

**Investor Funded Litigation 2019:
Leveling the Playing Field
or Funding the Takedown**

CASUALTY LOSS RESERVE SEMINAR
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Introduction

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

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Introduction



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Topics We Will Cover

- Overview of Litigation Financing
- Overview of Legal Issues
- Overview of Ethical Issues
- Recent Concerns
- Consumer Protection Issues

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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.

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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.

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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 in commercial litigation such as patent, trademark and other business litigation

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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.

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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.

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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

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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

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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.

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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.

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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

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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.

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Overview of Legal Issues

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

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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.

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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*

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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.

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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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Recent Concerns

- Consumer Protection Issues
- Impact on Judicial System

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Consumer Protection Issues

- Complex litigation funding contracts
- Steep litigation funding fees

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Responses To Protect Consumers

- States passed legislation to regulate investor funded litigation contracts
 - Maine, Ohio, Nebraska, Oklahoma, & Tennessee
- Regulations include:
 - Minimum font-size; Itemization of one-time fees and schedule of repayments; Disclosure of annual percentage rate of return; Penalty-free cancellation period from date of funding; Written acknowledgement requirement by attorney; Translated materials
 - Tennessee only state to institute "fee cap"
- State courts have placed litigation funding under usury law, which covers loan interest rates and fees

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Impact on Judicial System

- Increase of “frivolous” litigation?
 - Financiers will pursue cases with “huge potential for recovery” despite “small probability of success”
- Response:
 - Ethics requires legal counsel to turn down frivolous cases
 - Counsel and financier resources are limited
 - Counsel and financiers must still make a profit
 - Even weak cases deserve their day in court

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Impact on Judicial System

- Decrease in the incidence of settlement?
 - Fear that contract terms will dissuade settlement
 - Fear that financial resources will encourage plaintiffs to prefer litigation over settlement
- Response:
 - Plaintiffs will want to avoid fees and interest rates that accumulate as litigation proceeds
 - Plaintiffs may prefer receiving some judgment over a long, drawn-out trial

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Litigation Funding Documents

- Financiers want accurate and complete information before funding a case
- Generally, they will look over:
 - Publicly available documents filed with the court (pleadings, motions, hearing transcripts, court orders, etc.)
 - Discoverable documents and sources of information
 - Non-discoverable, privileged documents and information

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Litigation Funding Documents Issues

- Are litigation funding documents discoverable?
- Will providing privileged documents and information to potential financiers inadvertently waive the a privilege?

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Work-Product Doctrine

- Purpose of doctrine:
 - Protect an attorney’s thought processes and mental impressions against disclosure
 - Limit instances where opposing counsel can “piggyback” on attorney’s work

Viamedia v. Comcast Corp. (N.D. Ill., June 30, 2017, No. 16-CV-5486) 2017 WL 2834535.

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Work-Product Doctrine Application

- Federal courts view litigation funding documents as protected work-product
 - Documents can be protected if made by attorneys in anticipation of litigation, even if prospect of litigation was small
 - Documents contain attorney mental impressions and opinions about case or case valuation
 - “Dearth of case law” where other courts have applied work-product doctrine

Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd (S.D. Cal., Sept. 20, 2016, No. 315CV01735HRBB) 2016 WL 7665898.

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Work-Product Doctrine Application

- California courts likely share same view
 - Litigation funding documents, even if in the context of a business transaction, can be protected work-product

OXY Resources Cal. LLC v. Superior Court (2004) 115 Cal.App.4th 874.

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No Waiver Upon Disclosure to Financier

- Not inconsistent to disclose to financiers, who have an inherent interest in maintaining confidentiality of client's information
- Confidentiality agreements evidence reasonable expectation of confidentiality between parties

Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd (S.D. Cal., Sept. 20, 2016, No. 315CV01735HRBB) 2016 WL 7665898; *OXY Resources Cal. LLC v. Superior Court* (2004) 115 Cal.App.4th 874.

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Can Still Claim Substantial Hardship

- Party may argue substantial hardship to compel production of litigation funding documents
- Useful in getting case valuations
 - Case valuations likely relevant to damage claims or defenses
 - Case valuations may be difficult to obtain from another source
 - Likely no substantial equivalent for these valuations
- Still no production of attorney impressions or opinions

Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd (S.D. Cal., Sept. 20, 2016, No. 315CV01735HRBB) 2016 WL 7665898

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Counsel's Responsibilities

- Establish a reasonable expectation of confidentiality
 - Require a confidentiality agreement
- Set boundaries for financier's role in the case
 - Demand contract terms for recourse if financier breaches obligation to funded party
- Inform all parties about consequences of sharing information on case, even if purely financial
- Burden lies on counsel to assert the privilege

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Opposing Discovery Strategy

- A funded party faces discovery fights that non-funded parties do not
 - Communications can be numerous
 - Asserting the privilege and making privilege log can be time-consuming and expensive
- Expensive discovery fights can affect attorney expectations and what a funded party receives in its payout
- In the least, privilege log can give opposing counsel insight into the funded party's strategy and resources

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Next Steps: Litigation Financier Privilege

- Lobbying groups have an interest in advocating for legislation that provides a "litigation financier privilege"
 - Would allow financiers to thoroughly investigate a claim without fear of disclosing any documents
 - Parties will be relieved of some time-consuming, expensive discovery fights
 - Aligns with goal of equality in party resources and can encourage growth in investor funded litigation

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QUESTIONS?
COMMENTS?

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