OMNI BRIDGEWAY

Navigating the Ethics of Litigation Finance



IMF Bentham, Bentham IMF, ROLAND ProzessFinanz adopted the global name Omni Bridgeway in 2020.

DISCLAIMER: Any deal structures, pricing, models, and terms provided herein are for illustration only, subject to change,
and intended to give a general understanding of the way in which Omni Bridgeway may structure its transactions. Actual transactions and deal terms may vary based on the facts and circumstances of specific
investments. Claimants and
law firms may not rely on this introductory presentation; any specific funding deal will be governed solely by the terms
agreed to and set forth in an executed contract.

Faculty: James Batson, Esquire

- Senior Investment Manager, Director of Business Development and Structuring – US
- Litigation attorney for over 20 years
- Lead counsel, Zubulake v. UBS Warburg (U.S. District Court for the Southern District of New York), which led to several seminal e-discovery opinions
- Former member, United States District Court for the Southern District of New York's Advisory Groups' Pilot Project regarding Case Management Techniques For Complex Civil Cases
- JD, Fordham University Law School; MBA, Fordham Graduate School of Business; and BA, Cornell University.

Roadmap to Today's Program

- Introduction to Litigation Funding – why use it, what it is, and what it isn't
- Intersection of Litigation Funding with attorney-client and attorney work product privileges
- Intersection of Litigation Funding with various duties of professional responsibility and ABA Model Rules
- Disclosure issues
- Legislative developments and rule-making initiatives



What is Litigation Funding?

- **Generally two flavors:** "Consumer" and "Commercial"
- **Consumer legal funding**
  - Non-recourse funding to personal injury plaintiffs, generally in **smaller cases**, to be repaid along with financing fees if the plaintiff recovers
- **Commercial legal funding**
- Non-recourse funding to companies, individuals and law firms for a percentage of the ultimate recovery, if any – generally in a **large commercial lawsuit**

What is Litigation Funding?

- **Commercial sector financing (vs. consumer)**
  - Usually a contract between the client and funder
    - Usually non-recourse
    - Amount and form of recovery may depend on the length of the case and/or amount of recovery
    - Extensive due diligence (impacts privilege issues which will be discussed)
- **Common subject matters**: breach of contract; breach of fiduciary duty; intellectual property; copyright; patent; domestic and international arbitrations; complex business disputes; antitrust; environmental; and qui tam.
- **Litigation Funding is NOT**:
  - Insurance company retained defense counsel relationship
  - A loan; it typically is a non-recourse investment

Why Have Litigation Financing?

"Protracted discovery is expensive and is a drain on the parties' resources. Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent."

Miller UK Ltd. v. Caterpillar, Case No. 10 C 3770, 2014 WL 67340 (N.D. Ill. Jan. 6, 2014) (Cole, J.)

Why Have Litigation Financing?

"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."

New York Supreme Court Justice Eileen Bransten, *Litigation Funding LLC v. Jeffrey Lessoff, No. 650757/2012*

- High costs of litigation: attorneys fees, discovery costs, expert fees . . .
- Fund company operating expenses
- Diversify risk
- "Level the playing field"
- Budget stability

Common Types of Funding Arrangements

- Full Hourly
- Hybrid 50:50 Fees
- Costs
- Portfolios
- Working Capital
- Appeals
- Due Diligence
- Judgment Enforcement

The Funding Process



Ethical Considerations: MODEL RULES

- Model Rule 1.6 (confidentiality of Information)
- Model Rule 1.7(a)(2) (material-limitations conflicts rule)
- Model Rule 1.8(a) (regulation of business transactions with clients)
- Model Rule 1.8(e) (financial assistance to clients)
- Model Rule 1.8(f) (limitations on accepting representation of client with fees paid by third party)
- Model Rule 1.8(i) (acquiring a proprietary interest in a client's cause of action)
- Model Rule 2.3 (hybrid confidentiality rules governing provision of evaluations to third party)
- Model Rule 5.4 (prohibition on fee-splitting)
- See American Bar Association Commission on Ethics 20/20 Informational Report on Alternative Litigation Finance in accompanying appendix

Ethics Checklist

1. Is it permitted in the relevant jurisdiction?
2. Protecting a client's confidential information
3. Avoiding the representation of adverse interests
4. Avoiding financial arrangements with non-lawyers

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Champerty, Maintenance and Usury

- **Champerty**: "A bargain by a stranger with a party to a suit, by which such third person under- takes to carry on the litigation at his own cost and risk, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered." Black's Law Dictionary
- **Maintenance**: "An unauthorized and officious interference in a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action." Black's Law Dictionary

- Arose to combat abuses in medieval England – *i.e.*, "vexatious and speculative" litigation supported by "officious intermeddlers"
- Unscrupulous nobles lent names to bolster dubious and fraudulent claims against rivals
- Certain states still limit or prohibit litigation funding

Champerty, Maintenance and Usury

- **Usury**: for a transaction to constitute criminal usury, it traditionally must constitute a loan, and usually at unlawfully high rates of interest. *Donatelli v. Siskin*, 170 A.D.2d 433, 565 NYS2d 264 (2d Dep't 1991). Non-recourse cash advance by a personal injury funder found to be non-usurious in *Kelly, Grossman & Flanagan LLP v. Quick Cash, Inc.*, 2012 NY Slip Op. 50560(U) (March 29, 2012).

- Funding: Non-recourse cash advance between sophisticated parties represented by counsel (i.e., not a "loan")
  - No promise of repayment
  - No collateral to secure the debt
  - No guaranteed return on investment
- Many states exempt commercial (vs. consumer) transactions from usury laws

US Regulation of Funding

- Prohibited or restricted in some form in approximately 20 states.
  - *Maslowski v. Prospect Funding Holdings, LLC*, No. A16-0770, 2017 WL 562532 (Minn. Ct. App. 2017)
  - *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081 (W.D. Ky. 2015)
- Focus on consumer funding (unsophisticated parties not represented by counsel).
- Otherwise self-regulated in US – subject to judicial control and legal ethics rules
- The ABA, NY State Bar, NYC bar and other state bars have issued guidance to lawyers advising clients about litigation finance.

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The Attorney-Client Privilege

Purpose:

- To encourage clients to have honest, full and frank discussions with their attorneys.

Elements:

- communication;
- made in confidence;
- to an attorney or person working at the direction of an attorney;
- by a client or person seeking to become a client;
- for the purpose of securing legal advice; and
- there has been no waiver.

Exceptions:

- the communication was made in the presence of individuals who were neither attorney nor client, or was disclosed to such individuals;
- the communication was made for the purpose of committing a crime or tort (known as the crime-fraud exception); and/or
- the client has waived the privilege (for example by publicly disclosing the communication).
  - See generally *Upjohn Co. v. United States*, 449 U.S. 383 (1981)

The Attorney Work-Product Doctrine

Purpose:

- To provide "a certain degree of privacy," in which to prepare litigation. *Hickman v. Taylor*, 329 U.S. 495 (1947).
- Underlying rationale is that opposing party should not get a "free ride on the other party's research, or get the inside dope on that party's strategy. . . ." *Mensasha Corp. v. U.S. Dept. of Justice*, 707 F.3d 846, 847 (7th Cir. 2013).

Codified in Federal Rule 26(b)(3)(A):

- A party may not discover:
  - documents and tangible things;
  - prepared in anticipation of litigation or for trial;
  - by and for another party or by or for that party's representative, including attorney, consultant, surety, indemnitor, insurer, or agent; and
  - unless there is a substantial need for the information and the information cannot be obtained elsewhere without undue hardship.

F.R.C.P. 26(b)(3)(B) further protects:

- "Mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."
- Common interest privilege?

Litigation Funding Does Not Compromise Confidentiality

- Disclosures of material protected by the attorney work-product doctrine are made **only under NDA**
  - **Displays parties' intent** to maintain work-product protection
  - Not disclosed in a manner that "substantially increases the potential for **adversaries to obtain** the material"
- **No attorney-client communications** should be disclosed during due diligence or at any other time
- Decisions in key jurisdictions have uniformly **upheld work product protection** for materials provided under NDA to funders
- "Common interest" doctrine is more dicey (common legal interest)

Disclosure Of Funding Arrangements/Communications?

Lambeth Magnetic Structures, LLC v. Seagate Technology (US) Holdings, Inc., et al., 2:16-cv-00538 (W.D. Pa. 2017)

> "Plaintiff's agreement … was undisputedly prepared in anticipation of the instant litigation and for the purpose of pursuing the litigation. As a result, all of these materials are shielded under work product protection."

Increasingly the subject of **discovery requests/subpoenas**

Disclosure Of Funding Arrangements/Communications?

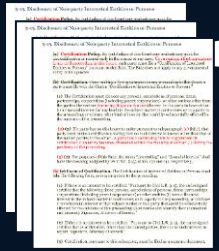
- Decisions based on **work-product protection and relevance**:
  - ***MLC Intellectual Prop. LLC v. Micron Tech., Inc.*, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).**
    - Court denied defendant's motion to compel reasoning that defendant's attempts to establish relevance based on potential bias and conflicts of interest concerns were speculative.
  - ***Miller UK Ltd. v. Caterpillar*, 2014 WL 67340 (N.D. Ill. Jan. 6, 2014).**
    - Court held that the terms of a funding agreement and related documents were not discoverable with signed NDA under attorney work-product doctrine.
  - ***Gbarabe v. Chevron*, 2016 WL 41548449 (N.D. Cal. Aug. 5, 2016).**
    - Court compelled a funded class action plaintiff to produce funding agreement where plaintiff's counsel failed to assert work product protection and conceded privilege and relevance.
  - ***Kaplan v. S.A.C. Capital Advisors LP*, No. 12-cv-9350 (S.D.N.Y. Sept. 10, 2015).**
    - Court denied production of funding documents where class action plaintiff objected to production and the documents were irrelevant, including as to adequacy of class counsel.

Disclosure Requirements

- Proposed revision to FRCP 26(a)(1) to require automatic disclosure **rejected** as premature by the FRCP Advisory Committee in December 2014, resubmitted in November 2017 and currently under consideration.
  - **The N.D. Cal amended their standing order to require disclosure of any litigation finance arrangements in class or other representative actions**
- Certain rules of arbitral bodies suggest disclosure by neutral (E.g., Canon II(A)(2) of the AAA Code of Ethics)
- Proposed Litigation Funding Transparency Act of 2019
- Judge Polster's Order Regarding Third-Party Litigation Financing, No. 1:17-MD-2804 (N.D. Ohio filed May 7, 2018).

Automatic Disclosure Of Funding Arrangements?

- 2016: N.D. Cal. proposed revision to Civil Local Rule 3-15:

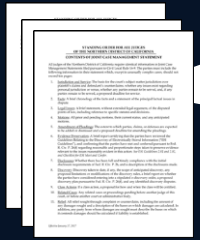


N.D. Cal. Civ. L.R. 3-15

The Certification must disclose any persons, associates of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves **(including litigation funders)** known by the party to have either: (i) a financial interest (of any kind) in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

Automatic Disclosure Of Funding Arrangements?

- January 23, 2017, N.D. Cal. adopted a **limited revision to its Standing Order**:



N.D. Cal. Standing Order

"In any **proposed class, collective, or representative action**, the required disclosure [under Civil Local Rule 3-15] includes **any person or entity that is funding the prosecution of any claim or counterclaim**."

Automatic Disclosure Of Funding Arrangements?

S.471 - Litigation Funding Transparency Act of 2019

Introduced in 2018 and 2019 for **any class action or MDL proceeding:**


S. 2815

A BILL

Litigation Funding Transparency Act

"(1) **disclose in writing** . . . the identity of any commercial enterprise, other than a class member or class counsel of record, that has a **right to receive payment that is contingent on the receipt of monetary relief** . . .; and

(2) **produce** for inspection and copying . . . **any agreement** creating the contingent right."

What Are the Pros and Cons Of Disclosure?

"DISCLOSE IT"

- Relevant to *something*
- Address potential conflicts (which ones?)
- Identify interested parties (not real party in interest)
- Right to know / integrity of judicial system
- Parallel to insurance coverage disclosure

"DON'T DISCLOSE IT"

- Discovery distractions (protected and rarely relevant)
- Chill of information flow to identify meritorious cases
- Increased expense of funding transactions
- Provides litigation advantage to other side
- Not the same as insurance

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Avoiding The Representation Of Adverse Interests

- Many litigation funding professionals are lawyers, but they **do not**:
  - Represent any claimant as part of the funding arrangement
  - Maintain control over the litigation – and thus, influence over a claimant's decisions, or the lawyer's "independent professional judgment"
- As in-house counsel, investment managers represent the funder, and thus, these conflicts rules generally are not implicated.
- And while funders often employ outside counsel for their own purposes, they make clear that neither represents the claimant.
- Funders often try to structure their investments so that there is an alignment of interests between the funder, the claimant and the claimant's lawyers.

Funders Do Not Control The Funded Litigation

- Lawyers must not permit a third party to interfere with the lawyer's **independent professional judgment**
- Courts carefully scrutinize contractual provisions that limit the client's right to make **decisions regarding settlement** (but see ABA's view on next slide)
- Transactions can be **voidable as champertous in certain states** if funder controls strategy and settlement
  - See, e.g., *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 694 (Fla. Dist. Ct. App. 2009) (deeming funder a "party" liable for opposing party's fees where funder had the right to approve any settlement entered into by claimant)
- Contractual provisions purporting to restrict the **client's right to discharge its lawyer** are generally deemed unenforceable

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Fee-Splitting

Fee-splitting prohibitions safeguard a lawyer's independent professional judgment

Individual case funding:

- Funder contracts with the claimant, from whom a portion of any litigation proceeds are received
- Claimant may also have a separate agreement to pay its lawyers a portion of any litigation proceeds received (or hourly/hybrid fee paid by funding)
- Funder is not paid by the lawyer and has no control over lawyer's independent professional judgment

Portfolio funding:

- Litigation funding company provides financing directly to the law firm, collateralized solely by the law firm's contingency share of a portfolio of cases.
- Protects lawyer's independent professional judgment because lawyer has no financial interest adverse to clients in multiple cases

Do Law Firm Portfolios Constitute Fee Splitting?

New York City Bar Association Formal Opinion 2018-5 (July 30, 2018):

Opined that portfolios with funders constitute fee splitting:



NYCBA Formal Opinion 2018-5

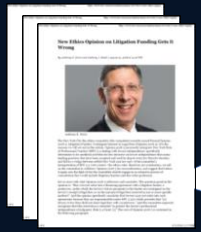
"A non-recourse financing agreement secured by legal fees in a matter . . . constitutes an impermissible fee-sharing arrangement regardless of how the lawyer's payments are calculated."

"Rule 5.4 is equally applicable when the lawyer's payment to the funder is based on the recovery of legal fees in multiple matters (*e.g.*, a portfolio of lawsuits against the same defendant or involving the same subject matter) as opposed to a single matter."

Do Law Firm Portfolios Constitute Fee Splitting?

What do **legal ethics scholars** think?

A. Davis and A. Sebok, "***New Ethics Opinion on Litigation Funding Gets It Wrong***" (N.Y. Law Journal, August 31, 2018):



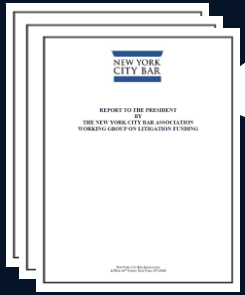
N.Y. Law Journal, August 31, 2018

"It creates distinctions between the loss of independence of lawyers who engage in traditional borrowing from their banks—where they place all of their receivables at the ultimate mercy of the ender if they default—and the supposed greater loss of independence where instead the lawyer borrows based on the results of specific cases, where the lender has no recourse if the cases fail to yield those results. **Such an interpretation is, surely, absurd.**"

Do Law Firm Portfolios Constitute Fee Splitting?

February 28, 2020: Working Group Report to NYCBA President

Backtracks on **Formal Opinion 2018-5:**



NYCBA Report (Feb. 28, 2020)

We conclude that **lawyers and the clients they serve would benefit if lawyers have less restricted access to funding** . . .

After analyzing the issues from a diverse array of perspectives, the Working Group believes that **the New York Rules of Professional Conduct should be modified to accommodate the reality of litigation funding**.

Key Takeaway's

- Maintenance, champerty, and usury
- Privilege and confidentiality: the attorney-client privilege, the work product doctrine (and common interest privilege?)
- An attorney's duty to maintain his/her independent professional judgment
- Perceived fee-sharing with non-attorneys issues
- Regulation
- Discovery issues

Recommendations

- Familiarize yourself with local laws, rules, and ethical decisions regarding litigation funding.
- Enter into a Non-Disclosure Agreement prior to engaging in substantive discussions. Do not simply rely on oral assurances of confidentiality.
- In jurisdictions with statutory prohibitions on champerty and maintenance, review case law regarding how those statutes are applied.
- Review Local Rules regarding mandatory disclosure.

OMNI BRIDGEWAY

Thank you

Jim Batson

Senior Investment Manager, Director of Business Development and Structuring – US

437 Madison Avenue, 19th Floor
New York, NY 10022
T: 212 488 5331

jbatson@omnibridgeway.com

Omnibridgeway.com

OMNI BRIDGEWAY

Global Offices

ASIA

Hong Kong
+852 3978 2629
+852 3977 0800
Level 27,
World-Wide House,
19 Des Voeux Road Central
Central, Hong Kong

Singapore
+65 6622 5396
#13-03
Six Battery Road
Singapore 049909

AUSTRALIA

Adelaide
+61 8 8122 1010
50 Gilbert Street
Adelaide SA 5000

Brisbane
+61 7 3108 1311
Level 18
175 Eagle Street
Brisbane QLD 4000

Melbourne
+61 3 9913 3301
Level 3
Bourke Place
600 Bourke Street
Melbourne VIC 3000

Perth
+61 8 9225 2300
Level 6
37 St Georges Terrace
Perth WA 6000
PO Box 5106
Perth WA 6831

Sydney
+61 2 8223 3567
Level 18
68 Pitt Street
Sydney NSW 2000
GPO Box 5457
Sydney NSW 2001

CANADA

Montreal
+1 514 257 691
60 Rue St Jacques
Bureau 401
Montreal QC H2Y 1L5

Toronto
+1 416 583 5720
250 The Esplanade
Suite 127
Toronto ON M5A 1J2

EUROPE, MIDDLE EAST & AFRICA

Amsterdam
+31 (0) 70 338 4343
Schiphol Boulevard 121
1118 BG Schiphol Amsterdam
The Netherlands

Cologne
+49 (0) 221 801155-0
Gereonstr. 43-65
50670 Cologne
Germany

Geneva
+41 (0) 22 818 6300
Rue de la Rôtisserie 4
1204 Geneva
Switzerland

London
+44 203 968 6061
81 Chancery Lane
London WC2A 1DD
United Kingdom

Dubai
+971 4321 0029
Unit 1905, Level 19,
Index Tower,
Dubai International
Financial Centre
507152 Dubai
United Arab Emirates

UNITED STATES OF AMERICA

Houston
+1 713 965 7919
LyondellBasell Tower
1221 McKinney Street
Suite 2860
Houston TX 77010

Los Angeles
+1 213 550 2687
555 West Fifth Street
Suite 3310
Los Angeles CA 90013

New York
+1 212 488 5331
437 Madison Avenue
19th Floor
New York NY 10022

San Francisco
+1 415 231 0363
50 California Street
Suite 2550
San Francisco CA 94111