PREFACE

This book has been in gestation for a very long time. In 2005, when I was first contacted by lawyers about the possibility of creating the rudiments of a commercial litigation finance vehicle, I had not heard of, or appreciated, the size of the already-existing consumer litigation finance market in New York and around the country. Soon thereafter I began to research the historical origins of these markets, and as my academic research went on, the consumer and commercial litigation finance markets rapidly grew. Eventually I began to teach a course based on my academic research as well as what I saw happening around me in the real world. I shared my materials with other professors who wanted to teach a similar course, and the idea of publishing a casebook followed naturally.

The contents of this casebook lay at the intersection of many well-known subjects within the law school curriculum: contract, tort, civil procedure, evidence, professional responsibility, insurance and capital markets law. No existing law school class devotes much, if any, class time explicitly to third-party litigation finance. This casebook is an attempt to fill that gap. Its ten chapters provide a foundation for a class, although many of the chapters could also be used individually as supplemental material for a free-standing unit on litigation finance in another course, such as torts, civil procedure or the law of lawyering.

The topic covered in this casebook has always been present in the common law, even if it has been hidden by a dense thicket of legal fictions, pretexts and denial. Plaintiffs have always had to find financing for their cases somehow—even taking into account civil legal aid, which rose and fell in the Twentieth Century. The risk of, and the potential financial reward flowing from, litigation has always been on the minds of investors and capital providers. This casebook makes visible what has been hiding in plain sight and brings into focus a patchwork of doctrines arise from that an inevitable feature of private law—that the gains secured by litigation are an asset, and various actors will always try to exploit that fact, whether to secure redress for another, or to profit from the securing of redress by another.

The law of third-party litigation finance is rapidly developing as investment in litigation and legal services grows. That makes writing a casebook and fixing in place a set of cases and materials a risky proposition, given that some of the book may be superseded by events. Notwithstanding that risk, this book has been written out of a conviction that the fundamental legal concepts which form this field of law are not going to ever disappear—

they may, at most, evolve. This casebook is appearing at a time when there is active debate throughout legislatures in the United States and Europe over the regulation of third-party litigation finance. This debate resembles in many ways the debates that arose (and are still ongoing) around insurance law and class actions. Whatever the outcome of this debate, the cases and other materials contained in this book will remain relevant and useful to anyone trying to understand the dynamic world of third-party litigation finance.

Finally, while I have made every effort to be even-handed and judicious in the selection of materials, it may be that I have left out viewpoints and information that some might view as crucial for a casebook on this topic. To the extent that I have made any errors of fact or omission, such errors are my responsibility alone.

Anthony J. Sebok

February 2024