# CLAIMS PURCHASING COMPANIES: THE CLAIMANT'S FRIEND, OR UNWELCOME PARASITE?

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*The travel industry is familiar with the concept of the claims management company. Many claims brought by claimants against tour operators, and others, pass through the hands of such companies. Whether one views this simply as a fact of modern litigation or as a development to be strongly deprecated depends on one's position in the market. The rise of a more recent phenomenon, the claims purchasing company, may be another matter. In this article, Sarah Prager questions whether the emergence of such firms is a matter for concern.*

## The business model

For some years now claims management companies have operated within the legal services market. The collapse of The Accident Group in 2003, and numerous concerns around the promises being made by such companies in their advertising material, led to their regulation under The Companies Act 2006. However, the Act only provides for the regulation of businesses that handle certain types of claims for compensation in relation to personal injury, financial products and services (such as mis-sold payment protection insurance), employment matters, criminal injuries, industrial injuries disablement benefit and housing disrepair.

Latterly the aviation industry has become aware of the emergence of a new phenomenon; the claims purchasing company. The business model is brilliantly simple. The company is established solely for the purpose of purchasing from consumers their right to sue airlines pursuant to the Regulation (EC) 261/2004 ('The Denied Boarding Regulations') for cancellation or delay of over three hours to flights. It advertises on the internet offering to purchase the consumer's right to sue the airline involved, in return for which the consumer assigns to the company his or her right to sue the airline. The company then brings an action against the airline suing it on the basis of this assignment.

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The company's profits derive from two sources: the difference between the sum paid to the consumer for his right to sue and the sum recoverable from the airline (typically the company will purchase the right to sue for 60% to 70% of the sum recoverable), and the costs recoverable from the airline in the proceedings. Both are modest sums, but when one considers that following the decision in *Sturgeon v Condor* (conjoined cases C-402/07 and C-432/07) and *TUI Travel, British Airways, Easyjet and ABTA v CAA* (CO/6569/2010) many thousands of passengers per year will be entitled to compensation for delay of over three hours, as well as those passengers entitled to recover for cancellation of flights, the potential for healthy profits to be made is obvious.

## The claim

Obviously the claim made by the claims purchasing company against the airline is only as strong as the underlying claim for compensation. The consumer cannot assign more than he has.

Therefore the company must prove that it has a valid claim for compensation under the Regulations.

The difficulty for the airline is that the law in this area, as developed by the European Court of Justice, very much favours consumers. Readers will recall the controversy surrounding the decision in *Sturgeon*, which imposes a liability to compensate for delay which is simply not in the Regulations themselves; but that controversy has been resolved resoundingly in favour of the consumer. Compensation is payable either in the event of cancellation or in the event of delay of over three hours.

Any attempt to escape liability by reference to Article 5(3) of the Regulations is also unlikely to succeed in the light of ECJ jurisprudence. It will be recalled that Article 5(3) of the Regulations reads as follows:

> "An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken."

**Do technical problems with an aircraft can constitute 'extraordinary circumstances'?**

Whilst extraordinary circumstances are not defined within the body of the Regulations, the preamble to them states that they may occur in the following situations: political instability; meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings, and strikes that effect the operation of an air carrier.

The difficulty with this defence is that, in contrast with Article 7 itself, the ECJ has interpreted it extremely restrictively. In *Wallentin-Hermann v Alitalia*, C-549/07 the court was asked to consider whether technical problems with an aircraft can constitute 'extraordinary circumstances'. The answer is 'no', save in very limited situations:

> "…A technical problem in an aircraft which leads to the cancellation of a flight is not covered by the concept of 'extraordinary circumstances' within the meaning of that provision, unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control…"

Furthermore, the airline can only prove that it has taken 'all reasonable measures' to avoid the technical problem if it establishes that:

> "…even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would clearly not have been able – unless it had made intolerable sacrifices in the light of the capacities of its undertaking at the relevant time – to prevent the extraordinary circumstances with which it was confronted from leading to the cancellation of the flight…"

Cases will be few and far between where an airline can demonstrate that the circumstances in which the technical problem arose were so unusual as to take them outside the unusual operation of an aircraft (which is taken to include dealing with unforeseeable and unpredictable technical glitches). The example given by the European Court in its judgment of a situation where there may be extraordinary circumstances is where:

> "it was revealed by the manufacturer of the aircraft comprising the fleet of the air carrier concerned, or by a competent authority, that those aircraft, although

already in service, are affected by a hidden manufacturing defect which impinges on flight safety".

What will not be sufficient, however, is the mere fact that the particular defect or problem which has arisen is very rarely encountered (as in a German case decided in the Darmstadt Regional Court on 20th July 2011 (7 S 46/11)), or possibly even unique.

It is now so difficult for airlines to bring themselves within the Article 5(3) defence when an aircraft has suffered technical difficulties that it is only extremely rarely that a court will be prepared to withhold compensation when an aircraft has 'gone tech'. As a result, in the vast majority of cases involving cancellation or delay of over three hours compensation will be payable by the airline to the consumer. Therefore the consumer has a right to sue the airline and the underlying claim, the subject of the assignment to the claims purchasing company, will be a valid one.

## The problem

Airlines are, by and large, resigned to the prospect of compensating consumers for cancellation and delay to flights. What they find difficult to accept, however, is the notion that they should provide the compensation stipulated by the Regulations, together with legal fees, only to see an unrelated claims purchasing company, which has not itself suffered any loss as a result of the delay or cancellation, benefitting from regulations which were intended to protect consumers.

Those involved in consumer protection should also be concerned at the emergence of such companies. Although they advertise themselves as the claimant's friend and ally, shouldering the burden of bringing the claim against the airline, the plain fact is that they take a significant proportion of the compensation payable to the claimant in exchange for bringing what is an entirely straightforward claim for liquidated compensation. In most cases litigation will not be necessary, and there will be no question but that compensation is payable. The position of such companies is analogous to those of claims management companies in the context of financial product mis-selling, whose conduct has lately been the subject of a great deal of scrutiny. Perhaps because their activities are more recent, and less high-profile, the claims purchasing companies have, to date, escaped this type of examination on the part of the media.

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## The solution?

There is a solution to the problem. The airlines are starting to fight back, by utilising a defence which strikes at the very heart of the purchasing company's business model; champerty. If the assignment between the consumer and the company is void for champerty, the business model fails.

Trafficking in litigation is contrary to public policy (so said Lord Wilberforce in the House of Lords decision in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679), and the assignment of a cause of action for the purposes of enabling the assignee or a third party to make a profit out of the litigation will generally be void as savouring of champerty (Lord Justice Moore-Bick in the Court of Appeal in *Simpson (as assignee of Alan Catchpole) v Norfolk and Norwich University Hospital NHS Trust* [2012] 2 WLR 873).

Champerty is a little used defence, and is rarely successful. However, in recent years it has succeeded in a number of tribunals. Most recently, in *Skywell (UK) Limited v Revenue & Customs Commissioners* (2012) UKFTT 611 (TC), a well-respected and experienced judge, Alison McKenna, sitting in the Tax Chamber, declined to

substitute a third party as appellant in an appeal against a Revenue and Customs VAT decision. She held that a deed which purported to assign to the third party a bare right to litigate, and which was unsupported by any collateral interest, was champertous and unenforceable for reasons of public policy.

Prior to that, and perhaps more pertinently in this context, the Court of Appeal had made a finding of champerty in the case of *Simpson*. In that case the claimant's late husband had contracted a hospital acquired infection whilst dying from cancer in hospital. The infection had not contributed towards his death, but the claimant believed that the Trust had failed to operate proper infection control procedures, and wanted to force it to confront its shortcomings. Another patient, Mr Catchpole, had issued proceedings against the Trust after contracting the same infection in the same hospital. He assigned his claim to Mrs Simpson for a consideration of £1, and she pursued it in her own name and for her own benefit. A district judge struck out the claim on the ground that a bare right to litigate was incapable of assignment.

On appeal to the Court of Appeal, it was held that a right to recover compensation for personal injury caused by negligence was a form of property that could properly be regarded as a "legal thing in action" within the meaning of the Law of Property Act 1925 s.136, and was therefore theoretically capable of assignment. However, the law would not recognise, on the ground of public policy, an assignment of a right to litigate that was unsupported by an interest sufficient to justify an assignee's pursuit of proceedings for his own benefit. The assignment of a cause of action for the purposes of enabling the assignee to make a profit out of the litigation would generally be void as champertous. The claimant was therefore guilty of "wanton and officious intermeddling" with the disputes of others, within the meaning of the authorities on champerty, which the Court of Appeal considered at some length.

Nevertheless, so the court held, the law on maintenance and champerty was open to further development as perceptions of public interest changed, and it was not possible to state definitively what might constitute a sufficient interest to support the assignment of a cause of action in tort for personal injury. It was not, however, in the public interest to encourage litigation whose principal object was not to obtain a remedy for a legal wrong, but to pursue a different object, namely, in that case, a campaign against the Trust.

**It was not in the public interest to encourage litigation**

## Conclusion

It seems to the author that the claims purchasing companies' business model is entirely predicated on trafficking in litigation, and in enabling them to make a profit out of the consumer's right to litigate. This is contrary to public policy both because it encourages meddling in another's right to litigate, and because it leads to the siphoning of compensation properly due to the consumer to a parasitic business which has not suffered the compensable loss. This, so the author considers, cannot possibly be what the European Court of Justice envisaged when it determined the cases of *Sturgeon* and *Wallentin-Hermann* so decidedly in favour of the consumer. It remains to be seen whether the English courts will take the same view; but what is certain is that the stakes are high, both for consumers, airlines and the claims purchasing companies themselves.

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