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LITIGATION FINANCE
An Overview for Receivers

By Daniel Seligman

In 2016, bankruptcy trustee Lee Buchwald had a problem. After years of litigation, he had won a $213 million judgment for the creditors of the Magnesium Corporation of America ("MagCorp"), a defunct mining company. Buchwald's next task was to protect the judgment on appeal. What would happen if he lost? He had almost no money in the bank to start litigation all over. His legal counsel had been working for more than a decade on a contingency fee. If the defendants succeeded in overturning the judgment, the creditors could end up with nothing.[1]

Buchwald's solution was to sell a portion of the judgment to the highest bidder for cash. With the money, he would pay the estate's administrative expenses and some creditors no matter what happened. The cash, in his words, would provide him with a "hedge" — an insurance policy of sorts — against an adverse decision on appeal. With this innovative transaction and the accompanying press coverage, Buchwald helped introduce litigation finance to a wider audience in the insolvency world and demonstrated its versatile uses for trustees and receivers.

The Litigation Finance Industry

Once considered a fringe industry and risky legal strategy, legal finance has entered the mainstream in the United States and elsewhere, as markets open up in Singapore[2], the Grand Caymans[3] and Canada,[4] for example. It is now a multi-billion dollar industry and growing rapidly.

In a typical transaction, a litigation funder — a third party with no official connection to the case — will invest money to pay some or all of the costs of a lawsuit in exchange for a share of the proceeds if the lawsuit is successful. Sometimes, the litigation funder's investment is earmarked for other uses, such as Buchwald's proposed

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partial distribution to creditors, or even the costs of running a business while the litigation is underway. The litigation funder doesn't act as counsel. Nor does it bring in its favored lawyers as advisors to oversee the litigation. Its investment is almost always a non-recourse transaction, meaning that if the recipient (usually a plaintiff) loses the case, the litigation funding firm does not recover any money; it has lost its investment. The funder makes money only if the case is won or a settlement is reached. The rewards can be quite handsome, with proceeds in the tens of millions.

Beyond the "Ick Factor"

Because of concerns that litigation finance will encourage frivolous lawsuits, it's not surprising the industry has vocal critics. "Quite understandably, the idea of 'funding lawsuits' doesn't sit well with a lot of people," the *Litigation Finance Journal* acknowledges.[5] "The notion that a plaintiff might sell a stake in their lawsuit to a third party (thereby transforming the lawsuit into an investable asset) just feels…a bit *icky*. But the truth is, once people look beyond the 'ick factor,' they're often surprised to learn that not only are their concerns unfounded, but that litigation finance actually benefits individuals and small businesses who are most in need. In fact, one might easily argue that litigation finance helps remove a good portion of the 'ick' from our current legal system."[6]

Nonetheless, some high profile cases have raised questions in the public mind. The lawsuit against Gawker Media by wrestler Hulk Hogan turned out to be financed by Silicon Valley billionaire Peter Thiel, who critics say had a grudge against Gawker.[7] More recently, the role of litigation funding firms in the ongoing N.F.L. concussion cases has provoked criticism. Some players sought loans from the firms based on their share of the settlement. In response, the N.F.L and others have questioned whether players, who suffer from a variety of mental and physical conditions, fully understood what they were doing when they signed away a portion of their claims for instant cash from the litigation funding firms. In 2017, the federal district court judge overseeing the litigation banned the funding agreements.[8]

The Chamber of Commerce's Objections

"This is casino litigation, where we all lose," Lisa Rickard, president of the U.S. Chamber of Commerce's Institute for Legal Reform, wrote in an op-ed piece two years ago for the *New York Times*. Allowing a funding firm to underwrite litigation "is a cancerous growth on our civil justice system, turning our courts into profit centers, increasing the number of lawsuits in an already-over-sued society, shifting control of lawsuit decisions toward funders rather than litigants, and reducing settlements for truly deserving victims."[9] The Chamber has called for federal courts to adopt mandatory disclosure laws requiring litigation funders to reveal their agreements with clients to the court (and presumably to opposing parties).[10] The Chamber has even called for an (unspecified) federal agency to regulate litigation finance. Ironically, the Chamber which almost always opposes regulation or wants less interference from the federal government when it comes to environmental matters or labor regulations, has embraced more federal involvement and oversight of the litigation finance industry.[11]

The industry has pushed back. "It is well known that the Chamber of Commerce is not simply critical of litigation funding—it's generally critical of litigation in all forms," wrote Christopher Bogart, the CEO of Burford Capital in response to the Chamber's criticism.[12] The Chamber's opposition "must be understood as part of an overarching effort to limit the use of the judicial process, regardless of the merits or financing mechanism."[13]

"A Match Made in Heaven"

There are many uses of litigation funding — from consumer lawsuits to breaches of contract and mass torts. But insolvency cases often seem the most compatible. Allison Chock, CIO of Bentham IMF, an Australian-based litigation finance firm with offices in the United States, describes the opportunities for litigation finance in insolvency cases as a "match made in heaven."[14] Why? Because an insolvency estate, by definition, is strapped for cash and the trustee or receiver is often trying to maximize the value of meager assets, she argues.[15]

Trustees and receivers regularly find themselves in charge of a company that has a legitimate claim against a competitor or a former official for bad behavior. Perhaps the company was the victim of fraud by a supplier. Or perhaps a former executive engaged in insider transactions and diverted funds. In many situations, the trustee or receiver may want to file a lawsuit for damages but simply doesn't have the money to pursue the case. Or perhaps the trustee has a modest pot of cash but is wary of the time and resources needed to go down the litigation road, knowing that the attempt to obtain documents from the defendant, particularly a large prosperous adversary, will likely produce a backlash. As one federal court succinctly noted: "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."[16]

Hence the appeal of litigation finance, which allows a trustee or receiver to think of litigation as an asset rather than as a potential burden or liability against the estate (e.g., someone owes the estate money). Proponents say the industry has a role to play at any stage of the insolvency process. To be sure, the opportunities early on are probably more varied. But Lee Buchwald demonstrated how litigation finance could help MagCorp years after it filed its bankruptcy petition.

The Saga of MagCorp

Buchwald began serving as MagCorp trustee in 2003, roughly two years after the company filed for Chapter 11 protection in U.S. Bankruptcy Court for the Southern District of New York (Manhattan).[17] Four months later, in response to Buchwald's motion, the court converted the case to a Chapter 7 liquidation. Buchwald then became the trustee of the Chapter 7 estate. At the time, it faced enormous environmental claims from its magnesium mining operations on the shores of the Great Salt Lake in Utah.[18]

The most significant breakthrough came in 2015, after a long jury trial in U.S. District Court, when Buchwald won the stunning $213 million judgment against company founder Ira

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Rennert and his Renco Group.[19] The press described the verdict as the culmination of a contentious effort—a crusade—to recover funds allegedly diverted before the filing of the bankruptcy petition.[20] Articles described how Rennert had supposedly spent millions in MagCorp dividends to help pay for a 43,000-square-foot mansion with 18 bathrooms on 63 acres of oceanfront property on Long Island, New York.[21]

At trial, Rennert's lawyers argued that the trustee's case was deeply flawed. MagCorp, they said, was the victim of a downturn in magnesium prices and other forces, including the illegal dumping of magnesium by China, not any shenanigans.[22] Even after the verdict, Rennert's lawyers showed no signs of folding or even wanting to negotiate a settlement. They told the press that the jurors "acted in an irrational and confused way" and announced they would appeal.[23] The fight would continue.

MagCorp, however, had minimal assets. "I had only $670,000 in the bank and had been litigating with a billionaire [Rennert] for 13 years," Buchwald recalled. "I was confident I would ultimately win the appeal and collect on my $213 million judgment," Buchwald said, but "all litigation is inherently speculative."[24] He needed help. His lawyer, Nicholas F. Kajon, described the situation this way: "The judgment was the only asset we had. It was the only chance for recovery for the creditors."[25]

The 363 Sale

So Buchwald broke new ground. He obtained permission from the bankruptcy judge to auction off a portion of the judgment to an interested buyer who otherwise had no connection with the case.[26] It was the first time that a federal bankruptcy judge had sold a slice of a judgment in an open auction under section 363 of the Bankruptcy Code.

The winning bid came from an affiliate of Gerchen Keller, a litigation finance firm in Chicago (now part of UK-based Burford Capital). Gerchen Keller offered $26.2 million in cash for the right to collect the first $50 million of the judgment. By then, Buchwald's appellate counsel (also working on a contingency fee basis) had filed the briefs before the U.S. Court of Appeals for the Second Circuit, urging the judges to uphold the verdict.

Buchwald understood that if he lost the appeal, he faced a grim situation. "I would not have sufficient resources to continue litigating against well-funded adversaries. I also wanted to be sure that the long-suffering creditors would receive recoveries regardless of the outcome of the appeal."[27] The sale to Gerchen Keller was Buchwald's hedge against the downside of losing in court. Under provisions of the sale, the cash would go to pay the administrative expenses of the estate and then creditors, not the trial lawyers.

The timing of the 363 sale was carefully chosen, Buchwald explained to the bankruptcy court. "If oral argument [in the U.S. Court of Appeals of the Second Circuit] goes poorly…I will not be able to monetize this asset on such favorable terms, if at all."[28]

As it turned out, Buchwald didn't lose. In March 2017, the appeals court affirmed the jury verdict and the $213 million judgment.[29] The defendants then sought to have the U.S. Supreme Court hear the case but that effort was unsuccessful.[30] It was the end of the road, and in October 2017, they finally paid the judgment in full. Litigation financier Burford Capital (which had purchased Gerchen Keller by that time) was paid its share.

The Champerty Trap

As the MagCorp case shows, the merits of litigation finance are considerable. But there are also a number of potential pitfalls and obstacles. Trustees and receivers are well-advised to exercise due diligence before they accept money from outside sources because things sometimes don't go as smoothly as they did for Buchwald.

Just ask Elaine Rudisill, the liquidating trustee for DesignLine Corp., a manufacturer of hybrid buses based in Charlotte, North Carolina, which filed for Chapter 11 bankruptcy in 2013.

Three years after becoming trustee, Rudisill had initiated more than 100 adversary proceedings. Of those lawsuits, only three were unresolved when she proposed to sell a portion of the proceeds from the litigation to RDSL, an affiliate of Parabellum Capital in New York City. The legal proceedings, all against insiders, were "breathtaking" in scope and involved "titanic litigation," according to Judge J. Craig Whitley. One action alone raised 131 causes of action against 18 defendants around the world.[31]

Initially, Rudisill attempted to seal (prevent from disclosure) the terms and conditions with RDSL not just from adversaries but from parties to whom she owed a fiduciary duty. Judge Whitley denied her motion.[32] In response, Rudisill sought to seal only some documents. This time, the judge agreed. But the judge denied Rudisill's accompanying motion to approve the RDSL transactions.[33] The RDSL agreements, the judge said, "did not comport with her stated intentions."[34] Nonetheless, Judge Whitley gave Rudisill and RDSL the right to amend the agreements once more and bring them back to the court for approval.

Then a different and more difficult problem raised its head: champerty, a doctrine dating back to medieval England that prohibits third parties from financing litigation and stirring up legal strife. Champerty laws — along with prohibitions against "maintenance" and "barratry"— were initially enacted to discourage frivolous lawsuits by individuals who were not party to the dispute and had no vested interest in it. Each of the three offenses involved somewhat different behavior. "Maintenance" referred to the filing of a lawsuit by someone who had no genuine dispute with the other party. "Champerty" was a subset of maintenance but with a twist: the party who encouraged the lawsuit stood to profit by the outcome. "Barratry" was usually defined as serial maintenance, the filing of multiple and repeated frivolous lawsuits.[35]

In the modern-day United States, champerty was (and is) on the wane, "narrowed to a filament," in the words of one federal court that described the nationwide trend to prune away the champerty doctrine.[36] But North Carolina was an exception. The narrow filament was a trip wire there because North Carolina has a champerty statute on its books.

The defendants argued that the trustee's agreements with RDSL ran afoul of the statute and were therefore void. For Judge Whitley, the issue came down in large part to this question: Did RDSL control the litigation? If so, the agreement was champertous. Although Rudisill insisted that RDSL had little or no

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influence over the fate of the litigation and was just a "passive onlooker," the judge found otherwise.[37] The trustee's contract gave the "power of the purse" to RDSL. It required Rudisill to return to RDSL each quarter "and ask RDSL to open its wallet," the judge said. Furthermore, Rudisill had to "consult with RDSL if she wanted to change lawyers." The cumulative effect of those provisions made the RDSL agreements champertous, the judge said in denying her motion to approve the transactions.[38]

Proponents of the litigation funding industry suggest that the holding in the *DesignLine* case is of limited significance. The bankruptcy court did not conclude there was a blanket prohibition on litigation funding in North Carolina. Indeed, it might have approved another litigation funding agreement where the trustee relinquished less control of her responsibilities. If nothing else, the case is a reminder that a trustee's proposed agreement with a litigation funder will receive careful, if not intense, scrutiny if champerty is an issue.

Ethics Rules

Another important issue is the ethics rules for lawyers. Although the American Bar Association's Commission on Ethics 20/20 concluded that litigation finance does not raise *per se* conflicts, it identified several areas of concern, including protection of attorney-client privilege, the confidentiality of attorney work product, and the prohibition against attorneys sharing their fees with non-lawyers.[39]

The fee-sharing issue, which involves the interpretation of Model Rule 5.4(a), came up in a recent opinion issued by the New York City Bar Association. In August 2018, the NYC Bar held that a lawyer may not enter into a financing agreement with a litigation funder (a non-lawyer) under which a lawyer will make future payments to the funder contingent on the lawyer's receipt of legal fees.[40] The rule "presupposes that when non lawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer."[41]

The Chamber of Commerce was quick to pounce. It described the opinion as a "full-throated condemnation of a core element of the litigation funding business model: promising a percentage of anticipated fees in exchange for cash."[42]

What impact will this opinion have in other jurisdictions? It's too early to tell. But both litigation funders and insolvency practitioners should follow this issue carefully. Some of the largest litigation funding firms have underwritten portfolios of claims, where they pay for a broad variety of litigation (from medical torts to bankruptcy to commercial fraud); they depend on agreements with law firms to recover their investment. The details of those transactions are typically private and not in the public domain so it is difficult to assess whether they would run afoul of the NYC Bar opinion (assuming it is adopted as a rule). Nor do we know if there is an alternate way of restructuring the litigation funding arrangements to avoid the constraints of Model Rule 5.4(a).

Disclosure to the Court

Yet another important issue is the disclosure of the litigation funding agreement to the court and the possible forced disclosure of communications between the client, the lawyers and the litigation funding firm.

At present, there is no federal rule that requires automatic disclosure of the existence of a litigation finance contract in federal district court.[43] Neither the Federal Rules of Civil Procedure nor U.S. Supreme Court precedent require lawyers to divulge if they have obtained money from a litigation funder.[44] In one pending multi-district commercial case, the national prescription opiate litigation, a federal district court judge adopted a minimalist approach. He required the lawyers that have obtained litigation financing and the funder to submit a letter to the court describing their agreement and two sworn statements (one from the lawyer, the other from the funder) verifying that the arrangement does not create a conflict of interest or give the funder control of the lawsuit.[45]

But bankruptcy trustees and receivers operate under different rules. They act in a fiduciary capacity—–their appointment comes from the court itself—–and they must disclose sales of significant assets to the court. If a bankruptcy trustee, for example, wishes to sell a claim (litigation) to a third party, there is a process under section 363 of the Bankruptcy Code to do just that. Lee Buchwald, as trustee of MagCorp, used that provision in his sale of the claim. He filed a complete copy of the proposed litigation contract with Gerchen Keller with the court.[46]

Could a trustee avoid the 363 process and sign an agreement with a litigation funder without going through an auction like the one Buchwald conducted?

In Chapter 7, the general answer is "no." A trustee would have to disclose and get authority of the court to proceed. In a Chapter 11 proceeding, perhaps there's a different answer if the trustee has been given broad authority to pursue whatever litigation is necessary and to settle claims. But even then, should a trustee assume the responsibility to act alone? How would the trustee select the litigation funder? Under what terms and conditions? Could competitors argue that the trustee signed a sweetheart deal? How will the judge react when he or she finds out (and learns that the transaction was consummated in private without court approval)?

The Work Product Doctrine

Suppose a trustee or receiver signs a litigation funding agreement. How much information is disclosed during the lawsuit to opponents about the transaction and its background?

In general, the "work product privilege" protects documents that are prepared in anticipation of litigation or for trial by or for another party or its representatives.[47] Think of an internal legal memorandum, prepared by a firm's counsel, which evaluates the merits and deficiencies of potential litigation. Can the other side of the dispute see the document if litigation is filed based on the analysis in the memorandum? No. But what happens if the lawyers for the trustee share their research or analysis with a litigation finance firm? The firm will not pay for litigation or buy a claim without going through a rigorous due diligence process, which will likely entail multiple reviews of documents and conversations with the trustee/receiver that has filed (or wants to file) the litigation. What happens then?

Two cases illustrate the different approaches used by courts,

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with different fact patterns and nuances that compelled somewhat different reasoning by the court and different results.

In a 2014 case, *Miller UK Ltd. v. Caterpillar*, the federal district court in Illinois was asked to decide whether communications between the plaintiff Miller and potential litigation funders were protected under the work product privilege, which "establishes a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary."[48] The privilege is based on the "deeply felt notion" that the opposing party should not be allowed to take a free ride on the other party's research "or get the inside dope on that party's strategy."[49] In some instances, the voluntary disclosure to a third party (such as a litigation funder) waives the work product privilege but only if the documents are disseminated in a manner that increases the opportunity they will eventually be divulged to adversaries. In this instance, the judge said Miller took precautions with some litigation funders to prevent disclosure to adversaries through confidentiality agreements. For those funders, the court held the work product privilege applied. In other instances, however, where Miller did not have a confidentiality agreement, the judge ordered the company to produce the documents for an *in camera* (private) review.[50]

In contrast, consider the approach used by a bankruptcy court in Florida in the case of *In re International Oil Trading Company* ("IOTC"), the culmination of a bitter contract dispute between IOTC and businessman Mohammad Al-Saleh.[51] The attorney-client privilege and the work product privilege were both issues in that case.

IOTC and Al-Saleh, the brother-in-law to Jordan's King Abdullah II, initially teamed up to provide fuel transportation across Jordan for U.S. military transport to Iraq. Al-Saleh's relationship with IOTC eventually soured, and Al-Saleh sued IOTC in Florida in 2008. Three years later, Al Saleh won a $28.8 million judgment that was upheld on appeal.[52] But Al Saleh's attempts to collect were unsuccessful. In response, he filed an action in 2015 to force IOTC into involuntary bankruptcy.

Meanwhile, Al-Saleh had sold the judgment to Burford Capital, the UK-based litigation financing firm. Burford later explained that it decided to help underwrite the case because Al-Saleh "was left with a very expensive piece of legal paper [the judgment] against individuals who were more than able to pay him what they owed — but chose not to."[53] IOTC vigorously opposed Al-Saleh's efforts to force the company into bankruptcy and said that Burford was the real party in interest. In discovery, IOTC attempted to obtain all communications between Al-Saleh and Burford as well as the litigation funding agreement itself. When Al-Saleh refused, IOTC sought to compel disclosure.

In a 2016 decision, the bankruptcy court found that Al-Saleh's communications with Burford were protected under both the attorney-client privilege and the work product doctrine.[54] Although disclosure of communications with an outside entity normally waives the attorney-client privilege, Judge Erik P. Kimball found that Al-Saleh's communications were covered by two exceptions to waiver known as the "common interest exception" and the "agency exception."[55] The "common interest exception" applies to instances where the third party and the client have a reasonable expectation of privacy and have embarked on a common enterprise, as was the situation in the IOTC case, the judge said.[56] The "agency exception" allows the court to exclude from discovery those communications between the client and non-attorney professionals (agents) who further the litigation aims. Both exceptions applied in this case, Judge Kimball concluded, and he denied IOTC's effort to obtain communications between Al-Saleh and Burford.[57]

The judge also declined to force the disclosure of communications under the work product doctrine. Nonetheless, he ordered Al-Saleh to produce the funding agreement to IOTC, minus payment terms and other materials that would reveal legal counsel's impressions and opinions of the litigation.[58] "Given the apparent complexity of the [funding] agreement and the admitted depth of Burford's involvement in the multi-faceted litigation against IOTC USA, no other document production, depositions, or other discovery methods will adequately substitute for the original document. Without access to key portions of the Funding Agreement, IOTC USA cannot hope to support a central component [of its argument]."[59]

Conclusion

Litigation finance is a hugely important and promising tool in insolvency cases. But complex legal issues are being resolved in the United States and elsewhere on a case-by-case basis, with pitfalls for the unwary or ill-prepared trustee or receiver. "The only limits are your imagination," says trustee Lee Buchwald about the litigation funding option. True enough for the sophisticated practitioner. The opportunities are indeed enormous but the downside is a litigation swamp with protracted disputes over confidentiality, document production and other issues. Approach with enthusiasm but caution.

ENDNOTES

1 Phone interview with Lee Buchwald, August 20, 2018.

2 In January 2017, Singapore's Parliament amended the civil law to allow third party funding for arbitration and abolishing the common law tort of maintenance and champerty. *Litigation Finance Journal*, "How Singapore Welcomed and Regulated Third Party Litigation Funding," February 13, 2018.

3 In a recent decision, the Grand Court of the Cayman Islands approved a commercial third-party funding agreement in *A Company v. A Funder* case, an unreported case from Justice Segal (November 23, 2017). See analysis in an advisory from Campbells Law Firm, January 5, 2018, available at www.campbellslegal.com/news-events/articles Champerty and maintenance are civil offenses in the Grand Caymans and while the opinion is not precedent, commentators praised its analysis and said it would serve as helpful guidance in the future. "The Grand Court's opinion is being viewed by many practitioners as a significant step towards sanctioning the use of litigation finance in the Cayman Islands," according to a summary from the Bentham IMF litigation funding firm. "While this may be correct, it's important to remember that legislative action is required to abolish the torts and offenses of maintenance and champerty in the jurisdiction." See, Bentham IMF, *Breaking*

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Down Barriers to Commercial Litigation Finance in the Cayman Islands (February 5, 2018).

[4] Litigation funding (sometimes referred to as "third-party finance") is growing in Canada. The long-standing common law doctrine of champerty served as a deterrent until 2015, when the barriers started to come down. In a 2018 decision, for example, the Quebec Court approved a litigation funding agreement for an insolvent company operating under court protection, *Re 9354-9186 Quebec Inc. (Bluberi Gaming Technologies Inc.)*, 2018 QCCS 1040. The Court confirmed that third-party agreements are not *per se* illegal and will likely be approved subject to the following principles: 1) the agreement is necessary to provide the plaintiff with access to justice; 2) the plaintiff's right to instruct and control the litigation are not diminished by the third-party agreement; 3) the agreement must not impair or compromise the lawyer and the lawyer-client relationship; 4) the compensation to the funder must be fair and reasonable; and 5) the third-party funder must keep confidential any privileged information. For additional information, see *The Third Party Litigation Funding Law Review – Edition 1*, article by Hugh Meighen (January 2018).

See, also, *Litigation Finance Journal*, "Litigation Finance is Booming in Canada, eh," October 12, 2017.

[5] *Litigation Finance Journal*, "Everything You Ever Wanted to Know About Litigation Finance," December 27, 2017, available at https://litigationfinancejournal.com/litfin101/everything-ever-wanted-know-litigation-finance

[6] *Id*.

[7] Peter Thiel's involvement as the financier of the lawsuit against Gawker Media initially remained secret but was eventually disclosed after the lawsuit was filed. A jury in March 2016 awarded Hogan (whose real name is Terry Bollea) $140 million in damages for invasion of privacy when it published portions of a sex tape of Hogan. Three months later, Gawker filed for Chapter 11 bankruptcy protection and put itself up for sale. https://en.wikipedia.org/wiki/Bollea_v._Gawker In November 2016, Gawker and Hogan settled for $31 million. See, *New York Times*, "Gawker and Hulk Hogan Reach $31 Million Settlement," Nov. 2, 2016.

[8] The NFL established a $1 billion fund for football players to submit individual claims for money damages. A provision in the settlement agreement that the players signed with the NFL prohibited them from assigning their claims to another person or entity, according to a federal district court judge in Pennsylvania who blocked the litigation funding agreements when they came to light. *New York Times*, "Judge Voids Loans to Impaired Players in N.F.L. Concussion Case," December 8, 2017. See, *In re National Football Players' Concussion Injury Litigation*, 12-md-02323, Doc. 9517 (December 8, 2017). "The purpose of the anti-assignment provision [in the settlement agreement] is to protect the interests of Class Members [the players] by recognizing that Class Members receiving monetary awards are by definition cognitively impaired." Order at pages 1-2. See, also, *Litigation Finance Journal*, "NFL Concussion Case: Judge Brody Blocks Litigation Funding Agreements," December 11, 2017. Some players had apparently assigned their claims to litigation finance firms in exchange for cash up front but paid high interest rates for the money. See, for example, the agreement of 11-year veteran player William White, who apparently assigned a portion of a $3.5 million settlement in exchange for a $500,000 advance which he used to pay off outstanding tax liens to the Internal Revenue Service. *Litigation Finance Journal*, "Parties Await Ruling on Pending Arbitration in NFL Concussion Case," May 15, 2018.

[9] Lisa Rickard, "This Is Casino Litigation, Where We All Lose," *New York Times*, May 27, 2016.

[10] See, for example, comments submitted by the U.S. Chamber of Commerce's Institute for Legal Reform and other parties to the Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the U.S. Courts, June 1, 2017, in regard to proposed rule changes. The Chamber asked the Committee to amend the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding arrangements in any civil action in federal court. For a contrary opinion, see the response submitted by Burford Capital LLC on September 1, 2017.

[11] Chamber of Commerce, Institute for Legal Reform, "Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation," October 2012.

[12] Christopher P. Bogart, "The Case for Litigation Financing," October 11, 2016, available on the Burford Capital website, www.burfordcapital.com/blog/case-litigation-funding, and published in the American Bar Association journal, *Litigation*, Vol. 42, No. 3, spring 2016.

[13] *Id*.

[14] *Litigation Finance Journal*, "Litigation Funding + Insolvency = A Match Made in Heaven," January 26, 2018, available at https://litigationfinancejournal.com/tag/allison-chock

[15] *Id*.

[16] *Miller UK Ltd. v Caterpillar, Inc.*, 17 F.Supp.3d 711, 718 (N.D. Ill. 2014).

[17] *In re: Magnesium Corporation of America,* case 01-14312.

[18] *In re: Magnesium Corporation of America,* case 01-14312, Doc. 1008 (Trustee's *31st Interim Status Report*), May 15, 2018, pages 1-2.

[19] The trial took place between February 2 and February 27, 2015 in U.S. District Court for the Southern District of New York (Manhattan).

[20] *New York Post*, "Billionaire Ira Rennert ordered to pay $118 million for looting own company," February 27, 2015. For background information about Rennert and the Magnesium Corporation of America, see https://en.wikipedia.org/wiki/Ira_Rennert

[21] It reportedly cost $110 million to build the Rennert mansion, www.businessinsider.com/ira-rennerts-hamptons-mansion-2015-3

[22] Bloomberg, "Billionaire Rennert Found Liable in MagCorp Looting Lawsuit," February 27, 2015.

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[23] *New York Post*, "Billionaire Ira Rennert ordered to pay $118 million for looting own company," February 27, 2015.

[24] Burford Capital Quarterly (May 2017), *Q&A: An Interview with Lee Buchwald and Nicholas Kajon*, available at www.burfordcapital.com/blog/magcorp-interview-buchwald-kajon

[25] Reuters, "Litigation funding in bankruptcy 'should be in every trustee's toolkit,'" March 14, 2017, available at www.reuters.com/article/us-otc-bankruptcy-idUSKBN16L2HJ

[26] *In re: Magnesium Corporation of America*, case 01-14312, Doc. 745 (Order Approving Sale of Renco Litigation Interest), August 24, 2016.

[27] *In re: Magnesium Corporation of America,* case 01-14312, Doc. 1008 (Trustee's Interim *31st Interim Status* Report), May 15, 2018, page 17.

[28] *In re: Magnesium Corporation of America*, case 01-14312, Doc. 736 (Supplemental Declaration of Lee E. Buchwald), August 19, 2016, pages 4-5.

[29] See summary order, *In re: Magnesium Corporation of America*, U.S. Court of Appeals for the Second Circuit, case 015-2691 (March 8, 2017), available at: http://www.ca2.uscourts.gov/decisions.html See, *Wall Street Journal*, "Court of Appeals Upholds $213 Million Judgment Against Renco," March 8, 2017.

[30] Petition for Writ of Certiorari, *Renco Group, Inc. et al v. Buchwald*, (No. 17-228), denied October 10, 2017.

[31] *In re DesignLine Corp*., 565 B.R. 341, 343 (Bankr. W.D. N.C. 2017).

[32] *Id*. at 344.

[33] *Id*. at 344.

[34] *Id*. at 344.

[35] The term "champerty" is derived from the French "champart," which in Medieval France was a tax levied by a landowner on tenants and paid as a share of the harvest (a percent of the crops). https://en.wikipedia.org/wiki/Champart *See, also,* Max Radin, *Maintenance by Champerty*, 24 Cal L. Rev. 48 (1935). Each of these prohibitions—-maintenance, champerty and barratry—was incorporated in many U.S. jurisdictions and some even remained on the books until the 20th century though they were rarely enforced. In New York, for example, a certain Philip Budner made legal history in 1965 when he was convicted of barratry, the first time the statute had been used since its enactment by the state legislature in 1881. Budner had apparently ordered a suit from a Manhattan clothing store and much to his chagrin, it did not fit. Budner filed nine separate claims or other actions against the company. *People v. Budner*, 15 N.Y.2d 253, 206 N.E.2d 171, 258 N.Y.S.2d 73 (1965).
For a helpful historical analysis of the role of maintenance, champerty and barratry, see the speech of Lord Neuberger, president of the UK Supreme Court, at Gray's Inn, "From Barretry, Maintenance and Champerty to Litigation Funding," the First Annual Harbour Litigation Lecture, May 8, 2013, available at: https://issuu.com/harbourlf/docs/harbour_first_lecture/1?e=13703349/11583407

[36] *Miller UK Ltd. v Caterpillar, Inc.*, 17 F.Supp.3d 711, 727 (N.D. Ill. 2014).

[37] *In re DesignLine Corp*., 565 B.R. 341, 346 (Bankr. W.D.N.C. 2017).

[38] *Id*. at 348-349.

[39] The American Bar Association's Commission on Ethics 20/20 examined the impact of technology and globalization on lawyer ethics and regulation. See draft *White Paper on Alternative Litigation Financing*, which concluded that the growing use of litigation funding did not require any adjustment in professional conduct rules for lawyers. See, *ABA Journal*, "Ethics 20/20 Commission Issues White Paper about Alternative Litigation Financing" (December 2011).

[40] New York City Bar Association, Formal Opinion 2018-5 (August 2018).

[41] *Id*., pages 5-6.

[42] https://www.instituteforlegalreform.com/issues/third-party-litigation-funding See blog for August 16, 2018. "A Big Win for Integrity: New York City Bar Association Rules Out Splitting Fees with Investors."

[43] Although there is no national rule requiring disclosure of litigation financing, the federal district court in the Northern District of California has adopted a local rule, L.R. 3-15, "Disclosure of Non-party Interested Entities or Persons," which states that upon first making an appearance in any proceeding, each party must disclose "any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves 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." Six federal Courts of Appeals have adopted local rules requiring parties to identify litigation funders. There is no rule, however, which requires the disclosure of the litigation finance agreement itself. See, for example, the Third Circuit's rule L.R. 26.1.1(b), which states that "every party to an appeal must identify on the disclosure statement required by FRAP [Federal Rules of Appellate Procedure] 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of the interest." Note the application only to publicly-owned corporations, which would exclude hedge funds and other private investment vehicles. The State of Wisconsin is the only state to mandate limited disclosure for its state courts. See, recent passage of AB 773 and signed into law by Governor Scott Walker (April 2018).

[44] Outside of bankruptcy cases, there are few instances where a complete litigation funding agreement has been placed in the public record. One of the exceptions occurred in a class action lawsuit in federal district court in California. As a general rule, in cases where class certification is an issue, courts have more latitude to inquire into the ability of counsel to pursue

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the litigation. That was the situation in a case against Chevron brought by a fisherman in Nigeria and others who alleged that an explosion on a drilling rig in 2012 damaged natural resources in that country. The judge ordered disclosure of the plaintiff's litigation funding agreement with no redactions in large part because Chevron raised questions about the adequacy of counsel (in this case, a small litigation firm in California) to represent the proposed class of claimants. Furthermore, counsel for the plaintiffs had not claimed privilege for the document. During the course of discovery Chevron's legal counsel learned of the plaintiffs' funding agreement with Therium Litigation Funding, a UK-based firm. The court ordered the plaintiffs to release the full agreement because it "is relevant to the adequacy [of legal representation]." See *Gbarabe v. Chevron Corp.*, 14-00173, Doc. 159 (Order Granting in Part Defendant's Motion to Compel), August 5, 2016. For background information about the case, see *American Lawyer*, "How Jones Day Unmasked a Litigation Funding Deal and Won," October 29, 2017. The court ultimately denied the request for class certification, Doc. 250 (March 13, 2017), and the case was dismissed, Doc. 270 (August 2, 2017). The *Gbarabe* case has been characterized as an "outlier" in some commentary. See, for example, Garrett Ordower, "Litigation Finance: Work Product & Discovery in the Wake of Gbarabe v. Chevron" (December 14, 2017), available at https://lakewhillans.com/articles.

[45] *In re: National Prescription Opiate Litigation*, case 17-md-02804, pending in the Northern District of Ohio. In May 2018, Judge Dan Aaron Polster ordered attorneys who have obtained litigation funding to submit *ex parte* and in camera for review a letter identifying and briefly describing the financing arrangement as well as two sworn statements (one from counsel, the other from the lender) that the financing agreement does not: 1) create a conflict of interest for counsel; 2) undermine counsel's obligation of vigorous advocacy; 3) affect counsel's independent judgment; 4) give the lender control over litigation strategy or settlement decisions; or 5) affect party control of settlement. See Doc. 383, filed May 7, 2018.

[46] *In re Magnesium Corp. of America*, case 01-14312, Doc. 729-1 (August 12, 2016).

[47] The work product doctrine (sometimes referred to as a "privilege') generally protects from discovery any documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative, including the other party's attorney or consultant. Fed. R. Civ. P. 26(b)(3). See, generally, *Hickman v. Taylor*, 329 U.S. 495 (1947). The party asserting the work-product protection carries the burden of demonstrating its applicability.

[48] *Miller UK Ltd. v Caterpillar, Inc.*, 17 F.Supp.3d 711, 734 (N.D. Ill. 2014).

[49] *Id*. at 734, quoting *Menasha Corp. v. U.S. Department of Justice*, 707 F.3d 846, 847 (7th Cir. 2013).

[50] *Id*. at 739.

[51] *In re: Intern. Oil Trading LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016).

[52] NBC News, "Oilman must pay $28.8 million in suit over Pentagon Contract," July 27, 2011. The oilman was Harry Sargeant III, a wealthy Florida businessman and co-founder of IOTC. The dispute between Al-Saleh and Sargeant was described as "having sprung from the pages of a Tom Clancy novel, with allegations of bribery, double-crossing and war profiteering leveled during the three-week trial" in state court in Palm Beach, Florida.

[53] Daniel Hall, "The recovery position in litigation," Burford Capital blog, August 15 2017, available at www.burfordcapital.com/blog/the-recovery-position-litigation

[54] *In re: Intern. Oil Trading LLC*, 548 B.R. 825 (Bankr. S.D. Fla. 2016).

[55] *Id*. at 832-835.

[56] *Id*. at 832-833.

[57] *Id*., page 833-835. What happens if there is no confidentiality agreement and the client has not yet filed litigation but is contemplating doing so? In a recent federal district court in Delaware, the judge found that documents given by Acceleration Bay LLC to litigation funder Hamilton Capital were not protected under the "common interest" waiver because they were prepared before an agreement with a litigation funder was signed and before litigation itself was filed. Nor were the communications protected under the work product doctrine because they were prepared with a "primary purpose" of obtaining a loan, as opposed to aiding in possible future litigation. "For that reason alone, the communications are not work product," the court held. See, *Acceleration Bay LLC v. Activision Blizzard Inc.*, case 16-00453, Doc. No. 461 (Memorandum Order)(Feb. 9, 2018). For a critique of the decision, see https://lakewhillans.com/articles/acceleration-bay-work-product

[58] *Id*. at 839.

[59] *Id*. at 839. It's important to note that in the *IOTC* case, the court found that Burford was involved in litigation strategy and the direction of the law suit. Hence, it and Al-Saleh could prevent the disclosure of information under the attorney-client privilege and the work product doctrine. But champerty was not raised as an issue. If it had been, Burford's argument to protect the confidentiality of communications with Al-Saleh would have undermined its potential defense against champerty, which typically involves an assertion by the litigation funder that is not involved in litigation strategy and does not direct the lawsuit. The situation in *IOTC* did not involve both issues. But practitioners should be aware of the potential conflicts between the issues (the preservation of confidentiality and the defense against champerty) if they arise in the same case.