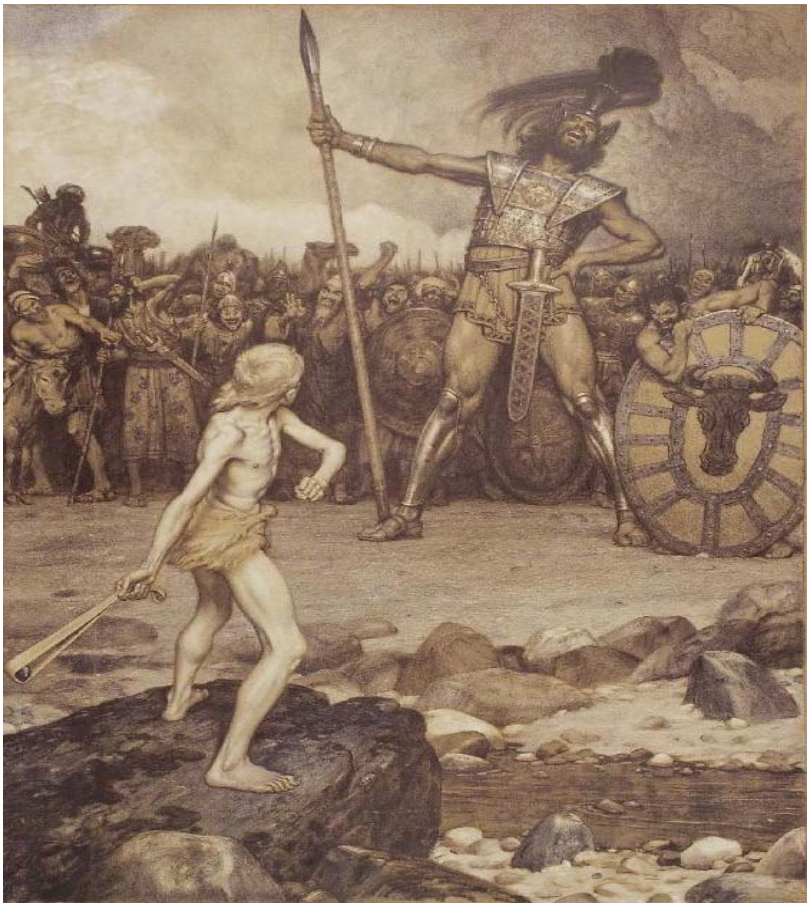
Class Actions & Litigation Funding – Settlement Distribution Schemes are broken

By Joshua Levenda-Freeman

This post is one in a series of posts on this blog written by students studying Non-Adversarial Justice at the Faculty of Law at Monash University. Students were invited to write blog posts explaining various complex areas of law relating to the justice system to ordinary readers. The very best post on each topic is published here.



David vs Goliath: Creative common source

When you think of class actions it is easy to see the parallel to the story of David vs Goliath, a story of overcoming almost insurmountable odds. Class actions involve combining a group of individuals in order to challenge the wealth and legal firepower of corporations.

However, someone must fund the class action on behalf of the group. Litigation funding has become crucial in fulfilling this role. 'Litigation funders' are commercial entities that agree to pay the costs of the litigation. In return, they receive a share of any settlement or damages recovered if the litigation is successful. However, the funding of class actions by third parties is fraught with danger.

The key issues

The Victorian Law Reform Commission (VLRC) has recognised the danger posed by litigation funders and has highlighted a series of problems which must be addressed in order to safeguard claimants in class actions.

The overarching goal of the VLRC is to ensure that claimants who seek to enforce their rights through class actions that are financed by litigation funders are not exposed to unfair risks or disproportionate cost burdens.

To achieve this objective, the VLRC has identified three primary questions that should be answered:

(1) When a case is funded by a litigation funder, should the Supreme Court of Victoria have more supervisory powers? For example, how much should lawyers and litigation funders be mandated by the court to disclose to their clients?

(2) Should lawyers be able to charge their clients a contingency fee – a proportion of the amount recovered if the litigation is successful – in order to mitigate the issues that arise from litigation funding?

(3) Should the Supreme Court of Victoria should impose stricter regulation on how class actions are conducted? In particular, the VLRC questions whether there should be a pre-trial hearing to determine if a claim should be allowed to continue as a class action, and whether the court should have specified legislative criteria for approving a settlement under a class action.

It would be difficult to comprehensively analyse every issue raised by the VLRC. This post focuses on the administration of settlement distribution schemes (SDS).

Settlement Distribution Schemes

The Black Saturday class actions serve as a reminder that just because a settlement is agreed upon, the fight does not end. On the contrary, the process of distributing the settlement to the victims, through a SDS, can involve delays, frustration and disempowerment. Victims of the 2009 Black Saturday bushfires described the overall process, and the involvement of litigation funders, as "morally bankrupt."

These comments reflect systematic problems with how the Supreme Court of Victoria (SCV) supervises settlement distribution schemes. Firstly, the SCV fails to protect claimants from the conflicts of interest that arise upon finalisation of a settlement. Additionally, the SCV lacks adequate safeguards for the implementation of the SDS.

Conflicts of interest

Upon approval of the settlement, "all of a sudden, the class action members all but lose their legal representation." This is because the law firm that previously was in charge of achieving justice, now has a different role – the firm now becomes responsible for distributing the money. This creates an obvious conflict of interest – there is an incentive for the law firm to deduct as much as possible for the administration of the SDS in order to maximise their profits. By extension, in order to make sense of the SDS and how it's being administered, class action members must find their own legal representation.

Introduction of strict disclosure requirements

In order to better protect the interests of class action claimants, the SCV must amend its practice note on Class Actions to include disclosure requirements regarding administrators of settlement distribution schemes.

There is currently no provision within Part 4A of the Supreme Court of Victoria Act, or the SCV's practice note on class actions, setting out disclosure requirements during a SDS. Instead, court supervision of the SDS remains discretionary, permitting the Court to make such orders as are just with respect to the distribution of any money paid under a settlement.

Several aspects of the Federal Court of Australia's practice note on class actions, should be adopted by the SCV. For example, the SCV should require administrators to advise the court

at regular intervals, of the progress and costs of the SDS. Claimants should also be advised at regular intervals of the same matters.

In addition, the SCV should require law firms to disclose to group members, and to the Court, how they intend to distribute the funds and how much time the firm anticipates it will take to distribute the funds to particular sub-groups. These announcements must be made in forms prescribed by the Court, and strive to reach as many group members as possible.

Finally, the SCV should require law firms to disclose to group members, at several points throughout the litigation, that a significant portion of the compensation will be given to the litigation funder. This is especially important during the finalisation of the settlement and announcement of the settlement figure.

Reforming the use of expert witnesses

Courts often use testimony from an independent costs expert, to ensure that the expenses claimed by the law firm during the class action and administration of the SDS are reasonable. However, the independence of the costs expert would be compromised if, for example, they were employed by the same law firm that is seeking to deduct money from the settlement amount. Reforms must be made to avoid this potentially significant conflict of interest.

First and foremost, the costs expert should be appointed by the Court. Justice Forrest stated that the best approach in the Kilmore East – Kinglake bushfire class action would have been to appoint a friend of the court, to act on behalf of the group members in identifying issues with the SDS.

These reforms are already being put into practice. One example is Bolitho v Banksia Securities Limited, where on 2 June 2016, The Honourable Justice Robson appointed an independent senior counsel to act as a friend of the court, and assist with the settlement application.

However, further implementation of these reforms is needed. A holistic and frequent review of the costs claimed by both the administrators of the SDS and litigation funders would

maximise the compensation received by group members and shorten the timeline for distributing the funds.

With the forthcoming review from VLRC expected in March 2018, we hope reforms continue to improve the protection of claimants' interests in class actions financed by litigation funders.