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ANALYSIS

Pa. Firms Carve Out Niche in Guiding Lawyers, Funders on Litigation Finance

From performing due diligence on cases to working on interest rate-proof transactions, attorneys at Fox Rothschild and Saul Ewing are finding ways to engage with litigation funders and the recipients of their investments.

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By Amanda O'Brien

What You Need to Know

- Saul Ewing and Fox Rothschild are servicing litigation funders and their funding clients alike, facing minimal competition in this sector of the legal market.
- Despite being a controversial financing option for law firms, attorneys at both firms expect opportunities to bring in work related to the industry to continue to expand as new investors consider entering the industry.

Love it or hate it, the litigation finance industry is here to stay. Two Pennsylvania-based firms are taking the opportunity to establish niche practices addressing the industry, performing due diligence on potential cases eligible for funding and staking claims on interest rate-proof transactional work.

Fox Rothschild launched its litigation finance practice as an offshoot of its litigation department around three years ago, with the practice incorporating the expertise of an unspecified number of attorneys across multiple of the firm's practices; Saul Ewing launched its litigation finance industry group around two years ago, and has a grand total of eight

attorneys working in the space spread across Minneapolis, Chicago and Boston.

The Nature of the Practice

Both firms indicated they helped service clients on both sides of litigation transactions: the funders and the firms looking to get cases funded, particularly in terms of due diligence.

“We’re really well situated in terms of the business flow that we have for due diligence projects—we’re just doing a lot of them lately,” said Saul Ewing practice leader Casey Grabenstein.

Fox Rothschild, meanwhile, also focuses on the actual transactions involving litigation funders, helping negotiate terms for financing and helping law firms steer clear of potential conflicts of interest.

“One of the gateway issues for pre-settlement litigation financing is the rule of professional conduct 5.4, which prohibits fee sharing with nonlawyers,” said partner Peter Buckley. “When a law firm gets presentation with a funding relationship, we get involved as outside counsel to advise the client about that transaction so that the firm itself is not providing advice about a funding agreement that may pay the firm.”

There’s another advantage to focusing on litigation funding deals—these transactions tend to be insulated from the effects of interest rates, which can throw a wrench into other kinds of transactions.

“Just from the investor side, one of the reasons this area will continue to grow is that it is a non-correlated investment,” Buckley explained. “When you’re diversifying a portfolio at a fund or a big financial institution, to have something that doesn’t rise and fall with interest rates is a hedge against those risks.”

In representing those transactions, said Fox Rothschild partner Erika Levin, formerly the general counsel at a litigation funder, the firm will typically handle negotiations or renegotiations between parties, due diligence, and legal research and analysis into a case.

Spotting the Opportunity Early

Due diligence work proved an entry point for Saul Ewing to begin working in the litigation finance space, although Grabenstein aspires for the practice to do more transactional work and for the firm to ultimately uncover more cases worth investing in on its own.

“I saw this was a booming industry, and it was an opportunity to be ahead of the curve in terms of being a market leader and riding the wave of where this was heading,” Grabenstein said of his decision to get involved in litigation funding legal work. “Litigation funding continues to be a booming industry, but it has seemed to flatten out a little bit. ... The industry is getting more mature, it’s still very healthy, it’s just not shooting up like a rocket.”

Levin expressed a similar sentiment, noting that she—along with Buckley, and litigation co-chair Brett Berman, who collectively lead the group—recognized this was a space where clients needed “legal assistance and advice in multiple capacities.”

“This is an area that’s changing and growing quickly,” she said.

However, both Levin and Grabenstein acknowledged that competition has thus far been minimal in this industry space. Grabenstein speculated that servicing litigation funders isn’t something firms are willing to publicize, and Levin suggested that the specialized nature of the practice enticed only a small number of practitioners.

“There are a few firms that have this practice or capability, but not many,”

Levin observed. “Unless you’ve worked with this space, it’s almost another language. ... You can’t jump into this space without knowing what you’re doing.”

Insurer Interest and Growth Opportunities

Grabenstein said he found additional growth opportunities for his practice on the insurance side of litigation funding. Although insurance companies typically find themselves on the defense side of funded litigation—and have been pushing for greater regulation of the industry alongside their defense counsel—they are becoming increasingly interested in offering litigation risk insurance.

“Over the past couple of years, we got involved in the insurance side of the affirmative litigation practice, and it’s really blowing up right now,” said Grabenstein. “Insurance is taking off—there are new insurers offering new products, and insurance companies are almost matching funding in the market. If you have a contingency fee matter, you take it on contingency and get it funded or have it insured.”

Fox Rothschild, meanwhile, is beginning to note growing interest amongst different kinds of potential litigation funders, including hedge funds.

“This is another asset class,” Levin said. “We’re starting to get a lot of calls and working more with hedge funds and investment banks. Funders are broad. ... We’re seeing all types of deals. It’s an offshoot of corporate finance.”

“We’re seeing a lot in the intellectual property space, and a lot in terms of co-investment opportunities and just continued litigation finance transactions of all sorts,” Levin continued. “This is an area that’s getting busier and busier.”

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