



Litigation Funding for Insolvent Estates

Woodsford Litigation Funding Insight

Access to Justice for Insolvent Estates

Third-party funding has long been recognised as a tool enabling access to justice for impecunious claimants which would otherwise be unable to afford the significant legal costs involved in pursuing large commercial claims.

An insolvent estate is the quintessential impecunious claimant – it may have good claims against deep-pocketed defendants, but due to a lack of resource those claims may not be pursued at all or they may be settled for significantly less than their true value. Legal claims are often the most valuable assets in an insolvent estate and it benefits both creditors and insolvency practitioners to unlock and realise that value.

In 2015, following his review of litigation costs in the UK, Lord Justice Jackson noted, specifically in relation to insolvency claims and addressing the need to maintain access to justice, that: “In larger cases IPs will be able to take advantage of third party funding, which is a new arrival on the litigation scene”. In fact, litigation funding had been available to insolvency practitioners for many years prior to 2015, but even in 2020 it is still a relatively under-utilised tool in an insolvency practitioner’s armoury.

Litigation funders and insolvency practitioners can be, and are, a very happy marriage; one has access to numerous legal claims but limited funds and the other has funds to unlock and support those claims. Where third-party funding has been used by insolvency practitioners to date, the outcome has been beneficial for the funders, the insolvency practitioners – particularly in terms of fee generation – and the creditors alike.

The Basics of Litigation Funding

Litigation funding, also known as “litigation finance” or “third party funding,” is simply an alternative means for insolvent estates to fund the costs of a legal dispute.

Rather than the insolvent estate paying the costs out-of-pocket (which, given the nature of the insolvent estate may well be impossible) or a lawyer proceeding on contingency, a commercial litigation funder finances the cost of the litigation in return for a share of any recovery made through the proceedings.

This kind of funding is typically non-recourse—if the claim is lost, the claimant is not liable to repay the investment of the funder. Thus, in a typical funding arrangement, the litigation funder shoulders the majority, if not all, of the risk.

In addition to benefits relating to resourcing, litigation funding can also have substantial strategic benefits and change the

dynamic of a dispute. For example, a funded insolvent estate will often be able to achieve a better settlement outcome more quickly than an unfunded claimant. This is principally because the defendant, upon becoming aware of the claimant’s funding, will appreciate that the tactic of depleting a

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claimant’s resources to stifle a claim would likely fail. A funded claimant is also less likely to feel any financial pressure to accept a low settlement offer. Further, the support of a sophisticated professional funder, signals to a tribunal and the defendant that an objective third party with substantial expertise and experience in disputes, is willing to risk its own capital because of the merits of the underlying claim and the prospects of making a recovery.

Although the conduct and control of a funded claim rests firmly in the hands of the claimant (and its lawyers), a litigation funder like Woodsford, which is staffed by expert litigators with decades of international law firm experience, can also be a valuable resource to the claimant team throughout the life of the claim. For example, a third-party funder often assists the claimant’s legal team with key strategic decisions and can attend arbitrations or other settlement discussions, which often helps the claimant to demonstrate its financial strength and its stomach for what may become a lengthy dispute.



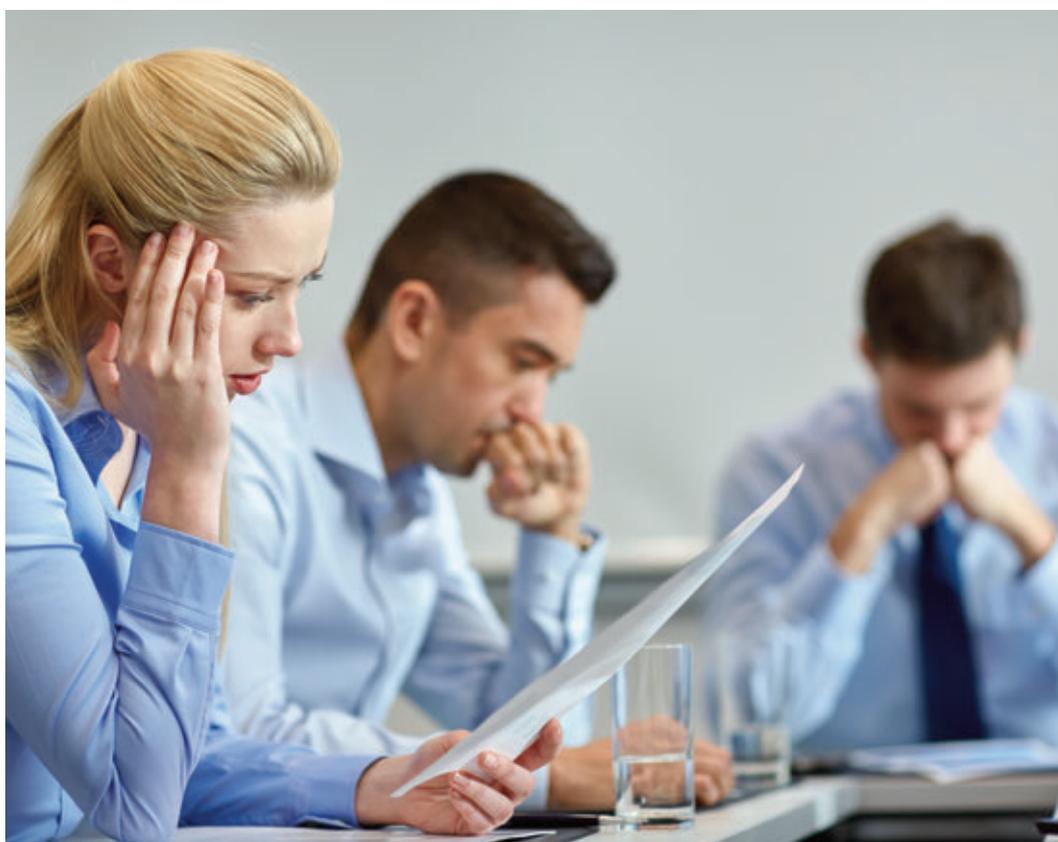
Seeking funding for claims

Given that Insolvency Practitioners are duty-bound to act in the best interests of the creditors as a whole, and that it is often in the best interests of the creditors to pursue the estate's claims, it is likely an extension of that duty to explore and seek the most financially advantageous method of financing those claims.

Insolvency practitioners' first port of call when seeking funding for a legal claim is often the creditors of the estate itself. Clearly, creditors have a vested interest in recovering the amounts owed to them by the insolvent estate and that may involve attempting to realise any contingent assets that the estate may have, including any legal claims. However, while the creditors may be willing and able to provide funds to assist in pursuing a legal claim, they often lack the appetite for litigation risk (and particularly adverse costs risk over which

they have no control) and fear the possibility of 'throwing good money after bad'. There may also be the added complication for the insolvency practitioner of having to deal with a number of different creditors and all of their competing interests and requirements.

Seeking funding for claims from a professional third-party litigation funder simplifies the process considerably. Litigation funders have significant capital resources and appetite for litigation risk, are professional and experienced in bringing legal claims (if the correct funder is chosen) and can relieve creditors from the frequently onerous and time-consuming task of financially backing, and then monitoring, litigation. For the insolvency practitioner, it brings the added benefit of dealing with only one funder rather than a disparate group of creditors.



What funders look for

The process of obtaining funding is relatively simple. A third-party funder like Woodsford pays part or all of the costs of funding a claim in exchange for a participation in a successful result. But certain questions come up about the process for those going through it for the first time. Often that process can differ from funder to funder.

Litigation funders maintain relationships with leading law firms, but ultimately the agreement to fund a case is made with the claimholder itself. The funder is ordinarily a passive investor; its role is largely limited to

Case intake includes initial case discussion, getting an appropriate non-disclosure agreement in place so that confidential communications are protected, and the

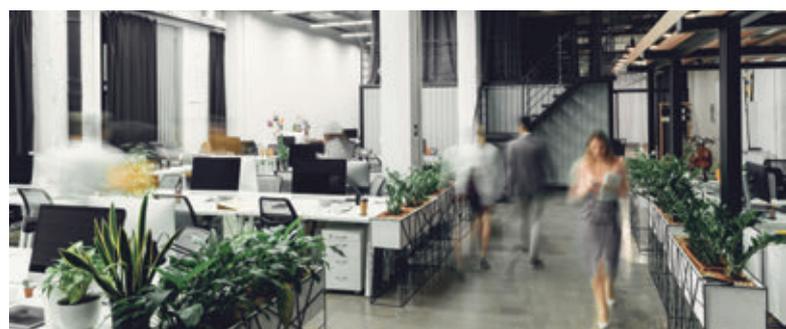
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negotiation of a term sheet. This phase can take as little as a week or ten days in the event that the case is totally prepared, and the parties quickly reach agreement on terms.

The diligence process of a case looks a lot like the consideration law firms give a case when deciding whether to represent a client – especially if they are considering acting on a full or partial contingency. The goal is to understand the risks and potential upsides of a case and select cases that are likely to succeed and result in a meaningful return for the claimant and funder. The first step in diligence is reviewing the claim itself – the parties, the dispute, the facts and the applicable case or regulatory law. Funders will also consider the likely defences that will be raised and the obstacles and pressure points present in a given jurisdiction or fact pattern. Finally, a funder like Woodsford will look at the facts that a claimant possesses and consider what facts might be unknown and how they might affect a case.

providing capital. Litigation funders do not dictate case strategy or settlement, although as previously noted they can assist in that process. They do not interfere with the relationship between counsel and its client. Claimants draw down what they need from a funding commitment and are generally not required to use all the capital committed by the funder. Funders rarely work with defendants, but instead provide financing to claimants with valuable claims.

There are three main steps in the process from initial conversation to financing a case: 1) intake, 2) diligence and 3) approval.



The second step in diligence is considering the likely damages. This includes a review of the damage theories and their application to the known facts. Damage theories should be realistic and have a firm basis in industry norms or prior cases. Investors are looking for a sizeable difference between case damages and the amount of funding being requested – too narrow and the insolvent estate will not receive a sufficient return for its claim, creating a misalignment of interest. Finally, a funder will look at the timing of a potential award or settlement. The longer it takes to resolve a case, the less present value that result has.

The third step in diligence is reviewing the law firm running the claim. A funder considers the experience, expertise, track record and resources. Funders greatly value



firms and more specifically, individual lawyers that have shown they can win similar claims. This does not always mean large or national practices – boutiques often have similar or superior litigators who are strongly incentivised to win. Funders also consider the firm’s pricing and whether it is seeking to participate in the outcomes by discounting their fees and accepting a contingent participation in the recovery. That financial participation by the firm



informs how the financial terms interplay, but also signals to the funder how strongly the firm believes in the case.

The fourth step is the budget – funders need a breakdown of the amounts of financing being sought for fees and disbursements. Funders want to make sure that the budget is realistic for bringing the case to completion, which can mean adjusting the budget down or up. It’s more common that a funder will recommend increasing the budget to make sure that the Claimant has sufficient resources to conclude the case.

The fifth step is understanding any enforcement and/or collection risk – foreign or insolvent defendants can result in uncollectible judgments. And the final step of the review is the narrative itself. Funders understand that general principals of equity and a sympathetic claim are usually better investments.

After the diligence is completed satisfactorily, and a conditional litigation finance agreement concluded, the investment will be taken to an approval committee for review. Approval is another set of eyeballs, another perspective and another set of questions. If the case is well prepared, the risks identified and explained, and the budget appropriate, the investment is usually quickly approved, closed and funded.

Working with Woodsford

Woodsford is one of the longest standing litigation funders in the world and was one of the founder members of the Association of Litigation Funders, an independent body that has been charged by the UK Ministry of Justice, through the Civil Justice Council, with delivering self-regulation of litigation funding in England. We have liaised with law reform bodies around the world on best practices. Woodsford has a presence in London, Philadelphia, New York, San Francisco, Toronto, Calgary, Tel Aviv,

who between them have extensive experience of a wide variety of litigation, arbitration and investments, and are well-placed to understand and assist with any claims that insolvency practitioners might wish to pursue.

Woodsford can fund insolvency practitioners on a case-by-case basis or, if an insolvent estate has a number of potential claims, Woodsford can fund some or all of them on a portfolio basis. In this way, Woodsford can facilitate the administration of an insolvent estate by covering not only the legal fees required to advance claims, but also any defence and administration costs and, importantly, the insolvency practitioners' fees. Woodsford's funding is provided on a non-recourse basis and also covers the adverse costs risk so if the estate's claim fails to result in a recovery, the creditors of the estate suffer no loss beyond the debts already owed to them by the estate. Woodsford's funding effectively provides insolvency practitioners with a no-risk solution.



Singapore and Brisbane and is staffed with former lawyers, accountants and bankers

Conclusion

Insolvency practitioners are duty-bound to act in the best interests of the creditors of the estate and it may be that those interests are best served by realising valuable legal claims which vest in the estate. Third-party funding will often be the key that allows those assets to be unlocked, realised and shared with creditors. If they haven't

already done so, insolvency practitioners and insolvency-focused private practice lawyers would therefore be well-advised to familiarise themselves with litigation funding and the reputable professional litigation funders operating in the market. Woodsford stands ready and willing to assist insolvency practitioners in this regard.

About the author

Charlie Morris is Woodsford's Chief Investment Officer, EMEA & APAC. He is an English-qualified senior lawyer with significant experience of handling high-value international litigation and arbitration across a wide range of sectors, both in his capacity as a lawyer and as a litigation funder. As Chief Investment Officer, EMEA & APAC, Charlie has overall responsibility for Woodsford's investments outside of the Americas and heads up Woodsford's Asia Pacific practice.

Before joining Woodsford in March 2016, Charlie was a lawyer at London disputes boutique Enyo Law LLP, having qualified previously at international firm Addleshaw Goddard LLP. Charlie splits his time between London, Singapore and Hong Kong.

About Woodsford Litigation Funding

Founded in 2010 and with a presence in London, Philadelphia, New York, San Francisco, Toronto, Calgary, Singapore, Brisbane and Tel Aviv, Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with

world-class legal expertise. Woodsford is a founder member of the Association of Litigation Funders of England and Wales.

For further information, visit www.woodsfordlitigationfunding.com or email **Charlie** (cmorris@woodsfordlf.com) directly.