# Litigation Funding ? an Overview from England and Wales

By James Brown | August 29, 2019

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Recent news reports will have highlighted for many commercial parties the existence of the litigation funding industry. In the past five years it has grown into a multibillion dollar industry and the number of entrants into this investing arena has multiplied exponentially. It is global in scope, and multijurisdictional, though its presence is most pronounced in the United Kingdom and United States.

The purpose of this article is to provide a perspective from England and Wales (more specifically from London) on what litigation funding entails, why it has grown here in popularity, and what commercial parties need to know about it from a practical perspective.

**What is litigation funding?**

Litigation funding involves a third party with no commercial or other interest in legal proceedings, whether litigation or arbitration, funding the costs of the proceedings – so saving the funded party from having to do so. Such funding is provided for a fee that is paid from any monetary sum realised by the funded party as a result of the funded proceedings being successful or upon a favourable settlement.

**The growth of the litigation funding industry in England and Wales**

The litigation funding industry has in recent years developed rapidly in England and Wales as a result of a number of key court decisions. Traditionally, English law had tended not to favour arrangements pursuant to which a third party funded the pursuit of claims by another. The doctrines of “maintenance” (which prohibited the improper support of litigation in which the supporter has no legitimate concern, without just cause or excuse) and “champerty” (which sanctioned the financing of another person’s claims for a financial reward) impacted on the legality of the funding of the pursuit of claims by third parties. The policy concern was that such funding by a third party could lead to the justice process being distorted by the meddling of the third party funder who would be focused on achieving a return on the investment. These doctrines can still operate to render unenforceable a third-party funding arrangement if it is not structured correctly. However, there has been a significant relaxation of the approach such that litigation funding in itself will not amount to maintenance and champerty unless there is something particular about the arrangement which is *improper*. So the courts will guard against arrangements which allow a third party funder — rather than the funded party that has the claim — to control the pursuit of the claim, or which allow the funder to have an excess of information concerning the matter or to potentially reap too excessive a profit relative to the total damages that may be recovered.

The case which really drove the development of the industry was that of *Arkin v Borchard Lines Ltd and others [2005] EWCA 655*. This established the principle of the “Arkin Cap” by which it was determined that a third party funder’s liability to pay the legal costs of the opponent of the funded party upon its successful defence of the funded claims (i.e. pursuant to the usual English law

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approach that the losing party in litigation be required to pay the legal costs of the successful party) should be limited. Thus, the funder should have to pay to the successful party in respect of its legal costs an amount no greater than the amount the funder had provided by way of funding of the claims in the litigation. With such protection in respect of the risk of having to pay the legal costs of the party on the other side if the funded party's claim was defeated, the funding market grew rapidly.

Over recent years there has been a gradual erosion of the Arkin Cap principle. Recently, in fact, the Court has exercised its discretion to hold a funder liable for *all* of the legal costs, incurred since the funding arrangement was agreed, by the party in the litigation that was adverse to the funded party upon the adverse party defeating the claim. However, as insurance will usually be placed to cover such an eventuality, the result is that the industry looks likely to continue to grow.

**Why might a party want litigation funding?**

There are a number of key reasons why:

1. It allows a party to pursue a claim without itself having to fund all of the costs of doing so. Instead, the funder pays the costs that it has agreed to pay as they are incurred, in return for being paid the agreed fee in the event of the claim succeeding and a recovery being made. As such, the existence of litigation funding means that a party can pursue a claim that it may not otherwise have been able to afford to pursue.
2. Alternatively, by reducing the cost of pursuing claims, funding means that the party with the claim can instead use its capital for what may be more pressing needs – e.g. to continue to fund its business or to invest in other commercial opportunities.
3. Litigation funding allows a commercial party to move the cost of litigation off its balance sheet. This can be attractive.
4. Whilst a funder is not permitted to be overly involved in the conduct of a claim by the funded party, the courts do recognize that a funder will need to undertake due diligence into the merits of a claim during the process of determining whether to provide the necessary funding. Further, the courts recognize that it is prudent and to be expected for a funder to undertake, during the progression of court or arbitral proceedings that it is funding, periodical reviews of the conduct and development of the case so as to manage the risk of an adverse cost order being made against the funder should the funded party's claims be unsuccessful. The litigation funding process and involvement of a funder might therefore provide a funded party with an additional degree of "comfort" in determining whether to pursue a claim. This is because an offer of funding from a reputable provider is likely to involve that funder having undertaken its own legal analysis to determine for itself that the claim has merit and the maintaining of funding during the proceedings is likely similarly to be based on an assessment by the funder that the merits remain good.

**What kind of claims can be funded?**

Typically, litigation funders will look to fund the costs of pursuing claims - whether by means of litigation or arbitration - and so not the cost of defending claims. Exceptionally, however, it may be possible to obtain funding for the costs of defending a claim if the defendant also has a counterclaim that is likely to succeed and to exceed the value of the claim.

The claims will usually have to have a monetary value. Sometimes it may be possible to obtain funding in respect of a claim for some non-monetary remedy, but the funder will need to be satisfied that there will be the possibility of shortly thereafter monetarising the value of what is claimed (so it

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may be possible, for example, to obtain funding for a declaration concerning the ownership of an item of property that could be sold thereafter).

Typically, litigation funding supports civil claims brought by commercial parties.

**What does litigation funding typically cover?**

The costs covered by the funder will be some or all of the following costs incurred in litigation or arbitration: (i) the costs of the law firm acting for the funded party; (iii) the costs of any barristers who are instructed to act by the law firm; (iii) any disbursements in respect of the claims, for example, the costs of expert witnesses; and (iv) the fees and disbursements of the arbitral tribunal or any court fees to be paid.

Funders will also sometimes agree to provide funding to meet any order or award made requiring a claimant to put up “security for costs”, that is to say security to ensure that the defendant will be paid its legal costs by the claimant if the defendant succeeds in defeating the claims and is awarded its legal costs.

**How is funding obtained and what might influence a funder to agree to fund a claim?**

The process of obtaining funding involves providing the funder with a package of information concerning the prospective claims to allow the funder to decide whether to provide the required funding. Agreements will typically be put in place during the evaluation process to maintain the confidentiality of documents and information provided during this process, and to seek to avoid the waiver of privilege in documents. Often, the funder will wish to tie a party seeking funding into an exclusivity period whilst it investigates the merits of the claims and makes a decision whether to offer funding.

The following factors are likely to impact positively on the likelihood of a funder agreeing to fund proceedings:

1. That the claims have good prospects of succeeding. Of course, funders may be willing to fund less meritorious claims in return for a significantly higher fee, but typically a funder is going to want the prospects of success to be greater than the prospect of the claims failing, and then by some margin in favour of success.
2. That the relevant facts in respect of the claims are supported by contemporaneous documentary evidence as much as possible and that the claims are not heavily dependent upon oral witness evidence. The performance of witnesses under cross-examination is unpredictable and so funders may shy away from cases which depend too heavily on witness evidence.
3. That the party against whom an award or judgment is to be sought will not only be “good for the money” (i.e. have sufficient means to pay or to enforce against) but that viable means exist to compel payment and so realise sums that are due. It is common for parties not to voluntarily comply with judgments or arbitral awards. A funder will want to know that there are assets available against which to enforce any eventual award or judgment if so and that there are legal avenues available that will facilitate the prompt realisation of sums owing against such assets. Assets need not be located in the jurisdiction of the courts or arbitral tribunal that will determine the matter. However, a funder will need comfort that the funded party will be able to take any award or judgment obtained easily to whichever jurisdiction assets may be located in and obtain payment of such award or judgment.

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4. That the claims do not give rise to important policy or political issues which may weigh upon the determination of the matter. So, for example, a funder may be unwilling to fund a claim which involves novel points of law on an important commercial matter where, for example, a decision one way or the other may open the "flood gates" to numerous similar claims because the additional "policy" considerations might increase the "litigation risk" (i.e. the potential for an unforeseen outcome).
5. That witnesses and documents have been identified and are available. If factual witness evidence will be necessary to successfully pursue a claim, funders will need to know that relevant witnesses have been identified and are willing to cooperate in providing evidence. That relevant documents are available and have been preserved will also be key.

**What are the consequences for a funded party if it succeeds with its claim?**

The terms of the funding agreement will provide when the funding fee is payable. Typically, the funder will be entitled to be paid its fee only upon any award or judgment obtained being realized.

**What if the funded party does not succeed with its claim?**

No fee will be due to the funder. The funder loses its capital investment and has no recourse against the funded party.

Sometimes a funder will have expressly agreed to be responsible for any "adverse costs order" that may be made against an unsuccessful party (i.e. requiring it to pay the legal costs of the successful party), although it should be noted that a funder may anyway be determined to be liable by the Court for such costs even absent such an undertaking. Usually, however, the funder will have required the funded party to have obtained insurance against having to pay such costs, because the existence of such "after the event" (ATE) insurance may serve to protect the funder from the risk of being determined liable to pay such costs (which can be the case if the funder party is not able to pay them).

**What does the future hold for the litigation funding market?**

The market for commercial litigation funding looks likely to continue to grow. It may be that funders will over time be subjected to increased regulation, which may have a tendency to increase the costs of obtaining funding. However, the expectation must be that as more funders enter the market, and as awareness of the industry and so demand for funding continues to increase, the costs of funding will decrease so as to counter this and to support demand. Moreover, there has been an emphasis in the commercial world in recent years to reduce legal expenditure whenever possible — an objective that can potentially be served by the growth in third party funding of legal claims - which will further support growth. Further, litigation funding can be seen as a tool that promotes greater access to justice – by for example facilitating parties bringing claims that they have to date been unable or unwilling to fund (including perhaps historical claims where there may be causes of action that accrued a number of years ago which are not yet time barred). For this reason, the availability of litigation funding is undoubtedly a "good thing," and we believe that more and more claims will involve funding and so continue to drive the development of this industry.

This alert was also published in *Law360*. (Subscription required)

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