LITIGATION FUNDING 2022

Contributing editors
Steven Friel and Jonathan Barnes

LEXOLOGY
Getting the Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the sixth 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 India, Japan, Luxembourg, Spain and Sweden.

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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, for their continued assistance with this volume.

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The United States is a federal system, with overlapping federal and state jurisdictions, including 96 federal judicial districts and 50 individual US states, each with its own court system. As such, attorneys and parties contemplating commercial litigation finance transactions in the US 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 be enforced. Further, because litigation finance remains relatively new, the law is still in development, so 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 addendum is largely focused 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.

Covid-19

The covid-19 pandemic has caused significant uncertainty in the litigation space, beginning in 2020 and continuing through 2021. Parties to litigation are unsure whether their current capital and revenue streams are sufficient to support the expense of drawn-out legal battles; lawyers are navigating the difficulties of collecting and reviewing discovery from clients who may not have access to their files during periods of lockdown or remote work; and courts grapple with keeping juries and litigants safe while attempting to keep the doors of justice open. Indeed, most US jurisdictions have moved to motion hearings by video or teleconference, and trials have been postponed by several months, if not indefinitely. Nearly all active cases have experienced covid-related delays to their schedules. In this time of uncertainty and capital conservation, many prospective plaintiffs are looking to hedge their risk through litigation funding.

US federal

Because litigation funding related issues typically involve matters of state law (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, there have been recent proposals to legislate funding at the federal level. In 2021, the United States Congress reintroduced the Litigation Funding Transparency Act (first introduced in 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) (the proposed law was initially put forward without success in 2018). It is in consideration with the Senate Judiciary Committee, so it remains to be seen whether the law will eventually be amended or enacted. Additionally, certain states have considered similar laws, including New York State (Assembly Bill 6866), Florida (House Bill 7041) and Utah (House Bill 312), all of which have recently introduced bills to regulate litigation funding locally.

There is no general affirmative obligation to disclose litigation funding in federal court, though as noted below, some district courts in particular states have mandated disclosure in limited circumstances. Federal Rule of Civil Procedure 7.1 does not require the automatic disclosure of the involvement of litigation funders in the corporate disclosure statements required at the beginning of an action. However, litigants should be aware that many jurisdictions have supplemented Rule 7.1 with their own corporate disclosure requirements, which are generally broader than their federal counterparts. While these regional requirements have been enacted in order to identify court-related conflicts, some ambiguity exists regarding whether these requirements should encompass litigation funders, and such ambiguity will need to be resolved on a per-jurisdiction basis. For example, while the Northern District of California requires disclosure in the particular context of class actions, at least one court has rejected an argument that Rule 3-15 (the local version of Rule 7.1) generally requires affirmative disclosure of a funder in other (non-class) contexts (*MLC Intellectual Prop., LLC v Micron Tech., Inc.*, No. 14-CV-03657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019).

Some courts do require disclosure of the presence of a litigation funder for class action lawsuits and multi-district litigations. (See, eg, N.D. Cal. Standing Order ¶ 19 (Nov. 1, 2018).) However, these disclosures have only been required to be made in camera. (See, eg, In re *Nat'l Prescription Opiate Litig.*, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering *in-camera* submissions relating to financing terms).)

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 California 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.) 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. In May 2020, the Board of Trustees of the State Bar of California voted to move forward with the Task Force's recommendations. Instead of adopting widespread revisions to the ethical rules, however, the California Supreme Court approved a narrowly revised rule with respect to non-lawyer fee sharing, and the Board of Trustees established a second working group to look at the development of a 'regulatory sandbox' for non-lawyer ownership. As of the time of writing, the second working group has not issued its recommendations.

California has 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).)

Delaware has held that litigation funding materials are not automatically relevant under Fed. R. Civ. P. 26, and a party seeking production of such documents must first establish that the discovery sought is relevant to their particular causes of action. (See *United Access Techs., LLC v AT&T Corp.*, No. CV 11-338-LPS, 2020 WL 3128269, at *2 (D. Del. June 12, 2020) ('As AT&T has failed to carry its burden on relevance [of litigation funding materials], the Court need not, and does not, address the parties' various additional disputes relating to work-product doctrine, attorney-client privilege, common interest, parent-child privilege, and spousal privilege.').)

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

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, to the extent that the structure of those arrangements might embarrass or demean the legal profession. (See id.) Further, lawyers or law firms contemplating litigation funding transactions should 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, at least one court in Texas 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).)

The US District Court for the District of New Jersey recently adopted Local Civil Rule 7.1.1, which requires the disclosure of information regarding the use of third-party litigation funding within 30 days of the opening of a new matter in the jurisdiction (Local Civil Rule 7.1.1 is retroactive, requiring that all cases pending at the time the Rule was adopted disclose funding). (See D. N.J. L. R. 7.1.1.) Under the Rule, parties must file a statement with information relating to any non-party who provides funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation, or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance. (Id.) The statement must include details about the identity of the funder, whether the funder's approval is required for litigation or settlement decisions, and, if funder approval is required, the nature of the terms and conditions relating to that approval. Parties must also provide a brief description of the nature of the financial interest. (Id.) In addition, Local Civil Rule 7.1.1 allows for additional discovery of the terms of any third-party litigation funding agreement upon a showing of good cause. (Id.)

Illinois

Litigation finance is permitted in Illinois. Notwithstanding the statutory prohibition of maintenance set out in 720 Illinois Criminal Code 5/32-12, the Northern District of Illinois has held that ordinary commercial litigation finance does not violate the statute. (See Miller UK v Caterpillar, 17 F. Supp. 3d 711 (N.D. Ill. 2014).) The court cautioned that 'the Illinois criminal maintenance statute should not be given new life by judges … [where it was] never intended to be applied'. (Id. at 727.)

Regarding privilege, federal courts in Illinois have concluded that funding agreements, and communications with a litigation funder pursuant to a non-disclosure agreement, remain protected from disclosure. (See *Art Akaine LLC., v Art & Soulworks LLC*, No. 19 C 2952, 2020 WL 5593242, at *6 (N.D. Ill. Sept. 18, 2020) (finding litigation funding discovery irrelevant and potentially harmful to the plaintiff); *Fulton v Foley*, 2019 WL 6609298, at *2 (N.D. Ill. Dec. 5, 2019); *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 is regulated by statute. (*See* Ohio Rev. Code section 1349.55 (2008).) For litigation funding agreements to be valid, the statute requires specific wording and disclaimers. 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 multi-district litigation in particular – than to Ohio specifically, an Ohio district court recently 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 (May 7, 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] 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).)

Maryland

Litigation funding agreements in Maryland have been considered as loans by state regulatory agencies and are thus subject to state licensing requirements and a statutory cap on returns. (See Maryland Commercial Law §§ 12-102; 12-103; Md. Const. Art. III, Sec. 57.) At least one Maryland state investigation determined that a litigation funding agreement was usurious because, although no interest rate was set out in the contract, the effective rate was higher than that permitted by statute.

Alabama

State courts in Alabama have held that the state has a strong public policy against litigation funding. (See *Wilson v Harris 688 So.2d 265* (Ala. Civ. App. 1996), holding that a funding agreement was void on public policy grounds because the agreement was 'an illegal gambling contract and its speculative characteristics make it closely akin to champerty'.)

Minnesota

Litigation funding is no longer against public policy in the state of Minnesota. Although its highest court held for over a century that litigation funding is champertous, it recently overturned its precedent in *Maslowski v Prospect Funding Partners LLC*, 944 N.W.2d 235, 241 (Minn. 2020), abolishing Minnesota's common law champerty doctrine. However, the opinion acknowledges that courts may still scrutinise litigation funding agreements, in particular ensure that such agreements do not provide the litigation funder with control over the litigation. (Id.)

Arizona

Champerty is not recognised in the state of Arizona, and thus the doctrine does not bar litigation funding agreements. (See *Landi v Arkules*, 172 Ariz. 126, 132, 835 P.2d 458, 464 (Ct. App. 1992).) At least some courts in Arizona have held that litigation funding agreements are protected under the work product doctrine. For example, the District of Arizona has held that litigation funding agreements fit within the Ninth Circuit's standard of materials 'created because of litigation'. This protection was held to extend to situations where a plaintiff is receiving financing from a third-party funder to support both litigation and operating expenses, where litigation is the scope of operation for that business. (See *Cont'l Circuits LLC v Intel Corp.*, 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020).) However, disclosure of the identity of the litigation funder itself was not protectable information under the work product doctrine. (Id.)

Kentucky

Litigation funding is generally not permitted in Kentucky, which recognises the doctrine of champerty by statute (KRS § 372.060). Federal courts in Kentucky and the Sixth Circuit have affirmed that litigation financing is contrary to public policy, and such contracts are void. (See *Boling v Prospect Funding Holdings*, LLC, 771 F. App'x 562, 582 (6th Cir. 2019) ('the [litigation funding] Agreements violate Ky. Rev. Stat. § 372.060, and … the Agreements are inconsistent with Kentucky's public policy'); *Charles v Phillips*, 252 S.W.2d 920, 921-22 (Ky. 1952) (setting aside a deed as champertous in violation of KRS 372.060 where it was given in consideration of sums advanced to prosecute a divorce action).)

Utah

Utah became one of the latest states to regulate litigation funding when its governor signed the Maintenance Funding Practice Act (HB 312) in March 2020. The Act requires litigation funders to register with the state, imposes reporting requirements on litigation funders, and sets forth required funding contract terms and disclosures.

North Carolina

As the common law prohibition on champerty and maintenance remains in effect in North Carolina, North Carolina considers many litigation funding agreements to be both void and against public policy. (See *Charlotte-Mecklenburg Hospital Auth. v First of Ga*. Ins. Co., 340 N.C. 88, 91 (1995).) Although North Carolina courts have found litigation funding agreements to be acceptable in certain very limited circumstances, many provisions common in third-party funder agreements are not permissible. (*Compare Odell v Legal Bucks*, LLC, 192 N.C. App. 298 (2008) with In re: DesignLine USA, LLC, 565 B.R. 341 (W.D. N.C. 2017).)

United States Tax Court

In May 2020, the United States Tax Court held that litigation funding payments structured as loans but including non-recourse contingent payments are considered 'income' rather than a 'loan' for federal tax purposes. In *Novoselsky v Comm'r* of Internal Revenue, 119 T.C.M. (CCH) 1474 (T.C. 2020), the Tax Court applied a multi-factor test to determine whether a litigation funding payment was the type of advance that should be treated as a 'loan'. The Tax Court found that because there was generally no obligation to repay the loaned money unless the litigation was successful, the advanced funds were more akin to advance payments for legal services (rather than a loan), and thus were properly considered income for federal tax purposes. (Id.) Lawyers and litigants considering litigation funding transactions should consider the potential tax and accounting implications, and may structure litigation funding agreements accordingly to suit the particular circumstances.

WOODSFORD

Robin Davis
rdavis@woodsfordlf.com

Alex Lempiner
alempiner@woodsfordlf.com

Dan Kesack
dkesack@woodsfordlf.com

Deborah Mazer
dmazer@woodsfordlf.com

8 Bloomsbury Street
London
WC1B 3SR
United Kingdom
Tel: +44 20 7985 8419
www.woodsfordlitigationfunding.com

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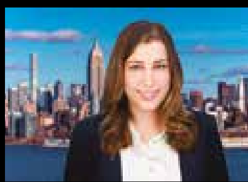

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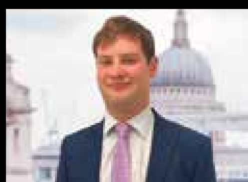

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For further information, visit
www.woodsfordlitigationfunding.com

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

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

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

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

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