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# Post-Event Report & Insights

September 18-19, 2019

Apella in NYC

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# Event Recap & Introduction

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Litigation finance is maturing as an industry. Already funders have shown they can significantly impact litigation, by altering the ways in which law firms make business decisions to reshaping the attorney-client relationship.

It was against this backdrop that the 2nd Annual LF Dealmakers Forum was held in New York City. The sold-out event, held over two days, hosted over 200 attendees, 38 speakers, 7 panel discussions, 2 deep dives, 1 keynote, as well as over 300 one-to-one meetings. Building on the success of the inaugural event, the 2nd LF Dealmakers drew a balanced representation of decision-makers, including corporate general counsels, law firm partners, litigation funders, institutional investors, advisors, and media.

## BY THE NUMBERS

**300 one-to-one meetings**

**200 attendees**

**38 speakers**

**14 sponsors**

**10 sessions**

The event was sponsored by industry heavyweights – Longford Capital, Mintz, ME Group, Bentham IMF, Brown Rudnick, Burford, Curiam, Validity, Westfleet Advisors, the D. E. Shaw Group, Houlihan Lokey, HTS, Parabellum, and Therium. David Siffert, Director of Research & Projects at the Center on Civil Justice at the NYU Law School, served as event chairperson, delivered opening remarks and introduced keynote Stephen Susman.

## **Keynote Stephen Susman Discusses the Industry's Origins**

The event began with a keynote address delivered by Stephen Susman, one of the most successful trial lawyers in the United States. Susman, founding partner of Susman Godfrey, explained why litigation finance works – it breeds efficiency in the marketplace, he noted. With more at stake, he claimed, attorneys were more likely to simplify their approach to case strategy.

When describing his start in the business, Susman believed his contingency-only plaintiff-side law firm filled a need in the marketplace. By creating mechanisms to provide incentives, such as fee and attorney compensation, Susman was developing the template that litigation finance is today.

He spoke of partnerships between law firms and funders. Firms must put their own capital toward claims on which other firms aren't willing to take risks, he said. Everyone should welcome funding if in fact the results are the filing of better cases and the more efficient handling of those cases that are filed.

Susman also spoke to the responsibilities of funders in establishing the industry's credibility. He suggested that funders embrace regulation and transparency. They should, he said, facilitate agreements that are founded on fairness. He called for the industry's players to play an active role in lowering the cost of litigation and ensuring equal access to justice.

## **Interactive & Insightful Panel Discussions**

The event's panel discussions ranged from broad overviews of industry trends to insights from experts based on deals in which they have done. Chief investment officers from Bentham IMF, Therium, Parabellum Capital, and Validity Finance spoke of key challenges and opportunities, while experts dove into a specific case where litigation funding helped to save a company. Executives from Intel, Hollister Inc., YE Ventures, and Mintz shared in-house perspectives concerning the adoption of litigation finance and how they have aligned their interests with those of funders.



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# State Of The Industry: Litigation Finance Market

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The industry continues to see inflows of capital as new funders and traditional asset managers enter the fray. Law firms are increasingly attracted to financing as they re-think traditional business models.

- **Rob Cooper**, CEO, ME Group
- **Fred Fabricant**, Partner, Brown Rudnick
- **David Gallagher**, Co-head of Litigation Investing, The D.E. Shaw Group
- **Michael Nicolas**, Co-Founder & Managing Director, Longford Capital
- **Richard Saltzman**, Senior Vice President, Houlihan Lokey (moderator)

In 2015, funders raised \$500 million; in 2018, that number rose to \$ 4 billion. Significant growth is coming from not only dedicated funders, but special situation funds and asset managers. Law firms, both AmLaw 200 firms and boutiques, are increasingly seeking funding and are more knowledgeable than ever before.

— IN 2018 —

**Litigation funders  
raised \$4 billion**

Firms are seeking funds for portfolio funding and to fund single case investments. Despite the growth, it represents a fraction of the total legal spend in the US. Firms are holding auction processes for funding while others entertain offers from funders as a source of leverage for settlement negotiations.

**Saltzman:** At the end of 2018, the view is that law firm funding would be the leading driver of growth in the market.

**Nicolas:** Over the past year we have seen a significant increase in law firms seeking funding on two levels: individual cases, and portfolio funding. We've done a number of portfolio transactions with both AmLaw 200 firms and boutique trial litigation firms. We've had a good relationship with those firms. We've also had single case investments and seen a number of firms enter the market for the first time. We're seeing premier trial firms who are starting to think about funding. We are seeing an ever-growing acceptance that litigation funding is here to stay and can be an important part of a firm's risk sharing and bottom line. More and more, it's what our clients are demanding.

**Fabricant:** Litigation funding has been a terrific opportunity for patent owners. Patent owners have found they have other options if they don't have the wherewithal to go to battle with Apple or Google. Patent owners are willing to engage, they realize the type of commitment that is required to take on big tech companies. It's also been great for law firms because they can now develop great relationships with clients. They can take on cases they normally couldn't because a client couldn't afford the out of pocket expenses. It's also great for funds it because they have an opportunity to invest in an asset, but only after careful due diligence. We see it as an alignment of interests between patent owners, law firms and the funds.

**“WE ARE SEEING AN EVER-GROWING ACCEPTANCE THAT LITIGATION FUNDING IS HERE TO STAY.”**

**Gallagher:** Firms are becoming more knowledgeable and sophisticated. Five years ago, firms may have been hearing about litigation finance for the first time. Today firms are much more aware and having discussions with their clients about this alternative. We're also seeing firms entertaining offers from funders as a source of leverage in settlement negotiations. They may not even close a deal with a funder but go to a mediation and agreeing to split the upside with a funder – say a \$70 million award from a funder, and the funder gets the upside on a \$200 million arbitration.

**Nicolas:** Most firms we speak with have already had an experience with commercial litigation finance. I am always being asked by law firms – are we behind in using commercial litigation finance? We have seen firms understand what we do, how we do it, and how it can benefit them. These firms are facing enormous pressure to think about litigation differently.

We're able to negotiate better terms as to where the law firm sits in the waterfall. No longer do we have to sit behind a lot of money. The earlier a law firm can participate and see a return on investment, the sooner it can start to recover its money, the better. That will make it more desirable for law firms to participate in more funding deals and opportunities.

### **Has the type of cases that law firms are taking on changed?**

**Cooper:** There are 3 categories of firms: 1) those that are wedded to it as a part of their strategy a core proposition and seeing a bridge between litigation funders and law firms 2) firms that see an opportunity with litigation funding but don't have the skill set or capacity, and may use a third party source for that funding and 3) those who haven't opened their eyes to litigation funding yet. Many firms are looking at litigation funding. But it remains in its infancy in places such as the UK, except for a few firms that have adopted it as a core part of their proposition.

## **“LITIGATION FUNDING CAN BE AN IMPORTANT PART OF A FIRM'S RISK SHARING AND BOTTOM LINE.”**

**Nicolas:** Since we started the company, we've stayed focused on the things we know. We stay focused on all types of commercial cases, IP, antitrust and international arbitration cases. These are the same areas of law that our legal team has practices. This is intentional, as it enables us to bring a best-in-class underwriting process because we have litigated the cases that we are investing in. What we see from our portfolio is a diversified portfolio. Not just commercial cases or IP or antitrust. We try to assemble a diverse portfolio which provides value to our investors. We see a lot of demand on patent side, but also other areas too. Growth is there across the spectrum.

### **How are you approaching the corporate market?**

**Gallagher:** That's an important area of growth for us. The bigger the company, the longer the conversation is. It's a cultural blockage to getting comfortable with filing a lawsuit, but the more they see their peers bringing affirmative litigation, and using litigation finance to pay fees and costs or monetize and take value out of the claim, the more they are jumping on bandwagon.

**Nicolas:** We provide a different way of thinking about legal claims of assets. With corporations it's a long conversation. There's an evolution that we are going through right now. There will be explosive growth in the use of litigation finance by companies, not just for litigation but also to monetize claims. And that's a huge opportunity for the industry.

The biggest challenge is the lack of historical information and data. There isn't much historical performance. It's about changing the mindset: legal claims as assets rather than bringing affirmative assets. It's a long conversation that must go from GC to CFO to CEO. It's a conversation that takes time but it's no different than the ones we have had with law firms.

**Other than corporations, is there anything else that comes to mind regarding the impact of legal market?**

We're seeing an acceptance of litigation funding among universities. Two years ago, we launched an initiative to make universities aware of litigation finance and how they could use it to monetize their IP portfolios. Today, we're seeing an increased use of funding by universities to protect their IP.

**Gallagher:** We advocate investing with an established funder and an established team. Further evidence of the industry's growth is due to a burgeoning secondary market for assets. In fact, the further maturation of an asset class – a developing secondary market – we are seeing it. You can also participate by investing in a portfolio of cases, or an individual case, but that comes with immense risk. It's a very technical area. We do internal and external reviews of the cases we consider. We want to be sure we have a strong chance of winning.

**For investors, you can measure return on capital. What metrics do you use to measure how successful you are in underwriting decisions?**

**Cooper:** We look for certain benchmarks: motion to dismiss, for example. If you can overcome that, your chances to win go up. When you go through the discovery process, and you know the evidence, we can assess whether we have the support to prove our case. We look through the lens of a trial: if we take it to trial, do we have a chance to win. Through the life cycle, we trace how the case is developing and whether there are any surprises. We address the cross roads as best we can, but the best test is our experience and the fact that have done this before.



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## CIO Roundtable: Insights, Challenges and Opportunities

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- **Allison Chock**, Chief Investment Officer Bentham IMF
- **Patrick Dempsey**, US Chief Investment Officer, Therium
- **Aaron Katz**, Chief Investment Officer Parabellum Capital
- **Dave Kerstein**, Chief Risk Officer, Validity Finance
- **Peter Snell**, Member Mintz (moderator)

## What types of cases do you like to fund and why?

**Dempsey:** Our focus is on commercial litigation. We are all former commercial litigators - things like breach of contract, business divorce, joint venture fights. We like them because they are often based on contracts and its easy to get hands on the merits of the case. The law is well settled, there is certainty around what these cases look like. On valuation it's not a question of whether we will win but how much, and how long it takes to get there. We also are fund investor in state arbitration and are seeing an uptick in patent funding. We're seeing more trade secrets cases. And trust and estates are an area we've been seeing increasingly – disputes about large estates – valuation and timing risks.

**“ON VALUATION IT'S NOT A QUESTION OF WHETHER WE WILL WIN BUT HOW MUCH, AND HOW LONG IT TAKES TO GET THERE.”**

## Do you have different metrics or approaches for evaluating subject matter areas?

**Gallagher:** We look at commercial litigation and international arbitration. We see a lot of international arbitration and patent litigation, which is on the riskier side of the spectrum. We try to make sure that the risk and return match up.

**Law firms are an important part of the ecosystem. What are your thoughts about the level of risk that law firms must take on?**

**Katz:** There needs to be structuring of transactions to align with everyone's interests. It's important because the law firms are the engines for the outcome. Our view has evolved and become much more nuanced. We used to want to share half of the risk and upside. Expenses are easy because cash is flexible. There are many ways a law firm can cheapen its investment. Over time we've moved away from rigid formulas of sharing. We look at the risk and need to have flexibility if things don't go right. Our view has evolved we used to have more straight sharing: 50 percent of risk for 50 percent of the upside. We've moved away from formal percentages to stages with caps. We think about what the right budget and allocation of risk should be at each stage. The relationship between the law firm and funder is important.

**“LAW FIRMS ARE THE ENGINES FOR THE OUTCOME.”**

**Chock:** In the US we like the 50-50 model. We budget at the outset and agree that the law firm will pay 50 percent of the fees. We've always had some flexibility where we pay 70 percent, but we want lawyers to have some skin in the game and a financial incentive to reach best outcome. In the US, we use the lawyer's stake in the matter as a proxy for helping us to be comfortable that they will make smart financial decisions that are aligned with what we'd like them to do.

**Dempsey:** We don't have a problem with funding all fees and expenses in a case. We have no problem if a firm shares the risk and upside but we recognize that many firms aren't set up to take risk, don't know how to price it. We need to be comfortable with the merits and risk of the case. Risk is usually less of a concern.

**Is there a surplus of capital out there?**

**Dempsey:** There is a lot of capital out there. The industry is very young. There is a lot of room to grow. There is room for creativity in how deals are built. Being nimble and being able to pull the trigger will help you win at attractive prices. I'd be lying to you if I didn't acknowledge there is a lot of capital out there.

## What do you see as growth area?

**Gallagher:** It's in corporates. More companies with funds available are approaching us, because they'd rather use capital to help their own P&L. As they get more educated about opportunities that funding brings to them there will be growth. There is a thought that bankruptcy or insolvency areas could be areas of growth. The fact that everyone is anticipating a recession means there may be more growth opportunities.

**“THE FACT THAT EVERYONE IS ANTICIPATING A RECESSION MEANS THERE MAY BE MORE GROWTH OPPORTUNITIES.”**

**Katz:** I think there will be growth in all areas of litigation. There will be some product innovation there is an ocean of opportunities in small ticket cases: \$ 5-\$15 million claims. I think there is work to be done there and I think its not going to grow explosively but there will be some growth in defense side cases. We also see potential growth in business valuation disputes.

**Chock:** In the US, we've been hiring in areas where there are opportunities: international arbitration, trade secrets, patent cases. We're expanding much the way a law firm would across practice areas, and where there are deal opportunities.

## Is litigation finance available for pro bono matters?

**Dempsey:** At Therium we have over the past 6 months launched Therium Access, which is focused entirely on pro bono cases. It started in the UK and we're rolling it out elsewhere to focus on doing greater good, not returns. Returns are pumped back into the pool of capital in the space.

## SPOTLIGHT

# A Case Study: How Litigation Funding Saved a Business

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- **Paul Yetter**, Partner, Yetter Coleman
- **Bill Patterson**, Partner, Swanson, Martin & Bell (former General Counsel of Business Logic Corp)
- **Boaz Weinstein**, Principal, Lake Whillans

The discussion focused on Business Logic's use of litigation funding to reach a \$61 million settlement in its litigation with Morningstar. This was a textbook case of how litigation funding could create positive results for a client, according to Boaz Weinstein, Principal at Lake Whillans. Following a Google search, Business Logic selected Lake Whillans; the case would be the firm's first financing and it would save a company. With \$ 4 million in revenues, Business Logic had trade secret misappropriation and breach of contract claims a Morningstar subsidiary of Morningstar. Most of the companies' funds were absorbed by the lawsuits.

The company was optimistic about its claims, so it continued. But it reached a decision: free up funds by cutting jobs or identify alternative, outside financing. It found a funder, Lake Whillans, which provided working capital and coverage on fees. Armed with fresh funding, the threat of protracted litigation initiated by Morningstar was no longer as intense. The company was able to settle for \$61 million, but it could have been far worse. Business Logic is now known as NextCapital and today has a staff of more than 150 employees. The case, which was the largest trade secret settlement in the state of Illinois, illustrates how funding can save a company from going under, but also help it thrive well into the future.



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DEEP DATA DIVE

# 10 Years of Litigation Finance: What the Data Tells Us

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- **David Perla**, Managing Director, Burford Capital
- **Jose Pariente**, Chief Strategic Sourcing & Procurement Officer, White & Case

**90% of the deals are turned down. Help us understand what they look like and how does that number break down into quality, considered, not considered.**

Over the past few years we have seen more or less 1500 inquiries about litigation finance. In 2018, we had 500 and funded 87 or 6% of them. In 2017, we had 1560 inquiries and funded 69 of them. The quality of what is coming in is improving due to the maturation of the market and our ability to screen things that cannot be underwritten.

Of those 1500, one third don't make it based the origination team. Of the remainder slightly less than half make it to the underwriting pipeline. Between 400-450 go into underwriting pipeline. Of those 30-40 percent get to our investment committee. So, of those that got to our investment committee – 52% got funded, vs 39 % in 2017. We're getting better matters, sifting them faster, getting more high-quality matters to underwriting and then funding half that get to our committee.

**“THE ETHICAL DEBATE HAS HELPED EDUCATE THE MARKET.”**

**How much is the ethical landscape impacting funding decisions?**

From a business perspective the ethical debate has helped by educating the market. There's a movement by large providers to create a trade association. There is talk about self-regulation. There is more capital flowing into the space than ever before. We committed \$750 million in the first half of the year. Our research tells us that support continues at about 68-69% among lawyers

when it comes to the question of whether litigation finance is a good thing to have in the market. The ethical debate has helped to better educate the market.

**The critics say that litigation finance will hurt the industry.**

We hear all the time about the fact that the US Chamber of Commerce believes that we'll create frivolous litigation or an elongated process of litigation. But if we reject 90 percent of the cases we get, we cannot create frivolous lawsuits. We actually provide a sifting mechanism – we signal to the market as to what constitutes a good case. In terms of elongation, all the data shows that resolution times are coming down. In 2014, we had avg resolution time of 2.1 years, by 2016 it dropped to 1.6, by 2017 it was 1.5 yrs.

**“THERE IS MORE CAPITAL FLOWING INTO THE SPACE THAN EVER BEFORE.”**

**Any trends in use of litigation finance?**

Despite the focus on portfolio financing, there will still be plenty of single case funding. We've also conducted research on CFOs. For large companies with \$10 billion or more in revenues, three-fourths of CFOs said they are forgoing claims due to the impact of legal expense on the bottom line. They are not bringing claims.



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## Beyond Billables: Best Practices in Law Firm Finance

# Beyond Billables: Best Practices in Law Firm Finance

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- **Owen Cyrulnik**, Managing Principal, Curiam Capital
- **Brian Fanning**, Director of Practice Economics, Davis Wright Tremaine
- **Richard Schirtzer**, Partner, Quinn Emmanuel
- **Reed Oslan**, Kirkland & Ellis
- **Cindy Chen Delano**, Partner, Invictus (moderator)

Law firms are risk averse. For the majority, when considering litigation finance, it comes down to leverage and resources. Most firms have high cost structures. Fixed utilization of resources is critical to the model. Lawyers need to bill hours. Firms must find ways to grow their market and find opportunities to ensure their people remain busy.

As Reed Oslan noted, Kirkland & Ellis is trying to use contingent fee cases as a form of currency. We're trying to use them to get better cases. The traditional model is still here, but litigation finance is an example that things can move, albeit slowly.

## **“CONTINGENCY WORK IS ICING ON THE CAKE.”**

Owen Cyrulnik said that litigation finance can be used to support the traditional law firm model. We can use it to simulate the contingency fee model. We can also use it to help a firm that's trying to shift to a different model by perhaps putting more senior resources to a matter and share risk.

Richard Schirtzer said contingency work is icing on the cake. Our data shows us that 11 percent of our work is on contingency. It's nice work but it's not the driving force at our firm.

**What stakeholder buy in do you need as to whether to take on contingency case? How do you decide to take on a contingency case and at what rate?**

**Oslan:** We use the same process that has been in place for 20 years. The partner proposing it provides details: who is the defendant client, where is the case located, what are the merits of the case, and what is the investment. We then have committees that would decide whether we do it or not. Like many firms our desire to heavily invest in contingency cases ebbs and flows. Right now, we're in business. We recently formed a junior practice group in litigation that is focused on contingency cases. I love contingency cases as a product. It's aligned with a client's goals. With many clients, we're trying to get them to use it as a currency.

**What happens after take on contingency case and facts turn out differently – do you ever regret taking on contingency?**

**Fanning:** We either cut our losses, look at staffing or double down. The facts can be different and if its early in a case and we haven't made a sizable investment, we may settle. We also look for funding so if we've assumed a certain amount of risk we may go out and look for more funding.

**Oslan:** Biggest surprise usually is the investment winds up being a lot more than we thought. It's never less. We have an obligation to our client to work the case so we march on. We aren't great at predicting the economics.

**“FUNDING ALLOWS US TO TAKE ON CASES THAT WE WOULDN'T OTHERWISE TAKE ON FOR OUR CLIENTS.”**

**Once you've negotiated a deal, how do you staff it and get lawyers to do right amount of work and have the right mindset?**

**Schirtzer:** We try not to impose a particular staffing model on a firm. We want to put together deals where modeling of return is good for us, and make sure once we get a return there is more for firm to share and plaintiff to share risk. We try to find partners we are comfortable with who know how to litigate and whom we trust.

**How do you make clients happy?**

**Fanning:** Funding allows us to take on cases that we wouldn't otherwise take on for our clients. Funding allows us to say yes when otherwise we would say no.

**Cyrulnik:** Litigation funding provides advantages in things that law firms can't do. We've had clients want to take in capital to stay alive in a case or after a win. What if a case goes in the wrong direction? There are lots of ways we can bring value to client that firms cannot. That's the most important thing: writing checks that law firms cannot.

**With a lot of capital out there chasing deals, how pick your strategic partners?**

**Oslan:** We know the half dozen firms we would want to talk to in a certain circumstance. If it's a patent case or trade secrets case we may look at certain firms. We often are a conduit for the client. If you're willing to put 50% of fee at risk then you're probably willing to put 100% of fee at risk, we try to help client in an informal way – there aren't that many cases. Depending on the type of case, we know which firms to go to, and we'll get the bids.

**What about the cost structure? What happens to the cost structure?**

**Fanning:** If you move work from hourly to fixed fee you have focus on what the costs are. There is a need to focus on costs where you are revenue constrained, but if you can manage the costs you can make a lot more money. We have lots of people who take data and try to leverage it to manage costs and understand cost of delivering services so you can take advantage of new opportunities.

**“DEPENDING ON THE TYPE OF CASE, WE KNOW WHICH FIRMS TO GO TO, AND WE’LL GET THE BIDS.”**

**What will the business model look like ten years from now?**

**Schirtzer:** There are ethical and rule-based constraints on capital raising. If there's a big shift in how funding works – it's allowing non lawyer equity investments in firms. There are new ways for firms to operate more like businesses than the partnership model. If they can do that, and invest in research and development, the business of law can be transformed in a big way.

**Fanning:** We see much more comprehensive relationships with clients. In our firm that comes from engagement, where we aren't billing by the hour and instead want to work efficiently with clients to solve their business problems.

**Oslan:** Clients will begin to drive more risk sharing with their law firms. There will be an acceleration because some clients are getting resistance at a level; they want a 50% discount. They'll realize this isn't the right model and there should be a transfer into risk sharing. Clients will force change: "We'll give you this case and give you \$250,000 per month and we'll give you \$ 3 million if we win. This could drive positive change.



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## Ask the Experts: Tough Questions in Litigation Finance

# Ask the Experts: Tough Questions in Litigation Finance

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We gathered some of the leading experts in litigation finance and posed questions that addressed some of the topics investors and corporate executives are asking. Here's what unfolded:

- **Aaron Katz**, Chief Investment Officer, Parabellum
- **Michael Kelley**, Partner, Parker Poe
- **David Jang**, Principal, Bardin Hill Investment Partners
- **Andrew Langhoff**, Managing Director, Red Bridges (moderator)

The litigation finance industry is in good shape. There is a need in the market. Ninety-eight 98% of those that have used litigation finance would use it again, according to a survey by Validity Finance. It's the early days, but what does the market look like? What mid-course adjustments do we need to make to pricing and how we deal with counterparties?

## How big is the litigation finance market?

**Langhoff:** This is the question most frequently asked by investors – and the question most difficult to answer. Most funders are private and don't report number or size of their investments. It's difficult to estimate because the market is fluid, with hundreds of millions of new dollars entering each year and market penetration continuing to grow among those taking up litigation finance.

**Katz:** I look at it from what we're able to put to work in a given year. Typically, that's \$125-150 million per year of commitments. Some firms can do twice that. I've seen numbers for capital put to work anywhere from \$1.5 to \$ 4 billion. Significantly, this figure does not include class actions or mass tort portfolios, which can reach \$50 million and more apiece, but which are usually financed on an interest rate basis and often with recourse.

## **What is a reasonable rate of return on investment?**

**Kelley:** In the commercial market you have to separate the quality of the risk to the investor base. Anywhere from 25-30 % and then there are outliers. We think that at scale there will always be really good cases but a 3x number – close to that is a much more realistic ceiling.

## **Has the investment thesis or business model for litigation finance been proven out yet?**

**Aaron:** Clients have gotten capital they need to see meritorious cases through. Aside from blow-ups and ethics, I think that has worked. We have had several vintages of investments mature and deliver the equity returns we need to stay in business. In the end it comes down to good case selection. In our view it comes down to price discipline and pricing it properly. The real ceiling on returns is the performance of the underlying cases.

**Kelley:** If you measure it by demand and interest from law firms and consumers, there are significant indications the thesis is proving out. Its very early but the industry is getting investments from many sources – family offices, hedge funds, multi-asset managers and other investors. The demand and positive reaction in the industry is suggesting that the model is proving out. Some sub components such as defense side funding have more development ahead as the industry matures.

## **What types of competition are there and how could it affect the market?**

**David Jang:** Traditional asset managers and hedge funds are already a source of competition and they will increase. I am starting to see the sell side entering the market, which can impact competition. We're seeing banks, brokers, institutional brokers enter market hunting for big dollar claims. They disrupt the traditional litigation finance sourcing and origination methods.

**Aaron:** This business proves to be a disappointment to large multi-strategy investors when they realize how labor intensive it is relative to scale. It's a lot of work to do a \$3-5 million deal and we have relationships with firms and can partner on large deals. Banks can be valuable because they are smart, they bring in expertise and resources.

## **Should the industry consider protecting itself or providing level of trust to counterparties?**

The panel was in agreement - the industry needs to make its case and enhance its brand through a trade association. This would help to create a level of credibility and trust to the market by establishing a set of best practices, conduct, or guidelines that govern the industry and its players. The panel agreed it was unclear which funders and firms would rise to the occasion and lead in the development of a trade association. As a panelist noted, "it would behoove the industry to have some self-regulation to figure out how we should move forward. It will be critical to growth of the industry.

**“SMALLER LAW FIRMS AND SMALL GROUPS ARE LEAVING FIRMS TO START THEIR OWN BUSINESSES AND DEVELOPING NEW BUSINESS MODELS AND TRANSITIONING TO A VENTURE CAPITAL MODEL.”**

## **How is the industry impacting law firms?**

Litigation finance is changing the capital structure of law firms by allowing them to make investments. Counter parties are launching new law firms. The industry is making law firms more competitive by enabling them to take on cases that were previously not possible. They are helping them to grow practices, grow across geographies. Funding has even been shown to save law firms. Smaller law firms and small groups are leaving firms to start their own businesses and developing new business models and transitioning to a venture capital model.



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# Current State of the Law in Litigation Finance

# Current State of the Law in Litigation Finance

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- **Peter Buckley**, Fox Rothschild
- **Lucian Pera**, Partner, Adams and Reese
- **Michael Roth**, Partner, Boies Schiller Flexner
- **Eric Schuller**, President, Alliance for Responsible Consumer Legal Funding
- **Alison Frankel**, Legal Columnist, Reuters (moderator)

Panelists shared first hand insights on recent developments in state and federal rules requiring disclosure and discovery.

The discussion examined the Third Circuit decision that a judge overseeing the NFL Concussion Ruling and Law of Assignments case overstepped her authority in an order that voided more than 1,000 player contracts due to evidence of abusive deals. The April 26, 2019 ruling stems from a hotly disputed decision in 2017. In that case, U.S. District Judge Anita B. Brody voided numerous signed NFL contracts where players had agreed to transfer significant parts of future awards in exchange for upfront cash to litigation funders like such as RD Legal and Thrivest Specialty Funding LLC. Judge Brody voided all of these contracts and directed the settlement administrator not to pay funders. The move drew protests from RD Legal and other funders who had disbursed checks to players expecting awards.

Peter Buckley, who represents Thrivest, said he hoped the decision and the resource-draining fight would speed up the settlement process and encourage lawyers negotiating future deals to better plan for a role for financing companies. Funding, he said, gives parties access to funds earlier than they would normally be. In granting speed to people who are injured, they can get their rewards sooner. Consequently, the need for funders will decrease. Regardless, the case was a wake-up call: what affects one group or one series of transactions can spill into others. It highlights the need to be vigilant – the issues being decided with regard to these transactions: pre or post settlement, they have an impact on the industry.



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# Deals Done Right: Lessons Learned from Top Litigators

# Deals Done Right: Lessons Learned from Top Litigators

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- **Steven Molo**, Founding Partner, MoloLamken
- **Jonas McDavit**, Partner, Desmarais
- **Tatiana Sainati**, Associate, Wiley Rein
- **Ronald Schultz**, Chair of the Executive Board, Robins Kaplan
- **Charles Agee**, Founder & CEO, Westfleet Advisors (moderator)

## How does the subject of litigation funding come up with client?

**Molo:** Sometimes we're contacted by a funder and they ask if we are interested in representing the client. Often the client has counsel. Sometimes people come to us with a case, and depending on our portfolio we might decide to go to a funder.

**“LAWYERS AREN'T GOOD ECONOMISTS, BUT WE DO UNDERSTAND THE RISK PROFILE OF A LITIGATION.”**

## How do you think about offering alternate terms to a client with funding or without funding?

**McDavit:** Lawyers aren't good economists and we aren't investment bankers. But we do understand the risk profile of a litigation. With patents, there are many ways a patent can die and obstacles before a patent gets to a verdict. That's how we start to think about a case. What's the risk profile of a case and then we look at where it fits in the portfolio of cases, we have within our risk profile. We either advise a client to get funding if we like the case but it doesn't work for us; the risk may be too large or we like the case and think we can self-fund.

## **What are the key points that clients need to know before beginning funding?**

The biggest issue is managing expectations. Full disclosure is very important. It needs to be understood when you are dealing with a client and a funder. You represent the client and not the funder, that needs to be clear to everyone. Clients also need to know the economics of a deal. We have a whole group of people who do rigorous analysis and work with spreadsheets. You don't want a situation where you are involved in dispute; the funder's lawyers get all the money in a recovery and not the client. It's important to walk a client through deal terms, how the waterfall works, and the various stages of the litigation. Next, you need to document the disclosure. It's critical that you manage client expectations, and have full disclosure to avoid surprises.

## **How important is having experience in litigation funding?**

**Sainati:** Having experience in funding is helpful in understanding the process, managing expectations. It's helpful in vetting cases and being able to estimate your realistic chances of having a funding agreement in place. You really need to understand how a deal will be structured, when fees will come in and what to expect in the process and how to engage with a funder.

## **How do you help clients evaluate funders?**

**Schultz:** There are a lot of funders and options in the market. You can go to a one stop shop, or a funder that does due diligence and shops it around. You can go with a funder that you have a relationship with.



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# Litigation Finance in the Legal Department: In-house Perspectives

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- **Stephen Akerley**, Member, Mintz
- **York Eggleston**, Managing Partner, YE Ventures
- **Timothy Murphy**, VP & General Counsel, Hollister Inc.
- **Brad Waugh**, Associate General Counsel, Litigation, Intel (moderator)

The closing panel provided the corporate perspective: what do general counsel and other corporate counsel think about litigation funding and how do they manage their own teams with respect to this alternative? In communicating with their leadership teams, it's important to help decision makers understand the market. To do so means helping to simplify the concept of funders, what services they will provide, how the process works, and what it will cost.

Timothy Murphy said he frequently relies on his outside legal counsel and funders to help him manage expectations of his organization's leaders. Funders and law firms can help him to understand how a litigation will play out, what it will cost and what he should communicate to leadership.

Stephen Akerley, a member at Mintz, also leans on outside counsel heavily. He uses them as early as possible, especially on complex matters such as patents. He said he would never go to a funder without vetting it with his outside counsel. "You must be willing to invest in internal resources to properly vet funders," he said.

Murphy said that many more companies are open to funding today. They are not only seeking funds, but looking for ways they can use funders to inject money into their organization, or monetize assets.

The market is driving greater awareness of litigation funding. A number of the largest funds weren't around two years ago. There's more capital and more opportunities today.

Murphy spoke about the qualities his team looks for in a funder: financial strength, and reputation are critical, he said. He said he avoids those with a reputation of being difficult to work with or being inefficient.

Finally, what Eggleston said would seem all too obvious: funding is the key. Believe it or not he said, a funder may commit but may not have the funds to do so. If they do, you can begin to look at deal structure, which are impacted by expenses and time needed from outside counsel. Once these components are in place, you can begin to evaluate a deal and have open discussions about deal terms, which are certain to evolve as the process moves forward.