Exton Advisors

What makes a case suitable for litigation funding?

Tom Steindler · Tuesday, March 15th, 2022

Individual investment firms will have many hundreds of cases brought to them each year and so it is essential that any case presented for investment is meticulously prepared to ensure that you or your client maximize the chances of success.

Fundamentally, an investor needs the confidence, as far as possible, that it can achieve a good return on its investment and must be presented with all relevant information to enable then to take a commercial view on the risk it will assume in investing in the case.

There are 3 fundamental questions to consider when applying for funding:

- **Do the economics of the investment work?**
- **Is the case strong on the merits?**
- **Is the defendant solvent and will any award ultimately be enforceable?**

1. Do the economics of the investment work?

Value of the Claim

Funding litigation or arbitration is a high-risk investment, and funders will require a certain investment to quantum ratio. In another words, the legal budget must be proportionate to the value of the likely recoveries.

Broadly speaking, if you are looking for investment in a single case, small claims coupled with large costs do not work economically.

Investors will typically look for a ratio of 10:1 in terms of realistic recoveries to funding requirement, though this varies between funders.

For example, a £100m claim would generally support a maximum budget for fees and expenses of £10m. However, it is important to be mindful that any final award of damages is, more often than not, lower than projected. In practice then, the greater the headroom between the realistic value of a claim and the legal cost associated with it, the more attractive the case will be to an investor.

Some things to consider when developing your damages theory:

- There should be recoverable damages large enough to support a return for each of the funder, law firm (to the extent acting on contingency) and client.

- A map of the main elements that make up your quantum coupled with as much analysis as possible to support each element. Expert quantum reports from an economist are helpful in some situations but will not necessarily always be required.

- Hard damages should be sufficient to support any investment without the need to rely on elements such as loss of profits, which by their nature are more subjective.

It is also worth noting that in circumstances where the economics of the claim do not support a litigation funding arrangement, other risk transfer solutions may still be available to help manage litigation risk.

Legal Budget

Litigation by its nature is unpredictable. This can make it difficult to budget with complete accuracy.

However, is vital to align the budget with the litigation strategy ensuring that spend is realistic and models likely economic outcomes, building in reasonable buffers to allow for costly detours. This enables an investor to better evaluate whether the case presents an investment opportunity.

Arguably, the most efficiently run cases are those where a law firm acts on pure contingency with every incentive to bring in a large judgement or settlement and minimise expenses. Funded cases, where the law firm shares in the risk, also typically create efficiencies; the discipline of working within a strict budget again ensures the law firm is not incentivised to go beyond the agreed budget.

Funders can be extremely helpful in helping to draw up an accurate litigation budget, not least where they have access to extensive data sets demonstrating the cost of litigating similar cases.

2. Is this a strong case on the merits?

Facts and Evidence

An investor will be looking for anything in a case that can potentially affect its outcome and the more developed a case when presented to an investor, the better. This will involve ensuring that as much evidence as possible to support all theories of liability and damages in the case is presented, including expert reports, where necessary.

Working with us at Exton gives an opportunity to look at a case with fresh eyes and help support the case strategy with new ideas.

It is important to be upfront about any challenges or unknown elements in a case – this will build trust but importantly allow you or your client to work with Exton and potential funders to address the gaps and build a meritorious case.

Legal representation

A litigation funder agreeing to make a non-recourse investment in a case is essentially investing in the legal team and their ability to successfully represent their client. The credentials of the law firm as well as the legal team on the defence side is an important consideration and demonstrable experience and success in litigating the type of case at hand will go a long way to building an investable opportunity.

It can also be helpful when looking to persuade a funder to invest in a case to show that the law firm also has some "skin in the game" and is willing to take the case on some level of contingency. Indeed, some funders will expect the law firm to take some element of risk in the case.

3. Is the defendant solvent and will any award ultimately be enforceable?

Investors will want to know if the defendant is able to meet the claim, together with any costs and interest. They will want to know where assets against which they may need to enforce, are situated. If assets are situated in jurisdictions where enforcement is difficult, that may deter some funders.

At Exton, our team can advise you on the different potential risk transfer options available to you and your clients and the suitability of your cases or cases for funding. Our in-house team will prepare the investment memorandum and proposal documents, ensuring that the critical elements of the case are addressed, including budgeting, recoverability and enforcement.

Our mission is not only to receive a "yes" from an investor but to negotiate a commercially attractive offer for your client. We will undertake a detailed pricing analysis as well as advising on the investment terms, ensuring that your client is receiving objective, independent and conflict free advice.

The vast majority of cases presented to litigation funders are rejected.

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