GREENPOINT
CAPITAL MANAGEMENT

LITIGATION FINANCE

Multidistrict Litigation Primer

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LITIGATION FINANCE PRIMER

As a percentage of revenue, U.S. companies spend four to nine times more on litigation than their counterparts in foreign jurisdictions. [1] The high cost of litigation provides well-funded defendants with a potent weapon: financial asymmetry. Defendants may engage in a costly war of attrition intended to exhaust and overwhelm a plaintiff's limited resources. As a result, many individuals or companies may choose to defer or even abandon legitimate claims if they lack the means to sustain a protracted litigation.

Faced with the prospect of forfeiting the chance to redress their grievances, injured parties often seek stakeholders who will subsidize litigation costs in exchange for a share of potential positive outcomes. Third-party litigation finance provides an equitable means of redistributing risk and equalizing the bargaining power of litigants by providing funding to undercapitalized plaintiffs.

At its most basic level, litigation finance ("Litigation Finance" or "Litfin") is the practice whereby a third-party, previously unrelated to the antecedent event of a lawsuit provides money to one of its parties in return for a financial reward derived from a potential positive outcome. The capital provided by Litfin investors may help individual plaintiffs pay for living expenses or directly pay for some of the costs of litigation, including attorneys' fees, expert witness fees, court costs and other expenses associated with a lawsuit. Alternatively, it can be invested in law firms to finance operations that support a broad portfolio of lawsuits. The financial reward for investors can take different forms including a flat fee, a multiple on the amount advanced, a percentage of the amount recovered or an interest rate when it is a loan to a law firm (among other more creative structures).

Litigation Finance has only recently emerged as an institutional-grade asset class due to the degree of legal uncertainty that has historically discouraged investment in civil justice system participants. The medieval English doctrines of maintenance, champerty and barratry historically prohibited third-party financing of lawsuits in the United States and in most other common law countries.

HISTORICAL PERSPECTIVE

Barratry is the practice of filing vexatious litigation. During the Middle Ages, the authorities could prosecute individuals who "stirred up" litigation by encouraging plaintiffs to bring suit. Maintenance is "an officious intermeddling in a suit that in no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend [the suit]." Thus, any third-party support for a lawsuit theoretically constitutes maintenance. Champerty is a form of maintenance that involves "maintaining a suit in return for a financial interest in the outcome. Because money is solicited from disinterested parties to fund litigation, usually in return for a share of the proceeds, syndicated lawsuits, by definition, constitute champerty." As the U.S. Supreme Court succinctly declared:

… maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.[2]

In response to the limits on third-party investments, many plaintiff's attorneys began to work on a contingency basis, receiving compensation only upon the successful resolution of cases. As other means of controlling abuses of the legal system became more effective, the need for the prohibitions also receded. In many states the public's interest in improving access to the legal resources for those that can least afford it is winning out over concerns underlying earlier prohibitions. As a result, widespread exceptions to these historical prohibitions have been made, allowing for investment in litigation finance assets. Still, these historical restrictions and concomitant reputational concerns likely contribute to capital scarcity.

MARKET DRIVERS & PRODUCTS

Outside of the legal field, companies typically rely on traditional avenues to finance their businesses including securities offerings, bank loans and other specialty financing solutions. Constrained by Dodd Frank and Basel III as systematically risky borrowers, law firms do not have the same range of options.

As a result, most contingency firms are self-financing, having at most only small bank lines of credit. They generally rely on either fee sharing with other law firms, partners' contributions or even credit card debt to fund working capital. Law firms, therefore, are historically underserved by capital markets and as a result pay comparably higher rates to finance their operations as compared to participants in other industries.

[1] Max Volsky, LexShares white paper: A Brief Introduction to Litigation Finance

[2] United States Supreme Court In re Primus, 436 U.S. 412, 424 n. 15 (1978)

From an investor's perspective Litigation Finance assets offer returns that are uncorrelated to traditional asset classes and provide compelling risk-adjusted returns. Equity-type investments in commercial cases can be structured with significant upside return potential; while portfolio loans often boast high yields with risk spread risk across diversified dockets. As such, the asset class is growing quickly. Institutional investors are bringing to bear innovative investment structures that help alleviate the capital constraints experienced by plaintiffs and the plaintiff's attorneys or firms ("Plaintiff's Firms" or "Plaintiff's Attorneys") who legally represent claimants in these matters.

The Litigation Finance industry offers three main product lines. Consumer ("Consumer" litigation finance) is generally structured as high rate advances to support individual tort claimants' living expenses during (often) protracted litigation. Commercial ("Commercial" litigation finance) is the provision of funding for commercial litigations in areas such as contracts, intellectual property, antitrust and banking, among others. These investments are typically made in exchange for a pre-structured share of positive litigation outcomes. Portfolio Lending ("Portfolio Lending" or "Mass Tort" litigation finance) generally takes the form of specialty credit or loans to Plaintiff's Firms, backed not by individual cases, but by a borrower's full docket of cases, often diversified across many litigations.

Greenpoint Capital primarily invests in Mass Torts.

TORT LAW & MASS TORTS

Tort law is a body of law that is used to apportion responsibility for damages that occur as a result of negligence, accidents and personal injury. A person who suffers an injury is entitled to receive damages, usually monetary compensation, from the person held responsible for those injuries. Tort law defines what constitutes a legal injury and whether persons may be held liable for injuries they have caused. In addition to physical injuries, legal injuries may also include emotional, economic, or reputational injuries, as well as violations of privacy, property or constitutional rights. Damages that result from torts can include wage losses, medical expenses, fire losses, and property damage, among others.

The estimated number of tort cases brought every year in the United States is approximately 1.2 million in state courts and approximately 100,000 in federal courts. A 2018 report by the U.S. Chamber of Congress estimates U.S. tort system costs totaled $429 billion in 2016. Of that, $244 billion went to compensate plaintiffs. Plaintiff's Firms received $77 billion, defense lawyers received $58 billion and $51 billion covered insurance costs.[3]

Plaintiff's Attorneys often work on a contingency basis—receiving financial compensation only upon successful resolution of a case. Personal injury Plaintiff's Firms specialize in lawsuits against individuals and businesses on behalf of an injured party. They have the knowledge and ability to review the case, determine whether the defendant is infact liable for the injuries, evaluate the extent of the damages, file important court documents and advise clients on whether and when to continue to pursue litigation or accept a negotiated settlement. Plaintiff's Firms may represent individual claimants or classes of claimants through class action ("Class Action") or mass tort ("Mass Tort") litigations.

CLASS ACTION

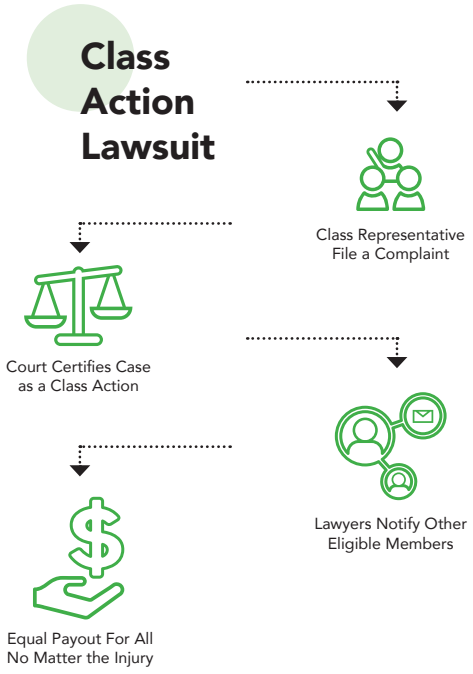
In a class action suit ("Class Action") an individual or small group of plaintiffs acts as representatives for a larger group of people claiming injury or harm. After filing a complaint in state or federal court, the class representatives ask the court to certify the lawsuit as a class action. The court has the authority to decide whether to certify the case as a Class Action.

If Class Action parties reach a settlement, attorneys develop a plan for notifying potential Class Members and for settling claims. If the court approves the settlement, lawyers notify potential class members ("Class Members", "Members", collectively the "Class") of their opportunity to submit a claim for a percentage of the settlement (contingent on each Member proving eligibility).

The disadvantage to plaintiffs in a class action is that Class Members do not have individual representation and not all have input in the case. Therefore, a Class Action case outcome is binary and applies equally to everyone in the Class. That is, typically Class Members receive identical settlement awards without individual voices in the process that might otherwise afford consideration for unique circumstances or specific damages. Eligible Class Members do have the right to "opt-out" of the settlement and pursue an independent claim. The cost of this approach (versus the potential award) often makes this an unreasonable pursuit. Figure 1 next page illustrates the Class Action legal process.

[3] U.S. Chamber of Commerce, "Costs and Compensation of the U.S. Tort System", October 2018

Figure 1. Class action lawsuit process



Plaintiff's Firms often do not pursue Class Action certification in product liability or toxic exposure cases with large numbers of claimants. Instead, these lawyers can file numerous individual lawsuits that may then be consolidated for judicial and administrative efficiency under a system known as multidistrict litigation ("Multidistrict Litigation", MDL" or "Mass Tort"). Mass Torts offer a means to efficiently achieve awards for multiple victims for whom unique consideration of circumstances and injury can still be considered.

MASS TORTS

Background

The underlying cases in most Mass Tort litigations are personal injury claims alleging harm from toxic exposure or from a defective product. Claims may also arise from deceptive marketing practices, typically designed to expand the potential market for a drug or device. Opioid marketing tactics over the past 25 years represent an excellent example of how this practice can be harmful. Dangerous marketing tactics, environmental toxic exposure or product failures often have broad-scale effects for which injury claims can be numerous.

Broad scale personal injury claims can clog court dockets across the nation. In order to increase efficiency by allowing a single judge to oversee cases with similar fact patterns and injuries, these cases may be consolidated in state or federal court in a process known as Multidistrict Litigation. Multidistrict Litigation is not the same as class action, although an MDL can lead to a class-action lawsuit.

As discussed, a Class Action is a single lawsuit on behalf of a Class of claimants. On the other hand, an MDL is comprised of multiple separate lawsuits for individual claimants. If the fact patterns and injuries bear enough similarity, the court may consolidate these cases for judicial efficiency.

In the Federal court system, the Judicial Panel on Multidistrict Litigation ("JPML") decides if and when to transfer cases to an MDL, and under which circuit and judge. This usually occurs when there are large numbers of cases against common defendants; and the courts expect more plaintiffs to file lawsuits. At the state level, the Supreme Court or a similar judicial body, can also decide to consolidate cases, and it is not uncommon for numerous consolidations to occur simultaneously across both federal and multiple state venues. As of 2018, there were 230 active federal MDLs with a total of 123,125 actions pending in 50 US District Courts.

A single judge oversees and administers cases in an MDL. Consolidation usually involves grouping together cases with common factual or legal issues for discovery, pre-trial hearings, trial scheduling and settlement negotiation. This allows the court to address common issues that affect many cases at once and pursue global settlement across all claims. In Mass Torts, identical outcomes are not prescribed for all Claimants as is true for Members of a Class Action.

Examples of MDLs include:

- Transvaginal mesh (Various MDLs by manufacturer)
- Atrium Hernia Mesh (MDL No. 2753)
- Xarelto (MDL No. 2592)
- IVC Filters (MDL No. 2641)
- Stryker Rejuvenate and ABG II hips (MDL No. 2441)
- Invokana (MDL No. 2750)
- Actos (MDL. No. 2299)[4]

Once many claimants are identified and retained and a request for consolidation is granted, Plaintiff's Firms coordinate litigation strategies through defined phases of an MDL process; each phase presents its own set of risks to both plaintiffs and defendants.

[4] https://www.drugwatch.com/lawsuits/

MASS TORT LITIGATION PROCESSES

Discovery

Assuming consolidation is granted, the presiding judge will commence with discovery. Therein, the first critical hurdle for Plaintiff's Attorneys is to establish a reasonable likelihood that the injuries were in fact related to use of the specific product or exposure to the adverse event in question. Plaintiffs must establish that there is scientific evidence to support a conclusion of causation and of liability against the defendants.

Further, a hearing to establish the veracity of any expert witnesses who may testify on behalf of plaintiffs is necessary. In federal court this is known as a Daubert hearing ("Daubert" or "Daubert Hearing") and is a hurdle for plaintiffs; before which a judge is unlikely to agree to continue with the proceedings. It is possible for a judge to put an end to the litigation if expert testimony and/or other evidence integral to the causation and liability arguments are deemed inadmissible.

BELLWETHER TRIALS

Once the various cases have been consolidated and a positive Daubert outcome has been achieved by the plaintiffs, the trial phase begins. At this stage, both plaintiffs and defense (the "Sides", individually a "Side") nominate a number of individual cases ("Bellwethers" or "Bellwether" cases) for trial. The judge then selects a set number, typically between 6 and 12 cases, with a mix of those nominated by the Plaintiff's Attorneys and by the defense. A judge may also choose cases neither side has nominated.

The Bellwether process is designed to provide both sides with a measure as to how juries feel about causation and liability, the severity of economic and non-economic damages and whether punitive damages are appropriate based on the behavior of the defendant(s). In short, verdicts from the Bellwether offer a gauge as to whether a settlement is appropriate and likely; they also anchor economic terms that may satisfy the claims.

The actual Bellwether verdicts are almost always appealed based on findings of fact or law. This allows each Side to continue to try the balance of the Bellwethers without having to remit payment on verdicts rendered. In fact, it is highly unlikely that any Bellwether verdict will be paid in full. The assumption is that once the verdict is rendered, it enters the appeal process; meanwhile, the rest of the trials take place and further evidence related to global settlement requirements are weighed. Bellwether trials often take 1-2 years to complete.

As Bellwether trials are being completed, there is almost always some form of communication between Sides regarding potential settlement offers. Often times the judge will appoint a "Settlement Committee" early in the process, with members from both Sides of the litigation charged with designing frameworks for global resolution of the litigation. One Side of the committee is often more inclined than the other toward speedy settlement based on trial outcomes.

SETTLEMENT NEGOTIATIONS

Settlement can occur among select groups of Plaintiff's Firms (and their respective clients) or can be structured for global resolution through a Master Settlement Agreement ("MSA"). It is not uncommon for a group of firms with perceived strength to be paid early while the defense strings along firms and plaintiffs viewed as having less leverage. For this reason, it is important to understand the political and economic strength of the various plaintiffs' firms in order to better anticipate how they may be treated by defense and how negotiations may play out.

Whether there is a global or piecemeal settlement, there is always a detailed contemplation regarding the various degrees of injury suffered by victims. Typically, an injury matrix ("Injury Matrix" or "Damages Matrix") is created to reflect variations with respect to likely causation severity of injury. This implies that an individual who had limited exposure to the product or hazardous material would necessarily receive less compensation than an individual who had significantly more exposure. Illness types, survivability, levels of pain, required revision surgeries and other case characteristics also inform the Damages Matrix. Therefore, overall settlement values are a function of the number and severity of the claims to be settled. Payment terms are then negotiated.

One critical variable is whether or not a negotiated settlement is open-ended or closed-and-fixed. Open-ended Agreements typically do not include delineation of the total sum required to extinguish liability, but instead they establish a set of criteria to allow for future claims to be adjudicated. These typically include proof of use or exposure and level of injury. The NFL Concussion case is an example of an open-ended settlement. The defendant is liable for payment (over time) to all persons who can prove that they meet the criteria as defined under the settlement.

The alternative is a closed-and-fixed settlement, where the defendant agrees to issue a one-time payment or a series of future payments in exchange for the release of claims. In the vast majority of these scenarios, a negotiated lump sum is disbursed by the defendant. Those payments represent the total sum of dollars to be divided up among the plaintiffs. Occasionally however, longer-term payment obligations are established to help the defendant finance the transaction over years or even decades. The tobacco

settlement is an excellent example of this; a long-term disbursement model was implemented to support optimal claimant outcomes while allowing for near-term constraints of defendants' balance sheets.

These different structures play a significant role in how claims administration is approached and whether or not defendants excuse themselves from the proceedings.

CLAIMS ADMINISTRATION

Once a settlement is reached, either on a global basis or in one-off deals with specific firms, the claims payment process is initiated. Whether lump-sum or future periodic payments are agreed to, plaintiffs generally establish a Qualified Settlement Fund ("QSF") governed by code section 468B of the Internal Revenue Code. This fund essentially acts as an escrow account. A third-party administrator is typically assigned to facilitate the claims-vetting and payment process. There are several companies and independent administrators ("QSF Administrators", "Claims Administrators" or simply "Administrators") that provide these services, and they are typically approved by the courts in order to ensure that the proceeds are sufficiently protected and that plaintiffs receive a fair and reasonable review of their claims.

Claims Administrators must review each submitted claim to verify:

- Use of the product or exposure to the hazardous material or event
- Proof that the damages being claimed have been verified through the examination of medical records
- Severity of injuries and remedial care directly related to the injuries
- Medical issues that remain chronic or episodic in nature and may require future care

While verifying an individual's claim and damages, the Administrator must also gather information related to liens or other claims against the recovery. That is, when an individual is harmed due to tortfeasance, many organizations may perform services on the basis of deferred payment, pending future recovery from the legal claim. For example, an injured party may receive care on the basis of deferred payment. The provider or insurer would thence hold a lien against funds from third-party settlement until this obligation has been met. Frequently a claimant will have one or several liens filed against their case from physicians' groups, hospitals, medical transportation companies, private insurers, Medicare and Medicaid and others. These liens must be verified by the Administrator or an outside vendor and are often negotiated to a lesser amount based on the outcome of the overall settlement and availability of proceeds.

There may also be consideration given to whether claim proceeds disqualify a recipient from preservation of government benefits. Prior to injury, many individuals received means-tested government benefits through Medicaid, SChip, SSI, SSDI and other programs. Receipt of material proceeds from a third-party lawsuit settlement may adversely impact a recipient's continued qualification for those benefits. This requires sophisticated planning via Special Needs Trusts, Structured Settlement providers and other financial planning and structuring tools available to ensure continued qualification for these benefits.

Once all Administrative issues have been resolved, the individual claim has been verified, liens are paid and government benefits preservation strategies are deployed, funds can then be disbursed to the various interested parties. The Administrator will draft a Settlement Statement articulating recipient awards and amounts owed to third-parties, including lien holders, Trust companies, structured settlement annuity providers, Plaintiff's Firms and finally to the claimant. The claimant must acknowledge all distributions and sign a full and final release of all claims against the defendant and the QSF Administrator.

Plaintiff's Firms are paid on the gross settlement amount and are reimbursed for approved expenses related to the prosecution of the case. Lienholders are paid from the remaining balance, and claimants receive the net amount either directly or through the disbursement of proceeds to trusts or structured settlement providers. A sample disbursement can be found below in Figure 2.

Figure 2. Sample administration disbursement table

Gross Settlement	$	200,000
Plaintiffs Firm Retainer Fee (40%)	$	80,000
Case Cost Reimbursement (Firm)	$	2,500
Hospital (lien)	$	17,000
Medicare (lien)	$	12,000
Special Needs Trust (Seed)	$	75,000
Net to Client:	**$**	**13,500**

The hallmarks of Mass Torts cases include (Figure 3, below, is a flow chart sumamrizing the MDL litigation process):

- Many plaintiffs against a single or multiple related defendants responsible for the products or contaminants alleging causing injury
- Adverting Firms ability to reach potential clients through marketing campaigns
- Economies of scale in acquiring and litigating on behalf of injured claimants
- National litigation consolidated in federal court or in a single (or sometimes multiple) states/s
- A consolidated federal litigation or one or multiple consolidated state litigations
- Consolidates discovery by plaintiffs and defendants
- Court-approved short-form complaint and plaintiff fact sheet available on court website
- Court appointed plaintiff's steering committee to manage the litigation
- Typically, a 3-year to 7-year duration from inquiry to settlement

MASS TORT FUNCTIONS

Within Plaintiff's Firms there are two major functional sub-categories often differentiated as Advertising firms ("Advertising Firms", "Referral Firms" or case "Aggregators") and handling firms ("Handling Firms" or "Handling Attorneys"). Advertising Firms will typically focus on marketing and client acquisition, initial client intake, case review and ongoing client support. Handling Firms, while they may also collect and aggregate their own cases, are typically focused on gathering specific detailed information from individual clients, modeling and evaluating damages, filing necessary court documents, negotiating settlements and representing clients in the event of a trial. Practically speaking, an Advertising Firm will refer cases to Handling Firms in exchange for a pre-determined percentage share of eventual overall fees from recoveries. Figure 4 below shows the typical division of labor between Referral firms and Handling firms.

Figure 3. MDL or Mass Tort litigation process

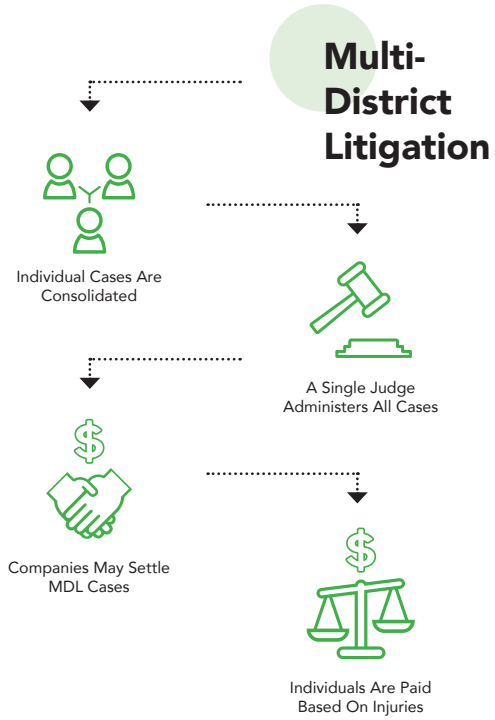


Figure 4. Referral and Handling Attorney roles
Referral attorneys work closely with handling firms, who provide the legal work to litigate and settle cases

CLAIMS ADMINISTRATION	HANDLING ATTORNEY
• Run advertising campaigns across numerous actions and aggregate claims • Secure retainer agreements with clients and typically also initiate the intake process, which can include securing through plaintiff fact sheets • Refer cases, for a percentage of fees, to Handling Firms in order to complete the necessary legal work to bring a case settlement	• May handle their own marketing campaigns and intake process • Complete primary legal work on behalf of clients including court filings • Negotiate Settlements for clients • Litigate cases in the event of trial • In the case of Mass Torts, they may also be on the leadership team that helps direct and control the multi-district litigation