

IP Hybrid Contingency and Litigation Funding

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Today's Presenters



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IP Litigation Funding

- Purpose: allow IP clients who cannot afford to enforce their IP rights because of cost, potential risk, or limited cash flow
- Funders: provide **non-recourse** funding to clients to enforce IP rights
 - No obligation to repay funder if no recovery made from dispute
- Funding Terms: funder pays 50% of national rates + 100% of costs

IP Litigation Funding

- Upon recovery:
 - Funder gets investment back
 - Funder gets a premium on investment
 - Firm gets unbilled 50% of fees
 - Any remaining proceeds are split among client, funder and firm in roughly equal shares

Funders

- Litigation financing is a booming industry
- There are many, many entities providing funding for litigation
- Two prevailing models:
 - Individual case funding
 - Portfolio funding

Individual Case Funding

- Funding agreement for one case only
- Make sure to sign NDA with client and funder before any detailed discussion of the case
 - Submit opportunity to Funder
 - Funder evaluates the merits of specific case (funder's legal, technical, and financial expert review)
 - Term Sheet and Funding Agreement Negotiations
- Committee members can assist with this process

Portfolio Funding

- Funder agrees to general terms with Firm
- Funder provides non-recourse loan to the firm, guaranteed by a portfolio of cases

Why Do It? – Company

- Helps undercapitalized companies pursue legitimate claims
- Provides capital injections for already-filed cases
- Increase access to top legal resources
- Decrease financial risk
- Additional review of a company's claims

Why Do It? – Law Firms

- Increase litigation client base
 - Allows for representation of undercapitalized clients
 - Can offer more flexible payment arrangements
- Increase utilization
 - Capital for key litigation expenses
- Broaden/deepen relationship with IP clients
 - Reduces risk IP clients will run out of money
 - Helps with achieving recoveries that more accurately reflect case merits and damages
- Funding guarantees roughly 60% realization

Law Firm Investment Philosophy w/ 50% Fee Funding

- Ground Rule: In the event of a successful recovery, look for a risk adjusted return of at least 2X the amount at risk
- Example: If litigation budget is \$2M, \$1M is at risk and contingent recovery to the firm must be at least \$2M on average

Due Diligence

- Provide a memo describing claim merits
 - Both strengths and potential weaknesses
- Provide information about the IP Client
 - Story and motivation for funding
- Provide information about the Law Firm
 - Reputation and experience level of counsel

Due Diligence

- Provide a realistic litigation budget
 - Funders will question budgets that look too low
 - Better err on the side of caution
- Place likelihood on each scenario (total = 100%)
- Quantify likely recovery amount in each scenario
- Identify and disclose unknowns

Due Diligence

- Provide expected damages award
 - Funders often target a 10x return
 - Ex: claim requires \$2 million in litigation funding, the expected damages should be in the \$20 million range
- Provide information about the defendant
 - Will an award be collectible

Funding Agreement

- General Terms and Definitions
- Funding Process/Schedule
- Representations/Warranties
 - No liens on patents; no other lien holder
- Covenants
 - Promise to continue to keep the IP active
- Distribution or “Waterfall” Terms
 - How the award will be divided between client, firm, and funder
- Rights to Terminate

Investment Philosophy

- Most Likely Resolution Scenarios:
 - Settlement right after successful IPR or motion to dismiss
 - Settlement after *Markman*
 - Settlement after summary judgment decision
 - Settlement on the eve of trial
 - Resolution after trial
- We will address all of these scenarios in the financial model



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