

# TEXAS LAWYER

## Texas-Style Appeal for Litigation Finance – Monetizing Claims Even While Case Drags On

By [Laina Miller Hammond](#) and [April Farris](#) | November 15, 2019

When it comes to commercial litigation, a trial victory — to paraphrase Winston Churchill — may not be the end or even the beginning of the end, but rather the end of the beginning.

Judgments in commercial lawsuits are often subject to lengthy appeals. A complex case can often take over a year to resolve in Texas intermediate courts, and a further appeal to the Texas Supreme Court is likely to follow, which can take years to reach final resolution. The appeal process can mean significant additional expense for all parties involved and add further economic stress to claimants. Likewise, law firms representing the client on a full or partial contingency also must wait to recoup their fee, which remains at risk until the judgment is paid.

Other times, the losing defendant simply refuses to pay the judgment, forcing the client to find and recover the defendant's assets, sometimes across the world. Like an appeal, enforcement and collection efforts can require significant investments of time and money, ultimately delaying the client's ability to enjoy the fruits of the litigation.

Many companies emerging from litigation may lack the additional capital or desire to weather a long and uncertain appeal or enforcement effort. Yet, these same companies are loath to abandon their hard-earned judgment.

Litigation finance can provide options to alleviate much of the waiting, risk, and expense of an appeal or asset recovery effort.

### Monetizing Judgments

Instead of the client waiting for a final resolution, litigation finance can monetize — or advance — a significant portion of the judgment value. Monetizing provides immediate capital to a company to put toward business needs and priorities. The company is able to unlock the value of the judgment now in exchange for a portion of the ultimate recovery later.

A client holding a judgment faces the risk of the judgment being overturned on appeal or turn out to be partially or entirely uncollectable. Through monetization, that risk is transferred in large part to the litigation funder financing on a non-recourse basis. The funder's return on its investment only comes from the case recovery. If the case is unsuccessful, the client owes the funder nothing.

Many clients choose to monetize a portion of their judgments in order to gain the certainty of some return on their investment in the case. In such cases, the client remains the party in

interest in the case and retains the responsibility for pursuing and control over the appeal or collection, but now does so with the funder's capital.

For example, imagine a company has won a judgment of \$40 million in Harris County district court and the defendant appeals and the case is assigned to the Houston 1st Court of Appeals. A litigation funder advances \$15 million, which the company uses partially to pay the fees and costs of the appeal and partially to market a new product. If the company wins the appeal and collects the judgment, the funder will be entitled to a pre-negotiated return—usually a multiple of its original investment or, in some cases, a percentage of the eventual recovery. If the company loses the appeal, the company has still recovered \$15 million, rather than \$0.

Law firms with a contingent fee interest in a substantial judgment or award can likewise use litigation finance to liquidate a portion of their fee and ensure some guaranteed revenue. Monetization enables the law firm to spread some of its risk in the case to the litigation funder.

### **Funding for Appeals**

Litigation funding can also be used to help pay the attorney fees and costs of the appeal itself. Appellate funding is similar to funding litigation at earlier stages. However, in cases in which a judgment has been secured, the factual record and legal issues in the case are far clearer than earlier in the case. As such, appeals typically carry less risk than cases at earlier stages in litigation, usually permitting the funder to offer more favorable rates. That said, an appeal is hardly without risk. Each stage of review brings additional uncertainty. The mixed composition of Republican and Democrat judges currently sitting on the Texas courts of appeals adds yet another element of uncertainty to the case.

The funder conducts diligence on these risk points and others and assesses the likely outcome of the appeal. If the funder decides to proceed, it will pay for a portion of the fees and costs of the appeal in exchange for a negotiated return on its investment.

As with monetization and earlier-stage litigation finance, in appellate funding, control over legal strategy and decisions remains entirely with the client and its counsel and the funding is non-recourse. Importantly, with monetization or appellate funding, a client no longer burdened by the financial strain of the case will be less likely to be forced to accept an unfairly low settlement offer from the opposing party.

### **Funding for Asset Recovery and Collection Efforts**

Even once a client obtains a final judgment, either with or without surviving an appeal, a defeated party may nonetheless refuse to pay, hide assets and put the onus on the client to enforce it.

Judgment enforcement often involves a lengthy and complex process of locating and recovering assets to satisfy the judgment. For some international defendants who maintain significant assets abroad, the asset search and recovery effort may span the globe.

Litigation funding can support a company's enforcement efforts in two key ways. First, the right funder has experience in asset recovery and a network of trusted experts, including forensic accountants, investigators and lawyers who specialize in enforcement litigation. Companies of all sizes who are inexperienced in judgment collection can benefit from the expertise and network a sophisticated funder offers.

Second, litigation funders provide non-recourse capital to hire the right experts and attorneys and to pursue the most effective enforcement strategy. Oftentimes, a client's litigation budget does not include the additional expense of judgment enforcement and collection, which can be substantial. Litigation funding can provide financial relief for a company already expending significant money on the litigation up to that point.

### **Conclusion**

Litigation funding can help companies minimize their cost and risk at a critical point in their lawsuit — after a judgment has been secured but before it has been paid. Whether used to monetize the judgment or fund an appeal or collection effort, funding, in the right circumstances, can provide much-needed capital and peace of mind to litigation-weary clients and their lawyers.

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