

What US GCs Should Know About Litigation Funding in England & Wales

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The situation may be a familiar one: a client with a meritorious claim, but insufficient financial resources (or even C-suite support) to pursue matters. In this tip sheet, we explain how the continued growth of litigation funding in England & Wales is significant; how it operates alongside the costs shifting mechanism so characteristic of English civil procedure; and how, if used properly, it can deliver a competitive edge for the client.

What is litigation funding?

Litigation funding – also known as third party funding – is an emerging and developing area of funding in the UK where one party (specifically one that is not involved in the dispute) agrees to provide an alternative financing solution to pay for part, or all, of the costs associated with commercial dispute resolution, in exchange for a fee or premium.

How can litigation funding help?

There are a number of advantages available to those who opt to use litigation funding to finance their case:

- Access to justice - litigation funding enables clients to pursue claims, in circumstances where funds may not otherwise be available.
- Maintain the status quo – having a third party finance the litigation costs keeps legal fees off the client's balance sheet and/or prevents the costs from being taken out of an in-house legal department's budget.
- Cash flow – not having to spend money on potentially costly legal proceedings maintains a client's cash flow, which can instead be spent on other aspects of the business, such as generating profits.
- Assists struggling companies – it enables companies that are bankrupt and/or engaged in insolvency proceedings to pursue a claim that it may otherwise not be financially able to bring – legal claims are important assets to the estate and/or business, as they can often be the only basis of recovery for unsecured creditors, but usually the company in question lacks the resources required to realise that asset.
- Additional costs – litigation funding is available not only to cover the cost of legal fees, but also disbursements and expenses, such as barristers' fees or court fees, which can be significant.
- Non-recourse – in most cases if the claim is unsuccessful then the litigation funder simply loses its money, as it has no right of recovery from the client.

Surely it cannot all be good news... what are the potential downsides?

There are certain elements that a client must take into account when considering whether third party funding is appropriate for its business:

- There is a cost to the client – generally the fees paid out plus a premium. However, this is met from a combination of winnings and costs recovered.
- Defence funding by a litigation funder is far less common (particularly in circumstances where there is no counter-claim being advanced by the defendant), the main driver being that clients are often unwilling to pay a premium over the actual cost of the litigation in order to get rid of a case that they believe has no merit to begin with.
- Litigation funding is generally limited to commercial cases (often of a high value) and there are fewer products available on the market that are suitable for consumer cases, such as personal injury cases or small claims.

But surely not every case can be funded? What are the main considerations for a litigation funder?

- The legal merits of the case – there must be at least a better than evens prospect of success and a good understanding of how the claim has been calculated.
- The size of the investment – a considered cost budget must be submitted by the lawyers on behalf of the client to ensure that the cost of financing the litigation is not disproportionate to the value of the claim.
- The ratio of recoveries to budget – this can be calculated in one of two ways: either as a percentage of the winnings; or as a multiplier of the committed capital, which increases as time goes by.
- An assurance that the defendant – the ultimate paying party if the litigation is successful (based on the principle that the unsuccessful party pays the costs of the successful party) – has adequate financial resources to satisfy the award sought, i.e. is creditworthy.

How does the application process work?

Different providers have different methods of running the litigation funding application process. However, the process can be a lengthy one and most litigation funders require in-depth due diligence, which often takes place during a period of exclusivity, during which the client is not able to seek alternative funding elsewhere.

There are a number of funded 'products' available from some of the larger funders, however, which enable smaller cases to be approved more quickly. That said, almost all cases require the opinion of a barrister placing the prospects of success at a good level.

Who are the litigation funders?

Litigation funders come in a range of shapes and sizes, from large international funders to smaller hedge funds. There are currently no regulatory requirements for companies seeking to provide litigation funding; instead there is a Code of Conduct for Litigation Funders, which was published by the Civil Justice Council – an agency of the UK's Ministry of Justice – in November 2011. This provides for, amongst other things, the capital adequacy of funders, the termination and approval of settlements, and the level of control that a litigation funder may exercise over the litigation (which is little to none).

A list of those litigation funders who have agreed to be bound by the Code of Conduct can be found on the website of the Association of Litigation Funders, the independent body charged with delivering the self-regulation of litigation funding in England & Wales.

I now understand funding, but how does 'after the event' insurance fit in?

An enduring feature of English litigation is the costs-shifting mechanism, whereby the loser pays a significant proportion of the winner's costs. As a result, litigation funding alone will not entirely de-risk the costs of commercial dispute resolution. Most litigation funders therefore will insist that the client has 'after the event' ("ATE") insurance in place in order to cover the adverse cost risk before agreeing to fund the litigation. This is a standalone product, separate from the litigation funding, that essentially acts as a safety net for a client, in the event of an order for adverse costs being made against it, by providing an indemnity for legal costs (usually only adverse costs) in the event that the claim is unsuccessful.

The majority of ATE insurers will offer a range of options with regard to the insurance premium:

- Fully deferred and contingent – the insurer is paid its premium at the conclusion of the litigation and only in the event that it is successful. This type of 'no win, no fee' premium is more expensive than others but, for a client who has little or no available funds, a contingent ATE premium might be the only means through which it can afford to pursue its case.
- Partially contingent and partially upfront – insurers will sometimes offer a lower overall price if the client is able to pay for some of the premium at the point of accepting the terms. For example, an insurer may reduce the overall price of the premium if the client agrees to pay a percentage of the total cost upfront with the balance being deferred and contingent.
- Fully upfront – this option is self-explanatory and usually provides the lowest premium.

Final thoughts

Although financial necessity is often a driver for clients seeking to explore the option of litigation funding, used properly, litigation funding can be used effectively from a strategic perspective to de-risk the litigation for a

client, to improve a client's cost position and to assist with cash flow. At the very least, however, it is an aspect of alternative financing that lawyers of England & Wales ought rightly to consider and discuss with their clients prior to embarking on litigation proceedings.

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