



THIRD PARTY LITIGATION FUNDING IN THE UNITED KINGDOM:

A Market Analysis



CONTENTS

Introduction & Executive Summary.....	1
Evolution of Litigation Funding.....	4
The Litigation Funding Market.....	8
Trends.....	11
Conclusion.....	15
Annex I: The Litigation Funding Market.....	16

“ I accept that third party funding is still nascent in England and Wales and that in the first instance what is required is a satisfactory voluntary code, to which all litigation funders subscribe. . . In the future, however, if the use of third party funding expands, then full statutory regulation may well be required, as envisaged by the Law Society.”

- Jackson LJ, 2009 Review of Civil Litigation Costs

INTRODUCTION & EXECUTIVE SUMMARY

As a vital part of its mission to prevent exploitation and abuse of the civil justice system for profit, the Justice not Profit campaign has conducted an in-depth market analysis into third party litigation funding (TPLF) in the United Kingdom. The resulting report details the rapid expansion of the TPLF market since Lord Justice Jackson's 2009 Review of Civil Litigation Costs. Lord Justice Jackson concluded in his review that if the use of TPLF expands, a voluntary code of conduct may no longer suffice for industry oversight, and "full statutory regulation" may be required. As this report indicates, the expansion has become a reality since 2009, and the regulation referred to by Lord Justice Jackson has become a necessity.

Report highlights include the following findings:

- Based on publicly available information, global assets under management by 16 TPLF providers operating in the UK are over £1.5 billion (bn). The actual figure is likely higher, given the lack of publicly available information about the operations of some funders.
- Current known assets under management of approximately £1.5 bn represent a 743% growth (from £180 million) since 2009, the year of Lord Justice Jackson's report.
- The values of cases receiving funding have continued to increase, with minimum claim values set out by funding firms rising to between £3 million (m) and £5 m. Top-tier

Snapshot of Funder Findings

- 16 TPLF providers examined in the UK
- Over £1.5 billion in global assets
- 743% growth since 2009

funders often make investments in cases which have even higher potential values.

- Litigation financing products in the UK are currently unregulated. The Association of Litigation Funders (ALF) provides a voluntary Code of Conduct for its seven member companies. The code is self-

policed and does not require public disclosures or disclosures to courts and litigation opponents; adherence is not a requirement in order to fund claims. Potential penalties for breach include a fine of up to £500, payable to the ALF and/or termination of ALF membership. Imposition of these penalties will not bar a TPLF provider from funding claims.

- The TPLF industry is increasingly globalised: foreign participants from the US and Australia are partnering with UK entities to engage in TPLF in England & Wales; at the same time, UK funders are financing cases around the world.

- Funders are diversifying their investments, which now include competition, securities, intellectual property and arbitration cases as well as new products such as global judgment enforcement.
- Funders are increasingly financing portfolios of cases, grouping higher risk with lower risk claims. This may be a first step towards attempted securitisation of claims, creating a new class of unregulated financial products and presenting the risk that courts may be required to deal with cases that would not be brought if assessed only on their own merits.

Defining Third Party Litigation Funding (TPLF)

The UK Association of Litigation Funders (ALF) defines litigation funding as a transaction in which “a third party provides the financial resources to enable costly litigation or arbitration cases to proceed. The litigant obtains all or part of the financing to cover its legal costs from a private commercial funder, who has no direct interest in the proceedings.”¹

In return for providing the monetary resources up-front for the litigation, the funder receives a portion of the settlement or judgment. If the case is lost, the funder recovers nothing. According to one funder, a typical return is 20-40 percent of the expected gross judgment or settlement of the case, with an uplift if the case takes longer than expected to be resolved, or costs more than initially budgeted.² For example in 2014, Burford Capital publicised an arbitration outcome in which it funded Rurelec PLC in a dispute against the government of Bolivia.

Burford earned a 73% return on its initial investment of \$15 m, receiving a total of \$26 m of the award.³

Funders have so far mainly favoured low risk, high reward claims arising from commercial disputes. As one US commentator noted, they focus on “the cases that are the most likely to be successful and have the highest potential damage awards. . .”⁴ Litigation funders can be individuals and small investment firms that do not specialise in litigation, but most often are large hedge funds or financing firms either dedicated to litigation funding or with substantial litigation funding operations.

Methodology

This TPLF market analysis is not exhaustive, but instead focuses on 16 litigation funders that have significant activities in the UK.⁵ This subsection of the industry is inclusive of both funders with their origins in the UK domestic market and affiliates of global firms. Additionally, these organisations have their primary activity in

litigation finance and publish information about their operations. As a result, funders active in the UK who do not publicly disclose any financial information, as well as United States and Australian-based funders whose primary operations are not in the UK, have been excluded from examination, as have financial institutions that invest in litigation finance on a case-by-case basis. However, certain foreign funders that have established UK subsidiaries or operations are included in this study, such as Bentham Europe, a joint venture between global market leader Bentham IMF of Australia and New York-based hedge fund Elliott Management Corporation.

The financial data included in this report are sourced from publicly available documentation including, but not limited to: annual reports and regulatory filings; newspapers; magazine articles and interviews; the ALF website; funders' websites and promotional material; and scholarly publications. Data shown represent the global assets of the analysed companies. All years demonstrated represent financial years as reported by the companies analysed. The litigation funding industry is not wholly transparent about its operations and financial data; thus, an analysis based on publically available information likely under-represents the size and scope of the TPLF industry.

The Bottom Line: Growth of the Litigation Funding Industry

The analysis of TPLF reveals that the global assets under management by litigation funds active in the UK are over £1.5 bn, up 743% from 2009 (£180 m).

This substantial expansion is the result of five years of significant growth both in the size of existing industry participants and in the number of litigation funders active in the UK. Since only a limited number of companies make their financial results public, the actual number is likely to be considerably higher.

Reflecting on the growth of the industry, Nick Rowles-Davies, Managing Director of Burford Capital, opined in the *Global Legal Post* that "the term 'nascent' is perhaps one that could be confined to the past".⁶ The emergence of large funders with over £100 m in assets and the surge of new entities in the market suggests that the industry is beginning to reach a critical mass at which self-regulation is no longer adequate.

In the following pages, this report will provide an examination of the historical evolution of litigation funding and the current regulatory framework, an economic analysis of the litigation funding market and an analysis of trends affecting market growth.

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EVOLUTION OF LITIGATION FUNDING

Historically, what is now described as litigation funding was not permitted under English law. Since the 1275 Westminster Statute, champerty, maintenance and barratry (all predecessor versions of modern litigation funding) have been prohibited on public policy grounds.

Maintenance is the “procurement, by direct or indirect financial assistance, of another person to institute, or carry on or defend civil proceedings without lawful justification”.⁷

Champerty is the performance of maintenance for profit, or the receipt of “a share of the proceeds of the action where property is in dispute”.⁸

Barratry, meanwhile, is the ‘stirring up’ of “suits, quarrels, or parties”.⁹

Thus, the outlawing of these activities amounted to a ban on the financing of others’ legal actions for profit.

The classic definition of the public policy concern leading to the prohibition of litigation funding was provided by Lord Denning, who in 1963 stated:

“The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses”.¹⁰

The Criminal Law Act 1967 abolished both the crimes and torts of maintenance, champerty and barratry on the grounds that the risks could be addressed in other ways. However, the Act states that this abolition “shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal”.¹¹ The concepts still exist, therefore, and a funding arrangement deemed to be contrary to public policy can still be found to be illegal on grounds that it constitutes maintenance or champerty. Although English law no longer prohibits litigation funding *per se*, it recognises that in some circumstances it can be contrary to the public interest and illegal.

Developments Regarding Litigation Costs in the UK

The growth of litigation funding has coincided with significant changes to the way litigation in the UK is paid for.

Whereas traditionally litigation was often funded by the litigants themselves (directly or through their insurance) or through civil legal aid, recent years have seen the British government experiment with a variety of different systems, with the aim of

balancing “access to justice” without unduly facilitating unmeritorious litigation and overburdening the courts.

The systems explored have included conditional fee agreement, or CFAs, introduced in 1990, which involve lawyers receiving a discounted percentage of their ordinary fees if the case is unsuccessful (possibly as low as 0%—also known as a “no win no fee”), but if the case is successful they receive their ordinary fees and may also receive a success fee or “uplift” calculated as a percentage of those ordinary fees. The maximum success fee permitted is 100%.

In November 2008, Lord Justice Jackson was tasked with conducting an independent review of costs and funding in civil litigation in England and Wales. His final report of December 2009 contained recommendations on a wide range of issues. Certain of these recommendations were taken up by the Government and eventually implemented by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO Act), subordinate legislation and changes to the Civil Procedure Rules.

The changes introduced through LASPO included the lifting of the ban on “damages based agreements” or DBAs, which permit lawyers to claim a percentage of any eventual reward as payment for handling the case. These are equivalent to US-style “contingency fees”.¹² LASPO introduced certain caps (25% in personal injury, 35% in employment and 50% in all other cases) and other regulations setting out the terms under which DBAs may be used, which operate in conjunction with the mandatory regulatory and ethical obligations that practising lawyers are required to abide by.

Emergence of the Litigation Funding Market

In parallel, third party funding has become increasingly common in the UK.

Favourable rulings by Australian courts, such as *Campbells Cash & Carry Ltd v Fostif Pty Ltd*¹³ and *QPSX Ltd v Ericsson Australia Pty Ltd*,¹⁴ encouraged the emergence and development of the professional funding market in other jurisdictions, and before long international funders were also participating in cases in the UK.

English cases, such as *Arkin v Borcard Lines Ltd*,¹⁵ were important milestones in the gradual development of professional third party funding. This case surveyed the many instances when funding arrangements had been used and accepted over the prior years and restated and established principles regarding the liability that funders may have for adverse costs in the event that the litigation they support fails.

Initially, participation in the professional litigation funding market was by major financial institutions including established funders based in other jurisdictions (e.g., Australia and the United States) and by global banks and insurers such as Swiss Re and Allianz. In fact, some of the current global providers of litigation finance services were ‘spun-off’ from these institutions into independent companies. Most major financial institutions seem to have now left the industry, though some still maintain small interests in market participants.

Jackson LJ: Regulation Should Be Considered After Industry Expansion

The Jackson report also considered litigation funding and found that it had a place among the variety of options open to claimants. However, Jackson voiced several key concerns about litigation funding in accord with the Law Society's views:

- Funding is only **available** where a substantial financial remedy is sought with a high likelihood of success.
- There is a lack of protection for recipients of funding from **withdrawal from the arrangement by the funder.**
- There is a lack of protection for recipients of funding from the funder's **insolvency.**
- There is a lack of protection for defendants and courts from **liability for adverse costs.**

As a result, he proposed:

- **A voluntary code:** a "code to which all litigation funders subscribe", which became the Code of Conduct of the Association of Litigation Funders (ALF), drafted with the Civil Justice Council, to which seven funders currently subscribe.¹⁶
- **Future consideration of statutory regulation:** support for "full statutory regulation" in the case of market expansion, particularly to group actions by consumers.¹⁷

Current Regulatory Picture

At present, litigation funding is offered by professional financial services firms, but the service offered is an unregulated financial instrument. Funders which are registered and based in the UK are regulated to some extent by the Financial Conduct Authority as investment firms, but the litigation funding product as such is not. In his 2009 Review of Civil Litigation Costs, LJ Jackson suggested that if statutory regulation were implemented, it should be under the Financial Services Authority (the regulatory functions of which have now been inherited by the Financial Conduct Authority).

Of relevance to the UK, the European Union has adopted a non-binding Recommendation for Member States which includes several safeguards regarding litigation funding in relation to collective redress cases.¹⁸ This includes a recommendation that the claimant party in collective cases should be required to "declare to the court at the outset of the proceedings the origin of the funds that it is going to use to support the legal action" and that it should be "prohibited to base remuneration given to. . . the fund provider on the amount of the settlement reached or the compensation awarded unless that funding arrangement is regulated by a public authority to ensure the interests of the parties". At present, these recommendations have not been implemented in the UK.

Association of Litigation Funders (ALF)

The ALF is a private company limited by guarantee, owned and directed by its member firms. It administers a self-regulating Code of Conduct. Presently, the ALF consists of seven member firms.¹⁹ This membership represents less than one-third of the 25 funders estimated by Lord Beecham to be operating in England & Wales in 2013.²⁰ In addition to administering the Code of Conduct, the ALF acts as an advocacy organization which “actively engage[s] with government, legislators, regulators and other policy makers to shape the regulatory environment for litigation funding in England & Wales”. ALF members market their membership in the organization, urging claimants and their lawyers “to work only with those funders who are approved members of ALF”.²¹

ALF’s Code of Conduct includes, among other provisions, a capital adequacy requirement, a prohibition against interference with the lawyer-client relationship and conditions under which a funder may withdraw from funding agreements. Its members agree to disclosure requirements towards claimants, including a requirement that the agreement must state whether and how the funder may provide input into settlement decisions.²² It does not impose any disclosure requirements to the court or opposing parties. It also incorporates a process for complaints. If a complaint against an ALF member for violating the code is found to be meritorious under ALF’s complaint procedure, the maximum fine is £500, payable to ALF.²³ A further potential penalty for noncompliance is termination of ALF membership, at the discretion of the organisation’s directors, who are representatives of the funder members.²⁴ Termination of membership does not prohibit the funder from continuing to fund claims, and many active funders choose not to be members at all.

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THE LITIGATION FUNDING MARKET

Based on publicly available information, the Justice not Profit campaign estimates that the assets under management (AUM) held in aggregate by litigation funders active in the UK is over £1.5 bn.²⁵ However, this figure is limited by the absence of information that is not required to be disclosed and the registration of some funders in off-shore jurisdictions, and therefore is likely to be a considerable under-estimation.

One funder alone, Burford Capital, has £357 m (\$500 m USD) in assets under management.²⁶ Moreover, the participation of New York-based hedge funds like Elliott Management Co. (AUM £16.36 bn)²⁷ and Eton Park (AUM £5.48 bn),²⁸ now in partnerships with Bentham Europe and Burford Capital respectively, suggests a broadening of interest in the litigation funding market and of increasingly financially significant backers for funders.²⁹ A number of major global financial institutions also invest in litigation funding, which demonstrates that such funding is seen as a lucrative emerging industry. Litigation funding has provided investors a new opportunity that allows them to hedge market risk, as investments into litigation finance are often countercyclical and do not follow general market trends.³⁰

Five years of significant growth, both in the size of existing industry participants and in the number of total participants, has resulted in 743% growth of litigation funding from £180 m in 2009 to £1.5 bn in 2015 (see Figure 1), based on aggregate financial information from public sources.

The pattern can especially be seen in the assets of the largest funders (in Figure 2): all demonstrate a substantial year-on-year increase in available capital. Growth of 743% indicates a significant increase in funding capability, increase in the value of individual claims and profits.

CAPITAL IN LITIGATION FUNDING

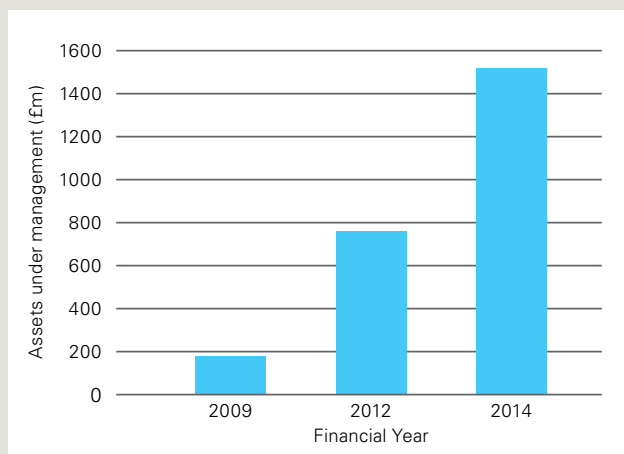


Figure 1. Assets under management in the UK litigation funding industry³¹

ALF MEMBER CAPITAL

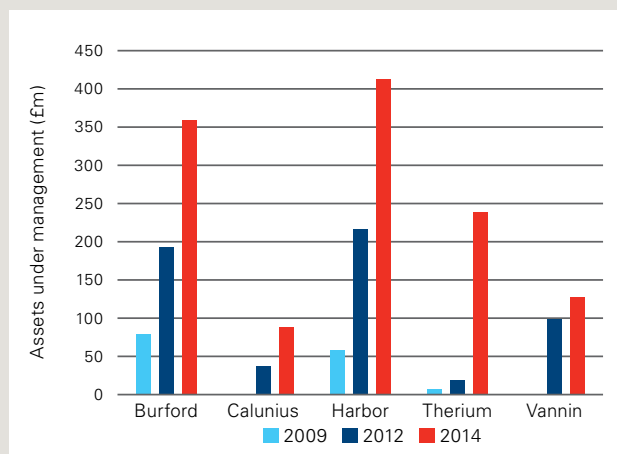


Figure 2. Assets under management of top five ALF funders³²

INDUSTRY FACTS

Total funders assessed in the UK	16
ALF members	7
Public companies	3
Funders with readily available financial information ³³	3
Funders with any available financial information	12
Funders domiciled in 'offshore' jurisdictions ³⁴	8

Market Characteristics

The litigation funding market has a number of larger funders, most of whom are ALF members, as well as a number of smaller funders who have elected not to join the ALF. The proportion of assets under management by the largest five ALF members is depicted below in Figure 3, showing that most assets remain concentrated among a core group of funders.

Two of the largest funders operating in the UK, Burford Capital and Juridica Investments, are public companies on AIM—the London Stock Exchange's international market "for smaller, growing companies"—and publish annual reports. The income and operating profit figures for both are depicted in Figures 3 and 4. Burford Capital has experienced a parallel increase in income and operating profit, with profit rising by 400% from 2008-9 to 2013-14. Juridica's income and operating profits similarly track in parallel, hitting peak in 2013.

ALF PROPORTION OF ASSETS UNDER MANAGEMENT

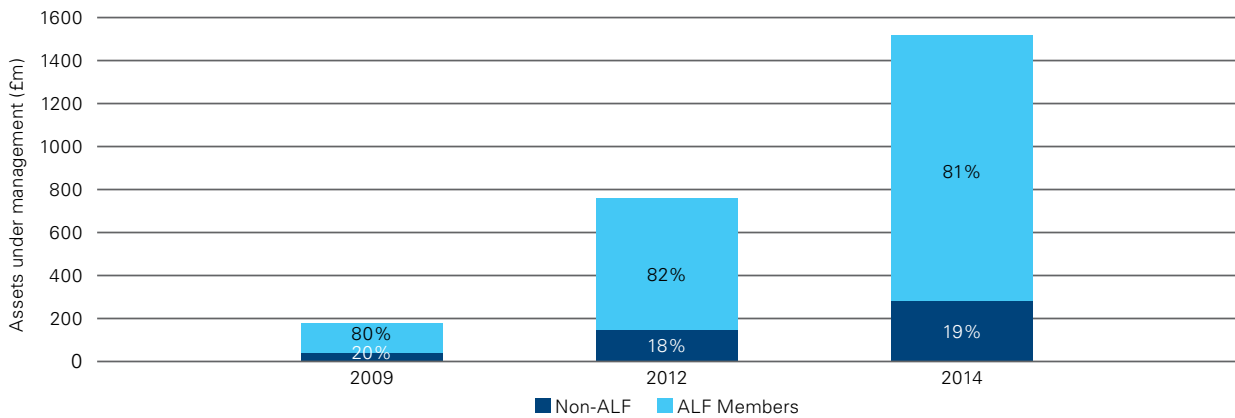


Figure 3. Proportion of total assets under management held by five ALF members

BURFORD CAPITAL LTD

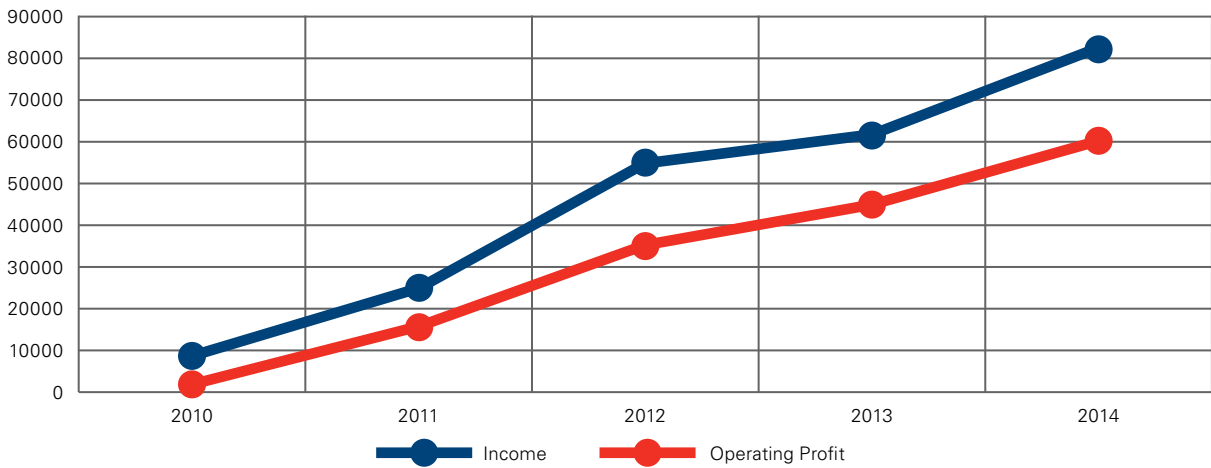


Figure 4. Burford Capital financials³⁵

JURIDICA INVESTMENTS LTD

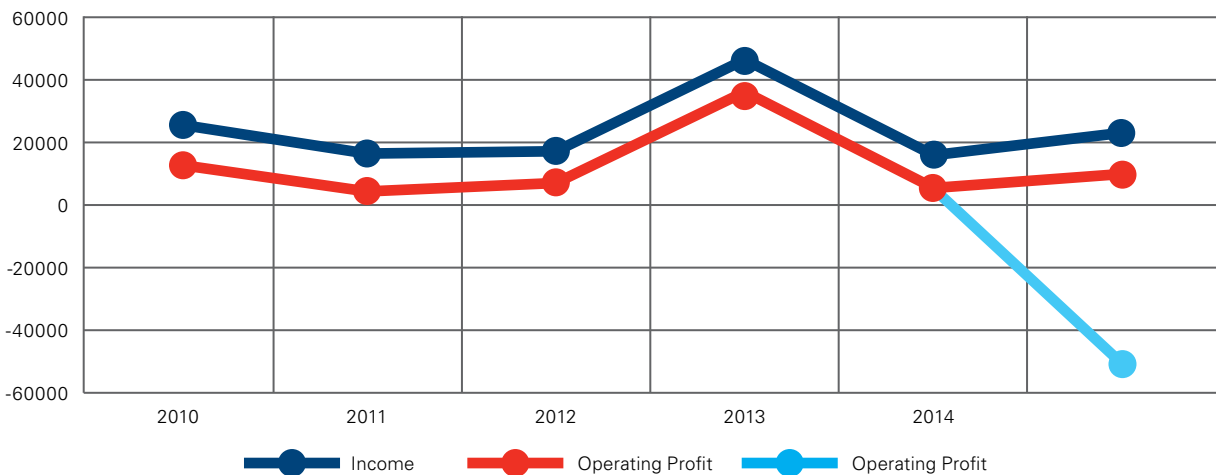


Figure 5. Juridica Investments financials³⁶

TRENDS

A number of trends have become visible on the basis of the market analysis, which will be discussed in the following pages.

A Hospitable Market

Lucrative opportunities in litigation finance have drawn an increasing number of market participants. This is particularly true for the growing UK market, which funders find increasingly attractive. This may be explained by the continuing success of existing market participants, and also by the evolving legal landscape. The judicial and public policy ‘blessings’ given to funding by case law and by the Jackson report have encouraged the industry and new opportunities have been presented by, among other things, the introduction of opt-out collective redress in the Consumer Rights Act 2015.

These opportunities for funders have emerged alongside the development of London as an international litigation and arbitration hub. With an attractive legal system (due to stability, quality, rule of law, language and geographic location), a significant proportion of international contracts are concluded under English law, and English courts are often chosen as the venue for the settlement of disputes. London has become a significant dispute settlement hub, and it now faces competition for this role.³⁷ Liberalising changes have occurred in order to maintain London’s attractiveness. Reforms include the establishment of a ‘financial list’ in the

Chancery Division of the High Court to hear large international financial services disputes³⁸ and the permission of non-legal ownership in legal services providers through the establishment of Alternative Business Structures.³⁹

The adoption of the Consumer Rights Act 2015 will likely also contribute to further emergence of class actions and litigation funding in the UK. The opt-out class actions it introduces in certain private actions in competition law (heard at the Competition Appeal Tribunal (CAT)) have been welcomed by claimant law firms and funders. For example, partners of Hausfeld & Co. LLP and Scott & Scott LLP have indicated their willingness to use it to bring substantial class actions⁴⁰ and a Hausfeld & Co. partner has indicated that he sees it likely that cases at the CAT will attract the interest of litigation funders.⁴¹

These changes, coupled with a continuing lack of regulation of litigation finance products, means that England & Wales makes a particularly attractive jurisdiction for litigation funders. The infrastructure and regulatory environment mean funders have been able to take advantage of a growing litigation environment as demonstrated by the significant growth of the industry as a whole, the number of participants and the successes of each individual firm.

Increasing Profits and Claim Values

Investment by large financial services firms such as Elliot Management Co. and Woodford Investment also show the wide-ranging targets in achieving market-beating income and returns on investment.

These funders make their figures publically available and show a significant rise in income over a one year period.

REPORTED INCOME BY THIRD PARTY LITIGATION FUNDERS — 2013–2014

FUNDER	2013	2014
Burford Capital	£60,660,000	£82,034,000
Juridica Investments	£12,856,000	£19,355,000

The values of cases receiving funding have also continued to increase with minimum claim values set out by firms rising to between £3 m and £5 m. Investments and claim values are linked: funders will typically have a required ratio between the quantum of the litigation claim and the investment as part of their investment criteria. This reportedly ranges from 4:1 to 10:1;⁴² for example, Harbour Litigation Funding typically requires expected damages of 10 times its investment.⁴³ Burford Capital has an average claim value of £5.3 m.⁴⁴ As a result, margins can continue to grow and improve the profits of funders.

Diversification and New Products

The expansion of the market has been complemented by several interesting developments in the industry. As available capital has risen, so have profits and the number of domestic and foreign participants. These expansions have resulted in increasing diversification and sophistication

of the financial products offered by funders. Sophistication has resulted in the evolution of litigation ‘funding’ to litigation ‘finance’ and the perceived reduction of the importance of case-by-case investment.⁴⁵ Instead, investments are increasingly complex and claims are bundled into ‘baskets’ or ‘portfolios’. In basket or portfolio funding, the funder finances several claims involving one corporate client or law firm, which diversifies the funder’s portfolio, mitigates problems of adverse selection, and allows funders to absorb losses more easily.⁴⁶ Burford’s 2014 Annual Report indicates that almost half (49%) of current committed capital is in portfolio arrangements. Single cases comprise 37%, and 14% is committed to “complex investments”.⁴⁷

As with any portfolio, investors will include a mix of lower and higher risk investments. In the litigation funding context, a higher risk investment is a case which is more uncertain or speculative, and which might present an unacceptable risk if viewed as a stand-alone proposition. However, where the rate of return is high enough, and the risk of loss can be offset again more certain cases, more speculative cases may be funded.

The bundling of litigation debt into packages held by funders could lead to the securitisation and sale of these packages to other investors. Should this prove successful, the incentives to have portfolios of cases (including speculative cases that might not be brought if assessed on their own merits) would also increase, potentially increasing burdens on the courts.

Besides the bundling of cases, litigation funders invest in a variety of areas of law and cases in multiple geographies. For instance, due to its high claim value, high budgets, and unclear champerty restrictions,⁴⁸ international arbitration has been a traditional market for funding.⁴⁹ In recent years, funders have

moved increasingly into general commercial litigation, including but not limited to competition, securities and contract litigation. In those areas, most funders have so far decided against investments in class or group actions, mass torts and personal injury claims. ALF member Calunius Capital has indicated on its website that “aggregating smaller claims can sometimes be the only way to make it commercially viable to bring a claim. Claim aggregation can take many forms, and the fund is flexible enough to consider them”.⁵⁰ The voluntary limitations imposed by funders may not be permanent and do not reflect these funders’ activities in other part of the globe. For example, funders such as Harbour Litigation Funding, which says it refuses class actions in the UK, actively fund them in jurisdictions such as Australia and New Zealand. Additionally, Burford Capital has announced new markets, such as enforcement of foreign judgments and a pilot small-case funding operation.⁵¹

In addition, where the largest and longer-established funders may have the resources to get involved in higher-value commercial litigation, other funders do not have the same resources or track record, and are more likely to diversify, including by investing in small or more speculative cases to earn a position in the market.

Globalisation

Litigation finance has grown to become a global phenomenon and the players are increasingly interconnected. Of the sixteen funders assessed, eight are domiciled in off-shore jurisdictions such as Jersey, Guernsey or the Cayman Islands.⁵² Beyond this, funders co-operate globally with firms such as Australian firm Bentham IMF. UK funder Harbour Litigation Funding finances cases in jurisdictions as diverse as the Netherlands, New Zealand, Australia, Cayman Islands and Singapore.

Positioning and Messaging

Besides litigation funders presenting and offering their products as mainstream financial services, they tend to publicly convey two key messages.

The first is that they provide access to justice. This claim is questionable, because major litigation funders clearly state in their investment strategies that funding is available almost exclusively for high-value commercial litigation and arbitration.

A second key message is that litigation funding is filling a gap in the market. They argue that their services are required in response to the continuing development of a litigation and claims culture, including the rising cost of litigation, rising liability awards and a pattern of increased frivolous legal action in the UK. However, there are legitimate questions about whether TPLF is a contributing factor to, rather than a response to, this increasing claims culture.

Public Interest Issues with Litigation Funding

Despite litigation funders’ financial success and the steep growth of the industry, the manner in which TPLF has developed does appear to present some risks and the industry is not without its critics. High-profile setbacks in certain cases (such as the Ecuadorean Lago Agrio litigation against Chevron financed by first Burford Capital and then Woodsford Capital,⁵³ or the Harbour Litigation Funding’s *Road Chef* litigation) have demonstrated certain shortcomings,⁵⁴ including the inadequacy of self-regulation in preventing some abuses.

In September 2013, the English Commercial Court in *Excalibur Ventures LLC v Texas Keystone* dismissed what were described by Lord Justice Christopher Clarke as “a range

of bad, artificial or misconceived claims” with a “grossly exaggerated” quantum of US \$1.65 bn.⁵⁵ The litigation was supported by three litigation funders, two of which were US companies and the third was a company incorporated in the Cayman Islands. None were members of the ALF and there were doubts over whether one of them even continued to exist at the time the judgment was handed down.

It was announced that Argentum Capital had left the ALF in 2014 amid concerns about the source of its capital.⁵⁶ It was also delisted by the Channel Islands Securities Exchange.⁵⁷ Its main investor was reported to be Centaur Litigation, which was reportedly under investigation by the Hong Kong authorities based on allegations that some of its capital originated from a Ponzi scheme by Brendan Terrill, the owner of Buttonwood Legal Capital Limited.⁵⁸

These developments illustrate that the existence of the ALF will not necessarily prevent less reputable funders entering the market, particularly as the market grows and more funders are competing for more speculative cases.

The propensity to take portfolios of cases (including low and high risk cases), and the likelihood of such cases being packaged and securitised, also adds, or will continue to add to the overall volume of more speculative cases being brought through the courts.

For defendants, this means an increasing volume of litigation to defend, which has its own cost to the economy. Even though cost shifting rules prevent overly speculative litigation can, funders are protected under English costs rules. They are only liable up to the amount they invested, regardless of the expense they caused a defendant by bringing a meritless claim. For this reason, funders may have an incentive to take a speculative case and press for a settlement, knowing that even if they lose, the defendants rarely recover the actual costs of defense (as opposed to the court-awarded costs). In many cases, this can force defendants to settle while giving the funders the advantage of a capped risk.

Finally, as more cases are taken on behalf of smaller and less sophisticated claimants (including consumers), there is a greater risk that funders may exercise control and potentially direct the litigation for their own benefit, as opposed to the claimants, giving rise to conflicts of interests.

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CONCLUSION

The “nascent” industry to which Lord Justice Jackson referred no longer exists. Since the reforms resulting from Jackson LJ’s review, the third party funding industry has grown significantly in terms of the number of market participants, the capital available to them, the types of disputes that are funded and the size of investments made. Initially, participation in the market was by major financial institutions including established funders based in other jurisdictions (namely Australia and the United States) and by global banks and insurers. Specialised financing firms now dominate the funding market in England & Wales.

Industry growth of companies in the UK, from global AUM of £180 m in 2009 to £1.5 bn in 2015—reflecting growth of 743%—establishes beyond reasonable doubt that the litigation funding market in the UK has expanded substantially in recent years. But attempts to quantify the size, presence and behaviour of the industry are hampered by the lack of transparency requirements. TPLF providers that are privately held, or are merely occasional litigation investors, do not disclose much by way of financial data or investments, nor do they publicise the terms of their agreements. Thus, the above AUM estimate likely *under-represents* the size and profitability of the market. The trend of litigation funding as a corporate or law firm finance instrument has resulted in the potential development of a class of financial instruments based on litigation investments.

The possibility to mask the risk of less secure investments (i.e., speculative cases) through bundling with higher quality ones creates a new class of unregulated financial products and presents certain public interest risks, including that the courts may be required to deal with cases that would not be brought if assessed only on their own merits. Currently, the industry is partially self-regulated in England & Wales. However, the Code of Conduct requirements of the ALF only apply to seven members, are self-policed, and do not require public disclosures or transparency to courts and litigation opponents. Membership in the ALF and adherence to its code are optional and the penalties are unlikely to create any meaningful deterrence from violating the code.

Given these developments and conditions, the industry has outgrown self-regulation and has already reached the critical point referenced by Jackson LJ: a point where regulation is necessary. If left ungoverned, litigation funding stands as a troubling risk to the market and to litigation in the UK.

ANNEX I: THE LITIGATION FUNDING MARKET

The following table depicts the funders observed in this study and their basic corporate information. Most commonly, funders are limited companies (Ltd) that have a corporate function as the investment adviser or manager to an offshore fund. Some are partnerships that have the same function. These corporate forms require very limited regulatory reporting and annual accounting with Companies House is minimal. Very little financial information can therefore be obtained for these firms.

Two of the funders, however, are public limited companies (PLC), meaning they are listed on a stock exchange. Both Burford Capital and Juridica Investments are traded on the AIM index (formerly Alternative Investment Market index) of the London Stock Exchange. This results in significantly more stringent financial reporting requirements and a duty to shareholders to produce credible and verifiable annual reporting. Therefore, information on Burford Capital and Juridica Investments has been easier to access and they have provided the most illustrated examples of litigation funders for this study.

OBSERVED FUNDERS

	COMPANY	FOUNDED	DOMICILE	LEGAL FORM	ASSETS	
ALF APPLICANT	ALF MEMBERS	Burford Capital	2009	Guernsey	PLC <i>(LTD subsidiary)</i>	£357 m ⁶⁰
		Calunius Capital	2007	United Kingdom	LLP	£90 m ⁶¹
		Harbour Litigation Funding	2007	United Kingdom	LTD	£410 m ⁶²
		Redress Solutions	2009	United Kingdom	LLP	n.a.
		Therium Capital Management	2008	United Kingdom	LTD	£240 m ⁶³
		Vannin Capital PCC	2010	Isle of Mann	PLC	£125 m ⁶⁴
		Woodsford Litigation Funding	2010	United Kingdom	LTD	n.a.
	NON-MEMBERS OF ALF	Bentham Europe	2014	United Kingdom	LTD	£2 m ⁶⁵
		Argentum Capital	2012	Jersey	LTD	n.a. ⁶⁶
		1st Class Legal Litigation	2004	United Kingdom	LTD	£1.4 m ⁶⁷
		Augusta Ventures	2009	United Kingdom	LTD	£60 m ⁶⁸
		Claims Funding Europe	2008	Ireland	LTD	£7.6 m ⁶⁹
		Commercial Intelligence Funds Group	1987	Singapore	LTD	£67 m ⁷⁰
		Fulbrook Capital Management	2012	Delaware	LTD	n.a.
Juridica Investments	2007	Guernsey	LTD	£134 m ⁷¹		
Worthington Group	1953	United Kingdom	PLC	£10.1 m ⁷²		

ENDNOTES

1. <http://associationoflitigationfunders.com/litigation-finance/>.
2. Scrantom, T. (2015) "Longshanks Folly: Litigation Funding in the Offshore World", *Offshore Investment*, May 2015 (http://www.offshoreinvestment.com/pages/index.asp?title=Litigation_Funding_May_2015).
3. See (<http://www.burfordcapital.com/wp-content/uploads/2014/11/2014-06-03-BUR-Rurelec-press-release-Final.pdf>). Burford's investment of \$15 m USD was recouped along with an additional return of \$11 m USD, making Burford's return \$26 m out of an award of \$41 m.
4. http://law.emory.edu/elj/_documents/volumes/63/2/comments/richey.pdf.
5. Seven of the funders analysed in this study comprise the current membership of ALF: Burford Capital; Calunius Capital; Harbour Litigation Funding; Redress Solutions; Therium Capital Management; Vannin Capital PCC; and Woodsford Litigation Funding. Bentham Europe, also studied in this report, has applied for ALF membership. Other non-ALF members studied are Argentum Capital; 1st Class Legal Litigation; Augusta Ventures; Claims Funding Europe; Commercial Intelligence Funds Group; Fulbrook Capital Management; and Worthington Group. Juridica Investments, also part of this study, is described as an "overseas funder" associate of ALF on the ALF website (<http://associationoflitigationfunders.com/>). For more information, see Annex I.
6. <http://www.globallegalpost.com/blogs/commentary/nascent-no-more-5627340/>.
7. *Giles v Thompson* [1994] 1 AC 142.
8. *Re Trepca Mines Ltd (No. 2)* [1963] Ch 199.
9. *Case of Barratry*, (30 Eliz) 8 Rep 36, 77 ER 5.
10. *Re Trepca Mines (No 2)* [1963] Ch 199.
11. *Section 14(2) Criminal Law Act 1967*.
12. In addition to lifting the ban on CFAs, LASPO introduced other changes such as putting an end to the ability of a successful claimant to recover not only their legal costs, but also the full success fee that they had privately agreed with their lawyer, and any premium they had paid for "after the event" or "ATE" insurance, both of which Jackson felt unfairly penalised defendants. LASPO also introduced "Qualified One-Way Costs Shifting" or "QOCS" for certain cases (e.g. personal injury), to limit claimants' exposure to defendants' costs.
13. *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.
14. *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219 ALR 1, 54.

15. *Arkin v Borchard Lines Ltd [2005] EWCA Civ 655.*
16. Jackson LJ (2009) Review of Civil Litigation Costs.
17. Jackson LJ (2009) Review of Civil Litigation Costs, p.121.
18. Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32013H0396:EN:NOT>).
19. <http://associationoflitigationfunders.com/about-us/>.
20. <http://www.litigationfutures.com/news/house-lords-debate-government-rejects-labour-call-six-month-reform-delay>.
21. <http://associationoflitigationfunders.com/about-us/>.
22. Code of Conduct for Litigation Funders, January 2014 (<http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf>).
23. (<http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf>) pdf, para. 25.
24. Art.30, Articles of Association, Association of Litigation Funders (<http://associationoflitigationfunders.com/wp-content/uploads/2015/02/ALF-Articles-of-Association-final-July-2014.pdf>).
25. The UK brokerage firm "the Judge", which secures litigation funding for clients, currently estimates that the available capital in the global funding market is "in excess of \$1 billion" USD (£640m), with the US, UK, Germany and Australia as the dominant markets. See (<http://www.thejudge.uk/third-party-funding/how-big-is-litigation-funding-market>). This is likely an under-estimation; UK-operating companies alone have assets under management more than double that amount.
26. <http://www.burfordcapital.com/investor-relations/>.
27. <https://www.preqin.com/docs/quarterly/hf/Preqin-Quarterly-Hedge-Fund-Update-Q1-2015.pdf>.
28. <http://www.reuters.com/article/2015/01/16/us-hedgefunds-etonpark-idUSKBN0KP2H920150116>.
29. Elliott Management Co. has also begun a series of cooperation in investments with IMF Bentham in the Asia-Pacific region.
30. This refers to the correlation of litigation to general market trends. Litigation is widely held to be negatively correlated to market performance, meaning it increases with deteriorations of the economic climate. However, overall market trends do not have a strong effect on litigation and, as a result, investors are able to use it to limit exposure to general market risk.
31. These figures are based on aggregations of the publicly available financial information of the market participants and include the global assets under management of funders.

32. Source: funders' websites; annual reports & accounts; funder press releases; Veljanovski, C. (2012) "Third-party litigation funding in Europe," *Journal of Law, Economics & Policy*, 8(3). Reliable data are not publicly available for ALF member firm Woodsford Capital, thereby excluding it from these calculations. Redress Solutions is omitted from this graph for the purposes of clarity: its reported assets under management in 2012 and 2014 are significantly lower than those of its fellow members, at only £0.5 m and £0.3 m.
33. Openly published annual reports.
34. Including domicile of the fund or the fund management company.
35. Burford Capital Annual Reports 2010, 2011, 2012, 2013 & 2014.
36. Juridica Investments Annual Reports 2010, 2011, 2012, 2013 & 2014. The declining "operating profit" line represents profits after the payment of management and performance fees to Juridica Asset Management Ltd and Juridica Capital Management Ltd, the advisory and management companies of Juridica Investments, which are both co-owned by Juridica Investments.
37. From, e.g., the Netherlands, Dubai, Qatar and Singapore.
38. <http://www.chba.org.uk/for-members/library/consultations/financial-list-initiative-consultation-document>.
39. Through the Legal Services Act 2007.
40. <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/11815145/British-firms-and-pension-funds-facing-a-foreign-exchange-time-bomb.html>.
41. <http://www.lawgazette.co.uk/law/new-rules-herald-us-style-class-actions/5048871.fullarticle>.
42. <http://www.lawgazette.co.uk/practice/litigation-funding-calling-for-backup/5040166.fullarticle>.
43. <http://www.harbourlitigationfunding.com/case-studies/roadchef-a-harbour-success-story>.
44. <http://www.burfordcapital.com/faqs/>.
45. Rowles-Davies, N. (2014) *Third Party Litigation Funding*. Oxford University Press. And, (<http://www.globallegalpost.com/blogs/commentary/litigation-funding-widens-its-net-30586101/>).
46. *Id.*
47. <http://www.globallegalpost.com/blogs/commentary/litigation-finance-the-case-for-the-defence-30759904/>.
48. Until *Bevan Ashford v Geoff Yeandle* ([1998] 3 WLR 172), champerty had been held by English courts as existing only to protect litigation proceedings within the court system. Arbitration was held to be outside of this restriction, for example by Steyn LJ in *Giles v Thompson* ([1993] 3 All ER 321) and by Kaplan J in *Canonway Consultants Ltd v Kenworth Engineering Ltd* ([1997] ADRLJ 95 – a Hong Kong decision).

49. Rowles-Davies, N. (2014) *Third Party Litigation Funding*. Oxford University Press.
50. <http://www.calunius.com/faqs.aspx>.
51. <http://www.burfordcapital.com/wp-content/uploads/2015/03/2015-02-10-Burford-Sprint-Release.pdf>.
52. Including domicile of the fund or the fund management company.
53. <http://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/>.
54. Burford Capital's statement on the Lago Agrio litigation can be found at (http://www.chevron.com/chevron/pressreleases/article/04172013_chevronandburfordjointstatementregardingthelagoagriolitigation.news); regarding *Road Chef*, see (<http://www.harbourlitigationfunding.com/news/roadchef-the-legal-background-to-a-harbour-success-story>); (<http://www.bbc.co.uk/news/business-31082657>). Though the workers (and Harbour) were successful in their claim, the duration of the litigation made it commercially unsuccessful for Harbour.
55. *Excalibur Ventures LLC v Texas Keystone and others* [2013] EWHC 4278 (Comm), paragraphs [24] and [29].
56. <http://www.thelawyer.com/analysis/behind-the-law/funding-fail-argentum-exits-association-of-litigationfunders/3019907.article>.
57. <http://www.litigationfutures.com/news/stock-exchange-delists-third-party-litigation-funder>.
58. <http://www.smh.com.au/business/ponzi-scheme-claims-against-litigation-funder-of-equine-class-action-20140221-337my>.
59. <http://www.bloomberg.com/news/articles/2013-04-08/wild-west-of-lawsuit-funders-supports-divorcees-to-soldiers>.
60. Burford Annual Report 2014 (<http://www.burfordcapital.com/investor-relations/financials/>).
61. <http://www.litigationfutures.com/news/calunius-secures-extra-50m-invest-litigation-arbitration>.
62. <http://www.harbourlitigationfunding.com/news/new-230-million-fund-available-immediately>.
63. <http://www.therium.com/pdf/Therium-Press-release-Final.pdf?v=1>.
64. This is at £25 m of annual available capital from Bramden Investments for five years. Veljanovski, C. (2012) "Third-Party Litigation Funding in Europe" *Journal of Law, Economics & Policy* (<http://jlep.net/home/wp-content/uploads/2012/10/JLEP-Issue-8.3.pdf>).
65. Bentham IMF Annual Report 2014 (Note 31) (<http://www.imf.com.au/docs/default-source/site-documents/annual-report-30-june-2014>). Bentham Europe is a joint venture between Australian Stock Exchange listed litigation finance firm Bentham IMF and the U.S. investment fund Elliott Management Co. The assets under management of the former are £88.21 m and the latter are £16.36 bn. (Refs. Bentham IMF Ltd Annual Report

- 2014 - <http://www.imf.com.au/docs/default-source/site-documents/annual-report-30-june-2014>; <https://www.preqin.com/docs/quarterly/hf/Preqin-Quarterly-Hedge-Fund-Update-Q1-2015.pdf>).
66. Argentum was delisted from the Channel Islands Stock Exchange and resigned from the Association of Litigation Funders following allegations of a Ponzi scheme perpetrated by its 'feeder funds' (<http://www.thelawyer.com/analysis/behind-the-law/funding-fail-argentum-exits-association-of-litigation-funders/3019907.article>).
67. 1st Class Legal Ltd Financial Statements 2014.
68. <http://www.litigationfutures.com/news/augustas-60m-warchest-ratchet-litigation-funding-smes>; <http://www.lawgazette.co.uk/practice/litigation-funder-unveils-60m-sum-for-smaller-claims/5046209.fullarticle>.
69. Claims Funding Europe Ltd Abridged Financial Statements 2013.
70. http://www.ft.com/intl/cms/s/b39b252e-5413-11e0-8bd7-00144feab49a,Authorised=false.html?siteedition=intl&_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2Fb39b252e-5413-11e0-8bd7-00144feab49a.html%3Fsiteedition%3Dintl&_i_referer=&classification=conditional_standard&iab=barrier-app#axzz3k6Hyreyo.
71. Juridica Investments Ltd Annual Report 2014 (<http://www.juridicainvestments.com/investor-relations/reports-and-accounts/reports-accounts/2015.aspx>).
72. The value of net assets of Law Financial Limited, the litigation funder purchased by Worthington Group (http://worthingtongroupplc.com/wp-content/uploads/2014/08/Worthington-Group-Annual-Report_v6.7.pdf).



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The Justice not Profit campaign opposes the Government's introduction of U.S.-style "class action" lawsuits into the UK legal system. It also highlights the dangers of a growing and unregulated third party litigation funding industry. We believe the integrity of our legal system is now under serious threat. The Justice not Profit campaign seeks to build a broad coalition of support to call on the Government to stop those who exploit the civil justice system for profit and to protect consumers and businesses alike.