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Effective regulation is key to the sustainability of litigation funding warns report

A study shows that the market for litigation funding, otherwise known as third party funding, is firmly established for commercial disputes in the UK. That market is extending into cases involving ordinary citizens, such as personal injury and group actions. Researchers from the Universities of Oxford and Lincoln warn that such developments mean that effective regulation is now needed to ensure clients have control in such disputes. They argue that transparency would protect the integrity of the dispute process, as well as funders' interests.

The report, published this month, concludes that claimants in England and Wales would have to rely on ancient laws that protect a client's interest in dealings with a lawyer—the common law of 'champerty' and 'maintenance'. This was first invoked in medieval times to stop a third party from buying into someone else's lawsuit; but in the 21st century, the researchers argue it should be more widely interpreted to include third party litigation funders as well as lawyers.

There has been a significant increase in the last ten years in the number of suppliers of third party funding in England and Wales, says the report. Third party funders are companies that are capable of raising vast sums of money to allow claimants in civil litigation cases to take their case through the courts or arbitration. In return for their finance, the funders retain a share of any damages awarded.

Under forthcoming legislation, third party funders can include lawyers' firms that are the sole funders of litigation – where they are working with clients on the basis of a contingency fee, also known as 'damages-based agreements' or 'no win no fee agreements'. Such arrangements are already common in the United States, are permitted in tribunals in England and Wales, and are due to be extended by the government under the Legal Aid, Sentencing and Punishment of Offenders Bill. The report notes that this development in the UK should give cause for concern and needs careful review.

Co-author Professor Christopher Hodges, Head of the Centre for Socio-Legal Studies at Oxford University, and Erasmus Professor of the Fundamentals of Private Law at Erasmus University, the Netherlands, said: 'A third party funder should be kept at arm's length in the litigation process. For instance, funders should not determine the terms of a settlement. There is the danger that funders might opt for a lower settlement than the client might want in order to resolve a case quickly. Similarly, we do not want to see a situation where the third party funder and a lawyer's firm are in collusion against their client's best interests. This does not appear to have happened yet in the UK, but we want to ensure that any risk of it happening in the future is removed. Clients need more legal protection as otherwise there is potential for third party funders to control claimants' cases for their own advantage.'

Co-author Professor John Peysner, Head of the Law School at Lincoln University, said: 'Our research demonstrates that third party funding has the potential to play an important part in the developing menu of funding options that will increasingly offer access to legal advice, representation and cost protection to citizens and companies. The key issue is to ensure that funding can legitimately claim that it has the transparency and integrity to support that growth and long term sustainability. Its USP should be that its business model supports access to justice in an open and appropriate model of risk and reward sharing'.

Co-author Dr Angus Nurse, now of Birmingham City University, added: 'The models of funding currently in use within the UK preserve the lawyer-client relationship, and our

research found that funders currently exercise strict due diligence in selecting cases to fund in a way that provides for effective self-regulation of the market. But as new entrants introduce different business models, the expansion in the funding may dictate a review of funding regulation to achieve both client protection and protection of the funding market itself. As a result, we consider that self-regulation may not be sustainable in the long term'.

The report of over 150 pages, 'Litigation funding: Status and Issues', examines third party funding in its many forms in different parts of the world. It finds that governments are encouraging this form of private funding to increase public access to justice, especially where public funds are not available or are being withdrawn.

The researchers suggest that an assessment of existing controls in each country should determine whether there is a need to provide more protection for claimants on a national level. This should be decided on a country- by-country basis, according to the existing professional ethical codes, self-regulatory processes and laws of each country, says the report.

The report shows that, to date, almost all of the claimants using third party funding have been commercial clients, usually small and medium sized companies, rather than private individuals. It suggests that full regulation would become essential if individual consumers start to engage third party funders to pursue their claims. The report concludes that there is less concern about the risks of third party funding for the business community.

A copy of the full report is available to media. For more information, please contact the University of Oxford Press Office on +44 (0)1865 280534 or email press.office@admin.ox.ac.uk

Notes for Editors

* Litigation funding: Status and Issues by Professor Christopher Hodges (University of Oxford, Professor John Peysner (Lincoln University) and Dr Angus Nurse (formerly of Lincoln University and now at Birmingham City University) is published on **date**?

***Professor Christopher Hodges**

Professor Christopher Hodges is Head of the CMS Research Programme on Civil Justice Systems in the Centre for Socio-Legal Studies at Oxford University. He trained as a lawyer, becoming Solicitor of the Supreme Court of England and Wales in 1979, and Solicitor of the Supreme Court of Hong Kong in 1984. He is a Fellow of the Society of Advanced Legal Studies.

He has written many books and articles about civil justice systems and class actions, his most recent books being *The Reform of Class and Representative Actions in Europe: A New Approach to Collective Redress* (2008); and *The Costs and Funding of Civil Litigation* (jtly, 2010).

Professor Hodges is currently investigating alternative dispute resolution systems (ADR), advising the European Commission in Brussels, which issued legislative proposals on ADR on 29 November 2011. He is also writing a book about the research findings, which is due to be published by Spring 2012.

He has advised various governments on issues of justice, particularly in relation to business and consumer policy.

For his profile, go to http://www.csls.ox.ac.uk/research_staff/christopher_hodges.php

***Professor John Peysner**

John Peysner is a Solicitor and Professor of Civil Justice, Lincoln Law School, University of Lincoln and Head of the Centre for Dispute Resolution. He is currently Head of the Law School. He is an Honorary Visiting Professor at City University, London. He was formerly at Nottingham Law School where he edited "The Litigator" and was founding Course Leader of the LLM in Advanced Litigation. He had seventeen years experience in litigation practice, including Law Centres, Legal Aid and latterly, defendant Medical Negligence. He writes and teaches on conditional fees, the civil justice changes, legal aid, litigation skills and funding, risk management and assessment, competition and World Trade Organisation law. He has conducted research on case management, costs, after the event insurance, cost benefit of ADR, civil procedural systems, legal aid, judicial education, consumer attitudes to solicitor's services, the impact of the Legal Services Bill and testing in house against contracted legal services. He is currently conducting research into private damage claims for breaches of competition law in Europe and the rise and fall of recoverability under the Access to Justice Act 1999. He was a member of the Lord Chancellor's Committee on Claims Assessors (The Blackwell Committee) and wrote the first draft of the report. He was a member of the Civil Justice Council (2002 to 2006) and chair of the Costs Committee. He was consultant editor of the Law Society's 'Civil Litigation Handbook'. He was a member of the Civil Committee of the Judicial Studies Board (2000 to 2008) and Academic Adviser to the Northern Ireland Legal Services Commission. He is a member of the Technical Board to the Law Society Clinical Negligence Specialist panel (2011)

For more background go to <http://www.lincoln.ac.uk/law/cdrc/Default.htm>

***Dr Angus Nurse**

Angus Nurse is Visiting Lecturer in Criminology and Criminal Justice and researches access to justice, restorative justice and environmental justice at Birmingham City University. He was Research Fellow in Compensation Culture at Lincoln Law School from January 2008 to the end of September 2011, Investigations Co-ordinator for the Royal Society for the Protection of Birds (RSPB) from 1990 to 1997 and was the RSPB's Legal & Data Protection Officer from 1997 to 2000. He was also an Investigator for the Commission for Local Administration in England (the Local Government Ombudsman) from February 2000 to February 2008. Together with Professor Peysner he has researched representative actions and restorative justice mechanisms in consumer cases for the UK Government's Department for Business Innovation and Skills (formerly the Department for Business Enterprise and Regulatory Reform) and the cause of excessive costs in civil litigation for the National Accident Helpline Ltd.

Angus has also written widely on privacy law, wildlife and environmental law and criminality, and Alternative Dispute Resolution (ADR), particularly the role of public sector Ombudsmen. He is currently investigating possible reforms of the UK Public Services Ombudsmen and their use as an alternative to judicial review, and conducting a review of UK wildlife law.

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