# Lawyers, Funds, & Money:
# The Legality of Third-Party Litigation Funding in the United States

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## I. INTRODUCTION

Imagine there is a plaintiff with a meritorious claim, but, because of the high costs of litigation, he cannot afford to bring or maintain it. Though there is a market for such claims and feasible fee arrangements are available, his claim is nonetheless rejected because of the litigation costs, the high risk of losing, and/or the unlikelihood of settlement. The claim, regardless of its merits, is over before it begins. There is now, however, one more option available to such plaintiffs: third-party litigation funding.

Increasingly, third-parties—investors with no legal interests in cases—are funding lawsuits, bearing most or all of the cost and risk of litigation.[2] In exchange for financing a lawsuit, an investor will receive a large percentage of an award or settlement.[3] Third-party litigation funding's proponents believe it empowers claimants to bring meritorious claims against defendants, providing them the otherwise unobtainable sling and rocks needed to challenge corporate goliaths.[4] Its opponents—chief among them the U.S. Chamber Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce—believe it encourages and enables claimants to bring frivolous and abusive claims and have, accordingly, attempted to frustrate these funding arrangements.[5]

In 2009, the U.S. Chamber Institute, recognizing that "third-party funding governed in the United States by a patchwork of relatively weak laws, cases, rules, and regulations," issued a seminal report on third-party litigation funding, predicting that it would cause substantial litigation abuse and that, under the doctrines of champerty and maintenance, it must be prohibited.[6]

American courts, despite the Institute's arguments, have largely upheld these arrangements on public policy grounds, concluding, like Australian and English courts before them, that, whatever the potential for abuse, third-party litigation funding allows low-resourced claimants greater access to justice.[7] The U.S. Chamber Institute thus re-focused its attention on the issue of disclosure, arguing that financing agreements must be disclosed to defendants.[8] In the twelve years since the Report's publication, American courts have grappled with the

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[2] Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding*, 36 CARDOZO L. REV. 861, 863 (2015).
[3] *Id.*
[4] *See* Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, 87 DEF. COUNS. J. 1, 2 (2020).
[5] *See generally* John Beisner et al., U.S. Chamber Inst. For Legal Reform, Selling More Lawsuits, Buying More Trouble: Third-Party Litigation Funding a Decade Later (2020) [hereinafter Chamber Report II].
[6] John Beisner et al., U.S. Chamber Inst. For Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States (2009) [hereinafter Chamber Report I].
[7] *See* Stroble & Welikson, *supra* note 4, at 7.
[8] Chamber Report II, *supra* note 5, at 26.A

Institute's arguments and have, by and large, rejected them, permitting third-party litigation funding and placing materials relating to these financing agreements beyond the scope of discovery.[9]

Part I of this Note provides a general overview of third-party litigation funding, from its modern origins in Australia and England to the litigation market as currently constituted in the United States. It concludes with a discussion of the U.S. Chamber Institute's 2009 Report, putting it in the political context of the tort-reform movement.

Part II reviews court opinions over the last decade that have considered the issue of whether the doctrines of champerty and maintenance necessarily bar third-party litigation funding in the United States, issues that were unlitigated when the Chamber Institute published its 2009 Report.

Part III reviews court opinions over the last decade concerning third-party litigation funding in the discovery context. In particular, whether financing agreements are generally "relevant" within the meaning of Federal Rule of Civil Procedure 26(a) as well as whether these agreements are protected under attorney-client privilege or the work-product doctrine.

Finally, Part IV briefly considers other developments regarding the disclosure of third-party litigation financing agreements. In particular, an Institute-sponsored proposal to add an additional fifth prong to Rule 26(a) to the Rules of Civil Procedure, which would require parties to disclose financing agreements to opposing parties "without awaiting a discovery request."[10]

## II. THIRD-PARTY LITIGATION FUNDING, AN OVERVIEW

The phrase "third-party litigation funding" has multiple meanings. As used in this Note, the phrase means, simply, any arrangement in which a non-party, with no legal interest in a lawsuit, contracts with a litigant to bear the costs of litigation in exchange for a percentage of the reward.

### A. Modern Origins

While these arrangements date to Ancient Greece and Rome, where funders' motivations were socio-political, not economic,[11] the development of modern third-party litigation funding, as now practiced in the United States, originates in Australia in the 1990s.[12] Though Australia—and other common-law countries, like the United Kingdom[13]—was historically hostile to third-party intermeddling in litigation, it gradually began to relax restrictions on these arrangements, allowing them in insolvency proceedings and, eventually, in civil litigation generally.[14] Because

[9] *See* Stroble & Welikson, *supra* note 4, at 10–15.

[10] Fed. R. Civ. P. 26(a).

[11] *See* Gina Marco Solas, Third Party Litigation Funding: A Comparative Analysis 15 (2017) (Ph.D. thesis, University of Cagliari).

[12] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation* Funding, 95 MINN. L. REV. 1268, 1279 (2011).

[13] *See* Solas, *supra* note 11, at 22–25.

[14] *See* Steinitz, *supra* note 12.

Australia severely limits the use of contingency fees,[15] its courts came to recognize that third-party litigation funding would allow claimants of more modest means greater access to justice.[16] Since Australia includes the winning party's attorneys' fees in any damages award (the so-called British rule),[17] its courts were likely convinced that third-party investors would be effectively deterred from funding meretricious litigation. Accordingly, the Australian government, recognizing the public policy potential of these arrangements, gradually loosened its centuries-old common-law prohibitions on third-party intermeddling, thereby creating a new market for legal claims and defenses.[18]

Australia's newly progressive attitude toward third-party involvement in litigation culminated with the High Court's 2006 decision in *Campbells Cash and Carry Pty. Ltd. v. Fostif Pty. Ltd.*[19] In *Fostif*, Firmstones & Feil, Consultants, a small, Sydney-based accounting firm, brought a representative action (the Australian equivalent of a class action) on behalf of 2,000 small tobacco retailers against sixteen tobacco companies, seeking to recover $100 million in licensing fees.[20] The accounting firm conceived of the claim, controlled the litigation, and, under the financing agreement, was due to receive one-third of the potential reward.[21] The companies argued that the agreement was clearly champertous and thus impermissible, but the High Court disagreed, finding that the arrangement was neither an abuse of process nor contrary to public policy.[22] In subsequent cases, the High Court clarified its ruling in *Fostif*, interpreting it to be "a ban on any general rule prohibiting the funding of litigation for reward."[23]

England, similarly, was re-evaluating its blanket bans on third-party intermeddling, abrogating all criminal and civil penalties for champerty in 1967.[24] In 2005, the English Court of Appeal clarified the uncertain legal status of litigation funding, holding in *Arkin* v. *Borchard Lines Ltd.* that litigation funding is not against public policy; on the contrary, it ruled that these arrangements facilitate access to justice, making them acceptable, provided the funder does not manage the litigation.[25]

With Australia and England legalizing third-party litigation funding, it seemed inevitable that the United States, another common-law country with high litigation costs, would likewise come to believe that this new form of third-party intermeddling should be permitted and promoted.

### B. Defining Third-Party Litigation Funding

[15] *Id.* at 1278 n.23.
[16] *Id.* at 1279.
[17] *Id.* at 1278 n.23.
[18] *Id*. at 1279.
[19] *Campbells Cash and Carry Pty. Ltd. v. Fostif Pty. Ltd.* [2006] 229 CLR 386 (Austl.).
[20] Marcus Priest, *Retailers Fight Tobacco Firms Over Fees*, FINANCIAL REVIEW (Sept. 9, 2003, 10:00 AM), https://www.afr.com/policy/health-and-education/retailers-fight-tobacco-firms-over-fees-20030909-jv0o2.
[21] *Campbells Cash and Carry Pty. Ltd. v. Fostif Pty. Ltd.* [2006] 229 CLR 386 (Austl.).
[22] *Id*.
[23] *See* Steinitz, *supra* note 12, at 1280.
[24] *Id*.
[25] Arkin v. Borchard Lines Ltd (Costs Order) [2005] EWCA (Civ) 655 (Eng.).

The phrase refers both to the funding arrangement, as distinguished from contingency fees (when an "attorney advances services and other costs associated with prosecuting a case in exchange for a certain percentage of any recovery")[26] and litigation lending (when investors contract with a lawyer or the lawyer's firm, not the party in the lawsuit),[27] and the industry itself.[28]

In the simplest and most common funding arrangement, an investor—like a bank or hedge fund[29]—will fund a single case; in exchange, the investor will receive a percentage of the proceeds recovered from the case's resolution, whether through the courts or a settlement.[30] These are non-recourse arrangements, so, should the plaintiff lose, he is not obligated to recompense the investor.[31]

These arrangements, according to Victoria Shannon, in her article, *Harmonizing Third-Party Litigation Funding*, share two important characteristics: (1) the investor contracts directly with the client, not the client's lawyer, and (2) the investor never becomes a party to the lawsuit.[32] Aside from funding the lawsuit, the investor has no connection to the litigation.

### C. The Litigation Finance Market

Over the last decade, third-party litigation funding has become a burgeoning, multi-billion-dollar, international industry.[33] In the United States, third-party litigation funding has grown exponentially, with US-based commercial entities raising an estimated $1.8 billion in capital since 2016.[34] Burford Capital—a major, US-based litigation finance firm founded in 2009—reported spending over a billion dollars in investments in 2018, "the first time [it had] crossed that threshold."[35] While the majority of specialized funders are based in Australia, Germany, and the United Kingdom, where third-party litigation finance is more established,[36] there are increasingly more United States-based funders, which, like Burford, are devoted almost

[26] Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 574 (2010).
[27] *See* Shannon, *supra* note 2, at 863 n.3.
[28] *See* Steinitz, *supra* note 12, at 1275–77.
[29] *See* Shannon, *supra* note 2, at 871.
[30] *See* Lyon, *supra* note 26, at 577.
[31] *Id.*
[32] Shannon, *supra* note 2, at 863 n.3.
[33] Mathew Goldstein & Jessica Silver-Greenberg, *Hedge Funds Look to Profit From Personal Injury Suits*, N.Y. TIMES, https://www.nytimes.com/2018/06/25/business/hedge-funds-mass-torts-litigation-finance.html (last visited March 28, 2021).
[34] Sean Thompson et al., *United States, in* THE THIRD PARTY LITIGATION FUNDING REVIEW 217, 217 (Leslie Perrin ed., 2019).
[35] BURFORD CAP., BURFORD CAP. ANN. REP. 2019 (2019), https://www.burfordcapital.com/media/1734/fy-2019-report.pdf.
[36] *See* Shannon, *supra* note 2, at 872.

entirely to these investments.[37] These funders can be large, publicly-traded entities (like Burford Capital) or private funds (such as Longford Capital).[38]

There are two distinct litigation markets in the United States: commercial and consumer.[39] The commercial market typically concerns business-to-business disputes, such as anti-trust violations, intellectual property infringement, and trade secret misappropriation.[40] These cases can yield substantial rewards, exceeding $10 million.[41] The consumer market, by contrast, largely consists of personal injury claims.[42] These claims can are brought individually or as class actions, and, compared to commercial claims, yield smaller rewards.[43] While the paradigmatic client is an impecunious plaintiff who, without litigation funding, cannot afford to bring a claim, clients are increasingly varied, from pro bono legal services to Fortune 500 companies.[44]

Typically, a third-party investor is contacted after a lawsuit has been initiated.[45] The person bringing the claim or defending against it will provide the investor with limited information.[46] Using this information, the investor, like a risk analyst, will consider the strengths and weaknesses of the client's case, the likelihood of success, and the ability to actually recover.[47] Based on these perceived odds, the investor may contribute the capital necessary to maintain the lawsuit, usually on a non-recourse basis.[48]

Though litigation finance is a seemingly novel means of maintaining lawsuits, it is not so dissimilar from two more-established legal lending schemes. As Jason Lyon observes in his article, *Revolution in Progress: Third-Party Funding of American Litigation*, the basic third-party litigation agreement (an outside investor bearing litigation costs on a non-recourse basis) is comparable to pre-settlement funding and syndicated lawsuits.[49] Under a pre-settlement agreement, an investor covers a litigant's living expenses while a lawsuit is pending, which are secured against a potential reward or settlement. In syndicated lawsuits, litigants, as a means of funding their lawsuits, sell partial rights in any reward or settlement to private investors; these investors, in turn, sell shares in the lawsuits.[50] The crucial difference between these schemes and third-party litigation funding is the size of the investment, and, concomitantly, the size of a

[37] *See* Letter from Laws. for Civ. Just. & U.S. Chamber Inst. for Legal Reform to Rebecca A. Womeldorf, Sec. of the Comm. on Rules of Prac. & Proc. of the Admin. Off. of the U.S. Cts., December 21, 2020, Appendix B, https://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_and_ilr_letter_on_tplf_to_civil_rules_committee_dec_21_2020.pdf.
[38] *See* Thompson, *supra* note 34.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 218.
[45] *See* Shannon, *supra* note 2, at 872.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *See* Lyon, *supra* note 26, at 574.
[50] Ari Dobner, *Litigation For Sale*, 144, U. PA. L. REV. 1529, 1529 (1996).

potential award.[51] Whereas the average pre-settlement loan a decade ago was no greater than $20,000, third-party investments often exceed $15 million, with potential awards of $100 million,[52] figures that have only increased over the intervening eleven years.[53]

### D. A Recipe for Abuse | The U.S. Chamber Institute for Legal Reform's 2009 Report

It was, one imagines, the predicted increase in mass torts, caused by third-party litigation funding, and the mammoth size of potential awards that inspired the U.S. Chamber Institute for Legal Reform to issue a report in October 2009 lambasting the practice.[54] While other defendant- and business-favoring organizations, like the American Tort Reform Association, likewise issued papers criticizing alternative litigation financing around the same period,[55] the Institute's 2009 Report became the "landmark piece for all criticism of the practice."[56]

The Report, prepared by attorneys from Skadden, Arps, Slate, Meagher & Flom,[57] was written after two major victories for the so-called tort reform movement. In 2005, President George W. Bush signed the Class Action Fairness Act ("CAFA"), which changed subject-matter jurisdiction rules governing class action lawsuits, allowing them to be removed from more plaintiff-friendly state courts to more defendant-favoring federal courts.[58] The ostensible purpose of the Act was to curb class action abuse, though opponents believe Congress' true motivation was to minimize corporate liability.[59] In 2007, in *Bell Atlantic Corp. v. Twombly*, the United States Supreme Court adopted a new pleading standard for federal complaints, supplanting the plaintiff-favoring notice pleading standard from *Conley v. Gibson* with a new, defendant-favoring plausibility standard, requiring plaintiffs to now demonstrate, "through factual matter," a "plausible" claim for relief.[60] Together, the Class Action Fairness Act and new "plausibility" pleading standard created greater hindrances for claimants, particularly in the class action context. The Act forced plaintiffs filing class action claims into less sympathetic federal courts, while the *Twombly* plausibility standard effectively made the barrier to entry higher for plaintiffs, further insulating defendants (especially businesses) from large lawsuits. Third-party litigation funding, then-fast developing in Australia and Europe, threatened to undermine these legislative and judicial victories.

With third-party litigation funding's legal status unclear, the U.S. Chamber Institute issued its 2009 Report with the goal of persuading courts and legislatures to revive the almost obsolete torts of champerty and maintenance, thus making third-party litigation illegal in the

[51] *See* Lyon, *supra* note 26 at 574.
[52] *Id*.
[53] *See* Thompson, *supra* note 34.
[54] Chamber Report II, *supra* note 5.
[55] *See* Letter from the Am. Tort Reform Ass'n, to Philip H. Schaeffer & Jeffrey B. Golden, Co-Chairs of the Am. Bar Ass'n Working Group on Alternative Litigation Financing (Feb. 15, 2011).
[56] *See* Solas, *supra* note 11, at 69.
[57] Chamber Report II, *supra* note 5.
[58] 28 U.S.C. § 1332(d) (2012).
[59] Jeffrey L. Roether, *Interpreting Congressional Silence: Cafa's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745, 2752 (2007).
[60] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

United States.[61] The Chamber's fear, one speculates, was that American courts, like the common-law courts of Australia and England, would similarly find the medieval rationales for these torts uncompelling. Worse, American courts would not only permit such financing, they would promote it on public policy grounds, seeing these financing arrangements, like the courts in *Fostif* and *Arkin*, as a commendable means of promoting greater access to justice for indigent plaintiffs. A report from a well-known lobbying group on a little-known subject, framed in terms favorable to the organization's objectives, could have an agenda-setting effect, persuading courts and legislatures—primed, after CAFA and *Twombly*, to be wary of aggregate litigation—that the potential for frivolous and abusive lawsuits, enabled by third-party litigation funding, would far outweigh whatever access to courts such financing might provide.

Under the existing contingency-fee based system, the Report argues, only meritorious claims are brought, as this system, combined with the high cost of litigation, disincentivizes attorneys working on contingency from bringing non-meritorious claims.[62] Because third-party litigation funding allows attorneys to "offload" the cost and risk of litigation, frivolous and abusive cases "that plaintiffs and their attorneys ordinarily would not have pursued are [now] much more likely to be filed."[63] This risk of abusive litigation is especially pronounced in the class action context, which, the Report notes, was "already very vulnerable to abuse."[64]

Using the familiar David and Goliath analogy, the Report reverses the roles.[65] The victims of this anticipated increase in abusive aggregate litigation would not be corporate goliaths.[66] It would be motorists, professional-service providers, and small-business owners, people and entities who cannot financially contend with investor-backed classes and, accordingly, will face coercive pressure to settle cases, regardless of the merits, as that would be the more economically efficient option for them.[67] However, the Report optimistically concludes, this future of unbridled frivolous litigation is not inevitable.[68] In 2009, when the Report was published, third-party funding was not prevalent and "governed by 'a patchwork of relatively weak laws, cases, rules, and regulations—and they are only in force in a handful of states.'"[69] The United States could thus avoid the fates of Australia and Europe by prohibiting the practice entirely or, at a minimum, prohibiting its use in aggregate litigation.[70]

## III. CHAMPERTY & MAINTENANCE AS APPLIED TO THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES

### A. Historical Background

[61] Chamber Report I, *supra* note 6, at 4, 7–9.
[62] *Id*. at 5.
[63] *Id.*
[64] *Id*. at 1.
[65] *Id*. at 4.
[66] *Id*.
[67] *Id*. at 4, 7.
[68] *Id.* at 12.
[69] *Id*. at 4, 12.
[70] *Id*. at 12.

In its 2009 Report, the U.S. Chamber Institute complained that there was no nationwide consensus or conversation regarding the continued viability of champerty and maintenance and whether these doctrines would bar third-party litigation funding.[71] While courts had not yet applied them to litigation finance, discussion of champerty and maintenance, contrary to the Institute, had been ongoing since the founding of the United States.[72]

Beginning in the nineteenth-century, as public attitudes towards third-party involvement in litigation were slowly changing, American courts started to question the extent to which these torts should be enforced to prevent third-party intervention.[73] Though American courts were increasingly sympathetic to indigent plaintiffs, who, despite having legitimate claims, lacked the financial means to file suit, courts were also wary of money-minded third-parties, who, they feared, would intermeddle in litigation solely for profit. As then-Judge Cardozo, writing for the New York Court of Appeals in 1929, succinctly put it: "[I]t seems to be agreed that anyone may lawfully give money to a poor man to enable him to carry on his suit. . . . What is feared and forbidden is the oppressive intermeddling of wealth or officialdom for publicity or profit."[74]

Over the twentieth-century, with the advent of Legal Aid, the public increasingly supported limiting the enforcement of champerty and maintenance to allow indigent claimants greater access to courts, but these torts were not all together eliminated.[75] The tort of maintenance continued to prevent attorneys from soliciting clients, and the tort of champerty continued to prevent attorneys from working on contingency.[76] Third-party litigation funding thus presented a thorny problem, as it both supported the public interest's in providing indigent claimants greater court access while, at the same time, risked allowing third-parties to profit from those claimants' lawsuits. In 1998, when European firms started to fund lawsuits in the United States,[77] it was an open question whether the public interest would overcome these for-profit concerns. During the last decade, some states, discussed *infra*, have found that the risk of profiteering outweighs the purported benefits of providing indigent claimants greater access to courts and, accordingly, have prohibited third-party funding of claims. The general trend, however, is to allow such arrangements.

### B. *Case Study* | Minnesota's Prohibition on Third-Party Litigation Funding

Third-party litigation funding's opponents argue that these funding arrangements constituted champerty and/or maintenance, making them illegal.[78] Champerty, a common-law tort under English law, is an agreement "between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant['s] claims as consideration for receiving part of any judgment

[71] *Id*. at 4.
[72] *See* Lyon, *supra* note 26, at 581.
[73] *Id*. at 581–82.
[74] *In re* Gilman, 167 N.E. 437, 439 (N.Y. 1929) (quoting 1 WILLIAM HAWKINS, PLEAS OF THE CROWN ch. 27 (6) §26 p. 460, quoted in *Neville v. London "Express" Newspaper*, 35 L.Q.R. 233, 379 (1919)).
[75] *See* Solas, *supra* note 11, at 30.
[76] *See* Lyon, *supra* note 26, at 582.
[77] Chamber Report II, *supra* 5, at 2–3.
[78] Jarrett Lewis, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 GEO. J. LEGAL ETHICS 687, 692 (2020).

proceeds."[79] Maintenance, a similar concept, is the assistance in "prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation."[80] The U.S. Chamber Institute's 2009 Report expressly argued that these common-law torts bar third-party litigation funding.[81] A decade after its publication, courts have now ruled on the legality of these funding arrangements and some, like the Institute, agree that these torts render third-party financing impermissible.

Minnesota, for example, in *Maslowski v. Prospect Funding Partners LLC*, refused to exempt litigation funding arrangements from its champerty and maintenance doctrines, effectively banning such arrangements in the state.[82] In 2012, the plaintiff sued to recover damages for injuries sustained in an automobile accident.[83] While her suit was pending, the plaintiff entered into a non-recourse agreement with the defendant, a litigation funder.[84] In exchange for giving the plaintiff $6,000, which she needed for living expenses, the defendant was promised $6,000, a $1,425 processing fee, and 60 percent annual interest from a potential award.[85] After winning her case, the plaintiff brought suit against the defendant, seeking a declaratory judgment that their contract was champertous and thus unenforceable.[86]

The Minnesota Court of Appeals, finding for the plaintiff, ruled that, while other states have eschewed or changed their doctrines to allow for litigation funding, Minnesota would continue to "follow [its] common-law rule prohibiting contracts for champerty."[87] These contracts, the court concluded, agreeing with and quoting the lower court's opinion, implicated several public policy concerns—in particular, disincentivizing settlement.[88] "[U]nless the amount recovered would exceed…the amount [plaintiff] would owe to the litigation funding company," she has no incentive to settle.[89] The more a plaintiff owes, the greater her unwillingness to settle, making litigation longer and costlier.[90]

Here, the Minnesota Court of Appeals portends what would later become a central argument against third-party litigation funding and the related need for disclosure: dis-incentivizing settlement. Without knowing the particulars of a contract or with whom the defendant is actually negotiating, the parties cannot settle cases, something the courts encourage. This inability to settle cases makes them longer, costlier, and ensures they are not decided on the merits. Minnesota is not alone is outlawing or limiting third-party litigation funding; five other states, including Pennsylvania, have explicitly applied these doctrines to litigation funding.[91]

[79] Maslowski v. Prospect Funding Partners LLC, 890 N.W.2d 756, 763 (Minn. Ct. App. 2017).

[80] *Id*.

[81] CHAMBER REPORT II, *supra* note 5, at 2.

[82] Maslowski, 890 N.W.2d at 763.

[83] *Id*.

[84] *Id*.

[85] *Id.*

[86] *Id*.

[87] *Id*. at 763.

[88] *Id*.

[89] *Id.*

[90] *Id.*.

[91] *See* Thompson, *supra* note 34, at 220.

### C. *Case Study* | Illinois & the Legality Third-Party Litigation Financing

*Maslowski* and these states notwithstanding, courts are trending toward limiting the doctrines of champerty and maintenance to allow for third-party litigation funding.[92] As American courts declined to extend these doctrines to contingency fees (finding a public policy interest in "supporting access to justice by means of contingency fees"),[93] twelve states, including New Jersey, either no longer recognize these doctrines or have excepted litigation funding from them.[94]

For instance, in *Miller UK Ltd. v. Caterpillar, Inc.*—a case that concerns both champerty and maintenance as well as the "relevance" of third-party investors for discovery purposes—the United States District Court for the Northern District of Illinois ruled that a litigation funding agreement did not constitute maintenance, making the structure and terms of the arrangement irrelevant and thus undiscoverable.[95]

In 2010, after a multi-decade busines relationship, Miller brought suit against Caterpillar, alleging misappropriation of trade secrets.[96] Caterpillar, the better-resourced of the parties, used "scorched earth" tactics to overwhelm its opposition, prolonging discovery disputes in an effort to pressure Miller to "abandon the case or settle on distinctly disadvantageous terms."[97] Miller, resisting this pressure, contracted with a third-party litigation funder, bolstering its financial position.[98] Caterpillar moved to compel production of the funding contract, arguing that it constituted maintenance, making its contents relevant.[99]

The district court was unconvinced, finding that the contract was not a form of maintenance.[100] In Illinois, a person is guilty of maintenance when he "officiously intermeddles" in a lawsuit that neither belongs to nor concerns him.[101] In other words, a person who provides unsolicited financial support for a lawsuit, despite having no bona fide legal interest in it, is guilty of this "hoary" doctrine.[102] Here, though, the funder's assistance was not unsolicited.[103] "The funder was sought out by a cash-strapped litigant embroiled in bitterly contested litigation," and the lawsuit itself, which Miller initiated, was not intended to promote a meritless cause.[104] "The funders were sought out by Miller to enable it to continue with the litigation that Miller had initiated in 2010 without prompting from any funder."[105] Because Caterpillar could not sustain a defense of maintenance, the contract and other "deal documents" were irrelevant under 26(b)(1)

[92] *See* Stroble & Welikson, *supra* note 4, at 7.
[93] *See* Solas, *supra* note 11, at 29.
[94] *See* Thompson, *supra* note 34, at 220.
[95] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 728 (N.D. Ill. 2014).
[96] *Id.* at 717.
[97] *Id.* at 718.
[98] *Id.* at 719.
[99] *Id.* at 719, 724.
[100] *Id.* at 726.
[101] *Id.* at 725.
[102] *Id.* at 711.
[103] *Id.* at 725.
[104] *Id.* at 725.
[105] *Id.* at 725.

of the Rules of Federal Procedure.[106] The court, accordingly, denied the defendant's motion to compel.[107]

## IV. THIRD-PARTY LITIGATION IN THE DISCOVERY CONTEXT

### A. The Relevance of Third-Party Litigation Funding Agreements Within the Meaning of Federal Rule of Civil Procedure 26(b)(1)

As with champerty and maintenance, courts also disagree about whether, when, and to what extent third-party litigation funding agreements are "relevant" within the meaning of Rule 26(b)(1) and thus discoverable.[108]

Rule 26(b)(1) sets the scope of federal discovery.[109] The parties can obtain information that is relevant to their claims or defenses, provided the information is proportional to the needs of the case and is not work-product or privileged.[110] This rule, according to the Supreme Court, should "be accorded a broad and liberal treatment to effect [its] purpose of adequately informing the litigants in civil trials."[111] However, the courts, in controlling the discovery process, must be mindful of Rule 1, which commands that civil trials be "just, speedy, and inexpensive."[112] Rule 26(b)(1)'s relevancy requirement should, therefore, be "firmly applied," and courts should not hesitate to use their power to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense" as required under Rule 26(c)(1)(A).[113]

#### 1. *Case Study* | West Virginia and the Relevance of Financing Agreements

In a relatively early example of a court finding litigation funding arrangements relevant, the United States District Court for the Southern District of West Virginia took a broad view of relevance.[114] In *American Medical Systems*—the infamous pelvic mesh case, which the U.S. Chamber Institute highlights as an egregious example of third-party litigation funding and the urgent need for disclosure—the court refused to grant a protective order, allowing documents "related to the referral, transfer, or sale of [the] litigation claims to law firms" to be subpoenaed.[115]

*American Medical Systems* addressed a discovery dispute stemming from a mass tort, multidistrict litigation concerning the manufacture and marketing of allegedly defective pelvic mesh products. Because the mesh, "used to correct a condition called pelvic organ prolapse," was allegedly defective, plaintiffs were required to undergo corrective surgeries to revise or

[106] *Id.* at 728.
[107] *Id.* at 743.
[108] Fed. R. Civ. P. 26(b)(1).
[109] Fed. R. Civ. P. 26(b)(1).
[110] Fed. R. Civ. P. 26(b)(1).
[111] Herbert v. Lando, 441 U.S. 153, 177 (1979).
[112] Fed. R. Civ. P. 1.
[113] Fed. R. Civ. P. 26(c)(1)(A).
[114] In re Am. Med. Sys., Inc., MDL No. 2325, 2016 WL 3077904, at *1 (S.D.W. Va. May 31, 2016).
[115] *Id.*; CHAMBER REPORT II, *supra* note 5, at 14.

remove them.[116] It was later revealed, as reported in the *New York Times*, that some of these surgeries were medically unnecessary, with third-party funders "coaxing women into having surgery" in order to increase the recovery in "lawsuits against medical device manufacturers."[117]

During discovery, AMS learned that these surgeries were "arranged and funded through third-party funding companies," raising questions about the necessity of the surgeries.[118] With plaintiffs refusing to disclose the details of these funding arrangements, AMS subpoenaed two nonparties, demanding documents "pertaining to ownership or financial interest in…[the] funding companies."[119] These nonparties also refused, arguing that the information was irrelevant because "it relates to 'suspected wrongdoing' of the nonparties rather than the claims and defenses in this litigation."[120] In response, AMS argued that, because the information "related to the plaintiffs' decisions to undergo corrective surgeries," it was "relevant to the reasonableness and medical necessity of [said] surgeries."[121]

The court, after noting previous discovery disputes and what AMS was and was not entitled to, found that most of the demanded documents were relevant to the litigation.[122]

> The subpoenas do not evidence a crusade against the nonparties' business practice; instead, AMS reasonably seeks to understand the motivation behind the plaintiffs' decisions to undergo corrective surgeries and how those surgeries were funded. A rational place to start is with the beginning of the money trail—the first entity interacting with the plaintiffs before the decision to have a corrective surgery is made.[123]

While the court did find the litigation funders and funding arrangement relevant, the particulars of the case, not a bright-line rule, resolved the discovery dispute. The case is more notable for its analysis of "relevance" within the meaning of Rule 26. The court concluded that, despite recent changes to the language of the rule and a new emphasis on proportionality, relevance, for discovery purposes, is broad and should be liberally construed, setting a standard that most parties can easily satisfy.[124]

### 2. ***Case Studies*** **| New Jersey, Illinois, and the Irrelevance of Litigation Financing Agreements**

The United States District Court of New Jersey, by contrast, recently held that funding agreements are not relevant, dismissing defendants' arguments as "pure speculation."[125] In

[116] *Id.*
[117] Goldstein & Silver-Greenberg, *supra* note 33.
[118] In re Am. Med. Sys., 2016 WL at *1.
[119] *Id.*
[120] *Id.* at *2.
[121] *Id.*
[122] *Id.* at *4–5.
[123] *Id.*
[124] *Id.* at *4.
[125] In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prod. Liab. Litig., 405 F. Supp. 3d 612, 619–20 (D.N.J. 2019).

*Valsartan*, another multidistrict litigation, mass tort case, plaintiffs alleged a generic drug used to treat high blood pressure contained carcinogens, causing personal injuries and economic loss.[126] In pre-discovery discussions, defendants requested "all documents and communications related to funding or financing, if any, you or your counsel have obtained to pursue this litigation."[127] Plaintiff refused, arguing their "private financial information is irrelevant to [defendants] claims and defenses...".[128]

The court, acknowledging that "courts are split,"[129] agreed with plaintiffs that defendants demonstrated "no legitimate need for the requested information."[130] Unless defendants can actually show an alleged agreement's relevance, the court will not direct "carte blanche discovery of plaintiffs' litigation funding...".[131] While defendants posited a parade of horrible scenarios that could arise from funding agreements, mere suggestions, without substantiation, did not make the agreements relevant.[132] "The fact that defendants have raised no nonspeculative basis for their discovery request results in its denial."[133]

Not all litigation funding concerns multidistrict litigation mass torts. In *Fulton* v. *Foley*, a plaintiff sued the City of Chicago, alleging he was wrongfully charged and convicted of sexual assault and murder, resulting in an almost twenty-five year prison sentence.[134] Chicago subpoenaed non-party Momentum Funding, LLC, whom it suspected of funding plaintiff's lawsuit, and demanded documents related to "all funding agreements and statements of the terms of funding."[135] Plaintiff moved to quash, arguing the information was not relevant within the meaning of Rule 26(b)(1).[136]

The court, acknowledging a plethora of decisions finding similar documents irrelevant, averred that questions of relevance must be decided on a case-by-case basis, with due consideration being given to the parties' arguments.[137] Yet, like in the other cited cases, defendants failed to persuade the court.[138] Like in *Maslowski*, the defendant argued that, without knowing the terms of the litigation agreement, it could not engage in settlement discussions. The court reminded the defendant that the standard for relevance is whether the evidence relates to the party's claims or defenses.[139] "Even if the documents could somehow be relevant for settlement discussions, settlement considerations are a wholly distinct concept and not a proper basis to obtain discovery under Rule 26(b)(1)."[140]

[126] *Id*. at 613.
[127] *Id*. at 614.
[128] *Id*.
[129] *Id*.
[130] *Id*.
[131] *Id*. at 619.
[132] *Id*. at 615-16.
[133] *Id*. at 616.
[134] Fulton v. Foley, No. 17-CV-8696, 2019 WL 6609298, at *1 (N.D. Ill. Dec. 5, 2019).
[135] *Id*.
[136] *Id*. at 1–2.
[137] *Id*. at *2.
[138] *Id*.
[139] *Id*. at *3.
[140] *Id*.

The defendant also argued that the documents were somehow relevant to plaintiff's bias.[141] This argument also failed to satisfy the relevance standard.[142] "The assistance of litigation funding, in order to pay the fees and expenses of a litigation, does not assist the fact-finder in determining the credibility of plaintiff's testimony. Rather, the mere fact that plaintiff stands to gain from a successful lawsuit (with or without litigation funding) is the relevant inquiry on cross-examination concerning bias. Litigation funding does not change or add to the nature of that inquiry."[143] Accordingly, defendant's subpoena was quashed, concealing the details of the agreement.[144]

### B. Attorney-Client Privilege & Work-Product As Applied to Third-Party Litigation Funding

Assuming that financing agreements are relevant within the meaning of Rule 26(b), these agreements might nonetheless be privileged or work-product protected, making them undiscoverable.

### 1. *Case Study* | Illinois & the Waiver of Attorney-Client Privilege

When a litigant solicits third-party funding, the litigant often provides the potential investor with limited information, allowing the investor to better assess the strengths and weaknesses of the case.[145] Proponents of disclosure argue that, in sharing this information, litigants waive their attorney-client privilege, so, pre-supposing the information is relevant within the meaning of the Rule 26(b), the details of these financing agreements must be disclosed upon request. Here, too, there is no national consensus, but of the courts who have considered the issue, a majority have found that, in disclosing information to potential investors, litigants waive their attorney-client privilege as to that information.[146]

In *Miller*, for example, the United States District Court for the Northern District of Illinois found that, in sharing information with a third-party investor, the plaintiff waived its attorney-client privilege as to that information.[147] The court noted that the purpose of attorney-client privilege is to ensure confidentiality.[148] While documents pertaining to legal advice on business matters can fall under this privilege,[149] when such documents are prepared with the intent of sharing that information with an unprotected third-party, that information is no longer confidential and, thus, the privilege is waived.[150] The court also held that the common defense exception—which allows disclosure of confidential communications to third-parties, provided

[141] *Id*.

[142] *Id*.

[143] *Id*.

[144] *Id*. at *4.

[145] *See* Shannon, *supra* note 2, at 872.

[146] *See* Stroble & Welikson, *supra* note 4, at 14.

[147] *Miller UK Ltd.*, 17 F. Supp. 3d at 733.

[148] *Id*. at 731.

[149] *Id*. at 730.

[150] *Id*. at 731.

those parties share a common legal interest with the client—did not apply.[151] Because the third-party funder had a commercial interest, not a legal one, the exception could not be asserted.[152]

### 2. *Case Study* | Texas & the Protection of Financing Agreements and Related Materials Under the Work-Product Doctrine

Similarly, proponents of disclosure argue that, in sharing information with potential investors, litigants also waive their work-product protection as to that information. Here, though, courts are generally trending toward finding these materials protected and thus undiscoverable.[153]

For example, in *Mondis Technology, Ltd. v. LG Electronics., Inc.*, the United States District Court for the Eastern District of Texas held that the work-product doctrine extends to materials created to solicit third-party litigation funding.[154] In *Mondis*, the plaintiff, with the assistance of its counsel, prepared presentations for potential investors, including documents relating to its litigation strategy.[155] The defendant moved to compel production of these documents, but the plaintiff refused, asserting the documents were work-product protected and thus undiscoverable.[156] Unlike the attorney-client privilege, the mere disclosure of work-product to third-parties does not waive the protection; the protection is waived "only if work-product is given to adversaries or treated in a manner than substantially increases the likelihood that an adversary will come into possession of the material."[157] Because the disclosure of these documents to third-parties did not substantially increase the likelihood that the defendant would come into possession of them, the protection was not waived and the presentations were thus undiscoverable.[158]

## V. RELEVANT DEVELOPMENTS: RULES CHANGES, COURT RULES, & LEGISLATION, PROPOSED AND PASSED

### A. Advisory Rules Committee

Instead of litigating whether investors' identities are relevant and thus discoverable under 26(b), a coalition of business organizations have proposed amending Rule 26 to require "disclosure of third-party litigation funding arrangements in any civil action filed in federal court."[159] In 2014 and 2016, the Advisory Committee on Rules of Civil Procedure twice declined to adopt the above-proposal, concluding that such action would be "premature," given the

[151] *Id.* at 731–34.
[152] *Id.* at 733–34.
[153] *See* Stroble & Welikson, *supra* note 4, at 1513.
[154] Mondis Tech., Ltd. v. LG Elecs., Inc., No. 2:07-CV-565-TJW-CE, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).
[155] *Id.* at *2.
[156] *Id.*
[157] *Id* at *5.
[158] *Id.* at *3.
[159] Letter from Lisa Rickard, President, U.S. Chamber Inst. for Legal Reform to Rebecca Womeldorf, Sec'y Comm. On Rules of Prac. and Proc. of the Admin. Off. of the United States Cts., (June 1, 2017) [hereinafter 2017 U.S. Chamber Letter] (https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf).

nascent nature of the issue.[160] In 2017, despite these rejections, the coalition submitted another proposal: an additional fifth prong (26(a)(1)(A)(v)), under which all parties would have to provide:

> [F]or inspection and copying under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has the right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment, or otherwise.[161]

The amendment-process is difficult, and, since opinions on third-party litigation funding seem to fall along the liberal-conservative divide, adoption of the amendment is not guaranteed.[162] The process is as follows. First, all proposed amendments to the Rules are sent to the Advisory Committee, which responds to these proposals in an Agenda Book.[163] If the Advisory Committee recommends one of the proposed amendments, the recommendation is forwarded to the Judicial Conference, the policy-making body for the federal judiciary, composed of Article III judges.[164] If approved by the Judicial Conference, the proposed amendment is forwarded to the Supreme Court, which, by majority vote, can approve the amendment.[165] The Supreme Court has until May 1 to vote on amendments.[166] Finally, if the Supreme Court approves an amendment, it is forwarded to Congress, which can reject the amendment up until December 1.[167]

While the Advisory Committee on Rules of Civil Procedure has not officially rejected the proposal, statements from sub-committees indicate that this, too, will not be adopted. For instance, in 2019, the MDL Subcommittee of the Advisory Committee on Rules of Civil Procedure noted that, as of now, it is unwilling to adopt a rule addressing third-party disclosure:

> The MDL Subcommittee continues to study third-party litigation funding (TPLF), including various proposals for disclosure. All that is clear at the moment is that the underlying phenomena that might be characterized as third-party funding are highly variable and often complex. They continue to evolve at a rapid pace as large third-party funders expand dramatically. It seems clear that more study will be required to determine whether a useful disclosure rule could be developed. Nor does it seem likely that the several advisory committees will soon be in a position

[160] Draft Minutes, Civil Rules Advisory Committee, October 30, 2014 *in* Civil Rules Advisory Committee Agenda Book at lines 434-620 (Apr. 2018) at lines 434–620.
[161] 2017 U.S. Chamber Letter, *supra* note 159 at 2.
[162] The Litigation Funding Transparency Act was introduced by Senators Grassley, Tillis, Cornyn, and Sasse, all Republicans, and the West Virginia and Wisconsin disclosure laws, discussed *infra*, were passed by Republican legislatures.
[163] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, HOW THE RULEMAKING PROCESS WORKS https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works .
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*

to frame possible expansions of disclosure requirements designed to support better-informed recusal decisions.[168]

### B. The Litigation Funding Transparency Act

Assuming the Rules are not amended, the easier means of mandating disclosure is through the legislature. It should be noted, of course, that while passing a law is easier than amending the Rules, laws are easier to repeal, making a Rules-change the more attractive option to third-party litigation funding's opponents. In 2019, Senator Chuck Grassley, then-Senate Judiciary Committee Chair, introduced the above-named act, the express purpose of which was to make mandatory the disclosure of an investor's identity to both the court and "all other named parties" in class action suits.[169] An identical bill was introduced in March 2021.[170] The law, argued Senator Ben Sasse, echoing the language of Rule 1, would ensure that decisions are premised on laws and facts, not "the size of your bank account".[171] "By shedding light on funding arrangements, this legislation is a common-sense step toward making transparency the rule."[172]

### C. West Virginia, Wisconsin, 7 & the Northern District of California

Some states have begun to regulate third-party litigation funding, including requiring disclosure of funders. For instance, in 2018, Wisconsin—using the above-quoted language from the U.S. Chamber Institute for Legal Reform's proposed amendment—changed its discovery laws, requiring that all funding agreements be disclosed "without awaiting a discovery request."[173]

In 2019, West Virginia, following Wisconsin's example, also required disclosure of what it terms "litigation financing contracts."[174]

In 2017, the Northern District of California adopted a rule requiring automatic disclosure of third-party litigation funding in class action lawsuits, the first such rule in the nation.[175] The revised rules now requires 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

[168] Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Practice and Procedure (June 4, 2019), 9–10.

[169] Litigation Funding Transparency Act, S. 471 116th Cong. (2019).

[170] Litigation Funding Transparency Act, S. 471 116th Cong. (2021).

[171] *Grassley Leads Lawmakers in Introducing Bill to Improve Transparency of Third Party Financing in Civil Litigation* (Feb. 13, 2019), https://www.grassley.senate.gov/news/news-releases/grassley-leads-lawmakers-introducing-bill-improve-transparency-third-party (last accessed May 16, 2022).**Error! Hyperlink reference not valid.**

[172] *Id.* **Error! Hyperlink reference not valid.**

[173] WIS. STAT. § 804.01(2)(bg) (2018)

[174] W. VA. CODE § 46A-6N-5 (2019).

[175] Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement 19 (Nov. 1, 2018), **Error! Hyperlink reference not valid.**https://www.cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges_1.17.2017.pdf.

counterclaim.[176] Similarly, in June 2021, the U.S. District Court for the District of New Jersey amended Rule 7.1.1 of its Local Civil Rules.[177] Now, parties using third-party litigation financing must disclose the existence of “any person or entity that is not a party and is providing funding for some or all of the attorneys’ fees and expenses for the litigation on a non-recourse basis.”[178]

## VI. CONCLUSION

In conclusion, American courts, despite the U.S. Chamber Institute’s 2009 Report, have generally refused to extend the medieval doctrines of champerty and maintenance to prohibit third-party litigation funding in the United States, concluding, like the common-law courts in Australia and England, that, whatever their potential for abuse, these financing arrangements will allow low-resourced claimants greater access to justice. While debates regarding disclosure of these agreements are ongoing, third-party litigation funding is now, indisputably, an unabrogable part of civil litigation in the United States.

[176] *Id*.

[177] N.J.A.R. 7.1.1 *amended by In re: Amendment of Local Civil Rules* of June 21, 2021 ( N.J. June 21, 2021), https://www.njd.uscourts.gov/sites/njd/files/Order7.1.1%28signed%29.pdf.

[178] *Id*.