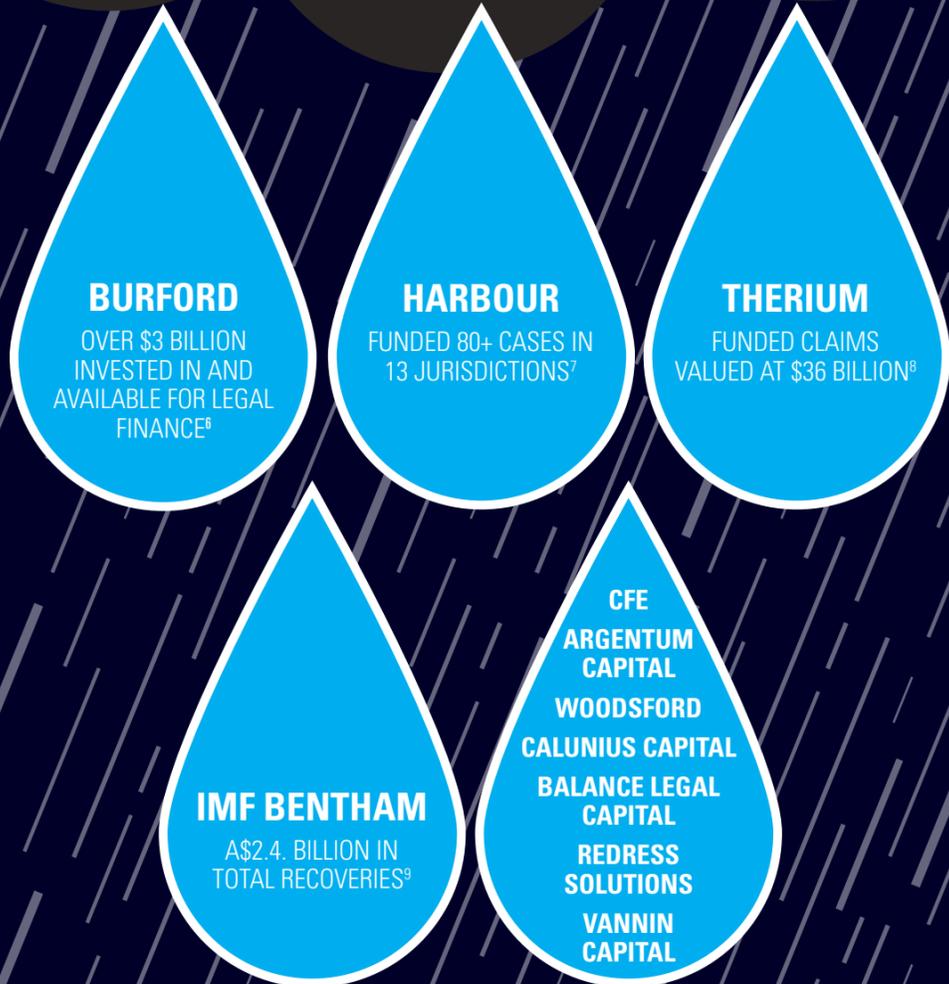


## OVER 40 FUNDED COLLECTIVE ACTIONS IN EUROPE



**“WE MAKE IT HARDER AND MORE EXPENSIVE TO SETTLE CASES”**

—**Allison Chock**, chief investment officer for Bentham’s U.S. division.<sup>1</sup>

# THE MURKY WATERS OF LITIGATION FUNDING

*An inside look at a financing industry with no transparency, no regulation, and no safeguards against abuse.*

### MAJOR CASES

- |                                  |                 |             |           |               |
|----------------------------------|-----------------|-------------|-----------|---------------|
| Achmea                           | Clydesdale Bank | KLM         | Otis      | Tesco         |
| ABN AMRO                         | DAF             | Kone        | Petrobras | Thyssenkrupp  |
| BA Cargo                         | Daimler         | Lloyds Bank | Petrofac  | UBS           |
| Banca Monte dei Paschi die Siena | Facebook        | Lufthansa   | Rabobank  | Van Lanschot  |
| BT                               | Fortis          | MAN         | RBS       | Volvo/Renault |
| Bosch                            | Google          | MasterCard  | Schindler | VW            |
|                                  | Iveco           | Mitsubishi  | Railway   | + many more   |



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# WHAT IS THIRD PARTY LITIGATION FUNDING?

Third party litigation funding (TPLF) is the practice of hedge funds and other financiers investing in lawsuits in exchange for a percentage of any settlement or award. These firms identify cases where there is likely to be a large recovery (such as collective actions) and pay the associated legal and administrative fees on behalf of the claimants.

# WHERE IS TPLF USED?

TPLF started in Australia and has spread to Europe, North America, and Asia. The large funders have offices in multiple countries and fund cases around the world.



**OVER  
\$100 BILLION  
AVAILABLE  
TO FUNDERS  
AND FIRMS  
WORLDWIDE**

## HOW MUCH DO FUNDERS MAKE FROM A CLAIM?

- If the case is successful, the funders claim a significant share of the financial recovery awarded to the claimants (generally **30%-40% of the recovery**) and are often paid before the claimants.
- In a public submission to the Dutch Ministry of Justice, one of the largest litigation funders (IMF Bentham) stated that they would typically make a **300% rate of return** on their cases.
- In the UK, a £14 billion class action on behalf of 46 million consumers was brought against MasterCard. The original funder invested **£40 million** in the claim and stood to make up to **£1 billion**.

## WHAT ARE THE MAIN CONCERNS WITH TPLF?

- Funders are generally not subject to any licensing, regulatory oversight, costs liability, or fiduciary duties.
- TPLF can lead to unnecessary, lengthy, and costly lawsuits.
- Funders invest in lawsuits not necessarily based on the merits of cases, but on settlement chances and profit maximization.
- They may end-up *de facto* controlling the litigation and prioritizing their interests over the interests of the claimants.
- TPLF operates in the shadows, with no mandatory disclosure of litigation funding agreements or corporate structures.

## WHAT DO JUDGES IN AUSTRALIA (THE BIRTHPLACE OF TPLF) THINK ABOUT LITIGATION FUNDING?

- An Australian Federal Court Justice criticized one funder's share of a class action against Appco as being "fantastic in the true sense of that word". The agreement had UK-based Harbour Litigation Funding receiving 40 per cent of any settlement or decision, or 400 per cent of the legal costs, whichever is greater. The Justice said, "... you would be in a situation where people are getting less than a quarter, on the analysis, of their claim".<sup>2</sup>
- A Supreme Court Justice in the Australian State of Victoria removed the funder and the law firm leading the Banksia securities class action from their roles supervising a proposed settlement distribution scheme after the funder was accused of intimidation, a lack of experience and charging excessive costs.<sup>3</sup>
- In a class action against Adero over "stolen wages", class members face paying fees of up to 40 per cent plus legal costs with the potential for low-paid workers to receive less than half their claim. Justice Michael Lee of the Australian Federal Court observed, "there seems to me something intuitively wrong about that"<sup>4</sup>



## SUGGESTED TPLF SAFEGUARDS

- Implement licensing through a government agency
- Require capital adequacy
- Ensure the claimants, not the funders, control the case
- Require funders to act in the best interest of claimants
- Ban law firms from owning funders and vice versa
- Impose costs liability
- Promote transparency

## DOES SELF-REGULATION WORK?

Litigation funders in Australia and the UK have attempted self-regulation through voluntary codes of conduct. Without serious consequences for breaches of these codes, self-regulation has little impact on funder behaviour.

- In the UK, just nine out of 31 known funders are members of the Association of Litigation Funders of England and Wales (ALF). If a funder breaches ALF's code, they can pay a fine up to £500. A funder can also be forced to leave ALF if they break the code, however, they can still continue funding cases.
- In Australia, only six of 33 funders are members of the Association of Litigation Funders of Australia (ALFA). There is no disciplinary action if a funder breaks ALFA's code.<sup>5</sup>

### ENDNOTES

- 1 Gershman, Jacob, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, WSJ (March 21, 2018), <https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600>.
- 2 Marin-Guzman, David, 'A real worry': Judge slams litigation funding fees, Australian Financial Review (May 30, 2019), <https://www.afr.com/work-and-careers/workplace/a-real-worry-judge-slams-litigation-funding-fees-20190529-p51sao>.
- 3 *Funder booted from Banksia class action settlement scheme after intimidation claims*, Lawyerly.com (August 30, 2019), <https://www.lawyerly.com.au/funder-booted-from-banksia-class-action-settlement-scheme-after-intimidation-allegations/>.
- 4 Clark, Stuart, *The hidden scandal in the financial services industry*, Australian Financial Review (May 30, 2019), <https://www.afr.com/companies/professional-services/the-hidden-scandal-in-the-financial-services-industry-20190528-p51s3y>.
- 5 Djinnovic, Marko and Ana Vlahek, *Uncharted Waters: An Analysis of Third Party Litigation Funding in Collective Redress*, U.S. Chamber Institute for Legal Reform (October 2019).
- 6 Available at: <https://www.burfordcapital.com/faqs/>.
- 7 Available at: <https://www.harbourlitigationfunding.com>.
- 8 Available at: <https://www.therium.com/about-litigation-funding/>.
- 9 Available at: <https://www.imf.com.au/about>.