

# [What Will Litigation Funding Look Like In 10 Years?](#)

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## **Summary**

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How will litigation funding be different in 2031? Thought leaders tell Law360 Pulse how they expect litigation funding could evolve.

## **Body**

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What do you think litigation funding in the United States will look like in 10 years? How will it be different than it is now? How should regulations evolve?

The Pulse of Litigation FundingLaw360 Pulse is examining the state of litigation funding in 2021, how law firms are using that financing and where the industry is headed. More in this series:

[Hedge Funds Muscle In On Funding Big-Ticket Cases](#)   [Litigation Funding May Sway BigLaw To Plaintiff-Side Work](#)   [BigLaw Attys Clamor To Snap Up Litigation Funding Jobs](#)   [Brown Rudnick Partner On Creating Models For Legal Funders](#)Law360 Pulse posed those questions to thought leaders in the legal industry and received perspectives on how the future of litigation funding could look.

Recent reports found that more attorneys are getting comfortable with third-party litigation funding as it continues to grow in use among firms of all sizes and across practice areas. And observers have predicted an "explosive growth" in the use of commercial litigation finance by companies, not just to fund litigation but also to monetize claims.

But will this momentum carry into the future? And if so, how will the landscape appear? What kinds of products will be in play?

Here are six different visions of what the future could bring for litigation funding.

## What Will Litigation Funding Look Like In 10 Years?

Richard Finkelman and Craig Freeman Managing Directors, Berkeley Research Group LLC Litigation funding is still a new idea for many people, and the rise in its popularity has some significant implications for the future of litigation. Today's litigation funders are primarily focused on corporate plaintiff cases, antitrust being one clear example. Valuing cases is more art than science — funders are using a combination of human domain knowledge and basic analytics to come up with predicted case values and potential resolution outcomes. Over time, expect due diligence and pricing to become more scientific and less driven by the predictions of subject matter experts.

Over the next decade, we expect to see new funding will come from more than the few funding companies available today. In the not too distant future, we see law firms offering clients funding services. Clients want better risk-sharing opportunities beyond today's alternative fee arrangements, and law firms will end up offering funding of their own, not only for big cases but also for a portfolio of matters — think employment litigation.

Advances in [artificial intelligence's] ability to predict legal outcomes will get better over time. Two trends, advances in the field of computational law and the ability of AI to learn by feeding the machine more data, will make predictions more accurate and actionable. This will benefit clients and spread adoption.

In the future, will there be a marketplace where people trade shares in already funded cases? Will there be special purpose acquisition companies, or SPACs, for different categories of litigations? Maybe, but there will be some challenges and regulatory issues to face if litigation funding evolves into a tradeable investment. Time will tell, but we wouldn't bet against the likelihood that litigation investments get securitized and traded somewhere.

Increased regulation will also come from future disputes involving funding activities. We can envision third-party funders ending up in litigations of their own, the outcomes of which may set precedents that become regulatory law.

Lastly, we note that issues related to fair access and AI and ethics will play an important role in how guidelines and regulations evolve for all participants involved in funding litigations. Will access to funding at all be fought over in court? The Magic 8-Ball says: Cannot predict now.

Erika Levin Partner, Fox Rothschild LLP Looking through the crystal ball, what do we see for the U.S. litigation funding industry in 2031? The easy answer is that the industry will very likely continue to grow in size and sophistication. I anticipate that technology — including AI and predictive analytics, as well as competition — will help to drive down the cost of capital associated with litigation funding and aid in the efficient deployment of capital for a broader range of matters.

In terms of products, I foresee clients embracing a broader range. In addition to single and portfolio funding deals, there will be a wider use of insurance and hedge products coupled with funding. I also foresee the further development of the secondary market and an increase in clients exploring syndications, as well as funding associated with monetization and the enforcement of arbitral awards and judgments.

With respect to the legal landscape, the projection for the next 10 years becomes harder. Currently, litigation finance is permitted in most American states, but the jurisprudence and legislation vary from jurisdiction to jurisdiction. It is important to note that champerty and maintenance remain part of the common law in the majority of the states. Over the next 10 years, with increased education and transparency, I predict that we will see a further relaxing of the champerty-related rules. I hope to see greater uniformity in how we approach the resolution of issues such as conflicts of interests, fee-sharing, disclosure, privilege/confidentiality, control, security for costs, adverse costs and adequate capitalization requirements.

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Studying and drawing from the experiences of other international jurisdictions, especially those which also share a common legal tradition — like Australia, the United Kingdom, Singapore and Hong Kong — will be increasingly helpful for the United States as we forge ahead into the next decade. I predict that the brunt of the efforts to address concerns relating to funding will continue to be borne by professional legal associations, as well as international arbitral institutions.

While I do not envision direct regulation of litigation funding within the United States, it is interesting to note that Australia has recently introduced regulations requiring litigation funders operating in it to hold an Australian Financial Services License and comply with the managed investment scheme regime under the Corporations Act 2001. Within the United States, close consultation between legal experts and the litigation finance industry will be of paramount importance to ensure that we calibrate our approach to funding in a way that is thoughtful and consistent. It is imperative to acknowledge the variety of types of cases that might employ some form of funding — recognizing that greater protection may be warranted for consumer and class action matters as opposed to those involving sophisticated commercial entities.

Harsh AroraPartner, Kelley KronenbergOur country will likely experience a significant growth in litigation financing in the next 10 years. I anticipate growth because of the benefits of litigation financing and the advancement in the technological and regulatory fronts. Litigation financiers approach their legal risk in the similar way other financiers approach business risk. More sophisticated technologies and algorithms developed by litigation financing firms will increase the access and the viability of backing litigation suits. Legalist, a startup formed by a litigation fund backed by billionaire Peter Thiel, is a model of the future of litigation financing as it is successfully creating algorithms and utilizing analytics to determine financial risk.

Typically, litigation financing has been more popular with plaintiff-side litigation, however, defense-side financing is growing. Defense financing protects the companies from potential financial risk, acting as insurance and taking on all the legal expenses. The financier assumes all the risk but profits by negotiating themselves a benefit. This practice is particularly useful in larger, riskier cases, like antitrust or trademark infringement suits, which insurance companies do not want to cover. Companies likely prefer this process because it provides the flexibility to restructure their litigation expenses to not substantially interfere with their ordinary business activities.

Regulations concerning litigation funding should focus on the ethical implications of a third-party financing a case. Litigation financiers can exert influence on the case strategy or settlement, which may contradict with the client's objectives. Conflicts are specifically problematic with crowdfunded litigation financing, since so many different interests may be represented. Guidelines of professional conduct do not permit a person who pays the legal services on behalf of the client to regulate a lawyer's professional judgment. Nevertheless, guidelines and regulations provide no clear understanding of the influence a litigation funder has on a case. Also, litigation financiers are not bound by attorney-client privilege, therefore some clients' information is not protected. Regulations should change to better address the role and limits of a litigation financier in order to ensure greater client protection.

William MarrInvestment Manager, Validity Finance LLC Ten years ago, most people had never heard of litigation finance. Ten years from now, it will be a central feature of our civil justice system, perhaps even supplanting the contingent-fee and hourly fee models as the preferred way to advance plaintiff-side litigation.

This past decade witnessed the steady collapse of potential barriers to funding: awareness of funding spread, transactions grew simpler and more client-friendly, funders developed track records of success, and legal and ethical concerns with funding fell away. The next decade, firms and clients will increasingly view funding as an efficient way to share the burdens and benefits of litigation, the same way companies already use third-party equity and debt financing to share the burdens and benefits of every other business endeavor.

## What Will Litigation Funding Look Like In 10 Years?

Litigation funding will look different in important ways. First, single-case funding transactions will be rare. Most transactions will be portfolio agreements with either law firms or large clients. That's because smaller clients will expect law firms to have financing solutions in place, and larger clients will find client-side portfolios the most efficient way to fund their many litigations.

Second, funding will become commonplace even for the Am Law 200. White-shoe firms that today adhere closely to the hourly fee model and resist discounting their fees will embrace funding, especially as the next generation takes over leadership positions.

Third, funders will innovate new funding models that both better serve existing clients and reach new clients. More states will follow Arizona in allowing nonlawyers to co-own law firms, allowing funders to more efficiently get capital to firms. Meanwhile, defense-side funding products will evolve and gain a foothold (though they will never be as common as plaintiff-side funding).

Finally, regulations will even more clearly permit funding and prohibit discoverability into funding agreements. But we can expect lawmakers and rules committees to eschew strict regulations, at least of the commercial litigation funding market. Instead, regulations will come primarily from the funding industry itself, which will establish high standards and bring self-regulation to the funding world the same way it already exists for the legal profession.

Kristen Weil Partner, Dentons  
The world of litigation funding has attracted considerable attention from litigation and arbitration practitioners, becoming increasingly popular in high-value international arbitration proceedings and litigation matters in U.S. courts.

Over the next 10 years, the legal profession may see attorneys, courts and clients becoming more familiar with third-party funding. Attorneys will need to become increasingly savvy in approaching litigation funders, presenting the merits of the case and negotiating mutually beneficial funding arrangements. As litigation funding becomes more widespread, attorneys will also need to manage clients' expectations about the types of cases that are most attractive to third-party funders.

An emerging trend in litigation funding that is expected to continue is investment firms funding a portfolio of cases, rather than individual litigations. Although some have speculated that third-party litigation funding may lead to filing highly speculative, but potentially highly rewarding cases, so far it appears that litigation funders are often conservative in their funding decisions, preferring to carefully vet and invest only in strong cases where a return on investment is likely.

It remains to be seen whether increased portfolio-based investments will encourage funders to invest in riskier cases because the risk can be absorbed across a pool of cases. Currently, funding is most common in higher-value cases. Over the next 10 years, however, attorneys may find that the world of financing expands to include smaller cases that otherwise would not attract funders.

In the absence of widespread guidance or regulation, it is possible that over the next decade states will adopt regulations about third-party litigation funding. Courts, too, may adopt more uniform standards regarding the disclosure of funding at the outset of a lawsuit and potential conflicts of interest. Courts may adopt local rules on this practice, or individual judges may incorporate disclosure into their case management orders. We would expect that bar associations may also build upon the American Bar Association's 2020 Best Practices for Third-Party Litigation Funding.

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Lucian PeraPartner, Adams and Reese LLPIn my ethics and professional responsibility practice, I see several trends emerging. Commercial litigation funding is becoming more available for smaller amounts of funding, both for single cases and for portfolios of cases. Cases that used to be too small to fund are now finding more interested funders. That trend will surely continue.

In my practice representing businesses that provide services to lawyers and law firms, more of these service providers are beginning to offer funding as a part of a broader suite of services. That trend will likely continue.

The lawyer ethics rule changes now in place in Arizona, the new lawyer regulatory sandbox in Utah, and the potential regulatory changes in other jurisdictions — especially if California adopts significant changes — may open the door to less concern about whether fees to funders amount to prohibited fee-sharing. Reducing that concern may well open the door to broader acceptance of funding. But it's very hard to predict whether these changes will spread and what effect they may have on the funding market.

As far as regulation of commercial litigation funding, the current trend toward stable, predictable case law providing work product protection about funding deals and communications with funders will continue, providing comfort to lawyers and other funded parties about confidentiality.

In my view, the efforts to force other, more fulsome disclosure about funding in commercial litigation will likely stall out soon for lack of any strong policy rationale supporting transparency.

--Editing by Orlando Lorenzo.