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# HOW ARE CLASS ACTIONS FUNDED?

Class actions always involve lengthy and complex legal proceedings. This makes them very expensive to bring.

The proceedings can be funded by the group members themselves, but this is not common, because:

1. In most cases, individual group members do not have the financial resources to fund the proceedings, even collectively.
2. The administrative burden of billing and collecting payments from hundreds, sometimes thousands, of group members makes it difficult to run a class action that way.
3. Class actions are usually brought in the name of a “lead applicant”, who represents the group members as a whole. That person is exposed to the risk of having to pay the legal costs of the defendant(s) if the claim fails, and those costs can be very substantial. The lead applicant needs to be indemnified by someone.

For these reasons, class actions are very often funded by independent companies known as litigation funders. These companies agree to:

1. Fund the proceedings on an ongoing basis by paying the law firm’s fees and other expenses of preparing the claim;
2. Provide ‘security for costs’, a payment like a bond, which the court mostly orders claimants to provide to protect the defendant if the class action doesn’t succeed.

In return for taking on these liabilities, and the risk of getting no return from their investment, funders contract to recover a percentage commission of the compensation payable to the group members at the end of the case, whether it is resolved by a court judgment or by an out-of-court settlement.

If the claim succeeds, the funder recovers the costs they have paid out, plus a commission of in the range of 25-35% of the total compensation, after all costs have been paid or refunded. If the claim fails, the litigation funder gets nothing, and cannot claim its costs from any group members. It may also have to pay the defendant’s costs, mostly out of the security for costs which had been agreed or ordered to provide.

Like most other legal proceedings, class actions are generally settled out of court, although the settlement may not take place until shortly before, or even during, a court hearing of the claim. All settlements are subject to court scrutiny and approval, including with respect to legal costs and money payable or repayable to a litigation funder. Payment of any settlement money is normally administered by a court-appointed fund administrator assisted by court-appointed lawyers.

The funding arrangements, the amount to be paid to the funder, and legal costs are also subject to court approval. Approval of costs is normally contingent on evidence from an independent cost consultant. The court will generally only approve costs if they are reasonable. Even the amount which each lead applicant and group member receives has to be pursuant to a court-approved formula.

For group members, including the lead applicant, the benefit of having a litigation funder is that you do not have to pay any legal costs for bringing the claim (either ongoing or at the end), and you avoid the risk of having to pay any costs to the defendant if the case fails, either wholly or in part.

Once a funder has been secured, a formal litigation funding agreement will be prepared, and group members will be asked to sign it. When not all group members have signed a funding agreement, and the claim succeeds, the funder usually applies for a common fund order. This requires all the group members to contribute equally to the costs and to the funder's commission, whether the group member has signed the funding agreement or not.

On average, legal fees and other costs account for 15 per cent of the settlement amount, while funders commissions average about 27 per cent. However, these amounts can vary widely, depending on the nature and size of the claim.

To take an example, assume a class action is settled for $160 million. The funder has paid all the legal costs, which total $15 million. Assuming the funding agreement allows it to be repaid its costs first (which is usually the case), this leaves $145 million. The funder’s commission of 25% ($40 million) is calculated on the whole $160 million. There will then be $105 million available for distribution to group members.

It is fair to say that, without litigation funding, many large and successful Australian class actions would not have been brought, and the claimants in those case would not have received any compensation for their losses.

**It is important you understand the way your claim is being funded. Please do not hesitate to contact us if you have any questions.**