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Friend or Foe?*

“Third Party Litigation Funding in Europe”
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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 the UK¹, and

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¹ The following were interviewed mainly during July 2011 with subsequent follow-up discussions and emails: 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), Dr. Arndt Eversberg (Managing Director, Allianz ProzessFinanz GmbH), Christopher Bogart (Managing Director, Burford Capital), Jonathan Barnes (Director, Woodsford Litigation Funding), Michael Zuckerman (Managing Partner, Redress Solutions), John Walker and Clive Bowman (Executive Directors, IMF (Australia) Ltd), Richard Fields (Juridica), Bob Gordon (1st Class Legal) and David Rae (Synergy Solutions/Axiom Legal Financing).

dedicated TPLF investors of group actions in Europe.² It explores the development and rationale of TPLF in Europe with a focus on the position in England and Wales (E&W)³, and emerging funding of group actions in Europe.⁴

The discussion below is organised as follows. Section II provides some background to the development of TPLF in Europe. Section III is an overview of the TPLF funders in England and Wales based on interviews conducted in the second half of 2011. Section IV examines group litigation funding in Europe. Section V discusses the justification for and likely impact of TPLF, together with some of the policy issues. Section VI looks at the criticism of TPLF that have been made in the USA and compares them 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 historically the legal position in common and continental European civil legal systems. These prohibitions were abandoned in European continental civil law countries. Third parties can finance litigation in nearly all civil law jurisdictions in Europe apart from Greece and Portugal.⁵

In most common law countries the prohibition on third party funding of legal actions continued until recently and still exist in some jurisdictions. These were also criminalized by statute.

The common law 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

² David Burstyner (Senior Legal Counsel, Omni Bridgeway) was interviewed. CDC declined to be interviewed on the grounds that 'it was not in its interests', and CFI did not respond to requests for an interview.

³ The legal systems of England and Wales, Scotland and Northern Ireland, which together make up the United Kingdom, differ. It is therefore necessary to distinguish these jurisdictions although in reality the differences are not that great and effectively TPLF investors will operate across the UK.

⁴ This is the first quantitative study of TPLF investors and their activities in the UK. The only other industry-wide study, albeit largely qualitative, is by lawyers Fox Williams *The New, New Thing: A study of the emerging market in third party litigation funding*, Fox Williams, 2010. Also Lord Justice Jackson, *Review of Civil Litigation Costs*, April 2010, Chap. 11. The E&W Law Society publishes *Litigation Funding* each quarter which lists TPLF funders, brokers and ATE insurance providers.

⁵ Lovell LLP, *At What Cost? A Lovells multijurisdictional guide to litigation*, 2010

trading in legal claims.⁶ The historical reason for these crimes was to prevent a frequent abuse.⁷ In medieval times it was prevalent for wealthy landowners to fund litigation in order to grab land from weaker parties.

The restrictions on third party funding of litigation have been progressively removed and 'de-criminalised' across common law countries. In England & Wales the laws of maintenance and champerty were decriminalized in 1967, and since the mid-1930s in the Australian states of South Australia (1935), Victoria (1950), New South Wales (1993), and the ACT (2002)⁸, (but continue Western Australia, Queensland and Tasmania). They have been removed in many states in the USA.

There is growing support for third party funding today 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. 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 including greater access to justice.

This is particularly so in common law jurisdictions where there is a growing concern over the high costs of litigation. The Oxford Study⁹ gave estimates of the legal and court costs for a "large scale damage case"¹⁰ involving a complex breach of contract with a €7m (US\$6m) lost profits claim in 27 countries. The joint costs of pursuing this claim to full trial in the E&W courts were estimated at US\$3m or 50% of the value of the claim. According to the Oxford Study the legal costs of suing in E&W were by far the largest by many orders of magnitude (eg 30 times greater than in Germany) of all 27 countries.¹¹ The Jackson Committee in the UK was a response to the growing

⁶ M Radin, 'Maintenance and Champerty', *California Law Review*, Vol. 24, 1935, pp.58-64.

⁷ P H Winfield, 'The History of Maintenance and Champerty', *Law Quarterly Review*, Vol. 35, 1919, pp.57-68.

⁸ Maintenance and champerty laws were abolished in South Australia by *Criminal Law Consolidation Act 1935*, Victoria by *Wrongs Act 1958* and *Crimes Act 1958*, New South Wales by *Maintenance, Champerty and Barratry Abolition Act 1993*, and in the Australian Capital Territory by *Civil Law Act 2002*. This leaves Western Australia, Queensland and Tasmania together with the Northern Territory where these remain 'crimes'

⁹ C Hodges, S Vogenauer and M Tulibacka, eds, *The Costs and Funding of Civil Litigation – A comparative perspective*, Hart Publishing, 2010.

¹⁰ 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).

¹¹ The legal costs estimates reported in the Oxford Study for other common law jurisdictions (Australia, New Zealand, and Ireland) are, in the author's opinion, gross under-estimates and have not been used. The author has independently sought advice which suggests that the legal costs of bringing this claim in Australia would be a minimum of AUD\$500k or AUD\$1m for both parties. This estimate is 10 times that reported in the Oxford Study.

concern that London was losing its place as the global centre for commercial litigation because it was, literally, pricing itself out of the market.

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.*"¹² 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*".¹³ The Oxford Study on litigation costs¹⁴ was more circumspect viewing TPLF as only 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 V below).

Third Party Funding Options

TPLF comes in many guises and operates in many areas of the claims process, such as personal injury. This overview is confined to the financing of complex and typically high value commercial litigation.

One useful categorization of TPLF 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

¹² Civil Justice Council, *The Future Funding of Litigation – Alternative funding structure*, June 2007, Recommendation 3.

¹³ 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).

¹⁴ Hodges, *et al.*

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 until late 2011 (and has been 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, product liability, etc..
- **After the event insurance (ATE)** insures the claimant against liability for 'adverse costs' in the event when the case is lost and the claimant 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 ATE insurance is available at any time after a dispute has arisen up to the determination of a trial. The cost of the ATE insurance is the premium which is a per centage of

the sum insured and depends on the level of cover sought, and assessment of the risk. The premium does not have to be paid if the case is lost but is payable in the event of success. Thus the actual payment is deferred because it 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 all or part of it can be recovered from the losing party. 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. If the insured claimant loses the case he or she does not pay the ATE premium. The ATE insurance will cover the claimant's liability to pay the defendant's legal costs. 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 dedicated 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 focused on the visible segment consisting of dedicated TPLF entities thus omitting those hedge funds, financial institutions, family offices and others which may also fund litigation.

Market Structure

There are 15 TPLF funders that have publicly stated that they supply or have raised funds in the UK in 2011 (Table1). However, the number of active investors funding commercial claims in E&W is much lower. IM Litigation Funding has ceased operations. The Hong Kong domiciled Argentum, while it advertises its services in the UK, appears not to have financed any claims to date. Two large 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. IMF¹⁵, the largest Australian-based TPLF investor, while it entered to fund group litigation in 2001 withdrew its presence in Europe, and to date is only co-funding two claims. On the other hand the litigation division of the German financial conglomerate Allianz, which funds considerable litigation in Germany, Austria and Switzerland, entered the UK market in 2002 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.¹⁶ This means that there are 10 active dedicated TPLF investors operating in the UK, with a further three (Juridica, Burford and IMF) making occasional investments.

The market is also in a state of flux. Several dedicated TPLF investors have already left the sector - IM Litigation Funding which had been very active in the insolvency area, and Managers & Processors of Claim Ltd (MPC) which funded several high profile cases (discussed below). On the other had a number of investors have indicated that they will enter the market while others are in the process of raising funds to expand into the provision of commercial TPLF.¹⁷

Most funders operating in the UK are relatively new with the exception of Allianz which has been funding claims since 2002. They therefore have only several years trading experience, small case loads, and few finalized investments.

¹⁶ 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. Morpurgo also identifies Juragent and Exactor AG as TPLF providers in Germany, and AdvoFin Prozessfinanzierung AG and Lexdroit in Austria, and Prozessfinanz in Switzerland. M de Morpurgo, 'A Comparative Legal and Economic Approach to Third-Party Litigation Funding', *Cardozo Journal of International and Comparative Law*, Vol. 19, 2011, pp. 343.

¹⁷ These include Fulbrook Management LLC based in New York and co-founded by US lawyer Selvyn Seidel who previously co-founded and until recently was a chairman of Burford Capital. Also Tangerine Fund part of Axiom Legal Financing based in London and incorporated in Cayman Islands, which at the time of writing was fund raising.

Table 1 TPLF investors in the UK, July 2011

Company	Start	Domicile	Offices	Structure	Source(s) of funding	Value of funds
Harbour Litigation Funding	2007	Cayman Islands	London	Harbour Litigation Investment Fund L.P.	Institutional investors, family offices, educational institutions, high net worth individuals	£60m over two years
Calunius Capital	late 2006	Guernsey	London	Calunius Litigation Risk Fund LP	Institutional investors	£40m
Vannin Capital	Jan-11	Isle of Man	IoM, BVI	Backed by IoM private equity house Bramden Investments	Private equity	£25m annually for five years
ILF Advisors	Jan-10	UK	London	Jersey-based Libra Litigation Fund One	Institutional investors, hedge funds, family offices, management team	£10m
Therium Capital Management	Jan-09	UK	London	Specialist financial platform of City of London Group plc (COLG) listed on London Stock Exchange	High net worth individuals	£9.77m
Woodsford Litigation Funding	2010	UK	London	UK limited company	IoM investment companies	£5m
Commercial Litigation Funding Ltd (CLFL)	2007	Jersey	London	Jersey protected cell company	High net worth individuals, private equity, hedge funds, family office	Redacted
Allianz Litigation Funding	2002	Germany	London, Munich	Allianz ProzessFinanz GmbH	Allianz Versicherungs AG	Undisclosed
IM Litigation funding	2002	UK	London	Ceased Operating in 2011		
Redress Solutions	2008	UK	London	Backed by two family offices	Primary funder is Charterhouse Square Finance Company Limited, a company in the Corob group. Also funded by a high net worth individual based in Monte Carlo which is in joint venture with Redress Solutions	Undisclosed
1st Class Legal	2006	UK	Shrewsbury	Underwriting House. Cover holder for Authorised ATE Insurer	Via other funders or directly from institutional investors, high net worth individuals, etc	Undisclosed
Juridica Investments	Dec-07	Guernsey	London	Listed AIM	Institutional shareholders - Invesco (31.61%), Jupiter Asset Management (14.59%), Baillie Gifford & Co (14.24%), Henderson Global Investors (7.1%), M&G Investment Management (5%), + others	£115m (over \$200m). £4.8 in the UK
Burford Capital	Oct-09	Guernsey	London, New York	Listed AIM	Institutional shareholders- Invesco (44.77%), Eton Park International (9.96%), Baillie Gifford & Co (9.03%), Reservoir Capital Group LLC (6.33%), Fidelity (5.57%), + others	£190m (over \$300m)
Argentum Litigation Investments	2009	Hong Kong	Hong Kong, Singapore, London, Luxembourg	NA	NA	Reported £15m invested but undefined whether in UK
IMF	Jun-01	Australia	Australia	Listed Australian Securities Exchange	Substantial shareholders: Acorn Capital (14.11%), Hugh McLernon (7.73%), Warrakirri Asset Management (6.26%) & John Walker (5.59%)	£2.3m in the UK

Source: Funders' websites and interviews. *Argentum did not respond the figure was taken from *Litigation Funding Magazine* (June 2011).

Those TPLF providers active in the UK can be 'tiered' on the basis of their capital and size:

- A number have significant funds generated from special fund raising efforts or from their parent company. These include Harbour¹⁸, Calunius, ILF Advisors,

¹⁸ Harbour plans to raise a further £60m in 2012.

Vannin Capital¹⁹, Woodsford Litigation Funding, Therium and Allianz. Redress Solutions is backed by two family offices. Also 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 several million to well over £100m.

- The second 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. This group includes 1st Class Legal (largely an ATE insurance provider), and CLFL (which is raising funds).

There are also hedge funds, financial institutions and other entities which have substantial funds but are not dedicated TPLF investors. Investment banks Credit Suisse and Deutsche Bank, and hedge funds Alchemy and Elliott among others have been mentioned in this context. These have operated for some time, and may be fairly active, but do not publicize their activities therefore it has not been possible to verify the size and extent of their investments. Indeed, opinions seemed polarized as to their significance with some in the US claiming that the capital flows from these dwarf those of the newer dedicated TPLF investors in the US, while others (such as IMF) claiming that this is largely a 'myth' and that the activities are non-existent in Australia.²⁰

The funds raised by TPLF investors come from private capital raisings either directly from individuals, family offices and/or institutions, or via private equity and hedge funds (Table 1). Several have raised funds through public listings (Burford, Juridica, and Therium via COLG), with dispersed shareholders and significant minority stakes held by major UK financial institutions such as Invesco, Ballie Gifford, Fidelity, Eton Park and Scottish Widows (Burford Capital) and 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. All are private companies with the exception of Juridica and Burford which are public companies listed on the London Alternative Investment Market (AIM). Interestingly Juridica and Burford are the largest dedicated TPLF investors in the USA. The backer of Therium (City of London Group plc, also a public company with a full LSE listing, although only a small proportion of Therium funds are supplied by COLG). Most investors from the first group are domiciled in low tax jurisdictions (Channel Islands, Isle of Man and Cayman Islands).

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

¹⁹ Vannin has stated that it has a commitment from their investors of £25m annually over five years.

²⁰ Based on an interview with Christopher Bogart of Burford Capital.

There have also emerged a small 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 to do so 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. There are four active brokers offering TPLF in the UK – Ligata, Maxima, The Judge, and Global Arbitration and Litigation Services.²¹

Size of the Market

The UK dedicated TPLF market is relatively small. Table 2 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, Burford in the UK - over US\$200m²² and US\$300 (in two capital raisings) respectively – and IMF, which are used to fund litigation outside the UK. Nevertheless, Juridica has committed around £4.8m to three UK claims, and IMF £2.3m to two co-funded UK claims.

The figures suggest a modest pool of confirmed investable funds in the UK of around £157m (as of late 2011) based on information supplied by 8 of the 15 TPLF investors (Table 2). In addition, some of the smaller investors have access to funds when they identify a suitable investment. Others such as hedge funds and financial institutions invest in litigation but the amount is not publicly available. This means that the £157m is perhaps a low estimate. 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, and it is not supported by the evidence to hand.

²¹ Exchange Chambers, barristers based in Liverpool, Manchester and Leeds, have formed a partnership with broker Maxima in June 2011. Exchange Chambers' website at <http://www.exchangechambers.co.uk/>.

²² Juridica was the first to list on London's AIM in December 2007. G. Bousfield, 'Third-party funders eye up Europe', *Commercial Dispute Resolution*, February 2010.

Table 2 Dedicated TPLF funding (£m) 2010-2011

Investor	Funds (£m)
Harbour	60.0*
Calunius Capital	40.0
Vannin Capital	25.0**
ILF Advisors	10.0
Therium	9.8
Woodsford	5.0
Juridica	4.8
IMF	2.3
Total	156.9

Source: Funders' websites and interviews.

*Allocated over two years.

**Annually, over five years.

There are several aspects to note about the UK dedicated TPLF investment market:

- Three dedicated TPLF investors (Harbour, Calunius and Vannin) dominate the sector with £125m or 80% of the estimated investable UK funds.
- The capital raised in London by US-based Burford and Juridica dwarf the estimated funds available for investment by the nine other active UK investors. Juridica and Burford have together raised around £305m, or almost twice the estimated funds of the nine active dedicated TPLF investors in the UK. This reflects the greater opportunities available for funding US litigation.

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 information as commercially confidential.

The Civil Justice Council (CJC) estimated by mid-2010 that 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".²³ 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 of the number of claims currently funded. 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, has committed these to funding 30 claims. This suggests an average investment of £2m per claim. If this average is extrapolated across to the active TPLF investors in the UK with banked funds (Table 2), this gives them the ability to fund around 75 claims (excluding Juridica and IMF which only make occasional investments in the UK). Adjusting for a number of investments in smaller, say, £1m claims, gives the ability to fund an estimated 85

²³ Civil Justice Council, *A Self-Regulatory Code for Third Party Funding*, July 2010, p. 11.

cases.²⁴ Assuming that this is over a two year period, implies an estimated 43 claims per year from the six TPLF investors active in the UK. If it is further assumed that an additional eight claims are funded by the remaining four active TPLF investors gives the investment capacity of an estimated 51 claims annually.

This seems broadly in line with the figures given by those TPLF investors interviewed. The figures supplied by those active TPLF investors interviewed gives an estimated 62 claims currently being funded in 2011 in the UK. This estimate can be expected to differ from the previous estimate due to the average two year duration of each claim, so that there is a carry-over of claims initially funded in prior years to the current year in which they are nearing finalization. The estimate needs to be qualified by several other factors – it is only an estimate, there may be an element of double counting as individual TPLF investors may be co-funding the same actions, and a number of the claims funded by UK dedicated TPLF investors are in other jurisdictions (e.g. USA, Australia).

This estimate can be put in context using an analysis in early 2008 by consulting firm LEK²⁵. It estimated that there were between 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. However, accepting these figures as crude estimates suggests that there were a maximum of 1,250 (or 1,000 excluding insolvency claims) potentially fundable cases. Assuming these estimates were valid today, the dedicated TPLF industry is funding a mere 4% (or 5% excluding insolvency claims) of commercial cases.

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 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 offered 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

²⁴ 10 claims at a value of £2m from the sample of 75 cases is equivalent to 20 claims at a value of £1m.

²⁵ LEK, *Litigation Funding: Market Review*, March 2008 (PowerPoint presentation).

traded on a stock exchange. But these shares are thinly traded and are not likely to be very liquid.²⁶

The prospectuses of the publicly listed funders - Juridica²⁷ and Burford²⁸ - 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.
- 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.

²⁶ For share prices see following Internet sites: Juridica <http://www.londonstockexchange.com/exchange/prices-and-arkets/stocks/summary/company-summary.html?fourWayKey=GG00B29LSW52GGGBXAIM>; Burford <http://www.londonstockexchange.com/exchange/prices-and-arkets/stocks/summary/company-summary.html?fourWayKey=GG00B4L84979GGGBXASQ1>; IMF <http://www.asx.com.au/asx/research/companyInfo.do?by=asxCode&asxCode=imf>.

²⁷ Juridica Investments Limited, *Admission Document to trading on AIM*, December 2007.

²⁸ Burford Capital Limited, *Admission Document to trading on AIM*, October 2009.

Case Selection

Table 3 summarizes the case selection criteria, success fee arrangements, types of cases funded, and experienced to date of UK 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. Funders who invest in insolvency cases include IM Litigation Funding (now no longer operating), Harbour, Redress Solutions, Therium, ILF Advisors, and 1st Class Legal. Some funders also deal with tax claims (Harbour and ILF Advisors).

Most dedicated TPLF investor will only fund commercial litigation, mainly contract and commercial disputes. Nearly all stated that they do not fund complex multiparty construction, patent trolling, matrimonial and personal injury, 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 4 and 5 below).

Most TPLF investors stated that they only funded commercial litigation in the UK and often more narrowly in England and Wales. This is because most are London based litigators who feel most comfortable with the law and procedural rules of the E&W's High Court. A number were prepared to fund cases outside E&W but often this is limited to 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 an attractive case flow given the nascent stage of the industry's development, which does not yet require searching wider for attractive claims.

The minimum and actual value of the claims which are or will be funded varies considerably (Table 3) but tends to be high. The minimum threshold set by many TPLF investors exceeds a claim of £1m, and some have larger minimum claims exceeding £5m. However, in practice claims with a lower value will be funded if they are particularly attractive in terms of the soundness of the case and the prospect of a quick resolution. 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. The investment per claim ranges from a low of £50k (Vannin Capital, Therium) to a maximum £6m (Harbour).²⁹

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.

²⁹ Burford Capitals maximum investment per claim is \$15m.