

PPF Restructuring & Insolvency Team – guidance note

Potential legal actions contemplated by insolvency practitioners

1. Background

- 1.1 This guidance note explains the approach adopted by the Board of the Pension Protection Fund (“PPF”) when asked by insolvency office holders (“IP”) to consider the merits of, or approve the instigation of, legal action. It also sets out how the PPF will view a defence to legal action.
- 1.2 The PPF assumes all the creditor rights of the pension scheme trustees in relation to an insolvent employer from the start of the assessment period¹, usually triggered by the occurrence of an insolvency event². The PPF exercises these rights to the exclusion of the trustees of the pension scheme.
- 1.3 If the PPF assumes responsibility for the scheme following the conclusion of the PPF assessment period, the rights of the scheme are transferred to the PPF and the trustees are discharged from their pension obligations from that time.³
- 1.4 The pension scheme is frequently the single largest creditor of the insolvent employer so it will often have a significant economic interest in the outcome of the insolvency. Therefore, to the extent that unsecured creditors have a say in the conduct of the insolvency, the PPF’s requirements are often key.

2. The PPF’s Approach

- 2.1 The PPF’s approach will always be driven by its duty to maximise returns to the scheme from insolvent employers.
- 2.2 It acknowledges that IPs will sometimes be faced with litigation issues, either in relation to a continuation of proceedings brought by or against the employer prior to insolvency, or as a result of their own actions or investigations (for example, antecedent transactions). These issues can represent a significant opportunity to enhance the return to creditors, ideally before significant legal costs are incurred.

¹ (s137 Pensions Act 2004)

<http://www.pensionprotectionfund.org.uk/AssessmentPeriod/Pages/AssessmentPeriod.aspx>

² Section 121(3) Pensions Act 2004 and Regulation 5 Pension Protection Fund (Entry Rules) Regulations 2005. See appendix 1, PPF guidance for insolvency practitioners

http://www.pensionprotectionfund.org.uk/DocumentLibrary/Documents/insolvency_guidance.pdf

³ (s161 Pensions Act 2004)

- 2.3 To the extent that such actions require sanction by the creditors, the PPF expects to be consulted when it is a significant stakeholder in the outcome of the insolvency. IPs are asked to provide reasonable notice prior to the deadline for any resolutions they may require.
- 2.4 The PPF also welcomes approaches from office holders who simply wish to seek the opinion of one of the major creditors, particularly if there is no creditors' committee.

3. Actions Being Brought or Continued by Insolvency Practitioners

- 3.1 The PPF will generally provide no litigation funding.
- 3.2 If an office holder intends to fund legal action from assets in the insolvent estate, the PPF will balance the forecast enhancement in the resulting dividend against the potential impact of costs. It will also consider the time cost of the delay in receiving and investing the dividend while the investigation and/or legal action continues.
- 3.3 It will expect IPs to have considered and be able to articulate the following areas before launching legal action:
- The prospects of success - the PPF will expect to see any legal opinion obtained by the IP, and will not generally support any legal action that assesses the chances of success at less than 60%. Legal opinions expressing the chances of success in non-percentage terms will not usually be sufficient.
 - Whether the potential targets of the proposed legal action have sufficient resources to pay any award made against them - excellent legal cases will not be supported if they are only likely to result in pyrrhic victories, unless there is an issue of wider legal importance to the PPF at stake.
 - Prudent litigation forecasts, including a worst case costs analysis - the PPF will expect the actions at each expected stage in the proceedings to be fully explained, and the costs of each stage to be quantified. It will also expect possible exit routes and the associated costs to have been identified in the event that the legal action does not proceed as hoped.
 - Funding of the action - in addition to funding from the insolvent estate, the PPF will expect the IP to have considered:
 - a. the chances of having an adverse costs order awarded and the availability of adequate after the event insurance;
 - b. litigation funding; and
 - c. conditional fee agreements.
 - Expertise of the IP's chosen legal advisors - we would normally expect the IP's legal advisors to have proven expertise in the litigation area being pursued.

- The strategic aspects of the claims – the PPF expects consideration to be given to alternatives to instigating or continuing legal action, and how they have been assessed to give the best likely return for creditors – for example, informal settlements, mediation, and assignments of claim for valuable consideration.

3.4 The PPF will expect a firm recommendation from the insolvency office holder in relation to the proposed litigation.

3.5 The PPF must be kept apprised as the legal action progresses, and consulted if key decisions are required, for example, on the desirability of settlement or if matters do not proceed as anticipated.

The PPF does not encourage IPs to threaten legal action unless they have a genuine intention to proceed in the absence of an acceptable alternative.

3.6 Actions Being Defended by Insolvency Practitioners

4.1 The PPF acknowledges an office holder’s statutory power to defend any action or other legal proceeding⁴. However, if challenged, the PPF will expect IPs to explain how the decision to defend or not defend claims is in the best interests of creditors generally.

4.2 The PPF will resist and object to IPs spending the creditors’ money defending actions brought against them personally for taking or failing to take actions required of them by law (for example, breaches of health and safety or environmental legislation).

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⁴ Schedules 1,2, 4 and 5 Insolvency Act 1986

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