



# **Litigation Financial Management: Budgeting and Risk Strategy**

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# Presenters



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- I. Introduction and Overview
- II. Mechanics of Litigation Budgeting
- III. Verdict Potential and Settlement Value
- IV. Using the Litigation Budget and Case Valuation to Drive Strategy
- V. Managing Litigation Budgets and Controlling Spend
- VI. Questions?

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# Introduction and Overview

# Importance of Budgeting: The In-House Perspective



Increasing costs of litigation



Need for certainty and expense management



Rising claims filings and nuclear verdicts



Insurance coverage portfolio planning



Disclosure and audit obligations

# Importance of Budgeting: The Outside Perspective

Drives strategy

Determines ideal staffing

Focuses efforts on endgame goals

Creates accountability for outside counsel team

Improves client relations

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# Mechanics of Litigation Budgeting

**Note: We are approaching this discussion primarily from a defense perspective.**

- Similar principles apply when assessing whether to bring suit as a plaintiff, but different considerations can come into play





## Two Threshold Questions:

1. Is the claim or lawsuit covered by insurance?
2. Is a third-party potentially responsible for the damages at issue?

# Threshold Question 1: Is the claim covered by insurance?

## Claims/lawsuits generally covered

- Negligence/gross negligence causing property damage or personal injury
- Certain employment-related claims

## Claims/lawsuits generally NOT covered

- Breach of contract
- Claims involving fraud or intentional actions

## If covered, assess and comply with notice requirements

- Claims-based notice vs. occurrence-based notice

## Assess and understand scope of coverage

- Primary and excess coverage
- SIRs and deductibles
- Defense obligations
- Potential coverage as an additional insured under a third party's policy

# Threshold Question 2: Is a third-party responsible?

## Is there contractual indemnity from a third party?

- Notice requirements
- Defense of claim

## Is there common law or equitable indemnity or contribution?

- Likely a question of the law that applies to your case

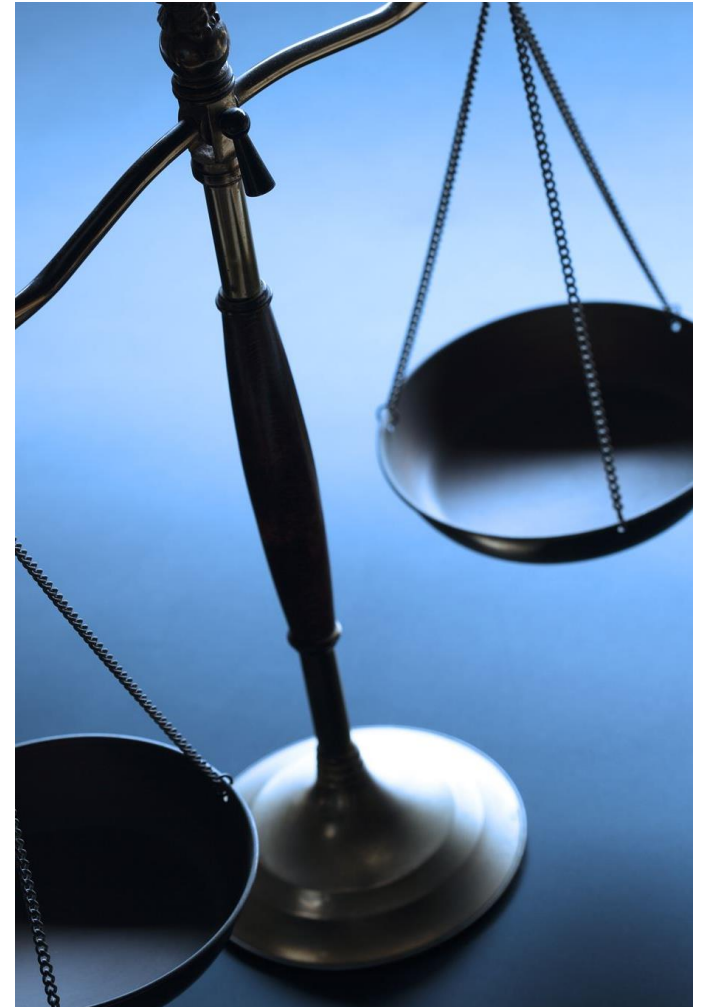
## Is there another party that is responsible in whole or in part who has not been named as a party?

- Proportional responsibility
- Third-party claims/impleader

- When to budget and value a case? Early and often!
- Initial case budgeting and valuation
  - Develop an early case budget based on known information and initial strategy
  - Set internal expectations on value (qualitative or quantitative)
  - Request an early budget at the time of the RFP or retention
- Update the budget and valuation as the matter progresses
  - Reassess at defined stages of the case (e.g., after responsive pleadings)
  - Update when significant developments occur
  - Review at least annually for long-running litigation
- Budgeting typically done by stage of the case (e.g., using ABA codes)

# Tailoring the Budget

- Consider factors that may influence fees and expenses at each stage
  - Company goals and risk tolerance
  - Novelty of claims and legal issues
  - State vs. federal nuances
  - Impact of local rules/standing orders
  - Opposing counsel
- Reference similar matters
  - Prior spend in analogous cases
  - Law firm tracking
  - Generative AI tools
- Scale to seriousness of the case
  - Under and over certain \$ thresholds



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# Verdict Potential and Settlement Value

## Goal: Identify monetary risk

- Determine worst case, best case, and most likely reasonable outcomes
- Develop over time with increased certainty
- Develop range of reasonable settlement values for stakeholders

## There are different methodologies for assessing settlement value, but all typically share common principles:

- Assess range of possible damages/verdict potential
- Overlay with case-specific factors
- Overlay with broader risk and business considerations
- Reassess as case progresses

# Assess Range of Possible Damages

- Easy scenarios
  - Complaint specifies a specific sum in dispute
  - Contract provides liquidated damages
- Research verdicts and settlements in analogous litigation
  - AI resources
- Assess potential for statutory damages
- Assess possibility of punitive damages
  - Check for jurisdictional caps



# Overlay Case-Specific Considerations

- Settlement history in similar cases or with same Plaintiffs' firm
- Percentage likelihood of a favorable v. unfavorable verdict on the facts at issue
- Damages regime
  - Joint and several liability
  - Comparative fault
  - Modified comparative fault
- Percentage of liability the company is likely to be assigned
- Appeal potential



# Overlay Broader Risk and Business Considerations

Risk of repeat  
litigation or follow-  
on cases

Likelihood of  
negative PR for the  
company

Confidentiality  
considerations

Impact on ongoing  
business and  
commitment of  
company man-hours

Need for court  
approval of the  
settlement terms

# Example of Settlement Value Calculation

- **Method 1: Calculate settlement value from verdict potential**
  - Based on verdict research and knowledge of your case, you determine a verdict could range from \$5M to \$10M
  - Assign percentage likelihood to each verdict outcome (e.g., 80% chance of \$5M verdict, 20% chance of \$10M verdict)
  - If applicable, assign a percentage of liability likely to be assigned to your client (e.g., client likely to be found 50% at fault, other defendant likely to be found 50% at fault)
  - Factor in any appropriate discounts (e.g., 50% chance my client would win on the key liability issue on appeal)
  - Low end calculation:  $\$10M * .2 * .5 * .5 = \$500,000$
  - High end calculation:  $\$5M * .8 * .5 * .5 = \$1M$
  - Reasonable settlement value in the \$500K to \$1M range

# Example of Settlement Value Calculation

- **Method 2: Cost of defense**
  - After budgeting and case valuation based on verdict potential, you determine that the cost of the litigation defense will exceed the value of the case
  - Consider an early “cost of defense” settlement value, typically on the low end of what it might cost to defend the case
  - Pros: Avoid litigation expenses and lost company many hours
  - Cons: Potentially incentivize repeat claims (aggressive defense can be a deterrent of non-meritorious claims)

# Example of Settlement Value Calculation

- **Method 3: Compare to prior settlement history**
  - Assume similar case settled for \$500K two years ago.
  - *Possible reasons to recommend a higher settlement value:*  
Inflation, worse facts in new case, no other defendants to share in the damages
  - *Possible reasons to recommend the same settlement value:*  
Identical claims/considerations, avoid an upward trajectory in values over time in the event you expect follow-on claims
  - *Possible reason to recommend lower settlement value:*  
Stronger facts, better jurisdiction, better liability regime

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# Using the Litigation Budget and Case Valuation to Drive Strategy

# Using the Budget and Valuation to Drive Strategy

- Budget and case valuation can help non-lawyer stakeholders understand and weigh in on litigation goals and strategy
- Examples:
  - Pre-suit or early settlement may be more cost-effective than litigation
  - Aggressive early litigation could be used to drive down settlement value
  - Litigation through a class certification decision could substantially impact the case value
  - Damages sought are so excessive that litigation is the only option
- Create an early list of key decision points and check-ins



## Best practices for maintaining privilege during stakeholder discussions of budgeting, valuation, and settlement

- Limit discussion to the control group
  - Higher-level employees in a position to control decisions
  - Include only those who need to know
- Choose appropriate communication method
  - Decide between meeting/phone call or written communication
- Exercise care in written communications
  - Write as if a judge or jury will eventually see the communication
  - Limit the distribution list
  - Include a “Privileged and Confidential” or “Contains Legal Advice” header
  - Use express terms indicating legal advice
- \*Attorney work product provides additional protection in active or reasonably anticipated litigation



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# Managing Litigation Budgets and Controlling Spend

## Matter management tools

- Electronic billing and case management tools
- Budgeting programs

## Alternative Fee Arrangements (AFAs)

- Flat/fixed fees for matter or by phase
- Blended rates
- Contingency fees
- Hold-backs and success fees



## Definition of Third-Party Litigation Funding

Lender advances money to a litigation party on a non-recourse basis, secured by an interest in the party's litigation claims



## Common Litigation Subject Matters

Breach of contract

Breach of fiduciary duty

Intellectual property

Arbitrations

Complex business disputes Antitrust



## Additional Legal Considerations

Applicable statutes or rules in the state of litigation

Applicable ethics rules

Disclosure obligations and likelihood of discovery side shows

# Questions?

Email us for litigation budget templates:

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**Thank you!**