

Introduction

Litigation is expensive, uncertain and inherently risky. Being able to pursue even a strong claim all the way to trial is dependent on the client being able to afford the legal costs and the financial risks of doing so. **FeeSolve** is a unique, innovative risk management and funding package for commercial claims. It is designed to give clients certainty in relation to costs and reduce the financial risks faced by clients when bringing a claim, by offering a variety of alternative funding arrangements.

The Problem

Litigants are typically required to pay **solicitor's costs** and **disbursements** (such as barrister's fees, court fees and expert witness fees) as a claim progresses, diverting significant resources away from the day-to-day management of a business, or an individual's personal resources.

The rules regarding inter parties costs recovery in civil proceedings in England and Wales are complex, but the general rule is that "costs follow the event". In other words, the loser pays the winner's legal costs. This means that, in addition to having to pay their own costs of the litigation, litigants face the risk of having to pay a proportion of the other side's costs (also known as **adverse costs**) if their case is unsuccessful.

Example 1

	Win	Lose
Legal Costs	£300,000	£300,000
Adverse Costs	-	£300,000
Subtotal (a)	£300,000	£600,000
Damages	£1,000,000	-
Legal Costs Recovered	£200,000	-
Subtotal (b)	£1,200,000	-
Net Position (i.e. (b) less (a))	£900,000	-£600,000

This is the 'standard model', where the claimant is responsible for their own fees (as the claim progresses) and for the risk of having to pay the other side's costs if unsuccessful. The standard model offers maximum reward but also maximum risk.

The Solution

FeeSolve. Choosing the right funding option allows clients to better manage their cash flow, reduces pressure on their budgets and removes some of the inherent risks of litigation, which in turn enables clients to negotiate from a position of strength.

Example 2

	Win	Lose
Legal Costs (including success fee)	£360,000	£300,000 ¹
Adverse Costs	-	£300,000 ²
ATE Premium	£100,000	-
Subtotal (a)	£460,000	£0
Damages	£1,000,000	-
Legal Costs Recovered	£200,000	-
Subtotal (b)	£1,200,000	-
Net Position (i.e. (b) less (a))	£740,000	£0

This shows how **FeeSolve** can be used to mitigate risk. This example is based on the litigant taking out an **Insurance Policy (ATE)** (to cover own disbursements and adverse costs) with Fieldfisher acting on a **Conditional Fee Agreement (CFA)**. These concepts are explained later in this Briefing Note.

Although the overall net position is lower in the event of a win, the downside risk is mitigated. Further, the litigant is not required to pay their own fees as the claim progresses, improving cash flow.

¹ Fieldfisher act on a Conditional Fee Agreement and disbursements are covered by ATE Insurance

² Covered by ATE Insurance

Conditional Fee Agreement

Applies in respect of:

Own Costs	Own Disbursements	Adverse Costs
Yes	Counsel costs only	No

A **Conditional Fee Agreement (CFA)** is an agreement between a lawyer (solicitor or barrister) and client, where the lawyer agrees to work for a reduced or no fee.

If the case succeeds, fees are charged at standard rates with an agreed percentage uplift (the **success fee**).

If the case fails, only the reduced fee (or no fee) is payable.

Where no fee is payable in the event of a loss, this is sometimes referred to as a '**no win no fee**' agreement.

Unfortunately the **success fee** element is not a 'recoverable cost' (i.e. not recoverable from the other side in the event of success).

The success fee is therefore payable by the litigant.

Insurance

Applies in respect of:

Own Costs	Own Disbursements	Adverse Costs
Yes	Yes	Yes

Insurance falls in to two categories:

- (1) Pre-existing insurance that you already hold (known as **Before the Event Insurance** or **BTE**);
- (2) Insurance purchased in respect of a specific piece of litigation (known as **After the Event Insurance** or **ATE**).

Insurance is predominantly used to insure against the risk of having to pay the **other side's costs** if you are unsuccessful.

It can however, in certain circumstances, extend to **own costs** and **own disbursements**.

There is usually a set amount covered (referred to as a **limit of indemnity**).

For **BTE**, a premium will already have been paid for the policy (perhaps as part of your wider business or personal insurance arrangements).

For **ATE**, a premium will be charged.

That premium is usually payable at the conclusion of a claim and only in the event of success. The insurance premium is not a **recoverable cost**.

About FeeSolve

FeeSolve is not a single product. It is a collection of solutions available to meet your needs.

Our expert team will work with you to ascertain which of the following solutions best meets your needs and objectives.

Damages Based Agreements

Applies in respect of:

Own Costs	Own Disbursements	Adverse Costs
Yes	Counsel costs only	No

A **Damages Based Agreement (DBA)** is a type of contingency fee arrangement, where the fee charged by a solicitor or barrister is calculated not by reference to the amount of time spent on the case, but as a percentage of the damages recovered by the claimant in successful proceedings.

DBAs were introduced in 2013 through the Damages Based Agreements Regulations 2013.

Law firms have been slow to adopt DBAs and as such DBAs are not widely available in the legal market.

Fieldfisher, as a market leader, is pleased to offer DBAs to clients.

If the value of your claim, the likely costs involved and the prospects of success are suitable for a DBA, we will be happy to consider this with you as a litigation funding option.

Third Party Funding/Litigation Loan

Applies in respect of:

Own Costs	Own Disbursements	Adverse Costs
Yes	Yes	No

Third party funding is an arrangement where a professional funder or investor invests in a case and agrees to fund the costs of litigation, with a view to receiving a return on its investment if the case is successful.

If the claim is unsuccessful, the funder receives nothing and loses their investment.

Litigation Loans are loans provided by specialist financiers.

Money is advanced as required (usually subject to a limit) to assist with funding **own costs** and **disbursements**.

The financier will, in most cases, charge interest based on the amount of time money has been advanced for.

Litigation loans can either be **recourse** (meaning you pay back whether you win or lose) or **nonrecourse** (meaning you don't).

Requesting a funding proposal

If you are interested in finding out more about FeeSolve then contact the solicitor with conduct of your case. Your solicitor will liaise with Fieldfisher's specialist Funding Team to create a bespoke proposal for you.

Please note, we are not able to provide proposals for all cases. Our ability to make proposals and which proposals we make will be based on the value of your claim, the likely costs involved and the prospects of success.

About Fieldfisher

Fieldfisher is a European law firm with market leading practices in many of the world's most dynamic sectors. We are an exciting, forward-thinking organisation with a particular focus on energy & natural resources, technology, finance & financial services, life sciences and media.

Our network has more than 1,450 people working across 25 offices providing highly commercial advice based on an in-depth understanding of our clients' needs.

We operate across our offices in Amsterdam, Barcelona, Beijing, Belfast, Birmingham, Bologna, Brussels, Dublin, Düsseldorf, Frankfurt, Guangzhou, Hamburg, London, Luxembourg, Madrid, Manchester, Milan, Munich, Paris, Rome, Shanghai, Turin, Venice and Silicon Valley.

Fieldfisher was named as a top 20 firm by the FT Innovative Lawyers Awards 2018.