Top 3 Litigation Finance Deal-Killers, And How To Avoid Them

By **Rebecca Berrebi and Boris Ziser** (May 6, 2025)

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An April report from Bloomberg Law identifying the funding behind Amazon Audible Inc. patent cases, among other cases, indicated that, based on publicly available data, new pockets of capital — including well-established and historically successful hedge funds — are entering the legal finance market.[1]

Further, with recent turbulence in the capital markets, it is expected that more capital will start flowing into alternative investment strategies, like litigation finance.

Legal asset funding sits at the crossroads of the finance and legal markets. While legal asset funding has some similarities with other private credit and equity models, transactions in the space have some unique characteristics when compared to the broader finance industry.

A universal truth of transactions is that despite best efforts, some deals die. Some can be revived with different parties or alternative economic points, and some cannot. No matter the transaction size, business subject or party sophistication, the possibility of failure always exists.

The litigation finance industry's deals are not immune. All too often, transactions between financiers and funded parties collapse, causing frustration, time pressure and expense.

The typical litigation finance deal starts with the receipt of term sheets that lay out some material economic and noneconomic terms, but, importantly, not all the particulars. Usually, these term sheets are highly negotiated and often include an exclusivity period and, on occasion, a break fee.

Once these term sheets are fully executed, funders start spending money to document the transaction and finalize the diligence. The clock to closing starts ticking.

Sometimes litigation finance deals die because of reasons beyond anyone's control — for instance, the diligence does not stand up to the expectations of the funders, the economics simply cannot work or business conflicts are discovered.

But, all too often, transactions collapse due to these three reasons: (1) a lack of trust among the parties; (2) a misunderstanding of the deal terms; and (3) time — shout out to the old adage, "Time kills all deals."

With awareness and effort, though, these common problems can often be avoided.

1. Trust

Skilled businesspeople and lawyers can protect against many risks in a transaction, but, at some level, there is always a leap of faith. Deal documents can outline clear obligations for each party, as well as consequences for bad behavior, but no transaction is riskless.

Since litigation finance deal duration often lasts for years, it is essential to build trust throughout the negotiation process and foster a sense of ongoing goodwill and teamwork. If one party is acting with opacity or is clearly resistant to fairness, distrust can creep in and lead to deal hesitancy, or worse, failure. Acting in good faith and with transparency throughout the negotiation process can help mitigate concerns.

Promoting trust starts at the term sheet phase. The financed party must be completely open about any known flaws of an investment opportunity right from the outset. No opportunity is perfect, but funders don't expect or require perfection. They do, however, expect forthrightness.

On the other side, funders would benefit by laying out the complete economics and providing at least a sense of all the expected major sticking points that may be further addressed in more robust documentation.

For example, no case is perfect. If the financed party has learned a material negative fact with respect to the case to be funded that affects its merits, it should disclose that. If some claims are weaker than others, or information has come to light indicating a lower likely recovery than initially expected, the financed party should disclose that, too.

There is nothing more likely to create problems for both parties than a late-stage unwelcome surprise in deal terms.

2. Common Understanding

In the litigation finance industry specifically, it is common that the user of funding does not engage in these types of deals on a regular basis. Therefore, often the terms laid out in a term sheet can be easily misinterpreted or not fully understood by the user.

Well-developed term sheets can save deals. It's better to have the hard conversations up-front, before fees are racked up and time ticks away.

Specifically, funders should share an economic model to promote understanding. Also, a discussion of ongoing obligations and events of default can be helpful to ward off difficult conversations once the deal has already started to move.

Legal transactional structures are fluid, and no two deals look alike. In fact, there are very few document templates available for litigation finance deals given that each one is highly tailored to fit a particular set of circumstances.

It is essential to understand the motivations of each participant in a deal to promote an alignment of interests, both in terms of economics and process. Talking through the expectations at each step of the life of the investment at the very start of the deal is essential to success.

In addition to understanding the economics, both parties would benefit from the financed party's understanding of the various obligations it will be required to perform under the transaction, such as reporting, reimbursement of various expenses and other covenants.

For example, financed parties will have to provide reporting about the progress of the case; agree to cooperate with the prosecution of the case, e.g., provide information to experts, prepare for depositions, testify in court, etc.; and agree to not take actions that could adversely affect the likelihood of success.

Many of these obligations are often new to the financed party and can seem daunting at first. A clear understanding of these obligations, and what internal resources will have to be dedicated to complying with them, will help avoid foot faults.

3. Time

Time is the ultimate deal-killer. At the end of the day, all dealmakers are humans, and people can lose conviction and motivation as transactions drag on. Other opportunities may arise for funders that cause distraction, and funded parties can get cold feet, leading to distaste of already negotiated deal terms. It is to everyone's benefit to move transactions along as quickly and efficiently as possible.

Nobody likes false deadlines, but setting and communicating realistic timelines — and meeting them — is essential to deal success.

Efficiently responding to due diligence requests and clearly communicating timing of deliverables can be powerful predicates for a positive working relationship.

Sometimes, a time and responsibility schedule helps keep everyone on track by laying out each deliverable, the responsible party and the date by which the parties expect to receive it.

Such a tool does not have to be inflexible, and while sometimes the time frames might be aspirational, the parties should aim to set goals that are achievable.

Parties are often reluctant to set appropriate timing expectations, as that may lead to uncomfortable conversations in what is sometimes a competitive environment. However, it is better to have those conversations and level-set early in the process.

The lifespan of these investments can be very long, often lasting for three to six years. Setting the right tone early can only help the ongoing working relationship, and make parties excited to close a deal and work efficiently toward that goal. Remember another old adage: Time is money.

Conclusion

The unique structure of litigation finance deals can lead to challenges. It is vital to keep common causes of deal failure in mind when pursuing these transactions.

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[1] https://news.bloomberglaw.com/business-and-practice/hedge-funds-private-equity-quietly-invest-in-litigation-finance.