

THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES

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RESUMO: O financiamento processual por terceiros chegou aos Estados Unidos. Diversos financiadores internacionais, como Juridica Capital Management e Burford Capital, estão usando empréstimos pelo sistema de equivalência em questões comerciais significativas no mercado jurídico estadunidense. Esses desenvolvimentos provocaram debates entre aqueles que defendem

ABSTRACT: Third-party litigation funding has arrived in the United States. A number of worldwide funders, such as Juridica Capital Management and Burford Capital Limited, are using nonrecourse loans to invest in large commercial matters in the U.S. litigation market. These developments have sparked debate between those championing increased access to justice and

um maior acesso à justiça e aqueles que temem um aumento da litigância de má-fé. Estão em debate os honorários de êxito norte-americanos, questões de sigilo profissional e ética, e proibições quanto a patrocínio, cobrança de honorários de êxito e captação de clientela. Este artigo faz um breve apanhado dos recentes desenvolvimentos em relação ao financiamento processual por terceiros nos EUA. Define financiamento processual por terceiros, apresenta uma visão global da situação atual do financiamento no mercado estadunidense, discute o hodierno ambiente regulatório, e perquire os principais argumentos utilizados pelos apoiadores e por aqueles contrários ao referido financiamento.

PALAVRAS-CHAVE: Captação de clientela – Burford Capital Limited – Cobrança de honorários de êxito – Honorários de êxito – Litigância de má-fé – Juridica Capital Management – Financiamento processual – Aumento do acesso à justiça – Patrocínio – Empréstimos pelo sistema de equivalência – Financiamento por terceiros – Estados Unidos.

those fearing an increase in frivolous lawsuits. Swept up in the debate is the American contingency fee, questions of privilege and ethics, and prohibitions on maintenance, champerty, and barratry. This article provides a brief summary of the evolving issues surrounding third-party litigation funding in the United States. It defines third-party litigation funding, provides an overview of the current status of funding in the U.S. market, discusses the current legal regulatory environment, and surveys the main arguments advanced by funding supporters and those who oppose it.

KEYWORDS: Barratry – Burford Capital Limited – Champerty – Contingency fee – Frivolous lawsuits – Juridica Capital Management – Litigation funding – Increased access to justice – Maintenance – Nonrecourse loans – Third-party funding – United States.

TABLE OF CONTENTS: 1. What is meant by Third-Party Litigation Funding? – 2. To what extent is Third-Party Litigation Funding used in the United States? – 3. What is the current legal and regulatory framework in the United States?: 3.1 Laws directly regulating Third-Party Litigation funders; 3.2 Maintenance, Champerty, and Barratry; 3.3 Rules of professional conduct, ethics opinions, and questions of privilege – 4. What are the current views regarding Third-Party Litigation Funding? – 5. What does the future hold for Third-Party Litigation Funding?

Like it or not, third party litigation funding has become a feature of the litigation landscape in the United States. A phenomenon that appears to have first arisen elsewhere, it was all but inevitable that the world's largest litigation market would attract prospective investors. The concept seems to be catching on. In recognition of its potentially transformative impact, a major U.S. legal publication proclaimed earlier this year, "Welcome to the world of third-party litigation funding".¹

1. Richard Lloyd, *The New, New Thing*, *The American Lawyer* (may 17, 2010), available at: [www.law.com/jsp/tal//PubArticleTAL.jsp?id=1202457711273&hblogin=1&login].

To help navigate this brave new world, this article provides a brief overview of the current state of play for third-party litigation funding in the United States. It defines third-party litigation funding, examines its current use in the United States, and discusses the legal and regulatory environment as it pertains to third party funding. A controversial subject, to say the least, this article also surveys the main arguments advanced by funding supporters and foes.

1. WHAT IS MEANT BY THIRD-PARTY LITIGATION FUNDING?

“Third-party litigation funding” is funding, by an outside party, of all or parts of a plaintiff’s litigation costs in exchange for an agreed share of any recovered proceeds. In other words, the funder extends a non-recourse loan to the plaintiff. If the claim is successful, either in litigation or settlement, the funder receives a portion or percentage of the recovery. The funder’s share may be calculated from several factors: (1) the sum of money involved; (2) the length of time until recovery; (3) the expected value of the plaintiff’s claim; and (4) whether the claim settles, proceeds to trial, or is appealed. If the claim is not successful, the funder does not recoup the litigation costs, which are the principal of its loan. In essence, third-party litigation funding extends contingency fees to non-lawyers.

There is another species of litigation funding that also is on the rise: high-interest, recourse loans made either to the plaintiff or his attorneys, generally secured by the lawsuit or a share of the contingency fee. This important subject has attracted considerable recent attention² but is outside the scope of this paper.

2. TO WHAT EXTENT IS THIRD-PARTY LITIGATION FUNDING USED IN THE UNITED STATES?

By most accounts, the U.S. market for third-party litigation funding remains relatively small but growing.³ Although the market is hard to quanti-

2. See, e.g., Binyamin Appelbaum, Lawsuit Loans Add New Risk for the Injured, *The New York Times* (jan. 16, 2011), available at: [www.nytimes.com/2011/01/17/business/17lawsuit.html?scp=1&sq=litigation%20funding&st=Search]; Binyamin Appelbaum, Investors Put Money on Law Suits to Get Payouts, *The New York Times* (nov. 14, 2010), available at: [www.nytimes.com/2010/11/15/business/15lawsuit.html].

3. See, e.g., Lloyd, *supra* note 1; Jonathan D. Glater, Investing in Lawsuits, for a Share of the Awards, *The New York Times* (june 3, 2009), available at [www.nytimes.com/2009/06/03/business/03litigate.html?_r=3&pagewanted]; Melissa Meleske,

fy, one article estimates that approximately 25 to 30 commercial cases a year use an external funding source.⁴ A number of well-known institutions offer third-party litigation funding for U.S. cases, but two have attracted particular attention: Juridica Capital Management and Burford Capital Limited. Juridica and Burford are the first litigation funders to raise money through IPOs (on the London Stock Exchange) and aim their investments largely at the U.S. market.⁵ Both companies also invest worldwide.⁶

Juridica and Burford focus on large commercial matters. Juridica invests exclusively in business-to-business related claims where the amount in dispute exceeds \$25,000,000.⁷ And it prefers claims that are likely to settle in a reasonable time frame.⁸ Burford's focus is "largely, if not entirely, on larger commercial matters", and it "does not intend to invest in litigation brought by individuals".⁹ The companies also generally avoid claims based on novel legal theories or that stand a substantial risk of being reversed on appeal.¹⁰ In other words, they are conservative when it comes to choosing their investments.

Such large cases come with large legal bills. And the majority of Juridica's and Burford's investments (about 60%) are referred to them by large law firms.¹¹ In the typical investment, the funder expends or "invests" between \$3 million and \$10 million.¹² In exchange, the funder takes an agreed-upon percentage of the recovery, usually two and a half to four times its up-front investment or 10 to 45% of the damages awarded.¹³

Hedging Bets: Third-Party Litigation Funding Gains Steam in the U.S., *Inside Counsel* (dec. 1, 2009), available at: [www.insidecounsel.com/Issues/2009/December-2009/Pages/Hedging-Bets.aspx?k=hedging+bets].

4. Meleske, *supra* note 3.

5. Lloyd, *supra* note 1.

6. Juridica Capital Management [www.juridica.co.uk/investments.php] (last visited nov. 23, 2010); Burford Capital, [www.burfordcapital.com/objectivesandpolicies.html] (last visited nov. 12, 2010).

7. Juridica, *supra* note 6.

8. *Idem*.

9. Burford Capital, *supra* note 6.

10. Lloyd, *supra* note 1.

11. *Idem*.

12. Juridica, *supra* note 6; Burford Capital, *supra* note 6.

13. Laura Atherton, *Third Party Funding in Arbitration: A Perspective from England* (oct. 2009) available at: [www.klgates.com/newsstand/Detail.aspx?publication=5950#third_party].

For example, in 2009, outside counsel for Gray Development Group introduced their client to Burford Capital. Burford agreed to advance \$5 million to address mounting litigation costs in exchange for 33% of any settlement and 40% of any judgment.¹⁴ In June 2010, a jury awarded Gray Development a \$110 million verdict.¹⁵ The math is impressive: Burford stands to recover about \$44 million or a return of approximately 880% on its investment.

3. WHAT IS THE CURRENT LEGAL AND REGULATORY FRAMEWORK IN THE UNITED STATES?

No single preferred approach has developed for the regulation of third-party litigation funding in the United States. Rather, a patch-work collection of state law exists in three substantive areas: (1) laws directly regulating funders; (2) the arcane doctrines of maintenance, champerty, and barratry; and (3) rules regulating attorney conduct and the application of attorney-client privilege.

Despite the potential for eye-popping returns, one potential area of regulation does not apply – prohibitions against usury. That is because the loans provided by third-party litigation funders are non-recourse.¹⁶

3.1 *Laws directly regulating Third-Party Litigation funders*

At least two states have enacted laws imposing restrictions on funders: Maine and Ohio. In Maine, funders must register with state authorities, disclose the fees and interest rates charged, and represent that the funder will not make any decision respecting the course of litigation.¹⁷ Ohio passed an almost identical provision in 2008.¹⁸ The Ohio law reverses a 2003 Ohio Supreme Court decision that struck down a third-party financing agreement as champertous.¹⁹

14. Andrew Longstreth, *Litigation Finance Firm Backs Big Winner in Arizona Dispute*, *New York Law Journal* (July 30, 2010), available at: [www.law.com/jsp/nylj/PubArticleFriendlyNY.jsp?id=1202464037477].

15. *Idem*.

16. See 44B Am. Jur. 2d *Interest and Usury* § 2 (2009) (non-recourse loans avoid prohibitions on usury).

17. Me. Rev. Stat. Ann. tit. 9-A §§ 12-104, 12-106.

18. See Ohio Rev. Code Ann. § 1349.55.

19. *Rancman vs. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003).

3.2 *Maintenance, Champerty, and Barratry*

The rise of third party funding has been accompanied by new interest in the all-but-forgotten prohibitions on maintenance, champerty, and barratry. Maintenance and champerty arose to assuage fears that intermeddling in litigation encourages speculative lawsuits, disturbs the peace of society, leads to corrupt practices, and prevents the remedial practice of law.²⁰ In medieval Europe, the wealthy would use (and fund) the legal claims of the poor to attack personal or political enemies.²¹ The doctrines of maintenance, champerty, and their close relative, barratry, were intended to counteract those perceived evils.²²

Technically speaking, “maintenance” is 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.²³ “Officious intermeddling” is a term of art defined to include meddling with the affairs of others where such involvement is neither asked for nor needed.²⁴ For example, an insurance company does not officiously intermeddle in litigation when it represents the insured because it has a prior contractual duty to provide representation and has an immediate stake in the outcome, namely, indemnification of liability.²⁵ On the other hand, an insurance company might, indeed, face liability if it were to agree to pay a plaintiff to prosecute claims against co-defendants of the insured.²⁶

“Champerty” is a species of maintenance in which the intermeddler makes a bargain with one of the parties to the action to be compensated out of the proceeds of the action.²⁷ A champertous agreement divides the proceeds of litigation between the claim’s owner and the third-party supporting

20. 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 1 (2009).

21. Jern-Fei Ng, *The Role of the Doctrines of Champerty and Maintenance in Arbitration*, *Mondaq Business Briefing*, (July 12, 2010), available at: [www.mondaq.com/article.asp?articleid=103272].

22. *Idem.*

23. 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 1 (2009).

24. *Allied Med. Assocs. vs. State Farm Mut. Automobile Ins. Co.*, No. 08-02434, 2008 WL 4771850 at *9 (E.D. Pa. Oct. 30, 2008), citing *Webster’s Third New Int’l Dictionary* 1180, 1567 (1981) (defining “intermeddle” and “officious”).

25. *Idem.*

26. *Lum vs. Stinnett*, 488 P.2d 347, 351 (Nev. 1971).

27. 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 1 (2009).

the claim.²⁸ A person with an interest in the litigation cannot be guilty of champerty or maintenance.²⁹ Traditionally, a civil action for champerty could be brought, but today champerty is generally viewed as a contract defense.³⁰ An agreement found to be champertous is void and will not be enforced by the courts.³¹

“Barratry” is frequently exciting or stirring up lawsuits and quarrels between others.³² It is both a crime and a tort.³³ At common law, the crime of barratry had to be shown by at least three separate acts.³⁴ The tort of barratry requires that a frivolous suit be brought maliciously.³⁵ A lawsuit is frivolous when there is such a deficiency in fact or law that no reasonable person could expect a favorable judicial ruling.³⁶ Proceedings brought primarily for an improper purpose, such as where the litigant does not believe his claim will be held valid, the primary motive is hostility or ill will, or the sole purpose is to deprive the defendant of property or force settlement having no relation to the claim’s merits,³⁷ satisfy the malice requirement.³⁸

Of the three, champerty has been the biggest historic bar to third-party litigation funding.³⁹ Today, state approaches to champerty have divided into three camps: (1) some states have reinforced historic applications of champerty; (2) other states have relaxed prohibitions on champerty; and (3) still other states

28. *Idem*.

29. *Idem*, § 2. The interest in the dispute required to avoid champerty and maintenance need not be as great as that required to satisfy standing requirements.

30. *Idem*, § 4. Injunctive relief for the party opposite a champertous agreement also may be available. See *Westmoreland County vs. RIA Group, Inc.*, 767 A.2d 1144, 1146-51 (Pa. Commw. Ct. 2001).

31. 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 4 (2009).

32. *Idem*, § 16.

33. *Idem*.

34. *Idem*.

35. *Idem*.

36. *Idem*.

37. *Citibank, N.A. vs. Hauff*, 668 N.W.2d 528, 537 (S.D. 2003).

38. 14 Am. Jur. 2d *Champerty, Maintenance, Etc.* § 16 (2009).

39. See Christy Bushnell, *Champerty Is Still No Excuse In Texas: Why Texas Courts (And The Legislature) Should Uphold Litigation Funding Agreements*, 7 Hous. Bus. & Tax L.J. 358, 358-63 (2007).

have abolished the doctrine of champerty. In all, 18 states explicitly permit champerty in some form.⁴⁰

First, states that have reinforced historic applications of champerty include Nevada and Minnesota. In 1997, the Supreme Court of Nevada stated: “To maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit”.⁴¹ In 2004, the Court of Appeals of Minnesota stated that if repayment of a loan was contingent upon the plaintiff recovering in litigation, the loan would be considered champertous.⁴² Further, the court noted that although there are safeguards in place to alleviate the potential evils associated with champertous agreements, there is no compelling reason to abandon the doctrine of champerty simply because a few states have chosen to do so.⁴³ In some jurisdictions, entering into a champertous agreement may even be criminal.⁴⁴

Second, states that have relaxed prohibitions on champerty include Florida, New York, and Texas. In 1996, a Florida appellate court upheld a loan where the interest payments were contingent upon varying levels of recovery.⁴⁵ In that case, a brother had approached his sister for a loan to pay legal fees in his company’s antitrust case. The brother offered varied interest rates, and the sister agreed to his terms. The brother later sought to renege, claiming the loan agreement was champertous, but the court disagreed because the sister had not approached the brother or dictated the terms of the loan.⁴⁶ In 2009, the New York Court of Appeals gave champerty a narrow reading in a distressed debt market context.⁴⁷ Specifically, the Second Circuit asked the New York Court of

40. See Anthony J. Sebok, *The Inauthentic Claim*, Benjamin N. Cardozo School of Law, Working Paper n. 298 (April 2010) available at: [<http://ssrn.com/abstract=1593329>] (listing 16 states as allowing champerty: Colorado, Connecticut, Florida, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Washington, and West Virginia). In addition, it appears South Carolina and Texas could also be added to the list. See *Osprey vs. Cabana Ltd. P’ship*, 532 S.E.2d 269 (S.C. 2000); *Anglo-Dutch Petroleum Int’l vs. Haskell*, 193 S.W.3d 87 (Tex. Ct. App. 1st Dist. 2006).

41. *Schwartz vs. Eliades*, 939 P.2d 1034, 1036 (Nev. 1997).

42. *Johnson vs. Wright*, 682 N.W.2d 671, 677 (Minn. Ct. App. 2004).

43. *Idem*, at 680.

44. See, e.g., Miss. Code Ann. §§ 97-9-11, 97-9-13 (a person guilty of maintenance shall be punished by imprisonment for one year in the state penitentiary).

45. See *Kraft vs. Mason*, 668 So.2d 679 (Fla. Dist. Ct. App. 1996).

46. *Idem*, at 681.

47. *Merrill Lynch vs. Love Funding*, 918 N.E.2d 889 (N.Y. 2009).

Appeals whether New York champerty laws prohibit buyers or secondary holders of distressed debt from bringing claims related to the debt in question.⁴⁸ The Court of Appeals answered that the champerty statute does not apply to collection of a legitimate claim, but rather bars purchased claims that would not be prosecuted if not “stirred up”.⁴⁹ The law’s purpose, declared the court, is “to prevent attorneys and solicitors from purchasing debts, or other things in action, for the purpose of obtaining costs from a prosecution thereof, and was never intended to prevent the purchase for the honest purpose of protecting some other important right of the assignee”.⁵⁰ In 2010, the Eastern District of New York applied the Court of Appeals’ reasoning to preclude champerty as a foreclosure defense against a bank that purchased the borrower’s mortgage and promissory note.⁵¹ In 2006, a Texas appellate court held that third-party litigation funding agreements are not contrary to Texas public policy, finding no evidence that the agreements necessarily increase or prolong litigation.⁵²

Third, states that have abolished champerty include Massachusetts and South Carolina. In ruling that champerty is no longer recognized in Massachusetts, the Massachusetts Supreme Judicial Court reasoned: “The champerty doctrine is (no longer) needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position”.⁵³ South Carolina adopted the Massachusetts court’s reasoning in 2000.⁵⁴

3.3 *Rules of professional conduct, ethics opinions, and questions of privilege*

The rules regulating the practice of law operate to affect the form of third-party litigation funding agreements. Specifically, American Bar Association Model Rule of Professional Conduct (“Model Rule”) 1.8(f) prohibits a lawyer from accepting compensation for representing a client from a third-party unless the client gives informed consent, there is no interference with the lawyer’s professional judgment or client-lawyer relationship, and client information is kept confidential. Model Rule 5.4(a) prohibits an attorney or law firm from

48. *Idem*, at 890-891.

49. *Idem*, at 895.

50. *Idem*.

51. See *U.S. Bank Nat’l Assoc. vs. Crutch*, n. 09-cv-998, 2010 WL 2978172, at *3 (E.D.N.Y. July 26, 2010).

52. See *Anglo-Dutch Petroleum*, 193 S.W.3d at 104-05.

53. *Saladini vs. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997).

54. See *Osprey*, 532 S.E.2d at 277.

sharing legal fees with a non-lawyer except in limited circumstances. Under Model Rule 5.4(c), a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services. Model Rules 1.8(f) and 5.4 combine to suggest that the funder should: (1) remain a passive investor and (2) contract directly with the client.

Further, the contours of privilege law are not well-defined when information is shared with third-party funders. Generally, the common-interest privilege protects communications when two or more clients consult with an attorney on matters of common interest.⁵⁵ For the common-interest privilege to apply, the clients must share an identical, or nearly identical, legal interest as opposed to a merely similar interest.⁵⁶ The common-interest privilege has been extended to other situations in some instances, for example, communications between an attorney and a client's insurer.⁵⁷ However, the law as to third party funders remains murky. At least one court has ruled that a client's and a lender's interests are not identical, and thus, the privilege will not protect documents shared with a funder.⁵⁸

Although an attorney may run into privilege questions when sharing information with funders, a recent Philadelphia Bar Association ethics opinion suggests it is not unethical to share information.⁵⁹ The opinion, drafted by the Association's Professional Guidance Committee, concluded it was permissible for an attorney to provide substantive information about a personal injury client's claim to a third-party lender which was considering providing funds to the client during the pendency of the personal injury case. Repayment of the funds would be contingent upon the successful resolution of the client's case. In addition, the lender would compensate the lawyer for the time spent in providing the information about the strengths and weaknesses of the client's case (and periodic updates) on an hourly basis, with a maximum aggregate fee of \$250. The Committee ruled the contemplated transaction did not violate ethics rules so long as there was full disclosure to the client of the advantages and disadvantages of the transaction including, in particular, the risk of waiver

55. 81 Am. Jur. 2d *Witnesses* § 368 (2009).

56. *Idem*.

57. See, e.g., *Linde Thompson Langworthy Kohn & Van Dyke, P.C. vs. Resolution Trust Corp.*, 5 F3d 1508, 1514-15 (D.C. Cir. 1993).

58. *Leader Tech., Inc. vs. Facebook, Inc.*, 719 F. Supp. 2d 373, 375-77 (D. Del. 2010) (requiring plaintiff to produce documents it shared with a lender).

59. Penn. Philadelphia Bar Ass'n Opinion 99-8 (2000).

of the attorney-client privilege (and the potential ramifications thereof), as well as the attorney's financial interest in the additional fee from the lender.⁶⁰

4. WHAT ARE THE CURRENT VIEWS REGARDING THIRD-PARTY LITIGATION FUNDING?

Not surprisingly, third-party litigation funding in the United States has spawned both ardent supporters and fierce critics. At the core of the controversy is the prospect that third party funding will increase the overall volume of litigation. The reasoning is simple: more money to pay for litigation will invariably translate into more litigation.⁶¹ This section outlines some of the arguments both for and against third-party litigation funding.

Arguments in favor of Third-Party Litigation Funding.

Proponents argue that litigation is expensive and funders play a valuable role by providing increased access to justice for plaintiffs who otherwise could not afford representation. Responding to charges that funding will lead to litigation abuse, proponents note that funders are sophisticated parties and generally will avoid financing weak claims. Indeed, proponents maintain that funders help plaintiffs avoid advancing such cases, citing funders' sophisticated vetting processes. They maintain that these processes can play an important role in evaluating the merits of litigation for plaintiffs through risk analyses and economic valuation models typically unavailable to law firms.⁶²

There would appear to be some basis for the proposition that litigation funders are choosy when it comes to the cases they will back. For example, Juridica asserts the company prefers to examine potential business-related claim investments that have been already reviewed and accepted by qualified lawyers.⁶³ In addition, Juridica conducts its own due diligence, which normally takes an additional 30 to 60 days.⁶⁴ Overall, Juridica appears very selective in determining the

60. *Idem*.

61. John Beisner, Jessica Miller, and Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States* (2009), available at [www.instituteforlegalreform.com/images/stories/documents/pdf/research/thirdparty litigation financing.pdf] (stating that an increase in the volume of litigation has been shown empirically in Australia since the advent of third-party litigation funding).

62. Juridica, *supra* note 6.

63. *Idem*.

64. *Idem*.

claims in which it invests. One source reported that by february 2010 Juridica had reviewed almost 400 cases but invested in just 23 of them.⁶⁵ Proponents contend that such highly scrutinized claims are unlikely to be frivolous.⁶⁶

Funding supporters also point out that the vetting process helps decrease the financial leverage defendants can exert on plaintiffs because the process educates plaintiffs as to the claim's value.⁶⁷ And if the claim is actually funded, a corporate defendant will be unable to outspend the plaintiff.⁶⁸ Funding, proponents contend, levels the playing field.

Arguments against Third-Party Litigation Funding.

Critics attack third-party funding on a variety of grounds, including that it increases frivolous lawsuits, is unnecessary, and creates conflicts of interest and otherwise imperils the relationship between attorneys and clients. The assertion that funding will spawn meritless litigation stems from the belief that funders base their investment decisions on considerations that go beyond the merits of a claim and instead focus on the present value of the expected return.⁶⁹ In other words, they look to not only the likelihood of success but also to factors such as time and the size of the potential recovery.⁷⁰ In this equation, a claim with a low chance of success but a potentially large return over a short period of time may still be attractive.⁷¹ Funders may also be able to tap other investors to finance litigation, securitize litigation costs, and sell derivative interests in lawsuits to spread the risk of a frivolous lawsuit among numerous investors.⁷²

Detractors also question the need for third party funding in a nation where there is a long tradition of contingency fee litigation. Why introduce something new – and possibly harmful – where there appears to be no shortage of lawyers ready, willing and able to take on cases in exchange for a percentage of any recovery? Moreover, as noted above, the cases funders have focused on are

65. Lloyd, *supra* note 1.

66. Douglas R. Richmond, *Litigation funding: investing, lending, or loan sharking?*, 2005 *Prof. Law. Symp. Issues* 17, 27 (2005).

67. Courtney R. Barksdale, *All that glitters isn't gold: analyzing the costs and benefits of litigation finance*, 26:3 *Tex. Rev. Litig.* 707, 734 (2007).

68. See Mariel Rodak, *It's about time: a systems thinking analysis of the litigation finance industry and its effect on settlement*, 155 *U. Pa. L. Rev.* 503, 514 (2006-2007).

69. Beisner, *supra* note 61, at 5.

70. *Idem*, at 6.

71. *Idem*.

72. *Idem*.

among the largest in the system. Thus, critics assert, it is not as though funders are helping “the little guy”.⁷³

As for added dangers, opponents argue that third-party funding creates the potential for conflicts of interest that may damage the attorney-client relationship. Given the large size of the investments, they question whether funders can resist the temptation to seek to influence decision-making relating to the handling of cases. In such circumstances, it is argued, there is no assurance that the interest of funders and the interests of clients will necessarily be aligned.⁷⁴

5. WHAT DOES THE FUTURE HOLD FOR THIRD-PARTY LITIGATION FUNDING?

Third-party litigation funding is currently in its infancy in the United States, and regulation is a patch-work of state law. As instances of U.S. third-party litigation funding increase, the patch-work collection of regulations is likely to evolve through judicial decisions, ethics opinions, and legislation. Third-party litigation funding may be an appropriate area for consistent state adoption of a uniform model code or even federal legislation, but until that time, attorneys should cautiously monitor developments. Funders may provide an attractive option for clients, but attorneys should conduct their own diligence before recommending such alternative arrangements or rushing to embrace them.

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73. University of Oxford, *Third Party Litigation Funding has not helped ordinary consumers* (june 2, 2010) available at: [www.ox.ac.uk/media/news_stories/2010/100602.html] (commenting that individuals do not benefit from the funding models currently available).

74. Barksdale, *supra* note 67, at 732.