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Monetizing Litigation Claims for COVID-19 Budget Constraints

Litigation and Dispute Resolution

To state the obvious, businesses coping with the economic effects of the coronavirus need liquidity. Many are seeking to obtain or enlarge traditional debt facilities to finance operations in the face of business disruption and declining asset prices.

As an alternative or complement to recourse debt capital, businesses with affirmative legal claims are increasingly seeking non-recourse claim “monetizations.” In-house counsel are considering third-party investment to accelerate recovery and drive revenue. Well-capitalized litigation funders have provided monetizations ranging from six to nine figures.

This article answers common questions concerning claim monetization posed by in-house counsel when weighing capital solutions.

What is monetization?

Monetization refers to the provision of working capital collateralized by legal claims. While litigation funding is most commonly used to pay for legal fees, monetization functions as a non-recourse advance on amounts that a business will ultimately recover in litigation. Unlike debt, the advance does not need to be repaid unless the litigation is successful.

How does monetization work?

Monetization can be provided entirely at closing or in multiple installments over time. When the case resolves, the funder will receive a share of the client’s recovery. The return is typically a multiple of the amount monetized, a percentage of the client’s recovery, or a combination of the two.

Can a business also obtain financing for its legal fees?

Businesses can typically use monetization funds for working capital purposes. This includes the payment of lawyers to the extent counsel is retained on an hourly basis. Monetization can also be provided in addition to traditional legal fee financing, through which lawyers are compensated on a hybrid-contingent basis. This may be appealing to in-house counsel facing tighter budgetary constraints because of COVID-19.

Which claims are appropriate?

Any affirmative litigation claim has the potential for monetization. The more developed a claim, the more easily a funder can assess the claim's value. For that reason, a significant amount of monetizations have occurred for opt-out and direct-action claims related to large class actions. Most litigation funders are well-versed in certain categories of commonly asserted claims and can close transactions within weeks. Examples include:

- The "payment card" litigation (also known as the "interchange" case);
- The "risk corridors" litigation;
- Food price-fixing litigation; and
- Other large antitrust disputes.

Experienced litigation funders have significant familiarity with these types of claims and may be able to close monetization transactions in a matter of weeks.

Can a claim be sold?

Many businesses seek to generate the most amount of capital possible through monetization and are willing to sell the entirety of their claims. Claim sales, however, are prohibited in many US states due to the doctrine of champerty. As a result, most funders will only monetize a portion of a client's claim. The investment is completely passive, as the client must retain control of the litigation. This preserves further recovery for the client after the funder receives its return and enables an alignment of interests.

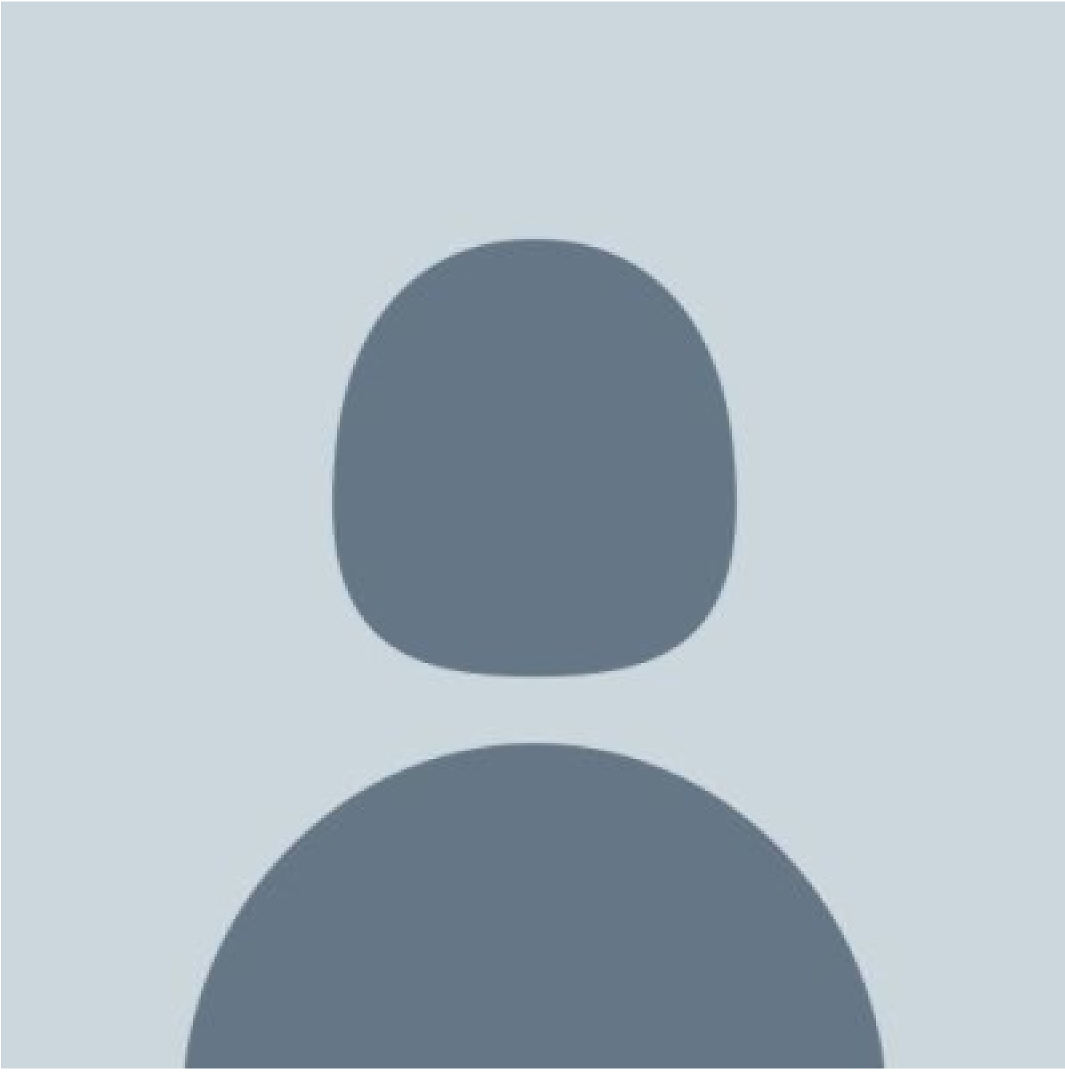
Why should a business seek monetization now?

For businesses with legal claims, monetization is worth exploring as a means to address COVID-related capital constraints. Beyond a current cash crunch, monetization may also make sense due to the impact of the public health crisis on litigation in general. For example:

- Courts around the country are closed or operating at reduced capacity, resulting in widespread delays that will lengthen the time to recovery.
- Discovery is inhibited due to the inability to take depositions.
- Cases may also take longer to settle due to defendants' own capital situations and the inability to schedule mediations.

These same factors may also weight in support of obtaining financing for legal spend. Law firms may be more amenable than usual to hybrid-contingency arrangements to address difficulties and delays in receiving regular payments for hourly work.

Andrew Lucking

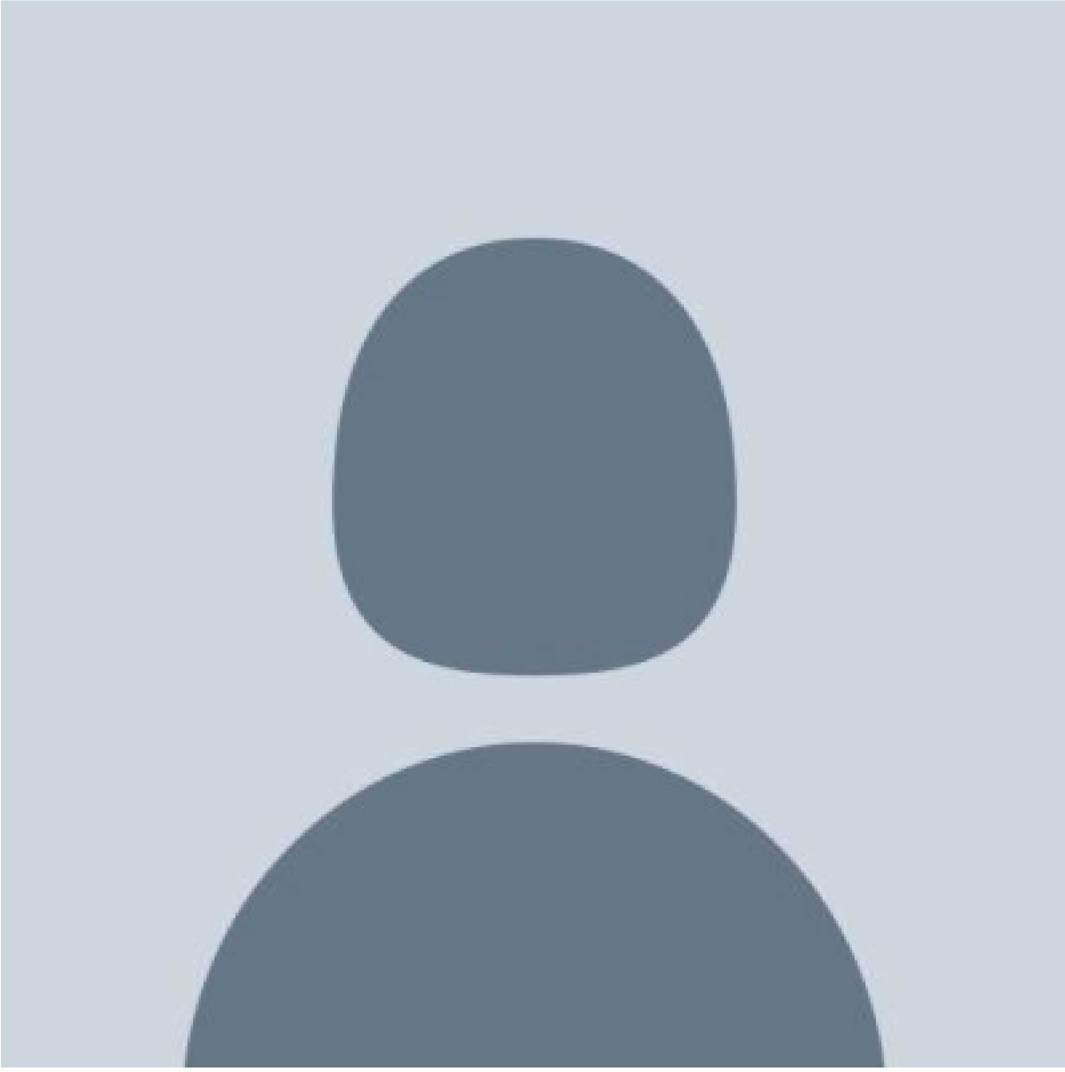


Commercial Counsel

LiveRamp

Andrew Lucking is commercial counsel at LiveRamp, a technology company based in San Francisco.

Dai Wai Chin Feman



Director of Commercial Litigation Strategies and Corporate Counsel

Parabellum Capital LLC

Dai Wai Chin Feman is director of commercial litigation strategies and corporate counsel at Parabellum Capital LLC, a litigation finance firm in New York.