

'Jackson' campaign: insolvency litigation reform (summer 2017 update)

'Jackson': the story so far

In December 2015, the government announced the end of the exemption for insolvency litigation from the 2012 Legal Aid, Sentencing and Punishment of Offenders Act – an exemption which helps return approximately £480m owed to creditors from rogue directors and others every year. R3 fought a long campaign to secure a permanent exemption from the Act, including winning an extension to the exemption in February 2015.

The government's announcement in December 2015 was of huge disappointment to the insolvency profession and business community but R3 will continue to raise the benefits of an exemption with parliamentarians and stakeholders and monitor closely the impact of the exemption on creditors and in tackling rogue directors from 6 April 2016.

Background

The Jackson proposals

In 2010 Lord Justice Jackson recommended that the Conditional Fee Arrangements (CFA) uplift and After the Event Insurance (ATE) premiums should no longer be recoverable from a defendant in all civil litigation cases (including insolvency). The proposals were brought forward through the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act.

The aim of the Jackson reforms was to crackdown on the growing 'compensation culture' and to better protect public funds and the public interest. However, in doing so the reforms swept up all types of civil litigation, including insolvency litigation, despite it already achieving Lord Justice Jackson's aims in protecting public funds and the public interest.

Why is an exemption important for insolvency litigation?

Insolvency litigation is a vital tool for recovering and returning money from rogue directors back to creditors. Without an exemption for insolvency litigation from the LASPO Act, R3 and a number of business organisations were concerned that directors who commit fraud, are negligent or who wrongly take money out of a business could walk away with almost half a billion pounds a year (£480m - up from £160m a year in 2013) according to academic research: money that is owed to creditors including small businesses and HMRC.

R3's campaign for a permanent exemption

R3's five year campaign led to initial success with a temporary carve-out from the LASPO Act (1 April 2013 – 1 April 2015) for insolvency litigation. Further success was achieved in February 2015 with an extension to the temporary exemption following the R3 led campaign and support from a number of business bodies.

The campaign saw:

- **175** mentions of R3 and our campaign to keep the exemption in national, regional, and trade press outlets.
- Led a coalition of 10 business bodies that called for a permanent exemption, including the Federation of Small Businesses, the Chartered Institute of Credit Management and the British Property Federation.
- Publication of a 2014 academic report (by Professor Peter Walton (commissioned by R3) of the University of Wolverhampton) on the likely impact of the reforms on insolvency litigation.
- Over **80** MPs signed two House of Commons motions supporting the exemption, following lobbying from R3 and our members.

- **15** Parliamentary Questions were tabled to ask government ministers about the exemption, following R3 lobbying.
- The exemption was raised in over **100** meetings with MPs and peers.
- The exemption was debated at least **5** times in parliament, following R3 lobbying.
- **3** years of extra time for the profession to continue to pursue creditors' money.

New research: initial findings in December 2015 and full report April 2016

R3 commissioned a new report from Professor Peter Walton at the University of Wolverhampton to look at the insolvency litigation landscape and the impact of the reforms on the creditor community (including the taxpayer and businesses). His previous report showed that, in 2013, around £160m a year of money owed to creditors might not be retrievable should insolvency litigation not be provided with a permanent exemption.

Initial findings were published in December 2015 (shortly before the Government announcement), with the full report published in April 2016. The key findings:

- CFA-backed insolvency litigation was used in 2014 to pursue claims whose value was likely to be in excess of **£1bn** - up from **£300m** in 2010.
- Approximately **£240m** of these claims relates to money owed to HMRC – up from **£50-70m** in 2010.
- CFA-backed insolvency litigation realised approximately **£500m** per year for insolvent estates (up from **£160m** in 2013), with around £120m of this owed to HMRC (based on a survey of R3 members).
- CFA use in insolvency litigation (in compulsory liquidation cases) rose 39% from 2010 to 2014, while the number of compulsory liquidation cases fell.
- Without the insolvency litigation exemption from the LASPO Act, **51%** of appointment takers say none of their cases would have gone ahead.
- Impact of the end of the exemption:
 - o **86%** of respondents to the survey believe less money will be returned to creditors;
 - o **63%** will take on fewer 'no asset' cases;
 - o **49%** will stop or decrease litigation;
 - o **54%** will seek to use third party funders; **52%** of survey respondents have never used third party funding.
 - o **22%** will seek to use Damages Based Agreements; **90%** of survey respondents have never used a Damages Based Agreement.

Next steps

Despite the government's decision to end the exemption, with a commitment to review the impact of the Act by April 2018, R3 will continue to press for a reconsideration of the policy.

If you have any questions about our campaign, please contact R3's Head of Communications (nick.cosgrove@r3.org.uk or on 020 7566 4215).