



Distressed Investing

2017

Maximizing Profits in the Distressed Debt Market

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The Harmonie Club ■ New York City

24TH ANNUAL CONFERENCE

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BEARD GROUP

LAW & BUSINESS PUBLISHERS

10:50 a.m. – Litigation Finance

Marc J. Carmel, Director, Longford Capital Management, LP

Benjamin I. Finestone, Partner, Quinn Emanuel Urguhart & Sullivan, LLP

Jude Gorman, General Counsel & Chief Administrative Officer, Reorg Research, Inc.

Faculty



Marc J. Carmel
Director



Benjamin I. Finestone
Partner



Jude Gorman
General Counsel & Chief Administrative Officer



Topics

- General Explanation of Litigation Finance
- Using Litigation Finance in Distressed Situations to Increase Returns and Decrease Risk
- Factors to Consider When Choosing a Litigation Funder
- Different Ways to Structure Litigation Finance Agreements
- Best Practices When Pursuing a Litigation Finance Arrangement
- Appendix – Information about Faculty

General Explanation of Litigation Finance

General Description of Litigation Finance

- Litigation finance is a rapidly growing form of specialty finance used by litigants and law firms
- Litigation finance is a way to monetize litigation claims
- Litigation finance is generally a non-recourse investment...it is *not* a loan
- Litigation finance is used by public and private businesses and non-corporate entities
- Litigation finance is available at any point in the litigation lifecycle

Using Litigation Finance
in Distressed Situations
to Increase Returns and
Decrease Risk

Benefits of Using Litigation Finance

- Treats legal claims as discrete assets that can be monetized
- Litigation finance may provide proceeds to fund all costs of the litigation
 - Attorneys' fees, expert fees and expenses, and out-of-pocket costs and expenses of litigation
- Litigation finance may even provide additional proceeds to fund other obligations or to “take money off the table”
 - Expenses unrelated to the litigation, including capital expenditure, operating costs, and other litigation
 - General administration of a bankruptcy estate
 - Distributions to constituents
- Reduces practical pressure upon senior creditors to fund claims for litigation proceeds that would benefit junior creditors primarily or exclusively
 - Conversely, litigation finance may be of particular utility where target of litigation asserts a lien on all of the estate's assets

Benefits of Using Litigation Finance (continued)

- Enables companies to pursue meritorious legal claims while avoiding exposure to the high costs of litigation
 - Spreads litigation risk and minimizes or avoids the need for plaintiffs to pay litigation costs
 - Provides claim owners with a “market check” on the viability of claims
 - Enables claim owners to use alternatives to traditional billing model (i.e., contingency arrangement) with law firms maintaining hourly rate model
 - Allows claim owners to work with law firms of their choice
 - Permits claim owners to pursue recommended litigation strategy
 - Eliminates pressure to accept settlement that undervalues potential recovery
 - Creates certainty within (litigation) budgets
 - Delay is expensive; funders, like most plaintiffs, typically comfortable with economic incentives for speedy resolution
- Avoids the adverse impact of litigation costs on corporate balance sheets, income statements, and earnings
- Law firm portfolio financing provides liquidity and reduces risk from cases taken on a contingency fee basis

Litigation Finance Can Be Used by Various Constituents in Distressed Situations

- Distressed Companies before bankruptcy, in bankruptcy, or after exiting bankruptcy
- Purchasers of distressed assets
- Plan Administrators, Litigation Trustees, and Liquidation Trustees
- Chapter 7 Trustees and Chapter 11 Trustees
- Assignees for the Benefit of Creditors
- Receivers
- Creditors with claims asserted against distressed companies
- Creditors with direct claims against third parties who acted in concert with the debtor

Factors to Consider When Choosing a Litigation Funder

Not All Litigation Funders Are Alike

- Structure of Litigation Funder
- Resources of Litigation Funder
 - Financial
 - Personnel
 - Access
- Professional Team
 - Legal Expertise
 - Experience
 - Personality/ Fit
- Manner in which funder operates
 - Level and quality of input/ consultation
 - Size of funder's portfolio of other cases

Different Ways to Structure Litigation Finance Agreements

Key Sections of a Typical Litigation Finance Agreement

- Distributions of money from the litigation funder
- Sharing of proceeds
- Representations and Warranties
- Covenants
- Monitoring
- Events of Default
- Confidentiality

Other Potential Ways to Structure Litigation Finance Arrangements

- Portfolio transactions
- Purchase-sale of claims
- Litigation funder as administrator of estate
- Recourse financing
- Receivables financing/ factoring

Best Practices When Pursuing a Litigation Finance Arrangement

Navigating Legal and Ethical Issues with Litigation Finance

- Understand the law in the relevant states
- Only work with a reputable litigation funder
- Only share confidential information with a litigation funder that is subject to a written confidentiality agreement
- Ensure the claim owner maintains control over litigation and settlement

Maintenance, Champerty, and Barratry

- Definitions:
 - Maintenance – helping another prosecute litigation with “officious intermeddling”
 - Champerty – a form of “maintenance” in which a third party helps another prosecute litigation in exchange for a financial interest in the outcome
 - Barratry – the continuing practice of maintenance or champerty
- Maintenance, champerty, and barratry are rules from medieval England that initially were incorporated in some state statutes and common law throughout the United States
 - Have been mostly abolished or narrowly defined to exclude legitimate litigation finance arrangements where litigation funder does not have control

Usury

- Definition:
 - Charging interest for a loan at a rate that exceeds the maximum legal rate
- Generally does not apply to litigation finance because:
 - Litigation finance agreements are not loans
 - Commercial relationships are often exempt

Ensuring that Attorneys Remain Trusted Advisors to Their Clients

- Attorneys should consider any factors that could create a conflict of interest with their client
- Attorneys should provide candid advice about litigation finance, including:
 - whether litigation finance proposals are in client's best interest
 - possible alternatives
- Attorneys are required to maintain independent professional judgment to client
- Attorneys should avoid impermissible financial assistance to clients
- Attorneys should avoid impermissible fee sharing

Attorney- Client Privilege

- Generally extends to:
 - communications between “privileged persons,”
 - in confidence,
 - for the purpose of obtaining or providing legal assistance for the client
- Sharing information with litigation funders may waive the attorney-client privilege
 - It *may* be protected under the common interest doctrine, which is an exception to the waiver of attorney-client privilege, but this is uncertain
 - Courts have generally been more comfortable protecting materials under the work product doctrine

Attorney Work Product Protection

- Generally extends to:
 - documents and tangible things
 - prepared in anticipation of litigation or for trial
 - by or for another party or its representative
- Also protects mental impressions, conclusions, opinions, or legal theories of an attorney or other representative concerning litigation
- This is the strongest of all protections recognized by the law
- Generally, attorney work product shared with a litigation funder is protected, but best practices are to do so under the confines of a confidentiality agreement
 - Although no blanket protection over the terms of the funding agreements

Appendix

Information about
Faculty

Marc J. Carmel, Esq.



Director

Phone: (312) 517-1360 **Mobile:** (773) 615-1599 **Email:** mcarmel@longfordcapital.com

Marc J. Carmel is a Director of Longford Capital. Marc is responsible for investment sourcing, underwriting and monitoring.

Prior to joining Longford Capital, Marc was Of Counsel in the international law firm Paul Hastings LLP and previously Partner in the international law firm Kirkland & Ellis LLP. With each of these firms, Marc was a member of their bankruptcy and restructuring practices.

Marc is an accomplished attorney with nearly 20 years of experience leading representations in restructurings and bankruptcies involving companies in varied industries (including energy, entertainment, health care, manufacturing, mining, real estate, retail, technology, and transportation).

Marc counseled distressed companies in out-of-court and in-court restructurings throughout the United States, advised private equity funds and strategic companies in acquiring assets of distressed companies as well as minimizing exposure to affiliates facing distress, and represented other constituencies involved in restructuring matters.

Marc has litigated numerous bankruptcy matters successfully, including non-consensual cash collateral use, debtor-in-possession financing, plan confirmation, and sales via section 363 and chapter 11 plans. Marc headed a restructuring and litigation team that secured a Second Circuit opinion upholding designation (i.e., disqualification) of chapter 11 plan vote of first lien lender.

Marc has counseled principals, boards of directors, senior management, and other advisors regarding legal and business issues in every aspect of complex financial and operational restructurings, including with respect to fiduciary duties, strategic alternatives, and all other aspects of contingency planning.

Marc is a member of the American Bar Association Business Bankruptcy Committee and Co-chair of the Use and Disposition of Property Subcommittee, the American Bankruptcy Institute, and the Turnaround Management Association.

EDUCATION:

- Harvard Law School, J.D.
- University of Michigan, Masters of Accounting
- University of Michigan, B.B.A.

OTHER ACCOMPLISHMENTS & AFFILIATIONS:

- Certified Public Accountant
- American Bar Association Business Bankruptcy Committee (Co-chair of subcommittee)
- Member American Bankruptcy Institute
- Member Turnaround Management Association



BENJAMIN I. FINESTONE

Partner

New York Office

Tel: +1 (212) 849-7000

Fax: +1 (212) 849-7100

E-mail: benjaminfinestone@quinnemanuel.com

quinn emanuel trial lawyers
quinn emanuel urquhart & sullivan, llp

Ben Finestone has extensive experience in all aspects of bankruptcy and related litigation matters. Ben is ranked as a leading New York Bankruptcy/Restructuring individual by *Chambers* (2013-2016), a “Super Lawyer” by *New York Metro Super Lawyers* (2013-2016), was one of 12 attorneys nationwide to be named as one of *Turnarounds & Workouts’* “Outstanding Young Restructuring Lawyers” in 2011, and received a 2013 Turnaround Award by the *M&A Advisor*. He is regularly involved in the most contentious and complex insolvency matters, including ad hoc creditor groups, such as Berry Petroleum Co., Essar Algoma, and OCZ Technology, statutory committees, such as Radioshack, NewPage, Trident Microsystems, SemGroup and Sentinel Management Group, and as special counsel for debtors, such as OAS, Washington Mutual, The Colonial BancGroup, FairPoint, and Solutia.

Clients describe Ben as “extremely commercial,” possessing a “deft grasp of legal nuance along with a business person’s commercial instinct” and a “unique capacity to distill issues quickly to their core in a way that really enables us to make thoughtful, informed, strategic decisions.” When needed, Ben is also “fearless and thoughtful when looking for big litigation targets for creditors.”

Prior to practicing law, Ben was a Certified Public Accountant and was a NASD Registered Representative in equity trading.



Jude M. Gorman
General Counsel & Chief Administrative
Officer
Reorg Research, Inc.
jgorman@reorg-research.com
Tel: 212.594.1709
Cell: 202.255.7888



Jude Gorman is the General Counsel and Chief Administrative officer at Reorg Research, a financial media and technology company focused on the distressed debt and restructuring industry. Prior to joining Reorg Research, Jude was an associate in the restructuring, insolvency and workouts group of Latham & Watkins LLP. While there, he represented debtors, unsecured creditors committees, secured lenders and ad hoc groups in a variety of bankruptcy and restructuring matters. He has a J.D. from Georgetown University Law Center and a BSBA from Georgetown University.