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quinn emanuel urquhart & sullivan, llp | business litigation report

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## Recent Developments on Funding Arrangements in the UK

The Court of Appeal in England & Wales, in its powerful judgment in *Sony Interactive v Neill and Ors* [2025] EWCA Civ 841 (*Sony v Neill*) of 4 July 2025, unanimously dismissed a challenge to the validity of litigation funding agreements (LFAs) which provide for payment based on a multiple of the capital deployed or committed in the relevant proceedings. Had the appeal succeeded, such agreements would have been rendered invalid, causing chaos for the litigation funding industry. It remains to be seen whether the judgment will be appealed to the UK Supreme Court. At the same time, the Civil Justice Council (CJC) of England & Wales published its much-anticipated report on litigation funding, which makes 58 recommendations and urges immediate reform.

### Background - The UK Supreme Court's Ruling in PACCAR

The UK Supreme Court's seminal judgment in *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28 (PACCAR) had found that LFAs that entitle the litigation funder to a percentage of any damages recovered constitute damages based agreement (DBA(s)) and that to be enforceable, a DBA must comply with the applicable statutory conditions, in particular the requirements of the Damages-Based Agreements Regulations 2013 (DBA Regulations 2013). The decision rendered many existing third party funding agreements invalid.

The underlying facts of the PACCAR case were that the Defendants, UK Trucks Claim Ltd (UKTC) and the Road Haulage Association (RHA), made

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## Another Year – Still “Most Feared”

The BTI Consulting Group has again named Quinn Emanuel the number one “most feared” law firm in its 2026 “Most Feared Law Firms in Litigation” guide. More than 350 in-depth surveys by Heads of Litigation, Chief and VPs of Litigation, General Counsel, and Chief Legal Officers determined this great achievement. This is the fifth time in the last six years that Quinn Emanuel has earned this coveted spot atop BTI Consulting Group’s “Fearsome Foursome” and the twelfth year the firm has been named to the list.

## Dan Brockett Recognized in “2025’s Most Influential Lawyers in Financial Lawsuits”

The Business Tycoon Magazine has highlighted Partner Dan Brockett in its list of “2025’s Most Influential Lawyers in Financial Lawsuits.” With over 20 years at Quinn Emanuel and landmark victories including a \$2 billion settlement against major Wall Street banks, Dan continues to set the standard for plaintiff-side financial litigation.

## The National Law Journal Recognizes Kevin Chu as a Rising Star

Partner Kevin Chu was named a Washington, D.C. Rising Star at the 2025 *National Law Journal* Awards. Kevin specializes in intellectual property litigation, with extensive experience in Section 337 investigations before the International Trade Commission. He has also successfully represented numerous clients before federal district courts and has been repeatedly honored for his work in IP litigation.

an application to the UK Competition Appeal Tribunal (CAT) for a collective proceedings order (CPO) in respect of breaches of competition law by the Claimants (Paccar Inc, DAF Trucks NV and DAF Trucks Deutschland GmbH) under section 49B of the UK Competition Act 1998. The purpose of the CPO was to enable UKTC and the RHA to bring proceedings on behalf of claimants who had purchased trucks from the Claimants. The European Commission had found that the arrangement that subsisted between the truck manufacturers to be in breach of European competition law.

UKTC and the RHA had to show that they had adequate funding arrangements in place to meet both their own costs and any adverse costs order if they were to obtain a CPO from the CAT. The PACCAR claimants were many, more than 18,000, with the claim itself worth more than £2 billion. The relevant parties obtained funding from third-party litigation funders and per the applicable LFAs, the funders' maximum remuneration was calculated by reference to a percentage of the damages ultimately recovered in the litigation.

The truck manufacturers' position before the CAT was that the LFAs constituted DBAs within the meaning of section 58AA of the Courts and Legal Services Act 1990, as amended (CLSA). Section 58AA of the CLSA provides that a DBA will be unenforceable unless it complies with the requirements set out in Section 58AA(4), including the requirement that it complies with the provisions of the DBA Regulations 2013. As such, they were unenforceable because they did not comply with the formality requirements made applicable by that provision. If this were right, there would be no proper basis on which a CPO could be made by the CAT in favour of either UKTC or the RHA.

The CAT ruled that the LFAs were not DBAs and were therefore not struck out by the relevant provision. A CPO could therefore be made. The truck manufacturers sought review of this decision in two ways: (i) they took an appeal to the Court of Appeal and, (ii) challenged the CAT's decision by way of judicial review. The Court of Appeal decided that it had no jurisdiction to hear an appeal and the Divisional Court dismissed the judicial review claim. The truck manufacturers appealed directly to the Supreme Court under the leap-frog procedure, with the Association of Litigation Funders of England & Wales intervening.

By a majority of 4 to 1, the UK Supreme Court (Lords Reed, Sales, Leggatt and Stephens, with Lady Rose dissenting) decided that the LFAs at issue were DBAs within the terms of section 58AA, CLSA, and would therefore be unenforceable unless they complied with (*inter alia*) the DBA Regulations 2013.

The decision had a huge impact on the litigation

funding industry, commercial litigation and in particular claims in the CAT and other large group actions. The regulatory regime for DBAs requires, amongst other things, that the agreements specify the claim, the circumstances for payment of the representative's fees and costs, and the reasons for setting the payment amount. The majority of LFAs were not compliant with these requirements, meaning that, post-PACCAR, many existing LFAs were rendered unenforceable unless they were restructured.

### **Court of Appeal of England & Wales Rejects Post-PACCAR Challenge to Litigation Funding Agreements**

This year, in *Sony v. Neill*, the Court of Appeal considered various appeals from the CAT, requiring it to decide whether an LFA that provides for the funder to receive a multiple of the amount it has paid (or committed to pay) is a DBA if it also caps that amount at the level of the damages received by the funded party.

#### ***Facts and Issues in the Appeal***

The case concerned conjoined appeals from the CAT in which the defendants had challenged the enforceability of the LFAs entered into by the claimant class representatives. These LFAs had been amended as a consequence of the PACCAR decision. The "funder's fee" in the original LFAs in PACCAR and in the present cases was calculated as a percentage of the proceeds which the class representative would recover if the proceedings were successful. In broad terms, the revised LFAs under consideration in *Sony v. Neill* provided that the funder's fee is to be calculated as a multiple or multiples of the funder's outlay (or its committed outlay) in the proceedings, although it is still paid out of the proceeds. The revised LFAs also provided that the amount of the funder's recovery is capped at the level of the proceeds recovered (or some possible subset thereof). In each of the cases under appeal, the CAT found that the revised LFAs were not DBAs so that the LFAs are enforceable. The unsuccessful defendants appealed in each case with the permission of the CAT.

The appeals raised three key issues in respect of the returns obtained by a funder (*Sony v Neill* at paragraph [5]):

- If the amount payable to a funder or insurer under the LFAs is payable from and/or capped by the proceeds of a successful outcome, is the amount of the payment "to be determined by reference to the amount of the financial benefit obtained" for the purposes of section 58AA(3)(a)(ii) of the CLSA?
- If the LFAs provide that the funder or insurer is paid a percentage of the proceedings, "only to the extent enforceable and permitted by applicable law" (or similar), is it a DBA, otherwise impermissible, or inappropriate for the purposes of certification?

- If the LFA is unenforceable and/or unlawful, can any parts of it be severed?

### **Decision**

The Court of Appeal upheld the validity of LFAs that allow the funder to recover a multiple of its investment rather than a percentage of damages. In a judgment given by Sir Julian Flaux C (with which Green and Birss LJ agreed) which was handed down on 4 July 2025, the Court dismissed the appeal and held that the revised LFAs were not unenforceable.

- It rejected the appellants' submissions that although the revised LFAs calculated the funders' return by reference to a multiple of the amounts advanced by the funders, they were nevertheless DBAs because of express or implied caps on the level of recovery at the level of damages recovered, or because the return would be payable out of such proceeds. The fee is determined by reference not to the damages recovered but by reference to the amount of funding provided and the fact that the source of the fee paid is the damages does not turn it into a DBA, nor does the fact that there is an upper limit or cap on the funder's fee recoverable by reference to the amount of damages recovered. The fee is still calculated or determined by reference to the amount of funding provided (*Sony v Neill* at paragraphs [115]-[123]).
- It rejected the appellants' further submissions that conditional language providing for a percentage based recovery in the event that the law changed (i.e. to reverse PACCAR), but otherwise to be calculated by reference to a multiple of the amounts advanced by the funders, nevertheless rendered the revised LFAs into DBAs. The Court held that unless and until the law is changed either by the legislative reversal of PACCAR or in some other way, the percentage provision in the relevant LFAs is simply of no contractual effect – the argument that (if severance were not possible) the presence of the percentage provisions renders the whole LFA an unenforceable DBA, is unsustainable (*Sony v Neill* at paragraphs [124]-[128]).
- As a result of the first two points, the Court declined to decide the third point, which had become moot, as to whether the DBA was the LFA as a whole, or was properly to be located somewhere within the LFA, or alternatively whether it was possible to sever any language which otherwise had the effect of rendering an LFA into a DBA (*Sony v Neill* at paragraphs [129]).

Since PACCAR, the vast majority of LFAs now provide for payment based on a multiple of the capital deployed or committed. Had the *Sony v Neill* appeal succeeded,

such agreements would have been rendered invalid, causing chaos for the industry yet again. The decision of the Court of Appeal should now provide clarity on the enforceability of revised litigation funding agreements for the majority of UK collective proceedings post-PACCAR. It also aligns with the recommendations of the Civil Justice Council in its recent report on litigation funding discussed below, which included the reversal of PACCAR.

### **The Civil Justice Council Publishes Its Final Report Recommending Sweeping Reforms**

On 2 June 2025, the CJC published its much-anticipated report on litigation funding which urges immediate reform following the PACCAR ruling. The CJC is a statutory advisory public body tasked with reviewing the civil justice system and making recommendations on its development, and its Final Report is meant to respond to the previous government's request for advice concerning litigation funding. This request came about in light of the PACCAR decision and the state of flux that the litigation funding industry was in following that.

#### ***Overview of the Recommendations***

The Final Report makes 58 recommendations in total including the following which are discussed in further detail below:

- the reversal of the effect of the Supreme Court's judgment in PACCAR;
- establishing statutory "light-touch" regulation, with enhanced regulation where the funded party is a consumer or in collective proceedings, representative actions, or group litigation;
- courts to be given discretion to award funding costs from a losing defendant in "exceptional circumstances"; and
- third-party funding of arbitration not to be subject to the formal regulation.

The CJC's initial recommendation concerned PACCAR. It recommends that the effect of the PACCAR decision be reversed by legislation, which should be both retrospective and prospective in effect, and make clear that there is a categorical difference between (i) contingency fee funding, i.e., funding provided to a party to a dispute by their legal representative (through a CFA or DBA) and (ii) litigation funding, i.e., funding provided by an individual or a business who is not a party's legal representative (litigation funders) for the purposes of dispute resolution. The report emphasises that the two are separate and should be subject to separate regulatory regimes. The legislation to be introduced should make clear that litigation funding is not a form of DBA and that it is a distinct form of funding from that provided by a party's legal representative, and should also make clear

that the provision of litigation funding is not a form of claims management service.

The CJC also recommends that the current self-regulatory approach be replaced. That should be done by replacing section 58B of the CLSA (the section that makes provision for LFAs) with "a formal, comprehensive regulatory scheme" that covers all forms of litigation funding. The CJC emphasises that such regulation will be "light-touch". The CJC recommends that the minimum, base-line, set of regulatory requirements should include provision for: case-specific capital adequacy requirements; codification of the requirement that litigation funders should not control funded litigation; conflict of interest provisions; the application of anti-money laundering requirements; and, disclosure at the earliest opportunity of the fact of funding, the name of the funder, and the ultimate source of the funding. Additional, but again still light-touch, regulatory requirements should apply to litigation funding provided to consumers and where it is provided to parties engaged in collective proceedings, representative actions or group litigation. The CJC said the new regulatory regime should avoid imposing "statutory caps or mandatory minima" in respect of funders' returns, and that standard terms for LFAs should be developed and annexed to the Regulations.

As to the recoverability of funding costs, the CJC recommended that litigation funding costs should be brought within the scope of the court's wide discretion to make costs orders where it is just and proper to do so. This would allow judges to assess whether these costs should be recovered, taking into account factors such as the defendant's conduct, the claimant's financial

position, and the necessity of litigation funding in that case. By being able to treat funding costs as recoverable, the courts would be able to ensure a fairer allocation of financial burdens of disputes, consistent with the general principle that costs should follow the event. According to the CJC, this is likely to promote access to justice for claimants who would not otherwise be able to seek rights-vindication before the courts and is also likely to promote earlier settlement, saving court time.

Finally, the CJC noted that litigation funding of arbitration proceedings should not be subject to the proposed formal regulation and it should remain a matter for arbitral centres to determine whether and, if so, how any such regulation should be implemented.

### **The Likely Impact of the Recommendations**

The Final Report will now be considered by the Lord Chancellor. Despite the CJC presenting its proposed regulatory regime as "light touch", its numerous recommendations would, if implemented, mean important changes to the litigation funding landscape in the UK which would reconcile access to justice and consumer protection with the commercial realities of the litigation funding market. Overall, in light of the *Sony v Neill* decision and the Final Report the key issues that might need to be addressed when considering regulating litigation funding in England & Wales have now been considered, either by the CJC or the courts. It remains to be seen whether legislation will follow to implement the CJC's recommendations and whether such legislation will be in line with the approach taken by the Court of Appeal. 

## NOTED WITH INTEREST

### **The Dubai International Financial Centre Court Reaffirms Its Status as a Leading Forum for International Asset Protection: Carmon and Dubai Law No. 2 of 2025**

The Dubai International Financial Centre (DIFC) has developed into one of the world's leading common law jurisdictions, serving as a hub for international commercial dispute resolution. A critical aspect of its appeal lies in the ability of its courts to provide interim relief, such as freezing injunctions, to protect assets in cross-border disputes.

The jurisdiction and power of the DIFC Courts to grant interim freezing relief in support of overseas proceedings came under scrutiny in *Sandra Holding Limited v Al Saleh & Ors* [2023] DIFC CA 003 (*Sandra Holding*) and *Carmon Reestrutura-Engenharia E Serviços Técnicos Especiais, (SU) LDA v Cuenda* [2024] DIFC CA 003 (*Carmon*), and has now been clarified by Dubai

Law No. 2 of 2025.

Under applicable DIFC law, the courts had statutory jurisdiction to recognise and enforce foreign judgments, with incidental powers to give injunctive relief. A central question before the Court of Appeal in *Sandra Holding* and *Carmon* was whether those injunctive powers were enlivened in a case in which proceedings were pending in a foreign court (assuming those proceedings were capable of giving rise to a judgment that would be amenable to ratification and enforcement in the DIFC).

### **Sandra Holding**

In *Sandra Holding*, the DIFC Court of Appeal found that the courts did not have jurisdiction to make freezing

orders in support of ongoing overseas proceedings, unless one of the statutory gateways was otherwise satisfied. In reaching its decision, it rejected a prior line of authorities finding that the courts had freestanding jurisdiction to grant relief in support of overseas proceedings, through a combination of statute and rules, including: statutory jurisdiction in respect of claims “in accordance with DIFC Laws and Regulations”, statutory jurisdiction to ratify foreign judgments; and powers under the DIFC Rules of Court to issue interim remedies in support of overseas proceedings (Judicial Authority Law (JAL) Article 5(A) (1)(e), DIFC Courts Law Articles 24(1) and (32), read with JAL, Article 7(6), and the Rules of the DIFC Court, Part 25).

In reaching its decision, the Court of Appeal held that the Rules of the DIFC Court could not add to nor extend the courts’ jurisdictional powers without clear express words to confer such powers and that the Rules of the DIFC Court referring to interim remedies in aid of foreign proceedings did not confer jurisdiction.

### **Carmon**

Carmon overturned Sandra Holding and the Court of Appeal confirmed its freestanding jurisdiction to grant interim relief in support of foreign proceedings, even where no substantive claim is yet before the DIFC Courts.

The Court of Appeal found that its jurisdiction to ratify foreign judgments properly construed confers jurisdiction to entertain an application for such relief as may be necessary to prevent its pre-emption by the dissipation of the assets of the prospective judgment debtor, where the applicable judgment can be recognised and enforced in the DIFC. The Court further found that the Rules of the DIFC Court providing for interim freezing orders could also be viewed as a source of the requisite protective jurisdiction, underscoring that the Rules of the DIFC Court can be a source of jurisdiction, depending on construction.

In reaching its decision, from a policy perspective, the Court noted that if a defendant in proceedings in a foreign court, whose judgment could be enforced in the DIFC, were to dissipate its assets to defeat execution of an apprehended judgment in the foreign jurisdiction and in the other jurisdictions in which the foreign judgment might be enforced, that would be a step which would render the jurisdiction and powers of an enforcing court nugatory. The Judgment says:

“The ability of a potential judgment debtor in a commercial dispute to make a pre-emptive strike against enforcement of any judgment against it would be inimical to the rule of law in trade and commerce, domestically and transnationally. The DIFC Courts are part of a growing network of international

commercial courts in a number of jurisdictions around the world. Where their jurisdiction and powers are amenable to constructions supporting the rule of law in transnational trade and commerce, such constructions should be preferred.”

### **Dubai Law No. 2 of 2025 Concerning the DIFC**

Law No. 2 of 2025 (DIFC Courts Law) came into force on 14 March 2025 and repealed and replaced the former legal framework pertaining to the jurisdiction of the DIFC Courts. The new legislation consolidates and modernises the DIFC Courts’ jurisdictional framework, including provisions for interim and precautionary measures.

Specifically, Article 15(4) of the DIFC Courts Law expressly confirms the DIFC Courts’ jurisdiction to hear and determine applications for interim relief, including freezing orders, disclosure orders, and injunctions, in connection with claims brought outside the DIFC seeking suitable precautionary measures within the DIFC, codifying the principle in Carmon.

The interpretation of the DIFC Courts Law recently came under scrutiny before the Court of Appeal in (1) Nadil (2) Noshaba v (1) Nameer (2) Nassema (Nadil). An appeal arose from a Court of First Instance decision refusing to grant a worldwide freezing order against the assets of respondents in the UAE (outside the DIFC) including on the basis that the enforcement of foreign judgments in the DIFC Court required “an asset, or something akin to an asset, to exist within the DIFC at the time of enforcement.” That was a marked departure from prior authority (albeit under the prior legal framework) which had confirmed that the enforcement of foreign judgments in the DIFC did not require the presence of assets in the DIFC.

At appeal, the freezing order was granted (*ex parte*) on the basis that there was at least a sufficiently arguable case for jurisdiction and power to warrant the grant of the orders sought. In an indication of the approach the Court can be expected to take in the future, the Court found that the existence of the jurisdiction and the powers to grant the interim orders made in the case is “strongly arguable” and that “[i]t would be surprising if the New Court Law had the effect of contracting the jurisdiction and powers of the Court.”

### **Conclusion**

By clarifying its jurisdiction and power to grant interim relief in aid of foreign proceedings, the DIFC has reinforced its role as a strategic hub for international dispute resolution. The Court of Appeal decision in Nadil indicates the courts will take a robust approach to its enforcement jurisdiction under the new legal regime. 

## Antitrust Litigation Update:

### Structural Remedies Making a Comeback in Merger Enforcement

Structural remedies are making a comeback in US merger enforcement actions. Under the Trump Administration, both the Department of Justice Antitrust Division (DOJ) and Federal Trade Commission (FTC) have resolved high-profile merger challenges and investigations through divestitures and similar remedies rather than seeking to outright block transactions in court. This approach marks a notable shift from the Biden Administration's aggressive approach to merger enforcement, often litigating cases through trial.

For example, in May of this year, the FTC approved the merger of Synopsys, Inc. and Ansys, Inc., two companies that offer software tools used to design semiconductors and related high-tech products. *See Complaint, In re Synopsys, Inc. and Ansys, Inc.*, Fed. Trade Comm'n (May 28, 2025). The FTC alleged that the proposed transaction would substantially lessen competition in violation of Section 7 of the Clayton Act in global markets for optical software tools, photonic software tools, and register transfer level power consumption tools. *Id.* But instead of litigating the matter to obtain an injunction, the FTC entered a consent order with the merging parties, allowing the transaction to proceed on the condition that the parties divest assets related to the three markets for which it had competitive concerns. *See Decision and Order, In re Synopsys, Inc. and Ansys, Inc.*, Fed. Trade Comm'n (May 28, 2025). In a statement accompanying the settlement, the FTC Chairman Andrew Ferguson explained his approach to structural remedies: "A settlement may be the best way to protect [merger] competition in some cases for two reasons. First, settlement can temper the potentially over-inclusive effects of an injunction blocking an entire merger. . . . Second, settlement maximizes the Commission's finite enforcement resources." *Statement of Chairman Andrew N. Ferguson In the Matter of Synopsys, Inc. / Ansys, Inc.*, Fed. Trade Comm'n (May 28, 2025).

Likewise, the DOJ recently approved two mergers on the condition that the merging parties divest assets. Most notably, in June, the DOJ abandoned a lawsuit seeking to enjoin the merger of Hewlett Packard Enterprise Co. (HPE) and Juniper Networks Inc. The case, which had been set to go to trial in early July, raised concerns that the merger could reduce competition in the market for certain enterprise network solutions. *See Complaint, United States v. HPE & Juniper Networks*, No. 25-cv-00951 (N.D. Cal. Jan. 30, 2025). But just weeks before trial was set to begin, the DOJ settled, approving the transaction so long as HPE divested certain enterprise network assets to a DOJ-approved buyer and the combined firm agree to provide licenses to related software tools. *See Proposed*

*Final Judgment*, No. 25-cv-00951 (N.D. Cal. June 27, 2025). A press release accompanying the agreement noted that the settlement achieves "a result otherwise unavailable through litigation" *Justice Department Requires Divestitures and Licensing Commitments in HPE's Acquisition of Juniper Networks*, Dep't Of Just. (June 28, 2025).

In another case, the DOJ approved the merger of Keysight Technologies Inc. and Spirent Communications Plc. after the parties agreed to a divestiture without going to court. Specifically, the DOJ raised concerns that the transaction could lessen competition in US markets for high-speed internet testing equipment, network security testing equipment, and certain wireless network testing devices. *See Proposed Final Judgment*, No. 25-cv-01734 (D.D.C. June 2, 2025). As with the matters above, the DOJ's approval of the transaction was contingent on the parties' agreement to divest assets related to the relevant markets. *Id.* In a statement about the settlement, the DOJ's Antitrust chief, Assistant Attorney General (AAG) Abigail Slater stated that the "structural solution preserves competition for key testing equipment" by "secur[ing] enforceable commitments from the merging parties" and while "provid[ing] transparency into the Antitrust Division's efforts to resolve merger investigations." *Justice Department Requires Keysight to Divest Assets to Proceed with Spirent Acquisition*, Dep't of Just. (June 28, 2025).

These developments may be a welcome sign to companies considering significant mergers or acquisitions in the near term. To the extent companies are willing to divest assets related to areas of competitive concern, these cases suggest that key US regulators may be willing to approve transactions without costly and time-consuming litigation.

However, merging parties should still proceed with caution. Both AAG Slater and the FTC Chairman Ferguson have emphasized in public statements that they will only approve merger settlements with meaningful divestitures that adequately resolve competitive concerns. Ferguson stated that the FTC is "clear-eyed about the dangers of inadequate or unworkable settlements" noting that "[t]he object of settlement is to protect competition as fully as would successful litigation without the expense and risk of litigation" *Statement of Chairman Andrew N. Ferguson in the Matter of Synopsys, Inc. / Ansys, Inc.*, Fed. Trade Comm'n (May 28, 2025). He emphasized that settlements should not be used "to paper over an anticompetitive transaction" *Id.* And in response to questioning from the Senate Judiciary Committee, Slater noted that any divestiture remedy in a merger case must be "effective and robust" *Questions for the Record, Ms. Abigail Slater*, Senate Jud. Comm. (Feb. 12, 2025).

## Trademark Litigation Update:

### Escaping *Dewberry* with Vicarious Liability? Not So Fast.

In February 2025, the Supreme Court handed down *Dewberry Group, Inc. v. Dewberry Engineers Inc.*, 604 U.S. 321 (2025) (*Dewberry*), reversing a \$43 million award that purported to “disgorge” profits attributable to trademark infringement, under the Lanham Act. The *Dewberry* opinion focused on three points. *First*, the Lanham Act allows a prevailing plaintiff to “recover [the] defendant’s profits” and the defendant is understood to be “the party against whom relief or recovery is sought in an action or suit.” *Id.* at 326 (citing 15 U.S.C. § 1117 and Black’s Law Dictionary). *Second*, the defendant Dewberry Group “reported no profits,” meaning the District Court’s award was based on the profits of the group’s affiliates, but not the Dewberry Group itself. *Id.* at 325. *Third*, plaintiff Dewberry Engineers “never tried to make the showing needed for [corporate] veil-piercing” before the District Court. *Id.* at 327. Taken together, the Supreme Court reasoned that Dewberry Engineers was not entitled to collect profits from Dewberry Group’s affiliates, because the affiliates were not named as defendants, and without a justification for veil piercing, the affiliates were separate corporations. *Id.* at 329 (Dewberry Engineers “cannot justify ignoring the distinction between a corporate defendant (i.e., Dewberry Group) and its separately incorporated affiliates”).

Trademark plaintiffs examining *Dewberry* may be tempted to try “pleading around” that corporate separateness by asserting claims for vicarious copyright infringement. After all, “[o]ne infringes vicariously by profiting from direct [trademark] infringement while declining to exercise a right to stop or limit it” *Sam Bernstein L. Firm, PLLC v. Heidari L. Grp., PC*, 2025 WL 1141167, at \*9 (C.D. Cal. Feb. 10, 2025) (cleaned up, quoting *Perfect 10, Inc. v. Visa Intern. Serv. Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007)). A plaintiff like Dewberry Engineers may thus believe it can collect profits from a defendant’s affiliates by accusing the defendant of vicarious trademark infringement.

But any attempt to escape *Dewberry* by pleading vicarious infringement will run headlong into two barriers. First, unlike other forms of vicarious infringement, vicarious trademark infringement is particularly difficult to plead and prove. *E.g. Perfect 10*, 494 F.3d at 806 (“The tests for secondary trademark infringement are even more difficult to satisfy than those required to find secondary copyright infringement.”). Specifically, various trademark infringement requires a showing that “the defendant and the infringer have an apparent or actual partnership, have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product.” *Id.* (quoting *Hard Rock Cafe*

*Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1150 (7th Cir. 1992)); *see also Kelly-Brown v. Winfrey*, 717 F.3d 295, 314 (2d Cir. 2013).

Second, assuming that a plaintiff can clear the high-bar of pleading and proving vicarious trademark infringement, the plaintiff will face a more fundamental problem: *Dewberry* requires corporate “veil-piercing” (604 U.S. at 327) yet proving vicarious trademark infringement would *defeat* any attempt to pierce the corporate veil. “[V]eil piercing for trademark infringement requires that the owners exercised complete domination of the corporation in respect of the allegedly infringing transaction.” *Cesari S.r.L. v. Peju Province Winery L.P.*, 2020 WL 1126833, at \*3 (S.D.N.Y. Feb. 24, 2020) (citing *HSW Enter., Inc. v. Woo Lae Oak, Inc.*, 2009 WL 4823920, at \*5 (S.D.N.Y. Dec. 15, 2009)); *see also Lauter v. Rosenblatt*, 2017 WL 6205784, at \*8 (C.D. Cal. Dec. 6, 2017) (On a Lanham Act claim, “[e]ven if the sole shareholder . . . dominated and controlled the corporation, that fact is insufficient by itself to” pierce the corporate veil without personal participating in the infringement).

The test for trademark veil piercing—complete domination—is thus inconsistent with vicarious trademark infringement, which requires “an apparent or actual partnership” between parties who “have authority to bind one another in transactions.” *Perfect 10*, 494 F.3d at 806. Put differently, if the parties are partners who have equal authority to bind each other, neither can be said to have exercised “complete domination” over the other.

Indeed, because vicarious trademark infringement is likened to “an apparent or actual partnership” it makes sense to apply the modern, majority rule that partnerships are *distinct* from their individual partners—which precludes veil piercing without something more. *E.g.* Del. Code Ann. tit. 6, § 15-201 (under Delaware law, “A partnership is a separate legal entity which is an entity distinct from its partners.”); Cal. Corp. Code § 16201 (same under California law); *Clonus Assocs. v. DreamWorks, LLC*, 417 F. Supp. 2d 248, 255 (S.D.N.Y. 2005) (same under New York law); *see also Moore v. United States*, 602 U.S. 572, 593 (2024) (recognizing that, by the time the sixteenth Amendment was passed, “the courts, Congress, and state legislatures treated partnerships as separate entities”). Attempting to escape *Dewberry* by pleading vicarious trademark infringement would therefore be self-defeating: proving vicarious trademark infringement would seem to preclude any attempt to pierce the corporate veil. The better tactic, as suggested by the Supreme Court, is for the plaintiff to choose the defendant more carefully in the first instance. If Dewberry Engineers had sued Dewberry Group’s affiliates directly, instead of targeting only their parent, Dewberry Engineers may have kept that \$43 million judgment. 

## Quinn Emanuel Secures Historic Class Certification Victory for 200+ Million Consumers in Landmark Antitrust Case Against Amazon

In *DeCoster v. Amazon*, Quinn Emanuel and its co-counsel, Hagens Berman and Keller Postman, just secured a historic class certification victory for over 200 million American consumers—likely one of the largest classes ever certified in United States history in a landmark antitrust case against Amazon. This case is one of a coordinated set of actions against Amazon for anticompetitive conduct regarding the Amazon Marketplace, including actions by the Federal Trade Commission, the State of California, and the District of Columbia. After Quinn Emanuel defeated Amazon's aggressive legal challenges, including two motions to dismiss and 700+ pages of opposition to the Firm's motion for class certification, Judge Chun granted Quinn Emanuel's motion on August 6, 2025 (released publicly on September 2, 2025), in a detailed fifty-page order that validates the Firm's comprehensive legal strategy.

The Firm's case centers on Amazon's anti-discounting policies that apply to selling on the Amazon Marketplace. Quinn Emanuel alleges that Amazon prevents businesses who sell on Amazon from selling their goods at lower prices anywhere else online, which makes it impossible for rival online marketplaces to challenge Amazon's dominance by facilitating sellers' ability to charge lower prices. At the same time, Amazon charges very high fees to all sellers, including a "referral" fee that applies to every single sale. Without Amazon's conduct, other marketplaces would charge lower fees, allowing sellers to charge lower prices, and Amazon would have to compete by lowering its own fees, driving price competition that would have widespread benefits. But Amazon systematically prevents this from happening. When anyone attempts to compete with Amazon on price by offering better deals on competing platforms like Temu or direct-to-consumer websites, Amazon punishes the relevant third-party sellers on Amazon's marketplace by removing their products from the critical "Buy Box", suspending shipping options, or terminating selling privileges entirely. Internal Amazon documents presented in the class certification briefing reveal the company's own employees acknowledged this conduct "encourages sellers to raise their prices on competitor websites" and could be perceived as "price fixing."

This conduct harms all or virtually all consumers. Because Amazon's conduct blocks or inhibits price competition on platform seller fees (known as "referral fees"), every transaction on Amazon involves the payment of inflated referral fees that would have been lower in a world where marketplace platforms could compete on price. Quinn Emanuel demonstrated this

class-wide impact through the economic analysis of the Firm's economic expert Dr. Parag Pathak, a Professor of Economics at MIT.

Quinn Emanuel's victory represents a turning point against Amazon's monopolistic practices. The Firm successfully demonstrated that Amazon's anti-discounting policy exists, impacts virtually all consumers, and constitutes clear anticompetitive conduct. In the process, the Firm also exposed Amazon's practice of "privilege cloaking"—improperly marking ordinary business documents as privileged to hide evidence of anticompetitive intent. And despite Amazon dumping terabytes of previously undisclosed data in a last-ditch effort to delay proceedings during the class certification briefing stage, Quinn Emanuel demonstrated to the Court that our proffered expert economic analysis passed the rigorous standards courts apply to antitrust class certification motions.

Although Amazon now seeks interlocutory review, we believe their arguments lack merit. This landmark certification decision marks the beginning of accountability for Amazon's systematic monopolization that has inflated prices for hundreds of millions of American consumers, and Quinn Emanuel looks forward to continuing to represent this class in the litigation.

This victory is the result of remarkable coordination among three firms. During class certification, Quinn Emanuel took the lead on the economic issues, including a deposition of Amazon's economic expert that showed his work had significant flaws. Hagens Berman took the lead on briefing, and on the class certification argument. And Keller Postman took the lead on exposing Amazon's privilege cloaking activities, played a crucial role in briefing, and is now taking a leading role in defending this victory from any appeal. 

business litigation report

quinn emanuel urquhart & sullivan, llp

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- When representing plaintiffs, our lawyers have garnered over \$80 billion in judgments and settlements.
- We have won eight 9-figure jury verdicts and five 10-figure jury verdicts.
- We have also obtained fifty-one 9-figure settlements and twenty 10-figure settlements.

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