



## LITIGATION FUNDING

### FREQUENTLY ASKED QUESTIONS

#### What is Litigation Funding?

Litigation funding, also known as legal financing, is when a party involved in a dispute or litigation, is provided with funds to pay some or all of their litigation costs. The party providing the funds typically has no direct role in the dispute or litigation other than the provision of the funds.

Whilst Litigation Funding can take different forms (including funding provided by a commercial Litigation Funder, an arrangement with the law firm that it will defer certain costs which will only be paid at the end of the (successful) case and insurance for certain aspects of the litigation), it usually refers to an arrangement with a commercial Litigation Funder, called 'Third Party Litigation Funding'.

**Third Party Litigation Funding** involves a third party, the Litigation Funder, providing funds to a claimant to fund the costs of their involvement in a Court case. In return for providing these funds, the Litigation Funder will typically seek return of its funding plus an agreed portion of what the funded party receives from the case, but only if it is successful.

Usually, litigation funding is 'non-recourse', meaning that if the funded party is not successful the Litigation Funder will not receive repayment of its funding or any return on this investment. This is the primary difference between litigation funding and a loan- whereas a loan must be repaid, the litigation funder will not receive any payment, including return of its funding, unless the funded claim is successful.

#### How do Litigation Funding arrangements work?

Once a Litigation Funder has determined that it is prepared to offer funding for a claim, it will provide the claimant with a **Funding Agreement** which will set out the rights and obligations of each party. Typically, that will include:

- The amount of funding being offered and the fee/commission which the Funder seeks to charge (in addition to repayment of its funding).
- The indemnity which the Funder is prepared to offer the claimant so that if the claim is unsuccessful, the Funder will pay the costs of the other side. This may be an unlimited indemnity or it may be capped at a certain sum. If the indemnity is capped then the claimant needs to bear in mind the risk that if the claim is unsuccessful and the other side's costs are higher than the indemnity, the claimant might have to pay the amount above the cap.
- The services which the Funder will provide in addition to providing the funding for the litigation. This might include consulting with the Lawyers and claimant in relation to strategy, facilitating reports to the claimant, reviewing the Lawyer's costs on an ongoing basis.

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- Acknowledgment by the claimant that it will cooperate with the Lawyers and Funder and follow reasonable legal advice given to it by the Lawyers, that it will not attempt to deal directly with the defendant and that in a class action, the Representative will provide instructions to the Lawyers in relation to the management of the class action on behalf of the other group members.
- Authority provided by the claimant for the Funder to provide day-to-day instructions to the Lawyers to progress the claim (usually in a class action context).
- The circumstances in which the claimant and the Funder, respectively, can terminate the funding agreement and the consequences of any termination.
- Processes for dealing with complaints and disputes between the claimant and the Funder, which might include referring complaints and/or disputes to external parties for resolution.
- Acknowledgments by the parties that the funding arrangement and information conveyed between the parties in relation to the claim are to be kept confidential.

After the parties have agreed the terms of the funding arrangement, they will sign the funding agreement and the Litigation Funder will commence paying the legal costs associated with the litigation.

The Litigation Funder typically maintains a **monitoring role**, which will vary from case to case. In a class action context, the Litigation Funder is usually empowered to provide day to day instructions to the Lawyers, with the Representative (the claimant who is representing the entire class and who is named in the Statement of Claim) also providing instructions to the Lawyers.

### **What are typical fees charged by Litigation Funders?**

The fees charged by a Litigation Funder will depend on a number of factors, including the strength of the claim it is being asked to fund, the value of the claim, the amount of funding required for the claim, where the claim is up to (for example, have proceedings been commenced, is the claim close to a mediation or trial), and the time it is likely to take to achieve a resolution of the claim.

Timing of resolution is important because the longer it takes for a claim to resolve, the longer the Litigation Funder must wait for its funding to be repaid and to receive any return on its investment. Unlike a standard loan, the Litigation Funder does not receive any interest on its funding whilst it is waiting for the claim to resolve.

Third Party Litigation Funders typically enter into funding agreements in which they undertake to fund a claim on the condition that if the claim is successful, they will be repaid their funding in full, plus be paid a fee or commission equivalent to a certain percentage of the amount the claimant (funded party) receives at the end. Most Litigation Funders charge a commission in the range of 20%-40% of claim proceeds received. Sometimes, a Litigation Funder might charge the fee/commission based on a multiple of the amount of funding it has agreed to provide, rather than a percentage of claim proceeds.

If a Litigation Funder is involved in funding a class action, and it settles or is successful at a trial, the Litigation Funder may ask the Court to make an order which requires all members of

the class to contribute to the repayment of the Funder's costs (the monies it has paid to fund the cost of the class action), plus pay the Funder a fee/commission equivalent to a certain percentage of total claim proceeds, regardless of whether each claimant has signed a funding agreement with the Funder. This is typically called a common fund order, or CFO. It may also be referred to as a Distribution Order.

However, in a class action which has been commenced in Court, ultimately any deductions from a settlement or judgment can only be paid if the Court approves them as being fair and reasonable.

## **What are the Benefits of Litigation Funding?**

### ***Removal or mitigation of financial risk***

Litigation is expensive and often the course it takes and the outcomes are unpredictable. If a Litigation Funder agrees to fund a case it will pay all or some of those costs and if the claim is unsuccessful in Court, the funded party will typically owe the Litigation Funder nothing. If the Litigation Funder has also agreed to provide an indemnity to the funded party, then this also protects the funded party from having to pay the other side's costs if the claim is unsuccessful. In this way, the involvement of a Litigation Funder can remove most of the financial risks associated with the litigation.

### ***Objective assessment of the claim***

A Litigation Funder will assess an application for funding using various criteria, including the strength of the case, the value of the claims, how much it will cost to run the case, and whether the other side will be able to pay the claim if it is successful. This means that an external third party has considered the claim and, if it has entered into an agreement to fund the claim, that is an indication that it considers the claim is a good investment. The funded party has the benefit of that independent review having been conducted by the Litigation Funder.

The Litigation Funder will often continue to assist with strategy as the case progresses and will bring to the claim the benefit of its experience in litigation, not just in relation to the legal issues, but also commercial factors which may be involved.

### ***Equality of arms for class actions***

**In a class action context**, often it will not be practical for an individual claimant to bring only their claim because the costs and risks of litigating an individual claim will usually outweigh the value of the claim itself.

Importantly, the involvement of a litigation funder in a class action addresses the risk that the defendant may outspend the plaintiffs in pursuing their legal defence; equality of arms is important to achieve justice in the adversarial civil justice system and the costs of a class action are significant and typically in the millions of dollars. In this way, it can be said that a litigation funder may 'level the playing field', ensuring these claims are considered on their legal merits rather than how much money the parties may have to spend on the litigation.

Psychologically, the involvement of a Litigation Funder can signal to the other side that an independent third party has determined that the claim is a good investment and is prepared to back it.

## **What are the Risks of Litigation Funding?**

### *Financial risks*

If the Litigation Funder has provided an indemnity to the funded party against adverse costs (the costs of the other side) but it is capped, then there is the risk that if the claim is unsuccessful, the funded party might have to pay the amount of the other side's costs which exceed any cap.

Even if the claim is successful, the costs of the litigation might be so high that after repaying the Litigation Funder its funding and paying its commission, there is not much left for the claimant. However, this risk is generally offset by the Court having to provide approval of all fees payable to the Litigation Funder in any class action.

### *Funder terminates the funding agreement*

The Funder may terminate the funding agreement if certain circumstances arise during the course of the litigation (typically if the prospects of the case succeeding diminish significantly or the value of the claim falls below a certain level) and the funded party will need to find a replacement funder. If it cannot do so, then the case may need to be discontinued.

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