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How Litigation Finance Can Turn Your Legal Department into a Profit Center

Litigation and Dispute Resolution


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CHEAT SHEET

- ***Litigation finance.*** Litigation finance occurs when a third-party company finances litigation on the basis that in return for its investment, it receives a predetermined return on the recovery.
- ***The use case.*** Litigation finance provides money for lawyer's fees, experts, costs, and other incidental expenses. If the case is not successful, the funding company will not recover the money — minimizing risk while still receiving the value of litigation assets.
- ***Keeping it confidential***. In general, the confidentiality of information shared with litigation finance companies is found to be a violation only where the disclosure substantially increases the opportunity for potential adversaries to obtain the information.
- ***It's going global.*** England is now home to one of the largest litigation funding companies, while litigation finance has also caught on in the UK, and is seeing movement in Germany, Singapore, and more.

Legal claims for companies are traditionally viewed as a cost center. Litigation finance is a way for a company that has a valid claim to pursue that claim and turn a potential accounts receivable issue into a revenue stream. The following hypothetical situation shows how a company — with insight and assistance from an informed and business-oriented general counsel — can take a potentially problematic situation and turn it into a source of revenue.

Tree Frog and Blue Scorpion

Tree Frog is a growing company in a burgeoning metrics analysis space. As a software licensing and delivery company, Tree Frog licenses its B2B software on a subscription basis off a centrally hosted platform to its customers. Tree Frog scores a huge client, Blue Scorpion. Blue Scorpion is a Fortune 500 company in the process of creating technology infrastructure. Blue Scorpion contracts with Tree Frog for a massive project that will last three years. However, because of its size and importance, Blue Scorpion says it pays its invoices only at net 120 days.

Because of the massive size of the account and lag time, Tree Frog continues to carry Blue Scorpion for more time than it would normally carry accounts receivable. Everything is fine for the first year of the contract. But then Blue Scorpion starts getting behind on its payments. Eventually, Blue Scorpion declares it no longer needs the service and terminates the agreement while still owing close to six months' worth of fees.

Elana Tzefardea, Tree Frog's CEO, is faced with the fact that one of the company's key sources of revenue is not only not paying, but she now needs to book the accounts receivable as a loss. Tzefardea approaches the company's lawyer, Jane Aesop, and asks her what they can do about this situation. Aesop, a former partner at a big firm, initially thinks that the situation is problematic. If they hire their usual outside firm, the one they use for corporate transactions, they will be billed hourly, and the hole they are in will deepen. If they hire a firm that takes cases only on a contingency, she is concerned that it will not have the requisite experience in contract disputes. Looking at what she thinks is a lose-lose proposition, Aesop goes online and sees that litigation finance is a new thing, but she does not know anything about it. After learning more, she goes back to Tzefardea and tells her that she thinks she has found a way to take the accounts receivable and monetize it: litigation finance.

What is litigation finance?

Litigation finance, in its most basic form, is when a third party finances litigation on a contingent basis. The litigation finance company agrees to pay for attorney's fees, discovery costs, and/or filing costs. The money is invested in a non-recourse manner, which means if the case is not successful, the funding company will not recover the money. This allows the attorney and/or client to pursue their cases more aggressively so they do not necessarily have to settle for a "cost of litigation" settlement or other suboptimal recovery.

In return for the investment of the money, the investment company contracts for a larger recovery when the case settles or there is a judgment. In general, the recovery by the litigation finance company is a multiple of the investment, determined by a multi-faceted analysis of the risk involved in the investment. In general, the recovery can be anywhere from one and a half times the investment on the low end to 10 times it on the high end.

What are the optimal ways to use litigation financing?

Litigation finance can help companies minimize risk by harvesting the value of litigation assets from a field of uncertainty. Generally, when faced with litigation, a company has two choices — invest the money in the litigation or in the operations of the company. While the reward for the litigation may be higher, the cost may be deemed too high. By reducing the risk through litigation finance, the company can achieve both goals: maximization of the litigation asset and mitigation of the cost.

Although many companies have the financial capacity to pay for their own litigation, paying out of pocket expands the potential risk related to recovery and comes with hidden costs, even when recovery is near guaranteed.

To calculate the true cost of the litigation, one must look at (1) the hard costs of the litigation (attorney's fees, court costs, depositions); (2) how long the litigation will take; (3) the expected return on investment; and (4) the lost opportunity costs if the company had invested the money for litigation into the company itself. The first is frequently considered by in-house counsel; the latter three less frequently.

To better understand how each of the latter three concepts increases the hidden costs of litigation, the concept of the present value of money (PV) needs to be explored. The idea is that US$10,000 now is worth more than US$10,000 five years from now, because if you received the money now, you could invest it and receive an additional return over the five years. While formulas for determining present value vary, case law offers variables to take into consideration, including (1) the current amount of money; (2) the length of time of the loss of the money; (3) the interest rate; and (4) the opportunity cost.

When evaluating the cost to your company of pursuing a given litigation case, take present value into account. To calculate the present value of your litigation recovery, you should combine the likelihood of recovery with the amount of expected recovery but also deduct the hard costs of litigation, the time of the litigation,* and the opportunity costs from the final amount. While the hard costs are often clearly budgeted, the timing and opportunity costs** are often less clear and far costlier.

* That is, litigation expenses incurred that require direct payment to a vendor or court: filing fees, expert witness fees, court reporters' fees for depositions, etc.

** That is, "the loss of potential gain from other alternatives when one alternative is chosen," as defined by the New Oxford American Dictionary.

Timing, in particular, affects the present value of your litigation recovery: Litigation can take anywhere from a year to three years (five years or more in some unusual circumstances, and occasionally more than 10 years in foreign jurisdictions). The prospect of retrieving a given amount in five years significantly diminishes the present value of the return.

What's more, even in a case that the company expects to win or settle relatively quickly, the present value of the return must be reduced by the lost business opportunities that the company could have pursued instead of spending money on lawyers. This analysis is especially true for public companies, where the payments to lawyers will immediately affect its profits and losses and potentially its stock. Meanwhile, the investors may not appreciate the benefits of pursuing that litigation even if it results in a hefty payday, because the recovery is earmarked as a one-time benefit on the balance sheet.

By contrast, litigation finance allows companies to reap the one-time benefits of a successful litigation without the continuous drain on resources during the litigation process. Using financing, companies are able to hire the best attorneys for their cases and pay for the litigation, all while the company is able to pursue other rewarding business opportunities with money otherwise earmarked for litigation. If the litigation does not succeed, there is no risk for the company.

Circling back to the prior formula, where the present value of litigation return equals the expected return combined with the likelihood of recovery, subtracted by the cost of litigation, the timing, and the opportunity cost, litigation finance suddenly makes the equation much stronger. Assuming the amounts of recovery are the same, the present value of litigation for a company receiving non-recourse financing is higher than that of a company that decides to fund its own litigation.

All in all, by paying for the litigation in real time, litigation finance increases the present value of the litigation recovery by freeing up capital otherwise spent on legal fees to be reinvested in the company.

Let's return to an anecdote from Tree Frog. In their case, litigation finance influences their litigation decision-making as follows: If the company must pay US$100,000, conservatively, in attorney's fees, to recover a US$1,000,000 receivable, paying for the litigation out of pocket significantly reduces the present value of their litigation.

Assuming the litigation will take approximately two years to complete and its cost will need to be paid every month, that US$100,000 would be unavailable for new projects, new clients, and operating costs for two whole years — exemplifying the lost opportunity cost that makes litigation so costly.

If, on the other hand, Tree Frog chose to use a litigation funder, the company would not have any out-of-pocket costs. The litigation would be paid for entirely by a litigation funder. Tree Frog would then be free to invest that same US$100,000 in developing new clients, infrastructure, and/or marketing. Instead of purchasing US$100,000 of a law firm's time, that US$100,000 would grow Tree Frog's business and potentially bring in three new clients with recurring annual revenue. By doing so it would (1) not incur the current expense of litigation and (2) use that same money it would have used for litigation to grow a new client base. If, and only if, there was a recovery, the litigation finance company would receive a return on its investment, with the rest of the money returning to Tree Frog.

Litigation finance can help companies reap benefits from previously unmonetized assets. By reducing the litigation risk and the cost of the litigation (including hidden opportunity costs), companies that use litigation finance are able to simultaneously monetize their litigation assets while not detracting from their ability to grow the business.

Five tips to consider when looking for litigation finance funding

Look at each case as you would any other asset class. When looking at the claim, try to determine the actual value of the claim and the amount you want to finance in comparison to how much you want to recover.

1. **WHAT IS THE "ACTUAL VALUE" OF MY CLAIM?**
   Actual value in practice looks at (a) the viability of your claim; (b) the actual damages incurred, not including punitive or trebling; and (c) the ability to collect.

(a) Viability of the claim
This is just like the classic law school exam. You need to look at the elements of your claims and ask, was there a contract? Was the contract breached? Did the breach cause damages? Was the breach the proximate cause of the damages? Once the checklist of the cause of action is laid out, then you can go forward on your decision to get the case funded.

Tip: Spell it out. Assume the funder is looking at a lot of cases. To make your case stand out, make it easy for the funder to figure out what the case is about.

(b) Actual damages
Actual or hard damages are what damages were actually incurred. When looking at this number, you should discount all non-tangible damages including damages that might be considered speculative. So, for example, a contract in which a defendant did not pay US$500,000 for services rendered would be a good example of actual damages. The other damages, the fact that the breach caused an additional US$2 million loss because of the opportunity costs, etc. may be real damages, but for sake of this analysis you should focus on the out-of-pocket damages. Then you should be able to show in a simplistic way what the damages are so a funder can easily understand it.

Tip: Don't assume the funder knows your business. Show it as simplistically as possible.

(c) Lost profits
If you have a loss-of-business or lost profits claim, make sure you have a tangible damages model for the financing company. It will make it a lot easier for underwriting.

(d) Ability to collect
This was one of the areas never covered in law school. There are a lot of cases that can be brought, but if there is not going to be a recovery, the litigation is just academic. So when you are looking to get funding, you should have already done a basic search on viability of the defendants so the funder can easily see from where the judgment will be fulfilled.

Tip: Show a clear path to the money!

2. **HOW MUCH DO YOU WANT TO FINANCE?**
   Have your counsel make a budget through trial to find the estimated funding amount. Litigation funders generally want to see that you have budgeted until trial, to make sure that the funding amount is sufficient. Never assume that the case will settle at any point.

3. **CONFIDENTIALITY**
   Remember that the current state of the law is in flux. You should always enter into an non-disclosure agreement with the litigation funding company if and when you are going to be sending internal documents to a third party. The attorney work product doctrine is currently the best way to go, so make sure it comes from corporate counsel.

Tip: Remember to protect your company with an NDA!

4. **RANK YOUR CASES**
   To get through due diligence more quickly, it is best to rank your cases for the litigation finance company. This will show the finance company that you understand the value, and it will make the process go faster. It will also make it easier to price the cases and make the process go faster.

5. **SPREAD THE RISK**
   Try to bundle your cases if you have more than one. A broader array of cases will be more interesting to a litigation financer. If the finance company can spread the risk across multiple cases it can be easier to underwrite and you can come to terms faster.

Tip: Diversify the risk!

What are some of the legal issues in-house counsel should know about?

Litigation finance tends to bring up a few practical issues that translate to legal issues. Questions to ask yourself (and other members of your legal team) include these: Are there restrictions of litigation funding in my jurisdiction? Can the litigation finance company force my company to litigate in a certain way? Does the introduction of a third party create confidentiality issues? Are the multiples charged by the litigation funding company legal? All four practical issues can be translated into their legal counterparts of regulatory risk, control of litigation, confidentiality, and usury. All four issues have been addressed in the past few years, and the following is a brief overview of how the courts are dealing with these issues in the United States.

(1) Does litigation finance face significant regulatory risk?

Currently, only a few US states regulate commercial litigation funding through specific case law discussed below, but there are no specific laws that prevent commercial-based litigation funding. Instead, what one finds is a patchwork of cases and statutes (generally focused on consumers) that prevent specific circumstances of funding.

A handful of states regulate consumer-based litigation funding, in which consumers take out small living-expense loans collateralized by their personal injury lawsuits. The overarching reasoning in these cases relates to the sophistication of the parties and for what purposes the funding is being used. The basic reasoning for these regulations come from the fact that consumer litigation funding addresses the same audience as payday loans and often serves the same basic living expense needs.

For example, in *Oasis Legal Fin. Grp LLC v. Coffman*, the Colorado Supreme Court held that Oasis Legal Finance Group, a finance company in the business of giving small loans to personal injury plaintiffs for living expenses, in fact, offered loans subject to the Colorado consumer loan laws. It should be noted, however, that even in Colorado, there is currently no commercial equivalent.

(2) Conflicts of interest

The key issue of conflicts in litigation finance relates to the concept of who is steering the litigation. This is known in legalese as champerty. Champerty is a common law doctrine based on preventing frivolous lawsuits that are initiated by third parties, developed in medieval times to prevent feudal lords from abusing the justice system. Most states have abolished this doctrine, saying it is archaic, but a few continue to enforce it. Minnesota, for example, has the most restrictive champerty law: If recovery is based on a third party prevailing, then it is champerty.

On the other hand, Delaware has specifically ruled that litigation finance agreements, as long as they are drafted correctly, are not subject to champerty. A Delaware superior court held that (1) the litigants had not assigned its claims to the funder and thus the real party in interest was prosecuting the suit; and (2) the financier did not have the express or *de facto* right to direct, control, or settle the claims; (3) Charge Injection Technologies (CIT), the plaintiff, was fully vested with control of the case but for certain limits on changing counsel and was, in fact, exercising that control and the financier had not stirred up or incited litigation for the purpose of continuing a frivolous or unwanted lawsuit; and (4) CIT itself was motivated to bring the suit but lacked the resources to do so on its own. Meanwhile, Arizona, California, Connecticut, New Jersey, New Hampshire, New Mexico, and Texas take the position that the champert was not adopted in their jurisdiction and thus does not apply.

Critics claiming champerty grounds tend to focus on the fact that litigation finance will in some way increase baseless litigation and/or make litigation harder to settle based on the externality of litigation funding. In reality, however, baseless litigation would be worthless in the litigation finance scenario because (1) the case would be unsuccessful if it went to trial, and (2) the value of the case for “nuisance” value would be too low.

The second concern arises from the idea that an outside investment that receives a part of the recovery is going to make a case harder to settle by increasing the required recovery in the case. Courts have said in opinions that they are concerned that litigation finance will interfere with the settlement of cases because the plaintiffs will not be able to settle for less with an outside litigation partner. This assertion, however, is incorrect because it assumes that the value of the litigation is affected by the investment. This assumption is faulty because it does not understand the basic economic theory of pricing and value. An object is worth whatever the market says it is worth. So the externality of an investment will neither increase nor decrease its actual value. That is, the case will settle for the proper amount because that is what it is worth.

In both of these analyses, there is no mention of the fact that insurance has been exerting artificial downward pressure on claims in an effort to increase profits for the insurance companies — a similar outside force that litigation finance detractors completely ignore.

(3) Confidentiality

One of the main concerns of attorneys entering into litigation finance agreements for the first time is whether the information provided to the finance company is confidential. In general, the confidentiality of information shared with litigation finance companies is derived from the attorney work-product doctrine. A recent case, *Viamedia, Inc. v. Comcast Corporation*, shows that work-product protection occurs "only where the disclosure substantially increases the opportunity for potential adversaries to obtain the information."

The reason for this difference is the work-product doctrine's roots in the adversarial process: The point of the protection is not to keep information secret from the world at large but rather to keep it out of the hands of one's adversary in litigation.

The court did not address the common-interest doctrine but simply held that disclosing work-product documents to litigation-funding firms, particularly under a non-disclosure agreement (NDA), does not constitute a waiver. While Comcast argued that the NDA permitted the litigation-funding firms to disclose the work-product to other individuals, such as their attorneys, the court found that Viamedia's disclosures did not make it "substantially more likely" that its work-product would fall into its adversaries' hands.

(4) Usury

Usury is an ancient concept that originated with Henry VIII. The concept creates visions of loan sharks and other organized crime members preying on the defenseless masses. That is not the situation in a commercial litigation finance arrangement.

To understand usury, one must first understand what "interest" is and what it is not. Interest is the price that a company charges for use of its money. Interest is usually based on how long the money is going to be used by the party that receives it and how risky the investment is for the investor.

As early as 1830, the US Supreme Court stated the elements of a usurious transaction: (1) a loan or forbearance of money, (2) an absolute obligation to repay the principal (not contingent on any event), and (3) greater compensation for the loan (i.e., interest to be applied on the principal) than is allowed under statute. "Absolutely" means "with no qualification, restriction, or limitation; totally."

As discussed earlier, key characteristics of litigation finance are (1) a cash advance (2) made by a non-party to the litigation (3) in return for a portion of the litigation proceeds, (4) regardless of whether it is from a settlement or judgment, (5) which is payable at the time of recovery only if there is a recovery. If there is no recovery, there is no payment.

A loan, in contrast, is the absolute requirement to repay money at a future time. The failure to repay the loan is a breach of the loan that will subject the party to civil litigation. In litigation finance, however, if there is no recovery, there is no payment.

This distinction is important. An example is student loans. Student loans, for the sake of this example, are the absolute form of a loan. Student loans, in general, have to be repaid regardless of any extenuating circumstance, including if the debtor files for bankruptcy. The underlying purpose of the usury law is to prevent a situation in which a debtor, the student in this example, would be liable for a debt regardless of any reason, at any interest rate whatsoever. In litigation finance, what you have instead is a commercial, arm's-length transaction in which the money is an investment alongside the plaintiff for the venture of recovering money.

In a contingent investment, the lender shoulders the risk of (1) no return, (2) uncollectibility, and/or (3) that the debt never actually becomes due. The party who has received the advance has a legal duty conditioned on an uncertain event. Usury laws are not predicated on risks of this nature.

What about the rest of the world?

Litigation finance started in Australia to solve a problem created by the fact that Australia does not allow lawyers to take a case on a contingency fee basis. Unlike the US model, Australian litigation funders do appear to take an active role in the litigation, often selecting the law firm and making important litigation decisions. The Australian position is that they do no more than insurance companies do on the defense side of the litigation. In this view, the litigation funder is the functional equivalent of the insurer.

Litigation finance also caught on quickly in the United Kingdom, where contingency fees are also restricted. England is now home to one of the largest litigation funding companies that is publicly traded on the London stock exchange and it collected approximately US$175 million from litigation finance in 2017. Litigation finance has seen some movement to other countries such as Canada, Germany, Hong Kong, New Zealand, Singapore, Brazil, and South Africa. The possibilities of litigation finance's growth are limited only by the need and the specific laws of the country. As the field gains acceptance, particularly among international companies, we can expect litigation finance to gain further traction around the world.

Conclusion

Litigation finance is a good way for companies to mitigate risk and monetize claims. Once the legal landscape is demystified, attorneys at companies can turn their accounts receivable into revenue centers.

Further Reading

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Niles v. City of San Rafael (1974) 42 Cal.App.3d 230; Holt v. Regents of the Univ. of Cal. (1999) 73 Cal.App.4th 871.

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