Third Party Litigation Funding in Europe

Cento Veljanovski

Draft 1 - 3 October 2011  This is work in progress with the data and results subject to revision. Do not cite or refer to without the author's permission.

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I INTRODUCTION

Third party litigation funding (TPLF) is where an investor otherwise unconnected with a legal action finances all or part of a claimant’s legal costs. If the case fails, the funder loses its investment and is not entitled to receive any payment. If the case succeeds, the investor takes an agreed success fee. While not entirely new, the emergence of TPLF has recently been put in the spotlight with the entry of dedicated firms investing in commercial litigation in the UK, Europe, and further afield.

The purpose of this study is to shed some light on the reality of TPLF based on interviews with all the leading dedicated TPLF investors based in Europe conducted during July 2011.¹ It explores the development and rationale of TPLF in Europe with a focus on the position in England and Wales (E&W) and emerging group actions in Europe.²

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¹ The following were interviewed: Neil Brennan (Chief Executive Officer, ILF Advisors), Neil Purslow (Managing Director, Therium), Nick Rowles-Davies (Consultant, Vannin Capital), Mark Wells (Managing Partner, Calunius Capital), Brian Raincock (Chairman, Commercial Litigation Funding), Ben Hawkins (Managing Director, Commercial Litigation Funding), Susan Dunn (Head of Litigation Funding, Harbour Litigation Funding), David Burstyner (Senior Legal Counsel, Omni Bridgeway), Dr. Amdt Eversberg (Managing Director, Allianz ProzessFinanz GmbH), Christopher Bogart (Managing Director, Burford Capital) and Jonathan Barnes (Director, Woodsford Litigation Funding). Interviews are continuing.

² The legal systems of the higher courts differ between England and Wales, Scotland and Northern Ireland which together make up the United Kingdom. It is therefore necessary to distinguish these jurisdictions wherein there are significant procedural and some substantive
The paper is organised as follows. Section II provides some background on the factors affecting the development of TPLF. Section III is an overview of the TPLF funders in England and Wales, and those funding group litigation in Europe based on a survey of the leading investors. Section IV examines the justification for and likely impact of TPLF, together with some of the policy issues which have arisen in Europe. Section V looks at the criticism of TPLF that have been made in the USA and compares these to the hard evidence.

II. BACKGROUND

Overview

Economists like markets, and are therefore naturally suspicious when laws prevent them from arising. But this was more or less the legal position in common and continent European civil legal systems. In common law countries third party funding of legal actions was prohibited, and a common law crime. The torts of maintenance (where a stranger supports litigation in which he has no legitimate concern) and champerty (when the person maintaining another receives a share of the gains from the legal action) prevented the funding of and trading in legal claims.

The historical reason for these crimes was to prevent a frequent abuse. In medieval times it was prevalent for wealthy landowners to fund litigation in order to grab land from weaker parties. To stop this abuse of the legal process, paying another’s legal costs and encouraging litigation were made ‘crimes’ under common law.

The restrictions on third party funding of litigation was removed in civil law countries, and recently fully or partially repealed in many common law jurisdictions. In England & Wales the laws of maintenance and champerty were decriminalized in 1967, later in several Australian states (Victoria, New South Wales, South Australia), and a number of states in the USA.\(^3\)

Third parties can finance litigation in nearly all jurisdictions in Europe. A recent survey found that of 24 European countries TPLF is only banned in Greece and Portugal (Table 1). In Netherlands, only non-for-profit organizations can fund claims, but this restriction has been circumvented by setting up special purpose companies which purchase or take an assignment over legal claims which they then pursue through the courts.

\(^3\) In Australia maintenance and champerty laws were abolished in a number of states in the 1950s (Victoria, Crimes Act 1958) and 1990s (New South Wales, Maintenance, Champerty and Barratry Abolition Act 1993 and in South Australia 1993).
In contrast to the historical prohibition against third party funding today there is growing support for it as means of giving greater 'access to justice'. The costs and complexity of litigation are seen as discouraging many meritorious claimants from seeking redress through the courts which results in many worthy claimants going uncompensated. Only those who feel particularly aggrieved or determined, or with deep pockets and a sufficient stake will be inclined to embark on litigation. Thus many see moves to ease the path to litigation as attractive, and achieving a number of goals.

This is particularly so in common law jurisdictions where there is a growing concern about the high costs of litigation. The Oxford Study gave estimates of the legal and court costs for a "large scale damage case" involving a complex breach of contract with a US$5m lost profits claim in 27 countries. This showed (Figure 1) that pursuing such a case to trial was highest in England and Wales, followed by Bulgaria and Romania. Generally litigation costs were substantially lower in civil law countries.

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5 The 'large damage case' is described as a 'substantial and complex breach of contract claim between two large companies over supply of defective machinery worth 2 million euro, with 5 million euro loss of profit' (Hodges, et al, p. 57).
Indeed, the joint costs in the E&W courts were estimated at £3m which was about 60% of the value of the claim. The Jackson Committee in the UK was a response to the growing concern that London was losing its place as the global centre for commercial litigation because it was, literally, pricing itself out of the market.

Figure 1 Litigation costs to claimant and defendant by country

As a result of the costs and uncertainty of litigation various insurance products, public support, and legal fee arrangements have grown up to spread and defray the costs of pursuing or defending against legal actions. The position in continental Europe is different but the issues are the same.

In the UK there has been official support for the wider use of TPLF. The Civil Justice Council (CJC) has given its support - “Properly regulated third-party funding should be recognised as an acceptable option for mainstream litigation.” The Jackson Report on civil litigation costs, which sought to increase access to justice, gave important public approval for TPLF saying that it “may be the most effective means of promoting access to justice for a claim against, say, a multinational pharmaceutical company”. The Oxford Study on litigation costs was more circumspect as it saw TPLF as only

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7 Lord Justice Jackson, *Review of Civil Litigation Costs*, April 2010, para 4.4.4. The Jackson Committee was set up by the Lord Chancellor (the UK’s chief legal officer).

8 Hodges, et al
likely to be used for large scale commercial litigation rather than personal and consumer litigation.

On the other hand, there are those who see the development of TPLF as imposing unnecessary costs on industry, not required to deter alleged misconduct, and creating a compensation culture driven by profit seeking financial entities trafficking in legal claims (see section IV below). In Europe the expression ‘American style litigation’ is used pejoratively to encapsulate all that is wrong with the legal system based on lawyers’ success fees and class actions. And the term is often used this way by the large law firms, including US lawyers in Europe, who typically are defendants’ lawyers.

Third Party Funding Options

TPLF comes in many guises. One useful categorisation is what can be called passive and active TPLF investment:

- **Passive Funding.** The TPLF entity is a passive investor in an actionable claim which, if successful, obtains a performance-based return. It is the responsibility of the claimant’s legal advisers to manage and prosecute the claim. As the case progresses the funder is kept informed and periodically pays invoices for legal and other costs. This is the predominant model of TPLF in Europe and particularly in the UK where the residual laws of champerty and maintenance prevent third parties from intermeddling and taking a controlling role in the conduct of litigation.

- **Active Funding.** In some jurisdictions the TPLF investor purchases or has assigned to him/her the legal claim, and enforces and funds these through to trial or settlement. In this model, the funder may also carry out the initial investigation of the claim, build a book of claimants, select the lawyers, and actively manage and run the litigation. This approach exists in Australia, the USA, and has been used in Europe for group litigation.

In addition, lawyers may also fund part of the costs of litigation through discounted or no-win-no fee arrangements. These lawyer-based success fees are of two types:

- **Conditional Fee Agreement (CFA)** The lawyer discounts his/her standard fee in return for an uplift expressed as a percentage of the standard fee if the claim succeeds. If the case is lost no further fees are payable. In the UK the ‘success’ fee is capped at 100% of the lawyers’ usual billing rate. This is also referred to as a ‘no-win-no-fee’ arrangement.

- **Contingency fees.** A contingency fee is where the lawyer discounts or commutes his fee in return for a share of the damages or out-of-court settlement should the action succeed. Contingency fees are permitted in the USA, Taiwan, Canada, Estonia, Hungary, Italy, Japan, Lithuania, Slovakia,
Slovenia, and possible but rarely used in Finland, Germany and Spain. They are banned or severely limited in many jurisdictions such as Australia, the UK (where they are nonetheless permitted in the administrative courts and in pre action work), Austria, Belgium, Cyprus, Czech Republic, Denmark, France, Greece, Ireland, Luxembourg, Malta, the Netherlands, Norway, Poland (but exist in practice), Portugal, Romania, Russia, Singapore, and Sweden (but permitted in special circumstances, for example class action).

In addition, the parties or funders can take out before and/or after the event litigation expenses insurance:

- **Before the event insurance (BTE)** is purchased prior to a claim to cover legal and associated costs should the insured be sued. BTE policies are common for a variety of civil and personal claims, and can be purchased with personal injury, household contents, car, holiday and credit/bank cards insurance, and commercial policies for directors’ liability, professional negligence etc.

- **After the event insurance (ATE)** insures the claimant against liability for ‘adverse costs’ where the loser of an action is liable for the winning party’s legal costs. This loser pays rule, sometimes erroneously called the ‘English rule’, exists in most common law countries with the exception of the USA, and most civil law legal systems. The payment of the ATE insurance premium is deferred and depends on the outcome of the case. This means that the insured claimant or TPLF investor is only liable to pay the premium if the claim is won in which case it can be recovered from the losing party. If the insured claimant loses the case, then no premium is paid and the ATE insurer pays for costs under the policy. The ATE premium is recoverable only in England and Wales and only until the Jackson reforms are implemented which is expected toward the end of 2012. The ATE insurance is also available in other European jurisdictions but the premium may be payable upfront and is not recoverable. Although it is a relatively new product, it has become popular amongst TPLF investors and many of them will not fund a case without ATE insurance in place.

In most countries, with the notable exception of the USA and the Russian Federation, there is also publicly funded legal aid given to impecunious parties to pay their lawyers’ fees and other out of pocket expenses. Legal aid is mostly confined to criminal and civil actions but rarely for commercial cases. Therefore it has a minor impact on TPLF market.
III. THIRD PARTY LITIGATION FUNDING IN EUROPE

Preliminary Issues

It is difficult to give a comprehensive overview of TPLF across Europe for several reasons. The TPLF market is in its formative stages and differs across jurisdictions, the latter for historical and procedural reasons. Further, there is limited data about the extent and structure of TPLF market since most TPLF investors have only recently entered the market, most are private entities, or part of a hedge fund or financial institution, with no legal obligation to report their activities, and often keep their activities confidential for legal and competitive reasons. Thus describing the market has necessarily focus on the visible segment consisting of dedicated TPLF entities thus omitting those hedge funds, financial institutions, family offices and others which also fund litigation. [This segment is being investigated by the author for inclusion in the next draft]

Market Structure

Table 2 below lists the dedicated TPLF investors who operate in the UK.\(^9\) There are 15 TPLF funders that have publicly stated that they supply or have raised funds in the UK. However, the number of active investors in E&W is much lower. IM Litigation Funding is no longer operating. The Hong Kong domiciled Argentum while it advertises its services in the UK appears not to have financed any claims to date, and IMF, the Australian based TPLF investor has a very small presence. Two substantial TPLF investors – Juridica and Burford – have raised funds and are listed on the London Alternative Investment Market (AIM) but fund litigation mostly outside the UK, principally in the US. On the other hand the litigation division of the German financial conglomerate Allianz, which funds considerable litigation in Germany, Austria and Switzerland, has entered the UK market but in contrast to its continental operations focuses on high value commercial litigation only, largely due to the higher cost of litigation in the UK.\(^10\) This leaves 11 active dedicated TPLF investors.

Most funders are relatively new (except for Allianz which has been funding since 2002) with only several years trading experience, small case loads, and few finalized investments. Several dedicated TPLF investors have already left the sector - IM Litigation Funding which had been very active and Managers & Processors of Claim Ltd (MPC) which funded a number of high profile cases (discussed below).

Those TPLF providers actively in the UK can be ‘tiered’ on the basis of their capital and size:

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\(^9\) The E&W Law Society publishes *Litigation Funding* each quarter which lists TPLF funders, brokers and ATE insurance providers.

\(^10\) The main TPLF investors in Germany are Allianz ProzessFinanz GmbH, Roland Prozessfinanz AG, Foris AG and DAS Prozessfinanzierung AG. They have collectively an estimated 95% market share.
A number have dedicated funds from special fund raising efforts or from their parent company such as Harbour\(^{11}\), Calunius, ILF Advisors, Vannin Capital\(^{12}\), Woodsford Litigation Funding, Therium and Allianz. Included in this tier are Juridica and Burford which have raised significant funds in the UK but have to date only funded a handful of cases in the UK. However, even within this group the financial capacity differs significantly from a mere several million to well over £100m.

Another group has some seed money and fund or co-fund on a case-by-case basis, but have no significant investible funds on their own account. These include First Class Legal (largely an ATE insurance provider), Redress Solutions, and CLFL (which is raising funds)

Then there are hedge funds, financial institutions and other entities which have substantial funds but are not dedicated TPLF investors, for example Credit Suisse and Deutsche Bank, and hedge funds Alchemy and Elliott. These have operated for some time, and may be fairly active, but do not publisize their activities, and are unfortunately, not included in this study. It is also the case

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\(^{11}\) Harbour plans to raise a further £60m in 2012.

\(^{12}\) Vannin has a commitment from their investors for £25m annually over five years.
that the capital flows from these dwarf those of the newer dedicated TPLF investors.\(^\text{13}\)

The funds raised by the first group come from private capital raising either directly or via private equity and hedge funds. Other investment comes from family offices (ILF Advisors), institutional investors, high net worth individuals, and educational institutions (Harbour). Several have raised funds through public listings (Burford, Juridica, and Therium via COLG), with dispersed shareholders and minority stakes held by major financial institutions such as Invesco, Ballie Gifford, Fidelity, Eton Park and Scottish Widows (Burford Capital) or Invesco and Jupiter Asset Management (Juridica). In most cases management has an equity stake and performance incentives.

The structure of the UK-based TPLF investors varies. Most are closed-end funds or backed by private equity or hedge funds. All are private companies with the exception of Juridica and Burford which are public companies traded on the London AIM, and this is the case also for the backer of Therium (City of London Group plc which has a full LSE listing although only a small proportion of Therium funds is backed by COLG). Most investors from the first group are domiciled in the Channel Islands or the Isle of Man for tax reasons.

The management teams, and typically founders, come from legal (Harbour, Therium, Burford Capital, Vannin, Calunius Capital, Woodsford Litigation Funding), financial (ILF Advisors) or insurance (Commercial Litigation Funding Limited) backgrounds/industries.

There have also emerged a number of brokers specializing in TPLF. The broker obtains prospective funding options from TPLF investors which are presented to the claimant and his lawyer. These funding ‘packages’ may include after the event insurance (see below) and conditional fee agreements. The broker’s commission is paid by the funder or the claimant from the award if the case is successful. Some funders deal with brokers but are reluctant and question their value, and whose interests they represent. The latter because the broker acts for the claimant but expects to be paid by the TPLF investor.

\(^{13}\) Source: Christopher Bogart from Burford Capital.
There are four active brokers offering TPLF in the UK – Ligata, Maxima, The Judge, and Global Arbitration and Litigation Services (Table 3).  

### Size of the Market

The dedicated TPLF market is relatively small. Table 4 shows the funds currently available and/or committed to TPLF investors operating in the UK based on publicly available information and interviews. This excludes the funds raised by Juridica and Burford in the UK - over US$200m\(^{15}\), and US$300 (in two capital raisings) respectively – which are used to fund litigation outside the UK. The figures suggest a modest pool of confirmed investable funds in the UK of around £150m to be invested during 2011 and 2012. In addition, some of the smaller investors have access to funds when they identify a suitable investment, but this may include co-funding with those listed above. Others such as hedge funds and financial institutions invest in litigation but the amount is not publicly available. Some in the industry have estimated that the total pool of funds is in the order of £500m but it is impossible to verify that this is a reliable estimate.

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**Table 3 Third party legislation brokers in Europe**

<table>
<thead>
<tr>
<th>Company</th>
<th>Offices</th>
<th>Activity</th>
<th>Minimum Claim</th>
<th>Commission Clauses</th>
<th>Where</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigata</td>
<td>London</td>
<td>Operates with insurance broker Jardine Lloyd Thompson</td>
<td>At least £100,000</td>
<td>Corporate litigation and arbitration cases as low as 5% of damages</td>
<td>UK</td>
</tr>
<tr>
<td>Maxima LLP</td>
<td>London</td>
<td></td>
<td></td>
<td>Commercial Disputes, Insolvency, Contract and Professional Negligence Case, divorce</td>
<td>UK</td>
</tr>
<tr>
<td>The Judge</td>
<td>London</td>
<td></td>
<td></td>
<td>Telecommunications sector, fraud, cartels</td>
<td>Mostly UK but also Singapore, Hong Kong, Australia, Russia, Canada, France, Germany, Sweden</td>
</tr>
<tr>
<td>Global Arbitration and Litigation Services</td>
<td>London</td>
<td></td>
<td></td>
<td>UK</td>
<td></td>
</tr>
</tbody>
</table>

Source: Brokers’ websites.

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\(^{14}\) Interestingly Exchange Chambers, a group of barristers based in Liverpool, Manchester and Leeds, have formed a partnership with broker Maxima in June 2011. Exchange Chambers’ website available at [http://www.exchangechambers.co.uk/](http://www.exchangechambers.co.uk/).

\(^{15}\) Juridica was the first one to list on London’s AIM in December 2007. G. Bousfield, ‘Third-party funders eye up Europe’, Commercial Dispute Resolution, February 2010.
The overall number of cases recently funded by TPLF investors is not known. Some TPLF investors have published or supplied figures, while others treat this as commercially confidential. The Civil Justice Council (CJC) estimated that by the end of 2010 no more than 100 cases had received third party financing in the UK, adding that "some of these cases may have been pursued by other forms of funding, some may not have been brought at all". Others have suggested that this is an underestimate putting the figure at two or three times higher.

It is possible to offer some crude estimates based on publicly available figures. In early 2008 LEK estimated that there were 500 to 1,000 commercial cases and about 250 insolvency cases (of claims commenced in 2006) that were potentially suitable for TPLF. LEK’s estimates were based on published judicial statistics of claims commenced in the E&W high court (Queens Bench and Chancery divisions) thus excluding those that were not set down for trial. Further, these estimates do not indicate whether the claims would have needed or wanted TPLF, or have satisfied the selection criteria of TPLF investors. Since TPLF investors appear to accept between 1 in 8 to 1 in 10 cases they consider, this would suggest a very small flow of fundable cases especially given the high thresholds set by some TPLF investors (see below).

Most, but not all, TPLF investors focus on claims with a value in excess of £1m. For example, Harbour Litigation Funding, which raised a £60m fund in 2010, plans to invest in around 30 cases by mid-2012. This suggests an average investment of £2m and assuming a 30% success fee implies an average minimum claim of at least over £6m. If we extrapolate this across the TPLF investors with banked funds (Table 4), this gives the ability to fund possibly around 75 cases. Assuming that this is over a two year period, it suggests funding about 38 claims per year from the top six TPLF investors. Adjusting this for some smaller claims and for the other 5 (active) TPLF investors, say, with an average of 4 claims per year this suggests around 58 claims annually over a two year period.

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Table 4 Dedicated TPLF funding (£m)

<table>
<thead>
<tr>
<th>Investor</th>
<th>Funds (£m)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harbour</td>
<td>60*</td>
</tr>
<tr>
<td>Calunius Capital</td>
<td>40</td>
</tr>
<tr>
<td>Vannin Capital</td>
<td>25**</td>
</tr>
<tr>
<td>ILF Advisors</td>
<td>10</td>
</tr>
<tr>
<td>Therium</td>
<td>10</td>
</tr>
<tr>
<td>Woodsford</td>
<td>5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>150</strong></td>
</tr>
</tbody>
</table>

Source: Funders’ websites and interviews.
*Allocated over two years.
**Annually, over five years.

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TPLF as an Investment

TPLF is not insurance but an investment. The funds are provided to claimants on a no-win-no-pay basis in return for a success fee.

As an investment class TPLF has a number of attractions. Most of those interviewed stated that TPLF was uncorrelated with other asset classes and perhaps mildly counter-cyclical, and offers high but risky rewards. Its downside is that it is a bespoke financial product requiring time-intensive due diligence, not scalable, high risk, the timing of outcomes/returns not controllable or predictable, and generally illiquid. The exception to the illiquidity is those publicly listed TPLF investors who have their shares traded on a stock exchange. But these shares are thinly traded and are not likely to be very liquid.\[18\]

The prospectuses of the publicly listed funders - Juridica\[19\] and Burford\[20\] - shed further light on the risks faced by investors:

- Not being able to raise additional funds if the company invests in claims in excess of total funds.
- Fluctuations in operating results due to different timing of collection of recoveries, changes and values of investments, etc. As a result company’s profits in one period will not be indicative of the future.
- Both companies are aware of legal restrictions in different jurisdictions and the potential difficulties it may bring. Burford Capital states (p.12): ‘There is also the risk that the Company may make an investment or otherwise engage in a business or financial transaction despite the uncertainty around a certain jurisdiction, leading to that investment being at risk by virtue of its investment agreement being found to be unenforceable’.
- Networking is crucial to company’s investment strategy.
- A risk of bad case selection.


\[20\] Burford Capital Limited, Admission Document to trading on AIM, October 2009.
- Liability for costs (especially in ‘loser pays’ jurisdictions or when ATE insurance was not purchased).

- Difficulties in recovery collection when defendant is unable to pay.

- Reliance on lawyers’ skills as the investor cannot control the prosecution.

- Juridica states that because lawyers owe legal professional duties to the court and their clients, it could create a conflict. There could be circumstances in which the lawyers are required to act in accordance with these duties, which may be contrary to other responsibilities to the company or inconsistent with firm’s investment strategy.

**Customers**

The demand for TPLF comes from claimants. However, typically the dealings are with lawyers who have relationships with TPLF investors and advise their clients as to the suitability of TPLF and its different providers. Occasionally TPLF investors are approached directly by claimants, or in the case of group litigation the TPLF investors may approach prospective claimants (see below). The need to develop a close working relationship with solicitors was stressed by all those interviewed as key to the business and a deal flow.

It has not been possible to get a profile of lawyers and claimants who have, or are likely to use TPLF. Generally lawyers who have used TPLF are not the ‘magic circle’ law firms but, as described by one TPLF funder, the 100-500 ranked law firms. However, the profile of law firms will differ among funders. Similarly, it is rare for a FTSE100 firm to use TPLF with the focus on small and medium sized enterprises.

The demand for TPLF comes from those who either cannot or who prefer not to fund their own litigation. Such firms either do not have access to sufficient capital, or see TPLF as a way of managing their cashflow and/or keeping litigation costs off balance sheet. By obtaining TPLF to cover legal costs, they do not incur upfront costs, only a contingent profit to write up against realized losses. Thus it cannot be assumed that TPLF investors fund only cash strapped claimants who would not otherwise have litigated.

**‘Customer’ Awareness**

One factor the industry struggles with is low ‘customer awareness’ and misconceptions about TPLF. The product is relatively new (apart from insolvency cases, see below) and there is no reliable track record given that most TPLF investors have operated for around two years and many have not finalized many of the cases they are funding.

Part of this is self-inflicted as TPLF investors differ in the extent they advertise or indeed wish to publicize their services. Most rely on developing extensive relationships with law firms. In E&W a solicitor has a professional duty to advise
clients on the litigation funding options as set out in Rule 2 (2.02 and 2.03) of the Solicitors Code of Conduct.\textsuperscript{21}

Others regard publicity as undesirable for reasons of commercial confidentiality and this is particularly so in relation to specific cases where there is even a reluctance to inform the other side that the claimant is funded.

This is borne out by recent surveys. An Ipsos Mori poll for Addleshaw Goddard (a second tier UK law firm) based on interviews held in June 2008 with more than 50 senior executives including heads of litigation, counsel, etc. drawn from the FTSE350 companies found that 30% had not heard of ATE insurance or TPLF.\textsuperscript{22} Only 2% of the respondents had used third party litigation funding with 46% saying they were very unlikely to use TPLF. This may be changing. A more recent survey commissioned by Harbour Litigation Funding in September 2010 of top 200 UK law firms found that 50% of respondents had direct experience of litigation funding.\textsuperscript{23}

**Case Selection**

Table 5 summarizes the case selection criteria; success fee arrangements, types of cases funded and experienced to date of UK focused or based TPLF investors.

The primary focus of TPLF until recently has been insolvency cases. These were typically small to medium-sized claims with fairly predictable outcomes. Such cases have attracted TPLF for the last century and still constitute the bulk of cases which have been funded. Funders who invest in insolvency cases include IM Litigation Funding (now no longer operating), Harbour, Redress Solutions, Therium, ILF Advisors, First Class Legal, and possibly Argentum and IMF. Some funders also deal with tax claims (Harbour and ILF Advisors).

Most dedicated TPLF investor only fund commercial litigation, mainly contract, commercial disputes. Nearly all stated that they do not fund complex multiparty construction cases patent trolling, matrimonial and personal injury, group actions, defamation, and clinical negligence claims. Several fund arbitration claims and several European funders specialize in group actions especially follow-on cartel damage claims (see Tables 6 and 7 below).

Most TPLF investors will only fund commercial litigation in the UK and often more narrowly in England and Wales. This is because most are London based litigators or with English legal training who feel most comfortable with the law and procedural rules in the E\&W’s High Court. A number fund cases outside E\&W but often this is limited to


\textsuperscript{22} Ipsos MORI, ‘Litigation Funding: Understanding the Strategies and Attitudes of Corporate UK’, October 2008. 34% of feedback came from FTSE100 firms.

\textsuperscript{23} Harbour Litigation Funding, *First Annual UK Litigation Survey*, September 2010.
common law jurisdictions (Australia, New Zealand, Canada, US and Caribbean). It is evident that this narrow focus arises from investors staying within their comfort zone, and perhaps the availability of a decent case flow given the nascent stage of the industries development.

The minimum and actual value of the claims which are or will be funded varies considerably (Table 5) but tends to be high. As stated above, the minimum threshold set by many TPLF investors exceeds a claim of £1m, and some have larger minimum claims exceeding £5m. Some TPLF investors have guidelines while others strict minimum thresholds. Often the word “proportionality” was used between the prospective investment and the anticipated award/success return.

Only claims with a financial remedy are funded. Actions for specific performance and injunctive relief were not considered for the obvious reason that there was no financial outcome in which to share.

While the other selection criteria varies and was expressed by those interviewed with different scientific precision and rigour, there were a number of common, and relatively, obvious ones. These included:

- Legal merits of the claim.
- Prospective investment in relation to likely financial outcome.
- The likelihood of success.
- Defendant’s solvency and ability to pay costs and any award/settlement.
- Claimant’s motivation, commitment, and (dis)honesty.
- Experience and deliverability of legal team.
- Portfolio risk management constraints in terms of proportion of investable funds committed to an individual case, and risk profile.

The selection of cases involves considerable due diligence from the management team, their legal advisers, and often forensic accountants. Funders with a private equity background used financial modeling to select cases e.g. Calunius Capital and Therium, others risk assessments, and others more informal methods. Most of this time and effort was upfront, and relatively fixed regardless of the size of the claim. For those who have a significant deal flow only a small number of prospective cases are funded. While this varies the acceptance rate was put at 1 in 10 to 1 in 8 of the cases seeking TPLF.
<table>
<thead>
<tr>
<th>Company</th>
<th>Minimum Claim</th>
<th>Success fee</th>
<th>Types of claims</th>
<th>Cases funded</th>
<th>Where</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harbour Litigation Funding</td>
<td>£3m</td>
<td>Greater of multiple of funding and % of proceeds</td>
<td>Breach of contract, cartel damage, professional negligence; Insolvency Act claims; misrepresentation; intellectual property; breach of fiduciary duty; tax and employment tribunal claims. No matrimonial and construction cases</td>
<td>1100 cases reviewed (at Sept 2011), c. 100 cases funded; 30 cases to be placed in current fund; no more than 8% of the fund in any one case</td>
<td>Mostly UK and other common law jurisdictions (US, Canada, New Zealand) also France</td>
</tr>
<tr>
<td>Vannin Capital</td>
<td>£5m (but can be as low as £500k)</td>
<td>Multiple of funding or % of proceeds</td>
<td>International arbitration, breach of contract, negligence, commercial. Also look at negligence and commercial cases. Has considered group actions but decided not to invest</td>
<td>Invested £8m in 7 cases (1 international claim; 1 IP case in the US; 3 breach of contract, 2 breach of commercial contract)</td>
<td>England &amp; Wales, Caribbean, USA and EU</td>
</tr>
<tr>
<td>Calunius Capital</td>
<td>Ideally £3m or 6 times investment. Rarely less than £1m</td>
<td>No fixed formula - usually a combination of multiple and % proceeds. Specifics depend on case</td>
<td>All commercial areas: breach of contract such as confidentiality agreements, trade and distribution agreements, breach of fiduciary duty; professional negligence. Also commercial IP cases. No divorce, personal injury, construction</td>
<td>Not disclosed</td>
<td>UK; British Virgin Islands, Channel Islands, Germany, Austria, Switzerland, Australia, New Zealand and Canada</td>
</tr>
<tr>
<td>ILF Advisors</td>
<td>£1m</td>
<td>10% to 20%</td>
<td>Contract disputes, tax, insolvency, tort, professional negligence, shareholding, group and single actions. No arbitration cases or complicated cases (medical, divorce, defamation, misuse, construction)</td>
<td>2 judgments expected, 2 settled; 2 ongoing trials, 1 case awaiting defendant reply, 10 under consideration, many in pipeline</td>
<td>England and Wales</td>
</tr>
<tr>
<td>Therium Capital Management</td>
<td>Above £1m</td>
<td>Multiple of funding or % of proceeds.</td>
<td>Large commercial litigation and arbitration claims. Also insolvency cases. No matrimonial, defamation, privacy, multi-party construction. Parent Accounts state 4 cases completed generating 207% return on investment</td>
<td>13 cases (£50k - £2.4m investments). Most still running</td>
<td>UK, Europe, US, Canada and Australia</td>
</tr>
<tr>
<td>Woodsford Litigation Funding</td>
<td>£3m</td>
<td>Multiple of funding 3 or greater or 10% to 50% of proceeds.</td>
<td>Commercial litigation and arbitration and expert determined disputes, specifically: general commercial litigation, e.g. contractual disputes; shareholder and company matters; financial services; financial markets and commodities; banking; commercial property; tax competition; professional negligence; insurance; fraud/dishonesty; intellectual property</td>
<td>Reviewed around 40 cases in 2011. 1 arbitration case funded (£0.5m investment)</td>
<td>UK; commercial litigation and arbitration and expert determined disputes, governed by English law</td>
</tr>
<tr>
<td>Commercial Litigation Funding</td>
<td>Above £2m</td>
<td>Multiple of funding or 25% to 30% of the proceeds.</td>
<td>Commercial and group actions. No clinical negligence and private injury</td>
<td>c. 200 reviewed. Funded or partly funded 12 cases (2 outstanding, 1 lost, 2 full trial)</td>
<td>UK</td>
</tr>
<tr>
<td>Commercial Litigation Funding Ltd (CFL)</td>
<td>Above £3m</td>
<td>Fixed fee plus daily interest agreed upfront</td>
<td>Break of contract, professional negligence, breach of directors’ duties, wrongful or fraudulent trading and transactions at an undervalue, insolvency</td>
<td>50 insolvency cases. 10-12 ongoing cases (August 2009)</td>
<td>UK</td>
</tr>
<tr>
<td>IM Litigation Funding</td>
<td>Above £3m</td>
<td>% of proceeds.</td>
<td>Insolvency litigation specialist. Work with Insolvency Practitioners. Commercial disputes, breach of contract, shareholder action, claims against former customers or suppliers, claims against directors, recovery of book debts and many other types of action</td>
<td>50 insolvency cases. 10-12 ongoing cases (August 2009)</td>
<td>UK</td>
</tr>
<tr>
<td>Redress Solutions</td>
<td>£150k</td>
<td>Fixed fee plus daily interest agreed upfront</td>
<td>Contract disputes, professional negligence claims, trustee and insolvency related actions, claims, directors and partner disputes, intellectual property cases, international &amp; domestic arbitration matters, class actions</td>
<td>50 insolvency cases. 10-12 ongoing cases (August 2009)</td>
<td>UK</td>
</tr>
</tbody>
</table>
## Table 5  Case selection, fees and case load of UK funders

<table>
<thead>
<tr>
<th>Fund</th>
<th>Minimum Fee</th>
<th>Case Selection</th>
<th>Case Load</th>
<th>Geographic Focus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allianz Litigation Funding</td>
<td>£100k</td>
<td>30% for first £500k and 20% thereafter or 1.5-3 times amount invested</td>
<td>Civil, personal injury, commercial and most claims apart from complex construction and public liability</td>
<td>12 large commercial cases in UK. 230 proceedings with claim value of €330m in Europe. Mostly Germany, Austria and Switzerland and UK</td>
</tr>
<tr>
<td>Argenentum Litigation Investments</td>
<td></td>
<td>Commercial and non-commercial litigation and arbitration including class actions, insolvency, patent infringements, product liability and professional indemnity</td>
<td>Cases include gaming, building and construction (mostly shareholder disputes). In 2009 funded pilots seeking damages for wrongful dismissal</td>
<td>Mostly Europe, and globally</td>
</tr>
<tr>
<td>Juridica Investments</td>
<td>Above US$ 25m</td>
<td>Mostly commercial cases. Does not fund personal injury, product liability, mass tort, or class action claims</td>
<td>At 30 June 2010 funded 23 cases including antitrust (2 monopolization, 3 price-fixing), 1 statutory claim, 12 patent cases, 1 property damage and insurance, 1 shareholder dispute, 2 contracts claims, 1 arbitration. Since admission to AIM total capital currently invested or committed $143.8m (October 2010)</td>
<td>Mostly US. Also UK and international arbitration</td>
</tr>
<tr>
<td>Burford Capital</td>
<td></td>
<td>No set arrangement but typically makes fixed investment and return based on this. Does not commit to fund whole trial or all legal costs</td>
<td>Commercial cases: business disputes. No matrimonial claims, no construction claims</td>
<td>So far committed $175m across 30 cases</td>
</tr>
<tr>
<td>IMF</td>
<td>Over AUD 52 m</td>
<td>20% to 45% proceeds</td>
<td>Insolvency, group actions, commercial litigation. Insurable Risk Cases are excluded</td>
<td>Total of 118 cases funded from October 2001 to 31 December 2010. 79 settled cases, 9 won, 5 lost at trial, 25 withdrawn (IMF terminated the agreement with the client prior to the conclusion of the case). From February 1999 to June 2007, IMF funded 90 of 763 cases reviewed (Abrams &amp; Chen, 2011). c. £2m invested in cases in UK</td>
</tr>
</tbody>
</table>

Source: Funders’ websites and interviews.
Managing Legal Costs

The approach to funding commercial litigation differs. The investment may cover the full costs to settlement, a part of the costs, or specific components of the costs such as expert witness professional fees. Those which operate in the UK often cover the full costs from the date funding is agreed. Typically they will cover legal, expert witness’ costs, adverse costs/ATE premia, and any other out-of-pocket expenses. This may not comprise the full costs of running a case, since a TPLF investor may be approached and agreed to invest at some intermediate stage in the litigation process.

The management of the legal costs was an area of concern among most TPLF investors. In the UK the costs of litigation are high (see Figure 1 above) and generally unpredictable being dependent on a number of substantive and procedural factors which vary and can be unpredictable, with a significant impact on the required investment and ultimate return. This contrasts with the civil legal system, such as Germany, where there is a tariff of professional fees and legal costs, which makes budgeting of legal costs, and hence the investment needed, fairly predictable. Further, UK lawyers are generally not good at budgeting and cost control. One TPLF investor described them as “like builders” exhibiting a tendency to under-quote legal costs, then once “on site” to go “over-budget”. This is of course not conducive to TPLF and one task and a major role of the TPLF investor is to pin down the budget. Indeed, lawyers who did not respond professionally to the request to provide well thought out budget estimates were often not funded.

The TPLF investors’ attitude to legal budgets and cost overruns differed. A number of funders (usually those with investment banking background) asked for estimates of a maximum costs with the TPLF funder making clear that cost overrun would not be accepted unless critical for the case (for example, if it was subsequently decided to appoint an expert witness). Others, usually ex-litigators, showed more tolerance toward budget overruns seeing this as almost inevitable. To avoid budget overruns, funders often took a pessimistic approach and pick ‘the worst case’ budget estimate. They also try and monitor the lawyers at each stage of the case by ongoing updates but they also admit that it is difficult given that the number of funders is smaller than lawyers.

Liability for adverse costs was not seen as a particular issue for most of the dedicated TPLF investors interviewed. While it increased the costs of litigation, the variability of outcomes, and decreased net settlements, it also made TPLF more attractive to potential claimants. Since the defendant’s legal costs are often equal to that of the claimant this has the effect of doubling the investment required, all things equal. Typically TPLF investors take out ATE insurance and the premia tends to be between 40% for pre-paid to up to 60% for outcome-based ATE coverage.24 Allianz, whose management team has a

24 ILF Advisors stated that ATE insurance constituted around 40% of costs covered by the funder. Allianz said that it varied between 40% to 60%.
German legal background and experience, did express concerns about adverse costs and said that this, together with the generally high costs of litigation in England & Wales, were the principle factors for their decision to only fund high value claims in the UK unlike their business in other jurisdictions. This is discussed further in section IV below.

**Return/Success Fee**

The return to TPLF investors is paid out of the damages or out-of-court settlement. The structure of the success fee differs, as do the underlying commercial rationales. While the broad terms are listed in Table 5, the precise terms vary considerably for individual TPLF investors, and often on a case by case basis.

The pricing of the success fee was explained in different terms by those interviewed. Some did regard it as a risk-reward payment, with the success fee reflecting the likelihood of success and failure. One example was given of a claim that seemed a near certainty of success where a low success fee was negotiated. This explanation was not accepted by others. They took the position that the risk was dealt with by their due diligence and case selection, and thereafter the success fee was determined by a return to costs (investment) ratio. As one investor put it, even sure fire winners have lost at trial citing the example of *Stone v Rolls*.

There are two methods of ‘pricing’ the return to a TPLF investment – a multiple of the investment as already described, or a percentage of the award or settlement, or some mix of both. Most TPLF investors will look for a return in terms of a multiple of the funds invested. This can vary between 1.5 to 6 times the investment made. This suggests a fairly high return but it will be appreciated that this must cover the losses on claims that fail.

It is more common for the return to be expressed as a percentage of the award or settlement. In the UK this ranges between 20% to 40% of the award/settlement, and in some cases 50% or higher. In Austria, Germany, Ireland and the Netherlands the experience is similar – a success fee of between 20% to 40%. These ranges appear lower than in Australia where TPLF investors’ success fees are between 30% to 60%.

A number of TPLF investors emphasized that their success fee is set in a way that it does not leave the claimant with less than 50% of the claim value. A higher success fee

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27 Ipsos MORI *op cit.* A survey by solicitors Addleshaw Goddard of FTSE100 in-house counsel found that almost half of the respondents thought that a 25% success fee was too high, and almost 60% that a 40% success fee was too high.
would demotivate the claimant and not be seen as fair or acceptable commercial split. This may be hard to achieve if damages or the out of court settlement is less than anticipated in the funding agreement. It is a reality of litigation that most cases are settled before trial often for sums less than the claim or the damages at trial. While it can be expected that those claims seeking funding are more likely to go to trial\(^\text{28}\), the success fee component may well be much higher. This will also be the case since settlements will often be an all-in offer where the individual components of damages, costs, claimants’ legal expenses including lawyers’ conditional fee payments, ATE and other elements are not broken down. This requires that the various claims on the settlement sum be prioritized.

Notwithstanding this most TPLF investors interviewed said that the potential rewards were high. The actual returns are hard to estimate given that those in the industry do not have a solid track record. There have been some significant recent losses (see below). However, a brief (but optimistic) glimpse is provided by Therium’s annual report which stated that the four cases completed had generated a 207% return on their investment.\(^\text{29}\) Financial data covering the period 2001 to 2010 for Australia’s biggest TPLF investor IMF showed an internal rate of return of 75% before overhead expenses.\(^\text{30}\)

It is important not too mesmerised by the headline success fees. Despite due diligence and the selection of ‘strong’ cases, a large number will fail given the uncertain nature of litigation. Thus fees generated on the successful actions must cover the investment on those claims that have been lost across TPLF investors’ portfolio of cases. Given that most TPLF investors have relatively small caseloads and will have invested differing sums, it only needs several failures to wipe out the net returns. Several stressed that this made case selection, and risk diversification and management crucial to the success of the investment strategy.

To underscore the risks several examples of high profile losses to TPLF investors have recently occurred. One of the largest TPLF funded claim to date was Moore Stephens v Stone Rolls Ltd.\(^\text{31}\) This was a £89m professional negligence claim brought by liquidators in 2007. The liquidators alleged that the company’s auditors Moore Stephens failed to detect the fraudulent activities of its owner which resulted in the company’s liquidation. IM Litigation Funding funded the claim which it estimated had a 70% chance of success and

\(^{28}\) Susan Dunn (Harbour Litigation Funding) commented that Harbour tends to fund ‘harder cases’ with a ‘much higher percentage is going to trial’.


\(^{30}\) Abrams and Chen, op. cit.

would have been in line for a reported £40m success fee. The High Court ruled in Stone & Rolls’ favour, but in June 2009 Court of Appeal (affirmed by the House of Lords) refused the claim, ruling that a company liable for fraud committed by its director to the third parties could not bring a claim for damages against its auditors. IM Litigation Funding lost its investment and because it had not taken out ATE insurance it paid an additional £2.5m in adverse costs. While its legal director said "this is not the end of third party funding" at the time of the judgment, IM Litigation Funding has ceased trading.

Arkin, described by the judge as ‘disastrous piece of litigation’, showed the potential costs of failure. Arkin’s lawyers agreed to work on a conditional fee basis and TPLF investor Managers & Processors of Claim Ltd (MPC) funded the costs of the expert witness (forensic accountants Ernst & Young) to provide a report on quantum and costs of organizing documents in return for 25% share of the damage/settlement sum up to £5m and 23% thereafter plus any recovery of experts’ costs from the defendants. MPC could withdraw if the expert’s report indicated that damages would not cover their investment, and its consent was needed to any settlement or compromises, but if there were a dispute over these the decision of Arkin’s counsel would prevail. MPC estimated its total outlay to end of trial would be about £600,000 and the probable settlement between US$5m-$10m. MPC’s actual outlay was over double this amount at around £1.3m which it lost, the claimant’s lawyers lost an undisclosed sum, and the claimant and MPC were confronted with the possibility of indemnifying the defendants’ adverse costs of nearly £6m. In the end the court limited MPC’s payment of adverse costs to £1.3m i.e. equal to the sum it invested, thus losing in total £2.6m. That is, MPC’s investment was four times greater than initially estimated and it could have been exposed to £7.3m in costs had the court ordered it to pay the entire adverse costs of the defendant.

32 These figure have been taken from Law Society Gazette, Major third party funding case fails in House of Lords, August 2009. Available at http://www.lawgazette.co.uk/news/major-third-party-funding-case-fails-house-lords. But I am reliably informed that this is a gross over-estimate.


34 Arkin v Borchard Lines [2005] EWCA Civ 655. Mr Arkin sought damages for anti-competitive actions from members of a number of shipping conferences, alleging that they had been guilty of predatory pricing which had driven Mr Arkin’s shipping company from the market. The European Commission began proceedings against members of the Shipping Conferences but drop the case in early 1991 because the Conference agreements had been amended. In 1996 after going into liquidation, Mr Arkin had the claims against members of the conferences assigned to him for breaches of Art 81 and 82 agreeing to share any proceeds 50:50 with the creditors.

35 MPC was an early funder also providing accounting services. It no longer operates. The case was originally funded by legal aid but it was withdrawn.
Forum Shopping

Forum shopping, where the claimant chooses the jurisdiction which is the cheapest and/or has the most favourable law/procedures was not a major consideration among UK based TPLF investors. Most only confined their investments to commercial disputes in England & Wales, and a subset to claims in other common law jurisdictions where they had previous experience. This was because they understood the legal procedures, could better anticipate the risks and costs involved, evaluate the lawyers and winnability of the claim, and had confidence in the quality of judicial resolution provided by the courts e.g. ILF Advisors. Even where there was foreign legal expertise and experience there was not a tendency to forum shop e.g. Calunius Capital has a senior and highly experienced German lawyer but does not actively seek to fund German cases. Others (Therium and Vannin Capital) were prepared to fund litigation and arbitration further afield in North America, Australia and Europe.

The other factor emphasised by many of those interviewed was that for most commercial litigation there is limited scope for forum shopping. This was because the legal jurisdiction had been determined in the pre-existing relationship of the parties, such as a term in a contract, governed by the nature of the dispute, and/or by the lawyers prior to seeking TPLF. The exception to this are those specialising in group litigation. Since these often involved parties across Europe and globally, and infringed European, Member State, and US and other laws, the action could be brought in any one of a number of jurisdictions.

Group Actions

A relatively new phenomenon in Europe has been group actions. Here the development and extent of group actions, and the role played by TPLF investors is examined.

Background

While many jurisdictions offer some form of collective redress this is often very circumscribed and not attractive to litigants and funders. Nonetheless, a number of TPLF funders have entered this specialist sector in the last several years largely on the back of the European Commission’s aggressive cartel prosecution programme,36 and it as yet unsuccessful support for collective redress in Europe.37

There has been an extensive debate in Europe over the legislative framework for collective actions. In April 2008, the European Commission published the *White Paper on Damages Actions for Breach of the EC antitrust Rules*. Its proposals for class actions failed to gain the support of the European Parliament and the effort lapsed. The consultations on more general reforms to introduce collective actions were launched again in early 2011.

A number of EC Member States have reformed their national laws to permit group actions, again with varying success. Some have adopted new laws permitting class actions while some have only provided a possibility of class action, without changing the legislation. So far:

- Laws permitting class actions have recently been introduced in Italy (2010), Sweden (2003), Poland (2010), and draft legislation exists in Belgium.

- In the Netherlands the *Collective Settlement of Mass Claims Act 2005* allows claimants through a representative association and defendants to agree a settlement which they can then petition the court to make binding. The Act allows for the claimants to opt-out but those that do not are denied the right to appeal.

- The German Federal Government opposes the class action model proposed by the EU although group actions are possible in Germany.

- In the UK no real progress has been made. In July 2006, the Department of Trade and Industry published a consultation paper on representative actions in consumer protection legislation to consider whether representative bodies should be permitted to bring actions on behalf of consumers. It recognized TPLF as a potential area of growth for class action claims. But it has not progressed much since.

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39. European Commission, *Towards a Coherent European Approach to Collective Redress*, European Commission Staff Working Document, February 2011. The consultation closed in April 2011. Some of the obstacles to class actions faced by claimants include passing on effect, lengthy and costly process, and lack of information regarding the claim. Recently, with regards to the latter, the European Court of Justice ruled that documents relating to a leniency program may be disclosed to claimants seeking damages in civil antitrust actions. It is up to the national courts to determine, on a case-by-case basis, whether to disclose leniency material to cartel damages actions. See *Pfleiderer AG v. Bundeskartellamt* [2011] C-360/09.


41. In November 2007, the UK Office of Fair Trading published its recommendations following its April 2007 discussion paper *Private Actions in Competition* Law. This found little political support.
The UK does not offer a hospitable legal environment for group actions. It allows for so-called representative actions (and the more limiting joined actions) which require that the claimants have the ‘same interest’ which appears to mean an identical interest.

The legal position was clarified in *Emerald Supplies v British Airways*\(^{42}\) where the E&W Court of Appeal placed a restrictive interpretation on the same interest requirement. Emerald Supplies and Southern Glass House Produce, importers of cut flowers which used British Airways (BA) to freight its products, sought damages from BA for overcharging for air cargo services as a member of an alleged cartel among airlines.\(^{43}\) The claim was originally launched by Hausfeld LLP (class action lawyers) in September 2008, at a time when the European Commission was still considering whether an infringement had occurred. The minimum amount of damages was £15,000.\(^{44}\) Hausfeld agreed a conditional fee arrangement and took out the ATE insurance. Two claimants sued as representatives of all direct and indirect purchasers who suffered loss from the air cargo cartel. A further 178 potential claimants were to be added at a later date as claimants.\(^{45}\) The High Court ruled that all those represented in the action must have “the same interest” as required by the civil procedure rules of the High Court (specifically CPR19.6). Because the class included direct and indirect purchasers the amount of damages, if any, for the direct purchasers depended on whether or not the alleged overcharges were passed on to a downstream buyer (the passing on defence). Further, CPR19.6 states that all the claimants who belong to the class action must be identifiable at the time the claim is issued and at all stages of the proceeding. Hausfeld’s strategy of adding more claimants later in the proceeding did not satisfy this requirement. The Court of Appeal ruled that the only factor linking the claimants was that they might all have a claim against BA, but the claimant did not manage to prove BA’s liability with respect to each claimant. The appeal was rejected. Hausfeld has proceeded by signing a co-operation agreement with Claims Funding International to co-ordinate the pursuit of *Air Cargo* cartel claims within the EU.\(^{46}\)

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\(^{43}\) COMP/39.258 Airfreight. 9 November 2011. The European Commission fined BA and 10 other airlines almost €800 million for fixing the air cargo price in the period 1999-2006.

\(^{44}\) Air Cargo Claim Form available on Hausfeld website. See http://hausfeldllp.co.uk/pages/cases/50/air-cargo.

\(^{45}\) “Class Dismissed”, *The Lawyer*, November 2010. Available at http://www.thelawyer.com/class-dismissed/1006210.article.

TPLF Funded Group Actions

A number of third-party funders have formed to invest in group actions largely in the antitrust and shareholder claim areas. Three funders specialize in this type of emerging litigation – Cartel Damages Group (CDC) based in Brussels and formed in 2001, Omni Bridgeway, the oldest company with 25 years experience in emerging country sovereign debt recovery which set up a group actions division in 2007, and Claims Funding International (CFI) established in Ireland (Table 6 below). Omni Bridgeway’s group litigation division is funded primarily from proprietary capital and, more recently, institutional funds. CDC specializes in purchase and enforcement of cartel damage claims. CFI was launched by IMF and the Australian class action law firm Maurice Blackburn in 2008 (IMF subsequently pulled out).

Table 6 Third party litigation funders specialising in group actions

<table>
<thead>
<tr>
<th>Company</th>
<th>Start</th>
<th>Domicile</th>
<th>Offices</th>
<th>Structure</th>
<th>Source(s) of funding</th>
<th>Value of funds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cartel Damages Claims</td>
<td>2002</td>
<td>Belgium</td>
<td>Germany, Ireland, Brussels</td>
<td>Incorporated in Belgium</td>
<td>Undisclosed</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Omni Bridgeway</td>
<td>25 years/2007 group actions</td>
<td>Netherlands</td>
<td>Hague, Geneva, London</td>
<td>Division of Omni Bridgeway</td>
<td>Internal and external funds</td>
<td>Undisclosed</td>
</tr>
<tr>
<td>Claims Funding International</td>
<td>2008</td>
<td>Ireland</td>
<td>Dublin</td>
<td>Incorporated in Ireland. Owned by Australian law firm Maurice Blackburn</td>
<td>Undisclosed</td>
<td>Undisclosed</td>
</tr>
</tbody>
</table>

Source: Funders’ websites and interviews.

These TPLF investors do not rely on specific class action legislation/reforms but Special Purpose Vehicles (SPVs) which purchase or have assigned to them claims, which they prosecute in their own right. The assignment of claims to such SPVs and their standing has been endorsed by the Dutch and German courts. This approach was developed by CDC.

Table 7 below provides further details of fees charged, minimum claim requirements, and case experience of TPLF providers engaged in group actions. To date the three group action TPLF investors have mounted seven follow-on cartel damage claims in the German and Dutch courts with no settlement/award yet:

- In 2001 CDC through a SPV brought an action in the Regional Court of Dusseldorf against German cement manufacturers convicted of a price fixing conspiracy. CDC purchased the claims of 28 companies - mostly SMEs active in the concrete

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47 The only TPLF investor to participate in the survey was Omni Bridgeway. The information for CFI and CDC has been collected from their websites and other public sources.

production and manufacturing sector. The claim is reported to be valued at €176m before interest.

- In April 2011 CDC’s affiliate company CDC Hydrogen Peroxide SA commenced an action in the Regional Court of Dortmund against several hydrogen peroxide manufacturers successfully prosecuted by the European Commission for fixing prices. This SPV purchased the damage claims of 32 pulp and paper makers who bought hydrogen peroxide during the period of the cartel. CDC agreed to give these claimants 75% of the value of any eventual proceeds plus an undisclosed initial payment. The damage claim is reported to be valued at €645m plus interest (this compares with the €388m fine levied by the European Commission).

- Omni Bridgeway’s group claims division also uses the SPV approach for its two European cartel claims Air Cargo and Elevators (in the Netherlands) which both consist of ‘dozens’ of participants. The Air Cargo claim has an estimated value of €200-€300m. It is also funding an Australian mass tort class action in relation to Abalone virus but this uses the standard TPLF approach.

- CFI has set up a SPV called ‘Equilb’ for its group action against Air France-KLM for fixing air cargo prices. The claim is reported to be in excess of €400m with interest on behalf of ‘victims’ all over Europe, such as Phillips and Ericsson, in a Dutch court (CFI is experiencing difficulties with their use of Equilb model in France). CFI has also invested in a shareholder class action in Canada adopting the usual success fee structure.

<table>
<thead>
<tr>
<th>Company</th>
<th>Minimum Claim</th>
<th>Success fee</th>
<th>Types of claims</th>
<th>Cases funded to date</th>
<th>Where</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cartel Damages Claims</td>
<td>NA</td>
<td>30%</td>
<td>Follow-on cartel damage claims</td>
<td>2 cartel damage cases - German Cement and Hydrogen Peroxide</td>
<td>Europe</td>
</tr>
<tr>
<td>Omni Bridgeway</td>
<td>$1m but actually around $50m</td>
<td>18% to 45% (30% to 35% for Air Cargo damages action)</td>
<td>Follow-on cartel damage, shareholder and mass tort actions.</td>
<td>3 group action - 2 cartel damages [Airfreight Elevators]</td>
<td>Europe, Australia, Japan, South Korea and Turkey</td>
</tr>
<tr>
<td>Claims Funding International</td>
<td>$5m and 70% success rate</td>
<td>7% in Dugal v. Manulife with $10m investment</td>
<td>Group actions and other significant legal claims - cartel damages, shareholder actions against corporate misconduct, group actions against investors</td>
<td>Air freight cartel damages against DSM and Euroilc. $500m - Shareholder claim in Dugal v. Manulife.</td>
<td>Europe &amp; Canada</td>
</tr>
</tbody>
</table>

Source: Funders’ websites and interviews.

Group actions are an area where TPLF investors face direct competition from lawyers. The much publicized entry of plaintiff and class action lawyers Hausfeld & Co LLP in London was a direct response to the anticipated growth of private and class actions law suits in Europe, especially follow-on cartel damage actions. This initiative faltered but Hausfeld has remained in the market both as a direct competitor to TPLF investors and in cooperation with them. It has drawn on its US class action experience, joined European claimants in its US actions, and advertises funding solutions such as its ‘Cartel Key’ funding methodology for cartel claims in English courts. Hausfeld also provides ATE insurance in conjunction with First Assist Insurance Group, and its lawyers work on a no win no fee basis and claim to have existing relationships with providers of litigation.
services thus are able to lower the disbursement costs. In the event that extra funding is needed Hausfeld offers help in finding a TPLF provider. Hausfeld so far appears involved in three follow-on cartel damage group actions - Air Cargo (in collaboration with CFI), Marine Hose, and Carbon Graphites.49

**Main Findings**

What then does the above show about the development of TPLF sector in England and Wales and Europe:

- New, small and fragmented, with investors of very different financial capacity, and evidence of exit already.

- TPLF is an attractive investment because it is not correlated with other classes of investment, and there are prospects of high returns.

- TPLF investors have varying approach and access to funds, and the industry can be ‘tiered’ in terms of the capital backing (or lack of it).

- Focused on commercial litigation displaying a spread in terms of claims and investment sums. But many focus at higher end of the commercial litigation market.

- Investable amounts vary from £50k (Therium) to £6m (Harbour).

- Claims vary from as low as £100k (Allianz) to £600m (Harbour).

- Success fees in range of 20% to 40% of realized value of claim or 2 to 4 times investment, or mix of both, but can be higher due to budget overruns and/or lower settlement/damage award.

- There is little evidence of forum shopping apart from those funding group actions in the cartel area, and a lot of evidence of parochialism with funding focused on English and Welsh cases.

- The demand for TPLF is complex and does not appear to come predominantly from impecunious plaintiffs. There are strong commercial and accounting reasons the costs of litigation are funded in this way.

49 Information from Hausfeld & Co LLP’s website http://www.hausfeldllp.co.uk/.
The funders expressed concerns about the lack of knowledge of TPLF options amongst lawyers and claimants.

TPLF investors do not appear to be inhibited by the residual law on champerty and maintenance, and prefer to take a passive role.

There are concerns about the level of costs, budgeting and adverse cost rules.

The growth of group actions has been inhibited by lack of legal reforms, poor disclosure requirements, and other procedural concerns.

Group action TPLF investors face competition from plaintiff law firms, but generally there is no common view that lawyers will compete directly in light of legal reforms that will allow contingent fees, multidisciplinary partners, and possibility of external funding (and listing).

III. POLICY AND ECONOMIC ISSUES

Justification and Likely Effects of TPLF

The judicial and public policy support for TPLF is that it gives greater access to justice. This is of course relative since as shown above the investment is typically in high value commercial litigation which will often have greater access to funds and legal support.

Nonetheless, greater access is not costless nor is it a goal that can and should be pursued at any cost. To the extent that TPLF funds meritorious cases that would not otherwise be pursued, it increases the effectiveness of the law and legitimate access to justice.

The economic case for TPLF is the volume of litigation and other forms of dispute resolution are inefficiently low in terms of a social cost-benefit assessment. The benefit side of the equation may be in terms of the efficiency of compensation, but more centrally in terms of the effectiveness of the law in deterring inefficient contract breaches, law breaking and commercial activities. This would be the case if the costs and/or the risks of litigation were excessive, the substantive law inefficient, and there were significant positive externalities not captured by the parties. Above some evidence of the first two factors have been given.

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50 There is a vast law and economic literature M Tuil and L Visscher, eds, New Trends in Financing Civil Litigation in Europe – A legal, empirical and economic analysis, Edward Elgar, 2010.
As to the third factor a number of external costs can be identified. First, for single claimant actions the costs of litigation may prevent redress, and create a legal system that inadequately imposes the costs of wrongdoing and contract-breaking on the parties who can best avoid these. Where TPLF facilitates group actions, then it serves to internalise the costs of wrongdoing on the perpetrators which would not otherwise be borne by them. We have seen that the principle category of groups actions so far funded is follow-on cartel damage cases. This is where a number of firms have come and secretly agreed to overcharge their customers. One of the features of price fixing is that it is a secret conspiracy causing losses to many 100s if not 1,000s of purchasers and those who have bought the goods and service produced by inputs that have been overcharged. The secrecy and dispersion of harm over decades creates a large number of potential claimants with small individual but large collective losses. Gaining compensation for these losses along traditional tort damage principles is an expensive and complex exercise. The aggregation of these myriad claims into one action is a) an efficient procedural device, which b) serves the economic function of compensation and deterrence. Thus in principle there is potential external benefits for those group actions funded by TPLF investors.

Impact of TPLF

TPLF does not address the high costs of litigation as a barrier to justice. It transfers litigation costs to a third party who is better able to fund it, or is the more efficient risk bearer. This may increase aggregate litigation and settlement costs or it may lower it. Indeed in general both forces are likely to exist simultaneously so that firm predictions about the impact of TPLF on performance indicators of the legal system (litigation rate; settlement, ‘drop’ rate; duration of disputes, gross and net compensation, and so on) cannot be made. If funding litigation by a third party allows the pursuit of a claim that would not have otherwise happen it increases the courts’ caseload, legal costs, court costs and court congestion, and while affording more claimants compensation the net sum paid to successful claimants will, all things equal, be less that if the case had been self-funded.

However, the litigation process is not that simple, and does not lend itself to such unqualified predictions. First, as already pointed out, a proportion of TPLF goes to firms which may have otherwise pursued their claim but have used outside funding for cash management and financial reasons. They are not impecunious. Second, the presence of a TPLF funder may result in a higher settlement rate, all things equal, as defendants realise that the claimant can fully finance the costs of taking the case to court. This has the effect of decreasing the litigation rate, and conserving legal and related costs. So the overall impact of TPLF will be difficult to predict, it depending on the weight of these opposing considerations.
The area where TPLF may have a more pronounced impact is group actions. The coordination and funding problems associated with group actions in Europe are large. As has been indicated above the different legal systems in Europe are not particularly supportive of group actions unlike these of the USA and Australia. As a result there has been forum shopping, and innovative responses by the TPLF sector to facilitate these actions which arguably would not have occurred. Moreover, given the active role of these group action funders, the number of actions mounted is greater than would otherwise have been the case, and hence the litigation and settlement rates will be higher, as will the payments by defendants. Thus one would expect the more straightforward prediction that TPLF will increase the level of litigation, settlements, and compensation paid compared to the status quo ante.

There is some empirical evidence of the effects of TPLF investment, although this research needs to be treated with caution. Abrams and Chen provide a statistical analysis of the caseload and impact of TPLF in Australia where class actions are permitted and more TPLF investors can take an active role in the management of a claim. The study is based on access to the case files of IMF Litigation Funding, Australia’s largest TPLF investor with an estimated 50% market share. By matching these with court data, the authors try to capture the effect of TPLF on the litigation process.

Abrams and Chen find that there is no statistically significant relationship between IMF’s level of investment and the volume of litigation over the period 2002-2008 based on an analysis of litigation in the Australian states that permit TPLF and those which did not. They did find some evidence that IMF funded claims, especially class actions, took longer to finalize, increased court ‘congestion’ and court expenditures. Interestingly Abrams and Chen suggest an external benefit from TPLF supported actions. Cases funded by IMF were on average cited in more judgments than unfunded cases indicating that they established new points of law or procedure. They therefore appear to generate external benefits for the legal system by clarifying and developing the law.

Abrams and Chen’s research has ambiguous interpretations and implications. Its most striking and surprising finding is that TPLF did not increase the volume of litigation controlling for other factors. But the policy implications of the other findings are less clear. The evidence that TPLF increased the duration of actions and court expenditures may reflect the fact that a disproportionately greater number of more complex and costly claims attract TPLF funding. This is anecdotally confirmed by some of those interviewed and by the high claim value threshold set by TPLF investors. Indeed, the authors of the

51 The limitation of the study is that only one company has been taken into account. IMF holds around 50% of the TPLF market in Australia.

52 Abrams and Chen use several data sets (1) 113 cases funded by IMF over the period 2001-2010; and (2) 763 claims considered and 91 funded over the period 1999-2007. The regression is based on state-year observations for the years 2002-2008 collected from Lexis-Nexis Australia on all published cases considered for funding by IMF between 2002 and 2008.
research suggest that these effects may be transitory following the introduction of TPLF as defendants recognize that the claimant is backed by a TPLF investor and are induced to settle a TPLF case earlier. Indeed, in Australia this is supported by other research that shows that TPLF cases are generally settled out of court (see studies by Morabito below).

**Passive vs Active TPLF investors**

As noted above in E&W TPLF investors cannot actively manage a case that they fund. This limitation on the assignment of legal claims, or to use the more emotive term the trading and ‘trafficking’ in unmatured legal claims, seems inefficient.\(^{53}\)

In the UK maintenance and champerty were decriminalized under the *Criminal Law Act 1967*. However, a contract which breaches the principles of maintenance will be considered contrary to public policy if the litigation funder interferes in the management and conduct of the case. This means that the degree of control which a funder can exercise is limited and purchasing claims by the funder prohibited. All TPLF funders in E&W interviewed saw no difficulties posed by the residual rules on maintenance and champerty, and were happy taking a passive role in the litigation funding.

The Court of Appeal in *Regina v Secretary of State for Transport*\(^{54}\) gives an indication of the current treatment by the courts. The case involved Spanish fishermen who were unlawfully banned from British waters despite having licenses to fish in them. In order to quantify the fishermens’ damage claim they appointed accountants Grant Thornton in return for a success fee of 8% of the proceeds if the case were successful. The Appellant pleaded that the arrangement with the accountants was champertous because it was a percentage of any damages recovered. The Court of Appeal ruled that because Grant Thornton only provided assistance which was not an expert opinion and did not seek to control the proceedings, it should be allowed to charge for its services on a contingency fee basis. The judgment therefore established that a third party funding agreement will not be regarded as unlawful simply because the rewards to the third party are expressed as per centage of the damages.

The case also offers an insight into the competitive process at work. The claimants were offered accounting services by Grant Thornton and Ernst and Young on an hourly basis, and a contingency fee arrangement by Managers and Processors of Claims (who were involved in *Arkin*). The claimants wanted to avoid “the prospect of incurring an open-ended liability for accountancy fees” and were keen to appoint MPC. Only then did Grant Thornton offer to work on 8% of the damages awarded.

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54 *Regina (Factortame Ltd and Others) v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 932.
The impression should not be given that unmatured legal claim cannot be assigned in England and Wales. In the insolvency and insurance areas they can and have been for many decades. And indeed, it is noteworthy that TPLF started in debt recovery/insolvency area in the UK (IM Litigation Funding) and Australia (IMF). It is also the case that insurance companies can have claims assigned to them by those they insure under the principle of subrogation.

**Adverse Costs**

Liability for adverse costs is another important factor. While in the USA this is described as the “English Rule” it is the usual cost allocation rule, with the US rule that each party bears their own legal costs being the exception. A recent multi-country survey found that the loser pays rule existed in 59 of the 65 (or 84%) largest jurisdictions.\(^{55}\)

The rule requiring the losing party to indemnify the costs of the successful litigant has a strong public policy rationale. It internalizes the costs on the party responsible for a failed claim or defence, thus ensuring that parties who are blameless do not end up shouldering avoidable costs. But it should be noted that indemnification by the losing party is not an automatic rule but one at the discretion of the court.

It is often said that a party’s potential liability for adverse costs decreases the likelihood of litigation and filters out unmeritorious claims as it imposes what can be a large penalty on failure. The effects in theory are a bit more complex than this but clearly it is less favourable to a claimant or defendant with a weak case, and it would tend to lower the litigation and raise the settlement rates.

What is of interest here is the relationship between TPLF and liability for adverse costs. The legal position and its practical effects are in a state of flux in England and Wales. The Court of Appeal in *Arkin* held that the TPLF investor “should be potentially liable for the costs of the opposing party to the extent of the funding provided” (para 41). That is if a TPLF funder invests £1m in an unsuccessful claim, it would only be liable for up to an additional £1m of adverse costs, thus potentially doubling its exposure.

The court in *Arkin* set out clear public policy grounds for its decision. It recognised the trade-offs involved between the general rule that costs follow consequences, and the need to encourage TPLF investors to finance cases and thereby give greater access to justice. In *Arkin* the TPLF investor only funded part of the costs and the court was concerned that full exposure to adverse costs would deter TPLF investors. In *Arkin* the TPLF investor invested £1.3m to cover the professional fees and disbursements of the

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expert witness and would have been exposed to adverse costs of over £6m. However, the Court went on to say that it saw no reason why the rule should not be applied where the TPLF investor funded all the claimants' legal costs. The court also said that TPLF investors were likely to cap their exposure and thereby have a "salutary effect in keeping costs proportionate" (para 42), and insuring that the prospects of the claim were sufficiently good.

The Arkin rule was criticized by the Jackson Committee which recommended full exposure by third party funders to adverse costs. This is incorporated in the draft Code of Conduct for the industry which followed the Jackson proposals.56

There are pros and cons to the Jackson’s proposal. First, it may deter TPLF investors from partially funding an action if as a result it has a disproportionate exposure to adverse costs. I say may because the investment exercise will balance the total exposure against the likely returns so it will have the effect of requiring a higher success fee and the funding of cases with larger damage claims.

The Jackson proposal creates an anomalous situation with solicitors under conditional fee arrangements not being liable for adverse costs whereas the TPLF investor is, even though both encouraged the litigation and imposed avoidable costs on the defendant(s). Indeed, this is the problem with the Arkin rule generally where the subvention of a TPLF investor tips the claimant in favour of litigating his or her claim, and imposing very significant costs on defendants which then go uncompensated if the claimant is impecunious.

Surprisingly the TPLF investors interviewed did not see the prospect of indemnifying defendants for the full adverse costs as a major inhibition to their activities. This is partly because their business plans focuses on high value damage claims. Some did see the prospect as an inhibition in the E&W situation because of the high absolute level of costs.

Another view expressed by some of those interviewed was that the debate over adverse costs was overblown. This is because most cases settled for sums well below the award and without an express discount for adverse costs or a separate settlement of the defendant’s legal costs. Thus whatever the formal rule there was rarely a payment of adverse costs as such. This, however, seems questionable or reflects a high risk

56 The CJC’s consultation paper draft self-regulatory code deals with capital adequacy (funder agrees "to have adequate resources of cash or cash equivalent (when needed) to meet its liabilities for at least the next twelve months"), liability for adverse costs provided expressly agreed with claimant, funder’s ability to cancel the agreement on giving 21 days notice and paying all the obligations, and in the event of a conflict of interest between funder and claimant, the latter will prevail. Civil Justice Council, A Self-Regulatory Code for Third Party Funding, July 2010. (devised by working group consisting of Harbour Litigation Funding, Calunius Capital, Allianz, IMF Australia and Commercial Litigation Funding).
strategy, as we have seen that ATE is often purchased and the premiums are very high, and where a TPLF investor has not taken out ATE the consequences can be fairly major.

IV. THE CASE AGAINST TPLF

The generally warm reception to TPLF in Europe contrasts with that in the USA. Some there see TPLF as a harmful to an already flawed U.S. legal system which will encourage encourages unmeritorious and excessive litigation, particularly for class actions.57 This is particularly so where the TPLF investor is allowed to take an active part in the trial process.

The claims underpinning these concerns need to be closely examined, as does the difference between the US legal systems and those of Europe.

One basic premise of the critics is that TPLF investors typically and intentionally fund weak and unmeritorious cases. It is clear from the interviews of European TPLF investors is that they devote considerable time to screening potential cases they have been asked to fund, reject most, and only fund those which have a very high probability of succeeding and high monetary value. Unmeritorious cases have the opposite features – a low or negligible probability of winning, and negative returns if they go to trial. Thus given the professional commercial approach to screening cases and funding them, it would be bizarre if funding unworthy or frivolous cases were a significant issue. The investment they make is highly risky, and reliant on the skills and commitment of the legal team (and claimant) they decide to fund. It has been shown above that there have been some heavy losses to TPLF investors which reflect the inherent riskiness of litigation even where it is agreed that the case has strong merits. Even in the abstract it does not make commercial sense nor will it yield positive returns to fund unmeritorious cases.

This is not to deny that TPLF may be used strategically and opportunistically. It is sometimes the case that a claimant will enter into discussions with a TPLF investor and announce these to the defendant before any funding has been secured to encourage a settlement or more favourable settlement. However, the use of funding simply to push a highly speculative claim at the instigation of the TPLF investor seems a minor consideration, unless of course the checks and balances in the legal system permit this generally.

Second, the fact that TPLF investment increases the litigation rate for some classes of claims is not ‘bad’ in itself. The demand for TPLF comes from two broad categories of claimants – those who would not otherwise have pursued their claim, and those who would have but see TPLF as a better way of funding it. Thus it is likely that the presence

57 Selling Lawsuits, Buying Trouble - Third party litigation funding in the United States, U.S. Chamber Institute for Legal Reform, October 2009.
of TPLF investors will increase the net litigation rate but by less than gross number of TPLF funded actions. For both categories the funding fills a gap in the market, and may bring into the legal system cases that are more complex or which for financial reasons would not have been litigated and settled in favour of the defendant. But this does not mean that the increase in the number of cases is evidence of some malfunction or perversity. The endorsement of TPLF by the Jackson Committee does not indicate a judicial horror of this; admittedly in the context where TPLF investors are entirely passive.

Where investors can exercise an active and even controlling role or can buy claims, there is little evidence yet that this has led to abuses which the courts have not controlled. There is no direct evidence for the USA or yet from Europe. Some have given as an example the facts surrounding Fostif an Australian case decided by the High Court of Australia in 2006. Fostif concerned claims for the recovery of amounts paid by tobacco retailers to tobacco wholesalers, allegedly for the purposes of the wholesalers paying a license fee, later found to be unconstitutional. Over 2,000 claimants signed an agreement for third party financing with funder Firmstone. Firmstone sought out retailers with claims, bought the rights to the claims that gave it control of the litigation in return for a success fee of one-third of the proceeds if the case was successful. The defendants alleged this was an abuse of the process to profit from the success of the litigation. The judge at first instance agreed, while the Court of Appeal allowed the appeal by the tobacco retailers and found that the third party litigation funding did not justify ending the proceedings. The licensed wholesalers appealed to the High Court who held by majority that in states where the laws of champerty and maintenance have been abolished, TPLF is not contrary to public policy and is not an abuse. However, the High Court stopped the class action because the tobacco retailers did not have the same interests in the proceedings as required by the law of New South Wales.

How is Fostif to be viewed? First, there is nothing inherently wrong with aggregating legitimate actions in one class, at the TPLF investor’s instigation. Fostif is authority at the Federal Australian level that this is not an abuse of process in those Australian states that have abolished champerty. Second, the action failed because it did not comply with the procedural requirement that all claimants have the ‘same interest’. This is the same requirement discussed for E&W representative actions, and which limits their use as a substitute for class actions. Third, Fostif does not appear to have led to any discernible increase in the number of class actions filed in Australian courts. In fact after Fostif the number of Australian class actions fell (although perhaps for extraneous reasons).59

58 Campbells Cash and Carry Pty Limited v. Fostif Pty Limited [2006] HCA 41. The Court did not decide the funders’ position for those states where legislation had not abolished maintenance and champerty laws, namely the Northern Territory, Queensland, Tasmania and Western Australia.

59 Morabito’s study found that the number of Australian class actions decreased by 15.8% between December 2004 to March 2009 quarters. The study also looked at the potential abuse of litigation by TPLF providers. Between 1992 and 2009 there were 18 cases funded by TPLF investors in Australian courts and all of 10 cases resolved were settled (8 were still in the process of settlement). V Morabito, An Empirical Study of Australia’s Class Action Regimes: 1st report on
Further as already noted the unpublished empirical study by Chen and Abram found no statistically significant evidence that TPLF increased the volume of litigation in Australia.

This is not to deny that given the very different structure of the US legal system TPLF may exacerbate existing flaws. Rubin\textsuperscript{60} has argued that there are limited economic efficiency grounds for TPLF in the US, and indeed a case against it. This is because the combination of class actions, contingency fees and the American Rule that each party bears their own legal costs, suggests that the litigation rates are probably ‘optimal’ if not inefficiently high. There seems little shortage of funding for claims in the USA, and arguably these generate external costs because plaintiffs under the American Rule do not take into account the defendants’ legal costs thus engaging in excessive litigation. Further, because of the more politicised nature of the legislature which makes rent seeking by special interest groups more effective, law is often (more) inefficient and hence the enforcement is likely to generate further external costs (losses) rather than benefits.

But as Hensler has observed:"Virtually every aspect of financing civil litigation in the United States differs from the European model".\textsuperscript{61} In the UK, which like the USA is a common law legal system, the adverse cost rule applies, there are limited disclosure rules, no contingency fees, no jury trials, the costs of litigation are generally higher, and there is very limited scope for class actions.\textsuperscript{62} For example, the rules of discovery/disclosure in the European civil law countries are weak, and less extensive than in England & Wales; but the latter nowhere as intrusive and disruptive as US discovery rules. The US liberal rules governing disclosure can be used strategically to increase costs and delay proceedings, which is one criticism made of the US litigation system.


\textsuperscript{61} D R Hensler, ‘Financing civil litigation: the US perspective’ in Tuil and Visscher op cit, p. 149.

V. CONCLUSIONS

Despite the fact that TPLF is a relatively new development in Europe, the last several years has seen many new entrants to the market, especially in the UK, and increasing number of cases funded. All TPLF investors interviewed were buoyant, saw high returns, and expected an intensification of competition which would have at least the effect of driving down the level of success fees.

The evidence shows that overall there have been little discernible adverse effects, and that the courts have viewed TPLF favourably but have adopted a rigorous approach to procedural and substantive rules of funded actions. The existing rules do impose obstacles to TPLF but these generally may be seen as consistent with the requirements of the good administration of justice. However, what has emerged in Europe is a rather parochial industry where TPLF investors imbued with the legal principles and practices of their national jurisdiction, have confined their funding to national cases.

The exception are group or class actions. These often have a pan-European dimension and have seen the emergence of specialist group action TPLF investors and lawyers. To date these have played a limited role in most European legal systems. In the UK they are circumscribed by the ‘same interest’ rule and to some extent the inability to purchase and assign claims, and as a result these actions have been commenced in other jurisdictions (Germany and the Netherlands). There are other inhibitions such as the passing on defence in antitrust actions and the requirement for claimants to opt-in rather than the US opt-out of such actions. Yet this is a formative period and few group actions have succeeded or settled. The law is in the process of reform and clarification and it is difficult to predict how things will evolve. Nonetheless, there is considerable political and legal resistance to the development of class actions, and certainly US-style class actions. But taking Europe as a whole the building blocks for active and relatively free involvement of TPLF exist.