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Minnesota Court Denies Substitution Motion: Implications for Litigation Funders

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A new decision may cut back on attempts by third-party litigation lenders to control settlements. Earlier this month, the U.S. District Court for the District of Minnesota refused to permit the substitution of a legal investment firm's affiliate, Carina Ventures LLC (Carina), for the original party plaintiff, Sysco Corporation (Sysco), in its federal antitrust lawsuits, *In Re: Pork* and *In Re: Cattle and Beef,* because allowing it would go against "strong public policy in favor of the parties to a lawsuit controlling the litigation, and particularly settlement."[1]

In 2019, Sysco agreed to $140 million in litigation financing from Burford Capital (Burford) to bring its various federal antitrust matters before the courts.[2] Under an amendment to the parties' Second Amended and Restated Capital Provision Agreement (the CPA), which arose in the context of early disagreements between Sysco and Burford,[3] Sysco agreed to immediately notify Burford of any settlement offers and "not accept a settlement without [Burford's] prior *written consent*, which shall not be unreasonably withheld."[4] Notably, the CPA was governed by New York law and provided for arbitration proceedings with the London Court of International Arbitration (LCIA), seated in New York under the Federal Arbitration Act (FAA).[5]

Later in 2022, new problems arose. Sysco negotiated settlements with some of the defendants, but Burford withheld its approval because the settlement amounts were too low.[6] Moreover, Sysco believed its counsel, also counsel to Burford in other matters, had a hand in counseling Burford to veto the negotiated settlements.[7]

Pursuant to the provisions of the CPA, on September 9, 2022, Burford filed LCIA arbitration proceedings in New York seeking a permanent injunction to restrain Sysco from executing the settlements.[8] On October 7, 2022, Burford filed an Application for Interim and Conservatory Measures, which it renewed on December 12, 2022, seeking also a temporary restraining order (TRO).[9] The arbitral tribunal granted Burford's TRO on December 14, 2022, restricting Sysco, on a provisional basis, from entering into the disputed settlement agreements.[10] Because both the LCIA and the FAA are silent regarding the standard to determine the appropriacy of interim measures, the parties disagreed on the applicable legal test.[11] Burford claimed that the tribunal should follow international law.[12] Sysco contended that New York law should apply because the CPA unambiguously selected New York as the seat and governing law.[13] Ultimately, the tribunal adopted the New York law standard, finding, *inter alia*, that where the FAA "is silent on a procedural matter, and the applicable institutional arbitration rules are similarly silent, procedures applied by the courts at the seat would be preferred to another set of *ad hoc* arbitration rules or international practice."[14] Applying New York law, the tribunal granted the preliminary injunction on March 10, 2023, concluding that Burford would suffer irreparable harm otherwise by permanently being deprived of the ability to seek specific performance of a prior consent contractual right.[15] That same day, Burford sought

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confirmation of the arbitration award in New York state court.[16]

Two days earlier, however, on March 8, 2023, Sysco had also filed a petition to vacate the TRO in the Northern District of Illinois, claiming that its law firm for the antitrust cases, Boies Schiller, was secretly working with Burford to prevent the settlements.[17] Back in New York, Sysco removed Burford's state court confirmation petition to the Southern District of New York.[18]

Yet the parties reached a new settlement. On June 28, 2023, Sysco, now represented by new attorneys, reached a new agreement with Burford, assigning its interest in the antitrust cases to Carina — a special purpose vehicle created in June of 2023 specifically to litigate the antitrust claims (and represented by Sysco's former counsel, Boies Schiller).[19] That same day, the parties stipulated to the dismissal of the Illinois action.[20] And the New York action was dismissed one day later, on June 29, 2023.[21]

Following this settlement, Sysco and Burford filed a joint motion to substitute Burford-created Carina for Sysco in the ongoing litigation.[22] As the District Court notes, Carina was created solely to accept Sysco's assignment of claims and to litigate them in the way that Burford seemed to desire.[23]

However, the court, in its discretion, shot down this motion.[24] While standing for antitrust lawsuits can be obtained by assignment, and in some cases that is valuable for antitrust enforcement, the court felt here that in permitting a litigation funder to step into the shoes of the party to whom it was financing would seemingly prevent settlement of litigation.[25] Although procedurally the opinion focused on the substitution of a party under Federal Rule of Civil Procedure 25(c), the court's denial of Sysco's substitution was based, in large part, on its general disapproval of contractual provisions "requiring the litigation financer's permission to settle the underlying litigation."[26] Litigants' control of their case and promotion of settlement are cornerstones of public policy.[27] Moreover, the court reasoned that it would go against public policy to allow such a substitution because the only interest Carina would have is to maximize the return on investment.[28] Even if technically plaintiffs are free to grant broad settlement veto rights to third-party lenders, the court opined that, in the event of a dispute regarding settlements, litigation funders cannot seek to enforce such contractual rights via a substitution motion.[29]

Given the wide-ranging impacts, this case continues to be watched closely at a global level. One concern is how rules limiting lenders' control over the litigation may impact future lending agreements and potential plaintiffs' access to crucial funding to litigate or arbitrate. For reference, third-party litigation funding (TPLF) has increased considerably in the last decade.[30] Between 2017 and 2021, for example, formal requests for funding agreements increased by 27% while total new agreements increased by 19%.[31] Moreover, in 2021 the Government Accountability Office (GAO) identified 47 active commercial litigation funders in the U.S. with a total of $12.4 billion in assets under management, and which had committed $2.8 billion to new litigation.[32] However, the GAO concluded that "despite the size, scope, and purported social function of the industry, state statutory regulations for TPLF are disjointed, state-level common law is in flux, and federal regulation is effectively non-existent."[33]

This opinion brings important questions to the forefront about the role that TPLF can play in both arbitral and judicial proceedings. Particularly, the decision highlights the lack of consensus regarding whether and to what extent litigants should be able to contract away litigation and settlement autonomy in exchange for funding.

At the preliminary injunction stage, the arbitral tribunal's majority sided with Burford, considering that Burford's

consent right under the CPA did not run afoul of "New York champerty law,[34] or federal and state policy encouraging settlement of lawsuits, or public policy and legal ethics codes concerning a client's right to control litigation."[35] The arbitral tribunal considered foundational that while *"[e]very litigant has the autonomy to decide when and whether to settle[, e]very litigant also has the autonomy to contract that right away unless there is some legal or ethical barrier to doing so.*"[36]

In deciding the substitution motion, however, the Minnesota trial court sided with defendants, citing the tribunal's dissenting opinion to highlight Burford's economic incentives in the litigation.[37] Central to that opinion was the notion that Burford's "private interests" in maximizing future profits, could not "overcome the strong public policy in favor of settling lawsuits."[38] Although the champerty doctrine was "no longer an automatic route to dismissal" — the court explained — "the reasons behind the champerty doctrine [remained] significant factors to the Court's discretion."[39]

If upheld, the opinion could reshape the future of TPLF. On the one hand, it may cut back on attempts by third-party litigation lenders to control settlements and push lenders to reconsider their investment strategies to reduce risks. On the other, it could limit funding options for plaintiffs facing complex and expensive legal disputes. If overruled, additional questions will likely emerge regarding the interplay between public policy considerations favoring settlements, litigants' control over their litigation, and the parties' contractual freedoms. One way to distinguish the Minnesota case may be on the high level of settlement approval given to Burford; funders and funded parties will likely pay particular attention to this issue in their agreements. In the meantime, the world is watching how the Northern District of Illinois will rule on virtually the same situation where a motion to substitute Carina for Sysco is also pending in the *In Re: Broiler Chicken* litigation.[40]

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[1] *See In Re: Pork Antitrust Litigation, In Re: Cattle and Beef Antitrust Litigation*, 2024 WL 511890 (D. Minn. Feb. 9, 2024) (hereinafter *In Re: Pork, Cattle and Beef*).

[2] *Id.* at *6.

[3] Problems first arose when Sysco assigned its claims to various customers in violation of an anti-assignment provision in the parties' CPA, dated December 22, 2020. *See Glaz LLC v. Sysco Co.*, 2023 WL 3598654, Petition to Confirm Arbitration Award ¶¶ 11–13 (N.Y. Sup. Ct. Mar. 10, 2023). To settle that dispute, the parties executed on March 31, 2022, a new amendment to the CPA, which required, in pertinent part, that Sysco immediately notify Burford of any settlement offers and seek Burford's written consent before accepting any settlement offer. *See Glaz, LLC v. Sysco Co.*, LCIA Case No. 225609, Order on Claimants' Preliminary Injunction Application ¶¶ 97, 196 (Mar. 10, 2023) (quoting Second Amended and Restated Capital Provision Agreement § 7(b)(v)).

[4] *Id.* at *7 (emphasis added).

[5] *See Glaz, LLC v. Sysco Co.*, LCIA Case No. 225609, Order on Claimants' Preliminary Injunction Application ¶¶15, 21, 121 (Mar. 10, 2023).

[6] *In Re: Pork, Cattle and Beef*, 2024 WL 511890, at *7.

[7] *Id.*

[8] *See Glaz, LLC v. Sysco Co.*, LCIA Case No. 225609, Order on Claimants' Preliminary Injunction Application ¶¶15, 21, 121 (Mar. 10, 2023).

[9] *See generally* Glaz*, LLC v. Sysco Co.*, LCIA Case No. 225609, Application for Interim and Conservatory Measures (Oct. 7, 2022); Glaz*, LLC v. Sysco Co.*, LCIA Case No. 225609, Application for Interim and Conservatory Measures and for an Immediate Temporary Restraining Order (Dec. 12, 2022).

[10] *See Glaz, LLC v. Sysco Co.*, LCIA Case No. 225609, Order on Claimants' Preliminary Injunction Application ¶ 38 (Mar. 10, 2023).

[11] *See id.* ¶ 156.

[12] *See id.* ¶¶ 157–158. The factors considered by international arbitral tribunals "include the risk of serious or irreparable harm, the balance of prejudice, and a preliminary consideration of merits issues." *Id.* ¶ 157.

[13] *See id.*¶ 159. Under New York's preliminary injunction standard, "*the moving party has the burden of showing 1) irreparable harm and 2) either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tilting decidedly towards the plaintiff.*" *Id.* ¶ 163 (citation and punctuation omitted; emphasis in original).

[14] *See id.* ¶¶ 162(i).

[15] *See id.* ¶¶ 129–131, 194.

[16] *See generally* Petition to Confirm Arbitration Award, *Glaz LLC v. Sysco Co.*, 2023 WL 3598654 (N.Y.Sup. Mar. 10, 2023).

[17] *See* Petition to Vacate Arbitration Award, *Sysco Co. v. Glaz LLC*, Case: 1:23-cv-01451, ¶ 27–36 (N.D. Ill. Mar. 8, 2023).

[18] *See* Notice of Removal, *Glaz LLC v. Sysco Co.*, Case 1:23-cv-02489 (S.D.N.Y. Mar. 23, 2023).

[19] *See In Re: Pork, Cattle and Beef*, 2024 WL 511890, at *1, 4 (D. Minn. Feb. 9, 2024).

[20] *See* Stipulation of Dismissal, *Sysco Co. v. Glaz LLC*, Case: 1:23-cv-01451 (N.D. Ill. Jun. 28, 2023).

[21] *See* Stipulation of Dismissal, *Glaz LLC v. Sysco Co.*, Case 1:23-cv-02489-PGG (S.D.N.Y. Jun. 29, 2023).

[22] *In Re: Pork, Cattle and Beef*, 2024 WL 511890, at *8–*10.

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[23] *Id.*

[24] *Id.* at *1–*4, *28.

[25] *Id.* at *28, *29.

[26] *Id.* at *7 (citation and punctuation omitted).

[27] *Id.* at *17–*20

[28] *Id.* at *9, *17, *24–*24.

[29] *Id.* at *8.

[30] *See* U.S. Gov't Accountability Off., GAO-23-105210, Third Party Litigation Financing: Market Characteristics, Data, and Trends 11 (2022), https://www.gao.gov/assets/gao-23-105210.pdf.

[31] *Id.*

[32] *Id.* at 11–12.

[33] Julianna Marandola, *In for A Penny and Out for Profit: A Federal Approach to Consumer Third-Party Litigation Funding*, 64 B.C. L. Rev. 1763, 1765 (2023).

[34] "Champerty was a form of medieval land tenancy that eventually gave its name to the vice of vexatiously stirring up other people to litigate. Together with barratry, champerty is a form of maintenance." *See In Re: Pork, Cattle and Beef*, 2024 WL 511890, at *6 n.8. "Maintenance refers to helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome." *See* U.S. Gov't Accountability Off., GAO-23-105210, Third Party Litigation Financing: Market Characteristics, Data, and Trends 4 (2022), https://www.gao.gov/assets/gao-23-105210.pdf.

[35] *See Glaz, LLC v. Sysco Co.*, LCIA Case No. 225609, Order on Claimants' Preliminary Injunction Application ¶ 203 (Mar. 10, 2023) (citation omitted; emphasis in original).

[36] *Id.*

[37] *See id.* (John J. Kerr, dissenting).

[38] *See In Re: Pork, Cattle and Beef*, 2024 WL 511890, at *4 (D. Minn. Feb. 9, 2024).

[39] *See id.* at *8.

[40] *See* Joint Mot. Substitution, *In re Broiler Chicken Antitrust Litig.*, No. 1:16-cv-08637 (N.D. Ill. Jun. 28, 2023) (Dkt. No. 6630); *see also In re: Pork, Cattle and Beef*, 2024 WL 511890, at *4 (D. Minn. Feb. 9, 2024).

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