



Justice Catalyst Access Fund
Accelerating Impact Litigation

Litigation Funding: A Primer for Public Interest Litigators

This is an introduction to an innovative new approach to supporting social, economic, and environmental justice: **Social impact litigation funding.**

Social impact litigation funding employs a commercial funding tool to **address a myriad of urgent civil legal needs**, including workers' rights, consumer rights, criminal justice/civil rights, environmental protection, housing, and racial and gender equality. This funding can **promote a more vibrant and sustainable public interest sector** by **catalyzing litigation gains and driving new resources into the justice ecosystem.**

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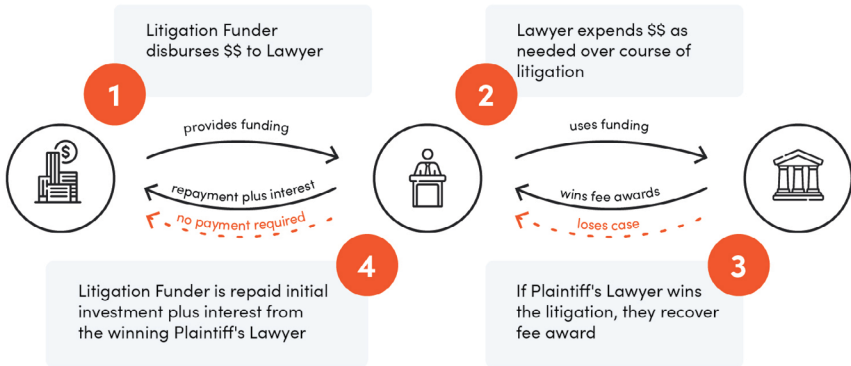
Commercial Litigation Funding

What is litigation funding?

Litigation funding is funding from a third party to litigation to pay for the costs associated with litigation or arbitration (lawyers' fees, case expenses, etc.) or to pay out a portion of the value of pending claims, judgments, awards or fees, in exchange for repayment out of the ultimate recovery. It is not a recourse loan. If a lawsuit or portfolio of lawsuits is unsuccessful, the recipient is not liable to repay the funding.

Litigation funding exists to 1) fill time lag between filing a meritorious case and achieving a recovery, and 2) spread the risk between a funder and a litigator. This enables productive litigation to proceed and reduces the ability of powerful defendants to filibuster litigation by driving up costs and dragging out proceedings.

Illustration of Lawyer-Directed Funding



Adapted from: GAO-23-105210

Who are the stakeholders?



Plaintiff or a Class of Plaintiffs



Plaintiff's Lawyer



Litigation Funder

What are the different types of funding?

Lawyer-directed funding: In this model, payment is directed to the litigator to cover their fees and/or costs as they pursue the claims on behalf of clients, and is repaid from the lawyer's contingency fees or fee awards. Funds can support single cases or portfolios of cases. This funding model can be used across a wide range of litigation. Portfolios enable funders to spread the risk across multiple cases and thereby lower the interest rates or multiples they charge on the funds.

Client-directed funding: In this model, payment is directed to the litigating client who repays from their ultimate recovery, either through a percentage of the award or an accumulation of interest. This funding model is common in intellectual property and personal injury cases.

Claim purchase/Asset recovery: In this model, the entire claim is purchased and pursued by a new team. This funding model is often used in bankruptcy proceedings, or where a successful party is struggling to collect on an awarded judgment.

OVERVIEW OF LITIGATION FINANCE INDUSTRY

Litigation finance in the U.S. is roughly 30 years old and experienced rapid growth in the early 2000s. It is now a \$13 billion industry. Despite concerns about the impact of third-party investors, the industry has filled a significant gap in the legal system, as the cost of litigation has far outpaced the ability for small and midsized parties to effectively litigate.

In the U.S., there is no federal regulation of litigation funding. Instead, funding is regulated by a variety of state laws including legal ethics and consumer lending rules.

How do funders diligence an investment?

In the commercial context, the primary question for a funder is the likelihood of financial recovery/return on investment. Factors considered include:

FISCAL SCREEN

- Strength of legal claims and the likelihood that damages will be awarded.
- Timeline of the case and fund deployment.
- Experience and track record of counsel.
- Ratio of requested budget to potential recovery.
- Collectability: Will the defendant be able to pay the judgment?

KEY TERMS IN A FUNDING AGREEMENT

- ▶ Timeline for funding
- ▶ Budget, including the proportion of fees and costs that are covered
- ▶ Fee Waterfall, which will determine which party gets recovery and in what order
- ▶ Interest rate or multiple on investment that will be charged or the percentage of recovery
- ▶ Structure of the loan and whether it applies to a single case or portfolio
 - ▶ Whether the funder is given a right of first refusal on funding future cases
 - ▶ Additional compensation for outsized results known as a “kicker”

Social Impact Litigation Funding

Social impact litigation funding harnesses the commercial funding model to drive social impact in communities traditionally excluded from accessing high quality litigation. From addressing sexual harassment in the workplace to protecting data privacy to tackling climate change, this model has the potential to unlock tremendous resources to fight some of our most intransigent social problems.

Social impact litigation funding is a crucial mechanism to address the “justice gap.” The “justice gap” describes the disparity between the volume of civil legal violations and the ability to prevail in cases against violators. In the United States, justice is a luxury that only a privileged few can afford. For example, more than 75% of civil rights cases have an unrepresented plaintiff. Low-income Americans do not receive any or enough legal help for 92% of their civil legal problems. Without enforcement, civil rights become rights in name only.

Social impact litigation funding also enables and finances more attorneys into justice-focused work by assuming some of the risk of litigation. By driving more talent into the field, and shouldering the risk, these funds build the justice infrastructure and promote innovation and creativity in making rights real.

Who are the stakeholders?



Plaintiff or a Class of Plaintiffs



Law Firm or Nonprofit



Litigation Funder

Innovative Funding Models

As the commercial funding industry expands, an increasing number of stakeholders are employing litigation funding for social impact. There are several innovative models:

Impact Fund: For 30 years, The Impact Fund has been working to facilitate high impact cases by funding case expenses. They have made 700 recoverable grants totaling over 8 million dollars, and currently have 2 million invested in 135 cases. They make investments from \$10,000–\$50,000 via applications open on a quarterly basis or through their rapid response application.

Time's Up Legal Defense Fund: This fund is five years old and focuses on workplace sex harassment and retaliation. They cap their investments at \$100K and can cover attorney fees and costs. They have funded 350 legal matters and respond to applications within 3 weeks.

Aristata: Founded in 2021, Aristata provides funding to commercial litigators to take on high impact cases for the social and environmental good. They make larger investments internationally, drawing closely from the commercial litigation model. They focus on a wide swath of cases tackling a myriad of issues including environmental justice, worker's rights and racial justice.

Justice Catalyst Access Fund:

JCAF is a nonprofit that provides flexible litigation financing at scale targeted to nonprofit litigators and public interest law firms. JCAF has supported more than a dozen nonprofits and public interest law firms in bringing approximately 100 cases. Since dollars granted are recycled directly into the corpus, **JCAF's model catalyzes continued impact into perpetuity via a hybrid, ever-green model designed to finance and scale the impact litigation sector.**

The Model

JCAF provides **flexible, risk-free financing to litigating nonprofit and for-profit organizations, repayable out of case recoveries.** A recoverable grant or loan enables the organization to draw down unrestricted funds which can be used to hire staff, investigate new cases, or otherwise expand cutting-edge impact litigation caseloads. When the organization receives fee awards, it returns a portion to JCAF until it has repaid the amount borrowed, plus a low interest rate. **In the absence of fee recoveries, nothing is owed to JCAF, thereby de-risking an organization's decision to take on new, creative, and strategic cases.**

The Vision

JCAF harnesses the power of social impact litigation funding to expand the field of public interest litigators. Carefully structured funding empowers nonprofits and public interest firms to scale their impact to meet pressing social, economic, and environmental needs.



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How do social impact litigation funders diligence an investment?

In the social impact context, funders are asking two questions:

IMPACT SCREEN

Will the litigation have a
positive social impact?

FISCAL SCREEN

What is the likelihood of
financial recovery/return
on investment?

Different social impact funders have different social impact definitions and priorities, and different target returns, ranging from partial return to breakeven to subsidized market rate returns.

Some Considerations for Social Impact Litigators

- If you win and collect fees, you will have to pay back the recoverable loan.
- Organizations should maintain their priorities, and use this vehicle as a tool, not as a new mission.
- Attorneys and staff need to record their billable hours and seek fees where available.

What are the advantages of litigation funding?

Social impact litigation investments lead to positive social and environmental change which would otherwise go unpursued.

Advantages for Social Impact Litigators

- Helps nonprofits and public interest law firms become more self-sustaining by leveraging their work to create a sustainable funding source to drive growth.
- Diversifies income streams and allows nonprofits to prioritize their grant funds to other, non-fee generating work.
- Manages risk for nonprofits and small civil rights firms, empowering them to take on risky or expensive cases.
- Reduces the pressure on smaller parties to settle for lesser results and levels the playing field with more powerful actors.

Advantages for Donors

- Social impact litigation funds can enable donor-driven investments and facilitate otherwise-challenging support of impactful litigation.
 - Donors who have broad issue area goals may engage a fund to identify effective litigation opportunities.
 - Funds can enable donors to support specific cases more efficiently.
 - Funds can help donors analyze proposed litigation strategies.
 - Funding can launch multi-year litigation with a sustainable funding stream in place that does not require ongoing philanthropic support.
- Money invested becomes evergreen and donor dollars can fund many, many cases into the future.
- Litigation funding can generate more justice-focused impact litigation and accelerate change, while adding more resources into the justice ecosystem.
- Litigation funding ensures that meritorious cases are not ignored for lack of resources.
- Litigation funding can help build the field of attorneys ready and able to litigate civil legal rights cases, fostering innovation and creativity.

Frequently Asked Questions by Potential Recipients

What happens if fund recipients lose their cases?

- No money is owed except out of case recoveries. If cases are part of a portfolio, then repayment may come from a different case recovery.

Why do social impact litigation funders charge interest?

- To develop more evergreen resources for the justice ecosystem.
- To try to maintain or increase fund size.
- To align incentives so that recipients can determine their own spending and litigation decisions.

Who has control over cases?

- Funders have a legal and ethical obligation not to seek to control litigation. Most funding agreements will contain terms disavowing any right to control cases, and investors contractually disclaim their right to interfere with the attorney-client relationship.

How do you maintain confidentiality?

- In diligencing cases, commercial funders will often ask to see confidential attorney work product after executing a confidentiality agreement.
- Funders should not, and might not be permitted to, see confidential attorney communication.
- Clients should give informed consent to funding arrangements where relevant.

What are the client disclosure requirements?

- State regulators increasingly require the disclosure of litigation funding; rules vary by jurisdiction.

What do you need to get started with social impact litigation funding?

- Some working knowledge of the financial impact and value of your cases.
- The ability and willingness to track and apply for fees.
- Funders will guide you through the process.

What does reporting look like?

- Reporting varies by funder, but funders will want to be kept updated on case proceedings through recipient updates, monitoring filings, and meetings to discuss progress and budgets.

Is there a risk of mission creep?

- Some organizations may fear prioritizing litigation, and especially fee-generating litigation, at the expense of other theories of change. Litigation funding is not for everyone, but when used wisely it frees up resources for other projects, builds capacity and sustainability, and generates unrestricted funding for future litigation and non-litigation work.

Can courts ever deliver social change?

- Judges may not deliver justice. But litigation can sometimes help support social change by:
 - Redistributing resources
 - Defending against greater harm
 - Enforcing hard-won victories
- The reality is that civil litigation is one of the only ways to seek recourse when your rights have been violated. If we don't enforce those rights, they will erode.
- This model seeks to ensure that resources flow directly into the communities that need and should benefit from resources generated via litigation.

This document is intended as a general description of litigation funding and is not legal advice. The terms of litigation funds can vary widely and still be called "litigation funding." This document relies heavily on the United States as its primary source of information and context.



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