

# *Third-Party Litigation Funding*

Prof. Anthony Sebok  
Cardozo Law School (NY)

# Definitions

- Maintenance: helping another prosecute a suit
- Champerty: maintaining a suit in return for a financial interest in the outcome
- Barratry: i) continuing practice of maintenance or champerty;  
ii) incitement to litigation by soliciting potential legal clients

## Maintenance may be permitted or prohibited depending on:

1. How the maintenance is provided
  - a. Money
  - b. in-kind support
  - c. moral support
2. The motive of the maintainer
  - a. personal profit
  - b. non-monetary benefit (e.g. spite, indirect economic gain)
3. Whether the maintainer has control of the litigation
  - a. no control
  - b. partial control
  - c. full control (which is the same as an assignment)
4. When the maintainer promised to support the litigation
  - a. After suit is filed by plaintiff
  - b. Before suit is filed by plaintiff
5. If the maintenance is champertous, how is the maintainer's reward calculated?
  - a. Straight recovery of agreed upon "reward"
  - b. Percentage recovery of party's recovery ("contingent")

# Example: New York Law

- New York Judiciary Law §489 states:

“No person or co-partnership . . . shall solicit, buy or take an assignment of . . . any claim . . . with the intent and for the purpose of bringing an action or proceeding thereon.”

(Case law applies §489 to “partial assignments of future contingent recoveries,” – the equivalent of maintenance for profit.)

- Cases interpreting §489 have focused primarily on the degree of intent or purpose required for a given assignment.

***Trust for the Certificate Holders of the Merrill Lynch Mortg.  
Investors v. Love Funding Corp.,***  
(N.Y. LEXIS 3862 (N.Y. 2009))

- It is not champerty for a party to purchase a full (or partial) interest in a lawsuit in which it has a “pre-existing interest” in the lawsuit.
- It does not matter that the interest in the lawsuit provides the assignee with a right to damages greater than the amount demanded in the pre-existing lawsuit.
- § 489 prohibits an assignee from taking the assignment in order to “obtain costs” by means of enforcing the rights in the lawsuit.

# Ethical Considerations for Attorneys

Three Potentials Problem Areas:

1. Problem with Loyalty
  - Who is the client?
2. Problem with Interference
  - What decisions can the client give to the funder?
3. Problem with Confidentiality
  - What privileged material, if any, can the lawyer reveal to the funder?