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International Caribbean Insolvency Symposium

Show Me the Money: Litigation Finance in International Insolvency – Challenges and Opportunities

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ABI International Caribbean Insolvency Symposium

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Litigation Finance in International Insolvency –
Challenges and Opportunities

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Today's Speakers

- Patrick E. Fitzmaurice, Moderator
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- Michael Pearson
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- Nick Pontt
Locke Capital | London
- Natascha Steiner-Smith
Collas Crill | George Town, Grand Cayman, Cayman Islands

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Litigation Funding

- Facts & Figures

- Recent reports show that in the litigation funding market size was about \$17.5 billion at the end of 2024.
- Other reports expect the market to grow at a compound annual growth rate of 11.1% in the period 2025-2037 with the market expected to reach \$67.2 billion by the end of 2037.
- This expansion has led to increased regulatory scrutiny, especially in cross-border cases, with emerging concerns around national security and disclosure requirements.

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Funding Structures

- Portfolio funding – allows multiple claims under a single facility, reducing risk through diversification.
- Single-case financing – common for substantial individual matters.
- Claims monetization – provides immediate liquidity for estates.
- Working capital funding – supports ongoing operations during proceedings.
- Judgment enforcement funding – assists in complex cross-border recovery efforts.

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International Insolvency

- Third-party funding has historically focused on commercial litigation matters but has increasingly been used in both domestic and cross-border insolvency matters.
 - Allows estates with low liquidity to pursue claims and generate recoveries for creditors, addressing a common challenge in many insolvency cases.
 - In cross-border matters into the U.S., funding can help meet property requirements for Chapter 15 eligibility in certain jurisdictions thereby providing the estate with the benefits and protections available under the bankruptcy code.

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Legal Considerations

- Confidentiality
- Attorney-client privilege
- The work product doctrine
- Disclosure requirements
 - vary by jurisdiction - comprehensive vs. minimal requirements
- Ethical considerations around control and potential

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Regulatory Environment

- U.S. - Recent Legislative Developments:
 - In 2024, Indiana, Louisiana, and West Virginia introduced new regulations governing litigation funding.
 - Federal proposals, including the Protecting Our Courts from Foreign Manipulation Act, indicate that increased oversight may be forthcoming.

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Regulatory Environment

- International - Recent Legislative Developments:
 - U.K. - In response to the Supreme Court's decision in *PACCAR*, the U.K. government has worked to develop a framework to clarify the enforceability of Litigation Funding Agreements.
 - Civil Justice Council's Working Group interim report published, full report expected by summer of 2025.
 - Re-introduction of Litigation Funding Agreements (Enforceability) Bill delayed until after CJC full report issued.
 - Australia, a pioneer in commercial funding, has supported its use in insolvency contexts since 1995.
 - *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386.

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Regulatory Environment

- The European Law Institute has developed twelve principles for litigation funding and generally recommends a light touch approach to regulation:
 - (1) Subject matter and purpose,
 - (2) Scope,
 - (3) Definitions,
 - (4) Promotional materials,
 - (5) Transparency,
 - (6) Avoidance and management of conflicts of interest,
 - (7) Capital adequacy of funders,
 - (8) Funders' fees,
 - (9) Confidentiality,
 - (10) Case management,
 - (11) Termination of third party funding agreements, and
 - (12) Dispute resolution and review by courts or other authorities.

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Regulatory Environment

- Singapore has enacted statutory frameworks explicitly backing funding in insolvency.
 - Singapore International Arbitration Centre, the Singapore Institute of Arbitrators, and the Law Society of Singapore have issued guidelines on third-party funding in Singapore relating to confidentiality, privilege, and funders' involvement in proceedings.
- Hong Kong has introduced reforms specifically addressing funding in international arbitration and insolvency cases.
 - Regulated by Part 10A of the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong).

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Recoverability of Funding Costs

- Factors that impact pricing:
 - Risk level
 - Timeline
- Models for structuring a litigation funder's return on capital:
 - Fixed multiple
 - Percentage of proceeds
- Waterfall:
 - Order of priority

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U.S. Cases

- *In re DesignLine Corp.*, 565 B.R. 341 (Bankr. W.D.N.C. 2017) (refusing to approve litigation funding agreement where proposed funder exercised too much control over the relevant claim).
- *In re Century 21*, Case No. 20-12097 (Bankr. S.D.N.Y.) (approving agreement pursuant to §§ 105(a), 363, and 503 of the Bankruptcy Code after debtors sought to monetize their interest in insurance coverage litigation).
- *Dean v. Seidel*, Case No. 20-CV-01834 (N.D. Tex. Apr. 20, 2021) (affirming the bankruptcy court decision to approve litigation funding agreement).
- *In re Magnesium Corporation of America, et al.*, Case No. 01-14312 (Bankr. S.D.N.Y.) (approving a sale of an interest in a judgment to a litigation funder pursuant to §§ 105 and 363 of the Bankruptcy Code and rejecting objections of certain noteholders that the transaction was unnecessary and too expensive).
- *In re The Great Atlantic & Pacific Tea Co., Inc.*, Case No. 15-23007 (Bankr. S.D.N.Y. 2022) (approving Chapter 11 debtor's litigation funding motion pursuant to §§ 363 and 364 of the Bankruptcy Code).
- *In re SmileDirectClub, LLC*, Case No. 23-90784 (Bankr. S.D. Tex. 2024) (barred from pushing down the repayment priority of loans owed to the company's founders in order to take on litigation funding).

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International Cases

- **Australia:** *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386 (holding that litigation funding was not an abuse of process or contrary to public policy but valid not just in insolvency matters, but across the board, as a policy that promoted access to justice).
- **Hong Kong:** *Unruh v. Seeberger* – Court of Final Appeal rules that insolvency proceedings are exempt from champerty and maintenance rules.
- **UK:** *R (on the application of PACCAR Inc & Ors) v Competition Appeal Tribunal & Ors* [2023] UKSC 28 (holding that litigation funding agreements were damages-based agreements and therefore unenforceable).

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Questions?

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Faculty

Patrick E. Fitzmaurice is a partner with Pillsbury Winthrop Shaw Pittman LLP in New York, where his practice focuses on litigation in domestic and cross-border insolvency matters in which he regularly represents clients in fraudulent transfer and other types of avoidance litigation. He also is frequently involved in advising creditors in foreclosure and other types of enforcement actions involving real estate and UCC collateral. Mr. Fitzmaurice regularly represents insolvency officeholders in asset recovery investigation and enforcement matters, and he is listed in *Lawdragon 100 Leading Cayman Lawyers* for 2025. He received his B.A. in 1996 from Georgetown University and his J.D. *cum laude* in 2001 from Brooklyn Law School.

Michael J. Pearson is co-founder of Fund Fiduciary Partners Ltd. in George Town, Grand Cayman, Cayman Islands, and is an experienced independent director, liquidator, trustee and advisor specialising in providing independent governance and dispute-resolution advice to companies, partnerships, trusts and other financial structures. He currently acts as a director and liquidator to a number of hedge funds and other investment holding company boards, both offshore and onshore. With more than 25 years of experience in the financial services sector, Mr. Pearson has occupied various senior roles in the insolvency teams of Big Four accounting firms prior to founding FFP in 2012. He has significant experience with wind-downs, restructurings and other complex situations, leading to disputes and litigation. Mr. Pearson is regularly sought out to deal with particularly difficult and contentious situations, often involving high-value litigation or regulatory issues. He has presented evidence and been cross-examined on many occasions in the U.S., U.K. and offshore. In recent years, Mr. Pearson has been involved in some of the highest-profile offshore situations. On the plaintiff side, he successfully sued a global bank in a Ponzi scheme for over \$100m, mediated against law firms and fiduciary firms, and brought actions against auditors. He was recently appointed as liquidator of Silicon Valley Bank NA to recover several hundred million dollars of assets. On the defense side, Mr. Pearson has successfully worked to defend funds and investors against insider trading and forfeiture actions. He has also acted as an independent director and special committee member in several multi-billion-dollar contested bond restructurings. Mr. Pearson is a Fellow of the Institute of Chartered Accountants in England & Wales and a U.K.-licensed and Cayman-qualified Insolvency Practitioner. He is a member of INSOL International and is the founding chairman of the Restructuring and Insolvency Specialists Association in the Cayman Islands, which has more than 350 members. He is also registered with the Cayman Islands Monetary Authority as an Approved Director. Mr. Pearson received his B.B.A. in 1999 from the University of Bath.

Nick Pontt is a managing director with Locke Capital in London leads the firm's growth, drawing on his experience in domestic and cross-border dispute-resolution and funding. Prior to moving from private practice, he was the head of Financial Services Litigation at Browne Jacobson LLP, where his work included acting for the trustee of Bernard L. Madoff Investment Securities LLC and the estate of Bernard L. Madoff. Mr. Pontt received his LL.B. and B.A. from Flinders University and his M.B.A. from the University of Oxford, where he was a Said Foundation Scholar.

Natascha Steiner-Smith is Counsel in Collas Crill's Insolvency and Corporate Disputes team in George Town, Grand Cayman, Cayman Islands. She has a wide range of experience in commercial litigation and international arbitration. Ms. Steiner-Smith's practice is focused on complex multijurisdictional disputes arising out of commercial contracts, shareholders agreements, and disputes involving financial institutions and high-net-worth individuals. She regularly advises shareholders, insolvency practitioners, banks and energy companies in cross-border proceedings. Ms. Steiner-Smith also has experience acting in § 238 fair-value appraisal proceedings. Prior to joining Collas Crill in 2021, she spent nearly three years at Maples and Calder in the Cayman Islands. Before moving to the Cayman Islands, she practised at Akin Gump and DLA Piper in London and New York. Ms. Steiner-Smith is a member of Ciarb, RISA and IWIRC. She received her undergraduate degree from New York University in 2005 and her law degrees from BPP Law School.