

Is it only litigation funding?

Maurice Power looks at recent developments in the financing of litigation

18



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This article explores some current developments in litigation funding: how the sector appears to be able to create new opportunities, attract substantial investment and expand its services outside of pure funding. Leading many of these trends is the adoption of artificial intelligence technologies.

While in its simplest terms, litigation funding is a facility that enables impecunious or risk adverse litigants to pursue a meritorious claim, it is clear that each of the parties involved have a different perceived benefit from the funding process:

- The impecunious litigant – simple access to justice
- The risk adverse corporate – remove litigation risk from balance sheet
- The solicitor / law firm – funding WIP, cashflow and sales tool to attract new clients
- The barrister – funding cashflow and sales tool to secure clients
- The funder – commercial transaction for profit
- The funder's investors – uncorrelated investment to generate financial growth

Despite the benefits, there are those who would like to curtail the continued growth of the funding market or, at the very least, impose regulation to offer protection to the consumers of litigation funding.

REGULATION

In the US market, we have seen the progress of the New York Consumer Litigation Funding Act, which would require funders to register with the state and establish contractual requirements in order to protect their consumers. The Act also seeks to prevent funders from issuing referral fees or commissions to attorneys, and from accepting payment from attorneys for funding their cases, while mandating that a 10-day no cost cancellation policy must be entered into every funding agreement.

On a national level, the US Chamber of Commerce is continuing to lobby for proposed federal legislation which aims to enforce mandatory disclosure of funding agreements in class actions and multidistrict litigation.

In 2011, England and Wales saw the formation of the Association of Litigation Funders to coincide with the launch of the Code of Conduct for Litigation Funders by the Civil Justice Council. Unfortunately, membership of this association has barely altered since launch, with new funders failing to see the attraction of membership – although many do adopt the Code of Conduct as their modus operandi.

All the attempts at regulation seem to acknowledge the value that the funding market brings, by providing a route to access justice, with the main focus of regulation being to protect the consumer, advocate a

FUNDING UPDATE

standard approach by funders and prevent the support or promotion of frivolous litigation.

As noble as these intentions are, they are currently proposed on a local or national level. Litigation funding is a global market with global players, so although the regulation may ultimately lead to a change of practice, those changes will only affect individual jurisdictions and may even prevent consumers obtaining the best commercial terms through increased market competition.

INVESTMENT IN FUNDING

With the attractive returns that litigation funding potentially delivers to investors, barely a week passes by without news of major investment in the sector, such as the recent announcement that IMF Bentham has launched its latest US\$500m fund. However, with the availability of large funds and the requirements of institutional and state investors, there is a need for the funders to utilise the assets under their management to continue to deliver good returns. This has led to funders adapting their approach to business generation, and identifying new ways of deploying their resources. The most notable change has been the growth in the number of group / class actions that funders are now supporting, or even instigating.

Whether it be shareholders or consumers, an action is unlikely to be pursued if the individual claimant is unable to compete on a level playing field with a larger and well-resourced defendant, epitomised in the David v Goliath analogy. However, gather a group of ‘Davids’ and secure funding, then suddenly the odds level out, or possibly swing towards the claimant group. Recent developments in funder supported group actions against RBS, Tesco, VW and Mastercard, to name a few, demonstrate the way that funders are providing the resources to provide access to justice that may be denied the individual claimant.

Is it a coincidence that the number of group actions around the world appears to be on the increase? Or is it a simple by-product of the blossoming funding market providing the finance for ‘Davids’ to hold ‘Goliaths’ to account?

From a funder’s perspective, a group action gains greater value as the number of claimants in the group grows; and so we are seeing more evidence of funders getting involved at an earlier stage. For example, funding the book build as well as the normal litigation funding requirements of the case, or even working with a law firm to identify the claim in the first place, instigating the action and then sourcing the claimants.

Critics may argue that the funder has no interest in the law, simply a return on their money. However, this does not take into consideration that the funder will not risk their investors’ money on cases that have no merit and, were the funders unable to support the action, then thousands, or in the case of Mastercard millions of claimants, would be denied their opportunity to pursue a claim.

As funders demonstrate quality returns to their investors, it is inevitable that more money will be made available from investors, as demonstrated by the £150m investment in Augusta Ventures in 2018.

LOWER VALUE CLAIMS

With large funds to utilise, it is hardly surprising that the majority of funders focus on claims with multi-million pound valuations. However, this does not service the needs of the individual claimants in lower value cases, the true David v Goliath battles.

The challenge with funding the lower value claims is managing the costs associated with generating, risk assessing and processing the applications. The traditional litigation funder risk assessment model involves a panel of highly paid legal experts reviewing documents and identifying which applications have merit and fit the funder’s risk profile. As many funders report that only 5%-8% of the applications they receive actually produce a funding agreement, it means that the vast majority of the time, the legal experts are reviewing applications that will never result in business.

When reviewing lower value cases, this is an expensive way of rejecting applications. Also, there are considerably greater volume of lower value cases that require funding, so the cost issues are effectively multiplied.

Litigation funding, as with all developing markets, attracts new businesses that look to establish themselves in a particular niche or section of the emerging space. One of the most recent entries into the funding market, Apex Litigation Finance, is focussing on servicing the lower value cases primarily in the insolvency sector.

To effectively assess the higher volume of lower value cases that they are targeting, Apex has installed an Artificial Intelligence (AI) tool

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into the heart of its risk assessment process to provide predictions on the likely case outcome, quantum and timeline. By removing the need for all applications to be assessed by costly legal experts, Apex has simplified the application process, is able to make offers of funding in record times and, as its assessment costs are much lower, it is able to deliver far more competitive funding terms to applicants.

While the adoption of AI, predictive analytics and future technology is a challenge that the whole legal profession needs to address, it is not surprising that litigation funders are at the forefront of their use.

We are also seeing funders expand their portfolio of services, to further establish themselves as valued partners to the legal industry. In recent times we have seen Burford move into asset tracing and enforcement; funders move in, and then out, of the after the event (ATE) market; the formation of a new law firm supported by Therium; and a £25m litigation funding facility agreed between Pinsent Mason and Augusta Ventures.

It is clear that the litigation funding industry has an appetite for development, creating valued solutions and leading change, not only for claimants, but for the whole legal sector.

‘Is it only litigation funding?’ I don’t think so!
Maurice Power is CEO of Apex Litigation Finance