US Law Week
March 29, 2023, 4:00 AM

Breaching a Litigation Funding Agreement—the Sysco/Burford Story

By Dai Wai Chin Feman

Opinion

Parabellum Capital's Dai Wai Chin Feman responds to a dispute between Sysco Corp., a food distributor, and litigation funder Burford Capital over price-fixing lawsuits, saying Sysco "conducted a master class on how to breach a litigation funding agreement."

Litigation funding is typically non-recourse in nature. Just because a litigation funding agreement is non-recourse, however, does not mean it can be breached with impunity.

University of Iowa's Maya Steinitz says certain contractual provisions "are the very essence" of a litigation funding agreement, and "any breach by the plaintiff of those provisions is presumptively material." One such provision is the "non-impairment of the claim." According to Steinitz's *Model Litigation Finance Contract*, breaching this term entitles a funder to the serious remedy of "an immediate refund" of its investment, as well as the retention of its upside in the claim proceeds.

As Steinitz writes, "funders must have certainty that they are getting what they bargain for and that the plaintiff is not selling 'damaged goods.'"

This type of breach lies at the heart of the dispute between food distributor Sysco and litigation funder Burford Capital. Burford gave Sysco $140 million of working capital secured by a portfolio of antitrust claims. Sysco then assigned away a substantial portion of those claims based on its own commercial considerations, materially breaching its agreement with Burford.

Media coverage of the dispute has focused on an unusual settlement consent right that Sysco gave Burford to resolve its claims for breach. Sysco now seeks to invalidate that right on public policy grounds so it can consummate settlements an arbitration tribunal has preliminarily enjoined.

This column is not about whether the settlement consent right is enforceable. Instead, it provides necessary context for the parties' dispute, which has been misconstrued as a litigation funding "cautionary tale." This label could not be more ironic.

Sysco chose to provide the right to Burford and received a release in exchange for doing so. It now seeks to disavow the right so it may settle beneath its own "settlement floor." Sysco thus materially breached, and now seeks to further breach by unreasonably settling away what remains of its claims for less than its own stated minimum. And it's only doing so because it is no longer incentivized to litigate due to its own misconduct.

Sysco's Material Breach

Burford provided $140 million to Sysco pursuant to an agreement that—consistent with industry norms—did not contain the limited consent right now at issue.

The agreement did, however, prohibit Sysco from divesting collateral without Burford's consent. Yet Sysco did exactly that. In the words of Steinitz—Sysco's proffered expert in the dispute—this "presumptively material" breach violated "the very essence" of the deal. (Sysco's pleadings curiously omit any mention of its breach.)

Sysco's breach fundamentally distorted its incentives. For Burford to receive its contractual return, it would now need a much larger proportion of the claim proceeds, lessening Sysco's remaining share. This created a moral hazard that Sysco would abandon its claims, or settle for very little, given that its marginal benefit from any additional settlement value was rendered insignificant by its own breach.

Sysco Provides the Consent Right to Resolve Burford's Claims

Under Steinitz's model contract, Sysco's breach would entitle Burford to recoup the entirety of its investment while maintaining its rights in future claim proceeds.

Sysco evidently sought to retain Burford's capital. In exchange for a waiver of Burford's contract claims, Sysco increased Burford's share of the remaining proceeds and, acknowledging its misaligned incentives, agreed not to settle without Burford's prior consent. The consent right was contractually limited, including that it "shall not be unreasonably withheld" or used "to impose a commercially unreasonable result."

In giving the consent right, Sysco contractually represented that it is "sophisticated," received "independent legal advice from experienced counsel," and "irrevocably waive[d]" any argument that the agreement is "against the public policy of any relevant jurisdiction."

Sysco Attempts to Avoid the Consent Right

Sysco represented to Burford that it had a "settlement floor," i.e., a level below which Sysco would not resolve its claims. Sysco nevertheless negotiated settlements for amounts that were below this stated minimum and, according to Burford, "several multiple lower than other plaintiffs' settlements."

When Burford learned of the proposed settlements, it exercised its consent right based on the commercial unreasonableness of the terms. In response, Sysco apparently "indicated that unless [Burford] obtained an injunction, it intended to execute the settlement … by the end of the year."

Burford then commenced an arbitration and obtained a temporary restraining order preventing Sysco from settling without Burford's reasonable consent. After a merits hearing with live testimony from principals and experts, the tribunal issued a preliminary injunction, finding Burford had demonstrated the requisite likelihood of success on the merits, irreparable harm, and balancing of the equities in its favor.

Burford's exercise of the consent right "was not unreasonable" in the tribunal's view because, among other things, Sysco did "not provide[] a reasonable explanation for going beneath the floor."

Sysco countered with a vacatur action in federal court and an aggressive public relations campaign. Sysco seeks to nullify the consent right it gave to resolve its own breach. Its application is supported by submissions from Steinitz contending that the consent right is unenforceable as a policy matter.

(Interestingly, Steinitz writes that "litigation funding contracts can and do include covenants that require approval by, or at least consultation in good faith with, the litigation funding firm before making strategic litigation decisions such as … the decision to settle.")

The Perverse Implications of Sysco's Position

Sysco attempts to portray itself as a sympathetic claimholder, assured of Burford's passivity, only to be victimized by a consent right that runs afoul of public policy by forcing unwanted litigation. The facts obviously tell a very different story.

Sysco, a self-described "sophisticated" plaintiff, received $140 million from Burford with no settlement consent right. Sysco proceeded to materially breach in a manner that its own expert–Steinitz–deems violative of "the very essence" of the parties' agreement.

To avoid a nine-figure liability, Sysco gave Burford a limited consent right, which right was only necessary due to the misaligned incentives created by Sysco's own breach. In giving the consent right and agreeing that Burford would be entitled to the lion's share of remaining proceeds as a remedy for Sysco's breach, Sysco expressly waived any and all public policy arguments.

Sysco proceeded to negotiate settlements below its minimum "settlement floor," validating the concerns motivating Burford's consent right. Then, when Burford exercised the consent right, Sysco dared Burford into a game of litigation chicken, effectively taking the position that the carefully crafted right is illusory.

In the event Sysco prevails, it will have retained Burford's $140 million despite its material breach, and will further be permitted to unreasonably settle its remaining claims. Sysco essentially seeks to benefit from a nine-figure windfall borne out of its own breaches, an ironic result for a supposed champion of public policy.

It remains to be seen whether Burford's preliminary injunction will stand. But regardless of who prevails, Sysco has conducted a master class on how to breach a litigation funding agreement.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Dai Wai Chin Feman is director of commercial litigation strategies and corporate counsel at Parabellum Capital.

Write for Us: Author Guidelines

Related Stories

Sysco Accuses Burford Capital Of Meddling In Antitrust Deals (1)
March 9, 2023, 2:28 PM

© 2023 Bloomberg Industry Group, Inc. All Rights Reserved