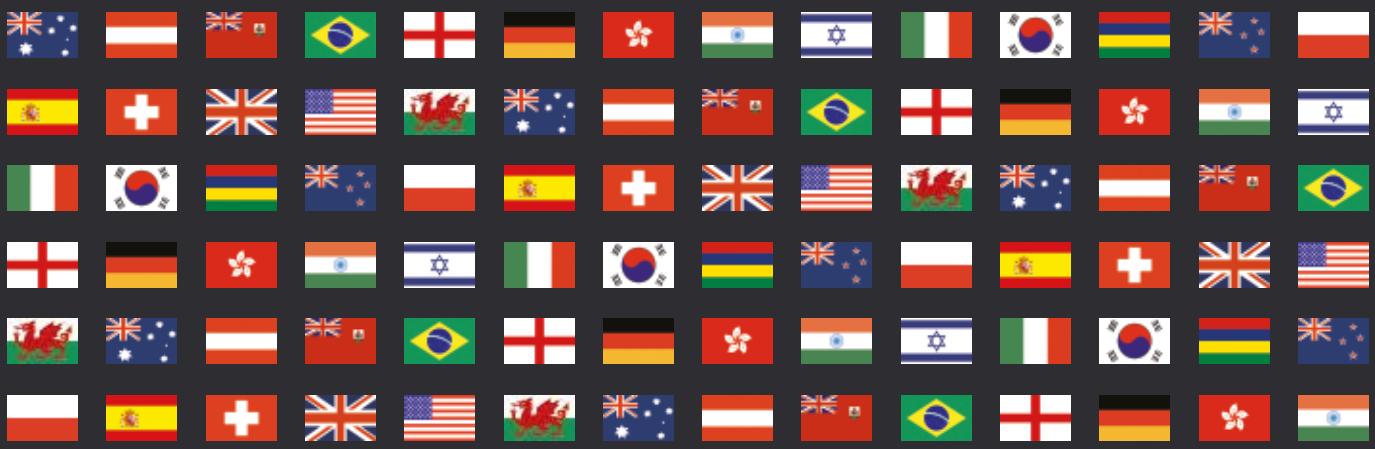
Litigation Funding 2020

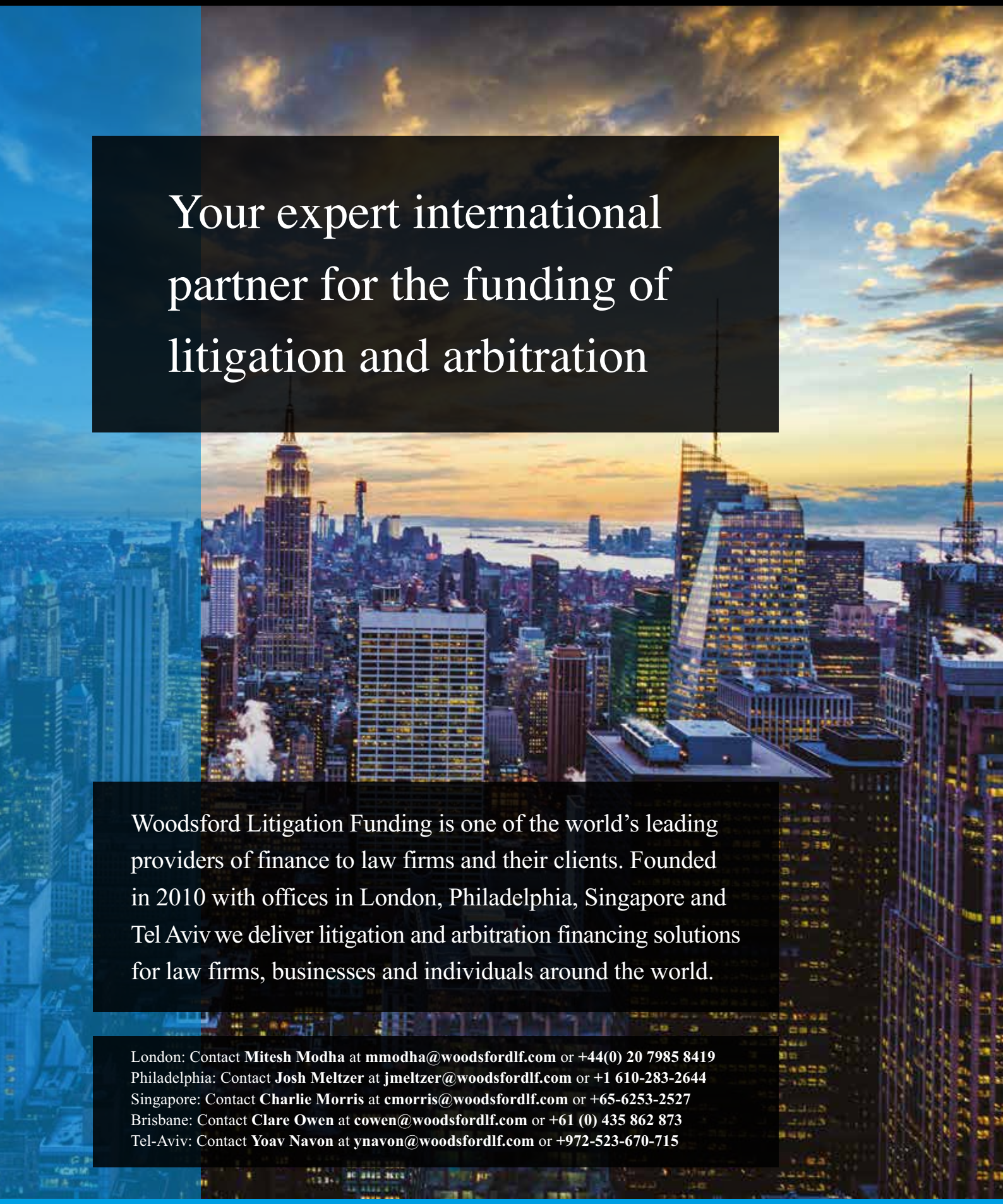
Contributing editors
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding



LEXOLOGY
Getting The Deal Through

WOODSFORD
LITIGATION FUNDING

WOODSFORD
LITIGATION FUNDING



Your expert international partner for the funding of litigation and arbitration

Woodsford Litigation Funding is one of the world's leading providers of finance to law firms and their clients. Founded in 2010 with offices in London, Philadelphia, Singapore and Tel Aviv we deliver litigation and arbitration financing solutions for law firms, businesses and individuals around the world.

London: Contact **Mitesh Modha** at **mmodha@woodsfordlf.com** or **+44(0) 20 7985 8419**
Philadelphia: Contact **Josh Meltzer** at **jmeltzer@woodsfordlf.com** or **+1 610-283-2644**
Singapore: Contact **Charlie Morris** at **cmorris@woodsfordlf.com** or **+65-6253-2527**
Brisbane: Contact **Clare Owen** at **cowen@woodsfordlf.com** or **+61 (0) 435 862 873**
Tel-Aviv: Contact **Yoav Navon** at **ynavon@woodsfordlf.com** or **+972-523-670-715**

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2016
Fourth edition
ISBN 978–1–83862–184–1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Litigation Funding 2020

Contributing editors
Steven Friel and Jonathan Barnes
Woodsford Litigation Funding

Lexology Getting The Deal Through is delighted to publish the fourth edition of *Litigation Funding*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 Italy and the United States of America.

Lexology 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.lexology.com/gtdt.

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.

Lexology 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.

LEXOLOGY
Getting The Deal Through

London
November 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in December 2019
For further information please contact editorial@gettingthedealthrough.com

Contents

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 here must pay particular attention to the many potential jurisdictions that may be implicated by a single 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 US 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 US. 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 (eg, state bar rules, contract law, status of champerty provisions, etc) or procedural matters governed by local practice, some of which are discussed below in the state summaries, there is little purely federal law on funding. However, the US Congress reintroduced the Litigation Funding Transparency Act of 2019, 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 (MDL) proceeding. The proposed law was put forward without success in 2018, and reintroduced in early 2019. It is in consideration with the Senate Judiciary Committee, so it remains to be seen whether the law will eventually be amended or 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.').)

Practicing 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 LA County Bar Association Ethics Committee Formal Opinion No. 500 (1999), discussing the permissibility of funding arrangement under California law and legal ethics regime.) Importantly, the California State Bar established a Task Force on Access Through Innovation of Legal Services, which recently published several alternate proposed revisions to the ethical rules that would, if adopted, either allow limited non-attorney ownership in law practices or largely do away with the traditional restrictions on fee-sharing. The proposed amendments remain subject to public comment and approval by the California Supreme Court. While it is still too early to predict whether either amendment will be adopted, it nevertheless suggests the state bar authorities recognise the important role litigation funding can play in promoting access to justice.

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 of 'any person or entity that is funding the prosecution' of 'any proposed class, collective, or representative action.' N.D. Cal. Standing Order No. 19 (Jan. 17, 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 affirmative disclosure under the local rules. (See, *MLC Intellectual Prop, LLC v Micron Tech, Inc*, No. 14–CV-03657, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019), rejecting the argument that a funded plaintiff had failed to comply with local rules by failing to identify the litigation funder.)

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. This is consistent with the general trend in most US jurisdictions. (See *Odyssey Wireless, Inc v Samsung Electronics Co.*, 2016 WL 7665898, at *5–*6 (S.D. Cal. Sept. 20, 2016); see also *Space Data Corporation v Google LLC* No. 16–CV–03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (communications with potential funders are not relevant).)

Delaware

Litigation finance is generally permitted in Delaware. However, the doctrines of champerty and maintenance remain applicable. See *Charge Injection Technologies, Inc v EI DuPont de Nemours and Co.*, 2016 WL 937400, at *3 (Del. Super. Ct. Mar. 9, 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 Technologies LLC v Intel Corporation*, 2017 WL 1787562, at *3 (D. Del. May 1, 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 Investment Management v Moonmouth Co.,* 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015); see also *Walker Digital, LLC v Google, Inc* , 2013 WL 9600775, at *1 (D. Del. Feb. 12, 2013) (claimant and funder share a common legal interest and communications are protected as both attorney client privilege and work product); but see *Leader Technologies Inc v Facebook Inc* , 719 F. Supp. 2d 373, 377 (D. Del. 2010) (no common interest inapplicable); *Acceleration Bay v Activision Blizzard*, 2018 WL 798731 (D. Del. 2018) (ordering disclosure where in the absence of signed non-disclosure agreement 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 International v Haskell*, 193 S.W.3d 87, 105 (Tex. App. 2006). However, the funding of certain categories of claims – for example 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 *US v Ocwen Loan Servicing*, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); *Mondis Technology Ltd v LG Electronics, Inc*, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 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 *US v Homeward Residential* Inc, 2016 WL 1031154, at *5 (E.D. Tex. March 15, 2016).)

New Jersey

New Jersey courts have long rejected common law prohibitions on champerty and maintenance. See *Schomp v Schenck*, 40 N.J.L. 195, 206 (Sup. Ct. 1878). More recently, New Jersey's state bar has offered guidance permitting plaintiff factoring of a contingent interest in a potential judgment. See New Jersey Advisory Committee on Professional Ethics, Opinion 691 (2001).

At the federal level, at least one New Jersey district court recently concluded that discovery into litigation funding was not relevant and that communications would likely be protected as work product. (See *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation*., No. CV 19–2875, 2019 WL 4485702, at *7 (D.N.J. Sept. 18, 2019) (collecting cases from a number of jurisdictions).)

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 (N.D. 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 a non-disclosure agreement remain protected from disclosure. (See *Viamedia, Inc v Comcast Corporation*, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017); *Miller UK Ltd v Caterpillar, Inc*, 17 F. Supp. 3d 711, 739 (N.D. Ill. 2014).)

Wisconsin

Litigation finance is permitted in Wisconsin. However, in early 2018, Wisconsin passed Wisconsin Act 235, which, among other things, 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 Ohio Rev. Code section 1349.55 (2008). 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 invalidated a funding agreement on champerty grounds. (See *Rancman v Interim Settlement Funding Corporation*, 789 N.E.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).)

Pennsylvania

In Pennsylvania, *Clark v Cambria County Board of Assessment Appeals*, 747 A.2d 1242, 1245 (Pa Cmwlth. 2000) saw champerty defined as a:

WOODSFORD
LITIGATION FUNDING

Zachary D Krug
zkrug@woodsfordlf.com

Robin M Davis
rdavis@woodsfordlf.com

Alex Lempiner
alempiner@woodsfordlf.com

1180 Welsh Road
Suite 200
North Wales
Pennsylvania 19454
Tel: +1 610 283 2644

> *[A] bargain by a stranger with a party to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject to be recovered.*

Under certain circumstances, litigation finance may not be permitted in Pennsylvania. For example in *WFIC, LLC v LaBarre*, 148 A.3d 812, 820 (Pa. Super. 2016), the court found that a funding agreement governed by Pennsylvania law was invalid because it met the requisite elements of champerty. (See *Riffin v Consolidated Rail Corp.*, 363 F. Supp. 3d 569, 576 (E.D. Pa. 2019) (assignment of claims is invalid as champertous).)

Nevertheless, regarding disclosure, federal courts in Pennsylvania have concluded, consistent with other districts, that communications with a litigation funder are protected as work product. (See *Lambeth Magnetic Structures, LLC v Seagate Technology (US) Holding, Inc*, 16–CV–0538, 2018 WL 466045, at *5 (W.D. Pa. Jan. 18, 2018).)

WOODSFORD
LITIGATION FUNDING

Key Members of our Executive Team

Yves Bonavero:
Chairman
Ex ED&F Man

Steven Friel:
Chief Executive Officer
Ex Brown Rudnick, DAC Beachcroft

Jonathan Barnes:
Chief Operating Officer
Ex Lewis Silkin

Mark Spiteri:
Finance and Commercial Director
Ex PWC

Charlie Morris:
Chief Investment Officer, EMEA & APAC. Ex Enyo Law, Addleshaw Goddard

Alex Lempiner:
Executive Vice President and General Counsel. Ex Milbank

Josh Meltzer:
Managing Director, US
Ex GE Capital

Robin M. Davis:
Senior Investment Officer
Ex Quinn Emanuel

Zachary Krug:
Senior Investment Officer
Ex Quinn Emanuel

Adam Eurusalimsky:
Senior Investment Officer
Ex Stewarts, Herbert Smith

Sarina Singh:
Director of Litigation Finance
Ex Jones Lang Lasalle

Michael Kallus:
Senior Investment Manager
Ex Fortress, Fish & Richardson

Yoav Navon:
Director of Litigation Finance
Ex Ron Gazit, Rotenberg

Steven Savage:
Head of Marketing
Ex Burford Capital

Mitesh Modha:
Business Development & Origination Director Ex Kain Knight

Alex Hickson:
Investment Officer Ex Shine Lawyers, Slater & Gordon (UK)

Daniel Littman:
Commercial Manager
Ex Ford Credit Europe

Helena Eatock:
Investment Associate
Ex Harcus Sinclair

Clare Owen:
Consultant
Ex Pinsent Masons

Ekin Cinar:
Consultant,
Ex Göksu Aydın

Eamon Wood:
Consultant

Our Investment Advisory Panel

Judge Shira Scheindlin
Ex US Federal Judge, SDNY

John Beechey CBE
Ex President of the International Court of Arbitration of the ICC

Fidelma Macken SC
Ex Court of Justice of the European Union and Irish Supreme Court

Simon Powell:
Ex Latham & Watkins

Terry O'Neil:
Ex Clifford Chance

David McLean:
Ex Latham & Watkins

Olivier Bonavero:
Ex ED&F Man

For further information, visit
www.woodsfordlitigationfunding.com

London: Contact **Mitesh Modha** at
mmodha@woodsfordlf.com or **+44(0) 20 7985 8419**

Philadelphia: Contact **Josh Meltzer** at
jmeltzer@woodsfordlf.com or **+1 610-283-2644**

Singapore: Contact **Charlie Morris** at
cmorris@woodsfordlf.com or **+65-6224-2448**

Brisbane: Contact **Clare Owen** at
cowen@woodsfordlf.com or **+61 (0) 435 862 873**

Tel-Aviv: Contact **Yoav Navon** at
ynavon@woodsfordlf.com or **+972-523-670-715**

@woodsfordLF

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-184-1