

April 22, 2026

Karla M. Shultz, Esq.
Deputy Chief Counsel
Civil Procedural Rules Committee
Supreme Court of Pennsylvania
Pennsylvania Judicial Center
PO Box 62635
Harrisburg, PA 17106-2635
civilrules@pacourts.us

Re: Proposed Amendment of Pa.R.Civ.P. 4003.2 (56 Pa.B. 1000)

Dear Ms. Shultz and Members of the Civil Procedural Rules Committee:

The International Legal Finance Association (“ILFA”) respectfully submits this comment in response to the Civil Procedural Rules Committee’s proposed amendment of Pennsylvania Rule of Civil Procedure 4003.2 (“the Proposed Rule”). ILFA is the global trade association for the commercial legal finance industry. Its members provide capital to companies, individuals, and law firms to help finance the costs of litigation and arbitration. ILFA regularly engages with courts, legislatures, and rulemaking bodies on matters affecting legal finance.

ILFA respectfully urges the Committee to (1) decline submitting the Proposed Rule to the Supreme Court, and instead (2) conduct further study of third-party litigation funding before proceeding with rulemaking. The Proposed Rule raises a number of problematic issues that we discuss below. Most importantly, it would create a disclosure regime that tilts the litigation playing field further in favor of certain interests at the expense of parties—particularly impecunious individuals and small businesses—that depend on litigation finance to vindicate their rights.

This letter proceeds in six parts. Part I explains what commercial litigation finance is and why litigants use it. Part II identifies three core flaws in the Proposed Rule. Part III explains that the Proposed Rule lacks a clear or valid purpose. Part IV explains that the Proposed Rule would enact an unlevel playing field that gives opposing parties a strong strategic advantage in litigation. Part V addresses why the insurance-disclosure analogy is inapposite. Part VI recommends that, if the Committee remains interested in the topic, further inquiry and dialogue with all stakeholders is appropriate before any rulemaking proceeds.

I. What is Commercial Litigation Finance and Why Do People Use It?

Legal services cost money (and often a lot of money).¹ Companies and individuals pay for legal services just like they pay for other goods and services, by either using (a) their own money or (b) third-party capital.² Outside the litigation context, when businesses need money to hire workers or develop new technologies, they can rely on their own capital (retained earnings) or they can enter the capital markets to raise external funds (typically equity or debt financing). And when people need to buy a home, purchase a car, or attend college, they can use their savings, or they can borrow money from third parties including banks, the government, or family members.

Businesses and individuals often rely on third-party capital to support their need for *legal services* too. Third-party support of litigation is a long-permitted and widely-celebrated aspect of our legal system. Rule 5.4(c) of the Pennsylvania Rules of Professional Conduct expressly contemplates and permits circumstances in which a third party finances another’s litigation. And the Rule regulates the practice by requiring that any third party who “pays the lawyer to render legal services for another” may not “direct or regulate the lawyer’s professional judgment in rendering such legal services.”

Examples of third-party litigation finance abound. One common form of third-party finance is the contingent fee, where a lawyer provides both (a) *legal services* to a client by litigating the case and (b) *financial services* by financing the legal fees and sometimes even the case costs of a matter. In a story that echoes contemporary opposition to litigation finance by large, moneyed interests, the contingent fee was initially opposed by companies that did not want impecunious litigants to have greater access to the courts.³ Today, of course, the legal ethics rules permit lawyers to finance their clients’ litigation through the contingent fee.⁴ In fact, the contingent fee is a celebrated aspect of our legal system that has helped improve access to

¹ See Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIA. L. REV. 499, 503 (2015) (detailing how the rising cost of legal services impedes access to justice).

² William R. White, *The Tobin Tax: A Solution to Today’s International Monetary Instability?*, 1999 COLUM. BUS. L. REV. 365, 385 (1999) (identifying “the different methods employed by firms in financing their investment programs” as fitting within “three main types: equity financing, debt financing, and internally-generated funds derived from retained earnings.”).

³ Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 254 (1998).

⁴ Model Rules of Pro. Conduct r. 1.5(c) (Am. Bar Ass’n 2020).

justice.⁵ The Proposed Rule seems to recognize the value of the contingent fee by expressly excluding such arrangements from the scope of the disclosure rule.

Unfortunately, most law firms cannot take many (or even any) cases on a contingent fee. Modern complex litigation is extremely expensive, with expense budgets in funded cases frequently exceeding \$10 million. Very few firms have the balance sheet to finance those costs in addition to working on full contingency. The contingent fee thus has limited ability to solve a real access-to-justice problem. The modern commercial litigation finance industry helps fill this gap.

Beyond the contingent fee, there are myriad other examples of litigants looking to third parties to finance their litigation. Pro bono representation, legal aid organizations, trade associations, and advocacy groups routinely fund litigation on behalf of others. Banks extend lines of credit to law firms. Corporations raise equity and debt on Wall Street to finance litigation budgets. Modern commercial litigation finance is not different in kind from any of these long-standing practices.⁶

Companies and individuals seek third-party litigation finance to help them pursue litigation for two types of restraints: (1) liquidity and (2) risk. A company that has suffered a trade-secret theft or breach of contract may have lost the very revenue it would need to hire counsel and fund a multi-year case. Others have resources but prefer not to concentrate the risk of litigation on their own balance sheet. Litigation finance allows both categories of claimholders to pursue meritorious claims that might otherwise go unvindicated, serving the same function as venture capital for a startup or a mortgage for a homebuyer.⁷

When large companies with millions or billions of dollars of revenue, and substantial assets, need to raise money for litigation, they typically raise relatively cheap equity or debt on Wall Street, because that is their cheapest cost of capital. Consider just two examples:

- When **Bayer AG** needed to raise capital earlier this year to finance its litigation needs, it did not call a specialist litigation funder. Rather, as a publicly-traded multinational corporation, it simply went to Wall Street to raise equity capital to finance those needs.⁸

⁵ Eric Helland & Daniel Klerman, *Contingent Fees and Access to Justice*, 102 WASH. U. L. REV. ONLINE 1, 1 (2024) (concluding based on a unique dataset from New York City that “contingent fees seem to have, at least partly, solved the access-to-justice problem in tort litigation”).

⁶ See Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919 (2015).

⁷ Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 575–82 (2021) (analyzing the liquidity and risk-constraint motivations that lead claimholders to seek commercial litigation finance).

⁸ Ludwig Burger, *Bayer seeks investor approval for 35% cash call to gird for litigation*, REUTERS (March 7, 2025).

By selling equity in its company, Bayer likely obtained lower financing costs than if it had approached a third party litigation funder. Notably, Bayer’s third-party capital raise would not be captured by proposed disclosure requirements for “third party funding,” allowing Bayer to sidestep the Proposed Rule by virtue of its status as a large, publicly-traded company.

- **ParkerVision**, another publicly-traded company, illustrates the various ways larger companies can raise third-party capital to support litigation too. A recent SEC filing by the company identified three ways it raised financing to support plaintiff-side litigation: it raised capital from a specialist financier that was secured not just by the litigation but also by “the majority of [the company’s] assets,” and it separately financed the litigation through “contingent arrangements with legal counsel, and various debt and equity financings.”⁹ If ParkerVision were a small company whose only asset was a valuable legal claim, it likely would have had to raise third-party capital subject to the proposed disclosure regulations. As a larger company with the luxury of raising general-recourse equity and debt rather than limited-recourse litigation finance, ParkerVision would face no comparable disclosure obligation.

Of course, most companies—the 99.9% of companies that are small businesses—are generally cut off from these liquid capital markets. Those smaller businesses cannot access these more traditional capital markets, so they are more likely to use alternative financial providers like the forms of third-party funding targeted by the Proposed Rule.

In other words, almost all businesses rely upon third-party capital to pursue litigation, but only a few—disproportionately small and medium-sized businesses (SMEs)—are likely to use the form of third-party non-recourse litigation finance targeted by the Proposed Rule. This is because SMEs usually do not have access to substantial retained earnings or to liquid debt and equity markets, and so they resort to litigation funders as a vital capital market for their litigation and business needs.¹⁰

II. The Proposed Rule’s Three Core Problems

With this background, we turn to the Proposed Rule, which would allow “discovery of the existence and terms of any agreement under which any person agrees to fund fees, costs, expenses, or any other sums incurred in the action or incurred by the plaintiff during the pendency of the action, in exchange for a right to influence litigation or settlement decisions with respect to the action.” The comment to the rule states that it is intended to apply to

⁹ ParkerVision, Inc., Annual Report on Form 10-K (Dec. 31, 2022).

¹⁰ Suneal Bedi & William C. Marra, *Litigation Finance in the Market Square*, 98 S. CAL. L. REV. 1379, 1383, 1417–18 (2025).

situations where the financier “receives a direct or collateralized interest in the proceeds of the action by settlement, verdict, judgment, or otherwise.”

In this section, we highlight three features of the Proposed Rule that deserve further scrutiny before the Committee and the Pennsylvania Supreme Court act.

First, prejudice. As discussed in Section IV below, the Proposed Rule would prejudice funded litigants and counsel. Funding terms are highly sensitive and would provide a strategic advantage to opposing parties. For this reason, courts have routinely protected these materials from disclosure to adversaries absent a specific articulated need.¹¹ The Proposed Rule would take a completely different approach by forcing funding disclosure as a matter of default.

Second, clarity. the Proposed Rule’s definitions are unclear and could result in uneven application of disclosure obligations. As written, the Proposed Rule could cover routine debt and equity, which could trigger an enormous overhaul of parties’ and counsel’s disclosure obligations by requiring parties to submit to the courts the terms of all their third-party capital arrangements. The Comment’s expansive description of covered arrangements would also encompass ordinary-course law-firm borrowing facilities, lines of credit, portfolio financing, and referral-fee structures that have nothing to do with the control concerns animating the Proposed Rule.

Assuming instead that the Proposed Rule *is not* intended to cover routine debt and equity, then not only should it be revised, but it becomes significantly underinclusive and discriminatory. As explained in Part I, not every company has the luxury of raising general-recourse third-party equity or debt (much less the luxury of having billions of dollars in retained earnings to finance litigation). Small and medium-sized businesses are more likely to use litigation finance that is recourse only to litigation proceeds. The Proposed Rule, which expressly only applies to “the plaintiff,” would thus impose a prejudicial disclosure obligation upon only one category of litigant, without subjecting other categories of litigants to the same disadvantage.

Third, “influence.” the Proposed Rule is ambiguous insofar as it demands an inquiry into whether a third party may “influence” litigation or settlement decisions. Virtually no court has a mandatory disclosure rule (more on that immediately below), only one of the nation’s 94 federal districts (the District of New Jersey), and only a handful of the nation’s nearly 800 federal judges (Judges Colm Connolly of the District of Delaware, Anne-Leigh Gaylord Moe of the Middle District of Florida, and Philip Calabrese and Carmen Henderson of the Northern District of Ohio), have enacted rules specifically addressed to third-party funder disclosure (some of which are *ex parte* only). And even those rules inquire *only* into whether a funder exercises “control” over litigation—not whether they may *influence* litigation. The word

¹¹ See Charles M. Agee III, Lucian T. Pera & Nate Petty, *Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law* (Westfleet Advisors rev. Feb. 2026).

“influence” is far more elastic than “control” or “approval,” creating a grey area ripe for litigation, and the Comment compounds the problem by extending the rule to any arrangement conferring an “ability to influence litigation or settlement decisions.” This language would sweep in standard contractual covenants—such as information rights, reporting obligations, consultation provisions, *including even conversations about information in the public domain*—that are routine features of commercial finance and bear no resemblance to actual decisional control. A vague and ill-determined inquiry into “influence” will result in very expensive and protracted discovery sideshows into whether a funder is influencing litigation.

The Proposed Rule is unnecessary because courts already have inherent authority to require the disclosure of litigation funding on a case-by-case basis during discovery. The nation’s state and federal judges have been fielding these discovery requests for more than a decade, and the overwhelming weight of authority concludes that litigation funding agreements are not relevant, are protected by the work product doctrine, and are protected by the attorney-client privilege.¹² Pennsylvania federal courts have reached the same conclusion. As the Eastern District of Pennsylvania stated in *Devon IT, Inc. v. IBM Corp.*:¹³

It is quite evident that the subpoenas seek the production of documents that were prepared by counsel . . . in anticipation of and during litigation and are protected by the work-product doctrine. Litigation strategy, matters concerning merits of claims and defenses and damages would be revealed if the documents were produced. The matters directly involve the mental impressions of counsel and are protected from disclosure as work-product. Moreover, the production of the items subpoenaed would intrude upon attorney-client privilege under the “common-interest” doctrine.

If Pennsylvania’s judges believe disclosure is required in a particular case, they have the power to require it and do not need a mandatory, overinclusive rule. Judges can also tailor disclosure on a case-by-case basis—such as by requiring disclosure of the fact of funding *in camera* to the court (which is the approach adopted in Kansas’ 2025 litigation funding disclosure law),¹⁴ rather than allowing an adversary blanket access to highly sensitive funding agreements that may embody litigation work product.

¹² See also *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, 2017 U.S. Dist. LEXIS 215773, at *5 (Dec. 19, 2017) (“Upon consideration of the parties’ arguments, and for the reasons stated below, the Court finds that the materials sought are privileged under the work product doctrine”); *Wilson v. Norfolk Southern Railway Co.*, 2:24-cv-01584-CCW (W.D. Pa. Oct. 14, 2025) (“the Court finds that litigation funding is not relevant and no additional discovery responses are warranted”) (quotation omitted).

¹³ 2012 WL 4748160, at *1 n.1.

¹⁴ See Kansas Senate Bill No. 54 (2025); see also Dai Wai Chin Feman, *Breaking Down the First Legislative Compromise on Commercial Litigation Funding*, NATIONAL LAW REVIEW (May 5, 2025).

III. The Proposed Rule Lacks a Clear Purpose

The Publication Report to the Proposed Rule states that “[t]he purpose of [the] disclosure would ensure both the court and the parties are aware of the potential ethical issues that may result from involvement of an outside funder with a stake in the outcome of the litigation.” The Publication Report does not elaborate on what these potential ethical issues might be, but a few points are worth emphasizing.

Because the practice of third-party funding is not new, it is unsurprising that the ethics rules already address these concerns. Rule 5.4(c) expressly permits third-party funding, and then addresses any ethical problems by prohibiting that third party from directing the lawyer’s professional judgment. Adversaries in litigation do not have a right to rifle through the other side’s papers to engage in a fishing expedition about whether the other side is violating its ethical obligations.

And the courts that have closely studied this issue have all found that third-party funding does not present significant ethical issues. Nor are expansive, novel disclosure rules necessary to safeguard the integrity of the judicial system.

The most instructive guidance comes from the Delaware Supreme Court’s Committee on Litigation Funding and Transparency, which undertook a year-long study of third-party litigation finance in 2022–2023.¹⁵ That committee solicited input from the bar, surveyed other jurisdictions, and reviewed actual experience in Delaware’s state courts. Its report is the most thorough judicial evaluation of the subject to date, and it is especially relevant because Delaware—home to a large volume of complex commercial disputes—has every incentive to safeguard the integrity of its courts while ensuring that litigants have access to capital. A copy of the Delaware report is included as Exhibit A to this submission.

The Delaware committee reached a straightforward conclusion: there was no evidence of systemic problems with litigation funding in the state courts, and therefore no need for a disclosure rule. The report expressly stated that “there do not appear to be any issues with the current use of third-party litigation funding in the Delaware state courts.” On that basis, the committee rejected broad proposals for front-loaded disclosure of funding arrangements. At the same time, it acknowledged that courts should retain a narrow tool to police the only legitimate concern in this area—whether anyone other than the litigant controls the case. To address that possibility, the report recommended a modest rule (if any), modeled on the insurance-discovery provisions of Federal Rule of Civil Procedure 26, that would authorize limited inquiry into whether a third party holds control rights over litigation or settlement. Importantly, the committee emphasized that broader discovery into the details of funding agreements (which are often unsuccessfully sought by adverse parties in discovery, leading to

¹⁵ Delaware Committee to Study Transparency in Third-Party Litigation Funding, *Report to the President Judge on Recommended Rule for Disclosure of Third-Party Litigation Funding* (June 30, 2023).

unnecessary satellite litigation) was unnecessary and inappropriate, and that attorney work product contained in funding-related analyses should remain protected.

The Delaware report also underscored that any rule should be tailored to the institutional needs of the courts, not to partisan calls for broader regulation. It suggested that if courts wished to screen for conflicts, they might require disclosure of a funder’s name to the judge—but not wholesale disclosure of agreements to opposing parties. And it cautioned against conflating Delaware’s narrow recommendation with efforts to regulate other forms of third-party finance, from contingent fees to insurance, which are already well entrenched and accepted.

The experience in Texas points in the same direction. At its August 29, 2025 meeting, the Texas Supreme Court Advisory Committee considered whether to recommend a third-party litigation funding disclosure rule. “After extensive debate, the Committee voted 14–5 against advancing any such rule. The discussion is pertinent because the Committee’s members—including sitting justices, experienced commercial and plaintiff-side practitioners, and legal academics—identified many of the same concerns raised in this letter. Multiple members questioned whether the proposed rule was procedural at all or instead a policy question beyond the Court’s rulemaking authority. As one committee member observed, proponents of such rules “have not been able to win the day at the Legislature, so they’re bringing it straight to the Court.” Another member urged the Committee to “stay as far away from this as possible,” explaining that litigation funding represents “one small sliver that has actually figured out how to address” the access-to-justice crisis. Yet another observed: “I don’t see how this has any value other than the discussions we’ve had about control of capital in our society, which is way beyond the scope of the Rules of Civil Procedure,” adding, “boy, this doesn’t look like a rule of procedure to me.” Finally, in a comment that captures the essence of disclosure dynamics, a member warned that defendants “want to exploit” funding dynamics— “[i]t’s not out of the kindness of the heart that Exxon, CenterPoint, and Koch Industries . . . want to understand this.”¹⁶ A copy of the Texas transcript is included as Exhibit B to this submission.

Practitioners with direct experience in the industry have reached the same conclusion. In October 2025, eleven leading litigation finance attorneys and advisors—who collectively have structured, underwritten, and negotiated hundreds of transactions with every major commercial litigation funder active in the United States—submitted a letter to the Federal Advisory Committee on Civil Rules explaining that commercial litigation funding is passive by design. They identified three interlocking reasons: (1) contractual terms that expressly disclaim funder control and preserve the funded party’s unilateral right to settle; (2) ethical rules that prohibit interference with the attorney-client relationship; and (3) the practical reality that protective orders in complex litigation prevent funders from accessing the confidential case

¹⁶ Meeting of the Tex. Supreme Court Advisory Comm., Transcript of Proceedings (Aug. 29, 2025).

materials they would need to direct litigation strategy in the first place. Their conclusion was that broad disclosure rules would serve no legitimate procedural purpose and would instead function as instruments for costly and intrusive discovery sideshows.¹⁷ A copy of the practitioners' letter is included as Exhibit C to this submission.

IV. The Proposed Rule Will Give Opposing Parties a Strategic Advantage in Litigation

It is unclear who requested this rulemaking. What is clear is that mandatory disclosure of funding terms has been a longstanding priority of certain defense-side interests, most notably the U.S. Chamber of Commerce's Institute for Legal Reform. The reasons for their advocacy are obvious.

First, disclosure of litigation funding agreements reveals who has funding, and who does not. Once a defendant knows that a small plaintiff has funding, they will leverage the budget and return metrics to game settlement or exhaust resources. And if a defendant knows that a plaintiff lacks the resources for a protracted fight, they know who they can grind down with dilatory litigation tactics. The Proposed Rule gives every defendant extraordinarily valuable knowledge about which plaintiffs do not have litigation support, without any corresponding disclosure in favor of the plaintiff.¹⁸

Second, disclosure of the litigation budget reveals how much funding a funded party has. This information that gives the defendant a detailed map of the plaintiff's endurance. Once a defendant knows how much money a small plaintiff has to fight the case, it knows how much aggressive motion practice and discovery is required to exhaust the plaintiff's resources.

Third, disclosure of the litigation funding agreement improperly grants defendants access to the plaintiff's work product and attorney-client communications.¹⁹ Litigation funding agreements routinely provide for staged funding through various case milestones. A funding agreement may, for instance, provide for a cap on funding until the parties clear a motion to dismiss, or may reference specific defenses that the defendant may raise. The work product doctrine and attorney-client privilege exist precisely so that one party need not turn over its case file and confidential strategy conclusions to the other side. The Proposed Rule abrogates those essential safeguards without any substantial need.

¹⁷ Letter from Litigation Finance Attorneys and Advisors to Advisory Comm. on Civil Rules, Judicial Conference of the U.S. (Oct. 15, 2025) (Rules Suggestion 25-CV-R).

¹⁸ Keith Sharfman, *The Economic Case Against Forced Disclosure of Third Party Litigation Funding*, N.Y. ST. B.J., Mar./Apr. 2022, at 36.

¹⁹ See, e.g., *Design with Friends, Inc. v. Target Corp.*, 2024 WL 4333114, at *3 (Sept. 27, 2024) (Bibas, J., sitting by designation).

V. The Insurance Analogy is Inapposite

The Publication Report also suggests that the Proposed Rule may be appropriate to create parity with the disclosure of liability insurance. The Report states that the Committee reasoned that Rule 4003.2 “authorizes the discovery of insurance agreements,” and the Committee believes “the rule would provide uniform consistent treatment for discovery of these agreements.” Respectfully, this argument overlooks several key considerations.

One essential difference between insurance and third-party litigation funding is that liability insurance companies *may control litigation*. Indeed, the Pennsylvania Supreme Court has expressly recognized the right of third-party insurance companies to control litigation, which is a feature of the insurance market that helps lower the cost of insurance to insureds. *See, e.g., Babcock & Wilcox Co. v. American Nuclear Insurers*, 635 Pa. 1, 20 (2015).

Critically, liability insurers’ right to control litigation is accompanied by a corresponding *duty of good faith* owed to the insured. This is a duty that may give rise to tort liability, not merely contractual remedies. It constrains how insurers exercise their control rights, including over settlement. Third-party litigation funders owe no comparable duty; their relationship with the funded party is purely contractual, and in standard commercial funding transactions, funders expressly disclaim control over litigation or settlement. The insurer’s control-plus-duty framework is precisely what justified the disclosure rule: courts and parties need to know who may exercise that legally sanctioned control. Absent the control right and the corresponding fiduciary-like duty, the rationale for disclosure falls away.

The disclosure of insurance agreements is thus appropriate precisely *because* courts view third-party control as an acceptable and generally good thing. Large corporations and insurance companies that benefit from this defense-side third party control are engaged in a protracted policy battle to codify entirely different rules for litigation funders, whereby funders *cannot* control. Thus, while the purpose of insurance disclosure rules is to identify insurers who everyone agrees can control litigation, the purpose of litigation funding disclosure rules is to restrict what is viewed as improper control by litigation funders. The Pennsylvania Supreme Court should not enact this double standard, at least not without further inquiry.

There are numerous other differences between insurance and third-party funding. For example, insurance disclosure identifies the pool of funds available to *satisfy a judgment* against the insured defendant, directly facilitating settlement. Litigation funding serves no analogous function. A funder’s return comes from the *plaintiff’s* recovery, not from a duty to indemnify anyone. Disclosure of funding terms tells the defendant nothing relevant to the claims or defenses; it reveals the plaintiff’s *financing arrangements*, which is strategically valuable intelligence masquerading as procedural transparency.²⁰

²⁰ Pa. R. Civ. P. 4003.2(a).

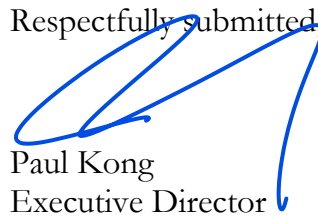
The more apt analogy to non-recourse third-party funding is not insurance. Rather, it is to all the different ways in which companies large and small finance their litigation. True symmetry would allow plaintiffs to rifle through the case files and financial papers of their adversaries to study their debt covenants, analyze their stockholder agreements, review litigation budgets and settlement reserves, and examine the defendant’s views of important litigation milestones and inflection points—to name just a few items.

VI. The Committee Should Reject the Proposed Rule or, at Minimum, Engage All Stakeholders Before Proceeding

If this letter resolves the Committee’s concerns, then ILFA respectfully submits that the Committee should reject the Proposed Rule and not enact any litigation-funder-specific regulations at this time. But if the Committee remains interested in the subject, then ILFA suggests that, before proposing any rule, the Committee engage in further dialogue with all stakeholders—not just those who proposed the rule, but also claimholders on both sides of the “v,” lawyers who represent plaintiffs and defendants, litigation funders who help address the nation’s access-to-justice crisis, and the counsel that draft and live funding agreements on a daily basis. This is the deliberate approach that the Federal Rules Committee, the Delaware Supreme Court, and many other judicial bodies have undertaken over the years.

ILFA stands ready to participate in that process and to provide any additional information the Committee may find useful.

Respectfully submitted,



Paul Kong
Executive Director
International Legal Finance Association

Exhibit A

Report to the Chief Justice and Presiding Judges of the State of Delaware
from the Committee to Study Transparency in Third-Party Litigation Funding

June 20, 2023

SUPERIOR COURT
OF THE
STATE OF DELAWARE

ERIC M. DAVIS
JUDGE

LEONARD L. WILLIAMS JUSTICE CENTER
500 NORTH KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801-3733
TELEPHONE (302) 255-0960

June 30, 2023

Chief Justice Collin J. Seitz, Jr.
Supreme Court of the State of Delaware
The Renaissance Center
405 N. King Street, Suite 505
Wilmington, Delaware 19801

Re: Third Party Litigation Funding Committee—Report and Recommendations

Dear Chief Justice:

On November 18, 2022, Your Honor entered the Order Establishing A Committee To Study Transparency In Third Party Litigation Funding (the "Order"). The Order set June 30 2023 as the date by which the Committee would submit its report and recommendations (the "Report") to Your Honor and the Presiding Judges. As the Co-Chairs of the Committee, Vice Chancellor Laster and I submit the Report.

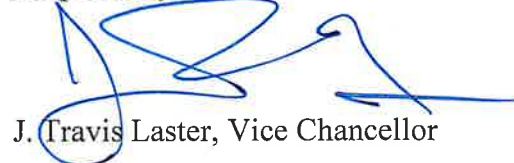
If there are any questions as to the Report, we are available at Your Honor's convenience. We would be pleased to meet with Your Honor or any of the Presiding Judges to discuss the Report.

Respectfully,



Eric M. Davis, Judge

Respectfully,



J. Travis Laster, Vice Chancellor

EMD/li

cc: Presiding Judges (w/encl.)
Committee Members (w/o encl.)

**REPORT TO THE CHIEF JUSTICE AND THE PRESIDING JUDGES OF
THE STATE OF DELAWARE FROM THE COMMITTEE TO STUDY
TRANSPARENCY IN THIRD-PARTY LITIGATION FUNDING**

I. Executive Summary

The Supreme Court of Delaware established a committee to study transparency in third-party litigation funding in the Delaware state courts (the “Committee”).

The Committee has completed its work and presents the Delaware Supreme Court and the Presiding Judges with its recommendations for addressing transparency issues in third party litigation funding in the Delaware state courts.

On the subject of transparency, the Committee finds as follows:

- There do not appear to be any issues with the current use of third-party litigation funding in the Delaware state courts.
- There could be value in considering a court rule that would authorize limited discovery into third-party litigation funding and limit broader discovery on that subject. A rule could provide helpful guidance to litigants and judges in this area. For purposes of discoverability, the Committee would recommend a rule, comparable to Superior Court Rule 26(b)(2) on insurance agreements, but which would only authorize discovery regarding whether there is any arrangement that gives a third party control over the litigation. The Committee would recommend that the rule not permit broader discovery into third party litigation funding absent some additional showing of need. The Committee would recommend that the rule make clear that some third-party litigation funding material, such as case analysis, is work product.
- The task of considering a court rule could be for the Committee or a future committee. There may be value in having each court prepare its own rule, because different courts may have different needs.

Because the Committee was only charged with examining issues relating to transparency, the Committee has not made recommendations regarding the substantive regulation of litigation funding.

II. The Committee

On June 28, 2022, the Delaware State Senate adopted a resolution titled, “ENCOURAGING THE DELAWARE JUDICIARY TO STUDY TRANSPARENCY IN THIRD-PARTY LITIGATION FUNDING.”

On November 18, 2022, Chief Justice Collins J. Seitz, Jr. signed an administrative order on behalf of the Delaware Supreme Court that formed a “Committee to Study Transparency in Third Party Litigation Funding.” The Committee was asked to consider transparency issues in litigation funding in the Delaware courts and make recommendations to the Chief Justice and the Presiding Judges regarding adoption of statutes or court rules to require public disclosure of third-party litigation funding.

The Committee is composed of the following members:

The Honorable J. Travis Laster, Co-Chair
The Honorable Eric M. Davis, Co-Chair
The Honorable N. Christopher Griffiths
The Honorable Craig A. Karsnitz
The Honorable Reneta Green-Streett
Christine Azar, Esquire
Megan Ward Cascio, Esquire
Anne C. Foster, Esquire
Kurt M. Heyman, Esquire
Kelley M. Huff, Esquire
Carla M. Jones, Esquire
Blake Rohrbacher, Esquire
David Soldo, Esquire

The Committee met via Zoom on January 11, 2023, February 14, 2023, March 27, 2023, and June 21, 2023. Two subcommittees were formed: a subcommittee to conduct a survey of attorneys and others in Delaware to determine the nature and extent of the use of third-party funding in Delaware courts and a subcommittee to survey how other jurisdictions have approached third-party funding.

A survey was sent out to select sections of the Delaware State Bar Association on March 13, 2023. The survey was also sent to the Delaware chapter of the Federal Bar Association. The results of the survey and information gathered from other jurisdictions are compiled and analyzed in this Report along with the Committee’s recommendations.

The co-Chairs of the Committee met with Chief Judge Colm Connolly to understand his concerns about litigation funding in the District of Delaware. The co-Chairs met with State Senator Kyle Gay to understand any concerns that the General Assembly might have about litigation funding. The co-Chairs met with Stuart Grant, a co-founder of Bench Walk Advisors, a leading provider of third-party litigation funding.

III. Overview of Litigation Funding

Third-party litigation funding is an arrangement where a third-party funder provides funding to a litigant or law firm in exchange for an interest in the potential recovery. *See generally*, Am. Bar. Ass'n, ABA Best Practices for Third-Party Litigation Funding (Aug. 2020) (the "ABA Report").

a. Types of Third-Party Litigation Funding

Third-party litigation funding is a broad term that can refer to a range of different things. When someone refers to third-party litigation funding, they often have a particular scenario in mind, rather than the general concept.

Third-party litigation funding is just one of many ways that parties obtain the funds to conduct litigation. An individual or business may draw on a line of credit and use the proceeds to pay for a lawsuit. Technically, that is a form of litigation funding, although one in which the lender can seek repayment from the borrower and its assets generally, rather than only from the proceeds of litigation. Insurance for defense costs is another form of litigation funding, albeit one in which the insured pays for the funding up front through a premium that covers both the litigation funding and other policy benefits. A full or partial contingency fee arrangement is yet another form of litigation funding. In a contingency fee arrangement, the law firm accepting the contingent fee arrangement acts as both counsel and lender by advancing the expenses necessary to pursue the case and not charging a fee unless there is a recovery. A contingency fee arrangement most closely resembles third-party litigation funding as discussed in this report, because the law firm can only recover from the proceeds of the case. For purposes of this report, third-party litigation funding refers to a lender advancing money to a party on a non-recourse basis, secured by an interest in a claim that the party holds.

There are two common models for litigation funding:

- **The Traditional Model:** The funder pays all litigation expenses and some or all of the attorneys' fees in exchange for a share of the

recovery. No funds go directly to the borrower. Under this model, outside counsel often operates under a discounted-fee arrangement and receives a share of the recovery.

- The Monetization Model: The funder makes one or more lump-sum payments to the borrower in exchange for a share of the recovery.

Under either model, the return to the funder can be calculated as a percentage of the recovery or based on a return of the principal advanced plus a rate of interest.

Consumers, businesses, and law firms use litigation funding. The different models raise different issues.

In consumer funding, a funder loans money to an individual plaintiff, often for a personal injury claim. The consumer is often represented on a contingent basis. If the funder uses the Traditional Model, then the funds are typically used to pay for litigation expenses, such as an expert. If the funder uses the Monetization Model, then the claimant receives the funds as a way of accelerating the receipt of proceeds. The borrower often uses the funds to pay for medical or living expenses while the case is ongoing. Consumer litigation funding can involve disparities in sophistication and bargaining power, and it raises issues typically associated with consumer lending, and particularly with high-interest consumer loan products.

In commercial funding, a funder loans money to a business, often for breach of contract, antitrust, or patent claims. Businesses that have retained counsel on a traditional hourly basis may use the Monetization Model to pay legal fees or to cover litigation expenses, such as expert fees. Businesses also may use the Traditional Model to create a constructive contingent fee relationship in which the funder pays counsel in return for a contingent share of the recovery. From the law firm's side, the arrangement looks like an hourly fee arrangement. From the business's standpoint, the arrangement looks like a contingency fee arrangement. Another use of the Monetization Model is as a form of insurance against an adverse result, such as reversal on appeal. A business that has prevailed in the trial court may borrow a sum of money secured only by the judgment, such that if the judgment is reversed, there is no collateral on which the funder can recover. A business may secure funding based on an individual case or on a portfolio basis. Commercial funding typically involves sophisticated parties bargaining at arm's length.

In law firm funding, a law firm that pursues cases on contingency may secure funding secured by its share of a recovery. Under the Traditional Model, a firm may secure funding to reduce its risk. Under the Monetization Model, a firm may use

funding to cover other firm expenses, such as fixed costs. A law firm may secure funding based on an individual case or a portfolio of cases.

b. Concerns about Third-Party Litigation Funding

From the standpoint of a court and other litigants in a case, litigation funding creates two types of concerns.

One concern is that litigation funding may result in the filing of additional cases that otherwise would not be brought. If the additional claims lack merit, then litigation funding creates a drag on the system. If, however, the funding is enabling individuals or businesses to pursue legitimate claims, then the funding is providing access to justice for those who otherwise could not obtain it. Because funders underwrite cases with the intent of obtaining a return, it is unlikely that litigation funding would result in meritless cases on average. It is nevertheless possible that in some areas of the law, litigation funding could be used to generate strike suits. One area where that concern may have some basis is for patent lawsuits. It does not appear to present a risk for the Delaware state courts.

A second concern is that litigation funding may result in a third party having control over decisions involving the litigation, including settlement, such that the litigation is not being controlled by the party before the court. The same issue exists for insurance coverage and is a valid theoretical concern. In practice, litigation funders do not obtain rights concerning control over a lawsuit or over settlement. This issue does not appear to be of present concern in the Delaware courts, but it is an area addressed by the Committee's recommendation.

c. Best Practices for Litigation Funding

Litigation funding raises a variety of substantive issues. The Committee was tasked with addressing litigation funding from the standpoint of transparency in the Delaware state courts, placing the substantive aspects of regulating litigation funding outside of the Committee's remit.

The ABA Report addresses a series of substantive issues and provides best practices. The ABA Report specifies that its recommended best practices are not meant to represent standards of professional conduct.

One area that the ABA Report addresses is the terms of a litigation funding arrangement. Key recommendations include:

- Any litigation funding arrangement should be spelled out in writing and written in clear, understandable terms.
- The arrangement must specify who is responsible for repaying the funder, from what source, and when.
- The arrangement should clearly address the termination or withdrawal of funding.
- The claimant must retain control over the litigation.
- The funder cannot direct the claimant's counsel or override the lawyer's professional judgment.

The ABA Report also raises issues that may arise in discovery and contains recommendations to head off privilege disputes. They include the following:

- The borrower's lawyers should exercise caution in making case-related reports or predictions to litigation funders.
- The borrower's lawyers should only supply the funder with public documents.
- The borrower should obtain written acknowledgements from funders that no privileged materials have been supplied.
- The borrower should not offer any opinion about the underlying litigation.
- The funder should use its own counsel to assess the underlying litigation.

IV. How Other Jurisdictions Have Treated Litigation Funding

Many states have begun regulating litigation funding agreements. Four approaches have emerged: (1) banning all forms of litigation funding, (2) regulating

the agreements by statute,¹ (3) permitting but regulating the funding agreements via common law and ethics opinions,² and (4) remaining silent on the issue.³

a. Banning Litigation Funding

Only two states—Kentucky and Montana—have banned litigation funding agreements, both by statute. *See* Ky. Rev. Stat. § 372.060; Mont. Code. Ann. § 37-61-408 (2021). The Kentucky statute addresses the funding while the Montana statute forbids attorneys from participating in such arrangements. The Alabama courts have declared litigation funding agreements void as contrary to public policy or under usury statutes. *See e.g., Wilson v. Harris*, 688 So. 2d 265 (Ala. Civ. App. 1996) (holding that funding agreements were invalid on public policy grounds because they amounted to illegal gambling contracts). Notably, the Alabama legislature has remained silent; thus, agreements are not *per se* prohibited but may be unenforceable. In contrast, Georgia has a statute that seemingly prevents litigation funding, but its courts have not enforced the statute since 1933. *See, e.g., Ga. Code Ann. § 13-8-2* (West); *Sapp v. Davids*, 168 S.E. 62 (Ga. 1933).

b. Regulating Agreements By Statute

A growing number of states have passed statutes aimed at regulating, but not preventing, litigation funding agreements. These statutes are generally aimed at disclosure and/or consumer safety. Wisconsin, for example, requires litigation funding agreements be disclosed to the courts even if no discovery has been made. *See* Wisconsin Act § 235. Almost every statute passed is aimed at protecting

¹ The following states regulate litigation funding agreements expressly by statute: Arkansas, Illinois, Indiana, Louisiana, Maine, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

² A minority of states regulate litigation funding agreements via their ethics rules. Alaska, Arkansas, California, Florida, New Jersey, Texas, and Washington are all examples. Judges across the country have, likewise, permitted and in some instances endorsed the use of litigation funding agreements. Arizona and Hawaii, for example, both permit the use of such agreements. *See Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020); *TMJ Hawaii, Inc. v. Nippon Tr. Bank*, 153 P.3d 444, 450 (Haw. 2007). A majority of those jurisdictions have permitted but regulated litigation funding. California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Rhode Island, South Carolina, and Texas courts have all commented on litigation funding agreements, permitting them in some form.

³ Kansas, North Dakota, South Dakota, Virginia, and Wyoming have not provided any guidance regarding litigation funding agreements.

consumers and serving public policy interests. New regulation in Indiana requires a claimant to provide written notice that the claimant entered into a funding agreement. *See* Ind. Code § 24-12-4-2 (2023); Ind. H.B. 1124. Arkansas adopted a rate for consumer lending transactions. *See* AR Code § 4-57-109. Maine, Nebraska, Nevada, Oklahoma, Tennessee, Vermont, and West Virginia all require certain disclosure statements be present in the agreements. *See* Me. Rev. Stat. Ann. tit. 9-A, § 12-101; Neb. Rev. Stat. §§ 25-3301-25-3309 (2010), Nev. Rev. Stat. ch. 604C (2021); Ohio Rev. Code §. 1349.55(B); Okla. Stat. Ann. tit. 14A §§ 3-801-817; Okla. Admin. Code §§ 160:75-1-1-160:75-9-1; Okla. Admin. Code § 160:75 App. A; Tenn. Code Ann. § 47-16-101; Vermont Code Ann. §§ 08-74-2251-2260; West Virginia Code Ann. § 46A-6N-3. New York regulates the agreements via champerty statutes, N.Y. JUD § 489, but the statute is construed narrowly and does not apply when the primary purpose was not to acquire assets but instead to bring a claim. *Id.*

Missouri and Texas currently have legislation pending that would regulate litigation funding agreements. *See* H.B. 2771 (Missouri); H.B. 2096 (Texas) and S.B. 1567 (Texas).

c. Court Regulation of Litigation Funding Agreements

Some states have regulated the enforceability of litigation funding agreements via judge-made common law and/or ethics opinions. For example, a Colorado court held that litigation funding agreements created debt to be governed by the Uniform Consumer Credit Code. *See, e.g., Oasis Legal Fin. Grp., LLC*, 2015 Colo. 63, 361 P.3d 400 (Colo. 2015). Maryland and Michigan took a similar approach. *See In re Plaintiff Funding Holding, Inc.*, 2015 WL 5637481 (MD. Comm. Fin. Reg. Aug. 18, 2015) (finding that “Respondents’ business activities constitute usurious and unlicensed lending to Maryland consumers in violation of Maryland law, and that it is in the public interest that Respondents immediately Cease and Desist from making litigation funding advances or other types of loans to, or otherwise engaging in lending activities with, Maryland consumers”); *see also Lawsuit Fin., L.L.C. v. Curry*, 683 N.W.2d 233, 239-40 (Mich. Ct. App. 2004) (voiding a litigation financing agreement on a finding that plaintiff held an absolute right to repayment on the “advances” and thus constituted a usurious loan for exceeding the legal interest rate).

Other jurisdictions have looked at funding agreements through the scope of public policy and fairness. *See Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 278 (S.C. 2000) (The court may examine “(1) whether the respective bargaining position of the parties at the time the agreement was made was relatively equal; (2) whether both parties were aware of the terms and consequences of the agreement;

(3) whether the borrowing party may have been unable to pursue the lawsuit at all without the financier's help; (4) whether the financier would retain a disproportionate share of the recovery; and (5) whether the financier engaged in officious intermeddling.”); *see also Anglo-Dutch Petroleum Int’l, Inc v. Smith*, 243 S.W.3d 776, 782 (Tex. App. 2007) (finding that litigation funding agreements were permissible as long as “they did not vest control over the litigation in uninterested third parties.”).

Opponents of litigation funding regularly assert that it violates the ancient doctrines of champerty and maintenance. Like Delaware, many jurisdictions have rejected that argument. *See Charge Injection Techs., Inc. v. E.I. duPont de Nemours & Co.*, 2016 WL 937400 at *3-6 (Del. Super. Mar. 9, 2016); *Schomp v. Schenck*, 40 N.J.L. 195, 206 (N.J. 1878) (rejecting common law prohibitions on champerty and maintenance); *Maslowski v. Prospect Funding P’rs LLC*, 944 N.W.2d 235, 241 (Minn. 2020) (abolishing champerty doctrine and holding that litigation funding agreements are enforceable); *TMJ Hawaii*, 153 P.3d 444, 450 (“[T]he common law doctrines of champerty and maintenance are not impediments to the assignability of the claims” for professional malpractice, breach of fiduciary duty, and fraud.”); *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997) (enforcing third-party litigation funding agreement and nullifying the doctrines of champerty and maintenance; further holding that it would evaluate such agreements by determining whether the agreement was fair and reasonable when made); *Landi v. Arkules*, 835 P.2d 458, 464 (Ct. App. 1992); *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 141 n.26 (Cal. 1987) (“California, however, has never adopted the common law doctrines of champerty and maintenance.”) (citations omitted)); *Weller v. Jersey City H&P St. Ry. Co.*, 57 A. 730, 732 (N.J. Ch. 1904) (explaining that the law of champerty and maintenance has never prevailed in New Jersey).

An increasing number of states’ ethics opinions have addressed issues associated with litigation funding. An advisory ethics opinion from State of Washington Bar explicitly stated that, “[a] lawyer cannot disclose client secrets or confidence to a third party. . . providing funding.” Wash. Committee on Professional Ethics Op. 208 (2005). Florida has also issued an ethics opinion regulating attorney conduct regarding litigation funding. *See Florida Bar Ethics Op. 00-3* (2002) (allowing an attorney to provide a client with information and resources regarding litigation funding but noting that such an agreement must comply with applicable statutes).

Some courts have addressed the issue through standing orders. For example, the Northern District of California issued a standing order for all judges that requires party disclosure to the Court of any entity or individual with a financial interest in

the litigation. *See* N.D. Cal. Standing Order for All Judges (2023). Chief Judge Connolly’s standing order is another example.

d. States That have Not Yet Spoken on the Issues

A few states have not yet addressed litigation funding. *See Supra*, n.3.

V. The Use of Litigation Funding in the Delaware Courts

The Committee was charged with evaluating measures to address transparency in litigation funding in Delaware state courts. At present, the most prominent use of litigation funding in Delaware appears to be taking place in the United States District Court for the District of Delaware, where Chief Judge Connolly has placed a spotlight on the issue. The Committee also conducted a survey to understand the prevalence of litigation funding in the Delaware state courts.

a. Chief Judge Connolly’s Standing Order and Subsequent Developments

On April 18, 2022, Chief Judge Colm F. Connolly of the United States District Court for the District of Delaware issued an order entitled “Standing Order Regarding Third-Party Litigation Funding Arrangements” (the “Standing Order”). The Standing Order applies to “all cases assigned to Chief Judge Connolly.” The Standing Order garnered local and national attention.

The Standing Order applies where “a party has made arrangements to receive from a person or entity that is not a party (a ‘Third-Party Funder’) funding for some or all of the party’s attorney fees and/or expenses to litigate this action on a non-recourse basis in exchange for (1) a financial interest that is contingent upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal loan, bank loan, or insurance[.]”

The Standing Order requires the party receiving such funding to disclose:

- the identity and address of the funder;
- the place of formation for any funder that is a legal entity;
- the nature of the financial interest of the funder in the litigation; and
- whether approval by the funder is necessary for litigation or settlement decisions and, if the answer is yes, disclosure of the nature of the terms and conditions relating to that approval.

The Standing Order also provides that parties may seek additional discovery of the terms of any funding arrangement “upon a showing that the Third-Party Funder has authority to make material litigation decisions or settlement decisions, the interests of any funded parties or the class (if applicable) are not being promoted or protected by the arrangement, conflicts of interest exist as a result of the arrangement, or other such good cause exists.”

After issuing the Standing Order, Chief Judge Connolly observed that several cases before him appeared to be related notwithstanding having been brought by facially different plaintiffs and *sua sponte* ordered a hearing, on November 4, 2022, in *Nimitz Tech. LLC v. CNET Media, Inc.* Civ. No. 21-1247-CFC (D. Del.). Chief Judge Connolly concluded that the plaintiffs were shell companies and had little involvement in the conduct of the litigation and ordered plaintiffs to disclose information related to third-party interests, including engagement letters, assets and bank account information, and correspondence between plaintiffs’ attorneys and the third-party funder.⁴ Plaintiffs filed a petition for a writ of mandamus with the Federal Circuit asking for reversal of Chief Judge Connolly’s order. Chief Judge Connolly filed a memorandum in the appeals court defending his authority to issue the order. The Federal Circuit denied plaintiffs’ writ of mandamus.

The co-Chairs met with Chief Judge Connolly to understand his concerns. As his rulings imply, Chief Judge Connolly is concerned that litigation funders are forming entities and using them to bring strike suits based on patent claims. The Standing Order is designed to generate information on this subject so that Chief Judge Connolly can determine whether action needs to be taken.

The Committee considered Chief Judge Connolly’s rulings and concluded that the issues Chief Judge Connolly is exploring are disproportionately associated with patent cases. The Committee does not believe that they affect practice before the Delaware state courts.

b. The Survey About Litigation Funding in the Delaware State Courts

The Committee members sought to determine whether (1) there is an issue in Delaware regarding transparency in litigation funding, and (2) the issue is one that needs to be addressed. While the Committee is composed of judges and lawyers from a variety of courts and substantive expertise, the Committee wanted to solicit and obtain a broader range of feedback on the issue. As a result, the decision was made to seek input from members of the Delaware bar.

⁴ *Nimitz Tech. LLC v. CNET Media, Inc.*, 2022 WL 17338396 (D. Del. Nov. 30, 2022).

A subcommittee was formed to develop a questionnaire to be sent out to members of the bar most likely to have had relevant experience. In drafting the questionnaire, the subcommittee balanced the goal of trying to receive relevant information against the likelihood that sending a relatively short questionnaire would increase the response rate.

Ultimately, the subcommittee drafted a 12-question survey. For the purposes of the survey, the term “litigation funder” was defined as “a third-party litigation financing firm that agrees to provide funding to a litigant or law firm in exchange for an interest in the potential recovery in a lawsuit. Litigants and law firms do not have to repay the funding if the lawsuit is not successful.” The definition is similar to that used in Chief Judge Connolly’s Standing Order. The same definition is used in this report.

An explanatory cover note and the survey link were sent to the following Delaware State Bar Association sections: (1) the Litigation Section; (2) the Corporation Law Section; (3) the Small Firms and Solo Practitioners Section and (4) the Intellectual Property Section. The same communication was also sent to the Delaware chapter of the Federal Bar Association.

As of the date of this report, 184 responses to the survey have been received. Three quarters of the responses received were from law firm partners or counsel. Another 17% were submitted by law firm associates, while 4% were from solo practitioners and 3% came from in-house counsel. The remaining responses came from government and public service attorneys, retired lawyers and judges and an outside consultant. In terms of law firm size, 39% of the responses were from firms with 1-25 lawyers, 20% came from firms of 101-250 lawyers, 18% came from firms of 51-100 lawyers, 16% were from firms of more than 250 lawyers⁵ and 7% came from firms of 26-50 lawyers.

Of the 184 responses received by the Committee, 80 indicated that they had been involved in a matter in which a party had received funding provided by a litigation funder. In those situations, approximately half of the parties in question had been entities, with another third involving individuals who had received litigation funding, while the remaining situations involved clients who were a combination of individuals and entities. In all but a handful of the matters, the party obtaining litigation funding was a plaintiff/petitioner, a counterclaimant, or a third-

⁵ The Committee notes that those respondents must have been lawyers at a firm with offices located in multiple jurisdictions, since no law firm with an office in Delaware has more than 250 lawyers in its Delaware office.

party plaintiff. In eight matters, the funding was obtained by either a defendant or a law firm itself. In two instances, the survey respondent was retained by either the litigation funder itself or by someone who had invested in a litigation funder.

The survey responses indicated that the use of litigation funding in matters is relatively evenly distributed across the Delaware courts. A plurality of responses cited the United States District Court for the District of Delaware (35 matters), but there were similar levels of use in the Superior Court of the State of Delaware (25 matters), and the Court of Chancery of the State of Delaware (24 matters). There were few reports of litigation funding in the Supreme Court of the State of Delaware (4 matters). The remaining 13 matters took place in a combination of other federal and state courts and international courts and arbitrations.

The subject matter of the proceedings varied. A plurality (21 situations) involved business or corporate litigation. The next two significant categories were personal injury litigation (12 matters) and patent litigation (10 matters). The remainder involved consumer class actions, mass torts or employment discrimination.

Out of the 184 responders, 35 had firsthand experience working with a litigation funder. About half of those had done so once or twice, with most of the remainder having done so between three and six times. A handful of those responding had worked with litigation funders more than six times.

In 16 instances, the fact of the litigation funding became known to the lawyer's litigation adversaries. In most of those situations, the fact of the funding was disclosed or revealed during discovery or trial. Twice, disclosure was ordered by a judicial officer, while in one instance, the fact was disclosed as part of a motion for approval in a bankruptcy court proceeding. One respondent noted that "funding might have to be disclosed in order to settle the claim as the interest on the funding is very high."

Although the Committee recognized that most survey respondents would be unwilling or unable to provide names of litigation funders, the following question was included in the survey:

"Q: If you have ever been involved in a matter or matters (a) in which any party received funding provided by a litigation funder, (b) the fact and identity of the litigation funder became known in the litigation and (c) the information is not subject to a confidentiality designation in the litigation, please insert the name or names of the litigation funders."

A variety of names were provided in 13 responses.⁶ None appeared more than twice.

c. Specific Feedback

In a reminder message about the Committee's survey, members of the DSBA sections previously contacted were told that if any of them wanted to be in touch with any of the members of the Committee to discuss their views on the topic of transparency in litigation funding, they should do so.

To date, Committee members have received direct feedback from two members of the Delaware bar.

One member of the bar expressed concern about whether the survey would generate reliable results from the solicited groups. That member felt that firms that "accept third party funding but do not favor transparency are less likely to respond, skewing the results."

Another member of the bar expressed the view that litigation funding is beneficial in many circumstances, particularly (a) for plaintiffs who cannot bear the costs of litigation themselves, and (b) for sophisticated companies in their capacities both as plaintiffs and defendants. That member of the bar would support a rule requiring disclosure of the existence of litigation funding and whether a funder has the right to control settlement, but did not believe any other disclosure or regulation is warranted.

d. Overall Assessment of the Survey Results

The information learned by the Committee through its survey and request for information from practitioners did not suggest a pressing need for additional guidance in the Delaware state court rules or procedures on the subject of disclosures of third-party funding arrangements. It appears as if the existing procedures and frameworks have provided a path to disclosure.

VI. The Alternatives Available in Delaware

To assist the Delaware Supreme Court and the Presiding Judges, the Committee sought to identify a range of alternatives that could be considered for addressing litigation funding in Delaware.

⁶ See Appendix A.

a. The Range of Alternatives

Possible alternatives range from substantive regulation to disclosure to leaving the developments in this area to the common law.

i. Substantive Regulation

At the most intrusive, options for substantive regulation might include limits on the returns received by funders (like to usury laws), restrictions on fee sharing with non-lawyers, licensing requirements for a finance provider to operate in the state, or restrictions on the role a funder can play in the litigation.

Consideration of any proposed regulation should first account for any relevant safeguards already in place such as lawyers' duties of professional responsibility (including the duties to maintain client confidentiality and independent judgment), rules of civil procedure addressing disclosure and discovery, and even common law contract defenses.

Any regulation should also consider existing incentives. For example, funders are naturally incentivized to avoid weak claims because funders can lose their entire investment if the suit is unsuccessful. Rulemaking that aims to police funders' selection of cases thus would be unnecessary and risk limiting the value funding provides to meritorious claimants.

Consideration should also be given to the difference between consumer funding and commercial funding. The latter involves sophisticated parties, often with counsel well versed in litigation funding, and thus without the need for heavy-handed policing.

ii. Disclosure Requirements

Most discussion of the regulation of litigation funding involves disclosure requirements. Disclosure is necessary, according to some, to prevent finance providers from "hiding" their influence over litigation and settlement. Others argue that disclosure is a red herring designed to give defendants insight into plaintiffs' cases.

What disclosure means in practice will vary depending on how far the disclosures go. The more detail required, the more insight the defense may have into the plaintiff's case. Access to information about funding could reveal the resources available to plaintiffs, giving defendants leverage in settlement when they know the money is running low.

Disclosure can be accomplished by requiring disclosure or by providing that the matter is an appropriate topic for discovery. An analogous rule appears in Rule 26 and permits the discovery of the existence and contents of an insurance agreement.

Options for disclosure or discovery include:

The Existence of a Funding Relationship. The least intrusive disclosure would be for the parties to reveal simply that a funding arrangement exists without disclosing any details. With that knowledge, the court and the parties can be alert during the litigation for any indication that the funding arrangement is adversely affecting the case. Disclosing the existence of litigation funding should not be burdensome.

Control Over the Litigation. A second level of disclosure would require a party to disclose whether the litigation funder has any control over the litigation. Disclosure on this topic would address the chief concern about litigation funding. The Committee understands that most litigation funders do not have any right to control litigation, so typically the response would be reassuring. If a funder did have a control right or if there was ambiguity about the issue, a redacted form of the funding agreement could be produced, or the agreement could be reviewed in camera by the court.

The Name of the Litigation Funder. A third level of disclosure would require that a party reveal the name of the finance provider. This would enable the court to determine if it has any conflict of interest such as investments in the fund at issue. It also allows the court to determine if the particular funder has had prior issues with inappropriate interference in the litigation. Disclosing the name of a funder should not be burdensome.

The Funding Agreement. An intrusive level of disclosure would require production of the funding agreement. Such a requirement could reveal information that would give an unfair advantage to the opposing party. For example, the financial return structure set out in the agreement could indicate how risky (or not) the funder believes the case to be. Opposing parties could make tactical decisions based on that information. It could also reveal how long the funder expects the case to go before resolution.

Case Analysis. The most intrusive level of disclosure would require production of case analysis. Courts have almost universally held that this material is shielded by the work product doctrine. Requiring disclosure of this material would

be highly disruptive and may lead to significant curtailing of funding available for meritorious claims.

iii. Do Nothing

A final option is to do nothing. That would not mean that litigation funding arrangements would not be subject to regulation. Instead, it would mean that the rules would be developed by the common law.

b. The Available Means

There are several means available to implement regulation over litigation financing if that is viewed as desirable.

A readily available route is the adoption of court rules. A rule-based approach is also flexible and can be revised based on future developments. Because rules are not designed to establish substantive law, they are not an apt method for substantive regulation. They would be effective for promoting disclosure. Rules could be adopted by individual courts or by the courts as a whole.

Standing orders are an alternative to court rules. Standing orders are easier to implement than rules, but they can be less effective, because it is more difficult for litigants to learn about them and comply. Standing orders can be implemented by individual judges, as Chief Judge Connolly's Standing Order shows. If there is a desire to gather information before adopting court rules, then standing orders could be a viable approach.

A statute is likely necessary for substantive regulation. That path would require coordinating with the political branches.

c. Recommendation

- The Committee has not identified any issues with the current use of third-party litigation funding in the Delaware state courts.
- The Committee does not believe that substantive regulation of litigation financing is necessary.
- The Committee believes there could be value in considering a court rule that would authorize limited discovery into third-party litigation funding and limit broader discovery on that subject. A rule could provide helpful guidance to litigants and judges in this area. For

purposes of discoverability, the Committee would recommend a rule, comparable to Superior Court Rule 26(b)(2) on insurance agreements, but which would only authorize discovery regarding whether there is any arrangement that gives a third party control over the litigation. The Committee would recommend that the rule not permit broader discovery into third-party litigation funding absent some additional showing of need. The Committee would recommend that the rule make clear that some third-party litigation funding material, such as case analysis, is work product.

- The task of considering a court rule could be for the Committee or a future committee. There may be value in having each court prepare its own rule, because different courts may have different needs.

VII. Appendices

- a. Appendix A: The Bar Survey and Results
- b. Appendix B: Table of Other Jurisdictions

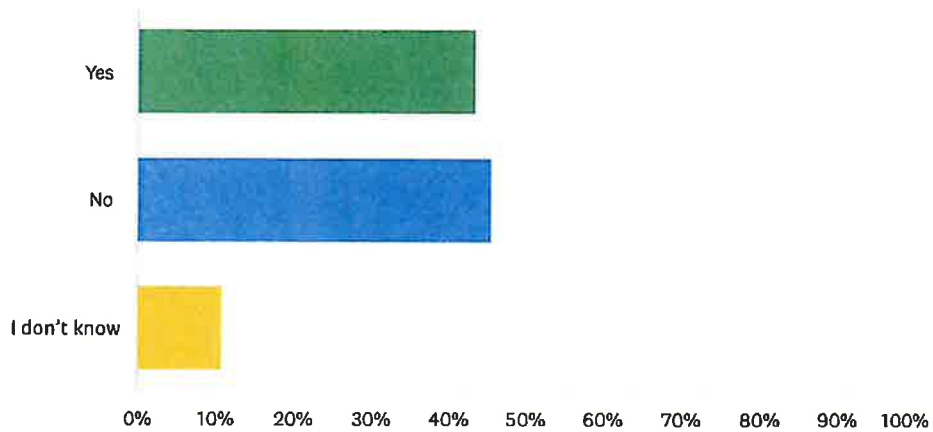
June 30, 2023

APPENDIX A

Litigation Funding Survey

Q1 Have you ever been involved in a matter in which you knew that either your client or the client of another party received funding provided by a litigation funder?

Answered: 184 Skipped: 0



ANSWER CHOICES

Yes

No

I don't know

TOTAL

RESPONSES

43.48%

45.65%

10.87%

80

84

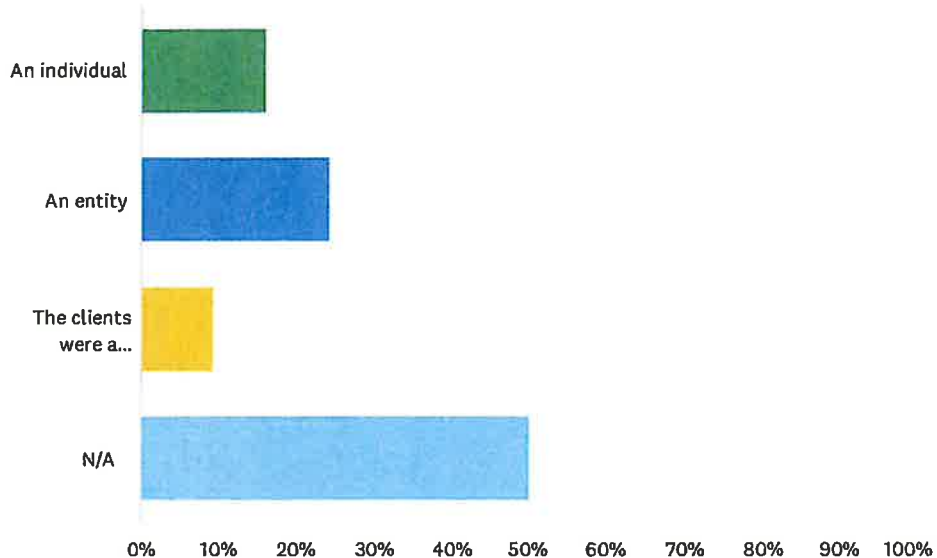
20

184

Litigation Funding Survey

Q2 If the answer to question 1 is yes, was the client in question an individual or an entity?

Answered: 161 Skipped: 23



ANSWER CHOICES

An individual

An entity

The clients were a combination of individuals and entities.

N/A

TOTAL

RESPONSES

16.15% 26

24.22% 39

9.32% 15

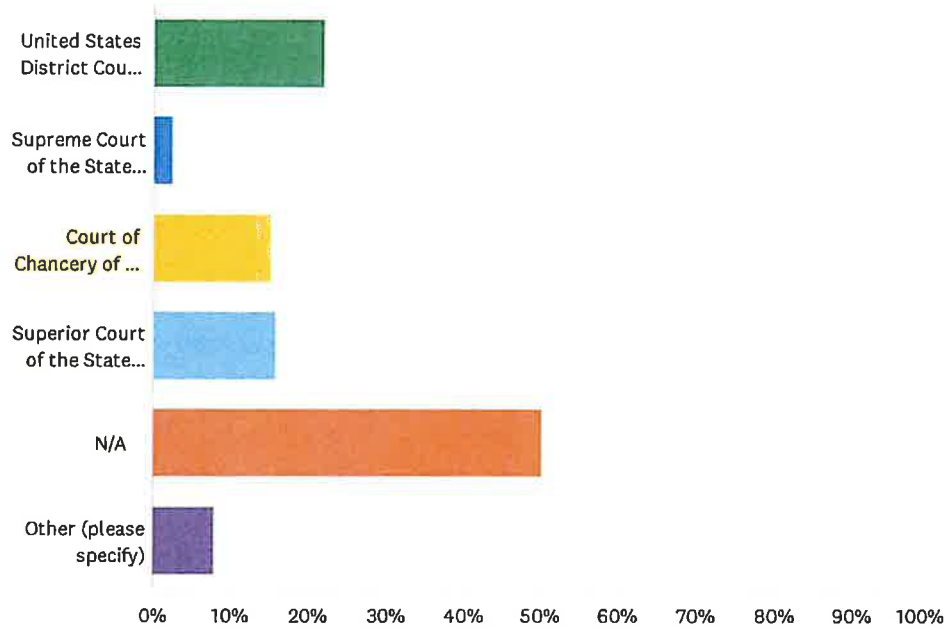
50.31% 81

161

Litigation Funding Survey

Q3 If the answer to question 1 is yes, in what courts were those matters?
Please choose all that apply.

Answered: 159 Skipped: 25



ANSWER CHOICES

RESPONSES

United States District Court for the District of Delaware	22.01%	35
Supreme Court of the State of Delaware	2.52%	4
Court of Chancery of the State of Delaware	15.09%	24
Superior Court of the State of Delaware	15.72%	25
N/A	50.31%	80
Other (please specify)	8.18%	13

Total Respondents: 159

#	OTHER (PLEASE SPECIFY)	DATE
1	I have long suspected that some of my clients' adversaries have had litigation funding, but do not know for sure.	5/1/2023 11:25 AM
2	US Bankruptcy Court for District of Delaware	4/27/2023 9:09 AM
3	U.S. District Court, M.D. FL; and 11th Cir. Court of Appeals	3/15/2023 3:21 PM
4	New York State Court	3/14/2023 1:51 PM
5	Cecil County Circuit Court in Elkton, MD (I was pro hac'd in for the trial)	3/14/2023 12:20 PM
6	International Arbitration	3/14/2023 11:48 AM

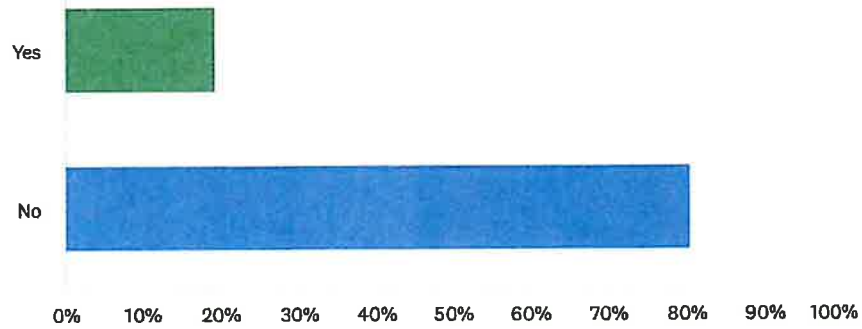
Litigation Funding Survey

7	Cayman Islands; C.D. Cal.	3/14/2023 11:36 AM
8	Other federal courts, including E.D. Va	3/14/2023 11:35 AM
9	Cayman Courts	3/14/2023 11:30 AM
10	United States Bankruptcy Court for the District of Delaware	3/14/2023 11:24 AM
11	Netherlands court	3/14/2023 11:24 AM
12	United States Bankruptcy Court for the Southern District of New York	3/14/2023 11:23 AM
13	Federal Court	3/14/2023 11:20 AM

Litigation Funding Survey

Q4 Do you have firsthand experience working with a litigation funder?

Answered: 181 Skipped: 3



ANSWER CHOICES

Yes

No

TOTAL

RESPONSES

19.34%

80.66%

35

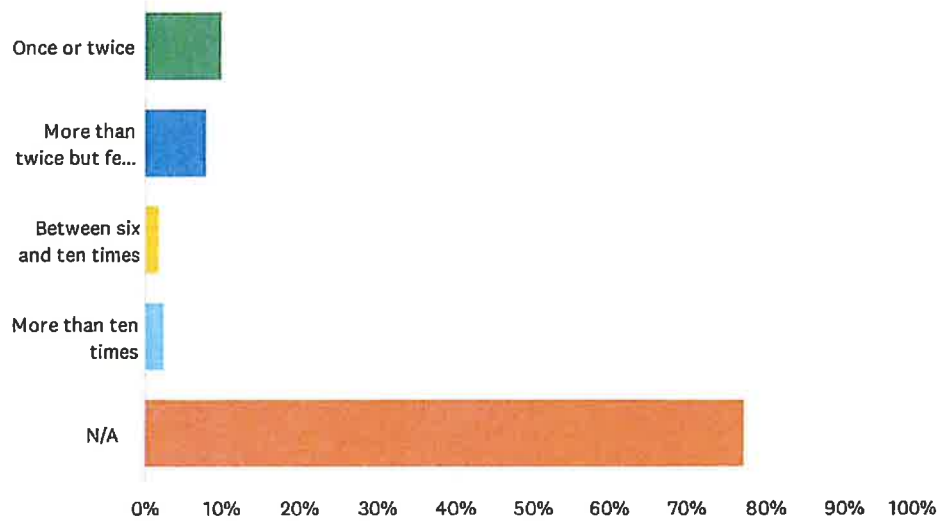
146

181

Litigation Funding Survey

Q5 If the answer to question 4 is yes, how many times have you done so?

Answered: 160 Skipped: 24



ANSWER CHOICES

Once or twice

More than twice but fewer than six times

Between six and ten times

More than ten times

N/A

TOTAL

RESPONSES

10.00%

8.13%

1.88%

2.50%

77.50%

16

13

3

4

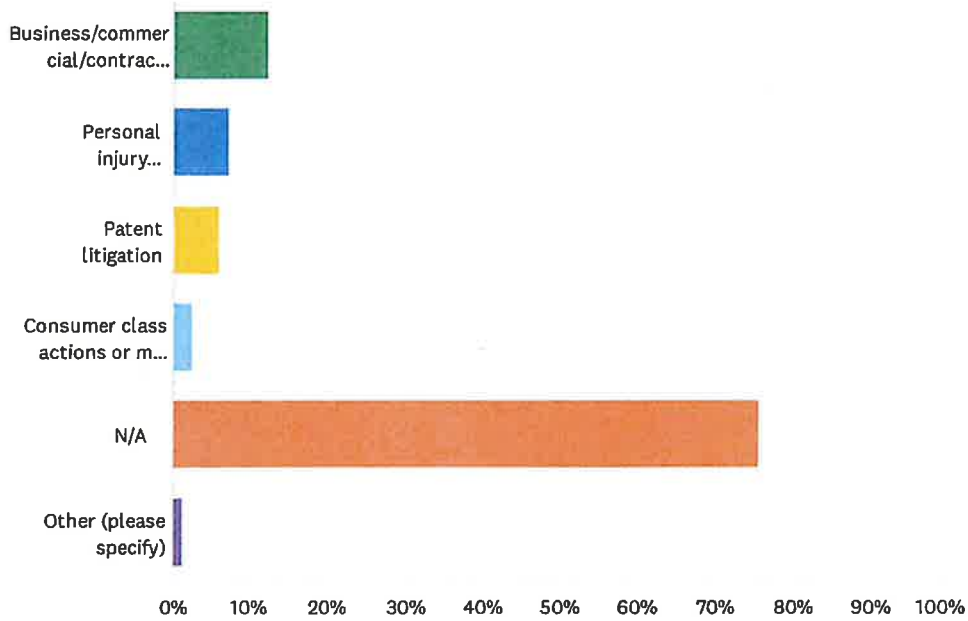
124

160

Litigation Funding Survey

Q6 If the answer to question 4 is yes, what was the type of matter(s)?
Please choose all that apply.

Answered: 160 Skipped: 24



ANSWER CHOICES

RESPONSES

Business/commercial/contract/corporate litigation

12.50% 20

Personal injury litigation

7.50% 12

Patent litigation

6.25% 10

Consumer class actions or mass tort litigation

2.50% 4

N/A

75.63% 121

Other (please specify)

1.25% 2

Total Respondents: 160

OTHER (PLEASE SPECIFY)

DATE

1 employment discrimination

3/15/2023 11:10 AM

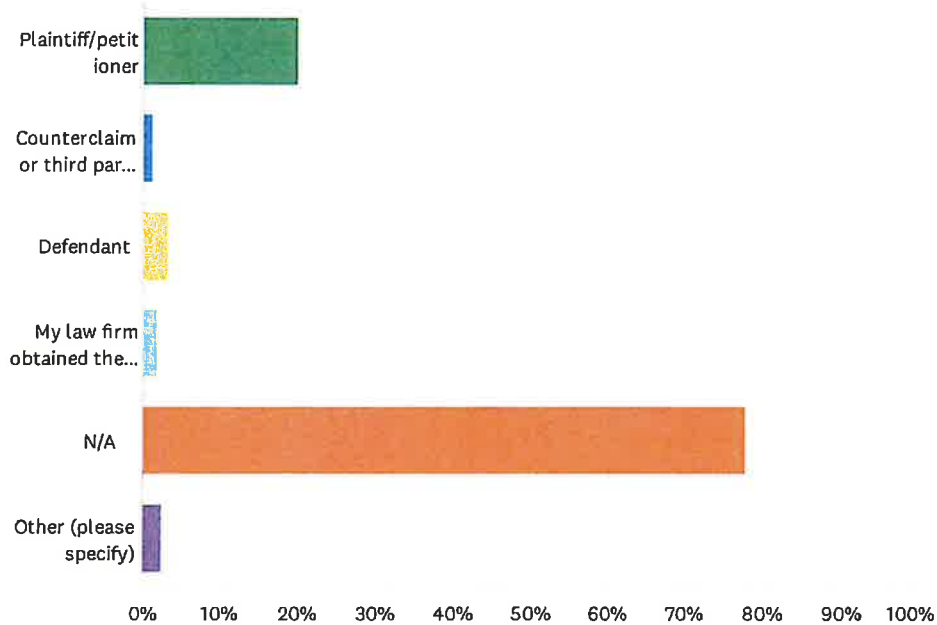
2 Cayman appraisal

3/14/2023 11:36 AM

Litigation Funding Survey

Q7 If the answer to question 4 is yes, what was the position type of your client? Please choose all that apply.

Answered: 160 Skipped: 24



ANSWER CHOICES	RESPONSES	
Plaintiff/petitioner	20.00%	32
Counterclaim or third party plaintiff	1.25%	2
Defendant	3.13%	5
My law firm obtained the funding	1.88%	3
N/A	78.13%	125
Other (please specify)	2.50%	4
Total Respondents: 160		

#	OTHER (PLEASE SPECIFY)	DATE
1	Most personal injury defense cases are funded by third-party insurance carriers. The material difference insurance company funding and other third party finders is the process for the latter requires the funded party to complete a case evaluation. For reasons not clear to me, that questionnaire is subject to discovery or disclosure.	4/27/2023 11:24 AM
2	Situations involved client investing with a litigation funder. In one, my client sued the litigation funder contending the PPM omitted material information. In others, I advised the client in connection with his investment decision.	3/22/2023 9:08 AM
3	Engaged by a litigation funder to assist in an evaluation of whether or not to finance pending litigation.	3/14/2023 10:54 PM

Litigation Funding Survey

4

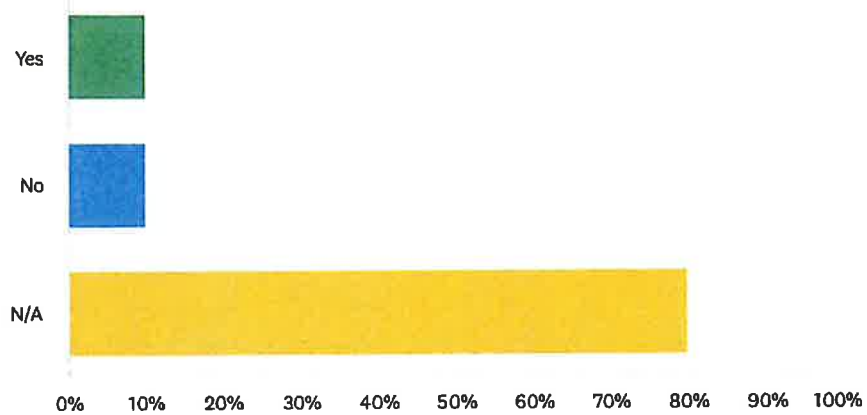
Note that I have investigated funding for specific risks in contingent litigation on behalf of stockholder classes but never actually secured it because the economics were not sufficiently favorable

3/14/2023 11:32 AM

Litigation Funding Survey

Q8 If the answer to question 4 is yes, did the funding ever become known to your client's litigation adversaries?

Answered: 160 Skipped: 24



ANSWER CHOICES

Yes

No

N/A

TOTAL

RESPONSES

10.00%

10.00%

80.00%

16

16

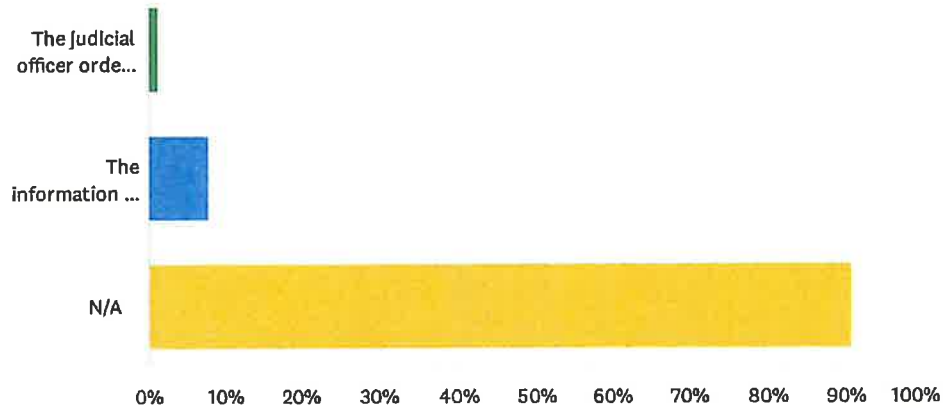
128

160

Litigation Funding Survey

Q9 If the answer to question 8 is yes, how did that information become known? Please choose all that apply.

Answered: 154 Skipped: 30



ANSWER CHOICES	RESPONSES	
The judicial officer ordered disclosure of the information.	1.30%	2
The information was disclosed or revealed during discovery or trial.	7.79%	12
N/A	90.91%	140
TOTAL		154

#	OTHER (PLEASE SPECIFY)	DATE
1	Funding was in bankruptcy court and needed court approval, so our client voluntarily disclosed it in a motion for approval.	4/27/2023 8:55 AM
2	In one matter, we had preliminary discussions with a funder that did not result in any funding. In another matter, advice was provided to a law firm involved with litigation funding.	3/15/2023 11:10 AM
3	Some defense attorneys seek this information during discovery. I object.	3/14/2023 12:58 PM
4	Funding might have to be disclosed in order to settle the claim as the interest on the funding is very high	3/14/2023 12:47 PM

Litigation Funding Survey

Q10 If you have ever been involved in a matter or matters (a) in which any party received funding provided by a litigation funder, (b) the fact and identity of the litigation funder became known in the litigation and (c) the information is not subject to a confidentiality designation in the litigation, please insert the name or names of the litigation funders.

Answered: 32 Skipped: 152

#	RESPONSES	DATE
1	Baker Street Funding	4/27/2023 11:24 AM
2	Our role was to provide Delaware legal opinions for a Delaware entity entering into a loan arrangement which I recall was to be used to fund litigation costs. I don't recall the identities of the parties and I was not involved in the litigation.	4/27/2023 8:57 AM
3	n/a	3/22/2023 3:00 PM
4	N/A	3/22/2023 1:57 PM
5	N/A	3/21/2023 12:00 PM
6	NA	3/20/2023 3:44 PM
7	I have not	3/19/2023 12:01 PM
8	Burford Capital	3/15/2023 6:45 PM
9	Ruckh v. CMC II, LLC et al, No. 8:2011cv01303 (M.D. Fla. 2018), and on appeal to the 11th Circuit. The funder's name is disclosed in the 11th Circuit decision as ARUS 1705-556 LLC.	3/15/2023 3:21 PM
10	Fortress / Fortress Investments Woodford Curiam Capital	3/15/2023 3:14 PM
11	Mavexar	3/15/2023 11:10 AM
12	NA	3/14/2023 8:18 PM
13	N/A NOTE -- we were involved in a case where the nominal plaintiffs/challengers to an administrative decision had their attorneys' fees paid by a third party that wanted the challenge to go forward, but did not want their identity disclosed; this was not for a "piece of the action" (i.e., a portion of any monetary award) but was a group opposed to the administrative decision whose involvement, if known, would have weakened the legal challenge; we were defending the decision and prevailed	3/14/2023 3:17 PM
14	NA	3/14/2023 1:10 PM
15	No	3/14/2023 12:55 PM
16	No, I thought purchasing an interest in the outcome of a lawsuit was prohibited as champerty.	3/14/2023 12:50 PM
17	Oasis Legal Funding	3/14/2023 12:47 PM
18	My client entered into the contract without my knowledge or consultation.	3/14/2023 12:20 PM
19	Can't recall.	3/14/2023 12:17 PM
20	N/A	3/14/2023 12:13 PM
21	Delaware Collateral and Security, LLC	3/14/2023 12:08 PM
22	N/A	3/14/2023 11:59 AM
23	Advocate Capital, and Oasis	3/14/2023 11:47 AM
24	Benchwalk	3/14/2023 11:36 AM

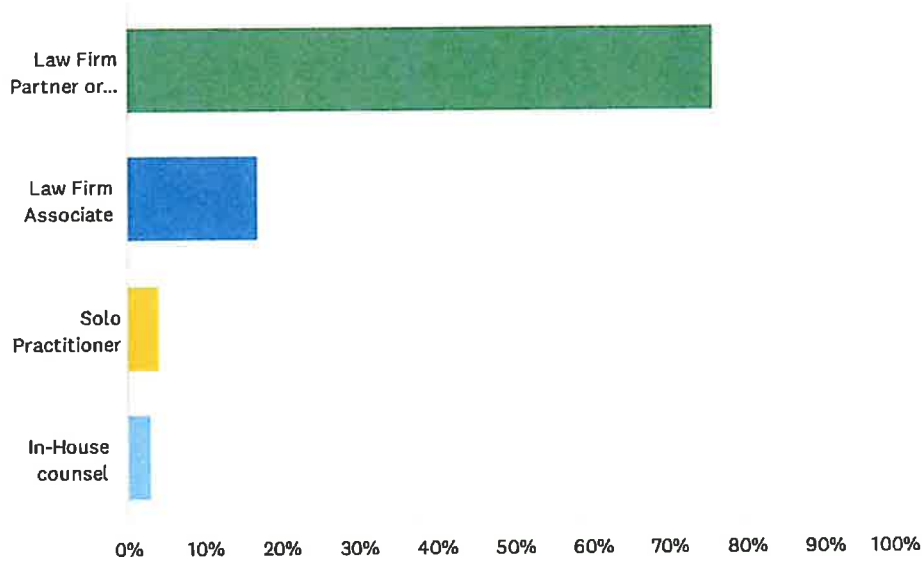
Litigation Funding Survey

25	Burford Capital	3/14/2023 11:31 AM
26	N/A	3/14/2023 11:31 AM
27	Omnibridge Burford	3/14/2023 11:30 AM
28	None	3/14/2023 11:26 AM
29	Attestor Limited	3/14/2023 11:24 AM
30	N/A	3/14/2023 11:23 AM
31	Unfortunately, I do not recall.	3/14/2023 11:23 AM
32	Bentham	3/14/2023 11:21 AM

Litigation Funding Survey

Q11 What is your position at your law firm?

Answered: 170 Skipped: 14



ANSWER CHOICES

RESPONSES

Law Firm Partner or Counsel	75.88%	129
Law Firm Associate	17.06%	29
Solo Practitioner	4.12%	7
In-House counsel	2.94%	5
TOTAL		170

#	OTHER (PLEASE SPECIFY)	DATE
1	director	5/1/2023 9:00 AM
2	retired judge	4/1/2023 2:42 PM
3	Government	3/15/2023 5:26 PM
4	retired partner	3/15/2023 12:16 PM
5	In-House counsel (formerly Law Firm Counsel)	3/14/2023 2:20 PM
6	Retired	3/14/2023 12:55 PM
7	Delaware DAG	3/14/2023 12:50 PM
8	Government	3/14/2023 11:46 AM
9	outside consultant	3/14/2023 11:24 AM
10	Deputy Attorney General, my experience was back when I was a partner at a law firm.	3/14/2023 11:23 AM
11	retired from private practice	3/14/2023 11:22 AM

Litigation Funding Survey

12

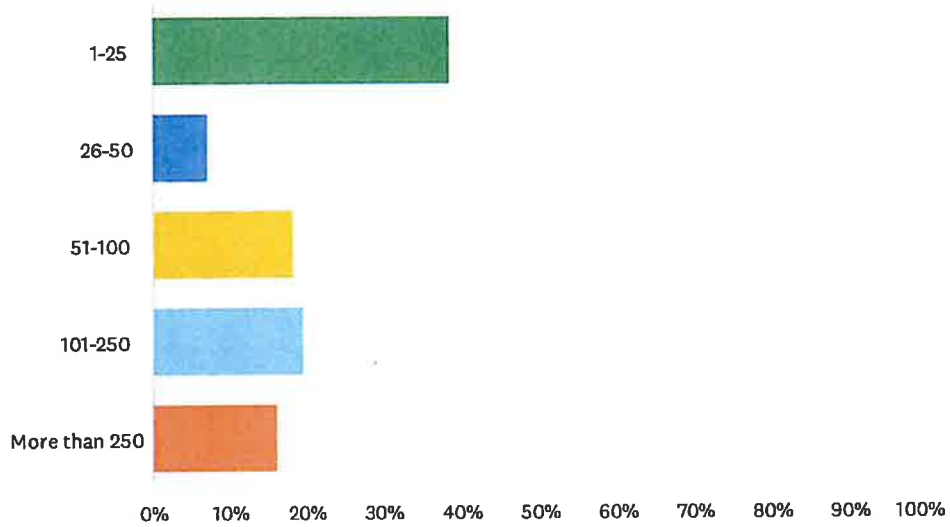
Public Service

3/14/2023 11:22 AM

Litigation Funding Survey

Q12 What is the size of your law firm (no. of attorneys)?

Answered: 179 Skipped: 5



ANSWER CHOICES

1-25
26-50
51-100
101-250
More than 250
TOTAL

RESPONSES

38.55% 69
7.26% 13
18.44% 33
19.55% 35
16.20% 29
179

APPENDIX B

State	Statutes/Case law
Alabama (AL)	<p>Not regulated</p> <p><i>Wilson v. Harris</i>, 688 So 2d 265 (Ala. Civ. App. 1996) (holding that a funding agreement was void on public policy grounds because the agreement was a ‘gambling contract . . . and its speculative characteristics make it closely akin to champerty’.)</p> <p>Despite the <i>Wilson</i> decision, Alabama has failed to adopt any rules regulating consumer legal funding. See generally Student Commentary: Consumer Legal Funding in Alabama, 36 J. Legal Prof. 529 (Spring, 2012) Several Bills considered, none passed.</p>
Alaska (AK)	<p>Not regulated</p> <p>Alaska R. Prof. Conduct 1.8, Conflict of Interest (prohibiting lawyers from acquiring a proprietary interest in litigation, arising out of the common law rules on champerty and maintenance.)</p>
Arizona (AZ)	<p>Not regulated</p> <p>Champerty is not recognized in the state of Arizona, and thus the doctrine does not bar litigation funding agreements. See <i>Landi v. Arkules</i>, 835 P2d 458, 464 (Ct. App. 1992).</p> <p>Litigation funding agreements are privileged. The District of Arizona has held that litigation funding agreements fit within the Ninth Circuit’s standard of materials ‘created because of litigation’. This protection was held to extend to situations where a plaintiff is receiving financing from a third-party funder to support both litigation and operating expenses, where litigation is the scope of operation for that business. See <i>Cont’l Circuits LLC v. Intel Corp.</i>, 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020). However, disclosure of the identity of the litigation funder itself was not protectable information under the work product doctrine. <i>Id.</i></p>
Arkansas (AR)	<p>Regulated</p> <p>Arkansas adopted a rate cap for consumer lawsuit lending transactions. See AR Code § 4-57-109.</p> <p>Ark. R. Prof. Conduct 1.8, Conflict of Interest (prohibiting lawyers from acquiring a proprietary interest in litigation, arising out of the common law rules on champerty and maintenance.)</p>
California (CA)	<p>Not regulated</p>

	<p>LA County Bar Assn. Ethics Op. No. 500 (1999) (discussing the permissibility of funding arrangement under California law and legal ethics regime)</p> <p>Pursuant to the Standing Order for all Judges in the Northern District of California, the parties must include in the Joint Case Management Statement the following information: "Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the 'Certification of Interested Entities or Persons' required by Civil Local Rule 3-15. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim." N.D. Cal. Standing Order for All Judges (2023).</p> <p>Communications with a litigation funder have been shielded from disclosure and, where subject to a properly executed non-disclosure agreement, should not result in a waiver. <i>See Odyssey Wireless, Inc. v. Samsung Elecs. Co.</i>, No. 3:15-cv-01738-H (RBB), 2016 U.S. Dist. LEXIS 188611 (S.D. Cal. Sep. 19, 2016); <i>see also Space Data Corporation v Google LLC</i>, No. 16-CV-03260, 2018 WL 3054797, at *1 (N.D. Cal. 11 June 2018) (communications with potential funders are not relevant.)</p> <p>The California State Bar established a Task Force on Access Through Innovation of Legal Services, which published several alternate proposed revisions to the ethical rules that would, if adopted, either allow limited non-attorney ownership in law practices or largely do away with the traditional restrictions on fee-sharing. Instead of adopting widespread revisions to the ethical rules, however, the California Supreme Court approved a narrowly revised rule with respect to non-lawyer fee sharing.</p>
<p>Colorado (CO)</p>	<p><i>Oasis Legal Fin. Grp., LLC v. Coffman</i>, 2015 Colo. 63, 361 P.3d. 400 (Colo. 2015) (litigation financing transactions created debt to be governed by the Uniform Consumer Credit Code where the agreements provided the litigation finance companies only with the rights that any creditor would have)</p> <p>"A lender who engages in such transactions, variously called 'litigation,' lawsuit,' or 'legal' 'funding', 'financing', or 'advances', with Colorado consumers must comply fully with Colorado's Uniform Consumer Credit</p>

	Code, §§5-1-101, et seq., C.R.S. 2009 (Code), including licensure." <i>See</i> Atty. Gen. Ltr. RE: Pre-Settlement Lender Licensing.
Connecticut (CT)	<p><i>Ankerman v. Mancuso</i>, 271 Conn. 772 (Conn. 2004) (finding that attorney did not violate Rules of Professional Conduct 1.8 where a client to a title action executed a promissory note for legal fees owed secured by the property in the title action and the attorney sought enforcement of the note only and did not foreclose on the mortgage).</p> <p>Bills considered, none passed.</p> <p>Principle of Champerty recognized in state: "Champerty is simply a specialized form of maintenance in which the person assisting another's litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery." C. Wolfram, <i>Modern Legal Ethics</i> (1986) § 8.13, p. 490; see also <i>Richardson v. Rowland</i>, 40 Conn. 565, 570 (1873).</p>
Florida (FL)	<p>Florida Bar Ethics Op. 00-3 (March 15, 2002) (addressing attorney conduct regarding litigation finance)</p> <p><i>Kraft v. Mason</i>, 668 So. 2d 679 (Fla. Dist. Ct. App. 1996) (concluding that where the financier did not intermeddle, instigate litigation, or exert control of the lawsuit after making the loan, the litigation contract was not void as champertous.)</p> <p>"Maintenance is an officious intermeddling in a suit which in no way belongs to the intermeddler, by maintaining or assisting either party to the action, with money or otherwise, to prosecute or defend it." 9 Fla. Jur. 2d Champerty and Maintenance § 1 (1979).</p> <p>Champerty is a form of maintenance wherein one will carry on a suit in which he has no subject-matter interest at his own expense or will aid in doing so in consideration of receiving, if successful, some part of the benefits recovered. 14 C.J.S. Champerty and Maintenance § 1a (1991).</p>

Georgia (GA)	<p>Pursuant to Georgia legislation, “[a] contract that is against the policy of the law cannot be enforced.” Ga. Code Ann. § 13-8-2 (West). The statute illustrates the following contracts as contrary to public policy: “(1) Contracts tending to corrupt legislation or the judiciary; (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter; (3) Contracts to evade or oppose the revenue laws of another country; (4) Wagering contracts; or (5) Contracts of maintenance or champerty.</p> <p>... ”</p> <p><i>Sapp v. Davids</i>, 168 S.E. 62 (Ga. 1933) (invalidated champertous contract under common law).</p> <p>It does not appear that any Georgia court has invalidated any contract as violative of the statutory prohibition against champerty since 1933.</p>
Hawaii (HI)	<p>There is little case law addressing litigation financing issues in Hawaii.</p> <p>At least one court in Hawaii has held that “the common law doctrines of champerty and maintenance are not impediments to the assignability of the claims” for professional malpractice, breach of fiduciary duty, and fraud. <i>TMJ Hawaii, Inc. v. Nippon Tr. Bank</i>, 153 P.3d 444, 450 (Haw. 2007)</p>
Idaho (ID)	<p>There is little case law addressing litigation financing issues in Idaho.</p> <p>However, Idaho precedent holds that while “Idaho law does not recognize champerty and maintenance, Idaho law is in accord with the many states which continue to recognize that the goals of champerty and maintenance provisions are still around and well, both defensively and offensively, in the form of actions or defenses based on abuse of process or malicious prosecution of civil actions.” <i>Wolford v. Tankersley</i>, 695 P.2d 1201, 1222 (Idaho 1984).</p>
Illinois (IL)	<p>Regulated by statute</p> <p>Recently adopted the Consumer Legal Funding Act (815 Ill. Comp. Stat. Ann. 121 (West 2022) et. seq.). The Consumer Legal Funding Act implements licensing and contractual requirements on financers, imposes limits on fees, and prohibits funder control of litigation and settlement decisions.</p>
Indiana (IN)	<p>Regulated by statute</p> <p>New regulation in Indiana requires a claimant to provide written notice of a funding agreement. <i>See</i> Ind. Code § 24-12-4-2 (2023); Ind. H.B 1124.</p>

Iowa (IA)	<p>There is little case law addressing litigation financing issues in Iowa.</p> <p>To the extent Iowa case law has addressed issues relating to litigation financing, Iowa courts have held that the “law now generally favors the assignability of choses in action” <i>Conrad Bros. v. John Deere Ins. Co.</i>, 640 N.W.2d 231, 236 (Iowa 2001). The Supreme Court of Iowa has held that the law generally “prohibit[s] the involuntary assignment of a claim for legal malpractice and prohibit[s] the assignment of a claim for legal malpractice to the adverse party in the underlying litigation.” <i>Gray v. Oliver</i>, 943 N.W.2d 617, 628 (Iowa 2020).</p>
Kansas (KS)	<p>There is little case law addressing litigation financing issues in Kansas.</p>
Kentucky (KY)	<p>Litigation funding is prohibited by statute under Kentucky law. <i>See</i> Ky. Rev. Stat. Ann. § 372.060 (West) (“Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.”)</p>
Louisiana (LA)	<p>Pursuant to Louisiana statute, the assignment and sale of litigious rights is permitted. <i>See</i> La. Civ. Code Ann. art. 2652 (“When a litigious right is assigned, the debtor may extinguish his obligation by paying to the assignee the price the assignee paid for the assignment, with interest from the time of the assignment.”)</p> <p>Comment (g) to the statute notes that “a contingency fee agreement between an attorney and his client is not a prohibited sale of a litigious right. <i>See</i> R.S. 37:218.”</p>
Maine (ME)	<p>Regulated by statute</p> <p>The Maine Consumer Credit Code Legal Funding Practices (Me. Rev. Stat. Ann. tit. 9-A, § 12-101, et. seq). Maine’s legislation requires litigation funders to register with the state authorities and mandates specific provisions that must be included in financing contracts, including a disclosure form setting forth the fees and interest rate charged and a representation that the company has no right to make, and will not make, any decisions regarding the course of the litigation.</p>
Maryland (MD)	<p>Maryland law does not prohibit litigation funding, but litigation financiers must comply with lending laws which restrict the kind of interest rates that can be charged. <i>See e.g., In the Matter of: American Legal Funding, LLC A/k/a American Legal Funding, L.L.c., A/k/a American Legal Funding, LLC, D/b/a American Legal Funding Llc/alfund Az1, LLC, D/b/a American Legal Funding Llc/alfund Az1, Llc/al</i>, 2011 WL 1540473 (Feb. 4, 2011) (state investigation by the Maryland Department of Labor, Licensing and</p>

	<p>Regulation, Office of the Commissioner of Financial Regulation found that litigation funder “activities constitute usurious and unlicensed lending to Maryland consumers in violation of Maryland law”); <i>In the Matter of: Plaintiff Funding Holding, Inc. D/b/a Lawcash, Plaintiff Holding V LLC, Dennis Shields, Harvey R. Hirschfeld, and Jason Younger, Respondents</i>, 2015 WL 5637481 (Aug. 18, 2015) (finding that “Respondents’ business activities constitute usurious and unlicensed lending to Maryland consumers in violation of Maryland law, and that it is in the public interest that Respondents immediately Cease and Desist from making litigation funding advances or other types of loans to, or otherwise engaging in lending activities with, Maryland consumers”).</p>
Massachusetts (MA)	<p><i>Saladini v. Righellis</i>, 687 N.E.2d 1224 (Mass. 1997) (enforcing third-party litigation funding agreement and nullifying the doctrines of champerty and maintenance; the court further held that it would evaluate such agreements by determining whether the agreement was fair and reasonable when made); <i>id.</i> at 1226 (“We have long abandoned the view that litigation is suspect, and have recognized that agreements to purchase an interest in an action may actually foster resolution for a dispute.”); <i>id.</i> at 1227 (“[R]elevant factors might have included the respective bargaining position of the parties at the time the agreement was made, whether both parties were aware of the terms and consequences of the agreement, whether [funde] may have been unable to pursue the lawsuit at all without [fundor]’s funds, and whether the [fees] is unreasonable in the circumstances.”).</p>
Michigan (MI)	<p><i>Smith v. Childs</i>, 497 N.W.2d 538, 540 (Mich. Ct. App. 1993) (holding that champerty is not a defense to the enforcement of a contract)</p> <p><i>Lawsuit Fin., L.L.C. v. Curry</i>, 683 N.W.2d 233, 239-40 (Mich. Ct. App. 2004) (voiding a litigation financing agreement on a finding that plaintiff held an absolute right to repayment on the "advances" and thus constituted a usurious loan for exceeding the legal interest rate)</p> <p>*usury laws and interest restrictions are another way that states/courts regulate third party litigation finance agreements. <i>See, e.g.</i> Mich. Comp. Laws §§ 438.31-438.32.*</p>
Minnesota (MN)	<p><i>Maslowski v. Prospect Funding P’rs LLC</i>, 944 N.W.2d 235, 241 (Minn. 2020) (abolishing champerty doctrine and holding that litigation funding agreements are enforceable); <i>id.</i> at 241 (“[c]ourts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation...”) (citing <i>Huber v. Johnson</i>, 70 N.W. 806, 808 (1897) (stating that 'it is difficult to conceive of any stipulation more against public policy' than a contract term requiring the litigation financier's permission to settle the underlying litigation)); <i>id.</i> (“There is also the possibility of further regulation by the Legislature...”).</p>

	<p>*On remand, the trial court ultimately held the litigation financing agreement was usurious under Minn. Stat. § 334.01 and thus unenforceable* <i>see Maslowski v. Prospect Funding P'rs LLC</i>, 978 N.W.2d 447 (Minn. Ct. App. 2022).</p>
Mississippi (MS)	No guidance.
Missouri (MO)	<p>Pending Legislation: H.B. 2771, <i>Consumer Legal Funding Model Act and the Civil Litigation Funding Act</i>, 101st Gen. Ass., 2d Reg. Sess. (Mo. 2022) (Passed by special committee, currently in rules & legislative oversight committee).</p> <p>Would require disclosure of all participants in litigation financing arrangements in personal injury suits during the discovery process:</p> <p>§ 436.575(1): "[A] consumer or the consumer's legal representative shall, without awaiting a discovery request, provide to all parties to the litigation, including the consumer's insurer if prior to litigation, any litigation financing contract or agreement under which anyone, other than a legal representative permitted to charge a contingent fee representing a party, has a right to receive compensation or proceeds from the consumer that are contingent on and sourced from any proceeds of the civil action by settlement, judgment, or otherwise."</p>
Montana (MT)	<p>Mont. Code Ann. § 37-61-408 (2021) (statute prohibiting attorneys from involvement in litigation funding)</p> <p><i>Lussy v. Bennett</i>, 692 P.2d 1232, 1235-36 (Mont. 1984) (explaining that Mont. Code Ann. § 37-61-408 also applies to a party prosecuting in person an action instead of acting through an attorney, and dismissing plaintiff's claim for "smack[ing] of champerty" and being against public policy).</p>
Nebraska (NE)	<p>Regulated by statute</p> <p>Neb. Rev. Stat. §§ 25-3301-25-3309 (2010) (statute imposing restrictions on third-party litigation funding and requiring mandatory disclosure statements)</p>
Nevada (NV)	<p>Regulated by statute</p> <p>Nev. Rev. Stat. ch. 604C (2021), <i>Consumer Litigation Funding</i> (statute imposing restrictions on third-party litigation funding and requiring litigation funders to be licensed).</p>

<p>New Hampshire (NH)</p>	<p><i>Markarian v. Bartis</i>, 199 A. 573, 577 (N.H. 1938) (concluding that champerty and maintenance doctrines are not in force in New Hampshire).</p> <p><i>Adkin Plumbing & Heating Supply Co., Inc. v. Harwell</i>, 606 A.2d 802, 804-05 (N.H. 1992) (allowing attorney to recover on a contingent fee agreement when he was discharged without cause prior to the disposition of the case, even though the contingency never occurred).</p>
<p>New Jersey (NJ)</p>	<p>New Jersey Advisory Committee on Professional Ethics, Opinion 691 (2001) (concluding that a lawyer may ethically refer a client to a factor concerning an advance against an anticipated personal injury judgment or settlement, provided that the lawyer follows the standards and limitations laid out by the Committee).</p> <p><i>Schomp v. Schenck</i>, 40 N.J.L. 195, 206 (N.J. 1878) (rejecting common law prohibitions on champerty and maintenance).</p> <p><i>Weller v. Jersey City H&P St. Ry. Co.</i>, 57 A. 730, 732 (N.J. Ch. 1904) (explaining that the law of champerty and maintenance has never prevailed in New Jersey).</p> <p><i>Cohen as Tr. of Robert B. Cohen Living Tr. v. Perelman</i>, 2018 WL 6034978, at *19 (N.J. Super. Ct. App. Div. Nov. 19, 2018) (observing that third-party litigation funding is fine so long as it does not run contrary to the public interest).</p>
<p>New Mexico (NM)</p>	<p>New Mexico has not extensively dealt with modern litigation finance. To the extent it has addressed issues relating to litigation finance, New Mexico courts have stated that personal injury claims cannot be assigned and the proceeds from those claims cannot be assigned. However, commercial claims are assignable.</p> <p><i>Quality Chiropractic, PC v. Farmers Ins. Co. of Am.</i>, 51 P.3d 1172, 1183 (N.M. Ct. App. 2002) (“We decline to abrogate the common law rule prohibiting the assignment of personal injury claims, and we reject any distinction between an assignment of the proceeds of a claim and an assignment of the claim itself”); <i>Wilson v. Berger Briggs Real Estate & Ins. Inc.</i>, 497 P.3d 654, 660 (N.M. Ct. App. 2021) (“Because we agree with the district court that none of the causes of action brought by Wilson against Berger Briggs state injuries or claims of a personal nature, but are instead commercial in nature, and our jurisprudence suggests and common law establishes that such commercial claims are assignable, we conclude there to be no error in the district court ruling in this regard and hold that commercial claims of the nature at issue in this case are assignable”)</p>

<p>New York (NY)</p>	<p>New York has a champerty statute. The statute contains a safe harbor and will not apply when the purchase price is at least \$500,000. Furthermore, the champerty statute is construed narrowly and will not apply when the purpose of an assignment is the collection of a legitimate claim. The statute will also not apply when the primary purpose in acquiring the assets was not to bring a claim. The Southern District of New York has also stated that under New York law that personal injury claims cannot be assigned but that plaintiffs can enter into agreements to conditionally assign settlement proceeds. Furthermore, one New York decision, as part of its reasoning, stated that a party could not get discovery into litigation funding because it could not show how it would be relevant into any claim or defense. The Southern District and Eastern Districts for New York have ruled similarly. New York courts have also dismissed cases regarding litigation financing agreements that are under New York law that include New York forum provisions when almost all of the aspects of the transaction took place in another state. Lastly, in 2005, the attorney general for New York and several litigation funding companies settled and entered into an agreement. As part of this agreement, the litigation funding companies would have to comply with various requirements including disclosing the amount to be advanced, an itemization of one-time fees, and the total amount to be repaid.</p> <p>N.Y. JUD § 489; <i>Tr. for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.</i>, 918 N.E.2d 889 (N.Y. 2009) (“the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim”); <i>Fairchild Hiller Corp. v. McDonnell Douglas Corp.</i>, 270 N.E.2d 691 (N.Y. 1971); <i>Evans v. City of N.Y.</i>, 2021 WL 3617269 (S.D.N.Y. July 15, 2021); <i>Worldview Entm’t Holdings, Inc. v. Woodrow</i>, 204 A.D.3d 629, 630 (N.Y. Sup. Ct. 2022) (“defendant has not explained how discovery about litigation financing and witness payments would support or undermine any particular claim or defense”); <i>Kaplan v. S.A.C. Capital Advisors, L.P.</i>, 2015 WL 5730101 (S.D.N.Y. Sep. 10, 2015); <i>Benitez v. Lopez</i>, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2009) (“Defendants do not explain how any litigation funding impacts Plaintiff’s credibility or how it could be used to impeach his trial testimony”); <i>Prospect Funding Holdings L.L.C. v. Maslowski</i>, 146 A.D.3d 535 (N.Y. Sup. Ct. 2017); <i>Application of Whitehaven S.F., LLC v. Spangler</i>, 45 F.Supp.3d 333 (S.D.N.Y. 2014).</p>
<p>North Carolina (NC)</p>	<p>North Carolina has not extensively dealt with modern litigation finance. To the extent it has addressed this issue, North Carolina courts have stated that the assignment of litigation proceeds are not <i>per se</i> champertous but can constitute champerty if some other aspect grants control over the litigation. A federal bankruptcy court in North Carolina also held that an agreement did constitute champerty under North Carolina</p>

	<p>law because the agreement allowed the funder to reevaluate the litigation and discontinue funding and give the funder other controls over the litigation.</p> <p><i>Odell v. Legal Buck, LLC</i>, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008); <i>In re DesignLine Corp.</i>, 565 B.R. 341, 348-49 (Bankr. W.D.N.C. 2017)</p>
North Dakota (ND)	North Dakota has not extensively dealt with modern litigation financing.
Ohio (OH)	<p>Regulated by statute. <i>See</i> Ohio Rev. Code §. 1349.55.</p> <p>Ohio's Supreme Court initially held that litigation financing constituted champerty. In response to this decision, Ohio's legislature passed a statute allowing for litigation financing in the state and outlining the rules regarding litigation financing. This statute requires the contract to disclose the total dollar amount advanced, an itemization of one-time fees, the total dollar amount to be repaid in six-month intervals for thirty-six months including fees, and the annual percentage rate of return. The contract must also provide that the consumer can cancel within five days of receipt of the funds without penalty. The contract must also include language that the company will not have a right in making decisions relating to the litigation. The contract must also include a written acknowledgement by the attorney representing the consumer giving several assurances.</p> <p><i>Rancman v. Interim Settlement Funding Corp.</i>, 789 N.E.2d 217, 221 (Ohio 2003) ("Except as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance. Such an advance constitutes champerty and maintenance"), <i>superseded by statute</i>, Ohio Rev. Code Ann. § 1349.55; Ohio Rev. Code Ann. § 1349.55.</p>
Oklahoma (OK)	<p>Regulated by statute</p> <p>Part of an article of Oklahoma's code is dedicated to litigation finance. These sections include provisions that allow a consumer to cancel the contract within 5 days of the funding date without penalty. The agreement must also contain certain disclosures including the amount to be paid to the consumer, an itemization of one-time charges, the total amount to be assigned by the consumer to funder, and a payment schedule. The agreement must also disclose that the funder will not participate in determining settlement of the claim or interfere with the attorney's professional judgment. It must also state that charges will only be paid from the proceeds of the claim. In addition to this, Oklahoma requires all litigation funders to become licensed in order to do business in the state. The license must be renewed every two years. Lastly, Oklahoma provides a</p>

	<p>model form for a funding agreement. Using this form creates a presumption that the funder has complied with the required disclosures of the statute.</p> <p>Okla. St. Ann. 14A §§ 3-801-817; Okla. Admin. Code §§ 160:75-1-1-160:75-9-1; Okla. Admin. Code § 160:75 App. A</p>
Oregon (OR)	Oregon has not extensively dealt with modern litigation financing.
Pennsylvania (PA)	<p>Champerty is still in effect in Pennsylvania. To establish a <i>prima facie</i> case for champerty the party involved must have no interest in the suit, the party must spend its own money in prosecuting the suit, and the party must be entitled by bargain to share in the proceeds of the suit. Under this standard, some litigation funding agreements have been held to be invalid. The Eastern District of Pennsylvania granted a protective order for documents that were sent to a litigation funding company because they were work product and were protected by the common interest doctrine. The Western District of Pennsylvania held similarly and found that communications with litigation funders were protected by the work product doctrine. Lastly, the third circuit reversed in part a decision by the Eastern District of Pennsylvania, which voided litigation funding agreements in connection with a class action and instead held that only true assignments that allowed the lender to seek funds directly from the claim administrator were void but that other litigation funding companies could pursue their claims outside of the claim administration process.</p> <p><i>Clark v. Cambria Cty. Bd. of Assessment Appeals</i>, 747 A.2d 1242, 1246 (Pa. Commw. Ct. 2000) (“The common law doctrine against champerty and maintenance continues to be a viable doctrine in Pennsylvania and can be raised as a defense”); <i>WFIC, LLC v. LaBarre</i>, 148 A.3d 812, 818 (Pa. Super. Ct. 2016) (“In order to establish a prima facie case of champerty, the following three elements must exist: (1) the party involved must be one who has no legitimate interest in the suit; (2) the party must expend its own money in prosecuting the suit; and (3) the party must be entitled by the bargain to share in the proceeds of the suit”); <i>Devon It, Inc. v. IBM Corp.</i>, 2012 WL 4748160 (E.D. Pa. Sep. 27, 2012); <i>Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.</i>, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018); <i>Nat’l Football League Players’ Concussion Injury Litig.</i>, 923 F.3d 96 (3d. Cir. 2019).</p>
Rhode Island (RI)	<p>Rhode Island has not extensively dealt with modern litigation financing. However, the District Court of Rhode Island has held that under Rhode Island law that an agreement to provide information in return for a percentage of any money that was recovered did not constitute champerty.</p> <p><i>Progressive Gaming Intern., Inc. v. Venturi</i>, 563 F.Supp.2d 321 (D.R.I. 2008).</p>

<p>South Carolina (SC)</p>	<p>South Carolina has not extensively dealt with modern litigation financing. To the extent it has, South Carolina has held that champerty is no longer recognized as a defense to a loan. Instead, when examining an agreement “The court may examine (1) whether the respective bargaining position of the parties at the time the agreement was made was relatively equal, (2) whether both parties were aware of the terms and consequences of the agreement, (3) whether the borrowing party may have been unable to pursue the lawsuit at all without the financier’s help, (4) whether the financier would retain a disproportionate share of the recovery, and (5) whether the financier engaged in officious intermeddling.” <i>Osprey, Inc. v. Cabana Ltd. P’ship</i>, 532 S.E.2d 269, 278 (S.C. 2000).</p>
<p>South Dakota (SD)</p>	<p>No guidance</p>
<p>Tennessee (TN)</p>	<p>Regulated by statute (Tenn. Code Ann. § 47-16-101)</p> <p>A litigation financier shall fulfill each of the following requirements when engaged in litigation financing:</p> <p>(1) The terms of the litigation financing transaction shall be set forth in a written contract that is completely filled-in with no incomplete sections when the contract is offered or presented to the consumer;</p> <p>(2) The litigation financing contract shall contain a right of rescission, allowing the consumer to cancel the litigation financing contract without penalty or further obligation if, within five (5) business days following the consumer’s receipt of the funds or goods, or execution of the litigation financing contract, whichever is later, the consumer gives notice of the rescission and returns any money or goods already provided to the consumer by the litigation financier;</p> <p>(3) The litigation financing contract shall contain a written acknowledgment by the consumer of whether the consumer is represented by an attorney in the dispute;</p> <p>(4) If the consumer acknowledges that the consumer is represented by an attorney in the dispute, the litigation financing contract shall include a written acknowledgment executed by the consumer’s attorney in the dispute in which the attorney acknowledges all of the following:</p> <p>(A) The attorney has had the opportunity to review the litigation financing contract on behalf of the consumer;</p> <p>(B) Whether the attorney is being paid on a contingency basis pursuant to a written fee agreement;</p> <p>(C) That all proceeds of the legal claim shall be disbursed by either the trust account of the attorney representing the consumer in the dispute or a settlement fund established to receive the proceeds of the dispute from the defendant on behalf of the consumer;</p> <p>(D) The attorney is representing the consumer with regard to the dispute that is the subject of the litigation financing contract; and</p>

	<p>(E) The attorney has neither received nor paid a referral fee or any other consideration from or to the litigation financier, nor will the attorney in the future; and</p> <p>(5) In the event that proceeds are paid into a settlement fund or trust, the litigation financier shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation financing contract.</p> <p>Tenn. Code Ann. § 47-16-104</p> <p>Non-members of the Tennessee bar are not able to access informal ethics opinions from the Tennessee Supreme Court. There did not appear to any formal opinions from the Tennessee Supreme Court on the topic; however, in <i>Shouhrue v. St. Mary's Medical Center, Inc.</i>, 152, S.W.3d 577, 587 (Tenn. Ct. App. 2004) the Court found an attorney acted improperly by entering into a litigation funding agreement without the fully informed consent of this client. <i>Id.</i></p>
<p>Texas (TX)</p>	<p>Permitted but regulated.</p> <p>The Texas Court of Appeals explicitly upheld the use of litigation funding agreements in <i>Anglo-Dutch Petroleum Int'l Inc. v. Haskell</i>, 193 S.W.3d 87, 100-04 (Tex. App. 2006), There, the Court found that an alternative litigation funding agreement was enforceable as long as the rules of professional responsibility are observed by the lawyers. <i>Id.</i> at 104. A lawyer can even assist a client in finding third party funding. <i>Id.</i> The Texas Court noted, “that, “[litigation funding agreements] did not violate public policy because they did not vest control over the litigation in uninterested third parties.” <i>Anglo-Dutch Petroleum Intern., Inc v. Smith</i>, 243 S.W.3d 776, 782 (Tex. App. 2007).</p> <p>However, the Texas Committee on Professional Ethics regulates how a third-party funder can receive his investment. <i>Compare</i> Tex. Comm. On Professional Ethics, Op. 5558 (2005) (finding a loan agreement that allows a finance company to recover a portion of an attorney’s contingency fee constitutes fee-splitting and violates Rule 5.05(a)) <i>with</i> Tex. Comm. On Professional Ethics, Op. 481 (1994) (finding a client paying for legal services by borrowing money from a third-party is permissible). Thus, in Texas, litigation funding agreements cannot allow the investor to recover funding from contingency fees. Tex. Comm. On Professional Ethics, Op. 576 (2006).</p> <p>Additionally, a lawyer may not share a client’s confidential information with third parties “unless the client provides effective consent after consultation or another exception to the lawyer’s duty of confidentiality applies.” Tex. Comm. On Professional Ethics, Op. 695 (2022).</p>

	Currently, bills that would require mandatory disclosure of third-party litigation are pending in the Texas legislature but are stuck pending committee review. <i>See</i> H.B. 2096 and S.B. 1567.
Utah (UT)	<p>Permitted with mandatory disclosures and governed by statute</p> <p>The Supreme Court of Utah ruled that there is a strong presumption that the voluntary assignment of a legal malpractice claim does not violate public policy. <i>Eagle Mountain City v. Parsons Kinghorn & Harris, P.C.</i>, 408 P.3d 322 (Utah 2017) (holding legal malpractice claims are assignable) (<i>sic.</i>). The Utah court reasoned that Fed. R. Civ. Pro. 11 adequately deters frivolous litigation; thus, fears that third-party funded litigation would result in bad-faith filings are speculative. <i>Id.</i> at 328-329. The Utah Supreme Court doubled down in 2021 and emphasized, “there are strong public policy interest[s] in allowing access to our courts.” <i>Matter of Estate of Osguthorpe</i>, 491 P.3d 894, 923 (Utah 2021).</p> <p>Utah did pass a statute, effective as of May 5, 2020, requiring mandatory disclosures. <i>See</i> Utah Code Ann. §13-57. Section 201 requires business entities who fund litigation to register with the state. <i>Id.</i> §13-57-201. Further, funders may not solicit attorneys, health care providers, or employees. <i>Id.</i> §13-57-202. The agreements must be in writing, contain a right of rescission and contain proper disclosures as well as meet other requirements specified by statute. <i>Id.</i> §13-57-301–302.</p>
Vermont (VT)	<p>Permitted and governed by statute</p> <p>Vermont has passed a statute that governs consumer litigation funding companies. <i>See</i> Vermont Code Ann. §§ 08-74-2251-2260. The companies must register with the Commissioner and submit a registration fee. <i>Id.</i> § 2252. Disclosures are required to appear on the front page of the contract. The required disclosures include:</p> <p>(a) A contract shall be written in a clear and coherent manner using words with common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional.</p> <p>(b) Each contract shall include consumer disclosures on the front page. The consumer disclosures shall be in a form prescribed by the Commissioner and shall include:</p> <ol style="list-style-type: none"> (1) a description of possible alternatives to a litigation funding contract, including secured or unsecured personal loans, and life insurance policies; (2) notification that some or all of the funded amount may be taxable; (3) a description of the consumer’s right of rescission; (4) the total funded amount provided to the consumer under the contract;

	<p>(5) an itemization of charges;</p> <p>(6) the annual percentage rate of return;</p> <p>(7) the total amount due from the consumer, including charges, if repayment is made any time after the funding contract is executed;</p> <p>(8) a statement that there are no fees or charges to be paid by the consumer other than what is disclosed on the disclosure form;</p> <p>(9) in the event the consumer seeks more than one litigation funding contract, a disclosure providing the cumulative amount due from the consumer for all transactions, including charges under all contracts, if repayment is made any time after the contracts are executed;</p> <p>(10) a statement that the company has no right to make any decisions regarding the conduct of the legal claim or any settlement or resolution thereof and that the right to make such decisions remains solely with the consumer and his or her attorney;</p> <p>(11) a statement that, if there is no recovery of any money from the consumer’s legal claim, the consumer shall owe nothing to the company and that, if the net proceeds of the claim are insufficient to repay the consumer’s indebtedness to the company, then the consumer shall owe the company no money in excess of the net proceeds; and</p> <p>(12) any other statements or disclosures deemed necessary or appropriate by the Commissioner.</p> <p>(c) Each contract shall include the following provisions:</p> <p>(1) Definitions of the terms “consumer,” “consumer litigation funding,” and “consumer litigation funding company.”</p> <p>(2) A right of rescission, allowing the consumer to cancel the contract without penalty or further obligation if, within five business days following the execution of the contract or the consumer’s receipt of any portion of the funded amount, the consumer gives notice of the rescission to the company and returns any funds provided to the consumer by the company.</p> <p>(3) A provision specifying that, in the event of litigation involving the contract and at the election of the consumer, venue shall lie in the Vermont Superior Court for the county where the consumer resides.</p> <p>(4) An acknowledgment that the consumer is represented by an attorney in the legal claim and has had an opportunity to discuss the contract with his or her attorney. (Added 2015, No. 128 (Adj. Sess.), § A.1.)</p> <p><i>Id.</i> § 2253. The Vermont statute specifically defines the impact of litigation funding on attorney-client privilege. <i>Id.</i> § 2255. The statute states, “A communication between a consumer’s attorney and the company shall not be discoverable or limit, waive, or abrogate the scope or nature of any . . . common-law privilege.” <i>Id.</i></p>
Virginia (VA)	No guidance but appears to be permitted.

<p>Washington (WA)</p>	<p>Permitted with regulations via advisory ethics opinions</p> <p>Washington does not appear to have a statute that governs litigation funding agreements but the Washington Court of Appeals endorsed the use of such agreements. See <i>Giambattista v. Nat'l Bank of Commerce of Seattle</i>, 586 P.2d 1180 (Wash. Ct. App. 1978) (finding that litigation agreements were not champertous).</p> <p>Washington State's Ethics Opinions also provide guidance. The Ethics Committee, via advisory opinions have held that confidential information, including client-identifying information, may not be provided to third parties funding the litigation unless the client has given informed consent. Wash. Committee on Professional Ethics Op. 183 (1990); <i>see also</i> Wash. Committee on Professional Ethics Op. 1319 (1989). In 2005, the Ethics Committee found, "[a] lawyer cannot disclose client secrets or confidence to a third party which provides funding." Wash. Committee on Professional Ethics Op. 2081 (2005).</p>
<p>West Virginia (WV)</p>	<p>Permitted and governed by statute</p> <p>West Virginia permits litigation funding agreements as long as the agreements comply with applicable statute. <i>See</i> West Virginia Code Ann. § 46A-6N-3. The statute requires a litigation financier to:</p> <ol style="list-style-type: none"> (1) The terms of the litigation financing transaction shall be set forth in a written contract that is completely filled in with no incomplete sections when the contract is offered or presented to the consumer; (2) The litigation financing contract shall contain a right of rescission, allowing the consumer to cancel the litigation financing contract without penalty or further obligation if, within five business days following the consumer's receipt of the funds, or execution of the litigation financing contract, whichever is later, the consumer gives notice of the rescission and returns any money already provided to the consumer by the litigation financier; (3) The litigation financing contract shall contain a written acknowledgment by the consumer of whether the consumer is represented by an attorney in the dispute; (4) If the consumer acknowledges that the consumer is represented by an attorney in the dispute, the litigation financing contract shall include a written acknowledgment executed by the consumer's attorney in the dispute in which the attorney acknowledges all of the following: <ol style="list-style-type: none"> (A) The attorney has had the opportunity to review the litigation financing contract on behalf of the consumer;

	<p>(B) The attorney is representing the consumer with regard to the dispute that is the subject of the litigation financing contract;</p> <p>(C) The attorney has neither received nor paid a referral fee or any other consideration from or to the litigation financier, nor will the attorney receive or pay such a fee in the future; and</p> <p>(D) In the event that proceeds are paid into a settlement fund or trust, the litigation financier shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation financing contract.</p> <p>Imposes cap on the interest rates consumer litigation funders may charge. West Virginia Code Ann. § 46A-6N-3.</p>
Wisconsin (WI)	<p>Permitted and governed by statute</p> <p>Permitted but governed by statute. The Wisconsin statute was the first statute passed that required litigation funding agreements to contain mandatory disclosures. <i>See</i> Wisconsin Act § 235. The Act requires all agreements to be disclosed to the courts even if no discovery request has been made. <i>Id.</i></p>
Wyoming (WY)	No guidance

Exhibit B

Excerpt from Meeting of the Texas
Supreme Court Advisory Committee

August 29, 2025

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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

AUGUST 29, 2025

(FRIDAY SESSION)

* * * * *

Taken before *D'Lois L. Jones*, Certified
Shorthand Reporter in and for the State of Texas, reported
by machine shorthand method, on the 29th day of August,
2025, between the hours of 9:00 a.m. and 3:32 p.m., at the
State Bar of Texas, 1414 Colorado Street, Austin, Texas
78701.

1 **INDEX OF VOTES**

2 Votes taken by the Supreme Court Advisory Committee during
3 this session are reflected on the following pages:

4 <u>Vote on</u>	5 <u>Page</u>
6 Third Party Litigation Funding	7 37539

8

9

10 **INDEX OF DISCUSSION OF AGENDA ITEMS**

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13 Report from Justice Bland	14 37354
15 Report from Justice Young	16 37357
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19 Code of Judicial Conduct	20 37453
21 Business Courts	22 37469
23 Rule of Civil Procedure 4	24 37491
25 Third Party Litigation Funding	26 37498
Confidential Identity in Court Proceedings	27 37539

1 move to confidential identity in court proceedings.
2 Hopefully you all can still be here. If we have to
3 jettison something, sorry, Roger, it will be the evidence
4 things.

5 MR. HUGHES: I'm heartbroken.

6 CHAIR TRACY CHRISTOPHER: So we're putting
7 you at the end.

8 All right. Robert.

9 MR. LEVY: Okay. So if you would go to
10 page 105 of the package. It is under Tab 6. That is a
11 memo from the Rules 1 through 14c subcommittee, although I
12 will point out that because of timing we didn't have the
13 opportunity to fully vet it, but the purpose of the memo
14 is to update the committee on the topic we last discussed
15 in November of 2024, and at that time, after a pretty
16 fulsome debate, we had not had the opportunity to complete
17 that discussion, and I think that there were some members
18 who had expressed a desire to gain more familiarity with
19 the issue.

20 This is -- also in the memo, included some
21 of the more recent developments that have taken place on
22 the topic. There has been a considerable activity, as
23 noted in the -- as we discussed at the last meeting, the
24 federal -- and I'm sorry, Justice Gray --

25 HONORABLE TOM GRAY: That's okay.

1 MR. LEVY: The Federal Civil Rules Advisory
2 Committee had appointed a subcommittee to look at this
3 question. They had discussed it previously, but the --
4 they had, for the first time, a specific committee focused
5 on it, and they are continuing their discussion on the
6 topic. They will actually be having a conference at
7 George Washington Law School in October, right before the
8 committee meets in October, and so I anticipate that there
9 will be significant discussion there as well.

10 There has also been a lot of state
11 legislative activity that a number of states in 2025
12 considered and adopted TPLF disclosure language, and some
13 Legislatures considered and did not adopt it. There was a
14 bill that was filed in the Texas Legislature that
15 didn't -- the chairman did not ask for a hearing, so that
16 bill did not progress; and one of the issues there, as I
17 understand it, is that the goal was for the Legislature
18 not to address the issue in deference to the Supreme
19 Court, and with the advice of this committee, to consider
20 whether the Court should adopt a rule; and that does raise
21 the question about if this is a political issue or a
22 policy issue, should this be a topic that is best left to
23 the Legislature versus the Court regarding whether
24 disclosure should be required.

25 And I think, in my view, that the -- the

1 right answer is that the Court really is in the best
2 position to consider and adopt rules that relate to
3 procedure, including disclosure of the information in
4 litigation, and that, while the Legislature certainly is a
5 policy-making body, they are not always the most adept at
6 legislative language that comports to clear rule-making,
7 as we saw in some of the other instances, such as business
8 court rules.

9 The -- another factor that is set out in the
10 memo is that -- or something to consider as one of the
11 questions that came up at our meeting is what -- what
12 difference does disclosure make? Why is it pushed by the
13 proponents? Why is it necessary? How does it change the
14 case or the outcome of the case? And the memo discusses
15 the content of specific funding agreements that have been
16 disclosed through disclosure, or in cases where there has
17 been debate about -- or the lawsuits about the funding
18 agreement itself, so funder and party have a lawsuit, a
19 breach of contract suit, and the funding agreement is
20 relevant to that proceeding, and so looking at those
21 agreements that have been disclosed, it provides, I think,
22 a very important and -- perspective on why funding
23 disclosure might be important and might be significant to
24 the court and the litigants.

25 Obviously, there are a number of arguments

1 as to why that shouldn't happen, and we'll defer to
2 Mr. Perdue, Jim, to discuss those. The memo does relay a
3 number of the arguments that have been made against
4 disclosure, but I think that one of the key elements for
5 this committee to consider is how the existence of funding
6 changes significantly the dynamic of a litigation
7 proceeding, the ability to settle, the limitations that
8 might exist from the part of the plaintiffs in terms of
9 whether settlement is practical or possible, depending on
10 where the case is or what the -- what the dollar amounts
11 are being discussed, who has the authority to make that
12 determination, and whether, in fact, the plaintiff would
13 even have the authority to settle based upon provisions
14 that might include nonmonetary relief.

15 I do also want to point out, we have gotten
16 some input this week from the Alliance for Responsible
17 Consumer Legal Funding, and Eric Schuller is here on their
18 behalf. They have commented about the desire or the
19 suggestion that a disclosure rule would not -- should not
20 include and would need to be revised to make clear it
21 doesn't include circumstances where there are funders or
22 loans that are made to individual plaintiffs to pay their
23 expenses, medical bills or whatever; and this is a
24 component of the funding world that is very different than
25 the funding that the disclosure rule is designed to

1 address.

2 In those circumstances, a plaintiff might
3 receive a loan for expenses, and the plaintiff would not
4 be obligated to repay the loan if the lawsuit -- if the
5 plaintiff does not recover, but if the plaintiff does
6 recover, the plaintiff repays the loan plus some component
7 of interest, but the funder does not get a percentage of
8 the proceeds of the case. So they are only getting their
9 money back plus the interest, and I don't believe that the
10 disclosure that's been proposed is trying to get at that
11 type of funding.

12 Additionally, there are situations where
13 there are funders, people that are funding lawsuits on,
14 you know, social issues or political issues; and there are
15 groups that are supportive of lawsuits that are being
16 brought; and they might, in fact, provide funding for that
17 litigation; and they would -- if there is a recovery,
18 if -- in that case, then they would be entitled to get
19 their money back, plus probably some, you know, small
20 interest component. That also is not the type of funding
21 that the funding disclosure rule is designed to address.

22 That doesn't change the dynamics of the
23 case. It doesn't impact questions about decisions on
24 proceeding, settling, or otherwise, and is not a situation
25 where the funder has an interest in the percentage of the

1 outcome. They are simply going to get their money back
2 that they had loaned to the plaintiffs to bring the
3 proceeding.

4 The -- one of the other issues that the
5 funding dynamic raises, and again, the memo talks about
6 the situations with the different types of agreements and
7 how they -- how they work in real practice, that if there
8 could be situations in cases where there's funding
9 provided by the funder to the plaintiff or the funding is
10 provided to the law firm; and it could be a situation
11 where the law firm is getting paid by the funder and the
12 funder has a percentage of the outcome and they have input
13 into how the case is managed; or the funder could be
14 funding a portfolio of cases for the law firm, and the
15 funder might be involved in developing the cases or not,
16 but they still would have some say and control over how
17 the litigation progresses.

18 And those facts, I do think, change the
19 dynamic of the case, and more significantly change, or
20 potentially change, the dynamic of the justice system and
21 our trial courts, to the extent that the funding itself
22 becomes the reason for litigation and not the merits of
23 the individual case and the efforts of the plaintiff to
24 obtain justice and the defendant to defend themselves, and
25 that might be fine. It might be a good thing. It might

1 open up courts to new opportunities, but I think it's an
2 important really critical issue, and without disclosure,
3 it's unknown, because you don't know whether funding is
4 impacting the case or not if there's no disclosure.

5 One interesting fact, at least I found it
6 interesting, that was reflected by the -- in the
7 discussion of the federal disclosure rule, is that some
8 estimates are that at least 50 percent of the cases in IP
9 litigation are funded, where the funders have a percentage
10 interest in the outcome of the case. So this is not a
11 minor trend that's only hitting a few cases. This is a
12 very significant trend that promises to have a long-term
13 impact on our justice system.

14 I learned today that the Arizona Supreme
15 Court adopted, yesterday, a funding rule that -- or
16 funding disclosure rule that will go into effect next
17 week, and it's a dynamic that courts are addressing and
18 Legislatures are addressing, because there is a
19 significant amount of money now that is impacting the
20 process.

21 Also of note, may be relevant, is the fact
22 that funders are talking about even investing in law firms
23 generally, and in states like Arizona, where they've
24 allowed non-attorney ownership of law firms, the funders
25 are talking about purchasing an interest in the firms

1 themselves. I don't know that that would be covered by a
2 funding disclosure rule, but it does reflect a very
3 significant dynamic in our legal system that will be
4 important for, I think, this committee and the Supreme
5 Court to be knowledgeable about.

6 I think that's kind of the overlay of the
7 issue. And, Jim, did you want to add to my comments or
8 respond?

9 MR. PERDUE: Well, I don't want to add to
10 your comments. So I got -- I pulled this, and Robert's
11 been very kind to include me in this committee a little
12 bit late. John Kim, as y'all know, has -- is having some
13 issues, and he's not here to address this, and John's in a
14 little different situation because John handles more
15 commercial-oriented litigation than I do, so I begin with
16 the caveat I don't handle intellectual property cases. I
17 don't handle very, you know, super large commercial versus
18 commercial cases. And I don't want to belabor too much
19 this, out of my ignorance.

20 What Robert just said at the end I think was
21 important, is my understanding of this universe, to the
22 extent you guys have a memo here, he has cited a -- I
23 think three examples of funding agreements that were
24 obtained somehow in litigation from 2014, one for 2018,
25 and one for 2019. All of those obviously were produced by

1 court order, so in specific cases where the issue is
2 raised, there is a remedy in the judicial system for this
3 access to this.

4 The rubber meets the road, however, and I
5 told Robert this up front, is that the rule as written
6 takes very much a sledgehammer to the pen and would
7 address it basically in our discovery rules in 194 of
8 mandatory -- of an additional element to mandatory
9 disclosure in all cases. Robert was kind enough to
10 concede to me that at least the goal of the proponents of
11 this rule are not trying to get to consumer funding, which
12 he just referenced at the end, which are kind of loans
13 directly to the party, but those loaners do have an
14 interest in getting repaid out of the recovery, which
15 would make that agreement subject to the rule. And I
16 don't -- I think even ExxonMobil would concede it's
17 looking at different issues involved in a party that has
18 it in federal court over climate change litigation versus
19 somebody who is suing Exxon for an F-250 hitting it after
20 an oilfield incident. Those are just two different
21 instances, but the remedy is identical under the proposed
22 rule.

23 To the big picture question, this has been a
24 legislative issue in every state that's addressed it.
25 Robert is correct that the Federal Rules Advisory

1 Committee has been studying it for sometime. He cited you
2 multiple states that have addressed it by legislation.
3 This is legislation that has hit the Texas Legislature at
4 different iterations probably for the last multiple of
5 sessions. Again, that legislation has tried to be more
6 nuanced in addressing commercial lending for financing a
7 piece of litigation through the firm versus consumer
8 lending for a bridge or interest of somebody who has
9 suffered a -- you know, and now can't work, which, again,
10 as I understand, is not necessarily the goal. But it has
11 represented a policy enactment.

12 I think Robert can correct me. I think a
13 few states have enacted this. Maybe Jersey. Jersey is
14 unique, for multiple reasons, but, generally, this has
15 been addressed through a policy question and, thus, a
16 legislative question. In the big beautiful bill there was
17 a lot to do with this area and a massive change to the
18 taxation status on these types of loans that comes --
19 let's be fair, comes from the exact same proponents of the
20 rule for disclosure were behind the legislation, the
21 purpose of which is to deprive capital to certain entities
22 in -- in the economy. And disclosure is designed to
23 deprive capital. That is the end point.

24 So when Robert and the proponents of the
25 rule say that the rule is designed to give you disclosure

1 to let you know about the interests that are involved,
2 what you're talking about is allowing the defendant to
3 know where capital has come from that has allowed a law
4 firm that litigated against Fox News related to lies about
5 a voting company, you're talking about a defendant being
6 allowed to know where capital has come to allow a
7 defendant to allegedly move literature in the medical
8 marketplace regarding birth control issue -- birth control
9 pharmaceuticals.

10 And that's what these things do, at the end
11 of the day, is they allow the defendant to understand the
12 flow of capital to people who are making claims against
13 them and without comments about the -- especially the 2014
14 one that they apparently got, and they got it by court
15 order. These agreements are taken on by, you know, pretty
16 advanced counsel, and they end up representing a repayment
17 interest in the recovery of the lawyer, generally. I will
18 admit that I do not know what the contents are as they
19 exist in IP litigation, because I don't do IP litigation,
20 and those obviously live in federal court, and they're not
21 -- they're not really the business of the Texas Rules of
22 Civil Procedure, when you come to saying that there's a
23 bunch of funding going on in patent cases, which don't
24 exist in our system.

25 So I think that this is a -- this is a

1 nationwide push. The proponents can't deny that it is --
2 the U.S. Chamber is very much behind this push. They have
3 drafted these rules in multiple states. They have been
4 behind the push for the rule at the federal level. They
5 have been behind the push for the legislation that was
6 part of the big bill that -- and then it got pulled out in
7 the negotiations between the House and the Senate on the
8 federal level.

9 So it does constitute a policy decision when
10 it comes to capital flows. This has been an issue that
11 has been presented to the Legislature by proponents at
12 various times. We've had -- we've got a couple of more on
13 the agenda today that the policy decision was made by the
14 Legislature to put rules in the Court's decision, but
15 they're policy decisions, and the policy decision was then
16 made by the Legislature. This is an instance where the
17 proponents of the rule have not been able to win the day
18 at the Legislature, so they're bringing it straight to the
19 Court, and the map goes to show you that the proponents of
20 the rule then take successes in various states to other
21 states to support the effort in those states.

22 Let me conclude with Arizona. Robert and I
23 might agree on this, above all else. Arizona is a model
24 of a lot of things that are going wrong as far as the
25 practice of law. If there is private equity that is

1 taking ownership stakes in law firms for the purpose of
2 having ownership in the law firm, for the purposes of
3 entrepreneur litigation, Arizona has made that policy
4 decision to open that market to what it is. From my
5 perspective, it's bad for the practice of law, but even
6 Arizona, because they've -- they're redefining the Wild
7 West, as a policy decision, not by rule, but by regulation
8 in their statutory scheme, is now having to address that
9 private capital behind those ownership interests. And
10 that is the -- that is the ramification of Arizona, but
11 realizing that the law that passed in Arizona has to do
12 with regulating these entities, and much of this has to do
13 with the, quote-unquote, foreign capital.

14 We have had similar issues in the state
15 regarding BlackRock and other funds, the ability to write
16 bonds in the state, all addressed at the legislative
17 level. And so a rule that just takes to the rules of
18 procedure and mandate in every single case that it's as
19 it's written, anybody -- anybody that has an interest in
20 the recovery of -- and within the case, other than the
21 lawyer or an insurance company, must be disclosed to the
22 defendant for the defendant to assess it.

23 It doesn't change the path of litigation, by
24 the way. It just allows the defendant to have knowledge
25 that it exists, to use it then for whatever purposes it

1 feels, and I can see how that may make some sense in
2 tailored intellectual property litigation. Two of the
3 instances that are cited in the rule, in the memo, are
4 specific to patent litigation. There has been a wealth of
5 literature regarding patent trolls and the problem that
6 exists in patent litigation regarding patent trolls.
7 There has been a ton of rules to address that. There's a
8 lot of case law around it, and even then, you know, you're
9 confronted with a policy decision regarding that flow of
10 capital.

11 So a rule has not been brought to you that
12 is designed to kind of carve out consumer loans. A rule
13 has not been brought to you to kind of address the nuances
14 that even Robert concedes exist in the marketplace, a
15 marketplace of which I will be the first to admit I am not
16 familiar, but there's a lot of issues; and, ultimately, at
17 the end of the day, you're brought a political question
18 versus a procedural question; and it's this committee's
19 role to advise the Court on whether it wants to weigh in
20 on a political question versus a procedural question.

21 Robert and I have a different take on that.
22 I think it's clearly a political question. I think all of
23 the activity around it is political. I think the fact
24 that this was -- this issue was brought to the committee
25 by a -- by a lobbying group, which tells you, I mean, it

1 wasn't brought by like a judge or somebody that confronted
2 it in state court, district court litigation in the state
3 of Texas.

4 Robert might be surprised at how much we may
5 agree about the devil in the details of specific funding
6 agreements. But since I've never entered one, I wouldn't
7 know. But that's -- those are certainly the contrary
8 points to the memo, and Robert was kind enough to put a
9 lot of those contrary points in his memo to offer you a
10 balanced memo on the issues involved with it. I wish John
11 was here. For a lot of reasons I wish John was here, but
12 that would be my reply.

13 MR. LEVY: If I could just clarify a couple
14 of things. On Arizona, the memo talks about Arizona, and
15 they do have this proposal where they're experimenting
16 with non-attorney ownership, and there are discussions
17 about disclosure relative to that, but the one thing that
18 was not noted in the memo is that the Supreme Court
19 yesterday adopted a separate rule that goes into effect in
20 January that provides for disclosure. It does include
21 language that exempts loans, contracts or arrangements to
22 pay expenses that require repayment, regardless of the
23 outcome, or loans for arrangements for personal needs or
24 medical treatment of a party, unless the purpose for doing
25 so is to enable the pursuit of the claim. So those types

1 of provisions would exempt out the consumer lending issue.

2 And one other point that I do think that's
3 relevant, or two other points. One is, you're correct,
4 Jim is correct, in terms of the courts that have ordered
5 disclosure, and one of the challenges is that courts that
6 considered this issue without a rule come to very
7 different results. So some courts that have considered
8 request for disclosure have denied those requests because
9 they focus on discoverability and the fact that the
10 funding agreements are not pertinent to the issues in
11 dispute in the case; and, therefore, they're not relevant
12 and discoverable under discovery rules. And going beyond
13 that, there's not clarity in many state court rules to
14 provide the courts with guidance on that, and that's one
15 of the drivers for having a rule on disclosure, is so
16 courts understand what the standard would be and how to
17 make that determination.

18 Another issue is if -- I wasn't involved in
19 this. Some here might recall the discussion that took
20 place many years ago on the debate over disclosure of
21 insurance agreements, and no doubt the insurance industry
22 was very vociferous in arguing against that, and
23 corporate -- or defendant companies were probably also
24 opposed to that fact, because they knew that if somebody
25 had knowledge of how much money is available to settle a

1 case in terms of the amount of insurance, then that's
2 going to focus the plaintiff on getting that amount of
3 money in settlement, and it changes the dynamic of
4 settlement discussions. But the argument was made that
5 disclosure is important, and the Court adopted a rule
6 doing that, and that was a decision that was made by the
7 Court, and it's now standard practice that parties have to
8 disclose insurance and the amount of insurance.

9 So there are, I think, policy reasons
10 involved, but, fundamentally, this is a procedural
11 question that I think I suggested the Court is well-suited
12 to address and should be the first place to consider an
13 issue like this.

14 CHAIR TRACY CHRISTOPHER: Could I ask,
15 Robert, if this rule is passed, what would a defendant do
16 with it once they get the agreement? How does it benefit
17 the defendant?

18 MR. LEVY: How does it benefit? The fact
19 that they are able to understand the dynamic that would be
20 involved in -- let's say you have a multiplaintiff case
21 and you've got multiple defendants and you're making a
22 decision about how to assess the case and make a
23 settlement offer, how to understand what money would be
24 necessary that if the plaintiff has, you know, a
25 contingency fee, which you're going to assume, and then on

1 top of that, whereas first -- excuse me, as first dollars,
2 you're going to have another 10 to 20 percent that go to
3 the funder, plus the funder has the ability to influence
4 the case by saying that they're not -- they have the right
5 to approve settlement, or they have the right to withhold
6 further funding, then that will have a significant impact
7 on a defendant's ability to assess the case and whether it
8 can be settled.

9 And, similarly, if you're looking at
10 situations where the funder is -- requires a calculation
11 of the value of nonmonetary relief, then that will help
12 the defendant understand can they propose a result or
13 settlement that would involve, you know, an agreed
14 injunction or an agreement not to use certain technology
15 or an agreement to pay into a lifetime trust versus a
16 payment now, and those issues are very important to
17 understand as you try to make a determination of how to
18 progress the case.

19 Additionally, I think that it will also be
20 important, and for the court as well, to also understand
21 what other parties are involved that have a direct stake
22 in the outcome. That can have a significant impact on the
23 potential that there could be a conflict with the court.
24 One of the issues -- and we discussed it a little bit in
25 November, but one of the issues that's important is, as

1 these funding dynamics become more mainstream, there are
2 retirement funds that are going to be investing in these
3 proceedings. There are holding companies and others that
4 are realizing that there is a significant return potential
5 in funding litigation, and as a result, there will be more
6 and more kind of mainstream companies engaged in this, and
7 it is certainly possible that a court could have a
8 financial interest in a company that is invested in -- in
9 funding, and they would not know that if there was not
10 disclosure.

11 CHAIR TRACY CHRISTOPHER: Yes, Justice
12 Kelly.

13 HONORABLE PETER KELLY: With regard to that
14 last issue, there are insurance funds and pension funds.
15 They can select which funds they invest in, and they can
16 rule out, say, any green energy solutions, like we have in
17 Texas, so you could easily get around that by statute or
18 rule-making for selection of pension funds so you don't
19 have a conflict of interest, the judiciary wouldn't.

20 A couple of points. First, they want to
21 understand it, the funding dynamics, so they can exploit
22 the dynamics. It's not out of the kindness of the heart
23 that Exxon, CenterPoint, and Koch Industries -- and I
24 could go on -- want to understand this. They want to
25 exploit the fact that there might be other financial

1 considerations.

2 Secondly, there's no real -- yes, situations
3 do arise where cases become unseizable, but how often
4 does that really happen? There's not really any -- again,
5 this is legislation or rule-making by anecdote and not by
6 any considered empirical survey of what -- how this is
7 affecting the civil justice system at all. Jim was very
8 right on point saying this is a political policy issue.
9 If you want to get deep into it, it's not just the flow of
10 capital. It's the existence of capital itself in that the
11 defendants, these industries that are interested in
12 acquiring disclosure of the litigation funding, they're in
13 it for the long haul. As it stands now, on the
14 plaintiff's side, the plaintiffs are not in it for the
15 long haul. They're one-shot plaintiffs. There was one
16 accident, one poisoning, one train derailment, you know,
17 that they're focused on. So once the plaintiffs are
18 compensated, they have no political interest in continuing
19 to fight the battle.

20 However, the defendants, the corporate
21 defendants, the -- or as they're now called, the
22 malefactors of great wealth, do have an interest in
23 distorting the -- a long-term interest in distorting and
24 exploiting the civil justice system in their favor.

25 What this would do, for better or worse,

1 what this is doing is actually creating long-term players
2 that have a continued interest in reforming the civil
3 justice system in their favor, so the first time you would
4 have a capital counterweight doing the lobbying, trying to
5 counteract the long-term players on the defense side. So
6 this really is a deep policy, political issue, that is
7 probably well beyond the scope of the rule-making
8 authority of the Texas Supreme Court. Under the
9 Constitution, it's for the efficient -- I pulled up the
10 quote earlier. It's on the Supreme Court website, right,
11 "responsible for the efficient administration, shall enact
12 rules necessary for the efficient and uniform
13 administration of justice of the various courts."

14 Doing something so deeply political and
15 deeply -- it's actually affecting the economic structure
16 of the country, is so far beyond the efficient
17 administration of the judicial system that it can only be
18 considered beyond the rule-making authority of the Court.

19 CHAIR TRACY CHRISTOPHER: Yes, Justice Gray.

20 HONORABLE TOM GRAY: I think it's important
21 to distinguish what some of the other states' involvement
22 in this is with regard to the topic. I start from the
23 premise that information has value. Some of these states
24 are regulating the industry of litigation funding, what
25 they can fund, disclosures mechanism in the industry. I

1 think that is a policy question that we should not involve
2 the judicial branch in, but as the memo talks about and as
3 Robert has made clear in his presentation, and I think as
4 well as what Jim had to add to it and Peter, that the --
5 what we're talking about for the Supreme Court is the
6 disclosure of information inside litigation, existing
7 litigation, and whether or not information is going to be
8 disclosed about the other side, the way it is being
9 funded.

10 To me -- and I noticed that Robert got to
11 this towards the end. I would have made it more towards
12 the front of the presentation. To me, this is the flip
13 side of the coin about discoverability of insurance. The
14 arguments that were made back in the beginning, and I'm
15 trying to remember what the -- Stowers. Stowers is
16 probably one of the most famous cases in personal injury
17 and all of Texas law, because it is about whether or
18 not -- what the policy limits are and whether or not you
19 can then go get into the insurance company's pocket,
20 because they didn't reasonably settle a case.

21 To me, this is the flip side of that coin
22 where the plaintiffs wanted to know what the insurance
23 policy is. The defendants are now wanting to know how the
24 plaintiffs are funding the litigation. And in that
25 regard, I think the proposal is actually a -- kind of a

1 mid-ground. It doesn't require the disclosure of the
2 agreement. It just -- it's a summary, basically, as I
3 understand it, a disclosure of what the agreement covers,
4 and then if there is something more that is relevant to
5 different aspects of the litigation, then the parties have
6 a right to seek more and potentially obtain more through a
7 court order.

8 The one area of this that I may have touched
9 on before I left the court was in a -- what would be
10 characterized as patent troll litigation. The issue in
11 that case was all about the attorney's fees and the
12 sanctions that had been imposed upon the plaintiff's
13 lawyers and potentially whoever was standing behind the
14 lawyers, and it was a -- I mean, that is a relevant
15 question if you have someone else that's funding the
16 litigation that you would get access to that information
17 through this disclosure.

18 This seems to be a disclosure in discovery,
19 a mid-ground that is appropriate for us to wade into, not
20 the policy decision about whether litigation funding is
21 good or bad or how we're going to regulate it. We don't
22 have a, you know, Department of Insurance regulatory body
23 to deal with that, but it certainly is a financing issue
24 that the Legislature may want to look at, but for the
25 discoverability of this information in litigation, I don't

1 see it as outside the Court's purview, although I am a
2 proponent of we shouldn't be writing the rules at all, as
3 I told Nathan when I was first asked to be on this
4 committee. And he said, "I'd heard that. That's why we
5 want you on the committee," but he probably regrets that
6 now.

7 But I think it is something that we need to
8 address, because it is about discoverability, and probably
9 the most compelling aspect to me of it is that it should
10 not be left to individual courts, geographically,
11 politically, nature of litigation. It needs to be
12 something that is uniform across the state, across
13 litigants, and as I understand from the presentations that
14 have been made, it will be an affirmative disclosure in
15 relatively -- a relatively small number of cases in Texas.
16 By far and away, the majority of cases will have no third
17 party funding, and it's very -- the rule would be very
18 easily complied with by that statement.

19 CHAIR TRACY CHRISTOPHER: All right. Any
20 other discussion? Kennon.

21 MS. WOOTEN: I guess I should start by
22 saying I wasn't a part of the conversation about insurance
23 agreements, so there might be some nuances I'm missing,
24 but it seems to me like the question is are these things
25 within the scope of discovery and that the test is -- is

1 there in the rules, right, is it relevant or reasonably
2 calculated to lead to the discovery of admissible
3 evidence, and the rule on insurance agreements
4 specifically refers to agreements under which a person may
5 be liable to satisfy part or all of the judgment rendered,
6 which is inherently within the scope of discovery, because
7 it goes right to the judgment and what happens in that
8 case. This is harder to assess for me, because we don't
9 know necessarily what the agreements say, and so I'm
10 struggling with the concept because of that scope of
11 discovery guardrail that I'm thinking should apply if it's
12 going to be a mandatory disclosure.

13 CHAIR TRACY CHRISTOPHER: Alistair.

14 MR. DAWSON: So to the point about it helps
15 settlement, I have a hard time accepting that, because, my
16 understanding -- I've never had a litigation funding
17 agreement in any of my cases. My understanding is that
18 they are there to fund expenses associated with the
19 lawsuit, expert fees and things like that, and you --
20 almost all of the cases that I've been involved in, the
21 plaintiff lets you know what their -- what they've got in
22 costs in the case as part of any settlement discussion.
23 If they've got 5 million in costs, they let the other side
24 know that, so that they can, you know, include that in
25 their settlement discussions. So I don't see how giving

1 them the funding agreement, which is essentially just
2 paying for those costs, assists in settlement, because
3 you're already going to provide that information.

4 And I don't know if this is analogous or
5 not, but I'll throw it out there, since it's Friday before
6 a holiday weekend, I don't think we require plaintiffs to
7 share referral agreements. Jim and I could have a
8 referral agreement, because he's got so much more money
9 than me, he pays all of the costs, and that's not
10 discoverable, nor should be discoverable. Who's paying --
11 as between Jim and I how we're dividing up costs is not
12 really relevant to any issue in the case. What's relevant
13 is what the costs are for purposes of the settlement or
14 what you can recover at trial, but not who's paying for
15 it. So I don't see how it really facilitates anything in
16 the case, and even though I have no experience with it, I
17 am a bit concerned that it could be used for improper
18 purposes, and I don't really know what those are, but I
19 just -- I worry about that.

20 CHAIR TRACY CHRISTOPHER: Do we have other
21 people who would like to weigh in? Yes, Pete.

22 MR. SCHENKKAN: There do seem to be
23 acknowledged across the board, both among those who think
24 the Texas Supreme Court should consider adopting a rule on
25 this subject and those who don't, a recognition that there

1 is a big picture debate over the balance of power in major
2 high stakes litigation and that this rule would affect
3 that balance and it would shift it in one particular
4 direction. I think that is all you need to know to know
5 that the Court should look very closely at the benefits
6 and risks of associating itself with taking a stance that
7 could be perceived as taking a side in that matter of
8 balance of power, when it is not necessary to the part of
9 the system that the Texas Supreme Court is in sole and
10 ultimate charge of, and I believe that that part of the
11 Court's duties and powers are best exercised -- and I'm
12 only hesitating slightly when I say "only exercised" in
13 making sure that the rules of professional responsibility
14 are appropriate in this regard.

15 If there are occasional funding agreements
16 that impair the independence of the lawyer in representing
17 his client, that's a problem that the Texas Supreme Court
18 has the power and the duty to see what it -- to think
19 about what can it do to prevent those abuses. That's not
20 part of discovery in an individual lawsuit. It shouldn't
21 be. We're just weaponizing a counterpart abuse.

22 So I'm very much against our going down this
23 road at all. I think the -- I think the Court's -- if the
24 Court perceives that there is a problem of significant
25 numbers of lawyers or lawyers in certain contexts of

1 certain kinds of lawsuits and certain kinds of funding
2 agreements yielding their independence and their
3 responsibility to their clients, as opposed to the people
4 they have entered into funding agreements with, or their
5 clients have entered into funding agreements with, the
6 Court should investigate that possibility and see what
7 amendments, if any, to the rules of professional
8 responsibility are appropriate, but it should stay out of
9 making this -- adding this into the business of discovery
10 in major litigation.

11 CHAIR TRACY CHRISTOPHER: Lonny.

12 PROFESSOR HOFFMAN: Since there's not a
13 question exactly on the table other than what do you
14 think, I'm not sure what the Court is asking here for our
15 input, but I can judge by the fact that you're letting
16 this conversation go on that the Court must want to have a
17 general sense of the room of how to think about this, so
18 if that's all you're asking, you can count me on the camp
19 of we should stay as far away from this as possible. I'm
20 happy to say more.

21 CHAIR TRACY CHRISTOPHER: No, go ahead, give
22 your explanation on why you think that.

23 PROFESSOR HOFFMAN: Sure. We have a problem
24 in this country with our litigation system that everyone
25 knows. It is that it is too expensive for most people.

1 There is a small segment that has figured out a way to fix
2 that problem, but the case has to be worth something
3 for -- for litigation funding, for capital to be willing
4 to go there, and so it is amazing that we are spending any
5 time thinking about how to take away capital
6 possibilities, when there's one small sliver that has
7 actually figured out how to address that. This is not
8 going to fix access to justice problems whatsoever, to
9 keep it -- to either keep it, expand it, or eliminate it.

10 But, Robert, you had a line where you talked
11 about the notion of -- I wish I had remembered your line,
12 but it was like something about how the money skewing the
13 litigation system, and I'm like, are you kidding me? I
14 mean, that's everything. There isn't anything that isn't
15 about money, and our entire system is designed for your
16 guys, always, and this is the smallest of smallest of
17 efforts that have been made, and they're enriching a very
18 small number of people, and then -- and then the only
19 other point I'll add is that the points for disclosure
20 are -- I tried to listen as carefully as I could to kind
21 of hear what it is that proponents want, and I just don't
22 hear it. I just don't hear anything that sounds credible.

23 I mean, you could -- they want disclosure
24 because they want to deter people from participating, the
25 same reason that the Tillis bill taxes at 40 percent,

1 because the goal here isn't disclosure. It's to end
2 litigation funding, because there's a source that makes
3 those litigations possible. So yeah.

4 CHAIR TRACY CHRISTOPHER: Going to the
5 proposed rule that your committee has drafted, but you
6 have already agreed that it's too broad, because it
7 encompasses more things than you think need to be done in
8 14a(a); is that correct, Robert?

9 MR. LEVY: I think that's fair. We had a
10 prior version of the rule that was in our October -- or
11 our October memo. This one was a little bit cleaner, but
12 it -- but I will agree that it would be beneficial to
13 carve out the consumer lending and the loans that would be
14 repaid with interest, but not a percentage of the outcome.

15 And I do want to point out that the language
16 in the memo from this week, that was not voted on by the
17 subcommittee, so I don't want to represent that that's the
18 subcommittee's view of what the rule should say. In the
19 October memo, we did vote on it, and there was a proposed
20 rule included, but it was there at the request of the
21 Chair that we -- that we come up with the rule language,
22 even if we didn't recommend that it be adopted, and so
23 that was the basis for the version in the October memo.

24 CHAIR TRACY CHRISTOPHER: Is there a reason
25 that you didn't just put it in mandatory disclosures?

1 Why, you know, if there was a such a rule, why wouldn't it
2 be there rather than in some standalone rule?

3 MR. LEVY: Yes. And I say this a little
4 chagrinned. I -- I thought that it -- to put it in Rule
5 14 because that was within the subcommittee's section, but
6 it probably would fit better in the mandatory disclosure
7 rules, but I didn't want to tread into anyone else's
8 jurisdiction.

9 CHAIR TRACY CHRISTOPHER: Okay. So if it
10 was in the mandatory disclosure rules, then (b), (c), (d),
11 and (e) would not be in play. What we would instead focus
12 on is the language in (a) --

13 MR. LEVY: Correct.

14 CHAIR TRACY CHRISTOPHER: -- that you
15 believe that we should have some changes to it with
16 respect to consumer funding, I guess is the way we
17 would --

18 MR. LEVY: Correct.

19 CHAIR TRACY CHRISTOPHER: -- call it.

20 MR. LEVY: I think it could be drafted in a
21 broader sense in that any -- it would not include loans to
22 plaintiffs where the repayment of the loan and interest is
23 the subject of the agreement, so that it wouldn't -- you
24 know, that should exclude out consumer loans, and it would
25 exclude situations where somebody is going to a bank or

1 going to an organization that would be providing funds for
2 the lawsuit that are simply going to get repaid.

3 CHAIR TRACY CHRISTOPHER: Yes, Chris.

4 MR. PORTER: I hear that, and it all seems
5 the same to me. The bottom line is who's funding
6 litigation, whether it be a bank or whether it be an uncle
7 or whether it be, you know, the neighbor down the street,
8 right, or a funder, right. If the point is we want to get
9 to the source of funding of the litigation, I'm not sure
10 how we can draw these distinctions and draw these
11 carve-outs relating to the course that you've mentioned.
12 And so, to me, it goes back to the fundamental point of do
13 we really care or need to know who is actually funding the
14 litigation.

15 MR. LEVY: So if I could address that. I
16 think the answer is very much yes, and, you know, for a
17 number of reasons. One, it goes back to something that
18 Kennon was talking about. I don't think that insurance
19 agreements are discoverable in a litigation because they
20 don't relate to the claims or defenses, and they certainly
21 don't relate to any information that could be used before
22 the finder of fact. They are important, and that's why it
23 was 1999 when the Texas rules were amended to require
24 disclosure of past of insurance agreements, because they
25 do significantly impact the economics of the case itself.

1 If you are bringing a lawsuit against a
2 party who doesn't have assets to satisfy a judgment,
3 you're going to want to discover that, but generally, you
4 would discover that after you get a judgment, not before.
5 That -- because it doesn't relate to the merits of the
6 case, and, similarly, in this type of situation, the --
7 the importance is the ability to gauge what the interests
8 are in the case and also who's controlling the case.

9 In the consumer loan situation, for example,
10 you don't know. You don't really care because the lender
11 isn't going to have the ability to tell the plaintiff
12 settle or don't settle, but if you have an agreement where
13 the funder does have that right that has to be consulted
14 whenever there's a potential settlement offer, that is a
15 definite change; and, you know, for example, if a court
16 says, "I want all of the parties at mediation," and that
17 includes the insurance company, because they are
18 decision-makers in whether it's to settle, that makes
19 sense, and judges often require insurance company
20 representatives with authority to appear at mediations
21 because they know the case cannot settle without their
22 involvement.

23 In this situation, if you have a settlement
24 discussion and the funder has a say in the outcome and
25 they're not at the mediation, case is very likely not

1 going to settle. And in response to Alistair's point, I
2 think if you had a funded case, you would know it, and you
3 would know how significantly it changes the dynamic of the
4 case, because it does hugely change who you talk to and
5 what the -- how to craft an outcome. And the -- another,
6 I think, significant issue is, you know, in talking about
7 what this is all about, there are certainly those that are
8 trying to -- that would say there should not be funding,
9 and there are arguments to be made as to why there
10 shouldn't be funding and arguments to be made as to why
11 there should be funding, including allowing access to
12 courts. But that's not what this proposal is talking
13 about.

14 It's talking about disclosure of the
15 existence of funding and what that -- what those
16 agreements provide, and that should not and would not
17 change whether funding is offered, available. It doesn't
18 tell a funder that you can't be in the case. It doesn't
19 do anything to limit the ability of somebody to get
20 capital and participate. The funders don't want to
21 disclose that information, because they have -- they're
22 able to manage and control and influence the outcome
23 without the defendants knowing about it. It gives them a
24 strategic advantage, but the fact that disclosure would be
25 available, again, is a similar context of the insurance

1 agreement situation.

2 And I did want to make one other point. In
3 the discussion about the ethical issues Pete made, that
4 there is actually -- and Kennon pointed this out in the
5 November discussion. There is a rule, it's 1.08, I think
6 it's (f) in Texas, that does have limits on the ability of
7 a lawyer to accept funding from a source other than the
8 plaintiff, and there are expectations on lawyers regarding
9 whether they can do it or not. The challenge is -- and
10 this is a broader challenge, not one that this rule would
11 address, is there are -- I think, or believe, there are
12 situations where plaintiffs aren't even aware of funding,
13 because if a plaintiff's lawyer has portfolio funding from
14 a funder, and the funder is not taking an interest in the
15 specific case, but in the portfolio of cases, they are
16 very involved and they care about the outcome and they're
17 monitoring the outcome, but the individual plaintiff
18 doesn't know. So the individual plaintiff's decision
19 whether to settle or not is really not relevant, because
20 the issue is caught up in the broad portfolio cases.

21 I don't know what the answer is to that.
22 This rule I don't think would solve that, but it would
23 provide transparency, at least that if there was such a
24 funding agreement, it would be known.

25 MR. PORTER: If I could briefly just

1 respond, just briefly. Respectfully, I'm not sure I
2 really heard what the difference is or if you necessarily
3 addressed what I was saying, because ultimately under that
4 logic, my neighbor down the street would be entitled to
5 come sit in the mediation because he or she would have --
6 he or she would be getting paid back, depending on the
7 outcome of the case --

8 MR. LEVY: Again, that's --

9 MR. PORTER: -- but setting that aside, I
10 think the difference between -- I understand the point
11 about the insurance agreements and making sure that people
12 are able to understand what could be there, are we going
13 after a party that would actually have some funds, is
14 there going to be a "there" there, but this is, again,
15 you've said the other side of the coin, and I agree with
16 you, but in a completely different context, because this
17 is the large part the plaintiff would be bringing this
18 case, and whether and to what extent that plaintiff has
19 funding to continue their -- to fund their lawsuit and
20 press it forward and prosecute that lawsuit, I'm not sure
21 what significance or what business that would be
22 necessarily of the defendant.

23 Again, I'm not saying this isn't something
24 that we should do. I'm just really not hearing your
25 compelling reason for it, and the point about the

1 insurance doesn't really move me, because, again,
2 that's -- we're talking about something completely
3 different. This is literally talking about a typically --
4 typically, sometimes they do have defense side funding,
5 but typically we're talking about plaintiff's side funding
6 and funders who are helping people to go forth and
7 prosecute their cases. I just don't understand why
8 defendant would necessarily need to know that information.

9 But I -- I'll be quiet for the rest of the
10 day, so we can go get out here and go watch Texas beat up
11 on Ohio tomorrow.

12 CHAIR TRACY CHRISTOPHER: Marcy.

13 MS. GREER: So my understanding is that the
14 litigation funding agreements cannot -- a plaintiff's
15 attorney or an attorney who is relying on them cannot give
16 away the control to a funder, and there is a difference in
17 insurance, because an insurance company needs to be at the
18 settlement table because the money is not going to come
19 out of the insurance policy unless the insurance company
20 agrees to do that; whereas, in litigation funding, they're
21 funding the litigation as it goes. They're not funding a
22 pot of money from which recovery can be made, and so it is
23 a little bit of a different animal.

24 I recall John Kim saying that he would never
25 enter into an agreement -- I've heard several plaintiffs

1 lawyers say this -- that would concede control over the
2 settlement.

3 MR. LEVY: That, actually, in looking at the
4 few agreements that have been disclosed, unfortunately,
5 that's not what they say. They give the funder
6 significant influence and input and, in some cases, veto
7 rights on settlement.

8 CHAIR TRACY CHRISTOPHER: But do they have
9 the same disciplinary rule that we have that would prevent
10 that?

11 MR. LEVY: Well, I mean, it is an ABA --
12 it's also an ABA rule. I don't know what -- in each state
13 what they have applied. Jim actually asked an interesting
14 question with respect to, you know, what state laws apply
15 to the funding agreement themselves. That's a whole
16 different discussion, but the agreements so far have --
17 give funders significant power. One specific power -- and
18 I don't blame them for doing this -- is they fund
19 entrenches, and so they'll give you a hundred thousand
20 dollars and then, you know, half a million and then more
21 money as the case progresses; and if they are not happy,
22 they have the right to pull the funding, and including if
23 they're not happy with how some of the cases are settling.
24 And -- but other cases, they have even more specific -- as
25 the memo points out, they have specific rights with

1 respect to settlement, how it's conducted, and what
2 monetary terms versus nonmonetary terms, and so those
3 issues are clearly part of funding agreements today.

4 MS. GREER: But, again, I think the veto
5 right would transgress an ethical boundary.

6 MR. LEVY: Well, which one -- which ethical
7 boundary?

8 MS. GREER: Because the lawyer is ceding
9 control, professional judgment, and representing fiduciary
10 duty to the client by allowing someone else to have veto
11 power. I mean, again, in the insurance context it's
12 different because the insurance company has the full --

13 MR. LEVY: I'm not sure that that duty is as
14 clearly stated, particularly if -- if in a situation where
15 a plaintiff signs off on the agreement, but even if they
16 don't, I'm not sure -- I'm not sure that issue is really
17 governing how those agreements are drafted, and we don't
18 know otherwise, because nobody sees them.

19 CHAIR TRACY CHRISTOPHER: Well, the few --
20 the one Texas case that you cited apparently didn't
21 contain any bad provisions in it. So perhaps we're better
22 in Texas.

23 MR. LEVY: I hope so.

24 HONORABLE PETER KELLY: Was that John Kim's
25 agreement?

1 MR. LEVY: I don't think his was disclosed.

2 CHAIR TRACY CHRISTOPHER: Pete, and then
3 Richard.

4 MR. SCHENKKAN: Back to the point about the
5 Texas Supreme Court sticking to the core part of its
6 responsibilities, if it is inadequately clear from the
7 rules of professional responsibility in Texas at this
8 point, the Court should certainly consider making it clear
9 that the lawyer for a plaintiff must disclose to the
10 plaintiff any funding agreement and its potential
11 implications on the lawyer's control of his representation
12 of the plaintiff; and if it's not clear at this point
13 that, as Marcy just suggested, crosses the line on that,
14 that a funding agreement that gives the funder control
15 over whether to settle crosses that line, we should amend
16 the rules of professional responsibility accordingly.
17 Otherwise, we should stay the hell out of this.

18 CHAIR TRACY CHRISTOPHER: Richard.

19 MR. ORSINGER: I wanted to say two things.
20 If we move this out of 14 into mandatory disclosures, I'm
21 concerned about the protective order provision. I can see
22 that if we're going to require this disclosure to the
23 defendant in a case, it should be limited to the
24 defendant. The court should be able to curtail that, or
25 maybe it ought to be written into the rule that it's only

1 to go to the defendant. If we move it to mandatory
2 disclosures and leave behind 14c on protective orders,
3 that would concern me.

4 Another thing is, is there any follow-up
5 discovery to the disclosure of the agreement? Like if the
6 agreement is between XYZ, LLC, it doesn't tell you who
7 they are. You just know the terms that some unknown
8 entity has some potential control. Is there any follow-up
9 discovery? I would have that question, but I'm sitting
10 here wondering, you know, what does this result in?
11 Perhaps the defendant's lawyer could file a grievance
12 against the plaintiff's lawyer for having traded away
13 control over the claim. Is that what this is? Are we
14 attempting to use the defense attorney to regulate the
15 relationship between the plaintiff's lawyer and the
16 client?

17 Otherwise, I don't see how this has any
18 value other than the discussions we've had about control
19 of capital in our society, which is way beyond the scope
20 of the Rules of Civil Procedure, it seems to me, but I
21 just don't know what this information is for. It's not
22 admissible in the case, and if it does show an
23 irregularity between the plaintiff's lawyer and the
24 plaintiff's client, it's the defense's -- the defense
25 attorney is the last one I would want to get in the middle

1 of that relationship. So I'm just very uncomfortable. If
2 this was a statute where the Legislature was establishing
3 public policy, you know, we would probably have to live
4 with it, unless there's some First Amendment right here,
5 but, boy, this doesn't look like a rule of procedure to
6 me.

7 CHAIR TRACY CHRISTOPHER: All right. Any
8 other general comments?

9 All right. No more general comments. We're
10 going to take a vote on whether we -- not as to the
11 specific language at this point, but whether we think
12 there should be a disclosure of these type of agreements
13 in our rules. All in favor, raise your hand. That's
14 five.

15 All opposed? That's 14, the Chair not
16 voting. All right. Okay, we're good.

17 MR. LEVY: If I --

18 CHAIR TRACY CHRISTOPHER: We'll move on to
19 our next subject, which is confidential identity in court
20 proceedings. And that's you, Jim?

21 MR. PERDUE: No.

22 MR. SCHENKKAN: It's me.

23 CHAIR TRACY CHRISTOPHER: It's Pete.

24 MR. PERDUE: I'm very blessed to have, I
25 will say, the best vice-chair in all of this committee.

Exhibit C

Rules Suggestion of 11 Attorneys and Advisors
Regarding Third Party Litigation Funding

October 15, 2025

October 15, 2025

Via E-Mail: RulesCommittee_Secretary@ao.uscourts.gov

Judicial Conference of the United States
Committee on Rules of Practice and Procedure
Advisory Committee on Civil Rules
Attention: Third-Party Litigation Funding Subcommittee

Re: Third Party Litigation Funding

We are a group of attorneys and advisors who practice regularly in the commercial litigation funding field.¹ Our firms routinely represent litigation funders, funded parties, law firms, insurers and insurance brokers, institutional investors, creditors, and other interested parties with respect to commercial litigation funding transactions. Individually, we have served in legal and business capacities internally at litigation funders, as fund managers ourselves, as well as in other related roles. Collectively, we have been involved in structuring, underwriting, negotiating, documenting, and continuing to advise on hundreds of transactions, including investments made by every major commercial litigation funder active in the United States, in every major type of commercial dispute.

We accordingly have substantial and direct experience with all facets of commercial litigation funding.² We provide the following information to the Advisory Committee in connection with its Third-Party Litigation Funding Subcommittee's ongoing study of issues related to litigation funding disclosure.

The Passive Nature of Commercial Litigation Funding

Commercial litigation funding is a passive investment business. In its Rules Suggestion (the "*LCJ Suggestion*"), Lawyers for Civil Justice advocates for broad, automatic litigation funding disclosure rules on the basis that "TPLF agreements give non-party funders specific mechanisms of control or significant influence over litigation and settlement decisions."³ We disagree.

LCJ is wrong for several legal and factual reasons. These range from unequivocal and binding contractual terms, to ethical guardrails, to practical realities.

1. Contractual Terms. Passivity is a central pillar of for-profit third-party commercial litigation funding. Although funding arrangements are bespoke in nature, they originate from form agreements containing standard terms, conditions, and provisions. We regularly draft and negotiate such agreements. They typically contain multiple provisions cementing the funders' passivity, including broad disclaimers of control recognizing (a) the funded party's ability to settle unilaterally, including with the advice of their counsel, (b) non-interference with the attorney-client relationship, and (c) the controlling nature of counsel's ethical obligations in the event of any conflict. Notably, these provisions are rarely subject

¹ Please see the footnotes to our signature blocks for our relevant industry experience and recognitions.

² Our comments are limited to for-profit, non-recourse, third-party commercial litigation funding.

³ Lawyers for Civil Justice, [Rules Suggestion](#), 25-CV-L, at 2.

to any substantive negotiation, given the parties' mutual understanding from the outset—and affirmation throughout the investment process—that the funding will be passive in nature.

With respect to the balance of agreement terms, a commitment to fund litigation is not *carte blanche*.⁴ Rather, funding contracts reflect a negotiated allocation of economic risk between litigants, capital providers, and/or counsel. This allocation is principally embodied in terms such as fee and expense budgets,⁵ proceeds waterfalls, and mechanisms to monetize non-monetary outcomes.⁶ It is also reflected in a litigant's obligation to pursue meritorious claims in good faith, an essential term in light of funders' lack of control rights.⁷

We therefore dispute LCJ's assertions that litigation funders are “directing” or “have significant control over litigation decisions,”⁸ and that “boilerplate disavowals of funder control” are associated with “federal judges and litigants [being] deceived.”⁹ Control disclaimers are material terms of litigation funding agreements. Moreover, a contractual requirement to act within the bounds of an economic agreement does not constitute “control.”¹⁰ And even where a funder has the ability to terminate funding in the event of breach, the exercise of termination rights is rare. That is because the cessation of funding could result in the dismissal of or the inability to pursue the action, and the resulting loss of

⁴ All commercial litigation funders with meaningful assets under management are institutionally-backed and government-regulated managers that oversee diversified portfolios of legal assets. They must maintain strict policies to prudently commit their assets under management, pursuant to fiduciary and risk-management obligations.

⁵ It is common for budgets to be staged over case milestones. Budgets are negotiated with input from law firms and outside vendors and can be directly correlated with case strategy. For example, budgets are influenced by factors such as the contemplated types of expert witnesses and other costs associated with the legal theories to be pursued, the estimated number of depositions to be taken, and whether to pursue certain defendants and claims.

⁶ If the litigation results in non-monetary proceeds that benefit the funded party, it is reasonable for the funding party to be compensated for that result. Funders routinely underwrite the potential for a case to resolve for non-monetary consideration. They will typically decline to invest in a situation where such potential is high, unless the non-monetary consideration can be monetized in a straightforward way.

⁷ This is an important protection against moral hazard, particularly since commercial litigation funders increasingly provide working capital and other funds to litigants that are not used for the ongoing payment of legal fees and expenses. See [The Westfleet Insider, 2024 Litigation Finance Market Report](#) (“Notably, allocations to monetization deals increased substantially, and we have observed a steady trend in this regard for the last four years”). Absent a litigant's obligation to pursue meritorious claims in good faith, a funder would face unacceptable risk of bad faith discontinuance of the action.

⁸ LCJ Suggestion at 5.

⁹ LCJ Suggestion at 16.

¹⁰ The most common sources of tension in funding arrangements relate to budget overage or working capital demands. Funders frequently receive requests to make accommodations or amend agreements in response to changing circumstances, such as unanticipatedly high legal fees and expenses. They are not always able to accommodate such requests for various reasons.

the funder's investment.¹¹ The unwarranted exercise of termination rights would also be damaging to a funder's reputation in the marketplace.

LCJ's allegations are also belied by our experience. We have been involved in hundreds of commercial litigation finance transactions¹² and are not aware of funders having an "indirect—but still powerful—influence"¹³ on cases. Tellingly, as opposed to presenting case studies that are actually representative of the U.S. commercial litigation funding market, the LCJ Suggestion is supported by an odd assortment of stale, foreign, and/or plainly idiosyncratic agreements.¹⁴ These agreements do not reflect prevailing norms in the U.S. commercial litigation funding market. Nor do their actual terms support LCJ's arguments.¹⁵

2. Ethical Guardrails. Litigation funding agreements must coexist with legal retention agreements. Ethical rules prevent funders from interfering with the attorney-client relationship. In third-party payor scenarios, Rule of Professional Conduct 1.8(f) explicitly prohibits "interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Attorneys must also comply with the terms of protective orders as set forth below.

3. Practical Realities. With limited exceptions (such as post-judgment scenarios and outright claim assignments), funded parties steadfastly insist on maintaining full control of their claims.¹⁶ Furthermore, funders, litigants, and counsel are acutely aware of the scrutiny on the litigation funding industry, due to efforts by LCJ and similar interest groups. This operates as an additional check. Funders must be extremely mindful of designing their arrangements to fit properly within the sacrosanct framework of the attorney-client

¹¹ Litigation investing is generally regarded as a high-risk asset class. Passivity compounds that risk, particularly in situations involving the prototypical financed litigant, which lacks the financial wherewithal to self-fund its claims. Therefore, the litigant is also unlikely to have resources available to recompense the funder for damages in the event of breach (particularly if the breach leads to an unsuccessful case outcome).

¹² Our experience also includes counterparty disputes regarding the terms of funding agreements. Such disputes are uncommon, and typically involve issues such as budget increases and the division of litigation proceeds.

¹³ LCJ Suggestion at 2.

¹⁴ Of the nine litigation funding contracts attached to the LCJ Suggestion, three have a non-U.S. orientation (ILP: Australia; Chevron: England; Dominion: England); a fourth is a non-profit funder of ADA claims (LMFS); and a fifth is a well-known anomaly in the industry in which Burford Capital established, via a contractual amendment, a consent right over settlement decisions by Sysco only in the wake of Sysco's material breach of its original contract with Burford. In that case, it is undisputed that the original capital provision agreement did *not* contain the consent right.

¹⁵ See, e.g., LCJ Suggestion at Ex. I, § 4.1 ("[Plaintiff] shall have the sole and exclusive right to Settle . . . all or any portion of the Litigations"), § 5.1 ("[Plaintiff] has the sole and exclusive right to control, act or refrain from acting in respect of any act, request or decision in connection with the Litigations"), and § 5.4 (stating that, as an overarching exception to the plaintiff's covenants regarding the conduct of the litigation, "none of the foregoing shall require [plaintiff] to continue a Litigation to the extent [plaintiff] reasonably determines that a Litigation no longer has merit").

¹⁶ Parties wishing to sell their claims or intellectual property can do exactly that (provided the claims are assignable) and will command a premium for forgoing control and upside. But that is different from—and less common than—"third-party litigation funding."

relationship and applicable laws (such as champerty), and to avoid becoming a real party in interest under Fed. R. Civ. P. 17.

Finally, confidentiality designations foreclose funders' ability to direct litigation strategy. Most funded commercial litigation is complex in nature and involves matters related to confidential information (such as trade secrets and other internal corporate materials). Courts routinely enter protective orders in such cases, and parties liberally designate productions and testimony as confidential, highly confidential, or attorneys' eyes only. The parties' attorneys are the first-line enforcers of these protective orders, at the risk of sanctions including loss of their professional credentials if they share information and documents with anyone who should not have access. As a result, in our experience, violations of protective orders are exceedingly rare (and already impermissible). This leads to funders' inability to review materials produced in discovery as well as information redacted on dockets. Thus, even if funders could control litigation (which they cannot), it would be impractical and imprudent to do so without access to critical evidence and rulings shielded by protective orders.

Disclosure

The for-profit, third-party commercial litigation funding industry serves a growing need in today's capital-intensive litigation environment. Market participants are economically rational and support the efficient settlement of meritorious claims, many of which could not be pursued without outside funding. While we support balanced transparency in principle, we caution against a disclosure regime that treats litigation funding contracts as inherently suspect and that, in turn, could counteract the very leveling of the playing field that litigation finance enables on behalf of financially disadvantaged litigants.¹⁷

In closing, we note that a disclosure rule would not solve the purported "problems" identified by LCJ unless broadly expanded beyond "third-party litigation funding" to all potential influences on litigant behavior. Under LCJ's view, virtually any contractual term, whether material or not, could be construed as potentially exerting direct or indirect control over a litigant.¹⁸ If anything can arguably be construed as "control," disclosure would necessarily encapsulate all other "direct or indirect" considerations for both plaintiffs *and* defendants and their counsel—whether contractual or not. This could logically include everything from recourse lenders and other creditors,¹⁹ to private equity or venture capital backers, to law firm partners, to shareholders, to

¹⁷ It is important to note that neither litigants nor their litigation funders have any visibility into their adversaries' budget or litigation strategies.

¹⁸ While investments have terms and conditions, they have no more influence than any other economic, business, or practical forces that could impact a litigant's decision-making.

¹⁹ Non-recourse litigation investors have significantly less rights than recourse lenders. It is not uncommon for litigants to carry debt, particularly those involved in "David vs. Goliath" bet-the-company disputes. Lenders can exert pressure on litigants and even foreclose on legal claims. This pressure also applies equally to defendants, which often have creditors secured by assets at dispute in the litigation, as well as key decisionmakers that may have personal liability and their own indebtedness considerations.

Committee on Rules of Practice and Procedure

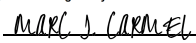
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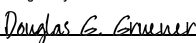
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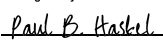
customers, to family and friends, to personal reputational considerations.²⁰ Such an approach would obviously be imprudent, with no purpose other than serving as a point from which to launch costly fishing expeditions for strategic advantage.

We thank the Advisory Committee for its thoughtful consideration of this topic.

Respectfully submitted,

DocuSigned by:

 9D3812EBB62044E...
 Marc J. Carmel²¹

Signed by:

 F0B97EDC7E9E44F...
 Douglas G. Gruener²²

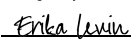
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 Paul B. Haskel²³

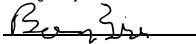
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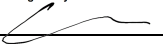
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 Michael P. Kelley²⁴

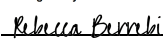
Signed by:

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 Christopher Leonardo²⁵

Signed by:

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 Erika Levin²⁶

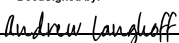
Signed by:

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 Boris Ziser²⁷

Signed by:

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 Charles Agee²⁸

Signed by:

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 Rebecca Berrebi²⁹

Signed by:

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 Ted Farrell³⁰

DocuSigned by:

 E2521E58984C4C1...
 Andrew Langhoff³¹

²⁰ Under LCJ's reasoning, there is no need to limit influences to those that are monetary in nature.

²¹ Submitting in individual capacity. Member of McDonald Hopkins LLC. Former Director of Longford Capital. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²² Partner of Levenfeld Pearlstein, LLC. Former General Counsel of Gerchen Keller Capital and Director & Senior Counsel of Burford Capital. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²³ Partner of Crowell & Moring LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁴ Partner of Parker Poe Adams & Bernstein LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁵ Partner of Gilbert LLP. Former Director of Parabellum Capital, Managing Member of 1875 Capital, and Outside General Counsel of Juridica Investments. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁶ Submitting in individual capacity. Partner of Fox Rothschild LLP. Former Senior Vice President and General Counsel of The Judge (a litigation finance and insurance company). Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁷ Partner of McDermott Will & Schulte LLP. Ranked by Chambers and Partners for *Litigation Finance Deal Counsel*.

²⁸ CEO of Westfleet Advisors. Former Executive Vice President & Chief Operating Officer of Augusta Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

²⁹ Co-CEO of Litigation Finance Advisors. Former Head of Corporate Affairs of Tenor Capital Management. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

³⁰ Co-CEO of Litigation Finance Advisors. Former Managing Director of Vannin Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.

³¹ Founder of Red Bridges Advisors. Former Principal of Gerchen Keller Capital and Chief Operating Officer of Burford Capital. Ranked by Chambers and Partners for *Litigation Funding: Brokers*.