Time for funders to speak up?

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As litigation funding finds itself becoming a societal and political issue, funders are being encouraged to be more vocal about the role they play – but where do the education gaps lie?

While the funding sector continues to garner positive attention, with influential bodies such as the UK Civil Justice Council broadly backing the use of third-party litigation funding (TPLF), the drive against this type of financing has not been extinguished. This is none more evident than in the US, where opponents steered by the US Chamber of Commerce have led a campaign against funding, while legislators are attempting to push through a string of bills in an effort to curtail an industry they remain somewhat suspicious of.

One of the most ruthless proposals was introduced in May by Senator Thom Tillis, whose Tackling Predatory Litigation Funding Act aims to impose a hefty tax on litigation funders, although the Act was last week barred from being incorporated into President Trump's One Big Beautiful Bill Act.

Back in the UK, high-profile cases such as *Bates v The Post Office* and *Merricks v Mastercard* have also intensified public scrutiny of funders' returns, while in jurisdictions such as Ireland, litigation funding is largely banned.

More action needed

A whitepaper released by Deminor last month (27 June) stated that litigation funders could do more to address concerns about the sector – "legitimate or not" – that exist among certain stakeholders. Among its call to arms, the funder stressed the sector could better explain how its actions improve access to justice, provide more transparency about its sources of capital and key personnel, clarify due diligence processes and focus on meritorious claims, and communicate its "necessarily conservative" approach to damages analysis and the rationale behind funding terms.

The Brussels-based chief executive of Deminor, Erik Bomans, says litigation funders need to better educate not only clients but the stakeholders, regulators and public about the types of causes they support and fund, why they have certain funding terms, and all the risks that they take. “[This means] more transparency about the money, the sources of money and conflicts of interest. If you read the European Commission’s Mapping Study of TPLF [published in March], you will see these are the real concerns and these are genuine concerns. We shouldn’t just dismiss them. We should, as mediation firms, be open to them and speak about them and try to alleviate these concerns,” Bomans says, adding: “We cannot hide and then blame others for not having confidence in what we do and who we are. We need to do a better job at this, and I think the sector is aware of it.”

The major consensus

London-based Steven Friel, CEO of collective redress funder Woodsford, says he does not see the negative perceptions about third-party funding “anywhere near as much” as other commentators do. He explains: “Woodsford’s three key jurisdictions are the UK, Australia and the Netherlands. In those jurisdictions, there is a large degree of consensus among the judiciary, the legal profession and public policy makers that litigation funding can be a force for good. While the decision of the UK Supreme Court in *PACCAR* was somewhat disruptive in the short term it led to an outpouring of support, including cross-party political consensus, for litigation funding.”

To the extent that there is criticism of litigation funding, Friel believes it comes from the very same people who are critical of litigation more generally. “Who doesn’t like litigation? Big corporate defendants who don’t like being held to account. Who does like litigation funding? Parties who use litigation funding to hold big corporates to account,” he states.

Overstated attacks

Friel believes that even in the US, the criticisms and attacks has been somewhat overstated. “Tillis’ proposed Bill has already floundered. There have been other pieces of legislation which go less to the existence of litigation funding and more to the issue around disclosure of litigation funding interests. We have no problem with disclosure. We’re very happy to disclose our interests. Many of our cases are in the public domain and we’re very proud to advertise what we do.”

Commenting on how she believes the funding market is being perceived at the moment,Ronit Cohen, founder and managing partner at Arcadia Finance in New York, says both claimants and law firms recognise the benefits of litigation funding. “From the beginning there have been naysayers, but these voices almost exclusively emanate from interest groups that support mega corporations and insurance companies, because these entities stand to benefit from a world where the defence bar has all the cards to play, and [claimants] and their lawyers are without adequate resources to fight on the same playing field. The general public is either unaware of the industry or not paying attention to these realities.”

Even the 17-year-olds…

So, if a lack of awareness persists, is it the responsibility of funders to be more vocal and forthright in educating the public and stakeholders?

For Friel, a lack of education is not a major problem. “We don’t suffer from an education problem among our client base. The people who need to know about what we’re doing and need to understand our products do.” Friel relayed that he had recently given a career talk to a group of 17-year-olds at a local school and even they had an understanding of what litigation funding was. “They had heard about litigation funding through the *Bates v The Post Office* and *Merricks v Mastercard* cases. If 17-

year-olds in a London comprehensive school know about it, I don't think we have an education problem."

Judges and the education gap

However, Friel notes that an education gap might exist within the judiciary, specifically in the UK competition space, and it is here that funders could be more vociferous about the realities of their business operations. "The English judiciary and the judiciary in all of our key jurisdictions are supportive of litigation funding. More specifically though, in relation to the UK Competition Appeal Tribunal (CAT), which is the only class action jurisdiction we have [in England and Wales] and gets to decide the return to the funder, I think there probably is an education gap," Friel remarks.

Among these gaps are unrealistic views of how profitable litigation funding businesses are, causing the judges to "push down the returns to funders in a way which could cause a lot of big cases and some litigation funders to become economically unviable", he comments. "I think if the judiciary properly understood the risks that we're taking, the costs involved in running businesses like ours and the returns that we need in order to sustain our businesses, you would see more generous settlement awards."

With more settlements in the CAT space than any other funder, Woodsford goes to great lengths to ensure the judges comprehend its business and the returns that it both seeks and needs in order to remain viable. "So far, we think they understand us and I have some confidence in that system. But, there is a danger here that an industry puts out marketing literature to say how profitable the sector is, how fantastic it is, and this might cause decision makers, like the judiciary on settlement approvals, to have unrealistic views," Friel states.

Not the stakeholders

In Cohen's experience, any anxieties about the funding sector are not coming from the stakeholders, lawyers, clients or from investors. "Rather, the concerns are being raised by the defendants in civil litigation, who have an obvious pecuniary interest in preventing litigation funding. The neutral party is the courts and, time and again, courts have ruled that funding is a legitimate option that does not hinder and, indeed, helps the administration of justice by levelling the playing field."

Regardless, Cohen asserts that litigation funders have been eager to educate the wider community from the very beginning. "Every litigation finance company that I have been part of has been out there and been engaged in thought leadership – educating the legal community through articles, blogs, conference attendance, panels and CLEs [Continuing Legal Education]. It takes time for new ideas to penetrate the legal industry [as it is] one built on precedent and slow to embrace even positive change," she emphasises, noting that it took years for the legal industry to recognise and legalise contingency fee arrangements. "But we see the impact every day and know that those in our industry will continue to make the effort to educate the community."

As for whether funders may increasingly look to finance cases that go 'under the radar' to avoid the scrutiny that can often come with the more high-profile and big-budget cases, Friel says this is certainly not Woodsford's approach."We are proud of our work in litigation funding, and more generally in collective redress, and are happy to support meritorious claims. We have no problem with scrutiny. We do not lurk in the shadows," he declares.