

## ***Don't Get Caught Without Appeal Protection: Outside financing can be the best bet for holding onto a big judgment.***

Many attorneys spend a lifetime waiting to hit that big case – the one with the deep-pocket defendant, where liability is clear and damages are significant. But when that big verdict comes, many attorneys realize that the war has only begun.

The defendant vows to appeal and diligently begins preparing post-trial motions. You and your client have spent a fortune on experts, court reporters, and demonstrative evidence, and any extra cash flow is needed to finance your other matters.

Of course, the defendant knows this and will use his resource advantage to continue the war, despite losing the most important battle. Faced with this problem, many trial lawyers have turned to outside sources to finance the cost of their appeals in order to defend large judgments.

### **Here's how it works.**

The nuts and bolts of judgment financing are quite simple. An investor buys a portion of the judgment from your client. First, the investor will decide on a dollar amount to invest (never to exceed 49 percent of the entire amount). That dollar

amount will be paid to you and your client in cash. In exchange, you and your client execute a partial assignment of the judgment, at a specific dollar amount. The investor will typically seek an interest in the judgment equal to two times the amount invested. In other words, in exchange for \$250,000 in cash today, your client will have to assign a \$500,000 interest in the judgment.

### **The money you receive is not a loan.**

It is the proceeds from the sale of an asset. The investor bears 100 percent of the risk of loss in the event that the judgment is reversed on appeal and no money is collected. The money you and your client take today is never repaid as would be the case in a conventional loan. The investor's return is limited to the specific dollar amount provided for in the assignment and is contingent upon collection of the judgment.

### **The interest may cover what the investor takes.**

Although it may seem like the investor is making out like a bandit, the spread between what you get in cash today and the investor's interest in the judgment is often more than covered by post-judgment interest.

Take a hypothetical \$2 million judgment. Assume an investment of \$250,000 for which the investor takes a \$500,000 interest in the judgment. Your \$2 million judgment is earning interest at a rate of approximately 10 percent from the date of the judgment. In this case, you would be

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earning approximately \$200,000 in interest per year. Therefore, the \$250,000 spread between what you receive today and what the investor gets is more than covered by the interest on the judgment.

If you think judgment financing may be right for you and your client, you should know the following factors investors evaluate in deciding which appeals to fund:

**Investors require a minimum dollar amount.**

Each investment firm will typically have its own minimum dollar amount of a judgment that it will be interested in financing. The reason for these minimums is the high transaction cost associated with each deal. Generally, funding will only be available for judgments in excess of \$100,000. In addition, investors will never invest more than 49 percent of the total amount of the judgment and their investment will almost never exceed \$1 million, regardless of the amount of the judgment.

**Investors look for deep pockets.**

Another important factor investors will use in evaluating whether to fund a particular appeal is the financial viability of the defendant. There is enough risk inherent in the appellate process without a concern about collection. Unless your defendant is a large corporation or municipal entity, funding will be virtually impossible to obtain in the absence of adequate insurance to satisfy the judgment.

**Is your judgment reasonable?**

If the amount of damages awarded in your

case is unprecedented, the investment firm will be concerned. Judgments consisting primarily of large punitive damage awards will rarely be funded. Investors are looking for reasonable compensatory damages. They prefer commercial disputes to personal-injury cases, but will fund any case that meet their underwriting requirements.

**Do you have a good case?**

Each investment firm has a panel of appellate consultants to whom they turn for an independent evaluation of the merits of the appeal for which funding is sought. These consultants, who are experienced appellate lawyers, evaluate the case on the merits, typically review the appellant's brief and evaluate the record before making a recommendation.

The independent consultant's report on the probability of success on appeal is the most important factor an investor considers in determining which appeals to fund. If the consultant expresses concern about the probable success on appeal, your chances of getting funding are minimal. Therefore, it is important to present your case for funding in a manner that is likely to lead to a favorable evaluation by the consultant. A detailed analysis of the cases cited in the appellant's brief along with additional research and proposed strategies for attacking the central argument are recommended.

In addition to the probability of success on appeal, the investors will also want to know how long it will take to get a disposition in the appellate court. Time is money for the investor and they will

therefore turn down funding opportunities even in strong cases, if the time to disposition is extraordinarily long.

### **Have quality attorneys on board.**

If the case receives a favorable opinion from the independent consultant, the final factor may be the quality of the appellate lawyers who are going to be working on the brief. If the investor perceives that trial counsel is stepping out of its league in handling the appeal without bringing in qualified help, that could be a deal breaker.

Trial lawyers can avoid this problem and still maintain control over the appeal by retaining consultants to work with them. In the alternative, the case can be referred to another firm with an experienced appellate lawyer who will appear of record in the case.

### **Is appellate financing ethical?**

Properly structured, judgment financing is an ethical approach to obtaining the necessary resources for fighting a costly and time-consuming appeal. However, because the agreement to obtain financing is a business transaction with the client, the attorney must be careful to follow the requirements of ABA Rule 1.8(a). Under this rule, the attorney is to provide full written disclosure, give the client the opportunity to seek the independent advice of counsel, and obtain the client's written consent.

To avoid the appearance of impropriety, lawyers should never finance a portion of their interest in the judgment without offering the same terms to the client. If the client elects not to proceed, and the attorney still wants to obtain the funding, a written consent agreement should be entered into in which the client expressly indicates that she does not wish to avail herself of the funding opportunity, but consents to have the attorney do so.

### **You are still in control.**

After the funding, the appeal is handled just like any other. The investor plays no role in how the case is handled following the funding. They do not review the briefs or participate in preparation for oral argument. They do not require that you consult with them regarding settlement discussions. Your autonomy as the lawyer is totally unfettered. Your ethical obligation and allegiance is to your client only and that should be clearly spelled out in the transaction documents.

By following these guidelines, financing can be a viable alternative to preserve large judgments from attack on appeal. When properly structured, everyone can win. Having the financial resources to assemble the right team for the appeal can often make the difference between winning and losing. ●●●