Data driven

John Lazar explains how data informs legal finance providers in their work

We live in an era in which data is often presented as the solution to every business problem. With this in mind, what role does data play in the legal finance industry? The answer: astute data analysis underpins crucial aspects of legal finance for both users and providers.

First and foremost, clients who receive legal financing from sophisticated funders with large data sets benefit from a data-driven perspective on case prioritisation, duration, budgets and case management. Second, data analysis helps legal finance companies track their investments' performance throughout the duration of client litigation and arbitration matters, to ensure their business is strong and profitable; which in turn serves their clients. Third, and most obviously, rigorous data analysis along with expert human judgment determines which matters legal finance companies will fund.

INTERPRETING DATA

Companies and most law firms recognise the value of data, but often lack sufficient data and breadth of experience in-house to evaluate their litigation portfolios as a legal finance provider could. Few companies and law firms engaged in litigation and arbitration have litigated the volume and variety of matters that would generate enough robust proprietary data to address any gaps.

'We don't have a portfolio of cases from which we can create metrics for application to future matters. Many of these cases tend to be their own little unicorns,' an assistant GC and director of litigation at a health insurance company explained in Burford Capital's 2022 *Affirmative Recovery Programs Report*. Meanwhile in a recent Lex Machina study, 74% of respondents who used legal analytics said that successful litigation was the key driver of incorporating data analysis into the business and practice of law. So companies that lack significant litigation experience face an obvious challenge.

Further, publicly available data relating to commercial litigation or arbitration is inadequate. In the US, despite the availability of court data through platforms like PACER, public data draw on the case and docket information of only the minority of cases that reach the federal court system. Lex Machina states that a mere 8% of US federal circuit cases since 2009 resulted in a win at trial (4% claimant wins and 4% defence wins). Beyond the record of a matter's duration, this limited data set contains little useful information on crucial data like settlement details.

When a legal finance company looks at hundreds of billions of dollars' worth of commercial litigation and arbitration every year, as Burford Capital has done since its founding in 2009, it accumulates a significant body of data about commercial disputes. That gives Burford a database of critical information that is simply not available elsewhere.

How can clients use legal finance data? First, they can use it to better identify, prioritise and extract greater value from litigation assets. Legal finance providers that have amassed meaningful proprietary data help clients make informed decisions about which litigation matters in their portfolios will yield the greatest value. Companies and counsel can better assess the risk and reward of pending claims and judgments – legal assets whose value their owners often do not fully recognise – through the benefit of legal finance companies that have proprietary data.

For example, a company may be unaware that a class action claim in its portfolio could reap a higher recovery if that company were to opt out of the class and bring its own claim. Legal finance providers can model

the potential returns of opting out. Clients can also receive data-driven guidance to prioritise legal assets that will return the most value through affirmative litigation.

Legal finance data also help clients manage litigation budgets and risk with greater certainty. GCs, heads of litigation and other senior in-house lawyers cite the high cost of litigation as a deterrent to pursuing valuable claims and judgments, particularly when operating under stringent cost management programs or budget cuts.

Although according to Burford's *Affirmative Recovery Programs Report*, three of five senior in-house lawyers believe that it is possible to predict with a high degree of accuracy what litigation matters will cost, nearly half say that their outside law firms do not provide accurate and reliable litigation budgets. Data analysis, when conducted by legal finance professionals with comprehensive data sets and deep technical knowledge, can create confidence around case costs and duration.

The human judgment and experience of the provider are key: 'We keep a close eye on our budgets and spending. We intervene where necessary and ask questions where appropriate, but we do want to automate that in a digital way,' explains the chief litigation counsel of a multinational energy company. Through regular communication with counterparties on spending and other metrics, a legal finance partner can head off clients' budget management problems.

CASE MANAGEMENT

Case management and budget management go hand in hand. Legal finance data can also be employed in litigation case management. Burford, for example, has a dedicated case management function through which it leverages data and collective experience to help clients optimise results.

This is not to say that, as some in-house lawyers who are less familiar with legal finance may worry, accepting outside capital impacts their control over a matter in any way. In fact, once a legal finance company invests in a litigation or arbitration matter, the funder acts as a passive capital provider. Client and counsel always retain decision-making control over their case and settlement strategy. Legal finance data, in the hands of experienced providers, can supplement that strategy.

QUANTITATIVE MODELLING

Clearly, there is a desire for more data when it comes to litigation: legal analytics' use in litigation finance in the US grew from 21% to 25% in 2021. Yet according to the *Affirmative Recovery Programs Report*, nearly four in five in-house lawy ers still say that their companies do not use quantitative financial modelling to make decisions about whether to pursue affirmative recoveries. Senior in-house legal teams can tap legal finance expertise to improve their litigation returns and to develop or strengthen a value-generating affirmative recovery program.

Burford's predictive models grow more reliable. Last year, the firm predicted with 96% confidence the returns on concluded matters in its portfolio. This rigorous modelling and analysis are aimed at ensuring the best possible outcomes for shareholders, investors and stakeholders—and they also matter to clients.

Legal data analysis helps legal finance companies track their investments' performance throughout the duration of client litigation and arbitration matters. The more information the counterparty supplies about the status of a case, the more substantive analysis the finance provider can perform to model the case's resolution and terms.

The monitoring and measuring of case milestones generate new data that strengthen a provider's models and enrich its guidance to clients. With a large and diverse portfolio of matters, an established legal finance provider can make a client's good case better when a positive development occurs, and guide a case back on track should a negative development arise. At a matter's resolution, funders can review the accuracy of predictions made and further refine their proprietary methodology to conduct due diligence on prospective matters.

PROPRIETARY DATA

The cost of legal finance capital hinges on the accuracy of the funder's quantitative modelling and the accurate assessment of a case or portfolio's merits and strengths. Legal finance underwriters examine copious data in the underwriting stage that buttress the strength of a client's funded matters throughout the investment.

Relevant data include the facts of the case, the law, the approximate duration and any possible hurdles standing between the finance provider and recovery. Further, underwriters model ways to enhance the damages, examine what it means if the damages get cut back, and predict the client's legal budget.

As worldwide adoption of legal finance grows, funders use ever-more sophisticated tools to conduct due diligence and provide certainty to clients. With time and a record of successful investments, legal funders accumulate rich private data, not only in the review of a range of potential investments, but also once cases have resolved.

Further, as most funders provide financing on a non-recourse basis - receiving a return on invested capital only upon a case's successful resolution - an accurate valuation of a matter (or matters, in a portfolio finance structure) is essential to the funder's returns and reputation.

Clients that receive financing reap the added benefit of knowing that a matter was funded through sound analysis. Reliable quantitative modelling based on an immense proprietary data set increases the likelihood that a client's funded matter will resolve successfully.

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