LMA Committee Circular

Committee	**Environment & Climate Litigation Committee**
Date	
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After a successful first session, the Environment and Climate Litigation Committee (ECLiC) reconvened on 7 March 2024. Jeremy Sher, International Co-Head of Global Class Actions at DLA Piper UK LLP, led a discussion on litigation funding. He joined our standing lawyer members, J. Clifton Hall III of Hall Maines Lugrin P.C., and Jason Reeves and Deepa Sutherland of Zelle LLP, who also shared their experience of litigation funding in the US and gave an update on recent cases.

Litigation funding and class actions

Climate Change and Insurance

Mr Sher stated his view that the insurance industry has a unique ability to have a positive impact on the transition to net zero. The influence of insurers and other financial services was being recognised and acted upon by regulators. Sustainability led policies within organisations were also key to that organisation's credibility, brand, and reputation.

The Committee agreed with Mr Sher that climate change entails the risk of more property, life and casualty claims. However, should insurers decide to withdraw certain types of coverage or arbitrarily increase their premiums as a response, there is a heightened risk of competition law issues. Additionally, the industry will have to embrace and prepare for new risks that are the result of the adverse consequences of climate change, such as increased pollution, losses caused by increased number of insect pests, climate-driven diseases, poor healthcare, and extreme weather conditions. Mr Sher pointed out that climate change would also have effects on health insurance where climate affects the health of insureds and the ability of public health systems to cope with demand.

Class action claims as an asset

Climate change also leads to litigation. Climate-related class actions are increasingly being thought of as assets, and particularly lucrative ones at that, as litigation funders take a significant cut of the results. As such, Mr Sher's observation was that the pool of investors into the class was growing. Legal funders take advantage of the widening scope of ESG legislation and standards, increasing NGO activities and growing consumer awareness of climate change. By his calculation, there had been over 2300 climate litigation cases worldwide so far, and approximately 1600 of those were heard in the US. This reflected the relative ease with which class actions can be brought in the US, but this was not exclusively where they take place with 51 jurisdictions having cases filed. Tort law reforms in the US making claims more difficult to bring mean more money is flowing to Europe, with jurisdiction shopping becoming more important.

He noted that approximately 10% of the environmental class action claims were currently compensatory in their nature. The majority of cases are principle based or attempts to change

public policy. Some are “backlash cases” aimed at reducing environmental regulation. At present 52% of defendants are governments.

Of particular concern for insurers could be where funders and NGOs are able to collaborate in the future pursuing both compensatory and policy agendas in the same claim.

Litigation funders are located all around the world. They tend to take a portfolio approach to climate related class actions, investing in actions throughout the world in order to maximise pressure against defendant companies and insurers. Using this approach, litigation funders are able to launch multiple actions with a view to achieving a certain hit rate, not needing to win all claims allows for greater litigation risk to be taken.

Increasingly, such capital is being deployed in product liability or greenwashing claims. This was in addition to the traditional targets of climate related litigation andfossil fuel companies, which should expect to continue to face increasing numbers of lawsuits.

This enhanced risk, together with increasing regulatory scrutiny and public expectations of insurer behaviour could lead insurers to withdraw covers from those oil, gas and mining companies that refuse to participate in the transition to a greener future. However, such a step to “de-insure” could result in claims against insurers, brought by businesses unable to trade because of the loss of their insurance. It was therefore important for insurers to think about how they will manage their relationships with such parties.

Future expectations

Currently, 75% of climate related class action lawsuits are located in the US, followed by Australia and then the UK. However, in Mr Sher’s view, litigation funders are investing an increasing amount of capital in European and UK climate related claims. He thought that the flow of capital toward class actions would continue. He referred to the firm of Pogust Goodhead as an example, a UK law firm which received a $450 million funding injection to focus on climate related litigation.

Traditionally, D&O policies were seen as being particularly susceptible to climate litigation. But these claims are slow to progress and less attractive for claimants and funders looking for a quick return in Mr Sher’s opinion.

Mr Sher is anticipating seeing climate related claims activity arising from product liability and consumer protection, where such actions arise from misleading advertising of sustainability credentials, for example. These types of claims represent better investment opportunities for litigation funders due to the sheer number of sustainability advertising claims made by those companies allowing a case to be pleaded in anticipation of a quick settlement. By way of example, Mr Sher noted that KLM had been sued by an environmental group that argued the airline’s “Fly Responsibly” campaign was misleading, given the environmental damage caused by commercial aviation. However, the court accepted that the advertisement did not deny carbon emissions caused by the airline – it only highlighted positive changes that the Dutch airline is making, and KLM successfully resisted the greenwashing allegations. He also added that considering the trend toward anti-greenwashing legislation, such actions will become more numerous, especially where sustainability claims were “target” related as opposed to being framed as aspirational.**

** - KLM has lost a more recent case on the same basis in Amsterdam since the meeting.

Mr Sher raised the question of the courts being the appropriate forum to resolve matters relating to rights and obligations of organisations in relation to climate change. He referred to consumer dissatisfaction with disproportionate economic returns for the funders and lawyers participating in the claims. An example is an article in the Times suggesting that following the funding injection senior partners at Pogust Goodhead could earn between £10 and £20 million, whilst junior lawyers could receive £1-2 million from the bonus pool each year. This has prompted ideas such as establishing a social policy framework whereby impacted businesses and consumers can seek redress and receive fair compensation outside the Courts.

There is increasing focus on transparency in relation to climate at the regulatory disclosure level. Mr Sher pointed out that Australia is in the progress of reforming their legislation to reflect the public demand for more transparency and he thought other countries would likely follow suit.

Consumer awareness around climate change accompanied with the investment activities of litigation funders may also have a social inflationary impact on the liability insurance market. The Committee agreed that there needs to be more focus on how class action climate litigation is funded especially where litigation funding is unregulated, given the potential affects on the insurance industry and indeed, wider society. Recent cases where claimants received small amounts or nothing following payment of costs and litigation funders are leading to political questions around the appropriateness of returns being demanded by funders.

Recent cases of note

ENEA v. Former Board Members & insurers

Ms Sutherland explained that the management team of the energy giant, ENEA, is suing its former directors and insurers. The basis of the claim is lack of due diligence conducted when the company considered investing more than PLN 650 million ($160 million) into a power plant. The company is seeking damages from the former directors, the supervisory board members who voted in favour of the power plant project, and from the company's insurers under its D&O insurance. This case demonstrates how directors are being scrutinised for ongoing fossil fuel investments and highlights for insurers what this shifting regulatory and policy landscape means for D&O claims. Moreover, in this case, D&O insurers are being sued directly.

Honolulu v various oil companies

This case was discussed at the previous committee meeting in January. Mr Hall noted that the unsuccessful claimant City has now appealed to the Supreme Court but has not raised any new arguments - the basis of the claim remains deceptive marketing and sales practices arising from the allegation that oil companies knowingly failed to warn the city and concealed the dangers of fossil fuels, particularly through government lobbying aimed at concealing the effects of climate change. The city claims that it has suffered substantial harm as a result, such as destruction of natural landscapes, flooding, loss of native species. The city's claims were initially rejected but are now being appealed.