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ALERT MEMORANDUM

Litigation Funding: Civil Justice Council Recommends New Regulatory Regime

7 July 2025

On 2 June 2025, the Civil Justice Council (the "CJC") published its Final Report on Litigation Funding (the "Report").[1] The Report followed a review established by the UK government in April 2024 in response to the Supreme Court's July 2023 ruling in *R (PACCAR) v Competition Appeal Tribunal*[2] ("PACCAR"), a decision which created significant uncertainty and upheaval in the litigation funding market by finding that most litigation funding agreements ("LFAs") were damages based agreements ("DBAs"), and likely to be unenforceable due to non-compliance with the statutory regime governing DBAs.

The CJC's recommendations for reform would retrospectively reverse the PACCAR decision, while moving away from the current approach of self-regulation and establishing a statutory "*light touch*" regulatory framework that aims to balance access to justice with appropriate protection for all parties involved.

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[1] https://www.judiciary.uk/wp-content/uploads/2025/06/CJC-Review-of-Litigation-Funding-Final-Report.pdf.
[2] [2023] UKSC 28; [2023] WLR 2594.

Background

In July 2023, the Supreme Court in PACCAR ruled that certain LFAs amounted to DBAs, where they involved a percentage-based return for the funder that was tied to damages. This decision caused considerable disruption the litigation funding market, as it:

- called into question the validity of many existing LFAs as: (i) they were unlikely to comply with the relevant statutory requirements for DBAs (the DBA Regulations 2013), and (ii) DBAs are not permitted to fund opt-out collective proceedings in the Competition Appeal Tribunal (the "CAT");[3]
- created uncertainty for litigants, legal representatives, and litigation funders who had been operating on the belief that LFAs involving a return calculated as a percentage of damages, were not DBAs; and
- forced the renegotiation of many percentage-based LFAs (in which a funder's fee is recovered from damages) into multiplier-based agreements (in which a funder's fee is linked to a multiplier of its investment), often on less favourable terms for funded parties, and while proceedings were ongoing.

The UK's former Conservative government initially planned to introduce legislation to state that such LFAs were not DBAs (the Litigation Funding Agreements (Enforceability) Bill 2024). However, following the general election in July 2024, that legislation was suspended, and the new Labour government indicated it would await the Report and the CJC's recommendations for reform before taking further action. Following a consultation and interim report (published in October 2024), the CJC published the Report on 2 June 2025.

The Chair of the CJC described the Report as providing "*a comprehensive and balanced package of reforms that will ensure that third party funding continues to support access to justice*"; the "*raison d'être*" of the CJC. His view was that the recommendations in the Report, if adopted, would "*form the foundation for a more transparent, fair and effective*" litigation funding framework.

The Report's Key Themes and Recommendations

The Report contains 58 recommendations for the reform of litigation funding. An overview of the most notable recommendations, together with commentary on the Report's key themes, is set out below.

PACCAR

In light of the Supreme Court's judgment in PACCAR, the CJC recommends urgent legislation clarifying that third-party litigation funding is not to be treated as a DBA and should fall outside the scope of existing statutory restrictions applicable to lawyer-based contingency fees. The Report suggests that Parliament should enact this change at the earliest opportunity and with both retrospective and prospective effect to restore market confidence and avoid undermining concluded or ongoing funded cases. As the Report notes, many pre-PACCAR LFAs have not been renegotiated, leaving these cases vulnerable to challenge without legislative intervention. For collective proceedings where funding arrangements were hastily renegotiated following PACCAR, the CJC recommends the new legislation confirm the validity of both pre-PACCAR and post-PACCAR funding arrangements. These recommendations are likely to resolve many of the ongoing disputes over the validity of LFAs which are working their way through the courts.[4]

Access to Justice

The Report states that litigation funding is "*an essential means to secure effective access to justice*"

[3] Although they can fund opt-in litigation, provided they comply with the DBA Regulations 2013.

[4] The Court of Appeal has recently addressed some of the outstanding issues, finding: (i) a funder's return calculated by reference to multiples of its investment is not a DBA, even where the return is expressly or impliedly capped at the level of proceeds recovered in the litigation, and (ii) LFAs may contain an alternative basis for calculating a funder's fee, by reference to a percentage of the damages, where that is expressed to be "*to the extent enforceable or permissible by law*". See *Sony Interactive v Alex Neill; Visa v Commercial and Interregional; Mastercard v Commercial and Interregional; Apple v Rachael Kent; and Apple v Justin Gutmann* [2025] EWCA Civ 841.

and is for some disputes "*the only viable means*" of funding resolution, emphasising that:

— litigation costs present a significant barrier to justice, both directly (where litigation is pursued) and indirectly (where potential costs prevent a party from pursing a claim);

— low-value and mass claims are often economically unviable without appropriate funding; and

— even economically viable claims may not be pursued where parties lack sufficient financial resources.

The Report cites concerns raised in responses to its consultation that funding encourages speculative or unmeritorious proceedings. However, the CJC was not convinced of the basis for such concerns. It considered that recent high-profile but ultimately unsuccessful funded cases, which were used in responses as evidence to support this argument (e.g., *Lloyd v Google,*[5] *Merricks v Mastercard,*[6] *Prismall v Google,*[7] *Le Patourel v BT Group*[8]), raised serious legal issues and were not to be dismissed as speculative or unmeritorious simply because they failed (in whole or significant part). The Report also highlights that funders say that they accept only a small fraction of the claims presented to them (approximately 3% to 5%), which is said to minimise the risk of speculative litigation.

While the CJC was more persuaded that one funded claim, *Smyth v British Airways*,[9] was unmeritorious, it did not appear to the CJC that this claim was backed by an established litigation funder, nor was it suggestive of a general pattern in terms of funding. Nevertheless, the CJC acknowledged there was a risk that litigation funding could be used to support unmeritorious claims and the Report proposes regulatory measures to reduce the prospect of defendants having to settle weak claims on economic grounds rather than defending them in court. The CJC otherwise considered that the court already has sufficient powers to deal with or deter speculative claims from being pursued.

The Report also cites the views of certain respondents to the CJC's consultation, who consider that litigation funding may result in a funded claimant being far better armed than a non-funded defendant, and that funders' returns can be unreasonably high thereby reducing damages available to claimants. The CJC, however, sees these risks as manageable through regulatory safeguards, judicial oversight and robust transparency rules, as detailed further below.

Regulatory Architecture

Historically, self-regulation of the litigation funding market has been championed by groups such as the Association of Litigation Funders (the "ALF"), whose code of conduct sets some limited capital adequacy thresholds and discourages funder control of litigation. But the Report observes that many funders do not join the ALF and that self-regulation does not guarantee anti-money laundering compliance nor consistent consumer protections. Even for those funders who are members of the ALF, the Report cites responses which note that inadequate complaints and sanctions mechanisms are currently in place to address non-compliance with the ALF's Code of Conduct.

With the value of the litigation funding market estimated at between £1.5 to £4.5 billion, the Report finds that the market has reached sufficient maturity to justify shifting from self-regulation to statutory oversight.

The CJC therefore recommends that the current self - regulatory approach be replaced with one of formal, statutory (but light-touch) regulation. It specifically recommends the replacement of section 58B of the Courts and Legal Services Act 1990 (which outlines the conditions an LFA must meet) with a new legislative provision that applies to all forms of litigation funding. The envisaged new legislative scheme would draw a principled distinction between the regulation of funding provided by the lawyers acting in the proceedings (i.e., Conditional Fee Agreements ("CFAs") and DBAs) and third-party

[5] [2021] UKSC 50.
[6] Case No:1266/7/7/16.
[7] [2024] EWCA Civ 1516.
[8] [2024] CAT 76.
[9] [2024] EWHC 2173.

litigation funding. The CJC considers the two regimes are distinct and should be treated as such.

The CJC envisages introducing the new rules via secondary legislation, which should be subject to review after five years to decide whether the Financial Conduct Authority (the "FCA") should have regulatory oversight of the area. For the time being, the Report does not recommend that regulation by the FCA is required, save in cases of portfolio funding. A breach of the proposed regulations regarding litigation funding would render any regulated LFA unenforceable, although the courts would retain powers to waive regulatory breaches if just and reasonable to do so.

The legislation proposed by the CJC would include provisions addressing:

— the capital adequacy of funders – which should be determined on a case-specific basis which allows for the funder to maintain (during the lifespan of the litigation) a sufficient level of capital to enable it to meet financial obligations that may arise under or consequent to the LFA. The litigation funder and the funded party's legal representative would need to certify jointly to the court and any other party to the funded litigation, that the funder has and maintains sufficient capital adequacy. The LFA would need to make provision for the steps which a funder should take if it reasonably believes that it will be unable to satisfy the capital adequacy requirements (e.g., giving appropriate notice to the court and other parties);

— the funder's compliance with anti-money laundering regulations;

— the prohibition of funder control of litigation. A breach of this requirement would, in addition to rendering the LFA unenforceable, result in the funder being liable for the funded party's costs and adverse costs;

— the prohibition and resolution of conflicts of interest;

— the circumstances in which LFAs may be terminated;

— the establishment of an independent, binding dispute resolution process to deal with disputes between litigation funder and funded party (which aims to avoid the kind of satellite litigation seen in the *Merricks v Mastercard* proceedings); and

— an obligation to disclose (at early stage) the existence and source of funding, but not the terms of the LFA itself.

The Report concludes that additional regulation should apply to litigation funding provided to consumer parties and parties engaged in collective proceedings and group litigation, which would include:

— a requirement to have in place ATE insurance with robust anti-avoidance endorsements;[10]

— the imposition of a regulatory "Consumer Duty" on funders, based on the FCA's Consumer Duty. This duty would require the funder to provide the recipient of funding with advance information in clear, simple and transparent terms, about the nature of the funding, its benefits to the funded party as well as its risks (including adverse cost risks and the amount of return likely to be due to the funder);

— a requirement for a funded party to obtain independent legal advice from King's Counsel, paid for by the funder, on the terms of the proposed LFA;

— disclosure of the LFA to the court at the commencement of proceedings, to enable the court to consider and approve (on a without notice basis) the funding arrangements and in particular whether the funder's return is fair, just and reasonable. This would presumably involve a modification to procedure in the CAT, where this analysis is not usually undertaken until much later in proceedings; and

— an obligation for the litigation funder and funded party's legal representative to certify they did

[10] Failure to comply with either the capital adequacy requirements or ATE insurance requirement would result in the funder being required to give security for costs.

not approach the funded party in respect of the claim. In other words, they would need to certify that the funded party sought funding and representation for their claim, rather than the funder or legal representative seeking a party for litigation that they themselves sought to pursue. This rule has the potential to be particularly impactful in curbing existing practices where claims are originated by lawyers and funders.

Beyond orthodox, single-case LFAs, the Report devotes significant attention to portfolio funding, whereby a funder or law firm pools multiple claims and finances them collectively. Because portfolio arrangements can collapse if the underlying legal business model fails (recent examples include SSB Law or Pure Legal), the Report recommends robust FCA oversight and regulation of portfolio funding as a loan product. As with litigation funding, funders providing portfolio funding should be required to maintain sufficient capital adequacy. The Report proposes that the government investigate in parallel the impact such funding has had on the legal profession and whether reform of legal services regulation is necessary as a consequence.

As to the scope of these proposals, the Report recommends that arbitration proceedings are not subject to any of the proposed new regulation governing litigation funding, but that crowdfunding (where it is provided on the basis of financial return to crowdfunders) should be regulated as a form of litigation funding.

Funding and Costs

Under the current *status quo*, funding costs (i.e., the success fee or return paid to a third-party funder) are generally not recoverable from the defendant in litigation. However, the Report notes that arbitrations seated in England sometimes allow recovery of such funding costs in "*exceptional*" circumstances, raising the prospect of an unequal playing field between litigants in court and those in arbitration.

The Report therefore recommends that courts be given discretion to award funding costs from a losing defendant in "*exceptional circumstances*", a standard shaped by factors such as the defendant's conduct, the claimant's financial position and the necessity of litigation funding in the case. Recoverability of funding costs "*should not be the norm*". The CJC believes this change will promote earlier settlement, save court time and prevent frivolous interlocutory applications and unnecessary legal expenditure.

Under the landmark Court of Appeal decision in *Arkin v Borchard Lines Ltd,*[11] courts originally capped a funder's adverse costs liability at the amount of funding contributed. After the Court of Appeal's decision in *Chapelgate,*[12] however, courts have exercised broader discretion, sometimes ordering full adverse costs liability. The Report endorses the codification of the *Chapelgate* flexibility, granting judges the discretion to hold funders fully liable for adverse costs if the circumstances warrant it.

The Report rejects the possibility of a blanket rule that security for costs should be available against funders. Instead, it suggests a more "*balanced*" approach, as it believes the proposed rules regarding capital adequacy and ATE insurance (backed by robust anti-avoidance provisions) should mean a funder can always meet an adverse costs order made against it. However, the Report finds that a funder <u>should</u> be liable to provide security for costs where it breaches the requirements concerning capital adequacy, or where ATE insurance has not been put in place as required.

The Report opts against a statutory cap on litigation funders' returns. Instead, it views targeted judicial scrutiny (particularly in consumer and collective contexts) as a means to ensure that funder returns do not become disproportionate. The CJC views caps on returns as a "*blunt instrument*" that may not account for the widely varying risk profiles of funded cases.

Contingency Fee Regime

The Report recommends the replacement of the current separate approach to the regulation of CFAs and DBAs with a single regulatory regime that

[11] [2005] EWCA Civ 655; [2005] 1 WLR 3055.

[12] *Chapelgate Master Fund Opportunity Ltd v Money* [2020] EWCA Civ 246.

covers all forms of contingency fee funding. This could be achieved by either a simplified standalone system which maintains the distinction between CFAs and DBAs, or through their replacement by a single contingency fee regime. Under this model, the indemnity principle would be abrogated for both LFAs and contingency fees (in order to minimise the potential for technical, procedural challenges to any form of contingency fee agreement).

The CJC also suggests that:

— legislation should clarify that hybrid funding arrangements are lawful (e.g., funding via a combination of fixed fee and CFA arrangements or DBAs, which enable a lawyer to receive a payment or some proportion of their fees in the event that their client's claim fails);

— the prohibition on the use of DBAs in opt-out collective proceedings in the CAT is removed;

— DBAs and CFAs should not cap lawyers' returns where the agreements are entered into by commercial parties. The CJC considers the imposition of caps in this context is a means to effect consumer protection, not required by commercial parties who are capable of negotiating entry into such agreements on an informed basis; and

— the DBA Regulations 2013 be reformed as a matter of urgency to make them easier to follow and more consistent with the demands of users.

Conclusion

In assessing litigation funding's future, the CJC emphasises several core themes: (1) preserving and enhancing access to justice, (2) instituting a proportionate but robust regulatory framework, and (3) harmonising multiple funding mechanisms under an overarching statutory regime.

By recommending legislative clarity regarding PACCAR, mandating standardised obligations around (amongst other things) capital adequacy and anti-money laundering, codifying flexible cost recovery principles and bringing DBAs closer to their original policy intent, the Report aims to reshape litigation funding into a regulated market that avoids some of the currently perceived issues with litigation funding.

It remains to be seen however whether the proposed reforms go far enough to limit the funding of speculative or weak claims. Despite the proposed oversight of funders' returns by the court, the absence of any cap on those returns may encourage funders to pursue such claims. The CJC's "*light-touch*" approach may therefore serve to reinforce litigation as an attractive asset class for funders, rather than a genuine vehicle for claimants to obtain fair redress.

Additionally, even with the CJC's envisioned reforms, settling funded cases is likely to remain challenging. Claimants may still be forced to adopt unrealistic settlement positions because any settlement sum will have to meet not only the claimant's needs, but also the high return on investment which funders expect, as well as the fees of various other stakeholders (insurers, legal representatives etc).

While the adoption of the CJC's proposals will depend on legislative processes, the CJC's blueprint signals a notable shift in approach to litigation funding. Practitioners and stakeholders in the litigation funding market are encouraged to track government announcements in the coming months to see the extent to which Parliament adopts the CJC's recommendations.

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