



EJF Paper on Funding of Collective Redress Procedures.

1. Executive Summary.

EJF has always emphasised the potential that liberal funding will encourage weak or frivolous collective litigation. That has not just been the experience in the United States but also in the United Kingdom. EJF has therefore consistently opposed the availability of sources of finance that may distort the process of collective litigation¹.

In the current European debate about collective redress, the funding of litigation is an issue that is being debated now in certain countries and is expected to become the subject of more frequent debate.

Certain forms of funding (other than the litigant's own resources) already exist in Europe. These include:

- Government legal aid (limited and reducing);
- Success fees whereby an attorney is entitled to an enhanced fee if he wins the case are widely permitted (but note that these are not a percentage of the award as in US-style contingency fees);
- Before and after the event insurance policies; and
- Third party process funding.

US-style contingency fees, whereby the attorney takes a significant part of any damages awarded, are not well established and are banned in most in European countries.

The loser pays rule (whereby the losing party reimburses all or at least a substantial part of the other side's costs) is firmly established across Europe.

Third party process funding of litigation is present in certain major European countries and is well known in party to party litigation. Such finance is provided from a variety of sources including insurers, investment companies and hedge funds. Typically, third party funders contract with litigants to provide finance in exchange for a percentage of any damages recovered or a multiple of the costs incurred.

To a large extent, to date third party process funders have concentrated on large, party-to-party commercial litigation, and it has been common (for example) in intellectual property litigation. Such funding is outside EJF's concern. What matters to EJF is the extent to which third party

¹ This paper does not touch on the use of third party funding in party to party litigation. Such funding is well established and does not raise the issues addressed in this paper.

process funding is (or may in future) be used in collective or representative litigation, because of the concern that such funding could encourage spurious claims.

Where third party funding is not available in collective litigation, EJF opposes its introduction. However, in countries where it is already available or where it in future becomes available as a means of financing collective litigation, EJF's priority is to persuade Governments effectively to regulate and control such funding in order that it should not distort the litigation process or encourage weak or spurious collective claims.

In relation to litigation funding, EJF:

- opposes the introduction of any mechanism that establishes in Europe attorney fees as a percentage of the plaintiff's award as in US-style contingency fees;
- stresses the potential of third party funding to encourage weak or frivolous collective litigation. EJF therefore opposes the expansion of such funding of collective litigation in new countries, and in countries where it is currently available EJF calls for the control and containment of such funding through effective regulation;
- insists on the retention of the loser pays rule and rules that ensure that however funded unsuccessful litigants have the means, if necessary, to meet the cost of reimbursing the winning party's costs; and
- calls for effective safeguards in any third party funding process.

In the UK this is a here and now issue. A major report on litigation costs and funding was published by Lord Justice Jackson on January 14th 2010 that contains recommendations relating to third party funding. For example, the report states that such funding should at least be subject to a code of practice and that in time it may be necessary to issue statutory regulations controlling the way in which third party process funding is provided².

At the EU level, in 2009 two initiatives on collective redress were being actively pursued by the previous Commissioners for Competition and Consumer Affairs in the previous Commission. The new Commission took office on 10th February 2010, and the relevant Commissioners have made clear their intention to pursue these initiatives, albeit probably with policy changes³.

In each of these cases, the issue of funding will arise. EJF calls for any EU relevant legislation redress expressly to address the issue of third party process funding as a means of financing collective litigation, and to identify the minimum requirements and safeguards that should be implemented in this area.

EJF will engage with government authorities on the basis of this position paper as and when the subject of litigation funding arises.

² See separate EJF analysis of Jackson LJ's report. At the time of writing, EJF is preparing further submissions on the final Jackson report.

³ DG Competition has been considering a Directive on damages for breach of competition law. DG Consumer Affairs has issued a discussion paper on consumer protection and is expected to publish a White Paper in this subject later in 2010 or in 2011.

2. Current Funding in Europe.

The main types of litigation funding available in Europe are summarised below. Annex I gives further details. It will be noted that there are regional differences.

- (a) Legal Aid: In the past, many European Governments traditionally provided “legal aid” to impecunious civil litigants. Because of past experience⁴ and the state of public finances, legal aid is available only to a very limited extent for collective litigation, and this source of finance is likely to decline further. It is also important to note that in most cases the provision of legal aid by government has not been accompanied by any in depth examination of the merits of the case, with the consequence that such government finance has been used to support cases that lack substantial merit.
- (b) Nordic Ombudsmen and Compensation Schemes: In the Nordic region, there is a strong tradition of resolving consumer disputes through the ombudsman system. As a result, although the Nordic countries have mechanisms for collective litigation, they are rarely used. In the field of medicines product liability, the Nordic Region has also developed statutory or industry funded compensation schemes. In Denmark, this scheme is Government funded. In the other Nordic countries the schemes are funded by Industry. These schemes stand outside the collective litigation mechanisms and remove the need for litigation.

It should also be noted that each of the Nordic countries has a collective right of action to recover damages, in practice it is not used since disputes are more conveniently resolved by the ombudsman office.

- (c) Representative Litigation: Representative or collective consumer claims for injunctions are available everywhere in Europe⁵. The extent to which such claims may also be made for damages is limited to a few states only. In a number of countries – e.g. Germany and Austria – consumer organisations are funded by Government, and they have a track record of bringing representative cases. The use of consumer organisations to represent consumers in collective claims (or to coordinate and support consumers bringing individual actions) has also been well developed in southern Europe and to an extent in France.
- (d) Insurance: The insurance market has for many years offered both before and (in some countries) after the event legal expenses and costs insurance. Before the event insurance is available to cover unknown future litigation costs. Such insurance is often sold as an adjunct to car insurance policies to cover litigation costs in the event of a claim against the driver. After the event insurance is more expensive and its availability is more limited. It covers future costs in an existing piece of litigation, and it may also include cover against the risk that the insured party – if he loses his case – will have to reimburse the legal costs of his opponent.
- (e) Market Based Solutions: In Germany, Austria, Switzerland, the Netherlands, UK and Eire both before and after the event insurance and third party process funding are available and coexist. As stated above, it is realistic to oppose the expansion of such funding to territories where it has not become established. However, where this is not the case, it is essential that governments recognise the risks and introduce the necessary

⁴ See CSH Hodges “Multi Party Actions” Oxford University Press, 2001.

⁵ See Table in Annex 2.

controls. Annex III proposes a series of safeguards that need to be adopted. This list is not exhaustive. As the position evolves, it is important to develop thinking on this issue.

(f) Assignment of Damage Claims

In certain jurisdictions, notably in Germany, damage claims are sold and assigned by aggrieved parties to funders at a nominal price with a price uplift in case of successful outcome of litigation. An example that received some publicity in this respect is the damage claims made by Cartel Damage Claims ("CDC") against six cement manufacturers who had been found in breach of anti-trust law. A group of 36 aggrieved companies assigned their claims to a special purpose company established by CDC which is pursuing the claims in its own name. The Federal High Court has ruled that this special purpose company has standing to pursue the damage claims.

- (g) Success and Contingency Fees: Annex II lists the countries where enhanced attorney fee arrangements are allowed. Success fees which provide an uplift in normal attorney fees upon a successful conclusion to a case are common. It should be noted that such success fees are not the same as contingency fees in the USA, which allow attorneys to share in a percentage of any damages awarded. There are few European countries where such contingency fees are allowed, and where they are permitted, their use is constrained and limited.

For example, following a decision of the Federal Constitutional Court, Germany has passed legislation permitting contingency fees, but their use is seriously constrained. There remain deep-seated concerns in the major countries of Europe about the conflict of interest created by contingency fees in lawyers and their consequent potential to distort the conduct of litigation.

- (h) Loser Pays Rule: In contrast to the US, the loser pays rule is firmly established across Europe. The EU Commission recognises the importance of keeping this rule, which acts as a brake on bringing weak or frivolous cases. Typically, the loser will pay 50 – 65% of the winner's legal costs, the Court normally judging the remainder to have been "non-essential" and therefore non-reimbursable. However, in Germany and several other countries, most litigation is reimbursed on the basis of the fixed tariff scheme. The losing party in Germany has to reimburse 100% of the winning party's tariff fees⁶. These factors are normally and should be taken into account by third party funders in assessing whether to invest in a case, since the litigants that they finance must be in a position to meet the loser pays rule.

3. Safeguards

Every European country has legislation allowing collective litigation to obtain injunctions. Today 15⁷ of the 27 EU Member States have laws allowing collective litigation for the recovery of damages. Those countries are developing such legislation and another (Belgium) is considering a draft collective action law. EU initiatives from DG Competition and DG Consumer Affairs have been referred to above.

⁶ If the winning party has contracted with his attorneys to pay more than the tariff fee, this additional amount is not reimbursed by the losing party.

⁷ Most recently, Italy passed an amended Class Action Law in 2009 – Law No. 99 of July 23rd – and Poland passed its Class Action Law on 17th December 2009.

The issue of consumer redress will not disappear at either national or EU level. There are strong voices calling for improved protection from consumers, and to date, collective litigation has been seen by the consumer lobby as the principal means of achieving this. Governments will not ignore these calls.

Until recently, the only mechanism that the authorities could think of that would achieve these ends was to adopt the US class action model. But now a new model is emerging among policy makers. This model is based on *encouragement of voluntary settlement of legitimate complaints; assistance from public authorities in gaining restitution for consumers; oversight by the court of voluntary resolution of complaints to ensure due process and to prevent the same matter being raised again; and the relegation of collective litigation to the last resort.*

This new model offers the opportunity of defusing the class action threat. It also reflects EJF's own proposals. But the new model needs to be further developed so as to include safeguards that protect industry's position, and policy makers need to be informed as to why those safeguards are necessary.

The principal elements in developing this new model of redress on which EJF insists are:

- that Europe should maintain its traditional policy that enforcement of generic private rights should be for the public authorities, thus minimising the need for enforcement through private litigation;
- that there are some types of actions that must not be submitted to any collective process, because the individual claims and characteristics of individual plaintiffs need to be assessed. Product liability claims are a prime example;
- that a company's right to defend its position in court must be available in every case;
- that if a claim has merit and a company wants to resolve the matter voluntarily, it should be facilitated in doing so, thereby avoiding the cost of litigation and potential reputational damage. In those circumstances, plaintiffs must show reason why the claim cannot be settled before they are entitled to start a class action;
- that public authorities may play a useful role in facilitating settlement⁸ when that is what the defendant wishes to achieve. The authorities can also be effective in filtering out meritless claims⁹;
- that any involvement of European public authorities in disputes over compensation must not permit such authorities to award compensation for private loss or to exert undue coercive pressure;
- that the courts should be in a position where necessary to oversee the voluntary resolution of disputes, so as to maintain due process, balance and fairness. They should ensure that no public authority or private claimant or funding interest is able to exert undue pressure or has a conflict of interest. Their approval should result in final agreements that prevent anyone else from reopening the case;
- that any class action procedure must (a) only be available as a last resort and (b) include certification and other safeguards, with effective court control¹⁰; and

⁸ For example, in the UK, it was found that some television phone-in competitions were being continued after the winner had been decided, with money being wasted by competitors on expensive phone calls that profited both the television and phone companies. As a result of action by OFCOM, the TV companies made management changes; improved internal controls; and, using their computer records to identify the victims, reimbursed those who had been cheated. All this happened within weeks and without the need for litigation. Similarly in Portugal, overcharging by mobile phone companies was resolved by those companies giving subscribers free calls at weekends

⁹ The Danish consumer ombudsman has found that after discussion with the parties, in 40% of cases complaints are withdrawn by consumers who realise that they do not have a legal right to compensation. The remaining 60% of cases were settled voluntarily. The experience of the Financial Services Ombudsman in England is similar.

- that in cases involving both the imposition of financial penalties by a regulatory authority *and* the award of damages for the consequent loss suffered by third parties, it is essential that the combined economic impact is taken into account to ensure that organisations are not unjustly burdened.

EJF will engage with governments and policy makers on the risks and safeguards needed, with the aim of persuading them that collective litigation should at best be a last resort. It should not be employed unless all other mechanisms of redress have been tried without success, and unless safeguards are in place to minimise the risk of abusive claims.

In EJF's view, European legislators have to date given inadequate thought to such matters. If collective litigation is to be a part of European collective redress policy – albeit as a last resort - it is essential that it is contained and controlled by the provisions needed to avoid unintended consequences. In EJF's view, the main safeguards required are:

- certification of merits before a case can be brought;
- proper class certification procedures to ensure that the action can be fairly tried in respect of each member of the class;
- maintenance of the loser pays rule;
- prohibition of opt-out actions, with cases only being brought by individually identified plaintiffs;
- effective gate-keeper mechanisms to avoid claims that lack merit;
- prohibition of contingency fees and any method of litigation funding that is liable to lead to abusive actions;
- prohibition of any case being used as a vehicle for the imposition of punitive damages;
- maintenance of the current prohibition of jury trials in such cases; and
- regulation and control of any third party funding mechanism.

Policy makers also need to recognise that issues of funding will arise at some point in the debate on collective redress. In that context, the way in which funding is provided – especially by any third party funder – must be subject to carefully balanced rules that protect the interests of all parties and of society as a whole. Annex III contains more detailed safeguards in relation to funding.

¹⁰ See Annex III

Annex I Funding in Europe

Insurance

The insurance market has for many years offered both before and (in some countries) after the event insurance. Such policies are common. For example, most motor insurance policies in the UK and Germany offer legal expenses insurance in case an accident leads to litigation.

Before the event insurance offers cover for a litigant's own costs incurred in litigation brought by or against the purchaser in the event that any of the specific covered circumstances occur. This differs from third party funding in that it is not providing funding for a particular case that has already arisen, but rather provides funding if a covered event happens in the future.

After the event insurance covers the litigant's own costs and (in some countries) the risk that the litigant may have to pay the other side's costs if he loses his case. The cost of taking out such insurance may be high, and it may be difficult to obtain such after the event cover, but while this form of insurance has an impact on litigation, it does not seem likely to distort the *conduct* of litigation or the way in which disputes are resolved¹¹.

In both cases, there is a debate in a number of countries as to whether the winning party should be able to recover the costs of BTE or ATE insurance premiums from the loser.

Third Party Finance

Third party process funding is an arrangement whereby funds are advanced to allow a party to pursue litigation. There are different business models among third party funders, but one typical model is as follows:

- The litigants are required at their expense to appoint their own lawyers and to obtain a report on the merits of his case.
- The process funding organisation will then assess the case, taking into account that they will usually have to reimburse the other party's legal costs if the action fails.
- The threshold for acceptance of a case is high not least because of the loser pays rule. Process funders normally require a strong chance of success before they will accept a case.
- Once a case is accepted, the contract is made between process funder and the litigants. The litigants separately retain and pay their own lawyers.

The process funder will not directly interfere in the conduct of the case, but it will receive reports on progress and express opinions. If those reports indicate unforeseen weaknesses in the case and a lower chance of success, the funder is able to withdraw funding. The funder will be liable for all costs (including those arising up to that point under the loser pays rule, where that risk is covered) but he will have no further exposure. Future costs (including potential payment of the defendants' future costs) will then have to be borne by the litigant, and this may well be enough to cause the litigant to withdraw his claim.

¹¹ As noted above, such insurance can add considerably to a party's litigation costs, and Jackson LJ's report of 14th January recommends that such costs should not be recoverable from the losing party.

Such funding is present in Germany, Austria, Switzerland, the Netherlands, Eire and the UK.

The market continues to expand, and some Governments see the provision of this kind of funding as an alternative to any previous regime of Government backed legal aid. However, third party finance is only viable for larger investments, and hence favours large commercial cases or collective cases.

So far as EIJ is aware, there is no regulation of third party funding in any part of the EU, although in certain jurisdictions the Court will apply its own rules to such funding. In the UK, the Court will not allow a third party funding organisation to have direct involvement in the conduct of litigation.

In the UK also, a voluntary code of practice is being developed by the third party funding industry. In his December 2009 report on the costs and funding of civil litigation in England and Wales, Lord Justice Jackson stated that while he thought that such a code of practice would suffice while the industry is still relatively small, it may well be necessary in the future to control the industry by means of statutory regulations.

Third party funding mechanisms were first developed in Australia and Australian companies have been among those to develop other markets. There are currently substantial third party funding companies operating in London, with more underwriters, hedge funds and brokers continuing to emerge.

It should be noted that in Australia itself, as a result of the decision in Brookfield Multiplex, third party process financing is recognised as an investment industry that should be subject to the financial services regulators in the same way that other investment companies are controlled (see note 12 on page 11 below).

Loser Pays Rule

In contrast to the USA, the loser-pays principle applies to civil litigation in Europe³. The party that loses its case is obliged to reimburse the other party's reasonable expenses.

"Reasonable expense" is interpreted differently from country to country. In the UK it means that usually 50 – 60% of the winning party's costs are reimbursed. In other jurisdictions the proportion is higher. In Germany, the figure is typically 100% of the tariff based fees, if the case is 100% won. Overall in Europe, the average recovery is around 65%.

It is essential that the loser pays rule remain in place as a reality check against litigants bringing weak or spurious cases.

Success Fees

Lawyers are allowed to charge success fees to their clients in almost every EU jurisdiction (see Annex II). Some countries, led by England, have introduced conditional fee arrangements (CFAs), which include 'no win no fee', normal hourly fees and success fee elements.

³ The exceptions to this rule tend to be particular types of litigation. For example, in the UK it does not apply to small claims procedures or labour or housing cases. But the rule is well established for serious civil litigation.

But it should be noted that these “success fees” are not the same as the US style contingency fee system where a plaintiff’s lawyer stands to share in any award of damages. The Nordic states have been *experimenting* with contingency fees in collective actions, but so far this approach has not been established in the Nordic countries and remains rare. Indeed, following its recent review of its national Class Action Law, it looks likely that Sweden will continue to reject the introduction of contingency fees.

Contingency Fees

In this paper, “contingency fee” is used to mean a fee paid to an attorney that is calculated as a particular percentage of any damages awarded. Although it is no cause for complacency, up till now contingency fees are banned in almost all European countries. Despite a limited decision from the Federal Constitutional Court in Germany, there remain deep-seated concerns about the nature of such contingency fees and their potential to distort collective litigation and to introduce conflicts of interest. It is realistic and important to protect this situation. The legal profession has been lobbying to introduce contingency fees as a new and powerful option for funding litigation.

Annex II: “Success” and “Contingency Fees” in Europe

“Contingency fee” is defined as a fee is based on a proportion of the sum recovered (*pactum de quota litis*).

In contrast a “conditional” or “success” fee is an arrangement whereby a party’s lawyer may only receive payment if he wins the case for his client (“conditional fee”) or whereby the attorney may receive a supplement to his normal fee if he wins the case (“success” fee). But neither of these arrangements gives the attorney any share in any damages recovered by his client.

| Country | Success fee | Contingency fee |
|----------------|-------------------------------|---|
| Australia | Yes: 25% cap in Federal Court | No |
| Austria | permitted for TPF | No |
| Belgium | Yes | No |
| Bulgaria | Yes? | |
| Canada | | Yes |
| Cyprus | | No |
| Czech Republic | Yes, capped at 25% | No |
| Denmark | Yes | No |
| Estonia | | Yes |
| Finland | Yes but rare | Yes but rare |
| France | Yes | No |
| Germany | | Yes 2008 on conditions |
| Greece | Yes, 20% cap | No |
| Hungary | | Yes |
| Ireland | Yes: no win no fee common | No |
| Italy | | Yes 2006 |
| Japan | Yes | Yes |
| Latvia | Yes | |
| Lithuania | | Yes, but 50% uplift is illegal. |
| Luxembourg | | No |
| Malta | | No |
| Netherlands | Yes | No. Bar lifted ban on contingency fees 2004, but Ministry not approved. |
| Norway | Yes | No |
| Poland | Yes | No (but occurs) |
| Portugal | Yes | No |
| Romania | Yes | No |
| Russia | Unenforceable but used | Unenforceable but used |
| Singapore | No | No |
| Slovakia | | Yes, up to 20% |
| Slovenia | | Yes up to 15% |
| Spain | | Yes |
| Sweden | | No, Yes for class action |
| Switzerland | | No; Success fee 2005 |
| Taiwan | | Yes |
| UK: England | Yes (CFA 1995, 100% cap) | No |
| UK: Scotland | Yes 100% cap | No |
| USA | - | Yes |

Primary Sources: National Reports from the Oxford Funding and Costs Project, 2009; National Reports in the Stanford-Oxford Global Class Actions Project 2008 www.law.stanford.edu/classactionconf; and Reports in the IBA Task Force on International Procedures and Protocols for Collective Redress, 2007 (restricted copy).

Annex III
Preliminary Summary of Safeguards on Funding

Among the safeguards recommended by EJP are the following.

- Third party funding must be regulated and provided exclusively by undertakings that are registered with and subject to the supervision of the relevant national financial services regulatory authority in each of the countries where they operate. Such financial regulators must assess whether or not particular types of funding amount to “managed investment schemes” which in certain countries are subject to particular control. As noted above, In Australia, third party process funding has been recognised by the court as an investment industry that should be subject to regulation by the financial services regulator.¹²
- Governments must ensure that their regulators maintain a register of those who provide third party process funding and that appropriate regulations apply with penalties enforced for breach of those regulations. Provided the process funder is headquartered in the EU, the prime responsibility should be with the regulator of the country where the funder is based, but each Member State should ensure that funding in its country conforms to the regulations.
- The main guiding principle of any such regulation should be to ensure that control of the conduct of the litigation (and of any settlement of the litigation) lies solely with the litigants and not with third party process funders. The third party process funder must not control the litigation or act in a manner that amounts to effective control.
- The terms of any funding arrangements (and in particular any potential profit element) must be disclosed to the Court and subject to the Court’s power to forbid any arrangements that could distort the proper and sound administration of justice. The Court must ensure that there is no distortive effect resulting from any profit-motive on the part of providers of funding, and must have power to take appropriate measures to prevent this. Court rules and guidelines should be issued to the Courts indicating how funding arrangements can lead to abuse and the need to ensure that appropriate safeguards are applied. The funding arrangements should not be disclosed to the public or to the other parties in the case.
- The Court should, in particular, examine the extent of the financial reward which a third party funder may make in the event of his client winning the case. Binding guidelines should be developed in this area and introduced by way of legislation, preferably at EU level. These guidelines should include reasonable limits to the rewards that can be earned by the funder, in order that Europe may not experience the litigation industry that has developed in the USA. In particular, the guidelines should set reasonable limits to the extent to which a third party process funder may share in any damages awarded, so that any such arrangement does not adversely affect the proper and sound administration of justice.

¹² See the Brookfield Multiplex case in Australia reported on 21 October 2009 in the Australian Financial Review. The Brookfield judgement was made in the Full Federal Court. At the time of writing, (February 2010) this decision is subject to an appeal to the High Court.

- If plaintiffs who are dependant on a third party process funder win their case, they shall not be entitled to recover costs from the defendant in excess of a normal reasonable attorney fee and necessary outgoings. In particular, they shall not be entitled to recover any contingency or success element of the fees charged by the third party process funder.
- In assessing whether it is prepared to invest in a piece of litigation, a third party funder will consider the experience and ability of the lawyers chosen by the party in questions. While this makes sense, a third party funding organisation must not be allowed actually to select the law firm that handles the case. That is a decision for the plaintiffs alone, and the plaintiffs and their attorneys alone should be responsible for the management, conduct and any eventual settlement of the case.
- While a third party process funder should be entitled to receive information on the progress of a case and any significant changes to the prospects of success, such funders should not be able to exercise directly or indirectly any control or influence over the conduct or settlement of litigation.
- If a litigant wishes to settle a case, the terms of the funding agreement must not allow the third party funder to prevent the litigant from doing so, but must oblige the funder to continue financing the case until such settlement is reached. Conversely, if a third party process funder changes his view of the likely success of a case and consequently wishes to stop funding that case, it is in no one's interest that a weak case continues to be funded, and the terms of the funding agreement should be allowed to be such that the funder is entitled withdraw funding in those circumstances¹³. In such circumstances, the funder will be responsible for all costs incurred up to the point that it ceases to fund the litigation, but it shall not be obliged to continue funding the case.
- Funding arrangements may include provisions that cover the position where one party wishes to settle a case and the other does not.
- The losing party will normally be required to reimburse all or a substantial part of the other party's legal costs if that other party is successful. It is important that the Court satisfy itself that each party has the resources to meet this obligation. If there is doubt about one party's ability to reimburse the other party, the Court should be able to make an order at the request of either party requiring the other party to make an appropriate payment into court in order sufficient to cover this eventual liability.
- Any third party funding contract must be between the funding company and the litigants. The agreement with the lawyers must be between the lawyers and the litigants and not with the provider of the finance. The reason for this is to minimise the risk of abusive behaviour in relation to the litigation and in particular of the funder being able to exercise any control or influence over the conduct or settlement of the case.

¹³ This is an area that will need care. It would be unacceptable for a funder to take on a weak case with poor prospects for success simply in the hope of achieving a rapid and profitable settlement, in the knowledge that they can simply abandon the case if such a settlement is not achieved. At the same time, it would be undesirable for all concerned for funding to continue to support a case after it became clear that – contrary to the information originally available and the analysis originally made – the case is unlikely to succeed. The practical reality of litigation is that the outlook for a case changes as the evidence becomes known. However careful the initial analysis, the prospects of success are likely to change.

- For similar reasons, while careful analysis of the merits of a case by third party funders is to be encouraged – including analysis from in-house or external lawyers, the litigation itself must not be handled or controlled by lawyers engaged by the third party funder nor may the third party funder be owned or controlled by law firms or lawyers.
- In recent years, the sale of asset backed securities has become common. It is foreseeable that projected income streams from litigation backed by third party funding organisations could provide the “asset backing” for such financial instruments. This would be distasteful and highly undesirable. Accordingly, such securitisation of income streams from third party process funding should be prohibited.
- The lawyers involved must have no financial interest in the damages awarded. Their financial interest should be limited to charging reasonable fees. By the same token, there must be a limit on any uplift in normal fee rates permissible under any conditional or success fee arrangement.
- Contingency fees, which involve an attorney or his firm personally benefitting from a percentage of any damages awarded, should not be permitted.
- Certain costs should not be recoverable by the winning party. These include the cost of insurance premiums; any amount in excess of the lawyer’s normal fee; the costs of taking out third party process funding and any amount payable to the funder upon conclusion of the case.
