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

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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.[1] In exchange for financing a lawsuit, an investor will receive a large percentage of an award or settlement.[2] 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.[3] 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.[4]

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.[5]

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.[6] The U.S. Chamber Institute thus re-focused its attention on the issue of disclosure, arguing that financing agreements must be disclosed to defendants.[7] In the twelve years since the Report's publication, American courts have grappled with the 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.[8]

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.?[9]

[1] Victoria A. Shannon, Harmonizing Third-Party Litigation Funding, 36 Cardozo L. Rev. 861, 863 (2015).

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[2] Id.

[3] See Joseph J. Stroble & Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, 87 Def. Couns. J. 1, 2 (2020).

[4] 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.

[5] 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.

[6] See Stroble & Welikson, supra note 4, at 7.

[7] Chamber Report II, supra note 5, at 26.A

[8] See Stroble & Welikson, supra note 4, at 10?15.

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

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