What is Commercial Litigation Funding?

➢ Litigation funding = litigation finance

➢ Any transaction where the asset value of a litigation claim is used to secure financing from an outside financier

➢ Funds are provided on a non-recourse basis = return of capital is tied to a successful outcome in the litigation
What is Commercial Litigation Funding?

➢ Began in Australia in 2001

➢ Adoption in UK and international arb

➢ Growth in US after financial crisis

➢ Bentham opens first US office in 2011

➢ Big Law adoption increases last 3 years

➢ Global adoption increases over last year (Canada, Asia)

“Litigation finance can be used by one company to sue another, so that the general counsel’s office can become a revenue generator instead of a cost center...”

— Above the Law
What is Commercial Litigation Funding?

➢ Funding for complex “business to business” commercial disputes

➢ Commercial funders typically do not invest in consumer disputes
Why is it Beneficial?

Who Benefits?

Small/mid-size companies

Large corporations
Why is it Beneficial?

Problems Facing Clients and In-House Counsel

➢ Incredibly Expensive Legal System

➢ Dissatisfaction with Hourly Billing Model

➢ Budget Uncertainty; Budget Runs Out

➢ Legal Fee Expenses on Corporate Balance Sheets

➢ Litigation is Risky

➢ Need for Risk Mitigation and Sharing
Interesting Statistics Concerning House Counsel

➢ 94% increased pressure on legal budgets = significant challenge

➢ 87% concerned about how litigation expenses depress financial results

➢ 54% have already moved work to firms that offer alternative fees

➢ 29% didn’t bring meritorious litigation because of budget or capital restraints

➢ 23% dropped a meritorious case in progress because the company was tired of the legal expense
Why Litigation Funding?

The irreducible conflict between clients and firms

➢ Pressure on client budgets create reasons to move costs off balance sheet
➢ BUT, firms can only tolerate so much risk; not always able to share costs and risk as much as needed
➢ Litigation funding can bridge this gap
A realistic hypothetical

Legal counsel to CFO: $5-7M spend (maybe) over next 3 to 5 years, for an affirmative/elective litigation (perhaps outside of the legal department’s budget) that counsel informs you is “highly likely” to be successful and return 5 – 6x to the corporation. Approved?

Answer?
Why Litigation Funding?

- Facilitates recovery of lost revenue
- Access to capital for meritorious claims
- Enables risk-sharing
- Reduces budget uncertainty
- Provides resources to retain top counsel
- Aligns company and counsel interests
- Off-balance sheet transaction; transforms legal departments from cost to profit centers
How Does it Work?

How Do Funders Invest in Litigation

➢ Full Hourly Fees
➢ Risk Sharing
➢ Costs Funding
➢ Working Capital
➢ Appeals de-risking
➢ Risk Sharing with Law Firms/Portfolio Funding
How Does it Work?

Risk Sharing: 50/50 (Client on Full Contingency)

Law Firm

Litigation Finance Company

Invest 50% of Fee Budget 20% Recovery

Client Litigation

Client Pays Costs 60% Recovery

Invest 50% of Fee Budget 20% Contingency

Law Firm
How Does it Work?

Risk Sharing: Portfolio of Contingency Cases

Litigation Finance Company

Invest 50% to 75% of Hourly Fees + discount

Recover 20% to 35% of Proceeds

Client Case 1
  Plaintiff case
  $25M+ in Damages

Client Case 2
  Plaintiff case
  $25M+ Damages

Client Case 3
  Defense case
  At deep discount

Client Case 4
  Defense case
  At deep discount

Legal Services

50%-75% Hourly Fees paid, plus 10%-15% Success Bonus from Plaintiff cases

Law Firm

Client Case

Plaintiff case
$25M+ in Damages

Defense case
At deep discount
How Does it Work?

Six Step Funding Process

NDA → Term Sheet → Due Diligence → Funding Agreement → Monitoring → Resolution
Ethics and Concerns

➢ Encourages frivolous litigation
➢ Maintenance, champerty, and usury
➢ Privilege: attorney-client privilege and work product doctrine
➢ Confidentiality of Information
➢ Control of litigation and settlement
➢ Third-party involvement in litigation
➢ Interference with attorney-client relationship
➢ Funder viability
Ethics and Concerns

Keeping Up With The Jones

➢ 28% outside counsel say their firms have used litigation funding – 4x increase in 3 years

➢ 75% outside counsel and 61% of in-house counsel predict litigation funding will grow in next 5 years

➢ Most AmLaw 100 firms, including many in the top 10/20, are utilizing litigation funding

➢ Exploration and use by large corporations is increasing
Bentham IMF’s US Investment Management Team

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Allison was formerly a shareholder of McKool Smith, a premier contingency law firm. She has 14 years of trial practice experience and 3 years of litigation funding experience.

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Eric was a trial lawyer at Yetter Coleman LLP, recognized by the National Law Journal as one of the top 10 litigation-only firms in the country, for 15+ years before joining Bentham in 2017.

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Jim was a partner at Liddle & Robinson. He has 20 years of trial practice experience and more than 5 years of litigation funding experience.

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Bentham IMF’s US Investment Management Team

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Ronit was a trial lawyer and senior associate at two of the nation's premier law firms prior to joining Bentham in 2014.

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Prior to joining the Bentham team, John was a prosecutor in the Los Angeles County District Attorney’s Office. Earlier in his career, he practiced as a litigator at Latham & Watkins LLP.

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