

How Firms Can Improve Their Chances For Litigation Funding

By **Kevin Penton**

Law360 (February 10, 2022, 2:37 PM EST) -- Litigation funding is increasingly common for cases, but so is something else: rejection.

For example, of the 1,727 applications that funding heavyweight Omni Bridgeway Ltd. received worldwide in its fiscal year ending in June 2021, it greenlighted only 77, or 4.5%, according to a presentation it made to investors in August.

The figures may seem daunting, but some funders suggest that companies and law firms looking for investors who can help level the playing field against a deep-pocketed defense can increase their chances of being among the chosen few by following certain practices.

Keep It Real on the Potential Return

Law firms and companies should be pragmatic about whether the amount they're requesting is proportional to the realistic value of the case, said Sarah Tsou, an investment manager and legal counsel for Omni Bridgeway.

If a funder funnels money into a case, they are looking to then make a profit on the investment, all while making sure that the party and the attorneys working on the case will also be adequately compensated from a potential favorable verdict, she said.

Companies and firms often overestimate the amount they expect to recover from a resolution — with high damage estimates that assume a very, very best case scenario — while underestimating the time and the cost it will take to get there, Tsou said.

Before approaching a litigation funder, attorneys should think about which lawyers will be sitting across the aisle and process the case from the defense side's perspective, taking into account what their arguments will be, how successful the opposing counsel's track record is and the likelihood that some of the rulings will go their way, she said.

"The more [money] we put in, the more we have to be able to realize in returns to make it worth the investment," Tsou said.



Eric Blinderman



Sarah Tsou

Know When To Approach a Funder

Goldilocks may have had her flaws, but she was consistent in searching for her sweet spot, whether it be in porridge, chairs or beds.

Similarly, law firms or companies seeking for an outside entity to fund their litigation costs should aim to neither show up too early in the process nor too late, experts said.

Omni Bridgeway will fund litigation at just about any step in the process, including post-trial, and it tends to greenlight funding more for cases that are past the embryonic stage, Tsou said.

"The more developed a particular case is, the more likely it is that we will be able to fund it, on terms that are attractive to everybody," Tsou said, "because some of the risks of an earlier case have been overcome by then, making the investment relatively less risky."

Therium Capital Management generally won't move on matters where attorneys are kicking around an idea and are looking for someone else to validate them so they can proceed, according to Eric H. Blinderman, its U.S. CEO. A sweet spot for him may be after a complaint has been filed, and the matter may have survived a motion to dismiss, but before the litigation is approaching the trial stage.

"Trial is inherently binary: You're either going to win or lose," Blinderman said. "You're putting yourself in the hands of, in large part, a jury of lay people."

Make a Realistic, Detailed Pitch

Whether it's that opposing counsel have won nine out of their last 10 trials or that your side's lead attorney has a couple of recent L's at trial, those making the pitch should be upfront not only with the potential strengths of their case but also with its potential weaknesses, Blinderman said.

While Therium will conduct its own research into a matter, the company appreciates it when attorneys are as detailed with what can go wrong with a case as with what can go right, as the approach demonstrates that the attorneys involved are thinking about the fight ahead and already looking at Therium as a potential partner, he said.

Culling and sorting what is sure to be piles upon piles of relevant data into digestible and organized files will also help litigation funders work faster, an important element for clients seeking a resolution to a dispute and to investors seeking a return in a realistic amount of time.

"By and large, we're going to find what the good, the bad and the ugly is," Blinderman said. "Focusing on only the good isn't necessarily going to establish credibility at the onset."

If at First You Don't Succeed ...

While the low approval rate can seem daunting, law firms and companies should not be dissuaded from approaching litigation funders if they believe the approach could be a good fit for a case, Tsou said.

Getting on the radar of litigation funders early on in a case could be a good tactic, even if the initial answer is "no," as attorneys could gain valuable insights on the process, she said. They also could come back later in the same litigation and get a favorable answer.

"If you look at our overall rejection rate for all applications it is pretty high, but if you look at individual law firms and clients with whom we have an existing relationship, where we've gotten to know them over the years and reviewed many cases together, the rate of rejection is actually much lower," Tsou said.

--Editing by Brian Baresch and Alyssa Miller.

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