

The State of Litigation Funding

*The Honorable Loretta A. Preska*¹

I. Current State of the Litigation Funding Industry

The industry of third-party litigation funding encompasses multiple benefits, opportunities, and implications. Third-party litigation funding (or litigation funding) is a process through which a third party agrees to fund the litigation costs of a pending lawsuit in exchange for some or all of the award. Litigation funding is akin to traders, making an investment in a certain stock, but, instead, funders are betting that they will succeed at trial. As the CEO of Burford Capital has put it, “litigation doesn’t fluctuate like the stock market does.”²

For decades, litigation funding has been part of the fabric of other countries’ legal systems. But only recently, in the wake of the 2008 financial crisis, did the industry of litigation funding sprout in the United States.³ Its popularity has increased as the fees and expenses of bringing a case to trial have grown cost prohibitive for all but large corporations.⁴ As of today, the global investment market of litigation funding generates annual revenues of approximately \$17.2 billion, of which the U.S. share is approximately \$4.5 billion.⁵ Last year, firms among the

¹ Senior Judge, United States District Court for the Southern District of New York. Judge Preska gratefully acknowledges the assistance of Samantha Helgason, Law Clerk, Fordham University School of Law, Class of 2021; Christine Goncalves, Judicial Intern, Fordham University School of Law, Class of 2025; and Carly Zdankowski, Judicial Intern, Benjamin N. Cardozo School of Law Class of 2023, in the preparation of this paper.

² 60 Minutes, Litigation Funding: More investors fund lawsuits, as rules and transparency lag behind, YOUTUBE (July 24, 2023), <https://www.youtube.com/watch?v=Dfr2UnnlGE8>.

³ What You Need to Know About Third Party Litigation Funding, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (Feb. 7, 2023), <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>.

⁴ Litigation Finance, OMNI BRIDGEWAY, <https://omnibridgeway.com/litigation-finance>.

⁵ Litigation Funding Investment Market Outlook (2023 – 2033), FUTURE MARKET INSIGHTS INC., <https://www.futuremarketinsights.com/reports/litigation-funding-investment-market>; US Litigation Funding Investment Market 2024-2033, CUSTOM MARKET INSIGHTS (Jan. 2024), <https://www.custommarketinsights.com/report/us-litigation-funding-investment-market>.

200 highest-grossing U.S. law firms were allocated nearly \$1 billion through litigation funding.⁶ This amount, and its use by some of the largest law firms, signals a growing acceptance of litigation funding in the United States from a budgetary standpoint and at a “cultural level.”⁷

With such persistent use, the inconsistencies inherent in litigation funding have become more prevalent, leading to states, courts, and proponents and opponents of litigation funding speaking on the issue of how properly to regulate litigation funding in the United States.

II. Litigation Funding and Its Implications

A. Litigation Funding Generally

Litigation funding is a mechanism by which a third party enters into a contract with a litigant to assist him or her in paying for a pending lawsuit in exchange for *potential* repayment of the loan; namely, the third party only gets repaid if the funded litigant wins his or her case.⁸

The funder is typically a litigation finance firm, which may be supported by venture capitalists, institutional investors, those in the private equity field, or similar types of entities and/or individuals.⁹ These types of funders have the most access to financing, making the risk of unsuccessful litigation less burdensome, which allows litigants to pursue their claims more vigorously by utilizing all available resources.¹⁰ Moreover, some, but only the minority, of

⁶ Justin Henry, The Am Law 200 Stepped Up Their Use of Litigation Funding Last Year, NEW YORK LAW JOURNAL, Mar. 28, 2024, at 1 (noting that the data drawn by Westfleet surveyed litigation funders during a 12-month activity period concluding on June 30, 2023. The report also only includes litigation activities involving a party based in the U.S.)

⁷ Id.

⁸ See Wilson Elser, Litigation Funding May Soon Be Addressed by New York’s Legislature, NAT’L L. REV., Nov. 20, 2021, <https://www.natlawreview.com/article/litigation-funding-may-soon-be-addressed-new-york-s-legislature>.

⁹ See Elser, supra note 8; N.Y. City Bar, Report to the President by the New York City Bar Association Working Group on Litigation Funding 4–5 (2020).

¹⁰ See id.

litigation financing firms are publicly traded companies; two prominent companies today are Burford Capital and Omni Bridgeway.¹¹

The traditional model of funding has been for a litigation funder to finance a case and share in the potential recovery. But another, newer method is the monetization of claims.¹² That is, funders advance a portion of the potential recovery to a party before there has been a resolution of the litigation.¹³ In just two years, the share of new commitments allocated to the monetization of claims has grown from 8%, in 2021, to 21%, in 2023.¹⁴

At present, plaintiffs are more commonly funded than defendants, but some speculate that, with the rise of third-party litigation funding, funders will soon be “expected to step up their pursuits of defendants” as well.¹⁵ In the context of commercial litigation funding, most third-party litigation funding agreements are made directly between a funder and a claimant.¹⁶

Third-party litigation funding typically falls into one of two categories: consumer litigation funding or commercial litigation funding. The former usually funds much smaller claims, such as

¹¹ See Elizabeth Korchin et al., The Third Party Litigation Funding Law Review: USA (2021), <https://www.lexology.com/library/detail.aspx?g=66de1180-f371-4be9-8dfc-5739d826225a>; see also Barney Thompson, Litigation finance industry opens up to private investors, FINANCIAL TIMES (Aug. 23, 2018), <https://www.ft.com/content/03921f5e-a49a-11e8-926a-7342fe5e173f>; IMF Bentham and Bentham IMF to become Omni Bridgeway, see also OMNI BRIDGEWAY, <https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2020/02/25/imf-bentham-and-bentham-imf-to-become-omni-bridgeway> (detailing IMF Bentham and Bentham IMF’s merger which in turn resulted in the creation of a single entity, Omni Bridgeway).

¹² Justin Henry, The Am Law 200 Stepped Up Their Use of Litigation Funding Last Year, NEW YORK LAW JOURNAL, Mar. 28, 2024, at 1 (noting that the data drawn by Westfleet surveyed litigation funders during a 12-month activity period concluding on June 30, 2023. The report also only includes litigation activities involving a party based in the U.S.)

¹³ Id.

¹⁴ Id.

¹⁵ See Is Funding Defendants the Future of Disputes?, LEGAL 500 (last visited Feb. 21, 2022), <https://www.legal500.com/fivehundred-magazine/editors-views/is-funding-defendants-the-future-of-disputes/>.

¹⁶ See W. Bradley Wendel, Are There Ethical Pitfalls in the Use of Third-Party Litigation Funding?, 80 The Advoc. (Texas) 51 (2017).

personal-injury and divorce.¹⁷ Commercial third-party litigation funding, on the other hand, usually funds litigation for large corporate entities, focusing more on claims involving “antitrust, intellectual property, and business-contract issues.”¹⁸ The most common type of claims are patent claims, which comprise 20% of the third-party litigation funding deals.¹⁹ While fewer commercial-based litigations are funded than consumer-based, commercial-based cases are often much larger, averaging between \$500,000 and \$5 million.²⁰

While both types of financing implicate many of the same concerns, there are some key differences. For example, an issue inherent in consumer third-party litigation funding is the fact that the litigant is usually less sophisticated than a commercial entity or a law firm, potentially resulting in unequal bargaining power between the litigant and the funder.²¹ This imbalance could allow the funder to, among other things, exert control over the litigation or charge the funded party unreasonable interest rates.²²

B. The Need and Motivation for Litigation Funding

Litigation funding is used for a variety of reasons, and the litigant, law firm, and funder pursue third-party litigation funding for the potential benefits that may come along with it. However, the benefits awarded to each party differ, resulting in each having different motivations to use such financing.

¹⁷ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, THIRD PARTY LITIGATION FINANCING (2022), <https://www.gao.gov/assets/gao-23-105210.pdf>.

¹⁸ Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, DEF. COUNS. J., Jan. 2020, at 6–7.

¹⁹ See Patrick Leahy, Shine Light on Third-Party Litigation Funding of US Patents, BLOOMBERG LAW (Apr. 28, 2023), <https://news.bloomberglaw.com/us-law-week/shine-light-on-third-party-litigation-funding-of-us-patents>.

²⁰ Cassandra Burke Robertson, Proposed Committee Recommendation to the Study Committee on Third-Party Funding of Litigation and Arbitration 2, 3–4 (2020).

²¹ See Austin T. Popp, Federal Regulation of Third-Party Litigation Finance, 72 VAND. L. REV. 727, 737 (2019).

²² See id.

On the litigant side, the primary use of litigation funding is to allow plaintiffs to pursue claims they would not have been able to prosecute otherwise.²³ In other words, access to deeper pockets gives litigants the freedom to retain counsel, conduct discovery, file motions, and the like, all of which might not be possible without financial backing.

This risk-shifting benefit also empowers law firms to take on more cases than they otherwise would have been able to. Since many attorneys and law firms do not accept cases on a contingency fee basis, third-party litigation funding provides an alternative financing mechanism that gives litigants options as to whom they hire as counsel.²⁴

Although the focus of U.S. litigation funding to date has largely been on commercial litigation, there is an untapped opportunity to fund larger-scale actions, such as class and collective actions. In class and collective actions, the first hurdle that a prospective group must overcome is to determine how to finance the fees and costs of litigation.²⁵ That is, if a contingency fee arrangement is not available to the class or collective, then an issue arises of how to afford the costs as a group. Litigation financing overcomes this initial hurdle, which, in turn, permits parties with viable claims to have their day in court. Although this type of funding is still rare and largely unexplored in the United States, it has been utilized in other countries, such as Australia, England, and parts of Europe.²⁶ As such, it could be a future area of development in the United States that ushers in a more diverse field of litigants.

²³ See Korchin et al., supra note 11.

²⁴ See Stroble & Welikson, supra note 18, at 2.

²⁵ Consumer Trends 2024: The future of Class Action funding, DWF GROUP (Jan. 23, 2024), <https://dwfgroup.com/en/news-and-insights/insights/2024/1/ct24-the-future-of-class-action-funding>.

²⁶ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, supra note 13.

From a funder’s perspective, there are a few different motivations to invest. **First**, and obviously, the prospect of winning a judgment creates a financial incentive for these funders.²⁷ The potential return on a funder’s investment can be large, especially for major investors, such as hedge funds and companies whose primary purpose is to provide such financing.²⁸ **Second**, funders can increase their brand recognition and ultimately expand their client bases. On these two points, we’ve seen litigation funders, in the U.S., embrace groundbreaking technology to help to produce predictive analyses and case assessments that drive up the success rates of their investments.²⁹ Funders, such as Legalist and Qanlex, are even using artificial intelligence to help them identify optimal cases for investment.³⁰ Legalist’s algorithm, for example, is called “the truffle sniffer,” and it searches for lawsuits based on the court, judge, and claim type.³¹ Another firm, VWM Capital, has long used algorithm-based technology to help promote awareness and increase the number of people with access to litigation funding.³²

Third, and quite interestingly, some firms have started to fund litigation to champion specific social justice causes. For example, two litigation funds were founded in 2023 for precisely this purpose. James Burnham launched Vallecito Capital – a \$50 million fund designed to back

²⁷ See Korchin et al., *supra* note 11.

²⁸ See *Is Funding Defendants the Future of Disputes?*, *supra* note 15.

²⁹ *The trends that shaped litigation funding in 2023*, VWM CAPITAL, <https://vwmcapital.com/insight/the-trends-that-shaped-litigation-funding-in-2023/>.

³⁰ Emily R. Siegel, *AI Helps Litigation Funders Mine Court Dockets for Legal Gold*, BLOOMBERG LAW (Mar. 1, 2024), https://www.bing.com/search?q=AI+Helps+Litigation+Funders+Mine+Court+Dockets+for+Legal+Gold&cvid=1c6235ada3094af1b6ac33150c354eb0&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIGCAEQRRg80gEHODkzajBqNKgCALACAA&FORM=ANAB01&PC=U531.

³¹ *Id.*

³² *The trends that shaped litigation funding in 2023*, *supra* note 29.

cases that support a conservative policy mission.³³ Separately, Aristata Capital, a firm partially backed by Democratic donor George Soros, has already invested in nine lawsuits aimed at holding corporations accountable for violations of environmental and human rights.³⁴

C. The Concerns Implicated by Litigation Funding

The growing popularity of litigation funding has also raised a host of new issues for courts and for legislatures. The key issues inherent in litigation funding concern the common law doctrines of maintenance and champerty, state usury laws, the role of litigation funding in cases, the ethical obligations of attorneys, and the degree to which disclosure of funding should be required.³⁵ Proponents and opponents of litigation funding regulation have differing beliefs as to how restrictive a regulatory regime is necessary.

1. Maintenance and Champerty

The earliest forms of litigation funding were known as the common law doctrines of champerty and maintenance.³⁶ Champerty, “maintaining a suit in return for a financial interest in the outcome,” and maintenance, “helping another prosecute a suit,”³⁷ were, and still are, prohibited by some states.³⁸ “By definition, maintenance and champerty prohibit third-party litigation funding.”³⁹ These prohibitions were put in place to avoid the filing of frivolous lawsuits that may

³³ Emily R. Siegal & Justin Wise, Capital Flows Into Litigation Funds With Social Justice Impact, BLOOMBERG LAW (Feb. 2, 2024, 5:00 AM), <https://news.bloomberglaw.com/business-and-practice/capital-flows-into-litigation-funds-with-social-justice-impact>.

³⁴ Id.

³⁵ See Korchin et al., supra note 11.

³⁶ See N.Y. City Bar, supra note 9, at 5–6.

³⁷ In re Primus, 436 U.S. 412, 425 (1978).

³⁸ See N.Y. City Bar, supra note 9, at 6–7.

³⁹ Ethics Comm. of the Com. and Fed. Litig. Section of the N.Y. State Bar Ass’n, Report on the Ethical Implications of Third-Party Litigation Funding 11 (2013).

unnecessarily consume the courts' time and resources.⁴⁰ Another concern leading to such prohibitions was that a third party may agree to fund a suit for personal or political reasons, rather than to benefit the client and facilitate the efficient functioning of the justice system.⁴¹ However, some states that once prohibited champerty and maintenance have now abandoned those prohibitions, reasoning that they actually impede the efficient resolution of disputes⁴² or deprive plaintiffs of an opportunity to litigate their otherwise meritorious claims.⁴³ But among the states that still recognize champerty and maintenance, many apply the theories behind such doctrines to invalidate litigation funding agreements.⁴⁴

2. Usury

Another issue inherent in litigation funding occurs when courts apply their state's usury laws to determine the validity of funding agreements, sometimes finding that because the agreement is structured as a loan rather than as an investment, usury laws apply. Usury is regulated at the state level, leading to states' applying such laws inconsistently across the board. However, usury laws are more applicable to consumer, rather than commercial, litigation financing transactions because for a transaction to be considered usurious, the borrower generally must have an absolute obligation to repay the funder.⁴⁵ Accordingly, because most litigation funding agreements are structured either as an investment or as a non-recourse loan, both by which the funder has a contingent right to some of the plaintiff's recovery—rather than being structured as a

⁴⁰ See id.

⁴¹ See Robertson, supra note 20, at 4.

⁴² See N.Y. City Bar, supra note 9, at 6–7.

⁴³ See Lyra Gao, Litigation Funding: The Case for New York to Revise Section 489, COLUM. UNDERGRADUATE L. REV., Oct. 4, 2020, <https://www.culawreview.org/journal/litigation-funding-the-case-for-new-york-to-revise-section-489>.

⁴⁴ See N.Y. City Bar, supra note 9, at 6–7.

⁴⁵ See Korchin et al., supra note 11; Wendel, supra note 16, at 52.

recourse loan—many courts are reluctant to apply their state’s usury laws to commercial financing transactions.⁴⁶

3. Issues Pertaining to Parties

At the trial court level, parties disagree whether a litigation funder’s involvement in a case affects the underlying merits. In one of my recent cases, two minority shareholders of Argentine energy company YPF SA – the Petersen Energía plaintiffs and the Eton Park plaintiffs – filed suit against YPF and the Republic of Argentina for claims arising from the Republic’s takeover of YPF. Because of the number and complexity of the issues presented, and several interlocutory appeals, the case has extended over nine years. Four years into the case, Burford purchased a portion of the plaintiffs’ claims and stood to gain, what was said to be, a more than 37,000 percent return on its initial investment.⁴⁷ The Republic of Argentina – unsuccessfully – challenged Burford’s involvement, arguing that the terms and effect of Burford’s agreement with the plaintiffs violated New York State’s champerty law because plaintiffs had relinquished control of their claims in exchange for a lumpsum payment and a reduced percentage of any recovery, and Burford’s sole motive was profit.

At trial, the Republic also argued that because a large portion of any recovery would go to Burford, the Court should award either no pre-judgment interest or a lower rate of interest. However, I held that the relevant inquiry was what damages were owed to compensate plaintiffs,

⁴⁶ See Korchin et al., supra note 11; Wendel, supra note 16, at 52; see, e.g., Anglo-Dutch Petrol. Int’l, Inc. v. Haskell, 193 S.W.3d 87 (Tex. App. 2006).

⁴⁷ Emily R. Siegal, Argentina Appeals a \$16 Billion Verdict in Litigation-Funded Case, BLOOMBERG LAW (Oct. 11, 2023), <https://news.bloomberglaw.com/business-and-practice/argentina-appeals-16-billion-verdict-in-litigation-funded-case>; Alison Frankel, This billion-dollar case against Argentina’s YPF wouldn’t exist without litigation funding. Is that a good thing?, REUTERS (Apr. 3, 2023), <https://www.reuters.com/legal/litigation/column-this-billion-dollar-case-against-argentinas-ypf-wouldnt-exist-without-2023-04-03/>; see also Defendants’ Memorandum of Law in Support of Their Motion to Dismiss, Petersen Energia Inversora, S.A.U. v. Argentine Republic, No. 15 Civ. 2739 (S.D.N.Y. Aug. 30, 2019), ECF No. 111.

not how plaintiffs have used or will use the damages awarded to them.⁴⁸ The Republic “owe[d] no more or less” because of Burford’s participation.⁴⁹ The case was brought by “plaintiffs against a defendant for its wrongful conduct towards them.”⁵⁰ Accordingly, in September of 2023, I entered a final judgment against the Republic in the amount of \$16.1 billion – the largest judgment ever entered in the Southern District of New York. Of the total judgment amount, \$14.4 billion was awarded to the Petersen Energía plaintiffs, and \$1.7 billion was awarded to the Eton Park plaintiffs. Burford is reportedly entitled to 35 percent of the overall recovery;⁵¹ although the case is currently on appeal.

Another issue that has appeared in recent cases is whether a litigation funder can go one step beyond financing a claim to step into the shoes of a plaintiff. This question was recently presented in several multidistrict litigation cases pending in the District of Minnesota and in the Northern District of Illinois. In 2019, Burford provided Sysco Corporation – a plaintiff in a pair of price-fixing MDLs pending in the District of Minnesota – with approximately \$140 million to finance Sysco’s claims in the two MDLs.⁵² In exchange, Sysco was required to inform Burford of any offers to settle and to obtain Burford’s consent prior to accepting a settlement offer.⁵³ Throughout the litigation, Sysco and Burford disagreed over whether to settle Sysco’s claims, with Burford consistently opposing settlement in favor of advancing the litigation. On June 28, 2023,

⁴⁸ Findings of Fact and Conclusions of Law, Petersen Energia Inversora, S.A.U. v. Argentine Republic, No. 15 Civ. 2739 (S.D.N.Y. Sept. 9, 2023), ECF No. 493.

⁴⁹ Id.

⁵⁰ Id.

⁵¹ U.S. Judge Orders Argentina To Pay \$16 Billion for Expropriation of YPF Oil Company, ASSOCIATED PRESS (Sept. 15, 2023), <https://apnews.com/article/argentina-ypf-preska-burford-petersen-eton-18d2dc00f0a1f9fa0233292edd1e57cb>.

⁵² Order Denying Motion to Substitute Party, In Re: Pork Antitrust Litigation & In Re: Cattle and Beef Antitrust Litigation, No. 18 Civ. 01776 (D. Minn. Feb. 9, 2024), ECF No. 2104, at 6.

⁵³ Id. at 7.

Sysco agreed to assign its litigation claims to Carina Ventures LLC – a limited liability company founded by Burford solely to acquire Sysco’s claims.⁵⁴ Carina Ventures and Sysco then filed a joint motion in both MDLs to substitute Carina Ventures for Sysco as plaintiff, so that Burford, through Carina Ventures, could step into the shoes of Sysco to negotiate its preferred settlement terms.⁵⁵ Predictably, defendants opposed the motions for substitution, arguing that the assignment of claims to Carina Ventures violated rules of champerty under state law.⁵⁶

Federal Magistrate Judge John F. Docherty, who is presiding over the matters, denied the motions for substitution, holding that “[t]he largest harm that condoning Burford’s efforts to maximize its return on investment would cause is the harm of forcing litigation to continue that should have settled.”⁵⁷ Judge Docherty reasoned that Burford only sought to extract a larger settlement payment to increase its return on investment and to establish a benchmark settlement amount by which to measure future settlements in as-yet-undisclosed financing arrangements.⁵⁸ Judge Docherty concluded that Burford’s private interests “cannot overcome the strong public policy in favor of settling lawsuits or the public policy in favor of allowing litigants to control their own cases.”⁵⁹

Conversely, in another, related antitrust MDL pending before District Judge Thomas M. Durkin in the Northern District of Illinois, Carina Ventures and Sysco jointly moved to substitute Carina Ventures for Sysco as plaintiff following Sysco’s assignment of its claim to Carina

⁵⁴ Id. at 9.

⁵⁵ Joint Motion for Substitution, In Re: Pork Antitrust Litigation, No. 18 Civ. 1776 (D. Minn. June 29, 2023), ECF No. 1940; Joint Motion for Substitution, In Re: Cattle and Beef Litigation, No. 22 Civ. 3031 (D. Minn. Apr. 21, 2023), ECF No. 277.

⁵⁶ Order Denying Motion to Substitute Party, supra note 52 at 14-15.

⁵⁷ Id. at 17.

⁵⁸ Id.

⁵⁹ Id. at 18.

Ventures. There, however, Judge Durkin approved the substitution of Carina Ventures for Sysco, holding that “[l]ike litigation funding agreements, such assignments are a fact of modern litigation,” and substitution would streamline the litigation process.⁶⁰

Although these are related MDLs based on federal antitrust claims and involve the same plaintiff, the same litigation funder, and a motion for substitution, the outcomes in the District of Minnesota differed from the outcome in the Northern District of Illinois based on the judge and the jurisdiction.

4. Attorney Ethical Obligations

Attorneys’ professional conduct is generally outlined in the Model Rules of Professional Conduct, and Model Rule 5.4 is particularly relevant. Model Rule 5.4, which has been adopted by every state in some form, prohibits lawyers/law firms from sharing legal fees with a nonlawyer.⁶¹ Accordingly, an attorney’s ethical obligations may be violated in situations where the law firm, rather than the claimant, is a direct party to the funding agreement.⁶² This issue may arise where the law firm stands to benefit financially from a third-party funding agreement, anticipates receiving future funding from the investor, or has “an attorney-client relationship with the funder based on other representations.”⁶³ However, courts have generally found that a lawyer’s participation in a commercial litigation financing agreement does not violate Model Rule 5.4.⁶⁴

⁶⁰ Order Granting Motion to Substitute Party, In Re Broiler Chicken Antitrust Litigation, No. 16 Civ. 8637 (N.D. III. Mar. 21, 2024), ECF No. 7184 at 2, 5; Joint Motion for Substitution of Plaintiff, In Re Broiler Chicken Antitrust Litigation, No. 16 Civ. 8637 (N.D. III. June 23, 2023), ECF No. 6630.

⁶¹ See Model Rules of Pro. Conduct r. 5.4(a) (Am. Bar Ass’n 2002).

⁶² See Korchin et al., supra note 11.

⁶³ David Riskin, Third-Party Litigation Financing: Ethical Issues for Attorneys (2022).

⁶⁴ See Korchin et al., supra note 11; see also Brandes v. N. Shore Univ. Hosp., 18 Misc.3d 1112(A), 856 N.Y.S.2d 496, 2008 WL 80629 (Sup. Ct. Queens Co. Jan. 8, 2008); Heer v. N. Moore St. Devs., LLC, 36 N.Y.S.3d 93 (N.Y. App. Div. 2016).

In April of 2024, the New York City Bar Association proposed to amend New York State’s Model Rule 5.4 to clarify how litigation funding should fit into the broader legal landscape.⁶⁵ The amendments would require firms to inform clients of any preexisting financial arrangements with non-lawyers that might impact representation of the client.⁶⁶ This proposal comes on the heels of other State Bars’ initiatives to relax the requirements of Model Rule 5.4 in an effort to increase access to legal services for lower and middle income populations.⁶⁷

5. Disclosure and Transparency

The existence of litigation financing agreements is often not disclosed to the litigant’s attorney, the court, and/or the jury, and this lack of transparency has several potentially negative consequences. One substantial consequence is that nondisclosure inhibits the court and counsel from properly assessing potential conflicts of interest.⁶⁸ One such conflict involves the possibility that funders will attempt to control the litigation, either pursuant to the agreement or more indirectly by, for example, influencing the litigant’s decision to accept or not accept a settlement offer.⁶⁹ Such control could interfere with counsel’s professional judgment and ability to make strategic litigation decisions solely for the benefit of his or her client, leading to a conflict of interest.⁷⁰

⁶⁵ Emily R. Siegal, Litigation Funders Set to Prosper in Proposed NY Rule Change, BLOOMBERG LAW (Apr. 10, 2024, 5:31 AM), <https://news.bloomberglaw.com/business-and-practice/litigation-funders-set-to-prosper-in-proposed-ny-rule-change>.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ See Stroble & Welikson, supra note 18, at 10.

⁶⁹ See id. at 17–18.

⁷⁰ See id. at 17.

Chief Judge Colm F. Connolly, who sits on the U.S. District Court for the District of Delaware, has echoed the need for transparency in litigation.⁷¹ Chief Judge Connolly expressed that parties in a recent series of intellectual property cases pending before him had failed to disclose their connections to litigation funder IP Edge. Consequently, he intends to implement certain disclosures to boost transparency among future parties.⁷² He further noted that such measures may have an added benefit for judges as they operate as a “measure of self-protection against potential hidden conflicts of interest when a party ... turns out to have an undisclosed connection to the judge.”⁷³

Nondisclosure may also inhibit one or both parties from making “a realistic and tangible assessment of the prospects of settlement.”⁷⁴ It further impedes a court’s ability to assess fully any motions for fee-shifting.

Some states and/or specific courts require parties to disclose third-party litigation funding agreements, but the majority do not. And those that do require disclosure have varying degrees and types of rules and/or laws, making such requirements inconsistent amongst different states and courts.⁷⁵ Wisconsin, is currently the only state with legislation requiring the disclosure of funding at the outset of litigation in commercial transactions specifically.⁷⁶ Some courts, like federal trial courts in Wisconsin and Delaware, require disclosure of any third-party financing arrangements

⁷¹ Emily R. Siegal & Michael Shapiro, Judge Urges Discipline for Lawyers Who Hid IP Litigation Funder (Correct), BLOOMBERG LAW (Dec. 7, 2024 4:00 PM), <https://news.bloomberglaw.com/business-and-practice/judge-urges-discipline-for-lawyers-who-hid-ip-litigation-funder>.

⁷² Id.

⁷³ Id.

⁷⁴ Stroble & Welikson, supra note 18, at 10-11.

⁷⁵ See N.Y. City Bar, supra note 9, at 16–17.

⁷⁶ See Korchin et al., supra note 11; Wis. Stat. § 804.01(2)(bg) (2017).

via standing orders at the outset of litigation.⁷⁷ Further, “approximately half of the federal circuit courts and one-quarter of the federal district courts” require publicly traded third-party funders to disclose their financial interest at the outset of litigation in order to consider any conflicts of interest; but those requirements usually do not impact litigation arrangements because most litigation financing firms are privately held.⁷⁸ Due to these inconsistencies, there is disagreement as to how much disclosure should be required.

With the rise of litigation financing, there has also been an increased recognition of the tension between the desire for disclosure of litigation funding agreements and the need for attorney-client privilege and work product protection.⁷⁹ These doctrines are implicated, in part, because third parties typically conduct due diligence before agreeing to fund a case. In doing so, funders often request documents and information from the litigant and/or counsel that would otherwise be considered privileged or protected as work-product.⁸⁰ Not only do funders request information to aid in their initial decision whether to invest in a case, but they also often require party or counsel thereto to provide continuous status updates throughout the case.⁸¹

One of the main questions that arises out of the foregoing issues is whether disclosure of potentially privileged information by a litigant or counsel waives attorney-client privilege or work-product protection.⁸² Regarding the former doctrine, the majority of courts to consider this

⁷⁷ What You Need to Know About Third Party Litigation Funding, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (Feb. 7, 2023), <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/>. Additionally, in 2018, the Northern District of California began requiring parties in any class, collective, or representative action to provide the court with the identity of anyone that is funding a claim or counterclaim. *Id.* (citing U.S. District Court for the Northern District of California, Standing Order for all Judges of the Northern District of California on the Contents of Joint Case Management System, § 19 (eff. Nov. 1, 2018)).

⁷⁸ Korchin et al., *supra* note 11.

⁷⁹ See Stroble & Welikson, *supra* note 18, at 13.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.* at 14.

question have held that such disclosure *does* waive attorney-client privilege.⁸³ For example, a federal court in the Northern District of Illinois has held that “any documents otherwise protected by the attorney-client privilege that [the plaintiff] shared with any prospective funder [loses its] protection under the attorney-client privilege when shared with third party funders.”⁸⁴ When privilege is waived, the party arguing against disclosure often asserts the “common interest” exception, but most jurisdictions only apply the exception if the common interest is legal in nature, not solely commercial, and if disclosure is carried out “to further that specific legal interest.”⁸⁵ However, other courts have held that documents related to third-party litigation funding do not fall under the exception at all.⁸⁶

Regarding work-product protection, most courts to consider the issue of waiver have held that materials disclosed to a third-party that would ordinarily be protected are indeed protected and are thus not discoverable.⁸⁷ For example, a federal district court in Texas has held that “documents prepared with the assistance of counsel and created with the intent of coordinating potential investors to aid in future possible litigation were protected by the work-product doctrine,” notwithstanding the fact that they were disclosed to the funder.⁸⁸ However, the court highlighted that there was also a nondisclosure agreement in place, and thus disclosure “did not substantially increase the likelihood that an adversary would come into possession of the materials.”⁸⁹ Conversely, some courts have held that a third-party litigation agreement itself is not protected as

⁸³ See *id.*

⁸⁴ *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 734 (N.D. Ill. 2014).

⁸⁵ See Stroble & Welikson, *supra* note 18, at 14.

⁸⁶ See *id.* at 16–17; see, e.g., *Miller*, 17 F. Supp. 3d 711.

⁸⁷ See Stroble & Welikson, *supra* note 18, at 15.

⁸⁸ *Id.* (citing *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304 (E.D. Tex. May 4, 2011)).

⁸⁹ *Id.*

work product “because it does contain the mental impressions of an attorney concerning the substance of the litigation.”⁹⁰

6. Other Issues

In response to disclosure and transparency issues, there is a mounting concern, in the U.S., that foreign governments could fund litigation to undermine U.S. national security. The Chamber of Commerce Institute for Legal Reform has specifically noted that third-party litigation funding could permit foreign competitors to advance their strategic interests against individuals, corporations, and entire industries through the United States’ judicial system and its resources.⁹¹ The Institute presents a hypothetical example where China’s sovereign wealth fund provides capital to a third-party litigation funding firm, which then finances a lawsuit against a major U.S. technology company.⁹² The Institute argues that, for purposes of this hypothetical, no legal parameters are in place to prevent the investing country from accessing sensitive information, produced in the lawsuit under the broad discovery rules in the U.S.⁹³ Access to third-party litigation funding also may arguably give foreign adversaries a chance to involve major U.S.-based companies in time-consuming litigation so that they can help competitors to advance their agendas.⁹⁴

There are also concerns that the rising utilization of litigation funding may lead to an increase in the filing of frivolous lawsuits because there is generally only minimal risk involved

⁹⁰ Id.

⁹¹ Michael E. Leiter et al., ILR Briefly a New Threat: The National Security Risk of Third Party Litigation Funding, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (Nov. 22, 2022), <https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf>.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

for funded parties if their case is unsuccessful.⁹⁵ On that note, there are also concerns about a potential increase in litigation costs due to the substantial resources available to funded parties as compared to those available to self-funded parties.⁹⁶

III. State-by-State Approach to Commercial Litigation Funding

At present in the United States, the legal and regulatory third-party litigation framework only exists at the state level. There have been attempts to regulate third-party litigation funding at the federal level, but none has been successful thus far.⁹⁷ As such, each state or state court to employ some sort of framework has done so differently, leading to inconsistent applications amongst the states.⁹⁸ Such restrictions relate to issues involving champerty and maintenance, disclosure and discovery, the imposition of monetary limits on funding, or requirements that the agreement includes certain terms or protective devices. Moreover, there are even some states that prohibit litigation funding entirely. This patchwork approach to state regulation has been referred to as “laboratories of democracy,” which, in turn, could encourage the implementation of a federal framework, necessitate a complete ban against third-party funding, or demonstrate that a federal framework is unnecessary. The following sections provide an overview of the individual approaches different states have taken to regulate third-party litigation funding.

A. The Most Hospitable States to Commercial Litigation Funding

1. Texas

Regarding disclosure and the discoverability of third-party litigation funding information, the federal court in the Eastern District of Texas has held that such information should be protected

⁹⁵ Stroble & Welikson, supra note 18, at 2.

⁹⁶ Id.

⁹⁷ See Korchin et al., supra note 11.

⁹⁸ See Robertson, supra note 20, at 4.

as work product and that disclosure of otherwise protected information to possible or actual funders should not waive privilege if there is a nondisclosure agreement in place.⁹⁹ Regarding disclosure of the agreement itself, the Eastern District has ordered the disclosure of the funder's identity, while also holding, however, that funder-litigant communications specifically can remain confidential.¹⁰⁰

2. New York

New York courts have generally held that third-party litigation agreements are valid and enforceable.¹⁰¹ One potentially applicable statute restricting litigation financing is New York's Judiciary Law Section 489, which bars "buy[ing] or tak[ing] an assignment of . . . a bond, promissory notes, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action of proceeding thereon."¹⁰² However, the statute contains a safe harbor provision exempting transactions that have an aggregate purchase price of \$500,000 or more.¹⁰³ Accordingly, because commercial litigation funding transactions generally involve cases exceeding \$500,000, the safe harbor applies to most assignments of claims.¹⁰⁴ Moreover, most litigation funding agreements do not assign a claim in the first place; rather the claimant retains the claim, and the funder receives a portion of the recovery if successful.¹⁰⁵ Therefore, Section 489 is typically not implicated in the first place,¹⁰⁶ and no New

⁹⁹ See United States v. Ocwen Loan Servicing, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016); Mondis Tech., 2011 WL 1714304, at *3.

¹⁰⁰ See United States v. Homeward Residential Inc., 2016 WL 1031154, at *5 (E.D. Tex. Mar. 15, 2016).

¹⁰¹ See, e.g., Echeverria v. Estate of Lindner, 801 N.Y.S.2d 233 (N.Y. Sup. Ct. 2005).

¹⁰² N.Y. Jud. Law § 489(1).

¹⁰³ N.Y. Jud. Law § 489(2).

¹⁰⁴ Maria Decker, Litigation Finance and State Law—What Should Counsel Know?, ABOVE THE LAW (June 3, 2021), <https://abovethelaw.com/2021/06/litigation-finance-and-state-law-what-should-counsel-know/>.

¹⁰⁵ See id.

¹⁰⁶ See id.

York court to date has invalidated a traditional third-party litigation agreement based on the state's prohibition of champerty.¹⁰⁷

The only other legislation in New York governing litigation funding—which has been introduced but is not yet enacted—is the Consumer Litigation Funding Act.¹⁰⁸ However, that statute would only cover consumer third-party litigation, and the state does not currently have any bills or other proposed regulations aimed directly at commercial third-party litigation.

Regarding disclosure, New York courts often find that third-party litigation funding materials are not relevant to the case and are thus not subject to disclosure.¹⁰⁹ However, in the context of attorney-client privilege, the U.S. District Court for the Southern District of New York has held that because the funder was not a party to the litigation with a common legal interest in the outcome of the litigation, but instead only had a common financial interest, the common interest exception did not apply.¹¹⁰ Accordingly, the information shared with the funder was not protected by attorney-client privilege.¹¹¹

Finally, the Ninth Circuit in 2020 certified to the New York Court of Appeals a question of whether a third-party litigation funding agreement “may qualify as a ‘loan’ or a ‘cover for usury’ where the obligation of repayment arises not only upon and from the client’s recovery of proceeds

¹⁰⁷ Steven Friel & Jonathan Barnes, Litigation Funding 2021 94–95 (2021).

¹⁰⁸ See S. 9105, 2017–2018 Leg. Sess. (N.Y. 2018); S. 4555, 2019–2020 Leg. Sess. (N.Y. 2019); S. 705, 2021–2022 Leg. Sess. (N.Y. 2021); S. 2702, 2023–2024 Leg. Sess. (N.Y. 2023).

¹⁰⁹ See, e.g., Kaplan v. SAC Cap. Advisors LP, No. 12-CV-9350-VM-KNF, 2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015); Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019).

¹¹⁰ See Cohen v. Cohen, No. 09 Civ. 10230 (LAP), 2015 WL 745712, at *4 (S.D.N.Y. Jan. 30, 2015) (“[The funder] is not a party to this litigation, and there has been no suggestion that she has any legal claim against Defendants whatsoever. She thus cannot possibly share any legal interest with Plaintiff sufficient to invoke the common interest doctrine. Although the two may have a common financial interest in the outcome of this litigation, that relationship does not fall into the narrow category primarily reserved for co-litigants pursuing a shared legal strategy.” (citation omitted)).

¹¹¹ See id.

from such litigation but also upon and from the attorney's fees the client's lawyer may recover in unrelated litigation.”¹¹² The New York Court of Appeals accepted the question but has yet to render a decision.¹¹³

3. Ohio

Ohio differs from Texas and New York because it *does* have a statute governing litigation funding, which requires the agreement to include specific wording and disclaimers to the funded party.¹¹⁴ However, this statute has been considered “relatively permissive” because it does not require disclosure to the court and does not limit the amount of interest the funder can charge the funded party.¹¹⁵ However, of note, Ohio is amending its third-party litigation funding statute to require more transparency and disclosure.¹¹⁶ Additionally, in the context of federal multi-district litigation, specifically, the Northern District of Ohio has required parties to disclose to the court in camera the existence of a funding agreement.¹¹⁷

B. States with State-Level Regulation of Commercial Litigation Funding

Among the states that allow litigation funding, very few have statutes expressly regulating litigation financing. As previously mentioned Wisconsin has a statute requiring disclosure of third-party litigation funding agreements at the outset of litigation, which applies to both consumer- and commercial-based litigation funding arrangements.¹¹⁸ To date, Wisconsin seems

¹¹² Fast Trak Inv. Co. v. Sax, 962 F.3d 455, 459 (9th Cir. 2020), certifying questions to 35 N.Y.3d 997 (N.Y.).

¹¹³ See Fast Trak Inv., 35 N.Y.3d 997.

¹¹⁴ See Ohio Rev. Code Ann. § 1349.55 (2008).

¹¹⁵ See Robertson, supra note 20, at 6.

¹¹⁶ See Eric Heisig, Ohio Senators Mull Litigation Funding Disclosures Bill, LAW360 (Feb. 7, 2023), <https://www.law360.com/articles/1573998/ohio-senators-mull-litigation-funding-disclosures-bill>.

¹¹⁷ See In re Nat'l Prescription Opiate Litig., 327 F. Supp. 3d 1064 (N.D. Ohio 2018).

¹¹⁸ See Wis. Stat. § 804.01(2)(bg).

to be the only state that statutorily requires disclosure of commercial litigation third-party litigation funding agreements.¹¹⁹

C. States with Court Rules or Regulations Governing Commercial Litigation Funding

The following section provides an overview of the states that allow litigation funding but restrict it in some way through court decisions or local court rules.

1. Illinois

Illinois does not have express legislation or regulations governing commercial-based third-party litigation funding, and litigation funding is typically permitted by the courts.¹²⁰ While Illinois has a statutory prohibition against maintenance,¹²¹ courts often find it inapplicable to commercial litigation finance agreements, absent “officious intermeddling” on behalf of the funder.¹²² Moreover, several Illinois courts have held that funding agreements and communications with funders, particularly if made pursuant to a non-disclosure agreement, are protected as work product.¹²³

2. California

In California, commercial litigation funding is generally permitted, which may stem, in part, from the fact that California never adopted laws prohibiting champerty and maintenance.¹²⁴ The State Bar of California Committee on Professional Responsibility and Conduct issued an

¹¹⁹ West Virginia has a statute requiring disclosure of all consumer litigation financing arrangements, but it does not cover commercial-based transactions. See W. Va. Code § 46A-6N-5 (2019). Utah also has a statute regulating litigation funding, but that, too, only applies to consumer litigation funding. See Utah Admin. Code. r. 152-57.

¹²⁰ See Decker, supra note 104.

¹²¹ See 720 Ill. Comp. Stat. 5/32-12.

¹²² Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).

¹²³ See Art Akaine LLC v. Art & Soulworks LLC, No. 19 C 2952, 2020 WL 5593242 (N.D. Ill. Sept. 18, 2020); Fulton v. Foley, No. 17-CV-8696, 2019 WL 6609298 (N.D. Ill. Dec. 5, 2019); Viamedia, Inc. v. Comcast Corp., No. 16-cv-5486, 2017 WL 2834535 (N.D. Ill. June 30, 2017); Miller, 17 F. Supp. 3d at 739.

¹²⁴ See Friel & Barnes, supra note 107, at 101.

opinion, in 2020, expressing its support for litigation funding. At the same time, the Committee cautioned attorneys to be cognizant of ethical issues implicated by the use of third-party litigation funding agreements.¹²⁵ Regarding disclosure, however, the federal trial court in the Northern District of California issued a standing order requiring parties in class, collective, or representative actions to disclose the identities of any third-party funders.¹²⁶ Yet courts are often reluctant to order discovery of litigation funding information or disclosure of the agreement itself.¹²⁷ At least one federal trial court in California has found that communications between a party and a funder do not waive privilege, particularly if made pursuant to a nondisclosure agreement.¹²⁸

3. Delaware

In Delaware, contrary to California, prohibitions against champerty and maintenance are recognized.¹²⁹ However, litigation funding is generally permitted in Delaware as long as it is clear that the funder is not exerting control over the litigation.¹³⁰ Additionally, while Delaware does not have any state-wide regulations governing disclosure, Chief Judge Connolly of the U.S. District Court for the District of Delaware has signaled that the court plans to strengthen its standing order with additional transparency and disclosure measures.¹³¹ Moreover, the Delaware Court of

¹²⁵ State Bar of Cal. Standing Comm. on Pro. Resp. and Conduct, Formal Op. 2020-204 (2020).

¹²⁶ See N.D. Cal. Standing Order on the Contents of Joint Case Management System (effective Nov. 1, 2018); see also N.Y. City Bar, supra note 9, at 16.

¹²⁷ See MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

¹²⁸ See, e.g., Odyssey Wireless, Inc. v. Samsung Elecs. Co., Nos. 3:15-cv-01738-H, 3:15-cv-01743-H, 3:15-cv-01735-H, 2016 WL 7665898 (S.D. Cal. Sept. 20, 2016).

¹²⁹ See Decker, supra note 104.

¹³⁰ See N.Y. City Bar, supra note 9, at 18; see also Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., No. 07C-12-134-JRJ, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015).

¹³¹ See Chief Judge Connolly, D. Del. Standing Order Regarding Third-Party Litigation Funding Arrangements (effective Apr. 18, 2022) (requiring a funded party to disclose to the court (1) “[t]he identity, address, and, if a legal entity, place of formation of the Third-Party Funder(s);” (2) “[w]hether any Third-Party Funder’s approval is necessary for litigation or settlement decisions in the action, and if the answer is in the affirmative, the nature of the

Chancery has also held that work-product protections remain intact notwithstanding disclosure of such information to a third-party funder.¹³²

4. New Jersey

New Jersey does not currently have any express legislation in place to govern third-party litigation funding, and courts have consistently rejected prohibitions on champerty and maintenance.¹³³ However, as of 2021, the U.S. District Court for the District of New Jersey has required the disclosure of funding, including the funder's identity, whether the agreement requires the funder's approval for litigation or settlement decisions, and a description of the funder's financial interest in the litigation. Notably, though, this order does not require disclosure of the agreement itself.¹³⁴ The same federal trial court held that the work-product protection still applied to information shared with a third-party funder.¹³⁵ The state court system, by contrast, does not require any disclosure of third-party funding.

5. Arizona

Additionally, Arizona does not have express legislation or regulations in place to govern third-party litigation funding, and the state does not recognize the common law prohibition of champerty.¹³⁶ Moreover, a ruling out of the U.S. District Court for the District of Arizona has held

terms and conditions relating to that approval;" and (3) "[a] brief description of the nature of the financial interest of the Third-Party Funder(s)").

¹³² See, e.g., Carlyle Inv. Mgmt. v. Moonmouth Co., No. 7841-VCP, 2015 WL 778846 (Del. Ch. Feb. 24, 2015).

¹³³ See Friel & Barnes, *supra* note 107, at 102.

¹³⁴ D.N.J. Civ. R. 7.1.1 (effective Aug. 5, 2021).

¹³⁵ See In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., No. CV 19-2875, 2019 WL 4485702 (D.N.J. Sept. 18, 2019).

¹³⁶ See Landi v. Arkules, 835 P.2d 458 (Ariz. Ct. App. 1992).

that funding arrangements are protected as work product, but disclosure of the funder's identity is not protected.¹³⁷

D. The Least Hospitable States to Commercial Litigation Funding

The following states are known to have the most restrictive regulatory regimes governing the use of third-party litigation funding.¹³⁸ Alabama courts almost entirely prohibit litigation funding agreements, reasoning that such agreements “are [a] form of speculating on litigation and are therefore void as against public policy.”¹³⁹ Kentucky, on the other hand, went so far as to enact a statute completely prohibiting third-party litigation funding based on its prohibition of champerty.¹⁴⁰

Colorado typically applies state usury laws to litigation finance, which severely restricts use of litigation funding in that jurisdiction.¹⁴¹ Similarly, a Pennsylvania state court “reaffirmed its prohibition on champerty and applied it to invalidate a litigation financing agreement.”¹⁴² However, federal courts in Pennsylvania have held that communications with a litigation funder are protected as work product.¹⁴³ North Carolina is also relatively restrictive, often concluding that litigation funding agreements are void, as they run afoul of the state's prohibitions on

¹³⁷ See Cont'l Cirs. LLC v. Intel Corp., 435 F. Supp. 3d 1014 (D. Ariz. 2020).

¹³⁸ See Robertson, supra note 20, at 6.

¹³⁹ Id.; Wilson v. Harris, 688 So.2d. 265 (Ala. Civ. App. 1996).

¹⁴⁰ See Robertson, supra note 20, at 6; Ky. Rev. Stat. Ann. § 372.060.

¹⁴¹ See Robertson, supra note 20, at 6.

¹⁴² See id.; see also WFIC, LLC v. LaBarre, 148 A.3d 812 (Pa. Super. Ct. 2016).

¹⁴³ See Lambeth Magnetic Structures, LLC v. Seagate Tech. (U.S.) Holdings, Inc., Nos. 16-538, 16-541, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018).

champerty and maintenance.¹⁴⁴ While North Carolina courts have occasionally permitted for such agreements to stand, it has only done so in “very limited circumstances.”¹⁴⁵

IV. Federal Regulation of Commercial Litigation Funding

In the background, there has been a growing dialogue surrounding whether a federal framework is needed to standardize practices on a national level. On the one hand, the United States Chamber of Commerce, for example, has pushed for federal legislation to regulate third-party litigation funding, urging the adoption of, among other things, uniform disclosure requirements.¹⁴⁶ On the other hand, the American Association for Justice has opposed legislation restricting third-party litigation funding, arguing instead that individual courts, not the government, should manage issues such as disclosure.¹⁴⁷ Furthering the foregoing agenda, in 2019, the Uniform Law Commission (“ULC”) created the Study Committee on Third-Party Funding of Litigation and Arbitration (“Committee”) to consider whether there is a need for uniform or model laws.¹⁴⁸ However, the Committee noted that inconsistency amongst the states may be beneficial as different approaches will lead to innovation.¹⁴⁹

The Litigation Funding Transparency Act, which was first introduced in 2019, and then reintroduced in 2021, has been one of the most prominent attempts to regulate litigation funding at the federal level.¹⁵⁰ This Act “would require disclosure of any agreement between (1) a party in any class action lawsuit filed in federal court or in any claim that is aggregated in a federal

¹⁴⁴ See Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 455 S.E.2d 655 (N.C. 1995).

¹⁴⁵ See Friel & Barnes, supra note 107, at 104.

¹⁴⁶ See Robertson, supra note 20, at 5.

¹⁴⁷ See id.

¹⁴⁸ See id. at 1.

¹⁴⁹ See id.

¹⁵⁰ See Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019); Litigation Funding Transparency Act of 2021, S. 840, 117th Cong. (2021).

multi-district litigation proceeding and (b) any third-party commercial enterprise that has a contingent interest in the outcome of the case.”¹⁵¹ It would also require disclosure of the funder’s identity. Despite support for this bill, it has yet to pass in the Senate.¹⁵²

Proponents of federal regulation have also urged the Advisory Committee for the Federal Rules of Civil Procedure to amend Rule 26(a)(1)(A) to require disclosure of all third-party litigation funding agreements. The Advisory Committee has taken a “wait and see” approach, choosing instead to monitor the status and usage of litigation funding in federal courts.¹⁵³

Most recently, in response to growing concerns about the use of litigation funding and its implications on U.S. national security, there has been a movement to harmonize regulation at the federal level. In September of 2023, bipartisan legislation for federal regulation of third-party litigation funding reached the U.S. Congress. The proposed bill would stop “foreign entities and governments from funding litigation in America’s courts.”¹⁵⁴ The bill would require disclosure of all third-party litigation funding, ban foreign governments from participating as third-party funders, and require the Department of Justice to author a third-party litigation funding report.¹⁵⁵

V. Recent Developments

There are also ongoing efforts at the global level to regulate litigation funding. Last summer, Britain’s Supreme Court held that litigation funding agreements would be classified as

¹⁵¹ See *id.*; see also N.Y. City Bar, *supra* note 9, at 19.

¹⁵² See GOVTRACK, <https://www.govtrack.us/congress/bills/117/s840> (last visited Apr. 1, 2024).

¹⁵³ See Stroble & Welikson, *supra* note 18, at 13.

¹⁵⁴ Bipartisan Federal Legislation Tackles Foreign Influence in Third Party Litigation Funding, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (Sept. 15, 2023), <https://instituteforlegalreform.com/blog/bipartisan-federal-legislation-tackles-foreign-influence-in-third-party-litigation-funding/>.

¹⁵⁵ *Id.*

damages-based agreements and, therefore, would need to comply with applicable regulations.¹⁵⁶ Any failure to comply with the regulations would render a third-party litigation agreement unenforceable.¹⁵⁷ As of early March of 2024, that decision was in flux, however, as the Ministry of Justice announced that the Government would introduce legislation in England and Wales to “restore the position that existed before the Supreme Court’s ruling.”¹⁵⁸ Many have opined that the UK Supreme Court’s decision had “damaging effects,” arguing that victims should have access to justice, especially when they are going up against massive corporations.¹⁵⁹

While the legal status of these agreements has been up in the air in the UK, commercial litigation funds, such as Winward Ltd., have been undergoing loan-style agreements that are not contingent on a particular litigation result to circumvent the UK Supreme Court’s decision.¹⁶⁰

VI. Conclusion

Overall, the rise in third-party litigation funding reflects a vital shift in the dynamics of legal financing. This shift presents both opportunities and challenges for the future. As the industry advances, navigating ethical considerations and proposed legislative and regulatory regimes will be crucial to creating a stable and fair judicial system.

¹⁵⁶ Jane Croft, UK Supreme Court deals blow to litigation funding industry, FINANCIAL TIMES (July 26, 2023), <https://www.ft.com/content/7ed8e9c4-e733-4601-8499-1c6aab278515>.

¹⁵⁷ Id.

¹⁵⁸ UK to reverse top court’s ruling on litigation funding, REUTERS (Mar. 3, 2024), <https://www.reuters.com/world/uk/uk-reverse-top-courts-ruling-litigation-funding-2024-03-04/>.

¹⁵⁹ See id.

¹⁶⁰ Emily R. Siegel, Rocade Capital Aids UK Litigation Funder with \$126.7 Million, BLOOMBERG LAW (Feb. 27, 2024), <https://news.bloomberglaw.com/class-action/rocade-capital-backs-new-uk-litigation-funder-with-100-million>.