

# Guide to establishing a litigation funding task force



As interest in litigation finance continues to grow across the legal industry, law firms are establishing task forces to investigate how funding can give them a competitive edge.

## We can help.

Omni Bridgeway has helped multiple law firms establish a litigation funding task force. We offer case studies demonstrating the bottom-line impact that funding can have for firms and clients. And we welcome the opportunity to meet with your firm to discuss how litigation finance can make a difference in your business.

## Implementation phases

# Stage one – Funding fundamentals

Litigation financing can provide distinct advantages for law firms looking to grow without taking on traditional debt.

### Non-recourse Investing

Unlike loans, which are due for repayment of the principal and interest under all circumstances, payment on an Omni Bridgeway litigation finance investment is triggered only by a successful settlement or judgment collection in the cases used as collateral for the investment.

### Preservation of Capital Reserves

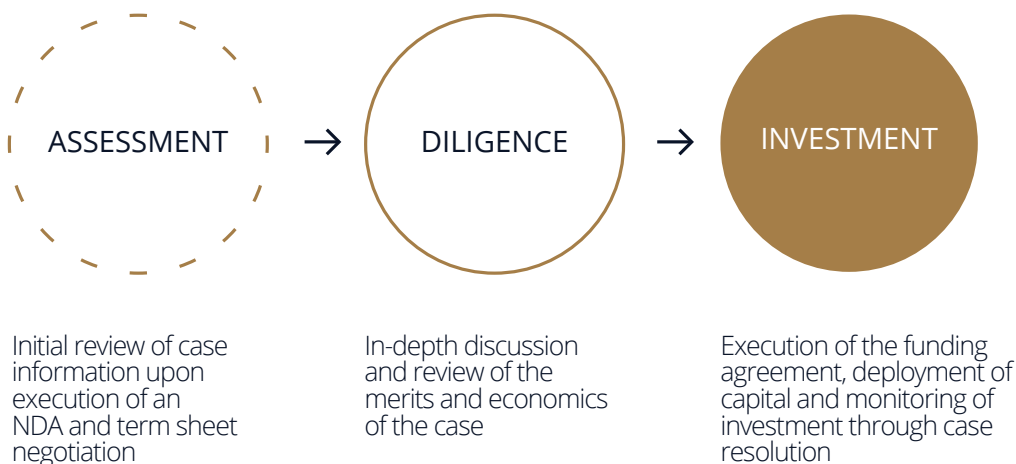
Firms do not need to tap their capital reserves to repay Omni Bridgeway's investment. Instead, our return is due from the fees actually collected in the cases agreed to serve as collateral for our investment.

### Flexible Application of Funds

Although our funding is typically used to cover fees and expenses in portfolio cases, law firms may also be permitted to use capital from Omni Bridgeway for any expenses they see fit, including lateral hires, office expansions and extending discounts to clients.

Familiarize task force members with the ABCs of litigation finance. The fundamental concepts a task force will need to understand about funding include:

### A. The funding process



## Practice areas appropriate for funding:

Antitrust litigation

Appeals

Arbitration

Asset tracing

Bankruptcy and insolvency

Commercial litigation

Distressed asset recovery

Intellectual property, including copyright, trademark, trade secret and patent

Judgment enforcement

Securities litigation

Whistleblower litigation



## Implementation phases

### B. Typical funding models and criteria

#### **Claimant funding: Single case and portfolio**

**Summary.** Arrangement wherein clients obtain non-recourse financing from a funder, typically subject to an agreement that the funder will recoup its investment, plus a return, either as a percentage of the recoveries from successful outcomes in the funded case(s), or a multiple of the funder's investment, or a combination of factors.

In some circumstances, clients may be permitted to use the financing for non-legal expenses. Some choose to take the excess amount remaining from paying legal fees for plaintiff-side cases and use it to pay a portion of the legal fees they are incurring in defense-side cases.

**Criteria.** Funders will typically look for a strong likelihood of success in the case(s), a clear ability for the defendant(s) to pay a judgment and likely recoveries (exclusive of punitive damages) in amounts multiple times the amount of funding sought. For portfolio investments, they will also seek a diversity of risk.

#### **Law firm funding: Plaintiff-side portfolio**

**Summary.** Arrangement wherein a law firm obtains capital from a funder collateralized by the contingent fees expected in multiple plaintiff-side cases, typically subject to an agreement that the funder will recoup its investment as a time-based multiple from the fees associated with successful outcomes in the cases in the portfolio. Firms may use the financing in any way they see fit.

## Implementation phases

**Criteria.** Funders will typically look for portfolios containing at least three cases with a diversity of risk, with each case having a strong likelihood of success and a clear ability for the defendants to pay judgments.

### Law firm funding: Defense-hybrid portfolio

**Summary.** Arrangement wherein a law firm obtains capital from a funder collateralized by the contingent fees expected in multiple plaintiff-side cases handled on contingency and one or more defense-side cases, typically for the same client. The funder will recoup its investment as a time-based multiple from the fees associated with successful outcomes in the plaintiff-side cases in the portfolio. Firms use the financing to offer reduced hourly rates in the defense-side cases included in the portfolio.

**Criteria.** Funders will typically look for portfolios containing at least three plaintiff-side cases, with each case having a strong likelihood of success and a clear ability for the defendants to pay judgments.

### C. The Mechanics of Capital Deployment and Returns

A funder's term sheet will describe the deployment schedule for the capital, usually by paying either monthly invoices or an agreed schedule of tranche payments. Returns to the funder typically (but not always) increase over time as the funder continues to invest capital. For law firm portfolio funding, the funder's return is often calculated as a multiple of the disbursed funding amount.

### D. Funder Roles and Responsibilities

When they invest in law firm portfolios, funders act as passive investors with no right or responsibility to control strategic or settlement decisions about the cases in the portfolio. They may, however, be available to provide input and expert assistance to the litigators upon request.

### E. Preservation of Confidentiality and Attorney-Client Privilege

In the United States, the current state of the law is best reflected in the comprehensive federal trial court decision in *Miller v. Caterpillar*, Case No. 10 C 3770 (N.D. Ill. Jan. 6, 2014).



#### RELEVANCE

The litigation funding agreement itself is typically not relevant to any claim or defense in nearly all cases (apart from cases involving enforcement of a funding agreement), and is not discoverable.



#### WORK PRODUCT

Attorney work product material is generally protected when disclosed to a funder under a written or oral non-disclosure agreement. The work product doctrine provides the strongest protection for exchanging sensitive documents with a funder.



#### COMMON INTEREST

In some cases, the common interest doctrine has been held to extend the attorney-client privilege to funders. But in others, the privilege has been held not to apply, so be sure to check with your funder for the most up-to-date law in your jurisdiction.

## Implementation phases

### Study opportunities to increase profitability with funding.

Law firms that use funding enjoy several profit-generating benefits, including:

- **Smooth cash flows.** Firms receive a portion of their fees in contingent fee cases as work is performed instead of waiting years for payment.
- **Better realization.** Steady and reliable payments from funders increase realization rates.
- **Client development.** Firms enjoy opportunities to represent new clients interested in sharing risk, thereby driving expansion through measured risk.
- **Relationship expansion.** Portfolio funding can be used to extend discounts in defense-side cases.

### Survey how ethical issues intersect with funding.

It's important for law firms to understand how ethical issues such as fee splitting, confidentiality, attorney-client privilege, champerty and maintenance intersect with litigation funding.

**CLE.** Omni Bridgeway offers law firms complimentary continuing legal education seminars covering the ethics of litigation finance.

## Stage two – Policy setting

### Implement a firm-wide litigation funding policy.

Creating firm-wide litigation funding policies helps firms think through various questions about how they will use funding, including:

- What latitude will partners have to take on cases brought by clients using funding?
- Who within the firm will be responsible for fielding client questions about funding?
- What level of risk is the firm comfortable taking in cases brought by clients using funding?
- Who within the firm will review all funding agreements to ensure compliance with firm parameters?
- What information are the firm's attorneys permitted to disclose about the firm's funding deals?
- What flexibility will practice group leaders and office heads have to obtain financing collateralized by a portfolio of litigation handled within their practice area or office?

## Implementation phases

### Disseminate the policy.

Disseminating firm wide litigation funding policies to internal attorneys and staff helps firms integrate funding into their practices in a systematic and manageable manner. Firms eager to deliver on client requests for added value may also wish to advise clients about their willingness to handle cases brought with funding, or their willingness to introduce clients to reputable funders.

## Stage three – Forging relationships with funders

### Identify litigation funders that will support your firm's values and needs.

Litigation funders are not interchangeable. When choosing a litigation funder, it is important to consider the following:

- Internal underwriting and transactional capabilities to vet the merits of your cases and document your financing transaction with maximum efficiency
- Track record of success
- Source and availability of capital
- History of disputes with claimants or their attorneys
- Likelihood of developing a mutuality of trust

## Conclusion

Law firms seeking to improve realization rates, achieve expansion and client development goals, and reduce their institutional financial exposure, can look to litigation finance as a strategic tool.

Please contact us for actionable guidance on the ways that funding can create value for your firm and clients.

# The global leader in financing and managing legal risks

Today's disputes involve multi-national, multi-cultural and multi-lingual parties facing multi-jurisdictional issues and cross-border recoveries. A global team is essential to meet these needs.



● Current locations and serviced remotely / agents / other



Omni Bridgeway is the global leader in legal finance and risk management, providing dispute and litigation finance from case inception to post-judgment enforcement and recovery. Listed on the ASX, Omni Bridgeway operates from 25 international locations.

## Curious to know more?

We would be delighted to explore tailored solutions to unlock value for your business.

[omnibridgetway.com](https://omnibridgetway.com)