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Investing in Lawsuits

By Robert W. Wood and Jonathan Van Loo • Wood LLP • San Francisco

Investing in lawsuits? More and more of it is occurring. In the United States, when plaintiffs can't fund litigation, contingent fees are the norm. Some law firms effectively fund contingent cases with revenue generated by hourly fees. And plaintiffs' firms frequently use their war chests generated from past awards to fund new contingent fee matters.

This overwhelming use of contingent fee arrangements explains why litigation funding from outside sources remains rare in the United States. But this is changing, and changing quickly. It is no accident that litigation funding from outside investors is far more common in jurisdictions with restrictions on contingent fee arrangements such as Australia. Nevertheless, domestic investment in lawsuits has become more common. And tax concerns must be considered.

Surprisingly, there does not appear to be much authority on the tax treatment of these new arrangements. The questions include debt-equity, the character of investment returns, and the timing of income. This article focuses on the basic tax treatment of outside investors acquiring an investment in a lawsuit. It considers an investment in an attorney's right to a contingent fee as well as a plaintiff's claim in a lawsuit. It can be instructive to compare the tax treatment of the acquisition of an interest in a plaintiff's claim to the tax treatment of the acquisition of an interest in an attorney's right to a contingent fee.

As is common in the context of M&A transactions, the buyers and sellers in litigation funding transactions do not necessarily share the same interests. Treating the funding as a loan allows the attorney or plaintiff to defer the recognition of income. However, that apparently comes at the cost of requiring the outside investor to recognize all or nearly all gain as ordinary. That makes a simple loan not generally attractive.

Sale treatment may allow the investors to recognize capital gain, which most investors like. However, the corollary is that the attorney or plaintiff would need to recognize gain at the outset. Treating the funding transaction as a prepaid forward contract—and this appears to be where the growing industry is going—may help bridge the gap between the desired tax treatment for the attorney or plaintiff and the investors. Yet it appears to be difficult to structure the funding to qualify as a prepaid forward.

Taxation of Contingent Fees

Attorneys and plaintiffs have begun to seek out new sources of funding. Of course, banks have long been traditional sources of funding for lawyers and law firms. However, bank loans are generally full recourse and are based on steady and reliable sources of repayment. Banks often have no interest in taking on the risk of contingent fees in complex and uncertain lawsuits. Instead, attorneys that expect to receive a large contingent fee have turned to the expanding field of lawsuit funding.

In a typical example, the financing party ("FP") provides upfront cash to the attorney in exchange for a share of the attorney's contingent fee. FP is frequently an investment fund. The attorney's obligation is nonrecourse, secured solely by his right to a contingent fee. If the lawsuit fails to pay out anything, FP gets nothing and the attorney keeps the cash. If the lawsuit succeeds, FP gets an amount that is determined according to the terms of the financing arrangement.

Is this financing transaction a loan or a sale? The answer is likely to depend on the details. As a rule of thumb, debt has traditionally been considered to be the return from the time value of money. A lender is primarily interested in earning interest and the return of principal should not depend on the success of the business. [*E. Ellinger,* CA-11, 2006-2 USTC ¶50,608, 470 F3d 1325 (2006).] In contrast, equity relates to the return from the risks and rewards of ownership, control, business risk and market fluctuations.

A nonrecourse advance to a lawyer, secured only by the lawyer's right to a contingent fee, certainly has elements of equity. The obligation is nonrecourse, and therefore dependent on the outcome of the litigation. Of course, nonrecourse obligations can still qualify as debt. As in all litigation funding, the circumstances matter.

Debt?

For example, when a plaintiff has won a judgment against a creditworthy defendant, the last remaining contingency may be an appeal to the Supreme Court. At that point, the recovery may be all but a certainty. A security interest in that lawsuit may be just as valuable as real estate. Indeed, FP's nonrecourse obligation secured by that recovery may even be more certain than an unsecured general recourse obligation of the attorney or the plaintiff.

In this context, the attorney may simply require bridge financing to hold over until payment is received. A nonrecourse obligation may make sense because the attorney does not want to be financially wiped out should a remote risk happen to materialize. In contrast, a case that is in the early stages of development with only a complaint filed in court may be far more speculative and uncertain. In that situation, instead of requesting bridge financing, the attorney may be asking FP to assume either part or all of the risk of the outcome of the litigation.

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The terms of the financing arrangement are likely to provide clues as to which of these two scenarios more appropriately fits the arrangement. At one end of the spectrum—a scenario in which FP assumes part of the risk—suppose the attorney won a judgment that entitles him to a contingent fee of $1 million and expects the defendant would be willing to settle for an amount that would yield $600,000. FP advances $400,000 at an eight-percent interest rate.

It is no accident that litigation funding from outside investors is far more common in jurisdictions with restrictions on contingent fee arrangements such as Australia.

This arrangement has several features that favor debt treatment. FP's return is based on the time value of money rather than the actual or expected recovery. Moreover, although the lender is taking on some risk because the obligation is nonrecourse, the security appears to be very strong. That is, the amount advanced is considerably less than the expected contingent fee, even if the lawsuit settles for a substantially smaller recovery. Although the rate of interest appears to be high, it is in line with other debt obligations.

Equity?

At the other end of the spectrum—a scenario in which FP assumes far more risk—suppose the attorney estimates the potential contingent fee to be in the range of $1 million to $4 million. FP advances $200,000 to the attorney in exchange for a right to receive the greater of 40 percent of the contingent fee or $200,000 plus 15-percent interest. Although these terms may appear to be unfavorable to the attorney, they reflect reality. The outcome of the litigation remains highly uncertain and the attorney's obligation is nonrecourse, secured only by his contingent fee.

This second scenario certainly appears to have more equity than debt features. The rate of return is not based on the time value of money but instead is based on the amount actually recovered in the case. FP seems to be taking on the risk of the litigation recovery. If anything is recovered, FP's gain appears based on the outcome of the litigation rather than the time value of money. FP seems to be putting the money at the risk of the litigation outcome.

Of course, we have been discussing this in terms of a spectrum. Some financing arrangements represent a hybrid of equity and debt characteristics. The amount the attorney owes may increase over time but at a rate far higher than is normally the case for debt. In those cases, the expected yield of the financing arrangement may itself provide information on the nature of the financing arrangement.

Treatment as Debt

If the arrangement qualifies as debt, it is not entirely clear how it would be classified. In particular, this instrument would not have a fixed maturity date. While the absence of a fixed maturity date tends to favor equity rather than debt, it is not necessarily determinative. [*T. Mixon, Jr. Est.*, CA-5, 72-2 USTC ¶9537, 464 F2d 394 (1972) (instrument constituted debt despite absence of fixed maturity date).]

After all, even though the actual maturity date is not known, it will generally be identified as occurring at a specified point in time. In most cases, the date all appeals are exhausted and payment is received or the date a settlement is reached serves as the effective maturity date. There is an objective basis for determining the maturity date, and this date would be outside the control of FP.

It is also not clear if the arrangement would be subject to the "original issue discount" (OID) rules. Interest would not be payable annually, suggesting that it should be treated as having OID. However, under Internal Revenue Code Section ("Code Sec.") 1273(a)(1), the amount of OID for a debt instrument is defined as the difference between the "stated redemption price at maturity" and the issue price.

This instrument would not technically fall under the OID rules because it has no definite maturity date. Therefore, it does not seem to be possible to determine the amount of OID. However, it would be possible to determine the amount of OID that would accrue under Code Sec. 1272 based on an *assumed* maturity date.

What if the amount of OID that accrued based on an assumed maturity date was simply equal to the amount of interest payable at any given time under the terms of the instrument? For example, the interest may be compounded annually. In that case, the lack of a definite maturity date may not have much significance.

That is, the terms of the debt instrument may provide for an accrual of interest that matches the amount of OID that would be accrued under Code Sec. 1272, based on an assumed maturity date. Therefore, it may be reasonable to treat the note as subject to the OID rules even in the absence of a definite maturity date. In this situation, the attorney would deduct OID and FP would accrue OID annually.

At the time the lawsuit settles, the attorney would include the entire amount of the contingent fee in income. Only the amount that had not been deducted as OID in previous years would be deductible by the attorney in the year of payment. Similarly, FP only includes amounts not previously included as income as OID in previous years.

The tax treatment as debt has certain benefits. The attorney does not have to take the amount into income in the year of entering the financing arrangement because the advance simply represents proceeds from a loan. At the same time, this arrangement has obvious drawbacks.

FP may not agree to an arrangement that requires it to accrue OID before any cash is received. Indeed, while the OID accruals are ordinary, FP's resulting loss may be capital if the lawsuit fails to yield any payment. Moreover, the attorney is likely to be a cash-basis taxpayer and may not be able to use the deduction from the OID before it receives payment. Thus, while this approach has its benefits, it threatens to give rise to a mismatch of timing and character of deductions and income that may be in conflict with the intentions and expectations of the attorney and FP.

Treatment as Sale

If the advance by FP is treated as a sale that closes at the time of payment, the attorney may be required to include the entire advance in income. In contrast to debt treatment, the attorney would not be able to defer the recognition of income until the outcome of the lawsuit was established. Instead, the attorney would likely be required to recognize taxable income at the time of the advance.

In determining if a transaction should be treated as a sale, courts have traditionally asked whether the "benefits and burdens" have been transferred. [*See Grodt & McKay Realty, Inc.*, 77 TC 1221, 1237,Dec. 38,472 (1981): "The key to deciding whether [the transactions] are sales is to determine whether the benefits and burdens of ownership have passed from [the seller] to [the buyer]."] However, in many contexts beneficial ownership is not determined by economic exposure alone. For example, in one ruling the IRS determined that an insurance company was the beneficial owner of certain investment securities. [LTR 201240018 (June 22, 2012).] The IRS reached its conclusion even though the insurance company had little or no economic exposure to those securities. Indeed, the insurance company only purchased the securities to hedge the risk related to one of its variable annuity products.

Depending on the circumstances, other factors such as the specific identification of the property, title or control may be more determinative to tax ownership than economic exposure. Moreover, state and local law can play a decisive role in determining tax ownership. In the context of contingent attorney fees, several factors, including benefits and burdens, appear to favor sale treatment.

Because the attorney's obligation to FP is nonrecourse, the attorney has effectively transferred the risk of loss as well as the potential for gain to FP. Courts have determined that this type of nonrecourse financing favors sale treatment. [*K. Sollberger,* CA-9, 2012-2 USTC ¶50,527, 691 F3d 1119, 1124 (2012): "Nonrecourse financing, which is sometimes viewed as an "indicator of a sham transaction," placed [the taxpayer] more in the position of a seller than a debtor."] In general, transfers of claims to litigation are recognized under state law, and this is not likely to be a controversial point. [*See, e.g.,* LTR 200107019 (Nov. 16, 2000) (accepting as a taxpayer representation that the transfer of a judgment to a charitable trust would be effective under state law).] Therefore, FP's advance may indeed be treated as a sale because too many of the benefits and burdens have passed to FP.

Character of Attorney's Income

If the financing arrangement is treated as a sale, the attorney should recognize income. Presumably, this should be treated as ordinary income. However, even this is not entirely clear. After all, courts have held that if a *plaintiff* sells a claim or chose in action, the character of the gain will generally be capital, even if a direct payment on the claim would otherwise be ordinary based on the origin of the claim. [*See B. Nahey,* CA-7, 99-2 USTC ¶50,967, 196 F3d 866, 868 (1999) (assuming that the *sale* of a claim would result in capital gain even when a direct *payment* of the claim would yield ordinary income); *M. Osenbach,* CA-4, 52-2 USTC ¶9409, 198 F2d 235, 236–37 (1952): "It is quite clear that ordinarily … when a taxpayer makes a gain from the sale or exchange of a claim or chose in action, this is taxable as a capital gain; while if the gain results from the collection of the claim or chose in action, this is taxable as ordinary income."]

The suggestion that gain on the sale of a plaintiff's claim results in capital gain is hardly intuitive. For example, an employment-related lawsuit may also have its origin in a claim for services income. A contract dispute may have its origin in lost business profits. Such mixed claims are common. However, a plaintiff can apparently realize capital gain by selling a claim that would otherwise result in ordinary income.

Can the attorney do the same with the sale of a contingent fee? It seems unlikely. In contrast to the plaintiff, the attorney is in the trade or business of generating services income from contingent fees. The attorney's contingent fee represents services income. This has several implications.

First of all, the attorney's claim to a contingent fee appears to qualify as "accounts or notes receivable acquired in the ordinary course of trade or business for services rendered," which is excluded as a capital asset under Code Sec. 1221(a)(4). The attorney certainly appears to acquire the contingent fee claim in the ordinary course of trade or business in exchange for services. Nevertheless, it is less clear if the claim to a contingent fee constitutes an account or note receivable given that the claim is entirely contingent on the outcome of the lawsuit.

Despite this uncertainty over the scope of Code Sec. 1221(a)(4), the better answer certainly seems to be that the attorney's gain should be treated as ordinary. The gain on the sale of the contingent fee claim appears to bear a close similarity to ordinary services income.

Assignment of Income Doctrine

When the lawsuit results in a payment either through settlement or some other means, who recognizes the income? Obviously, if the attorney is treated as recognizing income in the year of the advance, he will want to be sure that he will not also be treated as earning the income when the lawsuit comes to a conclusion. However, to be certain on this point, it is necessary to consider the anticipatory assignment of income doctrine.

The anticipatory assignment of income doctrine is a judicial principle that, when applied, treats the purported assignor of income as the beneficial owner of that income for tax purposes. As the Supreme Court explained in one frequently cited opinion, if the income has sufficiently ripened on the tree, it is too late to create a valid transfer, and the income will be assigned to the purported assignor. [*Lucas v. Earl,* SCt, 2 USTC ¶496, 281 US 111 (1930).]

In the context of contingent fees and litigation, the question generally revolves around how far advanced the litigation has progressed. For example, in one case the taxpayer assigned a portion of his claim to his wife and children after the trial court had already denied an application for a new trial and the Supreme Court had denied a writ of certiorari. [*R.S. Doyle,* CA-4, 45-1

USTC ¶9190, 147 F2d 769 (1945).] In that case, the Fourth Circuit explained that the litigation had progressed too far because the outcome was essentially assured. The fruit had ripened too long.

However, in another case, the transfer occurred after the district court had rendered a judgment, but while the case was on appeal. [*Cold Metal Process Co.*, CA-6, 57-2 USTC ¶9921, 247 F2d 864 (1957).] In that case, the court determined that the matter was a continuing controversy, and the income was not certain or earned at the time of the assignment. This dividing line appears to be accepted by the IRS. For example, the IRS has ruled that transfers of litigation claims are valid if the case is on appeal, and therefore there is a genuine uncertainty as to the outcome. [LTR 200107019 (Nov. 16, 2000): "[A]nticipatory assignment of income principles require the transferee to include the proceeds of the claim in gross income where recovery on the transferred claim is certain at the time of transfer, but not where recovery on such claim is doubtful or contingent at the time of transfer."]

As long as the litigation continues to be subject to appeal and a genuine contingency exists, the anticipatory assignment of income doctrine should not apply.

As long as the litigation continues to be subject to appeal and a genuine contingency exists, the anticipatory assignment of income doctrine should not apply. [*See* LTR 201232024 (Aug. 10, 2012) (transfer of claim to charity was valid while judgment was on appeal).] In most cases of litigation funding, it should be easy to avoid the anticipatory assignment of income doctrine. After all, contingent fee attorneys are likely not to seek financing if all appeals have truly been exhausted. However, this doctrine has the potential to be a trap for the unwary.

One could take the conservative approach and treat all advances to an attorney as sales rather than loans. Nevertheless, this course is not advisable when there is a genuine risk that the anticipatory assignment of income doctrine may apply. Instead, it is vital to consider the risk that the anticipatory assignment of income doctrine may apply to treat the attorney as earning the entire contingent fee.

If the anticipatory assignment of income doctrine does not apply, then the attorney takes FP's advance into income in the year of the advance *via* a sale transaction. At the time the lawsuit is resolved, the amount that is due to FP is excluded from the attorney's income. Instead of claiming a deduction as in the loan transaction, the attorney excludes the entire amount paid to FP.

Character of Income for FP

FP should have basis in the claim equal to the amount of the advance. Therefore, FP's taxable income should be equal to the difference between the amount realized and its basis. Does this income represent capital gain?

If the obligation were treated as debt, any income would likely be ordinary. If FP held the instrument to maturity, the entire amount of any gain is likely to be characterized as interest income or OID. However, in the case of a sale transaction, the character of the gain apparently depends on whether FP's claim is a capital asset.

The funding obligation is not likely to represent inventory or property held primarily for sale to customers within the meaning of Code Sec. 1221(a)(1). FP is not likely to be actively selling these types of obligations to customers. Because FP has no customers, FP is not likely to be treated as a dealer in these types of obligations. Instead, once originated, FP (or an investment fund managed by FP) is likely to hold the obligation until maturity, much like an investment asset.

Assuming FP is not a dealer, the obligation appears to have many characteristics of a capital asset. For example, in *J.M. Maginnis*, the Ninth Circuit applied a two-factor test to determine if an asset is a capital asset: whether the taxpayer has made an investment in the asset and whether the asset appreciates in value over time. [*J.M. Maginnis*, CA-9, 2004-1 USTC ¶50,149, 356 F3d 1179 (2004).] Because FP advances cash, and because the value of the obligation is likely to increase over time as the litigation progresses, the obligation appears to satisfy both *Maginnis* factors.

While the circumstances appear to favor classification as a capital asset, the *Maginnis* court itself stated that its two-factor test would not necessarily be appropriate in all cases. Other courts have applied different tests. [*See W.T. Gladden*, 112 TC 209, Dec. 59,202 (1999), *rev'd on a different issue*, CA-9, 2001-2 USTC ¶50,597, 262 F3d 851 (2001) (applying six-factor test to determine if water rights granted under Colorado state law qualified as capital assets).] Nevertheless, it is not clear that different tests for capital assets would result in a different outcome. Instead, it appears that the better answer is that FP's income should be treated as capital gain.

Prepaid Forward

In addition to debt and sale treatment, another possibility to consider is treating a litigation funding arrangement as a prepaid forward contract. In a prepaid forward contract, the buyer pays the seller for a sale that only takes place in the future. There is no sale for tax purposes at the time money changes hands.

In a prepaid forward, the transaction only closes at some future date. This type of transaction seems to come closest to achieving the desired tax treatment for both FP and the attorney. FP is not required to accrue income before receiving cash. Moreover, at the time the litigation concludes, FP gets capital gain treatment. The attorney defers income until the settlement and does not have to worry about a mismatch between the timing of deductions and income inclusion.

In Rev. Rul. 2003-7, 2003-1 CB 363, the IRS ruled that a variable prepaid forward contract would be treated as an open transaction rather than a current sale. In that ruling, the seller of stock agreed to deliver a variable number of shares of stock depending on the future stock price. The seller posted the maximum number of shares that it could be obligated to deliver. However, the seller had the right to settle the transaction with cash or to substitute different shares.

Apparently, the IRS ruled that the transaction should be open because the actual number of shares that would be delivered in the future was subject to uncertainty. This uncertainty means that the transaction bears a closer similarity to an option transaction than a sale. Given the uncertainty over both *how many* shares would be delivered, as well as *which* shares would be delivered, the prepaid forward is simply too indeterminate to treat as a sale.

In the context of litigation funding, what is the uncertainty that would merit open transaction treatment? Because the attorney's obligation is entirely nonrecourse, she will never have to pay anything to FP unless she receives *at least* as much money in contingent fee income. Moreover, the attorney will never receive *more* from FP than the amount advanced.

Thus, whatever the outcome of the lawsuit, the attorney is sure to receive at least the entire amount advanced by FP as gross income. Furthermore, the attorney will not receive any more from FP than the amount advanced. Of course, there remain significant contingencies.

Most obviously, it is unclear if the attorney will earn any contingent fee. Moreover, the amount of the attorney's *net* income from the lawsuit is not likely to be known. The attorney may incur significant expenses in the lawsuit after receiving the advance from FP. This provides some support for treating the financing transaction as open. If the attorney never receives any contingent fee in the lawsuit, she should be able to deduct all expenses from the amount advanced before determining her net income.

If the plaintiff also received funding, there might be an additional provision that could help support treatment as a forward contract. In that case, the attorney and the plaintiff could agree to grant FP greater control over the lawsuit at a future point in time, such as when the defendant makes a settlement offer. This type of enhanced control might be the trigger for treating the financing transaction as closed.

In such a scenario, the sale would only close when FP obtained control. When the lawsuit pays out, the attorney would exclude all amounts payable to FP. As discussed above, FP may be entitled to treat any gain as capital gain.

Conclusion

Treating litigation financing as a sale of a contingent fee has disadvantages for the attorney. Perhaps the biggest disadvantage is that the attorney must include the amount advanced by FP in income in the year of receipt. However, sale treatment has many attractive features for FP. Capital gain treatment appears to be highly likely. Moreover, FP will not be required to accrue any income before receiving cash.

Treating litigation financing as a loan has benefits for the attorney because income recognition is deferred. However, FP is not likely to welcome loan treatment because such treatment has the potential to require FP to accrue income before cash is received. It also appears to eliminate the possibility of capital gain treatment.

Treating the transaction as a prepaid forward seems to bridge the gap between the attorney and FP. The attorney may defer the recognition of income. Moreover, even though the attorney does not deduct interest, he may exclude the amount paid to FP. FP is not required to accrue income before receiving cash and still may receive capital gain treatment. However, it is likely to be challenging to structure the financing transaction to qualify as a prepaid forward. Given the current state of affairs, the tax treatment of litigation financing has many unanswered questions. Since a range of structural and tax treatments may be viable, the burden on drafting the documents and explaining to whom, when and how taxes will apply can be significant.

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