



Lisa A. Rickard
President

October 25, 2011

The Rt. Hon Kenneth Clarke QC MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
102 Petty France
London SW1H 9AJ

Dear Sir,

Ensuring Appropriate Safeguards with Respect to Third Party Litigation Funding

Thank you for your letter of October 13, 2011 in response to my letter of July 13, 2011, which set out the concerns of the U.S. Chamber of Commerce Institute for Legal Reform (“ILR”) in relation to the Legal Aid, Sentencing and Punishment of Offenders (“LASPO”) Bill.

While ILR is encouraged by certain aspects of your response, including your reassurance that the Government does not favour introducing ‘class actions’ as they exist in the U.S., a number of concerns remain. In particular, while ILR is also looking forward to the Civil Justice Council’s (“CJC’s”) forthcoming proposals relating to third party litigation funding (“TPLF”), which you refer to in the final paragraph of your letter, ILR is extremely concerned that the outcome may be that the Government endorses the self-regulatory code for third party funding which is due to be finalised this month by a CJC working party (the “CJC Code”). As explained below, in view of our knowledge of how the CJC Code has come about, ILR considers that it is likely to be wholly inadequate to guard against the potential dangers of TPLF.

Rather than endorse an inadequate self-regulatory code, ILR urges the Government to take time to consider the case for a mandatory set of safeguards for TPLF. For the reasons set out below, ILR recommends that such safeguards will be necessary and that the LASPO Bill provides a suitable opportunity to create the power for such safeguards to be put in place following a full consultation.

The potential dangers presented by TPLF

ILR strongly opposes investment in litigation by disinterested third party funders whose sole concern in any case is to maximise their returns. There is a danger that funders' incentive to maximise profits will drive them to exert pressure on claimants in relation to how litigation is conducted, including the acceptance or rejection of settlement offers.

While superficially it may appear that funders' interests are aligned with those of claimants who are seeking to obtain damages, that overlooks the fact that funders may take decisions on the basis of a portfolio of claims rather than each claim in isolation.

Unlike solicitors, who it might be argued are in a similar position where they act under damages-based agreements ("DBAs"), third party funders are not subject to professional rules of conduct which might provide claimants with at least a degree of protection (though ILR respectfully disagrees with the Government's view that such rules obviate the need for detailed regulation of DBAs).

It may also be superficially attractive to consider TPLF as somehow promoting access to justice. However, the reality is that TPLF is deployed almost exclusively in commercial disputes as a way of turning a dispute into an opportunity for profit. Investors in litigation are not motivated by access to justice concerns.

TPLF in collective actions

ILR is especially concerned about the potential impact of TPLF in the context of collective actions. The scale of damages involved in collective actions would create a lucrative opportunity for third party litigation funders and, in cases where the claims of individual members of the 'class' are of relatively low value, funders would likely become the main drivers of the litigation process.

Although it is encouraging that the Government is currently opposed to the introduction of a generic form of class action, it should not be taken for granted that the use of collective compensatory redress will not become more widespread in future. In April this year, for example, ILR contributed to the European Commission's consultation on collective redress and it may be that the impetus for new mechanisms will come from the European Union. In light of this dynamic situation it would be prudent for the Government to be proactive and ensure that adequate safeguards are in place ahead of time.

The need for mandatory safeguards targeted at TPLF and the inadequacy of the CJC Code

The dangers identified above need to be addressed by specific safeguards. Claimants should be protected from the risk of funders withdrawing their funding, being unable to satisfy their funding obligations or taking undue control over how claims are conducted regardless of whether their funders have signed up to a voluntary code. Defendants should also be protected by ensuring they are able to recover their costs in full from third parties which fund unsuccessful claims, as recommended by Lord Justice Jackson.

The CJC Code is not a suitable means of ensuring that adequate safeguards are in place. If only those third party funders which are members of the association which oversees the Code (the Association of Litigation Funders) are required to comply with it, then the degree of protection and the means of redress available in respect of other investors will depend on whether they happen to fall within another regulatory regime which is not designed to address the specific risks presented by TPLF (e.g., the regulatory regimes for claims management companies or financial services).

The content of the CJC Code and the manner in which it has been developed

While ILR awaits sight of a final draft CJC Code, it had serious misgivings about the contents of the last available draft and the manner in which it was developed. In particular, the version set out in the CJC's consultation paper of July 2010: (i) was not the product of an objective, independent drafting process; (ii) would have given funders excessive discretion and control over litigation thereby putting consumers at risk; (iii) failed to address concerns specific to collective proceedings; and (iv) lacked enforcement mechanisms to ensure compliance.

These concerns were raised by ILR in its response to the CJC's consultation¹ following which the CJC published a summary of responses which indicated that "[t]he main concern was that the Code did not strike the correct balance between the rights of funders and claimants so that litigants were not disadvantaged."² Despite that concern, the only stakeholders which have been involved in producing the version now being worked on, so far as ILR is aware, have been the members of CJC's current working party on TPLF which, besides the chair and a single member of the CJC, consists of three representatives of litigation funders and one representative of a legal expenses insurer. Accordingly, the working group is not representative of all stakeholders whose interests are affected by TPLF.

¹ ILR's response is available online at:

http://www.instituteforlegalreform.org/sites/default/files/images2/stories/documents/pdf/international/cjc_third_party_funding_response.pdf

² Civil Justice Council, "Consultation Paper on a Self-Regulation Code of Third Party Funding: Summary of Responses", June 2011, paragraph 3.

If the justification for funders, which are private parties, being so closely involved in drafting the Code is that it will be their association which takes ownership of the Code then one must question why it is necessary for the Government to become involved. Indeed, ILR questions whether it would be appropriate for the Government to endorse a code which has been drawn up largely by industry participants. This would run the risk of failing to provide sufficient safeguards for consumers against a practice which does not have an established track record in the UK, and indeed which presents risks to the sound administration of justice.

The LASPO Bill represents an opportunity to provide for appropriate safeguards

Given the significant package of costs and funding reforms which is currently underway, including the LASPO Bill and other measures which do not require primary legislation, ILR believes that now is an ideal time for the Government to consider mandatory regulation of TPLF including issues such as how best to protect both claimants and defendants, how much of claimants' damages funders should be allowed to take and whether TPLF should be restricted to certain types of claims. ILR respectfully suggests that the Government should insert a provision in the LASPO Bill which would create the authority for a statutory instrument to address these issues following a broad consultation, taking into account the work of the participants in the CJC process to date, but also the concerns of others.

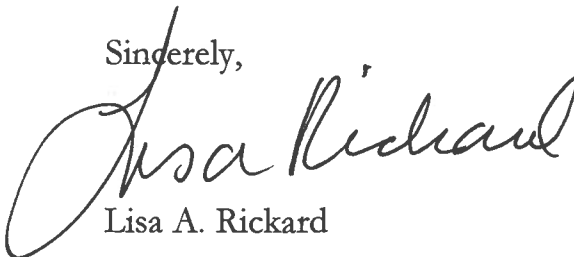
ILR observes in this regard that, due to the high returns sought by third party litigation funders, TPLF is not currently a realistic substitute for legal aid or for conditional fee agreements in the types of claim where they are most commonly used (e.g., personal injury). As a result, it is difficult to see how regulation of TPLF could undermine the Government's aims of reducing spending on legal aid and promoting a varied mix of funding mechanisms.

Regulation of TPLF calls for a proactive approach

While Lord Justice Jackson supported the approach of putting in place a voluntary code for TPLF in the first instance, there is good reason for the Government to adopt a more proactive approach. As stated, it would make sense for this important issue to be considered along with other major reforms of civil justice that are currently underway and, in any case, there is nothing to be gained from waiting for problems to emerge if and when the TPLF market becomes more developed.

Should it be of assistance, ILR would be happy to discuss the issues raised above with you or your colleagues at the Ministry.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa A. Rickard". The signature is fluid and cursive, with a large initial "L" and "R".

Lisa A. Rickard

Copy:

The Rt. Hon Jonathan Djanogly MP
Parliamentary Under Secretary of State for Justice

Lord McNally
Minister of State and Deputy Leader of the House of Lords