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Using Commercial Litigation Funding to Generate Business and Increase Law Firm Profitability

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Your Presenters



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- Investment Manager in Bentham's NY office, opened in 2011
- 3+ years of litigation funding experience
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- Leads Bentham's LA operations, opened in 2013
- 2+ years of litigation funding experience
- Partner at McKool / Hennigan for 10 years

Roadmap For Today's Presentation

- What is Litigation Funding?
- Development of Litigation Funding in the US
- How Commercial Litigation Funding Works
- How Funding May Help a Lawyer or Claimant
- Debunking myths about the litigation funding industry

Please submit questions during this program or feel free to reach out after the program at:

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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

What Is Litigation Funding?

- Generally two flavors: Consumer and Commercial Funding

- Consumer legal funding

Non-recourse loans to personal injury plaintiffs, to be repaid along with financing fees if the plaintiff recovers in the lawsuit

- Commercial legal funding

Non-recourse loans to companies, individuals and law firms for a percentage of the ultimate recovery, if any, in a commercial lawsuit

What Is Commercial Litigation Funding?

- Allows litigants or law firms to finance **complex, high-stakes litigation**
- Provides **capital** in exchange for a portion of the judgment
- Amount and form of recovery may depend on the **length of the case** and/or the **amount of recovery**
 - Percentage share of judgment
 - Multiple of investment
 - Greater of multiple or percentage

What Is Commercial Litigation Funding?

- **Generally non-recourse**

- If the litigant loses, the funder receives nothing
- The litigant (or law firm) does not have to repay money invested
- Thus, merits must be strong

- **Common subject matters:**

- Breach of contract
- Breach of fiduciary duty
- Copyright/Trademark
- Patent
- Domestic and international arbitrations
- Complex business disputes
- Antitrust
- Environmental
- Qui tam
- Bankruptcy litigation

How Is Litigation Funding Developing?

- **Relatively new** industry in the US
- More than **30 states** now allow some form of litigation funding
- **The ABA**, New York State Bar, NYC bar and many other state bars:
 - Found **no new rules** of professional conduct are necessary to protect the attorney-client relationship
 - Have provided **useful guidance** to lawyers
- Recognition that it is **no “threat to the integrity of the judicial system”**:
Entire US commercial funding industry invests in less than 100 cases a year

But What About Champerty?



Officious Intermeddler

- Previously thought to be prohibited as “**champerty**” and “**maintenance**” in many jurisdictions (*WHAT???*)
- Arose to combat **abuses in medieval England** – i.e., “vexatious and speculative” litigation supported by “officious intermeddlers”
- Unscrupulous nobles and royal officials lent their names to bolster **doubtful and fraudulent claims** in return for a share of the property recovered
- A **number of states** still prohibit or limit litigation funding

Why Is Litigation Funding Increasing In Popularity?

- **Pressure** on law firms to examine alternatives to billable hours and discounts
- **Limited number of firms** doing large business litigation through contingency arrangements. (Funding still required for large external expenses.)
- **Increasing acceptance** by corporate clients, law firms, academia, courts
- Investors considering litigation funding as a possible **uncorrelated asset class**
- Business contingency firms/practices are **now partnering with funders** to share risk with clients

How Does It Work?

- Case is **brought to a funder** (by a claimant, its lawyer, or unaffiliated lawyer)
- **NDA** executed and **initial due diligence** by funder
- **Term sheet**
- **Deep due diligence** by funder
- **Funding contracts** executed; transaction closes
- **Monitoring**

How Can Litigation Funding Help Law Firms?



How Can Litigation Funding Help Law Firms?

- Recognize any of these issues?
 - Intense **competition**
 - **Fee pressure**
 - **Dissatisfaction** with hourly billing model
 - Litigation **budget** runs out before trial
 - **Costs** eat up increasing percentage of litigation budget
 - Need the ability to **mitigate risk**

How Can Litigation Funding Help Law Firms?

How litigation funding solves them:

- **Boost law firm profitability:** Firms use contingency cases to increase revenue
- **No loss of control:** Lawyer and client retain control of strategy and settlement
- **No corners cut:** Counsel can focus on case merits, not client ability to pay
- **New case referrals:** Bentham relationship aims to be a two-way flow of litigation and capital

What Types of Funding Are Available?

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

Litigation Funding: MythBusters



Litigation Funding Constitutes Fee-Splitting



Litigation Funding Constitutes Fee-Splitting



Litigation Funding **IS NOT** Fee-Splitting

- ABA Model Rule 5.4: “A lawyer or law firm **shall not share legal fees** with a nonlawyer . . . (with exceptions).”
- Purpose is to safeguard lawyer’s **independence** and professional judgment
- Funders typically **contract with the client**, from whom any portion of the litigation proceeds are received
- **Portfolio**: protects lawyer’s independence and professional judgment (lawyer has no financial interest adverse to client’s)

Litigation Financing Is Usurious



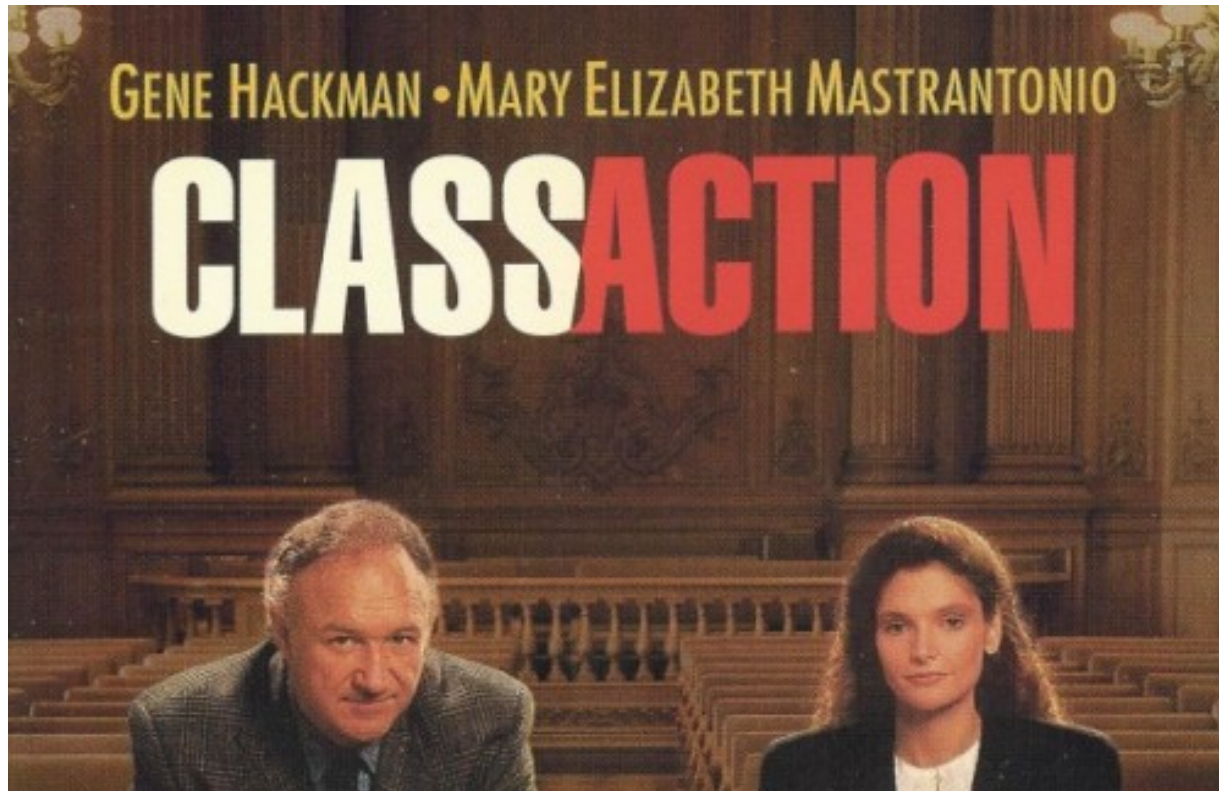
Litigation Financing Is Usurious



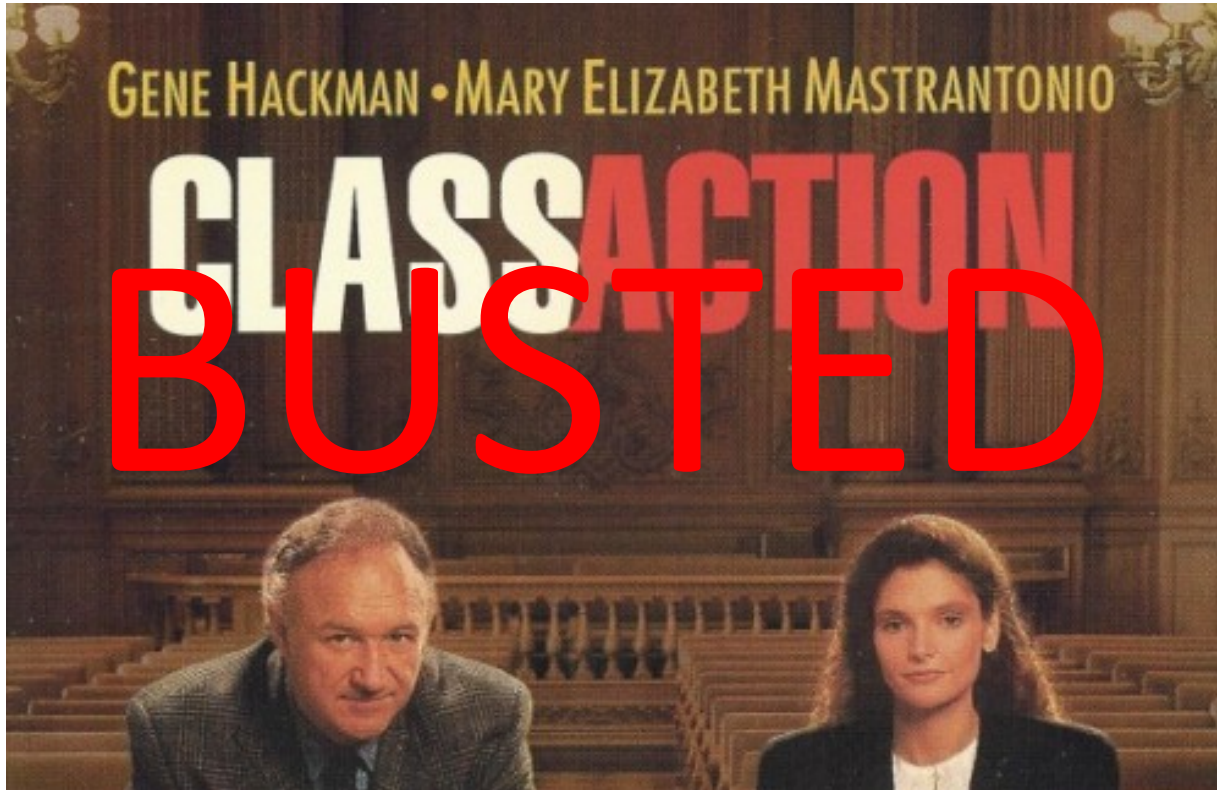
Litigation Financing Is **NOT** Usurious

- To constitute usury, a transaction traditionally must constitute a **loan**, and usually at unlawfully **high rates** of interest
- Funding: **Non-recourse** cash advance between **sophisticated parties** represented by counsel
 - No promise of repayment
 - No collateral to secure the debt
 - No guaranteed return on investment

Litigation Funders Finance Class Actions



Litigation Funders Finance Class Actions.



Funders **Typically Don't** Finance Class Actions

- Generally, commercial litigation funders **do not fund class actions** for a number of reasons
- For example:
 - Funders must contract with the client to avoid fee-splitting, and class action plaintiffs are usually **too numerous**
 - Funders cannot rely on a **judge's decision to approve** the receipt of funds in connection with fee application

Litigation Funding Promotes Frivolous Litigation



Litigation Funding Promotes Frivolous Litigation



Litigation Funding **DOES NOT** Promote Frivolous Litigation

- Funders have **no incentive** to fund such suits
- It would put us **out of business**
- Funding is **non-recourse** and funders only receive a return if the party they fund is successful
- Thus they review prospective cases carefully and fund only cases that have **strong merits**

Litigation Funding Prolongs Litigation



Litigation Funding Prolongs Litigation



Litigation Funding **MAYBE** Prolongs Litigation

- Funding allows litigants to reach the **merits** when they may not have the financial ability to do so – *is that bad?*
- No legitimate policy can support denial of funding as a way to **squeeze plaintiffs** without financial reserves
- Often an **early settlement** is the optimal outcome for a funder
- Funders **cannot interfere** in settlement negotiations*

Funders Control Case Strategy and Client Decisions



Funders Control Case Strategy and Client Decisions



Funders **DON'T** Control Case Strategy and Client Decisions

- Transactions can be voidable if funder **“intermeddles”** by seeking to control decision-making by the party and its lawyer
- Contractual provisions purporting to restrict the client’s **right to discharge its lawyer** are generally deemed unenforceable
- Lawyers must not permit a third party to direct or regulate the lawyer’s **professional judgment**
- Courts carefully scrutinize contractual provisions that limit the client’s right to make **decisions regarding settlement**

Litigation Funding Compromises Legal Privileges



Litigation Funding Compromises Legal Privileges



Litigation Funding **DOESN'T** Compromise Legal Privileges

- **No privileged material** should ever be disclosed during due diligence or at any other time – only between lawyer and client
- We **do not rely on the “common interest” doctrine** in any state
- Disclosures of material protected by the attorney work product doctrine are made **only under NDA**
- Decisions have uniformly **upheld work product protection** for materials provided under NDA to a consultant like Bentham

The U.S. Team



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