



Burford

AUTUMN 2017 ISSUE

Research: 2017 Litigation
Finance Survey

Interviews with
12 leading lawyers

Demystifying diligence

Law firm finance:
Comparing costs



BURFORD QUARTERLY

*A review of litigation
and arbitration finance*

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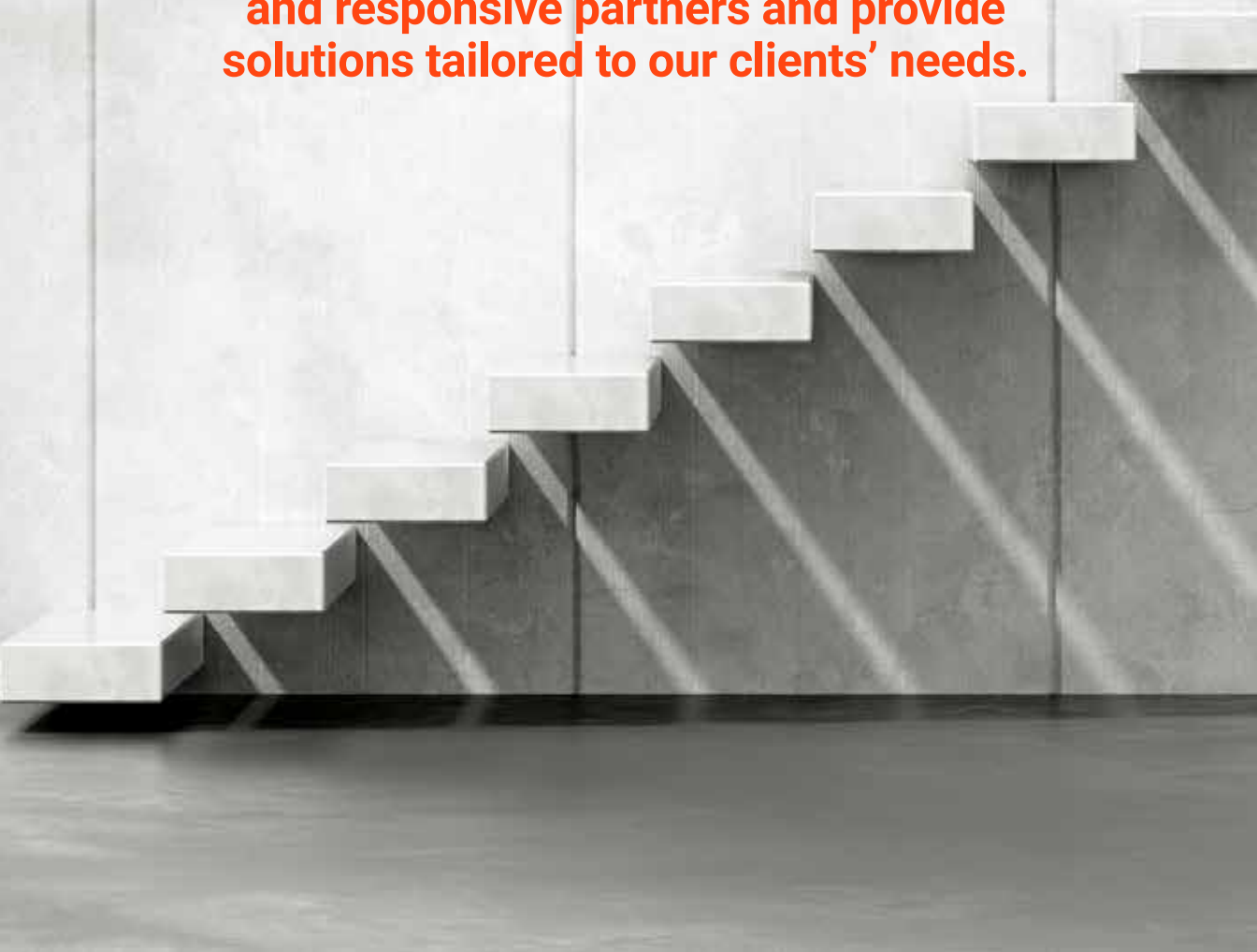
Burford Capital is a leading global finance and investment management firm focused on law. Its businesses include litigation finance and risk management, asset recovery and a wide range of legal finance and advisory activities. Burford is publicly traded on the London Stock Exchange, and it works with law firms and clients around the world from its principal offices in New York, London and Chicago.

414%

Growth in US lawyers who say their firms
have used litigation finance vs. 2013

2017 Litigation Finance Survey: New research shows continued strong growth

For years, Burford Capital has invested in research to better understand the litigation finance market. As the market leader, we utilize the most up-to-date understanding of what law firms and in-house lawyers know about litigation finance and how they use it. These insights help us be nimble and responsive partners and provide solutions tailored to our clients' needs.



From the beginning, the data have shown the increased use of litigation finance, while at the same time highlighting that there is significantly more opportunity for law firms and their clients to benefit from it. The 2017 survey continues the trend. More than one-quarter of in-house lawyers say their companies have used litigation finance. Nearly half of law firm respondents say their firms have done so.

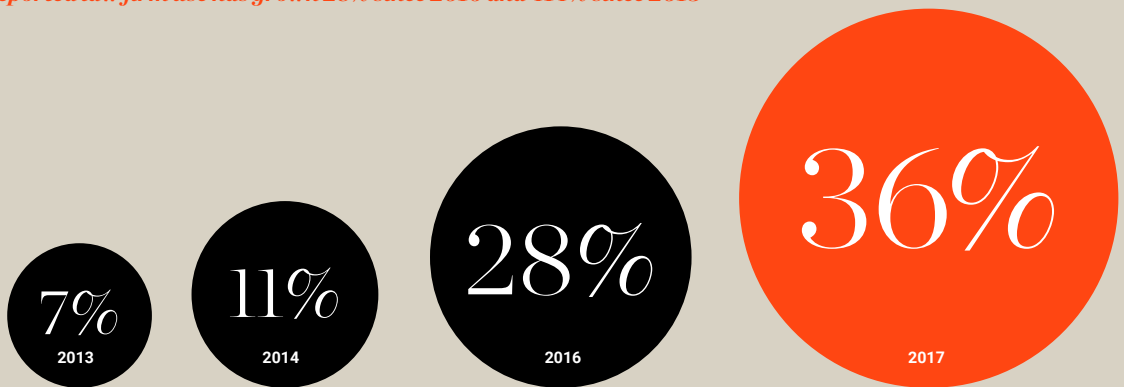
Those numbers have grown dramatically in just a few short years. But the survey also shows that we at Burford can do even more to educate the legal industry about litigation finance and its benefits.

Below we highlight key findings from the 2017 Litigation Finance Survey. The full report is online at burfordcapital.com. We encourage you to read it, and to contact us with questions or feedback.

Triple-digit growth

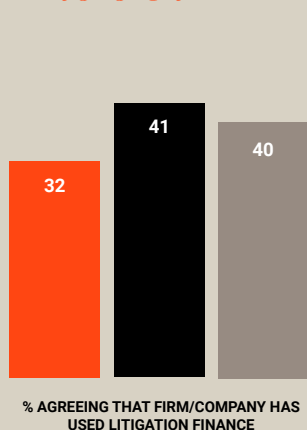
- 45% of lawyers say their firms have used litigation finance. In the US, compared to earlier studies, use has increased by 28% since 2016 and 414% since 2013.
- 26% of in-house lawyers say their companies have used litigation finance.
- Reported use of litigation finance is highest in the UK (at 41% of total respondents), followed by Australia (40%) and the US (32%).
- Among those whose firms or companies have used litigation finance, the majority say that use has grown in the last two years—that's true of 58% of law firms and 60% of in-house lawyers, with reported increases highest in the UK.

Reported law firm use has grown 28% since 2016 and 414% since 2013*

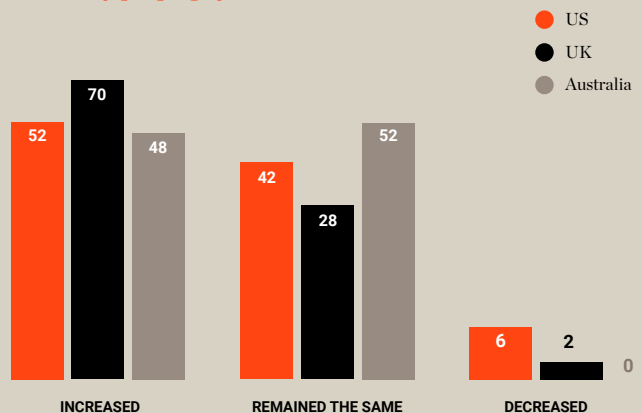


*Lawyers at US firms. Among all lawyers (US, UK, Australia) responding in 2017, 45% say their firms have used litigation finance.

Use by geography



Growth by geography



Continued expansion

- 76% of law firm respondents and 66% of in-house lawyers agree that litigation finance is a growing and increasingly important area of the business of law.
- This is the dominant view among those who have used litigation finance (83%) and those who haven't but would consider it (76%). Even a substantial portion of those who have neither used nor would consider it acknowledge that litigation finance is growing and important (44%).
- For lawyers who haven't used litigation finance but are open to it, a majority of law firm respondents (57%) and nearly half of in-house lawyers (49%) will use it in the next two years.
- The combined users and would-be users of litigation finance represent significant majorities of law firm respondents (76%) and in-house lawyers (62%), pointing to robust growth ahead.

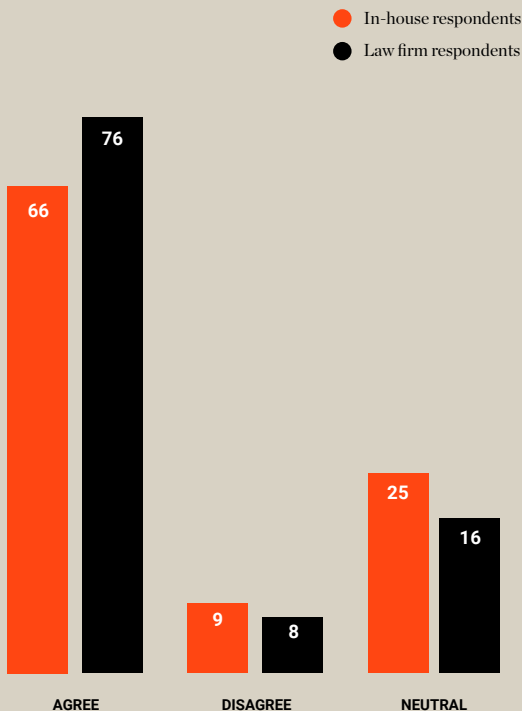
Needed solutions

Economic pressures on law firms and client organizations continue to present business challenges that demand innovative solutions. Litigation finance presents clear benefits.



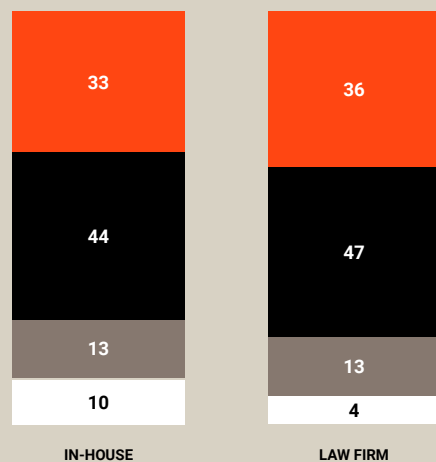
amount sought by 51% of litigation finance users

Litigation finance is a growing and increasingly important area in the business of law



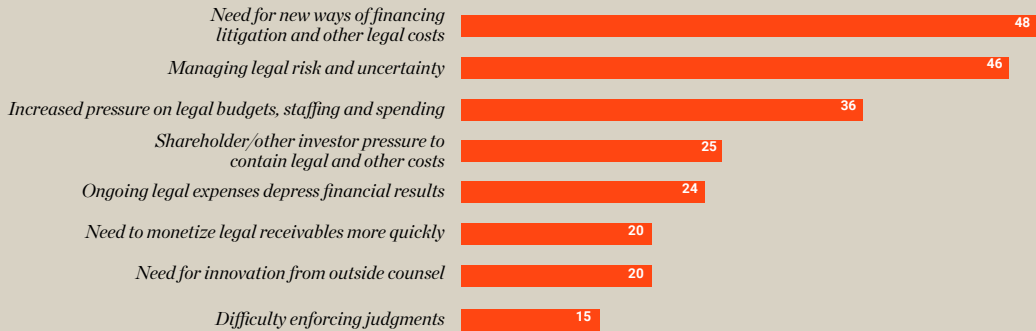
How familiar are you with litigation finance services?

- Very familiar
- Somewhat familiar
- Have heard of it
- Unfamiliar



Clients and law firms face critical business challenges

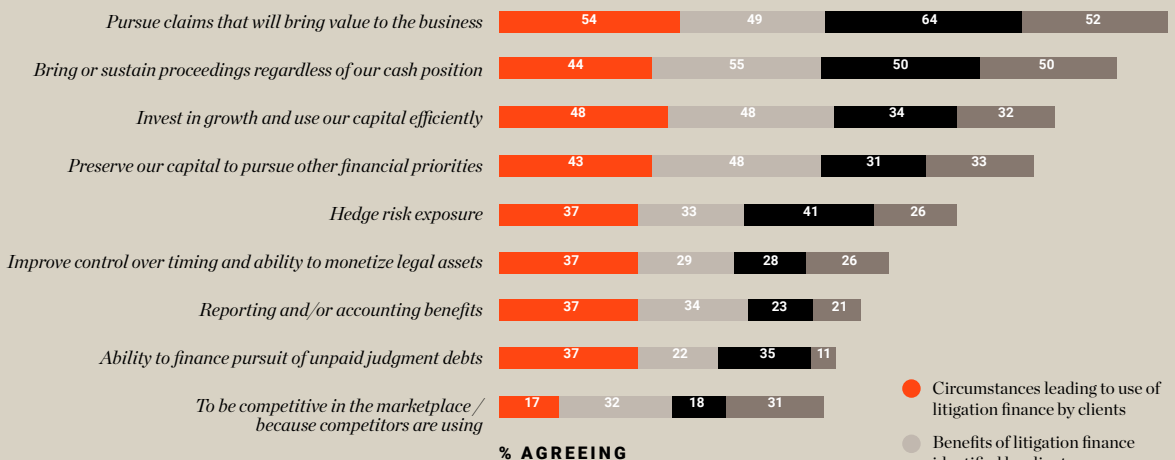
Client business challenges



Law firm business challenges



Litigation finance addresses business needs and offers clear benefits



- Circumstances leading to use of litigation finance by clients
- Benefits of litigation finance identified by clients
- Circumstances leading to use of litigation finance by law firms
- Benefits of litigation finance identified by law firms

How litigation finance is being used

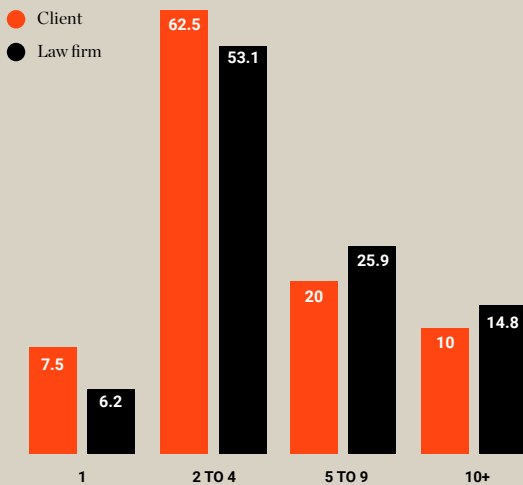
- The majority of those now using litigation finance estimate their organizations have two to four matters per year for which financing could be used.
- Among both law firm and client respondents, litigation finance is most likely for high-risk matters such as IP as well as for commercial disputes more broadly.
- A minority are using financing to monetize legal receivables—a useful tool to accelerate outstanding settlement awards or fees and to manage cash flow.
- Not surprisingly, most have financed single matters—but the use of other financing structures (such as portfolios) is on the rise.

- Compared to earlier studies, US law firm respondents have more than doubled their use of expenses-only funding (63% in 2017 versus 26% in 2016) and tripled their use of portfolio-based financing (27% in 2017 versus 9% in 2016).

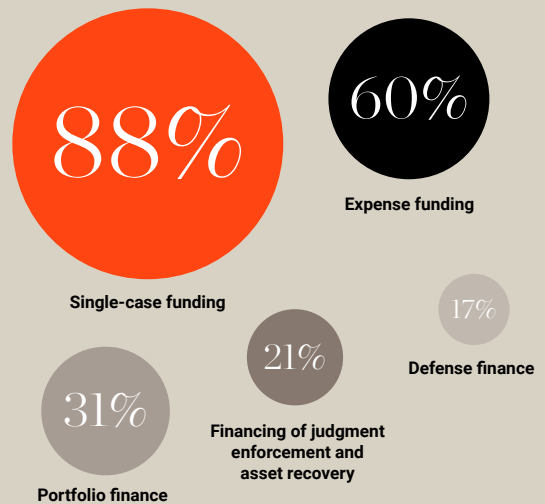
Sizing up financing

- For respondents already using financing, more than half (51%) seek amounts between \$1 million and \$10 million.
- Across all types of respondents, the ratio of financing sought to claim value pursued reflects a generally good fit for finance providers.
- Respondents also point to significant value in unenforced judgments that could be recovered with financing.

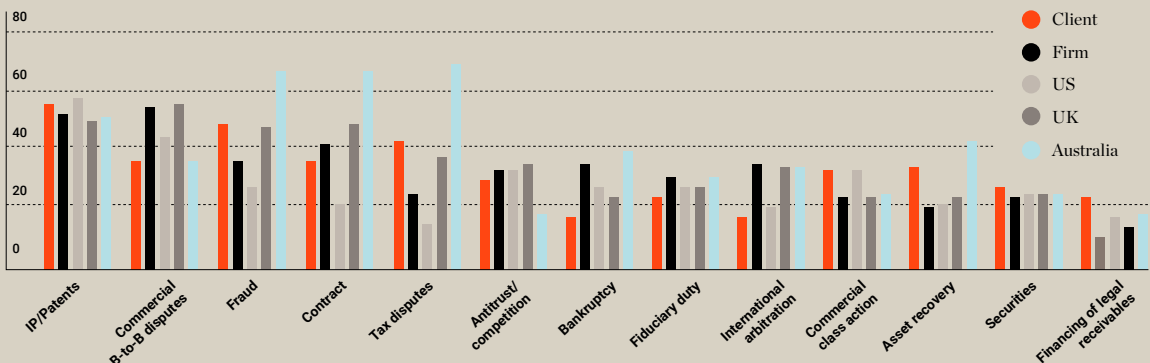
How many matters could your firm or company finance in a typical year?



What kinds of litigation finance has your firm or company used?

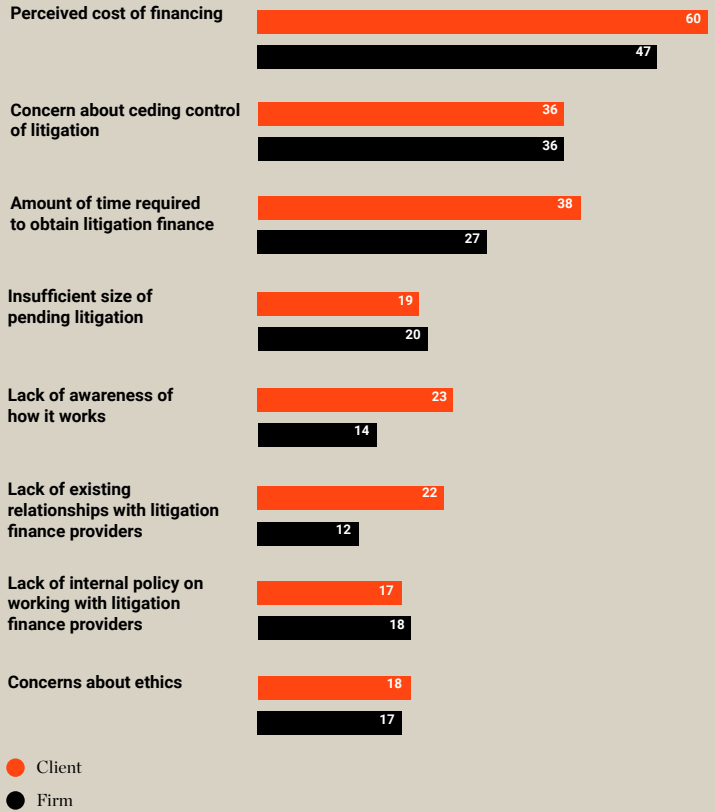


% that would be most likely to use finance by type of matter



What are the barriers?

- When lawyers choose not to use litigation finance, they usually do so for economic reasons, chief among them the perceived cost of funding.
- Concerns expressed by lawyers suggest the need for ongoing education about pricing, timing and process for securing legal finance (see articles on these topics in this and earlier issues of the Quarterly).
- Directly contradicting suggestions there is still some controversy surrounding the practice, ethical concerns rank last as an obstacle to using litigation finance.
- Hardly anyone believes that litigation finance will lead to frivolous litigation. Whereas 81% of in-house respondents and just over half of all surveyed in 2012 in the US believed financing would beget unnecessary litigation, just 10% of in-house respondents in the UK, UK and Australia persist in that discredited view today.

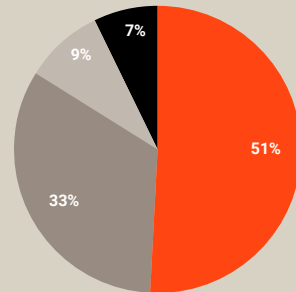


About the survey

- Survey conducted with lawyers who practice, handle or support commercial litigation
- 331 completed surveys by respondents from the US, UK and Australia
- 64% of law firm respondents were from firms with 100+ attorneys
- 47% of in-house respondents were from companies with \$500 million+ annual revenue
- Conducted May 17-June 16, 2017 by ALM Research Services

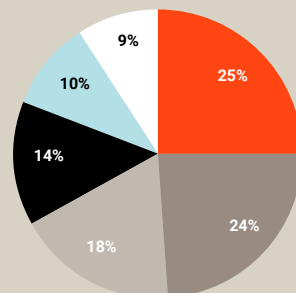
Law firm respondents

- Partner or Managing Partner
- Associate or Senior Associate
- Pricing officer or firm management
- Legal professional involved in litigation evaluation and/or strategy



In-house respondents

- Deputy or Assistant GC
- GC or CLO
- Deputy or Assistant GC
- Legal professional involved in litigation evaluation and/or strategy
- Corporate Counsel
- Other



2017 Litigation Finance Survey: Interviews with 12 leading lawyers

Collin Cox,
Partner, Yetter Coleman

Patricia Glaser,
*Partner and Chair, Litigation,
Glaser Weil*

Guy Harvey,
*Head of Commercial and
International Disputes,
Shepherd and Wedderburn*

Howard Janis,
*Director of Strategic Pricing
& Analytics, Dentons*

Ben Knowles,
*Partner and Co-Chair of the Global
Arbitration Group, Clyde & Co.*

Craig Martin,
*Partner and Chair, Litigation,
Jenner & Block*

Michael Mills,
*Partner, Quinn Emanuel
Urquhart & Sullivan*

Paul Skiermont,
Partner, Skiermont Derby

David Thompson,
*Managing Partner,
Cooper & Kirk*

Co-Chair,
*Intellectual Property,
AmLaw 100 Firm*

Partner,
AmLaw 20 Firm

Managing Partner,
*Corporate and Business
Litigation Firm*

In June and July 2017, Burford conducted individual phone and in-person interviews with leading lawyers, and we share excerpts from those interviews in the pages that follow. We are grateful for their time and perspective.

In your view, what's driving the growth of litigation finance?

David Thompson: The cost of litigation and desire to shift risk.

Howard Janis: Clients' unwillingness to pay for legal services directly, clients are looking to reduce their legal spend and law firms' desire not to take on all of the financial risk.

Partner, AmLaw 20 Firm: There's been a generational shift in terms of thinking. As litigation finance was written about in the trades and more and more firms were becoming involved—and they were name-brand, AmLaw 200 firms—people got more comfortable with it. As a firm, simultaneously, we had to adapt and become more entrepreneurial to stay profitable.

Patricia Glaser: Funding is growing because of a combination of (i) law firms being more creative in fee arrangements and (ii) the frequent disparity of resources between plaintiffs and defendants.

Craig Martin: I see litigation finance growing particularly in arenas that are not necessarily the Fortune 50, but rather business entities relating to bankruptcy, private equity and hedge funds, where litigation finance is seen as a necessary tool to access the best lawyers available. What is driving the growth in litigation financing, in my experience, is simply the need to fund significant litigation which is inherently costly and also risky. Those factors combine to lead those with substantial claims to seek to spread risk and reward.

Co-chair, Intellectual Property, AmLaw 100 Firm: In my field of intellectual property, there's an increasing degree of uncertainty... [and] an increasingly

high-risk, high-reward dynamic that's well-suited for litigation finance.

Paul Skiermont: Litigation finance means we have options if we don't want to take all the risk on fees, or if we want to share risk on expenses, or some combination. It allows us to take on more of that work and expand our business. We know from having worked with litigation funders that we're comfortable with sharing risk. We know based on our experience that it's been far more effective to share risk in a blended pool and have the ability to take on more work.

Guy Harvey: [A] growing type of need is when a client makes a conscious decision to use funding to keep the costs off the balance sheet and to avoid using its own funds.... For law firms, there is increasingly a recognition that clients expect us to be well-informed about litigation funding, and also a sense that funding will allow us to work in new ways and be more competitive.

Some firms and companies are reportedly forming internal task forces to study litigation finance. Has that been true in your experience, and do you think it's advisable?

Managing Partner, Corporate and Business Litigation Firm: No and yes. We work with by far some of the most sophisticated investors in the world—who know almost nothing about litigation funding. They look to us to provide that option. They want it. They know it's out there, but most are pretty unsophisticated about it. We're pretty knowledgeable about this. As part of our process [of reviewing financing options] we spoke to a lot of funders.

Paul Skiermont: There could be some benefits to taking that approach, because it's my perception that there are more folks trying to get into the business of litigation finance. We have only worked with litigation funders that we knew.... I can see the desire to have internal standards in place, to have certain criteria in place, before going down the road with a potential funder, because there are people trying to break into the industry and it's important to know how reputable they are, and their capacity to go all the way down the road for the duration, before getting into any kind of funding relationship.

Guy Harvey: Firms should have a sense that they have gathered information about all the options and funders and set clear guidelines about how it will benefit them and their clients. They should consider litigation funding as part of a larger understanding of all the ways they can work with clients with more flexibility.

Michael Mills: It's become a natural part of litigation, and our clients expect it. So, firms need to know who are the best people to go to.

Describe a successful experience with litigation finance or scenarios where it's especially helpful.

Managing Partner, Corporate and Business Litigation Firm: It can take ten years to resolve the big cases. Given that duration, litigation finance really benefits the clients because of something that happens in the market when law firms are at risk over a long period. When the time gets too protracted, sometimes they will throw the client under the bus and push them to accept what I would consider a not-very-good settlement because they don't want to carry the case. They will tell the client, "Some things have come up in the case we couldn't anticipate. Maybe we should seek a consensual resolution."

Litigation finance serves the client's interest in taking the economic pressure of reaching a resolution off the firm.

Partner, AmLaw 20 Firm: For certain cases, I've begun to think about litigation finance as early as the pitch stage.... There was [a] case where the client had gone into the pitch process hell-bent on working with a firm on a 100% contingency basis. The firm simply would not do that. I started talking to Burford about different options to offload risk and craft an engagement that for the client would have the same economics.

Collin Cox: One of the benefits of litigation finance is that it makes lawyers act more like businesspeople. It forces you to be more sophisticated in your financial analysis. It forces you to provide a budget, to think carefully about costs, to have accountability—all those are good things, and any time that lawyers can be more sophisticated as businesspeople, that should be welcome to clients and their firms.

Michael Mills: We're handling a case...that is being brought across six different state jurisdictions. The complexity of the case means that it has taken a year before proceedings could even be instituted. Without litigation finance, we wouldn't have taken it on... it's been made possible because of litigation finance.

What questions do firms and companies still have about litigation finance?

Craig Martin: There remains a huge information gap about litigation finance. Most clients have heard of it, but I think most would admit that they don't understand how it works, what it's available for, how the decision-making process works for litigation funders, and what kind of control litigation finance providers do or do not have over the matters they finance.

“Any time that lawyers can be more sophisticated as businesspeople, that should be welcome to clients and their firms.”

“It is well past time when it is acceptable to be uninformed about litigation finance.”

Collin Cox: I don't think most clients have a lot of awareness about litigation finance and I would bet they have let a lot of cases go because they didn't know all their options for sharing risk. I think lots of clients will be eager to think about using litigation finance on a case-by-case basis, more episodically.

Partner, AmLaw 20 Firm: GCs of Fortune 500 companies [don't] understand how Burford can help them in managing cost and offloading risk on some of their dockets in a broader and more strategic way. I think you can't go wrong in investing in educating in-house people. The in-house lawyers to whom we're pitching aren't always familiar with the details of litigation finance. How is it dealt with at a budget level? How does it work at an accounting level?

Guy Harvey: It is not so much questions as it is misperceptions. I think the major areas where further education is needed are around the cost of funding and how to secure funding. Clients may perceive it as expensive—but they aren't allowing for what funding enables them to do and why it costs what it does. Firms may not be good at addressing such questions and may themselves still lack information. But it is well past time when it is acceptable to be uninformed about litigation finance.

Howard Janis: The clients would like to understand what their options are. What's the amount that the client could recover if they went one route versus another? It's the cost-benefit analysis: What's my cost-benefit relationship of going one route versus another?

What are the most common misconceptions about litigation finance?

Michael Mills: The misunderstanding is that litigation finance is “one size fits all”. That you can only structure litigation funding in one way. There's a general need to understand that there are different kinds of litigation funders and different ways to structure litigation funding agreements, both for plaintiff and defense work.

Collin Cox: People who are new to litigation finance are confused about what happens when you bring in another party. What does that mean about who does what in the case? The way it should always work is that you have one client. Nothing changes. Now clients don't have the cost pressures, but you still answer to that same original client.

Paul Skiermont: I am consistently surprised when clients express surprise at how “expensive” it is. The funders are putting out money that may come back as nothing.

Co-Chair, Intellectual Property, AmLaw 100 firm: There are a lot of people that assume that litigants seeking financing in IP are seeking that financing to offload risk because they don't believe the merits of their case. The opposite is true.

What are ways that firms and clients could be using it but aren't?

Collin Cox: The concept of portfolio management is interesting and important. There are many firms that have run lines of credit for years and they are used to seeing the world in that way. In many ways financing based on portfolio management makes more sense. You're making a bet on the firm.

Managing Partner, Corporate and Business Litigation Firm: Before I had a portfolio relationship with Burford I talked to a lot of funders, and they can spend 45 days kicking the tires on a potential case. If I meet with the client on Monday and they say, “Alright, a third is an acceptable contingency, this is an important initiative for us. It's a \$200 million claim for us, we've got approval from the general counsel, the board signed off. Are you going to do it?” I can't tell him, “I'll get back to you in 45 days.” [Portfolio financing] is a great thing for us, ... because we [can] be responsive to the client in a timely fashion.

Guy Harvey: We see portfolio financing as a major opportunity for us to go out into the market with funding in place and develop clients. It gives us a particular selling point which is very useful to a firm of our size in

competing with other firms. I see defense funding as very interesting indeed... Clearly a lot of clients have to defend themselves in litigation and would be eager to have their litigation funded away from their balance sheets.

Michael Mills: In Australia, companies are beginning to work out ways that they could use litigation finance in commercial contexts, to move costs off their balance sheets. Corporates are also beginning to understand the opportunities they have to use litigation finance proactively. Their understanding is still developing about the scope to utilize litigation funding and tailor it to meet the company's/client's specific needs, rather than just being considered as a standard off-the-shelf product. Another change in Australia is that there are now many more litigation funders and with this competition comes more solutions and options. I am not sure if this is yet fully recognized and as a result, some past adverse impressions about litigation funding may understandably remain.

Ben Knowles: For the UK market, the addition of adverse costs isn't necessarily a reason not to use finance, but it can cause major problems in the process because ATE insurance can be so expensive.

Craig Martin: In terms of types of matters, the places where I see the most need and the most potential impact are insurance, IP and antitrust—and I think there's significant untapped need in antitrust and IP.

Among clients and law firms that still have not used litigation finance, what are the primary obstacles?

Craig Martin: For those who are still not using litigation finance, lack of need for external capital is the number one factor, and lack of understanding is the second most important factor.

David Thompson: For the most part, companies only raise it with me when they lack cash—they are not generally otherwise interested.

Paul Skiermont: I've never heard a client say, "I don't want to do it because I don't believe in it".

Patricia Glaser: I don't think it's an objection that prevents people from using litigation finance. I think it's mostly a lack of knowledge. Of course, there are people who say, "You're just encouraging litigation, that's what's wrong with America today." But that's silly. And of course, there are clients who don't use litigation finance because they don't want to share. But that's also silly—because if you don't share, you often won't be able to afford to bring the lawsuit.

Collin Cox: Lawyers are in one of the most tradition-based practices... We're always looking to precedent, we're always looking backward. And litigation finance is something that looks forward. What's going to take the fear of the unknown away? I think it's going to be lawyers talking to lawyers. The more that well-respected attorneys tell war stories about how litigation finance helped them, the more that will take away their fear.

Looking ahead to the next five years, do you have any predictions for how litigation finance will impact the business of law?

Michael Mills: The impact will continue to grow. Both on the plaintiff and potentially defense side, especially as corporations recognize that litigation finance gives them a means to move costs off balance sheets. There's tremendous appeal in that, and that is going to be another area of huge growth for litigation finance in Australia.

Co-Chair, Intellectual Property, AmLaw 100 Firm: In IP, there is more and more uncertainty and that is going to cause litigation finance firms to grow, because they're equipped to handle that risk and because they're better suited to assess and price it.

Partner, AmLaw 20 Firm: From my perspective, it will continue to allow me to compete for business that I couldn't otherwise compete for.

Patricia Glaser: I think there will continue to be growth, and you'll see more companies get into the space. With the good companies, there will be more of it, and the other companies you'll see dying on the vine. So much of it is about the people and the ability to make the right calls.... So much of litigation finance is the people and the trick is getting the right people. The people I've worked with at Burford have been great.

Do you have questions or concerns about litigation finance?

Craig Martin: No, I don't. For those without experience using litigation finance, sometimes there is an unspoken concern about what attitude courts have taken. It's not an ethical concern about champerty. When I encounter this type of question about how the courts treat litigation finance, I point people to the most relevant ruling, by a magistrate judge in the Northern District of Illinois,¹ and that alleviates any concerns they may have.

¹ *Miller UK Ltd. v. Caterpillar Inc.* (N.D. Ill. Jan. 6, 2014)

Collin Cox: As litigation finance has become more prominent, there's been more "controversy". But in the main, if you look at the overall practice of litigation finance, it's a positive development.

Guy Harvey: About the concept, no, I don't have concerns. In terms of the practice of it, there are a seemingly mushrooming number of people who say they're in the market as litigation funders. Many of them may be so in name only. Perhaps they're brokers positioning themselves as funders. That's something to be careful about: the fact that you don't know where money is coming from should be a concern.

Managing Partner, Corporate and Business Litigation Firm: I have to be comfortable with the relationship with the funder, that they're not going to try to find client confidential information that I can't share, that they're not going to try to unduly influence the case, and that everything is done in a way that gives first priority to the client and to the ethical rules that govern our profession. I have found Burford to be very good at that. I don't think all funders are.

What other recommendations do you have?

Partner, AmLaw 20 Firm: I think my overarching recommendation would be to focus on educating in-house people. I think it's the general counsels of more sophisticated client and potential client companies that need your attention. For nine out of ten cases that we handle at those companies, I think they still don't have an understanding of how litigation finance can be beneficial to them and their firms.

Ben Knowles: I believe the big thing that is required is a streamlining of the process.

Guy Harvey: I'm certain that with funding in place we're well placed to deliver what our clients need and want. Without it we're fighting with one hand tied behind our back. I think that firms that don't explore litigation funding and aren't offering it to clients are not providing the full range of service to clients.

Managing Partner, Corporate and Business Litigation Firm: I think we're invested in each other. I think when you build that kind of relationship over time, I don't want to show them a bad case because it would diminish our standing in their eyes. Likewise, I don't think they would want to be user-unfriendly with me because I'm a loyal customer.

ADDRESSING THE RESEARCH FINDINGS

Our one-on-one interviews, along with the online survey, pointed to a few areas where more education is needed on litigation finance.

PROCESS

How does diligence work? What does it take to get funding? Can the process be faster? See "Demystifying Diligence" in this issue of the Quarterly, as well as earlier articles on "Getting to Yes" in commercial and IP litigation.

COST

What are the relative costs of financing vs. paying out of pocket? How "expensive" is litigation finance? See Aviva Will's articles on cost-comparisons in this issue and the Summer 2017 Quarterly.

CONTROL

As a passive investor Burford has no control over litigation or arbitration—yet control is a question we're used to addressing. See how some of our team answer this question in this issue.

Law firm economics: Comparing the costs of self- finance vs. outside finance

Aviva Will



212 235 6820 / awill@burfordcapital.com

As Managing Director in charge of Burford's underwriting and investment team, Aviva Will has reviewed many hundreds of billions of dollars' worth of commercial litigation. She has particular expertise in antitrust and international arbitration matters, and in financing through bespoke portfolio models. Previously, she was senior litigation manager and Assistant General Counsel at Time Warner, Inc. and a senior litigator at Cravath, Swaine & Moore LLP.

Burford’s latest research affirms what I’ve heard repeatedly in conversations with lawyers over the eight years we have been in business: At first glance, litigation finance seems “expensive”—until one takes the time to compare the costs and benefits of self-financing versus utilizing outside capital.

For obvious reasons, we’re committed to helping lawyers understand why litigation finance costs what it does, and to making the case that it often is the better economic choice. To that end, in the Summer 2017 Burford Quarterly, I provided a financial model to help lawyers talk to their clients about the relative costs and benefits of legal finance for litigants. In the case studies below, I analyze the relative costs and benefits of law firms using outside capital to address a few of the challenges they encounter on a regular basis. The case studies are hypothetical and offered solely for illustrative purposes, but they demonstrate how litigation finance works to facilitate a firm’s growth without pushing it beyond its natural appetite for risk.

Case study: Hourly firm takes on risk

A respected law firm that works almost exclusively on an hourly fee basis is approached by the former co-owner of an international energy company with a breach-of-contract dispute after his former partners failed to share profits resulting from their venture. The firm thinks the claim has strong legal merits, and estimates potential damages at \$70 million.

The potential client—which is talking to other, competing law firms—does not have the means to pay the firm’s hourly fees for the duration of the litigation. Firm management is unwilling to expose the firm to the risk of taking the case on full contingency, although it is willing to consider a reasonable discount to its regular fees with a corresponding uplift from any award.

The partner assigned to the case does not want to lose the opportunity to work with the client, and she contacts

a third-party litigation finance provider. She receives the following proposal:

- The law firm can accept the case on a fully contingent basis, and the litigation finance provider will finance \$4 million of the \$5 million budget, with the firm risking \$1 million
- In exchange, upon successful resolution of the case, the litigation finance provider receives its investment back, the firm receives its \$1 million investment and uplift and the finance provider receives the remaining contingency

After reviewing the proposal, the law firm determines that the financing arrangement bridges the gap between the firm’s hourly model and the client’s budget issues, enabling the firm to pursue a strong case that will add value to the business.

WITHOUT FINANCING

The firm fails to work with the client

\$0

WITH FINANCING

The law firm establishes a relationship with a new client and generates new business for the firm without upending its hourly model

\$3 million in revenue for the law firm with \$1 million at risk and subject to an uplift upon successful resolution; \$1 million in expense costs passed through to the funder

Case study: Contingency firm seeks efficiency

A leading IP boutique has historically represented its clients on full contingency. But recent developments in the space have resulted in a heightened risk environment, making the firm reconsider its willingness to absorb pure contingency risk.

Concerned that the firm may soon have to choose between taking on too much risk or turning down good clients, a partner requests a proposal from a third-party litigation finance provider:

- The litigation financier will provide \$15 million in non-recourse portfolio financing—which is half of the expected \$30 million needed to pursue a portfolio of three IP claims with different clients, each with a total budget of \$10 million and expected proceeds in excess of \$150 million across the cases.
- With the IP boutique having secured a 40% interest in the proceeds of each case in exchange for full contingency arrangements, the litigation finance provider will receive 50% of the law firm’s contingent proceeds generated by the three cases.

The firm does the math and determines that financing enables the firm to mitigate 50% of its downside risk and generate \$15 million in fees as the cases are litigated, all while giving up only 25% of its proceeds if the claim is successful (\$15 million). Financing enables the boutique to fund legal fees and expenses for new IP matters, ensuring that the firm can balance its risk without sacrificing opportunities to continue growing its practice. The financing arrangement also supports new business: With less of its risk tied up in these cases, the firm can pursue new business with competitive terms and further diversify its book of cases.

OUTCOME	WITHOUT FINANCING	WITH FINANCING
Successful claim	<p>The case entitles the IP boutique to its entire contingency</p> <p>Total case proceeds of \$150 million entitle the firm to \$60 million</p>	<p>The case entitles the boutique to its fees plus a significant win</p> <p>Resulting proceeds of \$150 million entitle the firm to \$45 million—\$15 million in fees and \$30 million in contingent proceeds</p>
Unsuccessful claims	<p>The firm spends years investing an enormous amount of its resources in the case</p> <p>\$30 million in firm resources must be written off as a loss</p>	<p>The firm mitigates its downside exposure by engaging the funder to bear half the costs</p> <p>\$15 million in revenues even if all three cases result in total losses</p>

Case study: Improving tax outcomes to increase firm profits

A law firm that does a mix of hourly and contingent fee work is approached by one of its existing corporate clients with a new case. Because the client has already exhausted most of its litigation budget for the year, the client asks the firm to take the case on risk.

Based on the strength of the merits and what the firm expects to be the ultimate damages, the firm decides that it is willing to risk its hourly fees. But the firm's CFO has been exploring finance solutions to help the firm run more efficiently. The CFO has concerns about the negative tax implications of the firm's practice of self-financing expenses. Unlike salaries and overhead, expenses are not tax-deductible, meaning partners effectively cover the cost using after-tax dollars—ultimately reducing firm profits.

A litigation financier gives the firm CFO a proposal that will ease the burden of paying ongoing expenses while enabling the firm to keep most of its contingency from a successful case outcome:

- The litigation finance provider will provide \$3 million of financing to be used only to pay out-of-pocket litigation expenses
- In exchange, the litigation finance provider receives its outlay back and a 1.5x multiple return on its invested capital, collected only from future case proceeds

The financing frees up capital that the firm can redirect into the firm at year-end as expected. But the firm's CFO also recognizes another advantage of the arrangement: By dedicating outside capital to cover expenses, partners no longer have to contribute after-tax dollars to cover case costs—which (at a 39.6% top marginal tax rate) the CFO expects to increase firm profits by \$5 million in the current year.

WITHOUT FINANCING

The firm's partners spend income from other cases to cover this client's expenses

\$5 million in pre-tax income paid out by partners to cover \$3 million for the current year's expenses

WITH FINANCING

In addition to avoiding the risk of a \$5 million loss on expenses, the firm preserves cash to distribute as profits and invest in firm, with added tax savings

Not having to contribute \$3 million from profit results in a tax savings of \$2 million

Demystifying the litigation finance diligence process

Emily Slater



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Emily Slater is a Director at Burford, which she joined in 2010. She has reviewed hundreds of complex commercial litigation matters. Previously, she was a litigator at Debevoise & Plimpton LLP, where she specialized in bet-the-company litigation and regulatory investigations involving billions of dollars in damages.

It's human nature to want to start a journey knowing where you're going, how you'll get there and when you'll arrive. And this line of inquiry is typical of our initial conversations with clients and law firms about litigation finance, when we are often asked:

- 1. What are Burford's investment criteria?**
- 2. What do I need to do to secure financing?**
- 3. How long will it take?**

The journey to litigation finance is more straightforward than it may seem to those who are new to the practice. We work hard to make that journey clear, even as we recognize that securing non-recourse financing for multi-million-dollar, high-stakes commercial litigation requires expertise and effort. But we strive to create clarity around the process because, as our experience and research confirm, its absence can frustrate clients and firms seeking external capital.

Burford is unique in conducting the entirety of our diligence and investment process in-house. Our goal is always to complete the process as efficiently as possible. And regardless of the outcome, we strive in every interaction to create an understanding on which we can build in the future. In that spirit, we offer this guidance that we hope will be useful in "demystifying diligence" for both new and seasoned users of litigation finance.

What are Burford's investment criteria?

The best candidates for litigation finance meet the following criteria:

Type of matter: We invest in complex commercial litigation at any stage, including antitrust, securities, fraud, contract, patent and intellectual property, trade secret and other business tort matters, as well as international arbitration.

Strong merits: We receive returns only when cases succeed, so we will carefully assess the facts and legal merits of a claim, starting with an operative complaint or written summary.

Counsel: We value cases led by experienced litigation counsel with successful track records and a strategic

approach. During initial review, we confirm that counsel has been retained and has performed an analysis of the factual background and legal issues of the case.

Jurisdiction: We invest in matters filed or expected to be filed in domestic courts in a common law jurisdiction or in an internationally recognized arbitration center.

Capital requirement: Clients, firms and Burford get the best value when the amount requested is at least \$2 million. Most of our investments are between \$4 and \$10 million, and some are significantly larger.

Damages: Damages must be supported by solid evidence of loss, and should be large enough to support our investment and returns with the client keeping most of the litigation proceeds if the case goes well. Although the ratio of investment to expected recovery varies depending on the case, for an investment of \$2 million, the expected compensatory damages should be around \$20 million.

3 STEPS TO FINANCING

Initial review:

Confidentiality agreement, background documents reviewed

Active diligence:

Discussion of merits and economics, usually culminating in term sheet for matters in which we wish to invest

Investment:

Definitive documentation and execution of deal

What do I need to do to secure financing?

At Burford, we work hard to provide the best expertise and client experience in addition to the largest pool of available capital. Ultimately, we approach the investment diligence process as a collaboration, not a transaction.

Clients and firms seeking financing can aid the process in four important ways:

Prepare a realistic budget: Matters in which we invest must have sufficient funding to get to the finish line. That requires a realistic, conservative budget through trial. The most frequent reason we reject good cases is that the ratio of necessary investment to expected return is too narrow. To confirm that the economics of the litigation investment are workable, we rely on our counterparties to provide clear budgets that do not assume early settlement.

Organize documents: Active diligence requires our review of the key documents underlying the dispute as well as financial information about the businesses involved. We can work more efficiently when our counter-parties provide documentation quickly.

Be responsive: The single most important way that clients and lawyers can aid the process is to respond quickly to questions and document requests—a commitment we make to our counterparties.

Understand the risk profile of the case: Burford is in the business of taking risk, but we invest in cases that have strong risk profiles (acknowledging that Burford may have a different risk tolerance from finance firms or lawyers). Some of the characteristics we look for include:

- The case does not turn on a “he-said-she-said” credibility determination
- There is more than one viable legal theory that could lead to a recovery
- The legal theory is tested and has good support in statutory or caselaw
- The case theory makes sense in the commercial context of the transaction or course of dealing
- The damages theory can be reasonably extrapolated from past performance of the damaged company or there is an established contract, statutory or royalty rate
- The economics of the investment do not depend on the case settling early or on obtaining treble damages

How long will it take?

The timeframe to secure litigation finance depends on a variety of factors. Although we have financed cases in a matter of a few days, as a general rule, if cases are well worked up and information is provided in a timely fashion, commercial matters typically take four to six weeks from initial case review to investment. Patent matters typically take 30-90 days (with matters past PTAB or dispositive motion practice taking less time and patents that have not yet been tested taking more).

A variety of factors influence how long the overall process takes, including:

- **Client and firm:** Again, the responsiveness of clients and law firms in answering questions and providing documents is among the most significant factors.
- **Stage:** Matters with fewer unknowns (e.g., matters on appeal) require the least time (as little as a week to 10 days); yet-to-be-filed matters require more time.
- **Case type:** International arbitration and patent matters typically require more time.
- **Single-case or portfolio:** When a “going forward” portfolio is in place, the diligence process for new matters can be completed extremely quickly. For law firms, that provides speed that can be a significant advantage in competitive situations.



CONFIDENTIALITY

- Because we execute a confidentiality agreement as the first step of our diligence process, our communications with lawyers and their clients generally are protected from discovery by the work product doctrine
- For an overview of caselaw affirming work product protection for communications with outside providers of litigation finance, see “Work product protection for litigation finance” on Burford’s blog
- Out of an abundance of caution, despite the strong caselaw, we are circumspect about what we request in the diligence process to avoid any risk of waiver
- We do not request materials that are protected only by the attorney-client privilege

HOW BURFORD’S DILIGENCE ADDS VALUE

Client: Receives an independent assessment of risk—insights that can give reassurance of the strengths of a case or highlight potential areas of weakness

Lawyer: Receives an economic analysis that includes the risk/reward of taking on the case—insights that can make the firm’s practice more profitable

QUESTIONS TO ASK WHEN DILIGENCING FUNDERS

How much available capital does the financier have to invest?

Does the fund have a defined exit period or sunset date?

What are its sources of capital, and how reliable are those sources of capital?

How quickly can it provide a final term sheet?
(Pre-diligence term sheets are almost always revised.)

Does it conduct its diligence in-house?

Control: Addressing a common question about litigation finance

Perspectives from Nicole Berg, Christy Searl and John Lazar

As Burford's 2017 Litigation Finance Survey demonstrates, one of the persistent questions that clients and lawyers have about using external finance is whether doing so will in any way impact control of strategy, settlement or other litigation-related decision-making.

At Burford, the short and definitive answer is no. We are passive investors. Unless we are expressly purchasing a claim (which of course includes the right to control its prosecution), we do not control the legal assets in which we invest.

Nevertheless, control remains an area of concern for some lawyers and therefore merits ongoing dialogue and education. We asked three lawyer members of Burford's underwriting and investment team—Nicole Berg, Christy Searl and John Lazar—to share their perspectives.



Nicole Berg is a Vice President at Burford with experience spanning complex litigation and finance. Based in Chicago, she previously was an associate at Jenner & Block and served as a law clerk for Judge Jay Bybee at the U.S. Court of Appeals for the Ninth Circuit. Before practicing law, she was a senior trader at PEAK6 Investments.

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A Director of Burford's underwriting and investment arm in New York, Christy Searl previously was a Senior Vice President in the General Counsel's office at the Lehman Brothers Bankruptcy Estate. She spent nearly a decade as a Senior Vice President in Lehman Brothers' litigation department and was an Associate at Chadbourne & Parke.

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Lawyers may be uncertain about what happens when they involve a third-party capital provider. How do you address the issue of control and resolve that uncertainty?

Nicole Berg: This is a question we get asked often and the answer is very simple. There is no uncertainty in our deals: Burford is never in control of the litigation, and each deal is set up to make that explicit. Instead, Burford remains a passive investor, meaning that once we commit to make an investment, we fully expect the lawyers and clients to continue as the decision makers for the case.

Because we do not control the litigation, our diligence process is critical. In addition to evaluating the merits of a claim, we also evaluate the merits of the other players in the case. For example, we consider the quality of counsel and the motivations of the client. We must be confident in counsel's ability to pursue the case and comfortable with the client controlling the course of the litigation. Additionally, we always structure our deals so that the parties who *do* have control are incentivized to make rational decisions.

Although we do not control the litigation, we monitor our investments in many ways, including by asking our counterparties to keep us informed of any major developments. And, of course, there are many smart people at Burford and we often can add value to the litigation team, depending on the extent to which our counterparties want us involved. But in every case, and for every decision, the client has the ultimate say.

Until recently, you sat in the client's seat. Seen from that perspective, what questions would you have had about control? How has your perspective shifted since joining Burford?

Christy Searl: Prior to joining Burford as an underwriter, I was in-house litigation counsel for Lehman Brothers for 17 years, handling complex litigation and arbitration matters (and later, bankruptcy-related matters) with the assistance of talented outside counsel. At any given time, I had a litigation book of 50 or so active matters of varying complexity and exposure from the hundreds of thousands to the hundreds of millions of dollars. As is true with litigation generally, a very high percentage of those matters settled—close to 90 %.

My first question about litigation finance would have been how it would impact settlement decisions. Companies settle (or don't) for a variety of reasons: commercial, regulatory, public relations, moral and ethical, to name a few. At certain companies, gaining settlement approval often involves sign-off from business line heads, general counsels, board members, creditors and regulators, among others. The views of other important constituencies, such as customers, shareholders and the public, also are often considered. The last thing a client wants is a capital provider with some kind of "settlement veto power."

continued >

Even with the presence of financing from Burford, the decision to settle a case and at what price is the client's. Our contracts specify that clients have sole control of settlement. Burford also takes great care in working with clients to tailor deals so that at each decision point during the lifetime of a matter—motion to dismiss, summary judgment, trial, et cetera—their interests regarding settlement are aligned, as much as possible, with ours.

During my tenure as in-house counsel, I always strove to add value to the business by being a sounding board and confidant to my clients. The same is true at Burford. Having invested a great deal of time in financing a matter and having an obligation to monitor the deal through conclusion, Burford professionals—many of whom like myself have been risk-managing cases for decades—will provide confidential feedback to clients and their counsel, which they are free to use or disregard. In this way, we become a trusted partner in the expected positive resolution of a matter. Control of settlement, however, remains with the client.

Ninety % of my book of matters at Lehman pre-bankruptcy was defense-sided. I wish litigation finance had been on offer in those days. Our litigation department would have been happy to use Burford's non-recourse capital to finance the 10% of plaintiff-sided matters in my book, eliminating the legal expense line items from my group's P&L as well as the worst-case scenario of committing Lehman capital with no recovery. Some of the legal spend on the 90% defense-sided portion of my book also could have been managed through litigation finance by deploying Burford capital across a portfolio of defense matters with rewards for achieving specified performance targets.



John Lazar is a Vice President at Burford with extensive experience in arbitration and complex commercial litigation matters. Based in New York, he previously was a litigator at Cravath, Swaine & Moore and at Wollmuth Maher & Deutch.

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Law firms and clients tell us that Burford adds value to the litigation matters in which we invest. Since Burford remains a passive investor without control, what form does that “value add” take?

John Lazar: Burford's value add can take a number of forms, including reviewing and commenting on briefs and other filings, mooting lawyers before oral argument, assisting with selecting experts, and giving feedback when asked on strategy for settlement negotiations, trial or appeal. Of course, we always ensure that nothing we do interferes with the attorney-client relationship, and we offer our input only when it is sought—because again, ultimate decision-making authority always rests with the client and attorney. Our clients appreciate the views of Burford's team given that they are the result of our collective decades of litigation experience, whether that expertise lies in a certain area of law or even familiarity with a particular judge or opposing counsel.

We also find that potential clients appreciate our team's pre-investment diligence process, because it often helps flesh out potential weaknesses in a case and develop strategies for their mitigation. Even if Burford ultimately does not invest in a given opportunity, lawyers and clients report that the second look from a neutral and experienced team often serves to strengthen their case. In the end, it is the tremendous expertise and many years of experience of our team that separates Burford from others involved in litigation finance and enables us to best serve our clients.

With \$3.1 billion invested in and available to invest in the legal market, Burford and its 90 professionals work with law firms and clients around the world.

Lawyers choose Burford because we have more capital and more capacity to invest quickly and efficiently than any other firm in the industry. We utilize a respected team of more than 40 lawyers who are experienced, fast and easy to work with.

We benefit from a lower cost of capital that we pass on to firms and clients, and we're publicly traded and trusted as a strategic partner that always acts with consummate professionalism.

If you have questions about Burford or litigation finance please contact any of our three major offices, or email any of our staff at [firstinitiallastname@burfordcapital.com](mailto:firstname.lastname@burfordcapital.com).

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