Conference: Collective Redress - What now, what next?

PRACTICALITIES OF FUNDING GROUP CASES

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Funding collective redress – view from the trenches

- How does it work: service or financial product?
- Securing funding
- Getting the group together
- Conducting the case
- Distribution
Omni Bridgeway – European Experts

- 20+ years experience in finance and coordinating complex international proceedings from headquarters in The Hague;
- €1.4 billion worth of claims recovered;
- Represents governments (Export Credit Agencies), insurance companies, banks, multinationals;
- Multidisciplinary case teams - lawyers, finance specialists, intelligence experts;
- Detailed reference list and CV’s of team available on request.

How does it work – service or financial product?

- It can be more than just writing cheques – funders vary in approach
- At the outset discuss the funder’s role. What added value (if any) will the funder provide:
  - Will the funder provide an indemnity from adverse costs?
  - Does the funder have abilities or experiences which can help (eg: clients, processing discovery, evidence / claim intelligence gathering, global network)?
  - "A good client makes a good lawyer"
- Is the lawyer prepared to accommodate that role? Or would the lawyer consider the funder meddlesome? How will conflict (for example on strategy be resolved)?
- Regular dialogue and communication should be maintained between funder and lawyer
Securing funding

- Be professional and up front – funder may assume that
  the way a lawyer interacts during the application process
  is how they will behave during the case. Funders may
  reject an otherwise “perfect” case if they are
  uncomfortable with the lawyer
- Do not expect funders to have blind faith in the lawyer’s
  recommendation. Expect critical analysis of all matters
  relevant to recovery
- Include:
  - Costs estimate with reference to phases and variables
  - Weaknesses and risks, comprehensively and honestly
  - Alternative recovery scenarios (where appropriate), with
    a best guess of the probabilities of success for each
- Do not propose cases you are not genuinely confident in
  (alternatively be transparent if due diligence is to be done
  jointly with funder)
- Success fee: remember that the possibility of a substantial
  downside is always material in litigation
- Allow sufficient time (or articulate any time imperatives)

Getting the group together

- Plan for it to take longer than you would imagine is
  necessary, plus a little bit
- Develop different strategies for different target claimants:
  consumers, SME’s and multinationals
- Consider adequacy of similarity – for merits purposes and
  for damage calculation purposes
- For older claims have solutions for gathering the data.
  Consider sources outside the client
- Be organised – use IT systems, but do not overcomplicate
  it
- Identify sample / representative claimants or test cases
  early. Earmark potential replacement candidates in case a
  change becomes necessary. Get to know all of them.
  Assess their suitability (eg: as witnesses). Cover the group
  (ie: multiple samples). Maintain regular contact with them
- Watch time limitations
Conducting the case

- Give regular updates to clients / claimants. But beware of the spy. Give more detailed updates to the “inner circle”
- Consider having a committee of claimants
- Consider how to deal with lawyers’ detachment from beneficiaries of the case (claimants), perhaps leading to increased exposure of lawyers
  - Can a funder address that role?
- In an opt out process try and secure defendants’ agreement to not discuss claim directly with group members
- Consider whether to disclose existence of funding arrangement: could send defendants message of strength and diligent analysis
- Utilise any opportunities generated by having specific members in the group
- Some funders will assume many of the above tasks

Settlement and distributing the proceeds

- Plan and collect claimant data early
- Develop methodologies for calculating loss. Explore opportunities for objective formulas which do not require subjective assessment
- Have independent dispute resolution process
- Remember obligations to all claimants – eg: each claimant dilutes the other’s claims in a lump sum settlement
- Consider IT solutions. For example, a settlement voting mechanism using email or a web interface may have increased rates of response