

15. Multi-Party Actions (MPAs)

3C-130

15.1 Scope of MPAs

1. All applications for Legal Representation in a multi-party action or potential multi-party action must be referred to the Multi-Party Action Unit. The MPA Unit is

...

--- Looseleaf Page Break (123) ---

...

part of the Special Cases Unit and is based in the Commission's London Regional Office. Under the Code, a multi-party action is defined as:

“Any action or actions in which a number of clients have causes of action which involve common issues of fact or law arising out of the same cause or event.”

2. MPAs cover a wide variety of different circumstances, but most can be divided into either:
 - (a) instant disasters – that is where a large number of people have been affected, usually suffering from personal injury, by a sudden event such as a major transport disaster;
 - (b) creeping disasters – where a large number of people have been harmed by a common cause such as an allegedly harmful product or form of treatment.
3. Rules of court have been introduced to allow courts to manage multi-party actions (Civil Procedure Rules, Part 19, Section III). These rules give the court power to make Group Litigation Orders for the co-ordination and progress of group actions. Note that there is, in practice, no difference between the terms “multi-party action” and “group action”. Any case in which a Group Litigation Order is made by the court will be treated as a multi-party action by the Commission. However in practice it will be common for applications for funding for Investigative Help to be made to the Commission in a potential multi-party action long before the action is recognised as such by the court.
4. Multi-party actions need special treatment under the Code because they differ in a number of respects from individual claims. Typically, an MPA will include “generic issues” that is issues which are common to all clients or to a particular group of clients. The nature and extent of the generic issues will often vary during an action and may also become clearer towards the end of the investigative stage.

5. Work in progressing an MPA is divided into generic work and work on individual claims. Under the Code “generic work” means work in an MPA in pursuing the generic issues and includes:
 - (a) the selection, preparation and trial of lead issues and lead cases;
 - (b) the co-ordination of the action on behalf of clients;
 - (c) any work determined to be Generic Work by the Commission.
6. This division between generic and individual work has a fundamental impact on the way in which MPAs are funded under the Community Legal Service. It also affects the way in which Criteria in the Code as to prospects of success and cost benefit should be interpreted.

3C-131

15.2 Excluded Work

1. Most multi-party actions are personal injury claims. Funding of personal injury claims is generally excluded by a combination of Schedule 2 of the Act and the Commission’s power to refuse funding on the grounds that a CFA is more appropriate than CLS funding. Multi-party actions are not, as such, a priority area for funding. Like other personal injury actions, funding can only be provided for cases which come within the Lord Chancellor’s direction. However, since by definition a multi-party action concerns numerous claims with common issues, most MPAs have the potential to demonstrate a significant wider public interest as this is defined in the Code. It is on this basis that such funding as is available in personal injury multi-party actions will usually be provided.
2. [With effect from 1 April 2010 a new restriction has been introduced on bringing Multi-Party Actions within scope on public interest grounds. Under paragraph 11 of the Lord Chancellor’s Authorisation on scope \(set out at section 3.3 of this guidance\) Scope Direction individual damages claims within group actions cannot be brought within the scope on public interest grounds if they have a value of less than £5,000. Claims under £5,000 within an MPA in any event are liable to be excluded under the Funding Code criteria as explained at 15.3 below.](#)
- 2.3. MPAs which arise out of allegations of clinical negligence will be within scope and considered under section 9 of the Code. Similarly MPAs against public authorities alleging serious wrongdoing, abuse of position or power or significant breach of human rights, the most common example being child abuse group actions, are within scope under section 8 of the Code. However General Funding Code criteria 5.6.1 and
...

...

5.7.1, which allow for funding to be refused on grounds of the availability of Conditional Fee Agreements, do apply to clinical negligence cases and claims against public authorities which relate to an MPA. See Code criteria 8.2.1, 8.3.5, 9.2.1 and 9.3.1. The effect of this is that in such cases the Commission can seek a balance between public and private funding in the MPA, as for cases under the General Funding Code. Guidance on the division between public and private funding in MPAs is at 15.7.12 and 15.7.18 below.

34. Housing MPAs, for example an action involving a large number of tenants, the case will be fully within scope and legal representation will be available to cover both generic work and individual work. However the Commission will, in such cases, need to be satisfied that fair and appropriate cost sharing arrangements are in place in the action. Funding may be refused under standard Criterion 5.4.2 if private clients are not appropriately contributing to the costs. Funding may also be refused for individual cases under Criterion 5.4.5 if it is unreasonable for an individual case to be funded prior to the generic issues being resolved.
4. ~~There are a number of personal injury Multi-Party Actions for which funding was granted prior to April 2000 under the Legal Aid Act 1988 and is continuing. Any individual application for a certificate to join such an action after April 2000 must nevertheless be considered under the rules for the new scheme. As explained above, the Lord Chancellor's directions on scope allow for funding for personal injury claims in "cases that have a significant wider public interest". For this purpose the Multi-Party Action as a whole may be regarded as a "case" so that if the generic issues in the action have a significant wider public interest, then an individual application to join the action will be treated as coming within the Lord Chancellor's directions and will be within scope. Nevertheless such applications will still be subject to all the relevant merits criteria in the Funding Code. Personal injury claims other than clinical negligence will be subject to the General Funding Code criteria allowing refusal on the basis that a conditional fee agreement may be available (criteria 5.6.1 and 5.7.1 of the Code). See further guidance at section 10.2.~~

3C-133

15.3 ~~15.3~~ — Merits Criteria ~~in Multi-Party Actions~~

1. With effect from 1 April 2010 important restrictions exist in the Funding Code criteria for individual claims within an MPA which are valued at less than £5,000.
2. For MPAs under the General Funding Code the £5,000 minimum applies both for investigative help and for full representation (new criterion 5.7.6). If the Multi-Party Action has a significant wider public interest, a lead claim within that action can still be funded but individual claims cannot.

3. For Multi-Party Actions under section 8 of the Code i.e. claims against public authorities alleging serious wrong doing etc. the £5,000 limit in the General Funding Code also applies with some safeguards. Under section 8 an individual claim within a Multi-Party Action which is valued at less than £5,000 may still be funded but only if it is based on allegations of abuse of children or vulnerable adults or allegations of ~~De~~discrimination (see Code criterion 8.2.3 and 8.3.6). Note that ~~the saving for exemptions with~~ discrimination cases does not apply to every conceivable form of discrimination but relates to discrimination on the grounds of ~~age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or , -age, disability or -sexual orientation (see the definition at 2.4 of the Code Criteria)~~. All of these are also the forms of discrimination recognised expressly in the Equalities Act 2010.
4. The combination of the rules on excluded work set out above and the criteria on claims under £5,000 can be summarised as follows:
- (i) if an MPA has a significant wider public interest, legal aid can in principle fund the generic work including a lead claim within the action;
 - (ii) individual claims within the action can be funded if they are valued at more than £5,000. Note however that all relevant funding criteria must be satisfied of which the availability of CFAs is often an important consideration;
 - (iii) if an individual claim is worth less than £5,000 but the MPA comes within the housing or clinical negligence sections of the Funding Code, it could in principle be funded. There would however be difficulty in such individual claims satisfying the cost benefit criteria of the Code and, in the case of clinical negligence only, the criteria for refusal on grounds of CFA availability would still apply;
 - (iv) if an MPA falls under the general Funding Code, individual claims under £5,000 cannot be funded;
 - (v) if an MPA falls under s.8 of the Code (serious wrongdoing against public authorities etc.) individual claims valued under £5,000 can only be funded if they fall within the exceptions of abuse against children or vulnerable adults, or Discrimination as described above.

45. The special nature of multi-party actions makes it necessary to apply the normal Criteria in the Funding Code in a special way:

- (a) where the Commission is funding generic work only the Commission will need to consider what constitutes a “successful outcome” when applying the prospects of success Criterion (see section 2.3 of the Code). In general, the Commission will consider the prospect of the generic issues being litigated to a successful conclusion AND substantially recovering the generic costs. It is not therefore necessary for this purpose to consider the likelihood of success of any individual claims save to the extent that the court is likely to consider these in deciding whether generic costs should be recovered from the other side;
- (b) when considering issues of cost benefit, “likely costs” will be interpreted as referring only to the likely costs to be incurred by the Commission. This will usually be restricted to generic costs as described above;
- (c) when considering likely damages in cost benefit Criteria, it is appropriate to consider the aggregate of the net damages likely to be recoverable for all clients in the action (whether or not financially eligible). In an MPA which has a significant wider public interest it is also necessary to consider the wider benefit to others who are not directly involved in the litigation.

--- Looseleaf Page Break (129) ---

26. In an MPA it is often necessary for the Commission to consider issues of principle, such as expert or scientific issues as to whether a particular product may cause a particular form of harm. A good example from earlier litigation was the scientific issue as to whether the Petussis vaccine for whooping cough was capable of causing brain damage. Where important issues of principle are being considered by the Special Cases Unit or the Independent Funding Adjudicator, the Commission may declare that the issue in question is an issue of principle affecting a large number of claims. The procedures for this are set out in rule C46 of the Funding Code Procedures. Where a decision of principle is made by the Unit, the normal rights of review to the Independent Funding Adjudicator will apply. Once an issue of principle has been declared, it affects all claims within its scope and individual cases will not be able to challenge the decision of principle save where they are asserting that:

- (a) their own claim does not fall within the terms of the decision; or
- (b) significant new information has arisen which was not before the Commission when the decision of principle was made or has since come to light such that there are grounds for reconsideration of the decision of principle.

15.4 The Scope of CLS Funding

1. Multi-Party Actions by their nature affect groups of clients typically some of whom will be financially eligible for CLS funding and others will not. Each Multi-Party Action therefore raises the issue as to what the scope of public funding should be. In addition to the normal merits considerations the Commission must consider, not so much whether an individual applicant for funding is financially eligible, but whether in all the circumstances it is reasonable for the issues raised in the application to be pursued with the benefit of public funds.
2. Every Multi-Party Action is different but the questions below will usually need to be considered and should be addressed when applications are made to the Multi-Party Actions Unit.

Do the Issues Raised Require Public Funding?

3. CLS funding to pursue generic issues in a potential MPA is likely to be refused unless the Commission is satisfied that at least a reasonable proportion of the group likely to benefit from the case is financially eligible under existing eligibility limits. Funding is also likely to be refused if it appears to the Commission that the issues could be litigated on a private basis, whether under conditional fee agreements or otherwise. All the circumstances of the case must be considered including the size of the potential group, the resources of the group, the merits and the likely level of costs.
4. If not so satisfied any application to fund generic work is likely to be refused under Criterion 5.4.2 (other persons can be expected to bring or fund the case), or on the ...

--- Looseleaf Page Break (125) ---

...

grounds of CFA availability under Criteria 5.6.1 and 5.7.1 (except in priority MPAs where CFA availability is not a relevant criterion).

5. Where an MPA is primarily proceeding on a private basis CLS funding may still be available to support individual claims subject to usual merits criteria. This might include a fair and proportionate contribution towards the generic costs.

How should the issues be brought to trial – group action or test case?

6. In funding cases as part of the Community Legal Service, the Commission is under an obligation to seek to secure the best possible value for money (section 5.7 of the Act). Therefore the Commission will always seek to ensure that issues in a potential multi-party action are brought to trial in the most cost-effective manner. Usually at the time funding is applied for no multi-party action will have been established before the court. Instead, the Commission will be faced with one or more applications which raise an issue of principle which has the potential to affect a large number of other claims. The most common examples are drug and product liability cases. The Commission will require applicants to submit a case plan putting forward a proposed strategy for bringing the issues to trial. Options include:
 - (a) funding only one or more individual test cases all the way to trial while no other work is carried out pending the outcome of the test cases;
 - (b) issuing proceedings for a whole group of claims and seeking to have those claims stayed while one or more lead cases from the group are selected and progressed to trial on the Multi-Track;
 - (c) applying at the outset for a Group Litigation Order for the co-ordination of all the claims, ultimately leading to the selection and trial of lead issues.
7. There are pros and cons to each approach and ultimately it will be for the court to decide on the most appropriate means of bringing the issues to trial, whilst protecting the interests of the clients generally – especially in relation to the Limitation Acts.
8. The Commission's starting point will usually be that the test case approach (paragraph 1(a) above) is likely to be the most cost effective option, save where individual circumstances justify funding a wider group. The individual test cases will be funded on public interest grounds but the Commission will have power at the end of the case to waive the statutory charge for the test cases if necessary, as explained in section 5.7 of this guidance.
9. The test case approach will not be applied if there are good reasons to fund a full MPA or if the court makes a Group Litigation Order. Often, the structure of the action as determined by the court will not significantly affect the degree of funding provided by the Commission because funding will usually be restricted only to the generic work, as explained in section 15.10 above. However, if it is necessary or appropriate for the Commission to fund individual claims, the structure of the action ordered by the court may have an important impact on the case plan and on the cost effectiveness of the action. Funding will therefore be kept under review at all stages of the action.

If we fund a test case, what private contribution should be made to the costs?

10. Where we fund a test case on behalf of a wider group we will normally expect that group to make a contribution towards costs. The contribution may be claimed under Regulation 38(5) of the Community Legal Service (Financial) Regulations 2000. Our approach to this issue will be as set out at paragraph 5.5.5 of this guidance. In the context of a potential Multi-Party Action the question is what the wider group can reasonably be expected to contribute, not merely what proportion of the wider group are likely to be financially eligible. For example if a test case is likely to benefit a wider group of whom only about 30% are financially eligible, it does not necessarily

...

--- Looseleaf Page Break (126) ---

...

follow that CLS funding must be restricted to only 30% of the costs. The issue instead is what level of funding can reasonably be expected from the remaining 70%.

11. Note that if the Commission claims a contribution under Regulation 38(5) and that contribution is not paid, funding for the action can be refused or withdrawn (see Rules C18 and C54 of the Code Procedures and Regulation 38 of the Community Legal Service (Financial) Regulations 2000).

Where we are funding a Multi-Party Action, what is the appropriate division between public and private funding?

12. It is important that CLS funding is directed where it is most needed and that a fair balance is achieved between public and private funding. In the past this has been difficult to achieve because private clients had little incentive to participate in Multi-Party Actions, being deterred by the prospect of a significant but uncertain liability for own generic costs as well as potential liability for the other side. In this way Multi-Party Actions have tended to be dominated by financially eligible clients leaving the CLS fund ultimately responsible for almost the totality of individual and generic costs. However the Commission now has power to structure funding in a different way through the use of the power to waive financial eligibility limits under Regulation 5B of the Community Legal Service (Financial) Regulations 2000 (as amended with effect from 1 April 2003 by the Community Legal Service (Financial) (Amendment) Regulations 2003). The power to waive eligibility limits arises where:

- (a) We are funding Legal Representation in a Multi-Party Action;
- (b) The Multi-Party Action has a significant wider public interest;

(c) The Commission considers it cost effective to fund services only in relation to specific issues within the action.

13. This last condition means that eligibility limits cannot be waived simply so as to increase the overall liability of the fund. Any increase in the scope of funding by making more people financially eligible must at least be matched by a reduction in the scope of funding by restricting such funding to specific issues within the action. In practice the Commission's normal approach will be to restrict CLS funding to generic work only as explained below.

14. In a case where eligibility limits are not waived under the regulation the Commission of course only has power to issue certificates to eligible clients and in relation to generic work will fund only the proportion of such work referable to eligible clients. This proportion will usually be determined by the court making a costs sharing order setting out how solicitor and own client costs should be apportioned between claimants. Note that while the Commission is ultimately only responsible for a proportion of the generic costs in a contracted Multi-Party Action there is discretion to make payments on account at a higher level (see paragraph 55 of the Multi-Party Action Arrangements 2000 in Volume 1). The Commission will also fund the individual costs of eligible clients unless it is appropriate to restrict such funding on the grounds of CFA availability, in which case each certificate will be limited to covering that client's share of the generic costs only.

How will eligibility waiver work in practice?

15. The Commission will only use the power to waive eligibility if all the conditions in the regulations set out above are satisfied. Further the Commission will need to be satisfied that satisfactory proposals have been made in relation to private contributions to generic costs. Funding for generic work may be postponed until sufficient numbers of private clients have agreed to contribute (Criterion 5.4.2). Reluctance by clients and insurers to accept risk may cast doubt on the merits of the action. In more straightforward actions we may expect CFA insurers to take some

...

--- Looseleaf Page Break (127) ---

...

part of the generic risk to demonstrate their commitment. The Commission will also need to be satisfied that satisfactory arrangements are in place to ensure that the individual claims in the action will be able to proceed privately under conditional fee agreements.

16. Where the Commission decides to use its powers under Regulation 5B the normal approach will be as follows:

- (a) CLS funding will cover generic work only but the Commission will fund the majority of generic costs, subject to client contributions;
 - (b) All persons wishing to apply to benefit from CLS generic funding will be treated as financially eligible and will be entitled to benefit from such funding, subject to their individual cases satisfying the Funding Code merits criteria and to paying appropriate contributions as explained below;
 - (c) Since the Commission will not be funding work on individual claims it will probably not be necessary for each client to receive a certificate. Note that costs protection under section 11(1) of the Act arises when a person receives funded services and does not depend on the issue of a certificate. It may be more appropriate for the Commission or the lead solicitors to keep a register of clients benefiting from CLS funding. The Commission will consider whether the merits decision on individual claims should more appropriately be devolved to legal representatives;
 - (d) All individual costs will be funded privately, usually but not always through conditional fee agreements. If possible insurance products will be negotiated for the action to protect clients against liability to the defendant for any inter partes costs order relating to individual costs, as well as covering the client's own premium and disbursements if the individual claim should fail. Insurance is not expected to be needed in relation to generic costs where costs protection will apply to all clients;
 - (e) Appropriate arrangements will also need to be in place to provide funding on account to cover payment of premiums and individual disbursements. This could either be through a banking product attached to the insurance, funding by the client or legal representatives or else CLS funding on account;
 - (f) The Commission will work with legal representatives and the court to encourage all clients wishing to pursue a claim to take part in the co-ordinated action and to discourage or prohibit individual claims proceeding outside it or gaining any benefit from the action by delaying making their claims until the action is concluded;
17. The level of contributions from clients to generic costs and the mechanism for collecting contributions will need to be agreed between the representatives and the Commission at the start of the action. Levels should take into account estimates of likely numbers involved in the action and likely overall costs, recognising that these are impossible to predict accurately at an early stage in the action. However contributions will need to be set at a realistic level to ensure a good take up by clients, recognising also that some clients may also need to make provision for their own premiums and individual disbursements.

18. Rather than requiring all contributions to be paid to the Commission it may be more convenient simply to deduct the total of all client contributions from any final payment of generic costs at the end of the action. Whichever mechanism is used, most contributions will take the form of a one off capital sum, additional contributions only being due once the litigation reaches some further agreed stage. Applicants for funding would not be required to have their means individually assessed but could instead simply agree to pay the fixed contribution. However any client could ask to have their means assessed by the Commission and if their assessed initial contribution was less than the agreed contribution they would only have to pay

...

--- Looseleaf Page Break (128) ---

...

the lesser sum. Clients with ongoing contributions from income but would not have to make further contributions once their total contribution had reached the agreed amount.

How can recovery of generic costs be safeguarded?

19. The Commission will only be able to commit funds to litigate generic issues if arrangements are in place to maximise the recovery of generic costs if the generic issues are substantially successful. The first priority would be to recover generic costs in full from the opponent. Insofar as the court does not order full costs recovery any shortfall will usually be met out of the damages of successful claimants. To achieve this and ensure that all parties are clear of their obligations the Commission will expect all clients joining an action to sign an inter-claimant agreement as a condition for benefiting from CLS funding for generic work. Such agreements will cover the following:
- (a) Each client will agree that if they settle their claim they will not do so in a way which prejudices the recovery of generic costs. The extent of recovery of generic costs will be determined by the court at the end of the case (see *Sayers v Smith Kline Beecham PLC [2002] 1WLR 2274*);
 - (b) Individual clients who are chosen as lead claimants in the Multi-Party Action will not be permitted to settle their individual cases without the consent of the Commission (Rule C46.1 of the Code Procedures);
 - (c) In the event of there being a shortfall in recovery of generic costs for any reason that shortfall will be attributed to clients who recover damages at any stage in the case and will so far as possible be funded out of those damages. The agreement will need to make provision for clients whose cases settle early in a case perhaps by providing that a certain amount or proportion of their damages be retained by the Commission

against any future shortfall in recovery of generic costs, leaving the balance of damages to be released immediately to the client.

15.5 Multi-Party Action Contracts

1. Multi-Party Actions tend to be the most expensive and complex cases to receive public funding. They are therefore administered under special contracts issued by the Multi-Party Action Unit. The procedure for tendering and contracting in Multi-Party Actions is set out in the Commission's Multi-Party Action Arrangements 2000 which are contained in Volume 1 of this Manual.
2. Under the Arrangements Multi-Party Action Contracts are generally let by competitive tender. The Commission has established a panel of solicitors who have particular expertise in multi-party litigation. In general, tenders for Multi-Party Action Contracts must include either a firm on the panel or a firm which is already involved in the action in question. Every tender will have to include a costed case plan, fully detailed and costed for the first stage (normally at least the first six months) of proposed work under the Contract. Final decisions on choosing between competing tenders are made by the Commission's [MPA Committee Special Controls Review Panel](#), which includes representatives of the Law Society and consumer representatives.
3. Once a Multi-Party Action Contract is issued the MPA Unit will authorize work under the Contract in stages, subject to approving the updated case plan. Each stage will be costed and Contractors will normally be required to stick to their costings, although if an unforeseen event occurs the cost limit may be extended. As for other High Cost Case Contracts remuneration under the Contract is usually at fixed hourly rates to ensure risk sharing as between legal representatives and the Commission. Regular payments on account are made during the course of the Contract.

3C-135