ranging from the sole practitioner to major international firms. Members of the LSLA Committee sit on the Civil Justice Council, the Chancery Court Users Committee, the Rolls Building Users Committee, the Law Society Civil Litigation Committee and the Commercial Court Users Committee to name but a few. As a consequence, the LSLA has become the first port of call for consultation on issues affecting civil and commercial litigation in London, and it has on many occasions been at the forefront of the process of change.

This document sets out the response of the LSLA to the consultation exercise by the Civil Justice Council on Litigation Funding. In this, we draw on the experience of our corporate member firms, the vast majority of which have either acted for clients bringing claims with the benefit of litigation funding, or have defended such claims. Given this, the views that are expressed below reflect a range of perspectives.

There are a number of questions for consultation, and this document responds to those to which the LSLA feels it can provide a meaningful response.

We have numbered the main sections from A to E, and provide our comments by reference to those main topics, rather than question by question.

A – Questions concerning 'whether and how, and if required, by whom, third party funding should be regulated' and the relationship between third party funding and litigation costs.

1. *To what extent, if any, does third party funding currently secure effective access to justice?*[1]
2. *To what extent does third party funding promote equality of arms between parties to litigation?*
3. *Are there other benefits of third party funding? If so, what are they?*
4. *Does the current regulatory framework surrounding third party funding operate sufficiently to regulate third party funding?*[2] *If not, what improvements could be made to it?*
5. *Please state the major risks or harms that you consider may arise or have arisen with third party funding, and in relation to each state:*
    a. *The nature and seriousness of the risk and harm that occurs or might occur;*

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[1] *When considering this question please bear in mind that access to justice encompasses access to a court, judgment and enforcement and access to non-court-based forms of dispute resolution, whether achieved through negotiation, mediation, complaints or regulatory redress schemes or Ombudsman schemes.*

[2] *This question includes consideration of the effectiveness of courts and tribunals assessing an appropriate price for litigation funding.*

b. *The extent to which identified risks and harm are addressed or mitigated by the current self-regulatory framework and how such risks or harm might be prevented, controlled, or rectified;*[3]
c. *For each of the possible mechanisms you have identified at (b) above, what are the advantages and disadvantages compared to other regulatory options/tools that might be applied? In answering this question, please consider how each of the possible mechanisms may affect the third party funding market.*

6. *Should the same regulatory mechanism apply to: (i) all types of litigation; and (ii) English-seated arbitration?*
    a. *If not, why not?*
    b. *If so, which types of dispute and/or form of proceedings*[4] *should be subject to a different regulatory approaches, and which approach should be applied to which type of dispute and/or form of proceedings?*[5]
    c. *Are different approaches required where cases: (i) involve different types of funding relationship between the third party funder and the funded party, and if so to what extent and why; and (ii) involve different types of funded party, e.g., individual litigants, small and medium-sized businesses; sophisticated commercial litigants, and if so, why?*
7. *What do you consider to be the best practices or principles that should underpin regulation, including self-regulation?*
8. *What is the relationship, if any, between third party funding and litigation costs? Further in this context:*
    a. *What impact, if any, have the level of litigation costs had on the development of third party funding?*
    b. *What impact, if any, does third party funding have on the level of litigation costs?*
    c. *To what extent, if any, does the current self-regulatory regime impact on the relationship between litigation funding and litigation costs?*
    d. *How might the introduction of a different regulatory mechanism or mechanisms affect that relationship?6*
    e. *Should the costs of litigation funding be recoverable as a litigation cost in court proceedings?*
        i. *If so, why?*
        ii. *If not, why not?*
9. *What impact, if any, does the recoverability of adverse costs and/or security of costs have on access to justice? What impact if, any, do they have on the availability third party funding and/or other forms of litigation funding.*

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[3] *Please give full details of each possible mechanism and explain how each would work (including who any potential 'regulator' or self-regulator might be). Such details may make reference to mechanisms used in other countries. Possible mechanisms may include, but are not limited to, various forms of formal regulation (including licensing and conditions, requirements, etc) self-regulation, co-regulation, standards, accreditation, guidance, no regulation, or any other relevant mechanism.*

[4] *Different forms of proceedings include, for instance: individual claims; group litigation; collective proceedings in the Competition Appeal Tribunal; representative proceedings before the civil courts.*

[5] *Examples of types of cases include, for instance: personal injury claims; consumer claims; financial services claims; commercial claims.*

[6] *Please explain your answer by reference to a specified regulatory mechanism or mechanisms.*

10. Should third party funders remain exposed to paying the costs of proceedings they have funded, and if so to what extent?

A – LSLA Response

1. The LSLA is an active participant in campaigns that promote London as a centre for international litigation and arbitration. The development of litigation funding in the London market over the past 15-20 years has been of significant benefit for London as an international legal centre, promoting the development of substantial expertise in London of handling funded and group claims.

2. Activity in the funding market has already been affected by the Supreme Court decision in *PACCAR*, which has no doubt caused disruption to active cases, and may have created some stumbling blocks for the funding of new cases. Looked at objectively, disruption of this nature does nothing to assist efforts to promote London as a premier venue for the handling of large-scale complex litigation.

3. Against that background, we are concerned that any form of regulation which stifles litigation funding activity will be counterproductive and may deter third party funders from focusing on England as a jurisdiction in which to invest for the purposes of supporting large-scale litigation and arbitration matters. To the extent that capital is drawn to other European markets, where the demand for funding is growing, that would be a setback for the litigation sector in London.

4. We are broadly in agreement with the balanced approach set out by the European Law Institute ("**ELI**") in its Principles Governing the Third Party Funding of Litigation, which was published in final form in December 2024. The Principles represent a sensible framework to follow in funded cases. That said, for the London market, which is advanced in the use of funding, and with a number of relatively sophisticated and responsible funders operating, the need for a rigid regulatory overlay is questionable, save potentially to achieve a greater degree of protection for claims brought on behalf of consumers and lay clients, particularly group claims. These can be distinguished from commercial claims on behalf of more sophisticated corporate or high net worth individuals and family offices, namely those clients who actually have a real choice about whether to take on third party funding or not.

5. Heavier regulation may be counterproductive and disadvantageous for claimants to the extent that it creates barriers to entry for funders. The London market has already seen examples of cases that have resulted in successful outcomes for claimants with the involvement of non-mainstream funders. Limiting the supply of funding to the mainstream funders would potentially reduce supply and competitivity in respect of funding costs, albeit it is important to ensure that funders should have sufficient capital behind them.

6. That said, from a defendant perspective, different considerations arise, for example:

   (a) Concern as to costs exposure in funded claims. On this aspect, in the larger cases and especially group claims, costs can become very heavy on both sides, claimant and defendant. Some advantages do come from the involvement of funders, as to the management of the legal budget, and potentially bargaining power to negotiate lower hourly rates, so as to control overall claimant costs. On the latter point, we have seen

funders on occasion requesting budgets based on volume discounted hourly rates without any conditional/deferred fee structure.

(b) The security for costs regime does offer some protection for Defendants, albeit the counterpoint is that the inability to recover ATE premiums (often required to meet Defendants' concerns regarding security) already has a significant impact on the viability of funding for certain cases. These are both features which ultimately drive up the cost of litigation funding. Whereas security for costs is an important protection for Defendants, it should be recognised that the provision of security is a significant expense in the budget for a large commercial dispute, and the fact that the premiums for adverse costs insurance are not recoverable adds to the challenge. This can make the obtaining of funding more difficult and result in the value of claims needing to be even higher to attract funding which could hinder access to justice.

(c) Generally from a defendant perspective, there is appetite for some form of regulation, not with a view to stifling claims, but rather to protect defendants, and in some instances also claimants, particularly consumers. Features of such regulation may include early disclosure of funding arrangements and agreements, which would allow defendants to raise funding/security for costs issues at an early stage.

7. Finally, we raise for consideration whether for lower value claims with a settlement range in the single millions, access to justice could be enhanced by allowing the costs of at least part of litigation funding to be recoverable from the losing party. There is some precedent for this in arbitration proceedings (**Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361**)

(a) There are cases where the quantum is unlikely to meet the 10:1 damages to costs ratio which the funders tend to apply, but these claims are often not insignificant in value for those claimants. Recoverability could be capped to a percentage of the multiple/return, but may nevertheless encourage defendants to participate in early ADR.

(b) There are certain case types in this bracket where Claimants of modest means are being denied access to justice as they do not have the means to bring the claim themselves because, even if the solicitor agrees to act on a deferred basis it is very rare to find good (potentially specialist) counsel prepared to work without being paid for what can be years on end and so there is real need for funders to come in at this level. We have in mind the sort of David v Goliath claims where the Defendant to the litigation is of significant means and so can smother the claim with relative ease. Having a funder can level the playing field and allow the Claimant to secure the resources required. It is accepted that this will not be straightforward but a capped percentage for certain claim types (probably based on value) could be piloted.

This would also have the effect of expanding the market for funders who might not usually fund at this level. It is acknowledged that there are understandable concerns from defendant practitioners and any proposals would need to be very carefully thought through, with adequate protections, particularly in cases of questionable merit.

B – Questions concerning 'whether and, if so to what extent a funder's return on any third party funding agreement should be subject to a cap.'

11. *How do the courts and how does the third party funding market currently control the pricing of third party funding arrangements?*
12. *Should a funder's return on any third party funding arrangement be subject to controls, such as a cap?*
    a. *If so, why?*
    b. *If not, why not?*
13. *If a cap should be applied to a funder's return:*
    a. *What level should it be set at and why?*
    b. *Should it be set by legislation? Should the court be given a power to set the cap and, if so, a power to revise the cap during the course of proceedings?*
    c. *At which stage in proceedings should the cap be set?*
    d. *Are there factors which should be taken into account in determining the appropriate level of cap; and if so, what should be the effect of the presence of each such factor?*
    e. *Should there be differential caps and, if so, in what context and on what basis?*

B – LSLA Response

8. Capping the return across the board could in some cases mean the opportunity to obtain funding is lost.

9. Logically, the question does arise though as to why funder returns should be uncapped, when solicitors' success fees are limited under CFAs and DBAs. Those protections are clearly there for a reason, so a divergent approach in respect of funder returns needs to be explained and understood. Potentially reviewing and increasing the limits under CFAs and DBAs may provide a greater incentive for firms to step in and effectively act as funders in that group of cases where the quantum is insufficient to fulfil a funder's requirements - applying the 10:1 damages to costs ratio which the funders tend to apply, and which means that securing funding in cases where the quantum falls below £10m is a real challenge.

10. Save for that point, an efficient market and the promotion of competition between funders should guard against excessive returns.

11. Those clients who have the freedom of choice over funding are able to also decide as to whether the return on investment by the funder is excessive. But there will be cases where claimants do not have a choice and will ultimately be in a less robust position to negotiate with a funder on the return. This is why it is vital that we have a vibrant choice of funders competing for meritorious claims for such clients. The parameters are different for class actions where the risk sharing is slightly different but the same concerns as to risk and reward for the clients are in play.

12. We generally in any case see funders working to manage the economics of funded cases, balancing costs against quantum, so that a claimant does benefit from the ultimate outcome of the litigation. This includes controlling the legal spend as the case progresses and in some cases we have seen funders encouraging early settlement, before further legal costs are incurred.

13. In light of this, we cannot see a legitimate basis for funders to object to consumer claimants always receiving some minimum percentage of the damages obtained, as had been proposed by some in the discussions around this consultation. This is important for market perception – for funders not to be seen to be walking away with most or all of the damages at the end of the process. However, in relation to this:

(a) While there may be a market perception that funders walk away with the lion's share of damages and a need to address that perception, that has to be balanced against the risk that stipulating for a minimum recovery for consumers would stifle the market. To some extent this is what we have seen with the operation of the 50% limit in respect of DBA arrangements (see [9] above), which is one of the features of DBAs which limits take up.

(b) Whether by way of a cap or by way of a minimum recovery, the end result would likely be that at least some claims would become insufficiently attractive to secure funding, or would only be funded under a restricted budget which would not result in a true equality of arms (and at worst limit Claimant solicitors' ability to properly and efficiently progress claims). Particularly in that scenario, there is added risk for private practitioners, with solicitors on the Claimant side then coming under pressure to absorb budget overruns in the interests of the case, deferring more fees with all the risk and cash flow issues that that would bring, and potentially with limited rewards. It may also result in some Claimant firms being unable to act in certain matters irrespective of any merits of the underlying claims.

(c) The option for the Court to become involved to review funding (and settlement) arrangements (on a basis similar to the CAT rules) ought to be considered, but subject to the caveats mentioned in 36 below.

14. So, policing the ratio of damages returned to a client is not a straightforward matter. The appropriateness of a cap would depend on the quantum involved. For certain cases, imposing a cap on the funder return may mean that funding is not viable, thus impacting on the access to justice. Claimants may also take the view that a low return is better than no return, even if funders and other stakeholders take the majority of any damages award. As stated above, reviewing the CFA and DBA regulations may increase the potential for law firms to operate effectively in relation to those cases which do not fit with funders' financial requirements, noting the damages to costs ratio.

C – Questions concerning how third party funding 'should best be deployed relative to other sources of funding, including but not limited to: legal expenses insurance; and crowd funding.'

16. What are the advantages or drawbacks of third party funding?
Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.
What are the alternatives to third party funding?

a. How do the alternatives compare to each other? How do they compare to third party funding? What advantages or drawbacks do they have?

Please provide answers with reference to: claimants; defendants; the nature and/or type of litigation, e.g., consumer claims, commercial claims, group litigation, collective or representative proceedings; the legal profession; the operation of the civil courts.

b. *Can other forms of litigation funding complement third party funding? Alternatives include: Trade Union funding; legal expenses insurance; conditional fee agreements; damages-based agreements; pure funding; crowdfunding. Please add any further alternatives you consider relevant.*

c. *If so, when and how?*

17. *Are any of the alternatives to be encouraged in preference to third party funding? If so, which ones and why are they to be preferred? If so, what reforms might be necessary and why?*
18. *Are there any reforms to conditional fee agreements or damages-based agreements that you consider are necessary to promote more certain and effective litigation funding? If so, what reforms might be necessary and why? Should the separate regulatory regimes for CFAs and DBAs be replaced by a single, regulatory regime applicable to all forms of contingent funding agreement?*
19. *Are there any reforms to legal expenses insurance, whether before-the-event or after-the-event insurance, that you consider are necessary to promote effective litigation funding? Should, for instance, the promotion of a public mandatory legal expenses insurance scheme be considered?*
20. *What is the relationship between after-the-event insurance and conditional fee agreements and the relationship between after-the-event insurance and third party funding? Is there a need for reform in either regard? If so, what reforms might be necessary and why?*
21. *Are there any reforms to crowdfunding that you consider necessary? If so, what are they and why?*
22. *Are there any reforms to portfolio that you consider necessary? If so, what are they and why?*
23. *Are there any reforms to other funding mechanisms (apart from civil legal aid) that you consider are necessary to promote effective litigation funding? How might the use of those mechanisms be encouraged?*

C – LSLA Response

15. As to the advantages of third party funding, we would identify the following high level examples of scenarios where the ability to use third party funding is helpful in complex commercial litigation:

(a) allows businesses to litigate 'off balance sheet' thus allowing them to apply their finances to maintain or develop their core business, rather than having to choose between growing the business, or litigating their claim;

(b) can provide support to insolvent companies which might not otherwise have sufficient assets to fund recoveries for the insolvent estate and for the benefit of the creditors; and

(c) can give impecunious parties a credible threat of enforcement and therefore help them secure fair settlement terms.

16. Certainly, in respect of CFAs and DBAs, reform is necessary. The provision for firms to offer hybrid arrangements or partial CFAs is in need of urgent review. Many firms are keen to offer a combination of fixed fees and contingency arrangements as well as partially discounted rates to clients. It is in the interests of all stakeholders including clients that such arrangements have a level of certainty as to whether they are enforceable. There should be an urgent review of both Sequential Hybrid Damages Based Agreements ("**SHDBA**") and Concurrent Hybrid Damages Based Agreements ("**CHDBA**").

    (a) A SHDBA is one where an alternative fee agreement is followed by a DBA. This may arise where there needs to be seed funding to establish if a solicitor will agree to a DBA. A SHDBA is permissible but the approach taken to interim bills as noted below is of concern.

    (b) A CHDBA is an agreement whereby the solicitor agrees to a DBA on condition that a fixed fee or lower rate is paid on their normal fees. It is still unclear if this kind of agreement is permitted in the High Court. Further to enable such an approach, interim bills must be issued too.

17. It is worth noting that in the First Tier Tribunal and Upper Tier Tribunal, such arrangements have been common place with firms which advise on Tax Appeals being able to offer their clients fixed fees to cover their basic costs and disbursements with a contingency fee. This is because for historic reasons such Appeals have never fallen within contentious business, albeit that such cases can end up in the High Court on Appeal before a High Court Judge.

18. A review is urgent given the implications of recent case law as to the ability for solicitors to issue interim statute bills in cases where there is a conditional fee arrangement. With DBAs being generally not fit for purpose in larger commercial claims, without the primary legislative reform to the Solicitors Act 1974, it is likely that some firms will be discouraged from entering into CFAs and/or partial CFAs, especially for long running cases.

19. Supporting the ability of solicitors to undertake work on a deferred fee basis with the security that they will be able to recover basic fees on a monthly basis is essential, and indeed goes hand in hand with promoting litigation funding. Without deferral of fees by solicitors under CFAs, the economics simply will not work for many funded claims.

D – Questions concerning the role that should be played by 'rules of court, and the court itself . . . in controlling the conduct of litigation supported by third party funding or similar funding arrangements.'

23. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal rules, including the rules relating to representative and/or collective proceedings, to cater for the role that litigation funding plays in the conduct of litigation? If so in what respects are rule changes required and why?

24. Is there a need to amend the Civil Procedure Rules or Competition Appeal Tribunal Rules to cater for other forms of funding such as pure funding, crowd funding or any of the alternative forms of funding you have referred to in answering question 16? If so in what respects are rule changes required and why?

25. *Is there a need to amend the Civil Procedure Rules in the light of the Rowe case? If so in what respects are rule changes required and why?*
26. *What role, if any, should the court play in controlling the pre-action conduct of litigation and/or conduct of litigation after proceedings have commenced where it is supported by third party funding?*
27. *To what extent, if any, should the existence of funding arrangements or the terms of such funding be disclosed to the court and/or to the funded party's opponents in proceedings? What effect might disclosure have on parties' approaches to the conduct of litigation?*

D – LSLA Response

20. The view is that the rules as currently drafted offer sufficient flexibility. However the question of potential reform of the rules in this respect is a broader topic, and probably not best addressed in the context of a review of litigation funding.

21. We are not in favour of the courts being invited to take a view on the appropriateness of a funding arrangement and generally, the court does not need to know whether a claim is funded, unless that becomes relevant in the context of a specific application.

22. A degree of transparency may help both claimants and defendants by reducing the need for correspondence around funding arrangements and stipulating for certain basic information to be divulged as a matter of course.

23. But any requirement of transparency needs to recognise that funders come in all shapes and sizes. We would endorse the ELI's approach, which is to require a degree of transparency in cases of pure funding by unconnected third parties. Commercial confidentiality and other issues may militate against transparency in cases involving funding by connected parties, such as parent companies, family members and other benefactors. We are aware that a number of cases which don't involve consumers in class actions, such as shareholder disputes and family cases, benefit from ad hoc third party funding which may be motivated by some collateral purpose. In such cases, confidentiality is often essential, or the third party would not provide funding. Conversely, transparency as to the fact of third party funding would likely benefit defendants. We don't think that any need for transparency in those kinds of cases should undermine a light touch approach to regulation of litigation funding per se.

E – Questions concerning provision to protect claimants.

28. *To what extent, if at all, do third party funders or other providers of litigation funding exercise control over litigation? To what extent should they do so?*
29. *What effect do different funding mechanisms have on the settlement of proceedings?*
30. *Should the court be required to approve the settlement of proceedings where they are funded by third party funders or other providers of litigation funding? If so, should this be required for all or for specific types of proceedings, and why?*
31. *If the court is to approve the settlement of proceedings, what criteria should the court apply to determine whether to approve the settlement or not?*
32. *What provision (including provision for professional legal services regulation), if any, needs to be made for the protection of claimants whose litigation is funded by third party funding?*

33. *To what extent does the third party funding market enable claimants to compare funding options different funders provide effectively?*
34. *To what extent, if any, do conflicts of interest arise between funded claimants, their legal representatives and/or third party funders where third party funding is provided?*
35. *Is there a need to reform the current approach to conflicts of interest that may arise where litigation is funded via third party funding? If so, what reforms are necessary and why.*

E – LSLA Response

24. Litigation solicitors are used to operating with overlapping duties - for example, they need to balance their duties to the client with their duties as officers of the court. But the need for the solicitor to navigate conflict issues in funded cases is enhanced, given the complex commercial arrangements and relationships that exist.

25. Claimant solicitors need to be alive to and manage the risk of perception by clients that they are beholden to the funders, as a result of commercial relationships with funders which may straddle multiple cases.

26. We agree with the point in the ELI's Principle 4, about directing clients to seek independent legal advice, from a firm with no connection to the funder, before entering into a funding agreement. Consistent with this, we see claimant solicitors increasingly working with funding and ATE brokers, who have the specialist and market knowledge to advise on the range of products available, which are constantly evolving. But referring a client to a broker may not be a complete answer, and solicitors need to be transparent with clients as to whether they are advising the client on funding terms, or indicating that the client needs to consult with another firm to obtain that advice. This may be particularly important in the case of a class representative.

27. It is also important to bear in mind that at this stage of a case, the client may well not have the resources to obtain advice from another firm, and anything which would add to the costs burden would make a case even more difficult to fund. This would impact adversely on the aim of providing access to justice for those clients without sufficient resources.

28. There is also a further difficulty when instructing a non-connected solicitor for advice on funding terms - in practice it can be difficult for independent advisers (unless very sophisticated and used to working on funded claims themselves) to understand enough about the evidence, risks and likely timeline in the claim to advise properly on the potential net outcomes for claimant (a key aspect of advising on the terms offered by the funder).

29. We also see tensions arising in situations where the funding documentation makes significant inroads into duties of confidentiality, and the claimant's freedom to give instructions to the solicitor. We would endorse the ELI's Principle 10, which is that the funded party must have the ultimate decision making power. However, where the funder approves the budget and invoice payments, this in itself gives practical day to day control over the management of the case.

30. Another aspect which needs review is the extent to which disputes arise between funder and claimant. Disputes often arise due to a mismatch in the alignment of interests which may

develop as the case progresses, as expectations change about the likely recovery, and changes in scope put pressure on the legal budget. Tensions in this respect can be especially high when a settlement is imminent.

31. Solicitors are adept at navigating these situations without detriment to the client. For example, solicitors are well used to managing potential conflicts in litigation in which they are acting for the insured and the insurer, and where an insistence on separate representation to deal with a potential conflict would be inefficient and add to the overall costs burden. It has also always been inherent in a litigation process that when a case settles, the solicitor will lose the opportunity to generate further fees on an hourly rate. But the litigation market has seen great progress regardless in the area of alternative dispute resolution, with solicitors promoting settlement of cases before trial, whether through mediation or other forms of alternative dispute resolution. In the same way, our experience is that solicitors are faithful to their clients in the advice given in settlement scenarios, without regard to the economic impact on the solicitor. However there is scope for disagreement with funders on timing and terms of settlement. Introducing a cap on recoveries may reduce the scope for disputes as to the level of any settlement. Equally, introducing controls as to the extent of a funder's ability to input on a settlement process, for example, may add to the factors which persuade funders to divert capital to other markets, where similar controls may not exist. The scope for arbitrage here, and potential for flight of work to other jurisdictions, should be a factor. Consistent with existing practice, perhaps any ability of a funder to input on settlement should be limited to requiring the claimant to take reasonable steps to follow and act according to the legal advice given. It should also be uncontroversial that a funder would need to be transparent with the claimant if there was any question of the funder's ability to continue funding the case to the committed legal budget, and in particular as to whether any such issues would affect the funder's views on potential settlement.

32. As to other types of disputes arising in a funded matter, the claimant's ability to change solicitors and/or funder will be limited, and the claimant will be unlikely in many cases to have the resources to fund a dispute process within the funding agreements. Firms and funders should ideally pre-empt this known potential risk upfront and be transparent with clients as to what happens in various scenarios, for example:

    (a) what happens if a key partner/associate moves firm. Locking in the same law firm may not be an option for many reasons so the change of legal team scenario, should be considered and the process of managing any disagreement thought-out in advance.

    (b) when budget is exceeded and who carries the risks of any out of scope costs.

    (c) under what circumstances can a retainer be withdrawn from a law firm that has signed up to a long term commitment to run a case over several years.

    (d) in what circumstances should a funder be able to prevent funding of an Appeal over which the legal team has indicated there is merit.

33. These are potentially contentious issues, but all of them are known areas of potential dispute and agreements should not shy away from the uncomfortable conversations that these issues present to the client and the funder. Litigation is a fast moving service and there is no time to

be distracted by satellite disputes of this kind when the funder, client and legal team are not aligned.

34. In the scenario where these matters are in dispute, the claimant's options will be limited, and its bargaining power very weak. Funding documents tend to include arbitration or expert determination processes for resolution of disputes. It is often the case that these dispute resolution processes become involved, and are not capable of dealing with substantial disputes in the time required to allow resolution within the timescales under the relevant litigation process. Any dispute resolution process in a funded matter must be quick and efficient, to allow for rights and obligations to be determined on an expedited basis within the timeframe required by the ongoing litigation process.

35. This should all also be aimed at giving parties clarity and reducing satellite litigation/arbitration relating to funding, which is not in the interests of the parties or London as a leading litigation forum, and would also divert court resources from determining the actual substantive disputes.

36. Equally, we are sceptical about the ability and appetite for the Courts to become routinely involved in approval of settlements. That would place a huge burden on the judiciary, and it is inherently a challenge to identify the basis on which a review would be undertaken of the appropriateness of settlement terms in a complex commercial dispute with multiple stakeholders. There is also a significant difference between approving settlements in the collective regime or in a group context where the beneficiaries are not identified, as opposed to cases where there is an identified claimant who will have an intimate involvement in the contractual mechanics and in any interpretation or judgment as to the approval of any settlement.

37. A guarantee that consumers will always receive some minimum level of any damages awarded would also address some of the risk for consumers, addressing (in the most part) the need for the Court to intervene in any settlement (outside of the specific circumstances identified above). As to this, we refer also to the points made in paragraph 13 above.

F – Questions concerning the encouragement of litigation.

36. To what extent, if any, does the availability of third party funding or other forms of litigation funding encourage specific forms of litigation? For instance:

a. Do they encourage individuals or businesses to litigate meritorious claims? If so, to what extent do they do so?

b. Do they encourage an increase in vexatious litigation or litigation that is without merit? Do they discourage such litigation? If so, to what extent do they do so?

c. Do they encourage group litigation, collective and/or representative actions? If so, to what extent do they do so?

When answering this question please specify which form of litigation funding mechanism your submission and evidence refers to.

37. To the extent that third party funding or other forms of litigation funding encourage specific forms of litigation, what reforms, if any, are necessary? You may refer back to answers to earlier questions.

38. What steps, if any, could be taken to improve access to information concerning available options for litigation funding for individuals who may need it to pursue or defend claims?

F – LSLA Response

38. Claims are clearly on occasion advanced, whether funded or not, where the merits are questionable, but the perception is that there is an opportunity for an early settlement, based simply on the fact that a claim is up and running which leads to an irrecoverable costs risk for the defendant, which may encourage an early settlement. Also, there may be instances of the quantum in some cases being inflated in order to increase the chance of higher returns overall. In such cases, costs can become a bar to settlement, and even more so when funder returns are taken into account.

39. However, a claim which is funded, particularly by a well established funder, will necessarily have been subject to a high threshold in order to get off the ground. Funders scrutinise cases and merits in depth before taking a case on, which generally means that an unmeritorious claim will not be funded, albeit there will be exceptions.

40. The ratios that funders apply before agreeing to fund a claim also mean that it is only claims with the potential quantum that can fund a return to both the funder and the client as well as justify the legal costs. The risk of an adverse costs order in UK proceedings is also as with any litigation a clear barrier to a claim being issued without sufficient merit.

F – General Issues

39. Are there any other matters you wish to raise concerning litigation funding that have not been covered by the previous questions?[7]

G – LSLA Response

41. In preparing this response it is clear to us that the in-house perspective differs in some respect from the broad positions of the claimant and defendant camps, and the views of those in private practice.

42. We do wish therefore to record, in brief, views we have received from the in house (primarily defendant) solicitor perspective for completeness:

(a) Support for a regulated regime overseen by an independent regulator.

(b) Funders should remain subject to adverse cost risk.

(c) Support for full disclosure of funding arrangements and agreements, an early understanding of which can help parties to consider the merits of settlement.

(d) Funders should be subject to capital adequacy requirements.

(e) ATE insurers and funders should not be permitted to walk away from cost commitments if they no longer support a claim.

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[7] *Please note that the Working Party is not considering civil legal aid.*

43. We record these views in brief on the understanding that in-house views will be represented in more detail in other submissions.

London Solicitors Litigation Association
14 February 2025