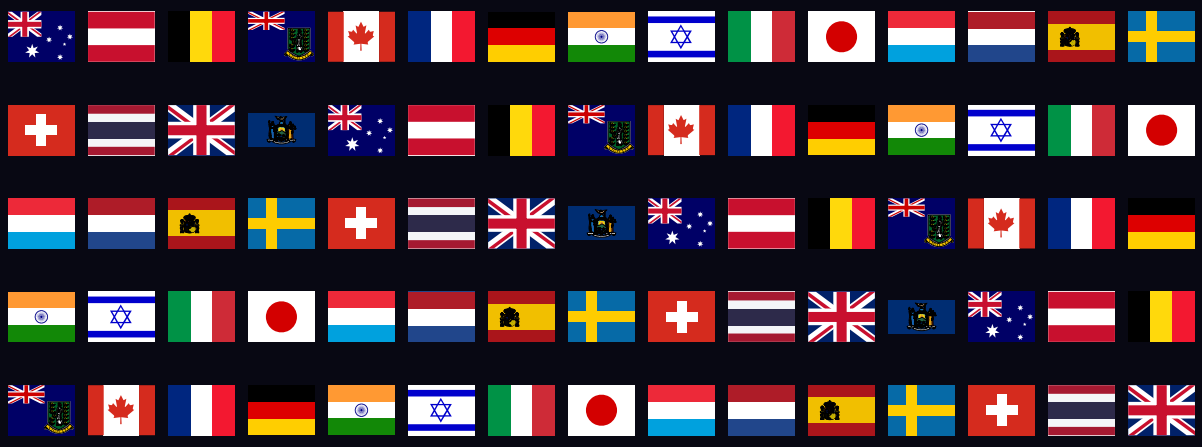
LITIGATION FUNDING

USA - New York



LEXOLOGY
Getting The Deal Through

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Litigation Funding

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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REGULATION

Overview

Is third-party litigation funding permitted? Is it commonly used?

In New York, third-party litigation funding is permitted, subject to a few caveats. While it is still a relatively new concept in the United States compared with, for example, the United Kingdom, more and more claimants and their counsel are considering third-party litigation funding.

In the traditional third-party litigation funding model, the third-party litigation funder makes a non-recourse loan to the holder of a claim to cover legal fees or costs in exchange for a portion of the proceeds (whether through court action or settlement) arising from the holder's enforcement of its claim. The judicial acceptance of litigation funding can be seen through the case law mentioned below, which has, on the whole, protected claimant-funder disclosures, held funder participation not to constitute impermissible interference between lawyer and client, and held that funders' returns do not constitute usury.

When addressing the related issue of third-party funding of law firms, New York Supreme Court Justice Shirley Kornreich extolled the value of 'the sound public policy of making justice accessible to all, regardless of wealth' and recognised that the expense of litigation can otherwise deter litigation against 'deep pocketed wrongdoers'. See Hamilton Capital VII LLC I v Khorrami LLP , 48 Misc 3d 1223(A), 9 (NY Supreme Court 2015).

Law stated - 20 September 2022

Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

New York law provides no explicit limits on the fees and interest that a funder can charge. NY Banking Law section 14-a provides that interest on a loan cannot exceed 16 per cent. The permissible interest rate can go up to 25 per cent if the loan value is from US$250,000 to US$2.5 million, without any limit for loans in excess of US$2.5 million. However, since third-party litigation funding is generally provided on a non-recourse basis, the funding is treated as a purchase or assignment of the anticipated proceeds of the lawsuit, and therefore not subject to the usury statute, which limits interest rates that a person can charge. 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).

Law stated - 20 September 2022

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

There are no statutes or regulations in New York directly applicable to third-party litigation funding, let alone any that expressly prohibit, or that would have the effect of prohibiting, third-party litigation funding.

One question that is often asked is if champerty prohibits third-party litigation funding. Since federal law does not address champerty, state law governs. There is significant variation between the states on this issue, with each state

having its own definition of conduct that is champertous (although several states no longer prohibit, or never prohibited, champerty).

New York has laws, long on the books, which prohibit champerty. New York courts interpret champerty to occur when a party purchases a note, security, or claim 'with the intent and for the primary purpose of bringing a lawsuit'. See 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) (the champerty 'statute does not bar a transfer or assignment when its goal is the collection of a legitimate claim'). The prohibition against champerty is 'limited in scope' and has historically been 'directed toward preventing attorneys from filing suit merely as a vehicle for obtaining costs'. See Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp , 13 NY3d 190 (NY 2009).

No court in New York has found the traditional third-party litigation funding model to be champerty.

The Court of Appeals of New York has analysed the champerty statute in the context of transactions in which a party acquires a note or security and then brings a lawsuit in its own name on the basis of that note or security. These cases help illustrate why third-party litigation funding is not champerty under New York law. The difference between champertous and non-champertous conduct turns on the party's intent when entering into the transaction. Compare Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors Inc v Love Funding Corp (it was not champerty where the party purchased a note and brought an action as a way to enforce its rights under the note) and Justinian Capital SPC v WestLB AG (it was champerty where the sole purpose of acquiring the note was so the plaintiff could bring the action).

In both cases, the transactions were structured very differently from how a traditional third-party funding agreement is structured. For example, a third-party litigation funder does not acquire the asset itself, nor does it bring a lawsuit in its own name. Instead, the party whose lawsuit is being funded is, and remains to be, the original owner of the asset that is the subject of the litigation. Further, the nature of the funder's interest is to the proceeds of the litigation, not the underlying asset itself.

In the unlikely event a court was to consider third-party litigation funding to be champerty, the statute prohibiting champerty was amended in 2004 to add a safe harbour provision (NY Judiciary Law 489(2)). The safe harbour provision exempts any purchase in excess of US$500,000 from the prohibition against champerty. See Justinian Capital SPC v WestLB AG . This would serve to protect just about any litigation funding arrangement from being prohibited as champerty.

Law stated - 20 September 2022

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

In New York, the New York Rules of Professional Conduct (NYRPC) govern a lawyer's conduct. A lawyer who violates the NYRPC could be subject to disciplinary action, which could lead to his or her disbarment (rescindment of his or her right to practise law).

The NYRPC rules that a lawyer needs to consider in connection with third-party litigation funding include the following:

- the lawyer's obligation to provide candid advice about the benefits and risks of litigation funding;
- avoiding conflicts of interest;
- maintaining client control over the proceeding; and
- the disclosure of information to the funder.

Rule 2.1 specifies that:

> *'In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.'*

A lawyer may not render advice based on the best interests of anyone other than his or her client. Accordingly, if a client is seeking litigation funding, a lawyer must 'provide candid advice regarding whether the arrangement is in the client's best interest', and should discuss the costs and benefits, as well as alternatives (see NYCBA Formal Opinion 2011-2). That includes advising the client if the lawyer has any sort of relationship – even if non-financial – with a potential funder. See SD v St Luke's Cornwall Hosp , 63 Misc 3d 384, 96 NYS3d 467 (NY Sup Ct 2019) (where a funder financed costs for an infant's lawsuit, the law firm should have disclosed that the funder was owned by the lawyer's brother).

Where the third-party litigation funder is paying the client's legal fees, the lawyer must ensure that the payment structure does not create a conflict of interest. The lawyer can meet his or her ethical obligations by obtaining informed consent from the client and ensuring that the funder does not interfere with the lawyer's independent judgement or the client-lawyer relationship (NYRPC 1.8(f)(2)). The rules prohibit a lawyer from representing a client if, for whatever reason, there is a risk that the lawyer's professional judgement will be adversely affected by the funder's involvement in the case (NYRPC 1.7(a)).

At all times, it is the client who must control the litigation. While the client may permit the funder to be involved in the strategy or other aspects of the lawsuit (subject to any risks discussed throughout this chapter), such involvement is only allowed with the client's explicit and informed consent (NYCBA Formal Opinion 2011-2). Except as authorised by law, a funder's influence must never amount to interfering with, directing or regulating the lawyer's judgement, or compromising his or her duty to maintain client confidences (NYRPC 5.4(c)).

Thus, regardless of the funder's financial interest, a lawyer has a duty to abide by the client's decision regarding litigation objectives and whether and under what terms to settle a matter (NYRPC 1.2).

In addition, as is discussed in more detail below, an attorney cannot disclose any information to any party, including a funder (or potential funder) without obtaining the client's informed consent to disclose such information (NYRPC 1.6(a)(1)).

Law stated - 20 September 2022

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

There are no governmental bodies that currently regulate or oversee third-party litigation funding in New York state.

However, there is a pending bill titled the New York Consumer Litigation Funding Act that would regulate consumer litigation funding. As of September 2022, the bill remains in the legislative committees, so there is no guarantee what provisions any final bill would contain. We note that this legislation targets consumer litigation funding as compared to commercial litigation funding. In particular, these proposed regulations would only apply to cases where the funded amount was under $500,000, which would exempt just about any funded litigation that is the subject of this article.

Various lobbying organisations and legislative agencies in the United States, and more specifically in New York, have suggested that further regulation is warranted, and have proposed that the Securities and Exchange Commission,

Federal Trade Commission or even the Consumer Financial Protection Bureau would be well placed to oversee third-party funders and ensure that third-party funders transact in a manner that protects the attorney-client relationship and the integrity of the judicial system and comports with the public interest. However, no such regulatory oversight has been enacted federally or in New York state.

Law stated - 20 September 2022

FUNDERS' RIGHTS

Choice of counsel

May third-party funders insist on their choice of counsel?

From a legal and ethical perspective, the client must select his or her own counsel and have control over the litigation (New York Rules of Professional Conduct (NYRPC) 1.2). However, from a practical standpoint, the funder is deciding whether to enter into a contractual agreement with the client and if the funder does not approve of the attorneys that the client wishes to retain, the funder is fully within its rights to decline to fund the litigation.

The quality of the attorneys is a significant factor in a funder's decision whether to fund the litigation. Thus, any client seeking litigation funding should expect that the funder will insist on counsel with experience, expertise and a proven record of success.

Once the funding agreement is signed and the client has retained its lawyers, the client controls the engagement. If the funder becomes displeased with the client's attorneys, the funder can speak with the client about its concerns, but the client decides whether, and with whom, to replace the attorneys. If the client does not follow the funder's wishes, the funder's only recourse will be governed by the terms of the funding agreement, which may allow the funder to cease funding the litigation.

Law stated - 20 September 2022

Participation in proceedings

May funders attend or participate in hearings and settlement proceedings?

Court hearings in New York, and in the United States as a whole, are generally open to the public and anyone, including the funder, may attend as an observer. The funder is not considered a party and therefore would not be entitled to participate in any judicial proceeding or otherwise be represented at a hearing or other court appearance.

Settlement conferences normally only include the parties to the litigation. Courts generally want to encourage settlement and, for this reason, settlement communications are treated as confidential and not discoverable in future litigation or by other parties. The funder should have no expectation of being able to participate in these discussions, though both parties could presumably consent. Further, even though the funder does not get a seat at the negotiating table as a matter of right, nothing prohibits a client from consulting with its funder about a proposed settlement or the funder from offering his or her thoughts to the client and its lawyers regarding settlement.

In arbitration, the hearing and settlement proceedings are both confidential and, absent agreement of the parties, the funder would not be entitled to attend.

Law stated - 20 September 2022

Veto of settlements

Do funders have veto rights in respect of settlements?

There is no law in New York that directly addresses a funder's veto rights in respect of settlement. In general, the funding agreement, including rights in respect of settlement, is defined by contract. As a matter of contract law, there is no reason why a client could not grant a funder the right to veto the client's acceptance of a settlement agreement.

That being said, an attorney is ethically obligated to 'abide by a client's decision whether to settle a matter.' (NYRPC 1.2(a)). Thus, even if the client granted to the funder veto authority over settlement decisions, if the client wants to accept a settlement in the face of a funder's exercise of its veto rights, the lawyer must follow the client's instructions and accept the settlement. The New York City Bar has considered this question and noted that absent client consent, a lawyer is not permitted to allow anyone to direct or influence litigation strategy, including whether to settle (New York City Bar Association's Committee on Professional Ethics Formal Opinion 2011-2).

Law stated - 20 September 2022

Termination of funding

In what circumstances may a funder terminate funding?

In general, the funding agreement, including the right to terminate, is defined by contract. If the terms of a contract call for continued funding, the funder has an obligation to continue funding, barring grounds for voiding that obligation. Such grounds may include fraudulent inducement or omission of material fact. A funder may also be excused from continued funding under the agreement if the contracting party materially breaches the agreement.

Law stated - 20 September 2022

Other permitted activities

In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Funders are not required to take an active role in the litigation process.

While not required to take an active role, in addition to providing the financial resources to support the litigation, there are many ways in which funders can serve as a valuable resource to counsel and to the client. By serving as an adviser or sounding board, the client (and the client's lawyers) can draw on a funder's broad experience and financial acumen to, among other things, consider the strategy and tactics as to the litigation, assess strengths and weaknesses in the case as the litigation proceeds and evaluate settlement proposals.

A funder can also review certain materials about the litigation and provide its thoughts to the client and the client's lawyers. The materials that the funder can review, however, will likely be limited by a protective order in the litigation that will restrict access to the other side's document production. The materials the funder can review may also be limited by concerns of potential waiver of attorney-client privilege or work product protection.

Law stated - 20 September 2022

CONDITIONAL FEES AND OTHER FUNDING OPTIONS

Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Litigation lawyers may enter into contingency fee arrangements.

Law stated - 20 September 2022

Other funding options

What other funding options are available to litigants?

Litigants have a wide range of funding options available to them. In addition to a full litigation funding agreement, where the funder covers all costs and legal fees, the litigant can enter into a partial funding agreement, where the funder funds only a portion of the litigation and the litigant (or the litigant's attorneys on a contingent basis) agrees to pay the rest of the costs and fees for the litigation. A litigant (or the litigant's attorneys) may also obtain portfolio funding, whereby the funder provides capital on a non-recourse basis to the litigant (or the litigant's attorneys), which is repaid from the proceeds of cases in that portfolio of cases.

A funder may also purchase an interest in the litigant (as well as certain rights to serve on the litigant's board) in exchange for a percentage of any recovery, which may address certain concerns about waiver of attorney-client privilege and work product.

A litigant can, of course, seek to take a recourse loan, using the proceeds of the litigation as collateral that must be repaid regardless of the results of the action.

With respect to a law firm obtaining a non-recourse loan from a funder to be repaid from the law firm's future legal fees, the New York City Bar Association (NYCBA) issued a non-binding advisory opinion in 2018 that called into question the appropriateness of such an arrangement (NYCBA Formal Opinion 2018-5). The NYCBA concluded that such an arrangement is impermissible fee-splitting in view of NYRPC 5.4. The NYCBA's opinion is inconsistent with settled New York case law on this point (see Hamilton Capital VII LLC I v Khorrami LLP , 48 Misc 3d (1223(A), 9 (NY Sup Ct 2015) (law firm financing is not impermissible fee-splitting, and further it 'promotes the sound public policy of making justice accessible to all, regardless of wealth.')). It is noteworthy that in its advisory opinion the NYCBA distinguished its analysis from the traditional litigation funding model – whereby the client obtains funding itself – which the NYCBA had previously held to be acceptable (NYCBA Formal Opinion 2011-2).

In view of widespread criticism of this non-binding advisory opinion, the NYCBA's president formed the Litigation Funding Working Group (Working Group) to 'study third-party litigation funding and to provide a report on observations and recommendations regarding the practices utilized in connection with litigation funding' (NYCBA Report to the President by Litigation Funding Working Group (2020)). In its report, the Working Group 'considered whether Rule 5.4, as interpreted in Opinion 2018-5, well serves the professional community and the public, or whether the Rule should be revised to reflect contemporary commercial and professional needs and realities' (p23). The group found that 'it would be beneficial for the Rule to be revised', and that 'lawyers and clients . . . will benefit if lawyers have less restricted access to funding' (p23) .

Law stated - 20 September 2022

JUDGMENT, APPEAL AND ENFORCEMENT

Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

In the US District Court for the Southern District of New York, a commercial claim can be expected to take approximately 40 months from filing to a trial on the merits of the case. Since many cases are resolved before trial through motion practice or settlement negotiations, the median length from filing to disposition of a case is six months. These statistics are available on the US Courts website.

For complex commercial claims, the timeline in New York state courts would be similar. Most of these claims will be heard before the Commercial Division of the New York Supreme Court, which is a specialised division that focuses on creating uniformity and predictability in complex commercial disputes.

Law stated - 20 September 2022

Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

Approximately 11 per cent of filed cases are appealed. In cases that have gone to trial, nearly 40 per cent are appealed. See Eisenberg, Theodore, 'Appeal Rates and Outcomes in Tried and Non-tried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes' (2004), Cornell Law Faculty Publications, Paper 359.

In the Court of Appeals for the Second Circuit, which encompasses New York, the median time from filing an appeal to disposition is approximately 14 months.

Law stated - 20 September 2022

Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

In our experience, defendants generally satisfy a judgment against them without the need for enforcement, let alone contentious enforcement proceedings.

However, if a defendant is unwilling to satisfy a judgment against it, both federal and New York courts have robust and well-established mechanisms to empower the plaintiff to locate, freeze and seize the defendant's assets to satisfy the judgment.

The ease or difficulty in enforcing a judgment is influenced by myriad factors, including:

- the judgment debtor's willingness and resources to resist enforcement proceedings;
- the size of the judgment;
- the location of the judgment debtor's assets;
- what, if any, steps the judgment debtor has taken to conceal its assets; and
- the extent to which the judgment creditor has mitigated against the risk of an unsatisfied judgment by careful selection of targets through pre-suit investigation and by learning as much as possible about the judgment debtor during discovery in the underlying litigation.

A defendant's ability to satisfy an ultimate judgment can be a key factor in whether or not a litigation funder will agree to fund a case.

Law stated - 20 September 2022

COLLECTIVE ACTIONS

Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

Class actions are permitted and third parties may fund them. In fact, third parties have funded many of the larger class actions. See, for example, Kaplan v SAC Capital Advisors LP , No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10 September 2015) (a securities class action on behalf of shareholders seeking over US$680 million arising from an insider trading scandal was funded by a third party). In 2017, the United States District Court for the Northern District of California issued a standing order that specifically requires the disclosure of a party funding a class action litigation (ND Cal Standing Order No. 19 (17 January 2017)). This rule does not apply to general civil litigation and there is no such rule directed specifically to disclosure of funders (as compared to those requiring general disclosure of anyone with a financial interest in the lawsuit) in any other courts, including those in New York.

Law stated - 20 September 2022

COSTS AND INSURANCE

Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In responding to this question, we think it best to distinguish between 'costs' (disbursements related to expenses other than legal fees) and 'fees' (legal fees). As a general rule, in US litigation, the losing party does not pay the attorneys' fees of the prevailing party except in specific types of cases, or where otherwise required by a contract between the parties. For instance, consumer protection or civil rights lawsuits allow for the collection of attorneys' fees, as do patent-related matters in exceptional cases. In addition, a court has the discretion to order the unsuccessful party (or its attorney) to pay to the prevailing party its attorneys' fees or other financial sanctions, if the unsuccessful party engaged in frivolous conduct in connection with the litigation (22 NYCRR 130-1.1; see also Fed R Civ P 11). In 22 NYCRR 130-1.1(c), New York has defined conduct to be frivolous if:

> *'1. it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;*
>
> *2. it is undertaken primarily to delay or prolong the resolution of the litigation . . . ; or*
>
> *3. it asserts material factual statements that are false.'*

Further, 'costs' are awarded to the prevailing party in both the New York state system and the federal system. In the state system, costs are set by statute and are a small and arbitrary amount based on factors such as timing and amount of resolution, with a maximum amount of a few hundred dollars. In federal court, however, awarded costs can be significant. Chargeable costs include some court and transcript fees, witness fees and document copying costs (28 USC section 1920). Expert witness fees, which depending on the nature of the litigation can be large, are generally not chargeable beyond the small statutory daily attendance fee. In some cases, document copying costs have been held to

include a portion of the prevailing party's e-discovery costs, which can be substantial. See Balance Point Divorce Funding LLC v Scrantom , 305 FRD 67 (SDNY 2015).

Law stated - 20 September 2022

Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

No published case applying New York law has held a third-party litigation funder liable for adverse costs (including attorneys' fees in applicable circumstances).

This does not mean that the terms of the funding agreement may not make the funder responsible for the payment of any adverse costs order. Best practices dictate that the funding agreement address whether the funder is or is not responsible for the payment of any adverse costs order (including any responsibility for attorneys' fees).

Law stated - 20 September 2022

Security for costs

May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Courts do not order a party to provide security except if the party is seeking a preliminary injunction or a temporary restraining order in advance of the adjudication of the dispute on the merits. See, for example, NY CPLR section 6312(b); Fed R Civ P 65(c). The court will set the amount of security required to 'an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained' (Fed R Civ P 65(c)).

Law stated - 20 September 2022

If a claim is funded by a third party, does this influence the court's decision on security for costs?

No. The applicable rules provide that the security should be calibrated to the amount of the potential damages that would be incurred if a party is wrongfully enjoined, not the resources of the party seeking an injunction.

Moreover, in many cases, the court would not necessarily be aware of the existence of third-party funding.

Law stated - 20 September 2022

Insurance

Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance indemnifies the client for legal costs in the event the client loses its case. ATE insurance, which is purchased after the dispute has arisen, can protect against paying the other side's adverse costs and can reimburse the client for its own attorneys' fees and out-of-pocket expenses.

There is no statute in New York that prohibits ATE insurance. That being said, as in most states, insurance in New York is, generally speaking, a heavily regulated field, with licensing and other rules that may affect who can issue or

purchase ATE insurance.

In our experience, ATE insurance is not commonly used in New York. But as lawyers and clients in New York become more familiar with ATE insurance, we would expect interest in this product to grow, including with clients who may have the resources to pay legal fees and costs on their own, but want to offset fees and costs if they lose the case.

We are not aware of other types of insurance, in the context of fees or expenses, commonly used by claimants in New York. But as interest in litigation funding grows, we would not be surprised if interest in ATE insurance grows with insurance alternatives entering the market.

Law stated - 20 September 2022

DISCLOSURE AND PRIVILEGE

Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

There have been efforts to require the disclosure of the existence and identity of a litigation funder. For example, in the United States District Court for the Northern District of California, a party must disclose the identity of a funder in class action cases only. That court rejected a broader proposed order that would have required the explicit disclosure of the funder in all cases in that district. In certain courts, such as the District Court for the Central District of California, a party is required to disclose anyone that 'may have a pecuniary interest in the outcome of the case' (CD Cal LR 7.1-1). While this rule is not specific to litigation funders, it may require the disclosure of the name, although not the funding agreement itself, of the funder.

In 2019, the United States District Court for New Jersey similarly declined to require disclosure of third-party funders. See In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Products Liability Litigation , No. CV 19-2875 (RBK/JS), 405 F Supp 3d 612 (DNJ 18 September 2019) (denying inquiry into the possibility that plaintiff was backed by a litigation funder on the grounds that such information is irrelevant where there is no evidence of any untoward behaviour). However, in 2021, the District Court in New Jersey amended its local rules to require lawyers to disclose limited details about third-party litigation funding. New Jersey Local Civil Rule 7.1.1(a) requires all parties to disclose the identity of any party providing non-recourse funding, if the funder's approval is necessary for litigation or settlement decisions, and a brief description of the nature of the financial interest. While the New Jersey District Court does not require the automatic disclosure of the funding agreement itself, a party may seek the disclosure of the agreement 'upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case.' No other court has adopted this broad disclosure requirement and there has not yet been any decision in New Jersey on what showing is necessary to justify the disclosure of an agreement.

There has not yet been any decision in New Jersey on what showing is necessary to justify the disclosure of an agreement. No other District has adopted this broad disclosure requirement, although Judge Connolly in the District of Delaware issued a standing order in April 2022 for cases before him that closely tracks the New Jersey local rule. Currently, no New York court or statute requires a party to disclose the existence of a litigation funder or a litigation funding agreement to the opposing party or to the court.

However, an opposing party could compel the disclosure of a litigation funding agreement if the court determines that the agreement is relevant to the case and it is not otherwise protected from disclosure. New York courts that have addressed this issue have found that, in the cases presented, the funding agreements were not relevant and are not discoverable. (See Kaplan v SAC Capital Advisors LP , No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (SDNY 10

September 2015) (ruling that a funding agreement was not relevant to the lawyer's adequacy as class counsel in a securities class action lawsuit and explicitly declining to address if disclosure of the agreement would be entitled to work product protection) and Benitez v Lopez , No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 (EDNY 14 March 2019) (denying defendant's request to review plaintiff's financing on the ground that it is not related to plaintiff's credibility nor relevant to any other claim or defence).) A recent New York appellate decision affirmed an order denying production of litigation financing as the defendant could not establish how such discovery would 'support or undermine any particular claim or defense'. Worldview Entm't Holdings Inc v Woodrow , 204 AD3d 629, 630 (1st Dept 2022). This ruling reflects the increasing tendency of courts to recognise that litigation financing does not require the disclosure of information relating to litigation financing.

If a court determined that the funding agreement was relevant to the case, then a party would be required to disclose the funding agreement if it were not protected from disclosure by attorney-client privilege or work product protection (see response below).

If deemed relevant, a client would likely be compelled to disclose at least some information about the identity of the third-party funder. See, for example, In re Nassau County Grand Jury Subpoena Duces Tecum Dated 24 June 2003 , 4 NY 3d 665, 678-79 (NY 2005) (information regarding the payment of fees by a third party is not protected as an attorney-client privileged communication).

New York courts have not addressed whether work product protection protects against the disclosure of a funding agreement. They have, however, recognised that the terms of a joint defence agreement, which is an agreement to share information between multiple defendants to the same litigation, is considered work product. See RFMAS Inc v So , No. 6 Civ 13114 VM MHD, 2008 WL 465113 (SDNY 15 February 2008).

Law stated - 20 September 2022

Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

In certain circumstances, the attorney-client privilege and the work product doctrine protect against the disclosure of communications and information shared between attorney, client and funder. There has been very limited analysis of these protections by New York courts as they relate to third-party litigation funding. We suspect that New York courts will likely find that attorney-client privilege will not protect communications with a third-party funder from disclosure. However, New York courts will likely find that work product protection will protect from disclosure of certain communications and information provided to a funder.

Communications between an attorney and client for purposes of providing legal advice are privileged in all US jurisdictions, including New York. If attorney-client communications are disclosed to a third party, the privilege can be deemed to have been waived as to the communications themselves and even in some cases as to the subject matter of the communications. However, if the communications are shared with a third party with whom the client has a 'common legal interest', there is no waiver of the privilege.

In the context of third-party litigation funding, whether disclosure of communications with a funder waives attorney-client privilege turns on whether a client has a common legal interest with the funder. There has only been one decision in New York addressing this question and it did not extend the common interest doctrine to litigation funders. There the court declined to protect information shared with a litigation funder. In Cohen v Cohen , No. 09 CIV 10230 LAP, 2015 WL 745712, at *4 (SDNY 30 January 2015) the court noted that:

> *'[Although] the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy.'*

So ruling, the court found that, since the litigation funder was not a party to the litigation and there was no suggestion that she had a legal claim against the defendant, there could not be a common legal interest. The work product doctrine is separate and distinct from attorney-client privilege.

The work product doctrine protects from disclosure documents prepared, and information collected, in anticipation of litigation. The work product doctrine can prevent such documents and information from falling into the hands of the party's adversary. Unlike attorney-client privilege, disclosing work product to a third party does not waive work product production where such disclosure did not substantially increase the likelihood that the work product would fall into the hands of an adversary in the litigation. See In Re Steinhardt Partners LP , 9 F3d 230 (Second Circuit 1993).

Since New York courts have not addressed the applicability of work product protection to the disclosure of information given to a third-party litigation funder, we look to other jurisdictions for guidance. Courts in those jurisdictions have generally found such information to be protected as work product. See Miller UK Ltd v Caterpillar Inc , 17 F Supp 3d 711, 736 (ND Ill 2014) (the disclosure of a memorandum describing the strengths and weaknesses of a case to a funder was protected as work product). This would specifically include documents prepared with the intention of disclosing to potential investors to aid in future litigation. See Mondis Tech Ltd v LG Elecs Inc , No. 2:07-cv-565, 2011 WL 1714304, at *3 (ED Tex 4 May 2011) (documents prepared with the intention of disclosing to potential investors in aid of future litigation were protected); Lambeth Magnetic Structures LLC v Seagate Tech (US) Holdings, Inc , No. 16-cv-00538, 2018 WL 466045 (WD Pa 19 December 2017) (same). We expect, but are not certain, that New York courts will adopt the same reasoning and protect work product disclosed to third-party litigation funders.

Ultimately, a balance needs to be struck between obtaining sufficient information to make decisions about whether, or to what extent, to fund a case and the risk of waiver, which could lead to the disclosure of information that could harm the case, and the funder's investment in it, by putting at risk the attorney-client privilege. Given the lack of definitive case law in New York on this issue, to avoid the risk of waiving attorney-client privilege, a funder should tread lightly in requesting communications between the client and attorney that would otherwise be protected as privileged communications.

However, work product protection will likely allow the client to disclose to the funder documents prepared in aid of the litigation, which should be sufficient to allow a funder to make an informed funding decision and to remain apprised of key developments over the life of the case.

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DISPUTES AND OTHER ISSUES

Disputes with funders

Have there been any reported disputes between litigants and their funders?

We are not aware of any reported disputes in New York between a litigant and a funder in cases where the funder has lent money to the holder of a claim to cover the legal fees and costs in exchange for a portion of the proceeds arising from the holder's enforcement of its claim.

There may be several reasons why there have been no reported disputes in New York. Most funding agreements have strict confidentiality provisions. And since most funding agreements have arbitration clauses, if there is a dispute between a litigant and a funder, that dispute would be confidentially arbitrated.

It is worth noting that there have been several reported disputes in New York (or by courts applying New York law) in the context of consumer legal funding, where a consumer legal funder provides a non-recourse advance to a plaintiff (commonly in a tort case) to cover the plaintiff's living expenses during the pendency of the case in exchange for a portion of the proceeds from the case. See Cash4Cases, Inc v Brunetti , 167 AD3d 448, 449 (1st Dept 2018) (affirming

a judgment in favour of a funder who provided non-recourse case advance to a client in a consumer personal injury lawsuit); Lynx Strategies LLC v Ferreira , 957 NYS2d 636 (NY Sup Ct 2010) (confirming an arbitration award in favour of the funder where the plaintiff and plaintiff's law firm did not pay the funder its share of the settlement proceeds); Obermayer Rebmann Maxwell & Hippel LLP v West , Civ No. 15-81, 2015 WL 9489791 (WD Pa 30 December 2015) (applying New York law and holding that failure to pay the funder its share of the proceeds was breach of a funding agreement); and MoneyForLawsuits V LP v Rowe , No. 4:10-CV-11537, 2012 WL 1068171 (ED Mich 23 January 2012) (same).

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Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

As legal costs increase, as client budgets for litigation shrink, and as lawyers and clients learn more about litigation funding, interest in litigation funding is growing in the United States, and more and more funders are entering the market. In selecting funders with which to do business, clients and counsel should look for funders that have:

- established track records of funding cases through to completion;
- ample resources to handle the expense of litigation;
- the fortitude to weather the uncertainties that are an inevitable feature of litigation;
- the ability to make funding decisions without inordinate delay; and
- the ability to offer sound advice along the way, while still respecting the autonomy of the client and the ethical duties of the lawyer to his or her client.

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UPDATE AND TRENDS

Current developments

Are there any other current developments or emerging trends that should be noted?

The use of third-party funding is continuing to expand in New York and throughout the United States. Both small and large companies are increasingly seeking third-party funding. Such companies include those with the capital to self-fund, but that would rather offset some of the costs of the litigation to third parties. There are also accounting benefits for obtaining litigation funding compared to a company paying the costs itself.

The growth of litigation funding has led to many new funders entering the US market. It has also increased the different types of funding available. From the traditional case-based funding model to portfolio financing, litigants can work with funders to obtain funding that is tailored to their particular needs.

Courts are increasingly amenable to third-party funding as well. Each year brings additional decisions that reflect acceptance of funding. Notable is a decision by a New Jersey US district court, WAG Acquisition LLC v Multi Media LLC (No. 14-2340-ES-MAH, DI 190), in which the court found that the existence of a third-party funding agreement that did not give the funder further rights independent of its funding did not impact plaintiff's ownership of intellectual property, nor its ability to bring a lawsuit enforcing its rights to such property.

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Jurisdictions

Australia	Piper Alderman
Austria	Nivalion AG
Belgium	Nivalion AG
British Virgin Islands	Martin Kenney & Co
Canada	Omni Bridgeway
France	Nivalion AG
Germany	Omni Bridgeway
India	Khaitan & Co
Israel	Woodsford
Italy	Fideal S.R.L
Japan	Miura & Partners
Luxembourg	Nivalion AG
Netherlands	De Brauw Blackstone Westbroek
Spain	PLA Litigation Funding
Sweden	Nivalion AG
Switzerland	Nivalion AG
Thailand	Rajah & Tann Asia
United Kingdom - England & Wales	Woodsford
USA - New York	Liston Abramson LLP