BENTHAM IMF

KEY ISSUES IN LITIGATION FINANCE

Disclaimer: The information contained in this guide is intended to provide a general understanding about key issues related to litigation finance. It does not constitute legal advice. We urge readers to get advice from their lawyers on litigation finance.

Introduction

As a well-capitalized, publicly traded company with an extensive history and track record of success in litigation finance, Bentham IMF has a reputation for operating with integrity and transparency. We are widely regarded as one of the most professional and ethical funders in the commercial litigation finance industry.

This document aims to provide a guide to many of the key issues related to litigation finance.

Champerty and Maintenance

To understand the complex legal issues surrounding modern day litigation finance, we must first look to the past. In medieval times, corrupt nobles would sometimes interfere in the legal system for personal gain, by using their subjects as proxies to fight disputes to gain power over other nobles or to enhance their wealth. In response to this problem, particularly in England, the doctrines of champerty and maintenance arose and laws were enacted to restrict third-parties from financially aiding litigants.

Maintenance refers to a third-party providing financial assistance to help maintain litigation.

Champerty occurs when maintenance is taken a step further and the third-party seeks a return for its financial assistance, usually in the form of a portion of the recovery from the lawsuit.

The doctrines of champerty and maintenance initially migrated to some of the states in this country along with settlers from England. But, as the legal system and public policy evolved, so too did maintenance and champerty case law. Even back in 1908, the English court in British Cash and Parcel Conveyors v Lamson Store Service Co Ltd. (1908) 1 KB 1006, noted:

> *"The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings.*

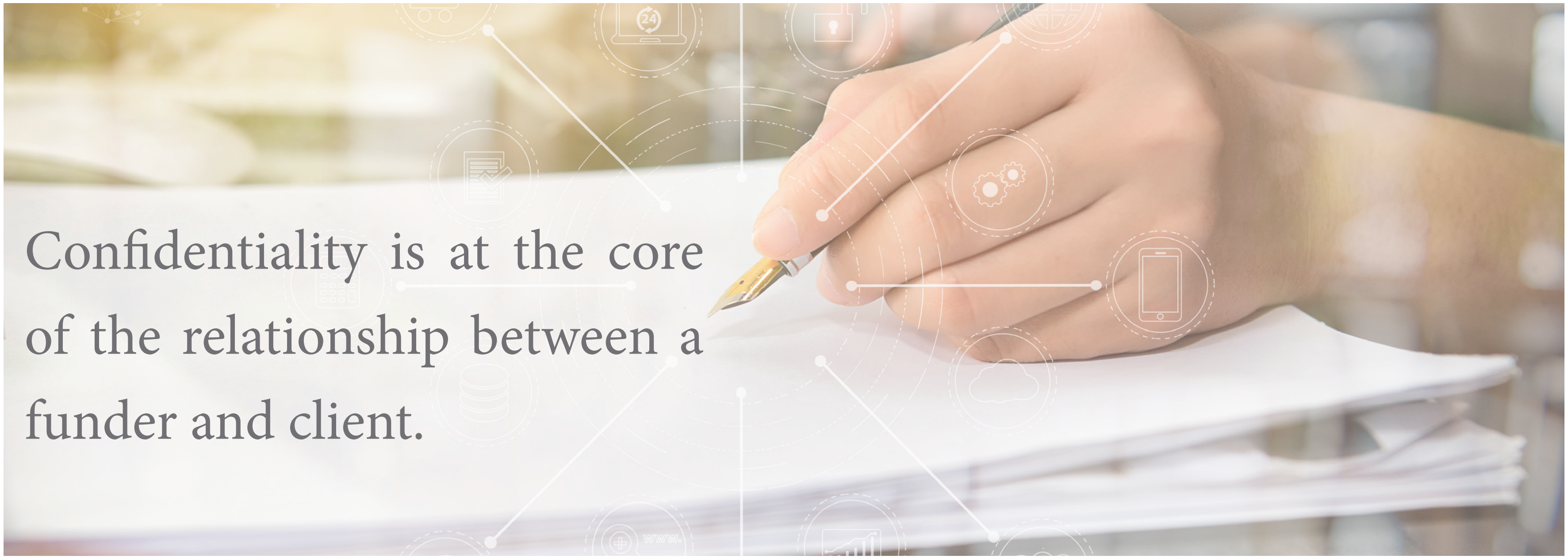
> *These notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete."*

Over time, the ancient laws of maintenance and champerty were abolished or interpreted by courts in such a way as to permit third party financing of litigation. Now, there are just a small minority of states where maintenance and champerty are still applied.

Recent widespread adoption of modern commercial litigation finance in the US has been affirmed by many courts throughout the country as a permissible means of affording access to justice. For example, in an unsuccessful challenge by a defendant to the plaintiff's funding arrangements, New York Supreme Court Justice Eileen Bransten noted in a 2013 decision in Lawsuit Funding LLC v. Lessoff, 2013 WL 6409971, 2013 N.Y. Slip Op., that "There is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation."

Even more recently, in the 2015 case of Hamilton Capital VII, LLC, I v. Khorrami, LLP, New York Supreme Court Justice Shirley Werner Kornreich commented about the importance of litigation finance as "…modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case."

Although it is important to check on this issue, maintenance and champerty is rarely an obstacle to litigation finance in the US today.



Confidentiality and Work Product

It is critically important that information shared between a funder and a client is kept confidential. This can mean that even the existence of a funding arrangement or potential funding arrangement should be kept confidential, as well as all information that is shared between the parties.

Consequently, funders usually insist upon a written non-disclosure agreement ("NDA") being executed before any substantive discussions occur. Protecting communications between the parties helps to demonstrate an intent to maintain confidentiality over shared information, which is a key plank under the attorney work-product doctrine. It has now become clear that information provided to a funder that is attorney work product is protected from disclosure.

The current state of the law on this issue is reflected in the comprehensive federal trial court decision in Miller v. Caterpillar, Case

No. 10 C 3770 (N.D. Ill. Jan. 6, 2014). The Miller court made a number of detailed findings that track and confirm Bentham IMF's practices, including the following: 1) work product material is protected under a written or an oral NDA; 2) the litigation funding agreement itself is not relevant to any claim or defense in nearly all cases (apart from cases involving enforcement of a funding agreement), and is not discoverable; and 3) common interest privilege does not apply in most states to protect disclosures to funders because the parties don't share identical legal interests.

The decision in Miller followed a similar decision in Mondis Tech. v L.G. Elec., Inc., 2011 WL 1714304 (E.D. Tex. May 4, 2011). In a subsequent decision that addresses Miller, the court recognized Miller to be "comprehensive and well-reasoned," but performed its own in camera review of the litigation finance materials. Doe v. Society of Missionaries of Sacred Heart, 2014 WL 1715376, (N.D. Ill. May 1, 2014). The Doe court arrived at the same conclusions with respect to the applicability of the work product doctrine when an NDA is in place. Based on these decisions and other legal precedent, the importance of executing an NDA before sharing confidential or work product information with a funder cannot be overstated. For a more comprehensive guide to applicable case law on this subject, you can read more here.

Attorney Client Privilege

When considering an investment, reputable funders will work to protect the confidentiality and interests of the parties seeking funding and their lawyers. As mentioned, Miller and other decisions have held that common interest privilege doesn't apply to communications between funder and client (as they don't share an identical common legal interest). Consequently, at Bentham, we make clear that we never want the client or lawyer to share information that could be subject to the attorney-client privilege. Doing so could put the client at risk of waiving the privilege.

Disclosure of Funding Arrangements and Agreements

The issue of disclosing whether a party is using funding has been raised numerous times in recent years by parties trying to ascertain the financial resources their opponents have available for their case. In most cases, parties making motions for disclosure of the existence of a funding arrangement, or the details of such arrangements, have met strong judicial opposition (generally based on the work product doctrine). A recent study by Westfleet Advisors found that litigants attempting to force disclosure of an opposing party's litigation financing documents have been "overwhelmingly unsuccessful."

Bentham recently authored a comprehensive article describing the detrimental effect that mandatory disclosure could have on our already overburdened judicial system. Namely, mandatory disclosure would likely waste the already limited resources of courts and judges by causing irrelevant discovery battles. It would also strip judges of the opportunity to consider the appropriateness of the disclosure, while leaving them with the time-intensive burden of managing the inevitable disputes following mandatory disclosures.

For additional insight into mandatory disclosure of funding arrangements, click here.

Control

For those considering litigation funding, fear over the issue of whether acceptance of funding equates to relinquishment of control over the conduct of litigation is unfounded. Reputable third-party funders exercise no control over litigation.

Parties seeking funding should be wary of litigation finance contracts allowing the funder to exert control over decisions otherwise held by the client or their lawyer. Such control may take the form of veto power over litigation strategy, ultimate sign-off on settlement, and over the client's choice of counsel. Further, these provisions run contrary to legal ethical rules forbidding third parties from interfering with a lawyer's independent professional judgment. A claimant and its lawyers should carefully review and analyze any control provisions under the legal professional responsibility rules of the jurisdiction in which the case will proceed.

That said, when desired, litigation funders can serve as a strategic sounding board for the lawyers and claimants they finance. This type of advice is one of the benefits of using a litigation funder like Bentham, which is staffed with lawyers who have deep experience in all phases of litigation. They can serve as a resource for a litigator who needs a second view from an objective party.

While funders do not have a right to control litigation or the terms of settlement, they do have the right to stay informed about the progress of the case. For this reason, it is customary for funders to request that they be kept informed about the progress of the cases they have funded, and any settlement offers put forth.

Conflicts of Interest

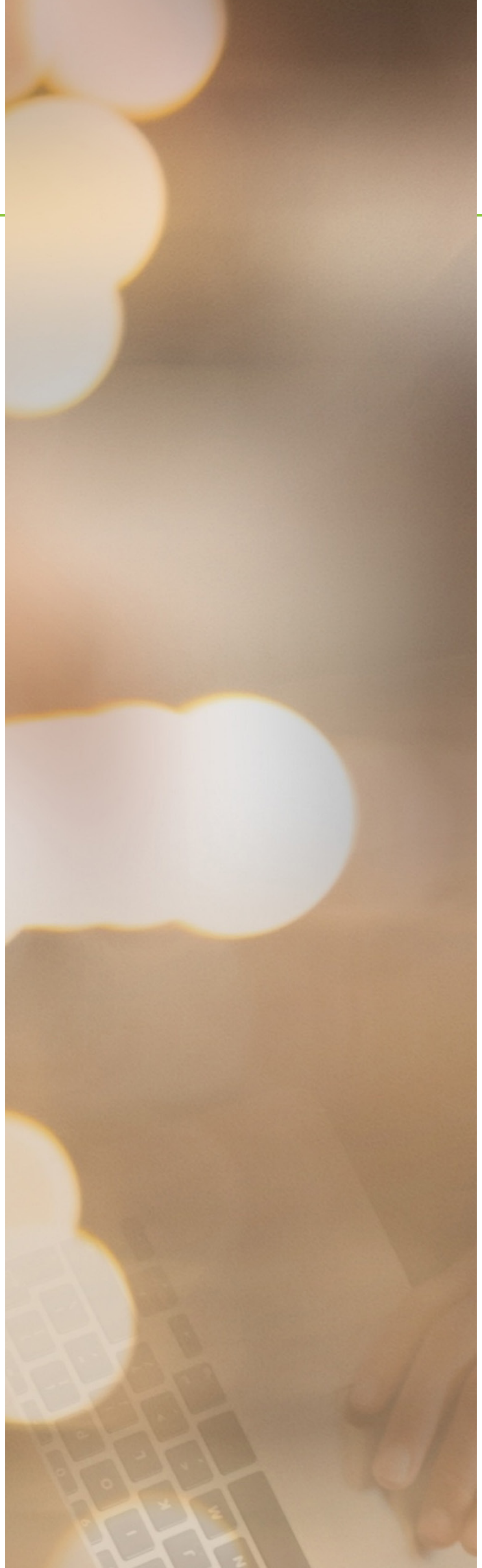
With a team of highly experienced former trial attorneys, Bentham is extremely knowledgeable about conflicts rules and is rigorous about avoiding the risk of a conflict. The lawyers we fund are encouraged to obtain informed consent from their clients before negotiating a funding arrangement – a move designed to ensure the lawyers' interests remain in line with those of their clients.

Conclusion

Bentham doesn't just know the ethical and professional standards of practice. Our record of adhering to them has prompted more than 130,000 claimants to trust us for the funding they need and the recoveries they deserve. Multiple parties utilizing our financing have made repeat funding requests. Our stewardship in the industry is further reinforced by recognition for excellence in funding that we have received from *Chambers & Partners*, *The Recorder*, *Corporate Counsel*, *Connecticut Law Tribune and LawDragon*.

We share our knowledge about the ethics and key issues of commercial litigation finance through CLE programs offered to law firms and legal education providers. Our investment managers and legal counsel, all of whom are highly experienced litigators, are also frequently called upon by legal publications and industry organizations to write and speak about funding and related ethical issues. Links to online videos, podcasts and webinars pertaining to this topic are provided here for your reference.

Please email info@benthamimf.com to inquire about how we can assist your company or law firm in gaining a more comprehensive understanding about the ethics of litigation finance.



Resources

Webinars

- Ethical Issues in Litigation Finance (Update) Lawline Webinar
- Ethical Issues in Litigation Finance ABA Law Practice Division Webinar

Videos

- Bentham IMF's Code of Best Practices
- Bentham's Core Values: Simplicity, Fairness and Transparency
- Bentham's Guidance on Protecting Attorney Client Privileged Materials When Working with a Funder
- Control & Settlement in Litigation Finance

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HOW TO GET YOUR CASE FINANCED

Parties seeking financing for litigation are often unsure of the steps involved in the litigation funding process.

Choosing a Funder and the Importance of the NDA

To begin with, litigation funders are not interchangeable. One important thing to keep in mind is that a litigation financing relationship typically lasts two to three years, through the resolution of the case, and will need to survive all usual complications associated with any complex commercial dispute. This means plaintiffs seeking funding, along with their lawyers, should look for a funding partner that has both the track record and financial resources to serve as a trusted advisor and a partner who can go the distance when an unexpected turn in the case requires revisiting the litigation budget.

When choosing a litigation funder, it is important to consider not just the funder's track record for success, but also how long it has been in business to determine whether it has addressed thorny issues. Inquire as to whether the funder has been involved in disputes with claimants or their attorneys. Look at who you will be dealing with at the company. Determine whether interactions with the company will be with an individual who will approach the deal like a banking transaction, or a seasoned litigator who understands the fundamental nature of the litigation at issue and can add value as it progresses. Also consider the source of the capital being provided - is it readily available to draw down from or does the funder need to make capital calls or go through other hoops to access it? Bentham IMF, for example, is comprised of experienced former litigators who understand the cadence of litigation and how to handle its associated obstacles along the often long road to resolution. Bentham IMF also has capital on hand to fund litigation fees, costs and even working capital and debt-satisfaction for claimants as soon as its diligence process is completed.

In addition to gauging a funder's reputation, history, and capital capabilities, the most successful funding arrangements are achieved when there is a mutuality of trust and respect between the funder, the claimant and the lawyers. Anyone considering litigation financing should have these goals in mind when first approaching a funder, to determine whether the funder is the right fit. It is imperative that all parties involved have a successful multi-year partnership with all interests aligned.

Once the preferred litigation financier is selected, the next step is to reach out with a general description of the case and the funding amount sought. Funders will invariably require a non-disclosure agreement ("NDA") before any substantive discussions occur. This is critical to the diligence process because it evidences the intent of the parties to maintain confidentiality over shared information under the attorney work-product doctrine. The current state of the law is reflected in the comprehensive federal trial court decision in Miller v. Caterpillar, Case No. 10 C 3770 (N.D. Ill. Jan. 6, 2014).

The Miller court made a number of detailed findings that track and confirm Bentham IMF's practices, including the following: 1) the litigation funding agreement itself is not relevant to any claim or defense in nearly all cases (apart from cases involving enforcement of a funding agreement), and is not discoverable; 2) the common interest doctrine does not apply in most states to protect disclosures to funders because the parties don't share identical legal interests; and 3) work product material is protected under a written or an oral non-disclosure agreement.

The decision in Miller followed a similar decision in Mondis Tech. v L.G. Elec., Inc., 2011 WL 1714304 (E.D. Tex. May 4, 2011). In a subsequent decision that addresses Miller, the court recognized Miller to be "comprehensive and well-reasoned," but performed its own in camera review of the litigation finance materials. Doe v. Society of Missionaries of Sacred Heart, 2014 WL 1715376, (N.D. Ill. May 1, 2014). The Doe court arrived at the same conclusions with respect to the applicability of the work product doctrine when an NDA is in place. Based on this and other legal precedent, the importance of executing an NDA before sharing confidential or work product information with a funder cannot be overstated.

Getting to the Term Sheet

After executing the NDA, one must then turn their attention to the specific deal terms and discuss the best way to get to a signed term sheet with the funder.

At this stage, claimants and their lawyers should expect to have a more robust, but still preliminary, conversation with their litigation funder about the case. In general, the funder will look for:

1) a simple explanation of the case;

2) where the case is pending (to verify there are no champerty or other restrictions in the jurisdiction);

3) the anticipated funding amount sought; and

4) the ideal funding arrangement (i.e., whether the claimant is looking for working capital, litigation fees, costs, or a combination of the three).

During these initial discussions, the funder will look to ensure that the matter meets its basic parameters. For instance, Bentham IMF typically requires a minimum investment amount of $1 million, a realistic damages estimate that supports that level of investment (usually about 8 to 10 times the proposed funding amount in reasonably attainable damages), and a liability theory supported by documentary evidence. Typically, a party seeking funding will approach a funder with lawyers already engaged or with lawyers willing to take the case on a certain contingency/hybrid arrangement pending the ability to secure financing. In situations where a party seeking funding has not already retained an attorney, funders are commonly willing to assist with making introductions and referrals if the matter satisfies the funder's minimum criteria and the merits appear strong.

From the initial discussions, the funder should be able to generally understand the claims, the amount needed to prosecute the case to completion, and a reasonable estimate of potential recovery. This information allows the funder to gauge its level of interest in moving forward. If that interest is strong, the funder will typically issue a term sheet that outlines the economic terms of the proposed investment and provides for a due diligence period to fully assess the merits of the case and related issues. For Bentham IMF, the term sheet is non-binding except for an exclusivity period, which generally lasts 30 to 45 days.

Funders require exclusivity because the diligence process is time consuming and may require bringing on an outside expert to analyze the specific area of law at issue. Certain funders attempt to lock up claimants with exclusivity requirements as early as the NDA stage, and often ask that claimants reimburse them for costs incurred (e.g., outside legal advice) as part of the diligence. Bentham IMF, in contrast, only requires exclusivity after the parties tentatively agree on terms. We also incur due diligence costs without seeking reimbursement from the claimant.

The funder's term sheet will invariably describe its proposed return structure. Returns typically (but not always) increase over time as the funder continues to invest risk capital in the litigation. There is no single way to establish up front what an acceptable return will be if the case is successful, and approaches vary widely. But it is often calculated as a multiple of the disbursed funding amount, a percentage of the litigation proceeds, or the greater of the two. One thing to look for is whether the funder proposes to take a multiple of the committed funding amount (as opposed to the amount deployed as of the date of any resolution). Often committed funds are not fully drawn upon if the litigation does not go the distance, in which case committing to paying a multiple of the committed amount is inadvisable. Bentham IMF's business is focused on certainty and fairness. As such, we welcome early resolutions of the matters in which we invest – if fair to all parties.

Claimants should also look at the proposed return priority structure. Generally, the funder will require a first-priority position to receive, at minimum, the return of its principal. If the claimant's lawyers have agreed to a full contingency arrangement and the funding is for working capital, the lawyers may want input in such an arrangement. Addressing issues like these sooner rather than later will benefit all parties and help facilitate the positive relationship necessary to make a litigation financing partnership work.

Presenting a Matter for Funding

Once the NDA and term sheet are agreed upon, the funder will begin the all-important due diligence process.

Litigation funders put each potential investment through rigorous diligence, which typically takes 30 to 45 days. Given that a typical case might last two and a half years and involve a commitment of a few million dollars, the funder's in-depth review is essential. This process includes meeting with the party seeking funding, reviewing relevant documents, and possibly hiring outside experts (especially if the case revolves around a highly-specialized area of law).

Claimants should prepare for this process early. The funder will ask for pleadings that best summarize the legal and factual arguments from each side, and documentary or other evidence that both supports the claims and refutes any facially strong arguments from the adversary. A legally sound and objectively measurable theory of damages – even if preliminary – is important, and a pre-litigation damages analysis conducted by the lawyers or their consultants is a huge plus from a funding perspective. If materials are voluminous, a claimant should set up a data room or file sharing account with this information and provide it soon after the term sheet is signed. The funder will invariably seek access to the legal team to discuss liability and damages issues in depth. If the case involves a niche practice area that requires the funder to engage outside expert consultation, ask whether this additional expense will be borne by you or the funder when negotiating the term sheet. Bentham IMF incurs all such costs as part of its diligence process.

Preparing for and assisting with the funder's diligence process may be tedious for a claimant and its lawyers. But it can be very helpful to strengthen the merits of the case, including identifying and shoring up any perceived weaknesses. The funder often reduces a case to somewhere north of its "worst-case scenario" and seeks an explanation of the best arguments available. Lawyers are often very appreciative of the process because it forces them early on to analyze the pitfalls in the case, identify the best evidence available, and crystallize counter-arguments sooner than they otherwise would do in the litigation process.

While each case presents a unique set of issues, funders at a minimum look for the following in any investment opportunity:

1) a cogent liability theory supported by documentary evidence, indicating strong prospects of success;

2) a sound damages theory that results in sufficient damages to cover the funder's return, the lawyers' contingency stake (if any), and (in Bentham's case) enough remaining for the claimant to recover at least 50 percent of any award or settlement; and

3) a high likelihood of collectability.

Being frank, realistic and dispassionate during the diligence process is important. Litigation finance is a multi-year partnership. Thus, it is best for all parties involved if the funder has the essential information to make an accurate underwriting decision. Once an investment decision has been made, you can expect to finalize and execute a funding agreement.

Closing and Monitoring a Litigation Finance Transaction

Finally, the parties will begin to consider the funding agreement itself.

The funding agreement represents the funder's contractual obligation to finance litigation expenses or working capital in exchange for a portion of any award or settlement. This contract is the only protection the funder has over its investment because funders typically do not take any other security interest or collateral. Thus, they likely may not be willing to diverge substantially from the terms that impact returns and return priority.

Claimants should be wary, however, of litigation finance contracts allowing the funder to exert control over decisions otherwise held by the lawyer (and in some instances, the claimant). Such control may take the form of veto power over litigation strategy, ultimate sign-off on settlement, and the claimant's ability to choose counsel. Further, such provisions run contrary to legal ethical rules forbidding third parties from interfering with an attorney's independent professional judgment. A claimant and its lawyers should carefully review and analyze any control provisions under the legal professional responsibility rules of the jurisdiction in which the case will proceed.

A reputable funder will typically ask to be apprised of settlement negotiations and may offer non-binding views on the same. Of course, good faith acceptance or rejection of a settlement offer typically remains fully within the client's purview. But the claimant should understand exactly what portion of the litigation proceeds it must turn over to the funder in exchange for the capital the funder has provided as of the date of that decision. It is also important to understand that the funder may require approval of any substitute counsel, but will often agree that such approval will not be unreasonably withheld. While substitution of counsel may be appropriate, any new attorney joining a financed case will have to be comfortable with 1) the deal terms, including priority; 2) the budget and contingency arrangements; and 3) consulting with and updating the funder. If the new counsel is not comfortable with the fundamental deal arrangements, then the underlying partnership with the funder simply will not work.

Once the transaction closes and the case is funded, the claimant's partnership with the funder begins. Many lawyers question the level of involvement a funder should have when it monitors its investment. Will the funder require weekly reports? Justification for strategy decisions? Review and approval of briefs? The answer is nothing quite so involved.

Bentham IMF subscribes to a "light touch" monitoring process involving regular updates on the progress of the case and notification of any critical events. The frequency of these discussions often depends on the level of activity – which varies over the course of any litigation – but is typically once per month. In addition to monitoring substantive case developments, the funder will carefully monitor the litigation budget to make sure there is sufficient capital committed to the investment.

Maintaining an open dialogue about both successes and unanticipated obstacles that arise during the litigation process is critical to the long-term success of the litigation finance partnership. When a case takes an unexpected turn, the funder can help right the ship by offering advice or helping the legal team identify the resources needed to get the case back on track. An experienced funder like Bentham IMF employs lawyers with a minimum of 10 years of litigation experience in its Investment Manager roles. Thus, it can and often does conduct an independent analysis of key issues through the resolution of the litigation at no cost to the claimant because its interests in a successful outcome are aligned. Of course, the claimant and its lawyers are not obligated to agree with the funder's advice, but the assistance can sometimes prove invaluable.

Should you have an interest in obtaining financing for a case or a portfolio of cases, contact us at info@benthamimf.com for a consultation.

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COUNSELING CLIENTS ABOUT SINGLE-CASE AND LITIGATION PORTFOLIO FUNDING

When lawyers embrace opportunities to help their clients think strategically about their businesses, they become better counselors to their clients. For commercial litigators, the potential to engage in such discussions with clients can be limited, since most commercial litigation clients prefer to exclusively devote their legal spend to defense-side matters. However, litigators whose clients have one or more meritorious plaintiff-side cases can step into a trusted advisor role by presenting clients with new and creative ways to leverage such cases to obtain financing.

How can lawyers initiate conversations about funding with their clients? And what issues and concerns should they be sure to address?

Below are our tips on when to broach the topic with clients and what points to raise during the conversation:

When is the right time to discuss the issue of litigation funding?

Funding can be used at any point in the litigation. However, the topic naturally arises when there is a discussion about the financial arrangements of the firm's representation or there is a change in circumstances.

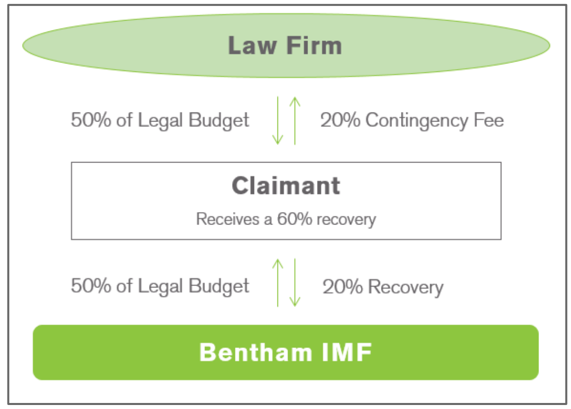
Therefore, discussing funding with clients can be advantageous at the following points:

- At the outset, when the firm is being hired or considered. Funding can even be raised as part of a response to a Request for Proposal.
- When a client indicates a need to decrease liabilities and improve overall financial health.
- When a litigation takes a significant turn.
- When the client's financial circumstances worsen, such that they may require funding.
- After trial but before any appeals, since litigation funding can also be used to finance appeals and/or "monetize" part of the judgment.

What types of funding are available for clients?

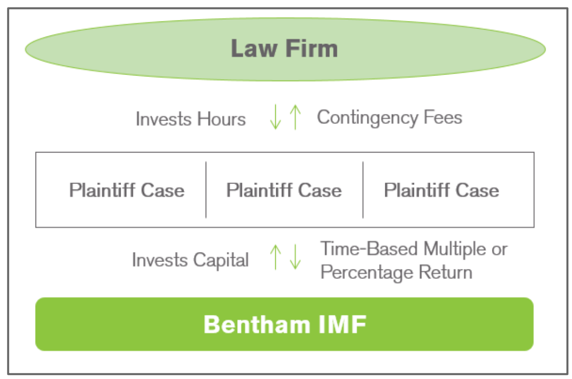
Single-Case Funding

Lawyers representing clients seeking the ability to obtain financing to cover their legal fees for one case, or use the case as collateral to obtain working capital for their business, will want to counsel their clients on the intricacies of single-case funding. In this type of arrangement, clients obtain non-recourse financing directly from a funder, typically subject to an agreement that the funder will recoup its investment, plus a return, as a percentage of the recovery that the client wins if it achieves a successful outcome in the case.



Portfolio Funding

Should a lawyers' clients regularly engage in plaintiff-side commercial litigation, they may benefit from counseling about litigation portfolio funding. This scenario, which borrows the basic elements of the single-case funding model, enables a client to obtain capital from a funder collateralized by multiple plaintiff-side commercial cases. By bundling their cases into one portfolio, rather than financing them on an individual basis, clients present funders with a lower risk investment opportunity. As a result, funders may seek a lower return on the investment, since the risk is lessened by the possibility of recovering their investment from multiple favorable outcomes, rather than a win in just one case.



An added benefit that clients enjoy from portfolio funding is the potential to obtain a larger amount of non-recourse financing. While clients can use this financing in any way they see fit, some choose to take the excess amount remaining from paying legal fees for plaintiff-side cases and use it to pay a portion of the legal fees they are incurring in defense-side cases. For example, a client may have claims that are likely to yield $50 million in recoveries. But the cost of taking those claims to trial is $2.5 million. Because the potential recovery is so large, the funder might agree to provide $5 million in funding, secured by the $50 million anticipated recovery. Half of the funding could go to the plaintiffs-side claims, and the client could use the other half to pay fees and costs in a defense-side matter.

How does litigation funding help improve a client's bottom line?

From an accounting perspective, funding helps solve one of the most difficult financial issues companies face with litigation. Legal spending is recorded as an expense; a large piece of ongoing litigation can have significant, negative impact on a profit and loss statement. On the other hand, litigation cannot be recognized as a potential asset – even in situations where the company may have a strong likelihood of a substantial recovery. The unfavorable accounting rules and the resulting drag on profits can sour companies on the prospect of pursuing litigation, even when it is meritorious and potentially lucrative. When funding is used to finance litigation assets, however, legal spending is removed from the books. The company's bottom line brightens and executives may be more likely to greenlight additional meritorious litigation. Most companies treat their legal departments as cost centers. Bringing strong claims in the right cases, and mitigating cost and risk by partnering with a funder, can turn the department into a solid revenue source.

What points should the firm emphasize?

Bentham suggests incorporating the following five points into discussions with clients about how funding can be used to their advantage:

- **Flexibility in financing arrangements.** One of the key benefits of funding is that it offers considerable flexibility in financial arrangements between firms and clients. Many firms offer alternative fee arrangements; however, they are typically limited to discounts that are recovered by the firm if the case is successful. Moreover, even those firms that offer a full contingency arrangement usually don't cover out of pocket costs. Finally, litigation funders can provide working capital directly to the client. Funding can allow for several more options, including:
    - Blending of hourly rates and contingency fees
    - Full contingency fees
    - Discounts on hourly rates
    - Flat fee
    - Install payments
    - Payment of all or part of out of pocket costs, which in many cases can run into the millions of dollars
- **Broad use of funds.** Litigation funding isn't just for attorney fees and costs. Clients can also use it as strategic or operating capital.
- **Benefits to the case.** Financial factors can limit the strategies that clients decide to pursue during a litigation. Funding affords clients the resources to employ the best tactics and hire the top experts without cutting corners to save money.
- **Funding is a non-recourse investment.** Clients are not obligated to pay back the funding if they don't prevail. The funder is reimbursed solely from the proceeds of the litigation. For clients who have plaintiff-side cases, using them as collateral to obtain strategic capital could be a less risky option than taking a line of credit from a bank. This is because, unlike a line of credit, which must be paid back with interest regardless of how a company performs, litigation funding must only be repaid (with a return) if the company achieves a successful outcome in the case(s) used as collateral to obtain the financing.

- **Client and firm maintain control.** Law firms should reassure clients that the funder does not control the litigation. However, they can provide expert advice and a second opinion on the merits of the case.

What are the next steps if clients are interested?

If the client is interested in obtaining single-case or portfolio funding, the attorney can offer to approach a litigation funder anonymously. The attorney can provide the funder with information such as the type of case, realistic recovery, expenses, duration of the case, jurisdiction, etc. and receive a preliminary assessment. If the client wants to move forward, the next step is to sign an NDA with the funder as a precursor to sharing more detailed information about the case. Attorneys should counsel clients about how the attorney client and work product privileges apply to information shared with funders and how any disclosure risks can be mitigated.

Ultimately, no client or law firm should *ever* walk away from a good case simply because they cannot work out a mutually acceptable retainer agreement, without first talking to a funder.

If you have a client considering litigation funding, contact us at info@benthamimf.com for a consultation.

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HOW TO PROPOSE A CASE FOR FUNDING

We frequently caution law firms and their clients against walking away from a good case simply because they cannot work out a mutually acceptable retainer agreement, without first talking to a funder. When they do decide to contact funders to explore financing options, there are certain key questions they should be prepared to answer.

While each funder uses a unique set of criteria to assess the potential value of investing in a case, lawyers are likely to find similarities in the factors taken into consideration. The following are the five key questions Bentham IMF typically asks to preliminarily evaluate whether a case meets our investment criteria. Included with each question is a brief explanation to provide context and help lawyers anticipate how we're likely to respond to the information provided.

What type of case is it?

Litigation funding is available in a broad array of commercial cases, but there are a few exceptions. The types of commercial cases Bentham funds include: breach of contract, breach of fiduciary duty, trade secret theft, copyright/trademark/patent infringement, complex business disputes, environmental, antitrust as well as domestic and international arbitration. We do not fund personal injury, discrimination, or malpractice cases. Moreover, we are unable to fund class actions of any type in the U.S. on a one-off basis.

What is the amount of actual damages at issue?

Funders evaluate a number of financial factors to determine whether funding makes sense. Generally, damages must approach or exceed $10,000,000 (exclusive of punitive damages) to meet Bentham's investment criteria.

How much funding is the claimant requesting and what will the funding be used for?

Bentham generally seeks to invest a minimum of $1,000,000, which can be used to cover attorney fees, costs, and various business expenses such as operating costs. Corresponding expected damages must then be approximately 8-10x of Bentham's proposed investment to provide a reasonable return, pay the lawyers' contingency fee and ensure that the claimant receives the lion's share of any award.

Does the claimant have representation and if so, what is the financial arrangement between the claimant and the attorney?

It is important for a funder to understand how an attorney is being paid because this will often have an impact on the funding arrangement. If the party does not have an attorney, a funder can usually provide a referral. Bentham has extensive relationships with top-notch lawyers in every field, and often provides multiple referrals to claimants. If the claimant is represented by counsel, then the funder will want to speak with the attorney at some point to discuss the merits of the case.

What jurisdiction is the case being litigated in?

Funders must be mindful of where the case is located as some states still have active maintenance and champerty laws prohibiting or restricting litigation funding. In addition, knowledge of the jurisdiction, court, and judge informs our understanding of factors that could impact the potential recovery in the case.

This initial step in Bentham's funding process also involves the signing of a nondisclosure agreement (NDA) by all necessary parties in order to protect attorney work product needed to evaluate the case for funding and to encourage the free flow of information.

Next Steps

If we determine after our brief discussion of the above questions that the case meets our investment criteria, we request the following additional information before signing a term sheet:

- The history of the case and allegations (at what stage is the case, how did the complaint arise, etc.)
- Copies of the complaint, pleadings, and any work product (ex. legal memoranda or damages analyses) that supports your legal position
- Information on the merits of the case, strengths and weaknesses, risks, settlement potential, etc.
- The anticipated length of time needed to litigate the case through trial
- The defendant's ability to satisfy a judgement

Notwithstanding the NDA executed between the parties, claimants and their counsel should be careful not to reveal attorney-client privileged communications to funders because doing so could void protection of the privilege.

To learn more about Bentham's funding process, read our funding overview or contact us at info@benthamimf.com.

BENTHAM IMF

WHEN A LITIGATION FUNDER ENTERS THE PICTURE, CONTROL OVER LITIGATION STRATEGY REMAINS WITH THE CLAIMANT AND LAWYER

For those considering litigation funding, fear over the issue of whether acceptance of funding equates to relinquishment of control over litigation strategy is unfounded. Generally, reputable third-party funders exercise no control over litigation strategy. Litigation funding is just that — funding. A funder provides financing to help attorneys and clients pursue meritorious claims and, in return, receives a return on its investment from the proceeds of successful verdicts or settlements.

There are ethical rules funders and lawyers must be mindful of that prevent a third party from directly influencing case strategy. Under those rules, lawyers must make independent decisions that are in the best interests of their clients. “It’s a paramount issue that state bar associations worry about,” observes Bentham’s Chief Investment Officer, Allison Chock. “We’re very cognizant of this…and we operate in the most conservative ways to avoid conflicts.”

That said, litigation funders can serve as a strategic sounding board for the attorneys and claimants they finance. Advice is one of the benefits of using a litigation funder like Bentham, which is staffed with lawyers who have deep experience in all phases of litigation. They can serve as a resource for a litigator who needs an objective view.

Chock notes that funders also serve as a resource and a benefit. “Those who have used us in this way appreciate the unemotional view of their case we can bring from the 30,000-foot level. We’re less involved in the day-to-day of a case and can provide an objective point of view.” San Francisco Investment Manager Matt Harrison concurs and stresses that the advice is optional for those who have received funding.

While funders do not have a right to control litigation strategy, funders do have the right to stay informed about the progress of the case. This is a far different approach than with insurers, who "exert a lot more control," says Harrison. "Counsel for an insurer will get highly involved in strategy and even in editing briefs." But that doesn't mean the funder is getting involved in the complexities of a particular matter or directing motion or discovery practice. Chock and Harrison confirm funders are "not in the weeds."

To learn more about funding options in cases or about how the funding process works, contact us at info@benthamimf.com for a consultation.

BENTHAM IMF

FACT OR FICTION: LITIGATION FINANCE MYTHS DISPELLED

Litigation finance has grown rapidly in recent years, as lawyers and litigants have increasingly embraced it as a critical tool to help them bring and sustain meritorious claims. Like any rapidly expanding industry, there are a few misconceptions about the way it works.

To help you sort fact from fiction, we've tackled five common misunderstandings about litigation funding. So let's start myth-busting!

Myth: Litigation funders control your case. Reputable funders like Bentham IMF exercise no control over litigation strategy after they make an investment. As we've noted before, litigation funding is a financial transaction—it provides critical dollars to claimants, firms, or companies to allow them to pursue meritorious cases and ensure a smooth cash flow for litigation expenses. The funder receives a return on its investment solely from the proceeds of a successful verdict or settlement. While the funder may be entitled to status updates on a case—i.e., its investment—it cannot dictate how the case is conducted.

Myth: Litigation funding triggers frivolous litigation. Funders invest only in those claims that have a strong likelihood of producing a significant return on their investments. They are highly selective about the cases they finance and conduct extensive due diligence to ensure cases are meritorious and have a significant chance of success. In other words, they are selecting worthy cases that could and should be given their day in court. While a few legal commentators initially suggested that funding might trigger a tsunami of plaintiff's litigation against Corporate America, that hasn't been the case. In fact, large companies increasingly use litigation finance to help trim their legal spend, provide budget certainty, reduce risk, and better align the interests of outside counsel with those of the company.

Myth: Litigation financing is too expensive. Litigation funders like Bentham seek a risk-adjusted return on their investment. By and large, litigation finance investments are considered higher-risk, in part because litigation funding is non-recourse. The funder receives a return on its investment only in the event of a successful judgment or settlement. If the case is unsuccessful, the funder receives nothing. Couple that with the fact that litigation in general is inherently unpredictable, and it becomes clear why the negotiated returns differ from those of a full recourse loan.

Myth: Funding puts privileged information at risk. At Bentham, we make clear to parties and lawyers considering funding that they should not share pure attorney-client privileged information with us. It's critical to us, in fact, that any information shared between the funder and a client remains confidential. We typically enter into a written non-disclosure agreement before substantive discussions about a potential funding arrangement occur. Because of key differences between the scope of protections for the attorney-client privilege versus the attorney work product privilege, we help ensure that any attorney work product that is shared with us remains protected from disclosure.

In the end, myths like the ones listed above might dissuade parties from seeking financing for litigation and, thus, litigants end up sacrificing the best results on their claims because of a lack of resources. This doesn't need to be the case as we're here to help.

For more information about financing, please contact us and consider perusing our multi-part series from last year which explains in greater detail the facts surrounding case financing.

To learn more about litigation finance, contact us at info@benthamimf.com for a consultation.

BENTHAM IMF

Curiouser and Curiouser! A Review of the NYC-BA's Ethics Opinion on Litigation Funding

By: Allison Chock, Chief Investment Officer, Sarah Jacobson, Legal Counsel and Connor Williams, Legal Counsel

Roughly one month ago, the New York City Bar Association Ethics Committee ("NYCBA") issued Formal Opinion 2018-5 (the "Opinion"), which advised that agreements between litigation funders and lawyers involving future payments contingent on the lawyer's receipt of future legal fees amount to impermissible fee-splitting between lawyers and non-lawyers in violation of New York's version of ABA Model Rule 5.4(a). Unsurprisingly, the opinion generated immediate discussion about the proper reading of Rule 5.4(a) and litigation funding in general.

Model Rule 5.4(a) provides simply that a "lawyer or law firm shall not share legal fees with a nonlawyer," with four explicit exceptions (a deceased lawyer's firm may make payments to that lawyer's estate; a lawyer purchasing a deceased lawyer's practice may pay the estate; a lawyer can include non-lawyer employees in profit-sharing retirement plans; and a lawyer can share court-awarded fees with a non-profit organization that recommended and/or retained the lawyer). As an ABA comment on Rule 5.4 makes clear, the fee-sharing prohibition is to "protect the lawyer's professional independence of judgment."

There are two points worth considering in evaluating the NYCBA's conclusion: First, Rule 5.4(a) predates the arrival of commercial litigation funding in the United States—by *decades*. The rule was adopted in 1983, and an older iteration (Disciplinary Rule 3-102) appeared in the ABA's Model Code of Professional Responsibility (the predecessor to the current Model Rules). Second, the plain language of Rule 5.4(a) is incredibly broad. Lawyers earn the bulk of their income through legal fees, and use (or "share") those fees in any number of ways that could hypothetically impact their judgment. Rule 5.4(a) addresses some of these expenditures in its four exceptions, but the bottom line is that the rule requires a common-sense, rather than a strict and formalistic, reading. If not, the prohibition against fee sharing could be read to prohibit any number of actions that lawyers routinely engage in to maintain and grow their practices. Moreover, context matters: other ABA model rules (*see, e.g.*, Rule 2.1) are also specifically concerned with maintaining the independent judgment of lawyers.[1] So, it isn't necessary to read Rule 5.4(a) (or any other single rule) broadly in order to ensure ethical conduct, when the underlying ethical principle is clearly set out in its own rule. In fact, as Peter R. Jarvis and Trisha Thompson of Holland & Knight recently noted, the ABA previously interpreted Rule 5.4(a) as rendering two of the current four "black-letter exceptions" unnecessary and extraneous because the behavior at issue was not reasonably likely to affect a lawyer's exercise of independent judgment.

The Opinion disregards these obvious points and instead opts for a broad reading of an old rule with predictable results. Revisiting it now that the initial round of debate has subsided offers little in the way of additional clarity as to the NYCBA's thinking. Upon further reflection, here are the most curious aspects of what remains an odd opinion:

The NYCBA effectively ignores legal precedent in New York.

Perhaps counterintuitively, the NYCBA acknowledges the public policy benefit of litigation funding early in the Opinion: "[It] may expand access to the courts to litigants who would otherwise be financially unable to pursue their legitimate claims. Litigation funding may also advance fairness by levelling the dispute-resolution field between parties with deep pockets and those with limited resources." Nevertheless, the NYCBA ultimately concludes that Rule 5.4(a)'s protection against improper influence over lawyers must override such benefits.

New York courts, however, have reached the opposite conclusion that Rule 5.4(a) does not constitute such a constraint. Buried in footnote 12 of the Opinion, the NYCBA begrudgingly acknowledges three recent cases from the last five years in which courts have enforced litigation funding agreements. *See Lawsuit Funding, LLC v. Lessoff, 2013 WL 6409971* (Sup. Ct. N.Y. County Dec. 4, 2013); *Heer v. North Moore St. Developers, L.L.C.*, 140 A.D.3d 675 (1st Dep't 2016); H*amilton Capital VII, LLC, I v. Khorrami, LLP,* 2015 N.Y. Slip. Op. 51199(U) (Sup. Ct. N.Y. County Aug. 17, 2015). The NYCBA's attempt to wave these away as mere attempts to enforce contractual obligations fails upon even a cursory review of the opinions.

In *Hamilton Capital*, for example, the court invokes the same public policy rationale as the NYCBA while reaching the opposite result, noting that "public policy favors this type of financing because it 'allows lawsuits to be decided on their merits, and not based on which party has deeper pockets'" (citation omitted), and that "other courts have analyzed the legality of similar financing arrangements . . . and held them not to run afoul of the applicable ethical rules." And, even more problematically for the NYCBA, the court in *Lawsuit Funding* specifically held that a non-recourse funding agreement—exactly the type the NYCBA advises against—does not run afoul of Rule 5.4(a) because, in part, "The Rules of Professional Conduct ensure that attorneys will zealously represent the interests of their clients, regardless of whether the fees the attorney generates from the contract through representation remain with the firm or must be used to satisfy a security interest."

A recent review of the Opinion and relevant case law by Anthony E. Davis (partner at Hinshaw & Culbertson) and Anthony E. Sebok (professor at Cardozo School of Law and consultant to Burford Capital) further notes that New York courts' acceptance of litigation financing arrangements is more widespread than these three cases, and concludes that the Opinion "fails to acknowledge the many cases, in addition to the three it cites, which reflect the degree to which courts accept the very practices that the [NYCBA] deems unethical." Such clear standing precedents—concerning largely the same public policy grounds cited in the Opinion—make it all the more baffling that the NYCBA couches its conclusion as an inevitable result of Rule 5.4(a). It isn't.

The NYCBA draws an arbitrary distinction that leads to absurd and damaging results (for law firms and their clients).

The Opinion specifically singles out one type of arrangement as violative of Rule 5.4(a): non-recourse funding arrangements, which allegedly by their very nature deter law firms from exercising independent judgment where the myriad other ways in which lawyers use their fees to support their legal practices do not.

The NYCBA's efforts to distinguish non-recourse arrangements for this treatment only highlight the arbitrary nature of its ruling. In attempting to explain why recourse loans would not improperly influence a lawyer's behavior, for example, the NYCBA hypothesizes that, "In the case of a recourse loan, there is no implicit or explicit understanding that the debt will be repaid only if legal fees are obtained in particular matters, and the creditor may seek repayment out of the law firm's assets." But imagine a small law firm that secures recourse funding with few hard assets and only a handful of cases on its roster, and the threat of the recourse lender's collection of law firm assets (or worse, *personal* assets) used as security for the loan if business or collections slow. It is immediately apparent that this recourse/non-recourse distinction does not necessarily amount to any type of real-world difference. Further, the NYCBA acknowledges, as it must, that Rule 5.4(a) "does not forbid payments from income derived from legal fees… since all or virtually all of lawyers' income ordinarily derives from legal fees and therefore all payments they make for nonlawyer salaries, services, etc., ordinarily derive from legal fees." In other words, under the Opinion's logic, non-recourse litigation funding arrangements present a risk of influencing lawyers' behavior in a way that non-lawyer law firm staffers who work day-in and day-out with lawyers and are paid bonuses based in part on future fee receipts based on case outcomes do not? This makes no sense; it is at least as plausible (if not more so) that the non-lawyers working with lawyers on a day-to-day basis at a firm would be possibly motivated and able to influence the lawyers' independent judgment, because their livelihood comes from those same legal fees.

The absurd results of the Opinion are not merely hypothetical. Consider the facts of H*amilton Capital*, discussed above. In that case, a law firm received $6 million in funding in 2009 secured by all property and proceeds acquired by the firm (*i.e*., the type of *recourse* funding preferred under the Opinion). By 2012, when it defaulted on the loan, it owed more than $600,000 in interest alone. Further failure to repay resulted in the interest ballooning to more than $2 million by 2014. It is difficult to understand how falling behind on a high-interest loan—when the future of the law firm and its partners personal assets are likely at stake—would have less impact on that law firm's independence on that matter than a non-recourse loan, which limits the lender's recovery to assets only where the firm is successful. In fact, Bentham IMF's funding agreements make clear that the client always retains control over the right to direct the legal matter(s) at issue.

The NYCBA appears to tacitly acknowledge the untenable nature of distinguishing recourse and non-recourse funding, noting in footnote 11 that "One might […] argue that any creditor has an incentive to encroach on lawyer independence and that there is no reason to single out those particular creditors who have a stake in lawyers' fees in particular matters." In response, the NYCBA blithely points to "90 years of ethics rules and opinions" have "at least implicitly *assumed*" a difference (emphasis added). This response cannot withstand even the barest amount of scrutiny. First, the NYCBA provides no analysis of any such ethics rules and opinions.[2] Second, the reference to "90 years" is baffling, as large commercial litigation funders have only been operating in the United States for just over ten years. Third, even if New York rules and ethics opinions have assumed a difference, New York courts have not, as shown in their upholding of the arrangements in both *Hamilton Capital* (recourse) and *Lawsuit Funding* (non-recourse). Finally—and perhaps most importantly—modern litigation finance contracts explicitly *disclaim* any control over the litigation by the funder. It is inconceivable that in the context of such contractual language, any reasonable lawyer would allow him or herself to be bullied by a funder into violating his or her professional independence.

The Opinion is unnecessary and runs contrary to the very public policy it acknowledges is important.

The NYCBA concludes the Opinion by essentially saying its hands are tied by the language of Rule 5.4(a), suggesting that perhaps a change to the rule should be proposed to the state judiciary or legislature. This peculiarly suggests that the NYCBA was little more than an unwilling participant without any choice but to issue the Opinion despite the public policy benefits of litigation funding, acknowledged at the beginning of the Opinion itself.

If the NYCBA's goal is to trigger a change to Rule 5.4(a), issuing an ethics opinion is an inefficient and ineffective method of doing so. Had the NYCBA simply not opined on this matter at all, practitioners in New York could still comfortably follow the legal precedents discussed above and the NYCBA could have quietly worked toward a rule change, explicitly or by the exceptions being created in the case law. Instead, the NYCBA opted to inject itself into this discussion in the form of an advisory opinion contrary to New York court opinions, adding unnecessary confusion to the issue.

Contrast, for example, the more measured approach to considering rules changes in support of improving public policy that has recently occurred in California. Earlier this year, the Board of Trustees for the State Bar of California commissioned an analysis of the legal services market. The resulting report voiced concerns like those raised in the Opinion: both individual and corporate clients are facing rising costs and increased difficulties with gaining meaningful access to the justice system. The proposed solution? *Relaxing* ethics rules (including specifically Rule 5.4) to allow for greater collaboration between lawyers and non-lawyers, including restrictions on non-lawyer ownership of law firms. By going out of its way to issue an arbitrarily restrictive interpretation of Rule 5.4(a), the NYCBA has pushed New York in the opposite direction and made access to justice more difficult.

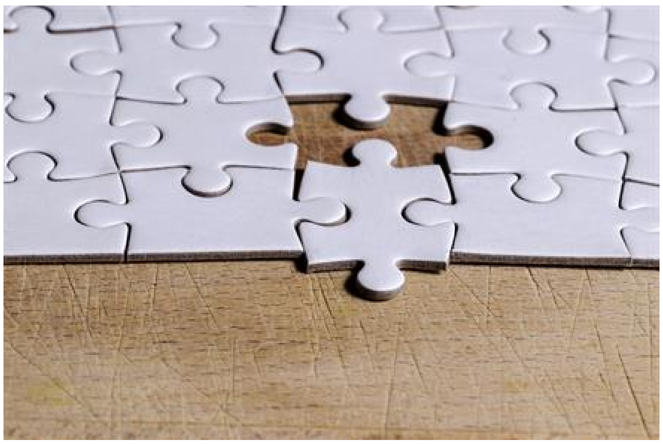
Given that the NYCBA's ethics opinions are advisory—that is, they have no regulatory authority over attorneys or the courts—it is tempting to simply write off concerns over their merits or public policy implications as merely theoretical. But that approach shortchanges the important role that the NYCBA can and should have in leading efforts to ensure that legal ethics rules best meet the needs of lawyers and clients alike. The Opinion falls short of this mark, instead introducing unjustified and unnecessary confusion into the field of litigation finance.

[1] Rule 2.1 expressly states: "Rule 2.1 Advisor. In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."

[2] One can only assume that the Opinion is referring to the ethics opinions previously cited in footnote 8 of the Opinion. Notably, those ethics opinions date from 1997-2007, prior to the advent of modern litigation finance in the United States, and none of them deal with any sort of modern commercial litigation finance contract with the express "no control" provisions that are typically included in such contracts.

THE LITIGATION FUNDING TRANSPARENCY ACT OF 2018

By: Matthew Harrison, Investment Manager and Legal Counsel



On May 10, 2018, Republican Senators Chuck Grassley, Thom Tillis and John Cornyn introduced a bill titled The Litigation Funding Transparency Act of 2018, which would require disclosure of litigation funding arrangements (including the funding agreements themselves) in any federal class action and any federal claim that is aggregated into a federal multi-district litigation (MDL) proceeding. One purported purpose of the bill, according to Senator Tillis, is to "keep the civil justice system honorable and fair."

Effectively, the bill would do exactly the opposite by imposing more barriers to entry for claimants trying to bring meritorious lawsuits against massive corporations—i.e., the major constituents of the U.S. Chamber of Commerce. Many such claimants already struggle to see their day in court due to a lack of economic means. As discussed below, this proposed bill subverts the actions of a committee already investigating the necessity for greater transparency of litigation financing arrangements and lacks sound policy rationale.

The issue of litigation funding disclosure is already being examined by the Advisory Committee on Rules of Civil Procedure, which has resisted the Chamber's efforts to force premature regulation or rule changes absent a careful study of the necessity for such measures. Indeed, in December 2014 and again in April 2016, the Advisory Committee rejected a proposal by the Chamber to amend Federal Rule of Civil Procedure 26 to require automatic disclosure of funding arrangements at the outset of all civil cases. The Advisory Committee noted that while questions raised by third-party financing are important and may change in the future, an attempt to craft automatic disclosure rules was premature. The Senators' decision to introduce this bill while that comprehensive examination is ongoing usurps the Advisory Committee's important role in considering whether such disclosures are necessary. The Senate should allow the Advisory Committee to engage in its deliberative process.

The proposed bill also lacks policy rationale. The press release announcing the bill asserts several times that it is designed to address the "potential for conflicts of interest" created by undisclosed litigation funding arrangements. If the Chamber's separate efforts before the Advisory Committee are any guide to interpreting that assertion, these conflicts supposedly would arise from a judge's stake in an enterprise that is providing the litigation financing. But existing rules of conduct for judges already address this concern. For example, the Code of Conduct for United States Judges states that they "should refrain from financial and business dealings that… involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves." Given that the judicial canons (and common sense) counsel judges away from these types of relationships, it is hard to imagine any realistic situation in which a sitting federal judge would have a business or other relationship with a litigation funder that would cause a conflict. The risk is theoretical, at best, and does not justify congressional intervention.

If by "conflicts of interest" the Senators mean threats to counsel's independence, candor, confidentiality and undivided loyalty, this too fails as a cogent policy reason for disclosure of litigation funding arrangements in class actions or MDLs. Lawyers are bound to follow a comprehensive set of ethical rules that address all of these issues, embodied by the ABA Model Rules of Professional Conduct and their state bar counterparts. As the ABA Commission on Ethics 20/20 found in its comprehensive 2012 Informational Report to The House of Delegates, litigation funding raises no novel professional responsibilities, since many of the same issues may arise whenever a third party has a financial interest in the outcome of the client's litigation. Indeed, the ABA Commission reinforced that a lawyer must always exercise independent professional judgment on behalf of a client that is free from third-party interference, and avoid influence by financial or other considerations. The Advisory Committee also considered this exact concern and determined that current ethical rules governing the attorney-client relationship are sufficient to avoid such conflicts. The Senators' bill presumes, without any evidence, that lawyers cannot be trusted to follow these existing rules absent some disclosure and judicial oversight of litigation funding arrangements.

Of course, much like the Chamber's broad push for disclosure of funding arrangements, the proposed bill ignores the cornerstone of disclosure and discoverability: relevance. As evidenced by Judge Polster's recent order in the opioid MDL, in which he required the lawyers to disclose litigation financing arrangements for his in camera review, judges already have the tools to discover the existence and terms of any potential funding arrangements where they deem it necessary. After careful consideration of the Chamber's previous proposals similar to this bill, the Advisory Committee concluded just that: "[J]udges currently have the power to obtain information about third-party funding when it is relevant in a particular case."

As further justification for the bill, the Senators offer nebulous statements about the potential evils of litigation funding, including distortion of the civil justice system and the risk of harming the interests of claimants themselves. This rhetoric does not stand up to scrutiny. Nowhere do the bill's proponents explain (nor could they) how litigation funding distorts the civil justice system, let alone how automatic disclosure of such arrangements in class actions and MDL proceedings addresses the supposed problem. And while they express concerns about fairness and the potential harm to claimants, they ignore the main reason why claimants seek funding for meritorious claims: the civil justice system is inherently biased in favor of those with financial means. Litigation funding benefits claimants by allowing them to finance expensive disputes against well-heeled adversaries. It levels the playing field, and at times even greatly benefits the government itself in the form of qui tam whistleblower funding.

Finally, the bill ignores the practical implications of litigation funding disclosure in the class action and MDL context. For starters, unnecessary disclosure obligations like these will surely lead to discovery sideshows designed to expose underlying confidential communications and shared information among funders, claimants and their attorneys. This, in turn, increases the burden on judges, who must resolve the inevitable discovery disputes, and results in increased discovery costs, which the Chamber has strongly advocated against and which recent Federal Rules changes have attempted to alleviate. Notably, Judge Polster's recent order—issued under his existing powers struck the right balance between his desire to learn about the existence of any funding arrangements for specific, narrow purposes, and the reality that the funding terms would likely be wholly irrelevant to the cases themselves. As his order mandating disclosure of financing arrangements for his in camera review concluded, "absent extraordinary circumstances, the Court will not allow discovery into [third-party contingent litigation] financing."

In short, The Litigation Funding Transparency Act of 2018 has no rational policy purpose and suffers from a lack of transparency itself. It is nothing more than a nod to the Chamber's aggressive lobbying efforts to incrementally chip away at a thriving industry designed to provide access to an often prohibitively expensive court system.