

# Legal Financing: Investing in Justice

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**“A lawyer, as a member of the legal profession, is . . . a public citizen having special responsibility for the QUALITY of justice.” ABA Model Rules of Professional Conduct, Preamble (emphasis added).**

- Justice = parties interests + adversarial process
- Lawyer: “Learned” or essential profession



## LEGAL FINANCING: Alternative Litigation Financing (“ALF”) or Third Party Financing (“TPF”)

- Interjects profit motive of financiers
- Fundamental sea change in US Litigation



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3

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## Presentation: LEGAL FINANCING

- Availability to lawyers/investors
- Survey the history and purpose
- Policy/ethical ramifications
- Mass Tort Case Study
- Forecast of impact on legal profession

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## Legal services industry revenue US

- Projected: approximately US\$350 billion 2020 – 2024<sup>1</sup>
- US litigation funding market?
  - No one really knows size
  - Some investors estimate up to \$85 billion<sup>2</sup>

1. [www.statista.com/forecasts/31117/legal-services-revenue-in-the-us](http://www.statista.com/forecasts/31117/legal-services-revenue-in-the-us)

2. <https://news.bloomberglaw.com/business-and-practice/nobody-knows-litigation-finance-size-but-its-not-85-billion>

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## Conservative estimate

- US\$11 billion in 2018
- Projected 2027: US\$22.4 billion
- Industry is in growth mode
- “Unicorn of non-correlated absolute returns”
- Unconfirmed returns of 50% to 60%

1. <https://www.prnewswire.com/news-releases/global-litigation-funding-investment-market-was-valued-at-us-10-916-3-mn-in-2018-and-is-expected-to-reach-us-22-373-3-mn-by-2027-growing-at-a-cagr-of-8-3-over-the-forecast-period-owing-to-litigation-funding-investments-being-un-301005840.html>

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## US legal financing industry

- US legal financing industry began in the 1990s
- American Legal Finance Association (AFLA) formed in 2004
- Presently 37 member companies
- AFLA code of conduct formalizes ethical standards business practices



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## Types of litigation financed: **EVERYTHING!**

- Class actions; Commercial; patent infringement; breach of contract; personal injury; mass tort
- Structure of financing: limited only by imagination and ethics rules
- Payments to plaintiffs for cost of litigation living expenses; money to law firms directly spread out over several cases; money to litigant for payment of hourly attorney fees, etc.

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## US legal financing industry

- AFLA mostly established institutions
- 2 publicly traded companies
- Large banks, hedge funds, pension funds, and insurance companies
- Set up like Private Equity Fund: raise capital/deployment period
- Team of attorneys/investment professionals make investment decisions

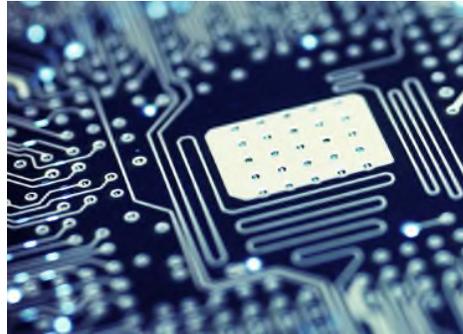
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## Litigation finance “start ups?”

- Preferred to be called “tech companies.”<sup>1</sup>
- College drop outs
- Attorneys and “machine-based insights” used to determine profitable cases



1. <https://techcrunch.com/2019/09/17/this-young-litigation-finance-startup-just-secured-100-million-to-go-after-cases-it-thinks-are-winners/>

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## Apple or Theranos?



theranos

## US: legal financing traditionally done by parties involved in the legal dispute either directly or indirectly through contingency fees or insurance defense

- Three forms of legal financing:
  1. Direct lending to law firms;
  2. Direct lending to litigants;
  3. Direct investment in the litigation.
- First two: generally approved
- Direct investing in litigation: ethical/policy quagmire

## Legal financing

- Non-recourse loans to litigants: access to justice
- Investing directly in litigation: Violates common law doctrine of champerty
- Fundamentally changes societies view of civil litigation and lawyers
- Litigation finance companies: avoid calling it investing in litigation

## Very few states ban or limit litigation financing

- American Bar Association (ABA) has offered guidance since 2012
- ABA resolution for third-party litigation funding August 2020
- Best practices for litigation financing



## ABA resolution August 2020

- Ethical rules implicated
- MRPC 1.6 confidentiality
- Information shared with funders: privileged?
- MRPC 1.7 (a)(2) Conflicts
- Duties to Funder? Business? Partners?

## ABA resolution August 2020

- MRPC 1.8 (a) and (e),(f),(i)
  - Business transactions with clients
  - Financial assistance to client
  - Funders standing behind lawyers
  - Independence compromised?

## ABA resolution August 2020

- MRPC 5.4(a)(c)
  - Sharing fees with non-lawyers
  - NYC bar op. 2018-5 (no securing of loans only with recovery; must use a fixed rate of interest)
  - Seeking to amend New York State ethics rules
  - Legal funding can't affect lawyers independent judgment
    - Is this possible??

## ABA best recommended practices

- Funding arrangement should be in writing
- Funding arrangement should ensure client remains in control and should spell out disagreement protocols between lawyer and client
- Lawyer should presume that litigation funding arrangement and agreement will have to be disclosed to the court

## Litigation funding in practice: mass torts

- Late night TV commercials: mesothelioma; pharmaceuticals; pesticides
- Class actions; MDLs
- Funding may occur before any clients are signed up
- Funding may occur after an “event”:
  - Regulatory/scientific decision: drug/carcinogen

## Funding dollars at work

- Invest in the development of experts
- Advertise for potential victims
- Identify favorable jurisdictions
- Pick your best case to try
- Create an inventory of thousands of cases

## Funding dollars at work

- Try one or two cases
- Favorable verdicts force companies to settle in mass
- Justice: no longer an individual determination
- Paradigm Shift: defendant/plaintiffs equally responsible

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## Litigation financing regulation

- Likelihood?
- Historically law has been a self regulating profession
- As society moves away from individualized determinations of justice regulation becomes more and more likely
- Litigation financing infuses billions of dollars annually into the US legal market
  - Commentators proposing federal regulation
  - Consumer financial protection bureau CFPB

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## Ramifications of legal financing on the legal profession in 20 years?

- More federal control?
- SEC regulation?
- Continuing relaxing of ethics rules?
- End of self regulated profession?

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## Thank you

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