Civil litigation is uncontrovertibly expensive and complex multi-party litigation even more so. In the majority of jurisdictions around the world legal financing rules impose barriers to litigating. Although often justified as necessary to prevent “frivolous” or “vexatious” or otherwise non-meritorious litigation, as a practical matter, legal financing rules reduce access to court for individuals, businesses and other entities with limited resources and as a consequence protect powerful individuals and institutions in society from being held accountable for violations of legal rules.

Although the economic factors that affect litigation are complex, three financing rules arguably have the greatest consequence for access to justice:

1. Cost allocation between parties
2. Restrictions on contingent fees
3. Prohibitions on third-party funding

Adverse cost rules (“cost/fee shifting”) raise the risk of litigating for plaintiffs and defendants alike, but hit hardest on parties with the least resources. Moreover, adverse cost regimes frequently require that plaintiffs – particularly those perceived as being unlikely to be able to cover defendants’ cost if the defendants prevail – post bond, the size of which may be related to the stakes, which may immensely increase the cost of access to court.

Prohibiting contingent fees effectively locks out plaintiffs who cannot afford to pay lawyers’ hourly fees and expenses necessary to maintain the litigation. “No win, no pay” fees free potential claimants from this burden but unless the lawyers who take on cases on this basis are compensated for risk, for example, with some sort of “success” fee, claimants with complex disputes are unlikely to find lawyers who will represent them on this basis.

Prohibiting third-parties from assisting with these expenses cuts off one solution to the litigation cost challenges facing plaintiffs. Insurance for litigation costs under liability insurance contracts, or to individuals and enterprises under legal insurance contracts, is an obvious exception to the prohibition on third-party financing. However, the first is available only to potential defendants and the second is not widely available in all jurisdictions and where it is available, may exclude certain kinds of litigation, such as group or class actions. So-called “after the event” insurance available in some jurisdictions is quite

---

1 Judge John W. Ford Professor of Dispute Resolution, Stanford Law School. I am grateful to Professors Axel Halfmeier, Leuphana University (DE); Jasmina Kalajdzic, University of Windsor (CA); Vincenzo Morabito, Monash University (AUS); Ianika Tzankova, Tilburg University (NL) and Justice Bernard Murphy, Federal Court of Australia and John Walker, co-founder of IMF-Australia for information about legal financing, third-party funding and collective litigation regimes in their respective jurisdictions. For a discussion of class action financing outside the U.S., see Camille Cameron, Jasmina Kaladjzic and Alon Klement, “Economic Enablers,” in Deborah Hensler, Christopher Hodges & Ianika Tzankova (eds.) CLASS ACTIONS IN CONTEXT: HOW CULTURE, ECONOMICS AND POLITICS SHAPE COLLECTIVE LITIGATION (Elgar, 2016).
expensive. Taxpayer-funded legal aid is another solution, but over the past several decades the use of legal aid for money damage litigation has been eliminated or sharply cut-back in many jurisdictions.

Not surprisingly there is fierce resistance from potential defendants to changing these legal financing rules in jurisdictions where they have the most “bite” and there is continuous pressure in jurisdictions with lower economic barriers to litigation to reverse course.

Enter the class action, a mechanism that facilitates groups of similarly situated individuals or entities banding together to bring litigation,\(^2\) which has the potential to spread both costs and risks of litigating. The initial goal of adopting such a procedure in most jurisdictions is to enable efficient disposition of large numbers of claims that result from a mass catastrophic event, financial fraud, or protection of consumer protection, securities or anti-trust (competition) law.\(^3\) However, class action procedures also have the potential to facilitate access to courts so that claimants with small value claims that would be too expensive to litigate individually can obtain compensation for harms resulting from legal violations. Class actions also provide a private enforcement mechanism to supplement public enforcement.\(^4\) Common law jurisdictions (Australia, Canada, Israel and the US) have tended to adopt representative class actions that grant standing to class members to represent the class, arguably amplifying their access to justice effect. Civil law jurisdictions have tended to adopt either aggregative non-representative procedures to address mass claims (e.g., the German KapMuG), or class action procedures in which standing is limited to government-authorized entities, pre-existing associations or special purpose vehicles (most EU member states and all Asian jurisdictions), assertedly to achieve the efficiency and compensatory goals of collective proceedings without encouraging private enforcement or non-meritorious claims for compensation.\(^5\)

Whatever the primary goals or form of collective litigation, jurisdictions rarely if ever adjust their legal financing rules when they adopt a new procedure for mass claims. As a result, procedures intended to facilitate access to court often have not achieved their aims. Experience has shown that parties are unlikely to come forward to serve as representative parties, if by doing so they are taking on not only the upfront and ongoing cost of paying lawyer fees but also the risk of adverse costs and perhaps in addition the obligation of posting a bond. In such a regime, class members who hang back can free ride on the investment of the class representative with incurring any risk. In many jurisdictions, lawyers who might be willing to represent the class representative or class on a contingent fee basis are not permitted to do so. In other jurisdictions, where “no win, no pay” legal financing rules have been adopted, lawyers representing a class on such a basis may be permitted to add an upcharge to their fees

\(^2\) Under Rule 23 defendants may also file motions for class certification, but this only happens in rare instances. In the Dutch collective settlement scheme (“WCAM”) defendants and plaintiffs together petition the court to approve a binding class settlement, on an opt-out basis. See Ianika Tzankova and Daan Lunsingh Scheurleer, “The Netherlands,” in Deborah Hensler, Christopher Hodges & Magdalena Tulibacka, “The Globalization of Class Actions,” 622 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 149 (2009).

\(^3\) Many jurisdictions permit class proceedings only in one or a few areas of substantive law. Most popular are consumer protection, securities, and anti-trust violations. See Deborah Hensler, “From Sea to Shining Sea: How and Why Class Actions Are Spreading Globally,” 65 Kansas U. L. Rev, 965 (2017).

\(^4\) In Australia and Canada, statutes and case law recognize both the compensatory and regulatory enforcement goals of class actions.

\(^5\) Id. To emphasize the compensatory function of collective procedures and quell appetite for private enforcement, European policymakers, at the behest of corporate lobbyists, adopted the label “collective redress” to refer to the new procedures that have come into force over the past decade.
in recognition of their taking on the risk of receiving no compensation for their time, but the amount of such upcharges is strictly limited. Adverse cost rules and prohibitions on contingent fees also discourage membership associations from bringing class actions. (Limiting remedies to declaratory or injunctive relief adds to this discouragement: while successful associations will recoup their fees and expenses if they prevail they will not secure a monetary award that could directly benefit their members or support their ongoing activities.) The result of the failure to adjust legal financing rules to fit the realities of class actions has been that in many jurisdictions with a class action statute on the books there has been little or no class litigation.\(^6\)

Over time, however, some jurisdictions have modified their legal financing rules to fit the exigencies of collective litigation and some jurisdictions have modified their original rules for collective proceedings to enable financing. Broadly speaking, three models have emerged, although there are differences among jurisdictions that have adopted each model. Over time, third-party litigation funding has come to play a role in each model, although its form and importance varies.

Private lawyer funding with judicial oversight and approval

This in essence is the U.S. model. Class counsel are appointed by the court under Rule 23(g)\(^7\) and lawyer fees are determined, post hoc, by the court, under Rule 23(h). Class members share the costs of a successful action in accord with the provisions of a settlement approved by the court, usually in proportion to their share of the settlement. The rules with regard to allocation of costs between plaintiff and defendant are the same as in individual litigation and the lawyer is allowed to represent the class on a speculative basis, akin to a contingent fee. The change in legal financing rules that is engendered by the class action is that whether and how much the lawyer representing the class will earn is shifted from a private contract between party and lawyer to a court decision.

Historically, money damage class actions in the US have been funded by plaintiff law firms, with the practice limited to firms that can self-fund and self-insure against loss, often with recourse to bank lines-of-credit. In mass claims (whether or not certified as class actions) where multiple firms are represented on plaintiff steering committees appointed by the judge managing the case, the firms may pool resources and when successful share fee awards.

Plaintiff class action firms relying for case financing on the new third-party litigation funders is a relatively new phenomenon in the US and some major funders claim to avoid funding US class actions, although they may engage in funding special purpose vehicles in European jurisdictions that restrict class representation to such entities. Whether litigation funders’ contracts with plaintiff class action firms must be disclosed to the court, and whether such disclosure should be in camera or available to defendants, are matters of sharp controversy. In Gbarabe v. Chevron\(^8\) Judge Susan Illston required

\(^6\) As is well-known to this audience, in the U.S., equitable fee doctrine has solved the free-rider problem and lawyers are permitted to request fees related to what they have achieved for the class, either on a percent-of-fund or lodestar basis. And neither the class representative nor other class members face a risk of adverse costs.

\(^7\) Under the PSLRA, in shareholder class actions, the court selects as representative plaintiff the class member with the largest financial stake in the action and the representative plaintiff brings class counsel with them.

\(^8\) Gbarabe v. Chevron Corp., 2016 U.S. Dist. LEXIS 103594
plaintiffs to disclose their third-party litigation funding agreement to the defendants as well as the court. Subsequently, the federal court for the Northern District of California adopted a local rule requiring that parties in class actions disclose at the time of first appearance in a proceeding the identity of any non-party entity that has a financial interest in the case, or any other interest that could be affected by the case outcome.\(^9\)

Canadian class action practice illustrates how legal financing rules affect class action practice and \textit{vice versa}. Procedurally, Canadian class actions resemble US class actions: class members have standing to represent the class, remedies include money damages, and money damage class actions proceed on an opt-out basis. At the time Ontario’s class action procedure was adopted, lawyers in ordinary civil litigation were not permitted to charge contingent fees. Recognizing that such a prohibition was likely to mean the class procedure would not be used, the legislature allowed contingent fees for class actions only. (Subsequently, the general prohibition on contingent fee contracts was also lifted.) Under the 1992 Ontario \textit{Class Proceedings Act}, the terms of the representative plaintiff’s contingent fee agreement with class counsel are subject to court approval.

Adverse cost rules can pose a tremendous challenge for class actions in Canadian provinces: it is a rare class representative who can take on the risk of paying costs should defendants prevail. In recognition of this, British Columbia has eliminated adverse costs for class actions, while maintaining cost-shifting for ordinary litigation. However, Ontario, the province with the most class action activity, retains cost-shifting. To enable class actions, entrepreneurial plaintiff law firms often have indemnified class representatives for adverse costs. However, as litigation has become more expensive and judges have become more willing to shift a large proportion of defendants’ cost when they prevail, assuming this risk is beyond the capacity of many firms. Third-party funding from both public and private sources has been the response to this challenge.

In 1992, the Ontario \textit{Law Society Amendment Act} established a public fund to assist putative class representatives by indemnifying them for adverse costs and, in some instances, helping with ongoing disbursements for expenses. A panel appointed by the Law Society considers applications and makes awards, taking into account the strength of the case and the class representative’s ability to secure other financing (including private third-party funding). If the class prevails, the fund is paid 10 percent of damages obtained and reimbursed for any disbursements.

More recently, private third-party funders have entered the market. Although Ontario has not eliminated traditional rules of \textit{champerty}, its courts have held that to effectuate the access to justice goal of class actions, third-party funding may be permitted with judicial review and approval. A recent medical device product liability case tested the permissible terms of financing. In \textit{Houle v St. Jude Medical}\(^10\) putative representative plaintiffs, their chosen attorney and Bentham IMF, a leading international litigation funder, entered into a contract that would relieve the plaintiffs of the risk of adverse costs and, in exchange for a 20 – 25 percent share of a future settlement (depending on when, if ever, such settlement occurred), provide up to 50 percent of plaintiff counsel’s fees on an ongoing basis and 100 percent of disbursements (including expert fees, which were anticipated to be hefty). In return


\(^10\) 2017 ONSC 5129
for this financing, the class counsel would accept 10 – 13 percent, depending on the time to settlement.\textsuperscript{11} At the court of first instance, the judge determined that a tri-partite agreement among class representative, class counsel and funder might, depending on the facts of the case, be deemed non-champertous,\textsuperscript{12} but that certain terms of the instant agreement – particularly those that required undertakings of the class representative with regard to communicating with the funder and responding to settlement offers, and provisions that permitted the funder to withdraw from the case under certain circumstances, made it unacceptable. He therefore refused approval with leave for the representative plaintiffs, lawyer and funder to submit a revised funding agreement. Instead, the parties to the agreement appealed. On Oct. 25, 2018 the higher court dismissed the appeal stating its agreement with the analysis of the court below.\textsuperscript{13}

The Private Association Model

In contrast to the US, Canada and Australia, most civil law jurisdictions that have adopted a collective litigation procedure limit representation to pre-existing associations or special purpose vehicles, such as foundations established for the sole purpose of representing a class.\textsuperscript{14} Most of these jurisdictions have maintained their cost allocation rules for collective litigation and continue to prohibit lawyers from charging on a contingency fee basis. Associations therefore must hire their own lawyers and pay up-front and ongoing fees and expenses and assume the risk of adverse costs. In some instances, long-standing consumer associations have solicited modest contributions from their members to prosecute class litigation or class settlement on their behalf. Generally, parties to litigation in European jurisdictions are free to contract for third-party financing, just as they are free to insure against liability; there is no civil law equivalent to the rules of champerty and maintenance.

The Netherlands has the most mature form of collective proceedings in Europe. Although its procedure has not been used in very many cases, when it has been used it has delivered large rewards to claimants while securing “global peace” for defendants facing high-stakes multi-party litigation. The success of the association model in Netherlands is owing almost entirely to its ability to call on third-party litigation funders.

In 2005, the Netherlands adopted a unique collective proceeding (“WCAM”) that permits claimants to join with defendants in petitioning the Amsterdam Court of Appeals (which has exclusive

\textsuperscript{11} Initially the putative representative plaintiffs had entered into a retainer agreement with their lawyer in which the lawyer would act on contingency fee and receive 33 percent of any damages obtained. However, as the law firm refused to indemnify the plaintiffs, the agreement specified that the law firm would seek third-party financing for the case.

\textsuperscript{12} The court emphasized (as did the appeals court) that decisions with regard to such agreements are to be made on a case by case basis, according to the facts of the case. Among the facts considered are the need for funding in order for the case to proceed and whether the terms of the funding agreement are “fair and reasonable.” Under Ontario law, the terms of any agreement must be disclosed (including to the defendant) but the amount of funding committed is not disclosed to the defendant.

\textsuperscript{13} Houle v. St. Jude Medical, 2018 ONSC 6352

\textsuperscript{14} The impetus for the association model apparently is a belief that it will eliminate or at least sharply limit agency costs, by comparison to procedures that empower class members to represent the class. Case studies of this form of class actions suggest (not surprisingly) that agency costs do not disappear although they may be different in form from the agency costs observed in Rule 23 class actions.
jurisdiction) to approve their previously negotiated settlement, on a binding opt-out basis after notice to class members. Claimants’ interests may be represented by pre-existing associations (e.g. consumer and shareholder associations), special purpose foundations, and commercial organizations, sometimes all in the same proceeding. The lawyers for each of these entities are paid on an hourly basis. Financing is provided, on a contingent basis, by third-party funders (and for membership associations, perhaps partially by members’ fees\textsuperscript{15}). While the lawyers may not charge contingent fees, the litigation funders are free to contract with a foundation’s or other entities’ officers to subsidize the lawyers and pay expenses, for a share of damages obtained. In the settlement context, there is no adverse cost risk but there is a risk that the foundation will not be able to arrive at an acceptable settlement and will come away with no reward for its efforts (or a lesser award than anticipated).

In the first few settlements presented to the Amsterdam court for approval, the parties did not include discussion of fees in the settlement agreements they asked judges to approve and the judges did not inquire about fees, as traditionally how parties pay their lawyers is a matter of private contract, not subject to court review. The most recent WCAM settlement, an eye-popping $1.5 billion settlement of claims against Fortis bank deriving from the global financial crisis, seems to have motivated the court to take a closer look at arrangements among entities representing claimants, their funders and the putative defendant. In the Fortis case, several special purpose foundations, a long-standing investor association (VEB) and a commercial recovery service (Deminor) joined with Fortis’ successor (Ageas) in petitioning the Amsterdam Court of Appeals to approve their previously negotiated settlement. The foundations and commercial organization were financed by third-party funders; the investor association supported its effort with membership fees. The claims organizations asserted claims on behalf of investors who had signed onto their efforts and agreed to share some of their proceeds from the settlement (termed “success fees”) with their chosen organization (termed “active claimants”) as well as other affected investors (“inactive claimants”). The lawyers acting for the claimants included at least two U.S. law firms, Grant & Eisenhofer and Kessler, Topaz, Metler, Check. The parties initially submitted to the court a settlement agreement that provided substantially different recoveries to the so-called active and non-active claimants, but when the court refused to approve this arrangement, the settlement terms were revised to eliminate this distinction with regard to calculations of recoveries. Settlement provisions with regard to the fees of different claimant organizations were not revised, but the court did object to the 25\texteuro; million “success fee” recovered by VEB, apparently on the grounds that a non-profit membership association should not benefit from litigating on behalf of a broader interest group.\textsuperscript{16}

The claims organizations and their funders appear to have benefited substantially from the Fortis settlement. For example, the commercial recovery service which claimed to have incurred almost 13\texteuro; million in costs recovered 10.5\texteuro; to cover costs from Ageas, plus 35\texteuro; in success fees from investors

\textsuperscript{15} This has proved a somewhat risky proposition, however: when a Dutch consumer association secured a settlement on its members’ behalf that was subsequently viewed as not as attractive as the outcomes some individual plaintiffs secured through litigation, the association felt it suffered a hit to its status and perhaps to its membership rolls, and declared it would think harder before going down this road again.

who contracted with it. One special purpose foundation, SICAF, that claimed to have incurred 4€ million in costs recovered 2.5€ million from Ageas, plus an estimated 40-45€ in success fees; as the foundation was a non-profit entity, the success fees were presumably divided among its lawyers and funders.\textsuperscript{17} VEB did ultimately receive its 25€ success fee, but the settlement was not made binding with regard to non-member investors it purported to represent. During the review and approval process with regard to the Fortis settlement, the Amsterdam Court of Appeals judicial panel is reported to have advised parties that in future it might take a closer look at fee arrangements, which would be a start departure from its former practices. Because the Netherlands has taken a leadership role in Europe with regard to collective proceedings, its formal rules and informal practices with regard to financing collective litigation may over time come to be adopted by other jurisdictions.

The Private Litigation Funding Model

Australia’s class action procedure, like Canada’s, was adopted at the federal level in 1992,\textsuperscript{18} and is modeled closely on Rule 23, meaning it is an opt-out proceeding.\textsuperscript{19} Also like Canada, Australia’s regime has retained the loser pays rule for civil litigation, but unlike Canada, Australia also has maintained its prohibition on pure contingent fee agreements, although it does permit lawyers to act on a “no win, no pay” basis. Class representatives assume the risk of adverse costs and unless they can find representation on a “no win, no pay” basis must pay class counsel upfront and ongoing costs and expenses. If the class prevails, all of the class members share in the common benefits secured through the litigation although they paid nothing to maintain the litigation and were not at risk of adverse costs. In a complex high-stakes litigation where success is far from guaranteed many lawyers will hesitate to take on representation on a “no win, no pay” basis and not many firms will have the resources to maintain the litigation against a well-resourced defendant. Further discouraging lawyers, if the class prevails, the class counsel can only look forward to a fairly modest “success fee” (up to 25 percent) on top of its hourly charges.

The result of the restrictions on funding class actions led in the early years of its history to the results that one might expect: few class actions were brought and those were effectively subsidized by lawyers retained on a “no win, no pay” basis.\textsuperscript{20} In the early 2000s, third-party funding entered the class action practice, led by IMF (now IMF Bentham, a leading international litigation funding). Today, third-party funding is baked into Australia’s class action regime. Reliance on third-party funding for class actions has changed – and continues to change – class action doctrine and practice.

\textsuperscript{17} Information provided by Prof. Tzankova, from a comment by her published in a Dutch journal.

\textsuperscript{18} In 2002, Victoria became the first state in Australia to adopt a class action and New South Wales followed in 2011.

\textsuperscript{19} In contrast to Canada and the U.S., however, the Australian class action procedure does not require court certification as a pre-condition to proceeding in class form. A defendant may oppose a case proceeding as a class, in which case the judge assigned to the case will determine whether the case satisfies the requirements of a class proceeding: that the complainant represent 7 or more plaintiffs, all with claims against the same defendant(s), all arising out of the same or similar circumstances, and all raising a common issue of fact or law. The judge may also assess the adequacy of class actions and must approve any class settlement.

Whereas the European association model of class proceedings clearly identifies parties for funders to transact with, the opt-out Australian model only offered the class representative, who was unlikely to secure enough damages on its own to make financing the litigation on a contingent basis attractive to the funders and would have little incentive to share its award with the funder while other class members got to keep all of their shares. The solution was for funders to contract separately with each class member, offering to take on the risk of adverse costs and contribute to maintaining the litigation in exchange for a share of each claimant’s damages. As Australian professional conduct rules allow fee-splitting between lawyers and non-lawyers, funders are permitted to contribute directly to law firms to maintain the class action.

The Australian solution to financing class actions had significant procedural consequences, for in order to execute individual contracts with class members, the opt-out class (what Australians now term an “open” class) had to be converted into an opt-in or “closed class”. In 2007, defendants challenged this funding arrangement, arguing that it subverted the federal legislature’s intent, but the High Court rejected the challenge on the grounds that it effectuated the legislature’s aim of increasing access to justice.21 Since then virtually all Australian class actions have been financed by litigation funders, an increasing number of which now operate within Australia.

To date, litigation funding has not been regulated in Australia, although listed funders are subject to shareholder regulations. Funders are free to contract with class members for a substantial share of the latter’s damages if they prevail. While in the U.S. (prior to the adoption of Rule 23(h) formally instructing the court to decide the appropriate amount of class counsel fees), equitable fee doctrine provided a basis for judicial inquiry into the allocation of settlement funds between class members and their attorneys, until recently Australia lacked such a doctrine. As in European jurisdictions, the issue of legal fees was left to private contract, subject only to professional conduct prohibitions on contingent fees.

Incorporating outside funders into class action practice has had significant consequences for Australian doctrine. In response to concerns that non-funded claimants were excluded from class litigation – an issue for defendants as well as claimants, as the former would remain liable for damages sought by those excluded from the class – some judges required that settlements submitted for their approval include non-funded as well as funded claimants. But to prevent the former from free-riding on the latter, judges approving these hybrid classes would require that settlement calculations be adjusted (via what were termed “equalization orders”) to reflect the fact that some class members were sharing their recoveries with litigation funders while others had enjoyed a free ride.22 In 2016, for the first time in Australian class action law, the Full Court of the Federal Court (a 3-judge panel) approved an application for a class action to proceed under a “common fund” doctrine.23 Under the new doctrine, all class members share in the costs required to fund the class action, including litigation funders’ fees, by paying a proportionate share of any monetary fund created as a result of the litigation. The court held further that the share to be provided to litigation funders (termed a “commission”) would be set by the judge overseeing the action, at the end rather than the inception of the litigation. In effect, the

22 Modtech Engineering Pty Limited v GPT Management Holdings Limited [2013] FCA 626
23 Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148
Australian class action regime moved closer to the US and Canadian regimes, albeit while maintaining the cost-shifting rule and the prohibition against retaining lawyers on a contingent fee basis.

**Implications**

Collective litigation, like all other forms of civil litigation, requires money to prosecute and defend. Funds can be provided to putative plaintiffs by a public source, by a quasi-public fund subsidized by a tax on class settlements, by plaintiffs’ legal insurance, by lawyers where they are allowed to self-fund the litigation in exchange for contingent fees, by associations using membership dues, or by purely financially motivated third-parties (or a combination of some or all). US law prohibits using Legal Service Corporation funds for class litigation, and is not generally available in other jurisdictions for mass claims of potentially high value. Ontario and Quebec are jurisdictions that have established and long maintained quasi-public funds that cover class representative’s risk of adverse costs and contribute modestly to maintaining class actions. Legal insurance is not widely available to potential claimants in all jurisdictions and in jurisdictions where it is available, insurance companies have been moving towards excluding mass or collective claims from coverage. Associations rarely have the wherewithal to prosecute class actions on behalf of their members, but as illustrated by the Netherlands experience they may be able to join in a proceeding involving better funded entities. Lawyers permitted to be paid on a contingent basis, as in the U.S. on a percentage of fund or lodestar basis with the amount determined by a judge, or as in Canada on a contingent fee basis, negotiated with the class representative, are willing to represent classes seeking money damages but the supply of firms with the resources to take this risk is limited and the need to indemnify putative class representatives for adverse cost risk significantly reduces the number of firms in a position to do so.

Experience to date suggests that over time class action procedures re-shape legal financing rules and that legal financing rules, in turn, contribute to evolution of class action procedures. Depending on the form of collective proceeding and the extant legal financing rules, third-party funding may be required to create viable class actions. The European approach to class actions -- limiting standing to represent a class to non-profit organizations while permitting free recourse to third-party funding – adopted explicitly to avoid perceived excesses of “American-style class actions” -- does not eliminate the risk of self-dealing. Over time, as European judges become more familiar with the agency costs inherent in collective proceedings they are likely to exert greater oversight over funding arrangements. The Australian regime has already moved in that direction with the promulgation of a new “common fund” doctrine. As US policy-makers argue over the appropriateness of third-party funding in class actions, they would do well to look to Canada, where judges are carefully scrutinizing the terms of class counsel’s contingency fee contracts and the terms of litigation funding agreements, with attention to particular case facts and concern about promoting access to justice for claimants with meritorious claims.