Disclaimer: The information contained in this guide is intended to provide a general understanding about key issues related to litigation finance. It does not constitute legal advice. We urge readers to get advice from their lawyers on litigation finance.
Introduction

As a well-capitalized, publicly traded company with an extensive history and track record of success in litigation finance, Bentham IMF has a reputation for operating with integrity and transparency. We are widely regarded as one of the most professional and ethical funders in the commercial litigation finance industry.

This document aims to provide a guide to many of the key issues related to litigation finance.

Champerty and Maintenance

To understand the complex legal issues surrounding modern day litigation finance, we must first look to the past. In medieval times, corrupt nobles would sometimes interfere in the legal system for personal gain, by using their subjects as proxies to fight disputes to gain power over other nobles or to enhance their wealth. In response to this problem, particularly in England, the doctrines of champerty and maintenance arose and laws were enacted to restrict third-parties from financially aiding litigants.

Maintenance refers to a third-party providing financial assistance to help maintain litigation.

Champerty occurs when maintenance is taken a step further and the third-party seeks a return for its financial assistance, usually in the form of a portion of the recovery from the lawsuit.
The doctrines of champerty and maintenance initially migrated to some of the states in this country along with settlers from England. But, as the legal system and public policy evolved, so too did maintenance and champerty case law. Even back in 1908, the English court in British Cash and Parcel Conveyors v Lamson Store Service Co Ltd. (1908) 1 KB 1006, noted:

“The truth of the matter is that the common law doctrine of maintenance took its origin several centuries ago and was formulated by text-writers and defined by legal decisions in such a way as to indicate plainly the views entertained on the subject by the courts of those days. But these decisions were based on the notions then existing as to public policy and the proper mode of conducting legal proceedings.

These notions have long since passed away, and it is indisputable that the old common law of maintenance is to a large extent obsolete.”

Over time, the ancient laws of maintenance and champerty were abolished or interpreted by courts in such a way as to permit third party financing of litigation. Now, there are just a small minority of states where maintenance and champerty are still applied.

Recent widespread adoption of modern commercial litigation finance in the US has been affirmed by many courts throughout the country as a permissible means of affording access to justice. For example, in an unsuccessful challenge by a defendant to the plaintiff’s funding arrangements, New York Supreme Court Justice Eileen Bransten noted in a 2013 decision in Lawsuit Funding LLC v. Lessoff, 2013 WL 6409971, 2013 N.Y. Slip Op., that “There is a proliferation of alternative litigation financing in the United States, partly due to the recognition that litigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation.”

Even more recently, in the 2015 case of Hamilton Capital VII, LLC, I v. Khorrami, LLP, New York Supreme Court Justice Shirley Werner Kornreich commented about the importance of litigation finance as “…modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case.”

Although it is important to check on this issue, maintenance and champerty is rarely an obstacle to litigation finance in the US today.
Confidentiality and Work Product

It is critically important that information shared between a funder and a client is kept confidential. This can mean that even the existence of a funding arrangement or potential funding arrangement should be kept confidential, as well as all information that is shared between the parties.

Consequently, funders usually insist upon a written non-disclosure agreement (“NDA”) being executed before any substantive discussions occur. Protecting communications between the parties helps to demonstrate an intent to maintain confidentiality over shared information, which is a key plank under the attorney work-product doctrine. It has now become clear that information provided to a funder that is attorney work product is protected from disclosure.

The current state of the law on this issue is reflected in the comprehensive federal trial court decision in Miller v. Caterpillar, Case...
No. 10 C 3770 (N.D. Ill. Jan. 6, 2014). The Miller court made a number of detailed findings that track and confirm Bentham IMF’s practices, including the following: 1) work product material is protected under a written or an oral NDA; 2) the litigation funding agreement itself is not relevant to any claim or defense in nearly all cases (apart from cases involving enforcement of a funding agreement), and is not discoverable; and 3) common interest privilege does not apply in most states to protect disclosures to funders because the parties don’t share identical legal interests.

The decision in Miller followed a similar decision in Mondis Tech. v L.G. Elec., Inc., 2011 WL 1714304 (E.D. Tex. May 4, 2011). In a subsequent decision that addresses Miller, the court recognized Miller to be “comprehensive and well-reasoned,” but performed its own in camera review of the litigation finance materials. Doe v. Society of Missionaries of Sacred Heart, 2014 WL 1715376, (N.D. Ill. May 1, 2014). The Doe court arrived at the same conclusions with respect to the applicability of the work product doctrine when an NDA is in place. Based on these decisions and other legal precedent, the importance of executing an NDA before sharing confidential or work product information with a funder cannot be overstated. For a more comprehensive guide to applicable case law on this subject, you can read more here.

Attorney Client Privilege

When considering an investment, reputable funders will work to protect the confidentiality and interests of the parties seeking funding and their lawyers. As mentioned, Miller and other decisions have held that common interest privilege doesn’t apply to communications between funder and client (as they don’t share an identical common legal interest). Consequently, at Bentham, we make clear that we never want the client or lawyer to share information that could be subject to the attorney-client privilege. Doing so could put the client at risk of waiving the privilege.

Disclosure of Funding Arrangements and Agreements

The issue of disclosing whether a party is using funding has been raised numerous times in recent years by parties trying to ascertain the financial resources their opponents have available for their case. In most cases, parties making motions for disclosure of the existence of a funding arrangement, or the details of such arrangements, have met strong judicial opposition (generally based on the work product doctrine). A recent study by Westflel Advisors found that litigants attempting to force disclosure of an opposing party’s litigation financing documents have been “overwhelmingly unsuccessful.”
Bentham recently authored a comprehensive article describing the detrimental effect that mandatory disclosure could have on our already overburdened judicial system. Namely, mandatory disclosure would likely waste the already limited resources of courts and judges by causing irrelevant discovery battles. It would also strip judges of the opportunity to consider the appropriateness of the disclosure, while leaving them with the time-intensive burden of managing the inevitable disputes following mandatory disclosures.

For additional insight into mandatory disclosure of funding arrangements, click here.

Control

For those considering litigation funding, fear over the issue of whether acceptance of funding equates to relinquishment of control over the conduct of litigation is unfounded. Reputable third-party funders exercise no control over litigation.

Parties seeking funding should be wary of litigation finance contracts allowing the funder to exert control over decisions otherwise held by the client or their lawyer. Such control may take the form of veto power over litigation strategy, ultimate sign-off on settlement, and over the client’s choice of counsel. Further, these provisions run contrary to legal ethical rules forbidding third parties from interfering with a lawyer’s independent professional judgment. A claimant and its lawyers should carefully review and analyze any control provisions under the legal professional responsibility rules of the jurisdiction in which the case will proceed.

That said, when desired, litigation funders can serve as a strategic sounding board for the lawyers and claimants they finance. This type of advice is one of the benefits of using a litigation funder like Bentham, which is staffed with lawyers who have deep experience in all phases of litigation. They can serve as a resource for a litigator who needs a second view from an objective party.

While funders do not have a right to control litigation or the terms of settlement, they do have the right to stay informed about the progress of the case. For this reason, it is customary for funders to request that they be kept informed about the progress of the cases they have funded, and any settlement offers put forth.
Conflicts of Interest

With a team of highly experienced former trial attorneys, Bentham is extremely knowledgeable about conflicts rules and is rigorous about avoiding the risk of a conflict. The lawyers we fund are encouraged to obtain informed consent from their clients before negotiating a funding arrangement – a move designed to ensure the lawyers’ interests remain in line with those of their clients.

Conclusion

Bentham doesn’t just know the ethical and professional standards of practice. Our record of adhering to them has prompted more than 130,000 claimants to trust us for the funding they need and the recoveries they deserve. Multiple parties utilizing our financing have made repeat funding requests. Our stewardship in the industry is further reinforced by recognition for excellence in funding that we have received from Chambers & Partners, The Recorder, Corporate Counsel, Connecticut Law Tribune and LawDragon.

We share our knowledge about the ethics and key issues of commercial litigation finance through CLE programs offered to law firms and legal education providers. Our investment managers and legal counsel, all of whom are highly experienced litigators, are also frequently called upon by legal publications and industry organizations to write and speak about funding and related ethical issues. Links to online videos, podcasts and webinars pertaining to this topic are provided here for your reference.

Please email info@benthamimf.com to inquire about how we can assist your company or law firm in gaining a more comprehensive understanding about the ethics of litigation finance.
Resources

Webinars

• Ethical Issues in Litigation Finance (Update) Lawline Webinar
• Ethical Issues in Litigation Finance ABA Law Practice Division Webinar

Videos

• Bentham IMF’s Code of Best Practices
• Bentham’s Core Values: Simplicity, Fairness and Transparency
• Bentham’s Guidance on Protecting Attorney Client Privileged Materials When Working with a Funder
• Control & Settlement in Litigation Finance