

The rise of third-party funding: turning potential claims into a profit centre

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Damages litigation in a commercial context is often viewed as a distinctly double-edged sword: your company may have been harmed and may have lost significant money or opportunity but the cost of recovering these, the time involved and the exposure in potentially not succeeding often lands such potential claims in the distant corners of the virtual in-tray. This often means that such claims are not pursued or are abandoned following a very rudimentary high-level assessment.

Third-party funding has changed this. It allows companies to fund such claims, de-risk the exposure and often monetise the claim even before a final judgment. It can turn the legal department from a business cost into a profit centre. Funding is also often available for the due diligence of a particular claim (collating the relevant documentation, establishing the potential loss and analysing the prospects of success).

How does this work?

It may be worth viewing a claim as an asset which comes with a particular likelihood of success in recovery. Very much like a debt. If you have a number of claims (for example recurring brand protection or IP cases) being able to spread the risk of non-recovery over a number of cases works in your favour. It increases the percentage of actual money recovered from the totality of actual claim (even if you lose a few cases along the way). This makes a portfolio of claims attractive to third-party funders.

Funders are also very enthusiastic about competition-based damages claims (alone, or in a portfolio with other types of claims). This is especially the case where a competition authority is investigating a competition law infringement. In such cases liability is established by the authority's

infringement finding and the claim will focus on establishing causation and the quantum of any loss. Such cases typically involve companies harmed by a cartel or an abuse of dominance.

What is the cost?

Third-party funding is an investment in a claim or a portfolio of claim and so comes at a cost. The precise level of this will depend on a number of variables, including the size of claim, required funding, amount of risk sharing (by the company and/or the lawyers), the likely duration of the claim, whether it is part of a portfolio or not. Typically, funders look to recoup around 40% of winnings or three times the money advanced.

When should I consider it?

Third-party funding is not a way of de-risking cases with distinctively gloomy prospects of success. Funders engage in detailed due diligence before reaching an investment decision. Rather, it is a way of funding cases for which there is either no or only a limited budget available or where existing corporate funds are better deployed elsewhere.

We have used third-party funding creatively and successfully in a number of claims we have pursued so far, ranging from individual funding for a follow on claim in the Competition Appeal Tribunal to arranging a multimillion-pound portfolio for competition damages actions across a number of European jurisdictions. We have also seen funding used by claimants as an effective tool in cases in which we have defended. The common theme in all those cases and structures is that the funding contributed significantly to the success of the case: by increasing cashflow, by de-risking cost exposure, by levelling the (financial) playing field between parties or simply by allowing a claim to proceed which otherwise would not have seen the light of day. ■