PROGRAM MATERIALS
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Discovery Issues in Litigation Finance

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DISCOVERY ISSUES IN LITIGATION FINANCE

(Presenter: Andrew R. Goldenberg of Goldenberg Law (www.glawnyc.com))

I. INTRODUCTION

A. Litigation Funding Basics

1. Practice in which a third-party funds a litigant's lawsuit typically for profit.
2. Funding is provided on a nonrecourse basis in exchange for a portion of any recovery.
3. Funding is not typically considered a loan but rather a form of an asset purchase.
4. Funding example: funder invests $500,000 and the case settles for 10 times that amount. Funder gets back its initial $500,000 and a multiple or a percentage of the recovery. If the plaintiff loses, funder does not get paid.

B. Proponents of Ligation Funding

1. Individual plaintiffs can receive cash advances to cover immediate expenses and/or legal fees.
2. Businesses can use funding to pay for legal fees and related expenses and free up capital for other uses.
3. Litigation funding acts as a lifeline to law firms who want greater flexibility with their caseload and can be used as working capital to cover salaries, rent, and other operating expenses.

C. Critics of Litigation Funding

1. Litigation funding disrupts the legal process by bringing in an outside party that can potentially exert control.
2. Encourages the filing of frivolous suits.
3. Gives attorneys an unfair advantage in settlement talks.

D. Regulation and Disclosure Issues

1. With this burgeoning new industry comes questions of regulation and disclosure.
2. On the state and federal level, governments, bar associations and legal institutions are trying to figure out how to regulate third-party funders and whether to impose disclosure requirements on the identity of funders and funding arrangements.

II. LITIGATION FINANCE PLAYERS

A. Business Plaintiffs

1. Most third-party litigation lawsuits begin with a business that has a valuable claim with many reasons not to prosecute.
2. Businesses are sophisticated, but are likely limited in terms of litigation experience and are risk sensitive to a lost investment.
3. Benefits for business plaintiffs:
    i. No downside risk which ties the business to the unpredictable nature of prosecuting claims.
    ii. Provides the initial investment necessary to fund a lawsuit and obviates the need to divert capital from other operations.
    iii. Aligns a law firm's incentives with its business client.
    iv. Reduces costs associated with business screening.
    v. Provides another level of sophistication that reduces costs.
    vi. Independent check on billing and invoices that reduces monitoring costs.

B. Individual Plaintiffs

1. Furthers social and democratic aims.
2. Provides access to courts and gives a voice to litigants that would otherwise not have the means to commence actions.

C. Lawyers and Law Firms

1. Litigation finance opens up a world of opportunity that is changing the way law firms organize, govern, and finance their practices.
2. Smaller firms can now compete effectively with larger firms for more complex cases.
3. Smaller firms can scale up or down the size of their firm based on the needs of a case.
4. Provides new opportunities for firms that shy away from contingency work.
5. Expands pool of potential matters and clients and enables firms to diversify revenue streams.
6. Allows for funding of portfolio of cases that provides working capital to a group of cases.

D. Defendants

1. Due process rights, ethical considerations, and frivolous filings.
    i. Who is the funder?
    ii. What are the funding arrangements?
    iii. What is the motivation behind the funding?

E. Criminal Defendants

1. Third-party funding has inspired different types of criminal defense funding.

III. ATTEMPTS TO REGULATE THE LITIGATION FINANCE INDUSTRY

A. Federal Level

1. Litigation Funding Transparency Act of 2018 ("LFTA")
    i. Aims "to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes."[1]
    ii. If adopted, LFTA would require disclosure of litigation funding arrangements in all class actions and multidistrict litigation in federal courts to the court and to all parties.
    iii. LFTA is intended to improve transparency and oversight so that courts and other parties are able to identify conflicts of interest and "know whether there are undue pressures and secret agreements at play that could unnecessarily drag out litigation or harm the interest of the claimants themselves."[2]
    iv. Critics of the bill argue that the proposed legislation unjustifiably "mandat[es] broad disclosure to the defendant."[3]
2. Proposed Changes to Fed. R. Civ. P. 26

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[1] S. 2815, 115th Cong. (2018).

[2] *See* Press Release, Comm. on the Judiciary, Grassley, Tillis, Cornyn Introduce Bill to Shine Light on Third Party Litigation Financing Agreements, https://www.grassley.senate.gov/news/news-releases/grassley-tillis-cornyn-introduce-bill-shine-light-third-party-litigation.

[3] *Burford Capital Comments on The Litigation Funding Transparency Act of 2018*, BURFORD CAPITAL: BLOG, https://www.burfordcapital.com/insights/insights-container/burford-capital-comments-on-the-litigation-funding-transparency-act-of-2018/.

i. The Advisory Committee on Civil Rules is considering proposed changes to Fed. R. Civ. P. 26 that would mandate litigation finance disclosure.

ii. The US Chamber of Commerce proposed a broad amendment to Fed. R. Civ. P. 26 that would require disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."[4]

iii. Other groups have taken a different approach to disclosure, where, for example, parties would be required to disclose the identity of the funder to the judge *in camera* so the judge can determine if any financial conflict actually exists.

3. Local Rules, Individual Practices, and Standing Orders

i. Many district courts now require some level of disclosure of the identity of litigation funders in a civil case.

ii. Some district courts require a party to disclose the nature of a litigation funder's interest in the case. either through local rules, individual practice rules, standing orders, or through local forms.

iii. The stated purpose of these rules and regulations is to assist judges with evaluating possible issues of recusal and disqualification and none require automatic disclosure in every case.

B. State Level

1. Unlike at the federal level, state disclosure of litigation funding has focused on predatory lending practices and on having litigation funding agreements that are free and clear of legal jargon so the everyday consumers can understand the funding terms.
2. Some notable state developments in disclosure requirements:

[4] ADVISORY COMM. ON CIVIL RULES, AGENDA NOVEMBER 2017, *supra* note 18, at 345.

i. Wisconsin passed "a first-of-its-kind state law requiring litigants to disclose their outside legal funding arrangements."[5] The rule requires a party, "without awaiting a discovery request, [to] provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[6]

ii. Other states like Kentucky, Alabama, Colorado, and Pennsylvania have attempted to bar litigation funding altogether:

    1. Pennsylvania court has reaffirmed its prohibition on champerty and applied it to invalidate a litigation financing agreement.[7]
    2. Alabama courts have held that litigation finance agreements are nothing but a form of speculating on litigation and are void as against public policy.[8]
    3. Kentucky has a statute that bars litigation finance.[9]
    4. Colorado has applied state usury laws to litigation finance.[10]

iii. Alabama, Illinois, Georgia, Kansas, Louisiana, Missouri, New Jersey, New York, North Carolina, Texas, and Utah have considered adopting regulatory legislation.[11]

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[5] Andrew Strickler, *Wis. Gov. Signs Legal Funder Transparency Rule*, LAW360, https://www.law360.com/legalethics/articles/1029480/wis-gov-signs-legal-funder-transparency-rule.

[6] WIS. STAT. ANN. § 804.01 (2019).

[7] *WFIC, LLC v. LaBarre*, 148 A.3d 812 (Pa. Super. 2016).

[8] *Wilson v. Harris*, 688 So. 2d 265 (Ala. Civ. App. 1996).

[9] Ky. Rev. Stat. Ann. § 372.060; *Boling v. Prospect Funding Holdings, LLC*, 771 Fed. Appx. 562, 581-82 (6th Cir. 2019) (unpublished) ("The Agreements contemplated that Prospect would, in exchange for providing funding to Boling to assist him in pursuing litigation, receive compensation from Boling's award. Under these circumstances, we conclude that the Supreme Court of Kentucky would hold that the Agreements violate Ky. Rev. Stat. § 372.060, and that the Agreements are inconsistent with Kentucky's public policy.").

[10] *Oasis Legal Fin. Grp., LLC v. Coffman*, 361 P.3d 400 (2015).

[11] *Inside the Battle Over Litigation Funding Regulation*, N.Y.L.J., July 12, 2019.

iv. Other states, such as such as Florida, Maine, Nebraska, and Ohio do not have statutes expressly covering litigation funding or have statutes that permit litigation funding.[12]

IV. VARIATIONS AND VARIABLES IN LITIGATION FUNDING AND DICLOSURE CONSIDERATIONS

A. Gawker Media, LLC v. Bollea

1. In October 2012, Gawker, an online media company, posted a report (including excerpts of the videotaped sexual encounter) about an extramarital affair between Terry Bollea p/k/a Hulk Hogan and a woman. Hogan sued asserting claims for invasion of privacy, among other claims.
2. In March 2016, a jury awarded Hogan $140 million in compensatory and punitive damages.
3. After the jury award, news broke that Peter Thiel, a Silicon Valley mogul, funded Hogan's lawsuit.
4. What was the purposes behind the funding?

B. NFL Class Action

1. In 2012, retired NFL players filed a class action lawsuit relating to concussions, among other things, suffered during their football careers.
2. In 2014, the NFL settled the class action. As a result of a complicated claims administration process, some former players waited several years before receiving an award. While waiting on their awards, some class members entered into cash-advance agreements with third-party funders. Pursuant to the cash-advance agreements, class members "assigned" their rights to a portion of their settlement proceeds to third-party funders in exchange for receipt of immediate cash.
3. In 2017, the District Court for the Eastern District of Pennsylvania voided the cash-advance agreements based on the settlement agreement's anti-assignment

[12] *Id.*; *see also* O.R.C. 1349.55(B).

provision and the court's role as a fiduciary to the class,[13] however, the Third Circuit vacated the order.[14]

4. Proponents of third-party funding viewed the Third Circuit decision as a win, but the decision raised more questions than answers.

C. #MeToo Litigation

1. The #MetToo movement has turned into an opportunity for third party lenders to capitalize on sexual harassment lawsuits.
2. In 2017, a litigation company launched an initiative called #MeToo Tales ("M2T") which was described as a collaboration between the funder and community organizers working to help victims of sexual harassment get justice.
3. In 2018, the New York Times wrote an article called "How the Finance Industry Is Trying to Cash In On #MeToo"[15] The article highlighted companies who offer money to plaintiffs in anticipation of future legal settlements on sexual harassment lawsuits.
4. Settlement-advance companies have set off alarms because of a history of providing cash at exorbitant interest rates. Consumer groups call these companies predators, while the cash advance companies say they are providing a vital service to people without other options.

D. International Litigation Funding

1. Litigation funding is not just a domestic issue. On the international front, funding is often used in large scale mass torts litigation. For example, the mass tort litigation between thousands of Ecuadorian residents of the Amazon and the oil giant Chevron.

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[13] *In re Nat'l Football League Players' Concussion Injury Litig.*, 2017 WL 8785717, at *1 (E.D. Pa. 2017), *aff'd in part, rev'd in part sub nom. Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96 (3d Cir. 2019).

[14] *Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96, 112 (3d Cir. 2019).

[15] *See* https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harassment.html.

2. In 2015, Chevron reached a settlement agreement with several third-party funders who had funded what turned out to be a fraudulent litigation. Funding raised a series of questions concerning ethics and reliance on counsel representations to clients and funders.

E. Not-for-Profit Litigation Funding

1. The long-held assumption in international litigation funding, particularly with international arbitrations, is "that the funder is a separate entity from the funded party and has profit-making as its primary motive."[16] However, some third-party funders are not looking to make a profit. Some funders want to create favorable precedents for future claims, defend state laws from challenges, gather information about parties, or fight against a particular industry.
2. For example, the Anti-Tobacco Trade Litigation Fund[17] helps low and middle-income countries finance defenses against tobacco companies' claims under investment treaties. Specifically, the fund provided financial support to the government of Uruguay for its defense against Philip Morris in an arbitration in which Philip Morris challenged government regulations requiring plain packaging of tobacco products.

F. Motivations and Effects on Funding

1. Leading scholar on litigation finance, Maya Steinitz, recently wrote:

> "[V]ariables such as the motivation and likely effects of the funding, type of funder, type of funded party, type of defendant, subject matter of the case, and forum all matter. Further, simply classifying the funding by type does not dispose of the inquiry as to what type of and how much disclosure, if any, is appropriate. For example, arbitrators, who usually have a private practice and serve clients when they're not serving on a tribunal, may be more likely to have a conflict of interest than are judges, pointing in the direction of more disclosure in arbitration. However, arbitrators, unlike judges, are not empowered to protect the general public and are not expected or empowered to consider policy implications to the same extent as judges are, pointing in the direction of less disclosure." [18]

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[16] *See* https://oxia.ouplaw.com/page/third-party-funders.

[17] *See* https://www.tobaccofreekids.org/what-we-do/global/legal/trade-litigation-fund.

[18] Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1092 (2019).

2. According to Steinitz, the "dizzying array" of funding variations and variables suggests that:
    i. Judges should be empowered to inquire into third-party funding; and
    ii. The extent and form of the funding inquiry should be left to the discretion of the individual decision-maker so she can engage in a thoughtful weighing of the intricate considerations as they pertain to the facts before her.[19]

G. Model Order Regarding Litigation Finance Disclosure

1. Order Regarding Third-Party Contingent Litigation Financing, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).
2. "Absent extraordinary circumstances…the Court will not allow discovery into [third-party contingent litigation] financing… [but] any attorney in any MDL Case that has obtained [third-party contingent litigation] financing shall:
    - share a copy of this Order with any lender or potential lender.
    - submit to the Court *ex parte*, for in camera review, the following:
        (A) a letter identifying and briefly describing the [third-party contingent litigation] financing; and
        (B) two sworn affirmations--one from counsel and one from the lender--that the [third-party contingent litigation] financing does not:
            (1) create any conflict of interest for counsel,
            (2) undermine counsel's obligation of vigorous advocacy,
            (3) affect counsel's independent professional judgment,
            (4) give to the lender any control over litigation strategy or settlement decisions, or
            (5) affect party control of settlement."

V. CASE EXAMPLES OF LITIGATION FINANCE DISCLOSURE DISPUTES[20]

A. Fed. R. Civ. P. 26(b)(1)

1. "DISCOVERY SCOPE AND LIMITS.

    Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case,

[19] *Id*.

[20] *See Recent Trends in Litigation Finance Discovery Disputes*, N.Y.L.J., February 8, 2021 (by Andrew Goldenberg).

considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable."

B. Cases applying Rule 26(b)(1)

1. *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig.*, 405 F. Supp. 3d 612 (D.N.J. 2019).
2. *Benitez v. Lopez*, 2019 WL 1578167 (E.D.N.Y. 2019).
3. *United Access Techs., LLC v. AT&T Corp.*, 2020 WL 3128269 (D. Del. 2020).
4. *MLC Intellectual Prop., LLC v. Micron Tech., Inc.*, 2019 WL 118595 (N.D. Cal. 2019).
5. *E. Profit Corp. Ltd. v. Strategic Vision US, LLC*, 2020 WL 7490107 (S.D.N.Y. 2020).

115TH CONGRESS
2D SESSION

S. 2815

To amend title 28, United States Code, to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 10, 2018

Mr. GRASSLEY (for himself, Mr. TILLIS, and Mr. CORNYN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28, United States Code, to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Litigation Funding Transparency Act of 2018".

SEC. 2. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY LITIGATION FUNDING IN CLASS ACTIONS.

(a) IN GENERAL.—Chapter 114 of title 28, United States Code, is amended by adding at the end the following:

"§ 1716. Third-party litigation funding disclosure

"(a) IN GENERAL.—In any class action, class counsel shall—

"(1) disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and

"(2) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

"(b) TIMING.—The disclosure required by subsection (a) shall be made not later than the later of—

"(1) 10 days after execution of any agreement described in subsection (a)(2); or

"(2) the time of service of the action.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 114 of title 28, United

States Code, is amended by adding at the end the following:

"1716. Third-party litigation funding disclosure.".

SEC. 3. TRANSPARENCY AND OVERSIGHT OF THIRD-PARTY LITIGATION FUNDING IN MULTIDISTRICT LITIGATION.

Section 1407 of title 28, United States Code, is amended—

(1) by redesignating subsections (g) and (h) as subsections (h) and (i), respectively; and

(2) by inserting after subsection (f) the following:

"(g)(1) In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall—

"(A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and

"(B) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

"(2) The disclosure required by paragraph (1) shall be made not later than the later of—

"(A) 10 days after execution of any agreement described in paragraph (1)(B); or

"(B) the time the civil action becomes subject to this section.".

SEC. 4. APPLICABILITY.

The amendments made by this Act shall apply to any case pending on or commenced after the date of the enactment of this Act.

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05.10.2018

Grassley, Tillis, Cornyn Introduce Bill To Shine Light On Third Party Litigation Financing Agreements

WASHINGTON – Senate Judiciary Committee Chairman Chuck Grassley and Senators Thom Tillis and John Cornyn today introduced legislation requiring disclosure of third party litigation financing agreements in civil lawsuits. Through such agreements, hedge funds and other commercial lenders finance the cost of civil litigation in return for a portion of any recovery. However, the existence and terms of such agreements are often not disclosed to the court or opposing parties, creating the potential for conflicts of interest. The *Litigation Funding Transparency Act of 2018* would require disclosure at the outset of any class action lawsuit filed in federal courts, or in any claim that is aggregated into a federal multi-district litigation (MDL) proceeding, of any agreement between a party to the case and any third-party commercial enterprise that has a contingent interest in the outcome of the case.

"As I've said time and again, transparency brings accountability. For too long, obscure litigation funding agreements have secretly funneled money into our civil justice system, all for the purpose of profiting off someone else's case. The courts and opposing parties should know whether there are undue pressures and secret agreements at play that could unnecessarily drag out litigation or harm the interest of the claimants themselves. No one's saying that litigation funding should be prohibited at this time. But a healthy dose of transparency is needed to ensure that these profiteers aren't distorting our civil justice system. Our bill strikes the appropriate balance in disclosing certain information while allowing courts to craft necessary protections," Grassley said.

"The Litigation Funding Transparency Act of 2018 is commonsense legislation that will shed light on third party litigation financing agreements to ensure that the court and opposing parties are made aware of who is financing the litigation and whether or not there are any conflicts of interest," Tillis said.

"Third party litigation financing pumps millions of dollars into our justice system, and the current lack of oversight makes it difficult to track this money's influence on litigation. This bill will give us insight into where this money is going and keep the civil justice system honorable and fair," Cornyn said.

Third party litigation funding is estimated to be a multi-billion dollar industry but is largely unregulated and subject to little oversight, fueling concerns that such agreements create conflicts of interest and distort the civil justice system. In 2015, Grassley and Cornyn **sought details** on the types of cases that funders will finance, the structure and terms of the agreements they enter into, and whether the court or interested parties are ever made aware of any such agreement. Since then, third-party litigation funding has skyrocketed. For example, litigation financier Burford Capital reported profits up 75% in 2016. And according to **Burford's own survey**, 28% of private practice lawyers in the U.S. say their firms have used third-party funding directly, "a four-fold increase since 2013."

To improve transparency and oversight, the *Litigation Funding Transparency Act of 2018* provides a simple, uniform rule that would apply to all class actions and MDL proceedings in federal courts. Specifically, it requires class counsel, in any class action filed in a U.S. district court, to disclose in writing to the court and all other named parties to the case the identity of any commercial enterprise (other than a class member or class counsel) that has a right to receive payment that is contingent on the receipt of monetary relief in the case. Such disclosure may be limited by stipulation or order by the court to protect certain information. The bill imposes the same disclosure obligations for MDL proceedings.

Text of the *Litigation Funding Transparency Act of 2018* is available **HERE**.

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Tags: **Budget, Economy & Tax**

PREVIOUS ARTICLE NEXT ARTICLE

Burford

BLOG

Burford Capital comments on The Litigation Funding Transparency Act of 2018

10 May 2018

There is a desire in some corners of the American legal system for there to be disclosure of litigation finance arrangements in proceedings involving multiple claimants, such as class actions or multidistrict litigations. Over the past week, we have seen that there is a right way and a wrong way to handle disclosure, the purpose of which is to avoid conflicts of interest.

Burford Capital has recently commented on what we consider to be the right way to handle disclosure in such proceedings. Judge Dan Polster, who is overseeing the opioids MDL, has ordered lawyers to disclose litigation financing ex parte and in camera to him. Judge Polster makes clear that the purpose of the disclosure is simply to affirm that there is no conflict and that the funder exercises no control over the matter. Judge Polster also makes clear that no discovery will be permitted into the litigation finance agreements—recognizing, as do the overwhelming majority of courts that have considered the issue, that these constitute protected attorney work product.

Judge Polster's order smartly addresses the core question of conflicts of interest without creating a potential for discovery detours that cause unnecessary delays and add unfair cost burdens. He also avoids handing defendants an unfair advantage by getting a free look at plaintiffs' financial affairs.

By contrast, The Litigation Funding Transparency Act of 2018 introduced today by Senators Grassley, Tillis and Cornyn is an example of the wrong way to handle disclosure—mandating broad disclosure to the defendant. No one has come up with any reasonable justification for a general rule requiring plaintiffs to disclose their sensitive financial arrangements to defendants, yet the proposed legislation sets the stage for this to occur. The Litigation Funding Transparency Act of 2018 is exemplary of calls for disclosure that talk about creating transparency but that are ultimately misused to create expensive and time-wasting frolics and detours in litigation and as a tactical device by defendants.

It is widely recognized that litigation finance has become a part of the legal mainstream. As the world's largest provider of litigation finance to commercial litigants—both plaintiffs and defendants—Burford looks forward to contributing to the dialogue around disclosure to ensure that it is addressed in the right way.

ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
November 7, 2017

June 1, 2017

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and
Procedure of the Administrative Office of the United
States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A)

Dear Ms. Womeldorf:

On behalf of the U.S. Chamber Institute for Legal Reform, the Advanced Medical Technology Association, the American Insurance Association, the American Tort Reform Association, the Association of Defense Trial Attorneys, DRI – *The Voice of the Defense Bar*, the Federation of Defense & Corporate Counsel, the Financial Services Roundtable, the Insurance Information Institute, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the National Retail Federation, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Property Casualty Insurers Association of America, the Small Business & Entrepreneurship Council, the U.S. Chamber of Commerce, the Michigan Chamber of Commerce, the State Chamber of Oklahoma, the Pennsylvania Chamber of Business and Industry, the South Carolina Chamber of Commerce, the Virginia Chamber of Commerce, Wisconsin Manufacturers & Commerce, the Las Vegas Metro Chamber of Commerce, the Florida Justice Reform Institute, the Louisiana Lawsuit Abuse Watch, the South Carolina Civil Justice Coalition, and the Texas Civil Justice League, [1] we are writing to renew the proposal for amending the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding ("TPLF") arrangements in any civil action filed in federal court.

TPLF is the practice of investors buying an interest in the outcome of a lawsuit, often in part to (a) allow a plaintiff to "cash out" of all or part of its interest in a claim, (b) allow plaintiffs' counsel to be paid up front for their prosecution of a claim, or (c) provide a plaintiff with money to litigate its claims. Absent robust

[1] Descriptions of each of the aforementioned organizations are attached as Appendix A.

disclosure requirements, TPLF will continue to operate in the shadows, concealing from the court and other parties in each case the identity of what is effectively a real party in interest that may be steering a plaintiff's litigation strategy and settlement decisions. The lack of transparency may also conceal serious conflicts of interest, as TPLF entities may be either publicly traded companies or companies supported by investment funds whose individual stakeholders may include judges, attorneys, or jurors.

To address these concerns, several of the aforementioned organizations submitted a proposal in 2014 that would have added to the list of required "initial disclosures" in the existing provision of Rule 26(a)(1)(A) a requirement that "a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."[2]

While the Committee ultimately opted not to proceed with formal consideration of the proposal at that time, it indicated it would continue monitoring TPLF and its usage in the federal courts. Since that time, there have been several relevant noteworthy developments, including new evidence of the rapid expansion of TPLF usage in the United States, the diversification of funding methods in a manner that is likely to fuel further expansion of the practice, and several specific episodes revealing significant problems with TPLF – all of which underscore the need for robust disclosure requirements.

I. The Rapid Growth Of TPLF

Expansion of TPLF in the United States. A principal reason the Committee cited for not pursuing the TPLF disclosure proposal in 2014 was its belief that there was uncertainty about the frequency with which TPLF was being used in U.S. litigation. In a very real sense, this objection served to underscore the need for greater transparency on this subject because the dearth of meaningful data regarding TPLF usage stems largely from the lack of disclosure. Since there is no standing duty to reveal TPLF arrangements, the presence of litigation funding in a case comes to light only rarely, usually as a result of discovery (in the limited circumstances it has been permitted) or disputes between parties and a funder.

[2] The full text of the proposed amendment is attached as Appendix B.

The reality is that since 2014, TPLF usage has increased substantially.[3] One of the largest funders in the United States, Burford Capital Limited ("Burford"), recently announced record income, profits, cash receipts and new investment commitments in a March 2017 press release.[4] Specifically, Burford announced a net after-tax profit of $115.1 million in 2016, representing a 75% increase from the profit realized in 2015.[5] In addition, Burford's income increased by 59% to a record $163.4 million, which was fueled in large part by a 60% increase in income from litigation-related investments.[6] Further, Burford announced robust organic cash generation facilitated by investment recoveries of $216 million.[7] And the expansion of Burford has culminated in record investment commitments of $378 million, which marks an 83% increase from 2015.[8] These strong economic figures by Burford were announced on the heels of its acquisition of Chicago-based Gerchen Keller Capital LLC, another large U.S. funder. Burford spent $160 million to buy Gerchen Keller – its largest rival[9] – which in early 2016 reported more than $1.4 billion in assets.[10] The combination of the two funders "result[ed] in purchase power of about $2.5 billion or more (with Burford at about $1 billion and Gerchen Keller at about $1.4 or $1.5 billion)."[11]

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[3] Henry Meier, *Litigation Costs Go Third Party*, Los Angeles Business Journal, July 4, 2016 ("[TPLF] industry growth has been rapid."); Matthew Fechik & Amy G. Pasacreta, *United States: Litigation Finance: A Brief History Of A Growing Industry*, Mondaq, Apr. 4, 2016 ("[TPLF] firms now invest about $1 billion a year, and the industry seems to be growing.").

[4] *Burford Capital Delivers 75% Growth in Full Year 2016 Profit*, Mar. 14, 2017, http://www.burfordcapital.com/newsroom/burford-capital-delivers-75-growth-full-year-2016-profit/.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Roy Strom, *With Profits Up 75 Percent, Burford's Results Reveal Evolving Litigation Funding Industry*, Mar. 14, 2017, The American Lawyer, http://www.americanlawyer.com/id=1202781274593/With-Profits-Up-75-Percent-Burfords-Results-Reveal-Evolving-Litigation-Funding-Industry.

[10] Julie Triedman, *Topping $1 Billion Mark, Big Litigation Funder Gets Bigger*, The Am Law Daily, Jan. 6, 2016, http://www.americanlawyer.com/id=1202746351295/Topping-1-Billion-Mark-Big-Litigation-Funder-Gets-Bigger?slreturn=20160006110304.

[11] *Burford Acquires Gerchen Keller: What is Going on?*, Fulbrook Capital Management, LLC, Dec. 20, 2016, http://www.fulbrookmanagement.com/burford-acquires-gerchen-keller-what-is-going-on/.

Burford's strong economic figures are a microcosm of the broader TPLF industry.[12] Indeed, a number of other major TPLF companies have likewise experienced significant expansion over the past several years. For example:

- Bentham IMF – the U.S. arm of IMF Bentham Limited, one of the largest litigation funding companies in the world − reported a 109% increase in total income in 2016 and recently announced a new $200 million litigation finance vehicle focused solely on funding U.S. cases and matters.[13] Bentham also recently announced that it would be opening its fourth office in the United States.[14]

- Therium Group Holdings, another funder, announced in April 2016 that it had secured $300 million to invest in commercial litigation financing ("the largest ever single investment in the litigation funding sector, globally") and that it would be launching operations in the United States in light of increased demand for litigation funding by law firms and businesses.[15]

- Longford Capital Management LP, which was founded in 2014 and invests in contract, antitrust and other claims, raised $56.5 million for its first fund.[16] The litigation funder experienced significant economic growth in its initial venture, obtaining returns in the "***70-90 percent range***."[17] Further, the privately held capital fund, now headed by a former Morgan Stanley executive, recently announced

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[12] Strom, *supra* note 9.

[13] IMF Bentham Final Report, June 30, 2016, https://www.imf.com.au/docs/default-source/site-documents/annual-report-30-june-2016; *Commercial Litigation Funder Bentham IMF Expands into Houston, Hiring Top Local Talent*, PR Newswire, Feb. 24, 2017, http://www.prnewswire.com/news-releases/commercial-litigation-funder-bentham-imf-expands-into-houston-hiring-top-local-talent-300413392.html.

[14] PR Newswire, *supra* note 13.

[15] *Therium Launches in U.S. to Meet Increasing Industry Demand for Litigation Funding*, Yahoo Finance: Business Wire, Apr. 19, 2016, http://finance.yahoo.com/news/therium-launches-u-meet-increasing-110300761.html.

[16] Julie Triedman, *The Big Players in the Litigation Funding Arena*, The American Lawyer, Dec. 30, 2015.

[17] Lynne Marek, *Chicago Investment Firm Looks To Attract $250 Million for Second Fund*, Crains Chi. Bus., Feb. 27, 2017, http://www.chicagobusiness.com/article/20170227/NEWS01/170229913/chicago-investment-firm-looks-to-attract-250-million-for-second-fund.

that it has raised more than double that for its sophomore fund − a staggering $118.47 million.[18]

- In 2016, Lake Whillans Litigation Finance LLC expanded by opening an office in Palo Alto to continue its work with Silicon Valley-based companies and corporate counsel.[19] Established in 2013, the company has already deployed more than $50 million in active capital.[20]

- Harbour Litigation Funding, which operates across the globe, including in the United States, recently announced that it has over £400m of capital commitments.[21] In 2016, this funder expanded its global team by more than 40%.[22]

- Vannin Capital, another international funder, recently announced the appointment of Jeffery Commission to serve as senior counsel in Washington, D.C. According to a company press release, "this appointment represents the latest expansion of Vannin's fast-growing business[.]"[23]

Expansion of TPLF in the United States has also been fueled by growing activity in the arena by private hedge funds.[24] For example, RD Legal Capital, a New Jersey-based hedge fund, invested in a $1.8 billion uncollected judgment against the Iranian central bank, while New York-based Elliott Management Corp. helped fund a lawsuit by Stan Lee Media Inc. against Walt Disney Co. regarding

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[18] *Id.*; S.E.C. Form D, Longford Capital Management, Mar. 9, 2017, https://www.sec.gov/Archives/edgar/data/1699903/000169990317000001/xslFormDX01/primary_doc.xml.

[19] *Litigation Finance Leader Lake Whillans Expands, Opening Palo Alto Office*, PR Newswire, Mar. 3, 2016, http://www.prnewswire.com/news-releases/litigation-finance-leader-lake-whillans-expands-opening-palo-alto-office-300230623.html.

[20] *Id.*

[21] Harbour Litigation Funding, https://www.harbourlitigationfunding.com/about-us/our-funds/.

[22] *Id.*

[23] *Vannin Capital Expansion Continues*, Jan. 19, 2016, http://vannin.com/press/article/156/2016-01-19/vannin-capital-expansion-continues.

[24] *See* Thomas Brom, *How Litigation Funding Upsets the Justice Marketplace*, California Lawyer, June 2015.

popular comic-book characters created by Stan Lee.[25] And EJF Capital (based in Arlington, Va.) has raised hundreds of millions of dollars to invest in mass tort lawsuits, including transvaginal mesh and Risperdal litigation.[26] The hedge fund reportedly is targeting "class-action injury lawsuits" at "hefty interest rates," with the loans to be repaid by law firms "as they earn fees from settlements and judgments."[27]

Another driving force behind the TPLF industry's expansion is the increasing use of TPLF by law firms.[28] According to one partner at a prominent law firm, "[m]y experience with funders is, all I've seen is growth."[29] Indeed, a recent survey conducted by Burford shows that TPLF is becoming more popular among large law firms in the United States.[30] The survey found that 28% of private practice lawyers say their firms have used TPLF directly, a four-fold increase since 2013.[31] Consistent with these findings, Burford recently asserted that it "has worked with 75 of the Am Law 100 and last year lent $100 million and $50 million to two global law firms, respectively, to finance their litigation departments."[32]

Another recent survey published by TPLF company Lake Whillans produced similar results.[33] According to the survey, the strongest motivation for using TPLF was the lack of funds/legal fees and hedging risk of litigation, respectively.[34]

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25 *Id.*

26 *See* Rob Copeland, *Hedge-Fund Manager's Next Frontier: Lawsuits*, Wall Street Journal, Mar. 9, 2015, http://www.wsj.com/articles/hedge-fund-managers-next-frontier-lawsuits-1425940706.

27 *Id.*

28 Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, The American Lawyer, Dec. 30, 2015, http://www.americanlawyer.com/id=1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom.

29 *Id.* (quoting Reed Oslan).

30 Julie Triedman, *Big Law Warms Up to Litigation Funding, Burford Survey Finds*, The Am Law Daily, May 3, 2016.

31 *Burford's Latest Research Shows Explosive Growth and Ongoing Evolution of Litigation Finance*, Burford Blog, May 3, 2016.

32 Strom, *supra* note 9.

33 *Litigation Finance, the Litigators Perspective*, http://lakewhillans.com/research/litigation-finance-the-litigators-perspective/.

34 *Id.*

Notably, in-house counsel were the only category describing TPLF "[a]s a means to fund operating expenses" in significant numbers, at 25%.[35]

In sum, there has been a dramatic expansion of TPLF over the last few years.[36] The scope of TPLF in U.S. civil litigation has reached a point such that the Committee should formally consider our proposal to require the disclosure of TPLF arrangements in all civil actions filed in federal court.

Changes in Funding Methods/Applications. TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, driving the pervasiveness of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits. Traditionally, TPLF firms invested solely in individual cases that went through their own vetting process. But recently, some of these firms have begun investing in portfolios of cases at certain law firms "based on their existing track record" and "the types of cases they handle."[37] In 2015, Bentham invested $30 million into such funding deals with seven different law firms.[38] That investment covered more than 60 cases in intellectual property, insurance coverage, entertainment, health care, contracts and other areas.[39]

Burford has also embraced the portfolio approach to TPLF. In 2015, about 50% of Burford's capital was in case portfolios.[40] Burford continued this trend in 2016, pouring an unprecedented $100 million into a portfolio of cases at one large

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35 *Id.*

36 Brom, *supra* note 24 ("By all accounts third-party funding . . .is spreading rapidly.").

37 Sara Randazzo, *Litigation Funding Pioneer Hits a Roadblock*, Wall Street Journal, Nov. 23, 2015, http://blogs.wsj.com/law/2015/11/23/litigation-funding-pioneer-hits-a-roadblock/. "Consider Pierce Sergenian, a six-lawyer trial boutique started by" former lawyers from "the litigation powerhouse Quinn Emanuel Urquhart & Sullivan," which "afford[s] to handle the 10 cases it has on board . . . by selling a separate interest in the potential recoveries to a financier[.]" Paul Barrett, *The Business of Litigation Finance Is Booming*, Bloomberg Businessweek, May 30, 2017. "The financing of Pierce Sergenian marks the first time that a law firm and funder have gone public about the existence of such a portfolio-investment arrangement." *Id.*

38 *Id.*

39 *See* Andrew Strickler, *Litigation Funding Industry Deepening Law Firm Ties*, Law 360, Nov. 16, 2015, http://www.law360.com/articles/727348/litigation-funding-industry-deepening-law-firm-ties.

40 Julie Triedman, *Arms Race*, *supra* note 28.

global law firm that Burford refuses to name.[41] One of the most notable findings of the Burford survey discussed above confirms the growing popularity of portfolio-based TPLF: "About as many lawyers said they had experience with portfolio financing in 2016 (9 percent) as had experience with single case financing, the most commonly understood form of third-party funding, in 2013 (7 percent)."[42]

Because the portfolio strategy by definition involves funding a larger and broader array of cases, it can be expected to increase the filing of ill-considered cases. Indeed, recent experience in the mass-tort arena revealed that TPLF is being used in large product liability litigation where lawyers amass as many "faceless clients as possible" without adequately investigating the merit of the claims.[43] A lawsuit brought by a former plaintiffs' law firm employee in connection with the use of TPLF in litigation involving allegedly defective mesh products summarized the business model employed by the law firm:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[44]

As one article explained, the TPLF company's "investment in a claims-bundling firm, known not for trial work but for multimillion-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder's usual customers: companies with big business disputes for their Am Law 200 firms."[45] Indeed, the use of TPLF to aid personal injury firms in aggregating "faceless" claims contradicts

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41 Julie Triedman, *Burford Boasts Big Year, Invests $100M in Law Firm Portfolio*, The Am Law Daily, Mar. 23, 2016.

42 *Burford's Latest Research Shows Explosive Growth and Ongoing Evolution of Litigation Finance*, Burford Blog, May 3, 2016.

43 David Yates, *"Mass Tort Warehouse" Fires Fund Officer to Avoid Paying Millions for Acquiring 14,000 Mesh Claims, Suit Alleges*, SE Texas Record, Oct. 10, 2015, http://setexasrecord.com/stories/510642299-mass-tort-warehouse-fires-fund-officer-to-avoid-paying-him-millions-for-acquiring-14-000-mesh-claims-suit-alleges.

44 Compl. ¶ 76, *Shenaq v. Akin*, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015).

45 Julie Triedman, *Arms Race*, *supra* note 28.

the representations of some funders that they rigorously assess each case investment and would never finance frivolous or dubious claims.

TPLF has also taken center stage at a growing number of startup companies that seek to raise funding for lawsuits via online marketplaces.[46] The usual course has been for TPLF entities to collect money from investors that they would in turn use to buy interests in a collection of cases of the fund's choosing. LexShares and Trial Funder Inc., however, are attracting investors, commercial plaintiffs, and plaintiffs' firms to their online marketplaces. Accredited investors are able to shop among individual cases and contribute as little as $2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment. Unlike traditional third-party litigation finance firms, these new startup companies solicit investments using a crowdfunding-like model, which allows ordinary accredited investors to choose among cases vetted by the company. Thus far, LexShares has raised approximately $5.5 million for 15 cases, including a legal malpractice lawsuit filed by an athletic association, a breach-of-contract lawsuit and a handful of product-liability cases brought against Fortune 500 companies.[47] Trial Funder's experience has been similar, with it earmarking substantial sums for personal-injury cases.[48]

At bottom, not only has TPLF become a more prominent facet of civil litigation in the United States, but it has also been accompanied by sophisticated changes in funding methods that will likely accelerate its growth.

II. The Need For Disclosure Of TPLF

Third-party litigation funding raises a host of legal and ethical issues that provide a compelling need for mandatory disclosure. The funding agreements may violate state champerty and maintenance laws, as well as ethical canons, and they often distort the traditional adversarial system of civil justice. Absent a robust disclosure requirement, plaintiffs will continue to utilize TPLF – in some situations, illegally – undetected and unchecked. Indeed, the rapid growth of TPLF in the United States over the past several years demonstrates that such agreements are used extensively without notice to the court or opposing party.

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[46] Sara Randazzo, *Litigation Funding Moves into Mainstream*, Wall Street Journal, Aug. 4, 2016.

[47] *Id.*

[48] *Id.*

In recognition of this fact, at least one federal district court – the U.S. District Court for the Northern District of California – has adopted its own TPLF disclosure requirement. Recently, that court added to its "Standing Order For All Judges" a provision requiring that "in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."[49] That action was taken in the immediate aftermath of a panel discussion at the court's annual judicial conference during which TPLF industry representatives took the position that their investments in class actions and other litigation should not be disclosed. As one attorney who studies the litigation funding industry explained, the Northern District of California rule is "really a harbinger and a signal that courts . . . need to consider the presence of third-party financiers in a lawsuit and consider their role."[50] Indeed, published reports indicate that the U.S. District Court for the Eastern District of Texas may also be considering a disclosure rule.[51]

Importantly, a TPLF disclosure requirement would be consistent with federal courts' interest in safeguarding legitimate, ethical civil litigation practices. Federal courts have long allowed defendants to utilize discovery tools to uncover unethical conduct by plaintiffs that could affect the case at hand.[52] Indeed, as one court

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[49] Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (Jan. 2017).

[50] Ben Hancock, *New Litigation Funding Rule Seen as "Harbinger" for Shadowy Industry*, The Recorder, Jan. 25, 2017, http://www.legaltechnews.com/id=1202777609784/New-Litigation-Funding-Rule-Seen-as-Harbinger-for-Shadowy-Industry?mcode=1202617583589&curindex=58&slreturn=20170228111023.

[51] *See* Ben Hancock, *Bentham Hires Yetter Coleman Partner as It Expands to Texas*, Texas Lawyer, Feb. 21, 2017, http://www.texaslawyer.com/id=1202779591965/Bentham-Hires-Yetter-Coleman-Partner-as-It-Expands-to-Texas?slreturn=20170228084913 ("After the [Northern District of California] disclosure rule was announced, Ron Clark, chief judge of the Eastern District of Texas, told Texas Lawyer that jurists in his division may follow the Northern District of California's lead and consider similar measures.").

[52] *See, e.g.*, *Parrot v. Wilson*, 707 F.2d 1262, 1271, n.20 (11th Cir. 1983) (affirming trial court's order requiring the production of interview tapes that had been secretly recorded by an attorney; "Disclosure is clearly an appropriate remedy when the evidence sought was *generated* directly by the attorney's misconduct."); *Baker v. Masco Builder Cabinet Grp., Inc.*, 2010 U.S. Dist. LEXIS 104018, at *11-12 (D.S.D. Sept. 27, 2010) ("Courts have also allowed defendants to inquire into alleged misconduct of plaintiffs' counsel because such misconduct may result in the denial of class certification."); *Stavrides v. Mellon Nat'l Bank & Tr. Co.*, 60 F.R.D. 634 (W.D. Pa. 1973) (granting defendant's motion to compel answers to deposition questions granted because the possible ethical misconduct on the part of plaintiff's attorneys in a class action could lead to denial of class certification).

explained in requiring the disclosure of consulting agreements securing the cooperation of a previously hostile witness, courts have an obligation to ensure that litigants' or their attorneys' "conduct does not ***erode the integrity of the adversary process***."[53] In that case, the defendants in a complex environmental litigation entered into various consulting agreements with a former officer of one of the companies and sought to shield the contracts under the work-product doctrine. According to the district court, those agreements "were designed to overcome the hostility between [the former officer] and [one of the defendants] resulting from the dispute over the circumstances of [the former officer's] departure from [the company] in 1979[.]"[54] In addition, the consulting agreements were tantamount to "purchas[ing] [the former officer's] cooperation in the instant case[.]"[55] Finding that "the conduct of [defendants] and their counsel in relation to [the former officer] ha[d] threatened to undermine the integrity of the adversary process in th[e] case," the district court ordered the production of the consulting agreements.[56]

The same logic supports the disclosure of TPLF arrangements at the outset of civil lawsuits. As set forth more fully below, a mandatory TPLF disclosure requirement is critical to the "integrity of the adversary process" because these arrangements threaten core ethical and legal principles that undergird our civil justice system.

TPLF May Violate the Common Law Doctrine of Champerty. Champerty is a centuries-old legal doctrine that prohibits someone from funding litigation in which he or she is not a party. It is intended to prevent courts from becoming trading floors where people buy and sell lawsuits based on their perceived merit. Although the TPLF industry has promoted the view that this doctrine has become a "dead letter,"[57] recent state and federal court decisions have given renewed vitality to champerty principles, particularly in the TPLF arena.

One recent Pennsylvania appellate decision is illustrative. In *WFIC, LLC v. Labarre*,[58] an attorney entered into a contingency-fee agreement with his client under

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53 *New York v. Solvent Chem. Co.*, 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996).

54 *Id.* at 289.

55 *Id.* at 289-90.

56 *Id.* at 289.

57 *Litigation Finance Is not Champerty, Maintenance or Barratry*, Burford Capital, July 30, 2013, http://www.burfordcapital.com/blog/litigation-finance-not-champerty-maintenance-barratry/.

58 No. 1985 EDA 2015, 2016 WL 4769436, at *5 (Pa. Super. Ct. Sept. 13, 2016).

which a TPLF company that had loaned money to pursue the litigation matter would be paid out of counsel's expected fees. In the course of sorting out a dispute among creditors about which entity should have priority in the distribution of available assets, the appellate court concluded that counsel's agreement to pay the funder out of his fees was champertous under Pennsylvania law because the investors were unrelated parties lacking a legitimate interest in the lawsuit. The court thus found the agreement invalid and unenforceable, making clear that "champerty remains a viable defense in Pennsylvania."[59]

These issues were also at play in *Justinian Capital SPC v. WestLB AG*,[60] a case decided by New York's highest court. There, DPAG (a German bank) bought notes from defendant WestLB that subsequently lost substantial value. DPAG wanted to sue West LB for fraud and malfeasance, but feared adverse reactions by German regulators. As a result, DPAG agreed to provide the notes to plaintiff Justinian Capital (a Cayman Islands company) so that it could sue West LB – and it did so. However, the defendant argued, and the New York Court of Appeals agreed, that such an acquisition was champertous. This was so, the court reasoned, "because Justinian did not pay the purchase price or have a binding and bona fide obligation to pay the purchase price of the Notes independent of the successful outcome of the lawsuit[.]"[61]

And in *Maslowski v. Prospect Funding Partners LLC*, the Minnesota Court of Appeals refused to enforce a New York forum-selection clause in a funding agreement on the ground that it was effectuated to evade "Minnesota's local interest against champerty."[62] The Minnesota Court of Appeals explained that "in this particular case, the decision whether the parties' agreement violates Minnesota's policy against champerty has the potential to expose personal-injury actions in Minnesota to the negative effects of champerty. Given that potential, Minnesota has a strong local interest in applying its prohibition against champerty in this case."[63]

A federal court decision published earlier this year has also made clear that champerty is not a moribund concept. In *In re DesignLine Corporation*,[64] a

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59 *Id.*

60 65 N.E.3d 1253 (N.Y. 2016).

61 *Id.* at 1259.

62 2017 Minn. App. LEXIS 26, at *22 (Minn. Ct. App. Feb. 13, 2017).

63 *Id.* at *22-23.

64 2017 Bankr. LEXIS 182, at *1 (U.S. Bankr. W.D.N.C. Jan. 20, 2017).

bankruptcy case, the trustee proposed to "sell" several adversarial proceedings to a litigation funder in order to obtain an advance on litigation expenses. In exchange, the funder would receive a substantial interest in the remaining proceeds of those actions, as well as the right of "input into future decisions" and the "power to cut off funding."[65] The opponents objected, contending that the agreements contravened North Carolina law because the funding company would exercise significant control over the litigation. The federal court agreed, placing great emphasis on the funder's "power of the purse" – i.e., the "ultimate power to cut off funding."[66] In light of this substantial control over the litigation by a party not otherwise interested in the lawsuit, the court found the agreements to be champertous under North Carolina law.

Each of the aforementioned champerty cases arose out of disputes between the funder and a funded party or person involved in the funding arrangement. But if a party is being sued pursuant to an illegal (champertous) funding arrangement, the defendant has a right to know and presumably would have standing to challenge such an agreement as champertous under the applicable state law. After all, "[t]he general purpose of the law against champerty and maintenance is to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law."[67] Each of these deleterious consequences has the potential to aggrieve a defendant being sued pursuant to a TPLF arrangement, including, for example, by deterring reasonable settlements or needlessly prolonging litigation, as elaborated in greater detail *infra*. Without a disclosure requirement, plaintiffs will continue to enter into TPLF agreements in the shadows, concealing potential and fundamental violations of state champerty law.

TPLF May Violate Ethical Rules Prohibiting Sharing Of Attorney Fees With Nonlawyers. Another troubling ethical implication of TPLF is the tendency of some lawyers who enter into TPLF arrangements to share their legal fees with the funder. Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances.[68] "As stated in the comments to Rule 5.4, this prohibition is intended to 'protect the lawyer's professional independence of judgment.'"[69] "Fee splitting is [also] viewed as running the risk of

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65 *Id.* at *10.

66 *Id.* at *17.

67 *Id.* at *11-12 (internal quotation marks and citation omitted).

68 Model Rules of Prof'l Conduct, R.5.4(a).

69 Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1291-1292 (2011) (quoting Model Rules of Prof'l Conduct R. 5.4 cmt. (2003)).

granting nonlawyers control over the practice of law or potentially enabling lay persons to practice law without authorization."[70] While "[f]unders may . . . insist upon contracting directly with the client in order to circumvent the prohibition,"[71] some of them are ignoring this blackletter principle. This is becoming more apparent in class actions, in which plaintiffs' counsel are securing funding by promising to share their fees (if awarded any) with the funder to pay it back.

For example, in *Gbarabe v. Chevron Corp.*,[72] plaintiffs commenced a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. Under the agreement entered into by plaintiffs' counsel and the funder, counsel agreed that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees – ***plus*** 2% of the total amount recovered by the putative class members.[73] Thus, apparently without their knowledge or approval, putative class members will have to hand over part of their recovery to the litigation funder. These sorts of provisions blur the line separating lawyers from nonlawyers and undermine the sacrosanct attorney-client relationship that is at the core of our civil justice system.

TPLF Creates The Possibility Of Conflicts Of Interest Among The Plaintiff, The Attorney, And The Funder. "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."[74] Indeed, attorneys owe their clients a fiduciary duty of allegiance – mandated by the rules of ethics – which requires them to put the interests of their client above their own, and to avoid even the appearance of impropriety.[75] However, an attorney that has contracted directly with a funding company may have contractual duties to it that are separate from – and, perhaps, inconsistent with – the attorney's professional duties to his or her client.[76] Moreover, because both third-party funders and attorneys are repeat players in the litigation market, it can be expected that relationships among them will

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70 *Id.*

71 Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *supra* note 3.

72 *Gbarabe v. Chevron Corp.*, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).

73 Litigation Funding Agreement ("*Gbarabe* Litigation Funding Agreement"), § 1.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, Dkt. No. 1864 (N.D. Cal. filed Sept. 16, 2016).

74 Model Rules of Prof'l Conduct, R. 1.7 cmt. [1].

75 *Id.*

76 *See*, *e.g.*, *id.*, R. 1.7(a) (providing that a "concurrent conflict of interest exists where" "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to . . . a third person").

develop over time. Attorneys can be expected to "steer" clients to favored financing firms, even if the client's particular circumstances suggest a different firm may be more appropriate, and *vice versa*.

Further, litigation financing arrangements raise confidentiality concerns insofar as they require plaintiffs to disclose privileged information to the financier. In order to evaluate a plaintiff's claim and determine whether and on what terms to finance the case, a litigation financing company generally will ask to evaluate confidential, and possibly privileged, information belonging to the plaintiff. If the plaintiff elects to provide the information to the financing company, any privilege protecting it likely would be waived. Attorneys advising a client at the outset of a case may be reluctant to provide the client full and candid advice in writing, knowing that any communications could be viewed by the funder as part of its diligence, and then would be available to the opposing party in discovery.

In short, interjection of a financially interested third party into the adversarial calculus threatens to interfere with fundamental duties owed by the attorney to his or her client. This unseemly dynamic raises the possibility that the attorney's professional judgment will be guided by the pecuniary interest of the entity bankrolling the litigation rather than the client's own interest.

TPLF Raises The Possibility Of Judicial Conflicts Of Interest. In addition, to threatening the attorney-client relationship, TPLF arrangements also pose a risk of conflicts of interest between the judge and the parties to the litigation. The Federal Rules of Civil Procedure already require nongovernmental corporate entities to disclose "any parent corporation and any publicly held corporation owning 10 percent or more of its stock."[77] The purpose of this rule is to provide judges with information necessary to determine whether they have a conflict of interest in adjudicating a case.[78] "As some TPLF entities are multibillion- and multimillion-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held TPLF entities, the web of personal relationships judges have could be impacted as well, leading to unintentional appearances of impropriety."[79]

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[77] Fed. R. Civ. P. 7.1(a)(1).

[78] Fed. R. Civ. P. 7.1 Advisory Comm. Notes, 2002 adoption ("The information required by Rule 7.1(a) reflects the 'financial interest' standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges.").

[79] Tripp Haston, *The Missing Key to 3rd-Party Litigation Funding*, Law360, Feb. 7, 2017.

A prime example of this problem arose during a racketeering suit in the United States arising out of misconduct by Steven Donziger, who had helped secure an $18.2 billion judgment against Chevron Corporation on behalf of Ecuadorians allegedly harmed by the company's drilling practices.[80] During a deposition in that proceeding, Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.[81] Upon being ordered to answer the question by the special master assigned to the case, Donziger disclosed that the funder was in fact Burford Capital.[82] The special master then disclosed that he was former co-counsel with the founder of Burford, who at one time sent the special master a brochure about funding one of Burford's cases.[83] The special master also disclosed that he was friends with Burford's former general counsel.[84] The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.[85] Nonetheless, as the special master recognized, the deposition "prove[d] . . . that it is imperative for lawyers to insist that clients disclose who the investors are."[86]

"The Donziger deposition demonstrates how frequently conflicts of interest may arise as a result of third-party funding."[87] "Without disclosure," courts will "be subject to unknown conflicts of interest,"[88] depriving the parties of their right to a fair and neutral tribunal. "Requiring routine TPLF disclosure" in all civil cases "will ensure courts are conflict-free"[89] – which is essential to the proper functioning of our civil justice system.

Funder Control Over Litigation. Another serious issue implicated by TPLF agreements is the threat they pose to the plaintiff's right to control his or her own claim. TPLF companies frequently dismiss such concerns by baldly asserting that they do ***not*** control litigation strategy. But Bentham's own 2017 "best practices"

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80 Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1658 (2013).

81 *Id.* at 1650.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.* (internal quotation marks and citation omitted).

87 *Id.*

88 Haston, *supra* note 79.

89 *Id.*

guide contemplates robust control by funders. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the TPLF entity is permitted to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions.[90]

A prime example of substantial funder control was the elaborate funding agreement utilized by Burford in the Chevron litigation discussed above. Specifically, the funding agreement at issue in that case "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'" – lawyers "selected by the Claimants with the ***Funder's approval***."[91] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[92] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[93]

More recent examples show that other TPLF companies are employing litigation-control tactics similar to those set forth in Bentham's best practices guide. One illustrative example is *Gbarabe v. Chevron Corp.*, the putative class action previously discussed.[94] The funding agreement in *Gbarabe* contains several key provisions that suggest the funder's desire to influence the course of the litigation. Specifically, the agreement refers to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[95] The agreement expressly prohibits the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent[.]"[96] Further, the agreement requires that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an

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90 Bentham IMF, Code of Best Practices (Jan. 2017), https://www.benthamimf.ca/newsroom/bentham-publications/2017/01/08/bentham-imf-code-of-best-practices-jan-2017.

91 Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added).

92 *Id.*

93 *Id.*

94 *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *6.

95 *Gbarabe* Litigation Funding Agreement, §§ 1.1, 10.1.

96 *Id.* § 10.1.

observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[97]

These kinds of provisions vest the funder with substantial control over key litigation decisions. Realistically, if a plaintiff's lawyer is being paid by the investor, it will be difficult to resist that pressure. Even when the TPLF provider's efforts to control a plaintiff's case are not overt, the existence of TPLF funding naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor. Absent concrete disclosure requirements, TPLF will continue to reduce a justice system designed to adjudicate cases on their merits to a litigation system effectively controlled by third parties interested solely in profit.

Third-Party Funding Undermines Settlement Efforts. Another troubling dynamic of TPLF is that it can delay and distort the settlement process. A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. In other words, the party will seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. Further, some TPLF agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements. In fact, in the first empirical study of the effects of TPLF, researchers in Australia (where TPLF is also prevalent) found that increased litigation funding was "associated with slower case processing, larger backlogs, and increased spending by the courts."[98]

The most notorious example of this problem was the funding agreement at issue in the Chevron Ecuador litigation discussed above. The investment agreement included a "waterfall" repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award.[99] Under the agreement, Burford would receive approximately 5.5% of any award, or about $55 million, on any amount starting at $1 billion. But, if the plaintiffs settled for less than $1 billion, the investor's percentage would actually go up.

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97 *Id.* § 10.2.4.

98 Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding* (January 2012), at 27, www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf.

99 *See* Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 11-cv-0691 (S.D.N.Y.), Docket No. 356, Ex. B

The disclosure of TPLF agreements will facilitate more accurate and realistic settlement negotiations between the parties. Further, it will allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent disclosure, the funder's presence as a player in the settlement process likely will remain hidden.

Proportionality And Cost Shifting. Under the Federal Rules of Civil Procedure, federal courts sometimes need to consider the resources of the parties to the litigation. For example, in every federal case, courts must determine the scope of permissible discovery under Rule 26. Rule 26(b)(1) states that the scope of discovery shall be "proportional to the needs of the case, considering . . . ***the parties' resources*** . . . [and] whether the burden or expense of the proposed discovery outweighs its likely benefit."[100] When a TPLF entity invests money to acquire an outcome-contingent right to proceeds in a case, it for all practical purposes becomes a real party in interest: the TPLF investor pays to prosecute the case; it presumably is involved in strategic decision-making; it presumably communicates with attorneys; and it often stands to collect a substantial share of any recovery.

Moreover, unlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and profit from litigation. Thus, the existence of a TPLF agreement to fund litigation is relevant to the proportionality element of the scope of discovery. TPLF companies are well-heeled strangers to a case who willingly buy into the litigation hoping to profit from its successful prosecution. For the purposes of the resources element of the proportionality requirement contained in Rule 26(b)(1), any TPLF company that has bought a stake in a case should be considered as part of the "parties' resources." It should not be allowed to hide in the shadows behind a relatively impecunious plaintiff.

Similarly, since a funder is effectively a real party in interest, it should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs. Rule 11 prohibits the filing of frivolous lawsuits and provides a mechanism for imposing "an appropriate sanction on any attorney, law firm, or party that violate[s] the rule[.]"[101] Similarly, Rule 37 authorizes the imposition of sanctions on parties and attorneys who engage in misconduct with regard to discovery.[102] The disclosure of TPLF

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100 Fed. R. Civ. P. 26(b)(1) (emphasis added).

101 Fed. R. Civ. P. 11(c)(1).

102 Fed. R. Civ. P. 37.

arrangements would be important information to have on the record in the event that a court determines it should impose sanctions or other costs under Rule 11, Rule 37 or any comparable provision.

For example, in *Abu-Ghazaleh v. Chaul*, a Florida state appeals court held that TPLF funders (an individual and company) that controlled the litigation qualified as a party to the lawsuit and therefore became liable for the defendant's attorneys' fees and costs.[103] The state statute at issue in that case specifically authorized the levy of attorneys' fees on the plaintiff where the claim advanced was "without substantial fact or legal support."[104] The court found that the plaintiff's claim was bereft of such legal or factual support. The court then determined that the TPLF providers were liable for the attorneys' fees because they were essentially a "party" to the litigation (and the named plaintiff was financially unable to pay such fees, which is often the case). The court reached this conclusion by scrutinizing the agreement entered into by the plaintiff and the TPLF providers, which provided that the funders were to receive 18.33% of any award the plaintiffs received and gave them "final say over any settlement agreements proposed to the plaintiffs."[105] As evidenced by *Abu-Ghazaleh*, if courts are put on notice that a third party is financing the underlying litigation, they will be in a much better position to determine how to impose sanctions or other costs, if such costs are warranted in a given case.

Third-Party Financing In Class And Mass Actions. TPLF has not been limited to individual actions. Instead, it has expanded into the class and mass action realm. For example, "class actions make up a significant portion of the cases that [Bay Area-based Law Finance Group] invests in."[106] "Other firms, like New York-based Counsel Financial, also market themselves as offering various kinds of financing to class-action plaintiffs[']attorneys."[107] The need for robust TPLF disclosure requirements is most acute in this context because aggregate litigation already involves little, if any, control by the plaintiffs. In a large consumer class action, the average plaintiff often has only a small amount at stake. The "representative" plaintiffs in such cases tend to be friends, neighbors or even employees of the attorney bringing the suit. As a result, the lawyers fully control the

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103 *See Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Ct. App. 2009).

104 *Id.* at 694.

105 *Id.*

106 Hancock, *New Litigation Funding Rule Seen as "Harbinger" for Shadowy Industry*, *supra* note 50.

107 *Id.*

cases instead of the people they supposedly represent. The concerns raised by such an arrangement are all the more glaring when the person driving the litigation is not even a lawyer with fiduciary obligations to the supposed clients or the court. After all, an individual can always complain to her lawyer or the court about the conduct of a funding company, but in a class action, there are often no interested plaintiffs. Thus, the funding company can effectively run the litigation with no check on its actions, underscoring the need for disclosure at the outset of a putative class or mass action.

In addition, the contemplated disclosures are relevant to evaluating Fed. R. Civ. P. 23(a)(4)'s adequacy-of-representation prerequisite for class treatment. Indeed, Judge Susan Illston recently recognized that point in *Gbarabe*, granting the defendant's motion to compel the disclosure of the funding agreement in that putative class action.[108] As the court explained, the "funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."[109] The court's reasoning proved well-founded. The funding agreement provided that the lawyers shall endeavor to "recover the ***maximum possible*** Contingency Fee,"[110] a requirement that may conflict with class member interests. Further, and as previously discussed, the agreement provided for a sharing of fees between plaintiffs' counsel and the funder – unbeknownst to the absent class members.

In sum, adding a funder to the class action fray would further dilute any influence the named plaintiffs have on the prosecution of their lawsuit, undermining their adequacy of representation under Rule 23(a)(4). As noted above, the Northern District of California recently promulgated a "standing order" requirement that TPLF be disclosed in all class actions and representative cases, providing an important precedent for making the practice more transparent.[111] And the Fairness in Class Action Litigation Act recently passed by the U.S. House of Representatives contains a similar provision that would apply to all class actions filed in federal courts nationwide.[112]

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108 *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *6.

109 *Id.*

110 *Gbarabe* Litigation Funding Agreement, ¶ 3.1.3 (emphasis added).

111 https://www.cand.uscourts.gov/news/210.

112 https://www.congress.gov/bill/115th-congress/house-bill/985/actions?q=%7B%22search%22%3A%5B%22fairness+in+class+action+litigation%22%5D%7D.

Disclosure Would Create Parity Of Financial Disclosure. One of the most frequently invoked lines of attack against mandatory TPLF disclosure requirements is that they unfairly single out TPLF companies while not requiring defendants to disclose their sources of financing. This criticism is misdirected because it ignores the unique aspect of TPLF – that a funder voluntarily decides to invest in litigation in the hopes of sharing in any profit. Our proposed amendment is narrowly targeted at this type of recourse investment – i.e., at those who have "invested" in litigation – in that there is a contingent interest in the outcome of the case. It is these types of contingent investments that are most likely to give rise to conflicts of interest and disputes over control of key litigation decisions in individual cases, as borne out by recent examples.

Moreover, requiring TPLF agreements to be disclosed at the outset of litigation would bring plaintiffs' Rule 26 disclosure obligations in line with those of defendants, who are already obligated to disclose information pertaining to their financial wherewithal. For corporate defendants, securities laws require substantial disclosure about litigation, including the amounts of reserves taken to finance or resolve litigation. Further, Rule 26 already requires the disclosure of insurance coverage, including insurance that will pay for the defense.[113] As explained in the Advisory Committee Notes accompanying the insurance provision, "[d]isclosure of insurance coverage . . . enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation."[114] As previously discussed, this same rationale supports mandatory disclosure of TPLF arrangements, which can inform settlement negotiations.

As with insurance agreements, TPLF arrangements would be subject to the proviso that the contracts be automatically disclosed "[e]xcept . . . as . . . ordered by the court."[115] In other words, while the plain language of Rule 26 provides that certain items (like insurance agreements) must be disclosed as a matter course, a court nonetheless has the authority to rule otherwise under the facts of a given case. Further, Rule 26(c) expressly provides that a "court may, for good cause, issue an order to protect a party or person from . . . oppression or undue burden . . . including

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113 *See* Fed. R. Civ. P. 26(a)(1)(A)(iv).

114 Fed. R. Civ. P. 26, Advisory Comm. Notes, 1970 amendment.

115 Fed. R. Civ. P. 26(a)(1)(A) ("Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties . . . .").

. . . forbidding [] disclosure or discovery."[116] Accordingly, in the event a TPLF agreement contains confidential information, a plaintiff could move for a protective order seeking to immunize that information from disclosure. The court would then review the agreement *in camera* and determine whether the information is in fact confidential and whether portions of the agreement should be redacted.

For all of the foregoing reasons, we once again urge the Committee to consider adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A). The Advisory Committee's examination of this proposal is greatly appreciated.

Sincerely,

Lisa A. Rickard
President
U.S. Chamber Institute for Legal Reform

Advanced Medical Technology Association

American Insurance Association

American Tort Reform Association

Association of Defense Trial Attorneys

DRI – *The Voice of the Defense Bar*

Federation of Defense & Corporate Counsel

Financial Services Roundtable

Insurance Information Institute

International Association of Defense Counsel

[116] Fed. R. Civ. P. 26(c)(1)(A).

Lawyers for Civil Justice

National Association of Mutual Insurance Companies

National Association of Wholesaler-Distributors

National Retail Federation

Pharmaceutical Research and Manufacturers of America

Product Liability Advisory Council

Property Casualty Insurers Association of America

Small Business & Entrepreneurship Council

U.S. Chamber of Commerce

Michigan Chamber of Commerce

Pennsylvania Chamber of Business and Industry

State Chamber of Oklahoma

South Carolina Chamber of Commerce

Virginia Chamber of Commerce

Wisconsin Manufacturers & Commerce

Las Vegas Metro Chamber of Commerce

Florida Justice Reform Institute

Louisiana Lawsuit Abuse Watch

South Carolina Civil Justice Coalition

Texas Civil Justice League

APPENDIX A – SUMMARY OF SIGNATORY ORGANIZATIONS

- **U.S. Chamber Institute for Legal Reform.** The U.S. Chamber Institute for Legal Reform ("ILR") is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation's civil legal system simpler, faster, and fairer for all participants. The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

- **Advanced Medical Technology Association.** The Advanced Medical Technology Association ("AdvaMed") is the world's largest trade association of medical device manufacturers. AdvaMed advocates on a global basis for the highest ethical standards, timely patient access to safe and effective products, and economic policies that reward value creation. AdvaMed seeks to advance medical technology to promote healthier lives and healthier economies around the world. AdvaMed's members range from the largest to smallest medical technology companies doing business in the United States. These companies produce medical devices, diagnostic products and health information systems.

- **American Insurance Association.** Celebrating its 150th year in 2016, the American Insurance Association ("AIA") is the leading property-casualty insurance trade organization, representing approximately 320 insurers that write more than $125 billion in premiums each year. AIA member companies offer all types of property - casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage, specialty, workers' compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance.

- **American Tort Reform Association.** The American Tort Reform Association ("ATRA") is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA's membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business, and professional associations.

- **Association of Defense Trial Attorneys.** The Association of Defense Trial Attorneys ("ADTA") is a select group of diverse and experienced civil defense trial attorneys whose mission is to improve their practices through collegial

relationships, educational programs, and business referral opportunities, while maintaining the highest standards of professionalism and ethics. Membership in the ADTA is exclusive and limited to one "prime" member in any city with population less than one million.

- **DRI – *The Voice of the Defense Bar*.** DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI provides its members with various educational and other tools that help defense practitioners deliver high-quality, balanced and excellent service to their clients and corporations. DRI's network consists of over 22,000 defense practitioners and corporate counsel.

- **Federation of Defense & Corporate Counsel.** The Federation of Defense & Corporate Counsel ("Federation") was founded seventy-five years ago as an international defense organization dedicated to the principles of knowledge, justice, and fellowship. Members include: (1) practicing lawyers actively engaged in the private practice of law who devote a substantial amount of their professional time to the representation of insurance companies, associations or other corporations, or others, in the defense of civil litigation and have been a member of the bar for at least eight years; or (2) corporate counsel and other executives engaged in the administration or defense of claims or for insurance companies, associations, or corporations who have national, regional or company-wide responsibility for a company of greater than local significance.

- **Financial Services Roundtable.** Financial Services Roundtable ("FSR") is the leading advocacy organization for America's financial services industry. With a 100-year tradition of service and accomplishment, FSR is a dynamic, forward-looking association advocating for the top financial services companies, keeping them informed on the vital policy and regulatory matters that impact their business. FSR members include the leading banking, insurance, asset management, finance and credit card companies in America. We are financing the American economy — creating jobs, expanding businesses, securing homes, businesses and retirement, insuring growth and building consumer confidence.

- **Insurance Information Institute.** The Insurance Information Institute ("I.I.I.") seeks to improve public understanding of insurance – i.e., what it does and how it works. I.I.I. is recognized by the media, governments, regulatory organizations, universities and the public as a primary source of information, analysis and referral concerning insurance. The organization's members consist of both large

and small insurance companies doing business in the United States, as well as various universities and the Connecticut General Assembly.

- **International Association of Defense Counsel.** Established in 1920, the International Association of Defense Counsel ("IADC") advocates legal reform and professional development. IADC's activities benefit its approximately 2,500 members and their clients, as well as the civil justice system and the legal profession. IADC's membership consists of partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500.

- **Lawyers for Civil Justice.** Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

- **National Association of Mutual Insurance Companies.** The National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade association with more than 1,400 member companies serving more than 170 million auto, home, and business policyholders. NAMIC promotes public policy solutions that benefit insurance policyholders and the NAMIC member companies that it represents. NAMIC member companies write nearly $230 billion in annual premiums, and have 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets. Membership in NAMIC is not restricted to mutual insurance companies and is open to stock insurance companies, reinsurance companies and industry vendor companies.

- **National Association of Wholesaler-Distributors.** The National Association of Wholesaler-Distributors ("NAW") is a federation of wholesale distribution associations. NAW works with academia and the distribution consulting community to advance the state of knowledge in wholesale distribution. It also represents the wholesale distribution industry before Congress, the White House, and the judiciary on issues that affect the industry's various lines of trade. NAW

members represent all lines of trade and include some of the largest wholesaler-distributors in the United States.

- **National Retail Federation.** The National Retail Federation ("NRF") advances the interests of the retail industry through advocacy, communications and education. NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation's largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans.

- **Pharmaceutical Research and Manufacturers of America.** The Pharmaceutical Research and Manufacturers of America ("PhRMA") represents the country's leading biopharmaceutical research companies. PhRMA's mission is to conduct effective advocacy for public policies that encourage the discovery of important, new medications for patients by biopharmaceutical research companies. PhRMA members, which include some of the largest pharmaceutical companies in the United States, invest billions in the research and development of innovative medicines that enable patients to live longer, healthier and more productive lives.

- **Product Liability Advisory Council.** Formed in 1983, the Product Liability Advisory Council ("PLAC") is a non-profit association that analyzes and shapes the common law of product liability and complex litigation. PLAC's mission is to help members successfully manage every link in the liability chain—from product design to manufacture to distribution through sale to end-users, and on to post-sale responsibilities. PLAC is comprised of more than 100 leading product manufacturers and 350 of the most elite product liability defense attorneys operating in the United States and abroad.

- **Property Casualty Insurers Association of America.** Property Casualty Insurers Association of America ("PCI") is the property casualty industry's most effective and diverse trade association. PCI represents nearly 1,000 member companies in a truly member-driven organization. PCI's purpose is to advocate its members' public policy positions in all 50 states and on Capitol Hill, and to keep its members current on the information that is critical to their businesses. Legislators and regulators depend on PCI as a source of accurate, data-driven information. Not spin. Not one-sided messages. Just solid insight about how

proposed legislation or regulation will affect our industry and the business community.

- **Small Business & Entrepreneurship Council.** The Small Business and Entrepreneurship Council ("SBE Council") is a 501c(4) advocacy, research and education organization dedicated to protecting small business and promoting entrepreneurship. SBE Council educates elected officials, policymakers, business leaders and the public about key policies that enable business start-up and growth. SBE Council's members include entrepreneurs and small business owners.

- **U.S. Chamber of Commerce.** The U.S. Chamber of Commerce ("Chamber") is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

- **Michigan Chamber of Commerce.** The Michigan Chamber of Commerce ("Michigan Chamber") encompasses approximately 6,600 member employers, trade associations and local chambers of commerce of every size and type in all 83 counties of the state. The Michigan Chamber's mission is to promote conditions favorable to job creation and business success in Michigan. Michigan Chamber member businesses provide jobs to 1.5 million residents. One of every 2.6 employees in Michigan works for a Chamber member firm.

- **State Chamber of Oklahoma.** Representing more than 1,500 Oklahoma businesses and 350,000 employees, the State Chamber of Oklahoma has been the state's leading advocate for business since 1926. The organization's mission is to advance public policies that promote Oklahoma businesses and employees.

- **Pennsylvania Chamber of Business and Industry.** Founded in 1916, the Pennsylvania Chamber of Business and Industry ("Pennsylvania Chamber") has served as "The Statewide Voice of Business™" by advocating public policies that expand private sector job creation and lead to a more prosperous Pennsylvania for all its citizens. The Pennsylvania Chamber is the largest business association in Pennsylvania, which consists of more than 9,400 member businesses of all sizes and industry sectors throughout the state—from sole proprietors to Fortune 100 companies—representing nearly 50 percent of the private workforce in the Commonwealth.

- **South Carolina Chamber of Commerce.** The South Carolina Chamber of Commerce ("South Carolina Chamber") is the leading statewide organization championing a favorable business climate for South Carolina companies and employees. Its mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. The South Carolina Chamber represents its members, which include both small and large companies, by assisting them with legislative advocacy and tracking, marketing, connecting and expanding their bottom line.

- **Virginia Chamber of Commerce.** The Virginia Chamber of Commerce ("Virginia Chamber") is the leading non-partisan business advocacy organization in the Commonwealth. Working in the legislative, regulatory, civic and judicial arenas at the state and federal level, the Virginia Chamber seeks to promote long-term economic growth in the Commonwealth. The Virginia Chamber's members include 25,000 Virginia companies, ranging from small businesses to Fortune 500 companies.

- **Wisconsin Manufacturers and Commerce.** Wisconsin Manufacturers and Commerce ("WMC") is the state chamber of commerce, the state manufacturers' association and the state safety council. Founded in 1911, WMC is Wisconsin's leading business association dedicated to making Wisconsin the most competitive state in the nation. The association has nearly 3,800 members that include both large and small manufacturers, service companies, local chambers of commerce and specialized trade associations.

- **Las Vegas Metro Chamber of Commerce.** The Las Vegas Metro Chamber of Commerce ("Las Vegas Chamber") is the largest business organization in Nevada. Founded in the early days of Las Vegas, the Las Vegas Chamber has effectively protected and strengthened the Southern Nevada business community, helping its member businesses grow and thrive and providing a voice for those businesses in local, state and federal government. The Las Vegas Chamber has thousands of member businesses from nearly every industry, representing more than 200,000 people.

- **Florida Justice Reform Institute.** The Florida Justice Reform Institute ("FJRI") is Florida's leading organization of concerned citizens, business owners, business leaders, doctors, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in Florida's civil justice system. FJRI's mission is to fight wasteful civil litigation through

legislation, promote fair and equitable legal practices, and provide information about the state of civil justice in Florida. To facilitate these goals, FJRI employs research and advocacy in support of meaningful tort reform legislation.

- **Louisiana Lawsuit Abuse Watch.** The Louisiana Lawsuit Abuse Watch ("LLAW") is a local non-partisan, nonprofit, citizen watchdog group dedicated to stopping lawsuit abuse that hurts Louisiana's families and threatens local businesses and jobs. Using community outreach, public education and grassroots advocacy, LLAW raises awareness about the costs and consequences of lawsuit abuse and urges elected officials to advance more balance, fairness and common sense to Louisiana's civil justice system. Since it was formed in 2007, LLAW has grown to nearly 6,000 supporters across the state, representing small business owners, health care providers, taxpayers, workers and their families.

- **South Carolina Civil Justice Coalition.** The South Carolina Civil Justice Coalition ("SCCJC") serves as the united voice for the business community on tort and workers' compensation issues; coordinating lobbying, legal, grassroots and public relations activities. Since 2003, SCCJC has been working to improve the legal climate in South Carolina and reduce the number and types of frivolous lawsuits brought against small, medium and large businesses who provide jobs and the many goods and services for South Carolina's citizens.

- **Texas Civil Justice League.** Founded in 1986, the Texas Civil Justice League ("TCJL") advocates for a fair and balanced judicial system in Texas. The Austin-based group is the oldest and largest state legal reform organization in the nation, with membership comprised of corporate businesses, law firms, professional and trade associations, health care providers and individual citizens.

APPENDIX B – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~strikethrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; ~~and~~

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment~~.~~; and

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

CHAPTER 804

CIVIL PROCEDURE — DEPOSITIONS AND DISCOVERY

NOTE: Chapter 804 was created by Sup. Ct. Order, 67 Wis. 2d 585, 654 (1975), which contains explanatory notes. Statutes prior to the 1983-84 edition also contain these notes.

804.01 General provisions governing discovery.

(1) DISCOVERY METHODS. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under sub. (3), and except as provided in ss. 804.015, 804.045, 804.08 (1) (am), and 804.09, the frequency of use of these methods is not limited.

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(am) *Limitations.* Upon the motion of any party, the court shall limit the frequency or extent of discovery if it determines that one of the following applies:

1. The discovery sought is cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.

2. The burden or expense of the proposed discovery outweighs its likely benefit or is not proportional to the claims and defenses at issue considering the needs of the case, the amount in controversy, the parties' resources, the complexity and importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

(b) *Insurance agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments

made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial.

(bg) *Third party agreements.* Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.

(c) *Trial preparation: materials.*

1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. This protection is forfeited as to any material disclosed inadvertently in circumstances in which, if the material were a lawyer-client communication, the disclosure would constitute a forfeiture under s. 905.03 (5). This protection is waived as to any material disclosed by the party or the party's representative if the disclosure is not inadvertent.

2. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) *Trial preparation: experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under par. (a) and acquired or developed in anticipation of litigation or for trial, may be obtained as follows:

1. A party may through written interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subd. 3. concerning fees and expenses as the court considers appropriate.

2. A party may, through written interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon motion showing that exceptional circumstances exist under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

3. Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for the time spent in responding to discovery under the last sentence of subds. 1. and 2.; and with respect to discovery obtained under the last sentence of subd. 1., the court may require, and with respect to discovery obtained under subd. 2., the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(e) *Specific limitations on discovery of electronically stored information.*

1g. A party is not required to provide discovery of any of the following categories of electronically stored information absent a showing by the moving party of substantial need and good cause, subject to a proportionality assessment under par. (am) 2.:

a. Data that cannot be retrieved without substantial additional programming or without transforming it into another form before search and retrieval can be achieved.

b. Backup data that are substantially duplicative of data that are more accessible elsewhere.

c. Legacy data remaining from obsolete systems that are unintelligible on successor systems.

d. Any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost. In response to a motion to compel discovery or for a protective order, the party from whom discovery is sought is required to show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from such sources only if the requesting party shows good cause, considering the limitations of par. (am). The court may specify conditions for the discovery.

1r. No party may serve a request to produce or inspect under s. 804.09 seeking the discovery of electronically stored information, or respond to an interrogatory under s. 804.08 (3) by producing electronically stored information, until after the parties confer regarding all of the following, unless excused by the court:

a. The subjects on which discovery of electronically stored information may be needed, when such discovery should be completed, and whether discovery of electronically stored information shall be conducted in phases or be limited to particular issues.

b. Preservation of electronically stored information pending discovery.

c. The form or forms in which electronically stored information shall be produced.

d. The method for asserting or preserving claims of privilege or of protection of trial-preparation materials, and to what extent, if any, the claims may be asserted after production of electronically stored information.

e. The cost of proposed discovery of electronically stored information and the extent to which such discovery shall be limited, if at all, under sub. (3) (a).

f. In cases involving protracted actions, complex issues, or multiple parties, the utility of the appointment by the court of a referee under s. 805.06 or an expert witness under s. 907.06 to supervise or inform the court on any aspect of the discovery of electronically stored information.

2. If a party fails or refuses to confer as required by subd. 1r., any party may move the court for relief under s. 804.12 (1).

3. If after conferring as required by subd. 1r., any party objects to any proposed request for discovery of electronically stored information or objects to any response under s. 804.08 (3) proposing the production of electronically stored information, the objecting party may move the court for an appropriate order under sub. (3).

(3) PROTECTIVE ORDERS.

(a) Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:

1. That the discovery not be had;

2. That the discovery may be had only by specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

3. That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

4. That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

5. That discovery be conducted with no one present except persons designated by the court;

6. That a deposition after being sealed be opened only by order of the court;

7. That a trade secret, as defined in s. 134.90 (1) (c), or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

8. That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(b) If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Section 804.12 (1) (c) applies to the award of expenses incurred in relation to the motion.

(c) Motions under this subsection may be heard as prescribed in s. 807.13.

(4) SEQUENCE AND TIMING OF DISCOVERY. Unless the parties stipulate or the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of

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discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(5) SUPPLEMENTATION OF RESPONSES. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(a) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to all of the following:

1. The identity and location of persons having knowledge of discoverable matters.

2. The identity of each person expected to be called as an expert witness at trial.

(b) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which 1. the party knows that the response was incorrect when made, or 2. the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(c) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(6) CUSTODY OF DISCOVERY DOCUMENTS.

(a) Unless the court in any action orders otherwise, the original copies of all depositions, interrogatories, requests for admission and responses thereto, and other discovery documentation shall be retained by the party who initiated the discovery or that party's attorney.

(b) The original copy of a deposition shall be retained by the attorney sealed as received from the person recording the testimony until the appeal period has expired, or until made a part of the record.

(7) RECOVERING INFORMATION INADVERTENTLY DISCLOSED. If information inadvertently produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

History: Sup. Ct. Order, 67 Wis. 2d 585, 654 (1975); 1975 c. 218; 1985 a. 236; Sup. Ct. Order, 130 Wis. 2d xix (1986); Sup. Ct. Order, 141 Wis. 2d xiii (1987); 1993 a. 486; Sup. Ct. Order No. 95-03, 191 Wis. 2d xix (1995); 1997 a. 35, 133; 2007 a. 20; Sup. Ct. Order No. 09-01, 2010 WI 67, filed 7-6-10, eff. 1-1-11; Sup. Ct. Order No. 09-01A, 2010 WI 129, 329 Wis. 2d xix; Sup. Ct. Order No. 12-03, 2012 WI 114, 344 Wis. 2d xxi; 2015 a. 55; 2017 a. 235.

Judicial Council Note, 1986: Sub. (6) requires that the originals of discovery documents be retained by the party who initiated the discovery, or his or her attorney, unless the court otherwise directs, until the time for appeal has expired. [Re Order eff. 7-1-86.]

Judicial Council Note, 1988: Sub. (3) (c) [created] allows motions for protective orders to be heard by telephone conference. [Re Order effective Jan. 1, 1988]

Judicial Council Note, 1995: The revision to sub. (2) (d) 1. makes it unnecessary to obtain a court order to take an expert's deposition. By mutual agreement, practitioners commonly agree to take experts' depositions without troubling the court for an order. The court's power to control the discovery process is sufficient to prevent abuses. The revision is based on Rule 26 (b) (4) (A), F.R.C.P. Subsection (2) (d) 2. is amended to specify that discovery of non-testifying experts may be made by interrogatories or depositions. The revision is based on Rule 26 (b) (4) (B), F.R.C.P.

Supreme Court Note, 2010: Sub. (2) (e) was created as a measure to manage the costs of the discovery of electronically stored information. If the parties confer before embarking on such discovery, they may reduce the ultimate cost.

The rule does not require parties to confer before commencing discovery under s. 804.05 (Depositions upon oral examination), s. 804.06 (Depositions upon written questions), s. 804.08 (Interrogatories to parties); or s. 804.11 (Requests for admission). These discovery devices, if employed before serving a request for production or inspection of electronically stored information, may lead to more informed conferences about the potential scope of such discovery.

Parties may not be able to reach consensus on how discovery of electronically stored information is to be managed. Accordingly, subs. (e) 2. and (e) 3. confer authority on the court to intervene as appropriate. In determining whether to issue an order relating to discovery of electronically stored information, the circuit court may compare the costs and potential benefits of discovery. *See Vincent & Vincent, Inc. v. Spacek,* 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981). It is also appropriate to consider the factors specified in the Advisory Committee notes to Fed. R. Civ. P. 26(b)(2)(B): (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information

that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

Judicial Council Note, 2012: Sup. Ct. Order No. 12-03 states that "the Judicial Council Notes to Wis. Stat. § 804.01 (2) (c), 804.01 (7), 805.07 (2) (d), and 905.03 (5) are not adopted, but will be published and may be consulted for guidance in interpreting and applying the rule."

Sub. (2) (c) is amended to make explicit the effect of different kinds of disclosures of trial preparation materials. An inadvertent disclosure of trial preparation materials is akin to an inadvertent disclosure of a communication protected by the lawyer-client privilege. Whether such a disclosure results in a forfeiture of the protection is determined by the same standards set forth in Wis. Stat. s. 905.03(5). A disclosure that is other than inadvertent is treated as a waiver. The distinction between "waiver" and "forfeiture" is discussed in cases such as State v. Ndina, 2009 WI 21, ¶¶28-31, 315 Wis. 2d 653.

Sub. (7) is modeled on Fed. R. Civ. P. 26(b)(5)(B), the so-called "clawback" provision of the federal rules. The following Committee Note of the federal Advisory Committee on Civil Rules regarding the 2006 Amendments to the Federal Rules of Civil Procedure (regarding discovery of electronically stored information) is instructive in understanding the scope and purpose of Wisconsin's version:

The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

The trial court has no authority to order the production of documents relevant to a claim upon which it could grant no relief. State ex rel. Rilla v. Dodge County Circuit Court, 76 Wis. 2d 429, 251 N.W.2d 476 (1977).

Discovery, although it has a purpose of finding admissible evidence, does not imply that what is discovered will be admissible. Shibilski v. St. Joseph's Hospital, 83 Wis. 2d 459, 266 N.W.2d 264 (1978).

When the cost of discovery was several times greater than the claim for damages, a protective order against discovery was appropriate. Vincent & Vincent, Inc. v. Spacek, 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981).

A highly placed state official who seeks a protective order should not be compelled to testify on deposition unless a clear showing is made that the deposition is necessary to prevent prejudice or injustice. State v. Beloit Concrete

Stone Co. 103 Wis. 2d 506, 309 N.W.2d 28 (Ct. App. 1981).

Public records germane to pending litigation were available under s. 19.35 even though the discovery cutoff deadline had passed. State ex rel. Lank v. Rzentkowski, 141 Wis. 2d 846, 416 N.W.2d 635 (Ct. App. 1987).

A lawyer's decision to spend a client's resources on photographic or video surveillance is protected work product. Disclosure of the fact of the surveillance and description of the materials obtained would impinge on the core of the work-product doctrine. Ranft v. Lyons, 163 Wis. 2d 282, 471 N.W.2d 254 (Ct. App. 1991).

A litigant's request to see his or her file that is in the possession of current or former counsel does not waive the attorney-client and work-product privileges and does not allow other parties to the litigation discovery of those files. Borgwardt v. Redlin, 196 Wis. 2d 342, 538 N.W.2d 581 (Ct. App. 1995), 94-2701.

Discoverability of lawyer work product is discussed. State v. Hydrite Chemical Co. 220 Wis. 2d 51, 582 N.W.2d 411 (Ct. App. 1998), 96-1780.

A substantiated assertion of privilege is substantial justification for failing to comply with an order to provide or permit discovery. Burnett v. Alt, 224 Wis. 2d 72, 589 N.W.2d 21 (1999), 96-3356.

Unfiled pretrial materials in a civil action between private parties are not public records and neither the public nor the press has either a common law or constitutional right of access to those materials. State ex rel. Mitsubishi v. Milwaukee County, 2000 WI 16, 233 Wis. 2d 1, 605 N.W.2d 868, 99-2810.

The test of whether the work-product doctrine under sub. (2) (c) applies is whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Once a matter is classified as work product, the party moving for discovery must make an adequate showing that the information sought is unavailable from other sources and that a denial of discovery would prejudice the movant's preparation for trial. Lane v. Sharp Packaging Systems, 2002 WI 28, 251 Wis. 2d 68, 640 N.W.2d 788, 00-1797.

Discoverability of work-product materials reviewed by testifying experts. Matthews. Wis. Law. June 2002.

The new Wisconsin rules of civil procedure: Chapter 804. Graczyk, 59 MLR 463.

Witness statements: Current state of discovery in Wisconsin. Van Domelen and Benson. WBB May 1988.

What You Need to Know: New Electronic Discovery Rules. Sankovitz, Grenig & Gleisner. Wis. Law. July 2010.

E-Discovery: Who pays? Edwards. Wis. Law. Oct. 2012.

Sweeping Changes to Rules of Civil Procedure. Billings, Gegios, and Bialzik. Wis. Law. June 2018.

804.015 Limits on discovery by prisoners.

148 A.3d 812
Superior Court of Pennsylvania.

WFIC, LLC
v.
Donald LABARRE, Jr., Esquire, PAFCO Investments LLC and Peter Ferentinos and Milton Martinez and Deborah Kocher and Polymer Dynamics, Inc. and Brad Jacoby and William Peoples and Carolyn Peoples and Abraham Barth and Duane Peoples and Dan Kacmar and Scott Peoples and Craig Peoples and Joseph Rock and Clifford O'Hearne and Arthur Peoples and Elizabeth Huggett and Stanley Staffeld and Peter Staffeld and Richard Peiter
Appeal of: Bruce McKissock, Esquire

No. 1985 EDA 2015
|
Argued May 17, 2016
|
Filed September 13, 2016

Synopsis

Background: Attorney brought unjust enrichment action against lender and investors who funded former client's litigation after attorney was discharged. The Court of Common Pleas, Philadelphia County, Civil Division, No(s): Civil Action No. 03183, Sept. Term, 2011, Glazer, J., granted summary judgment in favor of lender and investors, and former attorney appealed.

Holdings: The Superior Court, No. 1985 EDA 2015, Bender, P.J.E., held that:

attorney did not have valid charging lien against litigation proceeds;

amended fee agreement between attorney's former client and litigation fund investors was champertous;

attorney did not have standing to bring unjust enrichment claim; and

proceeds received by lender did not constitute unjust enrichment.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***814** Appeal from the Order Entered May 11, 2015, In the Court of Common Pleas of Philadelphia County, Civil Division at No(s): Civil Action No. 03183 Sept. Term, 2011. GLAZER, J.

Attorneys and Law Firms

Arthur W. Lefco, Philadelphia, for McKissock, appellant.

Deborah Kocher, appellee, pro se.

David P. Heim, Philadelphia, for PAFCO and FERENTINOS, appellees.

William Peoples, appellee, pro se.

BEFORE: BENDER, P.J.E., PANELLA, J., and STEVENS, P.J.E. *

Opinion

OPINION BY BENDER, P.J.E.:

Appellant, Bruce McKissock, Esquire, appeals from the order entered on May 11, 2015, [1] granting supplemental motions for summary judgment in favor of moving Appellees [2] and dismissing Appellant's remaining cross-claim for unjust enrichment against Appellees. After careful review, we affirm.

As the trial court noted in its Pa. R.A.P. Rule 1925(a) opinion, "[t]his matter has a long and circuitous history in which [Appellant's] cross[-]claim for unjust enrichment remains the only claim left in this litigation." Trial Court Opinion, 5/11/15, at 1. [3] The underlying litigation in this case dates back to 1999, when Polymer Dynamics, Inc. (hereinafter "PDI") filed a lawsuit against Bayer Corporation in the Eastern District of Pennsylvania (hereinafter "Bayer Litigation"). [4] PDI was represented by Appellant at the trial level during the Bayer Litigation. [5] The record indicates that PDI expected recovery in the amount of at least $100 million. [6] TCO, 11/7/13, at 1. ***815** However, on June 24, 2005, the jury issued a verdict in favor of PDI in the amount of $12.5 million. "Dissatisfied with the outcome, both

parties appealed the award." TCO, 5/11/15, at 3. "PDI did not have the financial resources to continue the lengthy litigation and thus solicited investors willing to advance money into a litigation fund [i.e. the Litigation Fund Investors] ... in exchange for promissory notes." TCO, 8/14/14, at 1.

In addition to the Litigation Fund Investors, PAFCO also made several loans to assist PDI in funding the Bayer Litigation. TCO, 5/11/15, at 2. As explained in detail by the trial court in a related case:

> [O]n or about September 1, 2004, PAFCO had begun funding PDI through a series of loans. Additionally, PAFCO lent $991,140.00 to PDI through the PDI litigation fund.... Moreover, PAFCO obtained valid security interests for the debt in 2004 and 2008. Specifically, in 2004, PAFCO acquired the assignment of a 1999 UCC-1 security interest in PDI's assets (hereinafter "2004 secuity interest"). The 2004 security interest was assigned to PAFCO on October 6, 2004 and secured until December of 2014.... Additionally, PAFCO received another security interest in 2008 (hereinafter "2008 security interest") which continued through 2018.

Appellant's Brief at Appendix C (quoting the Trial Court Opinion issued on 8/14/14, at 2 in ***Grimes v. Polymer Dynamics, Inc., et al.*** (No. 00675 of November Term, 2011)) (citations to the record set forth in ***Grimes*** omitted).

On or about August 28, 2008, Appellant entered into an amended fee agreement with PDI ("2008 Fee Agreement"), which converted his original 7.5% contingency fee into a 1/3 contingency fee, "with the understanding that the Litigation Fund Investors would be paid from Appellant's increased contingency fee...." Appellant's Brief at 6. The jury verdict of $12.5 million was affirmed by the Third Circuit Court of Appeals in 2009. TCO, 5/11/15, at 3. On September 30, 2010, Bayer paid the verdict amount plus post-judgment interest totaling $14,412,765.65, and deposited the funds into an escrow account with Gross McGinley, LLP. [7] ***Id.*** PDI then authorized Gross McGinley, LLP to distribute the funds to pay taxes owed to the IRS, the Commonwealth of Pennsylvania, and the City of Allentown, as well as legal fees owed to Gross McGinley, LLP and Bochetto & Lentz, P.C. ***Id. See also*** TCO, 11/6/14, at 2. The balance remaining in escrow after paying taxes and legal fees was insufficient to pay the full amount of the secured debt owed to PAFCO. [8] Thus, PAFCO agreed to reduce the balance it was owed and to accept the remaining escrow balance as payment in full of its debt. TCO, 11/6/14, at 2. Upon receipt of the funds, PAFCO chose to disburse funds to numerous Litigation Fund Investors in an effort to avoid future litigation. [9] ***Id.*** Appellant did not receive ***816** any payment for attorney fees incurred in the Bayer Litigation. TCO, 5/11/15, at 4.

On September 27, 2011, WFIC, LLC ("WFIC") [10] instituted this action with the filing of a complaint alleging unlawful distribution of the litigation proceeds, unjust enrichment, and seeking a determination that WFIC had first priority rights to the proceeds. ***See*** WFIC's Complaint, 9/27/11. On July 12, 2012, Appellant filed an Answer with New Matter asserting the following cross-claims: Count I—Breach of Contract against PDI; Count II—*Quantum Meruit* against PDI; Count III—Unjust Enrichment against William Peoples, [11] Peter Ferentinos, PAFCO, and individual Litigation Fund Investors [12]; Count IV—Seeking Declaratory Judgment; Count V—Request for Accounting against all named defendants in Count III; Count VI—Cross-Claims pursuant to Pa.R.C.P. 1031.1 against PDI, William Peoples, Peter Ferentinos, and PAFCO.

After extensive litigation, the trial court ruled that WFIC did not have a perfected security interest in the proceeds of the Bayer Litigation and, therefore, did not maintain priority over other secured creditors. TCO, 11/7/13, at 7. Following the entry of this order, Appellant's cross-claims remained pending and multiple cross-claim defendants filed supplemental motions seeking summary judgment against Appellant. The trial court granted summary judgment in favor of PAFCO and Peter Ferentinos with respect to Counts V and VI of Appellant's cross-claim. Additionally, the supplemental motions filed by cross-claim defendants Fred Appelgate Trust, Bruce Evans, William B. Fretz, Richard Hansen, Anthony W. Hitschler, and Holly Zug Trust, were dismissed as moot due to an agreement to enter into mutual releases. Trial Court Order, 5/11/15, at 1. All other pending claims for unjust enrichment were granted in favor of the remaining cross-claim defendants and Appellant's cross-claim for unjust enrichment was dismissed in its entirety. ***Id.***

Subsequently, Appellant filed a timely Notice of Appeal dated June 9, 2015. Herein, Appellant presents the following statement of questions involved:

1. Was [Appellant's] right to payment of his legal fees from the Bayer award superior to PAFCO's rights to the award[?]

2. Did [Appellant] have a valid charging lien on the Bayer award[?]

3. Does [Appellant] have standing to assert unjust enrichment claims against Appellees[?]

4. Did the disputed investors directly benefit from [Appellant's] legal services rendering them liable for unjust enrichment[?]

5. Did [Appellant's] right to recover attorneys' fees from the Bayer award have priority over all payments made ***817** to persons who were not legitimate litigation fund investors[?]

Appellant's Brief at 4.

Our standard of review with respect to a trial court's decision to grant or deny a motion for summary judgment is well-settled:

> A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary.
>
> In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law. Lastly, we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.

Thompson v. Ginkel, 95 A.3d 900, 904 (Pa.Super.2014) (citations omitted).

To begin, we address the issue of whether Appellant had a valid charging lien on the award in the Bayer Litigation. The 2008 Fee Agreement upon which Appellant bases his claim provides in pertinent part as follows:

> NOW THEREFORE, in consideration of [Appellant's] agreement to continue prosecution of this litigation, it is hereby agreed and intended between the parties on the following fee arrangement:
>
> 1. Based on the current award of $12.5 Million, plus accrued interest, [Appellant] shall be entitled to a 1/3 gross legal fee;
>
> 2. From the 1/3 gross legal fee, for and in consideration of loan accommodations in an amount of up to Three Million Dollars ($3,000,000.00) to the [PDI] Litigation Fund, [Appellant] has agreed to pay principal, interest and incentive to the [PDI] litigation fund note holders, as [i]dentified.
>
>   a. This payment has priority over any and all other payments and will be paid prior to any payment to [Appellant] under this fee arrangement with PDI or payment of obligations under the March 1, 2005 Revised Fee Agreement with M & H.
>
> ...
>
> 4. The firm of M & H shall subordinate its right to repayment of their expenses and its right to receive its contingent fee interest in the $12.5 Million Verdict to the payout of the PDI Litigation Fund expense. Once the PDI litigation fund expenses are satisfied, any remaining portion of the 1/3 gross legal fee on the $12.5 Million Verdict will be allocated to reimburse M & H for expenses advanced and to the payment of M & H's contingency fee agreement (the March 1, 2005 Revised Fee Agreement) in that Verdict.
>
> 5. In regards to any tax liens, the balance of the award recovery, net of the attorney fees/litigation fund payments, would exceed any pending tax lien.
>
> 6. If no further recovery is obtained, then [Appellant] will receive no further compensation for the legal services ***818** he has rendered in this matter. However, PDI shall

> be responsible for reimbursement of out-of-pocket costs advanced by [Appellant].
>
> ...
>
> 8. This Agreement constitutes the entirety of the Amended and Restated Fee Agreement entered into between PDI, [Appellant] and M & H, and the terms and conditions of this Agreement shall be controlled by applicable Pennsylvania law. Any dispute regarding payment of fees or reimbursement of costs on this matter shall be resolved by binding arbitration between the parties.

TCO, 5/11/15, at 2-3.

Appellant argues that the 2008 Fee Agreement created a charging lien, which entitled him to a security interest in the Bayer Litigation proceeds, and that PAFCO and other creditors of PDI should have been paid only after he had been paid. Appellant's Brief at 15, 19. However, as the trial court previously explained in the related ***Grimes*** matter:

> [T]his court is wary of allowing an attorney charging lien to proceed in this fashion as it is contrary [to] public policy. Attorney charging liens create priority over other creditors. Attorney charging liens are enforced to ensure that attorneys are paid for work performed, not for creditors to secure priority.... Potentially, if allowed to proceed, attorneys could create charging liens to defraud creditors out of rightfully secured priority positions. This court finds that the attorney charging lien created by the Amended Agreement is invalid and against public policy.

TCO, 8/14/14, at 5-6 (attached to Appellant's Brief as Appendix C).

Moreover, we conclude that the 2008 Fee Agreement is champertous and, therefore, invalid.

> Champerty may be defined as the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute or some profit out of the litigation. Maintenance is an officious intermeddling in a suit that in no way belongs to one, by maintaining or *assisting either party with money* or otherwise, to prosecute or defend it.[13] An agreement by a stranger to defray the expenses of a suit in which he has no interest or to give substantial support and aid thereto in consideration of a share of the recovery or the proceeds thereof is condemned by the courts as champertous[.]

In re Frazier's Estate, 75 Pa. D. & C. 577, 594 (1951) (emphasis added). ***See also Frank v. TeWinkle***, 45 A.3d 434, 438 (Pa.Super.2012) (noting that "the common law doctrine of champerty remains a viable defense in Pennsylvania.")

In order to establish a *prima facie* case of champerty, the following three elements must exist: (1) the party involved must be one who has no legitimate interest in the suit; (2) the party must expend its own money in prosecuting the suit; and (3) the party must be entitled by the bargain to share in the proceeds of the suit. 16 Summ. Pa. Jur. 2d Commercial Law § 4:88 (2d ed.). ***See also Belfonte v. Miller***, 212 Pa.Super. 508, 243 A.2d 150, 152 (1968) (defining a champertous agreement as "one in which a person having otherwise no interest in the subject matter of an action undertakes to carry on the suit at ***819** his own expense in consideration of receiving a share of what is recovered").

The requisite elements of champerty have all clearly been met in the present case. The Litigation Fund Investors are completely unrelated parties who had no legitimate interest in the Bayer Litigation. The Litigation Fund Investors loaned their own money simply to aid in the cost of the litigation, and in return, were promised to be paid "principal, interest, *and incentive*" out of the proceeds of the litigation. ***See*** 2008 Fee Agreement (emphasis added). "Under Pennsylvania law, if an assignment is champertous, it is invalid." ***Frank***, 45 A.3d at 438. Accordingly, we are constrained to conclude that the 2008 Fee Agreement is invalid and, therefore, Appellant is not entitled to any fees under said agreement.

In light of our determination that Appellant does not have a valid claim for attorney fees, we deem the issues raised by Appellant regarding the priority of his right to payment over PAFCO and "persons who were not legitimate litigation fund investors" to be moot and, therefore, we need not address the merits of these claims. "It is well established that the appellate courts of this Commonwealth will not decide moot ... questions." ***Commonwealth v. Smith***, 336 Pa.Super. 636, 486 A.2d 445, 447 (1984).

Finally, we address Appellant's unjust enrichment claims. Appellant avers that the trial court erred in finding that he has no standing to bring unjust enrichment claims against Appellees. Appellant's Brief at 21. Additionally, Appellant asserts that Appellees were "unjustly enriched as a result of directly receiving the benefits of [his] legal services." ***Id.*** at 27.

> "Unjust enrichment" is essentially an equitable doctrine. The elements of unjust enrichment are benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Whether the doctrine applies depends on the unique factual circumstances of each case. In determining if the doctrine applies, we focus not on the intention of the parties, but rather on whether the defendant has been unjustly enriched.
>
> Moreover, the most significant element of the doctrine is whether the enrichment of the defendant is unjust. The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff.

Styer v. Hugo, 422 Pa.Super. 262, 619 A.2d 347, 350 (1993) (citations omitted).

Here, it is clear that Appellant lacks standing to raise unjust enrichment claims against Appellees. As explained by the trial court:

> [Appellant] lacks standing to bring the claim for unjust enrichment against non[-]clients[,] PAFCO and the Litigation Fund Investors. The case law provides that a discharged attorney does not have a *quantum meruit* action against the attorney who ultimately settles the case, but may have a valid *quantum meruit* claim against the client. [***See Mager v. Bultena***, 797 A.2d 948 (Pa.Super.2002)]. The same concept applies here. At no time were PAFCO and the Litigation Fund Investors [Appellant's] clients nor did [Appellant] represent PAFCO or the Litigation Fund Investors in the underlying action. [Appellant's] client was PDI. Hence, [Appellant] may only recover its attorney fees against PDI, its client and not third party creditors.

***820** TCO, 5/11/15, at 6 (footnotes omitted). We discern no abuse of discretion or error of law by the trial court and, thus, we uphold its decision. Moreover, we concur with the trial court's observation that Appellant's only legitimate potential claim for attorney fees lies with his former client, PDI, who is not a party in this appeal.

Additionally, even if Appellant was found to have standing, his claims of unjust enrichment against Appellees are wholly without merit.

> Although PAFCO and the Litigation Fund Investors did realize a benefit from [Appellant's] legal services, the distribution of the proceeds by PDI to PAFCO and by PAFCO to the Litigation Fund Investors does not constitute unjust enrichment. PAFCO was a perfected secured creditor. Secured creditors with valid UCC-1 filings have priority over unsecured creditors. This court has already ruled that [Appellant] did not have a charging lien providing him with a security interest in the Bayer Proceeds. As such, [Appellant] was an unsecured creditor. Since PAFCO was a secured creditor and [Appellant] was an unsecured creditor, the distribution of the verdict funds to PAFCO before any payments to [Appellant] was proper based on the priority of perfected security interests. Hence, the distribution and retention of the litigation funds by PAFCO is not unjust. Consequently, the cross[-]claim for unjust enrichment fails against PAFCO.
>
> Similarly, the distribution to the Litigation Fund Investors also fails to satisfy the unjust requirement for a claim of unjust enrichment to exist. PAFCO, the holder of a perfected secured interest, was properly in possession of the verdict proceeds once the tax obligations were satisfied. Once the funds were in PAFCO's possession, PAFCO returned the principal loaned by the Litigation Fund

> Investors. PAFCO's rights to the proceeds were superior to that of [Appellant]. Once in PAFCO's possession, PAFCO was privileged to distribute the funds to the Litigation Fund Investors if it so chose. As such, [Appellant's] claim for unjust enrichment fails against the Litigation Fund Investors as well.

TCO, 5/11/15, at 5-6 (footnotes omitted). After careful review, we determine that the trial court's findings are adequately supported by the record.

As Appellant has failed to establish a genuine issue of material fact, we conclude that the trial court did not commit an error of law or abuse its discretion when it granted Appellees' supplemental motions for summary judgment.

Order affirmed.

All Citations

148 A.3d 812, 2016 PA Super 209

Footnotes

* Former justice specially assigned to the Superior Court.

1 In his Notice of Appeal, Appellant indicates that he is also appealing from "the Orders and/or Opinions adopted and incorporated by reference in the Opinion dated May 11, 2015, including but not limited to the Orders and/or Opinions dated November 7, 2013 (misidentified as November 3, 2013), July 18, 2014, and January 12, 2015, and from all prior adverse Orders and rulings made final by entry of the Order and Opinion dated May 11, 2015, which dismissed the final claim pending in the trial court." Appellant's Notice of Appeal, 6/9/15, at 1-2.

2 Motions for Summary Judgment were filed by the following Appellees: PAFCO Investment LLC (hereinafter "PAFCO"), Peter Ferentinos (majority shareholder and President of PAFCO), and William Peoples, Debbie Kocher, Craig A. Peoples, Duane Peoples, Brad Jacoby, Dan Kacmar, Milthon Martinez, Jessica Moran, Joseph Rock, Peter Staffeld, Elizabeth Huggett, Arthur Peoples, Scott Peoples, and Stanley Staffeld (hereinafter "Litigation Fund Investors").

3 Herein, we refer to multiple trial court opinions, all of which will be referred to by the abbreviation "TCO" followed by the date of the opinion.

4 ***Polymer Dynamics, Inc. v. Bayer Corp.***, No. 99–4040, 2007 WL 2343796, at *1 (E.D.Pa. Aug. 1, 2007), *aff'd in part, vacated in part*, 341 Fed.Appx. 771 (3d Cir.2009).

5 On February 2, 2004, PDI entered into an engagement letter with the firm of McKissock & Hoffman ("M & H") for representation in the Bayer Litigation. Appellant was President of M & H and signed the engagement letter with PDI on behalf of M & H. In September 2007, the firm of M & H dissolved, and Appellant became employed at Marshall, Dehenney, Coggin and Werner. Appellant personally entered a new fee agreement with PDI dated October 1, 2007.

6 "PDI alleged that Bayer machinery, for which PDI relied upon to maintain its business, had malfunctioned, resulting in PDI's insolvency. The complaint also included allegations of fraud, breach of fiduciary duty, misappropriation of confidential information, unfair competition, and breach of disclosure agreement." TCO, 11/7/13, at 1, n.6.

7 In early 2009, prior to the decision of the Third Circuit Court of Appeals in the Bayer Litigation, Appellant withdrew as counsel for PDI due to a conflict of interest. PDI later hired the law firm of Gross, McGinley, LaBarre and Eaton (Gross McGinley, LLP) for the purpose of collecting the jury award. *Pro Se* Appellee's Brief (Deborah Kocher and William Peoples) at 15, 17.

8 On August 14, 2014, the trial court ruled in the related ***Grimes*** case that PAFCO was the senior secured creditor of PDI at the time the judgment was satisfied in the Bayer Litigation.

9 PAFCO negotiated with individual Litigation Fund Investors for the payment of principle only, excluding interest and incentive due under the 2008 Fee Agreement. *Pro Se* Appellee's Brief (Deborah Kocher and William Peoples) at 19.

10 Larry Martin, a creditor of PDI, assigned his rights to the Bayer Litigation proceeds to WFIC.

11 William Peoples was the majority shareholder and President of PDI.

12 Appellant named the following Litigation Fund Investors individually as cross-claim defendants: Fred Appelgate Trust, Bruce Evans, William B. Fretz, Richard Hansen, Jackie Herbst, Anthony W. Hitschler, Elizabeth Huggett, Brad Jacoby, Dan Kacmar, Debbie Kocher, Milthon Martinez, Joseph McHale, Jessica Moran, Clifford O'Hearne, Arthur Peoples, Craig Peoples, Duane Peoples, Scott Peoples, Richard Reiter, Joseph Rock, Peter Staffeld, Stanley Staffeld, and Holly Zug Trust.

13 "The distinction between maintenance and champerty is this: Where there is no agreement to divide the thing in suit, the party intermeddling is guilty of maintenance only; but where he stipulates to receive part of the thing in suit, he is guilty of champerty." ***In re McIlwain's Estate***, 27 Pa. D. & C. 619, 622 (1942).

688 So.2d 265
Court of Civil Appeals of Alabama.

Willie G. WILSON
v.
Annie Ruth HARRIS.

2950010.
|
Aug. 30, 1996.
|
Certiorari Denied Dec. 20, 1996
Alabama Supreme Court 1952101.

Synopsis

Borrower brought declaratory judgment suit seeking determination that agreement with lender was void. Lender counterclaimed for breach of contract and promissory fraud. The Circuit Court, Lowndes County, H. Edward McFerrin, J., held that agreement under which borrower agreed to pay lender one third of any recovery she ultimately obtained in wrongful death case in which judgment in her favor was pending on appeal was unenforceable. Lender appealed. The Supreme Court transferred case to the Court of Civil Appeals for lack of jurisdiction. The Court of Civil Appeals, Crawley, J., held that: (1) agreement was gambling contract and therefore void under statute, and (2) agreement was closely akin to champerty and violated public policy.

Affirmed.

Robertson, P.J., concurred in result.

Attorneys and Law Firms

***266** Jim L. DeBardelaben and Dorothy F. Norwood, Montgomery, and Wayne P. Turner, Montgomery, for appellant.

James Allen Main and P. Leigh O'Dell of Beasley, Wilson, Allen, Main & Crow, P.C., Montgomery, and Tyrone Means and Anita Kelly of Thomas Means & Gillis, P.C., Montgomery, for appellee.

On Application for Rehearing

CRAWLEY, Judge.

The opinion of June 28, 1996, is withdrawn, and the following opinion is substituted therefor. Willie George Wilson appeals from an adverse ruling in an action for a declaratory judgment filed by Annie Ruth Harris.

In 1989, Harris sued Sears, Roebuck & Company, and other defendants, for the wrongful death of her daughter, who died from carbon monoxide poisoning due to a faulty water heater. In February 1992, a Lowndes County jury awarded Harris $4 million. One defendant settled with Harris and two defendants appealed. See *Sears, Roebuck & Co. v. Harris,* 630 So.2d 1018 (Ala.1993), cert. denied, 511 U.S. 1128, 114 S.Ct. 2135, 128 L.Ed.2d 865 (1994).

Harris's wrongful death case was pending on appeal for two years. During that time, Harris told Wilson, a friend she had known for 20 years, that she was in great financial need, and she asked Wilson to advance her money. Wilson agreed to give Harris up to $400 per month if Harris would assign to him a portion of any recovery she eventually realized from her lawsuit. Harris signed two agreements, dated April 7 and April 22, 1992, respectively, that provided the following:

"The April 7 Agreement

"The following agreement has been entered into by Annie Ruth Harris and Willie George Wilson, with the stipulation that this is the first part of an assignment that will be later drawn up between the above mentioned parties.

"Annie Ruth Harris, by signing this agreement hereby states that she is aware of the terms of this loan and is in agreement with it herein. And that by no means was she tricked into agreeing or manipulated by Willie G. Wilson to sign this agreement.

"Willie G. Wilson is loaning $1,300.00 as of this day (April 7, 1992). Upon a later date this agreement shall be an additive to an original assignment in which Annie Ruth Harris will agree to pay Willie G. Wilson 15% of monies recovered from all lawsuits she has pending. Other loans will be made from time [to time] up to $400 per month.

"This agreement shall be made more defined in the assignment that will be drawn up in the near future between both parties."

"The April 22 Agreement

"For value received, I hereby transfer and assign to WILLIE G. WILSON, one-third (1/3) of the money due or to become due under the Judgment in Lowndes ***267** County Civil Case # CV 90–35 dated 3–10–92 against State Industries, and Sears, with full power and authority to collect said sum as it becomes due and to give a receipt therefor in full discharge of said portion of the obligation." Without consulting her attorneys in the lawsuit, Harris signed both agreements in the law office of Wilson's attorney. The attorney's secretary testified by deposition that both she and the attorney explained the agreements to Harris before Harris signed them. The secretary recalled the following version of the event:

> "[W]hen [Harris] did it, I said '[O]kay, you got it straight now, you know what you're doing, right?' And she said, '[Y]eah, I know.' I said, '[O]kay, that means now if you got three million dollars, you know, by you signing it, that's gonna mean that Willie George could get a million.
>
> "She said, 'I know that. I know that. I know George. I've known George a long time. He's my friend and I want to do it, you know.' And she said, you know, she just let me know that she knew what she was doing. And I mean, even joked, you know to the point where, you know '[A] lot of people say that my oldest son is Willie George's anyway.' And I said, '[O]h, okay.' I said, '[T]hat's cool, you know, go ahead, you know.' ... I didn't—I didn't have any reason to think that she didn't understand it, you know, because she was adamant about doing it. She wanted to do it."

Harris denied that either Wilson's attorney or the attorney's secretary explained the agreements to her. She stated that when she signed the agreements, she read them and she knew what they said, but she did not understand what they meant. Harris stated that her understanding of the agreement was that if she recovered any money from the lawsuit, she would pay Wilson what she had borrowed plus "some extra money and the interest." On the other hand, if she did not recover any money from the lawsuit, she would not have to pay Wilson anything.

Harris testified by deposition that when she asked Wilson for a loan, "he told [her] about a contract he would have to draw up for [her] lawsuit, that he would get some of the—he would get half of the money." However, when Harris was asked whether she understood that, in the event she recovered, she would owe Willie George a percentage of the award, the following occurred:

> "A. I know I had to pay him back. I didn't know it was that much.
>
> "Q. But you knew it was a percentage?
>
> "A. A percentage. I did not know how much of a percentage."

When questioned about her understanding of the agreement to pay her lawyers a percentage of her recovery in the lawsuit, Harris testified:

> "Q. And you paid your attorneys who represented you by a percentage, didn't you?
>
> "A. I guess it was by percentage. I thought it was by the hour.
>
> "Q. You paid them by a percentage just like you made a deal to pay Mr. Willie George Wilson by a percentage, didn't you?
>
> "....
>
> "A. I did not know. Like I said, I did not know what that percent was. At the time when I signed the papers and I told them that I hired them to work for me, I did not know what the percentage was.
>
> "Q. So you had—
>
> "A. That's what I was really stating. I do not know what the percent is. If they say two percent, I would not know what that would mean.
>
> "Q. So you had the same understanding of the contract you had with your attorneys as you had with Mr. Willie George Wilson?
>
> "A. Yes."

Harris dropped out of school in the eleventh grade. She later received a GED certificate and completed training as a practical nurse or nurse's aide. She has six children and is presently divorced from her second husband. Her first husband died. She testified that she can read and write, but that she "had never been good at math."

***268** Wilson completed the seventh grade in school. When asked if he could read, he responded, "Not very well. Not

enough to feel comfortable with it." He is a self-employed home-builder. He testified by deposition that, sometimes, people want to buy his houses, but they cannot get financing, so he lets them make monthly payments to him until they can obtain conventional financing. He stated that he was not in the business of lending money, but "[i]f a person is in need and I know he's in need and if I have it, I lend [money] to him." He denied ever charging interest on such transactions. He also stated that he had entered into agreements like the one he had with Harris with other people. He described one such agreement as follows:

> "[Odessa Adams] came to me and wanted to borrow some money to save her car [from being repossessed] and some other things. And she told me about a lawsuit that she had pending....
>
> "And the lawsuit—the only way that she will be able to pay me back, if and when she win the lawsuit. If she doesn't win the lawsuit, she's not able to pay me back."

From March 1992 to June 1994, Wilson advanced funds to Harris in the amount of $4749.

In June 1994, when Harris learned that the appeal of her lawsuit had been concluded, she refused to pay Wilson one-third of her share of the judgment. Instead, she filed a declaratory judgment action seeking to have her agreements with Wilson declared void. Wilson filed a counterclaim alleging breach of contract and promissory fraud.

The trial court ruled that the agreements amounted to a series of loans that were unconscionable under Ala.Code 1975, § 5–19–16 (the Mini–Code). It also concluded that the agreements constituted gambling contracts that violated Ala.Code 1975, § 8–1–150, and were therefore unenforceable. The court found no factual merit to Wilson's promissory fraud claim, but determined that even if Harris had had no intent to perform her portion of the agreements, public policy would still prevent Wilson's recovery. The court granted a partial summary judgment for Harris, but entered a judgment in favor of Wilson in the amount of $4749, the total of his advancements to Harris. Wilson appealed to the Alabama Supreme Court, and the supreme court transferred the cause to this court for lack of jurisdiction.

Unconscionability

The trial court held that the agreements at issue were unconscionable loans under § 5–19–16 (the Mini–Code). Wilson argues that the provisions of the Mini–Code do not apply to him because he is not a "creditor" within the meaning of § 5–19–1(3). That section refers to those "who regularly extend or arrange for the extension of credit for which the payment of a finance charge is required."

We need not decide whether Wilson is a "creditor" within the meaning of the Mini–Code or whether the agreements are unconscionable because we hold that the trial court's judgment was correct on other grounds.

Gambling Contracts

Section 8–1–150, Ala.Code 1975, provides that "[a]ll contracts founded in whole or part on a gambling consideration are void." In *Thornhill v. O'Rear,* 108 Ala. 299, 19 So. 382 (1896), our supreme court observed that a gambling contract involves a wager and, defining "wager," the court stated:

> "A wager is nothing more than a bet, 'by which two parties agree that a certain sum of money, or other thing should be paid or delivered to one of them on the happening or not happening of an uncertain event.' "

108 Ala. at 302, 19 So. at 383 (citation omitted). The agreement here was that Harris would pay Wilson a sum of money upon the happening of an uncertain event over which neither party had control—Harris's recovery of damages after her personal injury lawsuit survived the appellate process.

Citing *State v. Stripling,* 113 Ala. 120, 123, 21 So. 409, 410 (1897), Wilson argues that the agreement is not a gambling contract because a gambling contract is one "whereby one party will be the gainer, and the other a loser," and under this agreement, Wilson claims, both parties will be gainers. That argument is unfounded in logic or common ***269** sense. We doubt that Harris would consider herself a "gainer" if she were required to give Wilson $833,000 in exchange for the $4749 advanced to her.

In the alternative, Wilson argues that if the agreements were gambling contracts, then Harris's action was untimely, because § 8–1–150 requires that an action to recover sums paid pursuant to a gambling contract must be brought within six months of the time of payment. That portion of the statute is obviously not applicable here. Harris paid no sums pursuant

to the agreement. Instead, she filed a declaratory judgment action to have the agreement declared unenforceable.

In *O'Farrell v. Martin,* 161 Misc. 353, 292 N.Y.S. 581 (N.Y.Cty.Ct.1936), the New York court dealt with an agreement similar to the one before us. In that case, a woman agreed to give her son-in-law half the proceeds of an insurance policy on the life of her daughter, and the son-in-law promised to give his mother-in-law part of the proceeds of a pending lawsuit alleging the wrongful death of his wife. In response to the argument that the agreement was void as a "gambling contract," the New York court held:

> "If there were no relationship by affinity between the parties, the court might feel constrained to hold the agreement by [the son-in-law] one for a wager. But a gambling contract generally exists only between parties who have no interest in the subject-matter except as to the possible gain or loss resulting, while here the [mother-in-law] did have a legitimate interest in the outcome of the litigation. I think that as a result of this relationship the transaction is not within the purview of the statutes against gambling.
>
> "The class of cases which the agreement at bar most nearly approaches is that of an assignment to a layman of part of a cause of action in consideration of an advancement for payment of the costs thereof. At common law such an agreement was void as champerty and maintenance. That is no longer true. Hence, if the assignment of part of the insurance proceeds had been for the purpose of carrying on the litigation the agreement would be valid. I can see little if any distinction between such a case and the one now before me."

161 Misc. at 355, 292 N.Y.S. at 584–85 (citations omitted).

The factors which led the *O'Farrell* court to uphold the agreement and to find that it was *not* a gambling contract are absent here: Harris and Wilson are not related to each other by consanguinity or affinity, and Wilson had no legitimate interest in the outcome of the lawsuit other than the recovery of money. Those same factors indicate that the agreements here partake of some of the elements of champerty alluded to by the *O'Farrell* court.

> "It is generally held to be champerty for a person who is without interest in a suit, and is not a party or an attorney or relative of a party, to intrude and speculate in the litigation by agreeing to defray the expenses, or to give aid and support in the preparation and prosecution, of the suit in consideration of a share of the recovery or the proceeds thereof.... It is not maintenance to furnish assistance, in money or otherwise, to a poor litigant to enable him to carry on his suit if the advancement is made for reasons of charity or friendship and not for profit. Such a transaction must be entered into with the view of subserving the ends of justice alone, and if it is turned to the purpose of speculation by a stipulation for a share of the verdict or judgment it will amount to champerty."

14 C.J.S. *Champerty and Maintenance* § 12 at 156 (1991).

All of the elements of champerty do not exist here. Wilson did not provide financial aid to Harris in order to enable her to prepare and prosecute the wrongful death action against Sears; Harris already had a judgment on appeal in that action when Wilson became involved. The Wilson–Harris agreements are therefore not, strictly speaking, champertous. See *Lott v. Kees,* 276 Ala. 556, 558, 165 So.2d 106, 108 (1964)(at common law, champertor was one who aided a suit or carried on a suit at his own expense); *Weinberg v. Magid,* 285 Mass. 237, 189 N.E. 110 (1934)(champertous agreement is one made in contemplation of litigation); ***270** *Young v. Young,* 196 Mich. 316, 162 N.W. 993 (1917)(champertor is one who stirs up litigation).

Even though the agreement in this case does not satisfy all the requirements for champerty, we believe that it nevertheless violates the public policy against gambling and speculating in litigation. As our supreme court observed in *Lott v. Kees,* supra:

> "The doctrine of champerty is directed against speculation in lawsuits and to repress the gambling propensity of buying up doubtful claims.... [A]greements should be carefully

> watched and closely scrutinized, when called in question, and if found to have been made ... for the purpose of gambling in litigation, or to be so extortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them."

276 Ala. at 560, 165 So.2d at 110 (quoting *Brown v. Bigne,* 21 Or. 260, 266, 28 P. 11, 13 (1891)).

In *Hackett v. Hammel,* 185 Minn. 387, 241 N.W. 68 (1932), the Minnesota court construed an agreement to finance a lawsuit for a tenfold share of the verdict as champertous. The court observed:

> "The vice of [the champertous agreement] was that a layman, with no interest in the lawsuit or its subject matter and no relation to defendant, advanced money to carry on the litigation, not as a loan, but to speculate upon and purchase a share in the outcome. In the case of defeat, plaintiff would have gotten nothing. But, if victory came, he would have gotten ten times his investment. *Such speculation in litigation in which the adventurer has no interest otherwise and where he is in no way related to the party he aids, is champertous. The element of intrusion for the purpose of mere speculation in the troubles of others introduces the vice fatal to what otherwise would be a contract.*"

185 Minn. at 388, 241 N.W. at 69 (emphasis added).

Despite the fact that Wilson's involvement in Harris's lawsuit was post-trial, many of the evils pointed out by the *Hackett* court inhere in the Wilson–Harris agreement. Wilson, who had no relation to Harris and no legitimate interest in her lawsuit, engaged in speculation as to the outcome of the case for a share of the proceeds in the event of her success. We think such an agreement violates public policy and is void.

> "The question whether an agreement is void on the ground that it is contrary to public policy is to be determined by its general tendency. If that is opposed to the interests of the public, the agreement is void, even though in the particular case the intent of the parties may have been good and no injury to the public may have resulted. It matters not that any particular contract is free from any taint of fraud, oppression, or corruption.... The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country. It is enough that the contract belongs to a class which has a tendency contrary to the public good, although in the particular instance, no injury results."

Sampliner v. Motion Picture Patents Co., 255 F. 242, 251–52 (2d Cir.1918), rev'd on other grounds, 254 U.S. 233, 41 S.Ct. 79, 65 L.Ed. 240 (1920).

The general tendency of the Wilson–Harris agreement is opposed to the public interest because it condones speculation in litigation, makes sport of the judicial process, and tempts the unscrupulous to prey upon the distress of the ignorant and unfortunate. We hold that the agreement violates public policy and is therefore void because it is supported by a gambling consideration and its speculative characteristics make it closely akin to champerty.

The judgment of the trial court is affirmed.

ORIGINAL OPINION WITHDRAWN; OPINION SUBSTITUTED; APPLICATION FOR REHEARING OVERRULED; RULE 39(k) MOTION GRANTED IN PART AND DENIED IN PART; AFFIRMED.

THIGPEN, YATES, and MONROE, JJ., concur.

ROBERTSON, P.J., concurs in the result.

All Citations

688 So.2d 265

Ky. Rev. Stat. § 372.060

Section 372.060 - Champertous contracts and conveyances void

Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.

KRS 372.060

Effective:October 1, 1942
Recodified 1942 Ky. Acts ch. 208, sec. 1, effectiveOctober 1, 1942, from Ky. Stat. sec. 209.

361 P.3d 400
Supreme Court of Colorado.

OASIS LEGAL FINANCE GROUP, LLC; Oasis Legal Finance, LLC; Oasis Legal Finance Operating Company, LLC; and Plaintiff Funding Holding, Inc., d/b/a LawCash, Petitioners,
v.
Cynthia H. COFFMAN, in her capacity as Attorney General of the State of Colorado; and Julie Ann Meade, in her capacity as the Administrator, Uniform Consumer Credit Code, Respondents.

Supreme Court Case No. 13SC497
|
November 16, 2015

Synopsis

Background: National litigation finance companies brought action against Attorney General and Uniform Consumer Credit Code (UCCC) Administrator for declaratory judgment that funding agreements for personal injury litigation were not loans. Attorney General and Administrator counterclaimed to enjoin companies from making or collecting loans without being property licensed and to collect penalties and sanctions. The District Court, City and County of Denver, Brian Whitney and Edward D. Bronfin, JJ., granted state's motion for partial summary judgment. Companies appealed. The Court of Appeals, Gabriel, J., 2013 WL 2299721, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Hood, J., held that:

the agreements created "debt" as an obligation to repay and were "loans" subject to UCCC, and

the agreements were not sales or assignments.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***401** *Certiorari to the Colorado Court of Appeals*, Court of Appeals Case No. 12CA1130

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En Banc

Opinion

JUSTICE HOOD delivered the Opinion of the Court.

¶ 1 Petitioners are national litigation finance companies. They buy interests in the potential proceeds of personal injury cases by executing agreements with tort plaintiffs to whom the companies provide money while the cases are pending (typically, less than $1,500). By the terms of the agreements, the money cannot be used to prosecute the legal claims. Instead, the plaintiffs are supposed to use the funds to pay personal expenses while waiting for their lawsuits to settle or go to trial.

¶ 2 In exchange, the plaintiffs agree to pay the companies a sum of money from the future litigation proceeds. This sum includes the amount advanced, an additional amount based on a "multiplier" that increases with the length of time it takes to resolve the claims, and various application and administrative fees. If the litigation proceeds are less than the amount due, the plaintiffs are not required to repay the shortfall.

¶ 3 This case concerns the nature of these litigation finance transactions. The companies contend they are asset purchases, but a state regulatory body classifies them as loans. The specific issue we address is whether these transactions are "loans" subject to Colorado's Uniform Consumer Credit Code (the "UCCC" or the "Code"). §§ 5–1–101 to 5–13–103, C.R.S. (2015). We conclude they are.

¶ 4 We hold that litigation finance companies that agree to advance money to tort plaintiffs in exchange for future litigation proceeds are making "loans" subject to Colorado's UCCC even if the plaintiffs do not have an obligation to repay any deficiency if the litigation proceeds are ultimately less than the amount due. These transactions create debt, or an obligation to repay, that grows with the passage of time. We agree with the court of appeals that these transactions ***402** are "loans" under the Code, and we therefore affirm its judgment.

I. Facts and Procedural History

¶ 5 Oasis Legal Finance Group, LLC; Oasis Legal Finance, LLC; Oasis Legal Finance Operating Company, LLC (collectively, "Oasis"); and Plaintiff Funding Holding, Inc., d/b/a LawCash ("LawCash"), operate nationwide, but they began doing business in Colorado in 2004 and 2001, respectively. They provide money to plaintiffs with pending personal injury claims arising from events such as automobile accidents, slip and falls, construction site injuries, and medical malpractice incidents. The language and structure of Oasis's and LawCash's litigation finance agreements differ, but the salient features are the same.

A. The Oasis Agreement

¶ 6 Oasis's funding agreement is titled "Purchase Agreement." The agreement labels the tort plaintiff the "Seller" and the funding company the "Purchaser." It describes the transaction as a sale and assignment—stating, for example, that the "Seller sells and assigns, and the Purchaser buys and assumes, the Purchased Interest." The agreement defines "Purchased Interest" as "the right to receive a portion of the Proceeds equal to the Oasis Ownership Amount." "Proceeds" are "whatever [the Seller] receive[s] as a result of the legal claim, for example through a judgment, Arbitration or the like." "Oasis Ownership Amount" is "the amount Purchaser is to be paid out of the Proceeds" based on an attached payment schedule. [1] The tort plaintiff must authorize Oasis to obtain "a consumer credit report and/or other financial and credit information as part of the proposed transaction."

¶ 7 The Oasis agreement begins with two prominent, capitalized provisions in the signature box. First, it states that "NO PART OF THE PURCHASE PRICE WILL BE USED TO SUPPORT, DIRECT OR MAINTAIN THE LEGAL CLAIM OR ITS PROSECUTION." Second, it allows for the possibility that the Purchaser *may* recover nothing as a result of the transaction. It makes clear that "IF SELLER COMPLIES WITH THIS PURCHASE AGREEMENT AND RECOVERS NOTHING FROM THE LEGAL CLAIM CITED BELOW, THEN PURCHASER SHALL RECEIVE NOTHING," while simultaneously emphasizing that "SELLER IS NOT ENTITLED TO RECEIVE ANY PROCEEDS UNTIL PURCHASER HAS RECEIVED THE OASIS OWNERSHIP AMOUNT."

¶ 8 Oasis also acknowledges in the agreement that "Purchaser shall have no right to and will not make any decisions with respect to the conduct of the Legal Claim or any settlement or resolution thereof and that the right to make such decisions remains solely with Seller and Seller's Attorney." Consequently, the tort plaintiff retains control of the pending litigation.

¶ 9 In addition, the Oasis agreement requires Seller to treat the transaction as a sale—not a loan—for all purposes, including taxes. Likewise, it requires Seller to describe the Purchased Interest as an asset of Purchaser–not a debt obligation of Seller—in any bankruptcy proceedings.

B. The LawCash Agreement

¶ 10 LawCash's agreement is titled "Funding Agreement," though an earlier version bore the name "Lawsuit Investment Agreement." The agreement characterizes the transaction as an assignment of an interest in the proceeds from the

resolution of a pending case—but not, it makes plain, an assignment of the lawsuit or cause of action itself.[2] The amount assigned is equal to "the ***403** funded amount, together with accrued use fee, compounded monthly, and other fees or costs, from the proceeds of [the] [L]awsuit." "Proceeds" include "any money paid as a consequence of the Lawsuit whether by settlement, judgment or otherwise." The agreement alternately describes the transaction as a grant of a security interest and as a lien in those proceeds. A payment schedule lists payoff amounts, though the current sample agreement does not include any actual figures.[3]

¶ 11 The LawCash agreement echoes the Oasis agreement in several important respects. First, it restricts a tort plaintiff from using money advanced to finance the litigation proceedings. The money can be used for "life needs only."

¶ 12 Second, the LawCash agreement acknowledges the possibility that LawCash might receive nothing depending on the outcome of the litigation. It states, for instance, that "there is no guarantee that the plaintiff will be successful or will recover sufficiently to satisfy [LawCash's] lien in whole or in part" and that "LAWCASH will be paid only from the proceeds of the Lawsuit, and agrees not to seek money from me [the assignor] directly in the event that the Lawsuit is not successful." Likewise, it provides:

> If I [the assignor] do not recover any money from my lawsuit, I will not owe LAWCASH anything. If I recover money from my lawsuit, which is insufficient to pay the full amount due to LAWCASH, then LAWCASH's recovery will be limited to the proceeds of the lawsuit.

¶ 13 Third, the LawCash agreement keeps control over the legal claim in the tort plaintiff's hands. It states: "LAWCASH SHALL HAVE NO RIGHT TO AND WILL NOT MAKE ANY DECISIONS WITH RESPECT TO THE CONDUCT OF THE UNDERLYING CIVIL ACTION OR CLAIM OR ANY SETTLEMENT OR RESOLUTION THEREOF AND THAT THE RIGHT TO MAKE THOSE DECISIONS REMAINS SOLELY WITH ME AND MY ATTORNEY IN THE CIVIL ACTION OR CLAIM."

¶ 14 Finally, the LawCash agreement characterizes the transaction as "an investment and not a loan."

C. The Litigation

¶ 15 The litigation finance companies commenced this case after a state regulatory body concluded companies in their field were subject to UCCC regulation.

1. The Administrator's Opinion Letter on Pre–Settlement Lender Licensing

¶ 16 In April 2010, counsel for an unrelated business asked the office of the Administrator of the Colorado UCCC (the "Administrator") for an opinion letter as to whether a business that engages in litigation finance needs any special licenses or is otherwise ***404** regulated in Colorado.[4] Counsel explained that the business would be "making non-recourse, pre-settlement loans" in Colorado:

> Basically, my client makes an advance to individuals involved in pending litigation based upon its evaluation of the likely settlement amount of the case. If the case does settle, then the advance must be repaid with interest. If the case does not settle and results in a defense verdict or judgment, then the entire advance or loan is forgiven.

¶ 17 In response, the Administrator issued an option letter dated April 29, 2010, on "Pre-settlement Lender Licensing," which concluded that these transactions are loans subject to the UCCC:

> The Administrator concludes that a lender who engages in such transactions, variously called "litigation", "lawsuit", or "legal" "funding", "financing", or "advances", with Colorado consumers must comply fully with Colorado's Uniform Consumer Credit Code, §§ 5–1–101,

et seq., C.R.S.2009 (Code), including licensure.

¶ 18 The Administrator reasoned that the business "makes loans" under our decision in *State ex rel. Salazar v. Cash Now Store, Inc.,* 31 P.3d 161 (Colo.2001). The Cash Now Store entered into contracts to pay taxpayers an immediate sum of money in return for a partial assignment of taxpayers' future federal or state tax refunds. *Id.* at 163–64. The refunds had been independently determined to be due but were generally not yet payable, and the advance was typically fifty to sixty percent less than the face value of the anticipated refund. *Id.* In the event that Cash Now received a refund that was less than anticipated, it could require the individual to pay the deficiency. *Id.* at 164.

¶ 19 Cash Now, facing an investigation that it was issuing usurious consumer loans, filed a complaint for a declaratory judgment as to whether the transactions violated the UCCC. *Id.* The trial court determined the transactions were purchases of choses in action, not consumer loans subject to the UCCC. The court of appeals agreed the transactions were not loans, labeling them sales and assignments instead. *Id.* We reversed and held that the transactions were UCCC loans. *Id.* at 163.

¶ 20 The Administrator's opinion letter quoted our *Cash Now* decision in explaining that "a loan is made when a creditor creates debt by advancing money to the debtor." *Id.* at 166.[5] The Administrator concluded the business she was asked to examine "advance[d] money to the consumer" and therefore made loans. She also noted that neither the UCCC nor *Cash Now* requires the borrower's personal recourse for an advance to be a loan; nonrecourse loans, secured with the consumer's lawsuit or its proceeds, fall within the UCCC's scope.

¶ 21 The Administrator also concluded that the loans are "consumer loans," as that term is used in the UCCC, *see* § 5–1–301(15), because (1) the recipients are individuals; (2) the debt is incurred "for personal, family, or household purposes"; (3) the advances are repaid with interest, constituting a finance charge; and (4) the advances are less than $75,000.

¶ 22 Oasis and LawCash assert that they stopped doing business in Colorado in 2010 after they became aware of the Administrator's opinion letter. Before voluntarily suspending business operations in Colorado, they conducted business here without any formal consumer complaints.

2. The Administrator's Investigation

¶ 23 In the course of formulating the opinion letter, the Administrator became aware ***405** of Oasis's and LawCash's litigation funding practices in Colorado and launched an investigation.

¶ 24 On September 23, 2010, the Administrator advised Oasis and LawCash by letter of her determination that the companies made loans in violation of the UCCC and the Colorado Consumer Protection Act, §§ 6–1–101 to –1121, C.R.S. (2015). The Administrator offered to settle the matter through an "Assurance of Discontinuance and Final Agency Order." Oasis and LawCash declined.

3. The Declaratory Judgment Action

¶ 25 Oasis and LawCash filed this case against the Attorney General and the Administrator (collectively, "the State"), seeking a declaratory judgment that funding agreements of this type are not loans.

¶ 26 The State filed counterclaims seeking to enjoin Oasis and LawCash from making or collecting on such loans without being properly licensed. The State also sought penalties and sanctions under the statutes.

¶ 27 The State moved for partial summary judgment. The trial court held that the transactions in question create debt and are thus loans governed by the UCCC under (1) the Code's plain language, (2) this court's historical definition of "debt," and (3) our ruling in *Cash Now.* It rejected the notion that the possibility of nonrecovery on some transactions necessarily removes them from regulation as loans. The trial court certified its ruling for immediate appeal under Colorado Rule of Civil Procedure 54(b).

¶ 28 The court of appeals affirmed. It emphasized that courts liberally construe the UCCC to promote consumer protection. *Oasis Legal Fin. Grp. v. Suthers,* 2012 COA 82, ¶ 10, —— P.3d ——. It pointed out that in *Cash Now* this court rejected a "narrow interpretation" of the term "debt" in favor of a "broad reading" of the UCCC's definition of "loan" and made clear that a loan does *not* require an unconditional obligation to repay. *Id.* at ¶ 11. And, citing the definition of "debt" from Black's Law Dictionary ("a specific sum of money

due by agreement or otherwise"), it stated that debt includes contingent debt, which may become fixed in the future with the occurrence of an event. *Id.* at ¶¶ 11–12. Because Oasis and LawCash create contingent debt, the court of appeals held the transactions at issue are loans. *Id.* at ¶¶ 12–13.

¶ 29 The companies appealed. We granted certiorari on the following issue: "Whether the court of appeals erred when it held that the litigation financing transactions in this case are subject to the requirements of the Uniform Consumer Credit Code (UCCC)."

II. Standard of Review

¶ 30 A trial court's order granting or denying summary judgment is subject to de novo review. *Westin Operator, LLC v. Groh,* 2015 CO 25, ¶ 19, 347 P.3d 606, 611. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." C.R.C.P. 56(c). The material facts of this case are not in dispute.

III. Analysis

¶ 31 Oasis and LawCash have sought to structure their funding agreements as sales and assignments of assets, explicitly noting within the agreements that the transactions are *not* loans. The tort plaintiffs do not have an obligation to repay borrowed funds if the litigation proceeds recovered are less than the amount paid. The finance companies emphasize that they take on the risk of complete loss.

¶ 32 The State contends the transactions are loans—nonrecourse loans secured by litigation proceeds, loans hobbled with interest rates sometimes approaching triple digits. In arguing that these agreements fall squarely within the UCCC's treatment of an advance of money as a loan, the State relies on this court's statements in *Cash Now* that the UCCC does not require an unconditional obligation to repay for a transaction to be a loan.

¶ 33 We begin by providing background information on the UCCC and exploring its ***406** role in consumer protection. The Code commits us to a broad construction of its terms to effectuate its remedial purpose, but the statute's general goals do not answer our specific question—that is, whether these transactions are "loans" under the UCCC. Therefore, we scrutinize the UCCC's definition of "loan" and the guidance embedded within it that a "loan" creates "debt." In doing so, we examine the substance of the transactions and apply our decision in *Cash Now.*

A. The Purposes and Policies of the UCCC

¶ 34 The UCCC regulates consumer credit transactions including consumer loans, leases, and credit sales. *See* § 5–1–301(12). For example, the Code seeks to corral what it terms "supervised loans," consumer loans with an annual finance charge exceeding twelve percent. *See* § 5–1–301(47); § 5–2–201. The Code restricts authority to make supervised loans to "supervised lenders," those licensed by the Administrator or otherwise exempted from the UCCC. *See* § 5–1–301(45), –301(46); § 5–2–301. The UCCC also regulates "payday" loans, *see* §§ 5–3.1–101 to –123; limits creditors' collection remedies, *see* §§ 5–5–101 to –112; and restricts what parties can agree to, *see* §§ 5–3–101 to –305. In addition, the UCCC conforms consumer credit regulation to the policies of the federal Truth in Lending Act. § 5–1–102(2)(f); § 5–3–101; *see* 15 U.S.C. §§ 1601–1693r (2014). By requiring disclosure of the cost of credit, the UCCC strives to help consumers shop for the best deal. *See* Colorado Attorney General, *Uniform Consumer Credit Code,* http://www.coloradoattorneygeneral.gov/departments/consumer_protection/uccc_car/uccc (last visited Nov. 12, 2015).

¶ 35 Section 5–1–102(1) of the UCCC ("Purposes—rules of construction") makes clear that "[t]his code shall be liberally construed and applied to promote its underlying purposes and policies." § 5–1–102(1); *see also Tulips Invs., LLC v. State ex rel. Suthers,* 2015 CO 1, ¶ 14, 340 P.3d 1126, 1131; *Cash Now,* 31 P.3d at 166 ("Colorado's UCCC is intended to be liberally construed to promote its underlying purposes and policies....").

¶ 36 The purposes and policies of the UCCC include protecting consumers from unfair practices, fostering competition among credit suppliers, and simplifying consumer credit law. *See* § 5–1–102(2)(a)–(g). *See generally Dikeou v. Dikeou,* 928 P.2d 1286, 1293 (Colo.1996) ("[The UCCC] is designed to protect a typically unsophisticated borrower from a generally sophisticated lender.").

¶ 37 The somewhat amorphous goal of consumer protection leaves room for a reasonable disagreement about whether and how litigation finance agreements should be regulated. Amici advance arguments why litigation finance is or is not ultimately good for consumers. But that is a question better suited to the legislature. The question for us is whether these transactions fit within the existing law's definition of "loan." The broad purposes of the UCCC do not on their own settle whether these transactions are "loans." Our inquiry is only complete with a careful reading of the statute's text and our precedent. To decide whether the litigation finance transactions before us qualify as UCCC loans, we turn to the statute's definition.

B. "Loans" Under the UCCC

¶ 38 The UCCC defines "loan" to "include[ ]" "[t]he creation of debt by the lender's payment of or agreement to pay money to the consumer ...." § 5–1–301(25)(a)(I). The definition of "loan" also encompasses the creation of debt through a credit account on which the consumer can draw, *see* § 5–1–301(25)(a)(II); the creation of debt by cash advance on a seller credit card or by a lender credit card issuer honoring the consumer's drafts, *see* § 5–1–301(25)(a)(III), (V); or the forbearance of debt arising from a loan, *see* § 5–1–301(25)(a)(IV). Subsection (25)(b) excludes from the definition of "loan" the forbearance of debt arising from a sale or lease as well as a card issuer's payments or agreements to pay third parties when consumers execute sales or leases with seller credit cards. *See* § 5–1–301(25)(b)(I)–(II). It is the first definition of loan that concerns us in ***407** this case, but we note that all of the definitions feature the crucial concept of debt.

¶ 39 The word "debt" also figures prominently in the Code's definition of the more specific "consumer loan":

> a loan made by or arranged by a person regularly engaged in the business of making loans in which:
>
> (I) The consumer is a person other than an organization;
>
> (II) The debt is incurred primarily for a personal, family, or household purpose;
>
> (III) Either the debt is by written agreement payable in installments or a finance charge is made; and
>
> (IV) Either the principal does not exceed seventy-five thousand dollars or the debt is secured by an interest in land.

§ 5–1–301(15)(a).

¶ 40 We agree with the Administrator that most of the elements of a consumer loan are readily satisfied in litigation financing transactions. Here, the tort plaintiffs are "persons"; the advances are for personal, family, or household purposes while litigation is pending; and the sums are well below the $75,000 figure as Oasis and LawCash advise "usually less than $1,500" is at issue.

¶ 41 While these definitions beg the question about the full regulatory reach of the Code, at the very least they make clear that debt is a necessary, if not completely sufficient, characteristic of the consumer transaction the Code seeks to regulate. So, we start there. Do the transactions at issue here create debt?

1. "Debt" Under the UCCC

¶ 42 We conclude that a litigation finance transaction of the type before us creates "debt" because it creates an obligation to repay. As we noted in *Cash Now,* the UCCC does *not* define the term "debt." *See Cash Now,* 31 P.3d at 165 ("The statute defines the term 'loan' as including several methods by which debt is created and also the forbearance of debt arising from a loan. The statute does not further define the term 'debt.' " (citation omitted)).

¶ 43 Though the term "debt" passes through the UCCC undefined, the Code signals within its definition of "loan" how debt can be created, which gives some indication of what debt is. A UCCC loan includes "[t]he creation of debt," and, the definition continues, debt is created "*by the lender's payment of* or agreement to pay *money to the consumer*." § 5–1–301(25)(a)(I) (emphasis added).

¶ 44 Debt is a broad concept. The UCCC contemplates the creation of debt whenever a lender makes a payment of money to a consumer. Black's Law Dictionary sets forth the meaning of many specific varieties of debt (nearly fifty types), but, as a general matter, it echoes the foregoing statutory language that "debt" is "a specific sum of money due by agreement or otherwise." *Black's Law Dictionary* 462 (9th ed. 2009). The Colorado Fair Debt Collection Practices Act defines "debt" as "any obligation or alleged

obligation of a consumer to pay money arising out of a transaction, whether or not such obligation has been reduced to judgment." § 12–14–103(6)(a), C.R.S. (2015). The federal Bankruptcy Code's definition of debt is vast: "debt" is "liability on a claim," 11 U.S.C. § 101(12) (2014), and a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured," *id.* § 101(5)(A). The Colorado Uniform Fraudulent Transfer Act borrows this federal definition. *See* § 38–8–102(6), C.R.S. (2015). Other state statutes similarly manifest capacious conceptions of debt. *See* Uniform Commercial Code—Secured Transactions, § 4–9–102(28), C.R.S. (2015) (defining "debtor" as a person with a non-lien interest in collateral regardless of whether he is an obligor); Colorado Foreclosure Protection Act, § 6–1–1103(3), C.R.S. (2015) (defining "evidence of debt" as a writing showing a right or promise to pay "a monetary obligation" including a note, bond, loan, credit, "or similar agreement").

¶ 45 In sum, a debt is an obligation to repay. We conclude that the transactions here create debt because the plaintiffs receive a payment of money and, in exchange, ***408** they commit to fully compensate the finance companies from the future litigation proceeds. This does not establish these transactions are loans, however, because there are other forms of debt, resulting for example from sales, *see, e.g.,* § 5–1–301(11)(a)(IV) (definition of "consumer credit sale" includes "debt"), that are not always subject to the Code's regulation of loans. Debt is necessary but not sufficient. Therefore, we probe further and find that these transactions have other characteristics of loans and that they cannot plausibly be labeled sales or assignments.

2. Unconditional Obligation to Repay Not Required

¶ 46 The finance companies argue these transactions do not constitute loans or create debt because plaintiffs' repayment obligations do not extend beyond their recoveries in the event of a shortfall. The finance companies point to the fact that, in approximately fifteen percent of cases, the litigation proceeds are less than the amount due, forcing the companies to adjust plaintiffs' repayment obligations. And, they note, when claims yield nothing, plaintiffs pay nothing.

¶ 47 We do not find controlling significance in these intermittent losses. Litigation finance transactions create repayment obligations—debt—at the outset. That fact is unaffected by the finance companies' subsequent reduction or cancellation of certain plaintiffs' obligations. And in eighty-five percent of cases, the companies fully recover. Therefore, in evaluating these transactions, we focus on how they are designed to work and how they actually work most of the time.

¶ 48 Normally, Oasis and LawCash advance money and expect full repayment at a later date, and normally that is what happens. The finance company investigates a plaintiff's claim; the parties sign an agreement; the plaintiff receives a payment of money; the litigation moves forward; and, after a settlement or successful trial, the plaintiff gives the finance company an amount of money equal to the amount advanced, plus an extra amount based on how long it took the plaintiff to pay up. Thus, the ordinary life of a litigation finance agreement is characterized by the creation and repayment of debt.

¶ 49 *Cash Now* also supports the view that these transactions constitute loans. We held there that exchanges of present money for future tax returns were loans under the Code, and in doing so we explicitly rejected the notion that a loan exists only where the borrower has an unconditional repayment obligation: "[W]e favor a broad reading of the UCCC's definition of 'loan' over the court of appeals' narrow interpretation, which requires an unconditional obligation to repay not mentioned in the statute." *Cash Now,* 31 P.3d at 166. We then twice disclaimed the existence of any statutory repayment requirement for a transaction to be a loan. *See id.* at 165 ("[T]he definition of loan under the UCCC does not require repayment."); *id.* at 166 n. 2 (explaining the definition of "loan" in the UCCC "does not include the requirement of repayment"). These conspicuous similarities suggest *Cash Now* is a reliable beacon for us here.

¶ 50 Nonetheless, Petitioners assert that *Cash Now* is distinguishable because the taxpayers there were liable for any deficiency, whereas the tort plaintiffs here have no such obligation. The companies base this argument on the following passage from *Cash Now:*

> As with the transactions at issue in [*Income Tax Buyers, Inc. v. Hamm,* No. 91–CP–40–3193, 1992 WL 12092431 (S.C.Ct.Com.Pl. Jan. 14, 1992)], the contracts at issue in the present case impose an obligation on the taxpayer to repay Cash Now only if the government fails to pay the amount of the anticipated tax refund. As the *Hamm* court explained, even the lender "demonstrates that it does not view the refund as a chose in action because the borrower

owes it a sum of money whether the refund or 'chose' is valuable to [the lender] or not. This is debt." Thus, the transaction is more properly characterized as a loan, rather than the sale of a chose in action.

Id. at 167 (second alteration in original) (citation omitted).

***409** ¶ 51 Petitioners are correct in part. *Cash Now* and the South Carolina case of *Hamm* (wh ich also concerned purported sales of anticipated tax refunds) both involved deficiency clauses that left the taxpayer-borrowers on the hook if the expected tax refunds failed to materialize, while here a tort plaintiff does not owe the litigation finance company a dime if his claim fails.

¶ 52 But this ultimately strikes us as a distinction without a difference. For one thing, the *Hamm* court was unpersuaded the transaction could escape treatment as a loan "even in the absence" of the deficiency clause. *Hamm,* 1992 WL 12092431, at *3. Further, the court of appeals correctly noted the above-quoted excerpt is "an acknowledgement of the facts in *Cash Now,* and not ... a limitation on the court's determination that a loan does not require an unconditional obligation to repay." *See Oasis Legal Fin. Grp.,* ¶ 14.

¶ 53 In short, we did not restrict our holding in *Cash Now* to cases involving identical facts. The *Cash Now* transactions were recourse—meaning the debtor had an unconditional obligation to repay—but we did not hold that this characteristic was necessary under the UCCC. To do so would be to shoehorn the word "recourse" into the statute's definition of loan: "[t]he creation of [recourse] debt by the lender's payment of or agreement to pay money to the consumer...." § 5–1–301(25)(a)(I). We are mindful that "in interpreting a statute, we must accept the General Assembly's choice of language and not add or imply words that simply are not there." *People v. Diaz,* 2015 CO 28, ¶ 15, 347 P.3d 621, 625 (quoting *People v. Benavidez,* 222 P.3d 391, 393–94 (Colo.App.2009)). [6]

¶ 54 In sum, the Code's language and our *Cash Now* decision show that the repayment obligation need not be unconditional; the debt "created by" a UCCC loan need not be recourse. Litigation finance agreements create debt because they create repayment obligations. This is so notwithstanding the litigation finance companies' embrace of risks that, from time to time, require them to adjust or cancel some plaintiffs' obligations. Most of the time, plaintiffs repay the full amount borrowed—and more.

3. Obligation to Repay Grows with Time

¶ 55 We find it significant that the obligation increases with the passage of time, another characteristic of a loan. In fact, one of the features of a "consumer loan" under the UCCC is the presence of a "finance charge." [7] *See* § 5–1–301(15)(a)(III). The Code defines "finance charge" as:

***410** The sum of all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the consumer, the creditor, or any other person on behalf of the consumer to the creditor or to a third party, including any of the following types of charges that are applicable:

(I) *Interest* or any amount payable under a point, discount, or other system of charges, however denominated.

§ 5–1–301(20)(a)(I) (emphasis added); *see also Black's Law Dictionary* 886 (defining "interest" as "[t]he compensation fixed by agreement or allowed by law for the use or detention of money ... esp., the amount owed to a lender in return for the use of borrowed money").

¶ 56 Here, the litigation finance companies require plaintiffs to repay more than the amount advanced. How much more is a function of time. *See supra* nn.1 & 3 (describing repayment schedules). The amount to which the companies are entitled does not fluctuate with market conditions; rather, it grows in predictable intervals fixed by the companies in the agreements. The longer the borrowed money is outstanding, the more the plaintiffs pay. Oasis denominates this rate of increase a "multiplier" while LawCash calls it a "monthly use fee," but in both cases the charges function as interest. This growth in the repayment obligation over time is a finance charge and a hallmark of a consumer loan under the UCCC.

C. Litigation Finance Transactions Are Not Sales or Assignments

¶ 57 Because the agreements do not transfer ownership rights, we reject the companies' theory that these transactions are "sales" or "assignments." In a sale, the parties agree to give and pass rights of property. *See Wilson v. Frederick R. Ross Inv. Co.,* 116 Colo. 249, 180 P.2d 226, 230 (1947); *accord* § 4–

2–106(1), C.R.S. (2015) (defining "sale" within the Uniform Commercial Code as "the passing of title from the seller to the buyer for a price"); *see also Black's Law Dictionary* 1482 (defining "sell" as "[t]o transfer (property) by sale"). Similarly, an assignment transfers rights and duties and puts "the assignee in the assignor's shoes." *SDI, Inc. v. Pivotal Parker Commercial, LLC,* 2014 CO 80, ¶ 18 n. 3, 339 P.3d 672, 676 n. 3; *accord Black's Law Dictionary* 136 (defining "assignment" as a "transfer of rights or property").

¶ 58 As detailed above, the tort plaintiffs continue to control the pending litigation even though they are purportedly selling their rights to a portion of the proceeds from that litigation. Oasis and LawCash do not step into the tort plaintiffs' shoes; the agreements provide them only with the rights that any creditor would have to receive payment of the amount due. [8]

IV. Conclusion

¶ 59 We hold that litigation finance companies that agree to advance money to tort plaintiffs in exchange for future litigation proceeds are making "loans" subject to Colorado's UCCC even if the plaintiffs do not have an obligation to repay any deficiency if the litigation proceeds are ultimately less than the amount due. These transactions create a debt, or an obligation to repay, that grows with the passage of time. We agree with the court of appeals that these transactions are "loans" under the Code, and we therefore affirm its judgment.

JUSTICE GABRIEL does not participate.

All Citations

361 P.3d 400, 2015 CO 63

Footnotes

1 Oasis's sample agreement uses $1,234.00 as the purchase price. Per the payment schedule, if the Seller pays off that amount to Oasis within six months, the payoff amount is $1,851.00 ($617.00 above the purchase price). That amount continues to increase based on a multiplier. For instance, within one year to fifteen months, the payoff amount is $2,776.50 ($1,542.50 above the purchase price). Within two years to thirty months, the payoff amount is $4,010.50 ($2,776.50 above the purchase price).

2 In our state, "[w]hether a cause of action for personal injury is now assignable ... and, even if not, whether the recovery from a personal injury claim is assignable before it is reduced to settlement or judgment" remains an open question. *See Allstate Ins. Co. v. Medical Lien Mgmt.,* 2015 CO 32, ¶ 21, 348 P.3d 943, 950. In *Allstate,* we noted that "an extremely small minority of jurisdictions" allow for the full assignability of *a cause of action* for personal injury, but "a not insignificant number of jurisdictions" recognize the assignability of *proceeds* from a personal injury action. *Id.* at ¶ 18, 348 P.3d at 949. But we did not enter the debate because the complaint in *Allstate* did not allege the breach of such an assignment, and the assignee did not pursue the assignor's personal injury claim as the real party in interest. *See id.* at ¶ 17, 348 P.3d at 948–49. Thus, the validity of either type of assignment was not before us. We need not answer the question here either because the State does not argue that the litigation financing agreements are void or unenforceable because the proceeds from a personal injury action cannot be assigned. Rather, it argues that the agreements create loans subject to the UCCC. We agree with the State that the transactions at issue are loans and not assignments. Consequently, we do not evaluate whether a tort plaintiff can assign the potential proceeds from a personal injury action.

3 An older sample agreement, which contains notations and appears to be a draft, uses $2,000 as the purchase price. Per the payment schedule, if the tort plaintiff pays off that amount to LawCash within about two months, the payoff amount is $2,779.32 ($779.32 above the purchase price). That amount continues to increase based on a multiplier. For instance, a year later, the payoff amount is $3,923.92 ($1,923.92 above the purchase price). The maximum that LawCash can receive is listed as $6,724.24 ($4,724.24 over the purchase price). The agreement lists the annual percentage rate of return on investment ("APR") as forty-two percent.

4 The Administrator is charged with the administration and enforcement of the UCCC and is authorized to provide guidance on how to comply with the Code. *See, e.g.,* § 5–6–104(1)(b) (providing the Administrator with authority to "[c]ounsel persons and groups on their rights and duties under this code").

5 In this part of *Cash Now,* we were discussing an official comment to the UCCC. *See* § 5–3–106, cmt., 2 C.R.S. (1999). That comment did not survive the Code's reorganization in 2000, but its disappearance does not affect our analysis because the Code's definition of "loan" remains the same except that the current statute substitutes "consumer" for "debtor." *Compare* § 5–1–301(25)(a)(I), C.R.S. (2015), *with* § 5–3–106(1), 2 C.R.S. (1999).

6 We also note that other UCCC jurisdictions have arrived at the same conclusion. For example, the South Carolina Administrator of the Department of Consumer Affairs determined in a November 14, 2014, opinion letter:

> [A] litigation funding transaction meets the definition of a loan as monies are given to the consumer. The broad concept of a "loan" under the UCCC certainly encompasses those circumstances where the consumer does not have an unconditional obligation to repay.

Notably, the South Carolina Code defines "loan" and "consumer loan" in substantially the same manner as the Colorado Code. *Compare* S.C.Code Ann. § 37–3–106(1) (2015) (defining "loan"), *and* § 37–3–104 (defining "consumer loan"), *with* § 5–1–301(25)(a)(I), C.R.S. (2015) (defining "loan"), *and* § 5–1–301(15)(a) (defining "consumer loan"). Similarly, the Kansas State Bank Commissioner reached the same conclusion in an opinion letter dated July 7, 2009, which observed the Kansas UCCC did not require an absolute repayment obligation and concluded that "plaintiff agreements" constitute loans under the Kansas UCCC.

In slightly different regulatory settings, the particular finance companies in this case have been treated as lenders. Maryland's Attorney General opined in November 2009 that a legal funding agreement constitutes a loan under the Maryland Consumer Loan Law, *see* Md.Code Ann., Com. Law, § 12–301(e) (2009), in a case involving Oasis. And in *Echeverria v. Estate of Lindner,* No. 018666/2002, 7 Misc.3d 1019A, 2005 WL 1083704, at *8 (N.Y.Sup.Ct. Mar. 2, 2005), a New York court concluded that LawCash's litigation financing contract was a loan "at usurious rates," "not an investment with great risk."

7 A finance charge is also characteristic of a "consumer credit sale," *see* § 5–1–301(11)(a)(IV), but consumer credit sales, unlike consumer loans, involve an exchange of "goods, services, a mobile home, or an interest in land," § 5–1–301(11)(a). Litigation finance agreements do not feature such exchanges; the companies swap money now for plaintiffs' obligations to pay more money later. We discuss, and reject, the companies' sale or assignment theory below.

8 Indeed, in an unrelated bankruptcy action, LawCash filed a proof of claim as a creditor seeking a security interest in arbitration funds where it had advanced money to a tort plaintiff through "an assignment of his interest in the proceeds of the Lawsuit." *See In re Sas,* 488 B.R. 178, 181 & nn. 11 & 13 (Bankr.D.Nev. 2013). Likewise, Oasis filed a proof of claim as a creditor in a tort plaintiff's bankruptcy action after that debtor failed to repay litigation funding advances. *See In re Armstrong,* No. 14–18107, 2014 WL 5816950, at *1–3 (Bankr.N.D.Ill. Nov. 7, 2014).

1349.55 Non-recourse civil litigation advance contracts.

(A) As used in this section:

(1) "Non-recourse civil litigation advance" means a transaction in which a company makes a cash payment to a consumer who has a pending civil claim or action in exchange for the right to receive an amount out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the civil lawsuit.

(2) "Company" means a person or entity that enters into a non-recourse civil litigation advance transaction with a consumer.

(3) "Consumer" means a person or entity residing or domiciled in Ohio and represented by an attorney with a pending civil claim or action.

(B) All contracts for a non-recourse civil litigation advance shall comply with the following requirements:

(1) The contract shall be completely filled in and contain on the front page, appropriately headed and in at least twelve-point bold type, the following disclosures:

(a) The total dollar amount to be advanced to the consumer;

(b) An itemization of one-time fees;

(c) The total dollar amount to be repaid by the consumer, in six-month intervals for thirty-six months, and including all fees;

(d) The annual percentage rate of return, calculated as of the last day of each six-month interval, including frequency of compounding.

(2) The contract shall provide that the consumer may cancel the contract within five business days following the consumer's receipt of funds, without penalty or further obligation. The contract shall contain the following notice written in a clear and conspicuous manner: "CONSUMER'S RIGHT TO CANCELLATION: YOU MAY CANCEL THIS CONTRACT WITHOUT PENALTY OR FURTHER OBLIGATION WITHIN FIVE BUSINESS DAYS FROM THE DATE YOU RECEIVE FUNDING FROM [insert name of company]." The contract also shall specify that in order for the cancellation to be effective, the consumer must either return to the company the full amount of disbursed funds by delivering the company's uncashed check to the company's offices in person, within five business days of the disbursement of funds, or mail a notice of cancellation and include in that mailing a return of the full amount of disbursed funds in the form of the company's uncashed check, or a registered or certified check or money order, by insured, registered or certified United States mail, postmarked within five business days of receiving funds from the company, at the address specified in the contract for the cancellation.

(3) The contract shall contain the following statement in at least twelve-point boldface type: "THE COMPANY AGREES THAT IT SHALL HAVE NO RIGHT TO AND WILL NOT MAKE ANY DECISIONS WITH RESPECT TO THE CONDUCT OF THE UNDERLYING CIVIL ACTION OR CLAIM OR ANY SETTLEMENT OR RESOLUTION THEREOF AND THAT THE RIGHT TO MAKE THOSE DECISIONS REMAINS SOLELY WITH YOU AND YOUR ATTORNEY IN THE CIVIL ACTION OR CLAIM."

(4) The contract shall contain the initials of the consumer on each page.

(5) The contract shall contain the following statement in at least twelve-point boldface type located immediately above the place on the contract where the consumer's signature is required: "DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT COMPLETELY OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COMPLETELY FILLED IN COPY OF THIS CONTRACT. BEFORE YOU SIGN THIS CONTRACT YOU SHOULD OBTAIN THE ADVICE OF AN ATTORNEY. DEPENDING ON THE CIRCUMSTANCES, YOU MAY WANT TO CONSULT A TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL PROFESSIONAL. YOU ACKNOWLEDGE THAT YOUR ATTORNEY IN THE CIVIL ACTION OR CLAIM HAS PROVIDED NO TAX, PUBLIC OR PRIVATE BENEFIT PLANNING, OR FINANCIAL ADVICE REGARDING THIS TRANSACTION."

(6) The contract shall contain a written acknowledgment by the attorney representing the consumer in the civil action or claim that states all of the following:

(a) The attorney representing the consumer in the civil action or claim has reviewed the contract and all costs and fees have been disclosed including the annualized rate of return applied to calculate the amount to be paid by the consumer.

(b) The attorney representing the consumer in the civil action or claim is being paid on a contingency basis per a written fee agreement.

(c) All proceeds of the civil litigation will be disbursed via the trust account of the attorney representing the consumer in the civil action or claim or a settlement fund established to receive the proceeds of the civil litigation from the defendant on behalf of the consumer.

(d) The attorney representing the consumer in the civil action or claim is following the written instructions of the consumer with regard to the non-recourse civil litigation advance.

(7) For English, French, and Spanish speaking consumers, the contract shall be written in the same language in which the oral negotiations are conducted between the company and the consumer. For consumers whose primary language is not English, French, or Spanish, the principal terms of the contract shall be translated in writing into the consumer's native language, the consumer shall sign the translated document containing the principal terms and initial each page, and the translator shall sign a notarized affirmation confirming that the principal terms have been presented to the consumer in the consumer's native language and acknowledged by the consumer, in writing. Principal terms shall include all items that must be disclosed by this section.

(C) If a dispute arises between the consumer and the company concerning the contract for a non-recourse civil litigation advance, the responsibilities of the attorney representing the consumer in the civil action or claim shall be no greater than the attorney's responsibilities under the Ohio Rules of Professional Conduct.

Effective Date: 2008 HB248 08-27-2008 .

2017 WL 8785717
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
This Document Relates to: All Actions

No. 2:12-md-02323-AB
|
MDL No. 2323
|
Signed 12/08/2017

EXPLANATION AND ORDER

ANITA B. BRODY, District Judge

***1** It has come to the Court's attention that members of the class or their representatives have assigned or attempted to assign monetary claims to third parties. Under the unambiguous language of the Settlement Agreement, Settlement Class Members [1] are prohibited from assigning or attempting to assign their monetary claims to third parties, and any agreement making such an assignment or attempt to assign is void, invalid and of no force and effect. Additionally, under the Settlement Agreement, the Claims Administrator is prohibited from paying a Class Member's monetary award to any third party that holds an assignment or an attempted assignment ("Third-Party Funder"). [2]

The purpose of the anti-assignment provision is to protect the interests of Class Members by recognizing that Class Members receiving monetary awards are by definition cognitively impaired. As the fiduciary of the Class, it is the Court's obligation to enforce this provision of the Settlement Agreement.

BACKGROUND

The administration of large settlements can provide unique challenges to the legal system as a whole, and the administration of the NFL Concussion Settlement has certainly been no exception. The issue before the Court was first raised by litigation before Judge Loretta A. Preska in the Southern District of New York. In that litigation, the Consumer Financial Protection Bureau ("CFPB") and the People of the State of New York ("NYAG") brought suit against RD Legal Funding, RD Legal Finance, LCC, RD Legal Funding Partners, LP, and Roni Dersovitz (collectively, "RD Legal"). As part of that suit, RD Legal [3] asserted that assignments of Class Member's monetary claims are permitted under the NFL Concussion Settlement Agreement. Upon learning of that assertion, Co-Lead Class Counsel, Chris Seeger, filed an amicus memorandum before Judge Preska disputing RD Legal's claims. *See CFPB, et al. v. RD Legal Funding, LCC, et al.*, No. 17-cv-890 (S.D.N.Y. Sept. 8, 2017), ECF No. 45.

Judge Preska was presented with the question of whether "the *NFL Concussion Litigation* settlement agreement forbids assignments of settlement benefits." Order at 4, *RD Legal Funding*, No. 17-cv-890 (S.D.N.Y. Sept. 8, 2017), ECF No. 59. Judge Preska referred that question to this Court because it implicates the administration of the settlement and the interpretation of the Settlement Agreement—over which this Court has continuing jurisdiction. *See* Settlement Agreement § 27.1, ECF No. 6481-1 ("Any disputes or controversies arising out of, or related to, the interpretation, implementation, administration, and enforcement of this Settlement Agreement will be made by motion to the Court."); *see also In re Nat. Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 426 (E.D. Pa. 2015) ("The Court retains continuing and exclusive jurisdiction over this action including jurisdiction over ... all Settlement Class Members...."). [4]

DISCUSSION

***2** The Settlement Agreement is interpreted under New York Law, Settlement Agreement § 27.1(a), ECF 6481-1, and New York law allows parties to void assignments of contractual rights so long as the anti-assignment language is unambiguous, *Neuroaxis Neurosurgical Associates, PC v. Costco Wholesale Co.*, 919 F. Supp. 2d 345, 352 (S.D.N.Y. 2013) (collecting cases).

In order to protect Class Members, the Settlement Agreement unambiguously prohibits Class Members from assigning claims or attempting to assign claims and renders any such assignment void, invalid and of no force and effect.

> Section 30.1 No Assignment of Claims. Neither the Settlement Class nor any Class or Subclass

> Representative or Settlement Class Member has assigned, will assign, or will attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint. Any such assignment, or attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint will be void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action.

Settlement Agreement, ECF No. 6481-1.

The above section bars the assignment of a Class Member's monetary claims—as can be shown by a simple syllogism. Section 30.1 prevents a Settlement Class Member from assigning "any rights or claims relating to the subject matter of the Class Action Complaint." *Id.* The subject matter of the Class Action Complaint includes the allegations that directly produced the Settlement Agreement and its monetary claim structure. Thus, any monetary claims under the Settlement Agreement are "relat[ed] to" [5] the Class Action Complaint, and assignment of those claims is prohibited. [6]

***3** Therefore, under the Settlement Agreement, Class Members are prohibited from assigning or attempting to assign any monetary claims, and any such purported assignment is void, invalid and of no force and effect. Furthermore, the Settlement Agreement instructs that the Claims Administrator shall not recognize any such action taken by a Settlement Class Member. Thus, Class Members simply cannot enter into a binding agreement that assigns or attempts to assign their claims. A Third-Party Funder that failed to perform proper due diligence before deciding to enter such an agreement is prohibited from now reaping the benefit of the contract.

Thus, based on the above reasoning, the answer to Judge Preska's question is: yes, the *NFL Concussion Litigation* Settlement Agreement forbids assignments of settlement benefits.

CONCLUSION

The Claims Administrator is instructed to inquire of every Class Member, who is eligible for an award, as to whether that Class Member has made an assignment or attempt to assign. Every such class member must provide a verified response to the Claims Administrator. If an assignment or attempt to assign has been made, the Class Member must also submit to the Claims Administrator any documents related to the transaction, including any documents signed by the Class Member's attorney.

To the extent that any Class Member has entered into an agreement that assigned or attempted to assign any monetary claims, that agreement is void, invalid and of no force and effect. Class Members receiving awards are, by definition, cognitively impaired. A Third-Party funder entering an agreement with a Class Member would obviously know that simple fact. Additionally, the anti-assignment language in the Settlement Agreement clearly states the intent that Class Members are unable to make assignments. Thus, the Court has little sympathy for a Third-Party Funder that will not receive a return on its "investment." Nevertheless, under the principle of rescission, Class Members should return to the Third-Party Funder the amount already paid to them. Accordingly, if the Third-Party Funder is willing to accept rescission and execute a valid waiver relinquishing any claims or rights under the entire agreement creating the assignment or attempted assignment, then the Claims Administrator will be authorized to withhold—from the Class Member's monetary award—the amount already paid to the Class Member under the agreement and return it to the Third-Party Funder.

Further instructions to the Claims Administrator will follow. So **ORDERED**.

All Citations

Not Reported in Fed. Supp., 2017 WL 8785717

Footnotes

1 Reference to Class Members includes any Class or Subclass Representative. *See* Settlement Agreement § 30.1.

2 The Claims Administrator, BrownGreer, has already made an official statement that it will not recognize the assignment of any monetary claims. *See* NFL Concussion Settlement Website, Frequently Asked Questions 5.31, available at https://www.nflconcussionsettlement.com/Un-Secure/FAQDetails.aspx?q=67#67.

3 RD Legal is a Third-Party Funder purports to have purchased assignments of Class Member's monetary claims.

4 To address the question, Co-lead Class Counsel, the CFPB, NYAG, and RD Legal submitted briefs to this Court. *See* ECF No. 8380.

5 Under New York state law, the phrase "relating to" is commonly given broad scope. *See, e.g.*, *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (defining "related to" broadly—and more broadly than "arising out of").

6 RD Legal argues that the assignment of a Class Member's monetary claim is permissible under the Settlement Agreement. Two main arguments are given, but neither is persuasive.

RD Legal performs linguistic backflips trying to demonstrate that the phrase "rights or claims relating to the subject matter of the Class Action Complaint" does not include Class Members' *monetary claims* and is instead limited to Class Members' *tort claims.* RD Legal's argument fails because its entire analysis is predicated on excising the phrase "relating to" from its interpretation of the Settlement Agreement's text. *See* RD Legal Mem. 10-12, ECF No. 8435 (repeating the phrase "subject matter of the Class Action Complaint" without discussing, at all, the meaning or existence of the preceding words "relating to"). The phrase "relating to" expands the definition of "subject matter of the Class Action Complaint" to include monetary claims under the settlement agreement. RD Legal evades discussing this important phrase, and therefore, its definition of the "plain meaning" of the Settlement Agreement is incorrect.

Also, RD Legal argues that Article 9 of the Uniform Commercial Code invalidates any attempts to restrict the assignment of payments stemming from a legal settlement. RD Legal argues that under Article 9, parties cannot restrict assignment of "a general intangible," which includes settlement proceeds. RD Legal Mem. 8-9, ECF No. 8435. Even if Article 9 covers the Settlement Agreement, the monetary claims under the agreement would be excluded by New York's version of the UCC.

The invalidation of anti-assignment provisions does not apply to "a claim or right to receive compensation for injuries." N.Y. U.C.C. Law § 9-408(d)(1). Clearly, an award that pays money for suffering head concussions is "compensation for injuries." Therefore, New York's UCC provisions allow for parties to create terms that prevent assignment of settlement claims, and RD Legal's argument that the Settlement Agreement cannot restrict assignment under the UCC fails.

923 F.3d 96
United States Court of Appeals, Third Circuit.

In Re: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION
*RD Legal Funding, LLC; RD Legal Finance, LLC; RD Legal Funding Partners LP; Roni Dersovitz, Appellants
*(Pursuant to Rule 12(a) Fed. R. App. P.)
In Re: National Football League Players' Concussion Injury Litigation
**Cash4Cases, Inc.; *Atlas Legal Funding, LLC; Atlas Legal Funding I, LP; Atlas Legal Funding II, LP; Atlas Legal Funding III, LP, Appellants
*(Pursuant to Rule 12(a) Fed. R. App. P.)
**(Dismissed pursuant to the Clerk's Order dated 8/2/18.)
In Re: National Football League Players' Concussion Injury Litigation
*Thrivest Specialty Funding, LLC, Appellant
*(Pursuant to Rule 12(a), Fed. R. App. P.)
Thrivest Specialty Funding, LLC, Appellant
v.
William E. White

Nos. 18-1040, 18-1482
|
No. 18-1639
|
Nos. 18-2184, 18-2582
|
No. 18-3005
|
Argued January 23, 2019
|
(Filed: April 26, 2019)

Synopsis

Background: Former professional football players brought multiple actions against National Football League (NFL), alleging that NFL failed to inform them of, and protect them from, risks of concussions in football. Following approval of class settlement agreement, various class members entered into cash advance arrangements with third party litigation funders, in which they purported to assign their rights to portion of their settlement proceeds in exchange for receipt of immediate cash. The United States District Court for the Eastern District of Pennsylvania, Nos. 2-12-md-02323, 2-18-cv-01877, Anita B. Brody, J., 2017 WL 8785717, voided cash advancement agreements. Three groups of litigation funders appealed, and their appeals were consolidated.

Holdings: The Court of Appeals, Smith, Chief Judge, held that:

litigation funders had nonparty standing to appeal from District Court's orders;

District Court's order voiding cash advancement agreements was appealable under collateral order doctrine; but

District Court's order directing claims administrator to disburse funds was not appealable under collateral order doctrine; and

District Court exceeded its authority to enforce class settlement agreement by voiding cash advancement agreements in their entirety.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal.

***99** On Appeal from the United States District Court for the Eastern District of Pennsylvania, District Court Nos. 2-12-md-02323, 2-18-cv-01877, District Judge: The Honorable Anita B. Brody

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Before: SMITH, Chief Judge, CHAGARES, and BIBAS, Circuit Judges

OPINION OF THE COURT

SMITH, Chief Judge.

***100** This consolidated appeal involves issues tangential to the expansive National Football League (NFL) concussion injury litigation. Following approval of the settlement agreement in that class action in 2015, various class members entered into cash advance arrangements with third party litigation funders. Under the agreements relevant to the cases on appeal, class members purported to assign their rights to a portion of their settlement proceeds in exchange for receipt of immediate cash.

In December 2017, Eastern District of Pennsylvania Judge Anita Brody, who had presided over the NFL class action and retained jurisdiction while the settlement was being administered, issued an order purporting to void in their entirety all of the assignment agreements. The District Court [1] explained that its ruling was necessary to protect vulnerable class members from predatory funding companies. Appellants RD, Atlas, and Thrivest, three groups of litigation funding entities, [2] now appeal that order and other related orders entered by the District Court.

We commend Judge Brody for her very able handling throughout this extraordinarily complicated class action and settlement, and we appreciate her steadfast commitment to protecting class members' rights. In this instance, though, despite having the authority to void prohibited assignments, the District Court went too far in voiding the cash advance agreements in their entirety and voiding contractual provisions that went only to a lender's right to receive funds after the player acquired them. Accordingly, we will affirm in part and reverse in part in case 18-1040. We will dismiss cases 18-1639, 18-2582, and 18-1482 for lack of jurisdiction. We will vacate and remand in cases 18-2184 and 18-3005.

I.

In early 2012, MDL 2323 was formed to handle claims that had been filed by former professional football players against the NFL based on concussion-related injuries. ***101** On May 8, 2015, the District Court entered a final order certifying a class of former NFL players and approving the parties' final settlement agreement. This Court affirmed the District Court's judgment and upheld both the settlement and the certification of the class for settlement purposes. *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016). The Supreme Court denied *certiorari* review, *Gilchrist v. Nat'l Football League*, —— U.S. ——, 137 S.Ct. 591, 196 L.Ed.2d 473 (2016); *Armstrong v. Nat'l Football League*, —— U.S. ——, 137 S.Ct. 607, 196 L.Ed.2d 473 (2016), and the settlement went into effect on January 7, 2017.

Under the settlement agreement, approximately 200,000 class members gave up their claims in exchange for potential proceeds from an uncapped settlement fund. In order to receive an award, a class member must first submit a claim package including medical records reflecting a qualifying diagnosis, among other things. The Claims Administrator then conducts a preliminary review for deficiencies, investigates the claim as appropriate, and makes a determination as to whether the class member qualifies for a monetary award. Either the class member or the NFL can

then appeal the monetary award determination. Only after any appeals are completed does the Claims Administrator pay out the individual's award.

In March 2017, the claims submission process opened for class members who had been diagnosed with a qualifying illness prior to January 7, 2017. The first payouts for this group of players took place in mid-2017. Individuals without a diagnosis prior to January 7, 2017, were required to receive a diagnosis from a practitioner approved through the settlement Baseline Assessment Program (BAP). Class members could begin registering for appointments through the BAP system in June 2017. Thus, after entering into the settlement in May 2015, class members waited at least two years, and often longer, before receiving their awards.

While waiting to receive their awards, hundreds of class members entered into cash advance agreements with dozens of litigation funding companies, including the three groups of funding entities who are appellants here. Under the agreements relevant to this appeal, class members purported to "assign" their rights to a portion of their settlement proceeds in exchange for immediate cash. The amount of proceeds assigned and the cash received varied with each class member's contract. The effective interest rate, calculated by comparing the amount of money assigned with the amount of money received, also varied significantly among the contracts.

Under the agreements entered into by the Atlas entities and Thrivest, the funding companies obtained no right to submit a claim directly to the Claims Administrator and instead acquired only the right to receive settlement funds after the Claims Administrator had paid out the awards to the particular class members with whom they contracted. Under the RD entity agreements, the funding companies purported to obtain both the right to collect directly from the Claims Administrator and the right to collect after the award was paid out to the class member.[3] Under all of the agreements relevant to this appeal, class members expressly did not assign their legal claims against the NFL, nor did the funding companies acquire the ***102** right to assert legal claims. *See, e.g.*, Atlas App. 890 ("[T]he Purchaser is in no way acquiring the Seller's right to sue.").

Importantly, the May 2015 final settlement agreement included a provision under which Judge Brody broadly retained jurisdiction over administration of the settlement:

> Section 27.1 Pursuant to the Final Order and Judgment, the Court will retain continuing and exclusive jurisdiction over the Parties and their counsel, all Settlement Class Members, the Special Master, BAP Administrator, Claims Administrator, Liens Resolution Administrator, Appeals Advisory Panel, Appeals Advisory Panel Consultants, and Trustee with respect to the terms of the Settlement Agreement. Any disputes or controversies arising out of, or related to, the interpretation, implementation, administration, and enforcement of this Settlement Agreement will be made by motion to the Court. In addition, the Parties, including each Settlement Class Member, are hereby deemed to have submitted to the exclusive jurisdiction of this Court for any suit, action, proceeding, or dispute arising out of, or relating to, this Settlement Agreement. The terms of the Settlement Agreement will be incorporated into the Final Order and Judgment of the Court, which will allow that Final Order and Judgment to serve as an enforceable injunction by the Court for purposes of the Court's continuing jurisdiction related to the Settlement Agreement.

The settlement agreement also included an anti-assignment provision:

> Section 30.1 No Assignment of Claims. Neither the Settlement Class nor any Class or Subclass Representative or Settlement Class Member has assigned, will assign, or will attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject

> matter of the Class Action Complaint. Any such assignment, or attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint will be void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action.

The District Court incorporated all of the settlement terms into its final order dismissing the case.

Following approval of the settlement, the District Court and class counsel took various steps to address cash advance agreements. In July 2016, class counsel first sent a letter to the class warning of predatory lending. The letter advised class members to avoid encumbering their settlement proceeds whenever possible. Atlas App. 1142 ("[I]f you are able to resist borrowing against any payments you might be eligible for under the Settlement, you should."). In June 2017, class counsel advised the Court that he was concerned with solicitations being sent to the class, including by high interest lenders, and received the Court's permission to send another letter to the class regarding the practice. In July 2017, Judge Brody scheduled a hearing for September 19, 2017, to address deceptive practices targeting the class, including solicitations from litigation funders.

In an entirely separate proceeding in the Southern District of New York before Judge Loretta Preska, the Consumer Financial Protection Bureau (CFPB) and the New York Attorney General challenged the business practices of the RD funding entities. In that lawsuit, the Government claimed that RD was engaging in fraudulent lending practices through certain agreements related to settlement proceeds, including agreements with NFL ***103** class members. A question arose in the CFPB lawsuit as to whether the NFL settlement agreement's anti-assignment provision precluded class member assignments of settlement proceeds. Judge Preska determined that the most efficient way to resolve that issue would be to "refer" the question to Judge Brody because she had presided over the settlement negotiations and retained jurisdiction over administration of the settlement. On September 8, 2017, Judge Preska issued a referral letter alerting Judge Brody to the issue, but was careful to note that she was not transferring any portion of the case to Judge Brody.

On September 19, 2017, Judge Brody conducted the scheduled hearing concerning deceptive practices. After learning of Judge Preska's referral letter, RD participated in the hearing, but other funding companies, including Atlas and Thrivest, were not involved. Following the hearing, class counsel filed a motion requesting that any disputed portion of a class member's award be withheld pending the Court's determination of whether the cash advance agreements were enforceable. The District Court granted Thrivest objector status as to the motion to withhold, and Thrivest submitted an opposition to class counsel's motion, arguing in part that the District Court lacked authority to adjudicate the enforceability of the third-party agreements. The Atlas entities moved to intervene and submitted opposition papers, but the Court did not grant the motion at that time, instead denying it as moot in June 2018.

On December 8, 2017, the District Court entered an order requiring class members to inform the Claims Administrator of all assignment agreements, and purporting to void all such agreements: "To the extent that any Class Member has entered into an agreement that assigned or attempted to assign any monetary claims, that agreement is void, invalid and of no force and effect." RD App. 5. The order further directed a procedure under which funding companies could accept rescission and return of the principal amount they had provided to class members by executing waivers relinquishing all rights under the agreements. The District Court noted that further instructions to the Claims Administrator would follow. [4]

The December 8, 2017 order did not make factual findings as to any specific agreement or the practices of any specific funding company. Instead, the District Court relied on the anti-assignment provision in the settlement agreement and its own role as a fiduciary to the class as bases for entering the expansive order. Although the December 8, 2017 order was directed broadly to all class members and all purported assignment agreements, and certainly affected the rights of all litigation funding companies that had entered into such contracts, many of the companies affected had not entered appearances or submitted any filings. Nor was any hearing conducted apart from the initial September 19, 2017 hearing. The RD entities filed a timely notice of appeal as to the December 8, 2017 order, No. 18-1040.

On February 20, 2018, the District Court ordered the Claims Administrator to disburse settlement proceeds directly to

qualifying class members who had entered into assignment agreements that the Court had voided under the December 8, 2017 order. The RD entities filed a second timely ***104** notice of appeal as to the February 20 order, 18-1482. Atlas filed a notice of appeal in March 2018 purporting to appeal both the February 20, 2018 order and the December 8, 2017 order, 18-1639.

On May 1, 2018, Thrivest filed a complaint to compel arbitration against class member William E. White in the Western District of Pennsylvania, pursuant to a cash advance agreement between the company and White. Thrivest also initiated arbitration with the American Arbitration Association in Philadelphia. On May 2, 2018, class counsel filed on the NFL class docket an emergency motion for a temporary restraining order to prevent Thrivest from pursuing arbitration. Judge Brody granted the motion. Following a hearing, Judge Brody entered a permanent injunction on May 22, 2018, enjoining Thrivest from arbitrating the enforcement of its assignment agreement with White. On May 29, 2018, Thrivest filed a timely notice of appeal, No. 18-2184.

On June 28, 2018, Judge Brody denied as moot the class's motion to withhold the disputed settlement funds. Thrivest filed a second notice of appeal as to that order, No. 18-2582, arguing that by denying the motion to withhold as moot, the District Court had effectively applied the December 8, 2017 and February 20, 2018 orders to Thrivest for the first time.

The Western District of Pennsylvania later transferred Thrivest's case against class member White to the Eastern District of Pennsylvania. In August 2018, Judge Brody dismissed Thrivest's separate lawsuit against White, citing her May 22, 2018 order enjoining Thrivest from pursuing arbitration. Thrivest filed a timely notice of appeal from the dismissal, No. 18-3005. [5]

II.

Prior to reaching the merits of these appeals, we must address whether they are properly before this Court. Specifically, the consolidated appeals present jurisdictional issues of timeliness and appealability, each of which we will address in turn.

A.

The parties agree that the RD entities timely appealed both the December 8, 2017 and February 20, 2018 orders. We agree. The class argues, however, that both the Atlas entities and Thrivest failed to timely appeal some of the orders they are challenging. We agree and will dismiss the relevant appeals.

Atlas filed its notice of appeal on March 22, 2018, purporting to challenge both the District Court's December 8, 2017 order and its February 20, 2018 order. The class contends that Atlas's March 22, 2018 notice of appeal was not timely as to the December 8, 2017 order. As discussed *infra*, we conclude that the December 8, 2017 order was a final, appealable order. The order was clear and definite in its ruling that the anti-assignment provision forbade assignment of settlement proceeds and that any agreement was "void, invalid and of no force and effect." RD App. 5. The order also specified that if the funding companies opted for rescission, they could receive "the amount already paid to the ***105** Class Member," RD App. 5; we conclude that statement was sufficient for Atlas to calculate damages with reasonable certainty. *See DeJohn v. Temple Univ.*, 537 F.3d 301, 307 (3d Cir. 2008) (noting that a judgment is not final until it reasonably resolves the extent of damages). Accordingly, the Atlas entities forfeited their right to appeal the December 8, 2017 order when they failed to file a notice of appeal within thirty days of that order. *See* Fed. R. App. P. 4(a)(1)(A). Further, although Atlas timely filed its appeal from the February 20, 2018 order, Atlas makes no argument in its brief regarding that order and has therefore forfeited any challenge to it. [6] We will dismiss Atlas's appeal at 18-1639 in its entirety for lack of jurisdiction.

As to Thrivest, there is no question that the company timely appealed Judge Brody's order enjoining it from pursuing arbitration (18-2184) and Judge Brody's order dismissing the *Thrivest v. White* case (18-3005). Thrivest also filed a notice of appeal on July 16, 2018, appealing from Judge Brody's order denying as moot the motion to withhold the disputed settlement funds. But in its briefing, Thrivest attempts to challenge not the order denying the motion to withhold, but rather the December 8, 2017 and February 20, 2018 orders. Thrivest argues that it was not until the Court's June order denying the motion to withhold that Thrivest understood the Court's previous orders to have decided the objections Thrivest raised in its November 2017 opposition. Thrivest argues that it therefore had no reason to believe, at the time those orders were entered in December 2017 and February 2018, that they affected its rights such that appeal would be necessary.

By their clear terms, the December 8, 2017 and February 20, 2018 orders applied to all assignment agreements entered into by class members, so the District Court necessarily rejected the arguments raised by Thrivest in its opposition when the Court purported to void the agreements. To the extent Thrivest attempts to appeal the denial of the motion to withhold, it failed to brief that issue and instead addressed only the December 8, 2017 and February 20, 2018 orders. Any argument as to the order denying the motion to withhold is therefore forfeited. Further, we conclude that Thrivest cannot bootstrap its arguments regarding the December 8, 2017 and February 20, 2018 final orders to its July 16, 2018 notice of appeal. Accordingly, we will dismiss as untimely Thrivest's appeal in case number 18-2582.

B.

In the remaining cases that were timely appealed, 18-1040, 18-1482, 18-2184, and 18-3005, the appellants–litigation funders appeal four orders: (1) the December 8, 2017 order voiding the assignment agreements; (2) the February 20, 2018 order directing the Claims Administrator to disburse funds; (3) the May 22, 2018 order enjoining Thrivest from arbitrating the enforceability of its assignment agreement; and (4) the order dismissing *Thrivest v. White*, respectively. We conclude that we have appellate jurisdiction to consider appeals of the first, third, and fourth orders under 28 U.S.C. §§ 1291 and 1292,[7] but ***106** that we do not have jurisdiction over the appeal of the February 20, 2018 order.

The December 8, 2017 and February 20, 2018 orders are not traditional "final" orders under 28 U.S.C. § 1291 because they did not terminate the litigation in the District Court. Yet there are circumstances where finality should be given a "practical rather than a technical construction." *Isidor Paiewonsky Assocs., Inc. v. Sharp Props., Inc.*, 998 F.2d 145, 150 (3d Cir. 1993). "[T]his is especially so when supplementary post-judgment orders are involved because the policy against and the probability of avoiding piecemeal review are less likely to be decisive after judgment than before." *Id.* (internal quotation marks omitted). Under the collateral order doctrine, we also have jurisdiction under 28 U.S.C. § 1291 to review "certain decisions that do not terminate the litigation ... as final decisions of the district courts if they are (1) conclusive, (2) resolve important questions completely separate from the merits, and (3) would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Russell v. Richardson*, 905 F.3d 239, 253 (3d Cir. 2018) (internal quotation marks omitted).

Here, the NFL concussion litigation final judgment has already been appealed to, and approved by, this Court. As a result, the District Court's post-judgment orders of December 8, 2017 and February 20, 2018 could not be appealed along with any future "final order," and there is not the usual concern of piecemeal litigation. At this point, however, our analysis of the December and February orders must diverge due to the fundamental differences between the two orders. The December 8, 2017 order bears indicia of finality—it purported to void any assignment agreement in its entirety, leaving no additional steps for the District Court to take. As revealed by the subsequent order enjoining Thrivest from pursuing arbitration to determine the enforceability of its agreement, the District Court believes that its December order fully and finally determined that substantive issue. The issues presented by the December 8, 2017 order are also important because they involve freedom of contract and the authority of the District Court, and those questions are collateral to, and completely separate from, the NFL class action merits issues. We therefore conclude that we have jurisdiction under 28 U.S.C. § 1291 to consider RD's timely appeal of the December 8, 2017 order.

As to the February 20, 2018 order, we conclude that the requisites for appeal under the collateral order doctrine are not satisfied. First, as a purely administrative order, the order did not conclusively resolve ***107** any dispute or determine any legal issue, as required under the collateral order test. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) ("To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question."). Instead, the District Court's December 8, 2017 order resolved the substantive issues related to assignment agreements, and the February 20, 2018 order was merely a ministerial order designed to effectuate the Court's prior order. *See* 15B C. Wright & A. Miller, *Fed. Prac. and Proc.* § 3916 (2d ed.) ("[M]any postjudgment orders will involve ministerial or discretionary matters that are effectively unreviewable."); *see also IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1020 (2d Cir. 1975) (holding that while the order at issue "finally dispose[d]" of the award, the collateral order doctrine was not "intended to apply to the scores of discretionary administrative orders a district court must make in supervising its receiver"), *abrogated on other grounds by*

Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 130 S.Ct. 2869, 177 L.Ed.2d 535 (2010).

Further, the February 20, 2018 order does not raise important issues, as required to satisfy the second collateral order element. There can be no question that the February 20, 2018 order is precisely the type of administrative order that the District Court plainly retained the authority to enter, as explained *infra*. And the order did not affect the substantive rights of the parties, which had already been ruled upon in the December 8, 2017 order. Instead, the order merely directed the Claims Administrator to distribute funds in a particular way. Such a discretionary, non-substantive decision by the District Court presents little for an appellate court to review, and is inappropriate for review under the narrow collateral order doctrine. We therefore conclude that we do not have appellate jurisdiction to review the February 20, 2018 order, and we will dismiss case number 18-1482.

The third order, enjoining Thrivest from arbitrating the enforceability of its assignment agreement is reviewable under 28 U.S.C. § 1292 as an order of the District Court granting an injunction. The fourth order, dismissing *Thrivest v. White*, is subject to appellate jurisdiction under 28 U.S.C. § 1291 as a traditional final order. Accordingly, we have jurisdiction to address the merits in three of the four timely appeals.

III. [8]

On appeal, the fundamental question is whether the District Court had the authority to void the cash advance agreements. We conclude that the District Court retained broad authority to administer the settlement, but that the Court ultimately ***108** exceeded its authority in voiding the agreements in their entirety.

A.

Where parties have entered into a settlement agreement and a district court has dismissed the case, the court retains jurisdiction over issues related to the case only to the extent it has expressly retained jurisdiction or incorporated the settlement agreement into its dismissal order. *Shaffer v. GTE N., Inc.*, 284 F.3d 500, 503 (3d Cir. 2002). Here, the District Court broadly retained jurisdiction over administration of the NFL class settlement and the class action parties. The Court expressly incorporated the settlement agreement into the order approving the settlement, including the jurisdiction retention provision. *See supra* Section I. The District Court also included a second jurisdiction retention provision in the final order:

> The Court retains continuing and exclusive jurisdiction over this action including jurisdiction over the Parties and their counsel, all Settlement Class Members, the Special Master, BAP Administrator, Claims Administrator, Lien Resolution Administrator, Appeals Advisory Panel, Appeals Advisory Panel Consultants, and Trustee. In accordance with the terms of the Settlement Agreement, the Court retains continuing and exclusive jurisdiction to interpret, implement, administer and enforce the Settlement Agreement, and to implement and complete the claims administration and distribution process. The Court also retains continuing jurisdiction over any "qualified settlement funds," that are established under the Settlement Agreement ....

RD App. 285. As a result, the District Court retained broad jurisdiction to administer the settlement and resolve issues relating to it. [9]

Although the District Court's retention of jurisdiction applied only to the parties and other related entities expressly set out in the retention provision—and there can be no dispute that the settlement agreement was not binding on nonparties—the Court also had authority to enforce its orders under the All Writs Act, 28 U.S.C. § 1651, as well as authority to protect the class as a fiduciary under Federal Rule of Civil Procedure 23. Neither of these sources of authority independently create jurisdiction, *see Clinton v. Goldsmith*, 526 U.S. 529, 534–35, 119 S.Ct. 1538, 143 L.Ed.2d 720 (1999); Fed. R. Civ. P. 82, but they both allow a court to exercise some degree of control over third parties in specific circumstances. *See In re Grand Jury Proceedings*, 654 F.2d 268, 277 & n.14 (3d Cir. 1981) (The All Writs Act "extends to all persons who are in a position to frustrate the implementation of a court order or the

proper administration ***109** of justice." (internal quotation marks omitted)); Communications Among Parties, Counsel, and Class Members, Ann. Manual Complex Lit. § 21.33 (4th ed.) ("The judge has ultimate control over communications among the parties, third parties, or their agents and class members on the subject matter of the litigation to ensure the integrity of the proceedings and the protection of the class.").

Specifically, under the All Writs Act, action is authorized to the extent it is "necessary or appropriate" to enforce a Court's prior orders. *See* 28 U.S.C. § 1651; *see also United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172, 98 S.Ct. 364, 54 L.Ed.2d 376 (1977) ("This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."). Or, as this Court has explained it, there is authority under the Act to issue an injunction where such relief is "necessary, or perhaps merely helpful." *Pittsburgh-Des Moines Steel Co. v. United Steelworkers of Am., AFL-CIO*, 633 F.2d 302, 307 (3d Cir. 1980). This Court has similarly clarified that any remedy under Rule 23(d) "should be restricted to the minimum necessary to correct the effects of improper conduct under Rule 23." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 310 (3d Cir. 2005); *see also Coles v. Marsh*, 560 F.2d 186, 189 (3d Cir. 1977) ("[T]he district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit consideration to the narrowest possible relief which would protect the respective parties.").

B.

Pursuant to the settlement agreement and the District Court order approving and adopting the agreement, the District Court retained the authority to enforce the terms of, and administer, the settlement. As noted *supra*, we have no doubt that the District Court had the authority to enter purely administrative orders such as the February 20, 2018 order directing the disbursement of funds to class members. Our analysis of the December 8, 2017 order is a bit more complicated. That order went beyond pure issues of settlement administration to adjudicate the third-party contract rights of litigation funding companies. Under the All Writs Act and Rule 23, the District Court had authority to enjoin behavior by third parties to the extent necessary to effectuate and preserve the integrity of its prior orders. The question becomes whether, to accomplish those goals, it was necessary for the District Court to void the cash advance agreements in their entirety in the December 8, 2017 order.

The anti-assignment provision in the NFL concussion settlement agreement is as follows:

> Section 30.1 No Assignment of Claims. Neither the Settlement Class nor any Class or Subclass Representative or Settlement Class Member has assigned, will assign, or will attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint. Any such assignment, or attempt to assign, to any person or entity other than the NFL Parties any rights or claims relating to the subject matter of the Class Action Complaint will be void, invalid, and of no force and effect and the Claims Administrator shall not recognize any such action.

This provision includes express language that any assignment "will be void, invalid, ***110** and of no force and effect." That is precisely the type of "clear, definite and appropriate language" that is required to void a subsequent assignment under New York law, which is the law governing the settlement agreement.[10] *See Allhusen v. Caristo Constr. Corp.*, 303 N.Y. 446, 103 N.E.2d 891, 893 (1952). "An assignment purports to transfer ownership of a claim to the assignee, giving it standing to assert those rights and to sue on its own behalf." *Am. Orthopedic & Sports Med. v. Indep. Blue Cross Blue Shield*, 890 F.3d 445, 454 (3d Cir. 2018); *see also In re Stralem*, 303 A.D.2d 120, 123, 758 N.Y.S.2d 345 (2003) ("In order for an assignment to be valid, the assignor must be divested of all control over the thing assigned. When a valid assignment is made, the assignee steps into the assignor's shoes and acquires whatever rights the latter had." (internal citations and quotation marks omitted)). As a matter of New York law, we conclude that any true "assignment, or attempt to assign, ... rights or claims relating to the subject matter of the Class Action Complaint" was void *ab initio* under the anti-assignment clause.

The question then becomes whether true assignments of settlement proceeds, like those reportedly in the cash advance agreements, qualify as assignments of "rights or claims relating to the subject matter of the Class Action Complaint." The District Court found that the anti-assignment provision language applied to assignments of proceeds. This is a pure question of interpretation reviewed for clear error, *see In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 193 (3d Cir. 2000), and we identify no clear error here. [11] Accordingly, we adopt the District Court's interpretation and conclude that any true assignments contained within the cash advance agreements—that is, contractual provisions that allowed the lender to step into the shoes of the player and seek funds directly from the settlement fund—were void *ab initio*. [12]

Based on these conclusions, we also must rule that it was necessary to the District Court's enforcement of the settlement agreement, and the enforcement of its own order approving and adopting the agreement, for the Court to be able to void any true assignments. Otherwise, class members and the litigation funding companies could have undermined the District Court's order by entering into prohibited assignments in contravention of the clear terms of the settlement agreement. We will therefore affirm the District Court's December 8, 2017 order to the extent it voided any true assignments set forth in the cash advance agreements. [13]

***111** In the end, however, we must conclude that the District Court went beyond its authority when it purported to void the cash advance agreements in their entirety. The District Court explained that it was the Court's obligation as fiduciary of the class "to enforce [the anti-assignment] provision of the Settlement Agreement." RD App. 2. That is true, as far as it goes. But to accomplish that goal, the Court had the option of invalidating only the assignment portions of the agreements containing true assignments and directing the Claims Administrator not to recognize any true assignments, without voiding the agreements in their entirety. Some of the agreements contained severance clauses or alternative loan agreements, and there is a dispute as to whether the purported assignments in the funding agreements were true assignments at all. [14] Accordingly, there are portions of the cash advance agreements that may be enforceable even after any true assignments are voided. Of course, once the funds are disbursed to the players, the District Court's power over the funds—and any contracts affecting the funds—is at an end.

Further, although true assignments, which allow a litigation funding company to step into the shoes of a class member and pursue the class member's rights through the claims process, would clearly violate the anti-assignment provision and would affect the administration of the settlement, something less than a true assignment may not. For example, there is no dispute that a loan transaction between a class member and a third party is not prohibited under the terms of the settlement. And where a class member enters into a non-assignment cash advance agreement, such an agreement could be structured like a loan, which would not seem to affect administration of the settlement or violate the anti-assignment provision. The District Court's authority certainly does not extend to how class members choose to use their settlement proceeds after they are disbursed. The District Court made no findings indicating that any aspects of the cash advance agreements, other than assignments, impaired the integrity of the settlement process. As such, to the extent the District Court's December 8, 2017 order voided the cash advance agreements in their entirety, the order was not narrowly tailored to the Court's findings regarding the impact of the agreements on the settlement. [15]

***112** In sum, although the District Court had the authority to enforce the clear terms of the settlement agreement by ordering that any true assignments are void and unenforceable, the Court did not have the authority to void other obligations under the cash advance agreements, particularly without affording the lenders notice and a hearing, or making specific findings that those obligations violated the Court's prior orders or would impair the Court's administration of the settlement. We will therefore reverse in part the District Court's December 8, 2017 order. As a result, the cash advance agreements remain enforceable—outside of the NFL claims administration context—to the extent the litigation companies retain rights under the agreements after any true assignments are voided.

C.

We express no opinion as to the ultimate enforceability of any of the cash advance agreements. We do note, though, that a court or arbitrator subsequently adjudicating these issues will need to address whether any individual agreement contains a true assignment and whether there remain enforceable rights under the agreement after any true assignment is voided. We presume that the full array of standard contract defenses will also apply in any subsequent litigation regarding these

agreements. As noted by Judge Brody in her December 8, 2017 order, some of the class members are cognitively impaired, and it is possible that some of them lacked the capacity to contract at the time they entered into the agreements. [16] Judge Brody's concern is well-taken. There may also be issues of unconscionability, fraud, or usury based on the high effective interest rates in the agreements and arguments by both class counsel and the CFPB that the agreements are disguised predatory loans, rather than true assignments. Because many of the agreements contain arbitration provisions, some of these issues may ultimately be subject to arbitration. Of course, these are all questions beyond the scope of the appeal before us, and they should be litigated (or perhaps arbitrated) on a case-by-case basis in an appropriate forum.

D.

Finally, it necessarily follows from our rulings limiting the reach of the December 8, 2017 order that the District Court exceeded its authority when it (1) enjoined Thrivest from pursuing arbitration of its rights under the cash advance agreement with class member White, and (2) dismissed Thrivest's lawsuit attempting to enforce that agreement. In entering those orders, the District Court relied on the fact that it had already invalidated the Thrivest agreement. But as we explained above, Thrivest's contract gave it only the right to receive settlement funds after the funds are disbursed to a class member, and the District Court's power over the funds and class ends at that point. *Supra* Parts I & III.B. Even if the parties had attempted to create a true assignment, we ***113** have held that the District Court did not have the authority to void Thrivest's agreement with White in its entirety. Thus it also did not have the authority to preclude Thrivest from litigating any of its remaining rights under the agreement. We therefore vacate the District Court's May 22, 2018 order enjoining Thrivest from pursuing arbitration and the Court's order dismissing Thrivest's complaint in *Thrivest v. White*, and remand for further proceedings, as appropriate.

IV.

For the reasons given, we will reverse in part and affirm in part the District Court's December 8, 2017 order. We will reverse to the extent the District Court purported to void the cash advance agreements in their entirety and void contractual provisions that went only to a lender's right to receive funds after the player acquired them. We will affirm as to the District Court's ruling that any true assignments—contractual provisions that permit the lender to seek funds directly from the Claims Administrator—are void. We will vacate the District Court's May 22, 2018 order enjoining Thrivest from pursuing arbitration and the District Court's order dismissing Thrivest's complaint in *Thrivest v. White*, and remand for further proceedings. We will dismiss the appeals at 18-1639, 18-2582, and 18-1482 for lack of jurisdiction.

Going forward, the litigation funding companies will be able to pursue, outside of the claims administration process, whatever rights they may continue to have under their cash advance agreements with class members. We offer no opinion as to the companies' prospects for success in enforcing the funding agreements. Indeed, our opinion today should in no way suggest that an individual agreement is enforceable. Any questions going to the enforceability of the funding agreements will have to be litigated or arbitrated in the appropriate fora.

All Citations

923 F.3d 96

Footnotes

1 Unless otherwise indicated, the term "District Court" refers to the United States District Court for the Eastern District of Pennsylvania and, specifically, Judge Brody.

2 Appellants in 18-1040 and 18-1482 are RD Legal Funding Partners, L.P.; RD Legal Finance, LLC; RD Legal Funding, LLC; and Roni Dersovitz (RD, or RD entities). Appellants in 18-1639 are Atlas Legal Funding, LLC; Atlas Legal Funding I, LP; Atlas Legal Funding II, LP; and Atlas Legal Funding III, LP (Atlas, or Atlas entities). Appellant in 18-2184, 18-2582, and 18-3005 is Thrivest Specialty Funding, LLC (Thrivest).

3 RD has since stated that it has made no attempt to collect directly from the Claims Administrator.

4 The Court did not expressly rule on the class's motion to withhold funds, but it necessarily rejected opposition arguments like those raised by Thrivest. By purporting to void the agreements, the District Court exercised authority that Thrivest argued the Court did not have.

5 Thrivest expressly limited its appeals to its agreement with class member White. *See, e.g.*, Thrivest Reply Br. at 1 n.1 ("Thrivest refers to its dispute as with White (and not the Class or Class Counsel) because its Agreement is with White and it sought to arbitrate only with White."). Thrivest subsequently moved for a stay related to an agreement it entered into with another class member. We denied that motion in part because Thrivest had appealed only as to its agreement with White.

6 As explained *infra*, even if Atlas had not forfeited its arguments as to the February 20, 2018 order, we conclude that it is not an appealable order.

7 We also conclude that we have jurisdiction despite the fact that RD and Thrivest were non-parties to the District Court litigation. In the usual course, only parties of record have standing to appeal. *IPSCO Steel (Ala.), Inc. v. Blaine Constr. Corp.*, 371 F.3d 150, 153 (3d Cir. 2004). "[A] nonparty may bring an appeal when three conditions are met: (1) the nonparty had a stake in the outcome of the proceedings that is discernible from the record; (2) the nonparty has participated in the proceedings before the district court; and (3) the equities favor the appeal." *Id.* The RD entities entered appearances and participated in briefing in the District Court, and Thrivest was granted objector status. To the extent these litigation funding entities were not parties below, *see, e.g.*, *Devlin v. Scardelletti*, 536 U.S. 1, 8, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002) ("Because they were not named in the action, the appellants in these cases were parties only in the sense that they were bound by the order from which they were seeking to appeal."), they nonetheless qualify for nonparty standing under our non-party appeal precedent. *See* *IPSCO Steel (Ala.), Inc.*, 371 F.3d at 153. Both groups of litigation funding entities have a stake in the outcome of the proceedings because the District Court purported to void their agreements with class members, eliminating their contractual rights. The companies also participated in the proceedings before the District Court and submitted related filings. The equities favor allowing the appeal because the funding companies have no way to challenge the District Court's orders, which affected their rights, apart from appealing here.

8 "This court applies plenary review to a district court's construction of settlement agreements, but should review a district court's interpretation of settlement agreements, as well as any underlying factual findings, for clear error, as it would in reviewing a district court's treatment of any other contract." *Coltec Indus., Inc. v. Hobgood*, 280 F.3d 262, 269 (3d Cir. 2002) (citing *In re Cendant Corp. Prides Litig.*, 233 F.3d 188, 193 (3d Cir. 2000) ("[B]asic contract principles ... apply to settlement agreements [and] ... contract interpretation is a question of fact, [thus] ... review is according to the clearly erroneous standard. In contrast, contract construction, that is, the legal operation of the contract, is a question of law mandating plenary review." (alterations in *Coltec*))). In this case, the District Court's interpretation of the settlement agreement terms is properly reviewed for clear error. The District Court's conclusion as to how the settlement agreement applies to the assignment agreements is an issue of construction that is properly reviewed de novo.

9 The litigation funding companies argue that the District Court's December 8, 2017 order was an advisory opinion because it answered a question "referred" to the Court by the Southern District of New York. This argument is meritless. As an initial matter, the District Court was already aware of the problem of the cash advance agreements and had scheduled a hearing prior to the referral letter from the Southern District of New York. Further, regardless of how the question of interpretation of the anti-assignment clause reached the District Court, it had retained the authority to adjudicate any issue related to interpretation of the settlement agreement. This retained authority originated from the underlying NFL concussion case that was the subject of the settlement agreement before the District Court, so the District Court's order simply could not have been an advisory opinion. We have no reason to express a view as to whether it would be appropriate for the Southern District of New York to rely on Judge Brody's order or adopt her rulings in the separate lawsuit before that Court.

10 The settlement agreement contains a choice of law provision specifying that the agreement "will be interpreted and enforced in accordance with the laws of the State of New York." Settlement Agreement Section 27.1(a).

11 Even if we had concluded that the District Court's ruling regarding the settlement language was a question of construction, subject to plenary review, *see In re Cendant Corp. Prides Litig.*, 233 F.3d at 193, we would hold that the quoted language includes assignments of settlement proceeds.

12 The litigation funding companies argue that Article 9 of the New York Uniform Commercial Code bars enforcement of the anti-assignment provision. Even assuming Article 9 of the New York U.C.C. applies to a class action settlement agreement, we are not relying on that agreement here. Instead, through incorporation into the District Court's final order, the settlement agreement has itself become an order, and that order is therefore the document we must analyze. The funding companies provide no basis for invalidating a court order based on a U.C.C. provision.

13 Of course, deciding whether any specific contractual provision is a "true" assignment or a false one requires examining the language of the specific contract. In this instance, such an analysis is unnecessary in the District Court because the effect of a void true assignment and a false assignment, where the funding company has not obtained a right to submit a claim through the settlement process, is the same: the Special Master will not enforce any purported assignment.

14 *See, e.g.*, RD App. 338 (CFPB complaint in S.D.N.Y. pleading that "Although RD mischaracterizes these transactions as 'assignments,' they are in fact offers to extend credit or extensions of credit for purposes of the Consumer Financial Protection Act of 2010"); RD App. 347 (CFPB complaint in S.D.N.Y. pleading that "Although RD characterizes its contracts as 'sales and assignments,' the transactions are loans under New York law"); RD App. 566 (Class counsel noting at 9/19/17 hearing, "Although they have been disguised in some ways as an assignment of a property right ... they're really loans").

15 It is unclear whether the District Court believes it voided the agreements in their entirety and made them completely unenforceable. The express terms of the December 8, 2017 order indicate that was the Court's intent. Subsequent orders, such as the May 22, 2018 order enjoining Thrivest from pursuing arbitration, also indicate that the Court believed it had voided the agreements in their entirety. At another time, however, the District Court noted: "No judgment as to whether RD Legal is or is not ultimately entitled to money has been made by the Court." RD App. 863 n.1. Similarly, in its opposition to Thrivest's Motion for Stay Pending Appeal, the class stated that Thrivest can pursue enforcement of its funding agreement after the funds are paid to the class member: "Once Mr. Andrews is actually paid on his claim, only then will the district court's authority end and Thrivest be able to assert all its legal claims against Mr. Andrews." February 26, 2019 Thrivest Opp. at 7–8.

16 Counsel for the class conceded at oral argument that the class was not making an argument on appeal that class members lacked contractual capacity. Jan. 23, 2019 Oral Arg. Tr. 49:7–20. Of course, this concession for purposes of this appeal will not be binding against class members in subsequent litigation regarding the enforceability of the agreements.

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The New York Times

How the Finance Industry Is Trying to Cash In on #MeToo

By Matthew Goldstein and Jessica Silver-Greenberg

Jan. 28, 2018

Accusations of sexual harassment have felled dozens of executives, but in one quiet corner of the financial world, the #MeToo movement looks like a golden opportunity.

Companies that offer money to plaintiffs in anticipation of future legal settlements are racing to capitalize on sexual harassment lawsuits.

That is setting off alarms in some quarters because the industry, like payday lenders, has a history of providing cash at exorbitant interest rates to customers who need the money for living and sometimes medical expenses.

The largely unregulated companies have operated with less public scrutiny than the rest of the litigation finance industry, which provides money to law firms to fund commercial lawsuits.

Historically, settlement-advance businesses have targeted personal injury and medical malpractice plaintiffs, many of them referred by their lawyers. But in recent months, lawyers say, more pitches are directed at women with sexual harassment claims.

For example, days after news broke of the Hollywood mogul Harvey Weinstein's history of sexual harassment, LawCash, a settlement-advance company, was trying to cash in. "Sexual abuse is a crime #HarveyWeinstein," read a LawCash tweet. The Brooklyn company offered cash upfront to sexual abuse plaintiffs "if you or someone you know is in need of financial help."

The settlement-advance firms get paid back only if a plaintiff collects money from a lawsuit. They make money by charging interest rates as high as 100 percent, which they are able to do because technically the money is considered an advance — not a loan — and therefore is not subject to state usury laws.

Consumer groups call the industry predatory. The companies counter that they are providing a vital service to people without other options.

Legal and business experts said there are scores of firms providing advances to tens of thousands of plaintiffs each year. The largest firms make cash advances totaling up to $40 million a year, according to an unpublished 2014 report by Diligence, a business intelligence firm.

Legal Bay of Fairfield, N.J., is one of the settlement-advance firms trawling for sexual harassment clients.

In one October news release, Christopher R. Janish, its chief executive, said he had “set aside a large portion of their presettlement cash advance funding specifically for plaintiffs of sexual harassment cases.” The next month, the firm trumpeted its “special focus for victims of unwanted sexual advances.”

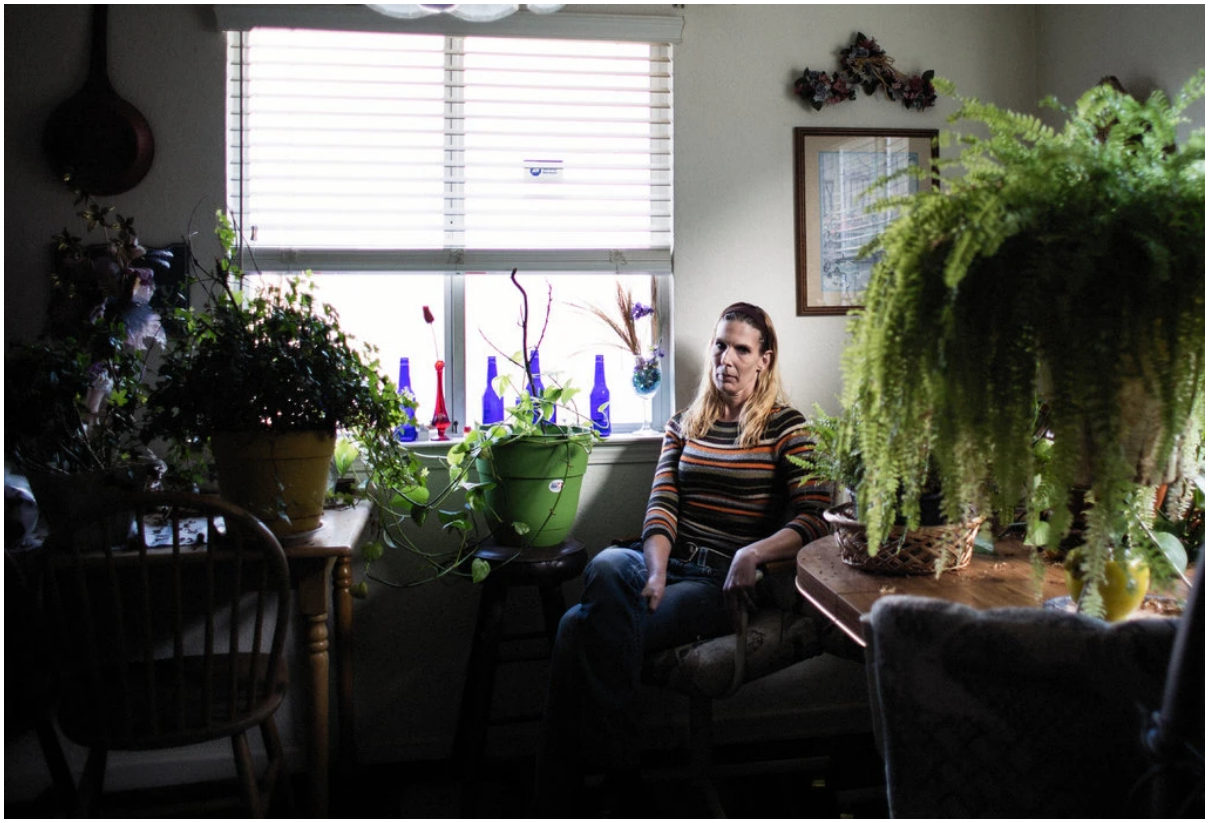
Mr. Janish said he did not know if the pitches had landed any clients. “It just really is more of a public awareness and branding thing,” he said.

The firms advertise on television and include hot-button search terms on their websites to lure traffic. That was how Heather Rothermund of Redding, Calif., learned of Nova Legal Funding in Los Angeles last summer. She had sued her employer, an adult care facility, for failing to discipline a co-worker who she said had groped her breasts and forced his hands down her jeans. Along with a state civil rights agency, she sought $250,000 in damages. The facility’s owner did not respond to a request for comment.

Ms. Rothermund, 41, said the alleged assault left her with bills for therapy and anxiety medications that she couldn’t afford. Her car was about to be repossessed when she came across Nova’s online advertisement. The company advanced her $2,000 against an anticipated future legal settlement, she said.

The money got her out of a financial hole and helped her avoid having to accept a lowball settlement offer. She said that if the case settled within the year she might owe $4,000 — double what she borrowed. If the case drags on, she will owe more.

“It is expensive, but it does help and it is available,” Ms. Rothermund said.



Ms. Rothermund at home in Redding, Calif. The advance gave her the financial means to wait for an acceptable settlement offer, she said. Talia Herman for The New York Times

For the past two decades, settlement-advance companies have been chasing the hottest — and most lucrative — trends in litigation. They have provided advances to victims of surgical vaginal mesh products; those suffering from ailments related to the Sept. 11, 2001, terror attacks; and former National Football League players with brain injuries.

“There are some companies that are trying to ride that ‘me too’ thing, and we are not doing that,” said T. Thomas Colwell, chief executive of TriMark Legal Funding in Oregon. “That is just opportunistic.”

Mr. Colwell said his firm had been providing cash advances to women with sexual harassment claims for 15 years. He said many clients worked in less glamorous industries than Hollywood and needed money to cover basic living expenses.

Only a handful of states regulate or license the settlement-advance firms, and little more than a website is necessary to get into the business.

Mr. Janish formed Legal Bay in 2014, a few years after getting out of state prison in New York for orchestrating a $13 million stock manipulation scheme.

Legal Bay’s promotional materials don’t mention Mr. Janish’s past. He said his legal history wasn’t relevant to customers. “My only obligation is to disclose to them the terms of the money they seek,” he said.

Last year, the Consumer Financial Protection Bureau and the New York attorney general sued R. D. Legal, claiming the New Jersey firm took advantage of former N.F.L. players who expected to receive money in the league's landmark concussion settlement. The authorities claimed that R. D. Legal had tricked the players "into costly advances on settlement payouts."

Just last week, Colorado's attorney general announced a $2 million settlement with LawCash and another settlement-advance firm, Oasis Financial, saying they charged personal injury plaintiffs "predatory interest rates."

The industry says it charges high fees to compensate for the risk of not being repaid.

But the industry's lucrative model has attracted mainstream financial institutions. The D. E. Shaw hedge fund, the private equity firms Parthenon Capital and Victory Park Capital, and Germany's DZ Bank have either bought stakes in or lent money to settlement-advance firms. D. E. Shaw has sold its stake in Oasis Financial.

In addition to providing cash upfront to sexual harassment plaintiffs, some firms are pursuing the more traditional form of litigation finance, providing money to law firms in exchange for a cut of potential settlements.

Nova — the same company that advanced money to Ms. Rothermund — plans to announce that it will provide financing for lawyers pursuing Hollywood sexual harassment cases.

"We're trying to level the playing field in cases against big Hollywood players," said Ron Sinai, Nova's founder.

And Legalist, a San Francisco litigation finance start-up, said that a Weinstein-related marketing pitch had attracted new clients, and that the company was now bankrolling three lawsuits against alleged sexual abusers.

The practices used by the settlement-advance industry have proved particularly controversial, uniting consumer groups and big business in opposition. Consumer activists argue that recipients don't understand how quickly the costs accumulate. Business groups, including the U.S. Chamber of Commerce, argue that cash advances artificially drive up litigation costs.

"I would never recommend an individual finance his or her recovery," said Robert Kraus, a New York employment lawyer. "It is inconsistent for a lawyer, if he believes in a client's case, to recommend that he or she should limit their recovery."

Some of the larger settlement-advance firms use lawyers to drum up business. The firms recruit lawyers in much the same way that pharmaceutical companies woo doctors: with perks such as holiday gift baskets and invitations to year-end parties.

At Oasis, one of the industry's biggest players, employees who got a lawyer to send at least three clients in a year were celebrated as "hunters," according to court documents in an employment dispute.

Oasis, which spends millions of dollars each year on TV advertising, said it had provided funds to 200,000 customers since it opened in 2003.

Michael Gibson, a former case manager at Oasis, said he had worked on up to 70 cases a day. The typical customer, he said, borrowed less than $2,000 but paid a fee that was the equivalent of an 80 percent annual interest rate.

"My personal opinion is that legal financings are predatory loans," Mr. Gibson said.

Some customers say the cost is worth it.

Nickie Burdick, 28, had been unable to work for two years after she was injured in a car accident. Ms. Burdick, of Batavia, N.Y., said her attorney had suggested she take out a loan against a potential settlement in her case.

She knew the rates were steep, but she didn't see another viable option, she said. She recently has been borrowing $2,000 a month from Oasis, accruing $220 in fees each time.

"It was either that or I lose my house and be homeless," she said.

Investment Claims

Revealing Not-for-Profit Third-Party Funders in Investment Arbitration

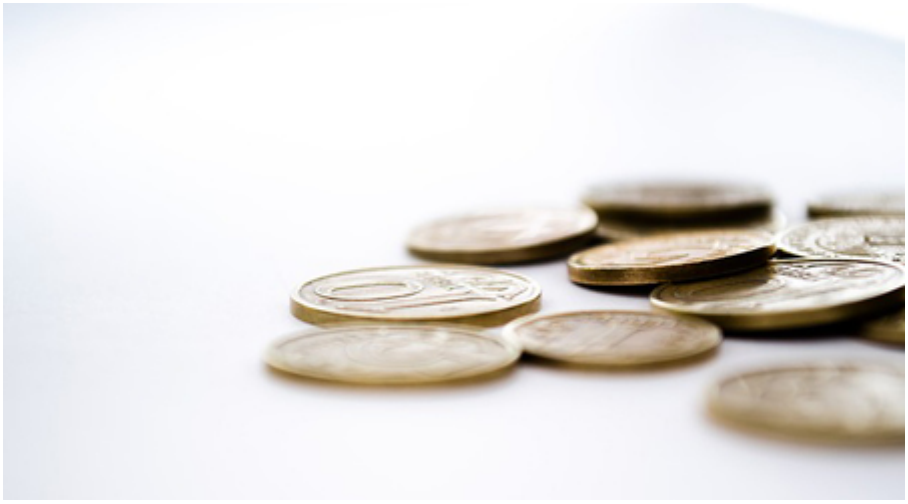


Image credit: Coins, money by thephilippenna [CCo Public Domain]

Author: Victoria Shannon Sahani, Washington and Lee University, School of Law

1 March 2017

The traditional view of investment arbitration tribunals is that the mere presence of a third-party funder has no effect on the arbitration proceedings. For example, the tribunal in *Oxus Gold plc v Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para 127, articulated the traditional view that third-party funding has no impact on the merits portion of the arbitration process: "It is undisputed that Claimant is being assisted by a third-party funder in this arbitration proceeding. The Arbitral Tribunal has mentioned this fact in its Procedural Order Nos. 6 and 7. However, this fact has no impact on this arbitration proceeding." The treatment of third-party funding may vary from tribunal to tribunal, however, since there are arguably no mandatory substantive precedents in investment arbitration regarding third-party funding. Nevertheless, most tribunals that have addressed third-party funding in their awards – if at all – have done so on the assumption that the funder is a separate entity from the funded party and has profit-making as its primary motive. Because of the traditional third-party funder's status as a mere financier, tribunals have essentially been able to simply acknowledge the presence of the funder and move on to addressing other aspects of the case.

Increasingly in investment arbitration, however, third-party funders are participating without a profit-making motive or with profit not being the primary goal. Such funders might be termed 'not-for-profit' funders. Not-for-profit funders are primarily motivated by goals other than turning a profit, such as creating a favorable precedent for future claims, defending state laws from challenges, gathering information about parties, or supporting or fighting against an industry. A famous example of a defense-side, industry-specific, not-for-profit funder is the Anti-Tobacco Trade Litigation Fund created by Bloomberg Philanthropies and the Bill and Melinda Gates Foundation to help low- and middle-income countries finance their defenses against tobacco companies' claims under investment treaties. Specifically, the Bloomberg Foundation and its Campaign for Tobacco-Free Kids famously provided financial support and technical assistance to the government of Uruguay for its defense against the tobacco company Philip Morris in the ICSID case *Philip Morris v Uruguay* in which Philip Morris challenged state regulations requiring plain packaging of tobacco products. Former New York City Mayor Michael Bloomberg also appeared in person at the January 2016 Annual Meeting of the Association of American Law Schools and

pledged in his remarks that his foundation would support countries that did not have the financial means to defend against arbitrations brought by tobacco companies like Philip Morris.

At least one investment arbitration tribunal has addressed a situation involving a not-for-profit funder trying to set a precedent. In *Quasar de Valores SICAV S.A. et al. v The Russian Federation*, SCC Arbitration No. 24/2007, Award of 20 July 2012, para. 223, the funder, Group Menatep Limited, was a former majority shareholder in the Russian oil company Yukos, rather than a separate third-party funding company, and there was no contract in place requiring the claimant to reimburse Menatep. By funding the *Quasar de Valores* case, Menatep was seeking to create a favorable "precedent" in hopes that such a precedent would be applied in its future, much larger, shareholder dispute against Russia under the Energy Charter Treaty. It is also important to note that in this case the tribunal denied the funded party's request to recover costs, because the third-party funder was merely trying to create a favorable precedent and was not entitled to receive repayment from the funded party, even if the funded party won the case. The term "not-for-profit funder" may not be entirely accurate with respect to Menatep's actions in this case, since Menatep expected to use the precedent from the *Quasar de Valores* case to win a monetary award in a future case related to the massive Yukos-related dispute. Nevertheless, Menatep is certainly a different type of funder than the traditional third-party funders that fund a portfolio of unrelated cases mainly for profit.

In addition, states involved in investment arbitration seem to have discovered the potential for not-for-profit funding and are seeking to account for such funding *ex ante* in their investment treaties. For example, on 15 February 2017, the European Parliament voted in favor of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), which brings this treaty one step closer to taking effect. To this Author's knowledge, this treaty is the first fully ratified treaty in the world to require parties to disclose third-party funding. CETA broadly defines "third-party funding" in Article 8.1 as "any funding provided by a natural or legal person who is not a disputing party but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute." Notably, this definition expressly includes both for-profit funders ("in return for remuneration") and not-for-profit funders ("through a donation or grant"). The EU and Canada decided to define a not-for-profit funder by focusing on whether the funder expects repayment for the capital it advances to the funded party rather than focusing on what other motivations the funder might have besides profit. This definition is an appropriate catch-all, since the variety of motivations a funder could have may be endless. Article 8.26 of CETA requires disclosure of only the name and address of the third-party funder "at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made." This is consistent with the practice among tribunals not to require disclosure of the terms of the funding agreement or the full funding agreement unless the funding agreement itself is at issue in the substantive dispute.

With respect to treaties that are still in the negotiation phase, the European Commission has proposed provisions nearly identical to the CETA provisions regarding third-party funding in Art. 1 and 8 of its proposed draft of Chapter II of the Transatlantic Trade and Investment Partnership, which has not yet been concluded. In addition, the current draft of the EU-Vietnam Free Trade Agreement, Ch. 8, Ch. II, Sec. 3, Art. 2, contains a similar definition of third-party funding as "any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant." The inclusion of the language "in the form of a donation or grant" is a recognition of the potential participation of not-for-profit funders. Art. 11 provides for a similar disclosure requirement as CETA and the EC's proposed T-TIP provisions, except it also adds a required disclosure regarding the "nature of the funding arrangement." It also requires that "the Tribunal shall take into account whether there is third-party funding" when making decisions regarding costs and security for costs. The text of the EU-Vietnam Free Trade Agreement was published after the negotiations concluded on 1 February 2016, but the treaty has not yet been ratified. The fact that there are references to not-for-profit funders in at least three ratified or proposed treaties is a sign that such funders will be subject to the same rules and constraints to which the traditional for-profit funders are already subjected.

Furthermore, at least one arbitral institution seems to be aware of not-for-profit funders, although none of the major international arbitration jurisdictions around the world have implemented any rules with

respect to third-party funding. In December 2015, the ICC Commission on Arbitration issued a Report entitled "Decisions on Costs in International Arbitration" that included some guidance to arbitrators regarding third-party funding. Notably, the Commission's definition of a third-party funder in footnote 44 of its Report could be interpreted to contemplate not-for-profit funders: "A third-party funder is an independent party that provides some or all of the funding for the costs of a party to the proceedings (usually the claimant), most commonly in return for an uplift or success fee if successful." The phrase "most commonly" could be a reference to the fact that funders may less commonly make agreements involving non-monetary compensation or for reasons other than receiving "an uplift or success fee."

The foregoing scattered references to not-for-profit funders in an investment arbitration tribunal's award, in three treaties, and in an arbitral institution's rulemaking body may not yet seem very noteworthy. In the grand scheme of international commercial and investment arbitration, however, this Author predicts that we are likely to see a rise in the participation of not-for-profit funders in investment arbitration in the future, both on the claim side and the defense side. When this happens, tribunals will be able to use these existing tools, as well as any similar tools that may be adopted in the future, to assess the participation of such funders in the same way that they already assess the participation of for-profit funders. In order to maintain the integrity of the investment arbitration system, it is crucial that all types of third-party funders are identified and addressed accordingly. The foregoing examples may be the first official attempts at defining and addressing the elusive not-for-profit third-party funder, but they will certainly not be the last.

As more countries adopt strong laws to reduce tobacco use, the tobacco industry is fighting back by challenging these measures under international trade and investment agreements. These lawsuits – and sometimes just the threat of such lawsuits – are aimed at discouraging countries from enacting or implementing life-saving tobacco control laws.

Countries including Australia and Uruguay are currently embroiled in international trade litigation brought by the tobacco industry to keep them from implementing their evidence-based tobacco control policies, and dozens more countries have been threatened with such action by tobacco companies or their representatives.

In response to this growing threat from the tobacco industry, Bloomberg Philanthropies and the Bill and Melinda Gates Foundation on March 18, 2015, announced the creation of the Anti-Tobacco Trade Litigation Fund. The fund will support low- and middle-income countries that have been sued by tobacco companies in arbitration under international trade agreements. Managed by the Campaign for Tobacco-Free Kids, the fund will provide financial and technical assistance to governments committed to defending their laws to reduce tobacco use.

> We are at a critical moment in the global effort to reduce tobacco use, because the significant gains we have seen are at risk of being undermined by the tobacco industry's use of trade agreements and litigation.
>
> Michael R. Bloomberg

> Country leaders who are trying to protect their citizens from the harms of tobacco should not be deterred by threats of costly legal challenges from huge tobacco companies…That's why we are supporting the Anti-Tobacco Trade Litigation Fund with Bloomberg Philanthropies.
>
> Bill Gates

Eligibility For Financial Support

Governments that have had their tobacco control laws challenged in international trade tribunals are eligible to apply to the Campaign for Tobacco-Free Kids for financial assistance. Funds may only be used in the defense of a case and for expenses directly related to the conduct of the litigation such as legal fees and costs, expert fees and other litigation related costs. The following criteria will guide evaluation of requests for assistance.

- The importance of the issue's resolution to both the specific low- or middle-income country, and to other countries that are considering similar action;
- The legal defensibility of the tobacco control measure being challenged;
- The probability of success on the merits to an international trade challenge;
- The size of the population that will benefit from the law; and
- The commitment of the government to tobacco control and to participating fully in the defense of the measure being challenged.

Other Types Of Assistance

While funding will be extended only to countries currently undergoing litigation in a trade forum and meeting these criteria, technical assistance is also available to governments that have been threatened by tobacco companies or their representatives, or that are moving ahead with strong legislation that might prompt trade-based litigation. This assistance includes consultation with lawyers and other experts experienced in supporting countries undergoing trade-based litigation, as well as access to guides and manuals that summarize key trade issues.

Contact Information

Government representatives wishing to discuss financial or technical support should contact Robert Eckford LLB at reckford@tobaccofreekids.org

53 U.C. Davis L. Rev. 1073

U.C. Davis Law Review
December, 2019

Essay
Maya Steinitz [a1]

FOLLOW THE MONEY? A PROPOSED APPROACH FOR DISCLOSURE OF LITIGATION FINANCE AGREEMENTS

Litigation finance is the new and fast-growing practice by which a nonparty funds a plaintiff's litigation either for profit or for some other motivation. Some estimates placed the size of the litigation finance market at $50-$100 billion. Both proponents and opponents of this newly emergent phenomenon agree that it is the most important civil justice development of this era. Litigation finance is already transforming civil litigation at the level of the single case as well as, incrementally, at the level of the civil justice system as a whole. It is also beginning to transform the way law firms are doing business and it will increasingly shape the careers of civil litigators at firms small and large. Consequently, Congress, state legislatures, state and federal courts, bar associations, international arbitration institutions, foreign legislatures, and foreign courts are concurrently grappling with how to regulate litigation finance and what, if any, disclosure requirements to impose on such financing.

This Essay aims to turn the debate inside out by proposing to abandon the quest for a bright line rule and to instead adopt a flexible, discretionary standard: a balancing test. The Essay culminates in a specific proposal for the contours the interests and factors which judges and arbitrators should be empowered and required to weigh when deciding whether and what form of disclosure to require. More specifically, the Essay details and rationalizes the specific public and private interests and factors to consider, including the profile of the plaintiffs and their motive for seeking funding, ***1074** *the funder's profile and motivation, the case type and the forum, the subject matter of the litigation, the potential effect on the development of the law, the structure of the financing, the purpose of the contemplated disclosure, and the procedural posture of the case.*

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*1075 INTRODUCTION

Both critics and proponents of the newly emergent phenomenon of litigation finance agree that the practice is likely the most important development in civil justice of our time. [1] Litigation finance is transforming civil litigation at the case level as well as, incrementally, at the level of the civil justice system as a whole. It is beginning to transform the way law firms are doing business and will increasingly shape the careers of civil litigators at firms small and large. It is unsurprising, therefore, that litigation finance is of interest to legislatures and the courts. At the state and federal level, in the judiciary, the legislatures, and at bar associations, the question of the day is whether and how to regulate litigation finance. That debate, and this Essay, focuses, specifically, on regulation through disclosure of the financing.

In summary, litigation finance is the practice by which a nonparty funds a plaintiff's litigation either for profit or for some other motivation. [2] Last year, some estimates placed the size of the litigation finance market at $50-$100 billion. [3] This market in legal claims has attracted specialist firms, private equity, hedge funds, wealthy individuals, the public (through crowdfunding platforms), and sovereign wealth funds, among others, who are looking for high-risk high-reward investments or for a *cause célèbre*. The high-profile funding of Hulk Hogan's lawsuit against Gawker has created a firestorm of public and regulatory interest. The funding of the concussion litigation, #MeToo cases, and Stormy Daniels' lawsuit--to name but a few recent examples--have dominated headlines and conferences.

This Essay argues that the quest for a bright line rule by which to regulate disclosure of litigation funding is fundamentally misguided because it fails to account for the near-infinite variability of funding scenarios, which implicate widely different interests, pose different ***1076** risks, and affect different constituencies in varying degrees. In other words, rules are a legal technology that simply cannot capture nor address the nuance, variability, and context-specificity that litigation finance implicates. Instead of a bright line rule, this Essay proposes that legislatures and courts shift to a standard-based approach and adopt, specifically, a balancing test. A specific balancing test, including factors and interests to be weighed by courts on an *ad hoc* basis, is then offered.

The Essay progresses as follows. Part I contains a description of pending and recent legislation and regulations. [4] Part II explains what's at stake as litigation finance expands and is poised to reshape civil litigation, civil justice, and the legal profession. [5] Part III explains the reasons why finding a uniform approach to whether or not to mandate disclosure of litigation finance and if so in what form has proved so controversial and elusive. [6] In a nutshell, the problem is the high variability of funding scenarios. The variables are described and unpacked. Part IV explains the invisible common thread in the otherwise-divergent current regulatory and scholarly approaches: when not punting, they assume a rules-based approach. [7] It then suggests moving away from a search for a rule to the embrace of a standard. [8] Part V then suggests such a standard or, more specifically, a balancing test, spelling out interests and factors to weigh. [9]

I. THE FLURRY OF LEGISLATIVE AND REGULATORY ACTIVITY AIMED AT A DISCLOSURE REGIME

Overlapping, but incohesive and under-theorized, discourses on whether and in what way to require disclosure of litigation finance are taking place at the federal, state and international levels. This Part describes these processes, and the proposals on the table, in that order.

A. At the Federal Level

At the federal level, two battlegrounds over regulation of litigation funding are currently waged and they revolve around legislation that would target complex (class and mass) litigation, at one level, and a possible change to the Federal Rules of Civil Procedure ("FRCP"), on ***1077** the other. With respect to the former, in May 2018, Senator Chuck Grassley, Chairman of the Senate Judiciary Committee, introduced the Litigation Funding Transparency Act of 2018 ("LFTA"), which aims "to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes." [10] The bill, reintroduced on February 13, 2019, [11] is a narrow, disclosure-only scheme that follows an earlier attempt to include litigation funding disclosure requirements as part of a broader push to restrict class actions-- the unsuccessful Fairness in Class Action Litigation Act of 2017 ("FCALA"). [12]

If adopted, LFTA would require disclosure of litigation funding arrangements in class actions and multidistrict litigation in federal courts to the court and to all parties. [13] LFTA's stated goal is to improve transparency and oversight of the litigation finance industry, so that the court and other parties are able to identify conflicts of interest and "know whether there are undue pressures and secret agreements at play that could unnecessarily drag out litigation or harm the interest of the claimants themselves." [14]

Critics of the bill, often large litigation funders, argue that the proposed legislation unjustifiably "mandat[es] broad disclosure to the defendant." [15] Instead, they suggest that disclosure should be limited to the court, to avoid "handing defendants an unfair advantage by getting a free look at plaintiffs' financial affairs." [16] Critics also argue that the bill would impose even greater difficulties to plaintiffs of limited economic means "by imposing more barriers to entry for claimants trying to bring meritorious lawsuits against massive corporations." [17]

***1078** With respect to amendments to the FRCP, as of this writing, the Advisory Committee on Civil Rules ("Advisory Committee") finds itself amidst dueling lobbying efforts by proponents and opponents of litigation finance, with the latter lobbying for a revision of the Federal Rules of Civil Procedure mandating disclosure while the former endorsing retention of the *status quo*. [18] The U.S. Chamber of Commerce, the nation's leading business lobby, which has for years led the battle to eliminate or at least restrict litigation funding, [19] recently renewed for the third time its call that federal courts require parties to disclose all litigation funding agreements--including the identity of the funder and the terms of the funding--at the outset of any case in federal court. It proposed a broad amendment to FRCP Rule 26 that would require disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise." [20]

Scholars have also trained their sights on the question of disclosure in litigation finance. For example, one scholar proposes that procedural rules be revised or reinterpreted to require any party supported by a third-party funder to disclose the identity of the funder to the judge *in camera* so the judge may determine if there is a financial conflict of interest. [21] Another suggestion is that a class relying on third-party funding should be required to disclose the arrangement to the court for ***1079** *in camera* review, and the decision-maker be provided at least the name of the funder. [22]

The Advisory Committee declined to take up a similar suggestion in 2014, but it left the door open for future regulation, with members noting that "[w]e do not yet know enough about the many kinds of financing arrangements to be able to make rules" [23] and that "third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now." [24] But more recently, in response to the latest advocacy for rule change, the Advisory Committee created a subcommittee tasked with considering the possibility of initial disclosure of third-party funders in multidistrict litigation. [25] The subcommittee recently reported that it "continues to gather information and has not yet attempted to develop recommendations about whether to consider possible rule amendments, or what amendments, if any, should be given serious study." [26]

Finally, federal courts, in typical common law fashion, have been weighing in on disclosure in litigation finance as various fact patterns increasingly come before them. [27] And while Congress is taking its time, district and appellate courts are enacting rules to deal with disclosure. As of this writing, twenty-four out of ninety-four district courts require some sort of disclosure of the identity of litigation funders in a civil case. Some of the district courts require a party to disclose the nature of a litigation funder's interest in the case. District courts impose these enhanced disclosure requirements in a number of ways, with fourteen promulgating local rules mandating broader disclosure than what is required under FRCP Rule 7.1, [28] two using standing orders, and ten ***1080** using local forms which require disclosure of litigation financiers. [29] In the case of appellate courts, six U.S. circuit courts of appeal have local rules requiring expanded disclosure of litigation funders beyond the requirements of Federal Rule of Appellate Procedure 26.1. [30] These circuit courts generally require a party to disclose any person or organization with a financial interest in the litigation. Beyond this, though, the rules of circuit courts vary in details, with different circuits having different rules regarding whether amici curiae must disclose litigation financing, whether disclosures are limited to certain types of appeals, and other such issues. [31] The stated purpose of these regulations is to assist judges with evaluating possible issues of recusal and disqualification and none require automatic disclosure in every civil case. [32]

B. At the State Level

State legislatures and courts have also, increasingly, taken up the issue of litigation finance regulation in recent years. Unlike federal regulation, which tends to come up in the context of commercial litigation funding or focus on class and mass litigation, the focus at the state level is on consumer litigation funding. [33] Therefore, these ***1081** regulatory efforts often focus on ensuring that agreements are in writing and contain terms with "common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional." [34]

Because the regulation of consumer funding is concerned with avoiding predatory lending-like practices, most of the state regulation is less germane to the current discussion, other than to demonstrate the prominence of the regulatory flurry around a phenomenon that is already altering the quantity, nature, and outcome of civil litigation and is poised to further do so in coming years. But some state-level developments are nonetheless worth noting in the current context. Specifically, in April 2018, Wisconsin enacted "a first-of-its-kind state law requiring litigants to disclose their outside legal funding arrangements." [35] The rule requires a party, "without awaiting a discovery request, [to] provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise." [36] This is the first state regulation which imposes a broad mandatory disclosure requirement for litigants funded by third parties. [37]

Finally, like their federal counterparts, state courts have also been called upon to decide whether and how litigation funding should be disclosed. [38]

***1082** *C. International and Foreign Regulatory Developments*

The development of litigation finance in the United States represents an expansion of an industry that first took hold in domestic litigation in Australia and the United Kingdom, and then expanded in international arbitration. [39] In the realm of international arbitration, the most important development is the creation of "soft law" in the form of a Report by the International Council for Commercial Arbitration ("ICCA")-Queen Mary Task Force on Third-Party Funding in International Arbitration, which was finalized, after a very long and public deliberative process, in April 2018. It restates the general norm emerging in international arbitration of requiring disclosure of the existence and identity of funders for the purpose of arbitrators' conflicts check and confirms the emergent consensus that arbitrators have the authority to order such disclosure. But, likely due to the controversial nature of disclosure, the report refrains from "provid[ing] any new standards for assessing conflicts, but instead refers such issues to existing law, rules, and guidelines." [40] Arbitrators, thus, are left to decide on their own whether, to what extent, and under what conditions, further disclosure may be warranted.

In Australia, the first jurisdiction to legalize (indeed-- actively foster) litigation finance, the existence of a litigation finance agreement needs to be disclosed, but the details of the agreement are likely ***1083** privileged.[41] And in the United Kingdom, the existence of a litigation finance agreement and the identity of the litigation funder are not considered privileged information but the details of a litigation finance agreement generally are.[42]

* * *

What pending proposals generally have in common is that, when they do not simply punt on the issue, they seek or assume bright-line rules on disclosure. The rest of the Essay questions this approach.

II. THE STAKES: WHY LITIGATION FINANCE IS UNDERSTOOD TO BE THE MOST IMPORTANT DEVELOPMENT IN CONTEMPORARY CIVIL LITIGATION

Critics and proponents alike agree that the rise of litigation finance in recent years is the single most important development in civil justice.[43] The following paragraphs explain the main reasons the practice is so ***1084** profoundly important and why it has generated so much interest among academics, lawyers, legislatures, the judiciary, the media, and the investment community.

A. Litigation Finance Implicates Foundational Questions of Civil Justice

The primary import of the industry is its propensity to increase the number of cases brought. This is either a positive or a negative depending on whether one focuses on the potential to increase access to justice for deserving but under-resourced plaintiffs, or on the potential to increase non-meritorious litigation.[44]

An associated concern, relating to systemic effects on the courts, is what affects the availability of funding and liquidity of legal claims might have on how quickly cases settle.[45] But peel away this level of the debate and other, possibly even more profound, implications arise.

***1085** *B. Constitutional, Human Rights, and Civil Rights Implications*

The ability to bring a suit--an expensive enterprise under the best of circumstances--implicates constitutional, human, and civil rights. Access to justice is a human right, "guaranteed as a legal right in virtually all universal and regional human rights instruments, since the 1948 Universal Declaration, as well as in many national constitutions."[46] In the United States, the right to bring a suit is often further described as a form of free speech and participation in certain types of cases is understood to be an aspect of democratic participation.[47] Tellingly, the last time a vigorous debate erupted around "champerty" and "maintenance"--the traditional doctrines that barred, with some exceptions, the funding of a suit by a nonparty--was when civil rights organizations took on civil rights cases, including school integration cases, pro bono.[48]

And for defendants, the questions of who funds the plaintiffs' case, the motivation behind the funding, and whether or not the defendants get to request discovery from the funders or, even, join them as parties, are often framed as questions of defendants' due process rights.

C. Implication for the Organizational Structure of Law Firms and the Competition for Legal Services

Litigation finance, especially with the very recent advent of "portfolio funding" -- funding tied to the performance of a portfolio of cases, ***1086** rather than that of a single case, and provided directly to law firms[49] -- is changing the competitive landscape of law firms and is poised to change the organization, governance, and finance of law firms.[50] For example, start-up and boutique firms are now able to effectively compete with so-called BigLaw and with established plaintiffs' firms for high-end work, including work that may require investment by the firm (e.g., contingency and *qui tam* cases). The availability of outside financing also vitiates the traditional workaround, developed when law firms had a monopoly over litigation finance, whereby

law firms created consortia of firms, where only one or some provides lawyering, and the others were brought on board solely to provide financing. [51] These changes will have cascading effects on how law firms finance and govern themselves.

D. Spillover Effects to Criminal Defense Finance

The financing of civil litigation, especially the modalities it takes, appears to have inspired modes of criminal defense funding. For example, following the development of the crowdfunding of litigation funding, [52] criminal defendants have followed suit with similar crowdfunding efforts. [53] And one may surmise that through sensitizing ***1087** the public to litigation funding, with its attendant host of conflicts and other ethical challenges, in the civil justice arena, conflicts-ridden modes of funding in the criminal defense realm may become more palatable than they otherwise would have been. [54]

* * *

The urgency of all of these questions is amplified when one considers the explosive growth of the industry in recent years, both nationally and globally, and the projections of further future growth as well as expansion into new areas.

Third-party funding, which until the beginning of this century was considered near-universally as a crime, a tort, or at least an ethical violation, has erupted into the mainstream and some estimates of the size of this global industry now place its market capitalization at $50-$100 billion. [55] Given the growing awareness of litigation finance, the fact that many areas of litigation, such as class and mass actions in the United States, have not yet been unlocked as "asset sub-classes," and the fact that various jurisdictions have only recently or not yet legalized the practice--by all estimates, litigation finance is poised to continue seeing robust growth in coming years. [56] This brings us to our next topic: the variability of litigation finance scenarios.

***1088** III. THE VARIABILITY OF LITIGATION FINANCE SCENARIOS

When assessing the suitability of the approaches currently contemplated, as outlined in Part I, it is important to understand the wide array of practices that fall under the rubric of "litigation finance" and the colorful cast of characters that are involved. Ultimately, the variability of litigation finance scenarios militates against a bright-line rule approach.

In 2016, litigation finance exploded into the public consciousness when billionaire Peter Thiel's funding of Hulk Hogan's lawsuit against Gawker became public. Mr. Hogan (whose legal name is Terry Bollea), a retired professional wrestler, sued Gawker for, *inter alia*, invasion of privacy for publishing a video showing him having sex with a friend's wife. [57] In May 2016, reports surfaced that Mr. Thiel, a Silicon Valley mogul, funded the case. Reporting suggested, specifically, that he did so in order to satisfy a personal vendetta: Gawker had "outed" him as gay a decade earlier. [58] Bankrolling Hogan's claim was, according to news reports, his "revenge." [59] Revenge is indeed a dish best served cold: careful canvassing for a "good" plaintiff ultimately yielded a $140 million judgment in favor of Mr. Hogan. The large judgment pushed Gawker into bankruptcy. [60]

***1089** Because the funding in this case felled a news outlet, journalistic interest was heightened and the case generated significant coverage in the press which, in turn, led to increased calls to regulate the nascent but fast-growing litigation finance industry. [61] Specifically, the case drew attention to the issue of whether the existence of funding agreements, the terms of any agreement, and/or the identity of any funders should be public information. [62]

To add complexity and intrigue to this example, according to Forbes magazine, Gawker executives "agree[d] to sell a minority stake in the company to Russian billionaire Viktor Vekselberg and his company .... [T]he money was used, in part, to defend itself from ongoing litigation." [63] In other words, litigation finance was utilized on both sides of the 'v.' with questionable funding sources and motivations on both cases.

Other ripped-from-the-headlines examples of funded litigations include Stormy Daniels' crowdfunded litigation; [64] the NFL concussion cases; [65] and #MeToo cases. [66] Predatory lending practices on the ***1090** consumer litigation finance part of the industry, often deployed when individuals of limited means have suffered a bodily injury and are seeking to finance personal

injury cases, have also been in the news.[67] In the international and transnational realm, attention grabbers include funding in the bet-the-company and bet-the-region mass torts litigation between thousands of Ecuadorian residents of the Amazon and the oil giant Chevron,[68] and the atypical, nonprofit funding by the Anti-Tobacco Trade Litigation Fund, created by Bloomberg Philanthropies and the Bill and Melinda Gates Foundation, which funded low- and middle-income countries that were defendants in the international investment arbitration against tobacco companies that claimed that regulations requiring plain packaging of tobacco products violated their rights under investment treaties.[69] A domestic corollary can be seen in the funding by Iowa agricultural groups of the defense of three state counties against pollution charges, through the following non-transparent structure:

> In March of 2016, documents revealed ... that agricultural groups-- including the Iowa Farm Bureau Federation, the Iowa Soybean Association, the Iowa Corn Growers Association (ICGA) and the Iowa Drainage District Association--secretly funded the defense of the Iowa lawsuit through a 501(c)3 nonprofit, the Agricultural Legal Defense Fund. According to Internal Revenue Service documents ... fertilizer and other agricultural company officials make up the bulk of the nonprofit's officers and directors, including representatives from Smith Fertilizer, Monsanto Co., Growmark, Cargill, Koch ***1091** Agronomics, DuPont Pioneer and the United Services Association.[70]

The list goes on and on, but these examples are sufficient to illustrate the key point upon which this Part will elaborate: the range of funding scenarios is vast and its vastness and variability is, arguably, the main reason those drafting proposed disclosure rules find it hard to settle on a noncontroversial formula. For example, our legal system arguably should treat providing access to justice very differently than it does using the courts as a vehicle for revenge. Similarly, as already acknowledged, average Joes and Janes should receive more protection (which may require disclosure to courts) than do sophisticated funded parties. And foreign governments and their agents acting as financiers may require a different level of scrutiny than a commercial entity, especially if the cases they invest in have national security or foreign relations implications.

Similarly, companies funding cases against their competitors should be treated differently than professional funding firms funding similar cases for a monetary profit. Politically-motivated funding, while distasteful to many, should be considered in light of First Amendment concerns not necessarily present in other types of cases. The consideration for disclosure in arbitration--generally a confidential forum but also one where the decision-makers are selected *ad hoc* by parties (i.e., do not have life tenure)-- are different from courts which, in rule of law societies, are transparent and wherein judges are not jostling for their next appointment. And it appears as though the public may regard a news outlet as different from other types of defendants, especially if the litigation threatens to drive it out of business.

In other words, variables such as the motivation and likely effects of the funding, type of funder, type of funded party, type of defendant, subject matter of the case, and forum all matter. Further, simply classifying the funding by type does not dispose of the inquiry as to what type of and how much disclosure, if any, is appropriate. For example, arbitrators, who usually have a private practice and serve clients when they're not serving on a tribunal, may be more likely to have a conflict of interest than are judges, pointing in the direction of ***1092** more disclosure in arbitration. However, arbitrators, unlike judges, are not empowered to protect the general public and are not expected or empowered to consider policy implications to the same extent as judges are, pointing in the direction of less disclosure.

And here is another example of the context-specificity needed. Even in international arbitration, one size does not fit all: the funding of a commercial claim brought by a commercial party does not, on its face, suggest transparency of funding is warranted. But the funding of an international arbitration involving, say, a boundary dispute or exploration rights does call for transparency as to who is pulling the purse strings because of the public interest involved in such matters. Finally, and again an example from international arbitration, at the beginning of the process disclosure of the identity of the funder aimed only at the tribunal may be all that is needed for conflicts check purposes. Conversely, at the end of a case when a panel needs to decide whether and to what extent to shift the cost of the proceeding to the losing party, disclosure of the funding terms to both the tribunal and opposing party may be warranted.[71]

The dizzying array of variables and variations suggests that: (i) judges and arbitrators should be empowered to inquire into funding and; (ii) the extent and form of this important inquiry should be left to the discretion of the individual decision-maker

so she can engage in a thoughtful weighing of the intricate considerations as they pertain to the facts before her. The next Part brings the analysis full circle with a proposed balancing test.

IV. THE PROPOSAL: A BALANCING TEST

To properly account for the role of litigation finance in proceedings before them, judges and arbitrators should be given broad discretion to undertake a contextual analysis and should not be hamstrung by the kinds of all-or-nothing or otherwise bright-line rules currently contemplated. Nor, however, should they be left totally without guidance, even though, at present, it is understood that decision-makers such as judges or arbitrators have the authority to order disclosure. In short, the proper approach to the question of whether and what to disclose is a balancing test.

To simplify a vast debate in legal philosophy,[72] the distinction between rules and standards is as follows. "Rules" are rigid and ***1093** constraining: "Once a rule has been interpreted and the facts have been found, then the application of the rule to the facts decides the issue to which it is relevant."[73] Conversely, standards provide *discretion*. They seek to guide rather than dictate an outcome. To illustrate:

> Oliver Wendell Holmes and Benjamin Cardozo find themselves on opposite sides of a railroad crossing dispute. They disagree about what standard of conduct should define the obligations of a driver who comes to an unguarded railroad crossing. Holmes offers a rule: The driver must stop and look. Cardozo rejects the rule and instead offers a standard: The driver must act with reasonable caution.[74]

There are tradeoffs when choosing one approach over the other, but a standard is ultimately preferable to a rule in this context. The main advantage of rules is their predictability. The main advantage of standards is fairness through context-specificity. This is so because rules give law content *ex ante* whereas standards do so *ex post*.[75] Further, "[r]ules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct .... [W]hen individuals can determine the application of rules to their contemplated acts more cheaply, conduct is more likely to reflect the content of previously promulgated rules than of standards that will be given content only after individuals act."[76] A standard, therefore, will ***1094** provide less guidance to litigation financiers, attorneys, and parties than a rule would and, in that sense, could create costly uncertainty. The lack of a rule could even allow for undesirable behavior as actors explore, through trial (no pun intended) and error, what is and is not permissible.

Notwithstanding the costs of uncertainty and potentially undesirable behavior, a standard is the right approach to litigation finance disclosure because the sector and its best practices are still evolving and, more importantly, because no single rule would be able to encompass the vast array of scenarios falling under the increasingly stretched definition of litigation finance. What rule, for instance, could adequately account for the difference between a corporate plaintiff whose legal costs are partially covered by a sophisticated investor who has arranged with the corporation's law firm to fund a portfolio of cases, on the one hand, and, on the other, a fired factory worker whose civil rights case is funded by a small startup focused on algorithm-driven investments in claims worth under one million dollars? And yet both of those are examples of litigation funding.

In the following Section I argue, more specifically, for a particular kind of standard: the balancing test. The reason for this recommendation is that "[i]n almost all conflicts ... there is something to be said in favor of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other."[77] A balancing test thus recognizes that, normatively speaking, litigation funding is, *ex ante*, neither "good" nor "bad" nor is its regulation (here, in the form of disclosure) "good" or "bad." It is context specific. This pragmatism, inherent to the judicial activity of balancing, is the reason why, while this legal technique has its detractors,[78] "[b]alancing tests are ubiquitous in American law. From the Due Process Clause to the Freedom of Speech and from the federal joinder rules to personal ***1095** jurisdiction, U.S. law makes the outcome of legal disputes dependent on the balancing of various *interests* and *factors*."[79]

A. The Proposed Balancing Test

In this Section, I will first outline the important interests of the public and of the parties at stake in litigation finance. Then, I will map those interests onto a series of concrete factors that judges and arbitrators should consider when deciding on disclosure. [80]

1. Interests

Whether and how a litigation is funded implicates public and private interests. [81] Specifically, the public has an interest in such matters as access to justice, the development of the law, the cost of civil justice, the level of litigation in society, whether systemically the "Haves" come out ahead in litigation, the length of time litigation takes, the extent of discovery the parties can afford/inflict, and the purposes for which the public good that is the justice system is being used (e.g., justice, compensation, third party profits, revenge, politics, policy, and so forth). [82] A special subset of public interest is the interests of the forum itself (usually, judicial economy). However, because the manner in which effects on the courts often feature in policy debates surrounding litigation finance, and due to the prevalence of arbitration which raises a separate set of concerns, I treat forum interests as a separate category. Finally, the private litigants, both the funded plaintiffs and the defendants who face them, have private interests which must be weighed. Some of those overlap with the public interests mentioned ***1096** above--plaintiffs, for instance, have a stake in improved access to justice and plaintiffs and defendants both have an interest in efficient proceedings--but others exist independently. Any test relating to a component of litigation--its finance--should weigh all of these categories of interests.

I will first lay out those interests in more detail, and in the next Section, I will turn to a discussion of how those interests manifest in specific aspects of a litigation (or arbitration) that could be the subject of a decision-maker's attention when contemplating disclosure.

a. Public Interests

That the extremely high cost of litigation puts justice out of reach for most average Joes and Janes is the starting point for many a course in first year civil procedure. The public has an interest in reducing barriers to accessing the courts. Indeed, the global litigation finance industry first took hold in Australia and the United Kingdom when each jurisdiction legalized the practice as part of national access to justice reforms. [83] Disclosure requirements that are too cumbersome may depress the level of available funding, or raise its costs, or both, diminishing the benefits litigation finance contributes to access to justice. [84]

The expense of litigation imposes an additional cost--by increasing the homogeneity of parties it also increases the homogeneity of the issues presented to the courts. This means that some areas of the law get more judicial attention than others and consequently benefit from more iterative and nuanced development. The public has an interest in access to justice generally, but also an independent interest in the development of areas of law that may be less keenly pursued by the deep-pocketed litigants who can best afford to go to court. Litigation finance has the potential to add significant diversity to the pool of those able to afford to litigate, and therefore to increase the diversity of issues before the courts. But it holds the potential to do more than that. In terms of contribution to the development of the law and the question of who gets to affect judicial law-making, namely is it only the "Haves," or do the "Have-nots" get a chance to do so as well?:

> ***1097** By aligning structurally weak social players who make infrequent use of the courts (one-shotters) with powerful funders who make repeated use of the court system (repeat players), litigation funding may alter the bargaining dynamics between the litigating parties in favor of disempowered parties. It may thereby enable the litigation process to serve as a redistributive tool by society's have-nots as opposed to an (unwitting, perhaps) guardian of the status quo in favor of society's haves. In other words, it may allow these traditionally disempowered parties to "play for rules," i.e., to affect the content of legal rules determined by the courts. [85]

In addition to the general barrier to access to justice imposed by excessively expensive litigation, the high cost of particular parts of the process, especially discovery, opens the door to gamesmanship. The party with more resources has considerable leeway to decide whether, for instance, to "bury" the opposing party with document production or to overwhelm it with discovery

requests. Over time, this has contributed to the assessment that the better-resourced party has an undeservedly higher chance of prevailing in any given case. This undermines the strong public interest in having courts that offer a level playing field. Litigation finance can redress that imbalance by equalizing the resources of parties thus making gamesmanship around costs a less effective strategy.

Not all public interests go the way of litigation finance, however. For instance, courts should be a place for the resolution of disputes and not a source of business profit. This is not to say that plaintiffs with legitimate claims should not be able to secure financial settlements or damages awards just because they need to pay financing costs in order to so do. (In this sense, financing litigation is the same as financing education, health care, and so forth through various forms of financing that carry fees). But it does mean that if in any single case, "portfolio" of cases, or category of cases, ultimately most of the recovery goes to the financiers (be they lawyers or third-party funders), rather than to compensate injured parties, deter bad behavior, or otherwise promote the traditional goals of the public good that is the civil justice system, judges can and should be able to take such factors into consideration as they already do, e.g., when supervising class action settlement. And this, in turn, may mean looking into the funding arrangements, including ***1098** the financial terms, and if need be, determining who is the real party in interest in the case. [86]

In the same vein, litigation finance may, in any given case, stretch the already lengthy timeline of litigation. The efficiency of the justice system is of considerable public interest. If financed parties use the resources available to them to draw out a case that might otherwise have been withdrawn or settled, in order to extract more profit, especially when a finance agreement allows a funder to "vote" against settlement, the system risks becoming more inefficient and expensive for everyone. In other countries, especially those with civil law systems, judges have much more discretion than do American judges, constrained as they are by the Seventh Amendment, to throw out a case at almost any stage of the proceedings. [87] The lesser discretion enjoyed in that regard by U.S. judges increases the danger that funded parties and those backing them could impose inefficiencies on the process in their quest for profits. [88]

***1099** Another, less obvious, element of this analysis is the public interest in data about this brand new, game-changing practice. [89] In the early days of the contingency fee, in the 1920s, the New York City bar and bench grew increasingly worried about contingency fee practices. In 1928, the bar associations for New York City, Manhattan, and the Bronx requested the Appellate Division of the First Judicial Department of the New York Supreme Court to investigate the matter. The Appellate Division entrusted Justice Wasservogel with the task and commissioned a report. The findings of this report led to a recommendation that attorneys be required to file a copy of the retainer agreements between the contingency lawyers and their clients, and an affidavit explaining how the retainer was obtained and affirming that the case had not been solicited by the attorney. [90]

The First Judicial Department implemented some of the report's recommendations, amongst them a requirement that plaintiffs' lawyers file so-called retainer statements that set out the terms of the attorney's compensation. Fast forward to 1955, and Justice Wasservogel was once again commissioned to produce a report on contingent fee practices and consider capping such fees. This second report was based on the retainer statements mandated by the 1929 regulations which were mined and resulted in a finding that 60% of retainers specified that 50% of any recovery went to the lawyers. The ultimate policy outcomes of this second, data-based report were that the First Judicial Department issued regulations that capped contingency fees in actions for personal injury or wrongful death at one-third. [91] The new regulations further required "that lawyers file with the court a 'closing statement' within fifteen days of receiving any money on behalf of a client, whether in judgment or settlement. The closing statement records '[t]he gross amount of the recovery, ... [t]he taxable costs and disbursements, ... [t]he net amount of the recovery actually received by the client, ... [t]he amount of the compensation actually received or retained by the attorney' ...." [92]

***1100** In other words, what is now a core tenet of contingency fee practice in personal injury cases (at least in New York), namely a cap on attorney's fees, was a direct outcome of data-gathering and data-based policy-making. [93] The need for data in the context of litigation funding is particularly acute because of a feature of the commercial litigation funding industry universally overlooked in the disclosure debate: funding agreements almost always contain arbitration clauses. [94] This means that the public--be it consumers or legislatures--has no way to understand the reality of the practice and engage in fact-based consumerism, negotiation, and regulation. [95]

With this non-exhaustive list of public interests in place, let us turn to look at some of the private interests at play. Here, too, the discussing is not meant to be exhaustive.

b. Private Interests

The private parties to consider are the litigating parties-- including individual plaintiffs, classes, and defendants--and the funders. (As a side note, another potential category of possible private parties whose interest should be weighed, but are beyond the scope of this Essay, are the investors who invest in litigation finance. These increasingly include pension funds, university endowments, and sovereign wealth funds. [96]) Plaintiffs' interests include access to justice and the wherewithal to withstand the long and expensive process of litigation on the individual case level (as distinct from the overall access to justice and average litigation length public concerns discussed in the previous Section).

***1101** Plaintiffs' interests also include privacy in relation to their finances. As I like to tell my students to illustrate this last point, whether my mother-in-law is funding my slip-and-fall case and what kind of strings she attaches to such funding has never been considered of relevance in a litigation. That *status quo* is a good place to start the analysis, with deviations requiring affirmative justification.

Of course, defendants have countervailing interests, such as being able to pursue avenues reasonably calculated to lead to material information that may help expeditiously and fairly resolve the dispute and a right to know, and confront, the real party in interest in the case they are defending.

Finally, funders' interests should also weigh in the balance. These include intellectual property in the financial products they produce and a desire to keep the costs of doing business (assuming a for-profit funder) low. [97] The latter means a legitimate concern in avoiding being dragged into the discovery process, being joined as a party, or otherwise being the target of strategic satellite litigation.

c. Forum Interests

In addition to avoiding conflicts of interest on the part of the judges, which is a basic tenet of the rule of law, core concerns for the courts and the judicial system as a whole are the efficient resolution of disputes and the overall integrity of the system. These, too, may point towards limiting satellite litigation relating to litigation funding in the form of seeking discovery from funders or joining them as codefendants for purely tactical reasons, practices which may unnecessarily complicate and raise the cost of litigation. But it also includes empowering judges to figure out, through disclosure, whether the funding terms inappropriately incentivize lengthening the litigation timeline as well as whether the funding arrangement, e.g. the composition of a portfolio, incentivize the filing of prima facie non-meritorious claims. [98] In the ***1102** same vein, the judicial system also has an interest in preventing arrangement types--such as highly synthetic derivatives backed by contingent (or even speculative) litigation proceeds-- that are likely to flood the courts with non-meritorious cases. [99]

2. Factors

Each of the interests discussed above can be mapped onto one or more concrete factors in any given litigation or arbitration. This is important, because judges and arbitrators should not be left to consider in the abstract whether disclosure, as a general concept, increases access to justice or diversity in legal issues, for example, but should instead be provided with guidance for how those interests might play out in specific litigation scenarios depending on their profile, as understood in light of the variables described above. The following Subsections describe those specific factors.

a. The Profile of the Plaintiffs and Their Motive for Seeking Funding

A plaintiff's profile and reasons for seeking funding are important because they bear on the extent to which interests such as access to justice are at stake. Funded plaintiffs may be consumers, start-up companies, established corporations, developing and developed nations, a lead plaintiff in a class action, or the class itself, to name but some examples. The degree to which disclosure-based court involvement and the rigors of the adversarial system should be brought to bear may differ based on such characteristics of the funded plaintiffs.

To further elaborate, an established corporation might seek litigation funding as a form of corporate finance. In this scenario, one might imagine a sophisticated corporation using third-party litigation funding as a way to shift litigation risk, to manage its balance sheet, or to obtain operating capital during a time when litigation otherwise limits access to capital. Conversely, parties who might otherwise lack the resources to withstand long and expensive trials, or even to bring their claims at all, may seek financing in order to be able to access the civil justice ***1103** system. [100] These cases should not be treated alike for regulatory purposes. Further, consumers are generally understood to require a higher level of protection than do sophisticated entities. Similarly, members of a class are understood to need more court protection than, perhaps, both of the preceding categories. [101]

b. Funder's Profile and Motivation

Dispassionate for-profit litigation finance firms, secretive hedge funds, wealthy individuals, family members, non-profits, law firms providing pro bono services, political action committees (PACs), foreign governments (through sovereign wealth funds or otherwise), "crowds" funding via crowdfunding platform-- all these are examples of litigation funders currently active in the market. These descriptors already hint at the wide variety of possible motivations for funding: profit, affecting rule-change for ideological or commercial reasons, assisting the indigent or a family member, hindering the competition, furthering foreign policy, opening up the courts to underrepresented claims or claimants, privately enforcing the law [102] -- these and more ***1104** may all be motivations for funding. Some motivations are, arguably, more worthy of protection than others. To take an extreme example, consider the firestorm that followed the Gawker case, where Hogan's backer seemed to be interested, troublingly, chiefly in revenge and where his target was a member of the Fourth Estate.

To make explicit what the foregoing illustration highlights-- the type-of-funder factor overlaps (but is not coextensive with) the funders' motivation. The commercial funder envisioned in the previous paragraph will likely be somewhat constrained by reputational considerations--wanting to be known for screening and backing good cases and providing decent funding terms. It is also likely to be interested in profitable cases which, usually, will correlate with meritorious ones, and will likely be uninterested in vendettas, politics, foreign relations, and the like. For good and bad, it will also not be concerned with promoting the public interest. Conversely, not-for-profit funders may be concerned with (their version of) the public interest but, of course, what constitutes and furthers the "public's interest" is often a contested matter. A sovereign wealth fund or a foreign government may seek to advance foreign policy or military goals. A one-shot funder [103] may be interested in profit, hindering a competitor, revenge, fame, or politics. A PAC, or a politically-motivated wealthy individual, will probably wish to advance a political agenda. A "crowd" may be comprised of people motivated by justice, politics, or profit. Interestingly, as the reaction to the Gawker case illustrates, maintenance--funding without a profit motivation--may be more problematic than champerty--funding for a profit--even though much of the contemporary consternation around the rise of litigation finance focuses on "profiteering" from others' claims and from the justice system. [104]

***1105** We should leave it to the discretion of the judge whether suspicion or evidence of certain motivations should factor into the decision of whether and how much to disclose of the funding arrangement. Similarly, the weight to be given to the type of funder, which *inter alia* hints at motivation, is also a factor to weigh in the balance.

c. The Case Type and the Forum

Individual litigation, class actions, mass actions, or arbitration (which can be domestic, international regarding commercial law, or international regarding investment law) implicate completely different issues which may call for court supervision and public interest-based transparency as to how a case is funded, by whom, in what manner, and for what goal.

For example, class and mass cases, wherein the lawyers rather than the clients drive and control the case, are very different from individual claims. In the class action context, in particular, members of the class are unnamed and may even be unknown. [105] Traditionally, courts exercise more supervision over such litigation including, critically, over settlements because of the myriad conflicts they entail and the scale of threat they present to defendants. The presence of third-party funding, in lieu of or in combination with attorney funding, is likely to exacerbate conflicts of interest in this context and so court involvement should be heightened as compared to individual cases. [106]

In another example, arbitration (excluding public international law disputes) is a private process conducted in a private forum. By its very essence, private adjudication behind closed doors involves less transparency than litigation in open courts. Further, arbitrators--privately appointed *ad hoc* to resolve a specific dispute based on the parties' agreement that they do so--are not a branch of the government entrusted with and required to safeguard the public interest in the same manner judges are. Arbitrators, therefore, may need to be more circumspect with the goals they wish to further in imposing ***1106** disclosure. [107] But even here, more granularity and nuance are required than simply identifying the case type or the forum. For example, it is understood that international investment arbitration, in which a foreign investor sues a government for violation of a bilateral investment treaty, is a form of private adjudication of public disputes and as such arbitrators sitting in such matters must hew more closely towards both transparency and safeguarding public interests (generally [108] as well as specifically when it comes to disclosure of who is funding the arbitration, in what manner, and in furtherance of what goals [109]).

d. The Subject Matter

Funders have shown interest in cases spanning areas such as contracts, torts, antitrust, intellectual property, consumer protection, *qui tam*, individual and mass torts, human and civil rights, divorce, international commercial, and investment law--to name some common examples. The degree of disclosure desirable in these disparate areas of law is, arguably, different.

One can easily argue, for example, that transparency with respect to those pulling the purse strings and influencing legal argumentation, strategy, settlement, and precedent-making is much more important in international investment disputes, which are governed by public international law, involve the distribution of public money into private hands, and often adjudicate the validity of the conformity of regulation and legislation in the areas of environmental protection, workers' rights, ***1107** and consumer protection with sovereigns' international obligation than it is in international commercial arbitration involving contracts between private parties. [110]

Similarly, divorce often implicates the third-party interests of minors. Therefore, who influences the course of such litigation and its outcome, and the court's ability to bring such potentially real party in interest forth is different than in, say, contract or even tort disputes. [111]

As these examples illustrate, the subject matter of the litigation should affect whether and what form disclosure of funding is appropriate.

e. Potential Effect on the Development of the Law

Famously, and as alluded to above, repeat players--like corporations, insurance companies, and third-party funders--can and do "play for rules," namely litigate rather than settle in order to change the content of the law. [112] And "[w]hile rule change is a public good, it may be profitable for litigation funders to invest in rule change. This is because they manage a portfolio of litigation and, in particular, because they invest repeatedly and sequentially in certain categories of cases." [113] Investing in precedent, in other words, is as valuable for repeat players as is lobbying for legislative change:

> [G]oing to trial specifically in order to obtain rule change may be strategic for litigation funders ... because the value of precedent is greater for them than it is for their one-shotter clients. Economists have argued that "when neither party is interested in precedent, there is no incentive to litigate, and hence no pressure on the law to change. When only one party is interested in precedent, that party will litigate until a ***1108** favorable decision is obtained; the law in such cases will favor parties with such an *ongoing interest*." [114]

Not every case has the potential to set precedent and change the course of the law. But when a judge believes the case before her is of such nature, it is reasonable to suggest she takes that factor under consideration, when deciding whether, to what extent, and to whom disclosure is warranted. Under such circumstances probing, for example, who controls the litigation--whether it is the client or the funder--takes on a heightened significance.

f. The Structure of the Financing

The way financing is structured is, perhaps surprisingly, also an important factor to consider when deciding what degree of involvement by the decisionmaker is warranted. [115] For example, a case may be invested in passively or actively. Namely, a funder may never get involved after initially vetting a case, requiring only to be informed of material developments. On the other end of the spectrum, a funder may be very involved, including in selecting the lawyers, dictating strategy, and controlling settlement decisions. [116] Historically, the greater the ***1109** control by the funder, the greater the suspicion and protection exercised by courts (through the intricacies of the doctrine of champerty). [117]

By the same token, the funding of individual cases involves different considerations than does the rapidly-growing funding of portfolios of cases. In the latter investment structure, the funders often contract directly with the law firm and plaintiffs may not even be aware that their cases are being funded. [118] They may therefore not be aware of salient features of their case such as the resulting conflicts of interest and how the interest formula may affect their lawyers' recommendations on whether, when, and for how much to settle. [119]

And here is yet another example from this more-obscure and less self-evident factor: whether a funder is reserving the right to create derivatives tied to the litigation proceeds may have systemic effects on the courts and may therefore implicate a public interest that is otherwise not common with respect to how one finances her case. [120] To ***1110** understand whether such a securitization prospect exists, decision-makers may need to see whether certain terms--such as a right to assign the claim or a portfolio of claims--are included in the funding agreement, especially if the agreement is a standard form developed by funders.

More broadly, certain structuring may render a litigation contract a security. In such a scenario, a whole host of securities regulation may come to bear. [121] And there may be additional crossover regulation implicated in other funding scenarios such as when a litigation is crowdfunded since crowdfunding is subject to its own set of regulation. [122] The foregoing highlights the fact that various regulators (not only courts) may have an interest in the terms under which litigation is funded, the structure funding takes, and the systemic effects those might have on the civil justice system as a whole as well as on the investing public.

g. The Purpose of the Contemplated Disclosure

The purpose(s) for which disclosure is sought--which may evolve and change over the course of the litigation--can and should also affect not only whether disclosure is warranted and to whom but especially which part of a funding agreement should be disclosed.

***1111** If the purpose of disclosure is for a judge or arbitrator to check for conflicts, disclosing the identity of the funder (and possibly its parent entities) may suffice and could potentially be done *in camera*. If the purpose is to determine whether the funder is a real party in interest, [123] which the court might wish to subject to its authority or a party that should be granted a right to intervene, then the level of control obtained by the funder--which may be embedded in a host of provisions in the funding agreement [124] --may be relevant. In another example, if a party (e.g., a member of a class) or the court suspect a funder is engaged in the unauthorized practice of law, disclosure of the role afforded to the funder in the funding agreement will legitimately be in question, and may possibly come up through a so-called intervention. [125] When supervision of a settlement is in question, both the degree of control and the funding formula may be fair game for scrutiny by a judge or members of a class. [126] Financial terms may also be relevant to determination of late-stage issues such as whether and how much fees to shift at the end of a case. [127]

***1112** The public interest in transparency with respect to understanding the scope and nature of the new, growing, and game-changing phenomenon of litigation finance could be another goal of disclosure. [128]

The purpose of requesting disclosure may be of an altogether different nature, though: abusive disclosure. Namely, requests for disclosure aimed at dragging a funder into discovery disputes or even into the main litigation as a party in order to prolong the litigation and raise its costs; to seek to find out the plaintiff's "reservation point" [129] at which it will settle not on the merits but because funding has been exhausted or for some other, non-merits-based reason; and to glean the type of proprietary financial products a funder has developed for competitive reasons that have nothing to do with the case at hand.

h. The Procedural Posture of the Case

The purpose for which disclosure is sought, as the discussion in the preceding Subsection implicates, bleeds into another factor: the procedural posture of a case. Funders have been known to step in and invest in a case before it is filed, after filing but before trial, after trial but before appeal, and after a final judgment or award has been rendered at the enforcement or collection stage. [130] The procedural posture can and should affect disclosure decisions.

For example, at the enforcement or collection stage, financial or control terms, which may have been relevant earlier in the proceedings, may no longer be relevant; still, the nature of the case and of the parties may continue to be relevant. And in another hypothetical, the very fact of funding, but nothing more, may be all that is needed when deciding ***1113** whether a contender for the role of class counsel is "adequate" as required by FRCP Rule 23. [131]

B. An Iterative Inquiry

Further, I suggest that the proposed balancing test may be deployed, with appropriate modifications for timing and context and with due regard to cost, at any stage of the litigation or arbitration. The analysis could even be repeated at different stages of the litigation because, as the preceding Subsection explains, the applicable factors may be different leading to a different result as to whether, to what extent, and in what form to order any disclosure.

For instance, at the commencement of an international arbitration, the fact of funding and identity of the funder may be sufficient because the question at hand for a tribunal to decide is whether conflicts of interests exits. But at the end of the process, if the case has not settled, the tribunal may need to see the financial and control terms in order to decide whether and how much of the fees to shift under the "loser pay" convention. [132] Financial provisions--e.g., how much funding has been committed and what formula is used to the divide the litigation proceeds--are regarded as particularly sensitive by many plaintiffs and funders and particularly open to strategic gaming by defendants who can "game" the litigation aiming to spend down the committed amount or trigger acceleration of interest.

The option to reevaluate can help prevent over-disclosure early on which may prove unnecessary if a case settles early.

C. Additional Disclosure Calibration Tools

At this point, it should be evident that disclosure is a process, not an event, and that decision-makers are faced with a spectrum of options, not with a "zero sum" decision.

At one end of the spectrum, a judge or an arbitrator may require disclosure *in camera* of the existence of funding only, with or without the mere identity of the funder included. At the other end of the spectrum, is the disclosure to the court, opposing party, and filing for the public record of the entire agreement. In the middle of the spectrum are such tools as the disclosure of certain provisions only and the redaction of others or the filing of a short, check-the-box closing ***1114** statement. A decision-maker can create further gradations by either declining a disclosure without prejudice so that the matter can be revisited as the litigation progresses or, conversely, by imposing a continuing duty to disclose so that if the existence of funding or the identity of funders change throughout the life of the litigation a plaintiff is under an obligation to so disclose.

In addition to regarding the disclosure decision as one that can be revisiting later in the process, as suggested above, decisionmakers can make use of *in camera* and/or *ex parte* submissions, redactions, "attorney's eyes only" designations, filing all or parts of the funding agreement under seal, or requesting attorneys to certify representations about what an undisclosed agreement does or does not contain. In short, the basic tools generally available to moderate undesirable effects of discovery are all available in this context as well.

The final, concluding Section of this Part provides an example of well-calibrated, context-sensitive disclosure by a federal judge presiding over a multidistrict litigation ("MDL").

D. An Example: The Order Regarding Third-Party Contingent Litigation Financing in In re *Nat'l Prescription Opiate Litigation*

A commendable example of a nuanced judicial approach that appears to have taken into account the type of case, the funded parties, the procedural posture, the possible deal structure (and its effects on conflicts of interest) and that made use of tools such *ex parte* submissions and certification by the attorneys, is an order by Judge Polster of the United States District Court for the Northern District of Ohio, presiding over an MDL.

Preliminarily, it should be noted that Judge Polster both broadly defined "third-party contingent litigation financing" as "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of an MDL Case, by settlement, judgment, or otherwise," [133] and surgically exacted that the term does not include "subrogation interests, such as the rights of medical insurers to recover from a successful personal-injury plaintiff." [134]

***1115** Next is the disclosure regime tailored by Judge Polster to the case at bar. "Absent extraordinary circumstances," he ordered, "the Court will not allow discovery into [third-party contingent litigation] financing," [135] but "any attorney in any MDL Case that has obtained [third-party contingent litigation] financing shall:

> • share a copy of this Order with any lender or potential lender.
>
> • submit to the Court *ex parte*, for in camera review, the following:
>
> (A) a letter identifying and briefly describing the [third-party contingent litigation] financing; and
>
> (B) two sworn affirmations--one from counsel and one from the lender--that the [third-party contingent litigation] financing does not:
>
> (1) create any conflict of interest for counsel,
>
> (2) undermine counsel's obligation of vigorous advocacy,
>
> (3) affect counsel's independent professional judgment,
>
> (4) give to the lender any control over litigation strategy or settlement decisions, or
>
> (5) affect party control of settlement." [136]

In so ordering, without handing defendants an informational windfall, the court thus placed the burden of safeguarding legal ethics despite the complications of third-party funding, and potential liability in case of a failure to meet it, on the gatekeepers

with the best view of whether problems exist or arise. And it also placed the lawyers, existing and potential funders on notice that the watchful eye of the court is upon them.

CONCLUSION

In sum, the quest for a disclosure rule has set policymakers on a wild goose chase that has led some to avoid or punt on the issue all together while leading others to propose disclosure regimes that are either over- or under-protective of the multiple stakeholders in this regulatory quandary--namely, plaintiffs, defendants, funders, the public, and the courts--and their varying complex and shifting interests. By ***1116** reminding the legal community of the availability of standards, especially balancing tests, and by fleshing out the specifics of what such a balancing test might consist of in this context, I have endeavored to break the Gordian knot of the surprisingly difficult question of whether and how to structure a disclosure regime for litigation finance.

Footnotes

a1 Copyright © 2019 Maya Steinitz. Professor of Law and Bouma Family Fellow in Law at the University of Iowa College of Law. I would like to thank Victoria Sahani, Alan Morrison, Ed Cooper, Anthony Sebok, and Nathan Miller for their comments on a draft of this Essay. I also thank Carly Thelen and Madison Scaggs for their dedicated research assistance. The author has served as expert witness, counsel, and consultant to law firms, corporate plaintiffs, litigation finance firms, and institutional investors investing in litigation finance.

1 *See infra* Part II.

2 For a fuller explanation of the myriad forms litigation finance takes, see *infra* Part III.

3 *See* Brian Baker, *In Low-Yield Environment, Litigation Finance Booms*, MARKETWATCH (Aug. 21, 2018, 10:59 AM), https://www.marketwatch.com/story/in-low-yield-environment-litigation-finance-booms-2018-08-17 [https://perma.cc/FL5P-4HMD].

4 *See infra* Part I.

5 *See infra* Part II.

6 *See infra* Part III.

7 *See infra* Part IV.

8 *See infra* Part IV.

9 *See infra* Part V.

10 S. 2815, 115th Cong. (2018).

11 *See* Ross Todd, *Republican Senators Reintroduce Bill Pushing for Disclosure of Litigation Funding*, NAT'L L.J. (Feb. 13, 2019, 6:40 PM), https://www.law.com/nationallawjournal/2019/02/13/republican-senators-reintroduce-bill-pushing-for-disclosure-of-litigation-funding.

12 *See* H.R. 985, 115th Cong. (2017).

13 *See* S. 2815 §§ 2-3.

14 *See* Press Release, Comm. on the Judiciary, Grassley, Tillis, Cornyn Introduce Bill to Shine Light on Third Party Litigation Financing Agreements (May 10, 2018), https://www.judiciary.senate.gov/press/rep/releases/grassley-tillis-cornyn-introduce-bill-to-shine-light-on-third-party-litigation-financing-agreements.

15 *Burford Capital Comments on The Litigation Funding Transparency Act of 2018*, BURFORD CAPITAL: BLOG (May 10, 2018), http://www.burfordcapital.com/blog/litigation-funding-transparency-act-2018 [https://perma.cc/63XX-VMXT].

16 *See id*.

17 *See* Matthew Harrison, *The Litigation Funding Transparency Act of 2018*, BENTHAM IMF: BLOG (May 14, 2018), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/05/14/the-litigation-funding-transparency-act-of-2018.

18 *See*ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 345-460 (Nov. 2017), http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf [hereinafter AGENDA NOVEMBER 2017].

19 *See, e.g.*, JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 2, 10, 14 (2012), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf; Harold Kim, *The Time for Litigation Funding Transparency Is Now*, U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 7, 2017), https://www.instituteforlegalreform.com/resource/the-time-for-litigation-funding-transparency-is-now [https://perma.cc/D3VT-KTHA].

20 ADVISORY COMM. ON CIVIL RULES, AGENDA NOVEMBER 2017, *supra* note 18, at 345.

21 *See* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 424-27 (2016). Sahani also argues that the current disclosure rules can be interpreted as relating to third party funding specifically, that the term "resources" in FRCP 26(b)(2)(C)(iii) should be construed to include third-party funding and that language referencing third-party funding should be added to the lists under Rule 16(b)(3)(B) and Rule 16(c)(2) such that information about funding be disclosed as part of the rules-mandated pretrial conferences. Additionally, she suggests adding a new Rule 7.2. In the context of disclosure of third-party funding agreements for a claim for attorney's fees, she suggests enforcing disclosure under Rule 54(d)(2)(B)(iv) or revising it to include third-party funding. *See id*. at 416-34.

22 *See* Aaseesh P. Polavarapu, *Discovering Third-Party Funding in Class Actions: A Proposal for In Camera Review*, 165 U. PA. L. REV. ONLINE 215, 233-34 (2017) (suggesting an affirmative duty on parties to disclose third-party funding agreements for *in camera* review); *see also* Sahani, *supra* note 21, at 424.

23 ADVISORY COMM. ON CIVIL RULES, MEETING MINUTES 13 (2014), http://www.uscourts.gov/sites/default/files/fr_import/CV10-2014-min.pdf.

24 *Id*. at 14.

25 *See*ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 139 (Nov. 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

26 *Id*. at 140.

27 *See, e.g.*, Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., Nos. 16-538, 16-541, 2018 WL 466045, at *6 (W.D. Pa. Jan. 18, 2018); United States *ex rel*. Fisher v. Ocwen Loan Servicing, LLC, No. 4:12-CV-543, 2016 WL 1031157, at *6-7 (E.D. Tex. Mar. 15, 2016).

28 The rule requires that "[a] nongovernmental corporate party must file two copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation." FED. R. CIV. P. 7.1(a).

29 *See*ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 210-11 (Apr. 2018), https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [hereinafter AGENDA APRIL 2018].

30 The rule requires that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation." FED. R. APP. P. 26.1(a).

31 *See*ADVISORY COMM. ON CIVIL RULES, AGENDA APRIL 2018, *supra* note 29, at 209-10.

32 *See id*. at 210.

33 *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460-61 (2012) [hereinafter *The Litigation Finance Contract*] (explaining the common distinction between consumer litigation funding, which focuses on the funding of small personal claims for individual clients, and commercial litigation funding, which focuses on the funding of larger, higher value claims brought by more sophisticated parties, these parties often being business entities); *see also* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 382-83 (2014) (noting three main types of litigation financing: consumer litigation financing, commercial litigation financing, and lawyer lending); Anthony J. Sebok, *Litigation Investment and Legal Ethics: What Are the Real Issues?*, 55 CANADIAN BUS. L.J. 111, 114-15 (2014) [hereinafter *Litigation Investment and Legal Ethics*] (describing the differences between consumer and commercial litigation investment); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 864-65 (2015) (noting the different regulatory regimes imposed on commercial and consumer litigation financing).

34 VT. STAT. ANN. tit. 8, § 2253(a) (2015); *see, e.g.*, ARK. CODE ANN. § 4-57-109 (2015); ME. REV. STAT. ANN. tit. 9-A, § 12-104 (2008); NEB. REV. STAT. ANN. § 25-3303 (2010); OHIO REV. CODE ANN. § 1349.55 (2008); OKLA. STAT. ANN. tit. 14A, § 3-805 (2013); TENN. CODE ANN. § 47-16-104 (2014); *see also*ADVISORY COMM. ON CIVIL RULES, AGENDA APRIL 2018, *supra* note 29, at 216-17 (discussing state legislation and regulations for regulating litigation funding through registration models and caps on rates and fees).

35 Andrew Strickler, *Wis. Gov. Signs Legal Funder Transparency Rule*, LAW360 (Apr. 3, 2018, 9:26 PM), https://www.law360.com/legalethics/articles/1029480/wis-gov-signs-legal-funder-transparency-rule.

36 WIS. STAT. ANN. § 804.01 (2019).

37 *See* Strickler, *supra* note 35.

38 *See, e.g.*, Carlyle Inv. Mgmt. v. Moonmouth Co., C.A. No. 7841-VCP, 2015 WL 778846, at *8-9 (Del. Ch. Feb. 24, 2015) (litigation funding documents serve a dual litigation and business purpose, but should still be subject to work product confidentiality protections); Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., No. 07C-12-134-JRJ, 2015 WL 1540520, at *4 (Del. Super. Ct. Mar. 31, 2015) (since the payment terms in a litigation finance agreement were prepared in anticipation of litigation, and involved attorney mental impressions and litigation strategies, these terms should be subject to work product protection); Conlon v. Rosa, Nos. 295907, 295932, 2004 WL 1627337, at *2 (Mass. Land Ct. July 21, 2004) (the need to evaluate bias and credibility of the plaintiff weighs against holding litigation finance documents confidential).

39 *See* Leslie Perrin, *England and Wales*, *in*THE THIRD PARTY LITIGATION FUNDING LAW REVIEW 48, 48-58 (Leslie Perrin ed., 2d ed. 2018) (reviewing litigation financing in England and Wales); Nicholas Dietsch, Note, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 698-705 (2011); Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 96-113 (2013); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-86 (2011) [hereinafter *Whose Claim Is This Anyway?*]). *See generally*LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2d. ed. 2017) (detailing third-party litigation funding in several countries and discussing the problems that may arise with litigation funding in international arbitration).

40 *See*INT'L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATIONN 12 (2018), https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

41 *See* Jason Geisker & Jenny Tallis, *Australia*, *in*THE THIRD PARTY LITIGATION FUNDING LAW REVIEW, *supra* note 39, at 1-11.

42 *See* Perrin, *supra* note 39, at 53.

43 *See, e.g.*, GEOFFREY MCGOVERN ET AL., THIRD PARTY LITIGATION FUNDING AND CLAIM TRANSFER 1 (2010) (ebook). More generally, "[w]e find ourselves in the second stage of a revolution in the financing of civil litigation ... [c]ompared with the situation seventy-five years ago, the plaintiffs' bar is today better financed, both absolutely and relative to the defense bar." Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 183 (2011). Critics include the U.S. Chamber of Commerce, through its publications. *See, e.g.*, JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009), https://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf; BEISNER & RUBIN, *supra* note 19, at 1 (labeling litigation finance "a clear and present danger to the impartial and efficient administration of civil justice in the United States"); *Third Party Litigation Funding*, U.S. CHAMBER INST. FOR LEGAL REFORM, https://instituteforlegalreform.com/issues/third-party-litigation-funding (last visited Sept. 8, 2019) [hereinafter *Third Party Litigation Funding*]. Other critics include Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613 (2012) and Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593 (2012). Proponents include ABA Comm. on Ethics & Prof'l Responsibility, *see* Formal Opinion 484 (Nov. 27, 2018), N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *see* Ethics Opinion 1104 (Nov. 15, 2016), and scores of scholars, *see, e.g.*, Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995); Sebok, *Litigation Investment and Legal Ethics*, *supra* note 33, at 111.

44 For arguments that litigation finance is likely to increase non-meritorious litigation, see, for example, Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239, 1258-60 (2016); Thomas J. Donohue, *Stopping the Litigation Machine*, U.S. CHAMBER OF COMM. (Oct. 31, 2016, 9:00 AM), https://www.uschamber.com/series/your-corner/stopping-the-litigation-machine; and *Third Party Litigation Funding*, *supra* note 43. For arguments that litigation is unlikely to increase non-meritorious litigation, see, for example, Molot, *supra* note 43, at 106-07; Shannon, *supra* note 33, at 874-75. More generally, for literature on the socially desirable level of litigation, see, for example, Richard L. Abel, *The Real Tort Crisis--Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) and Nora Freeman Engstrom, *ISO the Missing Plaintiff*, JOTWELL (Apr. 12, 2017), https://torts.jotwell.com/iso-the-missing-plaintiff/ (book review) ("Using a number of methodologies, these researchers have, again and again, confirmed Abel's basic empirical premise. In most areas of the tort law ecosystem, only a small fraction of Americans seek compensation, even following negligently inflicted injury."). For a classic law and economics analysis of the suboptimal levels of litigation, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISCOURSE 110 (2013) (describing the evolution of funding available to plaintiff-side personal injury firms and identifying the ways in which third party funders in this space may alter the American litigation landscape).

45 *See* Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1305-07. For empirical data on the subject, see Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer-Litigant Funding* 13 (Cardozo Legal Studies Research Paper No. 539, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137247 (using a dataset of funding requests to find that in cases where the plaintiff was funded and the lawsuit was settled, 417 days was the median amount of time between the initial payment to the funder and settlement of the case and the funder being fully paid); David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1080-81, 1107 (2013) (finding that although data on settlements cannot be obtained, "that once defendants recognize the increased likelihood of litigation and the greater resources held by plaintiffs, they would be more likely to settle in equilibrium. While transitioning to that new equilibrium, there is another potential benefit from litigation funding: earlier resolution of the law."); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding--A Signaling Model*, 63 DEPAUL L. REV. 233, 235 (2014) (arguing that third-party litigation funding gives plaintiff(s) more time to come to a better settlement); Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND J. ECON. 23, 49 (2015) ("[I]ncreased settlement may arise if litigation funding reduces the uncertainty of case outcomes .... Although settlement is not directly measured ... the number of cases filed and the number of finalizations are positively associated with litigation funding, whereas the number of times parties are required to appear before court per case is negatively associated with litigation funding ....").

46 Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, *in*ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 2 (Francesco Francioni ed., 2007).

47 *See, e.g.*, Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577-79 (2008) (arguing that trials further certain social and democratic aims such as giving a voice to litigants to express their claims and providing a platform for the publication of wrongs that may have been incurred).

48 *See The South's Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 YALE L.J. 1613, 1613 (1963).

49 *See As the Funding Industry Evolves, Portfolio Financing Grows in Popularity*, BENTHAM IMF: BLOG (May 10, 2018), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/05/10/as-the-funding-industry-evolves-portfolio-financing-grows-in-popularity [https://perma.cc/53U7-CHB4]; Press Release, Burford, Burford Capital Announces Innovative Insolvency Portfolio Financing with Grant Thornton (May 4, 2016), http://www.burfordcapital.com/newsroom/burford-capital-announces-innovative-insolvency-portfolio-financing-grant-thornton; *Portfolio Litigation Funding*, WOODSFORD LITIG. FUNDING, https://woodsfordlitigationfunding.com/litigation-finance/portfolio-litigation-funding (last visited Feb. 18, 2018) [https://perma.cc/E3YK-YN53].

50 For an in-depth discussion of these effects, see Maya Steinitz, The Partnership Mystique: Law Firm Finance and Governance in the 21st Century (forthcoming manuscript) (on file with author).

51 *See* Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 475-76 (1998); Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 387 (1990).

52 *See infra* note 122.

53 Prominent current examples include Michael Cohen, Benjamin Netanyahu, and Rick Gates. *See Michael Cohen Truth Fund*, GOFUNDME (Aug. 21, 2018), https://www.gofundme.com/hqjupj-michael-cohen-truth-fund; *Netanyahu Rejects Decision Banning Tycoons from Funding His Legal Defense*, TIMES OF ISRAEL (Feb. 24, 2019, 9:16 PM), https://www.timesofisrael.com/netanyahu-rejects-decision-banning-tycoons-from-funding-his-legal-defense ("Legal representatives for Prime Minister Benjamin Netanyahu declared Sunday that the premier does not intend to accept a decision banning funding from wealthy associates of his legal defense in the three corruption cases he is facing."); Kathryn Watson, *Judge Chastises Rick Gates for Legal Defense Fundraiser Video*, CBS NEWS (Dec. 22, 2017, 1:01 PM), https://www.cbsnews.com/news/judge-chastises-rick-gates-for-legal-defense-fundraiser.

54 For examples of such controversial, potentially conflicts-ridden, forms of criminal defense finance by President Trump with respect to the legal bills of his family members and former and current staffers, see Summer Meza, *Trump's New Conflict of Interest Could Involve Paying Off Officials to Not Talk About Russia*, NEWSWEEK (Nov. 18, 2017, 9:33 AM), https://www.newsweek.com/trump-legal-fees-staffers-conflict-interest-715995 ("[R]ather than using campaign donations or charging the Republican National Committee, [President Trump] has created a fund to finance the legal bills of his former and current staffers--which could violate ethics laws if there's a chance it could influence their testimonies .... The RNC paid more than $230,000 for two of Trump's personal attorneys .... The Republican Party has shelled out even more for Donald Trump Jr., paying more than $500,000 in legal fees as he faces allegations of collusion ....").

55 *See* Baker, *supra* note 3. Of course, since almost all funders are privately-held, and since substantial numbers of financings are provided by ad hoc funders, not dedicated litigation financiers, definitive numbers are unavailable.

56 *See, e.g.*, MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE 127-130 (2019) (discussing the rise of litigation finance and its growing prominence); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 164-68 (2011) (discussing the growing global scale of litigation finance in jurisdictions such as Australia and England, and how countries such as Spain and Brazil offer untapped markets for third-party funding); Christopher P. Bogart, *What's Ahead in Litigation Finance?*, BURFORD: BLOG (July 17, 2017), http://www.burfordcapital.com/blog/future-litigation-finance-trends [https://perma.cc/3P8Q-RPD3] (arguing that litigation finance will experience robust growth in the coming years); *Litigation Finance Forecast: Six Trends to Watch in 2019*, BENTHAM IMF: BLOG (Jan. 2, 2019), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2019/01/02/litigation-finance-forecast-six-

trends-to-watch-in-2019 [https://perma.cc/2KPG-BAA5] (predicting a surge in portfolio financing to fund more large-scale litigation).

57 *See*Bollea v. Gawker Media, LLC, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *2 (M.D. Fla. Nov. 14, 2012).

58 *See* Eugene Kontorovich, *Peter Thiel's Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST: THE VOLOKH CONSPIRACY (May 26, 2016, 5:19 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/; Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html.

59 Manuel Roig-Franzia, *What Happens When Billionaires Battle Gossipmongers? Prepare for Explosions*, WASH. POST (Feb. 9, 2019, 4:00 AM), https://www.washingtonpost.com/lifestyle/style/what-happens-when-billionaires-battle-gossipmongers-prepare-for-explosions/2019/02/08/bb475576-2be8-11e9-b011-d8500644dc98_story.html. Thiel told the New York Times, "It's less about revenge and more about specific deterrence .... I saw Gawker pioneer a unique and incredibly damaging way of getting attention by bullying people even when there was no connection with the public interest." Sorkin, *supra* note 58.

60 Gawker filed for bankruptcy on June 10, 2016. *See*In re Gawker Media LLC, 571 B.R. 612, 617 (Bankr. S.D.N.Y. 2017); *see also* Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016, 1:22 PM), http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#181ed4b17e80.

61 *See, e.g.*, Michelle Castillo, *Gawker to Pay Hulk Hogan at Least $31 Million to Settle Case*, CNBC (Nov. 8, 2016, 2:42 PM), https://www.cnbc.com/2016/11/02/gawker-settling-litigation-with-peter-thiel-hulk-hogan-for-undisclosed-amount.html (noting the founder of Gawker's thoughts on the legacy of the Gawker-Hogan litigation and the potential danger of "dark money" in litigation finance); Sorkin, *supra* note 58 (discussing the increased journalistic interest in third party funding); Martha C. White, *Peter Thiel vs. Gawker: Case Highlights World of 'Litigation Funding'*, NBC NEWS (May 29, 2016, 7:37 AM), https://www.nbcnews.com/business/business-news/peter-thiel-vs-gawker-case-highlights-world-litigation-funding-n581726 (discussing the growing practice of litigation finance).

62 This statement is based on more than a dozen calls from journalists received by the author in connection with the disclosure of the Thiel financing of the Hulk's case against Gawker.

63 Drange, *supra* note 60; *see* Tom Winter & Robert Windrem, *Who Is Viktor Vekselberg, the Russian Oligarch Linked to Trump Lawyer Michael Cohen?*, NBC NEWS (May 10, 2018, 6:22 AM), https://www.nbcnews.com/politics/donald-trump/meet-nice-russian-oligarch-linked-trump-lawyer-michael-cohen-n872716 (explaining that Vekselberg is possibly linked to money that has moved through companies he is associated with to Michael Cohen, President Trump's former personal lawyer and a convicted felon, and potentially paid to Stormy Daniels).

64 *See* Stephanie Clifford, *Clifford (aka Daniels) v. Trump et al.*, CROWDJUSTICE (Apr. 24, 2018), https://www.crowdjustice.com/case/stormy.

65 *See* Steven M. Sellers, *Troubled NFL Concussion Deal May Roil NHL Cases*, BLOOMBERG LAW (May 25, 2018, 4:06 AM), https://news.bloomberglaw.com/product-liability-and-toxics-law/troubled-nfl-concussion-deal-may-roil-nhl-cases.

66 *See* Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo*, N.Y. TIMES (Jan. 28, 2018), https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harassment.html; Philippe A. Lebel, *Could a Litigation Finance Initiative Capitalize on #MeToo?*, NAT'L L. REV. (Nov. 14, 2017), https://www.natlawreview.com/article/could-litigation-finance-initiative-capitalize-metoo.

67 *See, e.g.*, Matthew Goldstein, *Judge Dismisses Federal Suit Accusing Firm of Defrauding 9/11 Responders*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/business/september-11-attacks-nfl-concussion-settlements.html (discussing the practice of extending cash advances to people with pending cases such as 9/11 responders).

68 *See*Chevron Corp. v. Donziger, 833 F.3d 74, 134 (2d Cir. 2016); Steinitz, *The Litigation Finance Contract*, *supra* note 33, at 465-79.

69 *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 12, 22 (July 8, 2016). For an explanation of third-party funding in that case as well as other forms of third-party funding of investment arbitration, see Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, OXFORD U. PRESS (Mar. 1, 2017), http://oxia.ouplaw.com/page/third-party-funders [https://perma.cc/LFF9-ML4K].

70 Llewellyn Hinkes-Jones, *Open Records Request Exposes Rare Litigation Finance Document*, BLOOMBERG LAW (Feb. 23, 2017), https://www.bloomberglaw.com/product/blaw/document/X2CUA2PO000000 [https://web.archive.org/web/20170223223237/ https://www.bna.com/iowa-pollution-suit-n57982084227/]. The report goes on to quote Michael Reck, an attorney with Belin McCormick P.C. in Des Moines, Iowa, one of the law firms representing the counties, as stating that such finance agreements are "not uncommon." *Id*.

71 *See*INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 40, at 159.

72 For jurisprudential classics on the rules/standards distinction and its implications, see, for example, H.L.A. HART, THE CONCEPT OF LAW 126-31 (1961); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115-23 (1922); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFEE 10-12 (1991); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976). For examples of treatment of the distinction and its consequences from the law and economic tradition, see, for example, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

73 Lawrence Solum, *Legal Theory Lexicon: Rules, Standards, and Principles*, LEGAL THEORY BLOG (Sept. 6, 2009, 9:40 AM), http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html [https://perma.cc/8EF4-SXLV]. Solum, like others, distinguishes between standards and principles but, for simplicity, I will follow Dworkin and limit the distinction to rules and standards. *See* Dworkin, *supra* note 72, at 22-29.

74 Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985) (footnotes omitted).

75 *See* Kaplow, *supra* note 72, at 559-60.

76 *Id*. at 557.

77 Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2123 (1985). For an in-depth discussion of the benefits and perils of balancing tests, see, for example, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44, 965-66 (1987) (discussing these modes of judicial decision making in the context of constitutional law). Litigation finance, *inter alia*, intertwines with the constitutional values of the right to have one's day in court and of due process.

78 *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 636-49 (1988). *See generally* Aleinikoff, *supra* note 77 (discussing the rise in use of balancing tests and giving various critiques of balancing).

79 Lawrence Solum, *Legal Theory Lexicon: Balancing Tests*, LEGAL THEORY BLOG (Dec. 10, 2017, 5:37 PM) (emphasis added), http://lsolum.typepad.com/legaltheory/2017/12/legal-theory-lexicon-balancing-tests.html [https://perma.cc/8AGY-WUQW].

80 This is an expansion and an application of a taxonomy I first offered in a previous article. *See* Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1302-03.

81 Balancing tests often take the meta structure of balancing public versus private interests with different private and public interests falling under each category depending on the interests. A couple of examples include the balancing test for granting preliminary injunctions and the one for granting dismissal based on forum non conveniens. *See*11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.2 (3d ed. 2019); 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3828 (4th ed. 2019).

82 For a discussion of how repeat players such as funders can affect whether the "Haves" or "Have-nots" come out ahead in litigation, see Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1299-1302. For a similarly canonical explanation of why there is both too little and too much litigation due to the divergence of private and social incentives to sue, see Shavell, *supra* note 44, at 575-81.

83 Michael Napier et al., CIVIL JUSTICE COUNCIL, IMPROVED ACCESS TO JUSTICE--FUNDING OPTIONS AND PROPORTIONATE COSTS 54 (2007); RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 40 (2009), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

84 *See* Avraham & Sebok, *supra* note 45, at 5-6, 30.

85 Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1271-72.

86 In this vein, I have argued elsewhere that consumer litigation funding regulation should ensure that plaintiffs are guaranteed a minimum of 50% recovery of tort claims. *See Lawsuit Lending: Hearing Before the N.Y. State S. Standing Comm. on Consumer Prot.*, (N.Y. 2018) (statement of Maya Steinitz, Visiting Professor of Law at Harvard Law School, Professor of Law at University of Iowa School of Law), https://www.nysenate.gov/transcripts/public-hearing-05-16-18-nys-senate-hearing-consumer-protection-finaltxt. *See generally* Maya Steinitz, *Letter to the Hon. Sen. Orrt (NYS Senate) Regarding Litigation Finance (Lawsuit Lending) (2018)* (Univ. of Iowa Legal Studies Research Paper No. 18-15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238148 (arguing for a 50% minimum recovery requirement by addressing both the economics of the requirement and the normative arguments for it).

87 *See generally*JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 26-27 (1995) (outlining differences in the legal process between civil-law judges and American judges).

88 For an example of a litigation finance agreement that grants control over settlement of consumer cases (low value cases brought on a volume basis), see Mize v. Kai, Inc., No. 17-CV-00915-NYW, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) and *Carton v. Carroll Ventures, Inc.*, No. CV 17-0037 KG/SCY, 2017 WL 8941281, at *4 (D.N.M. July 10, 2017). Both cases discuss a funding scheme by a funding entity which funded discrimination cases brought under the Americans with Disabilities Act. Under the scheme, the funding agreement purported to limit the plaintiffs' ability to discontinue the litigation or settle without the funder's prior consent as well as to require plaintiffs to settle if so directed by the funder. The funding agreement also had the effect of awarding plaintiffs $50 per case with all other proceeds going to the funder and attorney. For an example of a litigation finance agreement that grants control over settlement of a mass tort case to the funder, see the discussion of the funding in the Chevron-Ecuador environmental mass tort litigation in Steinitz, *The Litigation Finance Contract*, *supra* note 33, at 465-79.

89 *See* Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1973-76 (2017) (describing the evolution of the requirement that lawyers in tort cases filed in New York file a copy of their retainer and a closing statement with pertinent information and how the data comprised of such disclosure affected the legislative cap on contingency fees in the state).

90 *See id*. at 1972-74.

91 *See id*. at 1974-75. Or a regulatory sliding scale. *See id*. at 1975.

92 *Id*. at 1975 (quoting the report) (internal quotation marks omitted). These closing statements, in turn, yielded Helland et al.'s article which contains invaluable findings including that "very few cases are resolved by dispositive motions; that litigated cases and settled cases have almost exactly the same average recovery; that median litigation expenses, other than attorney's fees, are 3% of gross recovery; that claims are disproportionately from poor neighborhoods; and that attorneys' fees are almost always one-third of net recovery, which is the maximum allowed by law." *Id*. at 1971.

93 *See id*. at 1972-76.

94 This observation is based on the author's extensive experience working with funders, plaintiffs, law firms, and investors, as well as on conversations with funding firms. Exceptions tend to occur only when the funding is provided by an *ad hoc* funder rather than a funding firm, which means that litigation over funding agreements in the courts are based on agreements that are unlikely to be the industry standard.

95 The lack of data about the industry and its practices was a recurring theme during the public hearing on the regulation of consumer litigation funding held by the New York State Senate Standing Committee on Consumer Protection in May 2018. *See* NY Senate, *Public Hearing - Committee on Consumer Protection - 5/16/18*, YOUTUBE (May 16, 2018), https://www.youtube.com/watch?time_continue=245&v=y2hQNhpVJHk.

96 *See* Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, WALL ST. J. (May 15, 2016, 5:37 PM), https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262 ("Pension funds, university endowments, family offices and others have collectively pumped more than a billion dollars into the sector ....").

97 By analogy, contingency fee agreements receive, under certain conditions, protection based on the same rational. *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 722-23 (2014).

98 Some market participants have suggested to me that some law firms and/or corporations are asking financiers to accept weak cases as part of a portfolio if they wish to obtain the right to finance the entire portfolio (or, in other words, if they wish to do the functional equivalent of taking an equity stake in the firm). If true, this is similar to the practice of bundling prime and subprime mortgages in mortgage-based securities. To highly simplify, the idea is that by first bundling and then "slicing" the bundles, securitization allowed for the shifting of risk of subprime mortgages from the originators and primary investors to the overall secondary market and the economy as a whole. Famously, the true costs of this practice were also externalized on the subprime borrowers who ended up in foreclosure, the taxpayers who needed to bail out banks and other entities, and the global economy as a whole. *See, e.g.*, Yuliya S. Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 REV. FIN. STUD. 1848, 1875-76 (2011); Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#36da42daf92f.

99 Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1318-22.

100 *See* Anthony J. Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & BUS. 813, 813-14 (2016); Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 894-95 (2015); Steinitz & Field, *supra* note 97, at 716; W. Bradley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 13-14 (2018); Christopher P. Bogart, *The Case for Litigation Funding*, BURFORD: BLOG (Oct. 11, 2016), http://www.burfordcapital.com/blog/case-litigation-funding [https://perma.cc/KLZ8-99VD]; Maya Steinitz, *Contracting for Funding in "Access to Justice Cases" Versus "Corporate Finance Cases,"*MODEL LITIG. FIN. CONT. (June 24, 2013), http://litigationfinancecontract.com/contracting-for-funding-in-access-to-justice-cases-versus-corporate-finance-cases [https://perma.cc/WFK4-PD6G].

101 This was generally held to be the case, for example, in the September 11th litigation. *See* Transcript of March 19, 2010 Status Conf., *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100, Doc. No. 2037 at 54-55 (S.D.N.Y. Mar. 19, 2010). On the potential conflicts of interest that third party funding of class action may introduce, see Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL INQUIRIES L. 109, 115-23 (2018). *See generally* Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499, 509-16 (2014) (outlining issues that may arise if third-party litigation financing becomes frequent in class action suits in the United States).

102 On third party funding's effect on private enforcement of law through class and mass action, see generally John C. Coffee, Jr., *Securities Litigation Goes Global*, LAW (Sept. 15, 2016, 12:00 AM), https://www.law.com/newyorklawjournal/almID/1202767289255/securities-litigation-goes-global/; Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 322-23 (2011).

103 On the disparate use of litigation by "one-shotters" versus "repeat players" to advance goals beyond a win in a particular case, especially to affect changes in the law, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-114 (1974) [hereinafter *Why the "Haves" Come Out Ahead*].

104 Champerty is defined as an "agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim" or, more pejoratively, as "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds." *Champerty*, BLACK'S LAW DICTIONARY (11th ed.

2019). It is a form of maintenance whereby "assistance in prosecuting or defending a lawsuit [is] given to a litigant by someone who has no bona fide interest in the case." *Id*. at *Maintenance*.

105 The writings on the conflicts of interest inherent in class and mass actions where the lawyers, rather than the clients, control the litigation are legion. *See, e.g.*, John C. Coffee, Jr.,*Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358-67 (1995); Samuel Issacharoff, *Class Action Conflicts*, 30 UC DAVIS L. REV. 805, 827-30 (1997); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 597 (2003).

106 A commendable example is a recent procedural order by Judge Polster of the United States District Court for the Northern District of Ohio, discussed *infra* Section D of this Part.

107 For the debates on the proper disclosure regime in international commercial arbitration, see Elizabeth Chan, *Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration*, 26 AM. REV. INT'L ARB. 281, 281-83 (2015); Jennifer A. Trusz, Note, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1673 (2013).

108 For discussions of international investment arbitration as a form of public law and the attendant considerations arbitrators must consider, see generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1543-45 (2005); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 71-73 (2011).

109 For discussion of the proper disclosure regime in international investment arbitration, and how it differs from the desirable regime in international commercial arbitration, see Rachel Denae Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. REV. 2935, 2944-48 (2018); Frank J. Garcia, *The Case Against Third-Party Funding in Investment Arbitration*, INT'L INST. SUSTAINABLE DEV. (July 30, 2018), https://www.iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia [https://perma.cc/52YH-4EZU].

110 International investment law involves the protection of foreign investors from governments in the jurisdictions in which they invest. Rights of action are afforded only to the former, not the latter, and are granted in Bilateral Investment Treaties (hence, the public international law nature of the dispute). *See*KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 88-90 (2013).

111 On divorce finance, see Jeff Landers, *Can't Afford Your Divorce? New Firms Specialize in Divorce Funding*, FORBES (Jan. 15, 2015, 3:24 PM), https://www.forbes.com/sites/jefflanders/2015/01/15/cant-afford-your-divorce-new-firms-specialize-in-divorce-funding/#29b3d2457715.

112 *See* Galanter, *Why the "Haves" Come Out Ahead*, *supra* note 103, at 100.

113 Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1312.

114 *Id*. at 1315 (quoting Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977)) (internal quotation marks added); *see also* Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 807 (1994).

115 This often-overlooked factor is, in fact, so important that its nuances and intricacies is a main reason that the ICCA-Queen Mary Task Force's soft law production effort ended up punting, rather than reaching, an agreed-upon guideline on disclosure. For a critique of the Task Force's grasp of the effects of deal structures, see Christopher P. Bogart, *Deeply Flawed: A Perspective on the ICCA-Queen Mary Task Force on Third-Party Funding*, BURFORD: BLOG (Oct. 6, 2017), http://www.burfordcapital.com/blog/icca-queen-mary-task-force-report-flaws [https://perma.cc/9NJK-XCLU]. For scholarship on different possible litigation finance structures, see generally Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. LEGAL ETHICS 253 (2016); Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831 (2013); Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155 (2015); Steinitz & Field, *supra* note 97.

116 In the Mize litigation, for example, the funder bargained for an explicit right to control settlement including a purported right to require the plaintiff to continue litigation and prohibit her from settling or withdrawing. *See*Mize v. Kai, Inc., No. 17-cv-00915-NYW, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) ("The agreement purports to limit Ms. Mize's ability to 'discontinue the Claims with[out] the prior consent of [Litigation Management]' ... and prohibits Ms. Mize from settling the case without prior consent of Litigation Management and requires Ms. Mize to settle if so directed by Litigation Management.").

117 *See*Stan Lee Media, Inc. v. Walt Disney Co., No. 12-cv-02663-WJM-KMT, 2015 WL 5210655, at *2-3 (D. Colo. Sept. 8, 2015) (stating that due to an entity's funding and control of litigation there is "a colorable argument that [the entity] should be held to be a party to the underlying litigation"); Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693-94 (Fla. Dist. Ct. App. 2009) (finding that a funder could be a party to a suit despite not being named in pleadings if they had sufficient control). The same rationale applies to court scrutiny of the selection of class counsel, litigation conduct, and settlement in class action. *See generally*BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK (2d ed. 2012) (referencing the ways in which attorneys, not clients, control class actions and the consequent safeguards placed by the rules of procedure and the court to protect the class member-clients).

118 *See*ROSS WALLIN, CURIAM, PORTFOLIO FINANCE AS A TOOL FOR LAW FIRM BUSINESS DEVELOPMENT (2018), https://www.curiam.com/wp-content/uploads/Ross-Wallin-Westlaw-Journal-Article.pdf [https://perma.cc/4QPR-WY6L] ("In portfolio finance transactions, a litigation finance company provides capital to a firm ... in exchange for a negotiated share in whatever proceeds the firm receives from a portfolio of cases."). The September 11th case is an example of a case in which the plaintiffs had no idea of the funding until they were slapped with the fees for it. *See* Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), https://www.nytimes.com/2010/11/15/business/15lawsuit.html.

119 *See* N.Y. City Bar, Comm. on Prof'l Ethics, Opinion 2018-5 (July 30, 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees (reasoning that portfolio funding may conflict with attorneys' independence and independent judgment).

120 *See* Steinitz, *Whose Claim Is This Anyway?*, *supra* note 39, at 1282-83 (discussing the potential systemic effects of litigation proceed-backed securities) ("[I]t is possible that in the foreseeable future we will also be witnessing the creation of a new form of securities--legal-claims-backed securities. Reportedly, some tort-litigation lenders are already in the practice of aggregating the claims they acquire and selling shares of the composite funds; that is, they are engaged in a rudimentary form of securitization. Further support of the proposition that securitization of this new asset class, namely legal claims and defenses, may be forthcoming in the near future can be gleaned from the fact that the first wave of litigation funding also generated a smattering of similar secondary trading in legal claims. A few lawsuits were syndicated during the 1980s, with some instances of syndication ending up in litigation. In addition, there is one case in which shares in future judgments have been traded on Nasdaq." (citations omitted)). For sources on the logic of bundling prime and subprime investments--be they mortgages or lawsuits--via securitization and the potential negative externalities such practices, if unchecked, can cause, including negative systemic effects, see *supra* note 98 and accompanying text.

121 *See generally* Wendy Gerwick Couture, *Securities Regulation of Alternative Litigation Finance*, 42 SEC. REG. L.J. 5, 16-19 (2014); Wendy Couture, *Does Litigation Finance Implicate the Policies Underlying the Securities Laws?*, MODEL LITIG. FIN. CONT. (Oct. 7, 2013), http://litigationfinancecontract.com/does-litigation-finance-implicate-the-policies-underlying-the-securities-laws/ [https://perma.cc/K34H-VWH6] ("[L]itigation finance implicates the securities laws' policy of ensuring disclosure. Therefore, to the extent that a litigation finance contract satisfies the elements of an 'investment contract,' it should be subject to securities regulation."); Richard Painter, *The Model Contract and the Securities Laws Part III*, MODEL LITIG. FIN. CONT. (July 22, 2013), http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-iii [https://perma.cc/MZ8S-YB77].

122 On the advent of crowdfunding, see generally Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F. L. REV. 307, 321-333 (2015); Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357, 1361-73 (2018). For regulation of crowdfunding generally, see, for example, 17 C.F.R. § 227.201 (2017) (outlining disclosure requirements).

123 *See*FED. R. CIV. P. 17(a) ("An action must be prosecuted in the name of the real party in interest."). In *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009), a funder "was to receive 18.33% of any award" and "had to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements." *Id*. at 693. Under those circumstances, the Court of Appeal of Florida held that the funder has achieved the status of "party" under Florida law irrespective of the fact that it was not so named in the pleadings. *Id*. at 693-94.

124 The direct and, more interestingly, indirect ways funders can gain control over the litigation are discussed in Steinitz & Field, *supra* note 97, at 735-40.

125 *See*7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1799 (3d ed. 2019) (explaining that intervention "enable[s] class members on the outside of the litigation to function as effective watchdogs to make certain that the action is fully and fairly conducted").

126 Judge Hellerstein's decision in the September 11th case, discussed *supra* note 118, in which he held, when scrutinizing a settlement, that attorneys, rather than the plaintiffs, should absorb the costs of interest paid on loans used to finance the litigation, is an example of why and when the financial terms may need to be disclosed. For a further discussion of the fee controversy surrounding the case, see Mireya Navarro, *Already Under Fire, Lawyers for 9/11 Workers Are Ordered to Justify Some Fees*, N.Y. TIMES (Aug. 27, 2010), https://www.nytimes.com/2010/08/27/nyregion/27lawsuit.html.

127 In international arbitration scholarship much ink has been shed, and some arbitral decisions have been issued, on the question of whether disclosure of funding is necessary in order for arbitrators to determine whether to shift fees (a norm in international arbitration which follows the so-called "British Rule" (loser pays) with respect to fee shifts). *See, e.g.*, Trusz, *supra* note 107, at 1677 (arguing that "institutions should expressly provide that the tribunal may not consider third-party funding in any decisions on costs or security for costs"). That scholarship and jurisprudence also discusses whether and to what extent disclosure is warranted at the beginning of the process in order to determine whether security of costs is warranted. *See, e.g.*, Chan, *supra* note 107, at 283 (arguing that an arbitral tribunal should be able to consider the funder's financial support and the terms of withdrawal for the funder when considering security for costs); Kelsie Massini, *Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs*, 7 Y.B. ARB. & MEDIATION 323, 330-32 (2015) (arguing that it is beneficial for the funder to be disclosed at the start of the arbitration proceedings for security of costs purposes).

128 *See supra* text accompanying notes 89-95.

129 A "reservation point" is "the least favorable settlement that the client is willing to accept." LARRY L. TEPLY, LEGAL NEGOTIATION IN A NUTSHELL 81 (3d ed. 2016) (emphasis omitted). The reservation point is affected by factors other than the value of the negotiated asset and knowing an opposing party's reservation point enables a party to make the lowest offer that would be accepted.

130 *See, e.g.*, *Commercial Litigation Funding*, BENTHAM IMF, https://www.benthamimf.com/what-we-do/commercial-funding (last visited Sept. 9, 2019) [https://perma.cc/2KFN-6NAQ] (stating that Bentham invests in claims at the pre-trial and trial steps, as well as during appeals and to help with judgment collections).

131 *See*FED. R. CIV. P. 23(g)(1)(A)(iv). For the jurisprudential elaborations of these requirements, see JEROLD S. SOLOVY ET AL., 5 MOORE'S FEDERAL PRACTICE § 23.120 (2003).

132 *See*INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 40, at 159.

133 Order Regarding Third-Party Contingent Litigation Financing, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

134 *Id*. at 1 n.1.

135 *Id*. at 1.

136 *Id*.

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Recent Trends in Litigation Finance Discovery Disputes

By **Andrew R. Goldenberg**

Litigation finance is where a nonparty funds a plaintiff's lawsuit in exchange for an interest in the recovery. Some recent estimates place the size of the litigation finance market at over $100 billion. This burgeoning industry has allowed for greater flexibility in how individuals, businesses and law firms approach litigation.

The increased use of litigation funding has resulted in more demand for disclosure of documents and communications concerning litigation funding arrangements. Such demands typically come from deep-pocketed litigants who seek to deplete a party's funds by requesting funding discovery that is irrelevant to the claims or defenses in the litigation. This article examines recent cases concerning litigation finance discovery requests, which more often than not are rejected on relevancy grounds.

For example, in *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig.*, 405 F. Supp. 3d 612 (D.N.J. 2019), the defendants sought discovery on whether the plaintiffs were backed by litigation funders, the details of the funding, and communications and documents regarding the funding. The plaintiffs objected to the discovery requests, although they agreed to produce certain discovery for in camera review.

For starters, the court noted the scope of relevant discovery set forth in Fed. R. Civ. P. 26(b)(1), which permits discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]" From there the court held that the requested litigation finance information was a "side issue" that had nothing to do with the key issues in the case. The court ruled that such discovery was denied "[u]nless and until defendants make a legitimate showing that plaintiffs' litigation funding is directed to a relevant issues, which has not been done … ." In so holding, the court relied on a plethora of recent caselaw that has rejected litigation funding disclosure on relevancy grounds, including the oft-cited case, *Yousefi v. Delta Elec. Motors*, 2015 WL 11217257 (W.D. Wash. May 11, 2015) ("[w]hether plaintiff is funding this litigation through savings, insurance proceeds, a kickstarter campaign, or contributions from [a] union is not relevant to any claim or defense at issue.").

In *Benitez v. Lopez*, 2019 WL 1578167 (E.D.N.Y. March 14, 2019), the defendants moved to compel the production of documents concerning the plaintiff's financing of a civil rights suit. The defendants argued that they were entitled to discovery on any financing, including the motives behind it because it went to the plaintiff's credibility and possible grounds for impeachment at trial. Citing Federal Rule 26(b)(1), the court held the defendants failed to establish that such discovery was relevant to the claims or defenses in the case. The court stated that the plaintiff's financial backing was irrelevant to issues of credibility, that litigation funding disclosure would not assist the factfinder in determining whether the plaintiff was telling the truth, and whether the case was being funded by a nonparty was irrelevant to any claim or defense at issue in the action.

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Similarly, in *United Access Techs. v. AT&T*, 2020 WL 3128269 (D. Del. June 12, 2020), the defendants moved to compel certain litigation funding discovery from the plaintiff, asserting that such discovery was not privileged and should be produced. The plaintiff countered by arguing that the litigation funding information was not relevant. After conducting an in camera review of the funding documents, the court concluded the defendants failed to meet the threshold requirement to show that litigation funding was relevant under Federal Rule 26. The court held that the defendants merely speculated that the plaintiff's sources of funding was relevant and failed to articulate with specificity how funding documents were connected to any claim or defense in the case.

Likewise, in *MLC Intellectual Prop. v. Micron Tech.*, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019), the defendant sought discovery of "persons and entities that have a financial interest in this litigation," including the identify of any third-party funder. The defendant claimed that the discovery was relevant to "to uncover possible bias issues" and needed the discovery "to understand the existence of conflicts of interest to identify and exclude jury members who may have a bias" and to "explore credibility and bias issues concerning [plaintiff's] witnesses."

The court rejected the defendant's request as irrelevant and held that the defendant failed to provide a specific reason to suspect bias or conflicts of interest. The court stated it could question potential jurors in camera regarding relationships with third-party funders and possible conflicts of interest and that the plaintiff had already confirmed that non-party witnesses were not funding the litigation. As such, the defendant's claims of possible bias and conflicts of interest were purely speculative.

But see *E. Profit Corp. Ltd. v. Strategic Vision US*, 2020 WL 7490107 (S.D.N.Y. Dec. 18, 2020). In this case the plaintiff sought discovery from the defendant on the sources of its litigation funding in support of a fraudulent misrepresentation counterclaim. Pre-trial, the defendant moved in limine to exclude any questions or testimony regarding its source of litigation funding, arguing that such disclosure would be irrelevant to the issues in the case. The plaintiff responded by stating it had a good faith belief that an affiliate of the Chinese Communist Party (CCP) had paid the defendant's legal fees and, if true, would negate defendant's counterclaim that it would have never entered into an agreement with plaintiff had it known that the individual who negotiated the agreement on the plaintiff's behalf was actually a CCP double agent.

The recent trend among district courts is to limit discovery into documents and communications relating to litigation funding on relevancy grounds.

The court denied the defendant's motion in limine and permitted questioning and testimony on whether defendant had been funded by a CCP agent. The court cited case authority that admitted funding documents "when such documents are relevant to credibility issues and to show bias of one party for or against another." The court ruled that if the defendant had accepted financing from a CCP agent, it would have been less likely the defendant relied on plaintiff's alleged misstatements that its principal was an opponent of the CCP or that such statements were important to defendant in deciding whether to enter into the agreement.

The recent trend among district courts is to limit discovery into documents and communications relating to litigation funding on relevancy grounds. Absent specific circumstances that link the discovery request to a claim or defense in the case, there appears to be no relevant purpose in seeking litigation funding discovery, other than to place additional cost and burden onto a party's use of litigation funding as a tool to level the playing field against a deep-pocket adversary.