Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know

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Both antitrust litigation and third-party funding are increasing globally. Indeed, the two phenomena may feed off each other—more funders fund antitrust litigation because there is more of it, and there is more of it because there is more funding. Third-party litigation funding generally means that someone other than a party, the party's counsel, or other entity with a preexisting contractual relationship with the party (like an indemnitor or liability insurer) provides non-recourse funding for a dispute.[1] In its early days, funding involved a third-party investor's providing funds to prosecute a plaintiff's claim (often personal injury) in exchange for a portion of the settlement or judgment proceeds from the case. Today, the increasing prevalence of third-party funding has precipitated a number of related legal developments around the world. It looks like third-party funding is here to stay and we, as antitrust lawyers, need to know more about it.

In this article we discuss the basics of third-party litigation funding and various funding-related regulatory and legal developments. We interviewed a number of third-party litigation funders while preparing the article, and provide their perspectives and insights.[2] Our focus is on the United States, the European Union, the United Kingdom, and Canada because the funders we interviewed identified those jurisdictions as the most attractive prospects for litigation funding in our interviews (although Canada to a lesser extent).

Why Antitrust Is Appealing to Litigation Funders

Not surprisingly, the funders we interviewed all gave similar answers as to why antitrust cases are attractive. The reasons include:

- The cases are generally brought by experienced and highly specialized legal teams;
- The value of antitrust claims is sufficiently high to attract third-party funding, particularly where a cartel has operated for many years, and sometimes decades;
- The financial viability of a particular action may be improved if plaintiff law firms file class actions or assemble groups of claimants when there are a large number of victims of cartels;
- The claims often follow a decision of a national competition authority, where liability has been established and the dispute comes down to the extent of the claimant's loss;

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1 Am. Bar Ass'n Comm. on Ethics 20/20, Informational Report to the House of Delegates, 1 (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

2 We interviewed the following funders on behalf of their organizations: Aviva Will, Managing Director, Burford Capital; Ashley C. Keller, Managing Director, Gerchen Keller Capital, LLC; Stephen O'Dowd, Senior Director of Litigation Funding, Harbour Litigation Funding; and Steven Friel, Chief Investment Officer, and Zachary Krug, Senior Investment Officer, Woodsford Litigation Funding. We also interviewed Selvyn Seidel, chair and CEO of Fulbrook Capital Management, LLC (and co-founder and former chair of Burford). Fulbrook says it occupies a different space, representing claimants and investors worldwide, linking claims with investors. Unless otherwise noted, all quotes from those companies in this article are from their interviews.

- Antitrust claims usually settle before a final judgment, further reducing the downside risks of funding;
- The significant up-front financial commitment and expense of litigating make sharing or shifting risk and expense an attractive proposition; and
- The defendants, importantly, are usually creditworthy.

Harbour Litigation commented that the majority of plaintiffs it funds in antitrust cases are large institutional investors. As a result, it is important to Harbour "to ensure they are seeking a monetary outcome from their case, rather than a more beneficial trading relationship with the defendants (e.g., discounted price list)" because "[w]hile it is possible to value future trading relationship benefits, it is less straightforward than a pure monetary outcome."

In Europe, several high-profile court actions have been brought by well-known third-party funders that purchase the claims from buyers of the allegedly cartelized goods:

- Belgian firm Cartel Damage Claims (CDC) sought redress in various Member States against manufacturers sanctioned by competition authorities for their participation in price-fixing cartels regarding Hydrogen Peroxide in Germany and Finland, Sodium Chlorate in the Netherlands, Cement in Germany, and Paraffin Wax in the Netherlands;
- Irish firms Claims Funding International (CFI) and Claims Funding Europe (CFE) brought damages claims in the Air Cargo cartel case (Netherlands), and recently announced they would file an action in the Trucks cartel case in the Netherlands;
- East-West Debt, based in Belgium, the Netherlands, and the UK, brought an action for damages in the Elevator cartel case in the Netherlands;
- Dutch firm De Glazenlift also brought an action in the Elevator cartel case in the Netherlands; and
- U.S. firm Gerchen Keller is funding the MasterCard case in the UK.

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The Basics of Third-Party Litigation Funding

Litigation investments are attractive to investors because the returns in one case are largely uncorrelated to other cases, to the stock market, or to other asset classes, which can help diversify a portfolio. They also have the potential to generate large returns, though Gerchen Keller explained that funding-market fees are more akin to the contingency fee market than to venture-capital-style home-run returns.

The industry has grown exponentially in the last decade to fund virtually all types of commercial cases and portfolios of cases where multiple matters are used as collateral to secure capital. Some funders have provided capital for start-up law firms or branch offices of law firms that will be paid back from successful litigation.

The latest development in this area has seen certain funders moving on from funding a discrete claim to repositioning themselves as "financiers," investing in portfolios of claims, and offering distinctive pricing models on this basis. For parties with adequate resources, litigation finance has evolved into corporate finance—funders can offer a more convenient financing structure, allowing capital that would otherwise be spent on legal fees to be allocated to other areas of their business during the life of the proceedings.

And the funders increasingly find ways to provide funding for defendants as well as plaintiffs. On the defense side, Gerchen Keller provides judgment indemnification to protect against an outsized judgment that could cripple an enterprise. It also sets benchmarks for defense success based on total exposure of a benchmark amount, in essence creating contingency-style incentives where a defendant may pay more in the event of a victory, but would pay only for a victory. An added attraction to the defendant according to Burford is that a funder can help a defendant "take significant litigation expense off their balance sheets." Woodsford believes that even without loser-pay rules, defense funding "can be attractive to both the funder and the defendant—similar to insurance, the defendant is able to mitigate a larger downside risk by paying the funder's comparatively smaller upside." Other funders would disagree, and suggest defense funding is uncommon because "a defendant has to pay a funder's charges from its own funds" regardless of the outcome. Certainly, it remains the case that litigation funders are primarily used by claimants.

The nature of the funders is as varied as the funding they provide. Some are publicly traded companies or private firms; some are hedge funds or individuals seeking to invest in individual cases.[3] The more traditional funders are considering different business models. Burford recently announced that it has launched a new law firm, Burford Law, using the UK Alternative Business Structure (ABS), which allows non-lawyers to own and invest in law firms.[4] Woodsford is also considering an ABS for several reasons: first, to avoid the possibility of being "held liable for adverse costs" in the UK (a risk that funders face); second, to allow it "a more direct role in controlling the litigation"; and finally, to "minimize some transaction costs inherent in having both a funder and a law firm dealing with the same issues." Woodsford acknowledges, however, that those "benefits may be outweighed by the managerial costs of running a full fledged law firm."

The Pros and Cons of Litigation Funding

Critics of litigation funding point to the need to protect the purity of justice by preventing third parties from manipulating the litigation process. One of the more outspoken opponents—the U.S. Chamber Institute for Legal Reform (ILR), which is an advocacy group of the U.S. Chamber of Commerce—has identified "four negative public policy consequences" of third-party investments in litigation: (1) they can "increase the volume of abusive litigation" because the funders "can hedge any 'investment' against their entire portfolio of cases;" (2) they undercut the parties' and lawyers' "control over litigation" because the funders can "be expected to try to exert control over . . . strategic decisions;" (3) they can "prolong litigation" by making "reasonable settlement offers less attractive" because of the investor's "extra demand" on a share of the proceeds; and (4) they "compromise the attorney-client relationship and diminish the professional independence of attorneys by injecting a third-party into disputes."[5] These potential consequences, according to the ILR, "represent a clear and present danger to the impartial and efficient administration of civil justice in the United States."[6]

Proponents of litigation funding tout the industry's ability to provide access to justice for under-resourced parties, enabling them to pursue proceedings that a lack of financing otherwise would have prevented. Or, as one U.S. court put it after noting that costs inherent in major litigation can be crippling to a plaintiff lacking resources to sustain a long fight, "Creative businessmen, ever

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[3] In 2015, *The American Lawyer* profiled six of the biggest litigation funding companies. *See* Julie Triedman, *The Big Players in the Litigation Funding Arena*, Am. Law., Mar. 4, 2016. One of the more provocative examples of individual funding is Silicon Valley investor Peter Thiel's funding of Hulk Hogan's sex-tape lawsuit against Gawker, which resulted in a $140 million jury verdict and led both Gawker and its founder, Nick Denton, to file for bankruptcy. (The parties subsequently entered into a confidential settlement agreement.)

[4] Burford explained to us that "Burford Law exists to serve our law firm clients, not compete with them" and that "Burford Law's current focus is on judgment enforcement matters, working closely with Burford Capital's growing judgment enforcement business."

[5] John H. Beisner & Gary A. Rubin, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-party Investments in Litigation*, U.S. Chamber Institute for Legal Reform 1–2 (Oct. 2012), http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf.

[6] *Id.* at 1.

alert to new opportunities for profit, perceived in this economic inequality a chance to make money and devised what has come to be known as third-party litigation funding, where money is advanced to a plaintiff, and the funder takes an agreed upon cut of the winnings."[7]

Funding advocates counter critics by noting that funders wanting to stay in business will not risk their investment in frivolous matters.[8] The English Court of Appeal recently approved the view of a high court judge that funders did not aim "to finance hopeless cases but those with strong merits."[9] Additionally, Ashley Keller with Gerchen Keller explained that although funders do not have the same fiduciary duties as a lawyer has to the client, Gerchen Keller structures investments to align incentives, does not take control of a case or change strategy, and ensures that the client remains in the driver's seat. Woodsford says its "level of involvement varies from case-to-case, depending on the needs and preferences of the claimants, lawyers, as well as the jurisdiction in which a case is pending," but Woodsford echoed the other funders interviewed in adding that "[u]ltimate decisions regarding settlement and legal strategy are always in the hands of the claimant and lawyer."

[A]lthough third-party funding has been recognized and approved by courts in a number of jurisdictions, there is presently little mandatory regulation of third-party litigation funding in most parts of the world.

The funding, of course, comes at a cost. If a party is successful, most funders will expect to recoup the sum funded plus a substantial share of the proceeds. But if a party would otherwise be unable to pursue proceedings without funding, recovering a portion of its claim is better than nothing. There can also be significant upfront costs in putting third-party funding in place. A party's legal team must conduct due diligence on funders and their credit worthiness, secure confidentiality agreements, and then agree to an appropriate funding agreement (the terms of which will vary depending on the parties and the case). Some or all of those costs may be wasted if an offer of funding is not made or where multiple funders have been approached.

Legality of Third-Party Funding

Historically, in many jurisdictions throughout the world, funding arrangements were prohibited by the doctrines of maintenance, champerty, and barratry. Those common law doctrines arose in Medieval Europe to prevent the wealthy from funding legal claims of the poor to attack personal or political enemies. They generally prohibit a third party from assisting in maintaining lawsuits, paying some or all of the litigation costs in return for a share of the proceeds, and stirring up lawsuits and disputes between others. Since the 1990s, however, there has been a general trend, frequently on a case-by-case basis, toward liberalizing or abolishing those doctrines, and considering instead whether the arrangements are contrary to public policy and unenforceable as a result. Some jurisdictions, however, still do not permit third-party funding arrangements.[10]

Still, the trend is not uniform and the status of the third-party funding industry remains somewhat in flux. And although third-party funding has been recognized and approved by courts in a number of jurisdictions, there is presently little mandatory regulation of third-party litigation fund-

7 Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014).

8 Burford described to us the controversy over litigation finance as "a noisy swirl of imagined discord that often overshadows real dialogue about litigation finance, resulting in a false equivalence between a very small but vocal group of critics and the larger majority who support its use."

9 Excalibur v. Texas Keystone Inc. and others [2016] EWCA Civ. 1144, 27 (Nov. 18, 2016).

10 For example, in Canada, third-party funding arrangements with contingency-based returns were thought to be prohibited under the common law doctrines of maintenance and champerty. *See* Dugal v. Manulife Fin. Corp., 2011 ONSC 1785, para 18, additional reasons 2011 ONSC 3147. Courts in Canada, however, now take the position that third-party funding is not champertous per se, but may be champertous if there is an improper motive. *See, e.g.*, Metzler Inv. GmbH v. Gildan Activewear Inc., [2009] OJ No. 3315 (S.C.), para 63.

ing in most parts of the world. What little regulation there is reflects the differences in the political and legal systems in the various jurisdictions.

United States. The New York City Bar Association issued a formal opinion in 2011 addressing ethical issues that may arise when a lawyer represents a client who has entered into a non-recourse litigation financing agreement. The opinion identified two potential legal barriers. First, it advised that "lawyers should be aware that in certain circumstances, courts have found that non-recourse litigation financing agreements violate usury laws," even where the financing companies "characterize non-recourse financing arrangements as a 'purchase' or 'assignment of the anticipated proceeds of the lawsuit (and therefore not subject to usury laws)."[11] Second, the opinion advised lawyers to be mindful that although no New York courts appear to have found non-recourse funding arrangements unlawful under New York law, "courts in other jurisdictions have invalidated certain financing arrangements under applicable champerty laws."[12]

More recently, New York's highest court found a funding agreement champertous under a New York statute that "prohibits the purchase of notes, securities, or other instruments or claims with the intent and for the primary purpose of bringing a lawsuit," despite a safe harbor that exists when the aggregate purchase price of the notes or other securities is at least $500,000.[13] The funder in that case, Justinian Capital, had taken an assignment of notes that had declined in value for a purchase price of $1 million. The very essence of the assignment was to bring suit against the issuer of the notes. The court did not hesitate in finding the agreement champertous under New York's statute. The court also found that the safe harbor did not apply because Justinian had not actually paid any portion of the purchase price and had no binding or bona fide obligation to pay it independent of the outcome of the lawsuit.[14] The court described the agreement as a sham transaction between the owner of a claim that did not want to bring it and an undercapitalized assignee that did not want to assume the $500,000 risk to qualify for the safe harbor.[15]

Although the decision involves a relatively narrow statutory provision not likely to apply in antitrust cases, it may have broader ramifications. In a press release immediately following the decision, Burford announced that it "reaffirms New York's support of significant litigation finance," and noted that the dissenting judge "would go even further and laud the role of litigation financiers as 'fostering accountability in commercial dealings.'" Burford commented that "the narrow facts" that lead to a champerty finding in that case takes "nothing away from the broad endorsement of substantial litigation finance transactions by New York's highest court."[16]

A federal court in Illinois rejected a defense that a funding agreement was prohibited by an Illinois criminal statute prohibiting champerty and maintenance, aptly observing that "over the centuries, maintenance and champerty have been narrowed to a filament."[17] The court noted that "the

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[11] The Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2011-12 (June 2011), 2011 WL 6958790, at *2 [hereinafter NYC Ethics Opinion].

[12] *Id.* at *3.

[13] Justinian Capital SPC v. WestLB AG, 2016 N.Y. Slip Op. 07047, 2016 WL 6270071, at *1 (NY Oct. 27, 2016).

[14] *Id.* at *4.

[15] *Id.* Along those lines, Woodsford noted that a well-regarded law firm's "willingness to have some significant skin in the game is one meaningful indicator" of the probability of a claim's success.

[16] Press Release, Burford Capital, *New York Court of Appeals Affirms Burford-style litigation finance Transactions*, http://www.burfordcapital.com/blog/new-york-court-appeals-affirms-burford-style-litigation-finance-transactions/.

[17] Miller UK Ltd., 17 F. Supp. 3d at 727.

few state courts that have held funding agreements champertous under their state statutes have only done so in the context of a suit by the parties to the contract seeking their enforcement."[18]

A Delaware court considered litigation funding in deciding a motion to dismiss, and provided guidance regarding how to properly structure a litigation finance agreement.[19] Specifically, the court suggested that a third-party litigation finance agreement could avoid champerty and maintenance claims where: (1) the agreement does not assign ownership of the legal claim to the funder; (2) the funder does not have any right to direct or control the litigation; and (3) the party bringing the claim retains the total and "unfettered" right to settle the litigation at any time and for any amount.[20]

Legislation regulating the litigation finance industry in the U.S. is currently relegated to the states, some of which have been active recently in regulating consumer litigation finance.[21] The ILR believes state regulation is not sufficient, and has advocated that federal regulation of the industry is essential. Its call has yet to succeed, but apparently has piqued some interest in the U.S. Senate. In 2015, Senate Judiciary Committee Chairman Chuck Grassley (R. Iowa) and Senate Majority Whip John Cornyn (R. Texas) expressed a concern that "[t]hird party litigation financing pumps millions of dollars into our justice system, and the current lack of oversight makes it difficult to track this money's influence on the actions of litigants and the outcomes of litigation."[22]

Hoping to gain "insight into where this money is going" and to enable them to "craft effective protection to keep the civil justice system honorable and fair," Senators Grassley and Cornyn sent letters to Burford Capital, Bentham IMF, and Juridica Investments Ltd. asking for "details regarding the cases they finance, the structure and terms of the agreements they've entered into and their returns on investment" as well as "information on firms' general practices, such as whether the court or interested parties are made aware of any third-party agreement."[23] To date, that inquiry has not resulted in legislation at the federal level.

Selvyn Seidel with Fulbrook acknowledges that "[m]any deep and opposing opinions are held" on the subject of regulating third-party litigation funding, but is pro-regulation as long as it is sensible. That can be achieved, he believes if "the industry, the market, the regulators, and the defendant community should, ideally, join hands to improve the situation."[24]

Europe. In much of Europe (outside of the UK), where class actions are more limited, the majority of third-party funders have adopted a business model of purchasing the claims from the victims. Under this model, which technically may not be considered financing, the funder acts in

18 *Id.* at 726 (citations omitted).

19 Charge Injection Tech., Inc. v. E.I. DuPont de Nemours & Co., No. N07C-12-134, 2016 WL 937400 (Del. Super. Ct. Mar. 9, 2016). The motion involved a financing agreement with a subsidiary of Burford.

20 *Id.* at *45.

21 For example in 2016, Indiana passed a consumer protection law that regulates loans made to consumer claimants. H.R. 1127, 119th Gen. Assemb., Second Reg. Sess. (Ind. 2016). Vermont and Arkansas also recently passed laws regulating the consumer litigation finance industry. *See* Vt. Stat. Ann. tit. 8, § 2251 et seq.; Ark. Code Ann. § 4-57-109 et seq. And in 2015, the Colorado Supreme Court ruled that consumer litigation funders who offer cash advances to plaintiffs in personal injury cases are making loans that are subject to payday lending rules. Oasis Legal Fin. Group, LLC v. Coffman, 361 P.3d 400 (Colo. 2015).

22 *See* Press Release, Grassley, Cornyn Seek Details on Obscure Third Party Litigation Financing Agreements (Aug. 27, 2015), http://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements.

23 *Id.* The letters, which are reprinted in full on Senator Grassley's website, inquire into matters either being litigated or arbitrated in the United States.

24 *See* Selvyn Seidel, *Fulbrook Primer on Third Party Dispute Finance* 49 (2016), http://www.fulbrookmanagement.com/fulbrook-primer-on-third-party-dispute-finance/.

its own name and on its own account (e.g., CDC, CFI/CFE). Though this model has been accepted in various Member States,[25] it is yet to be tested in others where the courts may be more timorous in the absence of a legal framework.

Indeed, after CFI's litigation vehicle, Equilib, brought a claim in the Netherlands against Air France, KLM, and Martinair, the three airlines brought a preemptory defensive action in French court to stave off a damages claim by Equilib in the Air Cargo cartel case.[26] The airlines argued that, according to French law, the very existence of Equilib should be deemed illegal as it was allegedly a fictitious company with unlawful purpose and cause. The French court rejected the airlines' action in 2012 for procedural reasons without reaching the merits and, in the end, Equilib never sued the airlines in France.

To date, no third-party funder has filed a cartel case for damages in France. The only local funder, Alter Litigation (which has not registered its company in France but in the UK), has remained inactive so far.

On the regulatory front, the EU is not authorized to regulate third-party funding generally; that responsibility lies with individual Member States.

The most aggressive stance on third-party funding in Europe has been taken in the High Court of Ireland, which ruled in February 2016 that third-party funding of litigation is illegal even though the defense in that case argued that the claim could not have been prosecuted without third-party support.[27] This decision is to be appealed directly to the Irish Supreme Court and so it remains to be seen whether the decision will be upheld.

On the regulatory front, the EU is not authorized to regulate third-party funding generally; that responsibility lies with individual Member States. The European Commission nevertheless issued a non-binding recommendation in June 2013, which provides two sets of principles on third-party funding in antitrust class actions that can usefully guide national courts of the Member States.[28] First, the Commission encourages national courts to stay third-party funded proceedings where:

(1) there is a conflict of interest between the third-party funder and the claimant party and its members;[29]

(2) the third-party funder has insufficient resources to meet its financial commitments to the claimant party initiating the collective redress procedure; or

(3) the claimant party has insufficient resources to meet any adverse costs should the collective redress procedure fail.[30]

Second, the Commission invites EU Member States to forbid third-party funders to:

(1) influence procedural decisions of the claimant party, including on settlements;

(2) provide financing for a collective action against a defendant who is a competitor of the fund provider, or against a defendant on whom the fund provider is dependent; or

(3) charge excessive interest on the funds provided.[31]

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[25] *E.g.*, Germany, the Netherlands, and the UK.

[26] Air France v. Equilib, Paris Commercial Court, Jan. 31, 2012 (RG 2011030421).

[27] Persona Digital Telephony Ltd & anor v. The Minister for Public Enterprise & ors [2016] IEHC 187.

[28] European Comm'n, *Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law*, 2013 O.J. (L 201) 60 (June 11, 2013), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN.

[29] The NYC Ethics Opinion identified a number of potential conflicts of interest that may arise in connection with referring a client to a litigation finance company, advising a client about financing, and extending financing to a client the lawyer represents in litigation. NYC Ethics Opinion, *supra* note 11, at *3.

[30] *Id.* ¶ 15.

[31] *Id.* ¶ 16.

It is yet to be seen if these principles will be adopted at the national level in the Member States.

In France, the national bar association has recently recommended the adoption of new legislation that would incorporate the European Commission's recommendations in the French Civil Code.[32] The proposed reform may be decisive in the development of third-party funding there.

Many Member States, however, still lack a regulatory framework for third-party funding, including countries where it has been developing in practice (e.g., Germany).

In England and Wales, there has been a significant increase in third-party funded claims alleging a breach of competition law over the last decade. That can be attributed to various features of the English legal system that make it an attractive jurisdiction for bringing those claims (e.g., the ease with which claims can be issued, the permissive approach taken by the English courts to the rules that govern jurisdiction, wide and early disclosure of documents, and costs rules). Part of England's attraction, however, stems from the innovative fee arrangements that have been offered to potential claimants, including law firms offering "no-win, no or less-fee" conditional fee arrangements or "damages-based agreements" (the UK's equivalent of contingency fee agreements). When these fee arrangements are coupled with third-party funding, as well as after-the-event costs insurance, this can enable claimants to bring claims on effectively a "risk-free" basis. As Gerchen Keller noted, the defendants are the ones who should be worried about loser pay rules.

In England and Wales, there has been a significant increase in third-party funded claims alleging a breach of competition law over the last decade.

There is no binding funding regulatory regime in England. Instead, a voluntary Code of Conduct for Litigation Funders has been in existence since 2011 and covers capital adequacy requirements for funders as well as rights to terminate or control proceedings.[33] The Association of Litigation Funders is the body responsible for overseeing this self-regulation. Currently, however, only seven funders are members of that association, leaving a large proportion unregulated.[34] This poses real questions over the viability of self-regulation.

Canada. Third-party litigation funding is a relatively recent development in Canada. Other than class action and personal injury contexts, third-party funding of private litigation is still quite limited. Third-party funding arrangements in Canada will not be approved if they facilitate "officious intermeddling" by the third party.[35] Agreements should acknowledge that the plaintiffs instruct counsel and that counsel's duties are to the plaintiffs.[36] Agreements that allow the funder to attend settlement discussions and unilaterally withdraw from the litigation on short notice have been noted as improper.[37]

Current Issues in Third-Party Funding

In addition to the ongoing debate as to what third-party funding is legal, to what extent, and under what general regulatory regime, there are some particular issues that courts are wrestling with. In each area, there are divergences of approach around the world, and the varying court-led approaches suggest that third-party litigation funding could benefit from a degree of regulation.

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32 Conseil National des Barreaux, *Final Report on Third Party Funding* (Nov. 20–21, 2015).

33 *See* http://associationoflitigationfunders.com/code-of-conduct/.

34 *Id.* The seven member-funders are Burford Capital, Calunius Capital LLP, Harbour Litigation Funding Ltd., Redress Solutions PLC, Therium Capital Management Ltd., Vannin Capital PCC, and Woodsford Litigation Funding Ltd.

35 *Metzler*, [2009] OJ No. 3315 (S.C.), para 60.

36 *Dugal*, 2011 ONSC 1785, paras 6 and 33(c).

37 *Metzler*, [2009] OJ No. 3315 (S.C.), paras 58 and 60.

Class Actions. The primary issue relating to funding that has arisen in U.S. class actions is whether funding agreements and related documents may be relevant to class certification issues and should therefore be disclosed in discovery. For example, the court in *Kaplan v. S.A.C. Capital Advisors, L.P.*, declined to compel the production of funding documents because they were irrelevant to the case, despite a challenge to alleged adequacy of class counsel's financial resources.[38] But at least one case has held to the contrary. The court in *Gbarabe v. Chevron Corp.*[39] compelled a class action plaintiff to produce a confidential litigation funding agreement because it was relevant to determining the adequacy of class counsel who, according to the pleadings in the case, had no formal office or support staff and had missed deadlines due to lack of resources. However, *Gbarabe* may be an outlier because the plaintiff conceded two of the strongest arguments against producing third-party funding information—relevance and privilege. In addition, the confidentiality provision in the funding agreement explicitly allowed for production in case of a court order.

Although the U.S. has had class actions for more than 50 years, they are still in their relative infancy in other parts of the world. England and Wales have moved faster and further than the rest of the EU in relation to the availability of antitrust class action damages claims. Following the adoption of Chapter 2 of Part 3 of the Consumer Rights Act 2015 in England and Wales, it is now possible—for antitrust actions only—to claim on an "opt-out" basis, rather than an opt-in basis in which each member of the class has to expressly choose to join the class. There are currently two pending antitrust class action claims. One, in relation to mobility scooters,[40] does not feature third-party litigation funding. Instead, the lawyers involved are working on the basis of a conditional fee arrangement, and after-the-event insurance is in place to cover any costs payable to the defendant if the claim is unsuccessful.

The second antitrust class action claim is the well-publicized £14 billion claim issued in September 2016 by Walter Merricks, as a representative acting on behalf of 46 million consumers in the UK, against MasterCard in relation to interchange fees. This class action claim is being funded by Gerchen Keller, which has publicly stated that it is putting up to £40 million behind the claim. Gerchen Keller is not part of the Association of Litigation Funding, and so not bound by its Code of Conduct. In light of past practice, the English court will most likely enquire into the nature of the funding arrangement, and in particular, any impact it would have on the likelihood of settlement. Notably, Lord Justice Jackson had anticipated that all third-party funders would adhere to the voluntary code.[41]

In Canada, third-party funding is far more common in class actions than in other cases, primarily because of the availability of both private and public third-party funding in class cases. In some provinces, funding is available in class action cases through public funds or, more recently, through a court-approved private third-party funding arrangement. Public funding for class

38 No. 12-CV-9350, 2015 WL 5730101, at *3–5 (S.D.N.Y. Sept. 10, 2015); *see also Miller UK Ltd.*, 17 F. Supp. 3d at 728 (after rejecting a defense of maintenance and champerty, holding that the "deal documents" evidencing the structure and terms of the financing transaction, were no longer relevant to the case.).

39 14-CV-00173, 2016 WL 4154849 (N.D. Cal. Aug. 5, 2016).

40 Gibson v. Pride Mobility Prods. Ltd., CAT Case No. 1257/7/7/16.

41 Review of Civil Litigation Costs: Final Report ¶ 2.4 (2009), https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

actions has been available in Ontario and Quebec for many years.[42] Applications for public funding are rarely opposed by defendants.[43]

Public funding in Canada has been provided in at least one antitrust class action. The claim there was based on alleged vertical price-fixing in the automotive resins market. The case settled and the Fund was awarded 10 percent of the net proceeds of the settlement claims process, as much as CDN$1.1 million depending on the take-up rate on the settlement.[44]

In English litigation, the Court of Appeal recently confirmed that a third-party funder of an unsuccessful litigant may be liable to contribute toward the successful litigant's costs, even on an indemnity basis, though currently that contribution is limited to the amount of funding provided.

Private third-party funding arrangements in class actions in Canada must be approved by the court.[45] Recent cases have held that approval must be obtained before class certification, and the funding arrangement must be "promptly disclosed" to the court.[46] At least nine third-party funding arrangements have been approved, including four in Ontario. Courts, however, have held that the commission payable should be reasonable and consistent with the commission (10 percent) that would be payable to the Fund.[47] The commission received by the third party typically ranges between 5 percent and 10 percent in cases where the arrangement received court approval.

Costs Recovery. Costs recovery is another emerging issue. In English litigation, the Court of Appeal recently confirmed that a third-party funder of an unsuccessful litigant may be liable to contribute toward the successful litigant's costs, even on an indemnity basis,[48] though currently that contribution is limited to the amount of funding provided.[49] In contrast, an arbitration tribunal may not have jurisdiction to make a costs award against a funder, given that it is unlikely to be a party to the arbitration agreement.

The English High Court has also recently upheld a decision of an arbitrator who awarded the successful party not only its legal costs of the arbitration on an indemnity basis, but also its costs of obtaining third-party funding (i.e., 300 percent of the amount advanced or 35 percent of the damages awarded, whichever is the higher)—this amounted to an additional costs award of £1.9 million.[50]

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42 The Quebec Legislature created the Fonds d'aide aux recours collectifs (the Fonds), which provides financial support for counsel fees, notices to class members, costs, and disbursements. *See* An Act Respecting the Fonds d'aide aux actions collectives, CQLR c F-3.2.0.1.1, s. 29, https://releve.canlii.org/en/qc/laws/stat/cqlr-c-f-3.2.0.1.1/latest/cqlr-c-f-3.2.0.1.1.html#sec2_smooth. More than one third of the 776 applications for funding from the Fonds in the past decade have been successful. The Fonds is supported by provincial subsidies and recoveries made under legislation permitting the Fonds to recover a percentage of any amount awarded to class members in a Quebec class action on settlement or judgment, regardless whether they were supported by the Fonds. In Ontario, the legislature created the Class Proceedings Fund (the Fund) to provide financial support for disbursements and adverse costs awards. Law Society Act, RSO 1990, c. L.8, s 59.1, https://www.ontario.ca/laws/statute/90l08. The Class Proceedings Committee determines whether to fund a case by considering the merits of the case, fund raising efforts, use and control of funds, public interest, the likelihood of certification, and the amount of funding required. In return, the Fund may recover a 10 percent levy on any monetary award or settlement in the funded class action in addition to repayment of all amounts provided to the plaintiff. In 2014, the Fund provided $1,329,046 in funding and approved 11 new applications.

43 In *Stewart v. General Motors of Canada Ltd.*, [2008] OJ No. 4426 (S.C.), the defendant was prepared to oppose an application to the Fund, but the application was adjourned and later abandoned once a settlement was concluded.

44 *See* Axiom Plastics Inc. v. E.I. du Pont Canada Co., 2013 ONSC 2675.

45 Fehr v. Sun Life Assurance Co. of Canada, 2012 ONSC 2715, para 90.

46 *Id.* para 89.

47 *Dugal*, 2011 ONSC 1785, para 33(d).

48 When costs are assessed on the indemnity basis, any doubt as to the reasonableness of costs incurred is resolved in favor of the receiving party. This is the opposite of the approach from when costs are assessed on the standard basis.

49 Excalibur [2016] EWCA Civ. 1144.

50 Essar Oilfields Serv. Ltd. v. Norscot Rig Mgmt. PVT Ltd. [2016] EWHC 2361 (Comm).

This is the first time an English Court has considered a tribunal's power to award the costs of third-party funding. The outcome contrasts with the position in English litigation, where these costs are considered not to be recoverable.[51] This decision is clearly good news for funded parties. The practical effect of prohibiting recovery of costs of third-party funding has meant that a funded party, if successful, will inevitably be out of pocket for the third-party funder's (often significant) fee.

But the decision raises serious concerns for parties facing a third-party funded opponent. There is generally no obligation in arbitration to disclose the existence of third-party funding arrangements, let alone the detailed terms of such funding. In many instances, parties might not even know that they are at risk of facing a very significantly inflated adverse costs award if they lose. Moreover, parties facing a third-party funded opponent encounter difficulties even if they win. If the third-party funded opponent is impecunious, a successful party is unlikely to be able to recover its costs from that party.

It is not clear whether the *Essar* decision represents the orthodoxy and the (new) rule or is simply an unusual exception and exercise of discretion due to the extreme facts of the case, where the arbitrator had been highly critical of the paying party's conduct. Either way it is increasingly likely that parties to London-seated arbitrations will now look to recover assorted other costs.

Proof of Ability to Fund. A number of actions in the EU have been dismissed because a litigation funder may not be able to fund the litigation. In the Cement case in Germany, CDC lost its lawsuit against cement manufacturers in 2013 because CDC, then acting as claimant, did not have sufficient funds to cover the litigation costs at the time the claims were assigned by victims of the cartel, although it was able to do so at a later stage when its action was dismissed by the lower court.[52] Two years after learning that lesson, CDC provided security of $2.5 million to the benefit of the defendant and the court cashier in a new claim it brought against HeidelbergCement in September 2015.[53]

But challenging the funder's financial standing is not necessarily an easy card to play for alleged cartelists defending against damages actions. For instance, a court in The Hague (Netherlands) sided with CDC in 2014 in the Paraffin Wax case where the wax manufacturers had failed to demonstrate that "at the time of assignment, CDC would not be able to cover any order regarding the costs of proceedings."[54] According to the judges, it was not enough to refer to the fund's financial standing, the defendants should have put forward "more facts and circumstances" to argue that the fund would not be able to pay the costs.[55]

The Ontario courts in Canada grappled with the ability of a third-party funder to provide sufficient financing.[56] The funding agreement in that case indemnified the plaintiff against exposure to adverse costs in return for a 7 percent share of the proceeds of any recovery subject to certain

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51 The definition of "costs" in the Civil Procedure Rules is narrower than section 59 of the Arbitration Act which refers to "legal *or other* costs of the parties" (emphasis added). In similar vein, since April 2013, after-the-event insurance premiums and the success fee on a conditional fee agreement have ceased to be recoverable from the other side in litigation before the English courts.

52 Landgericht Düsseldorf, December 2013, 17 (37 O 200/09 (Kart) U, NZKart 2014, 75). Confirmed by the Düsseldorf Court of Appeals: Oberlandesgericht Düsseldorf, February 2015, 18 (VI-U (Kart) 3/14, NZKart 2015, 201).

53 *CDC Files Cartel Damages Suit Against HeidelbergCement in Germany*, MLex, Oct. 2015, at 29. Other funds have had to close down for failing to find investors, like Talionis after it tried to bring a damages claim against the Paper cartel in Germany in 2010.

54 District Court of The Hague, December 2014, 17 (C/09/414499/HA ZA 12-293).

55 *Id.*

56 *Dugal*, 2011 ONSC 1785, para 33(d).

maximum amounts.[57] The funder had no assets in Canada. As a condition of approving the funding arrangement, the court required that the funder post security for the defendants' legal costs.[58]

Confidentiality and Privileges. Recent U.S. case law shows a trend toward finding that the information shared during litigation finance negotiations is protected by the attorney work product privilege.[59] For instance, in *Carlyle Investment Management L.L.C. v. Moonmouth Company S.A.*, the Delaware Court of Chancery recently found that communications exchanged between a litigation funder and a claimant or the claimant's attorney are protected from discovery under the work product doctrine because the negotiations involved the exchange of documents that included "lawyers' mental impressions, theories, and strategies," the documents were only prepared because of the litigation, and "the terms of the final agreement—such as the financing premium or acceptable settlement conditions—could reflect an analysis of the merits of the case."[60] The court noted that only a handful of American courts have addressed the issue, four of which found communications with the third-party funder were privileged and one of which did not.[61]

Recent U.S. case law shows a trend toward finding that the information shared during litigation finance negotiations is protected by the attorney work product privilege.

The disclosure of the existence and terms of funding is also currently a contentious issue in the U.S. The ILR and other groups have advocated amending Rule 26(a) of the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding at the outset of a lawsuit.[62] The funding industry has (so far, successfully) argued against a mandatory disclosure requirement.[63] Fulbrook, however, believes it can be helpful to disclose that a case has funding; disclosure can reduce satellite litigation (at least over disclosure issues), and the defense strategy may change when they know the plaintiffs have staying power.

In Canada, there are conflicting decisions among the superior courts of different Canadian provinces regarding the confidentiality or privilege attaching to third-party funding arrangements. In Ontario, the terms of the arrangement have been found not to be privileged. In Ontario, a motion to approve third-party funding must be made on notice to the defendant, and the motion should be open to the public.[64] In Alberta, Saskatchewan, and Nova Scotia, motions for third-party funding have been made ex parte, subject to a sealing order and without published reasons.[65]

One court has provided guidance on privilege and confidentiality concerns arising from third-party funding arrangements, holding that defendants are normally entitled to participate in

57 *Id.* para 6.

58 *Id.* para 3.

59 No. CV. 7841, 2015 WL 778846 (Del. Ch. Feb. 24, 2015).

60 *Id.* at *9.

61 *Id.* at *7 n.48 (citing Doe v. Soc'y of Missionaries of Sacred Heart, 2014 WL 1715376, at *3–4 (N.D. Ill. May 1, 2014) (finding work product protection); Miller UK Ltd., 17 F. Supp. 3d at 731–39 (finding work product protection, but rejecting common-interest doctrine and finding sharing documents with prospective funders waived attorney-client privilege); Devon IT, Inc. v. IBM Corp., 2012 WL 4748160, at *1 (E.D. Pa. Sept. 27, 2012) (finding common interest and work product protection); Mondis Tech., Ltd. v. LG Elecs., Inc., 2011 WL 1714304, at *2–3 (E.D. Tex. May 4, 2011) (finding privilege); Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp. 2d 373, 376–77 (D. Del. 2010) (rejecting both common interest and work product protection)).

62 Press Release, U.S. Chamber Institute for Legal Reform, TPLF Transparency: A Proposed Amendment to the Federal Rules of Civil Procedure (July 6, 2014), http://www.instituteforlegalreform.com/resource/tplf-transparency-a-proposed-amendment-to-the-federal-rules-of-civil-procedure.

63 *See* Response of Gerchen Keller Capital, LLC, Burford Capital LLC, and Bentham IMF to Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A) (Oct. 21, 2014), http://www.uscourts.gov/file/17644/download.

64 *Fehr*, 2012 ONSC 2715, paras 103–112, 139–142, and 154–158.

65 Schneider v. Royal Crown Gold Reserve Inc., 2016 SKQB 278; Stanway v. Wyeth Canada Inc., 2013 BCSC 1585, para 16.

motions for third-party funding because their interests are affected,[66] no privilege attaches to the terms of a third-party funding arrangement,[67] and the open court principle requires the motion for third-party funding to be open to the public.[68]

Forum Shopping. Due to the lack of harmonization of legal systems in the EU, third-party funders tend to be expert forum shoppers when seeking to sue cartelists. Selecting the right jurisdiction may very well be the key for success in many situations, and the EU offers significant advantages in terms of forum shopping. The main advantage is probably the ability to sue all the cartel members in the same jurisdiction, relying on an anchor defendant which has its registered office in this jurisdiction.[69] This anchor defendant does not even need to remain in the proceedings until the end. In 2015, in a landmark judgement in the Hydrogen Peroxide case, the European Court of Justice (ECJ) has confirmed that CDC had validly sued all the defendants in Germany because one of them (Evonik Degussa) had its seat in Germany, even though CDC settled with Evonik Degussa at a later stage.[70] The ECJ stated that jurisdiction could only have been challenged if there had been firm evidence that the claimant had colluded with the anchor defendant to choose the court, at the time the proceedings were brought, which was not the case here.[71]

Another advantage, which has also been confirmed by the ECJ in the above judgment, is that jurisdiction clauses (often included in supply agreements) are generally found inapplicable to damages claims resulting from a cartel infringement, unless they explicitly covered such disputes and were clearly accepted by the victim—which is rarely (if ever) the case.[72] For third-party funders, forum shopping will continue to be influenced by the favorability of national regimes to their funding arrangements.

Conclusion

Third-party litigation funding not only appears to be here to stay, it is a global growth industry. Despite its high costs and often protracted proceedings, the potential payouts of antitrust litigation make it a prime value proposition for well-capitalized funders. However, a key driver of litigation funder growth (in antitrust and other cases) will be the evolution of the regulatory environment. Funders may wish to operate in jurisdictions where rules on disclosure, privilege, and costs recovery are favorable. But the ease of bringing an antitrust claim, and the damages available to successful claimants, will likely still be a paramount consideration in the choice of jurisdiction. Among this complex matrix of choices, it may be in the funders' interests that rules on third-party funding are codified, so that jurisdictions can converge to a clear, global best practice standard. Until then, issues concerning the propriety of the many permutations of litigation funding, the variety of business models, and the underlying theoretical concerns will continue to percolate through the courts around the world. ●

See update on next page.

[66] *Fehr*, 2012 ONSC 2715, para 108.

[67] *Id.* para 141.

[68] *Id.* para 158.

[69] Article 6(1) EC Regulation 44/2001.

[70] Case C-352/13, CDC Hydrogen Peroxide SA v. Evonik Degussa GmbH, 2015 (Eur. Ct. Justice).

[71] *Id.* ¶ 29.

[72] *Id.* ¶¶ 57–72.

UPDATE: *As this article went to press, Burford announced that it has entered into an agreement to acquire Gerchen Keller for $160 million and a further potential performance-based $15 million. See Press Release, Burford Capital Adds Scale and Significant Private Capital Management Business Through Acquisition of Gerchen Keller Capital (Dec. 14, 2016), http://www.burfordcapital.com/newsroom/burford-capital-announces-gerchen-keller-capital-acquisition/.*