

# Fraud Intelligence

For the prevention, detection and control of fraud in all its guises

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## Litigate for free

Anecdotal reports concerning the costs of English litigation have not been exaggerated: it is very expensive, writes **Elizabeth Robertson** of Addleshaw Goddard. This is not good news for victims of fraud trying to recover their assets.

As a consequence of the current credit squeeze, turmoil in the financial markets and the economic downturn, fraud is much more likely to be uncovered and those who suffer loss are much more likely to want to take action. At the same time, increased regulation across many sectors may prove to be an additional driver to litigation where companies want to show the regulator and the wider world that they discover and take action against fraud. We know of investors, shareholders and businesses looking to bring claims against professional advisers, employees and directors for fraud, breach of fiduciary duty and/or misappropriation of assets.

Quite often, it is not the amount of legal spend incurred when fighting claims which causes concern, but the apprehension that unbudgeted costs might spiral beyond what was initially contemplated. No matter how good the advice regarding the merits of any case might be, ultimately there is a binary outcome in most cases: you win or you lose. In short, uncertainty is all-pervading.

The English Courts have been concerned for some time over the mounting costs to which parties are exposed in litigation. In cases of fraud an application for an injunction and/or freezing order can increase costs considerably. High legal costs can prevent access to justice, even for those cases with good prospects of success. In an effort to combat this, the Courts have made changes to the ways in which litigation can be

funded. If businesses or groups of individuals have a good case, these recent changes can be of real benefit, by giving more certainty over financial exposure across the full range of possible results.

By adopting the right litigation funding model, it is possible to reduce the day-to-day cost of running a dispute. In addition, it is possible to reduce, or eliminate entirely, the amount which needs to be paid in costs and expenses (including an opponent's costs) if you lose.

The funding techniques, which are simple in concept and yet largely unknown, comprise:

### After The Event Insurance

If this is available, the unique aspect of ATE is that if clients lose the case and have ATE insurance, the insurer will cover them against most of their opponent's costs and expenses, but it will not charge clients for this (ie, it waives the premium). Policies can be purchased after a dispute has arisen. If, however, clients do not lose the case, they are liable to pay the premium to the insurer, but this is often recoverable in full from the opposing party. This can therefore represent a win-win situation for clients.

### Conditional Fee Agreements

CFAs are agreements between a law firm and client under which the client will pay the firm's fees at less than standard rates if the litigation fails, and at a standard rate plus a 'success fee' if it is successful. If the client wins, the success fee should be recoverable from the opponent.

### Third Party Funding

This is the provision of funds by those who have no

connection with the litigation in return for a share of the proceeds. Funders will cover legal costs and expenses. If the client loses the case, the funder bears the costs and the client does not have to cover most of them. This option therefore allows clients to transfer the financial exposure to some or all of their legal costs and expenses. In return, the funder requires a share of the damages if the client wins.

There are other benefits to businesses, groups of individuals and even for “the man in the street” with these arrangements. Once an opponent finds out a claimant or group of claimants has put these solutions in place, they will understand that there is an increased risk to them of having to pay a success fee or an insurance premium if they lose. They will also anticipate that lawyers or third party funders have looked closely at the case and decided it was strong enough to back. This is a powerful message to send an opponent and is likely to encourage them to think more seriously about settling earlier. The ability to equalise

the “fire power” between the parties to legal proceedings, particularly in relation to civil fraud claims by private individuals or groups of investors should lead to a greater focus on the legal merits of such claims, with settlements tending less to reflect the inherent imbalance of financial resources between the parties.

Whether used separately or in combination, these funding techniques assist in transferring to third parties the cost risk of disputes, as well as managing and reducing dispute cost exposure. Given the right case, claimants will be reassured to know that it is possible to reduce such exposure to zero, or close to it.

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*Earlier this year Addleshaw Goddard launched a pioneering approach to funding litigation, weaving together the possibilities inherent in CFAs, ATE and Third Party Funding, through Contro £ which is helping clients to retain control of litigation costs more effectively. Go to [www.fundingcontrol.co.uk](http://www.fundingcontrol.co.uk) for more information. **Elizabeth Robertson** (+44 (0)20 7544 5469, [elizabeth.robertson@addleshawgoddard.com](mailto:elizabeth.robertson@addleshawgoddard.com)) is a partner in the Fraud and Regulatory Team at Addleshaw Goddard.*

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