iclg

# Lending & Secured Finance 2025

13th Edition

Contributing Editor:

**Thomas Mellor**

Morgan, Lewis & Bockius LLP

APLMA Asia Pacific Loan Market Association

LMA Loan Market Association

LSTA Advancing the Corporate Loan Market

glg Global Legal Group

# Editorial Chapters



# Expert Analysis Chapters

# Q&A Chapters



iclg

# An Overview of Litigation Funding



Scott A. Lessne


Paul B. Haskel


Paul Muscutt


John Laird

Crowell & Moring LLP


## 1 Introduction

### 1.1 What is litigation funding?

Litigation financing, third-party litigation funding, professional funding, settlement funding, or legal funding are all monikers that have been applied to a legal structure whereby a third party stranger to litigation provides funding to litigants to finance the fees and expenses of litigation with the hope of receiving a substantial return on the funding investment upon the resolution of the litigation.[1] Third-party funding of litigation or arbitration has become a well-established means of supporting formal legal recovery efforts. It has now also led to legal claims increasingly being seen as an asset class – a financial product – capable of delivering substantial returns to investors albeit at high risk.

Litigation funding has long been associated with arcane and ancient legal concepts such as "maintenance" (helping another prosecute a suit), "champerty" (maintaining a suit in return for a financial interest in the outcome), and "barratry" (the continuing practice of maintenance or champerty).[2] Under these concepts, third-party litigation funding was barred as a matter of public policy virtually universally until the late 20th century. In addition, rules of professional responsibility governing the behaviour of lawyers have also had something to say about a lawyer's role in a litigation funding arrangement, especially in the context of client confidentiality and privilege.

### 1.2 Market background

The litigation funding market has grown from a niche industry in the 1990s to a worldwide industry worth billions of dollars. The growth in the number of cases and litigants receiving litigation funding, and the number of litigation funders, has increased dramatically since the early days of litigation funding arrangements in Australia and in the United Kingdom. It was not until the early to mid-2000s that a similar phenomenon began to take hold in American state courts and legislatures who either abolished, modified, clarified or provided exemptions to their maintenance, champerty and barratry statutes – many of which had been on the books for years and long forgotten.

With the US becoming more hospitable towards litigation funding concepts, the entry of large funds into the marketplace seeking significant investment returns was sure to follow. At the end of 2023, there were 39 active litigation funders in the US with US$15.2 billion under management with another US$2.7 billion's worth of new deal commitments outstanding.[3] Along with a diversity of investor types (dedicated funders, multi-strategy funders, *ad-hoc* funders)[4] are the various structures litigation funders employ, generally broken down into two large categories: single case; or portfolio funding (and commercial or consumer). Within each category there are a variety of case types, structures, nuances, controls, confidentiality issues and due diligence issues that need consideration, all of which assist the litigation funder in making the ultimate decision to fund or not fund and how to document the investment. As litigation funding is often non-recourse, i.e., the entire investment would be lost if there is an unfavourable litigation result, the importance of these decisions cannot be understated. Another key factor in a decision to fund is time. Court timetables often dictate how long it takes to resolve a dispute and this, together with other factors (settlement negotiations and mediations, etc.) are often outside litigants' control. Funders are increasingly considering the terms of the funding arrangements and possible exit routes prior to resolution of the litigation – hence a secondary market has emerged: primary funders exiting certain of their deals to secondary funders.

This chapter will also explore:

- the regulatory regime in the US and England as illustrative primary litigation funding markets, including the legal principles of enforceability of litigation funding agreements, and potential consequences of being a funder or a recipient of litigation funding; and
- the common structures and related issues that arise during the course of negotiating and documenting a litigation funding arrangement.

## 2 Key Players and Benefits

### 2.1 Plaintiffs

On a basic level, plaintiffs may benefit in two ways: (i) by having a third party pay its legal fees and expenses, it allows certain injured parties access to the courts – allowing them to bring a claim when the economics for an attorney to work on a full contingency may be weak; and (ii) obtaining upfront cash from a funder beyond the amount necessary to pay out-of-pocket litigation costs allows a plaintiff to mitigate the risk of losing the litigation, essentially "selling" some portion of that risk to the funder.

### 2.2 In-house legal departments

While healthy corporate enterprises generally can self-fund their own litigation, obtaining third-party financing allows them to reduce the drag on earnings caused by the need to fund lengthy, ongoing litigation. In addition to mitigating the risk of a poor litigation outcome, funding allows corporate enterprises to spread income from a lengthy, meritorious litigation claim over several years by receiving cashflow to pay for the litigation instead of it being a cost to business while foregoing some cashflow later to reward the litigation funder, smoothing financial results.

### 2.3 Contingency law firms

Law firms that generate a large portion of their income from contingent cases, use litigation funding to (i) fund their current cost of operations when their cases are expected to be lengthy, and (ii) reduce the risk of not recovering their fees.

### 2.4 AmLaw 200 law firms

Historically, the largest law firms did little to no plaintiff work and of that, none on contingency. As the competition for talent and overall profitability has grown, many firms are taking on plaintiff cases on a contingent basis. As with the more traditional plaintiff firms, many of these "Big Law" firms are finding that partnering with litigation funders can be beneficial, both in reducing "lock up" of fees and mitigating non-recovery of fees.

### 2.5 Dedicated funders

Dedicated litigation funders are expert at finding, funding and managing funding opportunities. For successful firms, litigation can be a highly profitable, risk-adjusted, non-market correlated source of investment return. Inevitably, some litigations will fail and, hence, funders' portfolios must spread the risk ensuring other investments outweigh any failed investments.

### 2.6 Multi-strategy investment firms

Investing in litigation is highly specialised. Still, some hedge funds and private equity funds include litigation funding as one of the investment strategies available to their clients, who may be attracted by the high, non-market correlated level of returns. Many have found it difficult to compete without dedicated investment professionals. More recently, many of these firms have outsourced this skill set by partnering with dedicated funding firms.

### 2.7 Litigation insurance

An industry in litigation-related insurance has emerged over the past several years, in some cases competing with funders and in other cases partnering with funders. In the English litigation system (where the normal rule is the losing party pays the winning party's legal costs), an "after the event" ("ATE") insurance product has emerged, hedging the risks of court orders to pay the other side's costs in the event of unsuccessful litigation outcomes. Some funders have their own insurance products available and others partner with specialist insurer providers. It is a notoriously expensive product, reflecting litigation risk but protects the insured party from security for costs applications (where defendants try to thwart the claim by claiming the plaintiff cannot afford to pay the defendant's costs if the claim fails) and putting the plaintiff in a robust position to progress to trial without fear of costs. There is also general litigation insurance, including for US litigation where such costs risks are less likely to arise. Unlike litigation funding transactions in which the funder provides capital, insurers are paid a premium by the claimholders (these can be deferred or contingent). If certain loss parameters relating to the underlying claim are met, the insurance company makes a payment to the claimholder/policy holder. In many cases, litigation funders are, themselves, big customers of insurance companies, insuring their own portfolio of litigation finance assets.

## 3 Regulation of Funding Agreements

### 3.1 United States

An overall picture of the legal position for the US is highly complex. Litigants and litigation funders need to consider several issues including the governing law of the funding agreement, the venue of any litigation, and the jurisdiction(s) in which a judgment may be enforced.

New York law in particular is discussed below, as it is a significant financial markets hub, as well as examples of other patterns of behaviour in state-level regulation.

#### 3.1.1 Champerty, control of the litigation and compensation caps

Some US states maintain a negative view of champerty, such as Alabama.[5] Others, such as California, have never strictly had a prohibition against it. Where champerty and maintenance are applicable, generally a funder should not control the litigation.[6]

New York has statutory prohibitions on champerty, which limit the transfer of claims, rather than the support by funding of another's litigation. While there are no direct controls on how much litigation funders may charge, a New York usury statute[7] caps interest on loans at 16% for loans below US$250,000, or 25% between US$250,000 and US$2.5 million. However, litigation funding provided on a non-recourse basis is generally not subject to the usury statute.[8]

Some states have begun to directly regulate litigation funding, notably with regards to the financing of consumer litigation. Typically, points include: minimum disclosure requirements to consumers; registration of the funder with a state authority; and control of levels of fees the funder charges.[9] The state legislature has considered the New York Consumer Litigation Funding Act, which would only apply to cases where the funded amount was under US$500,000.

#### 3.1.2 Disclosure of funding arrangement in proceedings

In many state and federal courts, disclosure to the court and opposing litigant of the identity of other parties with a financial interest in the litigation is often required as a matter of course.[10] Some jurisdictions remain resistant to requiring any disclosure of interested parties.[11] While no specific rule of court has been implemented in New York, the state court system began a consultation on the matter in 2024, particularly with regard to personal injury and wrongful death litigation.[12]

In late 2024, the US Judicial Conference's Advisory Committee on Civil Rules formed a subcommittee to consider whether litigation funding agreements should be generally required to be disclosed in some manner in federal court proceedings.[13]

### 3.1.3 Transfers of claim as an alternative approach?

Again, attitudes vary by state. In Delaware, litigation funding is permitted but the champerty and maintenance doctrines disallow outright assignments of claims.[14] Under New York law, assignments of claims are champertous, where they are "*with the intent and for the primary purpose of bringing a lawsuit*".[15] If a New York court considers a litigation funding arrangement to be champertous, there is nevertheless a safe harbor provision, which exempts any purchase in excess of US$500,000 from the prohibition.[16]

## 3.2 United Kingdom – England

In English litigation, financial support can take various forms, most particularly:

- insurance indemnities (see ATE insurance above) protecting against orders to pay legal costs;
- fee arrangements with law firms known as '*conditional fee agreements*' where part of a law firm's fee is only payable upon a successful result, or damages-based agreements where payment of fees is met from a percentage of the proceeds recovered in the event of success (particularly used for bulk small claim work); and
- third-party funding of litigation in exchange for later payment upon certain triggers.

### 3.2.1 Champerty and control of the litigation

For some time now, champerty has been lawful in England within certain bounds, with particular considerations including:

- The extent to which the funder controls the outcome of the litigation – can the litigant settle without seeking permission of the funder or give instructions to legal representatives?
- Whether the funder is motivated to inflame the dispute because of the amounts of profit involved or, more seriously, has encouraged or participated in manufacturing evidence.

Funders often require an independent legal assessment both on the merits of the claim but also on the strength of a settlement proposal. In order to avoid champerty concerns, a funder should not have a unilateral veto over or right to direct a settlement. Where a funder exercises control or influence in the litigation or contributes to the claimant's legal costs in return for a share of the damages, this potentially puts it at risk of a third-party costs order.[17] If an agreement falls foul of champerty, it is liable to be unenforceable by the funder.

There are no specific requirements to be a commercial litigation funder beyond how agreements themselves are regulated. The Association of Litigation Funders ("ALF") produced a Code of Conduct in 2011 in consultation with the Civil Justice Council, which has been a model for scoping litigation funding agreements in England. In particular, the ALF Code of Conduct recommends that where a funder and litigant are in dispute over whether the litigant should agree a settlement "*a binding opinion shall be obtained from a Queen's Counsel who shall be instructed jointly or nominated by the Chairman of the Bar Council*". Specifically, for antitrust representative claims, the Competition Appeal Tribunal also has a role in approving settlements which can constrain funders in this regard.[18]

### 3.2.2 Requirements of enforceable damages-based agreements

In England, under a damages based agreement (see above), a service provider (typically the law firm but note below) is remunerated from a percentage of the proceeds of litigation, specifically, "*the amount of that payment is to be determined by reference to the amount of the financial benefit obtained* [by the litigant]".[19] In order for such agreements to be enforceable, they must comply with the Damages Based Agreements Regulations 2013 (the "DBA Regulations").

In 2023, the UK Supreme Court declared that litigation funding agreements need to comply with the DBA Regulations, where the funder's remuneration is based on the financial benefit to the funded party.[20]

Therefore, litigation funding in England can either be a financial arrangement independent of the outcome on damages or must comply with the DBA Regulations. A separate prohibition exists on damages-based agreements for opt-out collective proceedings before the Competition Appeal Tribunal.[21]

A key requirement of the DBA Regulations is that the agreement must provide a written explanation of the basis of the calculation of the payment rate.[22]

Further, a strict cap for net payments based on damages is limited to:

- 25% in personal injury claims.
- 35% in employment matters.
- 50% in all other matters.[23]

The payment obligation in first instance proceedings is limited to sums "*ultimately recovered*", not ordered by a court or agreed in settlement, *i.e.*, up to 50% of what the client ultimately receives can go to the service provider if so received (net of costs and disbursements).

Funding agreements which provide for payment to the funder either on the basis of damages recovery or on some other basis should sever the provisions based on damages recovery so alternative payment terms are enforceable without the need to be compliant with the DBA Regulations.[24]

It remains unclear if funding agreements which provide to pay the funder multiples of the amount of funding, triggered by success in the claim, also need to comply with the DBA Regulations.[25]

Finally, the Litigation Funding Agreements (Enforceability) Bill, if enacted, would exclude litigation funding agreements from the requirements of the DBA Regulations. However, the bill is on hold pending a wider review and consultation on third-party funding directed to be conducted by the Civil Justice Council ("CJC"). An interim report in October 2024[26] sought input in a consultation, and the CJC remained open to the possibility of recommending either formal regulation of the industry or not. The CJC report is due in the summer of 2025 and any reform of litigation funding regulation is unlikely before 2026.

### 3.2.3 Costs exposure for funders and insurance and costs recoverability for litigants

In English litigation, the court has the power to order a third party to pay costs.[27] Third-party funders are at risk of having adverse costs orders made against them[28] and this is more likely where the funder is shown to have controlled the litigation or where their agreements are deemed champertous. Nowadays, funders should be aware of the third-party costs risk and, the more limited the role of the funder in the litigation, the less likely a court will hold it liable for adverse costs.[29]

By contrast, arbitrators under English law have no jurisdiction to make costs orders against litigation funders.

The dichotomy is reversed for recoverability of the costs of funding for the funded party. In English litigation, a successful party cannot recover the costs it incurs in obtaining third-party funding from the losing party (though it can recover its legal costs of the litigation). In arbitration, however, tribunals have awarded parties these costs.[30]

#### 3.2.4 Disclosure of the funding arrangement in proceedings

In the regulated field of competition collective actions before the Competition Appeal Tribunal, a lead claimant must demonstrate the financial viability of their position to run the claim.[31] This will *de facto* require that litigation funding arrangements be revealed to the court and defendants although redaction may be possible.[32]

In litigation and arbitration more generally, there are no rules requiring disclosure of litigation funding agreements. Disclosure of litigation funding can become an issue in the context of security for costs orders,[33] or where a party ordered to pay costs fails to do so. It can be beneficial for settlement purposes at the outset of a claim for a claimant to disclose that its claim is supported by a third-party litigation funder. This is because most funders will have access to expert independent lawyers and will only fund cases where there are strong prospects of success and recovery. Disclosing that a claimant has funding therefore demonstrates both strength of claim and depth of pocket to fund to trial.

#### 3.2.5 Transfers of claims as an alternative approach?

In English law, it is permissible to make a legal assignment of one's claim. However, equitable assignments of claims (where the claim to some extent remains with the assignor) remains a grey area by comparison. Assignment of claims in bankruptcy by the liquidators or administrators (bankruptcy trustees), is a popular and growing area amongst bankruptcy trustees and funders in the UK. The bankruptcy trustee has a statutory power to sell all property of the company[34] and, therefore, issues of champerty do not arise, but careful consideration should be given prior to assignment if the bankruptcy trustee is to avoid a challenge to their conduct.[35]

It is also possible to assign the proceeds of a claim for appropriate value and a damages-based agreement is an example of this where the service provider obtains an interest in a portion of proceeds of a claim in exchange for advance funding to pursue the claim. Note the need to comply with the DBA Regulations.

## 4 Privilege and Confidentiality Issues

In England, legal professional privilege broadly exists in two relevant forms: legal advice privilege; and litigation privilege. The fundamental point is the need to keep communications confidential to retain privilege. At the due diligence phase prior to funding, non-disclosure agreements confirming the confidentiality of information passing to a potential funder are vital. Where a funding agreement is in place, common interest privilege (a doctrine permitting the sharing of privileged information between parties with a common interest) can apply to extend the privilege and has been discussed by the courts in the analogous ATE insurance context.[36] Consequently, information exchanged with a litigation funder under an explicit non-disclosure agreement is likely to be protected from disclosure by privilege.

In the US, the situation is similar. Attorney-client privilege and work product doctrine provide for confidentiality of communications that can be threatened by cooperation with a litigation funder. Common interest privilege can protect those privileges, but American state and federal district courts' treatment of the issue is not uniform. In particular, litigation analysis prepared in order to be shared with a funder may be unprotected by work product doctrine and common interest privilege because it could be deemed as having the dominant purpose of securing funding rather than litigation strategy and pursuit itself.[37] Certain jurisdictions will also strictly find that common interest arises when the communication is created, and so it could never arise regarding documents created before a funder entered the picture and which are subsequently shared with them.[38]

Again, best practice demands non-disclosure agreements as a necessary step to protecting privilege. Particular care on a case-by-case basis is required to establish what kinds of documents and communications can be shared to ensure privilege is respected by a particular US court.

Note that, in civil law systems, lawyers are under obligations of professional secrecy – they are not to reveal their client confidences. In some systems, those obligations have been explicitly held to be unable to extend to litigation funders.[39]

## 5 Types of Financing/Commonly Negotiated Terms

Given the underlying litigation, the legal, regulatory and business needs of parties can vary; litigation finance transactions tend to be structured in a number of different ways.

#### 5.1 Loan *vs* purchase

Many transactions are structured as loans, creating a creditor/debtor relationship between the claimholder and the funder. In this structure, the proceeds of the underlying litigation constitute the "collateral", securing the obligation of the claimholder to repay the debt.[40] Some courts (and the Internal Revenue Service ("IRS")), however, have ruled that for arrangements where the obligation to repay the loan is "non-recourse", in that it is wholly conditional upon success in the underlying litigation (or contingent fees claims), these arrangements are not truly "debt". For an obligation to constitute debt, it must include an unconditional obligation to pay. Rather, these agreements may be deemed to constitute a sale of an interest in future proceeds. More often, however, parties avoid the loan structure altogether and characterise the deals as outright purchases of the proceeds of litigation or contingent legal fee claims (which avoids otherwise potentially applicable usury statutes, discussed in section 3.1).

#### 5.2 Prepaid forward purchase agreements

A danger for many funders of having an investment characterised as a "purchase" is that the funder may be deemed to have acquired a direct interest in the litigation claim itself rather than merely a right to the future proceeds. This can have negative consequences for the funder from a tax perspective (see Section 7) and may interfere with the underlying litigation. For that reason, many funding transactions are characterised as "prepaid forward" purchases, in which the upfront purchase price is deemed a "prepayment" and actual settlement of the sale does not occur until the litigation proceeds are realised at a future date.

### 5.3 Single case *vs* portfolio

While the funding of single cases is common, the funding of portfolios of cases is becoming increasingly prevalent. This typically arises where a funder funds a collection of cases, or a law firm funds a portfolio of contingency fee cases. In these scenarios, the cases are cross-collateralised, such that proceeds of all cases flows into a single waterfall to repay the funding. In that way, a winning case in the portfolio can more than compensate for the losses resulting from a losing case in the same portfolio. This arrangement reduces the risk of loss and allows the funder to provide favourable financing terms to the claimholder or law firm.

### 5.4 Upfront funding *vs* drawdown

When litigation funding is used by the claimholder to pay legal fees and expenses, it is common to see a structure whereby the funder delivers funds to the claimholder over time, as the fees and expenses are incurred. In these circumstances, the funder will often pay these fees and expenses to the law firm or other service provider directly. But in cases where the funds are being used by the claimholder or law firm for other purposes, a single upfront payment is also quite common.

### 5.5 Payment waterfall

At the heart of a litigation finance agreement, regardless of structure, is the payment waterfall, which dictates how proceeds of the litigation claim or legal fees, as applicable, will be allocated. The waterfall is typically the most heavily negotiated part of any business arrangement and how they are structured can vary widely. For plaintiff funding, proceeds are usually shared between the claimholder and the funder but, to the extent plaintiff's counsel is working on a full or partial contingency, counsel may also be a beneficiary. In a typical scenario, the funder is repaid first (including its return) with the balance being remitted to the claim holder. In some cases, the funder's return is expressed as a multiple of funded amount (i.e. 2×, 3×, etc.) and on others, the funder's return will be expressed as a percentage of the proceeds obtained (see section 3.2 regarding enforceability of different approaches in England).

## 6 The Underwriting Process – What do Funders Look For?

It is often said that litigation funders end up funding less than 3% of opportunities presented to them. Due to the confidential nature of most funding transactions, there is no precise measure of this figure, and the nonrecourse nature of these deals makes it a particularly risky investment asset class and, consequently, the "pickiness" of funders is understandable. Beyond considering the risk that a court or arbitrator will fail to find the relevant defendant liable, prudent funders must examine a number of additional factors and risks that may thwart a positive outcome, including:

- Merits of the claim? Is the funder able to access sufficient information from the plaintiff or law firm to make that determination? For example, most UK market funders would look for an independent analysis of the merits from a King's Counsel and will typically look for 60% chance of success. Due to the funder's general lack of control, it must rely on the funded party's own self-interest to maximise return. For this reason, cases in which plaintiffs with emotional or non-economic motives, such as divorce cases, may not be ideal. Will an angry plaintiff refuse a reasonable settlement offer, thereby extending costly litigation and ultimately harming the funder's interest?
- Will a verdict or settlement beneficial to the plaintiff result in non-cash proceeds? A defendant agreeing to make a business concession or to give the plaintiff illiquid private equity may not be a positive outcome for the funder.
- What is the time to collection? A funder's return on a litigation victory that takes 18 months looks a lot different if the same litigation victory takes more than five years.
- What is the ratio of expected damages to funders total return? If possible, a funder wants to avoid a situation in which, as a litigation progresses, it becomes clear that the funder will be taking the lion-share of the proceeds (and as discussed above, this can even potentially render the funding agreement unenforceable). A plaintiff's resulting lack of motivation could seriously harm the funder's chances of achieving a positive outcome.
- Recoverability of damages. Is the defendant solvent? If necessary, does the defendant have assets against which a verdict could be easily enforced? What would be the cost of pursuing any ancillary enforcement proceedings?
- If the potential defendant is a State, which other jurisdictions may be a source of State assets for collection? How would sovereign immunity from execution on judgments and awards analyse the question of state immunity regarding those assets?
- Caliber of the lawyers leading the case? Do they have a good case strategy? Are they willing to work on a partial contingency such that they are sufficiently motivated and have some "skin in the game"? Is there good law for the plaintiff in the jurisdiction in which the proceedings will be held?

## 7 Taxation

The US federal income tax treatment of a litigation funding arrangement is not certain. The alternatives for tax treatment are highly fact-specific and, in part, depend on how the parties legally structured the financing. The typical categories for US tax treatment of a litigation funding arrangement include variable prepaid forward contract, loan, partnership or present sale. There is no one treatment that is desired across all funders and the tax consequences of each category and whether optimal for the parties will depend on each party's own tax circumstances.

That said, most litigation funders tend to prefer variable prepaid forward contract ("VPFC") treatment. A forward contract is a derivative contract for the future sale of property on terms that are negotiated in the present. The buyer in an VPFC pays the seller purchase price in advance of the forward sale and, as relevant for litigation finance purposes, the value of the property is variable.[41] Structured properly, for US tax purposes, the VPFC does not give rise to tax until the forward contract is settled.[42] Accordingly, the seller reports income at the conclusion of the case and, assuming the other requirements for capital gains treatment are met, a buyer subject to US tax reports capital gains (presently, subject to lower rates of US tax) from the receipt of proceeds.[43] A non-US buyer typically is not subject to US tax, including US withholding tax, on the settlement of an VPFC as the gain is generally treated as not connected with a US trade or business and as such, does not give rise to "effectively connected income" and further, is usually treated as non-US source, including in the context of an investor that invests through a partnership.[44] The resulting tax treatment of an VPFC is in stark contrast to a loan, which generally gives rise to US source interest income where the borrower is in the US and also can raise questions of whether a non-US investor is engaged in a US trade or business potentially subjecting the non-US investor to US tax and tax reporting obligations. Partnerships and deemed partnership arrangements can also produce potential US taxation for non-US investors as generally, partners will be treated as engaged in the underlying business of the partnership with the possibility of producing US-source income therefrom.[45] Additionally, care should be exercised in considering the non-US tax treatment of any such arrangement as it is possible that non-US tax laws may view the litigation funding arrangement as other than an VPFC for tax purposes.

## Acknowledgment

We are appreciative of the input and guidance on tax related matters that we received from Christine Lane. Christine is a partner and is co-chair of the Crowell Tax Group. Christine represents clients across a wide range of industry sectors, including health care and life sciences, insurance, technology and manufacturing. Christine routinely represents Fortune 50 and 100 clients in their tax planning and M&A transactions. She also represents emerging companies, private equity funds and family offices with their tax planning and transactional needs. Christine has served as a lawyer for the IRS Office of Chief Counsel in Florida and Washington, DC. and has also worked at the national office of a "Big Four" accounting firm. Christine regularly advises both litigation funders and litigation funding recipients on tax issues related to their transactions.

## Endnotes

1 For brevity and consistency's sake, we shall use "litigation funding" throughout this chapter when referring to the structure of the funding and "litigation funder" when referring to the third party providing the funds.

2 *Osprey, Inc. v Cabana Ltd. P'ship*, 532 S.E.2d 269, 273 (S.C. 2000) (*quoting In re Primus*, 436 U.S. 412, 424 n.15 (1978)).

3 https://www.westfleetadvisors.com/wp-content/uploads/2024/03/WestfleetInsider2023-Litigation-Finance-Market-Report.pdf

4 *Id.*

5 *See, e.g., Wilson v Harris* 688 So 2d 265 (Ala Civ App 1996) (litigation funding contract void as akin to gambling).

6 *See, e.g., Charge Injection Technologies, Inc v EI DuPont de Nemours and Co*, 2016 WL 937400, at *4-*5 (Del Super Ct 9 March 2016).

7 New York Consolidated Laws, Banking Law – BNK § 14-a.

8 See New York City Bar Association's Committee on Professional Ethics ("NYCBA") Formal Opinion 2011-2; *Lynx Strategies LLC v Ferreira*, 957 NYS2d 636 (NY Sup Ct 2010) (third-party investment for share of proceeds is not usury); but see *Echeverria v Estate of Lindner*, 2005 NY Slip Op 50675(U), at *8–9 (NY Sup Ct 2005) (non-recourse agreement was a 'loan', not an investment, because recovery was certain under strict liability statute and interest rate was, therefore, usurious).

9 A Government Accountability Office study provides a list of state laws as of 2022: GAO, Third-Party Litigation Financing: Market Characteristics, Data and Trends, December 2022, Appendix III: State Laws Addressing Third-Party Litigation Financing. Available at: https://www.gao.gov/assets/gao-23-105210.pdf. More recent laws include: Montana: SB 269, *Establish consumer protections and disclosures in litigation financing* (signed into law May 2, 2023); West Virginia: SB 850, *Updating Consumer Credit and Protection Act* (signed into law March 9, 2024); and Indiana: HB 1160, *Civil proceeding advance payment contracts and commercial litigation financing* (signed into law March 13, 2024).

10 E.g., District of Delaware, Standing Order Re: Third Party Litigation Funding Arrangements, April 18, 2022, available at https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Disclosure%20Statements.pdf; N.D. of California, Standing Order for All Judges, Updated Nov. 30, 2023, paragraph 17. Available at https://cand.uscourts.gov/wp-content/uploads/2023/03/Standing_Order_All_Judges-11-30-2023.pdf

11 *Lower48 IP LLC v Shopify, Inc.*, Case No. 6:22-cv-00997-DAE, Dkt. 36 (W.D. Tex. Nov. 2, 2023) (citing *Trustees of Purdue Univ. v STMicroelectronics N.V.*, No. 6:21-cv-00727-ADA, Dkt. 250 (W.D. Tex. Jan. 18, 2023); *Mullen Indus. LLC v Apple Inc.*, No. 6:22-cv-00145-ADA, Dkt. 64 at p. 5 (W.D. Tex. Oct. 19, 2022)).

12 https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/LitigationFinancingAgreements.pdf

13 https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/

14 *Charge Injection Technologies, Inc v EI DuPont de Nemours and Co*, 2016 WL 937400, at *4–*5 (Del Super Ct 9 March 2016).

15 *Justinian Capital SPC v WestLB AG*, 28 NY3d 160 (NY 2016); and *Credit Agricole Corp v BDC Finance LLC*, 2016 WL 6995892, 2016 NY Slip Op 32368(U) (NY Sup Ct 30 November 2016). *C.f. Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp*, 13 NY3d 190 (NY 2009) (where an assignee brought suit but it was found the intent of the transfer itself was not specifically for the purpose of the assignee doing so).

16 NY Judiciary Law 489(2). *See also Justinian Capital SPC v WestLB AG*, 28 NY3d 160 (NY 2016).

17 *Laser Trust v CFL Finance Ltd [2021] EWHC 1404 (Ch) and Various Claimants v Mercedes-Benz Group AG and others [2024] EWHC 695 (KB).*

18 Competition Appeal Tribunal Rules, Rule 94.

19 Section 58AA(3), Courts and Legal Services Act 1990.

20 *R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors* [2023] UKSC 28.

21 Section 47C(8) Competition Act 1998.

22 DBA Regulations, Section 3.

23 DBA Regulations, Section 4.

24 *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 16; *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited et al.* [2023] CAT 73.

25 At the time of writing, an appeal on this matter is to be heard by the Court of Appeal in *Alex Neill Class Representative Limited v Sony Interactive Entertainment Europe Limited et al.* and other joined cases at a date to be set in the summer of 2025.

26 Available at: https://www.judiciary.uk/wp-content/uploads/2024/10/CJC-Review-of-Litigation-Funding-Interim-Report.pdf

27 Civil Procedure Rules, Rule 46.2.

28 *Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655.

29 *Chapelgate Credit Opportunity Master Fund Ltd v Money and others* [2020] EWCA Civ 246.

30 *Tenke Fungurume Mining SA v Katanga Contracting Services SAS* [2021] EWHC 3301 (Comm)*; Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

31 Section 47B(8) Competition Act 1998; Rule 78 Competition Appeal Tribunal Rules.

32 See, e.g., *Coll v Alphabet Inc. & Ors.* [2022] CAT 6.

33 Where a party argues that the other party should provide funds in advance in escrow for fear that they may otherwise be unable to fulfil the court's costs orders later.

34 See Schedule 1 and Schedule 4 to the Insolvency Act 1986.

35 Note Section 168(5) Insolvency Act 1986, which allows "any person aggrieved by an act or decision" of a liquidator, to make an application to court for the act or decision to be reversed or modified and see decision in *Re Edengate Homes (Butley Hall) Limited (in liquidation)* [2022] EWCA Civ 626.

36 *Winterthur Swiss Insurance Company & another v AG (Manchester) Ltd & Ors* [2006] EWHC 839 (Comm).

37 E.g., *Acceleration Bay Llc v Activision Blizzard*, No. 16-453-RGA, 2018 U.S. Dist. LEXIS 21506 (D. Del. Feb. 9, 2018) at *6.

38 See, e.g., *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 364 (3d Cir. 2007); *Leader Techs., Inc. v Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010) (discussing that the community of interest be identical, not merely similar).

39 In France, for example, a Paris Bar Council Resolution stipulates that lawyers are not to independently advise, discuss or meet with a litigation funder without the involvement of the underlying client. *Conseil de l'Ordre*, Paris Bar, Resolution of 17 February 2017. Available at: https://www.avocatparis.org/system/files/publications/resolution_financement_de_larbitrage_par_les_tiers.pdf. Practically, the funded party has to keep the litigation funder informed in such a scenario, and the funder would need its own counsel to receive any legal advice on the matter. Orders for disclosure of documents to litigation opponents are generally rarer in civil law systems. Even where made, they may allow refusal to disclose documents on a similar confidentiality basis as privilege in order not to undermine professional secrecy. For example, in Qatar, a court may decline to order disclosure if a party shows that it has a "legitimate interest" to withhold documents, which could include any duties of confidentiality the party owes such as between lawyers and third party funders. Article 233 of Law No. 13 of 1990, Civil and Commercial Procedure Code.

40 Other issues relating to a loan structure lie in whether the underlying claims need to be part of the collateral package versus a narrow collateral description which only encumbers litigation proceeds. See, Sepinuk, Stephen L., *Identifying What Portion of a Settlement Payment is Proceeds of a Settlement*, The Transactional Lawyer, Vol 10 (October 2020) at https://accfl.memberclicks.net/assets/docs/Transactional%20Lawyer%20%282020-10%29.pdf

41 IRS Rev. Rul. 2003–7, 2003-1 C.B. 363 (while the ruling addresses an VPFC in the context of a stock transaction, the elements described in the ruling are often cited as the factors required by the IRS to support VPFC treatment in the context of litigation finance arrangements).

42 See IRC Section 1234A.

43 IRC Section 1222(1), (3) prescribes the requirements for capital gain treatment, including that a capital asset must exist to receive capital gains treatment. See also IRC Section 1234A.

44 See IRC Sections 865, 871, 881 and 882. Importantly, the facts and circumstances of each litigation finance arrangement must be considered to reach the determination that a non-US investor will not be subject to US tax.

45 *Id.*

**Scott A. Lessne** chairs the firm's Commercial Finance & Lending team. Scott's practice involves the representation of financial institutions and corporate clients in connection with the negotiation and documentation of commercial, asset-based, project-related, and real estate loan transactions, as well as advising clients on legal issues arising in complex single and multi-lender loan workouts and restructures. In addition, Scott advises financial institution clients on creditors' rights remedies, including judicial and non-judicial enforcement actions and bankruptcy strategies.

**Crowell & Moring LLP**
1001 Pennsylvania Avenue
NW, Washington, DC 20004
USA

Tel: +1 202 624 2597
Email: slessne@crowell.com
LinkedIn: www.linkedin.com/in/scott-a-lessne-b23094a

**Paul B. Haskel** is a partner in the New York office of Crowell & Moring. His practice focuses on the field of litigation finance. He regularly provides advice to litigation funders, private equity firms, and multi-strategy hedge fund clients in connection with their investments in funding transactions, including claims monetisation and the provision of non-recourse capital to both plaintiffs and law firms. His work involves the diligence, structuring, and papering of these transactions and includes advice regarding the management of credit risk, tax efficiency, state common law issues such as champerty and usury, and legal ethics. He is a frequent contributor on these topics and has been featured in *Litigation Finance Journal*, *ValueWalk*, and *The American Lawyer*.

**Crowell & Moring LLP**
Two Manhattan West, 375 Ninth Avenue
New York, NY 10001
USA

Tel: +1 212 530 1823
Email: phaskel@crowell.com
LinkedIn: www.linkedin.com/in/phaskel

**Paul Muscutt**, an experienced bankruptcy and restructuring lawyer with experince that covers all aspects of contentious and noncontentious insolvency, with specific knowledge of contentious work and focus on the asset-based lending sector. Paul acts for financial institutions, private equity investors, insolvency practitioners, directors, and corporate clients. Paul is a partner in Crowell & Moring's Corporate Group in the firm's London office. He is a member of the Legal and Technical Committee for the Asset Based Finance Association (part of UK Finance) and a member of R3's Policy Group.

**Crowell & Moring LLP**
Tower 42, 25 Old Broad Street
London EC2N 1HQ
United Kingdom

Tel: +44 20 7413 1327
Email: pmuscutt@crowell.com
LinkedIn: www.linkedin.com/in/paul-muscutt-7846919

**John Laird** is a solicitor-advocate and counsel in Crowell & Moring's London office, where he is a member of the International Dispute Resolution and Antitrust Recovery groups. John represents clients in both commercial and investment arbitration. In addition, his practice involves a wide variety of commercial litigation in the English High Court, including the pursuit and defence of competition claims.

**Crowell & Moring LLP**
Tower 42, 25 Old Broad Street
London EC2N 1HQ
United Kingdom

Tel: +44 20 7413 1324
Email: jlaird@crowell.com
LinkedIn: www.linkedin.com/in/john-laird-0149951

**Collaboration Powers Success.** Fresh ideas. Innovative thinking. Strategic insights about your business and your industry. That is what you can expect when our diverse teams of legal and business professionals — working closely with yours — focus on your success.
**Global Reach.** With offices across the U.S., Europe, MENA and Asia, Crowell is well-positioned to provide clients with legal and business insights to help them capitalise on global opportunities and mitigate risk in this dynamic geo-political and constantly shifting regulatory environment. **Government Experience.** More than 150 Crowell attorneys formerly served in pivotal positions in the U.S. and foreign governments.
**Strategic Growth.** Crowell continues to strategically advance the firm's growth priorities to meet the expanding and sophisticated needs of our clients.
**Diversity, Equity and Inclusion.** At Crowell, we know that representation matters, and diversity of culture and thought makes us stronger.

***Pro Bono***. Over 30 years ago, Crowell was the first law firm to create a full-time public service partner role. Our dedication to *pro bono* and public service is a core part of who we are as a firm. We pride ourselves on our deep commitment to a wide-ranging public service program, and we continually seek out new areas where we can make a meaningful difference.

**www.crowell.com**

Crowell

iclg International Comparative Legal Guides

The **International Comparative Legal Guides** (ICLG) series brings key cross-border insights to legal practitioners worldwide, covering 58 practice areas.

**Lending & Secured Finance 2025** features three editiorial chapters, 19 expert analysis chapters and 29 Q&A jurisdiction chapters covering key issues, including:

- Guarantees
- Collateral Security
- Financial Assistance
- Syndicated Lending/Agency/Trustee/Transfers
- Withholding, Stamp and Other Taxes; Notarial and Other Costs
- Judicial Enforcement
- Bankruptcy Proceedings
- Jurisdiction and Waiver of Immunity
- Licensing
- ESG Trends

The International Comparative Legal Guides are published by: glg Global Legal Group