

Litigation funding

Litigation funding is where a third party invests in a claim, paying for some or all of a party's costs of bringing the claim in return for an agreed amount or share of the proceeds if the claim is successful.

Funded claims are generally run on a no-win-no-fee basis: if the claim is unsuccessful, the client does not have to reimburse the funder, which simply loses its investment.

Litigation funding has come a long way in the last ten years. Historically, it was seen as very much for '*David v Goliath*' disputes where a claimant with limited resources needed financial assistance to bring a claim against a large opponent with deep pockets.



More recently, the litigation funding market has developed and competition amongst funders has meant that the cost of funding has reduced considerably. For smaller parties, funding can even up the arms race, undermining the common defendant tactic of prolonging the litigation while running up costs in order to strong arm the claimant into a less favourable settlement. Even for well-resourced companies, litigation funding can be a useful tool, taking litigation off a company's balance sheet and allowing it to invest in other areas of the business rather than paying ongoing legal fees to bring a claim which might not bear fruit for several years.

In English litigation, third party funders are not permitted to control the litigation or exercise undue influence over it. They can offer opinions and are required continually to assess and review their funded claims to ensure that the claims are brought on a proper and sound basis. To allow them to do this, funding agreements will generally provide that the funder be kept updated with key developments and given access to relevant litigation documents.

After-the-event insurance

The UK has a 'loser pays' system which, in most circumstances, means the unsuccessful party will be ordered to pay the other side's costs at the conclusion of proceedings. There may also be costs orders on individual issues that are determined as the litigation progresses. No matter how strong a claim is, there is always the risk the court will find in the other side's favour. Costs are likely to be very high if the matter goes all the way to trial, so the risk of having to pay adverse costs can deter potential claimants from bringing even strong claims.

After-the-event ('ATE') insurance is an insurance policy which a claimant (or prospective claimant) takes out after a dispute has arisen. Much like any other insurance product, in return for a premium, the insurer will cover some or all of the adverse cost risk so that if the claim is unsuccessful, the claimant is protected. Some insurers will offer wholly or partly deferred and contingent premiums, which only become payable at the conclusion of proceedings if the claim is successful.

A combination of litigation funding and ATE insurance mean significant commercial claims can truly be brought on a 'no win, no fee, no risk' basis.

Litigation funding in collective actions

Litigation funding and ATE insurance are key to the operation of to the collective actions regime in the Competition Appeal Tribunal. The nature of the regime is such that the class representative will be fighting large, well-resourced and often global entities, for the benefit of a wider class when they themselves stand to gain very little if anything from the dispute. For example, [Mark McLaren](#), former *Which?* Parliamentary and Legal Affairs Manager and consumer champion, is the sole director and member of Mark McLaren Class Representative Limited, seeking to represent UK consumers and businesses who purchased new cars, in a [claim against five international shipping companies](#).

Funding and ATE insurance are essential in these claims. Under the Competition Appeal Tribunal Rules and Guide, a class representative must be able to show at the outset that it will be able to pay the defendants' recoverable costs if ordered to do so, and must be able to demonstrate that it is able to fund its own costs of bringing the claim. While the funder is entitled to make a return on its investment, the return must be approved by the Competition Appeal Tribunal and individual class members will still receive the full value of their claim.

The collective action regime is in its infancy with the test for certification still uncertain pending the judgment of the Supreme Court in [Merricks v Mastercard](#), and the highly complex nature of these claims makes them very expensive. Notwithstanding that, there are currently eight live collective actions funded by five different litigation funders.

The car delivery charges claim is funded by [Woodsford Litigation Funding](#).

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If you would like to receive updates on the Car Delivery Charges claim you can register [here](#) and join the [LinkedIn Group here](#).