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JUNE 8 2017, 12:01AM, THE TIMES

# Litigation funders are a growing threat to our justice system

LORD FAULKS, QC



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**A**fter the election the government, whatever its colour, is likely to publish a review of the Legal Aid, Sentencing and Punishment Offenders Act 2012 (Laspo). Before doing so, it should take the opportunity to consider a growing and almost unregulated phenomenon that is in danger of undermining the integrity of our much-admired legal system.

The introduction of legal aid in the 20th century established an exception to the long-held rules that only the parties involved and with a direct interest in a litigation case should finance or benefit from it. Successive governments introduced various

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kinds of conditional fees, which by 2010 had produced something of a bonanza for lawyers and spawned organisations that are parasitic on the litigation process. The review of civil litigation by Sir Rupert Jackson published in 2009 resulted in Laspo and a curtailment of some of the excesses of the market.

Now, though, a new phenomenon is mushrooming: third-party litigation funding. This can come from hedge funds or any other private investors with no direct interest in a case, but who invest in litigation with the sole purpose of realising a high rate of return by taking a considerable share of any compensation.

Research has shown that since Jackson's review, UK litigation funders have increased their global assets under management by more than 740 per cent. Jackson recommended that, in the first instance, "all litigation funders" should subscribe to a "satisfactory voluntary code". A code was eventually produced, but only seven of more than 20 litigation funders known to be active in the UK have actually signed up. In any event, a breach of the code is hardly an incentive to ethical behaviour. A penalty of £500 can be imposed, which pales into insignificance compared with, say, the £40 million which a litigation funder is pouring into a collective case against Mastercard. Even if a litigation funder is evicted from the association overseeing the code, it can still continue unhindered.

As I said recently in the House of Lords, the government should get a grip now on the substantial third-party-funding market. Jackson was clear on what should be done when this market was no longer nascent: "If the use of third party funding expands, then full statutory regulation may well be required."

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Access to justice is extremely important, but the state of the market means that there are real risks of abuse and disproportionately large sums are flowing into the coffers of litigation funders. What can drive litigation is not the desire to redress grievances but to make profits. There are always challenging ethical issues for lawyers conducting litigation in a conventional way. These become much more challenging in third-party-funded cases. To whom is the duty owed? What if there is a conflict?

Let me tentatively suggest a few regulatory safeguards. First, the fiduciary duty of a lawyer towards a client should not be overtaken by an outside commercial interest. This means funder control should be prohibited or restricted. Second, litigation funding should not distort the legal process by creating an external financial pressure. There should be transparency about the provisions of a funding agreement for the judge and the defendant. Third, funders should be subject to licensing through a government agency. It is anomalous that qualified lawyers are subject to strict regulation but not funders. Finally, the licensing agency should be able to impose meaningful, enforceable sanctions for violations of its rules.

Laspo has done much to rebalance the way litigation is financed in the client-lawyer relationship. No doubt further improvements could be made. But it would be a mistake to fail to address the issue of third party funding. We should not lose sight of the public policy considerations which outlawed maintenance and champerty for so long.



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**Agnes Scorer** 4 hours ago

A well written article but it appears to fail to take in to account that third party litigation funders ("TPLF"s) do not finance each and every litigation claim a plaintiff or representatives of a plaintiff present to the TPLF.

For a TPLF to provide the financing and take on board the contingency costs associated with the litigation (plaintiff + respondent costs) the merits of the claim must stack up from a legal perspective. This somewhat reduces the view that TPLF is predominantly about profit and less so about redressing grievances. Without the provision of the financing, many bona fide claims would not progress as a common tactic by the legal team to the respondent is to ramp requests for security of costs which the plaintiff often has to post.

Plaintiffs should be aware of which TPLF is a member of the Association of Litigation Funders (of England & Wales) & if plaintiff decides to accept financing from a non-ALF member, then that is a decision for the plaintiff and should not be interfered with by those in Government who have no direct interest in a case. The members of the ALF tend to be managed by lawyers, less so by those from financial backgrounds

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