

# THE FUTURE OF FUNDING AND LITIGATING CASES

Litigation Finance & Blockchain Implications for In-House Counsel



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## Agenda

- Part I Litigation Funding
- Part II Blockchain in Litigation and Legal Operations



# Part I – Litigation Funding

- 1. The Basics of Litigation Funding
- 2. Trends in Litigation Funding
- 3. Opportunities and Challenges



Litigation Funding Defined:

the practice where a third party unrelated to the lawsuit provides capital to a plaintiff involved in litigation in return for a portion of any financial recovery from the lawsuit, usually as a non-recourse investment (if a case is not successful, the funder does not recover the investment)



#### **How It Works**

- Provide capital to plaintiffs
- May pay for costs including fees, expert witness fees, court expenses
- Fund working capital for companies in litigation
- If the case is successful, the funder will recover their investment plus a success fee. If the case is unsuccessful, the funder will lose its investment.
- Success fees = a multiple of the investment, a percentage of damages, or the greater of the two (terms vary significantly)



#### **How It Works**

- 1. Non-disclosure agreement
- 2. Term sheet/high level conversation
- 3. Diligence/exclusivity period
- 4. Negotiation and execution of litigation funding agreement
- 5. Funding drip and/or lump-sum disbursements
- 6. Monitoring of litigation
- 7. Distribution of proceeds from settlements and/or judgments



#### Why Use a Litigation Funder

- Helps undercapitalized plaintiffs further meritorious cases by financing litigation expenses
- Reduces the risk of premature settlement for less than the value of the case
- Provides liquidity for working capital
- Allows companies to manage how litigation costs affect balance sheets
- Enables access to top legal talent



# **Trends in Litigation Funding**

#### **State of Play Today**

- Enormous infusion of capital, projected to grow 20-30% a year reaching \$2.1B-\$2.7B by 2021
- 20-25 dedicated litigation funding companies today + investment units at hedge funds and other investment companies
- Mainstream market: high-value cases where cost/damages ratios are at least 1:10
- Investors see creation of a new asset class impervious to the stock market and economy



# **Trends in Litigation Funding**

#### **Trends**

- Wider array of funders = financial creativity in funding arrangements/cases
- Greater adoption by in-house counsel as a risk management and corporate finance tool
- Firms will offer financing options / bundle cases into portfolios



# **Opportunities and Challenges**

#### **Opportunities**

- Transfer of Risk
- Predictability
- Enhanced Recovery for Viable Claims (portfolio concept)



# **Opportunities and Challenges**

#### Challenges

- Control of Litigation
- Attorney-Client Privilege and Work Product
- Conflicts of Interest
- Transparency: Discovery and Admissibility Issues
- Ethical Issues and Fee-Sharing with Non-Lawyers



## Part II – Blockchain in Litigation and Legal Operations

- 1. Basics of Blockchain
- 2. How Blockchain Is Being Used Today
- 3. Impact on Litigation and Legal Operations in the Future



## What Is Blockchain?

- Blockchain is a form of Distributed Ledger Technology ("DLT")
- Blockchain is not Bitcoin.

It is a shared list of transactions

- Every new transaction creates a time-stamped "block." Each block is linked to the previous block creating a chain of transactions.
- The ledger is updated on a network of computers that are connected to the blockchain through the Internet.
- Benefits: speed, security, transparency, and permanence.



## **Blockchain: A Technology Revolution**

#### **Business Today**



#### **Business with Blockchain**





# Is Blockchain Secure?

- Uses encryption technology known as cryptography
- Public keys:
  - Permission-less: anyone can read the distributed ledger, send transactions to and watch them being included in the ledger, and participate in the consensus process.
- Private Keys:
  - Each member of the network has access rights so that confidential information is shared on a need-to-know basis.





### Why You Should Care about Blockchain



## **Blockchain Applications in Business**

- **1. FINANCIAL SERVICES AND TRANSACTIONS**
- 2. SUPPLY CHAIN
- **3. CONSUMER EMPOWERMENT**
- 4. MARKETING & BUSINESS DEVELOPMENT



## Definitions

- **Distributed ledger technology:** A digital record of data that differs from traditional centralized database technology in that there is no central administrator or central data ledger; instead, the ledger is replicated and shared among many different systems or computers in a distributed network that arrives at consensus via cryptography before storing the data.
- **Blockchain:** A type of distributed ledger database that maintains a continuously growing list of append only transaction records ordered into blocks with various protections against tampering and revision, with a cryptographic key.
- **Consensus mechanism:** A method of mathematically authenticating and validating a value or transaction on a blockchain or a distributed ledger without the need to trust or rely on a central authority. Consensus mechanisms are central to the functioning of any blockchain or distributed ledger. Two of the more common ones are Proof of Work and Proof of Stake.
- Smart contract: A piece of written code organized into a protocol that auto-executes subject to the satisfaction of preagreed conditions, thus adding additional functionality to a blockchain and providing the ability to automate certain processes. The protocol can facilitate, enforce, and verify all in an automated manner.
- **Nodes:** Members or systems of a distributed ledger or blockchain network that connect to and hold a replicated copy of the ledger and can have varying roles: to issue, verify, receive, inform, etc.
- Public Chain: A blockchain that anyone can join, read, write transactions to and participate in the consensus process.
- Private Chain: A blockchain or decentralized ledger that requires permission to join. All members may have varying levels
  of permissible actions with regard to chain transactions.



## What Is a Token?

- A token is a digital asset that can be used in many different ways:
  - Can describe a unit of value (for example, I have X number of Ether tokens)
  - A means of providing access to and transactional value inside a particular system, platform, or protocol
  - Can be used to create user interaction and provide a medium for the distribution of rewards and benefits to the token holders within a particular system, platform, or protocol
  - Utility, Security, Hybrid, Currency, Commodity

#### Tokens are not cryptocurrencies

- Cryptocurrency is digital currency that uses encryption techniques for governance and security and operates independent of any central bank.
- Bitcoin is a type of cryptocurrency and one of the most popular applications of blockchain technology

Banks are now using and trading tokens



## Murky Regulatory Waters: Tokens



- Not all tokens are created equal
- No regulatory clarity: tokens are often regulated as a "security"
- No clear guideline to determine which tokens are "security" and which are commodity
  - If security unlawful to effect any transaction unless registered as a national securities exchange or is exempted from such registration



## Smart Contracts: "if, then"

- A digital representation of the mutual agreements in a traditional contract that is stored on a distributed ledger
- Once recorded, it cannot be modified without the participating parties' permission
- An "*if, then*" statement; if a condition is met, then a result is **self-executed**



### **Smart Contract: How It Works**

Figure 1: How smart contracts work



Source: Deloitte Development LLC, 2017

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### Blockchain Implications in Litigation and Legal Operations

#### 1. Smart Contracts

Efficiencies and uniformity in repeatable transactions

Streamline routine tasks to free up braintrust

2. Transactions, Intellectual Property, Real Estate

Increased verification and security over documents

Streamline routine tasks to free up braintrust

- **3.** Employment Issues Portable health and employment records
- 4. Chain of Custody and Other Record-Keeping



## Conclusion

 Blockchain has initiated a global revolution and every company irrespective of its size will eventually get involved



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