

# Third Party Commercial Funding

Taking Stock Today, Looking at Tomorrow

Selvyn Seidel, Chairman & Founder

**Fulbrook Management LLC**

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# TODAY

## Brief History of the Past, through 2010

### A. Institutional Portfolio Funding

1. At the Creation: The “Classic” form, from Australia, Paying Prosecution Costs of a Litigation for a Financially Distressed Claimant, in Return for an Amount measured by a Percentage of Recovery, if Any, or a Multiple of Capital Invested, or Combination of the Two
2. Third Party Funding Emigrates
  - a. Continental Europe: Germany, Netherlands, Switzerland
  - b. UK
  - c. US
  - d. Other: France, Spain, Ireland, Canada, Brazil, Hong Kong, Singapore
3. Third Party Funding Starts to Develop Newer Products
  - a. For Cash used for Business or Personal Needs as Well as Prosecution
  - b. For Claimants Who can Afford Prosecution but Prefer Funder to Step In
  - c. For Defendants, in Financial Distress and Not in Financial Distress
4. Basic Premise: “Hands Off” Funding
5. Active Funders in the Industry
  - a. Number, 10 to 15 Most Serious; Locations of Base and Funding, Mostly Australia, UK, US; Public v. Private, several public but mostly private entities
  - b. Capital Available: Not Adequately Measurable, but perhaps in the low billions
  - c. Mostly Regional Funding rather than Cross Border Funding

# TODAY

## Brief History of the Past, through 2010 (cont.)

### A. Institutional Portfolio Funding (cont.)

#### 6. The Market

- a. Unaware of the Industry, for the Most Part
- b. Pent Up Demand: 100s of Billions or more?
- c. Guestimates of Size is all that is Possible

#### 7. Market Demand v. Industry Supply: Huge Gap, However measure Demand and Supply

#### 8. Issues Face Industry, including:

- a. Champerty, including "Control"
- b. Central Conflicts (Clients v. Lawyers v. Funders): the "Bermuda Triangle"; Funders v. Lawyers; Clients v. Lawyers; etc.
- c. Ethics of Attorneys
- d. Excessive Stirring Up of Litigation?
- e. Sham Litigations?
- f. Attorney Client Privilege/Work Product Concerns

# TODAY

## Brief History of the Past, through 2010 (cont.)

- A. Institutional Portfolio Funding (cont.)
  - 8. The Issues (cont.)
    - g. Disclosure (Under Contract; Beyond Contract, in Hands of Court or Arbitrators)
    - h. Class Actions
    - i. Alleged Excessive Returns to Funders (including Usury)
    - j. Rules and Regulations, and Whether they should be Imposed:
      - 1) The Courts rules and regulations
      - 2) The UK Code
      - 3) ABA Review Commission
      - 4) New York Opinion of June 2010
      - 5) Other
  - 9. Vocal Challengers of Funding, Including US Chamber of Commerce

# TODAY

## Brief History of the Past, through 2010 (cont.)

- A. Institutional Portfolio Funding (cont.)
  - 10. The Greenshoots of the Future
    - a. Funding Defendants
    - b. Funding Plaintiffs and Defendants Who Can Afford It
    - c. Additional Scope of the Product: Cash for Operatonal Needs of Business and Personal use
    - d. Services in Addition to and Linked to Products
      - (1) Not “hands off” but Affirmative Support
    - e. Services without a Financial Product
  - 11. International
    - a. Cross-Border Litigation
    - b. Cross-Border Arbitration
    - c. Enforcement of International Judgments/Awards
  - 12. Information is Spreading
    - a. Through Media, Conferences and Roundtables, Published Articles and Presentations, Government and Bar Association Attention, Court Decisions, Rules and Regulations
    - b. Credibility of Industry Growing
    - c. Market Knowledge and Demand Growing
    - d. Role of Debates

# TODAY

## Brief History of the Past, through 2010 (cont.)

### A. Institutional Portfolio Funding (cont.)

#### 13. Business Activity

- a. Funders increasing in Numbers, Overall but with Some Funders Dropping Out (See Below)
  - 1) Entry Barriers: Risk Appetite, Conflicts, Required Skill and Attitude
- b. Market Expanding
- c. Performance Results of Funding Being Disclosed (see below):
  - 1) IMF
  - 2) Burford Group Ltd
  - 3) Juridica
  - 4) Therium
  - 5) Harbour
  - 6) Other

# TODAY

## Brief History of the Past, through 2010 (cont.)

- B. Another Part of the Industry: Single Investor Funding Single Claim
  - 1. In Existence for Many Years
  - 2. Direct Investments: One Investor, One Claim
  - 3. Indirect Investments, Hedge Fund Analysis
  - 4. Nature of Investors: Hedge Funds, Private Equity, Substantial Individuals, Others
  - 5. Capital in this Segment of Industry Compared to Institutional Segment: Impossible to Calculate on Current Information but Guesses at Three to One
- C. Comparable “Investors”, although not Part of Industry and Much Different:
  - 1. Contingency and CFA lawyers
  - 2. Insurance Companies
  - 3. Civil Rights Litigation
  - 4. Tax Payer Lawsuits
  - 5. Union Claims

Status Summarized



# 2011, The Year that Was; 2012, The Year that Will Be

## 2011

- A. The Year 2011 was a Watershed Year for Third Party Funding
  - 1. It evolved from an “emerging” industry to an “arriving” industry
  - 2. “Arriving” = Here to stay, and just a matter of time until maturity
  
- B. Key Driving Factor: Spread of Accurate Information. This factor has:
  - 1. Reinforced reality and credibility of industry
  - 2. Caused pent up market demand to expand
  - 3. Caused the industry to grow somewhat in number, and develop new products and new services

# 2011, The Year that Was; 2012, The Year that Will Be

## 2011

- C. The Spread of Accurate Information about the Market and the Industry, (shown in general and derived from):
  - 1. More Studies and Analysis, such as
    - a. Jackson Report
    - b. American Bar Association
    - c. New York City Bar Association Opinion
  - 2. More Media and Public Coverage
    - a. Newspapers, General Press and Trade Journals
    - b. TV
    - c. Internet (including Google and Blogs)
    - d. More Journal Publications and Written Analysis and Presentations
    - e. Law Journals and Law Reviews
    - f. Scholarly Articles
    - g. Industry Presentations and Publications
    - h. Lawyers' Publications and Comments

# 2011, The Year that Was; 2012, The Year that Will Be

## 2011

- C. The Spread of Accurate Information about the Market and the Industry, (Shown in General and Derived from): (cont.)
  - 4. More Conferences, Roundtables, Discussion Groups
    - a. By Academic Groups (e.g., Fordham Law School Combined with New York State Bar Association)
    - b. By Independent Conference Groups (e.g. Lexis Nexis, and International ICC)
    - c. By Independent Interested Parties (e.g., Global Arbitration Review)
    - d. By Various Serious Law Firms
  - 5. More Dialogue and Debate
    - a. US Chamber of Commerce
    - b. House of Lords
    - c. Forums
    - d. UK Code
      - a. There is at this very minute active discussion and debate in the House of Lords that relates to Third Party Funding and the new UK Code on Funding, where different perceptions and approaches are being proposed, some of which support legislation in the area rather the voluntary Code regulation, others opposing

# 2011, The Year that Was; 2012, The Year that Will Be

## 2011

### D. International Litigation and Arbitration

1. General Differences Relating to Cross Border Disputes
  - a. From the Prosecution/Defense legal services side
  - b. From the Funding Side
2. International Arbitration in Particular (Illustrated Below)
  - a. January 2011 Iberia Law Publication, S Seidel, Funding of International Arbitration Claims
  - b. New York announces it will be *the* International Arbitration Center of World
  - c. June 2011 Forum, New York State Bar Association, Section on International Litigation, and Fordham Law School
  - d. London announces it will be *the* International Arbitration Center of the World
  - e. New Zealand?
  - f. Prime Financial Dispute Resolution Group Started in Hague
  - g. November 23, 2011 UK Code
  - h. December 7, 2011 Global Arbitration Review and Fulbrook Forum
  - i. December 15, 2011 Global Arbitration Review and Fulbrook Produce Booklet of Materials containing Publications, Media Coverage, Decisions, Rules and Regulations, on Funding of International Arbitration Claims. See Global Arbitration Review and Fulbrook Management Selected Reading Materials on Funding International Arbitration Claims, January 2012.
  - j. Alternative Business Structures Allowed in UK

# 2011, The Year that Was; 2012, The Year that Will Be

## 2012

### A. Off to a Flying Start

#### 1. UK Code

- a. The “Magna Carta Moment” (CDR Publication)
- b. Justice Jackson and Council of Civil Justice Support
- c. Funding Industry Support
- d. An important moment, but serious improvement needed and expected (e.g. International? “Control”? Conflicts? Commercial v. Retail? Protection of Funder? See e.g., SSeidel, in CDR Publication in 2012)

2. January 27 Roundtable of Funders in Paris on Funding International Arbitration Claims

3. Publications Stemming from January 27 Roundtable: See Summary of Roundtable produced by Cleary Gottlieb, Wilmer Hale, Allen & Overy

4. See Article produced for European Business Journal on International Arbitration Claim Funding, Part 1, February 2012

5. Conferences held relating to topic, e.g.: February 24, 2012 in Florida, March 10 in San Francisco, March 14 – 16 in NY, March 15 conference call of American Bar Association Section on International Litigation and Arbitration; April 13 Conference in London; April 18 Conference of the American Bar Association Section on International Litigation and Arbitration, in NY; May 22 Lexis Nexis Program in London

# 2011, The Year that Was; 2012, The Year that Will Be

## 2012

- B. Continuing Debates and Sparks
  - 1. UK Code
    - a. US Chamber of Commerce Criticizes
    - b. House of Lords and Others Question UK Code
  - 2. Alternative Business Structures in the UK
    - a. See also Judge Kaplan's decision

## Tomorrow

# No Longer “Emerging” but “Arriving”

### A. Data re Economic Performance of the Dedicated Funders

#### 1. Introduction

- a. Until recently, hard data was hard to come by, in any fashion
- b. Information is strictly confidential for many reasons, as a general matter
- c. Most Funders were and are private
- d. Even Public Funders restricted, and two of the three major ones are relatively new themselves, Juridica 2007, Burford 2009

#### 2. In 2011 and 2012, information is beginning to become available

- a. IMF issued report for its 12 years of being a public company reflecting such information as: it earned an average annual IRR of IRR during this period; the average time between investment and return was 2.3 years; it funded 135 cases to conclusion; it was “successful” on over 95% of its cases; it settled almost all cases.

## Tomorrow

# No Longer “Emerging” but “Arriving”

2. In 2011 and 2012, information is beginning to become available (cont.)
  - b. Burford issued its latest quarterly report, stating that the returns on the first eight investments it made yielded 92% IRR. (Since the formation of Burford was in October 2009, the time span between investment and return must have been under 3 years as an average)

Burford gave details as to one investment which has become public, an investment of about \$6 million which returned to it about \$18 million within about two years.

- c. Juridica just announced in its most recent report that it could report data on economic performance that seemed favorable.



## Tomorrow

# No Longer “Emerging” but “Arriving”

2. In 2011 and 2012, information is beginning to become available (cont.)
  - d. Therium, in London, was reported to have released information that its first four case showing returns had realized a 200% IRR.
  - e. In general, Funders like Harbour Litigation, which has been in existence for many years and says it has funded over 600 cases, looks for a return of about three to one on investment.
3. Institutional Industry Members growing
  - a. In 2011 and 2012, the industry has seen the industry members grow in number and scope (if gradually), including

## Tomorrow

# No Longer “Emerging” but “Arriving”

3. Institutional Industry Members growing in number and scope (cont.)
  - b. Additions and expansions, include
    - 1) Woodsford Litigation Funding started (UK)
    - 2) Calunius Capital (creates own capital Fund) (UK)
    - 3) Vannin Capital started (UK)
    - 4) Caprica Management started (UK)
    - 5) Managed Legal Solutions started (UK)
    - 6) Burford acquires First Assist (ATE insurer in UK)
    - 7) IMF establishes NY subsidiary, Bentham (NY)
    - 8) BlackRobe started (NY)
    - 9) Fulbrook started (NY and UK)
  - c. Subtractions and transfers include:
    - 1) Allianz withdraws (UK and Germany)
    - 2) IMF Litigation Funding withdraws (UK)
    - 3) Credit Suisse transfers its Funding operations to Parabellum Capital (NY)

## Tomorrow

# No Longer “Emerging” but “Arriving”

- B. Scholarly and Media Evaluations of Industry more Positive
  - 1. Comments about activity and growth of industry include:
    - a. “Booming”
    - b. “Robust”
    - c. Other
- C. At same time as industry develops, the changes occurring in the professions, business, finance, global economies and international commerce, are creating a more compelling need and environment for growth of Funding market and industry, such as:
  - 1. Dramatic increases in international communication and commerce, in global economic, commercial, social integrated needs, in government changes
  - 2. Resulting universal pressures to reduce cost, enhance production, enhance efficiency
  - 3. Individual disciplines changing to react and improve: including legal services, various other professional services, financial services, business
  - 4. Integration of law, finance, business, and other disciplines, producing integrated products and services
  - 5. Increased and swifter communications, greater knowledge and coordination

## Tomorrow

# No Longer “Emerging” but “Arriving”

- D. Commercial Importance to Countries and Regions of Litigation is developing and taking Front and Center Stage, providing another plank for growth of Funding
  - 1. Greater and more conspicuous recognition among governments that good litigations and country capacity, enhances international commerce
    - a. More business is attracted to jurisdictions which have legal systems to ensure and deliver civil and commercial justice
    - b. The legal systems themselves can benefit from increased use
    - c. Thus, for example and as noted above, New York has announced it will become not merely an arbitration center in the world, but the arbitration center; London announces that no, it will be the dispute center; even New Zealand weighs in

## Tomorrow

# No Longer “Emerging” but “Arriving”

1. Greater and more conspicuous recognition among governments that good litigations and country capacity, enhances international commerce (cont.)
  - d. Emerging countries have for years been explicitly trying to improve legal systems for these reasons
2. Good versus bad litigation systems is key ingredient in these developments
3. Funding can materially improve capacity to deliver good litigation capacity
4. Good versus bad Funding systems is key ingredient in this aspect

## Tomorrow

# No Longer “Emerging” but “Arriving”

- E. The Next Five Years Promises More of the Same
  - 1. Continued Information Spread
  - 2. Continued Expansion of Market Demand
    - a. Increased awareness
    - b. Increased track record
    - c. Increased credibility
    - d. Increased data on industry and markets
    - e. Ongoing developments of newer products and new services
    - f. New jurisdictions developing awareness and need
    - g. Ongoing economic complications, and aftermath of current complications
    - h. More rules and regulations for industry and market

## Tomorrow

# No Longer “Emerging” but “Arriving”

3. Continued expansion of industry members and capacity
  - a. More sympathetic environment to grow
  - b. Market demand continues and actually increases
  - c. Better industry abilities, and more competition, and improved pricing structures and products
  - d. Barriers to growth Continue to Exist But are Addressed, Lowering Barriers
    - 1) Generally High entry barriers
    - 2) Conflict barriers
    - 3) Appetite for risk barriers

# The Future

## A. What Does the Future Hold?

1. The Future can in fact be projected with some confidence, at least shorter term, given what is going on now, visibly and sometimes not yet visibly, and what seems clear from that and the needs.
2. This projection is best done for the next five years.
3. In general, 2012 will continue what 2011 began, with giant steps forward on a number of fronts, with ongoing factors illustrated above, and then, the next years, 2013 – 2016, will in good part build on the platforms laid in 2011 and 2012.
4. Specifically, the areas of development will include:
  - a. Specialists shall appear who counsel claimants, their lawyers and sometimes Funders and others, on what is best in a particular transaction, and more generally on different issues
    - 1) Some parties do something like this now, principally brokers
    - 2) But independent and qualified specialists will appear, such as independent professors, do fill this space more broadly, more independently, and otherwise, in general, with good prospects of making good contributions (e.g., Professor Maya Steinitz at the University of Iowa Law School)



# The Future

- b. More information about the industry and the market will develop, dramatically, either voluntarily or involuntarily, so that more informed analysis and decisions can be made
  - 1) With this, better communication and analysis of this information will grow, through the internet, through associations and groups, and other means.
- c. Many more “rules and regulations” and guidelines will pop up
  - 1) The UK Code will be a talking piece and punching bag and model for some of this growth, especially for Rules created by the Industry itself.
  - 2) A global set of rules, as opposed to the UK Code concentrating on UK Rules, will be established by global players in the industry
  - 3) Bar associations and groups, such as the New York City Bar Association, and the American Bar Association, and the Solicitors Association in the UK, will continue to analyze and produce opinions in the area that will create guidelines, and rules.
  - 4) Legislation will appear in some jurisdictions, such as in various States in the US where some have already started to appear which concentrate on consumer Funding.

# The Future

- d. "Specialization" will be a driving force throughout
- e. Funds will become more specialized, in certain practice areas or a single practice area or a portion of a single practice area, in certain jurisdictions or slices of jurisdictions, and otherwise.
- f. Collaboration and sometimes consolidation among Funds will be part of the specialization growth.
- g. "Services" will grow as it becomes more linked to the funding of Products, and actually will develop as a separate stand-alone component of the Funding and other industries.
- h. At the same time, natural affinities and combinations will develop, such as Burford acquiring its ATE insurer, or a Fund acquiring or joining with one or more legal outsourcers.
- i. New Products will continue to develop and become established, such as with a product for the defendant, and a product for the party who can afford to pay the legal fees but wants to offload that and the risk.
- j. New Services will develop, such as Funders being willing and interested in providing a professional integrated service to enhance the claim, and reduce the costs.

# The Future

- i. Evaluation of risks in the Dispute arena will continue to grow in sophistication and reliability and quantification, through use of scientific methods as well as application of experience and judgment.
  - 1) Risk Centers are in one way or another becoming parts of Funders operations, and will have independent value
- j. Old doctrines will grow and change to accommodate today's circumstances and needs, or be discarded, that have been governing before.
  - 1) "Control" as it now stands will, as an important and overriding illustration, be discarded, and replaced by doctrines which allow control, and allow acquisition of claims, but are accompanied by other rules and changes to deal with this newer situation, as indicated below.
  - 2) Changes to "control" will spin off changes in other rules and regulations, such as the responsibility of the Funder to the Court and the parties, the price of Funding, the attorney client and work product doctrines, the rights and obligations of the lawyers, the rights of the Funder.

# The Future

- k. Local and national and international governments and governing bodies will recognize the importance of Funding—as a product and service in itself, and as a factor in commerce of legal systems, as well as ordinary commerce—and find ways to improve its development, its regulation, and its use.
- l. Lively debates and discussions will continue to be part of the picture, with certain organizations, such as the US Chamber of Commerce, continuing to be most vocal and most concerned about various interests of parties, particularly defendants, whose interests need protection.
- m. Competition will increase, along with collaboration needed in a newer industry, and favorable effects will occur on prices, availability of product and services, and other aspects.
- n. That part of the industry which is interested principally individual investments in claims, on a continuing basis but with each investment being on a “one off” basis—as opposed to institutions dedicated to the investment area and working with a pool of capital – will continue and expand its interest and members and activity.
- o. The industry of Third Party Funding will itself become recognized and accepted as sustainable, long term, industry.