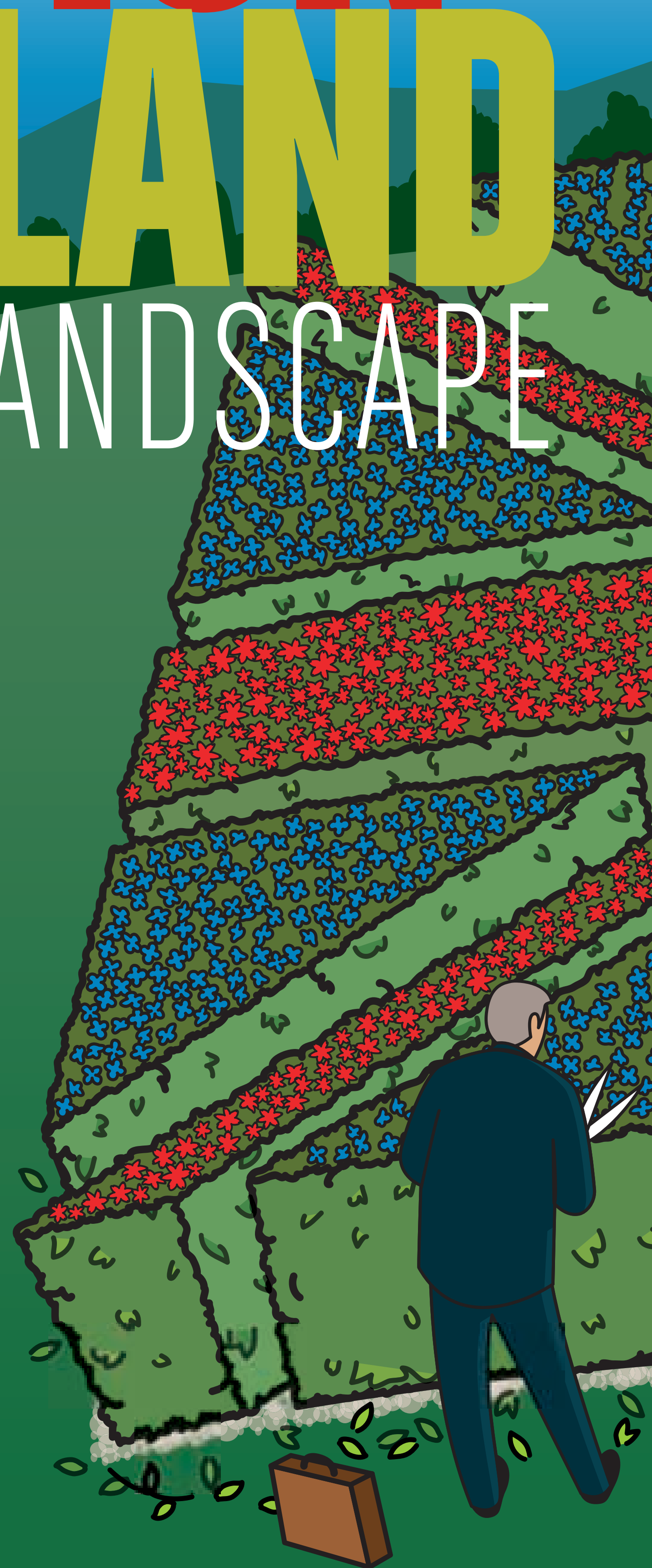
LITIGATION IN ENGLAND

A CHANGING LANDSCAPE

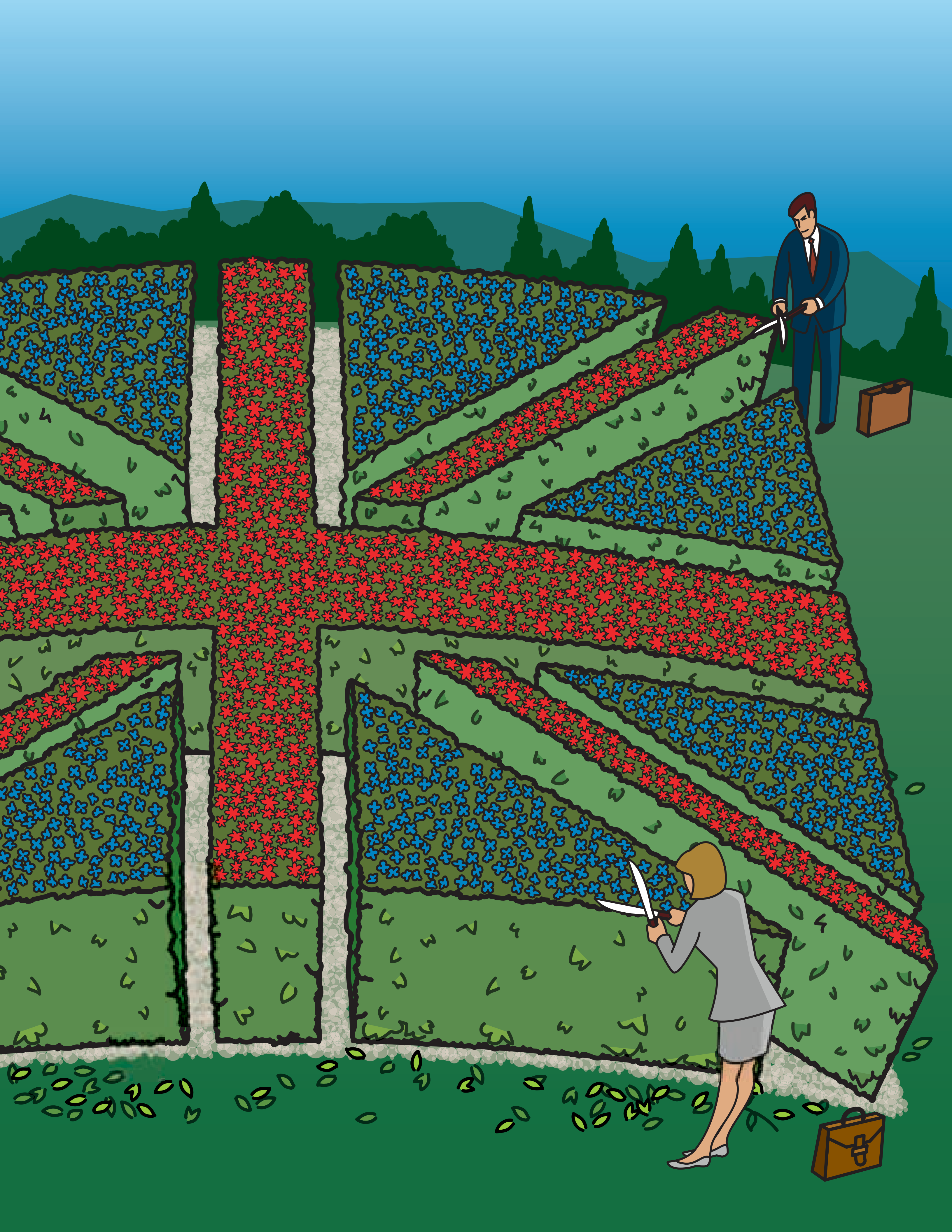


by Ian F. Lupson

Manufacturers and distributors of goods in, and into, the United Kingdom and other EU member states will be familiar with the framework governing liability in the event that those goods cause damage or injury to consumers. The combination of the European Product Liability Directive (85/374/EEC) and the two General Product Safety Directives (92/59/EEC and 2001/95/EEC) imposes requirements as to product safety and information and provides a uniform framework that, when incorporated into the domestic laws of the various EU states, gives rights of compensation in the event of default.

Strict liability is imposed on the manufacturer/distributor of a defective product, and a product is “defective” if it does not provide the level of safety that the consumer might reasonably expect. The bar is therefore set low, so why does no U.S.-style “claim fest” arise when a widely used product is alleged to be defective? The traditional response to this question has been that it has not been feasible to organize a “mass tort” approach to litigation in the U.K.

Might that be about to change?



This article looks at changes in the litigation landscape in the U.K. and asks whether, against the background of sharp overall economic decline, U.S. companies need to be more wary of the risk of suit in the U.K. and to review and revise their already strained legal budgets to accommodate this new risk.

The usual starting point for any analysis of why the U.S. is generally a more litigious business environment than the U.K. is the recognition that the U.K. "cost-shifting" rules militate against speculative litigation. That is undoubtedly true; the prospect of having to pay typically 60 to 70 percent of the other side's costs in the event of loss will commonly deter a certain type of claimant. As will the fact that, even if a claimant has no intention of actually proceeding to trial, he can't just "have a go" and then walk away if it doesn't work. Walking away comes with a similar price tag.

This "adverse costs" rule, along with a number of other factors, might be about to change, and these changes will undoubtedly affect the U.K. litigation landscape.

CRITICAL MASS

First, in common with many EU jurisdictions, the U.K. is moving closer toward a system that a U.S. litigator would recognize as permitting class actions. Note that the expression is "moving closer toward" rather than "adopting"—at least at this point.

If a mass-produced product is defective, an individual consumer would typically suffer only very limited loss (and, one hopes, no injury). Leaving aside issues of product recall—EU developments in which area probably warrant a separate article—a manufacturer/distributor's concerns arise if a large number of affected purchasers suffer and then come together to present a united front against it. The reader may recognize this as one of the key benefits/disadvantages (depending upon one's perspective) of the U.S. class-action system: a concentration of firepower.

The U.K. does not presently permit class actions, in the sense that a lawyer cannot "scoop the pot" by seeking to have a court order that his firm should be counsel for all potentially aggrieved purchasers unless such individual purchasers positively opt out of proceedings. It is sometimes said that in the U.K., a lawyer cannot act for a client he does not know.

The U.K. does, however, have Group Litigation Orders, or "GLOs." GLOs were introduced in the U.K. in 2000, and they can be made in any claim where there are multiple parties to the same cause of action. Crucially, however, claimants wishing to be involved in the litigation must opt in by applying to the GLO Group Register. An aggrieved party must first commence his own action against the defendant, and the making of the GLO then serves to have these separate actions managed collectively. It is an efficiency measure that stops well short of U.S.-style class-action litigation.

That GLOs can work is shown by a case brought a little while ago against the Borough Council of Corby, a town in the English Midlands, by and on behalf of a number of children. These claimants had suffered limb deformity allegedly caused by their mothers' environmental exposure to toxins during the Council's irresponsible dismantling of the large steel-making facility that once dominated the town. *In re Corby Group Litigation* [2008] EWCA Civ 463. This case demonstrates the effectiveness of using GLOs to allow a number of individual and perhaps otherwise powerless litigants to band together for strength in numbers—and to prevail.

In the context of antitrust (or, as it is referred to in the U.K., "anti-cartel") litigation, the governing statute—the Enterprise Act 2002—likewise makes provision for certain "specified bodies" to bring proceedings for claims for damages before the Competition Appeal Tribunal on behalf of a group of two or more named individual consumers. Each consumer must, however, give his consent to the claims being brought by the specified body. Specified bodies tend to be consumer associations and the like.

However, recent decisions of the English courts have limited the level of recovery in successful actions against cartelists to the measure of what individual claimants have actually lost (*i.e.*, compensatory damages rather than damages related in any way to the profit generated by the cartel). This will likely stifle class-action-style development in this area for some time. The rewards to the participants are simply not great enough.

Next, the influential Civil Justice Council (the statutory body responsible for advising the U.K. government on the continuing reform of the civil justice system), in a report issued in July 2008 entitled "Improving Access to Justice through

ANOTHER DEFINING CHARACTERISTIC OF U.S. COMMERCIAL LITIGATION—AT LEAST AS SEEN FROM A NON-U.S. VANTAGE POINT—IS THE ABILITY OF THE SUCCESSFUL PLAINTIFF'S LAWYER TO SHARE IN THE SPOILS OF HIS CLIENT'S VICTORY: THE CONTINGENCY FEE. CONTINGENCY FEES ARE PRESENTLY UNLAWFUL IN THE U.K.

Collective Actions," has formally recommended new legislation to make collective actions generally available in England and Wales. One of the key assumptions listed in the report is that "[c]ollective action reform is consistent with the Government's policy statements supportive of collective private action and is in addition desirable in the light of European policy which is focused on improving collective redress for consumers."

The newly appointed coalition government in the U.K., however, is likely to have quite a lot on its mind in the coming years, and one wonders, therefore, whether this recommendation will formally be translated into a statute anytime soon. On the other hand, it is cunningly labeled as being part of "Access to Justice" (a concept difficult to argue against), and those who promote this form of private redress, which requires little support from the public purse (which in the U.K., as elsewhere, is likely to suffer huge cuts in the coming years), may see their ideas find favor. And the Cameron/Clegg administration has moved quickly to accept other recommendations for reform—on which, see below.

In all these ways (GLOs, anti-cartel suits, and the possibility of statutory revision), the stakes are raised by the looming prospect of very large-scale multiclaimant litigation not dissimilar to that experienced by U.S. corporations in their own backyard. However, in addition to these measures allowing the concentration of firepower into "big cases," another important

and potentially far-reaching change is already taking place in the U.K. relating to the way litigation can be funded.

FUNDING

Another defining characteristic of U.S. commercial litigation—at least as seen from a non-U.S. vantage point—is the ability of the successful plaintiff's lawyer to share in the spoils of his client's victory: the contingency fee. Contingency fees are presently unlawful in the U.K.

Instead, the U.K. has the similarly named (sometimes confusingly so) "conditional fee." Under this arrangement, a lawyer can agree to act on a no-win, no-fee basis (just as he can in the U.S.), but unlike in the U.S., the upside potential to the lawyer's income if he wins is measured not as a percentage of what's at stake, but as a percentage increase in that lawyer's ordinary fees. Since the maximum percentage uplift is 100 percent—and that will be allowed only in the most difficult cases—it is immediately apparent that the incentive to get involved in no-win, no-fee cases can be limited.

However, a recent and extensive investigation seems to hint that perhaps, in the right circumstances, the English courts' stance with regard to consolidated actions and fee issues might soften. The investigation, chaired by a senior U.K. judge, Lord Justice Jackson, was entitled "A Review of Civil Litigation Costs" and was released in January 2010.

The report was commissioned in light of the near-scandal caused by the level of costs run up in two recent English High Court cases—one involving the collapse of the Bank of Commerce and Credit International and the other, the near-demise of the English life insurer Equitable Life. The cost of litigating in the U.K. was thought to have become so high that non-U.K. litigants (who after all have a choice as to where their arguments should be heard) might go elsewhere. That would not be good for U.K. Plc, so up went the cry (figuratively) of "Something must be done!" Lord Justice Jackson's report is that "something."

We have already seen that there has been some suggestion that the U.K. might adopt U.S.-style "unless you opt out, you're in" class-action jurisprudence. But what makes that attractive to the legal fraternity, of course (or at least to part of it), is the ability to share in the spoils. Since sharing in the spoils doesn't actually involve the loser's paying *more*, it's perhaps not too surprising that Lord Justice Jackson's report mulls over the possibility that—again, only in certain circumstances—the English courts might have to get used to the idea that a plaintiff's lawyer will be paid out of (*i.e.*, share) his client's winnings: the contingency fee. The report suggests that, subject to a 25 percent limit, contingency fees may be made lawful in England and Wales.

To say that this would be quite a change is something of an understatement, but that the law in such areas is capable of swift development is shown by what has happened to the old-fashioned common-law concepts of maintenance and champerty (*i.e.*, the doctrine that held it to be against public policy for a disinterested third party—somebody not involved in the case—to take a financial stake in somebody else's litigation). Such contracts, while no longer illegal (*i.e.*, not carrying criminal sanction), had until very recently been considered unlawful (*i.e.*, incapable of enforcement).

That view has become deeply unfashionable, and again under the banner of "Access to Justice," the Civil Justice Council has pronounced itself in favor of outside funding—and an outside funder (unlike the lawyer it funds) *can*, even as things presently stand, take a percentage of the spoils.

In a very short period of time, a handful of such providers have sprung up to service the U.K. courts—in essence creating a U.K. market for such "investment." If the amounts at stake are large enough (experience has shown that mass-claimant/low-individual-claim-value cases are not ideal for funding) and if the view on the merits is sufficiently robust, there is currently no great shortage of funding to back English litigation, even to the tune of several million pounds (slightly more in dollars).

One such well-known fund recently announced that it had raised £60 million (US$90 million) to invest primarily in U.K.-based commercial litigation. The backing comes at a price, of course—typically 20 to 30 percent of any eventual recovery.

Readers whose eyes have not glazed over by this point may well be asking, "That's all very well, but what happens if the claimant loses? His backers may pay *his* fees, but what about the other side's fees payable under the 'English rule'?"

There is a market answer to that question too. It is called ATE—or "after the event" insurance, the "event" being the accrual of the cause of action. Simply put, a claimant approaches an insurer, seeking to insure against the cost of losing and having to pay the other side's costs. The insurer does its best to assess the risk of having to pay out, the likely maximum payment, and so on. If it likes the risk, it will provide a premium indication.

ATE is relatively highly rated (*i.e.*, expensive), but payment of the premium is often deferred; indeed, in the present climate, it can be made payable only on a successful outcome to the claim. This creates a situation where an impecunious claimant (with a good claim) may well be able to get financial backing to bring the claim, and an insurer's protection against the cost of it all going wrong, at a cost of precisely *nothing* to himself. This is what is meant by the premium's being payable only on a success. If the claimant wins, the insurer has nothing to pay out, and the costs the claimant recovers from the loser include the premium. If the claimant loses, the insurers have to indemnify him for his liability to pay the other side's costs, but they waive the premium.

Thus, an impecunious claimant with a good claim can insulate himself entirely from the risk of losing and stand to retain 70 percent or so of the proceeds if he wins. The lawyer gets to run a case that might otherwise not have happened, and because he takes it on a conditional-fee basis, as explained above, he typically receives cost rates from the funder in any event, with an uplift (paid for by the loser) if he wins.

ATE insurance has itself become problematic, however. In our "winning case" scenario, the plaintiff is obliged to pay the deferred premium but in the ordinary course can claim it back through English "cost-shifting" rules. The trouble is that, in part to make up for all those times when no premium ends up being charged at all, ATE premiums when they *are* charged (and then when recovery is sought) are often very large, increasing still further the cost burden borne by the unsuccessful litigant. Lord Justice Jackson has a view on this phenomenon. His Lordship has suggested that the ATE premium be irrecoverable—that is to say, it must be paid out of the claimant's recovery, not transferred to the defendant. The coalition government seems warm to this idea, which is likely therefore to become law.

SO WHAT IS THE PROGNOSIS?

Speculative claims are unlikely to see much increase, as funders/insurers are not fools, and they simply will not back that kind of case. Conversely, impecunious clients with good claims are likely to find them easier to pursue—hence the attraction in terms of those who advocate "Access to Justice."

And there's a whole new class of impecunious claimants—full-size corporations whose legal budgets have had to be slashed in response to the recession and which, if anecdotal evidence is to be believed, are already wising up to this new way of maintaining litigation that might otherwise have had to be abandoned for reasons of cost.

Indeed, with the weight of the Establishment being brought to bear on reducing the costs of litigation for the precise reason of preserving/increasing the workload of the English High Court, it is a fair bet to say that, particularly as the effects of the global financial crisis begin to crystallize, the number of new cases filed will increase. This is already the case in areas such as professional malfeasance.

There is also a concern among commentators that litigation—still primarily seen in the U.K. as a means of obtaining redress in the event of wrong—may morph into something of a new investment class, for backers of legal funding vehicles. It is countercyclical, and returns are not dependent upon the normal vicissitudes of economic life. Who knows, a creative investment banker may even develop a secondary market in litigation bond derivatives. ■

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