

Ready for take-off

Jon Robins considers whether the developing third party funding market will begin to shift more towards higher volume, lower value claims



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For all the excitable commentary in the legal and business press about third party litigation funding – in other words, individuals or companies who financially back legal actions but have no connection with that action – it remains a minority practice.

The prospect of regarding litigation as an 'asset class' represents an intriguing intersection on the crossroads of law, business and finance; but it is an infant industry and one that is still emerging from the discarded shackles of champerty and maintenance – legal principles that go back to the medieval period that precluded disinterested parties from profiting on other people's cases.

However, third party funding has taken a few significant steps forward over the last few years. Most notably this occurred when it received the green light from Lord Justice Jackson in his 2010 Review of Civil Justice Litigation Costs and, at the end of last year, with the publication of a voluntary code of conduct for litigation funders. The rules, which cover members of the Association of Litigation Funders, were drafted by a working party of the Civil Justice Council (CJC).

NASCENT INDUSTRY

A new report, *Third Party Litigation Funding in Europe* (Case Associates, December 2011) puts this nascent industry into some kind of perspective. It estimates that only 187 claims have been or are currently being funded by investors in this way, including 62 in the last 12 months. There



are some 15 'dedicated funders' who have supplied or raised funds in the UK of at least £457 million. The report reckons that the three largest UK investors (Harbour, Calunius and Vannin) account for 80 per cent of the funds.

To put this into a different kind of perspective, Harbour – one of the pioneers of this new wave of litigation funding – reckons their minimum claim is about £3 million and their average is about £10 million. So we're not talking slip and trips or any kind of routine personal injury claims.

Susan Dunn, who set up Harbour Litigation Funding in December 2007 and co-founded litigation funder IMLF in 2002, argues that a lot more funding goes on than is suggested by the Case Associates report. She reckons that Harbour has looked at over 600 cases and 875 at IMLF. "We fund about eight per cent of what we see," she says. "The CJC figures make me laugh because they do not know what we

are doing and that's because most of what we do is confidential."

What, you might think, has this to do with the kind of work handled by claims management companies? "I remain of the view that, in principle, third party funding is beneficial and should be supported," said LJ Jackson in his landmark civil justice review. He cited five reasons for supporting third party funding: number one was that it provided an additional means of funding litigation "and for some parties the only means. Thus third party funding promotes access to justice."

It is a claim that appears to be supported by pretty scant evidence. As the Case Associates report notes, this judicial and public policy rationale is a weak justification. "In many of the cases it is not the claimant's impecuniosity but a rational commercial decision that third party litigation funding is the best way to fund litigation."

What are the prospects of third party funding entering the consumer market? Andrew Twambley, managing partner at Amelans and *Claims Management's* resident columnist, remains unconvinced. "From what we have seen of the market so far, funders aren't interested unless there is a minimum £200,000 investment. How many personal injury cases are worth over £100,000? Maybe two per cent," he says. The lawyer predicts that the development of a new funding industry is unlikely to affect anyone on the street.

FURTHER LEGITIMACY

"I'd predict if you were to approach a third party funder with a proposition to insure bodily injury claims they would be distinctly uninterested," comments Rocco Pirozzolo, legal expenses underwriting manager at QBE who sat on the CJC committee that helped draft the code. Pirozzolo reckons that the sector is blossoming. "There is a sense that the Jackson report legitimised the business to a greater or lesser extent," he says, adding that the new code will give further legitimacy to the market.

Interestingly, a funder called Caprica launched recently and vowed to "transform the industry by providing alternative litigation funding for lower-value commercial disputes." According to a report in the legal press, Caprica aims to invest around £100 million in the medium term and will look at cases with funding requirements as low as £50,000. It is backed by Thomas Miller, a company that claims to have in excess of \$4 billion under management. Thomas Miller's chief executive Bruce Kesterton has described its core mission as "to become a disruptive player in the third party litigation market."

Dr Angus Nurse is a visiting lecturer at Birmingham City University and the co-author (with Professors John Peysner and Chris Hodges) of a new report published last month entitled *Litigation Funding: Status and issues*. He reckons that a consumer litigation-funding product is almost inevitable.

The current market is "based primarily around high value, yet low volume claims" reflecting the due diligence carried out by funders and the need to consider in detail the legal issues involved in cases before

reaching a decision on whether to fund, explains Nurse.

"Commercial imperatives dictate that only good – and arguably the best – investments are selected," he continues. "The need to obtain best returns for the investment currently acts as pressure to support cases with merits, to advance them strongly, and to settle them quickly to achieve a return."

His research identified that a claim value under £100,000 was "not viable given the business model employed by the main funders... And in practice many funders operate a threshold of £1 million. However, the claim threshold is lower in other countries like Germany due to predictability of costs."

But it is inevitable, Nurse predicts, that new entrants will enter the litigation funding market with "slightly modified business models" that "rely instead on a higher volume, lower value claim where it becomes possible to secure funding to make such an operation viable and develop a steady stream of cases."

"There is evidence that niche funders are doing exactly that," he adds, flagging mis-selling of payment protection insurance, divorce claims and lower level commercial claims (i.e. under £100,000) as areas that will attract funders. Expansion of the litigation funding market and diversification of the business models will require "revisiting the need for regulation of litigation funding."

INCREASING DEBATE

"There is an increasing debate about how the third party funding model could be extended into the consumer claims market," reflects Tom Custance, dispute resolution partner with City law firm Fox Williams LLP. This is relatively straightforward in, for example, class actions where the total value of the claim could readily justify the funder's share of the spoils. "Class actions, however, are relatively rare in the UK," he adds.

Another area is the claims management industry because, according to Custance, it is arguably already a third party funder for consumer claims. "Claims management companies bring claims on behalf of their customers in exchange for a percentage of



the winnings," he says.

The main difference between third party funders and claims companies is that "the latter control their customer's claim". "However, most consumers have no problem with that, and indeed it is a positive feature of the process: a hassle-free way of getting financial compensation in return for the claims manager taking its cut", he says. "The question then is whether management companies can expand the types of claims they currently fund."

As Tom Custance points out, the likely scrapping of referral fees (under the Legal Aid, Sentencing & Punishment

of Offenders Bill) raises the prospect of personal injury firms merging with claims companies. "So, rather than PI claims being financed by no win, no fee agreements with lawyers, in future they may increasingly be third party funded by claims managers who have acquired expertise by combining forces with PI lawyers. If so, that would open up third party funding to the PI market which is probably the most substantial area of consumer claims."

Rocco Pirozzolo notes that although third party funders are not restricted from funding accident claims they were until very recently under the Solicitors' Code of Conduct 2007 (paragraph 9.01). Solicitors were prohibited, subject to obtaining a dispensation from the Solicitors Regulatory Authority, from acting with funders in any claim arising as a result of death or personal injury where the funder could take some of their damages as a

reward for funding the claim.

No equivalent provision is made in the 2011 Code of Conduct. "Lifting the prohibition would make sense as the Jackson reforms acknowledge that damages can be used to pay the costs of pursuing a claim," notes Pirozzolo. "This should apply to a funder's reward as much as any success or contingency fee, or to any ATE premium."

The expansion of the market and diversification of the business models "will require revisiting the need for regulation of litigation funding," reckons Angus Nurse. "The challenge is not so much that it is entirely focused on commercial claims but that as the market develops and business models fall outside the scope of the voluntary code, regulation may be needed to cover those activities."

The Hodges/Nurse/Peysner report talks of the "chaos of the rise and fall" of Claims Direct and The Accident Group,

and of other problems with claims management companies that "illustrate how a litigation management/funding system can develop beyond its original access to justice intentions."

Whatever forms the third party funding models of the future take, Andrew Twambley says that the industry has to be regulated properly, citing past scandals that left thousands of genuine accident victims penniless.

"History could happen again," he warns. "There is a need to be clear about what's in the small print. How much will the client actually get? It needs to be very carefully looked at." ●

Jon Robins is the author of *The New New Thing: A study of the emerging market in third party litigation funding* (Jures, November 2010). You can download it at www.jures.co.uk

Q : Who was the first accident management company to sign up to the

Aldermanbury Declaration

A : Who did you think it would be...?



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