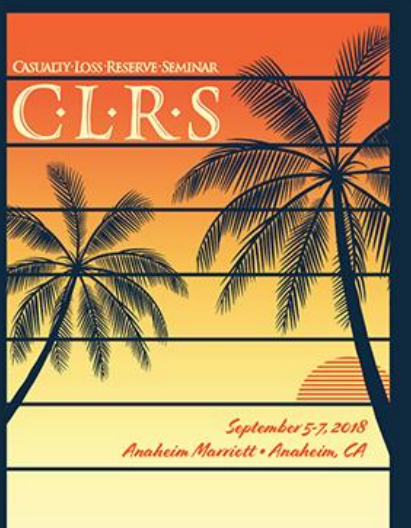


Investor Funded Litigation: Leveling the Playing Field or Funding the Takedown

CASUALTY LOSS RESERVE SEMINAR
ANAHEIM, CALIFORNIA
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Presented by: JONATHAN H. COLMAN



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Introduction

- Who is Terry Jean Bollea?
- Who is Peter Thiel?
- What is/was Gawker?
- What is \$140 million?

Introduction



Topics We Will Cover

- Overview of Litigation Financing
- Overview of Legal Issues
- Overview of Ethical Issues

Overview of Litigation Funding

- Litigation financing refers to a transaction in which a third party, that is neither a party to a legal claim nor their legal counsel, provides capital to a party to a legal claim (or their legal counsel) in exchange for a financial interest in the outcome of the legal claim.
- The signature feature of this form of capital is that repayment of the financing is contingent upon a successful outcome of the underlying legal claim.

Overview of Litigation Funding

- In its classic application, litigation financing is a tool that enables plaintiffs facing large litigation budgets to defer these costs to the successful outcome of their case
- OR
- To avoid the costs entirely if the case resolves unsuccessfully.

Overview of Litigation Funding

- A “new space”
- Originated in Australia and then to the U.K.
- United States: Last 10 years
- Estimates are that \$5 billion in funds have been earmarked for litigation funding, with the bulk (to date) in commercial litigation such as patent, trademark and other business litigation

Overview of Litigation Funding

- **Common Elements of Financing Transactions**
- Each transaction is negotiated, structured, and priced individually.
- Financing provider's repayment is secured by and contingent upon a successful outcome of the claim.
- Pricing may be based on the amount of capital provided, on the size of the recovery in the underlying claim, or some combination of the two; in most instances the pricing is graduated and increases in some fashion the longer the financing is outstanding.
- Financing provider has passive role in management and decision-making in the legal claim, with strict prohibitions against interference with the representing lawyer's exercise of their independent professional judgment.

Overview of Litigation Funding

- Financing is available to both plaintiffs and defendants, although the market for defendant-side financing is still in the early stages of development.
- Plaintiff-side financing is much more common, largely because of the relative ease of defining “success” on the plaintiff-side.

Downsides of Litigation Funding

- Reduces claim's potential upside
- Involves complex, time-consuming process;
- Requires specialized expertise in various legal and ethics issues;
- Requires disclosure of sensitive/ confidential information

What is a “Good Case” to Finance?

- The diligence conducted resembles the vetting that an experienced law firm would perform prior to accepting an engagement on a contingent fee basis.
- They will review pleadings, document production and discovery, attorney work product, expert reports, damages models and other financial information relevant to the economic viability of the claim.
- They will interview litigation counsel and perhaps the plaintiff
- Sometimes they will interview key fact witnesses.

What is a “Good Case” to Finance?

- Strength and novelty of legal theory
- Amount and demonstrability of damages claimed
- Credibility of key fact and expert witnesses
- Financial wherewithal of defendants to pay claim
- Financial motivations of the parties (including legal counsel)
- Jurisdictional factors (judge, jury, appellate courts)
- Reasonability of the parties
- Likelihood that parties will behave reasonably

Timing: When is Financing Sought?

- Financing is available at any stage in a case's lifecycle, from pre-complaint through the appellate process.
- Often it is desirable to arrange financing near the inception of a case when the budget and strategy are being formulated.
- However, financing is frequently obtained after the claim is well underway.
- Financing is only practically feasible after the party and their lawyers have performed a significant amount of research on the merits and financial viability of the assertion or defense of the claim.

How Much Does it Cost?

- Financing costs are analyzed and negotiated on a case-by-case basis and are based upon a variety of factors including the perceived risk of an adverse outcome and length of time the financing may be outstanding.
- In order to protect their interests, litigation funding groups often investigate the merits of an individual's legal claims and the likelihood of success prior to making cash advances.
- Capital providers strive to generate private equity-like returns (e.g., 20%-plus annualized returns) for their investors.
- Caveat: a provider receives nothing in cases that are unsuccessful.

How Much Does it Cost?

- The share of proceeds varies based upon:
 - The amount of money involved
 - The length of time until recovery
 - The projected value of the plaintiff's claim
 - Whether the claim is settled, goes to trial, or is appealed.
-
- Lawrence S. Schaner and Thomas G. Appelman, *The Rise Of 3rd-Party Litigation Funding*, Law 360

Overview of Legal Issues

- Various legal ethics issues may be implicated by litigation financing.
- Over the last decade, a significant body of law has developed concerning litigation financing, and several courts and ethical bodies have rendered opinions on this subject.
- Although this body of law continues to develop, these opinions offer guidance as to the parameters governing these transactions.
- Currently, litigation financing transactions are permissible and enforceable in every state.

Overview of Legal Issues

- Confidentiality and privilege waivers
- Champerty and related issues
- Legal ethics issues
 - Independence of professional judgment
 - Conflicts of interest
 - Confidentiality

What is Champerty?

- Champerty is an ancient legal doctrine originating in medieval England that was designed to prevent feudal lords from waging their wars through the court system.
- Champerty involves an “officious intermeddler” paying the expenses of another’s lawsuit in exchange for a portion of the recovery.
- At first glance, this may sound a bit like litigation financing.
- However, courts have applied champerty narrowly in the modern era, limiting it to situations in which frivolous litigation is instigated by a third party and/or where the third party is heavily involved in the management of the case.

What is Champerty?

Many states have abolished champerty, limited its scope or never adopted it at all

- California, Texas, New York and New Jersey never adopted champerty prohibitions. Florida and Massachusetts have explicitly abolished their ancient champerty rules.
- “It is unclear why the historical concerns of the common law would justify today placing special burdens on litigation funded by third parties” in that “existing ethical and legal obligations of lawyers and their clients” today have taken the place of champerty’s medieval role. *American Bar Association, Commission on Ethics 20/20, Informational Report to the House of Delegates, December 27, 2011*

Legal Duties to Finance Company

- Lawyers have no professional obligations whatsoever to the financing provider and do not render legal services or provide opinions to them.
- Most financing agreements contain provisions in which the client instructs its legal counsel to provide routine information to the financing provider, so that the provider can monitor the status of its investment and compliance with the financing agreement.

Legal Ethics for Attorneys

Attorneys working with finance companies must:

- Maintain independence of professional judgment
- Exercise reasonable caution to protect their client's confidentiality
- Avoid (or fully disclose) any conflicts of interest

Disclosure of Litigation Funding

- There is no affirmative duty to disclose the existence of a financing arrangement to the court or to the opposing party (although it should be noted that there is virtually no law directly on this subject yet)
- Any party seeking information about how a party's litigation budget is being financed would have to demonstrate that this information was relevant to the issues in the case.
- The mere fact that a party has provided financing does not make them a real party in interest in the litigation.

The Other Side of the Coin

- The U.S. Chamber Institute for Legal Reform issued a white paper suggesting changes to third-party litigation funding.
- Among the suggested changes are limits or prohibition on investor control of cases, forbidding all contact between the third-party funding group and lawyers without the inclusion of the client, banning law firm ownership of third-party funding groups, and full disclosure of funding contracts in litigation.
- *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation*, U.S. Chamber for Legal Reform (Oct. 24, 2012)

The Other Side of the Coin

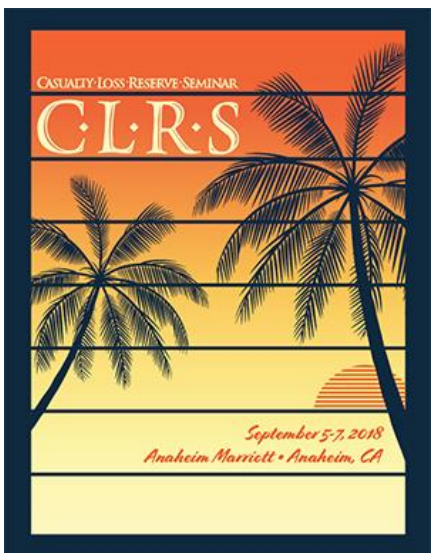
Northern District of California, Order, January 17, 2017
Certification of Interested Entities or Persons (Rule 3-15)

Each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest 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. In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim

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QUESTIONS?
COMMENTS?

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