

REVISED DRAFT – FOR DISCUSSION ONLY

THIRD PARTY LITIGATION FUNDERS ASSOCIATION

CODE OF CONDUCT FOR THE UNITED KINGDOM

1. INTRODUCTION

1.1 What the Code Covers

- 1.1.1 This is a voluntary code of conduct which sets out standards of good practice for Third Party Litigation Funders (“Funders”) operating in the United Kingdom.
- 1.1.2 Funders are companies which offer to provide finance to Claimants in order to enable Claimants to meet the costs and liabilities of bringing legal proceedings in the United Kingdom. In return for providing funding, in successful cases, the Funders are entitled to a share of the proceeds of the litigation as well as reimbursement of the costs they have paid.
- 1.1.3 Funders may provide ancillary services as part of their range of services, but the principal activity of any Funder is the provision of funding to claimants in return for a share of the money recovered from the litigation, if any
- 1.1.4 The Code applies to all Funders who are Members of the Association and provide or offer to provide services to Claimants in respect of legal proceedings brought in the courts of the United Kingdom. The Code provides valuable protection for users of our Members’ services and explains how your Funder is expected to deal with you on a day-to-day basis and whenever you have a complaint.

1.2 About this Code

- 1.2.1 This Code was developed by the Third Party Litigation Funders Association (“the Association”) which also administers the Code. The Association is a body funded by fees levied on its Members. A list of these Members is available on [insert website address].
- 1.2.2 This Code was introduced to ensure best practice by the Members of the Association and so facilitate the development of a transparent, professional and ethical litigation funding industry in the United Kingdom. One of the aims of the Code is to protect you, as a user of our Members’ services.
- 1.2.3 If you have any questions or require any further information about this Code, you should contact the Association at the details below. A copy of this Code is available on request from the Association or can be obtained on our website at

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[insert website address] or on the website of the Civil Justice Council at www.civiljusticecouncil.gov.uk

1.3 Objectives of this Code

1.3.1 The objectives of this Code are to:

- (a) facilitate the development of a responsible litigation funding industry in the United Kingdom ;
- (b) deemed to be meritorious
- (c) protect your interests by setting minimum standards for Litigation Funding Agreements, requiring full disclosure of each Litigation Funding Agreement and ensuring proper procedures are in place to handle any complaints you may have against any of our Members
- (d) identify high professional and ethical standards for our Members and take appropriate action should these standards be breached; market confidence: maintain confidence in the services provided by Funders
- (e) minimise the risk of default by our Members on their obligations to you; public awareness: promoting an understanding of third party funding
- (f) promote greater acceptance and wider use of Third Party Litigation Funders by the Courts and the Legal Profession in the United Kingdom; and
- (g) foster the competitive environment which exists in the litigation funding industry in the United Kingdom.

1.4 In this Code, “we” or “us” refers to the Association and “ Funder” or “Member” refers to a member of the Association who has offered to enter into or has entered into a Litigation Funding Agreement with **you**. All other definitions are set out in the Appendix to this Code.

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2. WHAT CLAIMS CAN BE FUNDED?

2.1 Criteria Applied by Our Members

2.1.1 In general terms, a Funder will decide whether it wants to enter into a Litigation Funding Agreement with you by assessing (among other things):

- (a) the strength and merits of your claim;
- (b) the type of your claim;
- (c) when your claim arose;
- (d) the court in which your claim will be heard and the law that applies to your dispute;
- (e) the amount of your claim;
- (f) the likely amount of your costs;
- (g) any legal or factual difficulties associated with your claim;
- (h) the ability of the proposed defendant(s) to pay you if you are successful;
and
- (i) how much documentary and other evidence there is to support your claim.

3. OUR MEMBERS' SERVICES

3.1 The Funder will enter into a Written Agreement with You

3.1.1 If a Funder decides to fund your claim, it will offer to enter into a written Litigation Funding Agreement with you. The written agreement will be legally binding on both you and the Funder when it is signed and will contain all the terms and conditions of the contract between you and the Funder. Further information about minimum terms you should expect to find in a Litigation Funding Agreement are set out in the Appendix to this Code. This is not intended to be an exclusive list but to act as a guide for those entering into or advising upon a Litigation Funding Agreement. A Funder cannot enter into a Litigation Funding Agreement with you unless you are, or will be, represented by a solicitor in relation to the litigation to be funded.

3.1.2 The Funder may require you to provide it with documents and other information both prior to and after entering into a Litigation Funding Agreement as necessary to properly evaluate your claim and ensure that it is meritorious.

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3.1.3 The actual terms and conditions of the Litigation Funding Agreement you enter into will vary according to the terms of trade of the Funder concerned and will be negotiated between you (or your lawyer) and the Funder. However, in all cases the Funder must comply with this Code.

3.1.4 The Litigation Funding Agreement may contain provisions which allow for one or more organisations (which may include another Member) to co-fund the litigation with the Funder. The Funder you have signed with, as a Member of the Association, remains responsible to you for ensuring that any litigation they fund complies with the Code regardless of whether any co-funder is a Member or not.

3.2 Advertising

3.2.1 Our Members may approach you directly to propose funding for your claims and litigation. The Member must, on making contact, disclose that they are a Member of the Association and offer to provide you with a copy of this Code

3.2.2 You are not under any obligation to discuss or accept any funding proposal with any Funder. If you indicate to the Funder that you are not interested in any funding proposal the Funder may put to you, the Funder must not contact you again in relation to that proposal, though you remain free to contact the Funder.

3.2.3 Our Members may advertise their services and may refer in their advertising to the fact that they are Members of the Association.

4. Our Members' Commitment to You

4.1 Our Members promise to treat you fairly and reasonably when providing you with services covered by this Code. In particular, our Members make the following commitments to you:

- (a) They will ensure that their promotional literature is clear and not misleading;
- (b) They will not accept any claim for funding which they consider to be frivolous or vexatious or which in their view otherwise lacks merit and good prospects of success
- (c) They will support the efficient resolution of your claim. This may include funding alternative dispute resolution procedures;
- (d) They will treat your sensitive personal and commercial information as private and confidential as required by law, and will take all reasonable steps to protect any legal privilege attaching to your documents or communications;

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- (e) They will handle quickly and cooperatively with any reasonable complaint you may have;
- (f) They undertake to publicise this Code and ensure that they have the resources and capability to put it into practice;
- (g) They will not engage in any anti-competitive conduct in implementing this Code

4.2 Our Members' Financial Capacity – Capital Adequacy Requirements

4.2.1 A Member complies with the capital adequacy requirements under this Code, if the Member

- (a)
 - (i) is able to pay all its debts as and when they become due and payable;
 - (ii) has total assets that exceed total liabilities as shown in the most recent balance sheet of the Member;
 - (iii) has no reason to believe that its total assets would not exceed its total liabilities on a current balance sheet;
 - (iv) reasonably expects that it will have adequate resources of cash or cash equivalent (when needed) to meet its liabilities for at least the next three months (including any additional liabilities it might incur during that period), taking into account all commercial contingencies for which the Member should reasonably plan; and

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- (v) has ensured that a responsible officer of the Member has documented that the officer has the reasonable expectation for at least the following three month period together with the reasons for forming that expectation, the contingencies for which the Member considers it is reasonable to plan, the assumptions made concerning the contingencies and the basis for selecting those assumptions; or
- (b) the Member is covered by an agreement for the current calendar year by virtue of which the Member's (ultimate) parent company shall compensate any annual net loss incurred by the Member during the term of the agreement to the extent that such loss is not compensated by withdrawing amounts from the profit reserves which were transferred to such reserves during the term of the agreement and the (ultimate) parent company is a regulated insurance company that is covered by EU capital adequacy requirements or is otherwise the holder of a financial services license issued by a national regulator approved by the Association.

5.1 Your Obligations

- 5.1.1 If you enter into a Litigation Funding Agreement and your claim goes to trial, you may be required to give evidence in court. You may also be required to provide copies of all of your relevant documents to the other side. We do not pay you to give evidence, to gather and supply your documents to your solicitors or to help with the case generally. The Funder is also not involved in the gathering or preparation of any evidence. That is a job for your solicitor.
- 5.1.2 If other people have the same or similar claims as you, the Funder may decide to fund their claims too. This may mean that you and they become claimants in the same litigation or that you become a representative party or are represented by another.
- 5.1.3 You must comply with all other obligations as set out in the Litigation Funding Agreement, for example, keeping your contact details up to date and providing all reasonable assistance to your lawyers to prosecute and successfully resolve your claim.

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5.2 Insurance

- 5.2.1 The Funder may pay for the premium for an insurance policy on your behalf for the purposes of covering any Adverse Costs Orders which may be made against you.
- 5.2.2 The cost of obtaining this policy will be subject to reimbursement from any damages or settlement sum as part of the costs of funding the litigation.

5.3 Your Litigation

- 5.3.1 The Funder will leave the ultimate decision over the conduct of your litigation to you and your Lawyers, whose duty to act in your best interests will remain unfettered.

5.4 Settling Your Claim

- 5.4.1 Only you can decide whether to settle your claim. The Funder may, however, ask you to obtain Counsel's opinion on any settlement offer with the opinion being binding on you and on the Funder. The Funder will pay for that opinion.

5.5 What Happens if Your Claim is Successful?

- 5.5.1 If your claim is settled or successfully concluded by judgment in your favour, the Funder will be entitled (subject always to the terms of your Litigation Funding Agreement) to:
 - (a) repayment of all money it has paid in relation to your litigation and claims; and
 - (b) the Agreed Share of the Resolution Sum.

There will be no further charges beyond this.

5.6 What Happens if Your Claim is Unsuccessful?

- 5.6.1 To the extent that was agreed in the Litigation Funding Agreement, the Funder will pay any Adverse Cost Orders which may be made in favour of the defendant and which are not otherwise payable by insurance and will pay Your Costs, subject always to the terms of your Litigation Funding Agreement.

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6. WHAT OUR MEMBERS CHARGE

6.1 The Agreed Share

6.1.1 Our Members will charge you a fee, being the Agreed Share, as consideration for providing funding to you. You need to be aware of the clauses set out in the Litigation Funding Agreement that determine the rate of the Agreed Share. The Funder and you may agree on an increased Agreed Share in the event you ask the Funder to provide additional funds to bring or defend an appeal.

6.2 Reimbursement of Costs

6.2.1 In addition to the Agreed Share, our Members will be reimbursed all costs they have incurred in relation to the claims and the litigation from any Resolution Sum you receive.

6.2.2 Included in this calculation of costs will be the payment of any outstanding insurance premium (if any) obtained on your behalf in accordance with clause 5.2 of this Code.

7. YOUR SOLICITOR’S ROLE

7.1 You Must Have a Solicitor

7.1.1 A Funder cannot enter into a Litigation Funding Agreement with you unless you are represented by a Solicitor in relation to the funded litigation, and the solicitor has advised you in relation to the Litigation Funding Agreement.

7.2 The Solicitor Duties to You

7.2.1 The Solicitor will have a duty to act in your best interests and the Litigation Funder cannot modify or interfere with that obligation.

7.3 The Terms on Which the Solicitor will Act for You

7.3.1 Your solicitor must act in accordance with legal requirements and with the Solicitors’ Code of Conduct from time to time in force and other professional rules. These include duties to act for you with integrity, and in your best interests and the solicitor must not allow his or her independence to be compromised.

7.3.2 Whilst the Funder may assert some measure of control over the litigation funding, your solicitor must not cede control of his or her firm or the conduct of your case to the Funder.

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- 7.3.3 Your solicitor should advise you on the merits of entering into, or continuing with a Litigation Funding Agreement, explain to you the basis on which you will be charged by the Funder and give you details of the estimated cost of the litigation.
- 7.3.4 If your solicitor has a personal benefit or interest in the Funder he or she must disclose that with complete frankness and insist on you receiving independent legal advice.
- 7.3.5 Your solicitor must ensure that any settlement reached with the support of the Funder is in Your best interest and not made solely with a view to obtaining the Solicitor's fee.

8. PROTECTION OF YOUR CONFIDENTIAL INFORMATION

8.1 What Information will be Protected?

- 8.1.1 Your relationship with the funder is protected by the principle of confidentiality. This confidentiality, and the protection it affords, extends to cover information shared within the context of this relationship. The Data Protection Act 1988 provides the statutory framework which governs the confidential treatment of your information by the funder.
- 8.1.2 Your relationship with your solicitor is protected by the principles of confidentiality and legal privilege as set out under the rule 4 of the Solicitors' Code of Conduct 2007. This code of conduct may be accessed online at: <http://www.sra.org.uk/solicitors/code-of-conduct.page>. Your solicitor will explain this to you.

9. WHAT OUR MEMBERS MUST TELL YOU

9.1 You are Entitled to Full Disclosure of All Terms and Conditions

- 9.1.1 The Funder will provide you with full terms and conditions of the Litigation Funding Agreement.
- 9.1.2 In addition, the Funder will disclose to you all ancillary or related agreements or arrangements it may have entered into in relation to your claims (including, where relevant, any co-funding agreements or arrangements) that could adversely affect you.

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10. IF YOU HAVE A COMPLAINT

10.1 How to Make a Complaint

10.1.1 If you have a complaint, you should raise it first in writing with the case manager at the Funder who has been responsible for your Litigation Funding Agreement.

10.1.2 The case manager will acknowledge your complaint promptly, and explain how the complaint will be addressed by the Funder. The complaint will be dealt with fairly and promptly, and you will be informed in writing of the outcome of the complaint. The case manager will keep you informed on a regular basis on the status of the complaint.

10.2 Dispute Resolution Process

10.2.1 If the Funder cannot satisfactorily resolve your complaint, you can use the Association's dispute resolution procedure.

10.2.2 Your complaints will be dealt with by the Association at no cost to you.

10.2.3 If you or the Funder has a dispute concerning the terms of the Litigation Funding Agreement or the terms of this Code that you cannot resolve, one party must serve on the other a notice (the "**Dispute Notice**") with a copy to the Association

10.2.4 The Dispute Notice must set out in detail the nature and grounds of the dispute and the outcome sought.

10.2.5 The Funder and the Claimant shall, within 14 days of service of the Dispute Notice, agree and appoint a Queen's Counsel (the "**Assessor**") to make an independent assessment and determination of the dispute (the "**Determination**").

10.2.6 In default of both parties agreeing the appointment of an Assessor in accordance with clause 10.2.5 either party may thereafter apply to the Chairman for the time being of the Bar Council of England & Wales to nominate an Assessor.

10.2.7 Within 14 days of the appointment of the Assessor, the parties shall each send to the Assessor a paper setting out their position, arguments and the evidence upon which they propose to rely. The decision of the Assessor on the Determination shall be final and binding on you and the Funder, and shall take effect 7 days after it is published to the parties. A copy of the Assessor's decision shall be provided to you, the Funder and the Association.

10.2.8 The Assessor shall determine in his or her absolute discretion the procedures and rules to apply in the conduct of the Determination.

10.2.9 The Funder will meet its own costs and the costs of the Assessor in providing the Determination.

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11. ENFORCEMENT

- 11.1 The Association seeks to ensure compliance with this Code by all members and takes any breach of this Code seriously.
- 11.2 Any Member who is found, as a result of any Complaint determined in accordance with clause 10 above, to be in serious breach of this Code will be liable for expulsion from the Association. In such an event, the Association will assist the claimant where possible to obtain a satisfactory resolution of the claimant's complaint. The Association will not however be responsible for indemnifying any shortfall in the Litigation funding Agreement.

12. OUR MEMBERSHIP

12.1 Criteria to Belong to the Association

- 12.1.1 Membership of the Association is open to any Funder that funds or is contemplating funding proceedings in any Court or tribunal in the United Kingdom pursuant to a Litigation Funding Agreement.
- 12.1.2 All Members must disclose the fact of their Membership in each Litigation Funding Agreement they enter into subsequent to becoming a Member. They shall also make this information available on their web site.

12.2 Where to get a List of Our Members/Former Members (incl. reasons for termination of Membership)

- 12.2.1 [Insert contact details for the Association]

13. HOW TO CONTACT US

13.1 How to Contact the Association

- 13.1.1 [Insert contact details for the Association]

13.2 How to Contact Your Funder

- 13.2.1 The full contact details of your Funder will be provided in the Litigation Funding Agreement.

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14. AMENDMENTS TO THIS CODE

- 14.1.1 The contents of this Code will be reviewed on a regular basis. Members and interested parties can make written suggestions to the Association. A full review of the Code, its effectiveness and relevance and of Members' compliance with it will be carried out by the Association. The Civil Justice Council will be provided with a copy of the annual review. Major amendments will be publicized in a transparent way.

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APPENDIX

1. WHAT THE DEFINED TERMS IN THIS CODE MEAN

Adverse Costs Order	means any quantified costs order made by a Court in favour of a defendant covered by the Litigation Funding Agreement.
Claimant	means any person, firm, or company with claims which may be the subject of a Litigation Funding Agreement.
Agreed Share	means that share of the Resolution Sum which the Claimant and the Funder agree will be paid or assigned to the Funder in consideration of the Funder providing funding for the bringing of proceedings.
Legal Privilege	means the privilege against disclosure which attaches to communications passing between a client and the client's solicitor or legal adviser or to communications in contemplation of litigation.
Litigation Funding Agreement	means an agreement under which the Funder agrees to fund (in whole or in part) the provision of litigation services (by someone other than the Funder) to the Claimant and the Claimant agrees to pay a sum, or assign a share of the Resolution Sum, to the Funder in specified circumstances.
Resolution Sum	means the amount or amounts of money or the value of goods, services or benefits obtained for which the claims are settled or for which judgment is given in any proceedings in favour of the Claimant, including any cost orders made in favour of the Claimant and interest.
Your Costs	means all or any of the items referred to in clause 4.2.1 (a) to (f) of this Code incurred by the Claimant in the course of any litigation to vindicate the claims.

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2. KEY TERMS OF THE LITIGATION FUNDING AGREEMENT

2.1 Taking Advice

2.1.1 You must take your own legal advice in relation to the Litigation Funding Agreement prior to signing it. We recommend that you also take advice on the taxation implications for you should you decide to proceed with the Litigation Funding Agreement.

2.2 Payment of Your Legal Costs and Expenses

2.2.1 If the Funder enters into a Litigation Funding Agreement with you, the Funder will pay such of the costs of your litigation as are specified in the Litigation Funding Agreement. These costs may, depending on the agreement you reach with your Funder, include:

- (a) the reasonable legal fees of prosecuting the claims in relevant court proceedings;
- (b) all expenses reasonably incurred by your solicitors including counsel's and expert's fees;
- (c) court costs;
- (d) any reasonable insurance premiums for insurance taken out in your name with the agreement of the Funder ;
- (e) any other out of pocket expenses of the Funder associated with the litigation and the resolution of your claims; and
- (f) VAT (if any). If you are registered for VAT you may be requested to seek repayment of that VAT and repay it to the Funder throughout the course of the Litigation Funding Agreement.

2.3 Payment of any Adverse Costs Orders

2.3.1 If your claim is unsuccessful and you or the Funder is ordered by the Court to pay the defendant's costs, the Funder will pay those costs unless there is an agreement that such costs will be covered by another means and do not comprise part of the funding provided in the Litigation Funding Agreement.

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2.4 Payment of Security for Costs

2.4.1 If in any litigation you or the Funder is ordered by the Court to provide security for the defendant’s legal costs, the Funder may (subject always to the terms of your Litigation Funding Agreement) provide that security by:

- (a) paying money into court; or
 - (b) providing a bank guarantee; or
 - (c) providing a guarantee or undertaking to the defendant and/or to the court;
- or
- (d) means of a policy issued by an ATE insurer;
 - (e) means of a bond from an ATE insurer or other third party

in each case as ordered by the court.

2.5 Other Services

2.5.1 The Litigation Funder may also provide any other non-legal assistance which you or your solicitors may reasonably request in connection with your claims.

2.6 What Happens if there is an Appeal?

2.6.1 If it considers the appeal to be meritorious and financially viable, the Funder will pay the costs of any appeal and any adverse cost orders that may arise from the appeal. The Funder may seek to negotiate an increase in the Agreed Share to reflect the increased costs and risks being undertaken by the Funder.

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2.7 Ending the Agreement

- 2.7.1 The Funder may terminate the Litigation Funding Agreement at any time subject to paying all the accrued obligations. The Funder will give 21 days' notice of termination, unless agreed otherwise in the Litigation Funding Agreement. The Funder will terminate if it is no longer satisfied of the merits of your claim and/or has determined that the proceedings are no longer viable.
- 2.7.2 You may terminate the Litigation Funding Agreement if the Funder commits a serious breach of the Litigation Funding Agreement and fails to remedy within 21 days of receiving a written notice from you to do so.