

**ACCELERATE PROFITS AND REDUCE RISK: NEW TOOLS FOR
LAW FIRM SUCCESS**

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What is Commercial Litigation Funding?

Commercial litigation financing is when a third party funder provides non-recourse capital to fund legal fees and expenses and/or to raise funds for corporate purposes (operating costs, etc.) in exchange for a financial interest in the legal matter. If a claim is successful, the funder receives an agreed-upon portion of the claim proceeds. If a claim is unsuccessful, the funder is owed nothing.

Why Litigation Funding?

“Litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation.”

New York Supreme Court Justice Eileen Branston, *Lawsuit Funding LLC, et al. v. Lessoff, et al.*, 2013 NY Slip Op 33066(u), December 4, 2013

Litigation Funding is an Innovative Solution

- Amount of investments vary. Bentham's customary investments range from \$1-10+ million
- Helps turn a cost center into a profit center
- Exhaustively studied for 2 years by the American Bar Association Commission on Ethics 20/20
- Bentham does not control decisions or interfere with attorney-client relationships
- Assists parties with company operating expenses
- Diversifies risk
- Enables parties to obtain the counsel and top experts of their choice

Why Have Litigation Financing?

- Litigation financing pays for the high costs of litigation: attorneys fees and/or out of pocket expenses (e-discovery, experts, etc.)

“Protracted discovery is expensive and is a drain on the parties’ resources. Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent.” *Miller UK Ltd. v. Caterpillar*, Case No. 10 C 3770, 2014 WL 67340 (N.D. Ill. Jan. 6, 2014) (Cole, J.)



Types of Litigation Funding

- Full Hourly
- Hybrid 50:50 Fees
- Costs
- Appeals
- Working Capital
- Flat Fee Advance
- Defense
- Due Diligence
- Judgment Purchasing and Enforcement
- Portfolio funding

Funding Model 1: 50/50 Hybrid

Bentham IMF

Invest 50% of Fee Budget ↓ ↑ 20% Recovery

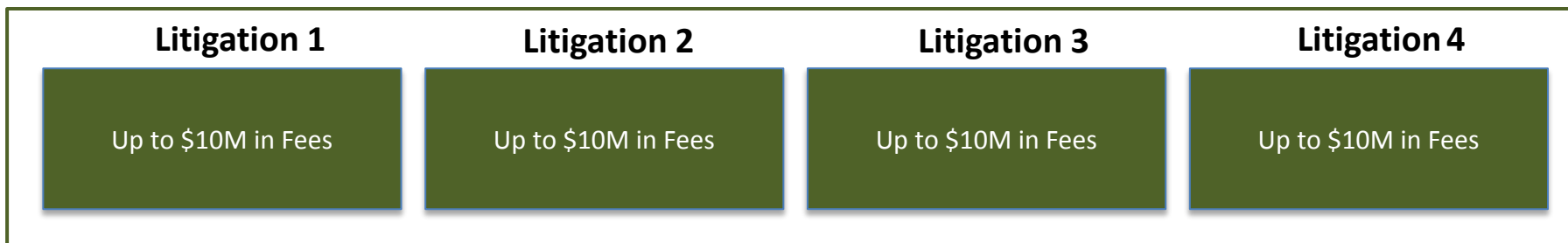
Client Litigation

Up to \$10M in Fees
Client Pays Costs

Invest 50% of Fee Budget ↑ ↓ 20% Contingency

Law Firm

Funding Model 2: Portfolio



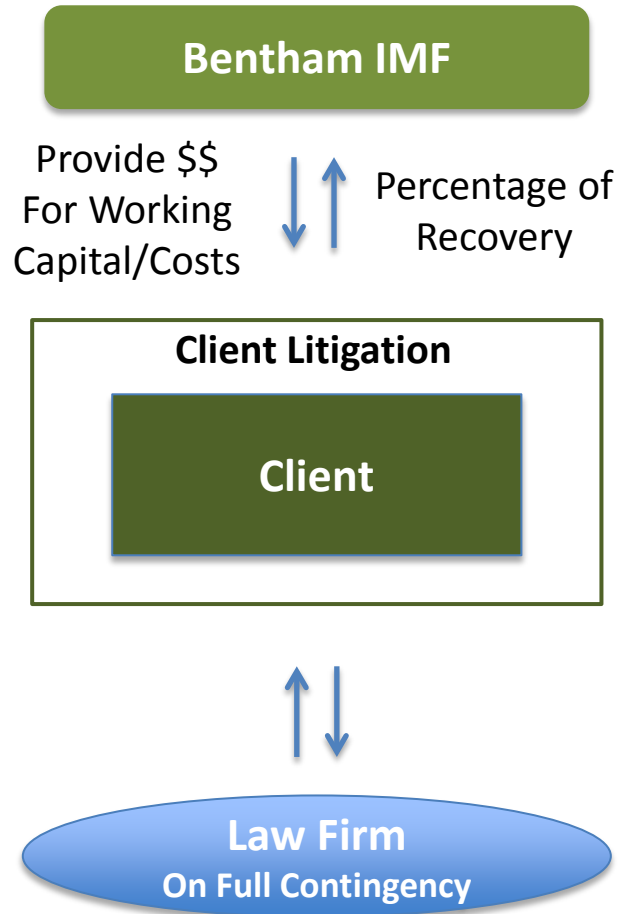
Invest 50% of Fee Budgets   40% Contingency

Law Firm

Invest 50% of Fee Budgets   Capped Return: 2x-3x

Bentham IMF

Working Capital and/or Cost Funding for Clients



Case Studies

▪ Case Study 1: 50/50 Hybrid

- Budget estimated at \$10M fees
- Bentham invests \$5M towards fees and costs
- Firm defers other \$5M in fees
- Client pays all costs
- Law firm and Bentham each receive a contingency payment of 20%
- Client recovery 60%

▪ Case Study 2: Portfolio Funding

- Bentham invests \$5-10M in fees and costs against a portfolio of four cases (at a \$2.5M budget per case)
- Clients pay no out-of-pocket costs
- Firm receives contingency recoveries
- Bentham entitled to capped return from any case:
 - 2x if less than 18 months
 - 2.5x if between 18 and 36 months
 - 3x if over 36 months

Litigation Finance, Privilege, and Ethics

Maintenance, champerty, and barratry

- Champerty: “A bargain by a stranger with a party to a suit, by which such third person under- takes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.” *Black’s Law Dictionary*
- Maintenance: “An unauthorized and officious interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action.” *Black’s Law Dictionary*
- Barratry: “Common barratry Is the practice of exciting groundless judicial proceedings.” *Black’s Law Dictionary*

Litigation Finance, Privilege and Ethics

- Privilege and confidentiality: written NDAs are imperative to protect documents and information subject to the attorney-client privilege and work product doctrine
- Review the American Bar Association Commission on Ethics 20/20 Informational Report on Alternative Litigation Finance for an overview of litigation financing and the Model Rules



Recommendations

- Familiarize yourself with local laws, rules, and ethical decisions regarding litigation funding.
- Enter into a Non-Disclosure Agreement prior to engaging in substantive discussions. Do not simply rely on oral assurances of confidentiality.
- In jurisdictions with statutory prohibitions on champerty and maintenance, review case law regarding how those statutes are applied.
- Work with funders who are aware of privilege issues.



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- Litigation attorney for over 20 years
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- Lead counsel, *Zubulake v. UBS Warburg* (U.S. District Court for the Southern District of New York), which led to several seminal e-discovery opinions
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- JD, Fordham University Law School; MBA, Fordham Graduate School of Business; and BA, Cornell University.

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