

## **Third-Party Financing of Class Actions: Recent Judicial Decisions, Ethical and Practical Considerations**

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Today's faculty features:

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# Third-Party Financing of Class Actions: Recent Judicial Decisions, Ethical and Practical Considerations

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## Introduction

- Today's topic: class action (and therefore attorney-directed) litigation funding.
- We will also speak about client-directed litigation funding and about attorney-directed mass tort litigation funding.
- We may address potential new defense-side litigation funding options.
- Not covered: individual consumer/personal injury litigation funding.

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## In the Beginning . . . .

- Doctrines like champerty, barratry and maintenance, but also cases like *Brown v. Bigne*, 28 P. 11, 13 (Or. 1891):
  - A fair bona fide agreement, by a layman, to supply funds to carry on a pending suit, in consideration of having a share in the property if recovered, ...ought not to be regarded as *per se* void....Indeed, it may sometimes be in furtherance of justice and right that a suitor who has a just title to property, and no means except the property itself, should be assisted in that way.**
- Developments in the U.K. and Australia precede the U.S. (and the sky has not fallen)

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## Today's U.S. Litigation Funding Market

- Collateralized loans secured by a law firm's receivables are still at the heart of most lawyers' and firms' financing.
- But there are problems caused by lawyers' (and/or clients') lack of access to capital.
- The growth and development of the U.S. claims transfer market.
- An "access to justice" issue but also a genuine financing and risk issue for lawyers and clients.

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## Nomenclature

- Litigation Finance
- Litigation Funding
- Third Party Funding
- Alternative Litigation Finance
- Commercial Claim Investing

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## IT ALL STARTED WITH EDWARD LONGSHANKS, HAMMER OF THE SCOTS

- Maintenance
- Champerty
- Speculation
- Usury



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## 700 Years of Randomness

Contingent Fees Permitted in the US  
**Contingent Fees Absolutely Illegal in England**

Champerty De-criminalized in England  
**Champerty Criminalized in Mississippi**

Loser pays rule in England  
**No Loser pays rule in US**

Usury prohibitions abolished in England  
**Usury regulated in the US**

All had impact on Access to Justice and Flows of Capital  
into law markets

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## Recent Developments

TPF Permitted by Legislation in England  
**Champerty largely ignored in US States**

Hedge and Private Equity Firms  
pouring into in Litigation

**English Lawyers permitted to charge  
Contingent fees (DBAs)**

Gambling increasingly legal in  
Common Law World

**Interest charges common in the Islamic world  
Derivatives of Derivatives**

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## The Key Issues

- Stigma and the “Inauthentic Claim” (the stranger’s money should not flow to litigants or lawyers because it upsets the natural symmetries and balance of the justice process)
- Independent Professional judgment is fragile and will be compromised by the stranger’s money
- Client secrets cannot be preserved when strange money comes into the system
- The lawyer monopoly over “investments” in cases perpetuates the quarantine

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## Why Do Law Markets Want Capital?

Access to justice

Law firm capital demands

Complete or partial alternative to contingent fees

Liquidity for working capital or expenses

Risk hedge against assets of speculative value

Choice and Options

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## Who are Law Market Capital Participants?

Lawyers

Banks

Retail

Commercial

Ad hoc investors (funds, HNWIs and institutional investors)

Insurance companies

Brokerage/agents/intermediaries

*How much* has been invested?

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## ***How is Capital Entering the Law Market?***

Recourse or non-recourse loans to claim or judgment holders

Direct purchases of interests of claim or judgment holders

Recourse and non-recourse loans to lawyers secured by fees

Hybrid litigation risk-sharing arrangements

Derivatives: collars and floors

Insurance products

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## Issues in Client-Directed Litigation Funding and How They are Addressed

- Conflicts of interest if lawyers represent the client in negotiations with the funder or if the lawyer wants to be the funder.
- Potential interference with client confidentiality and work product; defense ability to access.
- Potential interference with attorney judgment.
- Enforceability issues.

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## Why Should Lawyers, Instead of Clients, Direct Litigation Funding?

- Named class members can't bind the class.
- Individual mass tort plaintiffs can't borrow enough.

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## Issues in Class Action Litigation Funding and How They are Addressed

- Conflict of interest issues if the plaintiff's firm represents the client(s) in negotiating with a funder.
- Potential interference with client confidentiality and work product; defense (and court) ability to access.
- Potential interference with attorney judgment.
- Enforceability issues.
- Disclosure to client issues.
- Enforceability issues.
- Fee splitting issues.

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## A Funny Thing Happened on the Way Through NYC

- NYC Bar Ethics Opinion 2018-5 and RPC 5.4(a).
- Contrary to recent New York caselaw.
- Contrary to much of history of RPC 5.4(a).
- Not revoked, but under further study.
- *But see* Comment [2] to New California RPC 5.4.
- Possible federal preemption argument.

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## Wrapping Up

- Other recent cases and opinions of note.
- On the horizon or already here: defense-side litigation funding.

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# Open Questions and Answers



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