

6 Key Commercial Litigation Finance Trends For 2017

By **Ralph Sutton, Bentham IMF**

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The legal community has become increasingly aware of the role that litigation finance companies are playing in funding meritorious commercial litigation claims. With funding gaining acceptance throughout the U.S., law firms and corporations are investigating how they can benefit from the capital that funders provide, and which criteria they should use in selecting a funder. As the year begins, here are a number of major commercial funding trends to watch in 2017.



Ralph J. Sutton

1. Law Firm Portfolios

First, we will see a massive increase in the funding of portfolios of cases at the AmLaw 200 firms. By way of context, the vast majority of these firms have used or considered funding single cases inside their entrepreneurial patent or international arbitration practices. These cases had large dollar damages and high risk, making them perfect candidates for risk sharing.

But as funding has become more widely understood and valued, larger firms are seeking out reputable funders (more on this below) to help share risk across a basket of diverse cases from commercial disputes to tax challenges to copyright/trade secrets to treaty arbitrations. This trend will accelerate in 2017, driven largely by the fact that portfolio funding enables firms to compete for client business while covering their downside costs in hours. Larger AmLaw firms that embrace this approach to taking measured risk will see significant growth in profitability and realization rates from portfolios over time.

In the next few years, in fact, we expect that every law firm litigation group will have a portfolio of excellent cases in which a funder helps reduce the firm's risk. Funding will be ubiquitous, and firms that are slow to adopt funding will lose plaintiff engagements to those who can take cases on "effective contingency." Funding will be a standard feature in all pitch meetings, except perhaps with the most elite few firms and clients.

2. Law Firm Task Forces

Second, most large firms were unfamiliar with funding five years ago. Today, many such firms are forming multidisciplinary task forces to study the practical and ethical aspects of funding. We are aware of several such task forces at various stages of execution. These groups are formulating firm-wide policies regarding the use of funding, interviewing and vetting funders whose terms are fair to clients, and educating their lawyers about their professional duties to clients in funded cases. These strategic

moves make eminent sense, as clients are increasingly seeking ways to avail themselves of top legal representation by using alternative financing structures.

3. Funding Corporate Defense Cases

Third, how can funders help corporations reduce the amount they spend on legal fees devoted to defending against litigation claims? In the coming year, watch for litigation finance companies to provide funding directly to corporations for defense cases “bundled” with plaintiff cases. A “hybrid portfolio,” if you will.

Corporate clients can reduce their spending by 50 percent on such defense matters by assembling a portfolio that includes plaintiff and defense cases. Funders will recover their returns only from the plaintiff cases (which they will also fund), if meritorious. This new, untapped application of funding to benefit corporate law departments will provide balance sheet relief for the companies, and will be understood instantly as a boon to budgeting by CFOs and finance teams. The companies will be able to repurpose capital previously spent on legal fees to invest in expansion or other strategic goals.

4. Rule 26 Discovery and Funding

Fourth, over the last few years, a series of federal decisions have held that the existence of funding and the terms of funding arrangements are irrelevant to claims or defenses. The old standard for Rule 26 discovery relevance, that information was “reasonably calculated to lead to the discovery of admissible evidence” is gone. Another amendment to the rule announces the “proportionality standard,” which requires litigants to tailor discovery requests to account for the significance of the information requested, “the importance of the discovery in resolving the issues” and the cost of compliance. Under the new relevancy and proportionality standards of Rule 26, we will see more decisions this year denying satellite fishing expeditions into funding arrangements as both irrelevant and nonproportional.

5. Funding Will Launch New Law Firms

Fifth, we expect more lawyers will leave their firms to start new, innovative firms that share more risk with clients. Funding will be used to provide start-up equity in these firms. They will be nimble, and will avoid excessive conflicts, as they provide a mix of hourly and contingent arrangements, all supported by portfolio funding. Funders will provide the “equity” for the startups.

6. Funder Distinctions

Finally, as new parties enter the market and existing funders merge, expect clearer distinctions to arise between the funders themselves. Some will become known for their expertise in specific areas such as international arbitration, patent, tax or energy cases.

But more important than subject matter expertise, funders will be distinguishable to firms and clients based on their commitment to serving the needs of the parties receiving their funding. There are now two general types of funding companies, with accompanying sets of ethos — those run by trial lawyers and those run by hedge fund managers and financiers. The companies run by trial lawyers will be seen to focus on creating value for law firms and their clients, chiefly through single-case and portfolio funding of large and smaller matters. Those run by hedge fund managers will seek transactions that allow them to deploy larger and larger amounts of capital (potentially triggering their entitlement to management fees). These distinctions translate into dollars and cents differences in returns to clients

and benefits to law firms. Watch this space.

In sum, for AmLaw 200 firms, corporate departments, whistleblowers and entrepreneurial lawyers, 2017 will be a year of widely increasing growth, profitability and greater predictability concerning funding in the U.S. We might even see research and debate on a constitutional right to access to the courts, which could begin to address the legal inequities in our expensive system of civil justice.

Ralph J. Sutton is the chief investment officer of Bentham IMF, the U.S. arm of publicly listed IMF Bentham Limited. He is a former trial attorney with over 17 years of experience litigating cases.

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