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Message from the Chair

The Hope of International Peace Mediation

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By the time you read this hopefully some of the current international upheavals will be resolved. In addition to the many crises the world was facing, a political maelstrom has overtaken several Middle Eastern and African countries. I find myself thinking about the application of ADR to the world's struggles. Can the Middle Eastern and African countries employ negotiation processes to settle into a new political order that is equitable and long lasting? Can the tools of the ADR community be employed to coalesce differing political views and goals in order to achieve a peaceful and satisfactory resolution of the conflicts as has been achieved in other crises around the world?

The promise of mediation for the resolution of conflicts within and between states is not being ignored. Congress funds the United States Institute of Peace ("USIP"), an independent, nonpartisan, national institution established in 1984 which provides analysis, training and tools that prevent and end conflicts, promotes stability and professionalizes the field of peace building. As the USIP states "while conflict is part of the human condition, there are proven ways to prevent and manage violence and stabilize societies."

In just the last few months Qatar and United Nations representatives conducted intensive talks to end the long standing civil war in Darfur that have taken so many lives. Secretary of State Clinton visited Haiti in an effort to resolve the political crisis in the wake of the contested election results. Pakistan asked the U.S. to mediate the perpetual conflict with India over Kashmir. African Union representatives arrived in the Ivory Coast to resolve the standoff between the incumbent president and the winner of the last election. Saudi Arabia and Turkey tried to mediate the political crisis in Lebanon caused by Hezbollah's withdrawal from the unity government. The U.S. continued in its efforts to resolve the Israeli-Palestinian standoff. That "international peace mediation" is being employed in so many parts of the world demonstrates belief in the monumental potential power of ADR processes for resolving conflict.

In the face of all the strife in the world today, however, we must ask is international peace mediation working? Are we seeing enough success to urge that mediation be utilized in the numerous trouble spots around the globe? The answer appears to be yes; utilizing negotiation and mediation seems to have had significant success in stemming bloodshed and forging a peace among those engaged in state-based conflict. The Human Security Report Project 2007 reported that from the 1950s to the

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Investing in Commercial Claims; New York Perspectives

By Selvyn Seidel

Introduction, Summary, and Purpose

Investing in Commercial Claims—most frequently referred to as "Litigation Funding," "Litigation Financing," and "Alternative Litigation Financing"—is today becoming an almost fashionable topic of discussion and debate in some circles.[1] The potential is significant.[2] The sums involved are at least in the hundreds of billions.[3]

Given New York's center stage role as a commercial and dispute leader, what happens here carries weight. That is true as to New York alone, since the potential for funding activity in New York is substantial without more. That is true elsewhere as well, since New York is a leader and to an extent a Petri dish for other States across the country (and indeed for jurisdictions abroad). While technically each State governs the industry within its own borders, there is no question but that the experience and approach as it develops in New York will have far-flung implications.

This article explores what is going on in New York, in the context of more general developments. The article has four basic parts. First it summarizes the industry basics. Next it identifies some of the industry's most pressing issues and challenges, as well as some of its most compelling asserted benefits. Third, the article summarizes how the emerging industry is faring in, and the perspective from, New York.

Last, it looks to the future in New York. The conclusion here is that New York holds a promising future for the industry, and for the market which seeks it. The reasons are not complex. New York is, first and as noted above, the nation's preeminent center for asserting and defending against litigation and arbitration claims. Second, New York couples this strength with a general willingness and understanding through its courts, its legislature, its lawyers, its Ethics Committee, and its policy, to be, on the whole, more than prepared to listen, analyze, and then proceed as to the best way to treat the market and the industry.

With this New York approach, the industry and market have what they should want. They can tell their story. It is this article's premise that this story—if fully and accurately told, studied and managed—can and will contribute to the industry's taking root in New York and to the market here flowering.[4]

Overview of Industry and Market

Claims are assets. Like other assets, claims can be valued, bought and sold, financed, and otherwise treated for investment like a share of stock, an antique rug, or a plot of real estate. Claims are thus becoming, although slowly at the moment, an acknowledged discrete asset class.

Specialists have developed in valuing these assets, and financially supporting the prosecution of deserving ones. They consist in good part of institutions which have become known as, most frequently and as noted above, "Litigation Funders" or "Litigation Financers" or "Investors in Litigation." (There are other Funders and investors, such as hedge funds, investing in claims on a one-off basis) This article refers to them, for the most part, as "Investors in Commercial Claims."

"The potential [of investments in commercial claims] is significant. The sums involved are at least in the hundreds of billions."

If a claim has good prospects for success, the investor will pay for the legal and other costs of prosecution (and perhaps more, such as arrears the law firm has run up, or financial needs of the claimant's business). In return, the investor acquires some interest in the claim. If the claim is successful, the investor receives a portion of the recovery or a multiple of capital advanced or some other measure such as a combination of the two. If the claim is unsuccessful, the investor takes the hit, alone. This illustration gives a decent (although quite oversimplified) picture of how the industry generally works. There are endless variations on (and variances from) this theme.

To date and for the most part, the market consists of claimants who cannot afford to prosecute their claim, however worthy it may be. The size of this market is impossible to gauge at this time. Far too little data is available. But for discussion purposes it is defensible to project, as indicated above, that globally the market size runs, at a minimum, into the hundreds of billions of dollars. It also seems fair to say that the institutional capital available to serve the need is but a tiny sliver of the market demand.

The gaping divide between demand and supply is growing, and for several reasons. The market size for claimants in financial distress continues to grow rapidly during these troubled times. The market is also expanding to embrace (i) defendants being confronted with meritless claims who, themselves facing troubled times, are beginning to consider funding of their defense, plus (ii) a group of claimants and defendants that is starting to form who can well afford to pay the litigation bills, but who prefer, as an economic choice, to hedge their bets and transfer the cash outlay and risk of loss monkey to a third party.[5]

Issues, Challenges, Benefits

Not surprisingly, especially in an emerging industry such as this one, the industry has generated issues, challenges, and even attacks.[6] Among the most frequently raised general issues (many of which are overlapping) are these: Do industry operations violate the laws of champerty and maintenance? In this connection and in particular: does it give unacceptable control of the case to a third party, such as decision-making authority over the case strategy and direction, including choice of counsel, and decision-making authority during settlement discussions? Does it create unmanageable conflicts between the lawyer and the client, causing problems such as unacceptable compromises in the lawyer's professional independence? Does it charge abusive or otherwise intolerable returns? Do the contracts amount to "unconscionable" contracts that should not be enforced? How is the industry treated by the doctrines of confidentiality, attorney-client and work product protections?[7] Does the industry stir up litigations, especially baseless litigations? How does this all stack up to somewhat comparable situations, such as the contingency fee arrangement for law firms in New York, and the insurance claims situation where the insurance company steps into the shoes of the insured (both in the subrogation and the defense sides of insurance)?

Many of these issues are valid to raise. For example, a recurring question relates to the size of the returns. Should there be a cap in some situations, imposed on the market in some way, such as through rules or regulations? Do the extensive experience with and consequences of lawyer's contingency fee arrangements have relevance here? Does the individual situation require close examination on a case-by-case basis, rather than trying to address the issue in general terms—e.g., how does the fact that one claimant may be a commercial claimant with extensive business experience and with experienced professionals differ from the person without means or business experience or advisers who is run down by a drunken driver?

Another recurring question relates to the actual and/or potential conflicts of interest between the claimant and its lawyers, arising, some say, as a result of the funding provided. As indicated above, these can occur at any stage of the funding process, such as at the evaluation stage or the settlement stage. A host of different factors and possible responses are possible, each to be taken into the mix (e.g., the point that in some circumstances the appointment or other insertion of an independent objective third party—such as an independent qualified mediator—to address and decide a conflicted issue, can be helpful).

On the other side of the coin, the industry, operating properly, delivers undeniable benefits. Important benefits include:

- It gives voice to merit-based claims which otherwise would be lost or devalued.
- It provides tools to make the legal system and judicial system more cost-efficient and more effective.
- It equalizes bargaining power.
- It promotes civil justice and commercial soundness.[8]
- It establishes a new, integrated, comprehensive product and service, combining law, business, finance, technology and other areas, that a changing economic and professional environment is pushing for and requiring.
- It provides new economic products and services that the market is asking for.

Valid positions, points, arguments, questions and criticism deserve attention and management—indeed, require attention and analysis and management for the good of the industry and the good of the market.[9] That is what this article is intended to discuss briefly, with some conclusions and predictions. While the scope of this article does not allow for a detailed drilling down in its analysis, it should be remembered that the details are critical, where, as here, the cases, the claimants, and the funders, each differ one from the next like fingerprints.

Nonetheless, at this early stage of the industry's development in the United States, responses to general points, questions, answers and approaches are useful to foster an understanding of the field.

New York Perspectives

In brief and on the whole, New York is greeting the industry with positive interest, with some support, and, most importantly, with an open mind and willingness to inspect and analyze the industry objectively.

New York has laws and rules in crucial areas that litigation funding depends on, in varying degrees, for success. The most important legal concerns that have been raised are those under the umbrella doctrines of "champerty and maintenance." These doctrines historically restricted a third party from investing in someone else's claim. Over the years, this has changed dramatically across the country as these ancient doctrines were reassessed in light of contemporary realities.[10]

In New York, there is a statute which reflects that the doctrine of champerty has outlived its usefulness in most respects. Sections 488 and 489 of the Judiciary Law curb its application severely.[11] The New York Court of Appeals has strictly interpreted the law of champerty in New York stating "The prohibition of champerty [by Section 489] has always been limited in scope and largely directed toward preventing attorneys from filing suit merely as a

vehicle for obtaining costs."[12] The Court sharply distinguished "the difference between one who acquires a right in order to make money from litigating it," which was barred, from acquiring a right "in order to enforce it," which was permitted.[13] This recent New York Court of Appeals opinion has pulled together a good deal of what has been said in various other New York Courts, and today is likely the most important New York decision to have been reached. Subsequent New York cases have confirmed LOVE's pronouncements, distinctions, and importance.[14]

Indeed, in various mortgage related cases, where assignments have been made of the claims, the Courts have emphasized the legitimacy of the assignments against champerty challenges.[15] In *US Bank NA v. Crutch,* the court declined to find champerty where there was no evidence that the mortgage was acquired for the sole purpose of enforcement and stated that even if it were, the champerty statute does not apply if the purpose of the assignment is to collect a legitimate debt.[16] New York Courts which have otherwise addressed the issue have made an effort to understand and accommodate the industry. For example, in *Echeverria v. the Estate of Lindner*[17] the court noted that "LawCash's loan or investment, (whatever you may call it) to Mr. Echeverria can be viewed as a purchase of a chose in action; however, this advancement is still not considered Champerty."[18]

It should be noted some cases in New York (as elsewhere) involving investing in commercial claims, are hard to track; they fly under the radar. One good example is *In re Parmalat Securities Litigation.*[19] In that federal district court case in the Southern District, the plaintiff was funded by Deutsche Bank and the defendant was Bank of America. The funding arrangement never became an issue under the champerty law. It seems the Court and parties just assumed that no legal principle was violated in that complicated commercial case. (The Court did ask for a copy of the agreement; following a debate as to whether the agreement should be produced, it was produced.) Much of this is revealed in the Court transcripts, not in the decisions themselves.[20]

While such hard-to-track cases may not be making "law" in the commercial investment area, it is important to try to identify and follow them. They provide some insights into the Court's thinking on the issues that may arise.

There is another aspect of New York law and policy that bears importantly on litigation funding. New York, as a commercial center, recognizes a distinction between consumer or retail claims (such as personal injury) and commercial claims. There has been a long-standing effort to support business in the State of New York and respect contracts freely entered into by commercial parties. As noted above, in the funding industry, this distinction between consumer and commercial parties makes a real difference.

In addition, the New York State Bar Association's Committee on Professional Ethics has studied some of the pertinent issues. It has concluded that an attorney's referral of a client to a funder and representation of a client in dealings with a funder are not unethical (although reserving decision on whether a Court might question the arrangement under legal restrictions).[21]

Today New York's respected New York City Bar Association Ethics Committee is studying and reporting on various related areas. That study is enhancing awareness of the market and industry and is expected to produce guidelines for future activity. This is another important factor marking New York as a State that is interested in learning about, and providing rules and guidelines for, the market and the industry.

It should be mentioned that New York now has an important project afoot likely to encourage Investors in Commercial Dispute to invest in New York. Several Bar Association committees of New York State and New York City are working together to enhance New York's attractiveness to business. One key aspect is maintaining New York as a leading center in the world for international arbitration. Litigation Funding supports and promotes international arbitration.[22] One might expect that this goal of New York will align New York's interests and Funders' interests in various additional ways.

New York is also developing the infrastructure needed to support the industry. The three established major institutional Funders in the United States are operating with active New York offices: Burford Group Ltd, Juridica Management, and Credit Suisse. Fulbrook Management is just entering the industry, and with an active New York office. A number of prominent New York-based law firms act, as public records indicate, in funded cases. Public information shows these to include firms such as Patton Boggs; Simpson Thacher & Bartlett; Cadwalader, Wickersham & Taft; and Orrick Herrington & Sutcliffe. The presence of investors based in New York coupled with New York's vibrant legal community suggests a potential for significant investment activity in New York.

In short, by dint of its commercial and litigation prominence, New York is active compared to most other States relating to Litigation Funding. New York is paving a legal, ethical and commercial pathway that should be useful for New York and for others to follow into the future.

And, the Future?

In brief, New York presents an opportunity for the industry. New York is paying attention, and taking objective and analytical strides forward. New York is sensitive to the consumer/commercial distinction. The industry cannot ask for more.

Nonetheless the industry is in the early stages of development in New York and indeed in the United States. The industry has its work cut out for it. It needs to demonstrate the benefits it maintains it can and does provide. It needs to address—indeed welcome the chance to address—any legitimate issues raised.

Will the industry rise to the occasion and prove itself? It seems to be doing so to date. The prediction in this article is that this will continue, and that in essential aspects the achievement will take place within the next three to five years. If that occurs, the consequences for the industry and for the market will be positively felt in New York, in States across the country, and beyond.

Endnotes

1. An emerging industry in the United States, the industry has been around for years in other countries. It started about 30 years ago in Australia. It migrated to Europe about 15 years ago, principally in the United Kingdom. For a discussion of the growth and spread of the practice overseas, *see Dr. Maya Steinitz, Whose Claim is This Anyway? Third Party Litigation Funding, 95 Minn. L. Rev. (forthcoming 2011)* S. Garber, *Alternative Litigation Finance in the U.S., Issues, Knowns and Unknowns*, a publication of the Rand Institute of Civil Justice (May 2010); available at http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf; Heather A. Miller, *Don't Just Check Yes or No: The Need for Broader Consideration of Outside Investment in the Law*, 2010 U. Ill. L. Rev. 311.

   For a summary of the status of the industry in the U.S. and its development in 2009, see S. Seidel, *Stars and Strides*, the Litigation Funding Magazine, April 2010. For a general discussion of the market and industry, see S. Seidel, *Investing in Commercial Claims*, NUTSHELL PRIMER (February 2011) (Fulbrook Management LLC); *See also* Lord Justice Rupert Jackson, *Review of Civil Litigation*, chapter 11, at p. 117 (December 2009) (concluding that "third party funding is beneficial and should be supported"), available at http://www.judiciary.gov.uk/Resources/JCO/Documents/jackson-final-report-140110.pdf; the Litigation Funding Magazine, edited by Neil Rose; and Legal Futures, also edited by Neil Rose; Report of the U.S. Chamber Institute for Legal Reform, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States*, October 2009, http://www.Instituteforlegalreform.com/images/stories/documents/pdf/research/thirdpartylitigationfinancing.pdf. (2010) (criticizing the industry, especially when combined with class actions, and calling for its prohibition); Comments of the American Tort Reform Association Concerning Alternative Litigation Financing, submitted by the Association Co-Chairs on February 15, 2011 (urging the prohibition of litigation financing), available at http://www.atra.org/files.cgi/8551_Alt-Litigation-FinanceLTR.pdf; *Rancman v. Interim Settlement Funding Corp.*, 789 N.E. 2d 217 (Ohio 2003), a personal injury case, and effectively reversed five years later by the Ohio legislature but setting out various criticisms of litigation financing that have been referred to subsequently, such as in *Echeverria v. Estate of Lindner et al.*, 801 N.Y.S. 2d 233 (Sup. Ct. Nassau 2002) which discussed but ultimately did not follow *Rancman*'s analysis and conclusions.

2. Although most people in the United States are still not familiar with the industry, more and more people are learning and talking about it. Others are starting to use or become interested in the industry's products and services, thus forming a market. While still fairly early days in the United Sates, the industry has gained serious ground in 2009 and 2010 on a number of fronts, including capturing the attention of the media and some of the market. It promises an even quicker pace for 2011.

   It is particularly important to note that the American Bar Association's Commission on Ethics 20/20 has established an eight-member Working Group on Alternative Litigation Financing to study and report on the impact of legal ethics on industry of "ALF" (Alternative Litigation Funding, or what the commission refers to as "third-party litigation financing.") It issued a request for comment on November 23, 2010, and has received comments such as the one by the ATRA referred to above. The Request itself is useful reading, at www.abanet.org/ethics2020, and the comments in response, so far, are informative. The study and report is expected to be thorough, and the time needed is expected to be substantial.

   The entire area will be affected to some degree by developments in the United Kingdom, which should have overflow impact on other countries, including the United States. There, under legislation enacted in 2007, third parties can invest in law firms, starting in October of 2011, and also, under the legislation, law firms can amalgamate with certain non-law firms. Apart from all else, this development should support those contend that champerty as a doctrine should not restrict litigation financing.

3. Estimates of the market are, with serious lack of information and analysis at this early time, not possible to make with confidence or reliability. But estimates into at least the hundreds of millions on the market side, and a number of million on the supply side, provide satisfactory enough discussion points. For a description of some of the institutional investors in the market and the sums they have available *see* Leigh Jones, *Litigation Funding Begins to Take Off*, The National Law Journal, at p. 1, November 30, 2009 (identifying at that time over $400 million publicly committed by just three of the funders for investment in large commercial disputes. Since that publication in November 2009, that sum has increased by at least $200 million, with Burford's recent raise on the public market of about $175 million, and the Calunius announcement and some other announcements of others entering the industry. By way of further information and illustration, other investors, such as hedge funds, add at least hundreds of millions more.

4. As the Rand study, *supra* note 1, reflects, different segments of the industry should be analyzed separately. The study identifies at least three segments: non-recourse loans to individual consumer plaintiffs, lending or extending credit to plaintiff's law firms, and investing in commercial (business to business) lawsuits.

   Throughout, it is pivotal to keep a single point in mind that is so important that it deserves headlines: Commercial claims, the subject of this article, are thoroughly different from and must never be confused with personal injury and other individual or consumer-type claims. Commercial claims typically have claimants with business and financial experience, often coupled with professional and other advisors, as opposed to personal claims which often have neither, nor other protections that commercial claims have. Further, the commercial claims often have integral emotional and motivational differences in nature than personal ones. In brief: the analysis of one cannot be confused with the analysis of the other; the mixing of the two has all too frequently occurred so that while analysis of one can sometimes inform the other, on the whole the confusion has to date worked a disservice for both.

5. The investment is, in truth, double barreled. The third-party investor makes one investment, as noted. The claimant or defendant also makes his or her own investment: the amount that party agrees to pay to the third party on success.

6. A frequently cited report containing significant criticism of the industry, especially when coupled with class actions, is the report issued by the U.S. Chamber, *Selling Lawsuits, Buying Trouble, supra* note 1.

7. This topic is currently a discussion point by many. See, *e.g.*, the recent prominent coverage given to it by the National Law Journal, February 21, 2011, p 1.

8. *See*, Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571 (2010); Miller, *supra* note 1; Jonathan Molto, Litigation Finance: *A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65 (2010). One party put this poignantly, as quoted in a recent New York Times article concerning the advance the party received: "It's given me hope.... I don't view it as a loan; I view it as an investment in my future. They are helping me to get what is rightfully mine." Binyamin Appelbaum, *Taking Sides in a Divorce, Chasing Profit*, The New York Times, December 4, 2010, at nytimes.com/2010/12/.../05divorce.html.

9. The American Bar Association and the New York City Bar Association have, as noted elsewhere, undertaken an analysis and report in this area.

10. For a discussion of jurisdictions across the country, *see generally*, Anthony J. Sebok, *The Inauthentic Claim*, forthcoming *Vand. L. Rev.* Vol. 64 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593329.

11. One important restriction is to exempt claims exceeding $500,000. Indeed, the legislative history of Section 489 (2) states that the intention of New York in passing the amendment in 2004 was to promote the "market...for the purchase and sale of claims...by [protecting] the ability to collect on these claims without fear of champerty litigation." 2 McKinney's 2004 Session Laws of New York 18905 (2005).

12. *See also, Bluebird Partners LP v. First Fidelity Bank*, 94 N.Y. 2d 726, 709 N.Y.S. 2d 865 (2000) (reviewing the development of the doctrine of champerty from medieval times and declining to find champerty where the court could not conclude that the certificates were purchased with the intent and for *the* purpose of bringing a suit anthem.

13. *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors, Inc. Mortgage Pass Through Certificates, Series 1999- C1 v. Love Funding Corporation*, 13 N.Y. 3d 190, 199, 890 N.Y.S. 2d 377 (2009).

14. *E.g., Richbell Information Services, Inc. et al v. Jupiter Partners L.P. et al*, 280. A.D. 2d 208 (1st Dept. 2010) (when company needed money, an offering circular was sent around seeking investments to raise money to prosecute claims for fraud and tortious conduct to misappropriate interests in a joint venture); *In re IMAX Sec. Lit.*, No. 06 Civ. 6128 (NRB), 2011 U.S. Dis. LEXIS 41709 (S.D.N.Y. Apr. 15, 2011); *In re Arkady Malakhov*, Case No. 05-4708, 2011 Bankr. LEXIS 96 (Bankr. S.D.N.Y. Jan. 7. 2011); *SB Schwartz & Co. v. Levine*, 2011 N.Y. Slip Op. 1642, 918 N.Y.S. 2d (171) (2d Dept. 2011); *Fragrancenet v. Fragrancex.com.* 679 F. Supp. 2d 312 (E.D.N.Y. 2010); *Rozen v. Russ & Russ et al*, 76 A.D. 3d 965 (1st Department 2010) (in a suit alleging fraudulent transfer of property, Court concluded no champerty when attorneys acquired a person's rights "'in order to enforce them; and not 'in order to make money from litigating [them]'"); *Carbon Capital Management v. American Express Company, Corporate Solutions Group, and Salinger*, 2010 N.Y. Misc. Lexis 2512 (N.Y. Sup. Ct. Nassau 2010); *Carbon Capital Management vv. American Express Company, Corporate Solutions Group, and Salinger*, 2010 N.Y. Misc. LEXIS 3816 (N.Y. Sup. Ct. Nassau 2010) ("[assignor] assigned the cause of action [for breach of fiduciary duty and fraud] to Carbon Capital for the purpose of enforcing his pre-existing claim" and therefore not champerty); *D.T. Funding Inc. v. Radhika Ramlakhan*, 2010 N.Y. Misc. Lexis 2287 (N.Y. Sup. Ct. Queens 2010); *Seomi v. Sotheby's, Inc.*, 910 N.Y.S. 2d 765 (N.Y. Sup. Ct. New York 2010); *MVB Collision D/B /A Mid Island Collision v. Allstate Insurance*, 900 N.Y.S. 2d 631 (D. Ct. N.Y. 2d District Nassau 2010); *PS Finance LLC v. Parker, Waichman Alonso LLP et al*, 2010 N.Y. Misc. Lexis 2991 (N.Y. Sup. Ct. New York 2010); *U.S. Bank National Association, as Trustee of Lehman Brothers v. Crutch*, et al, 2010 U.S. Dist. Lexis 75481 (E.D.N.Y. 2010); *see also Lehman Brothers Holding v. Cornerstone Mortgage Company*, 2011 U.S. Dist. LEXIS 13306 (S.D. of Texas 2011), citing the LOVE case and N.Y. law.

15. *E.g., U.S. Bank National Association, as Trustee of Lehman Brothers v. Crutch et al*, (2010 U.S. Dist. Lexis 75481 (E.D.N.Y. 2010).

16. *US Bank NA v. Crutch*, 210 Lexis 75481 (E.D.N.Y. July 26, 2010). See also, *e.g., D.T. Funding Inc. v. Radhika Ramlakhan et al*, 2010 N.Y. Slip Op. 31244U (Sup. Ct. Queens, 2010), another illustrative mortgage case.

17. *Echeverria v. the Estate of Lindner et al*, 801 N.Y.S. 2d 233 (Sup. Ct. NY 2005).

18. That Court discussed an Ohio case which presented similar facts, *Rancman v. Interim Settlement Funding*, 99 Ohio St 3d 121, 789 N. E. 217 (2003), where an Ohio Court found, in a personal injury case, that there was champerty. The *Echeverria* court questioned the correctness of the Ohio decision which it concluded was based on the different governing Ohio law. The *Rancman* decision has been criticized as one of the worst decisions in the country, *see* Stephen Gillers, *"Waiting for Good Dough: Litigation Funding Comes to Law,"* 3 Akron L. Rev. 677 (2010) and the Ohio legislature reversed *Rancman* with the enactment of Ohio Rev. Code Ann. § 1349.55 (2008).The *Echeverria* Court discussed various aspects of the issues presented and concluded that more study is needed of the issues raised.

19. 04 M.D. 1653.

20. Other cases might deal with or impact commercial litigation funding somewhat, but are not commercial cases nor are they obviously identifiable. For example, a highly visible personal injury case in the Southern District of New York involved a class action for personal injuries arising from the bombing of the Twin Towers in New York. The plaintiff's attorneys received loans to prosecute the case and, on settlement of the cases recently, it was disclosed that the loans existed, and also that the plaintiff's attorneys wanted to have the loan's high interest rate covered. Judge Hellerstein, raised objections to this effort to recover interest that the court thought indefensible under the circumstances. The interest claims were withdrawn.

21. New York State Bar Association, Committee on Professional Ethics, Opinions 666 (73-93), June 3, 1994, states that a "lawyer may refer a client to a financial institution that will lend the client money for living expenses, where the repayment is contingent on the successful resolution of the client's claim for personal injuries"; Ethics Opinion 769, November 4, 2003, states that an "attorney who represents a client in a personal injury matter may undertake to represent the client in a transaction with a litigation financing company that advances cash in return for a portion of any eventual settlement or judgment received by the client" and may charge for such additional representation.

22. *See* S. Seidel, *Investing in International Arbitration Claims*, Iberian Lawyer (December 2010 edition), for a discussion of the industry and market as they relate to international arbitration claims.

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