

## REVOLUTION IN PROGRESS: THIRD-PARTY FUNDING OF AMERICAN LITIGATION

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*There is a growing phenomenon of for-profit investment in U.S. litigation. In a modern twist on the contingency fee, third-party lenders finance all or part of a plaintiff's legal fees in exchange for a share of any judgment or settlement in the plaintiff's favor. There are a number of international corporations, both public and private, that invest exclusively in this new "market."*

*Critics contend that third-party litigation finance violates the common law doctrines of "maintenance," or interference in a legal proceeding by a stranger to the suit, and "champerty," or maintenance for profit. Critics also raise numerous arguments based on the purported negative consequences of a widespread system of third-party finance. These include serious ethical considerations, the possibility of compromising attorney-client privilege, and an alleged tendency to encourage frivolous lawsuits while discouraging settlement.*

*This Comment argues that these critiques are flawed and that third-party litigation finance should be permitted but regulated to guard against its fairly limited dangers. I argue, first, that the common law doctrines of maintenance and champerty are inconsistent with our contemporary view of litigation. Over the past century, Americans have come to see lawsuits as a valid means of settling personal disputes, vindicating individual rights, and correcting social ills. Moreover, the procedural reforms of the early twentieth century were designed to liberalize rather than limit access to the courts. I conclude that third-party litigation finance is in keeping with our current values because it facilitates the filing of claims that might otherwise go unheard. This Comment contends, therefore, that such agreements should be legal and enforced in the United States. Finally, I suggest that the potential adverse consequences of the practice are in most cases unlikely to occur, and in cases where negative consequences are likely, they can be effectively addressed through enforcement of existing ethical and procedural guidelines or by adoption of new regulations.*

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## INTRODUCTION

It would have been easy to overlook the item in *The Times* of London on that Friday before Christmas in 2007.<sup>1</sup> It was tucked away in the Banking section of the Business pages, and the headline was characteristically understated.<sup>2</sup> The article itself rather dryly described the initial public offering of one Juridica Investments, Ltd., set to take place during trading that day on the London Stock Exchange's Alternative Investment Market (AIM).<sup>3</sup> While the piece acknowledged the novelty of the asset Juridica offered, it failed to mention that the sale of this particular commodity had been prohibited at common law for centuries. It certainly never hinted that if Juridica were successful, its business

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1. Miles Costello, *Lawsuit Financier Set to Make AIM Debut*, TIMES (LONDON), Dec. 21, 2007, [http://business.timesonline.co.uk/tol/business/industry\\_sectors/banking\\_and\\_finance/article3080707.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article3080707.ece).

2. *Id.*

3. *Id.*

model could fundamentally alter the American legal landscape. Yet that is precisely what seems likely to result.<sup>4</sup>

Just what was the novel investment vehicle so casually heralded in *The Times* that morning? American litigation. For the first time in history, risk-tolerant investors would have the opportunity to gamble on the outcome of commercial lawsuits in U.S. courts.<sup>5</sup> By all accounts, it was a welcome opportunity; the initial offering is reported to have raised £80,000,000, or roughly \$160,000,000.<sup>6</sup> Since the Juridica offering, shares of Burford Capital, a second litigation finance corporation focused primarily on American cases, have been offered on AIM.<sup>7</sup> Indeed, by early 2010, there were at least six companies, both public and private, in three countries, that focused primarily on litigation finance, and that purported to have investments in U.S. commercial litigation.<sup>8</sup> Moreover, numerous banking institutions, private companies, and hedge funds have created divisions specifically to focus on investing in this burgeoning market.<sup>9</sup>

Third-party funding for litigants is not an entirely new phenomenon. While Juridica was the first to take the concept public, its business model is largely an amalgam of two private lending schemes already in practice in the United States for the better part of two decades: pre-settlement funding

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4. Leigh Jones, *Litigation Funding Begins to Take Off*, NAT'L L.J., Nov. 30, 2009, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202435837230&Litigation\\_funding\\_begins\\_to\\_take\\_off](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202435837230&Litigation_funding_begins_to_take_off) by subscription.

5. Costello, *supra* note 1. Both Juridica and a second litigation funder, Burford Capital, report that they chose to focus primarily on American litigation because it was a vast, largely untapped market. JURIDICA INV. LTD., PLACING OF 78,400,000 ORDINARY SHARES AT 100 PENCE PER ORDINARY SHARE AND ADMISSION TO TRADING ON AIM 8–9 [hereinafter JURIDICA ADMISSION DOCUMENT], available at [http://www.juridicainvestments.com/en/investor-relations/~media/Files/J/Juridica/pdfs/Admission\\_Documentation.pdf](http://www.juridicainvestments.com/en/investor-relations/~media/Files/J/Juridica/pdfs/Admission_Documentation.pdf) (last visited Nov. 4, 2010); BURFORD CAPITAL, LTD., PLACING OF 80,000,000 ORDINARY SHARES AT A PRICE OF 100 PENCE PER ORDINARY SHARE AND ADMISSION TO TRADING ON AIM 19–20 [hereinafter BURFORD ADMISSION DOCUMENT], available at <http://www.burfordcapital.com/pdfs/Burford%20Admission%20Document.pdf>. See also Nate Raymond, *More Attorneys Exploring Third-Party Litigation Funding*, N.Y. L.J., June 4, 2010, <http://www.law.com/jsp/article.jsp?id=1202459195060>. Critics suggest it has a lot to do with the fact that, unlike the U.K., the United States does not follow a “loser pays” rule, which allows the lenders to finance questionable claims while still minimizing risk. JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES, (2009) [hereinafter CHAMBER INSTITUTE REPORT].

6. *Id.*

7. BURFORD ADMISSION DOCUMENT, *supra* note 5, at 20.

8. STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN AND UNKNOWN 13–15 (2010).

9. Jones, *supra* note 4. Whether the American justice system is appropriately referred to as a market is, in itself, a debatable proposition. The term is used here only in the literal sense of a place where commodities are in fact bought and sold.

and the syndicated lawsuit.<sup>10</sup> Both are a conceptual evolution of the more traditional contingency fee model, wherein an attorney advances services and other costs associated with prosecuting a case in exchange for a certain percentage of any recovery. Pre-settlement funding agreements, also known as lawsuit loans, are advances to personal injury plaintiffs, typically to cover living expenses during litigation, that are secured against the proceeds of any future resolution in the litigant's favor.<sup>11</sup> A syndicated lawsuit is one in which a plaintiff directly solicits individual investors in his claim to share proportionally in the recovery.<sup>12</sup> Pre-settlement funding and syndicated lawsuits have been in use—and hotly debated—since the late 1980s.<sup>13</sup> At the heart of these financing systems is a non-recourse loan, whereby the lender only recoups his investment if the borrower's suit ends on favorable terms.<sup>14</sup>

What makes the lending model of *Juridica* and its ilk so significant is the sheer size of its investments and the potential social and economic impacts of the burgeoning industry of for-profit investment in American litigation.<sup>15</sup> Where a typical pre-settlement loan to a personal injury plaintiff tends to max out at \$20,000 at the high end of the market,<sup>16</sup> corporate litigants may now routinely borrow up to \$15,000,000, on cases valued at \$100,000,000 or more.<sup>17</sup> Syndicated suits often deal with similarly high-dollar commercial claims, but the phenomenon is more individualized and the investors relatively few, without the infrastructure of a publicly traded corporation to maximize efficiency and simplify the practice.<sup>18</sup> The development of an organized market in commercial lawsuits has the potential to radically alter our legal landscape in a way that pre-settlement funding and syndicated suits have not.

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10. Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008).

11. Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 618 (2007).

12. Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 498 (1992). For a detailed history of lawsuit syndication, see Daniel C. Cox, *Lawsuit Syndication: An Investment Opportunity in Legal Grievances*, 35 ST. LOUIS U. L.J. 153, 154–59 (1990).

13. See Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimize Third-Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 347–50 (2004).

14. Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795, 795 (2004).

15. The Rand Institute for Civil Justice has called third-party litigation finance one of the “biggest and most influential trends in civil justice.” It recently launched the RAND Law, Finance, and Capital Markets Program to study the effects of third-party litigation finance and claim transfer. *RAND Law, Finance, and Capital Markets Program*, RAND INST. FOR CIVIL JUSTICE, <http://rand.org/icj/programs/law-finance> (last visited Nov. 4, 2010).

16. GARBER, *supra* note 8, at 12.

17. Jones, *supra* note 4.

18. See Shaltiel & Cofresi, *supra* note 13.

For all the growing popularity of third-party litigation finance, there is an emerging body of criticism that argues such funding is neither desirable nor legal in most jurisdictions.<sup>19</sup> Indeed, its legal status in the United States is far from clear. Laws governing third-party finance agreements appear to vary significantly from state to state.<sup>20</sup> At least three states have enacted legislation specifically to regulate third-party funding, and these statutes appear to apply primarily to loans in personal injury, rather than commercial, suits.<sup>21</sup> Also, while no American court has yet considered the legality of third-party lending in the commercial context, several have held that litigation loan agreements in personal injury suits are legal and enforceable.<sup>22</sup> A number of other courts, however, have objected to the practice of litigation lending and invalidated such contracts. Among these decisions, most point to prohibitions against “maintenance,” which is interference in litigation by those with no legitimate interest in the claim, and “champerty,” which is maintenance by those seeking to profit from another’s lawsuit.<sup>23</sup>

The common law doctrines of maintenance and champerty were developed “to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law.”<sup>24</sup> According to Max Radin’s definitive 1935 study, the doctrines arose in medieval England, at a time when there was a general disdain for litigation and a sense that lawsuits were an evil to be avoided whenever possible.<sup>25</sup>

Whether maintenance and champerty remain viable in twenty-first century America is a dubious proposition, as I will show, but critics have also

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19. See, e.g., CHAMBER INSTITUTE REPORT, *supra* note 5.

20. See generally Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002) (surveying then-current state laws against champerty and maintenance, or the lack thereof). Stephen Presser recently reviewed Bond’s findings and concluded they were still mostly valid. Stephen B. Presser, *A Tale of Two Models: Third-Party Litigation in Historical and Ideological Perspective* 23 n.72 (Northwestern Law Searle Ctr. on Law, Regulation, and Econ. Growth, Public Policy Roundtable, Discussion Draft, Oct. 2009).

21. The three states are Maine, Nebraska, and Ohio. See Maine Consumer Credit Code Legal Funding Practices, ME. REV. STAT. tit. 9-A, § 12 (2009); Nebraska Nonrecourse Civil Litigation Act, NEB. REV. STAT. ANN., § 25-3303 (West 2010); Non-Recourse Civil Litigation Advances, OHIO REV. CODE ANN. tit. 13, § 1349.55 (West 2008).

22. See, e.g., *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997); *Osprey v. Cabana*, 532 S.E.2d 269 (S.C. 2000).

23. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 219 (Ohio 2003) (declining to enforce a litigation lending agreement because “a lawsuit is not an investment vehicle” and “[a]n intermeddler is not permitted to gorge upon the fruits of litigation”); cf. *Odell v. Legal Bucks, L.L.C.*, 665 S.E.2d 767 (N.C. Ct. App. 2008).

24. 14 AM. JUR. 2D *Champerty, Maintenance, and Barratry* § 1 (2009).

25. Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 68 (1935).

highlighted other potentially negative consequences of third-party litigation finance. These include serious ethical considerations, the possibility of compromising attorney-client privilege, and an alleged tendency to encourage frivolous lawsuits while discouraging settlement.<sup>26</sup> As most state high courts have yet to explicitly rule on the validity of third-party litigation funding agreements in either a commercial or an individual context, it remains an open question which, if any, of these arguments will prevail.<sup>27</sup>

This Comment argues that third-party litigation finance should be legal in the United States but regulated to guard against its fairly limited dangers. I assert, first, that the common law doctrines of maintenance and champerty are inconsistent with our contemporary view of litigation.<sup>28</sup> Over the past century, Americans have come to see lawsuits as a valid means of settling personal disputes, vindicating individual rights, and correcting social ills.<sup>29</sup> Moreover, the procedural reforms of the early twentieth century, such as simplified pleading, were designed to liberalize rather than limit access to the courts.<sup>30</sup> I conclude that third-party litigation finance is in keeping with our current values because it facilitates the filing of claims that might otherwise go unheard. This Comment contends, therefore, that such agreements should be permitted and enforced in the United States. Finally, I suggest that the potential adverse consequences of the practice can be effectively addressed through the adoption of new regulations or by strict enforcement of existing ethical and procedural guidelines.

In Part I, I offer a brief snapshot of the litigation finance industry, its evolution, and the various forms such lending agreements can take. Part II examines the doctrines of maintenance and champerty and shows why they are no longer consistent with our contemporary attitudes about the role of civil litigation in society. Part III explores some of the more prevalent consequentialist arguments against third-party litigation finance and asserts that most are either inaccurate or unlikely to occur, but where such consequences are likely, they can be remedied through regulation. A brief Conclusion follows.

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26. CHAMBER INSTITUTE REPORT, *supra* note 5.

27. Bond, *supra* note 20.

28. See generally Stephen C. Yeazell, Brown, *The Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004).

29. MARLENE ADLER MARKS, *THE SUING OF AMERICA: WHY AND HOW WE TAKE EACH OTHER TO COURT* 3–8 (1981).

30. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 95–96 (Penguin Books 1991).

## I. A SNAPSHOT OF THE THIRD-PARTY LITIGATION FINANCE INDUSTRY

Although there are third-party finance models for defendants, this Comment explores only funding of plaintiffs' expenses because the methods and mechanisms of plaintiff-side lending are somewhat different than those on the defense side, and the market is significantly more developed.<sup>31</sup> This is not to suggest that practitioners of plaintiff-side lending consider themselves to be part of a single, unified industry. Indeed, though the industry began with loans to personal injury plaintiffs, some more recent lenders who specialize in corporate claim finance have taken pains to distance themselves from their predecessors' somewhat unsavory (ambulance-chasing) reputation.<sup>32</sup> Juridica, for example, does not fund personal injury claims and has likewise declared its opposition to third-party funding of class actions for similar policy reasons.<sup>33</sup> Nonetheless, despite the significant philosophical differences among third-party lenders, the basic premise of the service they offer is the same: a monetary advance collateralized with the possibility of a later recovery in the suit.<sup>34</sup>

The phrase "third-party litigation finance," as used here, refers broadly to any arrangement between a litigant and a party who is otherwise a stranger to the suit, whereby the stranger provides funding for a pending claim in exchange for a share of any eventual proceeds.<sup>35</sup> As with contingency fees, the litigant is only required to repay the third-party loan if the suit results in a favorable judgment or settlement. This is sometimes referred to as a "non-recourse loan" because the lender has no claim for repayment if the suit does not eventually

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31. See generally Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009).

32. *Our Policy Statement*, JURIDICA INV. LTD., <http://www.juridicainvestments.com/about-juridica/our-public-policy-statement.aspx> (last visited Nov. 4, 2010) [hereinafter *Juridica Public Policy*]. Critics have charged that lenders in the personal injury context prey on the vulnerability of plaintiffs who have been injured and who, typically, are otherwise socioeconomically disadvantaged.

33. *Id.* On the other hand, Selvyn Seidel of Burford Capital has said that his company would not be opposed to funding class actions, though it has not done so to date. Raymond, *supra* note 5.

34. Hananel & Staubitz, *supra* note 14, at 798–800.

35. These types of arrangements are alternately referred to as third-party litigation funding, pre-settlement funding, lawsuit loans, lawsuit lending, corporate claim finance, claim transfer, or claim alienation. Though these phrases convey subtle differences in the precise terms of the loan arrangement, they are often used interchangeably. To the extent that these phrases appear in this Comment, they refer generically to any third-party lending arrangement with a plaintiff or plaintiff's attorney in which the lender's recovery is contingent upon a favorable outcome for the plaintiff. Though attorneys at common law were also generally considered "strangers" to a suit, in the United States, we have more often come to think of them as allied with the parties. Thus, for purposes of this Comment, contingency fee arrangements are not considered third-party financing.

end in a recovery for the plaintiff that exceeds the amount of the advance.<sup>36</sup> Such loans may be used to underwrite the costs of litigation itself or, in the context of a personal injury claim, to offset living expenses during the pendency of the suit.

The most significant difference among plaintiffs' lenders is not in the type of loan offered but in the size and scope of the investments. Loans to individuals with tort claims are typically measured in thousands or tens of thousands of dollars, offset by damages awards that tend to peak in the low hundred thousands.<sup>37</sup> There appear to be hundreds of financial service providers offering loans to personal injury claimants.<sup>38</sup> By contrast, commercial claim finance is a more rarefied world, with fewer players in the market and significantly higher stakes. The litigants on both sides are typically corporate entities,<sup>39</sup> and funding can reach up to \$15,000,000 on cases valued at \$100,000,000 or more.<sup>40</sup> These cases commonly include disputes over contracts and intellectual property, as well as antitrust claims.<sup>41</sup> There are currently only two publicly traded companies, Juridica Investments and Burford Capital, that exist primarily to invest in American commercial litigation, though both are incorporated in the United Kingdom.<sup>42</sup> Each manages assets in excess of \$200,000,000.<sup>43</sup> A third company, IMF Ltd., is publicly traded in Australia and purports to invest in U.S. litigation, but it is not the company's primary market.<sup>44</sup> Three private companies also focus mainly on investing in American commercial lawsuits.<sup>45</sup> In addition, a handful of other corporations, public and private, have recently formed litigation funding divisions, including banking giant Credit Suisse.<sup>46</sup>

There is one other significant difference between lawsuit loans to personal injury plaintiffs and commercial claim funding: Third-party loans in the commercial context are sometimes made directly to the attorney or law firm

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36. Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 85-86 (2002).

37. See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); cf. GARBER, *supra* note 8.

38. A Google search, last conducted August 3, 2010, for the phrase "lawsuit loans" yielded over a half million hits, each of which was a solicitation from different companies (or at least unique domain names) offering litigation funding.

39. GARBER, *supra* note 8, at 15.

40. Jones, *supra* note 4.

41. GARBER, *supra* note 8, at 13.

42. See *id.*

43. *Id.* (regarding Burford); Jonathan D. Glater, *Investing in a Portfolio of Lawsuits*, N.Y. TIMES, June 3, 2009, at B1 (regarding Juridica).

44. IMF.COM, <http://www.imf.com.au/about.asp> (last visited Nov. 4, 2010).

45. GARBER, *supra* note 8.

46. *Id.*

rather than to the plaintiff. Such loans may be attached either to a particular case or to a portfolio of cases in exchange for a share of the fees collected.<sup>47</sup> This arrangement raises legal and ethical concerns, such as whether the attorney must disclose the arrangement to the affected client(s), and whether a financial responsibility to a third party would compromise the attorney's duty of loyalty to the client.<sup>48</sup> Moreover, the arrangement may run afoul of the general prohibition on fee sharing between lawyers and non-lawyers. Part III of this Comment examines some of the concerns specifically associated with providing funding directly to attorneys.

## II. OBJECTIONS TO THIRD-PARTY LITIGATION FINANCE GROUNDED IN THE COMMON LAW DOCTRINES OF MAINTENANCE AND CHAMPERTY

A frequently cited criticism of third-party litigation lending, both in case law and in academic commentary, is that, on their faces, such agreements violate the common law doctrines of maintenance and champerty. The *Oxford English Dictionary* defines maintenance as “the action of wrongfully aiding and abetting litigation; *spec.* sustentation of a suit or suitor at law by a party who has no interest in the proceedings . . . .”<sup>49</sup> Champerty is a particular variety of maintenance, wherein the party providing maintenance seeks to profit from the suit: “[a]n agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.”<sup>50</sup> The U.S. Supreme Court defines the doctrines more succinctly: “Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome.”<sup>51</sup>

Third-party litigation finance agreements would appear to be precisely the type of arrangement meant to be avoided by the champerty doctrine: a sort of speculation in litigation in which a stranger to the suit provides financial backing in the hopes of a lucrative result. However, the primary rationale for the doctrines no longer applies. This Part examines the evolution of the doctrines from the common law to the modern day and shows that they are out

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47. *Product Design*, JURIDICA INV. LTD., <http://www.juridicainvestments.com/juridica-capital-management/how-we-work/product-design.aspx> (last visited Nov. 4, 2010).

48. Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 *MERCER L. REV.* 649, 669–74 (2005). Accord Jonathan D. Petrus, *Legal and Ethical Issues Regarding Third-Party Litigation Funding*, *L.A. LAW.*, Nov. 2009, at 16.

49. *OXFORD ENGLISH DICTIONARY* 226 (2d ed. 1989).

50. *BLACK'S LAW DICTIONARY* 262 (9th ed. 2009).

51. *In re Primus*, 436 U.S. 412, 424–25 n.15 (1978).

of step with our contemporary beliefs about litigation. In fact, a system of third-party funding actually furthers our public policy goals in this arena.

A. Historical Context of the Doctrines of Maintenance and Champerty

To understand the arguments for and against applying the principles of maintenance and champerty to third-party litigation finance agreements, it is worthwhile to briefly examine the doctrines' evolution through the common law. Debate about the proper role of third parties in litigation dates at least to ancient Greece, when a parade of (often paid) "sycophants" would come forth to argue on behalf of one party or the other in a civil dispute.<sup>52</sup> Ancient Rome saw the rise of the "calumniator," or one "who without authorization brings actions in the name of another with which [he has] no concern" or otherwise brings false, vexatious litigation.<sup>53</sup> By the Middle Ages, abuse of legal process by third parties was of such concern that even attorney-advocates were banished from most English courtrooms for fear that they would use specialized knowledge of the law to manipulate the outcomes of cases.<sup>54</sup> It was against this historical backdrop that the modern doctrines of maintenance and champerty arose.

While the ancient cultures had largely viewed lawsuits as a rational way for civilized men to settle disputes, litigation in medieval England was viewed with a certain disdain.<sup>55</sup> It was considered a necessary evil, to be tolerated but never encouraged.<sup>56</sup> This has been attributed in part to changes in the forms of trial that arose during the Middle Ages.<sup>57</sup> Trials by ordeal or by battle elevated the stakes of litigation to life-and-death proportions.<sup>58</sup> It is not surprising, then, that bringing a lawsuit was regarded as a sign of a belligerent, vexatious

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52. Radin, *supra* note 25, at 49–50.

53. *Id.* at 53.

54. *Id.* at 56.

55. *Id.* at 68.

56. *Id.*

57. *Id.* at 58.

58. In a trial by ordeal, the accused was made to suffer some torment, such as holding a piece of glowing hot iron or plunging his hand into a vat of boiling water; if, after three days, his wounds were healing cleanly, it was interpreted as a sign of divine intervention and thus, innocence. As horrific as that may sound, the ordeal of cold water may have been worse, as it presented the accused with a particularly unenviable choice. Having been hog-tied and thrown into a frigid lake, he was believed innocent only if he sank to the bottom and guilty if he floated. Thus, he had to risk drowning (and hypothermia) to have a hope of survival. George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 585–86 (1997). All in all, the trial by battle, in which the parties engaged in hand to hand combat until one emerged victorious, seems comparatively fairer, if no less gruesome; at least the incentives were properly aligned with the potential outcomes.

spirit, counter to Christian teaching.<sup>59</sup> Participation by a third party, it was believed, could only serve to fan the flames of ill will.<sup>60</sup>

In medieval England, outside support for lawsuits raised political concerns as well. Feudal lords would underwrite suits against their enemies as a form of private warfare to weaken their opponent's coffers.<sup>61</sup> In many of these suits, the remedy sought by the plaintiff was title to a disputed parcel of land; when such suits were successful, the sponsoring noble would demand a share of the property as repayment for his support.<sup>62</sup> In this way, a lord could both expand his own dominion and weaken his enemies in a single action. The practice gave rise to a patchwork of ever-expanding mini-principalities, which in turn threatened the dominance of the Crown.<sup>63</sup> Maintenance and champerty were declared crimes and made actionable as writs in the civil arena.<sup>64</sup>

The doctrines remained viable long after the Middle Ages.<sup>65</sup> Writing his *Commentaries* some two centuries later, Sir William Blackstone said that maintenance "is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression."<sup>66</sup> Indeed, the view that a society that tolerates excessive litigation is necessarily broken survives in some quarters to this day.<sup>67</sup>

## B. Treatment of the Doctrines in American Courts

Maintenance and champerty found their way into American jurisprudence via the common law, but debates about their continuing validity have existed nearly as long as the U.S. legal system itself. Courts began to question the doctrines' reach as early as the middle of the nineteenth century.<sup>68</sup> By the time legal scholar Max Radin completed his study of maintenance and champerty in 1935, he argued that the doctrines were in practice largely dead and certainly out of step with American thinking about litigation at that time.<sup>69</sup>

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59. Radin, *supra* note 25, at 58.

60. *Id.*

61. *Id.* at 64.

62. *Id.* at 61.

63. *Id.* at 65–66.

64. *Id.* at 64–67.

65. *Id.*

66. 4 WILLIAM BLACKSTONE, COMMENTARIES at 1354.

67. See generally PATRICK M. GARRY, A NATION OF ADVERSARIES: HOW THE LITIGATION EXPLOSION IS RESHAPING AMERICA (1997) (arguing that a "litigation explosion" has created a society of adversaries, eroded democracy, and encouraged victimhood).

68. *Id.* at 68. The New York Code of Civil Procedure was amended to allow assignments of interests, a form of champerty, in 1848.

69. Radin, *supra* note 25, at 68–74.

Numerous state agencies and legal aid societies had by then begun to provide aid to indigent litigants, a practice which would have been unthinkable at common law.<sup>70</sup> Over the next few decades, the notion of law and litigation in the public interest began to flower,<sup>71</sup> and maintenance and champerty continued their slow decline.

The doctrines retained some potency during the twentieth century in ethical guidelines for lawyers, who were traditionally prohibited from soliciting business (maintenance) and from entering into contingency fee arrangements with clients (champerty).<sup>72</sup> A number of states continued to bar contingency fees as champertous for decades after Radin's article, despite his objections.<sup>73</sup> Today, vestiges of the bans on champerty and maintenance remain in the form of prohibitions on attorney lending to clients for expenses beyond the costs of litigation, though it is unclear how frequently such rules are enforced.<sup>74</sup>

It has only been in the last half-century or so that proscriptions against attorneys' solicitation of clients have begun to loosen. In 1963, the U.S. Supreme Court held in *NAACP v. Button*<sup>75</sup> that maintenance and champerty "by nonprofit organizations that engage in litigation as 'a form of political expression' and 'political association' constitute[ ] . . . conduct entitled to First Amendment protection, as to which government may regulate only 'with narrow specificity.'"<sup>76</sup> Fifteen years later, the Court extended that holding to protect individual attorneys advising potential clients about their legal rights, where similar expressive interests were implicated.<sup>77</sup> In a different case decided the same day, however, the Court suggested the continued validity of the maintenance doctrine within the legal profession, when it upheld a state's indefinite suspension of an attorney found to have solicited business from potential litigants where profit was his primary motivation.<sup>78</sup> The American

70. *NAACP v. Button*, 371 U.S. 415, 456–57 (1963) (Harlan, J., dissenting).

71. Yeazell, *supra* note 28, at 1978–80.

72. *Button*, 371 U.S. at 456–57 (Harlan, J., dissenting).

73. James M. Wootton, *How We Lost Our Way: The Road to Civil Justice Reform* 11 (Wash. Legal Found., Critical Legal Issues Working Paper Series No. 120, 2004). Maine was the last state to decriminalize contingency fees in 1965. *Id.*

74. Rule 1.8(e) reads:

[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2010).

75. 371 U.S. 415.

76. *In re Primus*, 436 U.S. 412, 422–25 (1978) (summarizing the holding in *Button*, 371 U.S. 415).

77. *Id.* at 434.

78. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455 (1978).

Bar Association Model Rules of Professional Conduct continue to prohibit most in-person solicitation of business on the same grounds today.<sup>79</sup>

Even after two centuries of debate, and Max Radin's assertions to the contrary, maintenance and champerty are not yet dead and buried, nor are they strictly limited in application to cases alleging unethical conduct by attorneys. Indeed, thirty-two states and the District of Columbia still retain either statutes or intact precedents prohibiting champerty.<sup>80</sup> While few, if any, states still regard either maintenance or champerty as crimes, both may be raised to challenge the validity of a contract that purports to grant to a third party an interest in the outcome of a case, or as a defense to a suit alleged to have been financed by or assigned to a third party.<sup>81</sup>

On occasion, plaintiffs have even raised maintenance as an affirmative cause of action, alleging that defendants tortiously sought to "stir up strife" against them in the form of another party's litigation.<sup>82</sup> Indeed, in 2009, Nevada developer Del Webb Communities successfully prosecuted a champerty claim against a home inspection company it alleged had officiously intermeddled in

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79. Rule 7.3 reads:

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

The comments on the rule note that:

[t]here is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter . . . . The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

MODEL RULES OF PROF'L CONDUCT R. 7.3 & cmt.1.

80. Presser, *supra* note 20, at 22–23. *But cf.* GARBER, *supra* note 8, at 18 (pointing out that "[t]wenty-eight of fifty-one United States jurisdictions (including the District of Columbia) explicitly permit champerty, albeit with varying limitations") (internal quotations omitted).

81. See generally Bond, *supra* note 20. Recent cases in which champerty was asserted include *Emmerson v. Walker*, 236 P.3d 598 (Mont. 2010) and *M.V.B. Collision, Inc. v. Allstate Insurance Co.*, 887 N.Y.S.2d 770 (Dist. Ct. 2009).

82. Officious intermeddling, or an intention to "stir up strife," has long been cited by courts as a necessary element of maintenance. See, *inter alia*, *Odell v. Legal Bucks, L.L.C.*, 665 S.E.2d 767, 773 (N.C. Ct. App. 2008) review denied, 676 S.E.2d 905 (N.C. 2009); *Petition of Hubbard*, 267 S.W.2d 743, 743–44 (Ky. 1954); *Rohan v. Johnson*, 33 N.D. 179 (Sup. Ct. 1916); *State v. Chitty*, 17 S.C.L. 379, 393 (Ct. App. 1830).

contracts with Del Webb customers.<sup>83</sup> The defendant had encouraged Del Webb homeowners to file suit against the developer and provided evidence for the claim in exchange for a share of any funds recovered.<sup>84</sup>

Champerty and maintenance still rear their heads in American courts.<sup>85</sup> Though raised infrequently, they retain currency, at least in some jurisdictions. Therefore, the legality of third-party litigation finance is uncertain in many states.

### C. Maintenance and Champerty in Third-Party Litigation Finance

#### 1. Where We Have Been

Third-party funding of litigation would appear to be the very evil the doctrine of champerty was created to prevent. Yet, my research suggests that, to date, no American court has had occasion to consider the legality of an agreement to fund corporate litigation.<sup>86</sup> Courts have, however, been called on to consider third-party loans on personal injury claims. These cases, while an imperfect analogue because of the perceived vulnerability of the injured plaintiff, may provide the clearest clue as to how courts would apply the champerty and maintenance doctrines to litigation lending in the corporate context.<sup>87</sup> Such suits have met with mixed success in American courts.

One of the earliest cases in the United States to consider the validity of litigation lending agreements was *Saladini v. Righellis*,<sup>88</sup> which called on the Supreme Judicial Court of Massachusetts to decide if the doctrines of maintenance and champerty were still recognized in the commonwealth. In *Saladini*, the plaintiff had lent an acquaintance approximately \$19,000 to aid in pursuit of a legal claim asserting his interest in a real estate venture.<sup>89</sup> In exchange, she would receive a flat return: half of any net recovery after the payment of legal expenses.<sup>90</sup> Two years later, the borrower/defendant settled his real estate

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83. *Del Webb Cmtys. v. Partington*, 2009 WL 3053709 (D. Nev. Sept. 18, 2009). The plaintiff is well known to first-year law students as the defendant in the famous coming-to-the-nuisance case, *Spur Industries v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

84. *Del Webb*, 2009 WL 3053709 at \*1–2.

85. See generally Bond, *supra* note 20.

86. Lenders purport to select cases in jurisdictions where the law regarding champerty and maintenance seems most well settled. BURFORD ADMISSION DOCUMENT, *supra* note 5, at 12–13. Cf. JURIDICA ADMISSION DOCUMENT, *supra* note 5.

87. BURFORD ADMISSION DOCUMENT, *supra* note 5, at 12–13. Cf. JURIDICA ADMISSION DOCUMENT, *supra* note 5, at 8–9.

88. 687 N.E.2d 1224 (Mass. 1997).

89. *Id.* at 1225.

90. *Id.*

suit for \$130,000 but failed to inform the lender or render payment under the agreement.<sup>91</sup> The plaintiff discovered the settlement and brought suit to collect her share of the proceeds.<sup>92</sup> Although the defendant had not raised the issue, the trial court in *Saladini* invited the litigants, sua sponte, to address whether the funding agreement was champertous.<sup>93</sup> It eventually ruled that the contract was void under the common law and dismissed *Saladini*'s case.<sup>94</sup>

On direct appeal, the Supreme Judicial Court overruled the lower court and held that champerty was no longer recognized in Massachusetts.<sup>95</sup> The court began its analysis by questioning the continued relevance of the theoretical underpinnings of the maintenance doctrine, noting that Massachusetts “ha[d] long abandoned the view that litigation is suspect, and ha[d] recognized that agreements to purchase an interest in an action may actually foster resolution of a dispute.”<sup>96</sup> The court reasoned that there are modern rules of procedure to deal more effectively—and precisely—with the concerns maintenance and champerty were designed to address, such as frivolous lawsuits or financial inequities between the parties negotiating an agreement.<sup>97</sup> It remanded the case to the lower court for a determination of whether the agreement was “fair and reasonable” in light of the totality of the circumstances.<sup>98</sup>

Six years after *Saladini*, the Ohio Supreme Court took up the issue of litigation lending, with different results, in *Rancman v. Interim Settlement Funding Corp.*<sup>99</sup> The plaintiff in *Rancman* had received a \$7000 advance on any future settlement of a claim pending against her insurance company for injuries sustained in a car accident.<sup>100</sup> The funding agreement provided for a graduated rate of return based on the length of time until resolution of her suit: \$19,600 if the case closed within one year of the loan, \$24,800 if the resolution happened between twelve and eighteen months, and so on.<sup>101</sup> After settling her suit for \$100,000 in less than a year, *Rancman* sought rescission

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1226–27.

96. *Id.* at 1226.

97. *Id.* at 1226–27. Here, the court cited Justice Holmes's famous reprimand: “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” *Id.* at 1227 (quoting O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

98. *Id.*

99. 789 N.E.2d 217 (Ohio 2003).

100. *Id.* at 218–19.

101. *Id.*

of the advance agreement on the grounds that it was a usurious loan, or one offered at an illegally high interest rate.<sup>102</sup> The defendant funder argued that the agreement constituted an investment, not a loan, and therefore was not subject to statutory limitations on interest rates.<sup>103</sup>

In an inadvertent nod to the complexity of the issue, *Rancman* yielded three different holdings, with a separate rationale at each level of review. The lower court agreed with the plaintiff that the agreement was a usurious loan and ordered repayment at a then-prevalent interest rate.<sup>104</sup> The court of appeals adopted the lower court's finding that the agreement was a loan but voided the contract altogether because the defendant was not a licensed lender.<sup>105</sup> The Ohio Supreme Court, by contrast, found it unnecessary to determine whether the agreement was a loan or an investment.<sup>106</sup> It held, *sua sponte*, that in either event, the contract was void as maintenance and champerty—practices it described as “vilified in Ohio since the early years of [its] statehood.”<sup>107</sup> While acknowledging that the doctrines “ha[d] lain dormant in recent years” and had historically been applied only to attorneys, the court asserted that they retained vitality and relevance in the state.<sup>108</sup> It found that the financing agreement at issue provided Rancman with a disincentive to settle her case and therefore threatened to prolong litigation.<sup>109</sup> This, the court noted, is “an evil that prohibitions against maintenance seek to eliminate.”<sup>110</sup> In affirming the judgment of the court of appeals, the court held that “a lawsuit is not an investment vehicle,” and that “an intermeddler is not permitted to gorge upon the fruits of litigation.”<sup>111</sup>

Five years later, the Ohio legislature effectively overturned *Rancman* when it adopted a bill to allow and regulate “non-recourse civil litigation advances.”<sup>112</sup> It was only the second state, after Maine, to affirmatively sanction third-party litigation finance.<sup>113</sup> The legislation established procedural guidelines and disclosure requirements for lending agreements, and carefully laid out the rights and responsibilities of the parties.<sup>114</sup> Among other restrictions,

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102. *Id.* at 219.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 220.

108. *Id.*

109. *Id.* at 221.

110. *Id.*

111. *Id.*

112. Mark M. Bello, *Lawsuit Funding—New Legislation in Ohio*, OHIO TRIAL, Summer 2009, at 29.

113. *Id.*

114. *Id.*

it prohibited third-party lenders from making any legal decisions regarding the underlying civil action.<sup>115</sup>

## 2. Where We Are Headed

The approaches favored by the *Saladini* court and the Ohio legislature are likely to be adopted in the majority of jurisdictions, and with good reason. The view of litigation that gave rise to the doctrines against maintenance and champerty no longer corresponds with our conception of the role of the lawsuit in society.<sup>116</sup> Indeed, our public policy choices regarding litigation for most of the past century have had the effect, if not the goal, of liberalizing access to the courts. Moreover, the problems meant to be addressed by the doctrines are more efficiently and effectively remedied by various modern rules of procedure.<sup>117</sup> Courts should, and likely will, set aside maintenance and champerty as obsolete, at least insofar as they may be applied to third-party litigation finance.

Over the course of the twentieth century, Americans have come to view litigation as “a noble tool that can lead to transformative social change.”<sup>118</sup> Not only are lawsuits a peaceful means of dispute resolution, but they have come to be seen as a method of redress for societal ills and a way of vindicating individual rights.<sup>119</sup> Indeed, the Supreme Court itself has discarded the notion that litigation should be “viewed as an evil in itself.”<sup>120</sup>

Stephen Yeazell has written about the past century’s reconception of litigation. In the wake of cases like *Brown v. Board of Education*,<sup>121</sup> he writes, “civil litigation has become an avenue for changing the *status quo*, for challenging the powerful, for rearranging the economic and political landscape, for . . . achieving social change.”<sup>122</sup> In short, he concludes, “[l]itigation, even ordinary civil litigation, became a form of political right-seeking.”<sup>123</sup> Even those academics who decry “America’s litigation explosion”<sup>124</sup> concede the shift in public opinion about the meaning and value of lawsuits in modern society.<sup>125</sup>

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115. *Id.*

116. Yeazell, *supra* note 28.

117. *Saladini v. Righellis*, 687 N.E.2d 1224, 1226–27 (Mass. 1997).

118. Presser, *supra* note 20, at 1.

119. Yeazell, *supra* note 28.

120. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 n.32 (1977).

121. 347 U.S. 483 (1954).

122. Yeazell, *supra* note 28, at 2000–01 (internal quotation marks omitted).

123. *Id.* at 1990.

124. OLSON, *supra* note 30, at 1.

125. See generally GARRY, *supra* note 67 (discussing the numerous factors that influence Americans’ understanding and valuation of lawsuits).

Concurrent with society's changing attitudes about litigation were legislative efforts to improve access to the courts. In the procedural revolution of the early twentieth century, American jurisdictions abandoned the rigid common law system of writs in favor of, first, code pleading and, later, the simplified notice pleading of the Federal Rules of Civil Procedure.<sup>126</sup> A few decades later, Congress and numerous state legislatures began to adopt fee shifting statutes, which require defendants to pay successful plaintiffs' legal fees when a statutory or constitutional right is implicated in the claim.<sup>127</sup> These changes had the goal and the effect of making the courts more accessible.<sup>128</sup> Far from dissuading litigation, we had begun to actively encourage use of the legal system to settle disputes and secure justice.

A series of Supreme Court cases in the 1960s, '70s and '80s that struck down state regulation of various aspects of the legal industry enshrined in American jurisprudence the shift in popular attitudes about litigation. Traditional prohibitions on the solicitation of potential plaintiffs, attorney advertising, and the like were set aside in favor of helping litigants to avail themselves of their legal rights.<sup>129</sup> Indeed, in *Bates v. State Bar of Arizona*,<sup>130</sup> the Court decried the "underutilization" of the legal profession and expressed hope that lawyers' advertisements would "assist in making legal services fully available" so that "the aggrieved [would] receive information regarding their legal rights and the means of effectuating them."<sup>131</sup> The effect of these holdings was that behavior once firmly considered to be impermissible as maintenance was now effectively sanctioned by the First Amendment.

This is not to suggest, however, that investment in litigation is necessarily conduct entitled to First Amendment protection. The Supreme Court was careful in *Button* to distinguish the NAACP's activities from those "for purely private gain."<sup>132</sup> Further, the Court has never found that absolute

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126. OLSON, *supra* note 30, at 94–101.

127. Yeazell, *supra* note 28, at 1999–2000.

128. OLSON, *supra* note 30 at 101–06.

129. See generally *NAACP v. Button*, 371 U.S. 415 (1963) (holding that the First Amendment protects solicitation of litigants by nonprofit organizations that engage in litigation as "a form of political expression"); *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) (holding that First Amendment protection extends to legal advice and referrals offered by a business association to its members); *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that attorney advertisement in printed media falls within the scope of First Amendment protection); *In re Primus*, 436 U.S. 412 (1978) (holding that an attorney can educate potential litigants about their rights when First Amendment concerns are implicated); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (holding that an attorney cannot be disciplined for soliciting the business of people with a specific legal problem via printed media).

130. 433 U.S. 350.

131. *Id.* at 376–77 n.32.

132. *Button*, 371 U.S. at 443.

deregulation of the legal industry is necessary or even desirable. In *Ohralik v. Ohio State Bar Ass'n*,<sup>133</sup> the Court held that an attorney's in-person solicitation of clients for pecuniary gain, without a significant political or expressive component, was not entitled to First Amendment protection.<sup>134</sup> It affirmed a state bar association's right to discipline such an attorney when the circumstances are likely to pose dangers to a compelling public policy—namely, protecting potential litigants from being pressured to make speedy and uninformed decisions regarding legal counsel.<sup>135</sup>

Still, the underlying rationale of those cases was about protecting litigants from “vexatious conduct,”<sup>136</sup> whether it be attorney manipulation or “the oppressive, malicious, or avaricious use of the legal process.”<sup>137</sup> It is unlikely that any of these would apply to a third-party litigation financier voluntarily sought out by a plaintiff in need of assistance to foster an already-existing, valid claim. This is all the more true when the litigant is a corporate entity receiving impartial and expert legal counsel. Indeed, in an age when liberalized pleading has resulted not only in greater access to courts but in greater costs in prosecuting claims because of expensive pretrial discovery, third-party funding could be considered a public service.<sup>138</sup> Moreover, the recent ruling in *Citizens United v. Federal Election Commission*<sup>139</sup> may have laid the earliest groundwork for an assertion that there is a constitutionally protected link between commercial activity and the rights of free speech and free association. Where there is no imbalance of power between funder and litigant, and the underlying claim is valid, it is not terribly difficult to imagine the current Supreme Court expanding the *Button* line of cases to include litigation lending. At the very least, it is clear that the concerns about abusive litigation practices that led the Court to permit the Ohio bar to regulate attorney conduct in *Ohralik* simply do not apply to third-party litigation funding.

It appears that as a society we no longer subscribe to the view that litigation ought to be discouraged. On the contrary, we believe that substantial impediments to litigation ought to be removed and that, in some instances at least, litigation ought to be encouraged. Therefore, the doctrines of maintenance and champerty are not only obsolete, they appear to run counter to

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133. 436 U.S. 447 (1978).

134. *Id.* at 454–58.

135. *Id.* at 457.

136. *Id.* at 462.

137. *Button*, 371 U.S. at 443.

138. See Yeazell, *supra* note 28, at 1995.

139. 130 S. Ct. 876 (2010) (holding, on First Amendment grounds, that Congress could not limit corporations' spending on political advertisements during election seasons).

our public policy goals. They no longer provide a valid justification for prohibiting third-party litigation funding. Indeed, the law has progressed so far in the other direction that there may even be a credible argument that litigation funding is entitled to constitutional protection.

### III. OBJECTIONS TO THIRD-PARTY LITIGATION FINANCE GROUNDED IN CONSEQUENTIALIST ARGUMENTS

Even if champerty and maintenance no longer offer an argument against third-party litigation funding, critics insist there are numerous consequences of the practice that provide justifications for prohibiting it. These include adverse effects on litigation in general as well as ill effects on the relationship between attorney and client. Some of these consequences appear likely, though not all would agree that the supposed outcomes are negative. Others may be remedied through new and existing regulations. Finally, a few of the putative consequences are unlikely to occur. This Part offers sketches of these arguments against third-party litigation finance and a brief response to each.

#### A. Effects of Third-Party Finance on Litigation in General

##### 1. More Litigation

Critics contend that allowing third parties to finance litigation will result in the filing of more lawsuits.<sup>140</sup> Presumably, at least some proportion of potential suits that would otherwise be dropped because the expense of litigation is prohibitive, or the risk of loss too high, would be filed if a third party were willing to share (or bear entirely) the costs and the risk. The result, critics argue, would be more litigation, slowing the administration of justice if one assumes no corresponding increase in judicial capacity.<sup>141</sup>

Because third-party litigation finance is a relatively new phenomenon, there is a dearth of data to verify its effects on litigation. In 2009, David Abrams and Daniel L. Chen conducted the first empirical study of third-party funding in Australia, where the practice has been in place in some jurisdictions for more than fifteen years.<sup>142</sup> They found that the filing of suits

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140. Paul H. Rubin, *Third-Party Financing of Litigation*, presented at the Third Party Financing of Litigation Roundtable, Searle Ctr., Northwestern Univ. Law Sch. (Sept. 2009), at 6–10, available at <http://www.law.northwestern.edu/searlecenter/uploads/Rubin-ThirdPartyFinancingLitigation.pdf>; see also CHAMBER INSTITUTE REPORT, *supra* note 5, at 5–9.

141. CHAMBER INSTITUTE REPORT, *supra* note 5, at 10–12.

142. David Abrams & Daniel L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes* (unpublished manuscript, on file with author).

has indeed increased in those jurisdictions where third-party funding is legal.<sup>143</sup> Perhaps equally telling, they noted a decline in suits in jurisdictions that continue to prohibit third-party funding.<sup>144</sup>

It is important to consider, however, that third-party finance in Australia has been employed most often to fund insolvency disputes and class actions.<sup>145</sup> Neither has so far been a primary focus in the nascent American industry,<sup>146</sup> so the effects Abrams and Chen observed may or may not be duplicated here. For instance, one would almost certainly expect to see an increase in litigation in a system, like Australia's, that focuses on financing class actions. Because those cases often yield low individual damages, they are typically unlikely to be filed by single plaintiffs. They are equally unlikely to have been aggregated there because contingency fees are generally not allowed, the cost of litigating would be prohibitive for the individual, and the alternative of assembling funding from multiple plaintiffs is logistically cumbersome and in itself costly. Thus, one would expect to see more litigation in Australia because many of these class actions could not have existed before the advent of third-party funding. The same effect would not necessarily be repeated in the American system, where contingency funding is already available for class actions, and where third-party funding is not expected to be widely directed toward class litigation.

Even assuming that Abrams and Chen's findings in Australia will be reproduced in American courts, the mere possibility that third-party funding will result in more litigation is not, in itself, a sufficient basis for prohibiting the practice. The Supreme Court's observation about the "great benefits" of attorney advertising in *Bates* is equally applicable to third-party finance: "Although [it] might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action."<sup>147</sup> With the availability of alternate funding streams, meritorious claims that would have previously gone unheard and unrectified may now see the light of day. And given that third-party lenders will only select those cases most likely to yield a return on their investment,<sup>148</sup> we can expect that very few of the cases they fund will be entirely without merit. Thus, even

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143. *Id.* at 19.

144. *Id.*

145. Standing Committee of Attorneys General, *Litigation Funding in Australia* 4–6 (Discussion Paper, May 2006).

146. See discussion *supra* Part I at 578.

147. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977).

148. JURIDICA ADMISSION DOCUMENT, *supra* note 5, at 18–23. Accord BURFORD ADMISSION DOCUMENT, *supra* note 5, at 18–23.

if third-party funding is likely to produce more litigation, it is equally likely to produce more *worthy* litigation, and thus to provide greater access to justice, which is a net benefit to society.

To the extent that the filing of a greater number of suits is seen as a problem, it is possible that regulation may provide a partial solution. A legislature could limit the availability of funding only to claims already filed. In New York, for example, funding agreements may only be executed after the client has independently established a cause of action.<sup>149</sup> This solution is of limited utility, of course. If litigation funding becomes widely available, there would be little to discourage a potential litigant from first filing a claim and then seeking the necessary funding, knowing that the suit could be easily dropped if the financing failed to materialize. But at a minimum, such regulation might dissuade third-party funders from seeking out plaintiffs and helping them to devise possible claims.

On the other hand, a post-filing funding system like New York's fails to take full advantage of one of the key benefits of third-party finance: the due diligence funders apply to each case they consider.<sup>150</sup> One could easily argue that it is preferable to have a plaintiff discover that funders consider his claim to be meritless *before* he engages the time and resources of the court and his opponent, rather than after. If third-party financiers can weigh in before a claim is filed, they may be as likely to reduce the amount of litigation as to increase it.

In short, there is not enough data to suggest what effect, if any, the third-party finance industry will have on the number of suits filed in the United States. While researchers have observed an increase in claims in Australia, the use of such funding there is different enough to place serious doubt on whether their findings would be duplicated here. Moreover, it is at least conceivable that third-party finance could yield a net decrease in litigation, with the rigorous review process claimed by funders like Juridica and Burford acting as a filter to weed out specious claims before they are filed. Even if third-party finance does "increase the use of the judicial machinery," this weeding out process may result in an overall increase in worthy claims filed. A more efficient

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149. Jones, *supra* note 4, at 2.

150. Burford claims that its "qualified legal professionals" employ a "rigorous process designed to rapidly screen out unsuitable cases." BURFORD ADMISSION DOCUMENT, *supra* note 5, at 22. Among the factors considered are "the strength of the claim and its likelihood of success; the potential value of a claim both following adjudication and for settlement purposes; enforceability of an ultimate award; financial condition of the defendant; the likely cost of litigating the claim; regulatory and ethical risks, if any, in the relevant jurisdiction; timing to get through trial and final judgment; and timing and likelihood of settlement." *Id.* Along the same lines, Juridica spends sixty to ninety days and between \$75,000–\$100,000 on the screening process for each case. GARBER, *supra* note 8, at 26.

use of the justice system could be seen as a benefit to society, even if litigation increases.

## 2. Encourages the Filing of Frivolous Claims

A variation on the argument that third-party finance will yield more lawsuits is the assertion that it will encourage the filing of frivolous claims.<sup>151</sup> This is highly doubtful, for the same reasons discussed above. But some critics insist that, if a claimant does not have to bear the financial risk of prosecuting his own suit, there is nothing to stop him from pressing ahead with any claim that shows a miniscule possibility of recovery. The U.S. Chamber Institute for Legal Reform has said that “third-party litigation funding . . . permits plaintiffs and their attorneys to offload risk and thus encourages them to test non-meritorious claims.”<sup>152</sup> One might imagine that this theory would extend to contingency fee arrangements because in that situation, as with third-party finance, a plaintiff does not have to bear the costs of his own suit. The Institute reasons, however, that the attorney’s interest in recovery would prevent her from accepting frivolous claims on a contingency basis.<sup>153</sup>

This logic ignores that the third-party funder’s interest in recovery is quite similar to the contingency fee lawyer’s, and similar constraints will govern which cases are accepted. Indeed, contingency fee lawyers can minimize risk with a mix of paid and contingency cases, but the third-party funders’ very existence depends upon an accurate assessment of the value of claims, and the relative level of risk associated with each. Therefore, it is reasonable to expect that their expertise at claim valuation will surpass that of most attorneys.<sup>154</sup> Again, this may make the filing of frivolous claims even less likely than under a contingency fee regime because the funder is exercising a more refined analysis of which claims are likely to succeed, and at what amount. At the very least, the third-party funder’s assessment would offer the potential plaintiff a “second opinion” as to the prospective value of his suit, versus relying solely on his attorney’s opinion.<sup>155</sup>

Still, it is true that well-capitalized and broadly invested companies like Juridica and Burford have more latitude than most attorneys to accept

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151. CHAMBER INSTITUTE REPORT, *supra* note 5, at 5.

152. *Id.*

153. *Id.*

154. See generally Molot, *supra* note 31 (examining the costs of the failure of risk management and suggesting how lawyers can relieve litigants of litigation risk).

155. Isaac Marcushamer, Note, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1604 (2005).

claims on speculation because the risk can be spread across a larger portfolio of cases.<sup>156</sup> Abrams and Chen studied the investment portfolio of IMF Limited, Australia's largest third-party litigation funder, and observed a growing spread between maximum profits and losses in the portfolio over time.<sup>157</sup> They interpret this finding to mean that cases being funded have grown riskier over the past several years.<sup>158</sup> Nonetheless, it remains unlikely that third-party financiers will accept truly frivolous claims because the ratio of risk to potential return in those cases is so lopsided.

This is not to suggest that a frivolous lawsuit would never present an acceptable level of risk for a third-party funder. Strike suits, or nuisance claims brought by shareholders "to blackmail [corporate] management into a settlement so that management can avoid the costly process of continued litigation,"<sup>159</sup> do occur and could potentially be profitable. *Juridica* appears to address strike suits in its public policy statement, saying that it "opposes attempts to use outside capital to fund litigation that does not have clear prospects of success."<sup>160</sup>

Defendants can rely on more than funders' goodwill, however, to avoid nuisance litigation. There are both state and federal laws designed to stunt strike suits.<sup>161</sup> The most notable of these is the Private Securities Litigation Reform Act,<sup>162</sup> which requires plaintiffs to plead with particularity facts tending to show that the corporation acted with intent to defraud investors.<sup>163</sup> When claims are truly meritless, the heightened pleading standard acts to cut off litigation at the demurrer stage, before discovery begins.<sup>164</sup> In addition, state laws often require minority shareholder plaintiffs to post a reasonable deposit to secure the corporation's costs in defending the action, which is only returned to the plaintiff upon a judgment in his favor.<sup>165</sup> Such laws would provide a powerful disincentive for third-party funders to underwrite frivolous claims because they raise the level of risk associated with the suit by encouraging the litigation to move forward to the trial stage, where the odds of success would be minimal.

Federal and state rules authorizing sanctions for the filing of frivolous suits offer a second line of defense against such claims. Attorneys have a duty to

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156. CHAMBER INSTITUTE REPORT, *supra* note 5, at 6.

157. Abrams & Chen, *supra* note 142, at 16.

158. *Id.*

159. Merritt B. Fox, *Required Disclosure and Corporate Governance: Challenges to Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113, 119 (1999).

160. See *Juridica* Public Policy, *supra* note 32.

161. See WILLIAM MEADE FLETCHER, 13 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS, § 5971.30 n.2 (2010).

162. 15 U.S.C. § 78u-4 (2006).

163. Stanley Veliotis, 47 AM. BUS. L.J. 313, 316-17 (2010).

164. See *id.*

165. *Id.*

warn clients when their claims are without merit.<sup>166</sup> Moreover, an attorney is required to attest to the validity of any complaint filed.<sup>167</sup> So long as the attorney has no financial stake in the outcome, there is no incentive for him to represent a claim he believes to be worthless. Any gains he might make in fees could be offset by fines for prosecuting a frivolous suit.

Finally, third-party funders will likely be averse to the reputational costs of supporting frivolous litigation. In his seminal study of the bargaining power of repeat players in litigation, Marc Galanter found that it was essential for parties regularly engaging in legal action to “establish and maintain credibility as a combatant.”<sup>168</sup> A strong “bargaining reputation” is necessary for the repeat player “to establish ‘commitment’ to his bargaining positions.”<sup>169</sup> While Galanter was referring to the reputations of the litigants themselves, his premise is equally applicable to the party financing the litigation. If a particular lender becomes associated with nuisance suits, its involvement in a particular case could undercut the plaintiff’s bargaining power to the extent that it suggests the claim is without merit. Even when the individual plaintiff has a valid claim, he may suffer from “guilt by association” with a lender known for underwriting baseless suits. It is therefore quite likely that third-party funders will prefer to cultivate a reputation for financing only legitimate claims.

### 3. Discourages Settlement

It is a widely accepted notion among opponents of third-party litigation finance that “the funder’s presence prolongs the litigation beyond what is fair or necessary” because it acts as a disincentive for the plaintiff to settle her case.<sup>170</sup> The logic is much the same as with frivolous claims; since the plaintiff has nothing to lose, he “can be expected to reject what may otherwise be a fair settlement offer and hold out for a larger sum of money.”<sup>171</sup>

The Ohio Supreme Court relied largely on this line of reasoning to void a third-party lending agreement in its landmark decision in *Rancman v. Interim Settlement Funding Corp.*<sup>172</sup> There, the plaintiff had been injured in an automobile accident and filed a suit against her insurer.<sup>173</sup> While the case was

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166. CHAMBER INSTITUTE REPORT, *supra* note 5, at 5.

167. FED. R. CIV. P. 11.

168. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, in *LAW AND SOCIETY*, at 165, 169 (R. Cotterrell ed., 1994).

169. *Id.*

170. CHAMBER INSTITUTE REPORT, *supra* note 5, at 6.

171. *Id.*

172. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220 (Ohio 2003).

173. *Id.* at 219.

pending, she secured two non-recourse loans from a litigation lender totaling \$7000 and agreed to repay \$19,600 if, as proved to be the case, her suit were resolved within twelve months.<sup>174</sup> After settling with her insurance company for \$100,000, Rancman sued the lender, seeking rescission of the contract and a declaratory judgment that litigation loans were “unfair, deceptive and unconscionable.”<sup>175</sup> The court concluded that the loan, coupled with an assumed 30 percent attorney fee, effectively barred Rancman from considering any settlement offer under \$28,000.<sup>176</sup> In voiding the contract, the court decried the “evil” of “prolong[ing] litigation and reduc[ing] settlement incentives.”<sup>177</sup>

The *Rancman* court’s analysis is flawed because it wrongly assumes that a claim like Rancman’s has no inherent value. The court seems to suggest that settlement talks ought to begin at zero, and the presence of third-party funding effectively raises the floor on negotiations to create an artificial inflation of the numbers. In reality, settlements of personal injury claims against auto insurers, like Rancman’s, happen every day. The figures agreed upon fall within a broad but discernible range. That range represents the actual value of the claim.<sup>178</sup> Indeed, if the value of such suits were not calculable with some reasonable degree of accuracy, the auto insurance industry could not exist because insurers would have no way of knowing what premium to charge to offset the aggregate value of claims against it and still ensure a profit. The historical factors that allow insurers to calculate the approximate value of a claim allow third-party funders to do the same.<sup>179</sup> In this way, lenders are able to set the figure advanced to the litigant low enough to make a return likely, and that figure is typically well below the actual value of the claim.

The truth of this was borne out by the facts of the suit underlying the *Rancman* case, which was ultimately settled for \$100,000, or nearly fifteen times the amount advanced to the plaintiff.<sup>180</sup> While it may be true enough that the advance provided Rancman with a disincentive to settle her case for less

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174. *Id.* at 218–19.

175. *Id.* at 219.

176. *Id.* at 220–21.

177. *Id.* at 221.

178. One could also refer to this as the fair value of the claim. However, it is arguable whether a settlement figure is made “fair” just because defendants have historically agreed to pay it. For my purposes here, the “actual value” of a claim is assumed to be whatever amount a defendant is willing to pay, and a plaintiff to accept, to settle the suit and avoid going to trial.

179. Martin, *supra* note 10, at 84–85. However, litigation lenders in a corporate context may need to develop a claim-valuation system of much more individualized precision than that used on a run of the mill automobile accident. See generally Molot, *supra* note 31. See also Russ Banham, *Parrying the Litigation Threat*, CFO MAG., Nov. 1, 2000, available at <http://www.cfo.com/printable/article.cfm/2989210>.

180. *Rancman*, 789 N.E.2d at 219.

than \$28,000, that fact is largely irrelevant. The much more powerful barrier to settlement at that amount was that her case was actually worth considerably more. So long as third-party lenders want to see a return on their investment, they will set the amount loaned, and the expected return, well below the fair market value of the given claim. Thus, to whatever extent such a loan sets a floor value on negotiations, it would likely not have a meaningful effect on the ultimate settlement figure.

Still, it is generally accepted that the modern system of pleading, with its lengthy discovery process, was designed in large part to encourage settlement. If, as has been said, “a trial is a failure,”<sup>181</sup> then any disincentive to settlement, however small, might well be rejected as counter to public policy. It is not at all clear though that third-party financing in fact discourages settlement. To the contrary, there is considerable evidence that the existence of third-party funding actually tends to promote settlement. As commonly drafted, third-party lending agreements include a structural incentive to settle, and to do so as quickly as possible: Typically, the amount of the funder’s recovery increases gradually over time.<sup>182</sup> Plaintiffs who wish to maximize their own recovery can be expected to make every effort to bring their cases to resolution at the earliest possible point in the process.

More broadly, Jonathan Molot argues that, as third-party lending becomes more well-established, an increasingly sophisticated market in litigation risk is likely to emerge for both plaintiffs and defendants.<sup>183</sup> Ostensibly, this will allow the parties to more narrowly pinpoint the value of a pending claim. Indeed, this is the expertise that Juridica Investments purports to offer its clients, claiming it brings “rational, economics-based evaluation models to commercial litigation.”<sup>184</sup> If the model works, then third-party litigation finance can also be expected to encourage settlement because it promotes certainty in two ways.

First, ignoring disputed questions of law (which act as a deterrent to settlement in any event), the parties would be likely to agree on the range of settlement values for the claim because their experts would be employing a similarly sophisticated methodology and applying the same historical data

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181. Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 948 (2004) (citing Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991)).

182. See, e.g., *Rancman*, 789 N.E.2d at 218–19.

183. Molot, *supra* note 31, at 8–14.

184. Juridica Public Policy, *supra* note 32.

to the same facts.<sup>185</sup> The discovery process could be reduced to the relatively simple matter of aligning the estimates of each party's experts.

Second, a system of claim valuation promotes certainty because it allows parties to avoid the relative *uncertainty* of jury awards. A well-established market in risk analysis would allow each party to predict a fairly narrow value range for each claim. Jury awards, on the other hand, have a tendency to diverge from the settlement range contemplated by the parties, and often quite significantly.<sup>186</sup> Jurors' analysis appears to be somewhat subjective and, as such, defies prediction. Moreover, Abrams and Chen speculate that where juries are aware of the third-party funder's presence, they may have a tendency to decrease damages if they perceive the award as not redounding to the benefit of the plaintiff.<sup>187</sup> A third-party funding system would bring a measure of uniformity, objectivity, and predictability to claim valuation and thereby promote pre-trial settlement.

These theories are supported by the limited empirical data concerning Australia's third-party finance industry. Abrams and Chen found a marked decrease in the average number of appearances each party made before the court in jurisdictions that allow third-party funding versus those that do not.<sup>188</sup> They reasonably interpreted this decrease to indicate a corresponding increase in out-of-court resolution between the parties (i.e., settlement). Moreover, because their analysis was designed to account for and rule out other variables, they concluded that up to 89 percent of the difference in settlement frequencies between jurisdictions with and without third-party finance was attributable directly to the availability of that funding.<sup>189</sup> It is significant, however, that third-party finance agreements in Australia tend to give the funder *de facto* authority to make key strategy decisions, including whether or not to settle,<sup>190</sup> and this is not typically part of the burgeoning American model.<sup>191</sup> Whether this produces a difference in settlement frequency remains to be seen.

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185. See discussion of funders' due diligence process, *supra* note 150 and accompanying text.

186. Abrams & Chen, *supra* note 142, at 10.

187. *Id.* at 11. On the other hand, one could just as easily imagine jurors *increasing* an award in this situation to ensure that the plaintiff receives the actual amount they deem the claim to be worth. In either event, the outcome would be difficult or impossible for the parties to predict in advance with any accuracy.

188. *Id.* at 19.

189. *Id.*

190. Martin, *supra* note 10, at 109.

191. *Industry Best Practices*, AM. LEGAL FINANCE ASS'N, <http://americanlegalfin.com/IndustryBestPractices.asp> (last visited Nov. 4, 2010). Accord GARBNER, *supra* note 8, at 36.

#### 4. Financing Itself Will Become a Weapon for Plaintiffs

Some commentators have expressed concern that the mere existence of a third-party funding agreement will become a powerful weapon in negotiations between the parties. The U.S. Chamber Institute for Legal Reform contends that knowing a plaintiff has the financial resources to press even the most frivolous of claims through trial will create an artificial pressure on defendants to settle at suboptimal terms to avoid the stress and expense of litigation.<sup>192</sup> This effect might be different, the Institute suggests, if we followed a loser pays rule.<sup>193</sup> But where a defendant has little recourse to recover the costs of litigation, and his opponent has deep resources that he is under no obligation to repay, the defendant may be forced to extricate himself at the earliest possible moment, even when he knows the claim against him is baseless.

Proponents of third-party funding counter that, far from giving plaintiffs an unfair advantage in litigation, such arrangements actually serve to remedy a longstanding imbalance of power that favors defendants.<sup>194</sup> It is certainly true that, in battles between an individual plaintiff and a corporate defendant, financial disparities often present a barrier to victory for the plaintiff. A protracted discovery process can be dauntingly expensive, making the availability of some kind of financial assistance essential. Hence the rise of the contingency fee.<sup>195</sup>

The authors of the Chamber Institute Report insist that this “David v. Goliath” conception of litigation ignores the fact that defendants come in all stripes and include poorly and modestly funded individuals.<sup>196</sup> While this is true as far as it goes, in reality, plaintiffs do not sue defendants they know to be insolvent. And even modestly funded individuals are often insured against liability—in which case, the true defendant is indeed a more powerful corporate entity. Viewed in that light, third-party litigation funding serves virtually the same function as insurance, placing the litigant on a more stable financial footing. It is difficult to see how acquiring such an edge is somehow fairer for those who bought insurance before the event that gave rise to litigation than for those who acquired the assistance after the claim began.<sup>197</sup>

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192. CHAMBER INSTITUTE REPORT, *supra* note 5, at 8.

193. *Id.* at 7.

194. Martin, *supra* note 10, at 102.

195. Yeazell, *supra* note 28, at 1995.

196. CHAMBER INSTITUTE REPORT, *supra* note 5, at 4.

197. Timothy D. Scrantom, *A Capital Idea*, LAWDRAGON, Fall 2009, at 60, 62.

## 5. Class Actions Magnify These Negative Effects

Critics of third-party funding claim that all these effects would be magnified in a class action setting.<sup>198</sup> The Chamber Institute Report cites five main objections.<sup>199</sup> First, they argue that plaintiffs' lawyers will be even more tempted to test questionable claims because of the potential for a large return. Defendants would be forced to agree to a "suboptimal" settlement rather than roll the dice at trial.<sup>200</sup> Second, they point out that potential plaintiffs may not be aware, or approve, of the funder's presence.<sup>201</sup> Third, the named plaintiffs are typically selected by attorneys, and play a minimal role in determining litigation strategy. Therefore, there is no "legitimately aggrieved plaintiff" to monitor the legal strategy, so "the funding company can effectively run the litigation with no check on its actions."<sup>202</sup> Finally, the Chamber Institute argues, the presence of third-party funders eats into the damages that would otherwise go to class members.<sup>203</sup> These objections amount to an argument against class actions generally, but they do not effectively indict third-party funding of such claims.

The problem of frivolous claims was addressed in Part III.A.2, and those points are equally applicable here.<sup>204</sup> Further, just because the plaintiffs' claim may be novel does not mean it is without potential merit. If the claim were truly frivolous, it is unlikely that going to trial would represent a roll of the dice for defendants. If the defendant believes that there is an element of risk in proceeding with litigation, then it stands to reason that the plaintiff has a chance of proving his claim.<sup>205</sup> In that case, the settlement may be "optimal," even if not preferred. The question of whether to proceed or to settle is simply one of legal strategy. To the extent that defendants are concerned less about losing the case than about the costs of defending the claim, they have the option of going to trial and pursuing a motion for costs upon winning.<sup>206</sup> Alternately, states could address these concerns by including class actions among the cases for which, as in securities fraud claims, plaintiffs are required to post a security deposit to cover defense costs.<sup>207</sup>

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198. CHAMBER INSTITUTE REPORT, *supra* note 5, at 8–9.

199. *Id.* at 8.

200. *Id.* at 9.

201. *Id.*

202. *Id.*

203. *Id.*

204. See discussion *supra* Part III.A.2.

205. For a discussion of the definition of "frivolous litigation," see GARBER, *supra* note 8, at 31.

206. See FED. R. CIV. P. 11(c).

207. See discussion *supra* Part III.A.2.

The Chamber Institute's putative concerns for plaintiffs are similarly ill-conceived. Judges must approve settlements and, in certain instances, attorneys' fees for fairness to the class.<sup>208</sup> The fact that part of the settlement will go to pay attorneys' fees, and/or to repay the lender for the same, is to be expected, so long as the amount is reasonable. Moreover, just because a plaintiff is selected by an attorney to nominally represent a class does not support the conclusion that there is no legitimate grievance or that the plaintiffs will fail to oversee the case. Finally, the court can require that the source and amount of funding for the class action be disclosed in opt-out notifications to potential plaintiffs, so they can decide for themselves whether to join the suit.

In the end, critics' fears of third-party funding of class litigation may never be realized. Juridica Investments has declined to invest in class actions, noting that they "are not susceptible to the market-based determinants that should drive settlements."<sup>209</sup> Burford principal Selvyn Seidel has said that, although his company is not opposed to investing in class actions, it has not done so yet.<sup>210</sup> He notes, however, that "[c]lass actions are not a sin."<sup>211</sup>

His point is a good one. As a body politic, we have created a system of class action to address widespread harms. If, as I and others have argued, we believe litigation is beneficial to society,<sup>212</sup> then third-party funding of worthy claims provides a valuable service and need not be curtailed.

## B. Effects on the Relationship Between Attorney and Client

### 1. Takes Control Out of the Hands of Plaintiffs

The Chamber Institute Report cites the groundbreaking Australian High Court case that legitimized third-party finance there as a cautionary tale about the hazards of external control.<sup>213</sup> In *Campbells Cash & Carry v. Fostif*,<sup>214</sup> the funder, Firmstones & Feil (Firmstones), had contacted a number of individual tobacco retailers and encouraged them to bring a class action to recover licensing fees allegedly overpaid to a certain wholesaler.<sup>215</sup> Firmstones agreed to finance the entire enterprise. In exchange, it selected the plaintiffs' counsel,

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208. 28 U.S.C §§ 1711–12 (2006).

209. Juridica Public Policy, *supra* note 32.

210. Raymond, *supra* note 5.

211. *Id.*

212. See *supra* Part II.

213. CHAMBER INSTITUTE REPORT, *supra* note 5, at 9–11.

214. [2006] 229 CLR 386; HCA 41.

215. *Id.* at 388.

and indeed, did not permit the attorney to speak with the plaintiffs directly.<sup>216</sup> The funder directed the prosecution of the case and retained the authority to decide when and whether to settle.<sup>217</sup> Since *Fostif*, the Chamber Institute Report notes, these or similar terms are often favored by litigation financiers in Australian litigation lending agreements.<sup>218</sup> Moreover, funders in Australia now generally reserve the right to withdraw funding at any time, virtually guaranteeing that even plaintiffs who retain nominal control of their suits will not make choices that are counter to the funder's wishes.<sup>219</sup> Critics insist that this parade of horrors will inevitably come to pass in the American third-party finance industry.<sup>220</sup>

As a threshold matter, it is not entirely clear that third-party control of litigation is necessarily a problem, provided that the underlying claim is legitimate. It is certainly conceivable that the funder's expertise in a certain kind of claim might yield more proven strategies and better-informed decisionmaking than the lay plaintiff's. Further, we have already accepted contingency fee arrangements, which theoretically exert similar external pressures on the litigant's decisionmaking.

On the other hand, our current shared conception of litigation as a system of moral vindication may not be so flexible as to encompass circumstances where the putative owner of a claim has virtually no role in its prosecution. The answer depends, perhaps, on whether, as a society, we are concerned more with process or with outcome. Ultimately, such a philosophical debate is beyond the scope of this Comment.

Taking as true the assumption that third-party control of litigation is a bad thing, it is nonetheless far from apparent that this result is inevitable. Regulation of industry practices and establishment of ethical standards akin to those governing lawyers can effectively limit the role of the funder in decisionmaking. For example, legislatures can establish, as a legal matter, a duty of loyalty owed by funders to litigants. This would require lenders, like attorneys and other fiduciaries, to place the interests of the client ahead of their own. More to the point, legislatures can—and have—mandated that third-party lenders have no role in decisionmaking. Both the Maine and Ohio statutes regulating the litigation lending industry require funders to agree—and to clearly

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216. *Id.* at 424, 478–80.

217. *Id.* at 390.

218. CHAMBER INSTITUTE REPORT, *supra* note 5, at 11.

219. *Id.*

220. *Id.*

disclose to clients—that they may not make decisions or otherwise direct the conduct of the underlying litigation.<sup>221</sup>

Such regulation, while a positive safeguard, may not be necessary, as the third-party litigation finance industry has made affirmative moves to regulate itself. The American Legal Finance Association, a trade group comprised of sixteen of the largest lenders in personal injury claims, has established a list of best practices by which all members must agree to abide.<sup>222</sup> Among them, each member agrees that “they will not take any step to: [a]cquire ownership in the consumer’s litigation” or to “[i]nterfere or participate in the consumer’s litigation, and/or attempt to influence the consumer’s litigation.”<sup>223</sup> In addition, a newly formed industry association in the U.K. has instituted restrictions on when a funder may withdraw support from a suit once it has been granted.<sup>224</sup>

At first blush, it may strain credulity to imagine that a third-party funder of a corporate claim would simply hand over \$5 million or more and say, “Call us when the case is resolved.” However, given the painstaking process of case selection undertaken by firms like Juridica and Burford, which includes a review not only of the merits of the claim but of the track record of the attorneys prosecuting it,<sup>225</sup> perhaps it is not so far-fetched that the funding companies will take a hands-off approach to managing the case.

Finally, judges may also have a role to play in regulating the control exercised by the litigation finance industry. Historically, in declining to find a lending agreement champertous, most courts have noted, as one factor in their decision, that the lender had no control over the prosecution of the case. “Officious intermeddling” is often a required element of maintenance, and some courts have held that funding alone, without a showing of greater control, fails to meet the threshold.<sup>226</sup> If this reasoning were adopted widely, it could amount to a common law prohibition on third-party direction of litigation without impeding third-party lending.

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221. Maine Consumer Credit Legal Funding Practices, ME. REV. STAT. tit. 9-A, § 12 (2007); Non-Recourse Civil Litigation Advances, OHIO REV. CODE tit. 13, § 1349.55 (2008).

222. *Industry Best Practices-ALFA's Code of Conduct*, AM. LEGAL FINANCE ASS'N, <http://americanlegalfin.com/IndustryBestPractices.asp> (last visited Nov. 4, 2010).

223. *Id.*

224. Neil Rose, *Third-Party Funders to Form Association to Oversee Code of Conduct*, LAW SOC'Y GAZETTE (Mar. 4, 2010), <http://www.lawgazette.co.uk/news/third-party-funders-form-association-oversee-code-conduct>.

225. Jennifer Bazanca, *In Turbulent Markets, Hedge Fund Managers Turn to Litigation Funding for Absolute, Uncorrelated Returns*, HEDGE FUND L. REP., June 24, 2009, at 2; see also *Investment Policy*, JURIDICA INV., LTD., <http://www.juridicainvestments.com/about-juridica/investment-policy.aspx> (last visited Nov. 4, 2010).

226. See, e.g., *Odell v. Legal Bucks, L.L.C.*, 665 S.E.2d 767 (N.C. Ct. App. 2008).

One state court recently took a different approach that may well become another powerful common law means of protecting the litigant's right to control his own suit. Florida's Third District Court of Appeal held in *Abu-Ghazaleh v. Chaul*<sup>227</sup> that a litigation lender was a "party" to the suit for purposes of the state's attorneys' fees statutes, and therefore liable for the victorious defendant's fees and costs. Noting that the lender had the right to approve counsel, the power to veto when, whether, and how the suit was filed, and sole authority to approve any settlement agreement, the court concluded that he "had such control . . . as to be entitled to direct the course of the proceedings" and was therefore a party to the suit.<sup>228</sup> Extending lender liability beyond its initial investment when it exercises control over a suit may be the most powerful means of all to limit the third-party's involvement in decisionmaking.

## 2. May Waive Attorney-Client Privilege

One largely unanswered question raised by opponents of third-party finance is how it affects attorney-client privilege and the work product rule. Numerous commentators have suggested that the attorney-client privilege may be waived by any plaintiff who provides confidential information about his claim to potential investors.<sup>229</sup> The theory is that, under existing evidentiary doctrines, disclosing otherwise privileged information to a third party constitutes a waiver of the privilege. Juridica's position, however, appears to be that it is included in the attorney-client privilege: The company has pointed to its presumed obligations under the privilege to explain why it releases only anonymous, generalized descriptions of its lawsuit investments to shareholders.<sup>230</sup> It is unclear on what theory Juridica bases its assumption of privilege.

My research uncovered only one case in the United States to date in which the assertion of privilege over communications with a third-party lender was disputed: *Bray & Gillespie Management L.L.C. v. Lexington Insurance Co.*<sup>231</sup> Because the judge's ruling did not reach the merits of the privilege assertion, it offers little in the way of guidance as to how courts might view the issue of privilege. However, it is instructive as an illustration of the issues. There, the defendant insurance company had sought to depose the plaintiff's chief operating officer about his discussions with Juridica regarding possible financing

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227. *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 694 (Fla. App. Dist. 2009).

228. *Id.* (internal quotation marks omitted).

229. CHAMBER INSTITUTE REPORT, *supra* note 5, at 8.

230. JURIDICA ADMISSION DOCUMENT, *supra* note 5, at 10.

231. No. 6:07-cv-222-Orl-35KRS, 2008 WL 5054695 (M.D. Fla. Nov. 17, 2008).

of the claim at issue in the case.<sup>232</sup> Counsel for the plaintiff objected, saying that the information was privileged, without further elaboration. The judge ultimately held that the plaintiff's manner of asserting the privilege was improper under her standing rules, because it was framed as a blanket assertion, and it failed to cite which specific "privilege" (attorney-client or work product) was claimed or the factual basis for it.<sup>233</sup> Without ruling on the merits, she noted that the state law governing attorney-client privilege required a showing that the party receiving the privileged information was "a member of the bar . . . or his representative [who] in connection with this communication [was] acting as a lawyer."<sup>234</sup> In addition, the party asserting the privilege must show that the communication was offered for the purpose of securing a legal opinion or "assistance in some legal proceeding."<sup>235</sup> Alternately, the judge noted, the work product doctrine, when properly asserted, would shield "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for a party, or by or for a party's representative."<sup>236</sup> The record appears to contain no further motions asserting privilege over communications with Juridica.

It seems likely that courts will ultimately find that communications with third-party litigation lenders are protected by the work product rule, but not by attorney-client privilege. The information exchanged and the calculations generated by the finance company are clearly created (a) for a party and (b) with litigation in mind. However, the plaintiff seeking funding would do well to limit the communication with the finance company to only that information that is most essential to its determination of the value of the claim to avoid inadvertent waiver of the broader attorney-client privilege. Arguments that this relationship is included in the privilege may well be unavailing. Even when the principals of the finance company are attorneys, it is far from clear that the service they offer would qualify as the sort of legal assistance contemplated by the privilege rule. For example, in *Bray*, it may be true that Juridica was offering assistance in a legal proceeding, but it is arguable whether its representative was "acting as a lawyer" in this capacity. Ultimately, questions of privilege will come down to state law, and legislators wishing to promote the practice of third-party lending should imbed any protections of privilege in statutes governing the industry.

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232. *Id.* at \*2.

233. *Id.* at \*4.

234. *Id.* at \*2.

235. *Id.*

236. *Id.* at \*3 (internal quotation marks omitted).

### C. The Special Problem of Direct-Funding of Attorneys

There is a common exception to the rule prohibiting attorneys from sharing fees with non-lawyers, which permits an attorney or law firm to secure temporary financing from a traditional lending institution to offset the costs of contingency fee litigation. However, conventional banks have typically been unwilling to provide claim-backed loans because they have no way of valuing the risks associated with a particular case.<sup>237</sup> Presumably, lenders specializing in litigation funding have or will develop an actuarial expertise in risk valuation, and would be well suited to fill the gap left by traditional lenders' reticence. But such an arrangement raises particular concerns not necessarily present when the loan is made directly to the litigant.

#### 1. Third-Party Funding May Not Qualify as a Loan

As a threshold matter, it is unclear whether third-party litigation financing directly to attorneys would qualify as a loan under the fee-sharing exception, or even whether the industry as a whole would want it to so qualify. Litigation funders have historically sought to paint their contribution to personal injury plaintiffs as an investment rather than a loan, highlighting the considerable risk of the non-recourse arrangement to justify short-term returns sometimes exceeding 200 percent or more and to avoid running afoul of state usury laws.<sup>238</sup> This argument has met with success in a number of courts.<sup>239</sup> To argue now that the same type of agreement, made with a law firm rather than with an individual plaintiff, should be regarded as a loan strains the reasoning of those cases, and may expose the industry to usury charges once again.

However, ignoring the potential conflict with the historical position of litigation funders for the moment, it is possible that third-party financing of attorneys could qualify for the fee-sharing exception without running afoul of usury laws. Among the cases that have held litigation funding arrangements to be usurious loans, courts have typically found that collection on the loan

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237. George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 810 (2001).

238. See Shaltiel & Cofresi, *supra* note 13, at 348. *But see* Echeverria v. Estate of Lindner, No. 01886/2002, 2005 N.Y. Misc. LEXIS 894 (Sup. Ct. Mar. 2, 2005) (finding a litigation funding agreement that compounded interest at 3.85 percent monthly to be usurious, despite defendant's insistence that the agreement was an investment rather than a loan).

239. See, e.g., Fausone v. U.S. Claims, Inc., 915 So. 2d 626 (Fla. Dist. Ct. App. 2005) (holding that the court had no legal authority to regulate third-party funding agreements but recommending that the legislature consider limiting usurious interest rates in such agreements); Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 95–101 (Tex. Ct. App. 2006) (holding that usury laws did not apply because financing was not a loan and repayment was contingent upon victory in the underlying suit).

was a relative certainty in the particular case.<sup>240</sup> Thus, the component of real risk associated with investments was lacking. Other critics have argued that such loans, whether certain or not, are usurious and unconscionable because they take advantage of vulnerable plaintiffs when they are most acutely in need.<sup>241</sup>

It might be that neither of these rationales would apply when the recipient of the loan is a lawyer or law firm. A portfolio of cases would necessarily include varying levels of risk associated with the individual cases, and presumably a law firm would not seek to offload risk on any case deemed to be a “sure thing.” Moreover, attorneys, unlike individual plaintiffs, are well positioned to negotiate the terms of third-party funding and to make such an agreement with full awareness of its consequences. In these circumstances, lacking any element of unfair surprise or unequal bargaining power, a finding of unconscionability is unlikely. Therefore, it is possible that third-party financing of attorneys could qualify for the fee-sharing exception without running afoul of usury laws.

## 2. Direct Funding of Attorneys Creates Ethical Dilemmas

Litigation lending directly to the attorney or law firm creates particular ethical dilemmas. Chief among them, some critics claim, is that it makes lawyers accountable to someone other than their client.<sup>242</sup> Even when the funder does not directly seek to exercise control over the case, such an agreement may introduce a subtle pressure to consider the wishes of the investor. This is especially true when the attorney hopes to have other clients’ cases similarly underwritten.

On the other hand, contingency fee arrangements create a similar impediment to the attorney’s unfettered exercise of professional judgment, and yet we permit them because they further the policy goal of broadening access to justice in situations where meritorious claims might otherwise go unexplored. One could argue that the difficulty of an attorney’s maintaining professional objectivity is greater where his own money is at stake than when a third party is funding the litigation. Viewed in that light, third-party funding actually offers a safeguard against impermissible attorney bias because it puts financial concerns at one step removed. Moreover, the American Bar Association’s Model Rules of Professional Conduct already specifically forbid attorneys to allow a third party who pays their fees “to direct or regulate the lawyer’s

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240. *Echeverria*, 2005 N.Y. Misc. LEXIS 894, at \*9.

241. McLaughlin, *supra* note 11, at 643.

242. CHAMBER INSTITUTE REPORT, *supra* note 5, at 8.

professional judgment.<sup>243</sup> The attorney's ethical obligation "zealously to protect and pursue a client's legitimate interests" provides yet another safeguard.<sup>244</sup> If the duty of loyalty is strong enough to overcome the attorney's own pecuniary interests in a lawsuit, surely it can overcome his concern for the interests of a third party to whom he is not otherwise beholden.

On balance, though, because third-party funding is available equally to attorneys and to their clients, there is little logic in introducing even the minimal risk of ethical breach associated with direct funding of attorneys. Moreover, if lawyers are not a party to such arrangements, they are better situated to advise their clients on the relative merits of a lending agreement and to make sure that the risks are adequately highlighted. The Maine, Nebraska, and Ohio statutes each assume that funding is provided directly to the plaintiff and require that the attorneys read and explain the lending contract before it is executed by the client.<sup>245</sup> Ultimately, it would safeguard the client's interests and thus better serve the attorney-client relationship if the lawyer were to remain neutral in executing the funding agreement.

### CONCLUSION

Third-party litigation lending is consistent with our values as a society. In general, American jurisprudence has come to regard litigation as a positive force and has sought to minimize limitations on litigants' access to legal services and to courts. The lingering suspicion of lawsuits still expressed in some jurisdictions is a relic of the common law, out of sync with our public policy and popular sentiment. As such, it does not provide a rational basis for prohibiting third-party finance.

There are, however, legitimate concerns about the possible effects of the third-party litigation lending industry. Fortunately, most are either self-remediating or can be effectively addressed through existing laws or further regulation. For example, although third-party finance may lead to more litigation, it is also likely to promote settlement because there is a financial incentive for plaintiffs to resolve their cases as quickly as possible. Moreover, as the industry evolves, it is likely to generate expertise that will add efficiencies to the settlement process, making it more routine and predictable.

Legislatures may want to be proactive in regulating the industry. Third-party financiers could be required to register their activities with the state to

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243. Petrus, *supra* note 48, at 17.

244. MODEL RULES OF PROF'L CONDUCT, Preamble (2010).

245. Maine Consumer Credit Legal Funding Practices, ME. REV. STAT. tit. 9-A, § 12 (2007); Non-Recourse Civil Litigation Advances, OHIO REV. CODE tit. 13, § 1349.55 (2008).

promote transparency and ensure fair dealings. As the industry grows, states may want to develop standards for licensing, so that certain minimum qualifications would need to be met before a lender purports to assign value to a claim. At the very least, lawmakers may want to require that a neutral licensed attorney approve every estimate of a claim's worth, so that plaintiffs have the benefit of independent counsel. In addition, states should consider requiring that third-party loans be made directly to litigants, rather than to their attorneys, to avoid the potential conflict of interest between the attorney's duty of loyalty to clients and the financial obligation to lenders.<sup>246</sup> In general, any legislation regulating the third-party finance industry should be aimed at increasing transparency and access to courts, and minimizing the pitfalls for litigants.

There is undoubtedly a market for litigation finance. Stock in Juridica Investments and in Burford Capital has increased in value as investors have realized returns as high as 61 percent on a single claim in under two years.<sup>247</sup> Moreover, as lawsuits have become ever more expensive, litigants have grown eager to find ways to limit costs and to offload risk. Much like the insurance industry, third-party funding offers a way for them to do that, and may offer a net benefit to society as well, by redistributing the cost burdens of litigation while promoting access to justice. Lawmakers would be wise to enact legislation aimed at promoting the practice and encouraging judges to recognize the validity of existing agreements. The third-party litigation finance industry is likely here to stay.

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246. See MODEL RULES OF PROF'L CONDUCT R. 1.8.

247. JURIDICA INV. LTD., ANNUAL REPORT & ACCOUNTS (2008), available at [http://www.juridicainvestments.com/~media/Files/J/Juridica/pdfs/2008\\_Annual\\_Report.pdf](http://www.juridicainvestments.com/~media/Files/J/Juridica/pdfs/2008_Annual_Report.pdf).