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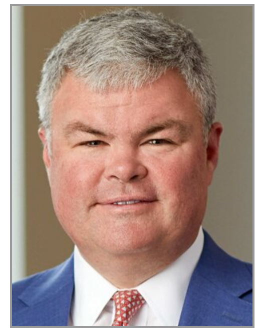
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Tracking The Evolution In Litigation Finance

By **Robert Wilkins** (April 17, 2025, 6:59 PM EDT)

In the U.S., litigation finance is still a young business. Even so, it has evolved substantially since its inception, with important lessons for the plaintiffs bar, the defense bar and for the financiers that continue to change their underwriting methods, analytical models and financial offerings.


Robert Wilkins

Roughly 10 years ago, funders in the U.S. began offering nonrecourse financing for plaintiffs' personal injury contingency fee cases. The business model, from a litigation perspective, was revolutionary.

Specifically, funders sought to capitalize on the dearth of credit facilities available to plaintiff firms while also capitalizing on the difference between perceived risk and actual risk in plaintiffs' contingency fee litigation.

Prior to the advent of litigation finance, most plaintiffs firms had few financial options; these were mainly limited to a line of credit from a bank backed by personal guaranties from the firm's owners. The firm would draw down on the line of credit as needed for firm and case expenses.

If the firm lost a case at summary judgment, trial or on appeal, that firm would nonetheless have to repay the case expenditures, along with accrued interest, or risk personal exposure. This traditional model created a large perceived risk, as firms spent tens or even hundreds of thousands of dollars on case expenses, while facing the specter of losing the case and having to repay out of pocket.

The reality, however, is that a vast majority of cases settle. And, because a case rarely settles for less than the expenses, the actual risk is comparatively small.

Litigation funders entered the market to remove the law firm's — and individual lawyers' personal — risk entirely, replacing it with loans secured by individual cases, and with repayment solely conditioned on the success of the funded case.

In exchange, lenders charged hefty interest comparable to rates usually associated with credit card debt — 17% to 23%.

By carefully vetting the law firms and lawyers and the financed case or cases, the lender could further reduce the actual risk substantially. Specifically, after a careful underwriting process, they would — notionally — only issue loans on strong liability cases, prosecuted by exemplary trial lawyers, against solvent defendants.

As the lender grew its portfolio of carefully underwritten loans, the risk would, in theory, decrease to almost nothing; all while supporting credit card interest rates on money loaned for a nonmarket correlated investment.[1]

Financing of this type was attractive to lawyers due to the elimination of financial risk along with the concomitant ability to take on more cases with risk limited to the lawyer's time. Moreover, because litigation finance was tied to a specific case's value, borrowers could obtain case-specific financing.

This removed the de facto cap on available funds created by a line of credit where, if a lawyer wanted to take on a potentially valuable case but had little available credit left on the firm's line, that lawyer would likely have to refer the case and miss out on a substantial portion of the fee

In short, lawyers were eager to take on the loans and lenders were equally eager to deploy funds and become a market leader in the space.

As the market grew, litigation finance companies looking to deploy ever greater amounts of funding expanded and modified their product offerings. To that end, funders started to loan against dockets of cases with funds untethered to a single case or specific case expenses.

Under this model, a firm could obtain loans — secured by a docket, or even several dockets, of cases — for advertising, case procurement or other business needs. But as lending products and existing loan profiles changed, funders sought additional security from their borrowers.

This included, in some circumstances, a reversion from nonrecourse to recourse loans, backed by personal guaranties. The move back to recourse lending, however, represented a substantial departure from the paradigm that originally made the loans attractive to borrowers and justified interest rates that were a multiple of what firms were previously charged on their, also recourse, conventional line of credit.

Regardless of the structure and security, a foundational problem is that litigation is inherently complex. Court decisions and fact developments over the life of a case, or docket, can make it extremely difficult, at inception, to accurately evaluate the likely outcome.

In addition, cases, including mass tort dockets, can have a long horizon before a result, good or bad, is certain. All the while, interest on underlying loans continues to accrue. And when loans include interest charges of 17% to 23%, that interest can quickly match or even exceed the loaned principal — just by way of example, a $1 million loan at 23% simple interest, after four years, bloats to $1.92 million, almost double the principal.

The certainty horizon can also be affected by unforeseeable external events. A recent example is the COVID-19 pandemic which, in 2020, shut down courthouses across the nation for roughly a year.

These built-in issues were made even worse as the defense bar grew increasingly knowledgeable about the financial products that were backing plaintiffs cases. According to some plaintiffs attorneys, defense firms who knew about underlying loans and their high interest rates — more than ever — employed tactics that tended to delay trial.

This additional delay caused the interest to grow exorbitantly, putting ever greater pressure on the borrowing firms as well as their lenders. Moreover, the limited risk profile of the original paradigm required knowledge, experience and — most of all — careful, painstaking diligence.

The rush to provide loans and innovative products may well have caused some lenders to compromise on these fronts which, along with the other factors mentioned herein, may have further increased the lending risk.

When debts were left unpaid, options were exhausted, and the debt was — or was allegedly — recourse, collection suits followed. As one example, in August 2023, litigation funder Virage SPV 1 LLC sued prominent Houston plaintiffs' attorney F. Kenneth Bailey Jr. and his law firm to try and collect on outstanding loans.

In July 2024, Virage filed a motion for summary judgment alleging that Bailey and his firm owe Virage "at least $81,781,962.53 in principal and interest."[2] Virage prevailed on its motion and, earlier this year filed a letter requesting a status conference with the court to "clarify the status of the case and issue the final order."

In May of last year, Virage sued another prominent Houston plaintiffs firm, Francis Spagnoletti D/B/A Spagnoletti & Associates. Demonstrating the effect of the high interest rates over time, Virage's original petition alleges a total outstanding debt of approximately $36.77 million against principal (issued in 2016) of $15.7 million.[3]

Similar collections cases by various funders can be found by searching the Harris County District Clerk's website and, one would imagine, through a search of other court filing systems across the country. It is worth noting, however, that these searches yield only the public filings. Where funders have incorporated confidential arbitration provisions into their loan agreements, collection cases are outside of the public purview; meaning that the true number of such cases is likely unknowable.

It should be obvious that collection suits were not any reasonable party's goal when entering into these financial arrangements. To guard against this potentiality, lenders have evolved to become increasingly savvy and careful.

In addition, armed with knowledge of their own and other's successes and failures, lenders are more focused than ever on case analysis, diligence, and crafting products that will achieve a positive outcome for the lender, the law-firm borrower, and the client.

The product offerings have also evolved to become more sophisticated and tailored, at times resembling a venture capital model with the funder taking a multiple of the loaned amount rather than charging interest. As another evolution, many funders now target plaintiffs commercial cases and will offer a "blend" where lawyers can take a percentage of their typical hourly fee for cash flow during the pendency of the litigation with the firm also retaining a contingency interest in the outcome.

However, the attention to detail employed by lenders as they conduct their diligence can be equally taxing on the lawyer or borrower who must ensure that the offered terms will be workable, repayable — if recourse — and will generate an attractive return for both the law firm and the client. Most lawyers have a demanding docket to maintain and possess little time or the experience required for these more recent and complex funding models.

As a result, niche business practices have entered the market to address the added complexity. Specifically, entities such as Westfleet Advisors offer advisory and brokerage services for firms that are considering litigation finance.[4]

Such advisory groups, which also employ attorneys, endeavor to relieve a firm, or its lawyers, from having to learn and stay updated on the lending market and variety of available products.

These entities also offer analysis of whether funding is likely to be available, what the funding will look like, and whether the case — or dockets — can support funding. Depending on the analysis, these entities will then reach out to funders and facilitate the actual lending.

Even so, the litigation finance market remains immature. To this day, borrowers receive dramatically different term sheets on identical collateral; a plain indication that lenders are continuing to learn how to appropriately value cases and structure products that will achieve a return for all.

The market players also continue to innovate and offer new products.

For instance, Atlantic is now offering an insurance component that can secure the result for the firm as well as the funder.[5] This, candidly, seems like a natural progression. After all, few are better than insurance companies at analyzing risk and evaluating potential outcomes, and the horizon for such outcomes.

But the added complexity and required diligence — while valuable on multiple levels — complicates getting a deal done and, equally, can delay funding.

For plaintiffs firms that want financing, the good news is that the current market offers sophisticated players who stand ready to provide analysis and assist with obtaining beneficial products. However, to be attractive to lenders, plaintiffs firms must have a good handle on their cases.

Perhaps most important is that a firm has the best possible understanding of the horizon for a case or group of cases, such that interest charges, or other terms associated with the lending, do not overwhelm the value of the case collateral.

For the defense bar, litigation funding is a reality of modern legal practice. Put simply, there are now more mouths at the trough. As a result, it is equally important for the defense bar to keep apprised of these financial products and to know how they affect the viability of claims as well as the settlement dynamics.

Robert A. Wilkins is a partner at Lightfoot Franklin & White LLC.

[1] In other words, unlike most traditional loans or investments, whether financial markets rise or fall, litigation continues largely unaffected by market fluctuations.

[2] Cause No. 2023-51403; Virage SPV 1 LLC vs. F. Kenneth Bailey Jr., P.C. & F. Kenneth Bailey Jr. ; In the 152nd Judicial District Court of Harris County, Texas. Virage's Motion for Summary Judgment further clarified that depending on the applicable date, the principal is either $40,244,338.04 or $40,238,553.89. The interest ranges from

$41,543,408.64 to $53,768, 353.19, for an outstanding total of between $81,781,962.53 and $94,012,691.23.

[3] Cause No. 2024-29875; Virage SPV 1 LLC v. Francis Spagnoletti d/b/a Spagnoletti & Associates d/b/a Spagnoletti & Co.; In the 152nd Judicial District Court of Harris County, Texas.

[4] https://www.westfleetadvisors.com.

[5] https://www.atlanticgrp.com In May of last year, Atlantic's Bob Koneck, Chris Le Neve Foster, and Richard Butters wrote a Law360 Article describing their business model. That article, titled Exploring An Alternative Model of Litigation Finance and can be found at: https://www.law360.com/articles/1835872/exploring-an-alternative-model-of-litigation-finance.