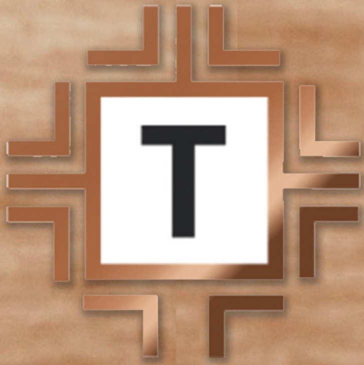

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Litigation Finance 101

Understanding the Basics of Litigation Financing

In recent years, more and more litigants have turned to third parties for financial support in meeting their litigation costs. In a litigation financing transaction, an investor provides a cash payment to a litigant in return for a share of any recovery in the case. As litigation has become more widespread in the last few years, it has inspired much interest, many questions, and a few criticisms. This article is intended to explain how litigation finance works and how it can best be used.

The most important thing to know about litigation funding argue is that it increases access to justice for parties who have legitimate claims but lack the resources to pursue them. Another important benefit of litigation finance is that permitting third-party investment in legal claims brings market forces into the judicial system, directing financial resources to the claims with the greatest chances of success. Although litigation finance may be contrary to some long-standing traditions and assumptions about how litigation should work, it's ability to promote fairness and efficiency demonstrates that those old traditions and assumptions may be due for some modification. Indeed, litigation finance promotes the most fundamental objectives of the legal system by making it possible for meritorious claims to be resolved on the basis of the relative strength of the parties' arguments, not on the relative sizes of the parties' bank accounts.

Nature of Litigation Financing

In the broadest sense, the term "litigation financing" refers to a variety of mechanisms by which a litigant receives funds from a third party in return for a share of the proceeds of the case. The litigant may use the funds to cover litigation expenses, including attorneys' fees or discovery costs, expert witness fees, and the like. The litigant may also use the funds to cover its own living or medical expenses during the pendency of the case. This latter approach occurs most often in personal injury cases when the plaintiff's injury causes financial losses that the plaintiff cannot pay out of his or her own pocket. In most litigation finance transactions, the third party's investment is "non-recourse," which means that the third party only receives payment if the litigant has a recovery. If the litigant loses, the third party also loses its investment, and the litigant has no obligation to pay return the invested funds.

A wide variety of litigants rely on some form of litigation financing, including both plaintiffs and defendants. In some cases, the litigants are large, well-heeled business enterprises with valuable claims that wish to manage their litigation risk, and the funders are sophisticated investors whose participation is akin to that of venture capitalists. In other cases, the party receiving funding is an individual with a personal injury claim who needs funds immediately. The one thing that all funded litigants have in common is the desire to spread the risk of litigation by sharing some of the benefits.

Historical Obstacles to Litigation Finance

Litigation financing is a relatively new phenomenon because common law principles long prohibited third-party investment in legal claims. Beginning in the Middle Ages, English law prohibited third parties from providing material support to the parties to a legal dispute. This prohibition was established by both penal laws and the common-law doctrines.[1] The rationale for this prohibition came from a phenomenon of the feudal order in which feudal lords sought to

acquire additional wealth and diminish the wealth of their rivals by finding parties who had a legal claim against those rivals and funding the litigation of those claims.[2] The doctrines at the heart of this prohibition were known as "maintenance," "champtery," and "barratry."[3] "Maintenance" is an umbrella term that refers to the provision of financial assistance. It usually refers to assistance that is provided without any expectation of sharing in the litigant's recovery.[4] "Champerty" is providing the same assistance with the expectation of receiving a share of any money recovered if the litigant wins.[5] Barratry involves the repeated practice of champerty, especially if it is undertaken by an attorney.[6]

Since the latter part of the twentieth century, many jurisdictions have discarded these medieval doctrines or explained that they had never followed those doctrines at all. Numerous courts have noted that the purpose of these doctrines is only to prevent the filing of frivolous lawsuits, speculation in groundless lawsuits, and the financial exploitation of under-resourced litigants. But those courts have also noted that this purpose can be accomplished by other rules, such as state rules of professional conduct, contract law, and the doctrines of unconscionability, duress, and good faith.

The growing acceptance of this analysis recognizes that it is possible to obtain the benefits of litigation finance, while controlling the risks that it can bring. Although a significant number of United States jurisdictions still apply the old common law doctrines, and others have enacted statutes prohibit litigation financing, litigation financing is increasingly available to litigants in many different financial and legal situations.

How Litigation Finance Is Used Today

The most widely known and well-established model of litigation funding is the investment in a single legal claim by an individual. In this form of financing, the investor contributes a sum of money and is entitled to a return on the investment if the individual obtains a recovery. This kind of funding has traditionally been used most often in personal injury cases, where the claimant's attorney was working under a contingent fee agreement. The claimant could use the invested funds to pay litigation expenses; or, when the claimant's injuries caused a loss of income, the invested funds could be used to cover his or her living expenses.

As litigation funding has grown over the last two decades, especially in the last few years, an increasingly wide variety of different kinds of litigation funding transactions have emerged. These new kinds of transactions have something in common with each other and with the traditional model of litigation financing: they provide a method for spreading the risk of financial loss in litigation from the litigants themselves to investors. The following discussion identifies some of the specific ways that litigation finance works in different legal and economic contexts as an instrument for spreading risk.

Contingent Fee Cases

In the traditional model of litigation finance, the financing agreement between the investor and the claimant is, in a sense, a supplement to the contingency fee arrangement between the claimant and the attorney. Contingency fee agreements are a kind of investment in a legal claim that relieves the claimant from having to bear the risk of spending money on attorneys' fees. When contingent fee agreements provide the only kind of investment in a claim, there are still litigation costs, such as discovery expenses or expert witness fees, and that cost must be borne

by either the attorney or the claimant. When a third-party investor makes its own investment in the claim, the investor supplements the attorney's own investment by contributing cash to cover those litigation costs or even to cover the claimant's living expenses during the pendency of the case.

When third-party investment is available on a wide scale, as it is today, there are benefits to claimants across the legal system. Extensive third-party investment provides an infusion of capital that provides a direct benefit to the claimants who receive funding and an indirect benefit even to claimants who don't receive funding. If attorneys do not have to risk their own resources to cover litigation costs in contingent fee cases, they can afford to take on more contingent fee cases, including cases in which the claimant does not receive any third-party funding. In short, by increasing the resources available to some plaintiffs, third-party investment improves the market conditions for all plaintiffs and makes contingent fee representation more widely available.

It is no wonder then, that many successful funding companies are building relationships with plaintiff-side law firms who have a record of success in contingent-fee cases. When those firms know that they can count on an outside investment in some of their cases, they have more of their own resources to use in supporting all of their cases. This provides an improved market for legal services for all plaintiffs who need lawyers that will work on a contingent fee.

Tort Law

Litigation funding can be invaluable in personal injury cases because the cost of litigating those cases can be so high, especially when the defendant is a large entity. And the development of computer technology in litigation only increases the already high cost of litigating a tort claim. When a personal injury plaintiff alleges a tort against a large entity, the case will likely involve the discovery of hundreds of thousands or millions of documents from the defendant, which can only be effectively analyzed through the use of expensive computer resources. In addition, the personal injury plaintiff will almost certainly need expert testimony to prove injury causation and/or damages. And many personal injury plaintiffs have lost substantial income because of their injuries and need something to help cover their living expenses while the case is pending. For all of theses reasons, litigating a tort case can be enormously expensive, even when the plaintiff's attorney is working on a contingent-fee basis.

Defendants, often funded by insurance coverage, have the resources to cover the high cost of litigating tort claims; and, as repeat players in tort litigation, they have incentives for extending the litigation that extend beyond the context of a particular case. These advantages for defendants are diminished, however, when plaintiffs can get third-party investment. That is why tort cases, especially personal injury cases, have been and will continue to be a fruitful field for litigation financing.

Commercial Cases

Commercial enterprises often need financing in the same way that individual parties do: they have a legal claim that could provide a lucrative recovery but they lack the cash on hand to cover litigation costs. Moreover, commercial enterprises often have a harder time finding lawyers to work on a contingent fee basis. In some respects, they can have a greater need for litigation fi-

nance. In addition, when a large litigation matter arises, a company can face difficult problems in trying to manage the risk associated with large litigation matters, especially when such matters arise from the company's own claims of right. Many times, this is because the cost of pursuing a claim in attorneys' fees and litigation expenses are quite certain and quite immediate, while the potential pay-off from the claim is remote in time and far from certain. In such a situation, pursuing a big claim or defending against one can cause definite and significant liabilities on the balance sheet without any reasonable assurance that the claim will prove to be an asset in the long-term. This is where third-party litigation finance comes in; it can be an invaluable tool for managing this kind of risk[7].

A business enterprise can use portfolio financing to cover litigation costs or to monetize litigation asset value. A company with several pending litigation matters can bundle its interest in those cases for investment by third-parties. The bundle of litigation matters can include plaintiff and defense cases, pre- and post-settlement cases, and others. The company offers a share of the net recovery in all of those cases in return for a payment from the investor. Such a payment is usually a fixed amount that is employed to cover litigation costs.

Arbitration

Litigation financing works as well in arbitration as it does in judicial proceedings. Even though arbitration can involve less procedure and, therefore, less cost than litigating a dispute in court, it still is not cheap. Moreover, as more and more commercial enterprises demand that their customers and contract counterparties agree to arbitration clauses, arbitration will be a forum in which there are significant disparities in resources between claimants and respondents. Just as it helps even the playing field in court, litigation financing can also help level the playing field in arbitration.

An arbitral forum may even provide additional benefits for parties who receive litigation financing. Specifically, it may be possible to recover litigation financing costs – the fees paid to the investor – as an aspect of cost-shifting, which is more readily available in arbitration than in court. In the United States, the "American rule" provides that parties should generally bear their own litigation costs, including attorneys' fees, regardless of whether who wins or loses. Court rules typically provide for very limited cost-shifting, allowing prevailing parties to collect costs such as filing fees, witness fees, and some other miscellaneous costs. In arbitration, however, parties can agree to cost-shifting for any or every litigation costs. When parties enter into an arbitration agreement that provides for the shifting of broadly defined "litigation costs," the prevailing party can argue that the expenses it incurred in obtaining litigation financing is one of the litigation costs that can be shifted.

This kind of argument recently succeeded in an English arbitration, where an arbitrator found that a party's breach of contract had, among other things, involved a deliberate attempt to deprive the claimant from having the resources to instigate and conduct an arbitration. Thus, when the claimant prevailed on the contract matter, the arbitrator concluded that the breaching conduct had forced the claimant to seek third-party funding and that the funder's fees could be recovered as a litigation cost[8]. This same kind of reasoning could be employed in American arbitrations, and this possibility means that arbitration could actually be an attractive forum for claimants who know that they will have to rely on litigation funding to effectively assert their claim.

Law Firm Funding

Litigation funding can make sense for law firms, especially in the form of portfolio funding. A variation of portfolio funding occurs when investors provide funding to law firms rather than to litigants. In this kind of investment, the investor makes an ordinary loan to the firm, which is secured by the firm's expected revenues. Of course, those revenues come from the firm's fees. The security can be tailored to include all of the firm's fees or the fees from select cases, depending on the preferences and objectives of both the investor and the firm. But it is possible for law firms to take a portfolio of the cases that they are litigating and obtain an investment in them without transgressing any ethical requirements.

When law firms engage in portfolio financing, they can reduce their own business risk and can take on additional cases without increasing their total exposure. Clients can gain similar benefits, especially business enterprises. For them, portfolio financing is an aspect of sound risk management.

There is one potential pitfall with respect to these kinds of investments in law firms. Legal ethics rules prohibit lawyers from sharing fees with non-lawyers[9]. When a law firm pledges its earnings from future fees as a security for an investment, it could be possible to characterize the granting of that security as a form of fee-splitting. Indeed, the New York Attorney General's office has recently suggested that this kind of investment does violate ethical rules[10]. But this opinion is outside the mainstream; prevailing authorities have held that this kind of arrangement can be perfectly consistent with the ethical rules[11]. After all, for any law firm, the overwhelming majority of its income comes in the form of legal fees. Therefore, if a firm takes any kind of loan, it is repaying the lender with earned fees. If this kind of repayment constitutes fee-splitting for the purpose of the ethical rules, it would be impossible for any firm to ever take a loan. It is difficult to see why loan repayment should not implicate the ethical rules but portfolio funding should. In any event, law firms and their investors must be careful to structure transactions to avoid any risk that their transaction will be characterized as fee-splitting.

Criticisms of Litigation Finance

Notwithstanding its increasing acceptance, and despite the evolution of the law, there are many critics of litigation financing who retain the concerns about it that inspired the doctrines of champerty and maintenance. Perhaps the leading critic of litigation finance is the United States Chamber of Commerce. The Chamber has published extensive arguments setting forth all of the reasons why litigation finance is a pernicious force, and the core of the Chamber's argument is that litigation finance is an instrument for exploitation, both of funded parties and of the legal system as a whole. As the Chamber puts it:

> [T]he notion that litigation financing is a mechanism for promoting justice is, at best, naïve, and at worst, disingenuous. In reality, litigation financing is a sophisticated scheme for gambling on litigation, and its impact on American companies is unambiguous: more lawsuits, more litigation uncertainty, higher settlement payoffs to satisfy cash-hungry funders, and in some instances, even corruption[12].

Others take a view much like that of the Chamber. Overall, critics of litigation finance make a number of specific complaints: that litigation finance promotes meritless litigation; that

it discourages early settlement and makes litigation drag on forever; that it transfers effective control of litigation from the litigants themselves and their attorneys to the investors; and that it is an unfair business practice that exploits litigants and deprives them of a fair return from their claims. Ultimately, when one puts aside medieval assumptions and urban legends and considers the facts about litigation financing, it is clear that all of these criticisms are without merit.

One of the most prevalent arguments against third-party litigation financing is that it will encourage more litigation and, in particular, more meritless litigation because parties will not have to risk their own money to pursue a doubtful case. This is a kind of "moral hazard" argument. That is, critics insist that shifting any portion of the risk of loss from the litigant to a third party will change the risk-benefit analysis that the litigant makes, encouraging the litigant to assert riskier claims. The problem with this argument is that it assumes that the investor is a kind of gambler, attracted to high-risk litigation because of the prospect of high-level payoffs. This assumption is belied by the realities of litigation finance. Those who invest in litigation are looking to maximize their return on investment, not to make risky bets for the sake of getting a thrill. Moreover, investors have extensive experience and sophisticated analytical tools to help them identify cases with a high chance of success. Thus, third-party investment in litigation is actually an indication that a case is meritorious, not meritless.

Another argument is a variation on the first: that parties who receive litigation funding will refuse to settle early, thus extending litigation beyond its "appropriate" conclusion. This argument depends substantially on the presumption that early settlements are always preferable, perhaps assuming that reducing docket congestion is the principal objective for the legal system. This argument also implies that the lawyers and investors are the only ones who benefit from making cases last longer, and it suggests that any litigation with more extensive costs is inherently less efficient in economic terms. But a just and efficient legal system should not promote settlements at the earliest opportunity and at any price. To the contrary, it should take longer to settle a meritorious case, especially when identifying the merits requires the development of evidence through the discovery process. A quick settlement often means that a plaintiff has surrendered to financial pressures and has sacrificed the value of his or her claim. While some categories of defendants may favor quick, low-ball settlements, such settlements are generally not in the interests of justice.

A third argument portrays the investor as a kind of puppet master, who manipulates the party receiving financing into acting for the investor's interest rather than the party's own interest. Specifically, critics maintain that the litigation finance company may take improper control over the litigant's choices or that the company may undermine the attorney-client privilege by seeking confidential information about the case as a condition of funding. This argument fails because it overlooks the fact that legal ethics rules in place in every state specifically prevent lawyers from doing anything that is not in their client's interest. Moreover, with this ethical requirement in mind, the standard litigation financing agreement requires that the investor refrain from seeking to influence the litigant's counsel or from otherwise interfering in the attorney-client relationship.

Finally, some critics insist that litigation financing is, in effect, "payday lending" for litigants. This argument depends on the presumption that an investment in litigation is a de facto loan and that the funder is collecting usurious interest and unfairly diminishing the litigant's eventual recovery. This argument flies in the face of the reality of litigation financing trans-

actions. For one thing, it disregards the fact that such transactions are non-recourse and only require repayment if the litigant prevails and obtains a recovery. In addition, in the overwhelming majority of cases, the funder makes a modest investment in return for a payment that would only comprise a small fraction of the recovery. The fact is that those who invest in litigation earn a reasonable return that is proportional to the risk of their investment. This is anything but usury.

Regulation of Litigation Finance

Even though the uniform prohibition on litigation finance has ended, there is no uniform method of regulating it across the United States. In fact, there are dramatic variations among states on the question whether litigation financing will be allowed and under what conditions. Moreover, as more and more litigants make use of litigation financing, more and more states come under political pressure to enact some form of regulation. At the moment, regulation falls into three basic categories: outright prohibition; heavy regulation through statute; and light regulation through the ordinary rules of contract law and state legal ethics rules.

As noted above, some jurisdictions still follow the medieval common-law doctrines that imposed an absolute prohibition on any third-party investment in litigation. In these states, a litigation finance agreement is treated as a contract in violation of public policy, and the terms of that contract cannot be enforced.

In other states, litigation finance is not completely prohibited, but statutory rules greatly limit the rate of return on investment. In the states, the restrictions on the rate of return are so significant that there are few or no incentives for any investor to fund the litigation of a clegal claim. For example, in some states, the litigation finance transaction is characterized as a loan and is subject to the state's usury laws. In this connection, the Colorado Supreme Court has ruled that the investment in litigation must be treated as a loan because "[l]itigation finance transactions create repayment obligations—debt—at the outset. That fact is unaffected by the finance companies' subsequent reduction or cancellation of certain plaintiffs' obligations. And in eighty-five percent of cases, the companies fully recover."[13] In other states, statutes have been drafted to expressly apply to litigation financing, imposing a specific limitation on the amount of money that can be paid to an investor.

A number of states have passed statutory regulations for litigation finance that prescribe a certain form for the transaction but that do not limit the investor's rate of return. Vermont's regulatory scheme includes a licensing requirement as well as some relatively limited disclosure requirements for the financing agreement[14]. In Vermont, for example, litigation finance companies must register with the state and provide proof of their financial stability by posting a bond or an irrevocable letter of credit[15]. The statutory scheme also includes certain disclosure requirements for litigation funding contracts, and it prohibits certain practices, such as requiring arbitration of disputes arising from the litigation funding agreement[16]. But the Vermont statutes do not impose any kind of limitation on fees or interest rates.

Finally, there are the states where litigation financing agreements are treated like any other contract. Parties must, of course, follow the ordinary rules of contract law. And public policy considerations mean that the agreements must not be structure to impair any of the lawyer's ethical obligations to his or her client. But apart from these very general regulations, investors and litigants are free to contract as they will for the funding of the litigant's legal claim.

Making the Investment Process Work

The process of engaging in a litigation finance transaction is much like the process for investing in any other substantial asset: the investor has preliminary discussions to gain basic information about the asset; the investor conducts a more thorough due diligence inquiry about the asset with the cooperation of the asset owner; the parties negotiate the terms for an investment agreement; and the parties draft and execute that agreement. This process can work effectively for all parties involved if a few simple principles are followed.

Financing the prosecution of a legal claim introduces another party – the investor – into a confidential and closely regulated relationship between the litigant and the litigant's attorney. The due diligence process requires that the investor be informed about the basic factual and legal bases for the claim and for any defenses that might be asserted against the claim. This due diligence process, as well as all other aspects of the financing transaction, should be structured to provide the maximum possible protection for the parties' confidential information. This protection has two principal aspects. First, at the outset of the due diligence process, the investor, litigant, and the litigant's attorney should enter into a confidentiality and non-disclosure agreement that permits the exchange of necessary information without waiving the evidentiary privileges of the attorney-client relationship, which protect attorney-client communications and the attorneys' own work from disclosure. Second, after the due diligence process is over, if the parties decide to go forward with the investment, any investment agreement should be structured so that, to the greatest extent possible, its own terms and the details of the economic relationship between the investor and litigant are protected from discovery in the underlying litigation.

Once the parties complete the due diligence process and intend to go forward with the investment, they must draft an effective investment agreement. Perhaps the most important thing in establishing the structure of any litigation finance transaction is to assure that it creates a non-recourse investment in the litigation. That is, the parties' respective rights and obligations must be structured so that the investor's right to a return is actually contingent upon the outcome of the litigation. If the investor has anything that can be characterized as an absolute right to repayment, the transaction will look more like a loan than an investment.

The transaction documents must include a full disclosure of the economic realities of the transaction. That is, it must clearly set forth the amount of money that the litigant receives, the amount of money that will be returned to the investor, and the way in which time will affect either the payment of the advance to the litigant or the amount to be returned to the investor. In addition, if the investment includes any specific fees charged to the litigant, the transaction documents must describe those with particularity. This kind of disclosure is usually essential in states that regulate litigation finance by statute and/or administrative regulations, and it is prudent in any jurisdiction because it precludes the possibility that the litigant can claim to have misunderstood or been misled about the return paid to the investor.

Litigation Finance in Other Countries

The United States is not the only country where litigation finance is booming. In fact, in several British commonwealth countries, the market for litigation finance is at least as large and well-developed as it is in the United States. In the United Kingdom, third-party funding of

litigation was unlawful until 1967, when reform legislation repealed criminal statutes that had prohibited champerty and maintenance, which were common law concepts describing "officious intermeddling" by third-parties in pending cases. As a result of these reforms, third-party litigation financing is now evaluated on a case-by-case basis and will be disallowed only when it is shown that a particular litigation financing agreement was contrary to public policies. These public policies related to: whether the funder was entitled to an excessive share of the recovery; whether the funder had too much power in controlling decisions about litigation strategy, which should be made primarily by the litigant; and whether the agreement was consistent with the objective of increasing access to justice[17].

Australia has embraced litigation financing even more enthusiastically than the United Kingdom. In most Australian jurisdictions, third-party funders are allowed to control any and all aspects of the litigation. In general, Australian courts have concluded that courts need not control how a litigant pays for his legal costs because other doctrines exist to prevent the misuse of the judicial process by non-parties to a case.

Not all Commonwealth countries follow this example, however. In a recent ruling, the Irish High Court held that third-party litigation funding is unlawful because it is contrary to the common-law doctrines of champerty and maintenance, which were first developed in the Middle Ages. The Irish Supreme Court even more recently affirmed this ruling because existing law mandated it; but the Supreme Court's opinion also suggested that the legislature should strongly consider reform legislation permitting litigation financing because it can play such an important role in providing access to justice[18].

Future of Litigation Finance

The last question is where does litigation financing go from here? Now that the market for this kind of investment has been created and developed, where will it go and how will it change the way in which the legal system works? Recent events and emerging trends offer some clues.

One of the most exciting and explosive aspects of emerging computer technology is artificial intelligence, and it has the capacity to intersect with litigation finance in a couple of ways that could change litigation practice even more dramatically. First, artificial intelligence could dramatically alter the way in which one determines the economic value of legal claims. When they evaluate a case for investment, litigation funders must account for a variety of contingencies about the case itself and the litigants. Perhaps the most important of these contingences relates to judicial decision-making at all phases of the case and to the jury verdict at the conclusion of a trial. Other contingencies relate to the quality of opposing counsel or the persuasiveness of identified expert witnesses. Artificial intelligence offers some hope of accounting for all of the variables that can be associated with these contingencies and of making fairly reliable predictions about how these factors will affect a case. This kind of data analysis creates opportunities for better case evaluation by litigation funders, and better case evaluation likely means more and better targeted investments[19].

Future changes in the business structure of law firms also might a significant effect on the operation of both litigation finance and, to a lesser extent, the legal system. As a general rule, contingent fee cases can be a prime target for investors because the litigants who need funding are typically the litigants who cannot afford to pay hourly rates to a law firm. Of course, there

are numerous law firms with many contingent fee cases and an established record of winning such cases. Currently, investors cannot enter agreements with law firms to fund a portfolio of the firm's contingent fee cases because the return on such an investment would likely be characterized as a form of fee splitting, which is prohibited by the rules of legal ethics. But if the business structure of the law firm changes, this limitation on investment may change as well.

Recent developments in the United Kingdom suggest that the Anglo-American legal tradition can accommodate alternative business structures for law firms[20], and such structures would likely make it easier for law firms to obtain investments in their own cases. In the United Kingdom, the Legal Services Act 2007 permitted the creation of alternative business structures for law firms. In particular, this legislation made it possible for non-lawyers to directly invest in law firms or to have an ownership stake in those firms. This permission came with certain safeguards: lawyers were still required to have managerial control and responsibility over the firm's legal work; and the pool of investors is limited because regulations would establish certain fitness obligations for any party that wished to invest in or own a law firm. The purpose of these reforms was to make it easier to capitalize law firms and to make those firms more efficient and economically competitive. In addition, the legislation sought to make it easier for certain kinds of entities, such as charities and trade unions, to own law firms. These reforms also make it easier for litigation funding companies to make investments in the business of law firms, especially through the acquisition of ownership shares. If a litigation investor was allowed to purchase an ownership stake in a firm, it could provide a source of capital to fund the firm's operations and assure itself of a significant return on its investment.

Another potential development could relate to the characterization of litigation financing expenses as a taxable cost. In the United States, cost-shifting is sometimes used as a powerful tool of judicial policy. When that policy seeks to encourage certain kinds of lawsuits or to sanction certain kinds of conduct, it can make cost-shifting available so that the losing party has to pay for some or all of the winner's litigation costs, including attorneys' fees. As litigation financing becomes increasingly commonplace, it is possible that the costs of financing could be included as one of the costs to be shifted from the winner to the loser of a lawsuit. Here again, an indication of the American future can be found in England. A recent English court decision has held that the cost of litigation funding can be a recoverable cost in arbitration. Although there are a number of unique circumstances in this case that might make it an outlier, the court's analysis is suggestive. In the right situation, there may be compelling arguments for including litigation funding expenses as a recoverable litigation cost.

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Footnotes

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