

Are investors interested in your appeal?

Appeal funding provides a risk transfer and mitigation strategy for plaintiff and attorney

By Michael Blum

The appellate process can be emotionally and financially devastating to plaintiffs. They have often exhausted their emotional and monetary resources during the trial phase. Or maybe they had no funds to begin with. For contingency-fee attorneys, an appeal may mean years before any revenue is realized. The financial strain and emotional stress caused by an appeal clearly takes its toll.

Appellate funding is non-recourse financing

Appeal funding is non-recourse financing for plaintiffs and their trial attorneys who have a money judgment on appeal. The funding occurs while the appeal is pending and before the appellate decision is reached. Appellate financing is a cash advance; it is not a loan. It is a non-recourse investment, so no interest is ever charged and no monthly payments ever made. If the case is ultimately won, everyone wins. If the case is eventually lost, plaintiff and attorney keep every dollar advanced and owe the appeal funding provider nothing.

An appellate advance is an immediate answer to the financial demands that often face deserving plaintiffs and their attorneys. Not only does it transfer some of the risk away from plaintiffs and attorneys, it can eliminate the financial pressure to accept an unfair offer. And it enables a plaintiff and attorney to make decisions, and defend their judgment on appeal, solely on the merits of the case.

Ethics and interference

Ethics is certainly a concern when dealing with any litigation funding company. Only a minority, non-controlling interest in the judgment should be sold. Any agreement should specify that the appeal-funding provider will not offer any legal advice, that they will not interfere in the attorney-client relationship, and that they will not dictate when to settle or whether or not to accept a settlement offer. They should only be a passive investor.

George Kuhlman, Ethics Counsel to the American Bar Association, cautions, "Those seeking to acquire an interest in another's litigation don't acquire the right to control the legal strategy or intervene in the attorney's ability to make judgments. If the company does not involve itself in the legal strategy of the case, I would see no inherent conflict in the process."

Advances to plaintiff or attorney

The basis of an advance to the plaintiff is the amount of the judgment he or she will receive after attorney's fees and costs are paid. Attorneys' fees, as well as any expenses or case costs advanced by the attorney and reimbursed by the plaintiff, should be separate and not part of, or subject to, a transaction with the plaintiff.

Likewise, the attorney lien for fees serves as the basis of an advance to the trial attorney, separate and distinct from the interest of the plaintiff.

Use of funds

There should be no restrictions on how a plaintiff or attorney may use the proceeds from an appeal funding. Plaintiffs should be able to use the funds to pay trial or appellate attorney fees, pay personal bills, and reduce personal debt or simply to set cash aside, free from risk if the case is ultimately lost. Trial attorneys should be able to use the funds to expand their practices, fund case costs, pay personal bills or just to save for future use.

Decision making by the investors

Although the decision of an appellate funder to invest may be a difficult one, the factors considered by a funding company are relatively straight forward. Appellate briefs and post trial motions are obvious, but consideration is also given to the nature of the award, i.e. compensatory vs. punitive, the experience of the appellate attorney, the jurisdiction in which the appeal is heard, the make up of the appellate justices, and certainly the ability to collect on the judgment given a favorable appellate decision. Since the non-recourse investment is not a loan, the credit of the plaintiff or attorney is generally irrelevant.

The cost of the funding

Generally, there are two pricing models used in Appeal Funding. "Fixed pricing" provides for the purchase of a specific dollar amount of the judgment for a specified purchase price. The terms are

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established in the purchase agreement and remain the same regardless of the time it takes for the matter to be resolved.

"Fee pricing" provides for a monthly fee for the use of the advance. The fee accrues until the matter is resolved and is structured as a non-recourse fee (no interest). A variety of individual circumstances will dictate which model is more advantageous for the plaintiff or the attorney.

Both pricing models may seem expensive until one considers that the investments are non-recourse and losses are frequently incurred. Therefore the returns to the funding company must be sufficient to compensate for the losses incurred by the funders, as well as the extended time over which it takes for the appeal to be decided.

Michael Blum is a former trial attorney and CEO of Appeal Funding Partners, LLC, *a company providing non-recourse funding to attorneys and plaintiffs with money judgments on appeal. He has over 17 years of experience funding money judgments on appeal. He served on the Consumer Attorneys of California Board of Governors and the Board of Directors of the Consumer Attorneys of Marin.*
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