Is funding defendants the future of disputes?

Litigation funding has secured a place in the US disputes landscape, yet questions remain about the benefits – and future – of third-party involvement, writes Laura Pollard

Despite initial reluctance from corporates and law firms, litigation funding has become a more accepted feature of the US commercial litigation landscape, although it has only been largely embraced by plaintiffs thus far. That, however, may be about to change as funders are expected to step up their pursuit of defendants.

Litigation funders provide all or some of the financing to cover the costs of disputes. In return, they receive a slice of the winnings if the case is successful; this may be a percentage of the damages or a multiple of the amount of funding provided. If the case is not successful, the funder may simply lose its investment.

For investors, it is easy to see the allure of an asset class which is uncorrelated with economic cycles, particularly in the context of low interest rates or stock market volatility. Litigation funding has proved an attractive option for major

"Ten years ago it wasn't very common, but now, most lawyers who are handling large, sophisticated disputes will receive outreach from potential litigation funders"

Tad O'Connor, partner, Kasowitz Benson Torres

investors, including hedge funds. The potential returns are large, although the unpredictability of litigation, and the confidentiality of the agreements, can make it a tricky asset class to analyse.

Third-party funding has not always been greeted with open arms, though. Steven Davidson, partner at Steptoe & Johnson, notes how the largest law firms have historically represented defendants, rather than plaintiffs, in personal injury, wrongful death, and mass tort litigation, which may account for such firms feeling a level of suspicion towards funders.

'I think that's changed, because a lot of the litigation funding has moved into traditional commercial disputes, where there isn't necessarily a real dichotomy between plaintiff and defendant,' Davidson says. After all, he adds, 'it's certainly commonplace for a large company to have a commercial dispute with another large company or a country'.

Mark Goodman, co-chair of Debevoise & Plimpton's litigation team, notes: 'Litigation funding is more routinely being used to fund business-to-business disputes, which are the types of cases in which large, traditional firms feel comfortable being involved. Commercial contract disputes, for example, don't raise the kinds of conflicts for firms like our firm that might arise in, for example, mass tort cases.'

Funders are also increasingly visible in the market, touting for work. 'More and more funders are reaching out to lawyers or law firms to see whether their clients would like to consider litigation funding,' says Tad O'Connor, partner at Kasowitz Benson Torres. 'Ten years ago it wasn't very common, but now, most lawyers who are handling large, sophisticated disputes will receive outreach from potential litigation funders.'

Access to justice?

Proponents of litigation funding argue that it allows plaintiffs to pursue meritorious claims which

"One obvious area of concern is that the litigation funder will have inappropriate or undue influence on the plaintiff being funded"

Mark Goodman, co-chair of litigation, Debevoise & Plimpton

they may not have sufficient resources to fund themselves. This access to justice argument is certainly appealing in what can be a prohibitively expensive legal system. Not everyone shares this rosy view, however, and some commentators ask whether an industry centred on profit-making can rely on arguments about fairness.

'One obvious area of concern is that the litigation funder will have inappropriate or undue influence on the plaintiff being funded,' says Goodman. 'However, in our experience, as long as we are working with a funder who is ethical and who has put in place an appropriate funding agreement and other governing documents that clearly define the funding entity's role, this has not been an issue.'

Gerry Silver, leader of Sullivan & Worcester's litigation group, notes that while funders typically want to receive updates on their investment, they do not dictate the strategy. 'If the funder is aligned with the law firm, they'll trust the firm to do what is in it and the client's best interests. Then it's all set up so that the funder benefits too.'

Still, the fear that funders could try to direct a case is a pervasive one. Others question whether the introduction of a third party could reduce the plaintiff's own financial incentive enough to affect their interest in the case.

There are also operational questions. As large amounts of money are now being directed towards litigation funding, some fear this could lead to weak claims being pursued, simply because money is available. The obvious counterargument is that funders want to make good returns, and will only invest in cases likely to succeed.

Unsurprisingly then, successful funders will employ experienced lawyers, previously from leading law firms, who can effectively analyse a case. 'These people

"If the funder is aligned with the law firm, they'll trust the firm to do what is in it and the client's best interests"

Gerry Silver, litigation lead, Sullivan & Worcester

know what they are doing,' says Silver. 'They know what the problems could be, and they know the upside and the potential cost.'

The best-known funders are those which have been around the longest, like Burford Capital and Bentham IMF, but there are newer players too. 'The number of litigation funders seems to be increasing, almost exponentially. There used to be a handful of big players, but we're learning about lots of new entrants to the market,' says Tariq Mundiya, chair of litigation at Willkie Farr & Gallagher. 'The more new entrants to the market there are, the more competitive and potentially saturated the market for litigation funding becomes.'

Disclosure issues

As third-party funding becomes increasingly prevalent, the courts have more opportunity to consider the technical issues which the industry raises. 'If the plaintiff is receiving litigation funding, a key question is whether that should be automatically discoverable,' says Mundiya. 'Should there be mandatory disclosure? There are arguments on both sides, but I think that transparency in a dispute always helps.'

Many courts have thus far been reluctant to compel disclosure of funding documents, often referring to the work-product doctrine, which protects from discovery certain materials prepared in anticipation of litigation.

In *Viamedia Inc v Comcast Corporation* et al, before the Northern District of Illinois in 2017, the defendant sought production of documents disclosed by the plaintiff to prospective funders. The court found the documents were shielded from discovery, and that protection had not been waived.

This decision concurred with an earlier case, *Miller UK Ltd v Caterpillar Inc*. Here, the court held that materials provided to prospective funders under a nondisclosure agreement were protected.

In 2018, the New York City Bar Association established a litigation funding working group, which is studying the issues involved in third-party financing, including disclosure. It expects to publish a report by the end of 2019 and has invited comments from stakeholders.

'Although the practice of litigation funding has become much more prevalent,' says Davidson, 'it is still not exactly clear whether courts and arbitral bodies will just accept it as a normal part of the litigation process, or whether they'll show some scepticism towards it.'

"The more new entrants to the market there are, the more competitive and potentially saturated the market for litigation funding becomes"

Tariq Mundiya, chair of litigation, Willkie Farr & Gallagher

While it is clear litigation funding is playing a role in the US commercial litigation market, what remains to be seen is how far new developments, such as those in defence-side funding, might impact the industry – and the litigation landscape – in the future.

'There's a fair amount of money in the market from litigation funders and other investment vehicles – like hedge funds – and they'll be looking for new ways to make investments,' remarks Davidson. 'Funders moving to the defence side could be the next trend.'

Davidson is not the only lawyer to speculate on funders investing in defendants' cases in the near future. How this could work in practice, however, is not yet clear, but the legal market – and this particular researcher – will no doubt be watching with interest. ●