



A Response by the Forum of Insurance  
Lawyers to the Law Society Consultation on  
Litigation Funding.

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**FOIL** (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

**FOIL** has approximately 1700 members from over 100 private practice firms. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted following consultation with the membership.

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## **A Response by the Forum of Insurance Lawyers to the Law Society Consultation on Litigation Funding.**

The Forum of Insurance Lawyers notes that the Law Society's Civil Litigation Committee has recommended that the Law Society should review its policies on costs and funding, particularly contingency funding. In particular, FOIL notes that the Law Society wishes to know if members of the profession agree with the arguments it has set out in its "Key issues and background information" paper in support of contingency fees. In addition, the Law Society is also considering its stance on the current CFA regime, Third Party Funding and other costs issues including the retention of the indemnity principle.

### **Contingency Fees**

FOIL has an open mind on this subject. Some members have expressed concerns and it is important, before such a radical reform is introduced, that the consequences and implications are understood fully. At this stage FOIL takes the view that it would be appropriate for the Law Society to also have an open mind on the issue and not to support this major change without calling for it to be investigated further. In particular, although contingency fees may have a role to play in funding some forms of litigation, FOIL would wish to see more detailed research before forming a view on their suitability for personal injury cases.

FOIL has examined the arguments in favour and against contingency fees set out in the paper. We would make the following comments:

#### Access to Justice

FOIL would agree that it is important that all legitimate cases are able to find suitable funding to enable compensation to be sought and recovered where liability exists. The Law Society paper notes that "whilst the conditional fee system has significantly widened access to justice, there remain gaps". It states that some personal injury claims where care damages would be a significant element of the award are "difficult to fund" and that as a result litigants may be denied justice in "particularly complex cases". It states that there are instances

where at present funding is not available "often in what might be seen as the most deserving of cases".

FOIL would urge caution in using access to justice as an argument for the introduction of contingency fee arrangements in personal injury cases. We are not aware of any research which shows that seriously injured potential claimants find it difficult to locate a solicitor to take on their case. This is not an argument that is widely heard anecdotally. To give weight to this point, if it is accurate, FOIL takes the view that it should be backed by research.

Any regime introduced to fund litigation must also, of course, ensure access to justice for defendants. The costs incurred by many types of defendants: local authorities, insurance companies, the NHS, and charities, for example, have a knock-on effect upon the public in general. Private defendants are also entitled to a system in which the defence of claims is not prohibited by excessive cost.

#### Motivation

The paper states that contingency fees may offer clients an assurance of their lawyer's motivation to win.

Whilst this statement may be true, it could also be said of the current CFA regime. The counter argument to this is set out in the 'arguments against contingency fees': that conditional arrangements give solicitors an interest in the action which may conflict with the duties they owe to their clients and to the court.

These arguments must be balanced if the reputation of the profession is not to be tarnished. There have been instances, most recently in the miners' compensation claims, where the availability of success fees has led lawyers to act contrary to their clients' interests. It is important that contingency fees do not provide a greater incentive for unscrupulous lawyers to damage the profession's reputation in the eyes of the public through an excessive motivation to win. FOIL feels that this identified argument in favour of contingency fees should be treated as a double-edged sword.

## Proportionality

The paper states that contingency fees "offer costs recovery which is proportionate to the value of the case, meeting the increasing calls for costs to be so proportionate".

This may be the case in smaller and medium-sized cases. In larger cases, however, whilst fees may be proportionate to the value of the claim, they can quickly become disproportionate to the work undertaken. From the findings of Professor Richard Moorhead and Senior Costs Judge Hurst in their report on the operation of contingency fees in the United States, it is clear that contingency fees in larger value cases can give rise to a fee "disproportionate to the lawyer's effort".

In the United States this is mitigated in some jurisdictions by a system of regulation of the level of fees. Higher fees on large cases are tolerated in the United States because they are part of a system of cross-subsidy under which claimant lawyers use these 'windfalls' on larger cases to fund the bringing of smaller cases where the contingency fees may not be sufficiently profitable to make handling them worthwhile without cross-subsidy. US lawyers typically obtain their work in different ways to lawyers in this jurisdiction and handling smaller cases on contingency fees is seen as vital to ensure that instructions on larger, more profitable cases are also received.

The Law Society paper, in para 2.14 makes it clear that it not intended that cross-subsidy should apply to caseloads in England and Wales, but that instead solicitors will choose the most profitable funding option for each case:

*"It is certainly unlikely that a claimant's solicitor will choose an arrangement where the likely outcome will be lower than could be achieved from the other option. Thus, a relatively low value case is more likely to be done under a conditional fee arrangement and a higher value case under a contingency fee. The Law Society does not consider that this is inappropriate and believes that, as a result, solicitors are more likely to take on a wider range of cases".*

This does cast doubt over the 'argument in favour' that contingency fees will bring proportionate costs recovery. The lack of proportionality perceived under

the present system is most acute in smaller cases. The system outlined above would leave that issue unchanged.

This concept of 'pick and mix' funding whereby solicitors are free to choose, from a range of options, the one that will yield the most profit, creates dangers for the profession. The end result of such a policy is that the overall cost of litigation is likely to increase with no perceivable improvements in access to justice. The additional costs will either have to be borne by clients themselves, running contrary to the philosophy of putting clients' interests first and creating a conflict of interest between the lawyer and client in deciding upon a funding method: or alternatively, much of the additional cost will have to be borne by society in general through increased insurance premiums and a 'knock-on' effect on other organisations. The reputation of the profession cannot be enhanced by allowing that to occur.

The concept of cross-subsidy through contingency fees raises ethical issues and can appear unjust: is it really appropriate for a claimant in a tetraplegic case or a child brain injury case to lose a substantial sum in damages to improve access to justice for those suffering a rear-end shunt? That said, it does appear to offer some benefits to the wider society, through allowing smaller, less profitable cases to be handled. The system envisaged in the Law Society paper does not offer those wider benefits but it still retains the potential for larger fee deals on serious cases than those permitted at present. FOIL takes the view that that change can only be justified by the profession if it introduces a wider benefit. For example, if a contingency fee system, which in effect raised the legal costs for handling a claim, also brought certainty and removed the need (and cost) of detailed assessment, thereby lowering costs overall, it might be justifiable depending upon the percentages permitted. It would not be justifiable if the only result were to increase the profitability of cases. A proposal which has the potential to achieve only that has to be subjected to in-depth scrutiny to ensure it will not merely sanction excessive charging.

The Law Society paper states that to deal with the issues above it will be appropriate for there to be additional safeguards. It is not easy to see how the dangers can be controlled through regulation. As the Law Society states "a balance will need to be struck between protecting the litigant from unreasonable percentages, the need to ensure that the lawyer's risk is adequately reflected and the need for certainty". It is difficult to see how these issues can be balanced by a

simple 'one-rule-fits-all' approach and yet a more complex system, which must inevitably lead to an examination of the actual work undertaken, raises the possibility of even more satellite litigation and post-judgment costs than the present system.

The issue of proportionality raises very difficult issues. The system of regulation will be critical in balancing competing principles of justice. It will not be satisfactory to introduce a contingency system with "regulation to follow": the whole regime must be thought through and developed holistically if mistakes are not to be made which will damage the civil justice process and the profession's reputation.

### Already in Use

As stated in the paper, forms of contingency fees are already used in Employment cases and in the predictable costs regime for RTA cases. FOIL feels that their use in Employment cases could be useful as a research model and would welcome more information on the impact they have had on costs and behaviour in that forum. It must be remembered however that the average award by an Employment Tribunal is under £20,000. The use of 'contingency fees' in lower-end RTA cases must be treated with caution as a model for wider introduction. The RTA cases to which the rules apply have settled and are usually standard cases where the work required is fairly predictable. The rules are limited to small cases where receipt of excessive costs through the operation of a broad-brush approach is not an issue.

### Recovery of Costs

Whilst the issue of recoverability is not included in the arguments in favour of contingency fees, it does have an impact upon several of the arguments against contingency fees. It raises difficult issues: if additional contingency fees are not to be recoverable the claimant's damages must inevitably be reduced. If contingency fees are to be recoverable from a losing opponent, as the paper states "there may well be an increase in the costs of litigation generally". Neither of these outcomes is desirable and it is hard to see how the introduction of contingency fees can be promoted by the Law Society if one of these outcomes is inevitable. The challenge will be to see if contingency fees can remove some of

the problems of the current system without bringing in these disadvantages: the devil is in the detail.

Whilst the Law Society states that its policy has always been to maintain the principle that costs should follow the event, this issue is now being examined in detail, through a number of research studies, and in particular, by Lord Justice Jackson as part of his review of the cost of litigation. Imaginative solutions are being identified. Although FOIL accepts that the Law Society has had a long standing view on the issue it may be an appropriate time to examine the issue in more detail to ensure that ideas thrown up by recent research are being reflected.

The paper states that "it is hard to see why the defendant should not pay the costs simply because a contingency fee agreement is in place". This raises issues covered above under 'proportionality'. If contingency fees are to be recoverable any concept of 'client control' is removed. It must therefore be replaced by regulation to ensure that excessive charging is not permitted. Even if contingency fees are paid by the client market forces do not operate fully to regulate the legal market: claimants do not shop around but find legal representation by other means, often word of mouth, through marketing or through a claims management company. In these circumstances regulation would be required to protect the consumer, and the reputation of the profession.

This raises again the need for further examination of how the whole system including the regulation would work before the value of contingency fees can be properly examined.

#### Unmeritorious claims

The Law Society paper raises the issue of contingency fees exacerbating the growth in unmeritorious claims and states that there is no evidence to suggest that this is the case. The evidence from the United States in the report by Professor Richard Moorhead and Senior Costs Judge Hurst confirms that view and FOIL would agree.

There is some concern, however, at the following paragraph:

"We [the Law Society] consider that the insurance industry is well placed to resist unmeritorious claims. It can do that both by resisting such claims in court and, in its own interests, through the cases that it accepts by way of after the event insurance."

Whilst we accept that the insurance industry can and does resist unmeritorious claims (which we presume includes hopeless cases and fraudulent claims) they are burdensome to the system and expensive to resist. FOIL feels that the Law Society should place responsibility on solicitors bringing claims to resist bringing unmeritorious claims and would consider if it a backward step if the introduction of contingency fees weakened that approach and placed more responsibility on defendants. The muddling of the interests of the providers of legal expenses insurance with the interests of insurance companies defending claims is unhelpful.

At present FOIL takes the view that insufficient is known about contingency fees to enable it to answer a simple 'yes' or 'no' to the question of whether it agrees with the arguments in favour. Too much depends upon detail still to be developed.

FOIL would argue that more research to gain a greater understanding of the issues and identify the pitfalls is essential before a view can be reached on the value of reform. It would welcome lobbying from the Law Society for that research to be undertaken.

### **The current CFA regime**

FOIL has already raised a number of issues, below, on the current regime with Lord Justice Jackson.

#### Fixed success fees

The decision in *Lamont v Burton* [2007] EWCA Civ 429 is seen by FOIL members as particularly unjust, and worthy of urgent rectification. Although FOIL accepts the argument that a certain amount of 'rough with the smooth' is necessary with fixed costs to obtain certainty and reduce satellite litigation, the implications of this decision are seen as bringing the system into disrepute by rewarding on a significant level an unsuccessful lawyer.

The fixed success fee regime also ties defendants' hands where part of a claimant's claim proves not to be genuine. If, for example, the hire claim proves not to be genuine the defendant cannot pursue the matter to court to obtain a cross order on costs because that would entitle the claimant to a 100% success fee.

Overall, FOIL takes the view that, whilst not wishing to lose the benefits that certainty brings (including the avoidance of satellite litigation), the fixed success fee regime would benefit from a degree of flexibility, in particular the ability of a judge to interfere with the default 100% success fee where the claimant has not accepted a reasonable offer or has brought an unreasonable head of claim.

#### BTE cover

On the issue of BTE cover the case of *Kilby v Gawith* [2008] EWCA Civ 812 is widely seen as having increased costs without achieving any improvement in access to justice, and as having compounded a problem which arose with the abolition of the 2000 Regulations. Under the old system of regulation, if a solicitor failed to consider whether or not his client had existing BTE cover his costs could be unrecoverable. Despite the impact of *Sarwar v Alam* [2001] EWCA Civ 1401 claimant solicitors can still recover a success fee even if their client had been in a position to fund the claim under insurance at much lower cost. Despite a lack of awareness of BTE cover the Ministry of Justice's own research has shown a high market penetration of the product of 59%. Greater use of that cover would reduce additional liabilities and significantly reduce overall costs.

#### ATE cover

A major problem in the recoverability of ATE premiums is the lack of market forces to keep premiums low. Following the Court of Appeal's decision in *Rogers v Merthyr Tydfil* [2006] EWCA Civ 1134 a defendant cannot legitimately argue that an ATE premium was too expensive on the ground that other comparable policies cost less. If a proportion of the premium was payable by the claimant at least a small degree of market control would be introduced.

The purchase of cover from non-regulated companies also causes concerns over regulation and fraud. Defendants often have concerns in such situations over the

reliability of the cover in the event that they are successful and have cause to call upon it.

### **Third Party Funding (TPF)**

In a personal injury context FOIL does not believe that there are access to justice issues which require TPF to be made available as a solution. Invariably Third Party Funders look for prospects of success of well over 50% (often up to 70%) on cases worth at least £100,000, (and often much more). A client wishing to commence a personal injury claim fitting those criteria is almost certain to find a solicitor willing to bring the case on a CFA basis. Even in jurisdictions where the TPF market is much more developed, such as Australia, it is rarely used for personal injury cases.

For commercial cases the position can be very different. It can be difficult for a client with a high value commercial dispute which will involve high fees to find a solicitor willing to accept instructions on a CFA, particularly in smaller firms where the high costs involved may create excessive risk. For some of these clients TPF may provide a route to access to justice which would otherwise be unavailable. Entering into a TPF agreement requires a careful weighing of the costs and benefits. Commercial clients may be willing to accept an agreement under which they pay over 30% of their damages in costs to enable them to recover the remainder, but a similar arrangement entered into by a personal injury client could impact upon their future care. Clients in personal injury matters may not have the same kind of commercial awareness which corporate clients have, which makes it more difficult for them to assess the risks involved and make an informed decision.

For all of these reasons, whilst accepting that TPF may have a place in the litigation system, FOIL takes that view that the prohibition against acting for a personal injury client with the benefit of TPF (Solicitor's Code of Conduct Rule 9) should remain in place.

### **The Indemnity Principle**

FOIL is in agreement with the Law Society's recommended policy that the indemnity principle should be abolished.