Commercial Litigation Funding
A Guide for Plaintiffs & Commercial Litigators Seeking Funding in the United States
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Editors' Note: While some would say there are too many lawyers in the world, the problem a business has when it needs to seek redress from the courts for harm inflicted upon it by another business is not that there are too many lawyers. Rather, the problem is often, ironically, that there are not enough lawyers willing and able to take on a lawsuit at a cost the aggrieved business can and is willing to pay. This is where the contingency fee arrangement has traditionally come into play. But many excellent lawyers are unwilling or unable to take work on such a basis, and, even when they are, the percentage of the recovery demanded in the form of the contingency fee can be quite expensive.

One magnificent attribute of capitalism is that markets create solutions to problems. The solution to this problem was the advent of third-party litigation funding. This article is about one of the two parts of the world of third-party litigation funding: commercial litigation funding. We believe it to be the most comprehensive, yet plain English treatment of the topic. Further, because it is not written by a firm offering commercial litigation funding, as are most articles on the topic, we believe it to be the most objectively written article out 'there.'

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Cite this article as *Litigation Funding: A Guide for Plaintiffs & Commercial Litigators Seeking Funding in the United States*, by Jonathan Friedland & Jeremy Waitzman (Financial Poise, February 13, 2024)

1 Introduction.

1.1 Commercial Litigation Funding Defined

Commercial litigation funding, also known as "third-party litigation funding,"[1] is a form of financing in which a third party ("***Funder***") provides funds to either a party with a legal claim ("***Fundee***") against a third party (i.e., a defendant) or a law firm representing one or more parties with one or more legal claims against a defendant. In exchange for the funding, the Funder gets to share any settlement or award that is obtained from that legal claim.

Commercial litigation funding ("***CLF***") almost always involves funding the side of the plaintiff (while providing funding to defendants is theoretically possible, it is not common). We define the CLF industry as being comprised of such Funders, the intermediaries that connect Funders with Plaintiffs and their law firms, and attorneys (like us) who represent Funders and Fundees in the deals they make with each other.

1.2 Why this Guide?

The way CLF works is *generally* the same regardless of who the Funder is. There are, however, marked differences among Funders, and great variations in the economic and legal terms they offer potential Fundees. The industry is still relatively young, and Funders tend to be guarded about their diligence processes and the terms they offer Fundees. The result: a marketplace in which it is more difficult to know what terms are 'market,' and legal documents that are far more bespoke than many other transaction types.

In addition to these issues, we'd be remiss if we didn't channel our inner Sy Syms. That great American 20th century philosopher is, perhaps, best known for bequeathing to the world the adage, 'an educated consumer is our best customer." This is particularly apt where, as is common in the CLF setting, much negotiation between a Funder and Fundee is conducted by the Funder and its outside counsel, on the one hand, and the Fundee and its litigation counsel, on the other hand. This is often fine, but sometimes Fundee's litigation counsel will determine that it is either not experienced nor familiar enough with the market to advise on the CLF transaction itself; and other times Fundee's litigation counsel will be uncomfortable doing so because of conflict concerns. See Section 7.5.

As its title suggests, this resource is intended to serve as a 'guide', so to speak, for Fundees in search of Funders. It doesn't give away any secrets, but it will help you understand in broad strokes how CLF works and how Funders generally approach it.

1.3 Who are We?

Your humble authors of this Guide- Jonathan Friedland and Jeremy Waitzman- have been working together on CLF matters since 2017.

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[1] A rose by any other name... To be more precise, third-party litigation funding is a broader term that includes both commercial litigation funding and consumer litigation finance. This article is about the former, not the latter. Also, third-party litigation funding is referred to by other names, depending on who's talking. For example, the American Bar Association's Commission on Ethics 20/20 referred to it as "Alternative Litigation Funding" in its 2012 Informational Report to the House of Delegates.

We have closed numerous small deals, dozens of deals where the funding amount was over $10 million.[2]

Our clients include larger and smaller Funders and Fundees and wehave worked for, alongside, and against a good number of the members of the International Litigation Finance Association ("***ILFA***"). While most of our work in the space is transactional, we have also helped Funders with inside corporate work, worked on Funder-Fundee disputes, and helped Fundees evaluate funding offers from competing Funders. While there is a necessary shadow of confidentiality in the CLF industry, we are proud to be part of a small group of outside counsel with this depth of experience in the field

We are grateful to Andrew Langhoff of the CLF advisory and brokerage firm, Red Bridge Advisors, for his review of and thoughtful comments to a draft of this Guide.

1.4 How to Read this Guide

This Guide is short. The best way to read it the first time around is in its entirety, in order, and without looking at the footnotes. For whatever it's worth, though, here's our color commentary about its parts:

1. This Introduction (Section 1). Read this first.

2. Sections 2-6, which form the background one should do to get a general 'lay of the land.' If you do not know the industry, you should read it before getting to the good part.

3. In Section 7, the Transactional Q&A Section, we've tried to anticipate and answer some questions you should have as you roll up your sleeves and look for and later negotiate CLF.

4. Section 8 is the Litigation Q&A, which addresses the most common questions others ask us about how CLF may impact an underlying lawsuit.

5. Section 9 discusses issues that exist if Fundee is financially distressed.

We've included references to a few articles and cases we consider essential reading for anyone looking to expand their knowledge about CLF after reading this Guide.[3]

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2 One public (i.e., not confidential) example involved the purchase of a portion of the interest in proceeds of $213 million fraudulent conveyance judgment. In 2016, the chapter 7 bankruptcy trustee for Magnesium Corporation of America sold a $50 million share of a $213 million judgment it has against fraudulent conveyance transferee, Renco Group Inc. and former MagCorp owner, Ira Rennert. See *Litigation Funder Monetizes Portion of Fraudulent Transfer Judgment in Cutting-Edge Transaction* (DailyDAC, September 19, 2016).

3 This Guide is not about CLF news. It is intended to be an evergreen explanation. To that end we intend to update it regularly. To receive a PDF of the article each time it is updated, email info@financialpoise.com with the subject line "Please send me the CLF Guide when it is updated." A great short summary of expected trends in the industry in 2024 is Jeffrey Lula, *5 Litigation Funding Trends To Note In 2024* (Law 360, January 10, 2024).

1.5 Uses of Proceeds

In CLF, the Funder provides funds to cover litigation costs to pursue the Fundee's claims. Such costs may include legal fees, expert witness fees, court costs, and other expenses associated with pursuing the case. Sometimes, a small portion of the provided funds may be used for expenses not directly related to litigation, most often for general working capital purposes. So, the Funder is the *source* of funds, and, most typically, the funds are used to fund litigation or litigation-adjacent expenses.

1.6 The 'Typical' Fundee

1.6.1 Fundees That *Need* the Money

CLF is sometimes sought by Fundees who lack the financial resources to pursue legal claims against a third party. CLF can thus fulfill the need of parties that cannot afford to pay attorneys by the hour, and law firms that cannot or will not take on a wholly contingent basis. In this way, litigation funding can help level the playing field in disputes involving large, well-funded defendants (think 'David vs. Goliath').

1.6.2 Fundees That *Don't Need* the Money

Many (maybe most) Fundees, however, can afford to pay attorneys on an hourly basis but choose to use CLF. Why? The reasons can be put into two basic buckets:

- One reason is purely economic, of course, as is any risk-hedging decision. Stated differently, putting someone else's money at risk has some obvious benefits over putting one's own money at risk. This is particularly true given the largely binary ('win or lose') nature of litigation.

- A second goes to 'sticking with one's knitting.' Just as a company that makes widgets may decide to enter into a sale/leaseback transaction on the basis, in part, that it is not a landlord and its time is not best spent doing 'landlord things,' and just as some owners of popular consumer brands that used to manufacture their products later evolved to become marketing-only companies that today rely on contract manufacturers because marketing is what they do best, so too might a company decide that investing capital outside its core competency does not present a highest and best use of its capital.[4]

CLF offers other benefits to a Fundee/prospective Fundee.

[4] Stewart Ackerly, Director and Head of Originations at Statera Capital puts it this way: "Companies are realizing that even if they have the resources to pay their law firm of choice by the hour, CLF provides a risk-mitigation and cost-management tool that is beneficial to in-house legal departments and companies generally. CLF enables a company to pursue affirmative claims and turn these contingent assets into meaningful financial recoveries for the company, without having to bear the risk and cost of pursuing those claims." See also Jonathan Friedland, Elizabeth Vandesteeg, and Jeffrey Goldberg, *Litigation Risk Mitigation Through the Use of Third-Party Litigation Funding* (The Corporate Counselor, August 2017).

For example, as Jeffery Lula, a principal at GLS Capital where he oversees the day-to-day for commercial litigation funding investments, has noted, "CLF can also provide internal accounting benefits by eliminating recurring legal expense that can be artificially lowering profitability and valuation."

Another example: the process of seeking CLF serves a 'second opinion' function with respect to the subject litigation. That is, if you are looking for CLF and every Funder you speak to takes a pass, that may tell you something about the merits of your case. According to Charles Schmerler, head of litigation finance at Pretium Partners and formerly an AmLaw 25 law firm litigation partner, "funders absolutely have a vested interest in being honest and direct with fundees and their lawyers at the earliest stages. No one wins if the case is not evaluated candidly and critically by an experienced funder right at the start."

Funders also do much more than just write checks. As discussed in Section 8, Funders employ people who previously worked as senior litigators who can and do offer valuable advice during the course of the litigation.[5]

1.7 <u>How do Funders Find Fundees?</u>

The best Funders don't need to find Fundees; Fundees find *them*. Right?

Wrong.

The most prominent, well-regarded professional service firms spend a ton of money on marketing and PR. This is true across every industry. From accounting to financial advisory, from banking to law: virtually every 'white shoe,' 'magic circle,' and 'bulge bracket' firm spends significantly on making sure that potential clients think of them as a go-to firm. This is not intended to denigrate. It's just intended to remind you that Funders need customers, too, and Fundees *are* their customers (clients).

With that as background, all you really need to know as a potential Fundee is that Funders spend a great deal of time writing articles, speaking at conferences and webinars, and trying to be mentioned in articles that are attended/read by attorneys who litigate complex commercial disputes. So, one of the better ways to access Funders is to ask your law firm for referrals. However, funders also spend time trying to access in-house counsel, so if you're a C-suite executive, your general counsel may already have views on the industry.

1.8 <u>Who are the Funders?</u>

Funders are specialized group of professional investors, either at a CLF firm or a litigation funding department within a larger hedge group, who focus largely, if not exclusively, on investing in legal risk.

Many, if not most, of the people at Funders with whom you will interact are former senior litigators or other legal subject matter experts who were formerly at sophisticated law firms, and others are quants[6].

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[5] Don't confuse advice with control; Funders certainly don't. See Section 7.4. From Statera's Head of Underwriting, Matt Blumenstein: "Although the lawyers we fund are not required to seek our advice, let alone follow it, many of them do confer with us on key briefs, arguments, or points of strategy. We are, after all, experienced lawyers with extensive knowledge about the cases, and we aren't as deep in the weeds as the lawyers, so we have fresh eyes and a potentially valuable degree of objectivity."

[6] A quant is a financial professional who uses mathematical and statistical models to analyze and value financial instruments, such as stocks, bonds, derivatives, and other securities. Quants are typically employed by investment

They tend to be extremely smart, honest, and professional. However, they are in the business of making as much money for their investors as possible, and many have sharp elbows.

Above all else, 'better' Funders do not outsource the job of underwriting the merits of your (the Fundee's) litigation. The experience and skill to do this are the 'alpha' that Funders bring to their investors. Asking a funder whether it outsources this function is, in our view, not all that different from asking an investment advisor whether it outsources the function of coming up with investment advice. If the answer to either question is yes, then keep walking.[7]

1.9 Who Invests in Funders? How are investments valued?

CLF is an example of an *alternative asset* and a highly *uncorrelated asset*. Because of how most CLFs are organized and how most raise money, their investors generally must be *accredited investors*. These facts come together to result in most investors in CLF being institutional investors and very affluent families/individuals. If this sounds like the universe of investors that invests in traditional private equity, that's because it is. In addition, just like most alternative assets and other illiquid assets that are the targets of private equity, the manner of valuing these investments before they mature requires a detailed evaluation of likelihood of success and value of the ultimate recovery- which is a similar process used by Funder in its underwriting process[8].

2 **History of Litigation Funding**.

2.1 'Ancient History' & Historical Objections

The origin of litigation funding can be traced back to medieval Europe, where wealthy individuals would finance legal disputes in exchange for a share of the winnings or sometimes just to harass other noblemen. And this type of lawsuit funding was commonly viewed as objectionable due to the common law doctrines of *champerty* and *maintenance*.[9]

Both doctrines were intended to prevent the wealthy and powerful from using their financial power to influence legal proceedings and undermine the fairness of the justice system. The concern was that by funding lawsuits, third parties could exercise undue influence over the litigation, leading to unjust outcomes or frivolous claims. These doctrines were exported to the colonies and, thus, were in the background of U.S. common law from its beginning.

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banks, hedge funds, asset management firms, and other financial institutions.

[7] As Pretium's Schmerler has noted, a potential Fundee should look for a Funder whose principals have real partner-level experience leading high-value cases in the same subject area as your case. Not only is their experience invaluable, but they will understand that there can be ups and downs along the way and be more likely not to panic at the first sign of trouble.

[8] See, for example, *A Valuation Framework for Litigation Finance Assets* (Houlihan Lokey, December 2023).

[9] *Champerty* refers specifically to the sharing of the proceeds of a lawsuit, while *maintenance* refers to any support or encouragement of a lawsuit by a third party who does not have a legitimate interest in the outcome of that lawsuit.

In the modern context, courts generally view litigation funding as permissible so long as the funder does *not exert undue influence over the litigation*.[10] Many jurisdictions have enacted laws or regulations and certain judges or legal divisions have implemented rules that clarify the circumstances under which litigation funding is allowed and provide safeguards to ensure that the funder's interests do not conflict with the interests of the litigants.[11]

2.2 Modern History & the Modern Trend

The modern history of litigation funding started in Australia and the UK in the mid-1990s. . This was due to a confluence of laws and legal rulings that made those countries particularly fertile to the development of this industry.

Given the porousness of money and people, especially among the English-speaking finance hubs of Sydney, London, and New York, it was only a matter of time before litigation funding gained traction in the United States. And that started to happen in the U.S. commercial market in the mid-2000s.

As the industry grew in the U.S, the application of the old doctrines of champerty and maintenance became more limited; courts facing the issues recognized that there are legitimate reasons for third parties to provide financial support to litigants. The fact of the matter is that pursuing a lawsuit can be prohibitively costly, making it difficult for parties harmed by some wrong to pursue a legitimate legal claim.

Protracted discovery is expensive and is a drain on the parties' resources. When a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent.[12] Indeed, the reason for the "proliferation of alternative litigation financing in the United States" is "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."[13]

The alternative of hiring an attorney on contingency is not always possible, and, even when it is, it can be far more expensive than CLF.

3 **CLF vs. Secured Lending.**

3.1 CLF is Generally Not a Loan

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[10] E.g. *Osprey, Inc. v. Cabana Limited Partnership*, 340 S.C. 367, 384 (S.C. 2000) ("We abolish champerty as a defense because we believe it no longer is required to prevent the evils traditionally associated with the doctrine as it developed in medieval times.")

[11] If you are as careful a reader as we are in writing, you will have noticed we have refrained in this paragraph from using "CLF" and from capitalizing the word "funder." This was intentional, to distinguish litigation funding generally from its two constituent subparts: *commercial* litigation funding and *consumer* litigation funding. See Section 4.

[12] See *Making Horses Drink, 81 Fordham L.Rev. 1669, 1695 (2013); Matthew Jarvey, Boilerplate Discovery Objections: How They Are Used, Why They Are Wrong, And What We Can Do About Them*, 61 Drake L.Rev. 913, 915–916 (2013); William Griesbach, The Joy Of Law, 92 Marq. L.Rev. 889, 907 (Summer 2009).

[13] *Lawsuit Funding LLC v. Lessoff*, 2013 NY Slip Op 33066(U) (Sup. Ct. N.Y. County December 4, 2013), citing American Bar Association's Commission on Ethics 20/20, referenced above in footnote 1.

There are two conceptual ways to think about a CLF transaction. The first is that the Funder is loaning money to the Fundee where the collateral for the loan is the recovery from the litigation. The second is that the Fundee is selling, and the Funder is buying, a portion of the future recovery (if any) in exchange for an upfront price or an upfront agreement to cover certain litigation costs. Neither is perfect.

CLF certainly has several hallmarks of a loan. Yet, it lacks others. The bottom-line up front on the question is that CLF is neither intended to be, nor is it structured to be a loan. Rather, industry participants typically denominate and structure the contract between Fundee and Funder as a *variable prepaid forward contract.* This means that the seller (the Fundee) agrees to sell a portion of the future recovery of the litigation being funded at a price that cannot be determined at the time of the agreement. See Section 3.3 for a more detailed explanation of VPPFCs.

3.2 The Non-Loan Characteristics of CLF

Ways in which typical CLF does not look like a loan? First, with limited exceptions[14], CLF is extended to the Fundee on a non-recourse basis. In other words, the Funder is paid only if the litigation results in a recovery for the Fundee. Loans, in contrast, are usually recourse to a borrower, meaning the lender has the legal right to demand compensation or payment regardless of outcome.

Second, the Fundee must use the funds advanced by the Funder (the "***CLF Advances***") in compliance with a budget or purposes agreed to with the Funder. And the overwhelming majority[15] of the CLF Advances usually must be used to prosecute the litigation being funded: direct litigation costs, i.e., attorney fees; and "hard costs," including discovery costs, expert fees, and filing costs (basically anything other than attorney fees).

This is in stark contrast to a typical borrower-lender relationship, in which a lender does not direct how its borrower spends the borrowed funds (for a host of reasons, not the least of which is to avoid later potential lender liability claims). Sometimes, CLF Advances do not even pass through the hands of the Fundee and, instead, are paid directly to Fundee's attorneys or other third parties.

Third, the Funder does not typically earn 'interest' as such. Rather, in exchange for providing CLF, the Funder will get a negotiated portion of the litigation proceeds ("***Litigation Proceeds***"), which is often tied to a multiple of deployed capital rather than some kind of stated interest rate.

3.3 Variable Prepaid Forward Contracts Explained

Generally speaking, a *forward contract* is an agreement that anticipates the actual delivery of a commodity on a specified future date.[16]

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[14] Think in terms of bad boy guarantees.

[15] Funders will sometimes agree to permit some small portion of the CLF Advances to be used for other purposes, such as for the overall working capital of the Fundee or to pursue a licensing strategy in the case of a dispute around intellectual property.

[16] IRC § 1259(d)(1) defines a forward contract as a "contract to deliver a substantially fixed amount of property (including cash) for a substantially fixed price." See also *Anschutz Co. v. Comm'r*, 664 F.3d 313, 324 (10th Cir. 2011) (citing *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472, 117 S.Ct. 913, 137 L.Ed.2d 93 (1997)).

A *prepaid* forward contract is a type of forward contract where payment is made at the outset, and the delivery of the underlying asset or commodity occurs at a future date. The price of the asset is determined when the contract is created, and the payment is also made at that time. This type of contract is distinguished from standard forward contracts, where the payment and transfer of the underlying asset typically happen simultaneously in the future. Prepaid forward contracts can be used to hedge against the risk of price declines in securities or commodities, while still allowing the owner to benefit from potential price increases.

A *variable* prepaid forward contract ("***VPPFC***"), a specific type of prepaid forward contract, is often used by shareholders with significant stock holdings as an investment strategy. These contracts allow shareholders to receive an upfront payment—usually a substantial percentage of the current market value of the stocks—in exchange for agreeing to deliver a variable number of shares or cash equivalent at a future date. The contract defines floor and ceiling prices that dictate the number of shares to be delivered, providing protection against downside risk and allowing for some upside potential.[17]

In the context of CLF, the typical deal structure can be likened to a prepaid forward contract. In these arrangements, the Funder provides financing upfront to cover legal fees and expenses. In return, the Funder receives a portion of the recovery in the future if the litigation is ultimately successful. This structure aligns with the concept of a prepaid forward contract, where the Funder (akin to the buyer in a forward contract) pays upfront, and the return (akin to the delivery of the underlying asset) is contingent upon a future event—in this case, the successful outcome of the litigation.

A typical CLF deal meets the definition of a prepaid forward contract in that an initial payment is made (funding the litigation costs), and the return on this investment depends on the litigation's future outcome. Just as in a variable prepaid forward contract, where the return depends on the future value of the underlying asset, in litigation funding, the return depends on the future success of the legal claim. This arrangement allows the Fundee to manage the financial risk associated with pursuing the litigation, much like how prepaid forward contracts are used to manage financial risk in other contexts.

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[17] VPPFCs are used in a variety of contexts. The 10th Circuit explained their use in the context of tax and estate planning: "A VPPFC, a species of forward contract, typically involves a counterparty, frequently a financial institution, and a shareholder who owns stock that has appreciated significantly but does not want to sell that stock because the sale will trigger a tax liability. Upon entering a VPPFC, the shareholder pledges shares of appreciated stock to the counterparty, which is granted a security interest in the pledged shares. The counterparty then executes a short sale of the same stock and provides the shareholder with a percentage of the proceeds of that short sale. The stock pledged by the shareholder provides collateral to the counterparty for the upfront payment and guarantees the shareholder's financial obligations under the VPPFC." "At the maturity date of the VPPFC, typically a number of years later, the shareholder delivers to the counterparty the specified number of pledged shares of stock based upon the price of the stock at the time and according to a formula agreed upon by the shareholder and counterparty at the inception of the VPPFC. Alternatively, the VPPFC may allow the shareholder to settle the contract with an equivalent amount of cash or with equivalent, but not identical, shares of stock." *Anschutz Co. v. Comm'r*, 664 F.3d at 316 (internal references and quotes marks omitted and grammar changed for readability).

3.4 Benefits of Not Being a Loan

3.4.1 Tax Benefits

Because CLF transactions are generally treated as prepaid forward contracts (and provided the IRS does not successfully challenge that treatment), any profit a Funder makes from its share of Litigation Proceeds if held for the requisite holding period is taxed as capital gains instead of ordinary income- a distinct tax advantage for the Funder and its investors.

This treatment is also beneficial to the Fundee from a tax perspective for two reasons: first, like a loan, a prepaid forward contract structure enables the Fundee to avoid taking the CLF Advances into income. Rather, the taxable event for the Fundee does not happen unless and until it receives Litigation Proceeds. Second, the structure avoids the potential cancellation of debt income ("***CODI***") that results in the forgiveness of a loan (whether the loan was recourse or not).[18]

3.4.2 Usury

The position that a CLF transaction is not a loan is an essential underpinning for the industry because loans are often subject to usury laws, and the imputed rates of return for successful CLF transactions are typically far in excess of the limits imposed by such laws, where applicable.

The non-recourse nature of CLF (explained in Section 3.2) is the basis on which courts have universally ruled that most CLF agreements are, in fact, not loans and, thus, not subject to usury law. See e.g. *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449 (N.Y. App. Div. 2018) ("Assignment agreements such as the agreement at issue here are not loans, because the repayment of principal is entirely contingent on the success of the underlying lawsuit")[19]. This *can* be the result even in the context of consumer litigation finance. See e.g. *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell,* 193 S.W.3d 87, 96 (Tex. Ct. App. 2006) (same).[20]

4 CLF vs. Consumer Litigation Finance

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[18] An important legal precedent for the industry is Revenue Ruling 2003-7, 2003-5 IRB 1, in which the IRS approved of open transaction treatment for a variable prepaid forward contract involving the sale of stock. See generally *Money Now, Taxes Later With Prepaid Forward Contracts* by Robert W. Wood (Forbes, May 29, 2021).

[19] The Ninth Circuit examined *Brunetti* in *Fast Trak Investment Company, LLC v. Sax*, 962 F.3d 455 (Ninth Circuit 2020) by noting that in *Brunetti*, the Funder's payment was contingent upon the successful recovery of proceeds from a single case, whereas in the case before it, the Funder's repayment was secured with his future attorney fees in about five to ten unrelated cases. The Ninth Circuit first certified two questions to the New York Court of Appeals: (1) Whether a litigation financing agreement may qualify as a "loan" where the obligation of repayment arises not only upon and from the client's recovery of proceeds from such litigation but also upon and from the attorney's fees the client's lawyer may recover in unrelated litigation and, if so, (2) what are the appropriate consequences. Although the New York Court of Appeals accepted the certified questions, they were later withdrawn.

[20] We italicized the word "can" with intent. We do not work in the consumer litigation finance space.

Consumer litigation financing is to CLF as Chapter 7 bankruptcy practice is to Chapter 11 corporate bankruptcy practice: they have similar names and share some baseline concepts, but that's where the similarities end. They serve different markets and have fundamentally different characteristics.[21]

4.1 Target Fundees

CLF is aimed at Fundees that are involved in complex commercial litigation, such as breach of contract disputes, patent infringement cases, or securities fraud lawsuits. *Consumer* litigation financing, on the other hand, is aimed at individual plaintiffs who are involved in personal injury lawsuits, employment discrimination cases, or other types of *consumer* litigation.

4.2 Use of Advances.

As stated in Section 2.1, CLF Advances are used overwhelmingly for direct litigation costs and sometimes do not even touch the Fundee's bank account, instead being paid directly to the Fundee's litigation attorney and other experts and service providers. Consumer litigation financing advances, on the other hand, typically are paid directly to the Fundee for the Fundee to use personally, never for litigation costs.

4.3 Size of Claims

CLF typically involves larger claims, with funding amounts that can range from tens of thousands to millions of dollars. In contrast, consumer litigation financing typically involves smaller claims, with funding amounts that are generally in the range of a few thousand to tens of thousands of dollars.

4.4 Underwriting/Due Diligence

CLF Funders generally conduct very thorough due diligence and risk assessment of the likelihood of success on the litigation to be funded before agreeing to provide funding. In contrast, the likelihood of success or failure in consumer litigation is generally easier to assess, both because the matters are less complex and because the financing is typically provided much later in the litigation as compared to CLF, which is typically provided very early in the litigation (and often before litigation is even filed). Moreover, consumer litigation financers rely on portfolio math to reduce overall risk, meaning they involve themselves with a greater amount of cases in order to reduce the impact of any one of them.

4.5 Repayment Terms

In stark contrast to CLF, consumer litigation finance is commonly structured as a cash advance or a loan, which must be repaid regardless of the outcome of the case. As stated above, CLF Funders are only paid in connection with a successful outcome. In addition, consumer litigation finance sometimes involves the outright sale of the claims themselves, which is rare in the context of CLF.

4.6 Regulatory Environment:

The regulatory environment for CLF is far more permissive than for consumer litigation financing as CLF typically involves sophisticated parties represented by counsel, while consumer litigation financing

[21] The industry's leading trade association, the International Legal Finance Association ("***ILFA***") , provides this useful fact sheet that hammers home the distinction. See also *Minnesota Supreme Court Fails to Distinguish Between Consumer and Commercial Litigation Funding Agreements* (ILFA, December 1, 2023).

may involve less sophisticated and unrepresented parties who sometimes need regulatory protection from bad actors.

5 Types of Commercial Litigation Financing.

5.1 Generally

In one respect, we painted the picture above of CLF with purposeful imprecision: we defined CLF in part as "a form of financing in which a ... Funder ... provides funds to a *party with a legal claim*." The imprecision is that the financing is *not* always provided to the party with the legal claim; sometimes, it is provided to the *attorney* for the party with the legal claim.[22]

This suggests there are two types of CLF. However, there are more. For example, when the attorney is the party being funded ("***Attorney Fundee***"), the CLE Advance may be made on account of a single case ("***Single Case Funding***"), or it may be made on account of a portfolio of cases ("***Portfolio Funding***"). In this last instance (*i.e.*, when the Attorney Fundee is being advanced funds based on the strength of a portfolio of cases), the transaction may sometimes be structured as a limited recourse loan rather than a variable prepaid forward contract, but the situation typically has some complexity to it preventing the Attorney Fundee from securing traditional bank financing.

The variety does not stop there. Going back to the situation in which the Fundee is the party with the legal claim, it is not uncommon for the Fundee to have similar claims against multiple potential defendants. This is common in the case of patent litigation because when a Fundee is the owner of a patent, the Fundee (a) often is the owner of more than one patent and so may have unrelated claims against multiple defendants; and (b) often has claims of infringement of that patent by multiple defendants. In addition, there are instances where a Fundee may have multiple causes of action against multiple separate defendants, which may also give rise to a portfolio-type transaction structure.

The portfolio structure, whether used with Fundees or Attorney Fundees has benefits to both parties. For the Funder, it allows for a diversification of risk. That is, if one of the claims/litigations against a particular defendant fails, the Funder still can recover from one of the other cases and allows a funder to spread out the risk. For Fundees, it allows for the funding of multiple cases without the need to separately negotiate multiple funding agreements or seek multiple Funders and better pricing (see below).

The concept is very similar to a traditional diversification of investments- if one asset class is a loser, the overall portfolio may have winners in other areas so that a portfolio continues to increase in value. For a Fundee, the advantage of a portfolio structure is that it often results in better pricing since the risk to the Funder is lower (i.e., it is not an all-or-nothing proposition with respect to a single matter).

Nevertheless, based on a survey conducted by Bloomberg Law at the end of 2023 is that the expectation for 2024 is that the vast majority of fundings will be single case financing direct to the claimholders or single case law firm financings.[23]

5.2 Area of the Law Variation

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[22] We didn't think you could handle the truth until you had sufficient context. You're welcome.

[23] See Robert Dillard, *ANALYSIS: Expect to See Targeted Growth in Litigation Finance* (Bloomberg Law, November 5, 2023,).

For reasons that are likely self-evident, the common themes of most legal claims in which CLF is used are that:

- The cost to litigate them are substantial.
- The potential for large recovery is significant.
- Their likely outcome, at least within a range, are reasonably predictable.

In terms of the type of litigation where CLF is most commonly used, we tend to group such litigation into these categories:

- General Commercial Litigation: This encompasses a broad range of disputes between businesses, such as breach of contract, business torts, and other commercial disagreements.
- Antitrust and Competition: Litigation related to anti-competitive practices, market manipulation, and other antitrust issues.
- Asset Recovery and Judgement Enforcement: Litigation to recover assets in cases where defendants have hidden assets or fail to pay judgments.
- Bankruptcy and Insolvency: Examples of claims arising in this context can include those against directors and officers for violating fiduciary duties and fraudulent transfer claims. See also Section 9.
- Patent and Intellectual Property: Claims that allege the infringement of intellectual property rights, particularly patents.
- Securities Litigation: Such claims may involve disputes related to securities, such as shareholder actions and other financial instrument-related litigation.
- ESG Litigation: Claims related to environmental, social and governance matters.
- Class Actions and Mass Torts: Class action lawsuits are typically complex, drawn-out, and expensive. Class action attorneys are tasked with representing a large group who have allegedly suffered a harm as a result of corporate or government malfeasance. This requires a substantial investment of time and resources. The expenses associated with class action lawsuits, which can include discovery, expert witnesses, and trial costs, can quickly become overwhelming, making it challenging for even well-established law firms to shoulder the risk alone. One recent noteworthy case in these areas was Perez v. Rash Curtis & Assoc., Case No. 4:16-cv-03396-YGR, 2021 U.S. Dist. LEXIS 189889, 2021 WL 4503314 (N.D. Cal. October 1, 2021). In Rash Curtis, class counsel sought, and the court denied, reimbursement of CLF expenses. The court held that such expenses "fundamentally relate to the cost of doing business" and are not recoverable from the

corpus of a class settlement.[24] Mass tort cases, of course, are sometimes brought as class actions, but sometimes they are not. Either way, they, too, sometimes use CLF.

5.3 Limitations of this Section

We have still not described (nor will we attempt to) all the variations in the industry because Funders typically have broad investment mandates and, so, the variety of investments they may make is limited only by their creativity. In other words, while 'classic' CLF involves funding one or more lawsuits, Funders also engage in activities that are simply not that. For example, it can be within the investment mandate of a CLF to (a) trade securities of a company based solely (or at least primarily) on the outcome of pending or threatened litigation, and (b) purchase receivables from a law firm or a plaintiff (in which case the purchaser would effectively be acting as a factor) after litigation is concluded.

6 The Role of Insurance in CLF.

Judgment Preservation Insurance ("***JPI***") is designed to permit a plaintiff who won at trial to hedge the risk that an appeal will reverse the judgment. JPI is exactly what it sounds like- insurance that protects a claim or group of claims which have already received judgments. JPI policies are essentially structured as a math problem. If a judgment is granted for X, but the plaintiff only receives Y, the insurer will cover the difference or a portion thereof after payment by the plaintiff of the applicable premium and retention amount (as applicable). While typically thought about in the context of protection against reversal on appeal, it also has the effect of accelerating the recognition of judgment related gains in plaintiff earnings, monetizing judgments while appeals are still pending, and potentially even allowing the conversion of debt, since the policy effectively guarantees a minimum recovery so long as there is no collection or enforcement risk associated with the judgment. In the context of JPI, Insurers do not take over the case (the existing counsel of the insured often remains on the case) nor pay any of the defense or settlement costs.

Conflicts between Funder and Fundee can sometimes arise in the context of JPI. Whereas, a Fundee or Funder may prefer the certainty of knowing that it may walk away from a lawsuit with a recovery equal to the judgment less the premium costs of JPI, the other party might have a different perspective on the likelihood of success on appeal or the certainty of payment. While the decision to acquire JPI remains in the Fundee, unless an agreement is reached between the Funder or Fundee in such scenario or the funding agreement explicitly includes the obligation to fund appeal costs, the Fundee may need to self-fund or seek alternate funding in the context of an appeal or pay for the insurance premiums out of its own recovery.

Other insurance products have begun to enter the mix as well, including: (i) After-the-Event (ATE) Insurance (policies that protect litigants against the opposing side's costs and expenses), (ii) Before-the-Event (BTE) Insurance (policies that offer coverage for potential legal costs before a dispute arises), (iii) Litigation Funding Insurance (specialized form of coverage designed to protect litigation funders against the risk of losing their investment in the event of an unsuccessful outcome), and (iv) Portfolio Insurance

[24] The court stated: "With respect to the reimbursement of monies expended for litigation financing, the Court finds on principal that those amounts should not be charged to the class. First, those amounts are not recognized statutorily. Second, class counsel has not provided this Court with any authority that litigation funding has been reimbursed in other cases. Third, debate in the legal community remains regarding the pros and cons of such entities. While it may have been useful in this case, the Court is not inclined to approve such expenses on this record, and without vigorous debate before deliberation. Many plaintiffs' firms self-finance, and presumably have complex lines of credit with financial institutions. To allow such an expense here might suggest that other class counsel should or could request reimbursement for their own financing arrangements. Thus, the Court is not inclined to approve costs which fundamentally relate to the cost of doing business."

(comprehensive solution that covers multiple litigation cases within a portfolio). These insurances are all relatively new in the context of litigation finance and it will be interesting to see how both pricing and utilization develop over the next several years.

7 Transactional Q&A: Answers to Specific Questions You May, or Should, Have.

7.1 What is the first document a prospective Fundee should insist a prospective Funder sign?

A non-disclosure (a/k/a "confidentiality") agreement. An NDA in the context of a prospective CLF relationship should be a two-way agreement, meaning that it protects each party against improper disclosure of its confidential information by the other party. Sometimes the NDA is included in another document, such as a consulting agreement that could provide additional protections for the parties.

Regardless of the form of the NDA, for the reasons explained in Section 8, it is imperative that it be in place before any confidential information is shared with a prospective Funder and that it clearly states that the confidential information will be exchanged for the primary purpose of the litigation or anticipated litigation.

7.2 What is the second document a prospective Fundee should insist a prospective Funder sign?

A term sheet or letter of intent, like many commercial transactions, is far more efficient (*i.e.*, cheaper) for the parties to negotiate a term sheet or LOI rather than jumping right to definitive documents, since a well-drafted term sheet or LOI will likely bring to the surface business issues that are 'deal breakers" to either party. A mutually executed term sheet or LOI in the CLF context, like in some other commercial transactions, usually provides the Funder with a period of exclusivity during which it will conduct its due diligence and try to negotiate and execute a definitive CLF agreement with the Fundee. The term sheet, once agreed, will serve as the business framework for the transaction.

7.3 What key elements are usually included in a term sheet or LOI?

7.3.1 Funding.

The Funding amount and timing of CLF Advances, including whether funding will be in a single lump sum or if funding will be made as needed or in tranches, based on the Fundee or underlying case meeting/reaching certain milestones/dates.

7.3.2 Use.

While sometimes funding may be used at the sole discretion of the Fundee, more typically, CLF Advances are for specific purposes only. These uses are most commonly tied to expenses of pursuing litigation- namely to cover attorneys' fees and other expenses incident to the prosecution of the case, such as expert fees or third-party discovery costs. Alternatively, they may be used for a specific purpose (e.g., pursuing IP licensing strategies) or more generally as working capital.

7.3.3 Security.

While the CLF Advances may be non-recourse as to the Fundee, the Funder will nevertheless require a security interest related to a Fundee's breach of the agreement. The scope of the security almost always includes proceeds of any sort from the applicable funded litigation and accounts created to accept proceeds therefrom. Depending on the credit risk of the Fundee or the nature of how the funds will be used (e.g., general working capital), Funder may require more comprehensive security.

A Funder will commonly require a Fundee to authorize it to file an 'all asset' UCC-1 financing statement even when, as is often the case, Fundee has not granted Funder a lien on all assets. First time Fundees are commonly surprised by this. The reasons Funders do this is that it makes drafting the UCC-1 simpler and because it serves to obscure the fact that a CLF transaction has occurred.[25]

7.3.4 Funder's Share of Litigation Proceeds.

The term sheet is going to provide what portion of the proceeds the Funder will be entitled. Given the risk and non-recourse nature of these advances, the "rates" are often higher than you would see in a typical bank loan. While the rate may sometimes be expressed as a stated percentage interest rate (e.g., 35% internal rate of return), most often, the return is expressed as a multiple of invested capital (e.g., 2x invested capital), which multiple may increase depending on how long it takes for Funder to be paid (e.g. 2x if paid within 2 years, 3x if paid after 2 years). In addition, it is not uncommon for a return to have a residual component as well that may kick in for "homerun" type returns. The terms around a Funder's share are some of the most important and pivotal terms of the entire transaction.

7.3.5 Distribution of Litigation Proceeds.

The distribution (or waterfall) of proceeds is also a highly negotiated provision. While the first stage is almost always at least a 100% return of Funder's CLF Advances (which may be *pari passu* with counsel if counsel is paid on a contingent basis), proceeds in excess of that amount may be split in a number of different ways. These may range from Funder being paid its full share prior to Fundee's receipt of any proceeds to Fundee being able to take a certain dollar value or large percentage of funds at some higher level of the waterfall. More typically, however, once Funder has received a dollar amount equal to its initial advances, the parties will share some percentage of the next tranche of proceeds. Depending on who the Fundee is (i.e., plaintiff vs. law firm), payments to the law firm are also typically addressed within the waterfall structure.

7.3.6 Termination Events.

Once an agreement is signed, a Funder typically must fund the CLF Advances on the criteria stated in the agreement (e.g., reaching certain case or timing milestones and proving proper backup invoices and documentation) unless there is an event of default or unless an event occurs that, while not an event of default, permits the Funder to cease funding. Most CLF Agreements, for example, allow a Funder to cease funding in connection with a material adverse change ("***MAC***"). Negotiation over what constates a MAC is common and examples may include a very negative development in the litigation (e.g., a legal ruling in the case that limits the possibility of success or damage recovery), the withdrawal of counsel, or other circumstance that greatly diminishes the likelihood of success.

Most of the time, if Funders elects to cease funding, it does not mean that Funder is entitled to an immediate return of its CLF Advances, but rather, shall remain entitled to some portion of the proceeds, if they are received. However, if funding halts because of an event of default, the occurrence of that event of

[25] Read *Dealing with Corporate Distress 12: Meet Our Little Friend, The UCC* (DailyDAC, September 12, 2022) for a refresher about the distinction between attachment and perfection.

default may (as noted in Section 3.2) trigger an obligation under bad boy guarantee. A Fundee is well advised to understand, up front, the what triggers the Funder will expect.

7.3.7 Dispute resolution and governing law provisions.

Term sheets often call for disputes to be resolved by arbitration. In addition, while there can be some variation, most commonly, term sheets are governed by Delaware law (as that is the jurisdiction most commonly used by Funders to create their financing vehicles) or New York law (as that is where an outsized portion of Funders are headquartered). That said, the location of arbitration will likely occur in the principal business location of the Funder.

7.4 What level of control does a Funder typically seek over decisions about the case(s) being funded?

Funders who know what they are doing insist on having no such control. This is critical because numerous provisions of the American Bar Association's Model Rules of Professional Conduct, which are ethical rules governing attorney behavior, prohibit attorneys from sharing legal fees with non-attorneys or allowing non-attorneys to direct or control the attorney's professional judgment in representing a client. These rules are designed to ensure that attorneys maintain their independence, professional judgment, and loyalty to their clients. Model Rule 5.4 applies to Funders because Funders are not practicing law (and even if they were, they do not have an attorney-client relationship with its Fundee. Moreover, while a Funder's interests are usually consistent with the interests of its Fundee, this is not always the case. For example, if a defendant makes a settlement offers, Fundee and Funder may not always agree on whether or not to accept it, but as stated elsewhere, this is ultimately Fundee's call (in consultation with its counsel)[26].

Notwithstanding the lack of control that Funders abide by, it is advisable for Funder, Fundee, and Fundee's litigation counsel to have a common understanding before the CLF transaction closes as to the expectations of each as to strategy and settlement. "Alignment of interest is the cornerstone of a successful funding relationship," says Schmerler. "If there is a disconnect among the parties, reaching an outcome that works for everyone becomes more difficult."

7.5 How does litigation funding change the relationship between a Fundee and its Counsel?

Other than payment obligations, which are often covered by Funders pursuant to the CLF Agreement, the relationship is unchanged. That is, all strategic and other consultations continue to occur between the law firm and its clients, and all privileges continue to exist (unless significant mistakes are made). But wait, (in the words of the great American inventor, Ron Popeil) there's more…

[26] The issue of effective "control" and other regularly debated topics around litigation finance from the perspective of several relevant stakeholders (e.g. judges, litigators, law professors, etc.) is covered well in *A bridge too far? An expert panel examines the promise and peril of third-party litigation financing*, published in Judicature in 2019 (Duke Law School).

As noted in Section 7.2, Fundee's litigation counsel will sometimes be uncomfortable advising Fundee on the CLF transaction itself because of conflict concerns. While not all situations require this, the concern can arise for a couple of reasons. First, Funders commonly require Fundees to execute an irrevocable letter of instruction with their counsel. The letter is commonly limited to serving the purpose of ensuring that litigation proceeds are paid pursuant to the waterfall provided for in the CLF Agreement. Second, Fundee's litigation counsel obviously has an interest in the outcome of the negotiation, as it has a direct impact on the ability of a plaintiff to fund a litigation.

7.6 How long does the process take?

Like most commercial transactions, the answer depends on the level of complexity and the preparedness of the respective parties. That said, the typical timeframe we have observed in our practice from NDA and first discussions to final document execution is 2-3 months. Pretium's Schmerler observes that the process is made immeasurably easier for the would-be Funder if the would-be Fundee and its counsel prepare a funding memo setting forth the legal and factual bases of the case and containing an honest assessment of its strengths and weaknesses. Funders generally focus on four core issues, notes Schmerler: legal merits, likely duration of the case from funding to conclusion, reasonably available damages, and collectability. The sooner the Funder can assess those with the assistance of the Fundee, the quicker the process will move forward.

7.7 What costs are involved in securing financing? How are they paid?

Unless a party represents itself (you've likely heard the saying "a party that represents itself has a fool for a client"), at a minimum, a Fundee will need an attorney to represent it in its negotiations with the Funder. Sometimes, but not always, this may be the same law firm that is handling the underlying litigation. In addition, if a broker (i.e., intermediary) is involved, there will be fees for those services.[27]

CLF agreements commonly provide for these expenses as a draw against the overall commitment amount (but that may come at the expense of funds that otherwise would be used to support the litigation). In addition, Funders almost universally expect that their fees related to the investigation (e.g., due diligence) and documenting the transaction will constitute payments/deployments against the commitment amount, as will other miscellaneous expenses that the Funder may incur.

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[27] Brokers are typically paid by the Funder but the amount of that payment is commonly the cost sometimes is passed onto the Fundee. The 'market' in the United States for smaller deals (say, $5 million or less) is for about 5% of the total amount of the funding commitment (ignoring any milestones that may need to be met and otherwise regardless of whether the full amount is ever deployed) to be paid to the broker at closing. The percentage ratchets down as the funding commitment increases.

Many Fundees can benefit from using a broker when seeking CLF. While attorneys (like us) in the industry will generally be quite happy to introduce you to Funders, they may understandably be somewhat biased toward their own clients, with whom they have deep relationships and, therefore, trust. An excellent broker, however, has deep relationships with far more Funders than does a typical attorney and, like excellent brokers in any space, adds value far beyond simply walking a Fundee to a Funder. Rather, they are better positioned to understand what is and is not market than most attorneys in the space.

Sometimes, but not always, Funders will agree to cap these fees, but any cap should be included in the term sheet. When expenses are deployed against the commitment amount, the Funder will be entitled to repayment upon receipt of proceeds, though it is a negotiated point as to whether the return is on a dollar-for-dollar basis or whether the advanced fees will be entitled to the same return as any other funds deployed in the transaction.

7.8 What happens if Fundee loses the litigation?

Unfortunately, no Proceeds will be available to Funder or Fundee. If the funding is structured as a "portfolio" type investment Funder may be able to recover CLF Advances from the first matter in a subsequent matter. Otherwise, Funder will, subject to the caveats immediately below, simply have made an unsuccessful investment, with no recourse against Fundee.

CLF agreements include covenants, representations, and warranties. The breach by a Fundee of a covenant typically gives the Fundee the right to stop making Advances. The breach of a representation or warranty may also give the Fundee the right to stop making Advances and, may also result in recourse liability depending on the nature of the breach (as can fraud or intentional misrepresentations on the part of a Fundee).

8 Litigation Q&A: Answers to Specific Questions You May, or Should, Have.

8.1 Is there a concern that information shared by a Fundee with a Funder will be used by the defense in the funded litigation?

Yes, it is an issue that should concern any litigation, but certain legal doctrines may protect information shared between a Fundee and a Funder from discoverytances. Understanding the issues and circumstances will enable a Fundee to avoid problems.

The Attorney-Client Privilege & The Common Interest Doctrine

A Funder should generally not ask a prospective Fundee for copies or even summaries of attorney-client communications. That said, sharing may be acceptable once the formal relationship is consummated, depending on where the litigation is taking place.

The attorney-client privilege is a fundamental legal principle ensuring confidentiality in communications between an attorney and their client. It protects confidential communications between the attorney and the client made for the purpose of obtaining or providing legal assistance from being used as evidence by the opposing party. It prevents the compulsion of testimony and the production of evidence about the privileged communication.

A litigant (or the litigant's attorney) can waive the privilege, either intentionally or unintentionally, by disclosing the contents of the communication to third parties or in situations where the confidentiality of the communication is not maintained. E.g. *Grochocinski v. Mayer Brown Rowe & Maw LLP*, 251 F.R.D. 316, 326 (N.D. III. 2008)

The common interest privilege (as described below) is an exception to the rule that no privilege attaches to communications between a client and an attorney in the presence of a third person. E.g. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 815 (7th Cir. 2007). In effect, the privilege extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances. Id. at 815.

According to some courts, the common interest privilege is applicable when (1) parties undertake a joint effort (2) with respect to an identical legal interest, as opposed to a business or rooting interest, and (3) the withheld communications are made to further said ongoing legal enterprise. E.g. *Grochocinski v. Mayer Brown Rowe & Maw LLP*, 251 F.R.D. at 327.

So, when a Funder and Fundee enter into a funding arrangement, they certainly have common interest in the prosecution and outcome of a litigation. The question is whether that common interest is enough for the doctrine to protect the attorney-client privilege from detaching as to confidential communications and disclosure of certain documentation between them and/or with respective counsel.

The answer, at least in front of courts that require that the identical interest be a "legal interest, as opposed to a business or rooting interest," is no. E.g. *Miller v. Caterpillar*, 17 F.Supp.3d 711,732 (N.D. Ill. 2014) ("A shared rooting interest in the "successful outcome of a case"—and that is what Miller explicitly alleges here—is not a common legal interest"). But the analysis does not end there. Not even close.

The privilege is subject to a wide array of interpretations among state and federal courts. For example, in the Third Circuit, while the degree to which parties' interests must converge is more relaxed, the communication must be shared with the *attorney* of the party with the common interest rather than the party itself. *In re Teleglobe Communications Corp.*, 493 F.3d 345,364-366 (3d Cir. 2007).

A complete explanation of this topic is beyond the scope of this article. Suffice it to say that not only is the case law varied, but it is also confused.[28]

Work Product Protection

In contrast to the attorney-client privilege, most courts facing the issue should hold that the work product protectionwill not be lost when work product is shared with a Funder.[29]

[28] To understand this topic better we recommend you read (1) Kenneth Duvall's excellent treatment of the subject, *The Common Interest Privilege: What Exactly Is It, and When Does It Apply?* (ABA, August 25, 2021), (2) Gregory B. Mauldin's earlier and equally elucidating article, *Invoking the Common Interest Privilege in Collaborative Business Ventures* (The Federal Lawyer, 2009), and/or William Mara's also excellent but shorter and more recent article, *Litigation, Professional Perspective - The Common Interest Exception & Litigation Funding* (Bloomberg, July 2022).

[29] Case law and commentators (including some we cite below) often refer to the work product protection as a *privilege*. They are wrong. We don't want to be pedantic, like obnoxious grammarians, but words especially matter when trying to explain legal concepts in an accessible way.

The work product protection, as embodied in FRCP 26(b)(3)(A), is not an *evidentiary privilege* but rather a *discovery protection*. This rule protects materials prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) from being discovered by an opposing party, under certain conditions.

While evidentiary privileges, such as attorney-client privilege or doctor-patient confidentiality, protect against the disclosure of certain communications regardless of the litigation context, work product protection specifically pertains to the *discovery process* in litigation. Unlike evidentiary privileges, which can absolutely prevent the disclosure of information, work product protection can be overcome if the requesting party demonstrates substantial need and an inability to otherwise obtain the equivalent without undue hardship.

The work product protection, embodied in FRCP 26(b)(3)(A) at the federal level, protects materials prepared by or for an attorney in anticipation of litigation from being discovered by opposing counsel. This includes notes, memos, research, reports, interviews, and other documents or tangible things prepared by or for the attorney. While distinct from the attorney-client privilege, the work product protectionoften overlaps with it. However, the work product protectionis broader in some respects, as it covers materials prepared by individuals who are not attorneys, as long as the preparation is for litigation purposes.

Funders, to do their due diligence on the litigation they are considering funding, always require prospective Fundees (or their attorneys) to provide work product. This is the primary reason that, as noted in Section 7.1, an NDA is the first document a Funder and prospective Fundee should execute, as it protects the Fundee in the event the Funder somehow permits work product to fall into the hands of another party (and this, in turn, is why prospective Fundees must take care to work with Funders they either completely trust not to make such a mistake or, at the least, is capitalized well enough to pay damages in the event of a breach of the NDA).

The paragraph immediately above begs the question of whether the work product protectionmay be lost by sharing work product with a Funder. While we already answer that question three paragraphs above, we appreciate you may want a little color. For that, we start by redirecting your attention back to *Miller UK Ltd. V. Caterpillar, Inc.*,

While *Miller* is not helpful for a Fundee who wants to rely on the common interest privilege to protect the attorney-client privilege, it's helpful on the question of the work product protection. The *Miller* Court examined the issue this way:

> The attorney work product privilege establishes a zone of privacy in which lawyers can analyze and prepare their client's case free from scrutiny or interference by an adversary. It protects documents prepared by attorneys in anticipation of litigation for the purpose of analyzing and preparing a client's case… *Hobley v. Burge*, 433 F.3d 946, 949 (7th Cir.2006). The core of attorney work product consists of "the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ.P. 26(b)(3)(B). Material containing this information "are out of bounds*...." Mattenson v. Baxter Healthcare Corp.* 438 F.3d 763, 768 (7th Cir.2006)…
>
> Underlying the privilege is the deeply felt notion that the opposing party "shouldn't be allowed to take a free ride on the other party's research, or get the inside dope on that party's strategy, or … invite the [trier of fact] to treat candid internal assessments of a party's legal vulnerabilities as admissions of guilt." *Menasha Corp. v. U.S. Dept. of Justice*, 707 F.3d 846, 847 (7^{th} Cir.2013). Justice Jackson has perhaps said it best: opposing counsel should not be permitted "to perform [their] functions … on wits borrowed from their adversary." *Hickman v. Taylor,* 329 U.S. 495, 516, 67 S.Ct. 385, 91 L.Ed. 451, (1947) (Jackson, J., concurring)…
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> …The majority in *United States v. Adlman*, 134 F.3d 1194 (2d Cir.1998), on which Miller relies, rejected the "primarily to assist in litigation test," in favor of the "because of" test, explaining that "[i]n addition to the plain language of the Rule, the policies underlying the work-product doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision."…

> While disclosure of a document to a third party waives attorney-client privilege unless the disclosure is necessary to further the goal of enabling the client to seek informed legal assistance, the same is not necessarily true of documents protected by the work product doctrine. This disparity in treatment flows from the very different goals the privileges are designed to effectuate. The attorney-client privilege promotes the attorney-client relationship, and, indirectly, the functioning of our legal system, by protecting the confidentiality of communications between clients and their attorneys. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). In contrast, the work-product doctrine promotes the adversary system directly by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. *Appleton Papers, Inc. v. E.P.A.*, 702 F.3d 1018, 1022 (7th Cir.2012); *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1428 (3rd Cir.1991); *E.E.O.C. v. FAPS, Inc.*, 2012 WL 1656738, 28 (D.N.J.2012).

Miller v. Caterpillar, 17 F.Supp.3d at 734-737. See also *Hardin & Andrew Hill v. Samsung Electronics Co., Ltd., et al*, Civ. No. 2:21-cv-00290-JRG, Dkt. No. 119, 2022 WL 14976096 (E.D. Tex. Oct. 25, 2022).[30]

8.2 <u>Is there a concern that the terms of the CLF will be discoverable in the funded litigation?</u>

The short answer is yes. The longer answer is that the law on this question is not uniform.

Rules Requiring Mandatory Disclosure?

One thing is clear: there is no mandatory disclosure of CLF terms under the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure ("***FRCP***") 26 is titled "Duty to Disclose; General Provisions Governing Discovery." Section (a)(1)(A) of Rule 26 requires parties in a litigation to make certain *initial* disclosures. These initial disclosures include (a) contact information for people likely to have discoverable information, (b) a list of documents that each party has that may be used to support its position, (c) a computation of damages, and (d) any insurance that may be available to satisfy a judgment. Various lobbyists have advocated for FRCP 26(a)(1)(A) to be amended to add the existence of CLF as an initial

[30] Ryan M. Schultz wrote a short and smart note about *Hardin & Andrew Hill* titled *Communications with Potential and Actual Litigation Funders are Protected as Work Product under Narrow Fifth Circuit Precedent*. In part, he wrote "The Court's finding regarding work product protection for these documents is notable for at least two reasons. First, the Court found that work product protection is present even under the Fifth Circuit's narrow interpretation of "anticipation of litigation" requiring that the "primary motivating purpose" was to aid in future litigation. Other jurisdictions have a broader interpretation of "anticipation of litigation" in that such protection is present if the documents were created "because of" the prospect of litigation. Thus, such documents exchanged between outside counsel and a funder should be covered by work product doctrine in most, if not all, jurisdictions across the country as these documents are created primarily for, and also because of, anticipated litigation and not simply to raise funds. We, of course, agree.

Schultz supported his position with the following citations: See, e.g., *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992) ("The document must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation."); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) ("Today, we join our sister circuits and adopt the 'because of' test as the standard for determining whether documents were prepared 'in anticipation of litigation.'"); *United States v. Torf*, 357 F.3d 900, 907 (9th Cir. 2004) ("[W]e join a growing number of our sister circuits in employing the formulation of the 'because of' standard.").

disclosure.[31] And others have pushed in the other direction.[32] For now, FRCP 26(a)(1)(A) remains unchanged.[33]

The fact that FRCP 26 does not require *automatic* initial disclosure does not prevent a court issuing local rules that nonetheless require disclosure.[34]

Arguably, the most famous of which is Judge Colm Connolly, the U.S. Chief District Judge in Wilmington, Delaware, who issued a standing order requiring the disclosure of third-party litigation funding arrangements. It requires disclosure of the existence of such funding, identification of the Funder, whether Funder approval is necessary for litigation or settlement decisions (and if yes, the nature and terms of such approval rights), and a brief description of the financing interest of the Funder. It also provides that a party may seek additional discovery of the funding upon certain showings.

In stark contrast to Judge Connolly's action are those of Chief Judge Rodney Gilstrap, who issued a standing order *precluding* parties from introducing evidence, testimony, or argument regarding legal finance.[35]

Among the 50 states, we are aware of only one state that legislatively requires disclosure of CLF agreements: Wisconsin[36] However, just as the lack of a requirement in the FRCP does not prevent federal courts from making their own rules and rulings, so too can state courts act as they see fit.

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[31] The United States Chamber of Commerce's Institute for Legal Reform is one example. It first submitted its proposal to amend the Rule, to the Federal Advisory Committee on Civil Rules, in 2014. For more information see Mark Popolizio, *Third-party litigation funding in 2022 -- three issues for your radar*, January 31, 2022 ("***Popolizio***").

[32] See Popolizio. ("From the other side, the American Association for Justice (AAJ) is one group challenging the Chamber's proposal. In January 2018, the AAJ submitted a letter to the Advisory Committee refuting what it referred to as the Chamber's 'one sided' proposal on several grounds.").

[33] For a deeper dive into the current state of play on discussions to amend the Federal Rules of Civil Procedure and Appellate Procedure regarding CLF, see Stewart Ackerly, *Appellate Funding Disclosure: No Mandate is Right Choice* (Law 360, June 30, 2023).

[34] In 2021, as an example, the District of New Jersey promulgated Local Civil Rule – L. Civ. R. 7.1.1. It requires a party to disclose information regarding anyone who is not a party and is providing funding for any attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for a contingent financial interest based upon the results of the litigation or a non-monetary result that is not in the nature of a personal or bank loan, or insurance. See also Local Civil Rule- C. Civ. R. 3-15 (Northern District of California).

[35] Standing *Order on Motions in Limine in Cases Assigned to Chief Judge Rodney Gilstrap Involving Allegations of Patent Infringement and/or Breach of FRAND Obligations, as well as Declaratory Judgment Actions which Relate to the Same* (E.D. Tex. Dec. 14, 2022). Judge Alan D. Albright (W.D. Tex.) also reportedly issues a similar order in *Corrigent Corp. v. Cisco Systems Inc*, Order on Motions in Limine, No. 6:22-CV-00396-ADA (W.D. Tex. Apr. 26, 2023). See Andrew Cohen, *US Judges Rule Legal Finance May Not be Discussed at Trial* (New York Law Journal, June 7, 2023) (so reporting).

[36] WISC. STAT. §804.01(2)(bg) ("Third party agreements. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or

One of the most comprehensive guides we know of addressing what courts have issued what rules on the subject is a memorandum authored by Patrick A. Tighe, Rules Law Clerk dated 2/7/2018, titled "*Survey of Federal and State Disclosure Rules Regarding Litigation Funding*" ("***Tighe Memo***").[37] According to the Tighe Memo, at least as of its publication:

- Only the Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Federal Circuit Courts of Appeals have local rules mandating disclosure of the *existence* of CLF, but none of them require disclosure of the CLF agreement itself.

- About 25% of all U.S. District Courts have local rules or forms mandating the disclosure of CLF in civil cases.[38]

A court, of course, can require disclosure in the absence of a local rule that speaks to the issue. And defendants commonly demand such information (and plaintiffs commonly object). A comprehensive discussion of case law is beyond the scope of this article but to assist you in your own further research and analysis, we have some thoughts to share.

First, as of the date of this article's publication, the most comprehensive survey of case law on this issue that we have located is an article titled *Third-Party Litigation Funding- State and Federal Rules & Case Law*.[39]

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otherwise.").

Other states require disclosure of third-party litigation funding agreements but only in the consumer litigation financing context. E.g. W. VA. CODE ANN. § 46A-6N-6; Montana's law was signed into law on May 5. 2023).

However, the line separating the consumer and commercial contexts is not as bright as it should be because such state laws (which usually include provisions that go far beyond disclosure obligations) commonly, by their plain reading, apply to any funding or financing transaction in which a plaintiff is an individual, regardless of how sophisticated the individual is or what the subject matter of the litigation is. This is particularly ironic because these laws are so clearly not intended to address CLF.
This critical distinction is glossed over by many commentators. E.g. *Lawmakers in Mont. And La. Pass Bills to Require Disclosure of Litigation Funding* (Claims Journal, June 12, 2023).

[37] Patrick A. Tighe, Survey of Federal and State Disclosure Rules Regarding Litigation Funding, in Advisory Committee on Civil Rules, Agenda Book, April 10, 2018, 209, 215–217. The Tighe Memo is included as pages 209-229 (out of 412 pages) of the written materials produced for the Meeting of the Advisory Committee on Civil Rules held on April 10, 2018. For your convenience, you can see the *Tighe Memo* here without the remainder of the written materials.

[38] We've not independently confirmed the accuracy of the Tighe memo except as we explicitly state we have. Many of these district court local rules, for example, are open to interpretation.

[39] Mark Behrens, Katie Jackson, and Carl Silverman, *Third-Party Litigation Funding- State and Federal Rules & Cases* (Shook Hardy & Bacon, May 11, 2022). Note that this article, while more comprehensive and current than the *Tighe Memo*, does not do as good a job of delineating between rules and cases applicable to the CLF context and the consumer litigation financing context as the *Tighe Memo*. Another good article on this subject (albeit arguing for greater disclosure, which we think is wrong) is Jeffrey J. Grosholz, *In the Shadows: Third-Party Litigation Funding Agreements and the Effect Their Nondisclosure Has on Civil Trials*, 47 Fla. St. U. L. Rev. (2022). To read more about the opposite position, the single best source to look to is the ILFA.

Second, while one might easily read that the trend is one of courts requiring greater disclosure, much of that case law has been made in the consumer context rather than the CLF context. The fact of the matter is that in the *CLF context*, the trend is in the other direction.

With that as backdrop, we discuss just two recent cases.

Lower48 IP LLC v. Shopify, Inc.[40]

Ever hear the expression 'trying to try a case in the court of public opinion?' Here's an example of that in the form of a [LinkedIn post] posted by Jess Hertz, General Counsel of Shopify in June, 2023:

> *Today, Shopify filed a motion in the United States District Court for the Western District of Texas requesting that the Court compel the disclosure of third-party interests in an ongoing patent troll case against us.*
>
> *Shopify entrepreneurs are builders and innovators. Patent trolls stifle that innovation, burying hard-working entrepreneurs in piles of legal paperwork. They quietly orchestrate hundreds of patent litigation cases every year, with no accountability. In many cases, we don't know who's funding these lawsuits.*
>
> *We are no longer willing to accept this as the status quo. Litigants and judges need – and deserve – to know who they're litigating against...*

The court of *law* in which the motion was filed disagreed with Ms. Hertz and denied Shopify's motion to compel the plaintiff (Lower48 IP LLC) to identify any Funders backing the plaintiff's case. More precisely, the magistrate judge denied the motion in June and the District Court affirmed that ruling in November.

The decision represents a resounding victory for Funders and Fundees. First, the court specifically rejected the rational of Judge Connolly's standing order. Second, it rejected an attempt to equate Funders with patent trolls.

Shopify, however, is by no means groundbreaking; it is merely representative of the dominant trend. E.g. *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12CV-9350 VM KNF, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015). ("Court finds that the defendants did not show that the requested documents are relevant to any party's claim or defense. Therefore, the defendants' motion to compel production of the plaintiffs' Litigation Funding Documents is denied.").

Nunes v. Lizza[41]

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[40] Case number 6:22-cv-00997 (U.S. District Court for the Western District of Texas).

[41] 2021 WL 7186264 (N.D. Iowa Oct. 26, 2021).

The Plaintiffs in Nunes, who operated an Iowa dairy farm, were close family members of U.S. Congressman David Nunes. At the time the Defendants (who wrote and published an article accusing them of knowingly employing undocumented laborers) filed their motion to compel documents related to the funding of the prosecution of the case, the only remaining allegation against them was that they defamed the plaintiffs. The Plaintiffs objected on relevance grounds. 2021 WL 7186264 at *1.

After noting that "Congressman Nunes is closely related to the individual Plaintiffs and has a history of litigation against media defendants, including a lawsuit in this Court about this same story," (id. at *2) the Court went onto analyze the issue, relying heavily on *Fulton v. Foley*, 17-CV-8696, 2019 WL 6609298, at *1 (N.D. Ill. Dec. 5, 2019), a case addressing the relevancy of litigation funding in the context of a claim for wrongful arrest and conviction and the cases that court cited. 2021 WL 7186264 at *3.

The *Nunes* Court noted that Fulton's compilation of cases (including *Kaplan v. S.A.C. Capital Advisors, L.P.*) in support of their contention that "[a]s a general matter, courts across the country that have addressed the issue have held that litigation funding information is generally irrelevant to proving the claims and defenses in a case" was helpful. Id. at *2-3.

The Court then went onto state that "[u]nsurprisingly, none of the cited cases [including *Kaplan v. S.A.C. Capital Advisors, L.P.*] involves a dispute between a prominent U.S. Congressman and a media conglomerate [Hearst] engaged in a highly-publicized and contentious defamation case." Id. at *4.

The Court then quoted *V5 Techs. v. Switch, Ltd.*, 334 F.R.D., 306, 311–12 (D. Nev. 2019) (internal citations omitted), aff'd sub nom. *V5 Techs., LLC v. Switch, LTD.*, 2:17-CV-2349-KJD-NJK, 2:17-CV-2349-KJD-NJK, 2020 WL 1042515 (D. Nev. Mar. 3, 2020):

> "Nonetheless, there is no bright-line prohibition on such discovery. Discovery into litigation funding is appropriate when there is a sufficient factual showing of "something untoward" occurring in the case; "[f]or example, discovery will be [o]rdered where there is a sufficient showing that a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or not being protected, or conflicts of interest exist." Mere speculation by the party seeking this discovery will not suffice. Courts will compel discovery into funding sources only upon the presentation of "some objective evidence" that the discovering party's "theories of relevance are more than just theories."

2021 WL 7186264 at *4. Using V5 Tech as the framework for its analysis, the Court concluded "there is more than speculation or mere theory regarding the relevance of third-party funding" and granted the motion to compel.

Like *Shopify*, we did not choose to discuss it here because it is groundbreaking. Rather, it, too, is merely exemplary of the old adage, 'facts matter.'

9 Special Considerations When Fundee is Financially Distressed.

The Fundee that is Financially Distressed but Not in Bankruptcy or Another Insolvency Proceeding

We discuss the profile of Fundees in Section 1.6 and in it we noted that many if not most Fundees do not necessarily need the money provided by Funders; companies with the healthiest of balance sheets choose CLF for a host of reasons. However, the case of a Fundee that is not financially capable of funding a lawsuit is not rare. And, in fact, financially distressed companies (and their successors) represent a growing percentage of all Fundees.

This is not surprising when one thinks for just a moment of the context. First, to state the obvious, a financially distressed company is indeed unlikely to be able to fund litigation on its own. A secured lender of the would-be Fundee *may* be willing to fund, but they generally drive a hard bargain on the terms of that funding, including the extraction of releases, the appointment of an independent director, and others that take autonomy away from the company and that can harm its other creditors. Moreover, the secured creditor itself is often a target of potential litigation. These realities can serve as powerful reasons for a financially distressed company to look elsewhere to fund litigation.

Second, a financially troubled company is likely to be insolvent or at least potentially so. The causes of such a company's trouble often include actions by third parties that can form the basis of litigation claims against those third parties. As noted in Section 5.2, these include claims based on allegations against directors and officers for breaching their fiduciary duties. They may also include claims for fraud, deepening insolvency, and lender liability.

The Fundee in Bankruptcy or Another Insolvency Proceeding

The potential litigation claims owned by a financially distressed company are not limited to actions that might have precipitated the distress. In most bankruptcy cases, for example, any creditor who received a payment within 90 days of the filing of the bankruptcy may be subject to attack as the recipient of a voidable *preference*. And other transfers of a company's assets may be subject to attack as *fraudulent transfers*.

Bankruptcy is not the only destination for a financially distressed company. That company may recover. Or it may become the subject of an alternative to bankruptcy, such as an assignment for the benefit of creditors or a receivership. Regardless, the company (or its assignee, receiver, or bankruptcy trustee) may have valuable assets in the form of causes of action but may lack the liquidity necessary to monetize them.[42]

The Fundee that is a Post-Confirmation Litigation Trust

Chapter 11 cases commonly conclude with a confirmed Chapter 11 plan that, in turn, creates a 'post-confirmation liquidating trust.' That trust is typically empowered to liquidate the remaining assets of the debtor's estate which are not otherwise administered under the Plan. The proceeds of such liquidating are then distributed to creditors of the Debtor's estate pursuant to provisions of the Plan.

The assets at issue in this context usually include any or all of the causes of action touched on above, and CLF is being used with increasing frequency by post-confirmation estates to fund litigation of such causes of action.

[42] See also Jeffrey Lula, *Litigation Finance Offers Significant Benefits for Restructuring Matters* (The Bankruptcy Strategist, December 2023).

An Important Bottom Line

In any of these situations, the Fundee needs to be aware of the ethical issues[43] that are unique to bankruptcy and its strategic alternatives. The good news is that these issues are navigable. In fact, the party that bears far more risk in 'getting it right' is the Funder, not the Fundee.

With this in mind, we next touch on the Funder's perspective in these contexts.

9.1 Fraudulent Transfer Risks.

Potential Funders will likely be concerned that a CLF transaction itself may later be challenged as a constructive fraudulent transfers. If the CLF transaction is entered into before the Fundee's bankruptcy, such risk can be ameliorated, but not totally eliminated.

Entering into a CLF agreement during the pendency of a Fundee's bankruptcy will require court approval under Bankruptcy Code §363. This requirement adds some time and expense to the transaction but will also obviate any concern about fraudulent transfer risk. It also has the distinct potential to open the transaction up to competitive bidding.

9.2 Control Risks.

Potential Funders will also likely have some concern that a financially distressed company that has not filed bankruptcy may do so or may become subject to another insolvency regime. In such event, there is some risk that the people in control of the Fundee at that the time of the transaction will not remain in control.

9.3 Fundees in Bankruptcy.

The theoretical legal risk is that another party in control (e.g. a bankruptcy trustee) will reject the CLF agreement. This, however, is not likely to be a real-world risk since the debtor's estate only stands to benefit from the CLF. The more practical risk, which always exists but may be more pronounced in a Fundee's bankruptcy, is that necessary witnesses (*i.e.*, the Fundee's employees) become less accessible (*i.e.*, they become former employees).

9.4 Fundees that are Post-Confirmation Estates/Litigation Trusts.

In this specific context, a Funder needs to take particular care to ensure that the party with whom it is dealing has the authority to enter into the transaction and the standing to bring the underlying litigation. To be clear, the Fundee in this context will not be the company but, rather, will be the post-confirmation vehicle created in bankruptcy (or otherwise).[44] To that end, a Funder would be well advised to do a very

[43] Tom Salerno's *Third-Party Litigation Funding (TPLF) and Ethical Issues In Bankruptcy* (DailyDAC, September 26, 2022) provides an excellent overview on the subject. See also Jonathan Friedland and Elizabeth Vandesteeg, *Third-Party Litigation Funding: A New Option for Resource-Strapped Bankruptcy Estates* (The Bankruptcy Strategist, December 2017).

[44] For more about strategic alternatives available to a financially distressed company: *Dealing with Corporate Distress 01: Hello Darkness, Our Dear Friend* (DailyDAC, March 12, 2020); Friedland, et al., STRATEGIC ALTERNATIVES FOR AND AGAINST DISTRESSED BUSINESSES (Thomson Reuters, 2024); and Friedland, et al., COMMERCIAL BANKRUPTCY LITIGATION (Clark Boardman Callaghan, 2024).

close review of the terms of the Chapter 11 plan and the confirmation order related to the establishment of the litigation trust or other entity seeking the financing.

We think you'll also like:

1. *Reading and Writing a Letter of Intent*
2. *What Is a Non-Disclosure Agreement? Non-Disclosure Terms Explained*
3. *Dealing with Corporate Distress 12: Meet Our Little Friend, The UCC*
4. *Third-Party Litigation Funding (TPLF) and Ethical Issues In Bankruptcy*
5. *Dealing with Corporate Distress 01: Hello Darkness, Our Dear Friend*

[Editors' Note: To learn more about this and related topics, you may want to attend the following on-demand webinars (which you can view at your leisure, and each includes a comprehensive customer PowerPoint about the topic):

1. *Introduction to Commercial Litigation Finance*
2. *Third Parties Involved in the Litigation Finance Industry*
3. *Litigation Finance Market Process***]**