EJF Response to Lord Justice Jackson's Final Report on the Costs of Civil Litigation (the "Report")

European Justice Forum (EJF) is a not-for-profit coalition of business, organisations and individuals that wish to promote a fair and balanced system of civil justice in Europe. It seeks to ensure that those with a legitimate grievance have access to justice. It aims for a system that facilitates redress while allowing innovation and enterprise to flourish and that enhances competitiveness[1]. In this regard, we appreciate the emphasis place in the report on a wider awareness and use of ADR procedures to resolve disputes.

We should like to congratulate Lord Justice Jackson and his colleagues on a major piece of work that should lead to significant improvements in the cost of litigation.

We were grateful to be able to contribute during the consultation process, and we hope that it may be helpful now to comment on certain aspects of the report. Our concerns are directed to the following recommendation in the report:

- Changes to the costs shifting rules particularly as regards collective litigation;
- Broader use of contingency fees; and
- The regulation of third party litigation funding.

These points are addressed on the following pages.

We appreciate that the consultation phase of the report is ended, but we would welcome the opportunity of discussing the above points which are set out in more detail below. We shall in parallel be raising these issues with the Ministry of Justice.

European Justice Forum
Malcolm J C G Carlisle
26nd February 2010

[1] EJF is organised under Belgian law with its registered office in Brussels. It has a current membership of some 40 major companies and organisations. It is supported by a network of leading law firms in the major European jurisdictions that both feed information of national legislative activity and provide links to national governments through which EJF can deliver its message. Further information can be found at www.europeanjusticforum.org

Response to Lord Jackson's Report on the Costs of Civil Litigation

1. Costs-Shifting Rules

For the reasons set out in the Report, we support the recommendation that a party should no longer be able to recover from a losing opponent the costs of taking out ATE insurance or the success element of a contingency fee arrangement. We hope that these recommendations will be implemented.

However, the Report also recommends that in certain litigation, a regime of qualified one-way costs shifting should be introduced. Here we have two strong reservations.

(i). We should keep two-way costs shifting in Personal Injury (PI) Cases.

We are concerned at the proposal that qualified one-way costs shifting should be introduced in Personal Injury (PI) cases. This is an area where abuse has been apparent in the past and where there is often an assumption that the defendant has deep pockets. We believe the two-way 'loser pays' rule should remain in place as a healthy check on abuse – always bearing in mind that the Court already has discretion to vary this rule.

If nevertheless, qualified one-way costs shifting is introduced we recommend that broader recognition should be given to cases where such a change to the normal rule would be unfair.

The Report indicates three circumstances in which the court should make a costs order against an unsuccessful PI claimant, namely where:

- the claimant has behaved unreasonably (e.g. by bringing a fraudulent or frivolous claim);
- the defendant is neither insured nor a large corporation;
- the claimant is conspicuously wealthy.

We recommend that two other circumstances be added to these exceptions, namely where:

- a PI claimant is financed by a third party litigation funding organisation; and
- (without prejudice to our comments below) where the claimant has entered into a contingency fee arrangement whereby he faces no risk of paying his own legal fees unless the case is won.

In both these cases, the claimant's litigation costs are fully covered by third parties who should also (as the Report recommends) hold themselves out as

having the means to bear the financial risks of litigation including adverse costs orders. The Report already recommends that such third parties should be able and willing to reimburse a winning party's costs, and there seems to be no reason to make an exception in this regard for PI cases, particularly as the Report anticipates an enhancement of part of the damages awarded to a successful PI litigant.

We also consider it essential that the risk of an adverse costs order should lead to a more careful consideration of the merits of a PI case by any person offering to provide third party or contingency fee finance. Experience has shown that – particularly in PI cases – there is a risk of weak cases being brought in the hope of achieving at least a compromise settlement[2].

(ii) Qualified One-Way Costs Shifting should not be allowed in any Collective Litigation

Particularly in collective litigation, the normal loser-pays rule has proved to be fair and just and in the interests of society as a whole. Consequently, we welcome the Report's recommendation that this rule should be the default position for collective litigation as a whole. However, we note with concern that the Report recommends that in collective litigation over PI claims, the norm should be qualified one-way costs shifting.

In our view, the weight of evidence is that existence of the loser pays rule helps to deter weak or spurious claims being pursued in the hope of forcing a favourable settlement regardless of merit. Particularly in collective litigation, it is important that those providing the funding should realise that they are exposed to the potential expense of paying the others side's costs. It leads to a more realistic initial consideration of the merits of the case, and it encourages the parties to keep that analysis under review as the case proceeds. The lack of this rule in the USA contributes heavily to the volume of abusive class actions.

These arguments apply as much to collective PI cases as to other collective litigation.

There is clear evidence that huge sums of public and corporate money were wasted in the group actions brought in respect of PI cases in England and Wales in the 1980s and 1990s under the one-way cost regime that existed under Legal Aid, because lawyers pursued one after another massive case that proved to be unmeritorious[3]. To risk going back to this situation would be highly undesirable.

[2] See "Multi Party Actions" by Dr Christopher Hodges, Oxford University Press, 2001
[3] Ibid

Because collective actions can involve huge numbers of claimants, the pressure on defendants to settle bad cases can be enormous. The adverse effect on a Company's reputation is often in itself a considerable stimulus to settlement, and to introduce a no-cost rule (either for both parties or for the claimants alone) would in our view be unprincipled, damaging to the economy and not in the public interest.

We also note that the Ministry of Justice has recently declared Government policy to be the retention of the loser pays rule, in particular in collective litigation.[4]

It should be remembered that in practice the decisions on the claimants' side in collective actions are taken by the lawyers or those providing the funding (see below). The experience of the cases referred to above in the 1980' and 1990s strongly suggests that lack of the risk of an adverse costs order was an important factor in bringing cases that had at best a weak chance of success. The normal loser pays rule provides an effective check on such behaviour.

2. Prohibition of Contingency Fees

We remain opposed to any arrangement whereby a lawyer's fees are calculated as a percentage of the sum recovered by a successful claimant – particularly in the case of collective litigation. We believe that this opens the door to the kind of abuse experienced in class actions in the USA and in certain other countries, where there is clear evidence that such arrangements have fuelled a litigation industry. A relatively small number of leading US plaintiff law firms shares enormous revenues generated by contingency fees. They literally become litigation banks with the resources to fund any case against a defendant with deep pockets who can be expected on a pragmatic, economic basis to prefer early settlement to protracted litigation, regardless of the merits of the case. They have already established offices in the UK and elsewhere in Europe.

We would draw attention to the escalation of risk that would arise if contingency fee arrangements were allowed in opt-out collective litigation. Up to now such litigation has not been available in the UK, and we sincerely hope that it will not be allowed in the future. Nevertheless, we are concerned at the frequency with which opt-out litigation has been advocated by certain groups.

[4] The Government's Response to the Civil Justice Council's Report: "Improving Access to Justice through Collective Actions", Ministry of Justice, 20 July 2009 at http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf

Moreover, although it remains general government policy (as expressed in the response of the Ministry of Justice to the Civil Justice Council's recommendation last year for generic collective litigation), we are alarmed to see a proposal currently before Parliament that in the financial services sector, opt-out collective litigation might be allowed[5].

The problem becomes even more acute if contingency fees are allowed in combination with qualified one-way costs shifting for individual and collective personal injury cases. One of the many reasons for abuse, and the creation of a litigation industry in the US, is the way their rules work in combination with each other. Litigation abuse is rampant in the US because personal injury claims are often brought on a contingency fee basis and there is no costs shifting to the claimant or the claimant's lawyer. Quite simply, there is no financial incentive to conduct a thorough review of the case before filing. Under the changes proposed in the Report, the combination of one-way costs shifting for personal injury cases and contingency fees creates a system that is virtually identical to the problematic US system.

If contingency fees are used, we note your recommendation that an independent solicitor should advise the litigant of the implications in order that the litigant's rights are properly protected. We accept that, provided this advice involves a thorough review of the case and its suitability for a contingency fee arrangement, such intervention will provide some protection, but in our view this will not be sufficient.

We would recommend that if contingency fees are to be allowed, there be more detailed study of how such independent legal advice should be given to ensure it is a thorough exercise. We further recommend that – if contingency fees are to be introduced - independent solicitors should be required to present a report to the court setting out the contingency fee arrangements and confirming that in their opinion those arrangements will not distort the course of litigation nor impede any settlement of the dispute.

We note that the Report recommends application of the Ontario rules to costs shifting, and if there are to be contingency fees, we certainly agree with this approach.

[5] The Financial Services Bill 2009. At the time of writing this Bill is about to enter committee stage in the House of Lords.

We note that your Report calls for there to be clear regulations on contingency fees, and again, if there is to be a wider use of contingency fees, we agree that such regulations are essential. However, with respect, we believe those regulations should be wider than the matters referred to in paragraph 4.5 of Chapter 12 of your Report. We also believe that the regulations should be designed not just to protect the interests of the client but those of society in general.

We would also ask that there be debate on the scope of regulations and the practicalities of enforcing such regulations on all solicitors and counsel who might be engaged in contingency fee arrangements.

Here there is a contrast with the parallel recommendation in your Report that there should be controls on the provision of third party litigation financing. There are less than 20 such firms operating at present, and even if – as we expect – the third party finance market expands rapidly, there will still only be a small number of firms to oversee. It would be considerably more difficult to enforce rules on the number of lawyers who might enter into contingency fee arrangements.

As indicated above, if contingency fees are to be used, we agree with your recommendation that the claimants and/or their lawyers should be responsible for any adverse costs orders. In our view this is essential.

However, for the reasons set out above, we remain strongly of the view that contingency fees should not be allowed in any form of collective litigation.

3. <u>Third Party Process Funding.</u>

We recognise the position that third party process funding (TPF) is achieving in party to party litigation in the UK. It is a rapidly growing source of funding in part because it is a potentially lucrative business opportunity.

To date, TPF has been used only to a limited extent in collective or representative litigation in Europe. However, if a market develops for the funding of collective litigation, we have no doubt that TPF companies will offer to supply that need. We have no doubt that such a market will arise if the use of collective litigation expands.

We note the development of a voluntary code of practice for third party process funding, and we agree that this is helpful. But in our view this will not be sufficient. We strongly believe that regulation will be required.

Your Report foresees that regulation of TPF is likely to be required in the future. Our only point of disagreement is on timing. In our view, although the TPF industry is not at present the major source of funding, regulation should be imposed now, before it becomes more difficult to control the way in which TPF companies operate.

In Australia, third party process funding has been recognised as an investment industry that should be subject to the financial services regulators in the same way that other investment companies are controlled[6]. We believe that the same approach should be taken in the UK.

Third party process funding is an industry and is intended to be highly profitable. Currently, the loser pays rule makes for a careful analysis of the risks of litigation, and we agree with your Report that there must be a guarantee that TPF funders will meet an adverse costs order in any litigation they fund.

We are not confident that a voluntary code of practice will be sufficient to provide such a guarantee. TPF funding is made on the basis of contracts between the funders and the litigants they support. There is, of course, no contractual nexus with the opposing party and therefore no contractual way in which a winning party can enforce a costs order against the funder in the event that the opposing litigants fail to meet that costs order. To provide certainty and enforceability, we believe that regulation will be needed.

In Annex I, we attach a draft set of proposals as to the regulations that should be applied to third party process funding in order to mitigate the risk of abuse. This is a provisional list, and we would encourage debate about the risks that can arise in connection with TPF funding and how those risks may best be contained and controlled.

We note that your recommendation *"the funder should be obliged to continue to provide whatever funding it originally contracted to provide, unless there are proper grounds to withdraw. The precise definition of proper grounds for withdrawal will require some careful drafting."* (Chapter 11, Section 2.8). For the reasons set out below we believe that there should be further consultation of what those grounds for withdrawal should be.

We understand the risks of abuse set out in your Report, and we certainly agree that there must be a thorough assessment of the merits of the case at the start,

[6] See the Brookfield Multiplex case in Australia reported on 21 October 2009 in the Australian Financial Review. At the time of writing this case is subject to appeal.

before a TPF contract is signed. We also agree that adequate measures must be put in place to prevent TPF funders from using any eventual rights to withdraw funding as a means to control or influence the conduct or settlement of litigation.

However, we also see the risk of a funder being locked into financing litigation beyond the point at which the case has a reasonable chance of success.

In almost all litigation, the outlook for a party's chances of success changes as the case proceeds and more evidence comes to light. Both the litigant and a TPF funder should, in our view, be encouraged to reassess the value of continuing the litigation as it proceeds. If there is disagreement between the litigant and his funder, we believe that the funder should be able to withdraw from the case, where there are proper grounds to do so.

It would be in no one's interest for a funder to be obliged to continue supporting litigation beyond the point at which there was a reasonable chance of his client succeeding. In the case of such withdrawal the funder should be liable for all costs incurred (on both sides) up to the point of withdrawal, but not beyond.

There is a balance to be struck here, and we have sought to address this issue in Annex I.

European Justice Forum
Malcolm J C G Carlisle
26nd February 2010

Annex I
Preliminary Summary of Safeguards on Third Party Funding

Among the safeguards recommended by EJF are the following.

- Third party funding must be regulated and provided exclusively by undertakings that are registered with and subject to the supervision of the relevant national financial services regulatory authority in each of the countries where they operate. Such financial regulators must assess whether or not particular types of funding amount to "managed investment schemes" which in certain countries are subject to particular control.[7]

- Governments must ensure that their regulators maintain a register of those who provide third party process funding and that appropriate regulations apply with penalties enforced for breach of those regulations. Provided the process funder is headquartered in the EU, the prime responsibility should be with the regulator of the country where the funder is based, but each Member State should ensure that funding in its country conforms to the regulations.

- The main guiding principle of any such regulation should be to ensure that control of the conduct of the litigation (and of any settlement of the litigation) lies solely with the litigants and not with third party process funders. The third party process funder must not control the litigation or act in a manner that amounts to effective control.

- The terms of any funding arrangements (and in particular any potential profit element) must be disclosed to the Court and subject to the Court's power to forbid any arrangements that could distort the proper and sound administration of justice. The Court must ensure that there is no distortive effect resulting from any profit-motive on the part of providers of funding, and must have power to take appropriate measures to prevent this. Court rules and guidelines should be issued to the Courts indicating how funding arrangements can lead to abuse and the need to ensure that appropriate safeguards are applied. The funding arrangements should not be disclosed to the public or to the other parties in the case.

- The Court should, in particular, examine the extent of the financial reward which a third party funder may make in the event of his client winning the case. Binding guidelines should be developed in this area and introduced by way of legislation, preferably at EU level. These guidelines should include reasonable limits to the rewards that can be earned by the funder, in order that Europe may not experience the litigation industry that has developed in the USA. In particular, the guidelines should set reasonable limits to the extent to which a third party process funder may share in any damages awarded, so that any such arrangement does not adversely affect the proper and sound administration of justice.

[7] See the Brookfield Multiplex case in Australia reported on 21 October 2009 in the Australian Financial Review.

- If plaintiffs who are dependant on a third party process funder win their case, they shall not be entitled to recover costs from the defendant in excess of a normal reasonable attorney fee and necessary outgoings. In particular, they shall not be entitled to recover any contingency or success element of the fees charged by the third party process funder.

- In assessing whether it is prepared to invest in a piece of litigation, a third party funder will consider the experience and ability of the lawyers chosen by the party in questions. While this makes sense, a third party funding organisation must not be allowed actually to select the law firm that handles the case. That is a decision for the plaintiffs alone, and the plaintiffs and their attorneys alone should be responsible for the management, conduct and any eventual settlement of the case.

- While a third party process funder should be entitled to receive information on the progress of a case and any significant changes to the prospects of success, such funders should not be able to exercise directly or indirectly any control or influence over the conduct or settlement of litigation.

- If a litigant wishes to settle a case, the terms of the funding agreement must not allow the third party funder to prevent the litigant from doing so, but must oblige the funder to continue financing the case until such settlement is reached. Conversely, if a third party process funder changes his view of the likely success of a case and consequently wishes to stop funding that case, it is in no one's interest that a weak case continues to be funded, and the terms of the funding agreement should be allowed to be such that the funder is entitled to withdraw funding in those circumstances[8]. The EJF paper recognizes the delicate balance between these two principles, i.e. the TPF cannot control the conduct of the litigation but the TPF should be able to withdraw funds if it thinks there is no longer a real prospect to win the case. The only way to guarantee the observance of both principles is subjecting the TPF's intention to withdraw funds to an ex ante control either by the Court or by the Regulator. In such circumstances, the funder will be responsible for all costs incurred up to the point that it ceases to fund the litigation, but it shall not be obliged to continue funding the case.

- The losing party will normally be required to reimburse all or a substantial part of the other party's legal costs if that other party is successful. It is important that the Court satisfy itself that each party has the resources to meet this obligation. If there is doubt about one party's ability to reimburse the other party, the Court should be able to make an order at the request of either party requiring the other party to make an appropriate payment into court in order sufficient to cover this eventual liability.

[8] This is an area that will need care. It would be unacceptable for a funder to take on a weak case with poor prospects for success simply in the hope of achieving a rapid and profitable settlement, in the knowledge that they can simply abandon the case if such a settlement is not achieved. At the same time, it would be undesirable for all concerned for funding to continue to support a case after it became clear that – contrary to the information originally available and the analysis originally made – the case is unlikely to succeed. The practical reality of litigation is that the outlook for a case changes as the evidence becomes known. However careful the initial analysis, the prospects of success are likely to change.

- Any third party funding contract must be between the funding company and the litigants. The agreement with the lawyers must be between the lawyers and the litigants and not with the provider of the finance. The reason for this is to minimise the risk of abusive behaviour in relation to the litigation and in particular of the funder being able to exercise any control or influence over the conduct or settlement of the case.

- For similar reasons, while careful analysis of the merits of a case by third party funders is to be encouraged – including analysis from in-house or external lawyers, the litigation itself must not be handled or controlled by lawyers engaged by the third party funder nor may the third party funder be owned or controlled by law firms or lawyers.

- In recent years, the sale of asset backed securities has become common. It is foreseeable that projected income streams from litigation backed by third party funding organisations could provide the "asset backing" for such financial instruments. This would be distasteful and highly undesirable. Accordingly, such securitisation of income streams from third party process funding should be prohibited.

- The lawyers involved must have no financial interest in the damages awarded. Their financial interest should be limited to charging reasonable fees. By the same token, there must be a limit on any uplift in normal fee rates permissible under any conditional or success fee arrangement.

- Contingency fees, which involve an attorney or his firm personally benefitting from a percentage of any damages awarded, should not be permitted.

- Certain costs should not be recoverable by the winning party. These include the cost of insurance premiums; any amount in excess of the lawyer's normal fee; the costs of taking out third party process funding and any amount payable to the funder upon conclusion of the case.