Litigation Funding

Contributing editors
Steven Friel and Jonathan Barnes

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2019

GETTING THE DEAL THROUGH

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Third edition

Getting the Deal Through is delighted to publish the third edition of *Litigation Funding*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Israel, Spain and the United Arab Emirates and a new article on United States – other key jurisdictions.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford Litigation Funding, for their continued assistance with this volume.

GETTING THE DEAL THROUGH

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United States – other key jurisdictions

Zachary D Krug, Robin M Davis and Alex Lempiner
Woodsford Litigation Funding

The United States is a federal system, with overlapping federal and state jurisdictions, including 96 federal judicial districts and 50 individual US states. As such, attorneys and parties contemplating commercial litigation finance transactions in the United States must pay particular attention the potential jurisdictions that may be implicated by a particular transaction, including:

- the governing law of the litigation finance agreement;
- the location of the parties;
- the venue of the particular litigation; and
- the jurisdiction in which a judgment may eventually need to be enforced.

Further, because litigation finance remains relatively new, and the law is still in development, those considering a litigation funding transaction in one jurisdiction would be well advised to consider the applicability of precedents from other jurisdictions.

This brief addendum is not intended to be a comprehensive guide to litigation finance in the United States outside of New York. Rather, it endeavours to highlight some of the notable rules and precedents in a few important jurisdictions beyond New York, which have developed recently as litigation finance has become more common in the United States. The focus is largely on permissibility of commercial litigation finance generally, and any rules regarding disclosure of funding and the scope of protection afforded communication with funders; consumer litigation finance transactions may implicate other regulations that are beyond the scope of this addendum.

US federal

Because litigation funding related issues typically involve state law matters (state bar rules, contract law, status of champerty provisions, etc) or procedural matters governed by local practice, there is little federal law on funding. However, the United States Congress introduced the Litigation Funding Transparency Act of 2018, which, if enacted, would require disclosure of funding (and a copy of the funding agreement) in any federal class action or federal multi-district litigation proceeding. The proposed law is still in early stages of being considered and remains in consideration with the Judiciary Committee, so it remains to be seen whether the law will eventually be enacted.

California

In California, litigation finance is generally permitted by state law. Indeed, unlike many eastern states, the doctrines of champerty and maintenance were never adopted into the state's laws. See *In re Cohen's Estate*, 152 P 2d 485 (Cal Dist Ct App 1944); *Abbot Ford, Inc v Superior Court*, 43 Cal 3d 858, 885 n 26 (Cal 1987) ('California . . . has never adopted the common law doctrines of champerty and maintenance.').

Practising attorneys in California, as in all states, are guided by rules of professional conduct and, importantly, such rules do not prohibit litigation finance transactions. See, for example, LA County Bar Assoc Ethics Committee Formal Opinion No. 500 (1999) (discussing the permissibility of funding arrangement under California law and legal ethics regime). Importantly, in mid-2018, it was announced that the California State Bar has approved the establishment of a task force that would, inter alia, consider revisions to the ethical rules on fee-sharing and non-attorney ownership. While it is too early to predict how the task force might impact litigation funding, it suggests that the regulatory landscape may start to change.

Regarding disclosure, there is no rule requiring disclosure of a party's funded status. However, for class action litigation in the federal courts, the Northern District of California recently revised its Standing Orders to require the disclosure 'any person or entity that is funding the prosecution' of 'any proposed class, collective, or representative action.' ND Cal Standing Order No. 19 (17 January 2017). Accordingly, for class or collective matters in the Northern District, a party's funded status should be disclosed at the initial stages pursuant to Rule 3-15, or, if arising later, in connection with a party's case management statement. For all other matters, there is no general obligation of disclosure.

Importantly, communications with a litigation funder have been shielded from disclosure and where subject to a properly executed non-disclosure agreement should not result in a waiver. See *Odyssey Wireless, Inc v Samsung Elecs Co*, 2016 WL 7665898, at *5-*6 (SD Cal, 20 September 2016). This is consistent with the general trend in most US jurisdictions.

Delaware

Litigation finance is generally permitted in Delaware. However, the doctrines of champerty and maintenance remain applicable. See *Charge Injection Techs, Inc v EI Dupont De Nemours & Co*, 2016 WL 937400, at *3 (Del Super Ct, 9 March 2016). As such, outright assignments of claims may be regarded as champertous and any funding transaction should be clear that the funding entity does not control the litigation. See id at *4-*5.

Regarding disclosure, there is no general rule requiring disclosure of a party's funded status. Moreover, one Delaware federal court has concluded that, in at least some contexts, litigation funding agreements are not relevant and potentially confusing and prejudicial. See *AVM Techs, LLC v Intel Corp*, 2017 WL 1787562, at *3 (D Del, 1 May 2017).

With regard to privilege, both state and federal courts in Delaware have held communications with litigation funders are protected from discovery. As Delaware's Court of Chancery has remarked, there is '[n]o persuasive reason . . . why litigants should lose work product protection simply because they lack the financial means to press their claims on their own[.]' See *Carlyle Inv Mgmt v Moonmouth Co*, 2015 WL 778846, at *9 (Del Ch, 24 February 2015); see also *Walker Digital, LLC v Google, Inc*, 2013 WL 9600775, at *1 (D Del, 12 February 2013) (claimant and funder share a common legal interest and communications protect as both attorney client privilege and work product); but see *Leader Techs, Inc v Facebook, Inc*, 719 F Supp 2d 373, 377 (D Del 2010) (no common interest inapplicable); but see *Acceleration Bay v Activision Blizzard*, 2018 WL 798731 (D Del 2018) (ordering disclosure where in the absence of signed NDA and using a 'but for' standard for work product).

Texas

In general, Texas common law never incorporated the doctrine of champerty. See *Bentinck v Franklin*, 38 Tex 458, 468 (1873). Texas courts have reviewed commercial litigation funding agreements and found them not to be champertous or otherwise a violation of public policy. See *Anglo-Dutch Petroleum Int'l v Haskell*, 193 SW 3d 87, 105 (Tex App 2006). However, the funding of certain categories of claims (eg, malpractice actions) may present public policy issues. See id. Further,

lawyers or law firms contemplating litigation funding transactions should be sure to ensure that the contemplated structure does not misalign incentives or undermine the primary duty to their clients. See Texas Bar Opinion No. 576 (concluding that proposed arrangement was 'tantamount to fee splitting').

Regarding privilege, several federal courts in Texas have concluded that litigation funding information should be protected as work product and a non-disclosure agreement obviates waiver. See *United States v Ocwen Loan Servicing*, 2016 WL 1031157, at *6 (ED Tex, 15 March 2016); *Mondis Tech, Ltd v LG Elecs, Inc*, 2011 WL 1714304, at *3 (ED Tex, 4 May 2011).

Further, while there is no rule requiring disclosure of a party's funded status, one court has ordered the disclosure of the identity of a litigation funder, while simultaneously holding that communications with that funder remained confidential. See *United States v Homeward Residential, Inc*, 2016 WL 1031154, at *5 (ED Tex, 15 March 2016).

Illinois

Litigation finance is permitted in Illinois. While the common law prohibition of champerty has been abolished, there remains a statutory prohibition. See 720 Illinois Criminal Code 5/32-12. However, as set forth in a well-reasoned and comprehensive discussion in *Miller UK v Caterpillar*, 17 F Supp 3d 711 (ND Ill 2014), an ordinary commercial litigation finance transaction would not be problematic.

Regarding privilege, several federal courts have concluded that communications with a litigation funder pursuant to an non-disclosure agreement remain protected from disclosure. See *Viamedia, Inc v Comcast Corp*, 2017 WL 2834535, at *3 (ND Ill, 30 June 2017); *Miller UK Ltd v Caterpillar, Inc*, 17 F Supp 3d 711, 739 (ND Ill 2014).

Wisconsin

Litigation finance is permitted in Wisconsin. However, in early 2018, Wisconsin passed Wisconsin Act 235, which, inter alia, requires disclosure of all funding agreements in civil litigation. Specifically, the Act mandates that 'a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.'

Ohio

In Ohio, litigation finance is permitted and it is regulated by statute. See section 1349.55 (2008) of the Ohio Rev Code. The statue requires specific wording and disclaimers to be made in order for the finance agreements to be valid. The statute was promulgated in response to an Ohio Supreme Court decision which had previously invalided a funding agreement on champerty grounds. See *Rancman v Interim Settlement Funding Corp*, 789 NE 2d 217 (Ohio 2003).

In a decision that is likely more relevant to federal practice – and in particular – multi-district litigation than Ohio specifically, a recent district court ordered any funding be disclosed to the court in camera but made clear that any such disclosures should not be subject of ancillary litigation or discovery. See *In re National Prescription Opiate Litigation*, 17-MD-2804, Dkt No. 383 (7 May 2018).

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