



Litigation funding in Norway



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1. Introduction

In some cases, the cost of pursuing a legal claim may prove to be a barrier for individuals and companies alike. A typical example of this is in class actions, where the cost of the case can significantly outweigh the individual claims, despite the cumulative value of the claims greatly exceeding the costs. In response to such challenges, litigation funding emerges as a potential solution. However, a recent landmark Supreme Court judgment has shed light on the limitations within the existing regulatory framework, specifically in cases that seek to combine opt-out class actions with external litigation funding. This article explores what litigation funding is, its development in Norway, and the associated advantages and considerations.

2. Definition and recent development

Litigation funding, often referred to as third-party funding, is an arrangement where a third party agrees to cover all or some of the expenses associated with pursuing a legal claim. In exchange, the funder receives remuneration, which is typically a portion of the awarded amount if the claim succeeds. This model has gained global recognition and is steadily gaining traction in consumer class actions outside the Nordics but remains relatively uncharted territory in Norway.

However, in a recent landmark ruling, Norway's Supreme Court placed the issue of litigation funding combined with class actions in the spotlight (see our previous [article on class action in Norway](#) for further details on this case). The case centered on competition law violations involving home security system companies Sector Alarm and Verisure, resulting in substantial fines. Alarmkundeforeningen, a group representing affected customers, initiated a class action lawsuit under the opt-out mechanism, thereby automatically including customers unless they chose to opt out.

Global litigation finance firm Therium sought to provide funding for the consumers pursuing this case, with the condition that the company would receive a return of three times their investment if successful, which would be claimed from the consumers' awarded damages. The key question before the Supreme Court revolved around whether Alarmkundeforeningen could stipulate such a prerequisite for its appointment as group representative, allowing for the financing costs of the lawsuit to be claimed from compensation awarded in the event of success.

The Supreme Court determined that the class action rules outlined in the Dispute Act did not give room for such financing arrangements within opt-out proceedings and, consequently, Alarmkundeforeningen could not serve as the class action representative for this lawsuit.

The Supreme Court highlighted that the statutory regulations in this context imposed clear constraints on the courts' interpretive freedom, and that it is the legislator's responsibility to consider whether modifications to the Dispute Act should be made to enable the combination of opt-out lawsuits with external litigation funding through a reduction in awarded compensation.

Given the onerous requirements imposed on the group representative in opt-out class actions, particularly in relation to costs, there is certainly a case to be made for opening up to the combination of opt-out class actions and litigation funding, as requested by Alarmkundeforeningen in the abovementioned case.

3. Advantages and considerations

One of the considerable advantages of litigation funding is enhanced access to justice. Litigation funding removes the upfront financial burden for the claimant of pursuing legal action, thereby serving as a powerful tool to ensure "access to justice" for parties with valid claims but limited financial means.

By shifting the financial risk from the claimant to the funder, litigation funding also safeguards claimants from the costs of an unsuccessful case, which means better risk mitigation for claimants. With this shift in financial risk and burden, smaller entities can challenge larger, well-funded opponents on equal footing, hence leveling the playing field in legal disputes.

Furthermore, litigation funders typically conduct rigorous due diligence before investing, with the aim that only robust claims with a high likelihood of success are pursued. This implies that the cases that are funded, merit further consideration in court and align with the pursuit of just outcomes.

However, while litigation funding offers compelling advantages, it is essential to recognise potential factors that require consideration by the involved parties.

One such factor is that litigation funders typically seek a substantial share of the damages awarded if the case succeeds, potentially reducing the claimant's share. Nevertheless, if the alternative in the absence of funding is to not proceed with the case at all, a reduced portion of the damages would still be preferable.

Another aspect to weigh is the potential for differing interests among the funder, the claimant, and their legal counsel, which can lead to conflicts that may influence decision-making. These situations can, however, be mitigated through a well-structured funding contract.

Furthermore, it is worth noting that litigation funding tends to be more feasible and practical in cases involving substantial sums of money, thus limiting its utility to such specific scenarios. This is one reason why litigation funding often pairs well with class actions, as these cases, despite comprising relatively minor individual claims, can aggregate into significant collective amounts.

Additionally, considerations about disclosure of funding details should be taken into account. In Norway, there is currently no general statutory rule on disclosure of litigation funding arrangements, but disclosure may still be necessitated to some extent, inter alia to prevent issues related to conflicts of interest, including potential connections between judges and investors. However, disclosure might not be problematic; in fact, some parties voluntarily divulge such arrangements, often for strategic purposes, such as signaling financial capability.

As of now, the probability of the disqualification of a judge due to litigation financing is low, given the limited number of investors operating in the Norwegian market and the small number of funded cases in Norway. However, as more players enter the market and the scope of cases increases, the potential for conflicts of interest will rise. Consequently, transparency will be a key factor as the industry grows.

4. Summary

Litigation funding stands as a useful tool in the legal landscape, providing access to justice while mitigating financial obstacles. We attribute its limited adoption so far in Norway to the lack of regulation, unfamiliarity with the concept and limited number of suitable cases. However, as the complexity and costs of civil law cases in Norway continue to rise, along with the number of class actions, we expect litigation funding to gather momentum in the years ahead. Balancing the expansion of access to justice with addressing potential challenges will be crucial. With a well-defined regulatory framework and increased awareness, litigation funding can evolve into a strategic asset for businesses and individuals, ensuring that justice remains accessible to all, irrespective of financial constraints.