



# UK LAW FIRM GUIDE TO **LITIGATION FINANCING** 2024

Litigation Financing for Commercial Disputes



## LITIGATION FINANCING FOR COMMERCIAL DISPUTES

The rapid growth of the litigation funding and After the Event (ATE) insurance market has brought about many challenges for today's lawyers. In addition to maintaining your position and reputation as a disputes lawyer, you are also expected to provide advice and assistance on an area that is, quite frankly, nothing short of a minefield.

This is where TheJudge and Erso Capital can help. Our jointly produced Law Firm Guide to Litigation Financing provides information designed to help you to:

- Put your client in an informed position to make decisions with regard to the payment of their legal fees;
- Comply with your professional obligations and with the Insurance Distribution Directive when assisting your clients to obtain ATE insurance;
- Provide a higher level of client service; and
- Maximise your firm's profitability.

**This guide has been designed specifically for commercial disputes based in England & Wales; however, many of the principles may also apply to matters proceeding in other jurisdictions.**

## CONTENTS

<b>SECTION 1   Information for the Law Firm</b>	
<b>About TheJudge and Erso Capital</b>	<b><u>5</u></b>
Your SRA Duties	<u>6</u>
- Key Points for the Law Firm	<u>7</u>
- Key Points for the Individual Lawyer	<u>8</u>
<b>SECTION 2   Financing options for the Client</b>	
<b>Managing the cost of bringing a dispute</b>	<b><u>12</u></b>
Litigation Funding	<u>14</u>
- Monetisation	<u>15</u>
After the Event Insurance	<u>16</u>
- Security for costs	<u>18</u>
- Accelerate	<u>18</u>
<b>SECTION 3   Law Firm Funding and Insurance Arrangements</b>	
<b>Financing for the Law Firm</b>	<b><u>20</u></b>
- WIP Funding and Insurance	<u>20</u>
- Portfolio Arrangements	<u>24</u>
<b>SECTION 4   Making an application</b>	<b><u>28</u></b>
Key Criteria	<u>28</u>
The Application Process	<u>29</u>
Required Documentation	<u>29</u>
<b>SECTION 5   Additional Resources</b>	<b><u>31</u></b>
TheJudge's Tailored Workshops	<u>31</u>

## SECTION 1 | INFORMATION FOR THE LAW FIRM

### About TheJudge

Established in 2000 with offices in London, Manchester, California, Toronto and Hamburg as well as affiliates in Sydney, TheJudge is a broker solely dedicated to legal risk insurances which include ATE insurance, contingency fee (Damages Based Agreements) Insurance and other legal risk covers.

Ranked in Tier 1 by Chambers and Partners, TheJudge is one of the most trusted and experienced teams in this highly specialised, technical and fast-moving market and boasts a proven record of not simply responding to developments but pro-actively driving them.

TheJudge Group is a wholly owned subsidiary of the Thomas Miller Group, a distinguished insurance and financial services business, which currently writes in excess of USD \$1bn in premiums a year and has over USD \$3.5bn of assets under management, operating from 18 offices around the world.

### About Erso Capital

Erso Capital, a litigation finance company affiliated to TheJudge, can provide litigation funding solutions in isolation and as part of a comprehensive package which includes insurances being arranged via TheJudge team.

Erso provides finance for legal fees and expenses for individual cases and funding facilities for portfolios of cases, through to monetisation arrangements in relation to existing awards or bankruptcy claim assets. Established in 2021 by the founders of TheJudge, Erso understands the interplay between funding and insurance for disputes, thereby optimising outcomes for clients. Erso's knowledge, broad investment mandate and holistic approach set it apart from traditional third party funders.

### What Do We Do?

We work closely with lawyers to mitigate the cost and remove the time burden of obtaining litigation finance. We give lawyers the tools and support needed to meet professional obligations and to find the appropriate solutions for clients. We facilitate informed

discussion as to how clients will pay for their case and put in place funding and risk transfer solutions that are capable of staying the course. Above all, we find innovative ways for law firms to attract new clients by modelling insurance, funding and fee arrangement options that work for a particular client also but also improve lawyers' fee realisation and profitability.

The litigation insurance market and the litigation funding market should not be considered in isolation of each other. Whether clients have a cash-flow requirement or are seeking to achieve budget and risk certainty over legal spend, it is vital that lawyers understand the variety of products and solutions available in each market and how they might interact to achieve desired objectives.

Our value to you lies in our knowledge of both the litigation insurance and litigation funding markets. We have unrivalled experience in tailoring arrangements which include the integration of funding and insurance and, where requested, we can provide a range of options to both finance and remove the financial risk of pursuing a dispute or portfolio of cases. With Erso's capital base and TheJudge's extensive insurance and reinsurance relationships, you have the support and benefit of a team that can collectively provide a truly bespoke arrangement designed around your clients' particular needs and requirements.

Should your client not require third party funding, or if third party funding is being sourced from elsewhere, TheJudge can still be retained as a litigation insurance broker.

### Our Fees

We are distinguished from our competitors by our experience, our reputation and the way we are paid. We do not charge an application fee. TheJudge receives payment in the form of a contingent commission from the selected insurer upon receipt of their premium. Erso receives a contingent funder fee from the funded party in the event of success.

## Your SRA Duties

The SRA Standards and Regulations 2019 (STaRs) replaced the SRA Handbook in 2019. According to the SRA, the STaRs “comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold”. There are now two distinct Codes of Conduct – one for individuals and one for firms. The two Codes provide a set of standards which you are expected to meet and, for the first time, separate an individual solicitor’s personal responsibilities from those of their firm. The STaRs are much simpler and shorter than the 2011 Handbook and the revised approach offers more flexibility and encourages those to whom the Codes apply to exercise their own judgement in applying the standards to their specific situation. However, whilst the old Handbook went into some detail about discussing fee arrangements with clients, the STaRs structure no longer lends itself to providing examples of how to apply the standards in any given situation. The STaRs implement the EU Insurance Distribution Directive (EU) 2016/97, which provides further obligations for firms assisting clients with their ATE insurance arrangements. The relevant duties and obligations can be found in the SRA Standards and Regulations 2019 (STaRs) (which include the Code of Conduct for Firms and Code of Conduct for Solicitors, RELs and RFLs (individuals)), the SRA Financial Services (Scope) Rules and the SRA Financial Services (Conduct of Business) (CoB) Rules.

## Key Highlights

This section applies to law firms and individual fee earners when advising clients on the management of their legal fees. It is imperative to provide the client with the right information, at the right time and in the right format. The information you give to the client will vary according to their particular needs and circumstances and the type of work you are doing for them. For example, an individual is unlikely to need the same information as a sophisticated commercial client who instructs you to handle their disputes on a regular basis.

Please note that this section is not intended as a substitute for reading the SRA Standards and Regulations 2019.

It is also important to note that additional rules apply to credit related regulated activities such as a disbursement funding loan by way of an agreement subject to consumer credit legislation.

## The Broad Principles

SRA Principle 2, which states “You act in a way that upholds public trust and confidence in the solicitors’ profession and in legal services provided by authorised persons” and SRA Principle 7, which states “you act in the best interests of each client” are probably the most relevant. These duties to extend to fee-earners giving advice relating to litigation funding and ATE insurance. It is arguably not enough to simply rely on a reference to the existence of these products in the retainer letter – there should be active discussion with the client.

All too often lawyers only engage in meaningful discussions about litigation funding and ATE insurance where there is a concern that the client can’t or won’t pay their fees. However, failing to explain to a client that they may be able to secure non-recourse funding for their fees, or insurance that will provide reimbursement in the event of a loss, may mean the lawyer will not have allowed the client to make a fully informed decision or have been acting in the client’s best interests. There is a risk of failing to meet SRA obligations.

## The Potential Penalties

Breaches of SRA obligations should be reported within the firm, and serious breaches may have professional disciplinary implications, or ultimately even lead to personal criminal sanctions. In addition, a breach could open the door to potential professional negligence claims and lasting reputational damage.

## How We Can Help

Regular training sessions providing an updated overview of the market and available products are vital. Many law firms run sessions focused on litigation funding, but such sessions often refer to insurance superficially, without examining products beyond adverse costs cover, or discussing the interplay of insurance and funding, or the law firm’s specific obligations relating to insurance distribution activities.

Training workshops by TheJudge in conjunction with Erso provide market intelligence using practical examples that give the participants a real-life understanding of how both funding and insurance options can be tailored and combined to meet the needs of the client and the firm. Click [here](#) to read more about what we offer.

## Key points for the Law Firm

**A law firm should be registered with the Financial Conduct Authority (FCA) for insurance distribution.**

The SRA Financial Services (Scope) Rules state that a law firm may carry on insurance distribution activities but only as an ancillary insurance intermediary. However, in order to do so, your firm must be registered with the FCA as an “Exempt Professional Firm” and the SRA must have been notified of your registration. The regulated activity must arise out of, or be complementary to, other professional services provided to the client. As a result, it is not permissible for a law firm to undertake a regulated activity in isolation for a client without exempted status or a direct FCA authorisation.

**Whilst a firm can carry on insurance distribution activities as an ancillary insurance intermediary, it must not involve itself in creating, developing, designing and/or underwriting a contract of insurance.**

This is an important point because, historically, some lawyers have played an active role in structuring their client’s litigation funding and ATE insurance arrangements. The lawyer will be required to provide information relating to the client’s case and their specific insurance needs but they must leave it to the insurer and/or a regulated broker to use this

information to create, develop and design an insurance solution for the client.

**The law firm must appoint an Insurance Distribution Officer to take responsibility for the firm’s insurance distribution activities.**

The SRA must be notified of the Insurance Distribution Officer’s name and contact details. This is the case even if all you plan to do is assist the client to complete the application form for ATE insurance.

**The law firm must ensure its litigation/disputes lawyers understand the litigation funding and ATE insurance options that may be available.**

The CoB Rules stipulate that each relevant law firm employee must possess the requisite knowledge and ability to be able to undertake insurance distribution activities that arise as part of their role. Even sophisticated claimants may not have a sufficiently broad understanding of the products available to absolve the law firm of their responsibility to put the client in an informed position with regard to managing their legal fees in a dispute. It is, therefore, important that disputes lawyers are able to hold meaningful discussions about a changing market with their clients and that they refer the client to a specialist if the client requires a more detailed conversation than they are able to provide.



### For the individual lawyer

The STaRs place much more obligation on personal professional responsibility. Individuals are personally accountable for compliance with the Code of Conduct for Solicitors and other regulatory requirements which apply, including the SRA Financial Services (Conduct of Business) Rules.

#### Important things to know before assisting the client with ATE insurance

It is a requirement that you act in the best interests of each client. It is hard to see how you can meet this requirement without first discussing the client's needs and ensuring the client is aware of the options that are available to them.

- **The Code of Conduct for Solicitors includes the following:**

You must give clients information in a way they can understand and ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

At the time of the engagement and as the matter progresses, you must ensure that clients receive the best possible information about how their matter will be priced, the likely overall cost of the matter, and any costs incurred.

In addition to discussing your fee estimate, you should be discussing with the client how they might pay for your fees, as well as the protection that may be available to them in respect of the other liabilities they may face, such as exposure to disbursements and the potential for adverse costs orders.

- **The SRA Financial Services (Conduct of Business) Rules set out the information you must give to the client before providing a service which includes the carrying on of regulated activities.**

When carrying out insurance distribution activities, the Rules provide that you must explain that the law firm is an ancillary insurance intermediary and provide the following statement:

"[This firm is]/[We are] not authorised by the Financial Conduct Authority. However, we are included on the register maintained by the Financial Conduct Authority so that we can carry on insurance distribution activity, which is broadly the advising on, selling and administration of insurance contracts. This part of our business, including arrangements for complaints or redress if something goes wrong, is regulated by the Solicitors Regulation Authority. The register can be accessed via the Financial Conduct Authority website at [www.fca.org.uk/firms/financial-services-register](http://www.fca.org.uk/firms/financial-services-register)."

This statement can be given on a stand-alone basis or can be built into other documentation such as your standard terms and conditions, provided it is given in a manner that is "clear, fair and not misleading".

#### What to consider before introducing your clients to providers in the litigation funding and ATE insurance market

- **You must act in your client's best interests and retain your independence when recommending third parties to your client.**

Many finance providers incorporate into their sales pitch their ability to refer work to law firms that in turn refer their clients to them. A lawyer must not let the promise of future work or their gratitude for past work be the reason that they refer clients to one particular provider.

- **You must not use, or propose to use, the services of another person unless they are appropriately registered and authorised to provide the necessary service.**

Any party assisting the firm or the client to arrange ATE insurance must be FCA regulated or be an exempt professional firm under Part XX of Financial Services and Marketing Act. This means that allowing the litigation funder to source or arrange the client's adverse costs insurance policy will not absolve the lawyer of their SRA and IDD duties and could lead to the law firm falling foul of their duty not to use, or propose to use, the services of a party that is not authorised to carry on insurance distribution activities.

- **Any referral to a third party that can only offer products from one source is made only after the client has been informed of this limitation.**

The client should be made aware that the market offers a variety of products both on a deferred premium and upfront premium basis and that these products can be obtained on their own or can be mixed and matched to create a bespoke solution for the client's case.

- **Any arrangement you enter into with a funder or insurer must provide that referrals will only be made where it is in the best interests of the particular client.**

This is particularly important where you are considering (or have entered into) a portfolio arrangement between your firm and an insurer and/or funder which provides for insurance or funding for the client.

- **The client must be fully informed of any fee sharing relevant to their matter.**

The client needs to be made aware if you have entered into an arrangement through which the funder or insurer provides cashflow or hedges some of the law firm's risk in return for a share of the law firm's fees, even if the client is not a party to the arrangement.

- **The client needs to understand that funding and insurance products can be purchased separately.**

They also need to be aware of the differences in the terms available and any changes to the price. For example, if a litigation funding arrangement involves a referral to the funder's preferred adverse costs insurer, the client needs to be made aware of the following:

1. More competitive terms may be available if they search the market
2. A specialist broker can be engaged to search the market for them
3. If the arrangement involves the funder paying all or part of the premium on an upfront basis, the client should understand that:

- a. a deferred and contingent premium may be available from the same or other providers.
- b. the upfront element of the premium will be added to their loan and will be subject to the agreed success fee.
- c. whilst a deferred and contingent premium may be slightly higher than an upfront premium, the client needs to be put in an informed position to compare the difference in price between the upfront premium with any resulting cost of funding versus the cost of the deferred and contingent premium.

#### Prior to the conclusion of a contract of insurance, you must provide the client with the following:

- **A statement of their demands and needs, and the insurance proposed must meet these demands and needs.**

It is vital that the insurance policy meets the demands and needs of the client. This is so even if it is being obtained predominantly to give comfort to the litigation funder as a prerequisite to a litigation funding arrangement. You must provide the client with objective and relevant information about the policy and how it meets their demands and needs in good time so that the client can make an informed decision on whether to purchase the policy. The details must be adapted according to the complexity of the contract of insurance proposed and the individual circumstances of the client.

- **Whether the firm provides a personal recommendation about the insurance products offered.**

Where the firm has given a personal recommendation to the client, the firm must, in addition to the statement of the demands and needs, provide the client with a personalised explanation of why a particular contract of insurance best meets the client's demands and needs. See the Personal Recommendations section on the following page to understand more about the enhanced actions a lawyer must take when making a personal recommendation.

■ **An Insurance Product Information Document.**

If the client is an individual acting outside of their trade or profession, you must ensure the insurer provides them with an Insurance Product Information Document (IPID) setting out the key information relating to the policy necessary to enable them to make an informed decision about the specific insurance product. An IPID must be provided whether or not you are providing a personal recommendation and irrespective of whether the policy is offered as part of a package with a non-insurance product or service such as litigation funding.

■ **Whether the firm is acting as an agent for the client or for the insurer.**

If an insurance broker is involved, it should also be made clear to the client whether the broker is acting as their agent or agent to the insurer.

■ **The firm's relationship with the insurer.**

In particular, the client needs to be notified if the firm has a direct or indirect holding representing 10% or more of the voting rights or capital in a relevant insurer, or whether an insurer has a direct or indirect holding representing 10% or more of the voting rights or capital in the firm.

■ **If your firm is contractually bound to place insurance with a specific insurer, you will need to provide the name of these insurers to the client upfront.**

If your firm uses more than one insurer, you must provide the names of all insurers and let the client decide who they wish to go with.

**Making personal recommendations**

Many clients will expect their lawyer to personally recommend the most appropriate insurance product to meet their needs and, historically, many lawyers have done this as a matter of course. The latest version of the SRA Financial Services (Conduct of Business) Rules echoes the Code of Conduct in that it places the focus personally on individual solicitors rather than the firm.

■ **You must disclose whether you are making a personal recommendation and, if so, whether it is based on a “fair and personal analysis”.**

Where you provide a personal recommendation, you must also provide a personalised explanation as to

why this contract of insurance best meets the client's demands and needs.

■ **If you are making a personal recommendation based on a “fair and personal analysis” your analysis must have included “a sufficiently large number of insurance contracts available on the market” and must be “in accordance with professional criteria regarding which contract of insurance would be adequate to meet the client's needs”.**

Such analysis can be time consuming; however, you, or the client, can instruct a regulated broker, such as TheJudge, to undertake a search of the market and compare insurance products on your client's behalf.

**Commissions and incentives**

■ **You must account to the client for any financial benefit or other advantage received as a result of referring clients to a litigation funder or ATE insurer.**

Where the firm receives commission or a financial benefit, it must keep a record of the amount and how the firm has accounted to the client. You can only keep a financial benefit if the client has been notified of the amount and has agreed that you can keep it.

■ **A firm must not be remunerated, or remunerate its employees, in a way that gives rise to an incentive to recommend one ATE insurance policy over another if the other policy better meets the client's demands and needs.**

You must personally be able to justify the choice of any funder or insurer you put forward based on your client's needs over any potential benefit to you or your firm. Solicitors can no longer leave this to their firm – you must be able to personally justify the choices and advice offered to each client.

**And finally**

Your obligations to the client especially in relation to Insurance Distribution are complex. [Click](#) to read more about TheJudge's Accelerate product which helps you demonstrate that market searches have been carried out and relieves some of that burden (for cases where the level of insurance required is up to £250,000).

It is important to keep records of your discussions with the client and your insurance distribution activities. Your normal file note will be sufficient provided it contains the name of the client, the terms and the date of the instruction.



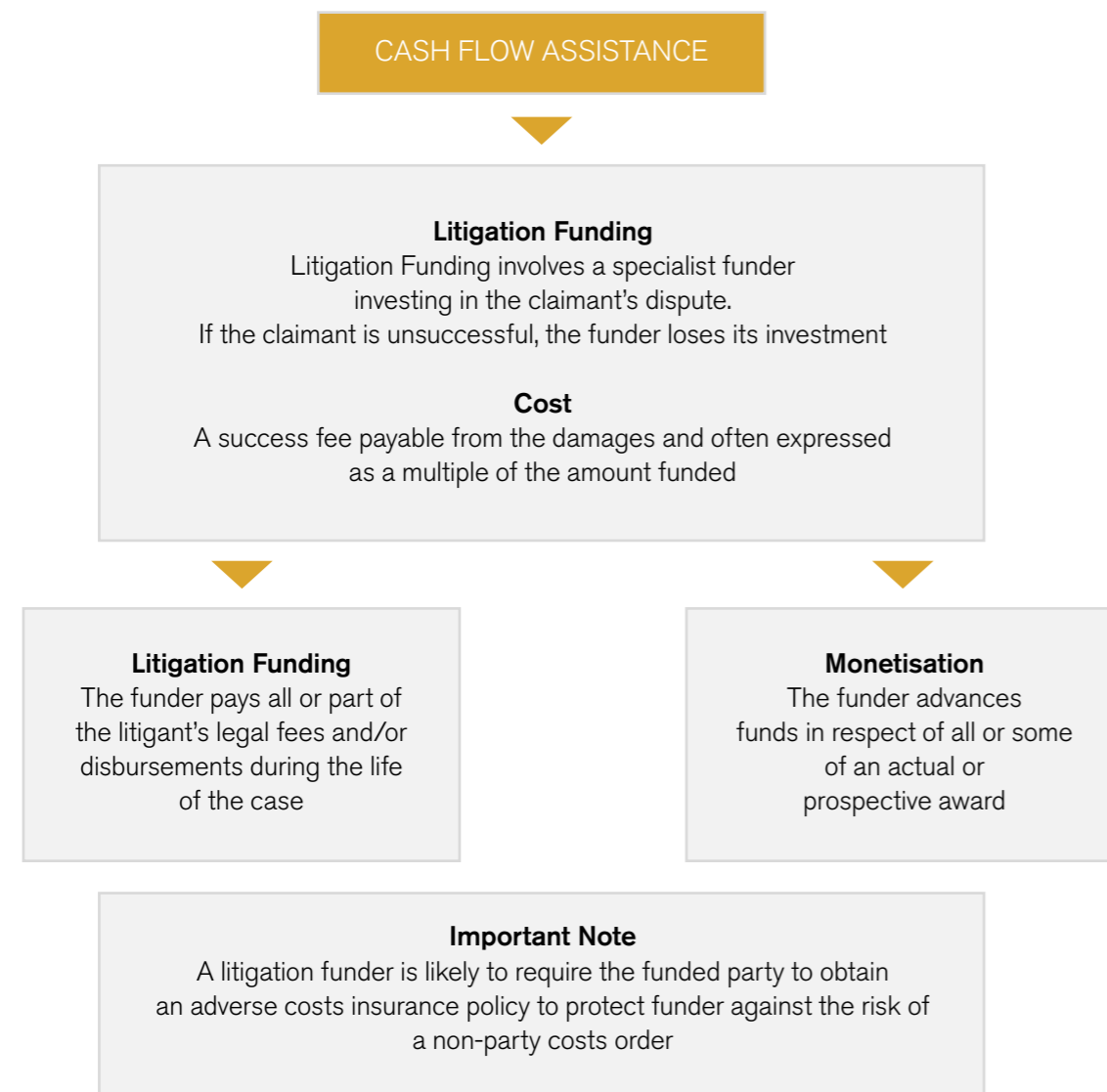
## SECTION 2 | FINANCING OPTIONS FOR THE CLIENT

### Managing the cost of bringing a dispute

Whilst litigation funding offers valuable support for claimants requiring assistance with the ongoing payment of their legal fees, ATE insurance can often provide a flexible and cost-effective route to fee certainty for claimants and defendants where cash flow is not the primary concern.

Understanding the full breadth of the options available, how they can work together and how they impact the net recovery of the claim is vital when considering the most commercial way to facilitate a dispute.

The key to finding the most cost-effective route to bringing a dispute lies in identifying the overriding objective





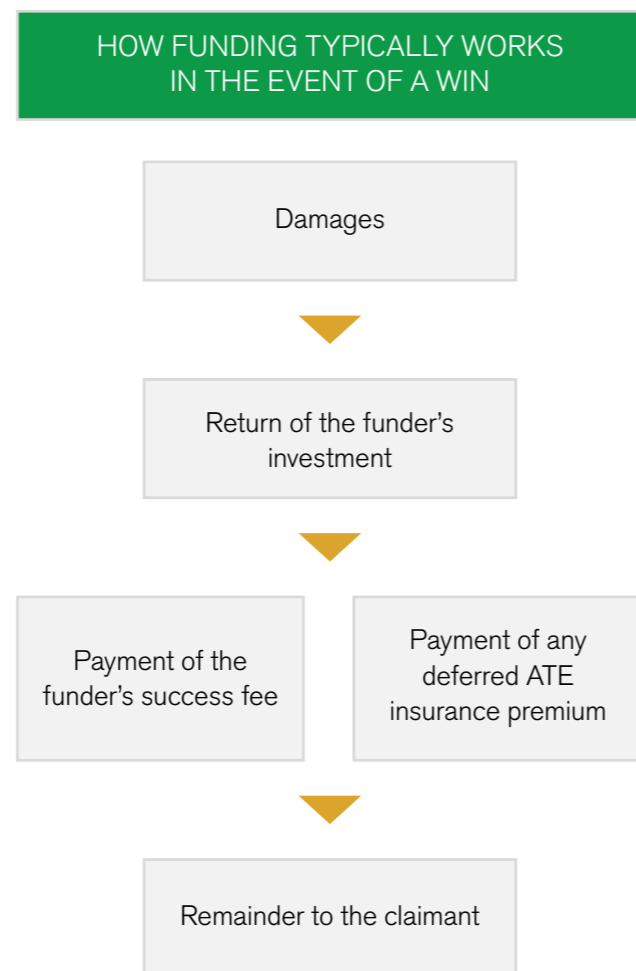
### Litigation Funding

Traditional litigation funding involves a specialist funder financing some or all of your client's legal fees incurred in bringing the dispute in exchange for a share of or payment from any damages recovered.

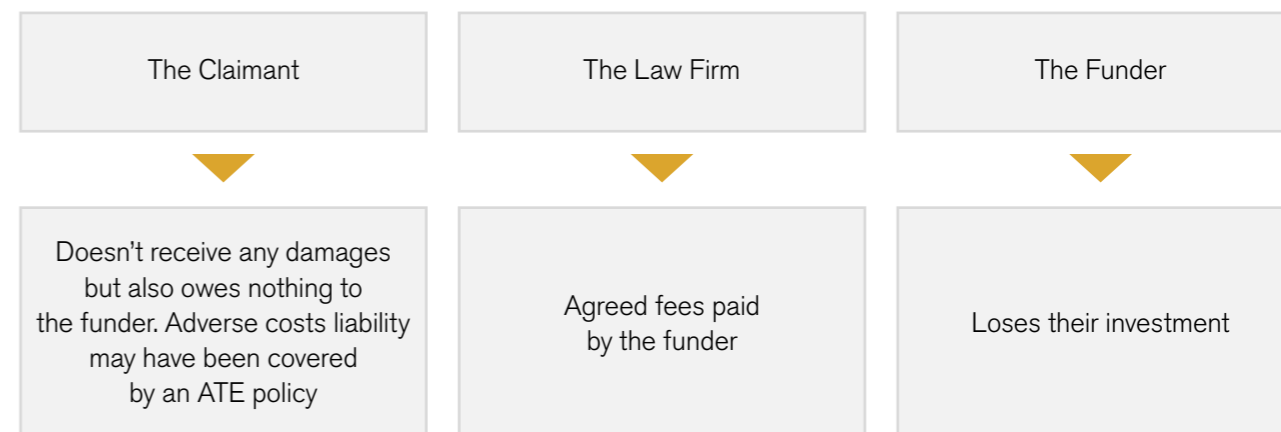
#### What can be funded?

- Own solicitor fees: the funder may expect the client to pay a portion of your fees and/or may ask the lawyer to act on a partial conditional fee agreement.
- Disbursements: such as Counsel's fees, court fees and expert fees.
- Enforcement costs: the funder may be willing to fund the cost of enforcing an award, once obtained, and recovering the damages.

#### How does Litigation Funding work?



### HOW FUNDING TYPICALLY WORKS IN THE EVENT OF A LOSS



#### What does litigation funding cost?

The success fee is usually expressed as:

- A multiple of the amount the funder has invested; or
- A percentage of damages; or
- The greater of the above

The judgment of the UK Supreme Court in *R(on the application of PACCAR Inc) v Competition Appeal Tribunal [2023]* determined that funding agreements where the funder's success fee is a percentage of damages must comply with the Damages Based Agreement Regulations 2013. As a result, and unless and until there is a change in the law (through legislative change and/or case law), funders may exercise caution and seek a multiple-based success fee only for litigation in England & Wales and for proceedings in the Competition Appeals Tribunal. In other jurisdictions funders might structure returns based on or to include a percentage of damages.

#### What types of cases can be funded?

Litigation funding is available for claimants with damages-based commercial disputes provided there are reasonable prospects of the claim succeeding and the opponent paying the damages.

#### Who should use litigation funding?

Claimants that require cash flow assistance to pay their legal costs and are unable, or do not wish, to negotiate an alternative fee arrangement with their lawyer which would not require any fees to be payable during the course of the dispute.

#### How can Erso Capital help?

Erso Capital is a litigation funder that provides non-recourse funding for legal costs for a wide spectrum of commercial litigation and arbitration matters. Erso is an affiliate of TheJudge and enables a solicitor to access a combined litigation insurance and funding solution to provide the appropriate commercial outcome.

#### Funding for smaller disputes

The wider funding market is geared towards high value disputes and there may be barriers to funding small to medium sized commercial disputes where the funding returns might ordinarily be disproportionate to the proceeds of such litigation. Erso Capital's "SME Facility" has been created to overcome those barriers. Returns are typically half the cost of normal litigation, achieved through staged pricing and fairer returns based on amounts actually deployed rather than committed. More details are available at [www.ersocap.com](http://www.ersocap.com).

#### Monetisation

In certain circumstances, a funder may be willing to monetise a claim by advancing funds in respect of some or all of an actual or prospective award. The monetiser will often also pay some or all of the legal costs incurred in bringing the claim or enforcing the award.

Monetisation is often utilised in insolvency matters and in high value commercial disputes, including investment treaty arbitration, where the claimant is seeking to release funds from their dispute to pay for other expenses or is suffering from litigation fatigue and wishes to extract themselves from the claim.



**What does monetisation cost?**

The funder will either retain all of the recovery or will take a share of it, depending upon the terms of the agreement.

**After the Event (ATE) Insurance**

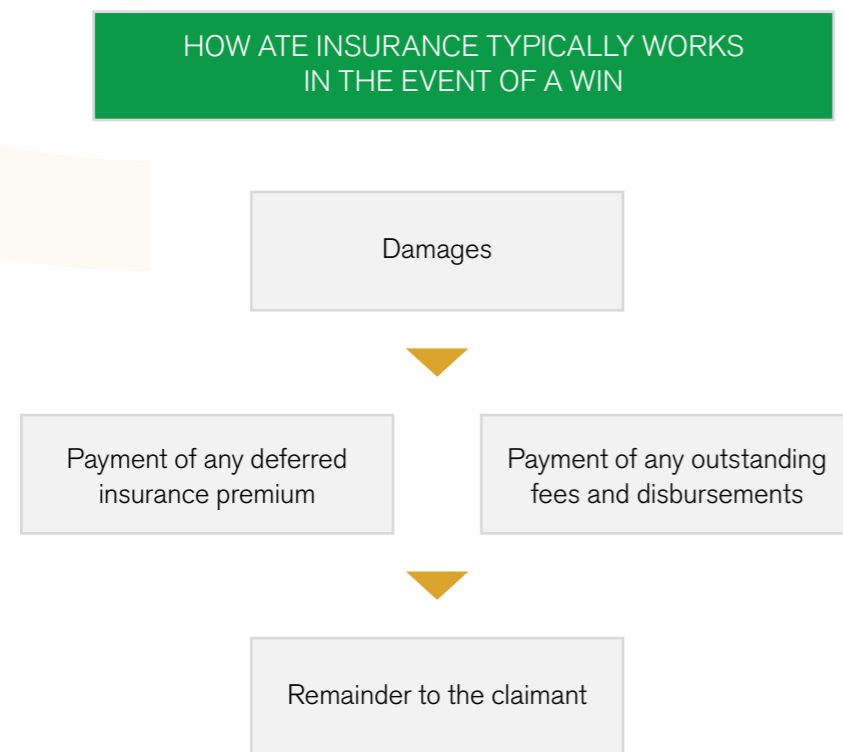
The risk of having to pay the opponent's costs in the event of unsuccessful litigation or arbitration can be prohibitive for many claimants. Some good cases are not pursued due to fear that adverse costs can more than double a litigant's overall financial exposure in the event they lose. Other cases are frustrated when the defendants are granted an order compelling the claimant to provide security for their costs.

In both instances, ATE insurance can provide an indemnity to cover the claimant's potential exposure to their opponent's costs and, where required, the policy can be used as a means to provide adequate security for costs, either directly or indirectly by underpinning a separate financial guarantee in favour of the opponent.

**What can be insured?**

- Opponent's Costs: client's potential liability for the opponent's costs

**How does ATE insurance work?**

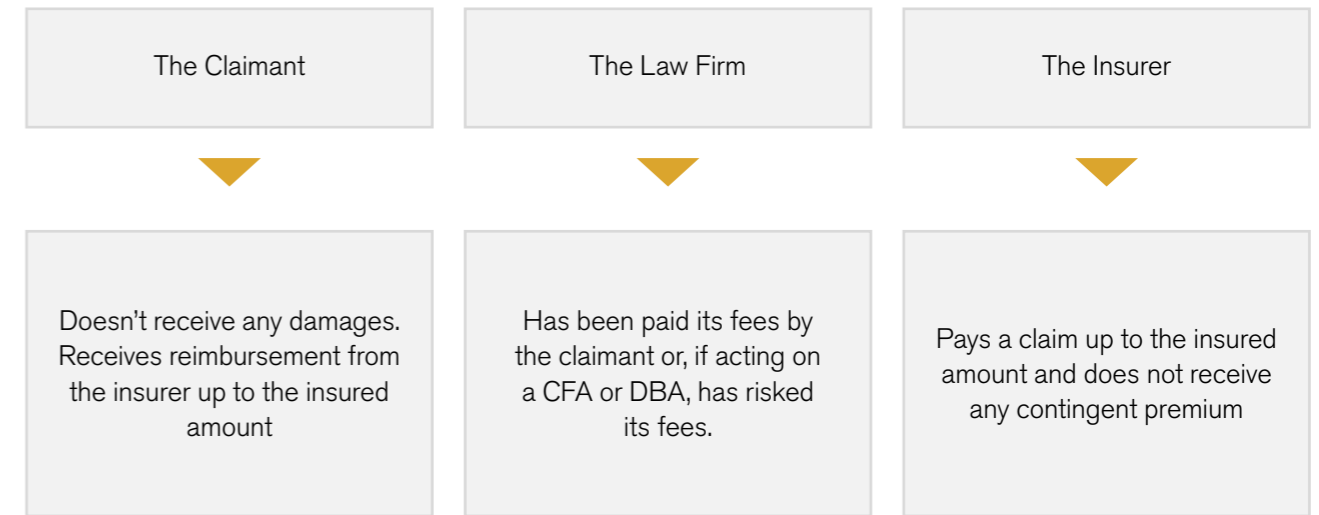


- Own Disbursements: such as counsel's fees, court fees and expert fees
- A percentage of own solicitor fees that you are paying: the insurer will regardless expect the client or solicitor to retain some of the risk (potentially under the terms of a partial CFA)

**Other available products**

- Judgment preservation insurance: covering the risk that a successful court judgment or arbitral award is reversed on appeal or annulled. The holder of the insurance thus has certainty of an agreed level of recovery even if an opponent's appeal is partially or wholly successful.
- Cross Undertaking in Damages Cover: insures the risk of having to pay out under a cross-undertaking for damages provided by a claimant in order to obtain a freezing order or some other form of injunctive relief.

**HOW ATE INSURANCE TYPICALLY WORKS IN THE EVENT OF A LOSS**



Please note that the insurance will provide an indemnity only and will not pay costs as the case proceeds. However, ATE insurance can be used alongside a deferred fee agreement, should you offer this, or alongside third-party funding.



### What does ATE insurance cost?

The premium for all types of ATE insurance will depend upon the amount of cover required and the prospects of the case succeeding. ATE insurance is, however, likely to cost significantly less than the success fee charged by a litigation funder, as an insurer is only likely to make payment at the end of a dispute. This opens up scope for innovative combinations of insurance with portions of funding to meet the client's objectives.

### The premium may be structured in various ways including:

1. Wholly or partially upfront.
2. Deferred and contingent upon success. This means that the premium is only paid if the case is successful, as defined in the policy.
3. Staged or discounted to provide for a reduced premium should the case settle early.

Paying the premium upfront or agreeing that your client will pay an excess or a contribution can also reduce the premium.

### What types of cases can be insured?

ATE insurance is available for the majority of dispute types other than criminal and matrimonial matters provided there are reasonable prospects of the claim succeeding. It is easier to structure a solution for damages-based disputes; however, insurance may be available for defendants and cases with a non-financial outcome if the insured is in a position to pay the premium upfront. It can be difficult to structure an economically attractive arrangement for cases worth less than £50,000.

### Security for Costs

In some circumstances, a defendant in a litigation (or arbitration) might challenge a claimant's ability to satisfy a cost order should the defendant prevail. This can lead to the defendant seeking an order from the court or tribunal that the claimant should provide some form of financial security (security for costs). The amount of such security can be sizeable. Sometimes an adverse costs insurance policy will be deemed adequate to provide or defeat an application for security for costs.

However, this is a factor to be decided upon by the court or tribunal who will take into account the terms and conditions of the policy as well as the stability and reputation of the adverse costs insurer.

By way of reinforcement, or in response to concerns regarding the ability of the adverse costs insurance to meet a security for costs application, some insurers will remove offending terms or offer anti-avoidance clauses or a Deed of Indemnity, which may act as sufficient security.

### Accelerate

Accessible at [www.thejudgeglobal.com/accelerate](http://www.thejudgeglobal.com/accelerate)

Accelerate provides a fast-tracked market search process for obtaining ATE insurance requiring adverse costs and own disbursements of up to £250,000 for commercial litigation and insolvency disputes. Using Accelerate benefits fee-earners and clients. Accelerate provides access to an insurance market which may be unfamiliar, thus helping lawyers towards meeting obligations to assess appropriate options for clients. If indicative terms are received through Accelerate, the fee-earner has a meaningful foundation on which to discuss and plan with the client how to address litigation costs risk.

After a detailed review of the market position for ATE insurance applications for commercial cases requiring adverse costs and own disbursement cover of up to £250,000, TheJudge has concluded that these proposals are best served by a process that involves us approaching a smaller number of insurers who are able to provide an immediate response and who have proven over time that they are able to offer commercial terms on a sufficiently proportionate basis in order to be of interest to clients for cases where there is a higher degree of scrutiny over economics.

The process is very simple. Within 24 hours of completing a short online application form, and subject to your client's case meeting the standard criteria, we will be in a position to provide you and your client with a competitive non-binding indication of terms, or a selection of terms, for adverse costs and own disbursements cover. Once you have confirmed your client's in principle acceptance of any indicative terms and provided supporting documentation, the chosen

insurer has 5 days to undertake their due diligence following which they will either confirm the terms, offer different terms or decline to provide the insurance.

Importantly, the quotations will be provided by A-rated insurers and, given our relationship with them, will generally be more competitive than you would receive

through a traditional search of the market. The aim of Accelerate is to afford you and your client the speed and certainty of obtaining ATE through a fast-track arrangement whilst maintaining the peace of mind that comes from a search of the market. We now have 4 A-rated insurers on the panel and so we can effectively do a detailed market search within 24 hours.



## SECTION 3 | LAW FIRM FUNDING AND INSURANCE ARRANGEMENTS

### Financing for the Law Firm

In addition to supporting your clients, various solutions have been created for the benefit of the law firm. These products facilitate the firm's ability to offer alternative fee agreements and, in so doing, help the dispute resolution team meet its financial objectives.

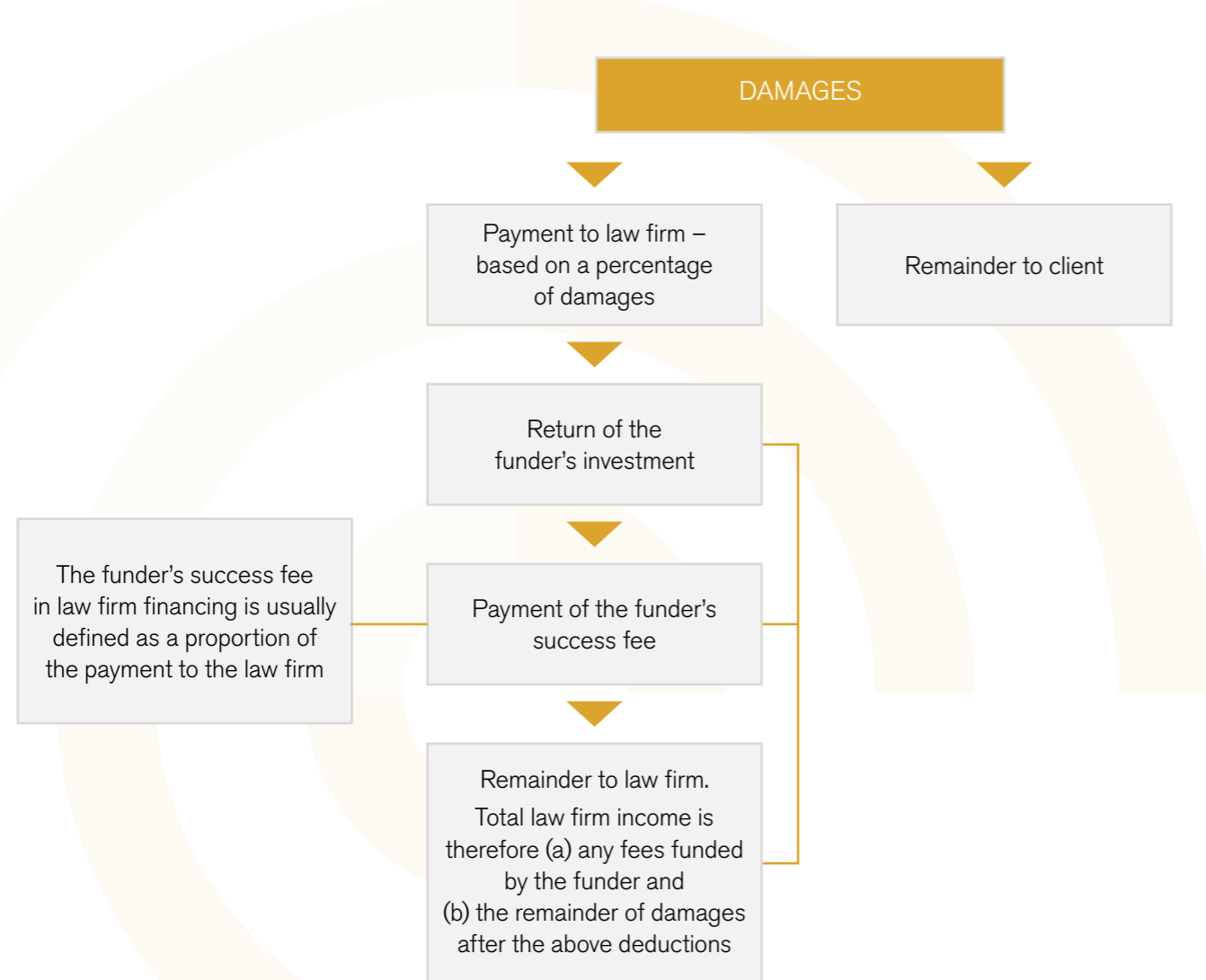
These solutions have the added benefit of enabling the firm to offer a full DBA to the client which complies with the DBA Regulations, whilst ensuring the law firm receives some fee income regardless of the outcome of the case.

### DBA/CFA Funding

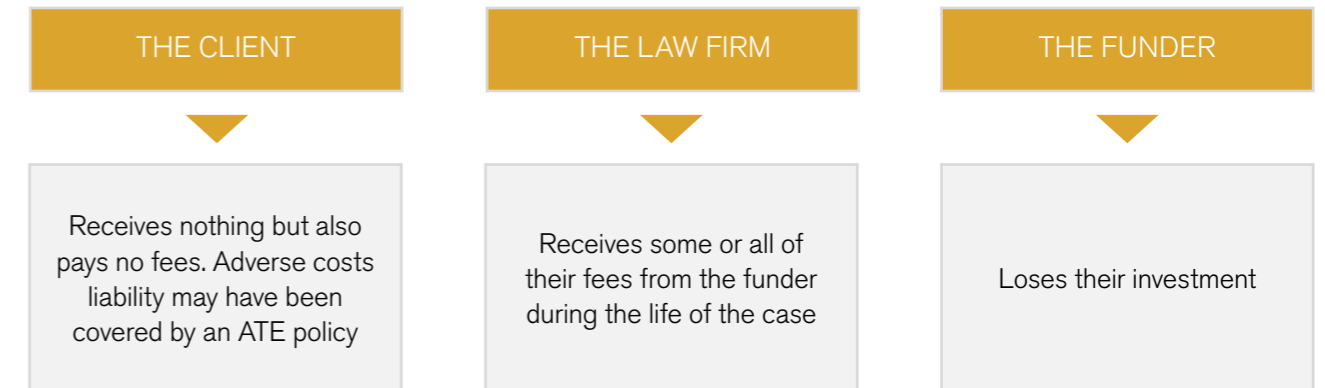
Litigation funders are increasingly offering funding arrangements directly to law firms to assist with their cash flow where law firms are acting under a no win, no fee or low fee arrangement. Such funding can be used to cover work in progress as well as any disbursements the law firm may incur on behalf of a client.

If the case is unsuccessful, the litigation funder will lose their investment. If the case wins, the funder will receive the return of their investment and will take a share of the law firm's success fee.

### How DBA Funding typically works in the event of a win



### How DBA Funding typically works in the event of a loss



### DBA insurance

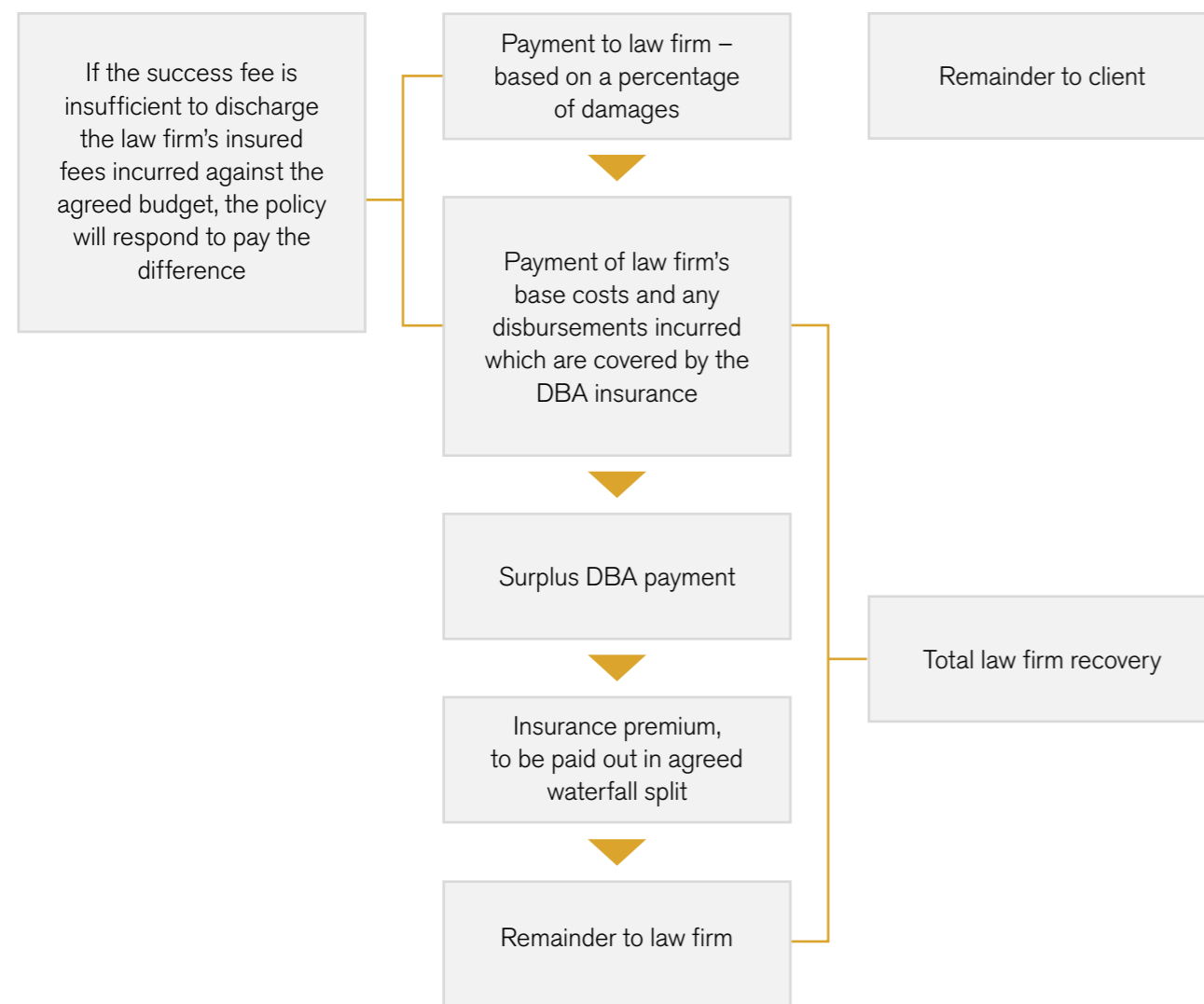
Where cash flow is not a primary concern, DBA insurance may provide a more cost-effective way of hedging some of the law firm's risk.

DBA insurance is a policy taken out by the law firm to cover a portion of the firm's fee risk under a DBA. The policy can also sit behind a CFA but is more commonly used with DBAs because there is usually more headroom in the success fee from which the insurer's premium can be paid. Such policies cover a risk distinct from an ATE policy (which the client may still need to take out to cover its adverse costs risk).

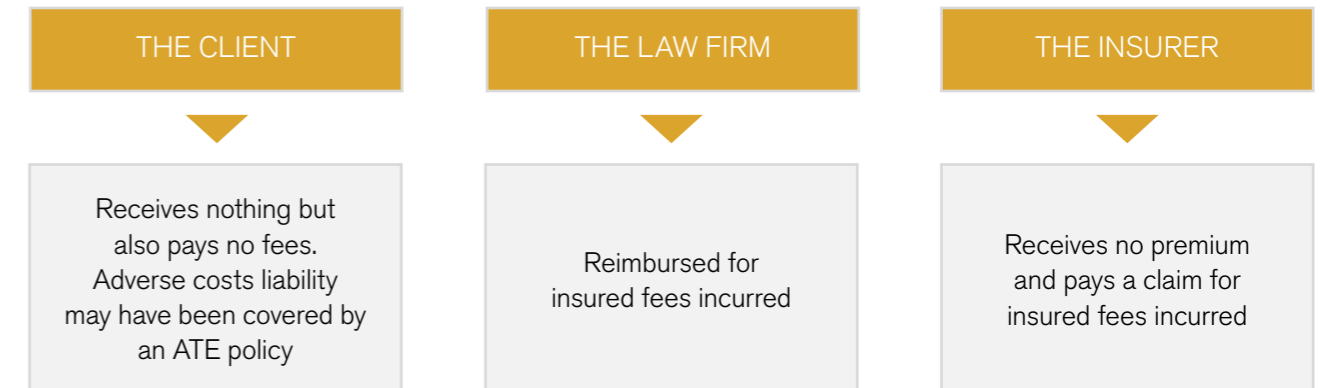
If the case is unsuccessful, the insurer reimburses the law firm for an agreed portion of the fees incurred, up to the limit of indemnity. The policy can also be tailored to cover 100% of counsel's fees, and other disbursements where the law firm is responsible for these under the terms of the DBA.

If the case is successful and the firm recovers its DBA payment, the law firm accounts to the insurer for the premium. Importantly, the premium is generally only payable from the surplus success fee after the law firm's fees have been paid and only to the extent there are sufficient funds available. This way, the policy guarantees the law firm a minimum realisation rate no matter the outcome of the case.

### How DBA Insurance typically works in the event of a win



### How DBA Insurance typically works in the event of a loss



### Benefits of Law Firm Funding and Insurance Arrangements

- **Increases profitability**

Facilitates the law firm's ability to access significant success fees whilst guaranteeing that the firm receives some fee income irrespective of the outcome of the case.

- **The simplicity of the relationship with the client**

The agreement is between the law firm and the insurer or funder, and there is no need for the client to be involved (although they should be informed; see above). This may remove some complexity from the client's own arrangements – they benefit from

a contingency arrangement direct with their lawyer rather than needing to approach the funding market themselves.

- **The speed in which an arrangement can be put in place**

The alignment of risk between the funder and/or insurer and the law firm means these arrangements are often quicker to put in place than a litigation funding arrangement directly with the client for a case in which the law firm is not taking any risk. This enables the lawyer to spend less time finalising their fee agreement and allows them to move on to focusing on the substantive work involved in the case.



## Portfolio Arrangements

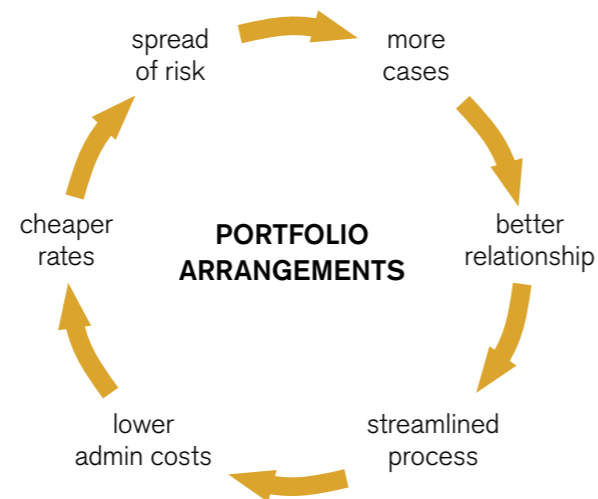
### What is a portfolio arrangement?

A portfolio arrangement enables multiple cases to be insured and/or funded under a single facility through a streamlined process and on agreed terms. In addition to preferred rates, the law firm or the client can benefit from speed and certainty and may also be able to include cases that aren't likely to be offered terms on a standalone basis.

### It's important to tailor the arrangement to meet your needs

The key is to consider the options available on the market and to tailor the arrangement specifically to meet your and your client's needs.

There are various ways this can be achieved, along with a sliding scale of commitment levels and a range of benefits available on both sides.



### Consider who will be the funded or insured party

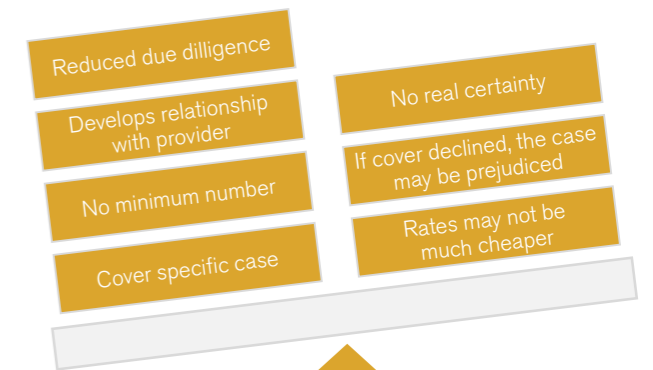
i) **The law firm:** As explained in the previous section, various products exist to enable the law firm to act under outcome-based retainers whilst guaranteeing that the law firm will receive an agreed level of fees, no matter the result in the case. Where the law firm envisages they will want to obtain these products on a repeat basis, a portfolio arrangement can be tailored to speed up the process and to enable the law firm to access preferred rates.

- ii) **A specific client with a multiple cases:** A portfolio can be tailored to provide a specific client with fast track or guaranteed funding or insurance for multiple (though not necessarily a huge number of) cases on pre-agreed terms.
- iii) **A special purpose vehicle:** A particular project may require a focal point for controlling the interests of a number of claimants. The insurance and funding can be routed through the designated entity.

## Type of arrangement

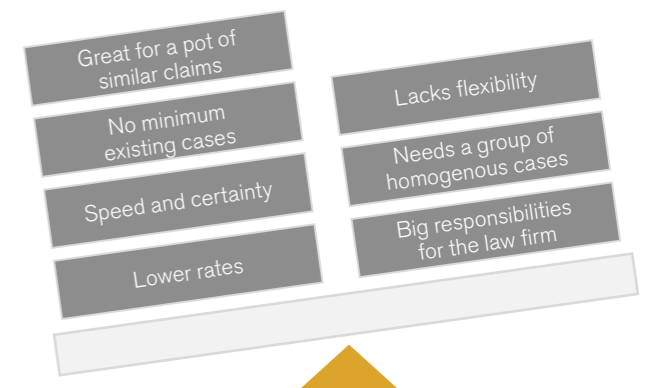
### Prior Submit Arrangement

The provider individually assesses each case prior to offering terms. This type of arrangement can range from being nothing more than a right of first refusal through to offering the comfort that the provider will only take a cursory look at the case to ensure the criteria is met and will then offer terms at a pre-agreed rate.



### Delegated Authority Arrangement

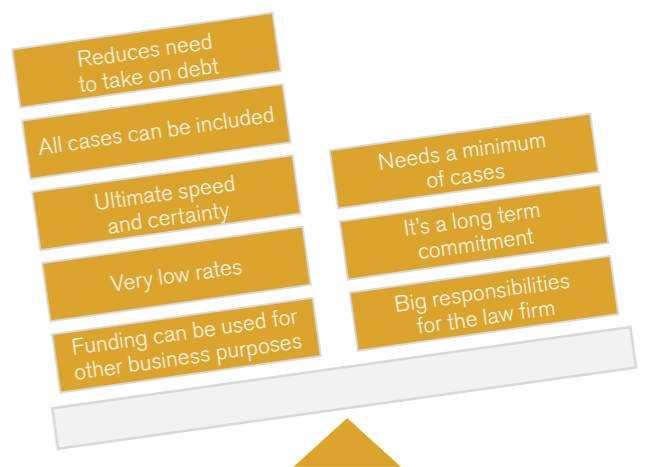
The law firm has the authority to arrange funding/ insurance on a case-by-case basis with agreed terms provided the case meets fixed criteria. This type of arrangement can be difficult to structure for a broad commercial disputes practice but can work well for certain case types such as professional negligence, group actions or cases in which there are multiple claimants with similar claims.



### Cross-collateralised Arrangement

A cross-collateralised arrangement provides insurance and/or funding for use across all cases that fit an agreed criteria. The provider will undertake significant due diligence prior to putting the arrangement in place but, once in place, they will remain passive.

The arrangement will run for a set time or until the last case has closed and will, ultimately, ensure that the law firm receives an agreed amount of fees (or the client's exposure will be capped at an agreed level) across the collection of cases. The premium/success fee will only be payable in the event the law firm or client recovery across the book of cases exceeds the agreed amount.



## Key Considerations for Portfolios

Whether a portfolio arrangement is right for you, and if so, which type, will depend upon many factors. Some of the key questions to ask yourself are listed below:

### How many and what type of cases are likely to require insurance/funding?

A portfolio approach simply doesn't work for all. If the volume is low and the case types and sizes variable, it becomes harder to build an arrangement that provides benefits beyond those available on a case-by-case basis. The benefits to clients, lawyers and providers must be evident.

### Who will be the end client?

An arrangement can be put in place to enable you to quickly arrange insurance or funding for your fee-paying clients or it can be structured to benefit your firm when acting under an outcome-based retainer.

### What are you hoping to achieve?

Speed, certainty, lower costs and increased profitability are achievable in the right circumstances. If you're simply looking to use an announcement of a funding portfolio for PR, consider the effect this may have on the way your firm's cases are viewed by the wider market of providers if you need to approach them for funding or insurance on a one off basis subsequently.

### Funding or insurance? Or both? Is the overriding priority to ensure a fixed level of cash flow or to manage risk?

Funding works well for the former and insurance can provide a cheaper alternative for the latter. If both appeal, an arrangement that insures the risk with the ability to draw down some fees on a flexible basis might be the answer.

### Does it make sense to have a one size fits all arrangement or a panel that can be more flexible?

Every provider has their favourite case types and those they don't really like. Take time to think about which provider is the best fit and if it is appropriate to build a portfolio across all disputes, or whether it makes more sense to have a panel of providers or a syndication.

### Is a co-ordinated process realistic?

It can be challenging for some firms or departments within firms to co-ordinate their approach to funding and insurance on a case type, practice or firm level. If it is unlikely that a co-ordinated approach will be implemented successfully, it may not be worth investing time in agreeing a portfolio arrangement.

### Have you considered the SRA implications of having a portfolio in place?

This is of particular importance if the client is the funded or insured party and/or where you have fee-sharing arrangements in place with the provider.

Ultimately, it is important to distinguish a portfolio arrangement from the "special relationship" you may have from repeatedly using the same provider. The former should be based on a negotiated set of favourable terms, compared with the market, and should be agreed in advance. The latter arrangement may offer familiarity of process and swifter turnaround but will not negate the requirement to consider on each occasion whether the provider is the right one for the client's case requirements.

### Why consider using TheJudge to explore portfolio arrangements?

As the market leading broker in this very specialised industry, we have vast experience of identifying the most appropriate providers and negotiating carefully tailored portfolio arrangements. Needless to say, if a portfolio arrangement is put in place, we will continually review the market to ensure the insurance arrangements remain to be the most appropriate for your needs.



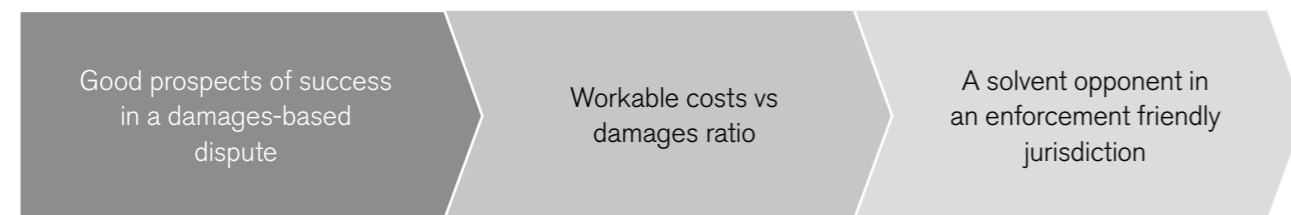
## SECTION 4 | MAKING AN APPLICATION

TheJudge uses its expertise and aerial view of the market to identify the most appropriate insurance providers and where appropriate integrate the insurance coverage to work with litigation funding, which could be alongside TheJudge's affiliate Erso Capital, or any other funder that has been chosen.

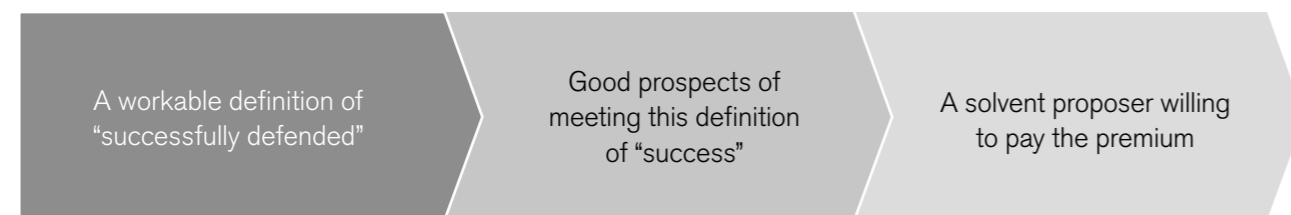
### Key Criteria

In our experience funding/insurance is likely to be available for cases fitting the following criteria:

#### For Claimants

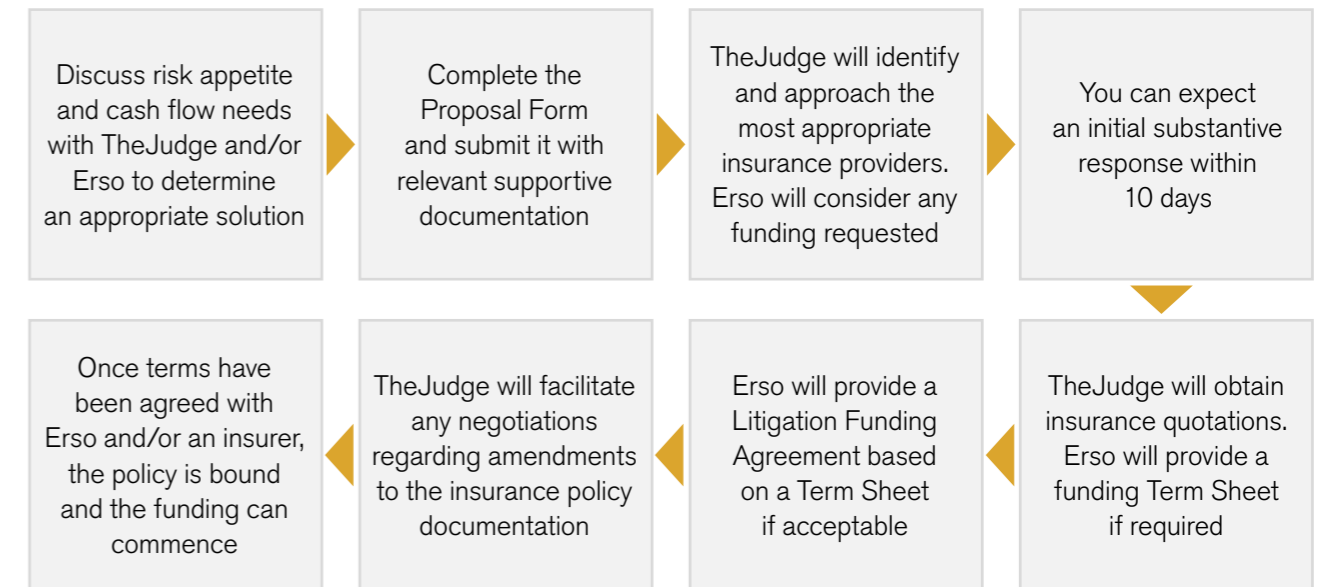


#### For Defendants



- Funding and/or insurance can be available for the majority of dispute types other than criminal and matrimonial matters.
- It is easier to structure a solution for damages-based disputes; however, funding and/or insurance may be available for cases with a non-financial outcome and/or for defendant matters if the parties can agree on how the success fee or premium will be paid.
- The minimum limit of cover for ATE insurance via TheJudge is £25,000 and for litigation funding the minimum funding commitment from Erso is £500,000. However, the amounts available are impacted by the ratio between the estimated value of the claim and the projected legal costs to pursue the claim to a fully contested trial.

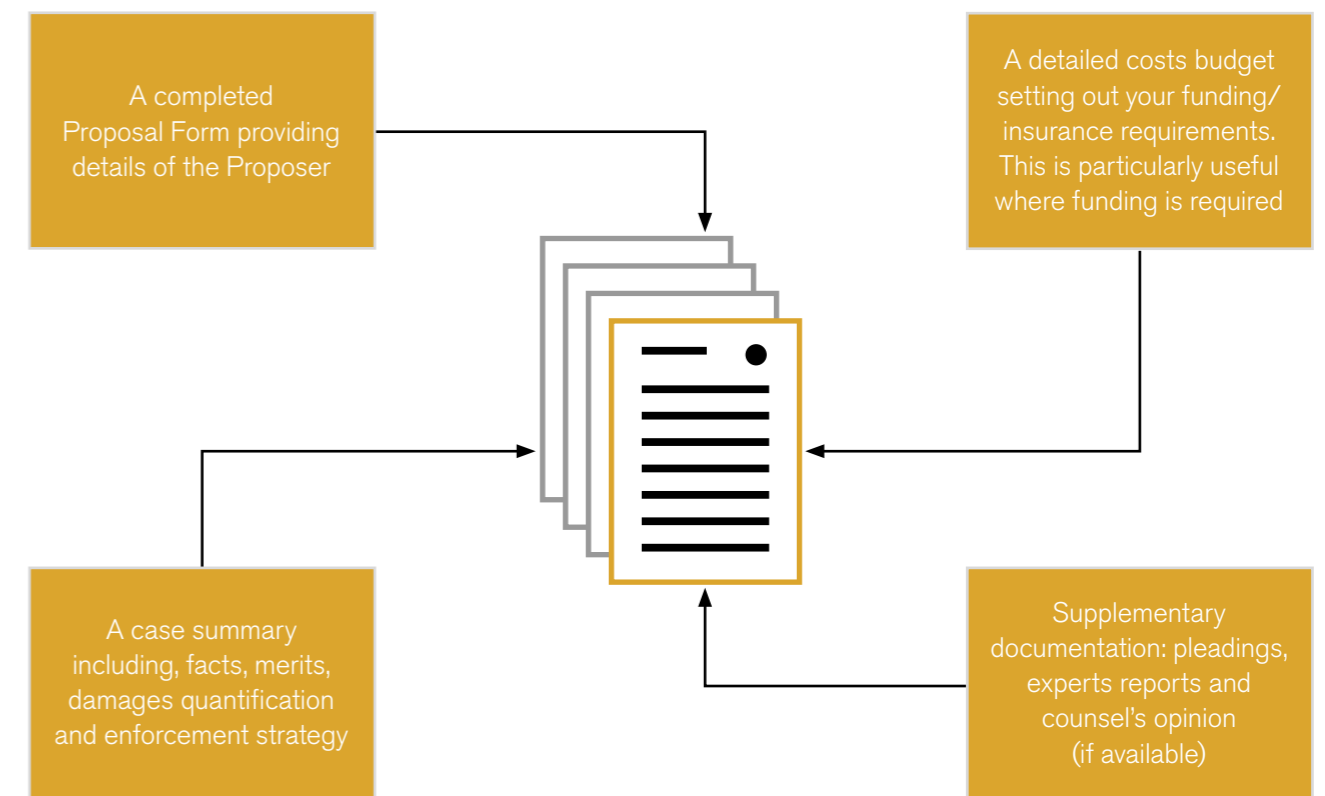
### Application Process (funding and insurance combined)



The level of detail required in the application may depend upon the stage and complexity of the case and the amount of funding and/or insurance required. We have set out below the basic requirements but please visit [www.thejudgeglobal.com/contact/](http://www.thejudgeglobal.com/contact/) to download the latest template proposal form and Briefing Note & Cost Budget.

Where the ATE insurance requirement for adverse costs and own disbursements is £250,000 or below, our Accelerate product can be used. In order to apply, there is a short online application form: <https://www.thejudgeglobal.com/accelerate/>

### Required Documentation



### Tips when applying

Good case presentation is invaluable when seeking litigation insurance. A considered and comprehensive case presentation can significantly improve the chances of securing offers and the speed of underwriting decisions. Here are some tips to help you when applying for litigation insurance:

#### 1. Provide a case summary

It is helpful to provide a short, concise summary of the case, prepared by the instructed lawyers. This should outline the background, the key issues and the strength of the case. This enables underwriters to quickly form a view about the case and to focus their more in-depth analysis.

#### 2. Explain why you believe that your client is likely to succeed

Insurers and funders will only support cases with good prospects of success. The case summary or written opinion should set out the reasoned view of the legal team on the case merits, as well as commenting on any commercial aspects which may not be readily apparent from the pleadings or correspondence.

#### 3. Address the likely challenges or defences

The key challenges or defences should be addressed head on, including commentary on why you believe that these arguments can be overcome. If the case is at a very early stage, it is useful to pre-empt the likely defences and comment on them.

#### 4. Detail your view on the claim value

A realistic valuation of the claim is vital for insurers and funders when considering the case economics and the viability of any potential insurance cover or financial investment.

#### 5. Consider and address enforcement

For funders and for insurers offering a contingent premium, the enforcement or collection risk is as important, if not more so, than claim value. The commentary should include the financial strength of the defendant entity, whether the defendant is likely to be insured for the claim, the location of assets and detail the enforcement strategy where appropriate.

#### 6. Consider what documentation should be supplied in support of the case

Whilst insurers will take into consideration the solicitors' and/or Counsel's views on the prospects of success, they will ultimately form their own views on the merits of the case. Whilst they must be provided with all the material information in support of the case, providing too much documentation which is not directly relevant to the risk assessment or covered elsewhere in the papers can be off-putting and can slow down the process.

One approach is to supply the key material documentation, accompanied by an index of further documents which can be made available upon request.

#### 7. Refer the insurer/funder to key documents

Remember, you will know the case better than the insurer. It can save time to highlight the crucial supportive documents in your case summary.

#### 8. Use the team at TheJudge and ERSO

The teams are on hand to discuss any queries relating to case presentation or the application process. Please do not hesitate to contact us for advice and guidance.

## SECTION 5 | ADDITIONAL RESOURCES

Word versions of TheJudge Briefing Note and Application Form documents can be found at [www.thejudgeglobal.com/contact/](http://www.thejudgeglobal.com/contact/)

### Tailored Training Workshops

For two decades, TheJudge has been an industry leader in delivering bespoke training sessions for dispute resolution, litigation and arbitration departments around the world.

Our training sessions can be presented by TheJudge, by Erso, or in combination. They provide an overview of the litigation finance market using practical examples that give your team a real-life understanding of the options available and how they can be tailored to meet the needs of the client or your firm. We have a unique perspective across both the litigation funding and insurance world due to our long-standing position in the marketplace.

Our tailored workshops can include topics such as:

1. An up to date overview of the funding and insurance products available on the market and how they can be tailored to manage the cost risk for the client.
2. A clear understanding of how funding and insurance products can be utilised by the law firm to reduce risk and maximise realisation when acting under DBAs and CFAs.
3. The ability to confidently discuss the potential options with your client and maximise the opportunities those discussions bring for your law firm.
4. Using insurance and funding as security for costs.
5. Adapting funding and insurance for different types of disputes and different jurisdictions.

**Please contact Matthew Amey if you would be interested in organising a workshop for your department.**

### Disclaimer

This guide has been produced free of charge to provide illustrative information for solicitors and other legal representatives interested in understanding some of the potential litigation finance and insurance products available to claimants with meritorious claims. All products are subject to local regulation and laws. This guide provides information on the rules and regulations applicable to litigation funding and insurance in England & Wales but such rules and regulations are subject to change and this guide is not intended to be a substitute for checking the appropriate rules and regulations as they may apply to individual circumstances. Neither TheJudge Group of companies or Erso Limited or its affiliates accept any responsibility for any losses suffered in reliance on the guide which is for information purposes only and is not intended to be legal or regulatory advice.

Copyright TheJudge Limited 2023





## Locations



### London

90 Fenchurch Street,  
London EC3M 4ST  
+44 845 257 6058

[info@thejudgeglobal.com](mailto:info@thejudgeglobal.com)



### Manchester

Chancery Place, 50 Brown Street,  
Manchester M2 2JG  
+44 203 882 7405

[info@thejudgeglobal.com](mailto:info@thejudgeglobal.com)



### California

19200 Von Karman Ave, Suite 400,  
Irvine, CA 92612  
+1 (877) 766 8958

[usinfo@thejudgeglobal.com](mailto:usinfo@thejudgeglobal.com)

TheJudge Americas LLC operates strictly under the name  
TJ Insurance Services while conducting insurance business in the  
State of California. License # OL80453



### Toronto

Richmond-Adelaide Centre, 120 Adelaide St, Suite 2500,  
Toronto, M5H 1T1  
+1 (416) 238 6730

[infocan@thejudgeglobal.com](mailto:infocan@thejudgeglobal.com)



### Hamburg

Neumühlen 15  
22763 Hamburg  
+49 40 2000 322 20

[euinfo@thejudgeglobal.com](mailto:euinfo@thejudgeglobal.com)



**TheJudge Ltd**

90 Fenchurch Street, London, EC3M 4ST  
+44 845 257 6058 | [info@thejudgeglobal.com](mailto:info@thejudgeglobal.com)