



LITIGATION FUNDING

Leveling the Playing Field for Claimholders

REMBRANDT LITIGATION FUNDING

- Rembrandt provides litigation funding to cover the costs of new and ongoing complex litigation.
- Our mission is to help claimholders address the high costs associated with pursuing meritorious legal claims.
- After Rembrandt commits capital, it remains passive. The lawyers and clients maintain control of the case.
- Rembrandt only receives a return if value is received for the underlying claim.
- Rembrandt helps fund IP and non-IP cases.

ABOUT REMBRANDT

- Rembrandt IP Management is a 10-year old \$150M committed capital fund.
- For the last decade, Rembrandt has successfully monetized intellectual property, namely patents, through active assertion and licensing.
- Rembrandt also has a litigation funding arm that provides passive funding for the hard-costs of litigation.
- Rembrandt has the deep legal, technical, and financial expertise necessary to properly evaluate complex IP and non-IP claims.

BENEFITS OF LITIGATION FUNDING

- Litigation funding enables claimholders to pursue meritorious claims without risking their own capital, freeing up resources for other uses.
- Litigation funding broadens claimholders' choice of counsel, enabling them to consider firms that utilize alternative fee structures.
- Litigation funding enables claimholders to focus on optimizing the merits of their cases, rather than making suboptimal decisions based on the significant costs associated with complex litigation.
- Litigation funding enables law firms to pursue strong cases for which neither they nor their clients have the funds available to cover costs.



REMBRANDT

Patent Infringement Solutions

**Ethical Issues in Third Party Litigation Funding Agreements
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Definitions

- Maintenance
 - Helping another prosecute a suit

- Champerty
 - Champerty is a type of maintenance
 - Maintaining a suit in return for a financial interest in the outcome

- Barratry
 - A continuing practice of maintenance or champerty

Maintenance and Champerty

- The historical justification for prohibiting maintenance was that third-party funding of litigation encouraged fraudulent lawsuits
- Each state has its own set of nuanced statutes and/or common law
- Many states (27/51 including DC) now allow at least some forms of maintenance and champerty, relying on:
 - Doctrines of abuse of process and malicious prosecution directly address concerns of fraudulent and baseless litigation.
 - Attorneys' ethical obligations to both the court and clients to pursue litigation in good faith.

Maintenance and Champerty (cont.)

- Certain states affirmatively allow the practice.
 - Ohio enacted Ohio Rev. Code 1349.55 in 2007 to overturn case law prohibiting maintenance and champerty. New statute provides from certain well-known rules on how contract must be written (drawing heavily from consumer protection law).
- New Jersey allows the practice through common law.
 - “This Court need not address the doctrines of champerty and maintenance, as they do not presently exist in New Jersey.” *Polo by Shipley v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987).

Maintenance and Champerty (cont.)

- However, certain jurisdictions continue to generally prohibit maintenance and champerty:
 - Mississippi bans all maintenance except contingent agreements.
 - “It shall be unlawful for any [third party to provide a person with assistance] to commence or prosecute further, any proceeding in any court or before any administrative board or other agency, regardless of jurisdiction; provided, however, this section shall not be construed to prohibit ... any attorney at law or solicitor in chancery, for either a fixed fee or upon a contingent basis, to represent such person.” Miss. Code Ann. § 97-9-11.

Maintenance and Champerty (cont.)

- Delaware:
 - *Charge Injection Technologies v. E.I. du Pont de Nemours & Co.*, C.A. No. N07C-12-134-JRJ (Del. Super., Feb. 27, 2014).
 - “[D]ecisions of the Delaware Supreme Court, the Court of Chancery, and the Superior Court make clear that contrary to [plaintiff’s] argument, champerty and maintenance are alive and well in Delaware.”
 - Maintenance is “the intermeddling in a suit by a stranger, one having no privity or concern in the subject matter and standing in no relation of duty to the suitor.”
 - “Champerty cannot be charged against one with an interest in the matter in controversy. An agreement is not champertous where the assignee has some legal or equitable interest in the subject matter of the litigation independent from the terms of the assignment.”

Maintenance and Champerty (cont.)

- No Champerty in California
 - No statute governing champerty or maintenance in California.
 - California law provides that a cause of action arising out of the violation of a property right may be transferred by the owner. The California rule is that a right to recover money or other personal property in a judicial proceeding is *presumptively* assignable. See *In re Cohen's Estate*, 152 P.2d 485, 489 (Cal. Dist. Ct. App. 1944) (specifying that the doctrines of champerty and maintenance are obsolete and inapplicable to American society). The offense of maintenance is unknown to the laws of California. The doctrine of champerty and the principles based thereon have no application under California law. *Mathewson v. Fitch*, 22 Cal. 86, 95 (1863). See Cal. Civ. Code §§ 953, 954 (1872).
 - See *Wikstrom v. Yolo Fliers Club*, 274 P. 959, 960 (Cal. 1929) (indicating that under California law, assignability is the rule while nonassignability is the exception limited to “wrongs done to the person, the reputation, or the feelings of the injured party...”); *Bush v. Superior Court of Sacramento County*, 10 Cal. App. 4th 1374, 1378-81 (Cal. Ct. App. 1992); *Cohn v. Thompson*, 16 P.2d 364, 366 (Cal. App. Dep’t Super. Ct. 1932).
 - See 7 Cal. Jur. 3d Attorneys at Law § 6.

Choice of Law

- Generally, California follows a governmental interests approach to choice of laws questions. *ABF Capital Corp. v. Grove Properties, Co.*, 126 Cal.App.4th 204, 215-16 (2005).
- If no contractual choice-of-law provision, court analyzes governmental interests of the various jurisdictions involved to select the most appropriate law
- When a bargained-for choice-of-law provision is in a contract:
 - court first determines whether chosen state has a substantial relationship to parties or transaction, or any other reasonable basis for the parties' choice of law,
 - next determines whether the chosen state's law is contrary to a fundamental policy of California, and whether California has a materially greater interest than the chosen state in the determination of the particular issue.
- Restatement (Second) of Conflict of Laws § 187(2).

Usury

- Usury is an act or practice of lending money at a rate of interest that exceeds the maximum lawful rate.
- Investment not lending
- No absolute guarantee of repayment
- However, some courts have found that funding invokes usury laws:
 - North Carolina court found investments in a contingency suit are “cash advances” covered by usury statute. *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 311-312 (2008).
 - In a New York strict liability labor case, risk of non-recovery was found to be a very low; thus, specific funding arrangement best understood to be a loan. *Echeverria v. Estate of Lindner*, 7 Misc. 3d 1019(A) (Sup. Ct. 2005).

Usury in California

- Elements of usury in California:
 - (1) The transaction must be a loan or forbearance;
 - (2) the interest to be paid must exceed the statutory maximum;
 - (3) the loan and interest must be absolutely repayable by the borrower; and
 - (4) the lender must have a willful intent to enter into a usurious transaction.

Ghirardo v. Anonioli, 883 P.2d 960, 965 (Cal. 1994).
- Transactions are presumed not to be usurious with the borrower bearing the burden of proving the essential elements of a usurious transaction. *Id.*
- Maximum amount of interest set by statute at 12% per year
- Usurious loans in California must, *inter alia*, be absolutely repayable
- Effects:
 - Applicable as a statutory or common law cause of action to recover the unlawful interest paid
 - At the court's discretion, treble damages may be awarded for contracts held usurious

Ethical Responsibilities

Independent Judgment:

- ABA Model Rule 2.1: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”
- ABA Model Rule 5.4(c): “A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”
- Attorneys must understand and conclude that a funding agreement does not affect the attorney’s independence or temper his or her candor with the client. Need to maintain professional independence and client needs to make ultimate decisions.
- Funder is not the attorney’s client.
- Funder’s goals may not always align with client’s goals.

Ethical Responsibilities (cont.)

Conflicts of Interest:

- Client-lawyer relationship exists only between lawyer and client seeking funding.
- Relationship with funder through contract or implication
- Concurrent conflicts:
 - ABA Model Rule 1.7(a)(2): “a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if ... there is a significant risk that the representation of one or more clients will be materially limited by ... a third person or by a personal interest of the lawyer.”

Ethical Responsibilities (cont.)

Negotiation of Funding Contract:

- Potential conflict if agreement terms may have impact on lawyer
- A conflict exists if any interest of the lawyer, “would materially impair the lawyer’s ability to consider alternative courses of action that otherwise would be available to a client, to discuss all relevant aspects of the subject matter of the representation with the client, or otherwise to provide effective representation to the client.” ABA Comm. On Ethics and Prof’l Responsibility, Formal Op. 00-418 (2000).
- Contingent fees may create conflicts with or without funding
- Can disregard incentives but must get waiver in writing
- Practice Tip: Get a waiver in writing. Informed consent after explanation of material risks and reasonably available alternatives to proposed terms. Explain to client the ways in which the funder’s terms could adversely affect the client’s interests to the lawyer’s benefit.

Ethical Responsibilities (cont.)

Financial Assistance to Clients, cont'd:

- Lawyer may also acquire an interest in the client's cause of action. Governed by ABA Model Rule 1.8(i): "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case."
- Also difficult for client to discharge the lawyer if lawyer has a proprietary interest in the cause of action.

Ethical Responsibilities (cont.)

Referring Clients to Funders:

- Many states have ethics opinion addressing this issue.
- Typically, attorneys are permitted to refer a client to funders, provided:
 - Such agreements are legal in the jurisdiction;
 - Attorney has no interest in the funder; and
 - Attorney does not receive a referral fee.
- Attorneys can also advise clients on terms of funding agreement provided the attorney is competent to evaluate such an agreement and fully advises the client of consequences of terms of the agreement.

Confidentiality, Privilege & Work Product

- Pre-Funding Diligence
- Duty of Confidentiality – ABA Model Rule 1.6. A lawyer may not disclose, “information relating to the representation of a client” without the client’s informed consent, unless the disclosure is impliedly authorized in order to carry out the representation.
 - Scope of duty is broader than A-C privilege. Duty to safeguard information.
 - Does not create an evidentiary privilege.
 - Client may give informed consent to disclosure of confidential information. Risk is waiver of A-C privilege.

Confidentiality, Privilege & Work Product (cont.)

- Common Interest Exception
 - Exception to the general rule that disclosure to a non-privileged party waives the privilege
 - May have a common interest even if not represented by the same lawyer.
 - Split of authority over whether a funder and client have interests sufficiently in common to fall under the rule of non-waiver but most courts say no common interest during diligence phase.
 - Ex. *Leader Techs v. Facebook*, 719 F. Supp. 373 (D.Del. 2010) (for common interest to apply, there must be a commonality of legal, not merely business interest. The test is whether the disclosures would not have been made but for the sake of securing or providing legal representation.)

Privilege/Common Interest in California

- Not recognized statutorily in California
- “[A] nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine. *Oxy Resources California LLC v Superior Court*, 115 Cal. App. 4th 874, 889 (Court of Appeal First District Feb 11, 2004)
- Not an expanded attorney-client relationship encompassing all parties and counsel who share a common interest.
 - communicated information would otherwise be protected from disclosure
 - whether disclosing waived any applicable privileges.
- “While involvement of an *unnecessary* third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication.” *Id* citing *Insurance Co. of North America v. Superior Court*, 108 Cal. App. 3d at p. 765.

Privilege/Common Interest in Texas

- *Mondis Tech., Ltd. v. LG Electronics, Inc.*, No. 2:07-CV-565-TJW-CE, 2011 WL 1714304, at *2 (E.D. Tex. May 4, 2011):
 - Documents and slide presentations created for potential investors
 - Litigation and licensing strategies and implementation of those strategies
 - Documents prepared for potential investors
 - Court found protected by work product
 - Although disclosed to third parties, disclosures did not create a waiver
 - Disclosed subject to non disclosure agreements
 - Did not substantially increase the likelihood that an adversary would come into possession of the materials
- No common interest when parties were negotiating the value of the patents in the sale

Confidentiality, Privilege & Work Product (cont.)

Work Product Doctrine

- Based in common law but codified in the Federal Rules of Civil Procedure and most state rules
- Purpose is to protect thoughts, mental impressions and strategies of lawyers from being discovered by opposing parties in litigation
- Limited in scope to, “documents and tangible things otherwise discoverable... prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent)... Fed. R. Civ. P. 26(b)(3).
- Only lost where the disclosure increases the likelihood that the adversary will come into possession of the documents.

Confidentiality, Privilege & Work Product (cont.)

Work Product Doctrine in California

- No statutory provision governing waiver of work product protection in California.
- “However, California courts have recognized that the waiver doctrine is applicable to the work product rule as well as the attorney-client privilege. (*Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 214, 91 Cal.Rptr.2d 716, 990 P.2d 591.) The work product protection may be waived “by the attorney's disclosure or consent to disclosure to a person, other than the client, who has no interest in maintaining the confidentiality ... of a significant part of the work product.” *Id.* Citations omitted.
- Thus, work product protection “is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation. *Id.* Citations omitted.

Ethical Responsibilities (cont.)

Evaluation for Use by Third Persons:

- ABA Model Rule 2.3 provides that:
 - (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
 - (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
 - (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.”

How it Works in Practice

Funding of Complex Commercial Litigation:

- IP infringement, antitrust, contract disputes, etc.
- Funding arrangement is typically between funder and the claimholder
- Non-recourse; funder only receives a return if value received for underlying claim
- Law firm takes all or majority of case at risk – alignment of interests
- Funder pays for out-of-pocket expenses and/or legal fees of claimholder in exchange for a portion of the recovery
- Incurred and anticipated costs
- Anticipated and existing cases

Typical Funding Deal Terms

- Litigation funding budgets - depends on type of claim
 - \$500,000 – \$5M+
 - Budgets should be realistic and case should be fully-funded
 - Contributions made in accordance with pre-agreed budget
- Funder gets secured interest in recovery
- Priority return of funded amount
- Time or event based multiple of funding amount
- Fixed or variable percentage of net recovery
- Right to provide future funding
- No control of claim
- No recovery in the event of a shortfall
- Standard representations and warranties

Questions



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