THE CITY OF LONDON LAW SOCIETY

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Civil Justice Council
Room E218
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By email: Graham.Hutchens@hmcourts-service.gsi.gov.uk

Dear Sirs

A Self Regulatory Code for Third Party Funding

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Civil Justice Council's Consultation Paper on *A Self Regulatory Code for Third Party Funding* has been prepared by the CLLS Litigation Committee.

We appreciate that the consultation period ended on 3 September 2010. Given that the paper was only issued on 23 July, the chairman of our Committee requested an extension of time in which to respond. It seemed to us unlikely that interested parties would have sufficient opportunity to provide feedback in a consultation which effectively lasted little more than the month of August when many people are on holiday. It was also not in accordance with the Government's Code of Practice on consultations which suggests a minimum period of 12 weeks and longer if this covers a holiday period. Sadly, the request for more time was declined.

Nevertheless, as the matter of litigation funding is of considerable interest and importance to members of the Society's Litigation Committee and its member firms, we have taken the trouble to respond to the Consultation Paper. Our response is below.

We deal with the four consultation questions in turn:

1. Do you consider that the Code of Conduct for the Funding by Third Parties of Litigation in England and Wales, in its current form, should be endorsed by the CJC as best practice for commercial litigation funders? If not, what improvements should be made?

As a general point, we agree that, at this early stage of the development of the third party funding market, self-regulation is the way forward. Things are to some degree at an experimental stage and we believe that statutory regulation would risk being too prescriptive and might miss the mark. With self-regulation, there is more chance for sensible rules to evolve. Statutory regulation now might strangle the child at birth.

We have the flowing detailed comments on the draft code:

Paragraph number	Comment
1.3	The Funder's reward could in the alternative include or be limited to a multiple of the funding provided, or some other financial reward
2.1(b)	Change "identify" to "ensure"
3.2	Add to the end of the sentence: "acting for the Litigant and independent of the Funder".
3.4	It should be made clear that unless there is another funding agreement with the other co-funder(s), then the primary funder shall be responsible for the defaults and conduct of the co-funders
3.5 and 3.6	We have reservations about the apparent ease with which a funder can walk away from a funding agreement. No funder should be allowed to withdraw without sufficient notice being given. The option of immediate withdrawal without notice is not in our view acceptable; a funder should only be allowed to terminate for good reason and upon reasonable notice being given. We also believe a withdrawing funder should remain liable for existing costs, liabilities and obligations falling upon the litigant, including its obligations towards its opponent. Accordingly, the clauses should be modified so as to say that a funder may only withdraw if there has been a material adverse change in the prospects of success and/or the prospects of recovery in the reasonable opinion of the funder. If there is disagreement between the funder on the one hand, and the litigant and its legal advisers on the other as to this, then the matter should be sent for the opinion of a neutral QC. We also believe that a litigant should on reasonable grounds – such as concerns about the funder's financial ability to discharge its responsibilities under the agreement – be entitled to terminate the agreement. Accordingly a suggested re-draft of the clauses would in our view be: "3.5 The LFA may entitle the Funder, subject to paying all costs, liabilities and obligations of the Litigant (including the Litigant's exposure to pay such monies to any other parties in the litigation) accrued upon giving reasonable notice (in any case not less than 21 days' unless otherwise agreed) to terminate the LFA if there is in the reasonable opinion of the Funder a material adverse change in (a) the prospects of success and/or (b) the likely recovery. If there is disagreement between the Funder on the one hand, and the Litigant and his legal advisers on the other hand about such circumstances arising, then the matter shall be referred to an

	independent Queen's Counsel with experience in the type of claim in issue, for a decision binding upon the Funder as to whether such grounds for termination by the Funder exist. 3.6 The Litigant shall be entitled upon giving reasonable notice (in any case not less than 21 days' unless otherwise agreed) to terminate the LFA upon grounds that in his reasonable opinion, shared by his legal advisers (a) there has been a material breach by the Funder of his obligations under the LFA and/or (b) that the requirements as to the Funder's financial capacity set out in clause 5 below are not or will not at any relevant time in the future be met. If there is disagreement between the Funder on the one hand, and the Litigant and his legal advisers on the other hand about such circumstances arising, then the matter shall be referred to an independent Queen's Counsel with experience in the type of claim in issue, for a decision binding upon the Litigant as to whether such grounds for termination by the Litigant exist. Where such termination by the Litigant is justified, then the Funder shall remain liable for all costs, liabilities and obligations of the Litigant (including the Litigant's exposure to pay such monies to any other parties in the litigation) accrued up to the date of termination."
4.1(c)	The funder should be required to do more than merely "take all reasonable steps" to protect legal privilege. There should be an absolute obligation upon him to do so, including, where appropriate, the entering into a common interest privilege agreement with the litigant. This clause overlaps with clause 8; we would suggest a single clause dealing with privilege and data protection. We also suggest the correction of a typo – it is the Data Protection Act 1998 (not 1988).
4.3	In the fourth line, we suggest the sentence should read: "These costs will only relate to costs incurred during the period covered by the LFA unless otherwise agreed."
4.5	There does not seem to be any definition of 'Adverse Costs Order'.
5.1	We suggest the first sentence should read; "Each funder shall ensure that it has, and confirm to the Litigant that it has adequate financial capacity to meet all of its obligations including under its LFA as follows:" We also suggest that the funder should be obliged to notify the litigant of any material adverse change in its financial position. A litigant should be entitled to terminate the agreement on grounds that in his reasonable opinion, the funder does not have or is in danger of not having sufficient financial resources to carry out is obligations to the litigant. We have set out a suggested clause above in relation to clauses 3.5 and 3.6.
6.2	We suggest the sentence be modified so as to read: "The Funder must not exercise control over the Litigant, solicitor...(etc)"
6.3	We suggest this clause be deleted. This is a matter for the solicitor, who has his own professional obligations, and who is not in any event bound by this Code.
6.4	We suggest this clause be deleted. Again, this is a matter for the solicitor, who has his own professional obligations, and who is not in any event bound

	by this Code. We do believe, however, that it would be appropriate for the Code to state that a funder should disclose whether he has received any commissions or other financial inducements from any other person involved in the arrangements, such as a solicitor, insurer or barrister.
7.1	In the second line, we suggest the deletion of the word 'ultimate' because it does not in our view add anything; indeed the funder is precluded from participating in *any* decisions about the conduct of the litigation.
7.2	We believe the third sentence should be deleted. It is indeed a matter for the litigant alone, acting on the advice of his lawyers, to decide whether to settle a claim. A funder has the option of withdrawing from the LFA if he is not prepared to continue with funding the claim, under the circumstances and safeguards set out above in relation to clauses 3.5 and 3.6.

2. Do you consider that the Constitution for an Association of Litigation Funders in its current form should be endorsed by the CJC as best practice for commercial litigation funders?

Our only comment on this is that the lower limit of £500,000 for membership may present an unjustified barrier to entry for those wishing to enter the litigation funding market. We suggest there should be no lower limit.

3. Will the Code or Constitution have any impact on your area of business or sector – particularly in terms of benefits or costs?

We believe not in the short term. LFAs are still relatively uncommon in high value civil claims (which is the case load of the members of the Committee) and they will remain subject to individual negotiation by the parties in each case. Nevertheless we wanted to give feedback on the Code as we envisage that, over time, elements of the Code may find their way into industry standard agreements. To that extent, we would like to see the Code get off 'on the right foot'.

4. Any other comments?

No.

Yours sincerely

Simon James

Simon James
Chair
Litigation Committee

THE CITY OF LONDON LAW SOCIETY
LITIGATION COMMITTEE

Individuals and firms represented on this Committee are as follows:

Simon James (Chairman)	Clifford Chance LLP
Duncan Black	Field Fisher Waterhouse LLP
Tom Coates	Lewis Silkin LLP
Angela Dimsdale Gill	Hogan Lovells International LLP
Geraldine Elliott	Reynolds Porter Chamberlain LLP
Gavin Foggo	Fox Williams LLP
Richard Foss	Kingsley Napley LLP
Tim Hardy	CMS Cameron McKenna LLP
Willy Manners	Macfarlanes LLP
Rory McAlpine	DentonWildeSapte LLP
Arundel McDougall	Ashurst LLP
Hardeep Nahal	Herbert Smith LLP
Stefan Paciorek	Pinsent Masons LLP
Joanna Page	Allen & Overy LLP
Kevin Perry	Edwards Angell Palmer & Dodge UK LLP
Patrick Swain	Freshfields Bruckhaus Deringer LLP
Philip Vaughan	Simmons & Simmons