

Civil Justice Council Consultation Response on Third-Party Litigation Funding

Personal Information

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Are you responding on behalf of your organisation? No

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1. To what extent, if any, does third-party funding currently secure effective access to justice?

Third-party funding secures effective access to justice only to the more sophisticated, larger entities. It does not provide effective access to justice to the normal person.

2. To what extent does third-party funding promote equality of arms between parties to litigation?

Litigation funding does promote a degree of equality of arms between parties to litigation.

3. Are there other benefits of third-party funding? If so, what are they?

Other benefits of third-party funding include access to justice to certain entities who would otherwise not have that access, and deferral of litigation costs.

4. Does the current regulatory framework surrounding third-party funding operate sufficiently to regulate third-party funding? If not, what improvements could be made to it?

No, the current regulatory framework does not regulate third-party funding to any extent necessary. The regulation for all third-party funders in the UK should govern who is responsible for the running of the litigation, what cap in terms of percentage the funder can take out, and a clear explanation from the litigation funder as to the purpose of their funding and the reasons for the terms of the funding.

5. Please state the major risks or harms that you consider may arise or have arisen with third-party funding.

A. The biggest risk is that the user of third-party funding might expend serious amounts of time and considerable expense and end up with nothing, where the third-party funder takes it all.

B. This risk is not addressed or mitigated by the self-regulatory framework at all, and it could be protected by a properly regulated environment.

6. Should the same regulatory mechanism apply to all types of litigation and English-seated arbitration?

Yes, as long as the contractual arrangement between the parties is very clear, which it is not today.

8. What is the relationship, if any, between third-party funding and litigation costs?

If there is third-party funding in place, litigation costs go up.

9. What impact does the recoverability of adverse costs and/or security for costs have on access to justice?

The recoverability of adverse costs and security for costs make claimants and defendants both far more aware of the risks of litigation and the strengths of their own position. This means there is less speculative litigation, but more importantly, speculative defence or applications made by rich claimants or defendants.

Therefore, the recoverability of adverse costs and/or security for costs does potentially provide wider access to funding, because it stops potential intimidation of those less well-funded.

10. Should third-party funders remain exposed to paying the costs of proceedings they have funded?

Third-party funders should be treated in exactly the same way as a normal claimant.

11. How do the courts and how does the third-party funding market currently control the pricing of third-party funding arrangements?

There is no control of pricing. It is simply supply and demand.

12. Should a funder's return on any third-party funding arrangement be subject to controls, such as a cap?

A funder's return to third-party funding arrangement should absolutely be subject to controls and absolutely requires a cap. Otherwise, as has been demonstrated, third-party litigation funders become predatory and conflicted inevitably with their clients.

13. If a cap should be applied to a funder's return, what level should it be set at and why?

A level of a funder's return should be capped at a maximum of 50%.

14. Should the cap be set by legislation? Should the court be given a power to set and revise the cap?

Yes, it should be set in legislation. The cap, of course, could be revised during the course of proceedings, but only to the maximum allowed by law.

15. Addressing Litigation Funding as a Claimant/Defendant

From question 15 onwards, I can only address these questions as a claimant/defendant, as that is the role I have taken. In that capacity, I believe that properly regulated third-party funding has a very important role to play—but only if it is properly regulated through legislation. It cannot be left in the hands of third-party funders themselves in a self-regulatory fashion. This simply encourages abuse by the unscrupulous few, which then unfortunately calls into question the integrity of the majority.

PACCAR and the Impact on UK Litigation

The result of PACCAR was that the majority of third-party funders adjusted their marketing and contractual approach to comply with the decision. However, the unscrupulous few wrongly stated that PACCAR had an adverse impact on the UK litigation industry.

Alternative Ways of Funding Litigation

Alternative ways of funding litigation, such as Conditional Fee Agreements (CFAs) and crowdfunding, will always have a place, but they are complex instruments and difficult to present and understand. While they are useful for sophisticated users, they also have disadvantages. That being said, CFAs and Damages-Based Agreements (DBAs) should still be included within the regulatory regime that should cover third-party funding and any contingent funding agreement.

27. Disclosure of Funding Arrangements

The existence of funding arrangements and the terms of such funding should be disclosed to the Court, but not necessarily to the funded party's opponents in proceedings. Any decision to seek security for costs or assess the financial conduct of a case should be determined solely on the merits of the case, and the Courts should ensure this happens through case management.

35. Checkbook Power

The problem can be summed up as 'checkbook power,' where the funder—the holder of the purse—can dictate the terms of litigation to their own advantage.

Additional Perspective on Third-Party Litigation Funding

Third-party litigation funding, properly regulated, is a tool that can be used to enable meritorious legal cases to be argued, which may otherwise not be able to be argued because of financial issues. This has to be a good thing. The general availability of litigation funding, on a properly regulated basis, will properly question and put to the test the strengths of argument for both claimants and defendants, if one knows that the other can be properly funded and is not disadvantaged by a lack of financial wherewithal. This will lead ultimately to more cases being brought and defended on merit alone. I am unable to comment, however, on group litigation, collective or representative actions. As long as the two parties, i.e. the third-party provider of litigation funding and the user of that litigation funding, whether in the capacity of claimant or defendant, know the rules through properly regulated legislation, then third-party litigation funding should be actively encouraged.