Complex Litigation Funding:
Ethical Problem or Ethical Solution?

W. Bradley Wendel
and
Joshua P. Davis

I. Introduction.

Some commentators have worried that third-party funding, particularly in complex litigation, may give rise to ethical concerns. For that reason, various courts now require that plaintiffs' counsel reveal third-party funding in proposed class actions (or in litigation more generally).[1] In this Essay, we explore an alternative possibility: that third-party funding may solve ethical problems rather than cause them.

Part II provides the bulk of our analysis. It explains why third-party funding can comply with the letter and spirit of the relevant ethical rules and why it whether it causes or cures ethical problems depends on the setting. We note that if third-party funding agreements are properly structured—protecting, for example, lawyers' independent judgment—they should not pose ethical problems. We further contend that the scrutiny to which third-party funding is subjected often proceeds from a false premise—that more traditional forms of litigation funding do not raise ethical issues. The contrary is true. Every form of litigation funding has its pitfalls. Attorneys who are paid by the hour may maximize their profits by spending more time—and billing more time[2]—on legal work than is in their clients' interests. On the other hand, attorneys who are paid on a contingent basis may have incentive to settle earlier in litigation and for a lesser amount than benefits their clients. We suggest that in some contexts third-party litigation funding may ameliorate these tensions between clients and counsel.

Part III identifies two settings in which third-party litigation funding *may* do more good than harm. A first example—the topic of Part III.A—involves private antitrust enforcement, primarily through class actions. This example may be counterintuitive. Various attributes of antitrust law suggest the potential for overenforcement: treble damages; civil and criminal enforcement; and claims under state and federal law. But there is substantial evidence that concern about overenforcement of the antitrust laws is not only unjustified but backward—that the real concern should be about *under*enforcement. In general, scholars have explained that complaints about overenforcement through class actions and other complex litigation—

[1] *See, e.g.*, Standing Order for All Judges of the North District of California Contents of Joint Case Management Statement 19 (N.D. Cal. Nov. 1, 2018); *see also* Civ. L.R. 7.1.1 (D.N.J. June 21, 2021); Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022).
[2] See, e.g., Lisa Lerman, A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation, 34 Hosftra L. Rev. 847 (2006); Lisa Lerman, Gross Profits? Questions About Lawyer Billing Practices, 22 Hofstra L. Rev. 645 (1994); Lisa Lerman, Lying to Clients, 138 U. Pa. L. Rev. 659 (1990).

sometimes hyperbolically labeled "legalized blackmail"[3]—are exaggerated, if they exist at all. Our analysis of antitrust enforcement is more granular than that. We note that even for the ban on antitrust cartels—agreements that are relatively easy to prosecute because they are subject to so-called *per se* condemnation—the best evidence suggests that the law is not *over*enforced, but rather *under*enforced.

There are many reasons for potential underenforcement of price fixing.[4] Particularly pertinent are the incentives of plaintiffs' lawyers. They often lack the financial resources of large, corporate antitrust defendants and, partly for that reason, tend to be risk averse. Third-party litigation funding could serve as a corrective—filling plaintiffs' lawyers' war chests, stiffening their spines, and giving them greater incentive to persist in litigation when doing so will benefit their clients. As a result, rather than create an ethical problem, third-party litigation funding may help to solve it.

Part III.B suggests another possible benefit of third-party litigation funding. It might help to diversify the plaintiffs' lawyers who pursue class actions and other complex litigation. Courts, scholars, and other commentators in recent years have lamented the lack of diversity among plaintiffs' counsel in complex litigation. A potential obstacle to such diversity is the need for capital. Plaintiffs' counsel incur substantial expenses—in both time and litigation costs. In society at large, women and people of color tend to have significantly less capital than white men. To the extent that a disparity in capital prevents diverse counsel from pursuing or receiving important roles as plaintiffs' counsel, third-party litigation funding could promote progress. That possibility is admittedly speculative. We do not mean to make any strong claims. We suggest, however, it is worth consideration and research as judges, regulators, and policymakers assess the costs and benefits of third-party litigation funding.

A theme runs throughout our analysis. We should be careful to avoid a mistake that might be characterized as a variation on the naturalistic fallacy—that the practices to which we are accustomed are necessarily good.[5] We may be so used to clients paying attorneys by the hour and, to a lesser extent, on a contingent basis that we assume those financial arrangements raise no potential ethical issues. If so, we may view third-party litigation funding as aberrant and thus

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[3] See, e.g., Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357 (2003).

[4] Those reasons range from arbitration doctrine that can provide defendants practical immunity from private antitrust liability under federal law, American Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013), to procedural rules that make it difficult for plaintiffs to plead antitrust claims, Bell Atlantic Corp., v. Twombly, 550 U.S. 544 (2007), or to survive summary judgment. Matsushita Electrical Industrial Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574 (1986).

[5] To be sure, the term "naturalistic fallacy" is often used to refer to more technical issues so as G.E. Moore's discussion of efforts to reduce the good to natural properties, such as pleasurable or desirable, in PRINICIPIA ETHICA (1903), the is-ought problem dating back to DAVID HUME, A TREATISE OF HUMAN NATURE (1738-40), and more generally, and more closely related to the discussion in the text, that whatever is found in nature is necessarily good. See, e.g., Interview with Steven Pinker in UPI (available at https://www.upi.com/Odd_News/2002/10/30/QA-Steven-Pinker-of-Blank-Slate/26021035991232/).

suspect. One of our main points is that we should resist this version of the naturalist fallacy. Instead, we suggest returning to first principles to determine whether third-party litigation funding is good, bad, or indifferent, a conclusion that may well vary by context.

II. Litigation Financing First Principles.

When properly structured, standard commercial litigation financing transactions do not cause counsel for the claimant to violate any provision of the rules of professional conduct for lawyers. Nor do they lead to disloyalty under the common law of agency and fiduciary duties.

Note the qualifiers in those statements. They limit the claims to *commercial* and *standard* litigation financing transaction that are *properly* structured. Consumer litigation financing raises distinctive concerns—akin to those related to payday lending—that we will not consider here.[6] We also assume, as we believe to be the case, that commercial litigation financing has become relatively standardized in response to commercial and legal ethics considerations. At this point in the development of the litigation financing industry, numerous highly sophisticated financing firms, whose officers are mostly former partners at large law firms, have become established. These financing firms are repeat players in this transactional space and obtain legal advice as needed from outside counsel. A substantial body of publicly available information—from academic articles to continuing legal education materials—explains the ethical pitfalls in litigation financing transactions and how to avoid them. In short, prominent, reputable litigation financing firms have addressed the potential ethical issues seriously and effectively. As the American legal profession considers expanding third-party litigation financing to new areas, such as class actions or non-class aggregate litigation, it is important to keep in mind some of the potential ethical issues and how they have been addressed.

When litigation financing was a relatively new industry, the few scholars studying it would often begin by explaining what this strange new thing was, sometimes analogizing it to the lawless Wild West.[7] It has since become domesticated and is a now a familiar part of the legal landscape.[8] This familiarity might not breed contempt exactly, but it does risk losing sight

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[6] *See*, *e.g.*, Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133 (2019).

[7] Influential early articles include 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); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 NYU L. REV. 1273 (2012).

[8] As part of its Ethics 20/20 Commission, the American Bar Association formed a Working Group on Alternative Litigation Financing which prepared a report, known as the White Paper, on Alternative Litigation Financing. It was adopted by the House of Delegates in 2012. *See* Commission on Ethics 20/20 White Paper on Alternative Litigation Finance Informational Report to the House of Delegates (hereinafter "20/20 Report"). In 2020, after what it

of some of the costs and benefits of litigation financing. The normative perspective one can take could be from the point of view of the litigation system, or of society as a whole, or of the ethics of lawyers representing clients who have obtained litigation funding.

Some opposition to litigation financing echoes the policies underlying the common law doctrines of champerty and maintenance. Those doctrines sought to limit participation in litigation to those who had some connection with its subject matter.[9] Of course, what is the right sort of connection with the subject matter of the litigation can be subject to reasonable disagreement. What about liability insurers, for example, or plaintiffs' lawyers representing clients on a contingent fee basis? For the most part, standard commercial litigation financing transactions avoid problems relating to involvement in litigation by strangers by providing for no right on the part of the investor to have any say with respect to the conduct of the litigation by counsel.[10]

A recurring critique of the ABA's Model Rules of Professional Conduct is their tacit assumption that the Abe Lincoln, small town, localized solo practice model is still an accurate description of the way in which most legal services are delivered to consumers.[11] Even something as mundane as the representation of an insured under a liability insurance policy, with compensation provided by the insurer that has a right under the policy to direct the lawyer's conduct of the litigation, fits uneasily within the framework of the rules. The "eternal triangle" of lawyer, insurer, and insured has been the subject of considerable controversy and scholarly attention in the professional responsibility literature, which would be unnecessary if the rules handled the problem in a satisfactory manner.[12]

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characterized as a period of "exponential growth" in litigation financing (I'm not sure that's accurate), the Section of International Law of the ABA Section of Litigation proposed a set of Best Practices for Third-Party Litigation Funding. It was adopted by the House of Delegates in August 2020.

[9] *See* Max Radin, *Maintenance By Champerty*, 35 CAL. L. REV. 48 (1935).

[10] *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 737-38 (2014); *see also* Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *5 (Del. Super. Ct. Mar. 9, 2016); Miller U.K., Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711, 740 (N.D. Ill. 2014) (in camera review of financing agreement shows no assertion of control over the case or settlement by the funder).

[11] *See*, *e.g.*, Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 ST. MARY'S J. ON LEG. MALPRACTICE & ETHICS 304 (2017); Andrew Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49 (2015); Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2587 (2014); Gillian K. Hadfield, *Innovating to Improve Access: Changing the Way Courts Regulate Legal Markets*, DAEDALUS 5 (2014).

[12] *See*, *e.g.*, Ellen Smith Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II – Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29 (2001); Ellen Smith Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I – Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000); Tom Baker, *Liability Insurance Contracts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101 (1997); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997);

The rules also provide partial or unsatisfactory solutions to problems that recur in modern complex litigation contexts. Class action conflicts, both among class members[13] and between the class and counsel,[14] are fairly well understood, but remain pernicious. Even more challenging are conflicts arising within non-class aggregate representations, where it is exceptionally difficult, if not impossible, for clients to monitor the performance of their lawyers.[15] In aggregate litigation, representative lawyers have fiduciary duties to all parties and their counsel.[16] In contrast with the simple model of litigation in which an individual client instructs the lawyer on the client's objectives, or the lawyer is able to obtain the informed consent of a single, identified client to some adjustment in the duties ordinarily owed by the lawyer, the informal, ad hoc decisionmaking structure within non-class aggregations of individual claims makes it extraordinarily difficult for the lawyer to proceed as an agent for a defined principal.[17] The rules of professional conduct are ineffective in providing guidance to lawyers in a mass tort MDL (and let's not even consider the problem of mass tort *bankruptcy* proceedings!).

For these reasons, there is more to the ethical analysis of litigation financing transactions than simply marching through the potentially applicable rules of professional conduct. The rules simply are not well adapted to new and emerging forms of legal practice or innovative techniques for financing the delivery of legal services.

Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?* 4 CONN. INS. L.J. 259 (1997); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics,* 9 GEO. J. LEGAL ETHICS 475 (1996); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?,* 72 TEX. L. REV. 1583 (1994); Robert O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987).

[13] See, e.g., Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581 (2003); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 177 (Deborah L. Rhode ed. 2000); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997).

[14] *See*, *e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products Inc.* , 80 CORNELL L. REV. 1045 (1995).

[15] *See* ALI Principles of the Law of Aggregate Litigation § 1.05, cmt. f. *See also* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

[16] *See* Manual for Complex Litigation § 10.22 (4th ed.); Massaro v. Chesley (In re San Juan Dupont Plaza Hotel Fire Litigation), 111 F.3d 220 (1st Cir. 1997).

[17] *See* Charles Silver, *The Responsibilities of Lead Lawyers and Judges in the Multidistrict Litigations*, 79 FORDHAM L. REV. 1985 (2011).

That is not to say that lawyers can ignore the rules. Even if the drafters of Rule 5.4(a)—prohibiting sharing legal fees with non-lawyers—were thinking mostly about personal-injury lawyers sending "runners" or "cappers" to solicit accident victims and never gave a moment's thought to alternatives to bank financing for law firms,[18] the rule still says what it says and lawyers must comply with it.

An opinion of the New York City Bar Association reaffirming the fee-splitting rule was a mini-bombshell within the litigation financing industry.[19] For a while it created considerable uncertainty. Then a working group of the City Bar published a report acknowledging that literal application of Rule 5.4(a) to litigation financing transactions may not reflect contemporary professional needs and realities.[20] Although Rule 5.4(a) has not been amended, the understanding among New York lawyers and litigation financing firms is that the 2018 City Bar opinion is no longer good law. The reason is not the *ipse dixit* of the City Bar working group, which has no more regulatory authority than the City Bar ethics committee (which is to say, none). Rather, the persuasive effect of the working group report derives from its having drilled down through the text of the rules into the underlying principles of fiduciary loyalty and professional independence. It made a persuasive case that properly structured litigation financing transactions do not put undue pressure on these ethical duties.

We go slightly beyond the conclusion of the City Bar working group to argue that properly structured litigation financing transactions may be affirmatively a good thing from the point of view of professional ethics. Section III will develop the arguments that litigation financing has considerable benefits for the resolution of complex commercial and mass tort litigation. Before putting forward this affirmative argument, however, we need to play defense for a moment and address some of the ethical risks that may arise in connection with commercial litigation financing transactions. Significantly, the characteristic ethical risks of litigation financing are associated with some of its benefits. For this reason, we will present these risks in conjunction with their benefits. While some may worry, for example, that litigation financing may interfere with the process of settling civil litigation, it is also the case that litigation financing may mitigate some of the existing conflicts that arise in the settlement process. Similarly, while there may some concern that the interests of third party "strangers" to the litigation may influence the conduct of litigation, the financial contribution of these strangers may contribute to the fair resolution of disputes by providing the financial wherewithal one party needs to participate effectively in the process.

The risk of the involvement of strangers in litigation is, in short, that the usual vectors of interest in a typical litigated matter will become misaligned. On a simple picture of a lawsuit, the plaintiff and the defendant have legal interests that they seek to vindicate through litigation. Assuming each is represented by counsel, the duties of their lawyers are to provide technically

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[18] *See* W. Bradley Wendel, *Making Sense of the Fee-Splitting Rule*, JOTWELL- LEGAL PROFESSION (Feb. 27, 2018), available at https://legalpro.jotwell.com/making-sense-fee-splitting-rule/ (reviewing Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 101 (2018)).
[19] N.Y.C. Bar Ass'n. Comm. on Prof'l Responsibility, Formal Op. 2018-5.
[20] N.Y.C. Bar Ass'n, Report to the President by the N.Y.C. Bar Ass'n Working Group on Litigation Funding (2020),

competent assistance that furthers the lawful objectives of their clients.[21] As a matter of the law of agency, the parties' lawyers are obligated to interpret the instructions of their clients reasonably in accordance with their understanding of the clients' wishes.[22] On this model, lawyers provide expert assistance following the instructions of their clients. Although clients may have mixed motives – perhaps in addition to money damages a plaintiff may desire public vindication or some kind of injunctive relief, and a defendant may be concerned about its reputation as well as its exposure to damages – it is ultimately for the clients to determine the objectives of the representation.[23] Lawyers are required to monitor themselves to ensure that they do not have interests of their own, financial or otherwise, that would interfere with the fiduciary duties of loyalty and care they owe their clients.[24] Specifically in connection with financing transactions, lawyers must also ensure that any compensation for the representation they receive from anyone other than the client will not interfere with the lawyer's independence of professional judgment or the lawyer-client relationship.[25] Underscoring the importance of independence, the rules of professional conduct have a second provision, stating that "[a] lawyer shall not permit a person who. . . pays the lawyer to render services for another to direct or regulate the lawyer's professional judgment in rendering such services."[26] The usual, simple picture of a lawsuit therefore imagines interests running in one direction, with the client instructing the lawyer on the objectives of the representation and the lawyer providing unconflicted, independent assistance to the client in achieving those objectives.

In the following discussion, Section II.A presents a brief overview of some of the features of standard commercial litigation financing transactions. Section II.B then discusses the potential risks that litigation financing poses for the settlement process, including the client's exclusive authority to decide whether to accept an offer of settlement and the impact of litigation financing on the exercise of independent professional judgment by counsel for the claim owner. Section II.C considers the risk of third-party interference, specifically with reference to the doctrines of champerty and maintenance and the interests they further.

A. Standard Litigation Financing Terms.[27]

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[21] Restatement (Third) of the Law Governing Lawyers § 16(1) (2000).
[22] Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller, eds., 2014), at 321.
[23] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 1.2(a).
[24] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 1.7, 1.8.
[25] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 1.8(f). The rule also requires that the client give informed consent to the third-party payment of compensation and that confidential information pertaining to the representation not be shared with the payor.
[26] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 5.4(c).
[27] Much of the discussion in this section is based on the authors' experience advising law firms and litigation financing companies. In our experience, the terms described here are standard among major commercial litigation financing firms. Because the investment agreements are confidential, however, we cannot refer interested readers to original source documents backing up our assertions.

Commercial litigation financing transactions are structured as passive investments by the funder. In exchange for obtaining money, either in a single lump sum or in several tranches, the funded party agrees to repay the funder out of the proceeds of any judgment or settlement obtained. The transaction is without recourse, so if the claim owner recovers nothing, the funder loses its investment.[28] The repayment may be calculated as a percentage of the proceeds or, more commonly, as a multiplier of the amount invested, with the coefficient increasing over time (e.g., 2x if there is a recovery within one year, 2.5x if between 12-18 months, 3x beyond 18 months, *etc*.).[29] A waterfall provision in the financing agreement specifies the order of payment, with the funder generally receiving "first money out" in the form of repayment of the amount invested, followed by an allocation of proceeds among the funder, the claim owner, and the law firm.[30] The amount of recovery by the funder may be capped beyond a certain dollar amount, so that the claim owner and counsel have all of the upside beyond that amount, or all three parties may continue to share in the proceeds. The funder generally has a security interest in any proceeds recovered in the litigation.

The counterparty in litigation financing transactions may be either the claim owner or the law firm. In theory a claim owner funding deal may not involve the law firm at all, but in practice the claim owner is generally represented in negotiating the financing transaction. Because the claim owner agrees to repay the funder out of the proceeds of the judgment or

[28] Technically the funder is a purchaser of a contingent share of the proceeds of the litigation, which is a defined term in the investment agreement. Because the obligation to repay is not certain, the transaction should not be treated as a loan and thus is not subject to state usury limits. One state court reached the contrary conclusion with respect to consumer litigation financing. *See* Oasis Legal Finance Group, LLC v. Coffman, 361 P.3d 400 (Colo. 2015). To the best of our knowledge there is no comparable authority treating commercial litigation financing as a loan.

[29] It has become folklore in the litigation financing industry that returns based on a multiplier are permissible, while those based on percentages are not. New York City Bar Association Opinion 2018-5, after reviewing prior ethics opinions in which the payment to a non-lawyer based on the percentage of fees generated, states, "A nonrecourse financing agreement secured by legal fees in a matter—*i.e*., an arrangement in which it is contemplated that the lawyer will make future payments only if the lawyer recovers fees—constitutes an impermissible fee-sharing arrangement *regardless of how the lawyer's payments are calculated*" (emphasis added). This makes sense given the formalistic application of the fee-splitting rule in this opinion. What matters, in the committee's view, is that the funder's repayment comes out of attorneys' fees, not whether the repayment is calculated as a multiplier or a percentage. This is the case regardless of whether the fees owing to the law firm are calculated as a percentage of the client's recovery, as in a standard contingency fee agreement.

[30] *See*, *e.g.*, Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 91-93 (Tex. App. – Houston [1st Dist.] 2006) (detailing terms of transaction structured as investment in a pending lawsuit, with the return to investors taking the form of a preferential partial assignment of the plaintiff's recovery). This differs from a law firm obtaining financing from a bank and seeking to pass the costs of borrowing on to the clients as an expense of litigation. The permissibility of doing this was an issue in the World Trade Center litigation in the Eastern District of New York, involving compensation for first responders and other workers at Ground Zero of the 9/11 attacks. *See* Burch, *supra* note __, at 1278, 1290.

settlement, no issue arises under the state version of Model Rule 5.4(a). Itprohibits only lawyers from sharing legal fees with non-lawyers. In claimant-funding transactions, the parties agree that the proceeds will be held in an escrow account and divided into three streams, pursuant to the waterfall provision in the financing agreement. One stream goes to each of the claim owner, funder, and law firm, respectively.

In contrast, law firm financing transactions potentially raise fee-splitting issues under Rule 5.4(a). The funder's share of the proceeds may appear to be paid out of the attorneys' fees payable to the law firm under its engagement agreement with the claim owner. (Of course, *all* payments by a law firm to a non-lawyer providing financing, including payments of interest on an ordinary secured credit line, come out of the fees received by the law firm for representing clients.[31]) The practice of funding portfolios of cases in law firm financing deals, rather than single cases, has developed to avoid interfering with the law firm's exercise of independent professional judgment in the representation of its clients. Although the New York City Bar opinion mentioned above applies the fee-splitting rule in the same way to single case and portfolio financing transactions,[32] this is regarded as an outlier view. Portfolio financing has achieved widespread acceptance. The idea is that the securitization of the funder's investment in the proceeds of multiple litigated matters brings the transaction closer to a standard secured line of credit with a commercial lender, which is generally accepted as not implicating the fee-splitting rule. However, litigation financing transactions with the law firm as counterparty differ from ordinary commercial lines of credit in that they are without recourse. Because non-recourse financing is riskier for the investor, the financing firm's effective rate of return is higher than the interest rate obtained by a commercial lender.[33]

In either claimant-funding or law-firm-funding deals, the investment agreement includes numerous representations and warranties. In addition to the usual ones in any commercial transaction (good title, not in default, parties are duly organized and in good standing, all required disclosures made, etc.), the funder generally commits itself not to exert any control whatsoever over the conduct of the litigation or any actions taken by counsel for the claim holder. This includes, and generally is specifically represented as including, decisions with respect to settlement of the matter. Sometimes the funder will require periodic reporting on the status of the litigation, including whether a settlement offer has been made, but the funder will not attempt to interfere with the professional judgment of counsel. The funded party may commit

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[31] *See* D.C. Bar Op. 322 (2004) ("a law firm's profits result almost entirely from its fees"). But no one thinks paying interest to a commercial lender raises an issue under Rule 5.4(a). *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (3d. ed. supp. 2011) § 45.5, Illus. 45-1; Doug Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 677 (2005) ("Of course there is no prohibition against attorneys borrowing from banks to finance their practices. No courts or disciplinary authorities have ever suggested that attorneys who finance aspects of their practices with bank loans "share" or "split" their fees with the banks when they make loan payments.").
[32] N.Y.C. Bar Ass'n. Comm. on Prof'l Responsibility, Formal Op. 2018-5.
[33] *See* Burch, *supra* note __, at 1303.

to using the invested amount to pay for the expenses of litigation, instead of blowing it on a lavish vacation or an Italian sports car.[34]

Many of the features of this admittedly schematic description are responsive to the ethical duties owed by counsel for the claim owner. Whether the counterparty is the law firm or the claim owner, sophisticated litigation financing firms know that lawyers will be thinking about the impact of the financing transaction on their duties of loyalty, confidentiality, and independence. Representatives from financing firms often get on the phone with law firm general counsel to discuss features of the transaction and to respond to ethical and liability concerns raised by the firm.

The next two sections discuss some of the risks that lawyers may be thinking about, the ways that financing transactions respond to them, and some of the benefits of litigation financing. The first set of risks has to do with the potential that a litigation financing transaction might somehow interfere with the settlement process. That could be an ethical problem from the point of view of the claim owner's lawyer or a systemic problem from the point of view of the trial court. In reality, however, funding may tend to make settlement more likely, or at least fortify a party with less financial strength relative to the opponent, so that the resulting settlement is more likely to be fair.

The second concern has to do with the possibility that litigation funding will not merely level the playing field but will introduce strangers to the litigation, who are pursuing their own idiosyncratic interests and may wish to control the conduct of litigation by counsel. In our view this is something that happens only infrequently, although it tends to attract public attention. While most commercial litigation financing agreements prohibit the exercise of control by the funder, it is not entirely clear what would be wrong with the funder exercising some control. Control by a non-party is routine in public interest litigation, for example, and no one seems too fussed about that. The worry about control is rooted in the common law doctrines of champerty and maintenance, but properly understood these principles are aimed at ensuring that only *meritorious* claims are litigated.

B. Deconflicting Settlement.

All financial arrangements between lawyers and clients create conflicts of interest.[35] For the most part these are not on the radar of Model Rule 1.7.[36] It prohibits lawyers from

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[34] *See* Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice between Tort and Contract Norms When the Deal Breaks Down,* 66 VAND. L. REV. 1831, 1847-48 (2013) (one of several hypotheticals illustrating risks to the funder from the client's breach of the investment agreement).

[35] *See*, *e.g.*, A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165 (2003); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978).

[36] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 1.7(a)(2).

representing a client where there is a significant risk that the representation would be materially limited by a personal interest of the lawyer. This reflects a drafting choice by the American Bar Association and state regulators, not the absence of a real tension between the financial interests of lawyers and clients created by either hourly or contingent fees. Hourly fees create well known incentives to run the meter, overstaff matters, or engage in additional research, discovery, or motion practice without a corresponding benefit to the client. As the late legal ethics scholar Deborah Rhode memorably observed, diligent lawyers will leave no stone unturned, provided they can charge by the stone.[37] Hourly fees also separate the lawyer's incentive to promote the successful resolution of the client's matter from the lawyer's financial motive, since the lawyer will be paid regardless of the outcome of the matter.[38]

On the other hand, contingent fees create conflicts by combining three roles—those of provider of legal services, financier, and insurer (that is, the bearer of risk).[39] The contingency fee arrangement may create an incentive to depart from the role of faithful agent for the client by taking actions such as slanting the advice given to a client regarding settlement to protect the lawyer's financial investment.[40] Unlike hourly fees, which are often paid by institutional clients, often with in-house legal departments, contingency fees are often employed in the representation of individual, relatively unsophisticated clients. These clients are less capable of monitoring their lawyer's billing practices and pushing back if necessary. The monitoring problem is exponentially increased in aggregate litigation, where individual clients tend to disappear into a collective "inventory" of cases handled by a law firm.[41]

In an important paper published when litigation financing was something of a novelty, Beth Burch argued that some of the settlement-related conflicts that are endemic to contingency-fee financing could be mitigated by unbundling the lawyer's competing roles as investor and advisor.[42] Litigation financing firms have a straightforward interest, namely to make money.[43] Plaintiffs, on the other hand, have a wide range of financial and nonfinancial interests, varying risk preferences, and, in the case of aggregate litigation, potential difficulty in reaching consensus.[44] Attorneys have fiduciary duties to their clients, but recurring patterns of abuse tend to crop up in class and non-class aggregate litigation; these include pressuring clients to settle early, collusive settlements, and pressure to prevent clients from opting out of inventory

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[37] Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).
[38] Clermont & Currivan, *supra* note __, at 534.
[39] Restatement (Third) of the Law Governing Lawyers § 35, cmt. b (2000) (noting that contingent fees "enable a client to share the risk of losing with a lawyer, who is usually better able to assess the risk and to bear it by undertaking similar arrangements in other cases"); Burch, *supra* note __, at 1291.
[40] *See, e.g.*, Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship,* 23 L. & SOC. INQUIRY 795 (1998).
[41] Burch, *supra* note __, at 1292.
[42] Burch, *supra* note __, at 1277-79, 1315-16.
[43] *Id.* at 1311.
[44] *Id.* at 1306-11.

settlements.[45] The detachment of litigation financing firms, who are passive investors in the claims, combined with their ability to diversify risk, may relieve some of the financial pressure that tends to cause plaintiffs' attorneys to become lax with their fiduciary duties when it comes to settlement. There may be some tension with attorneys' ethical obligations, however, to the extent the financing firm wishes to monitor the performance of counsel, influence strategic decisionmaking, or weigh in on the desirability of a settlement.[46]

On the other hand, situations may arise in which the presence of litigation financing alters the parties' incentives in a way that makes settlement less likely. In a notorious 2003 case, the Ohio Supreme Court held that a litigation financing agreement was void because of the incentives it created regarding settlement of the underlying dispute.[47] The doctrinal basis for the decision was the ancient wrong of champerty, which we discuss below.

Setting aside for now the definition of champerty, the court's concern had to do with the impact of third-party financing on the decisionmaking of the plaintiff and plaintiff's counsel. The plaintiff in a lawsuit against an insurance company had sought to monetize the value of her claim. She obtained advances totaling $7,000 from two funding companies. The first advance of $6,000 gave the funding company the right to the first $16,800 in proceeds. If the plaintiff had a 30% contingency fee agreement with her attorney, she would accordingly have an absolute disincentive to settle for anything less than $24,000, because she would keep the $6,000 advance if there were no judgment or settlement in her favor. For any settlement offer, the court reasoned, the plaintiff would require a premium of $18,000 to settle. Of course, that may not be a bad thing. Settlement is not necessarily a good in itself.[48] From the point of view of legal ethics, however, the important point is to ensure that the incentives created by litigation financing, and the contractual relationship between the funder and either the claim owner or the law firm, does not interfere with the core fiduciary obligations lawyers owe their clients.

1. Authority.

As a matter of the rules of professional conduct governing lawyers, as well as the law of agency, the authority to make, accept, or reject a settlement offer is strictly that of the client.[49]

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[45] *Id.* at 1292-1300. To Burch's list should be added the concurrent conflicts of interest under Rule 1.7 that result from representing sub-groups with different theories of liability or damages claims. The *Amchem* and *Ortiz* decisions which for practical purposes ended class action treatment of mass tort claims were based largely on these concerns. In the non-class aggregation context, however, courts often defer to plaintiffs' counsel to set up subcommittees to represent groups of claimants having interests in common. If they do not ensure that differing interests are adequately represented, there are few avenues for underrepresented groups to seek relief.

[46] Burch, *supra* note __, at 1315.

[47] Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003). For the subsequent limitation of the holding of *Rancman* by legislation, *see infra* note __.

[48] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

[49] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 1.2(a). We note that these matters become more complicated in the class context, where not only class counsel but also the class representative plaintiff serve in a representative capacity. See, e.g., Lazy Oil; Corn Derivatives

Perhaps more importantly, however, as a matter of agency law, it is clear that only the client has the authority to enter into a binding settlement agreement, unless the client has validly authorized the lawyer to make the decision.[50] The opposing party would almost certainly confirm a lawyer's claim to have validly been authorized by the client to settle. In fact, it is hard to imagine any party represented by counsel being willing to enter into a settlement agreement not signed by the opposing party.

One way the funder might influence settlement through the claim owner's counsel would be by leaning on the lawyer who would, in turn, seek to persuade the client. While clients always retain the exclusive authority regarding settlement, they understandably rely on the advice of their counsel to determine whether to make or accept an offer. In addition to the protection afforded by the representation and warranties in the investment agreement, if the funder did seek to exert influence, this would be a situation in which a lawyer would have to act based on rules of professional conduct that require lawyers always to maintain independent professional judgment, free from the influence of third parties – those who pay the bills or otherwise. The cases in which an investor in litigation explicitly pressured a party to reject a settlement offer are very unusual. The most notorious example is probably the lawsuit brought by the professional wrestler known as Hulk Hogan against an online media company called Gawker, alleging that Gawker had violated Hogan's right to privacy by publishing a sex tape featuring Hogan's wife and his best friend, Bubba "The Love Sponge" Clem.[51] Reportedly the case was financed by Silicon Valley mogul Peter Thiel, who was motivated by his own beef with Gawker, which had outed him before Thiel was open about his sexuality. According to press reports, at Thiel's urging Hogan turned down substantial settlement offers in order to provide Thiel a vehicle with which to punish Gawker.[52]

A certain amount of backbone may be sufficient to resist pressure from funders to conduct the litigation in a particular way or to urge the client to reject a reasonable settlement offer (although, again, reputable commercial litigation financing companies insist that they do not want to be involved in settlement discussions). However, there have been reported cases in which the financial or other terms of litigation investment agreements have been structured in ways that risk interference with the client's exclusive settlement authority.[53] By analogy with cases holding unenforceable any financial penalty or other provision in a lawyer-client engagement agreement that purports to restrict the client's right to accept or reject settlement

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(concurrence) (class counsel should act in the best interests of the class in supporting or opposing a class action settlement, even if the class representatives disagree).

[50] Restatement (Third) of the Law Governing Lawyers § 22(1) (2000).

[51] W. Bradley Wendel, *The Miller-Becker Lecture: Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 4-5 (2018) (discussing the case).

[52] *Id.* at 5, 31, 39.

[53] *See*, *e.g.*, Burch, *supra* note __, at 1321 (discussing Burford's investment in the Lago Agrio litigation in Ecuador and provisions that penalized the plaintiffs for accepting a settlement offer less than $1 billion).

offers,[54] it is possible that a court might invalidate such a provision in a litigation investment agreement. However, if the funding agreement is with the claim owner, not the law firm, there is not the same risk of impact on the lawyer's fiduciary duties to the client. In the view of one of us at least (Wendel), a sophisticated claim owner and a litigation financing firm may be permitted to agree to an arrangement whereby the funder exercises control delegated by the claim owner. This is admittedly an untested approach.

2. Independence.

Another feature of the ethical landscape for lawyers representing clients who receive litigation financing is the professional duty of independence. This is recognized in several places in the Model Rules of Professional Conduct, including a general duty in all circumstances to "exercise independent professional judgment,"[55] a more specific provision stating that a lawyer "shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services,"[56] and another rule prohibiting third-party payments of attorneys' fees unless "there is no interference with the lawyer's independence of professional judgment."[57] The ABA Rules demand professional independence, particularly where money is involved.

Independence is important not only within the lawyer-client relationship, but also for the adversarial presentation of a party's case. Courts thus may worry about an undisclosed third-party payor that has the right to direct the actions of counsel. In the opioid MDL pending in the Northern District of Ohio, U.S. District Judge Dan Polster caught wind that some of the firms representing plaintiffs in the proceedings might have obtained what he called "third-party contingent litigation financing (3PCL)."[58] To safeguard the integrity of the proceedings, he ordered any attorney that had obtained 3PCL financing (or presumably had assisted a client in doing so) to disclose that fact and to submit affidavits from the funder and from counsel, for the court's *in camera* review, indicating that

> the financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement.[59]

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[54] *See*, *e.g.*, Angino & Rovner v. Jeffrey R. Lessin & Assoc., 131 A.3d 502 (Pa. 2016); Compton v. Kittleson, 171 P.3d 172 (Alaska 2007); Hoover Slovacek LLP v. Walton, 206 S.w.3d 557 (Tex. 2006); Morris Law Office, P.C. v. Tatum, 388 F. Supp. 2d 689 (W.D. Va. 2005); Ellis Rubin P.A. v. Alarcon, 892 So.2d 501 (Fla. Ct. App. 2004); Sanes v. Clark, 25 S.W.3d 800 (Tex. App. 2000); Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. Ct. App. 1994).
[55] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 2.1.
[56] *Id.*, r. 5,4(c).
[57] *Id.*, r. 1.8(f).
[58] *See* In re National Prescription Opioid Litigation, Order Regarding Third-Party Contingent Litigation Financing, Case No. 1:17-MD-2804, 2018 WL 2127807 (May 7, 2018).
[59] *Id.*

In return, Judge Polster offered a significant *quid pro quo* for funders: He would not permit any discovery into third-party financing. Although the brief order did not state a reason for this limitation, an obvious explanation is that the only issues on which discovery would be reasonably calculated to lead to admissible evidence were already covered by the affidavits reviewed by the court *in camera*.[60]

C. Leveling the Playing Field While Not Handing Over Control.

Max Radin's classic article *Maintenance By Champerty* begins with the observation that powerful parties to disputes were accompanied by a retinue of kinsmen and friends, while someone appearing without such support was "a miserable wretch in the literal sense of both words."[61] Intervention on behalf of another was a great reform in the ancient world, but the significance of their interest or lack thereof in the proceedings was contestable as the social institution of litigation evolved. Even as the role of advocate became professionalized in the Roman republic, advocates kept up the fiction of having some personal interest in the matter.[62] English common law likewise exhibited great mistrust for participation in litigation by disinterested parties, combining it with a powerful aversion by landed parties to any sort of litigation that might dispossess them of the source of their wealth.[63] When combined with

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[60] There is by now a sizeable body of caselaw addressing the discoverability of litigation financing documents, both the "deal documents" such as the investment agreement and underlying documents that were shared by a party or its counsel with the funder. Courts have shown a strong tendency to reject overbroad claims of relevance of litigation financing documents. *See*, *e.g.*, In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612 (D.N.J. 2019); V5 Techs. v. Switch, Ltd., 334 F.R.D. 306 (D. Nev. 2019); VHT, Inc. v. Zillow Group, Inc., No. C15-1096JLR, 2016 WL 7077235 (W.D Wash. Sept. 8, 2016); Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 VM KNF, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015), *aff'd,* 141 F. Supp. 3d 246 (S.D.N.Y. 2015); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014). Courts sometimes observe that discovery may be proper if a party can raise a non-speculative allegation of impropriety related to litigation financing. *See*, *e.g.*, *In re Valsartan*, 405 F. Supp. 3d at 619. However, I am not aware of decisions permitting discovery after the party seeking it provides a non-speculative basis for believing it would be relevant to show impropriety. Occasionally courts do order production of documents shared with the funder, reasoning through the attorney-client privilege and work product issues involved. The most prominent example is Acceleration Bay LLC v. Activision Blizzard, Inc., No. 16-453-RGA, 2018 WL 798731 (D. Del. Feb. 9, 2018). Importantly, however, this decision does not rest on any of the grounds of impropriety cited by Judge Polster, such as a conflict of interest for counsel or the interference by the funder with professional judgment.

[61] Radin, *supra* note __, at 49.

[62] *Id.* at 52.

[63] *See* Charge Injection Techs, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *2 (Del. Super. 2016) (providing a brief but helpful overview of the history of champerty and maintenance doctrines: ""The common law doctrines of champerty and maintenance originated in Medieval England in response to the practice of feudal lords and other wealthy individuals financing other individuals' legal claims, usually against the financier's political or personal

medieval attitudes toward speculation and usury, the horrifying prospect that men without capital might force their way into the landed classes motivated the creation of legal doctrines aimed at the wrong of intermeddling in legal actions belonging to others.[64]

The modern doctrine of maintenance and its close cousin champerty survive in some U.S. states,[65] although in most they have either been abolished or limited significantly in their scope. Defined concisely, "maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."[66] Champerty is a type of maintenance, with the key element of both being the participation in litigation by someone other than a party to the underlying dispute.[67] On that definition, a lawyer receiving a contingency fee for representing the plaintiff in a lawsuit is engaging in champerty; indeed, when continency fees were in their infancy, they were criticized as a species of champerty.[68] There is now a "consistent trend across the country. . . toward limiting, not expanding, champerty's reach."[69]

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enemies, in exchange for a share of the results. These 'champertors' enlisted paid retainers – known as 'maintainers' – who would prosecute the suits ruthlessly on the champertors' behalf. Such claims often involved title to land, which meant that the champertor would grow richer by becoming a joint owner of the landed estate.").

[64] Radin, *supra* note __, at 60-61; 3 WILLIAM BLACKSTONE, COMMENTARIES *134.

[65] The Ohio Supreme Court's *Rancman* case reacquainted many American lawyers with champerty. *See* Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003). *Rancman* held that a litigation financing transaction was void as a violation of the doctrines of champerty and maintenance. Quoting an 1823 case, the court 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." *Id.* at 220 (*quoting* Key v. Vattier (1823), 1 Ohio 132, 136). In 2008, the Ohio legislature effectively overruled *Rancman* by passing a statute that permits non-recourse civil litigation advance contracts. Ohio Rev'd Code 1349.55 ("Non-Recourse Civil Litigation Advance Contracts"). The statute requires disclosure of transactional terms, such as the total amount to be repaid and the annual percentage rate of return; requires a prominent disclaimer of any authority by the funder to interfere with the attorney's independent professional judgment, particularly regarding settlement; provides a five-day cancelation period; and also requires an acknowledgement by the claimant's attorney of several provisions.

[66] Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000) (quoting In re Primus, 436 U.S. 412, 424 n.15 (1978)).

[67] Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98 (2011).

[68] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986) § 9.4.1, at p. 527. Traditionally "[c]ourts lumped the contingent fee in with other champertous practices that were thought to stir up unwanted litigation and involve unscrupulous lawyers in the nefarious business of brokering lawsuits" (citing *Coon v. Landry*, 408 So. 2d 262 (La. 1981)). See also Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998).

[69] Del Webb Communities, Inc. v. Partington, 652 F.3d 1145 (9th Cir. 2011). Several states have abolished, or have never recognized, the doctrines of champerty and maintenance. *See*, *e.g.,* Osprey, Inc. v. Cabana, L.P., 532 S.E.2d 269, 276 (S.C. 2000); Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997); Rice v. Farrell, 28 A.2d 7, 8 (Conn. 1942) (champerty never adopted in Connecticut); Matthewson v. Fitch, 22 Cal. 86, 95 (Cal. 1863) (first California legislature's

1. Litigation Financing and Access to Justice.

The effect of legal prohibitions on champerty and maintenance is to make it more difficult for some "friendless" parties to sue for wrongs committed against them, and that was exactly the point. Contingency fees help mitigate this problem, but they are not an option in many instances. Many law firms that handle certain types of cases, including intellectual property and commercial litigation, are organized as partnerships or other types of business entities in which the entire firm puts its capital at risk and bears the risk of non-recovery in the event the client does not prevail in the litigation. Under internal firm policies, however, the partner originating the representation may be entitled to a substantial financial reward if the case is concluded successfully. Other partners (or members, if it is not a partnership) may understandably be reluctant to risk their money so that someone else in the firm can realize a big payday. Even in the absence of fairness issues (or simple envy), law firms may not be in the best position to manage the risks of self-financing litigation. In economic terms, third-party litigation financing allows claim owners and lawyers to offload the burden of financing and risk-bearing onto specialist firms who are in a better position to perform these functions.[70] There are some plaintiffs' side law firms that do very well at managing financial risk; in effect they compete with litigation financing firms. To the extent it is permitted by relaxed champerty and maintenance doctrines, litigation financing spreads the benefit of these financially robust plaintiffs' firms to a larger pool of potential clients. This is the access benefit often touted by supporters of litigation financing.

Proponents of third-party litigation financing also frequently refer to the David and Goliath problem, in which a large litigant is able to use its superior financial resources to wear down a smaller opposing party, even if the latter has a factually and legally meritorious claim. In a well-known decision from the Northern District of Illinois, the district court observed:

> Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent. . . . But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms.[71]

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decision to omit champerty statutes when organizing state is clear statement of doctrine's inapplicability). Other states define the doctrines narrowly enough that they do not affect litigation financing. *See*, *e.g.*, Bluebird Partners v. First Fidelity Bank, 731 N.E.2d 581, 587 (N.Y. 2000). A New York statute exempts transactions valued in excess of $500,000 from the definition of champerty. *See* N.Y. Jud. L. § 489(2).

[70] W. Bradley Wendel, *The Miller-Becker Lecture: Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L REV. 1, 13 (2018); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 370-72 (2009).

[71] *See* Miller U.K., Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711, 718 (N.D. Ill. 2014).

Similarly, in a Texas state court case, a smaller company needed to raise money to finance the costs of protracted litigation against oilfield equipment giant Halliburton, and also to keep its business running during the pendency of the lawsuit.[72]

The question is whether these benefits can be realized without the harms sought to be avoided by the prohibition on champerty and maintenance. In line with the modern trend of relaxing these prohibitions, many courts understand champerty and maintenance as aligned with other doctrines that protect the integrity of the litigation system against certain types of abuses. For example, the term "officious intermeddling" is often used in the definition of maintenance, but is not always defined. Looking closely at the facts of cases dealing with this definition, however, one can discern that courts tend to understand officious intermeddling as akin to the tort of malicious prosecution or the promotion of baseless litigation, involving conduct such as filing a suit with intent to distress or harass, or a fake summons or subpoena.[73]

Consider the definition of officious intermeddling in a leading California case, *Martin v. Freeman*.[74] One attorney, Douglas, lent money to another, Shinn. Shinn discharged his obligation on those loans by assigning to Douglas a claim he had against Freeman. That claim was subsequently assigned to Martin, the plaintiff in the lawsuit, and brought against Freeman. The defendant, Freeman, argued that the assignment was invalid because it violated a state anti-champerty statute. The Court of Appeal held that Douglas did not "buy" the claim as that term is defined by the statute for several reasons, including the inapplicability of anti-champerty doctrines to legitimate causes of action. "The purpose of the statute, as is that of champerty laws in general, is to prevent the officious fomenting of litigation."[75] Here the idea of "officious" participation in litigation is the touchstone for determining when a contractual assignment of a cause of action will be permitted. As for officiousness, the court appeared to define it in terms of whether the underlying claim was meritorious:

> The outright purchasing by attorneys of claims which perhaps otherwise would never be sued upon obviously would tend to stir up a good deal of litigation if it were permitted; but the transfer by one who owes money to an attorney of a claim which the transferor possesses against a third person may have but insignificant effect in the volume of litigation, and it partakes much less of the officious intermeddling nature of out and out purchase and sale.[76]

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[72] Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 90-91 (Tex. App. – Houston [1st Dist.] 2006).
[73] *See*, *e.g.*, Charge Injection Technologies, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400 (Del. Super. 2016); Miller U.K., Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711, 725 (N.D. Ill. 2014); Kraft v. Mason, 668 So.2d 679 (Fla. Ct. App. 1996); Weigel Broadcasting v. Topel, 1985 WL 2360 (N.D. Ill. 1985); Giambattista v. Nat'l Bank of Commerce, 586 P.2d 1180 (Wash. App. 1978).
[74] 216 Cal. App. 2d 639, 31 Cal. Rptr. 217 (1963).
[75] Martin v. Freeman, 216 Cal. App. 2d 639, 643, 31 Cal. Rptr. 217, 219 (1963).
[76] Martin v. Freeman, 216 Cal. App. 2d 639, 643, 31 Cal. Rptr. 217, 219 (1963).

This case suggests that the doctrines of champerty and maintenance, as they are understood today, are essentially concerned with stirring up *baseless* litigation. Courts that have abolished champerty and maintenance may refer to other constraints on non-meritorious litigation, such as sanctions under Federal Rule of Civil Procedure 11 or its state equivalents.[77] As the Supreme Judicial Court of Massachusetts put it, if a court is concerned about baseless litigation, it is better to deal with that problem directly, "rather than attempting to mold an ancient doctrine to modern circumstances."[78]

2. The Control Critique, Again.

In some states that continue to recognize the viability of champerty and maintenance, assertion by a funder of control over the conduct of litigation by counsel, including selection of counsel, case management, tactics, and particularly acceptance of settlement offers, is the "third rail" of litigation financing in the United States. Touch it and the deal is dead. This is not the case in Australia, where third-party financers are legally permitted to exert significant control over the litigation.[79] In the U.S., however, funders must be strictly passive investors, at least when funding lawyers. (There is an interesting open question concerning the degree of control the funder may have over the *claimant's* conduct of litigation.[80]) The absence of any right on the part of the funder to control the litigation is an important factual consideration supporting the conclusion that the financing transaction is not champertous.[81] For example, the purchase of a claim was held not to constitute champerty where the purchaser did not acquire any ''control,

[77] *See*, *e.g*., Hardick v. Homol, 795 So.2d 1107, 1110–11 (Fla .Dist. Ct. App.2001) (*citing* Alexander v. Unification Church of America, 634 F.2d 673, 678 (2d Cir.1980) (New York law)); Saladini v. Righellis, 687 N.E.2d 1224, 1226-27 (Mass. 1997); McCullar v. Credit Bureau Systems, Inc., 832 S.W.2d 886, 887 (Ky.1992); Security Underground Storage, Inc. v. Anderson, 347 F.2d 964, 969 (10th Cir.1965) (Kansas law).

[78] Saladini v. Righellis, 687 N.E.2d 1224, 1227 (Mass. 1997).

[79] *See* Campbells Cash and Carry Pty. Ltd. v Fostif Pty. Ltd .[2006] HCA 41 (known in the literature as the *Fostif* case).

[80] *See* Ass'n of the Bar of the City of N.Y., Formal Op. 2011-2 (2011) ("While a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation."). One of us has argued consistently that a sufficiently sophisticated claim owner, certainly including a corporation with in-house legal advice, could delegate a significant degree of control to a third-party litigation funder. See Wendel, *Paying the Piper*, *supra* note __, at 18-31; W. Bradley Wendel, *A Legal Ethics Perspective on Alternative Litigation Financing,* 55 CAN. BUS. L.J. 133 (2014). The relevant ethical value that is *not* implicated by agreements between the funder and claim owner respecting control is the independent professional judgment of counsel for the claim owner, who remains free to advise the client/claim owner based solely on counsel's independent assessment of the client's best interests and any applicable legal obligations the client has incurred, including to the funder.

[81] *See*, *e.g*., Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. App. – Houston [1st Dist.] 2006).

input, influence, right or involvement of any kind" in the conduct of the litigation.[82] Similarly, in a prominent (albeit unpublished) Delaware case, the trial court held that a third-party financing agreement did not constitute champerty or maintenance because the funder had neither the contractual right to control the litigation nor *de facto* control over counsel's conduct in the litigation.[83]

Reputable commercial financing firms do not attempt to exercise control over any aspect of litigation, from the selection of counsel to case strategy to the acceptance of settlement offers, when the financing transaction is with a law firm. In fact, representations and warranties made in standard commercial litigation financing contracts expressly disclaim any right to interfere with counsel's handling of litigation.[84] Ironically, on the defense side, there is frequently financial support provided by an entity that has extensive contractual rights to control the conduct of litigation, including settlement. That party is called a liability insurer.

Familiarity with liability insurance should not obscure the asymmetry here: The extent of third-party control over the defendant's conduct of litigation would set off alarm bells if a litigation financing firm sought anywhere close to that level of control over the *plaintiff's* counsel's handling of the representation. We have made peace with third-party liability insurance and extensive control on the defense side of the conduct of litigation, but it is important to see that this is because of the extensive regulation, by state insurance law, of the insurer-insured relationship.[85] For example, refusing to settle a case within policy limits can subject an insurer to tort liability if the insurer acted in bad faith.[86] One of us has long contended that some modest degree of control by a funder on the plaintiff's side might be permissible if it were subject to similar duties to exercise that control in good faith.[87]

As noted in the previous section, courts have occasionally suggested that litigation financing is tantamount to an exercise of control by a third party over litigation, given the incentives it creates.[88] The *Rancman* case from the Ohio Supreme Court caused an uproar when it was decided. In the intervening years, however, other courts have not accepted its invitation to scrutinize the financial terms of litigation funding contracts for their incentive effects. It is worth

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[82] Odell v. Legal Bucks LLC, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008).

[83] Charge Injection Technologies, Inc. v. E.I. Dupont De Nemours & Co., 2016 WL 937400, at *5 (Del. Super. 2016).

[84] *See*, *e.g.*, Miller U.K., Ltd. v. Caterpillar, Inc., 17 F.Supp.3d 711, 740 (N.D. Ill. 2014) (*in camera* review of financing agreement shows no assertion of control over the case or settlement by the funder).

[85] *See* W. Bradley Wendel, *A Legal Ethics Perspective on Alternative Litigation Financing,* 55 CAN. BUS. L.J. 133 (2014).

[86] *See* Douglas R. Richmond, *Advice of Counsel and Insurance Bad Faith*, 73 Miss. L. Rev. 95, 101 (2003); Kent D. Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113 (1990). The landmark case establishing tort liability for bad faith conduct by the insurer is *Crisci v. Security Insurance Co. of New Haven*, 426 P.2d 173 (Cal. 1967).

[87] *See* W. Bradley Wendel, *Third-Party Litigation Financing*, in TEXAS BUSINESS LITIGATION (Sofia Androgué & Caroline Baker, eds., 2016).

[88] *See supra* notes __ - __, and accompanying text.

emphasizing that *Rancman* was a consumer funding case, involving an unsophisticated client who may have been particularly vulnerable to lawyerly overreaching. In the usual commercial litigation financing case, however, the claim owner is a sophisticated business entity, often with in-house legal representation. It is not surprising that the concerns underlying *Rancman* have not had any real influence on the way courts think about control in the context of commercial funding transactions.

3. Loosening Restrictions on Non-Lawyer Investments.

Model Rule 5.4 is a broad prohibition on the participation of non-lawyers in law firms, as partners, shareholders, or even passive investors.[89] Believing that "'entrepreneurial lawyers and nonlawyers would pilot a range of different business forms' that will ultimately improve access to justice and the delivery of legal services,"[90] the state of Arizona became a pioneer in alternative structures for legal practice, including permitting lawyers to share legal fees with non-lawyers. The Arizona Supreme Court eliminated Rule 5.4 from the Arizona Rules of Professional Conduct and established an approval and regulatory process for Alternative Business Structures, entities in which non-lawyers have an economic interest or decisionmaking authority that would have been prohibited by Rule 5.4.[91]

III. How Third-Party Litigation Funding May Improve Litigation Dynamics

We developed our two main points in Part II. They are: (1) the letter of the ethical rules does not prohibit properly structured third-party funding agreements, and (2) their spirit may not either, depending on context. Indeed, we noted that third-party funding may turn out in some cases to be an ethical solution, not an ethical problem. Next we explore two examples where that may be true.

The first example involves third-party funding of private antitrust class actions, and the second funding of class counsel from diverse backgrounds. Of course, these examples are not mutually exclusive. Diverse attorneys—women, people of color, members of the LGBTQ+ community—may seek leadership positions in antitrust cases.

To be clear, we are not contending that third-party funding *would* be an ethical solution in these contexts, just that it *might* be. Our goal is to illustrate that third-party funding may create desirable incentives and opportunities. A careful and extended analysis would be required to show that third-party funding *would* have these positive effects—or, perhaps, that it already is.

A. Third-Party Funding of Private Antitrust Enforcement

[89] Am. B. Ass'n, Model Rules of Prof'l Conduct, r. 5.4.
[90] Arizona Judicial Branch, *Alternative Business Structures*, available at https://www.azcourts.gov/cld/Alternative-Business-Structure (quoting ARIZONA SUPREME COURT TASK FORCE ON THE DELIVERY OF LEGAL SERVICES: REPORT AND RECOMMENDATIONS (Oct. 4, 2019), pp. 12-13).
[91] Arizona Judicial Administration Code § 7-209.

Substantial empirical evidence and analysis suggest that antitrust litigation on average results in recovery of less than the actual harm antitrust violations cause and less than the benefits antitrust violators receive. That can give large corporations with market power incentive to violate the antitrust laws. John Connor and Bob Lande capture this possibility succinctly: in antitrust, they claim, crime pays.[92]

Some commentators have doubted this point because plaintiffs in antitrust cases may recover nominal "treble" damages,[93] multiple plaintiffs may recover damages for the same conduct (including direct purchasers from antitrust violators, indirect (downstream) purchasers, and competitors), and, for some conduct, antitrust violators are subject to both civil and criminal liability.

Even taking those considerations into account, however, antitrust recoveries may remain below actual harm because:

(1) Procedural obstacles and other dynamics generally cause victims to recover less than single "antitrust" damages;

(2) "Antitrust" damages omit many of the categories of harm caused by antitrust violations so that single "antitrust" damages are less than actual harm;

(3) Combining points (1) and (2) suggests that victims of antitrust violations rarely, if ever, recover compensation equal to the full harm they suffer; and

(4) Many antitrust violations are not discovered and, even if discovered, cannot be successfully proven, including because the violators have destroyed the evidence.

Part of this dynamic is attributable to a power imbalance between plaintiffs in antitrust cases—or, more accurately, their attorneys—and the large corporations they sue. Plaintiffs' counsel in antitrust generally operate on a contingent basis. They pay the costs of litigation, which can amount to many millions of dollars in a single case. They also invest their time, which can be worth tens of millions of dollars in a single case. If they recover nothing, they lose the money and time they invest. That can render plaintiffs' attorneys averse to risk. As a result, they may settle in a way that does not maximize their expected return but that insures against a catastrophic loss. Only a limited number of plaintiffs' law firms have the capital needed to front the hard costs and the value of their legal services over the life of a long, complex litigated matter. In contrast, the large corporate defendants that tend to be defendants in antitrust cases may have a higher tolerance for risk and so may settle on favorable terms compared to the expected value of litigation.

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[92] John M. Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime Pays," 34 Cardozo L. Rev. 437 (2012) (explaining that monetary sanctions even in cartel cases—the easiest antitrust cases to prosecute—are only 9 to 21% of what they should be for optimal deterrence).
[93] We put the word "treble" in quotation marks because, as discussed below, see infra Part III.A.2, in antitrust treble damages capture much less than three times the harm that an antitrust violation actually causes.

The aversion to risk of plaintiffs' attorneys can explain in part why they and third-party funders often can strike mutually beneficial deals. The third-party funders may be risk neutral or, at least, less averse to risk than plaintiffs' attorneys, owing to their capacity to diversify across a portfolio of investments in a number of different litigated matters. The plaintiffs' attorneys can trade some of their potential upside to the funders in exchange for some of their downside risk.

Given those dynamics, third-party funders may tend to right an imbalance in settlement negotiations. By removing some risk from plaintiffs' attorneys, they may enable plaintiffs to settle for an amount closer to the expected value of litigation than they otherwise would. That could help plaintiffs' lawyers approach optimal levels of private antitrust enforcement.

With that framework in place, consider the evidence that plaintiffs recover less than the actual harm they suffer from antitrust violations.

1. Actual recoveries result in less than single "antitrust" damages.

Cartel cases—involving horizontal price-fixing—would seem to be particularly susceptible to overenforcement, not underenforcement. Cartelists face the prospect of both civil and criminal liability. Moreover, the burden of proving a *per se* antitrust violation is relatively modest. Unlike so-called rule of reason cases, horizontal price fixing is subject to *per se* condemnation. That means plaintiffs do not have to prove defendants have market power to establish an antitrust violation. Nor do they have to show the conduct at issues has greater anticompetitive effects than procompetitive effects. If plaintiffs prove that defendants engaged in horizontal price-fixing, then they have established an antitrust violation. All that is left to show is that the conduct caused harm and, if it did, the amount of the resulting damages. Moreover, civil litigation may follow on the heels of criminal litigation and, quite possibly, guilty pleas. If so, defendants may lose on whether they violated the antitrust laws as a matter of issue preclusion.

Yet even in cartel cases—involving a conspiracy to inflate prices above competitive levels—the evidence is that the cumulative financial penalties corporations pay are almost always less than single "antitrust" damages.[94] Various procedural rules and litigation dynamics explain why that would be so.[95] Courts have made it progressively more difficult for antitrust plaintiffs to escape mandatory arbitration,[96] to survive motions to dismiss,[97] to get classes

[94] John M. Connor & Robert H. Lande, "Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages," 100 Iowa L. Rev. 1997 (2015).
[95] See generally Robert Klonoff, "The Decline of Class Actions," 90 Wash. U. L. Rev. 729 (2013) (discussing ways in which courts have made prosecuting class actions more difficult).
[96] American Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).
[97] Bell Atlantic Corp., v. Twombly, 550 U.S. 544 (2007).

certified,[98] and to survive summary judgment.[99] Further, as noted above, the plaintiffs and their lawyers usually lack the resources of the conspirators—generally large, well-funded corporations.[100]

For these and other reasons, even in the easiest cases to prosecute—cartel cases—the total financial payouts by defendants are generally below single "antitrust" damages. John Connor and Bob Lande have conducted the most rigorous analysis of this issue to date. They found that on average—depending on how one measures—cartelists pay in total between about 20 to 67% of single "antitrust" damages as a result of civil and criminal litigation.[101]

2. <u>"Antitrust" damages do not include much of the harm caused by antitrust violations</u>.

Another reason that antitrust victims may recover less than the harm they suffer is that they are unlikely to obtain compensation for various categories of their injuries. "Antitrust" damages—the damages that plaintiffs can obtain in antitrust litigation—is much less than the actual harm caused by antitrust violations.[102]

Consider a conspiracy to inflate prices above competitive levels. Plaintiffs bringing claims usually seek to recover the resulting overcharge damages, that is, the extra amount they paid because of the conspiracy. But price-fixing conspiracies cause many other kinds of harm. First, plaintiffs lose the use of the extra money they paid from the time of the purchase to the time of recovery, so-called prejudgment interest. But plaintiffs cannot recover pre-judgment interest in antitrust cases. Plaintiffs thus are forced in effect to give antitrust violators interest-

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[98] *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 934 F.3d 619 (D.C. Cir. 2019) (holding that class certification was inappropriate where 12.7% of absent class members were uninjured); *In re Asacol Antitrust Litigation*, 907 F.3d 42 (1st Cir. 2018) (suggesting that class certification may be inappropriate if a class contains uninjured members and plaintiffs must rely on declarations or affidavits to determine which class members were injured); *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 316 n. 14 (3d Cir.2008); *but see Olean Wholesale Grocery Cooperative, Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022) (en banc) (holding that courts may certify classes containing uninjured members and approving practical approaches to establish common issues predominate for purposes of certification). See also Joshua P. Davis & Eric L. Cramer, "Antitrust, Class Certification, and the Politics of Procedure," 17 Geo. Mason L. Rev. 969 (2010) (explaining ways in which courts have made class certification more difficult, particularly in antitrust cases); Joshua P. Davis & Eric L. Cramer, "Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases," 41 Rutgers L. Rev. 355 (2009) (explaining ways in which courts have made class certification more difficult, particularly in antitrust cases).
[99] Matsushita Electrical Industrial Co., Ltd. V. Zenith Radio Corp., 475 U.S. 574 (1986).
[100] Joshua P. Davis & Eric L. Cramer, "Of Vulnerable Monopolists?: Questionable Innovation in the Standard for Class Certification in Antitrust Cases," 41 Rutgers L. Rev. 355 (2009)
[101] John M. Connor & Robert H. Lande, "Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages," 100 Iowa L. Rev. 1997 (2015).
[102] Robert H. Lande, "Are Antitrust 'Treble' Damages Really Single Damages?", 54 Ohio St. L. J. 115 (1993).

free loans. Second, non-conspirator competitors often react to price inflation by raising their own prices, causing so-called umbrella effects. Plaintiffs very rarely pursue or recover umbrella damages in antitrust cases. Third, inflated prices discourage some purchases from buying the good or service subject to the conspiracy, resulting in a so-called dead weight loss. Antitrust plaintiffs rarely, if ever, recover for deadweight loss.

Bob Lande has calculated that, for these and similar reasons, if a court were to award "antitrust" *treble* damages, that would amount roughly to *single* or at most one-and-a-half times actual harm.[103] It follows that if a court were to award—or the parties were to settle for—single "antitrust" damages, that would really amount only to about 33% to 50% of actual harm.

3. <u>Victims of antitrust violations recover less than the harm they suffer.</u>

When we combine the analysis in Parts 1 and 2 above, we see the potential for underenforcement of the antitrust laws. The analysis in Part 1 suggests that cartelists on average pay—and victims receive—between about 20 to 67% of single "antitrust" damages. The analysis in section 2 indicates that single "antitrust" damages range from 33 to 50% of actual harm. Combining these points, we can infer that when defendants face litigation for an antitrust violation, they *on average* pay—and plaintiffs receive—between 7 and 33% of actual harm.[104]

4. <u>Many victims of antitrust violations never recover at all.</u>

Another reason the victims of antitrust victims may receive inadequate compensation—and antitrust violators face insufficient deterrence—is that antitrust violators escape detection. Further, antitrust enforcers—federal and state governments and the victims of antitrust violations—may discover insufficient evidence to initiate antitrust litigation, even if they discover what they believe is an antitrust violation. The analysis above discusses cases in which antitrust violators were forced to pay. Often they are not. Taking this into consideration, there is reason to believe that even in the easiest cases to prosecute—cartels subject to the so-called *per se* standard—the total financial liability that antitrust violators incur—including government sanctions and private recoveries—is too low. John Connor and Bob Lande calculate that the total monetary sanctions in cartel cases are only 9 to 21% of what they should be to provide optimal deterrence of antitrust violations.[105]

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The above analysis suggests that victims of antitrust violations recover too little in antitrust litigation to achieve optimal compensation or deterrence. To be clear, private enforcement may nevertheless play a crucial role in compensating victims and deterring antitrust

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[103] Id.

[104] The lower bound should be calculated by multiplying the lowest percentages—20% times 33%—and the higher bound by multiplying the highest percentages—67% times 50%. The results range from about 7 to 33%.

[105] John M. Connor & Robert H. Lande, "Cartels as Rational Business Strategy: Crime Pays," 34 Cardozo L. Rev. 437 (2012).

violations.[106] The total recovery of private plaintiffs in federal antitrust class actions from 2009 through 2021 was just shy of $30 billion.[107] Indeed, private antitrust enforcement may have a greater deterrent effect than government criminal enforcement.[108] Still, the overall analysis suggests that optimal levels of deterrence and compensation would best be achieved by enhancing the recovery of antitrust victims.

Enter third-party litigation funders. To the extent that they are more tolerant of risk than plaintiffs' attorneys, they may be able to stiffen the spines of plaintiffs' antitrust attorneys. The consequence could be private antitrust enforcement that more closely approaches ideal levels of compensation and deterrence. When it comes to private antitrust enforcement, then, it is at least possible that third-party litigation funding does not pose an ethical problem but rather offers an ethical solution, if only a partial one.

B. Diversity of Lead Counsel in Class Actions and Other Complex Litigation

A similar point applies to diversity among the lawyers who prosecute class actions and other forms of complex litigation. It is at least possible that third-party funding would support diversity. Here, however, our analysis is more speculative. We make only three brief points.

(1) Access to capital is important to seek or obtain important roles in class actions or other complex litigation;

(2) The gap between, on one hand, white men and, on the other hand, women and people of color is even greater when it comes to capital than when it comes to income; and

(3) Plaintiffs counsel in class actions and complex litigation tend to be overwhelmingly white men.

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[106] Joshua P. Davis & Robert H. Lande, "Defying Conventional Wisdom: The Case for Private Antitrust Enforcement," 48 Ga. L. Rev. 1 (2013) (explaining that private antitrust enforcement provides valuable compensation and deterrence, but that procedural and substantive obstacles to recovery cause that compensation and deterrence to be below optimal amounts).
[107] The total recovery was $29.3 billion. Joshua P. Davis & Rose Kohles, 2021 Antitrust Annual Report: Class Action Filings in Federal Court (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930), at 2. See also Joshua P. Davis & Robert H. Lande, "Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement," 36 Seattle U. L. Rev. 2169 (2013) (analyzing 6o cases of successful private antitrust enforcement and drawing lessons from the evidence); Robert H. Lande & Joshua P. Davis, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases," 42 U.S.F. L. Rev. 879 (2008) (analyzing 40 cases of successful private antitrust enforcement and drawing lessons from the evidence).
[108] Robert H. Lande & Joshua P. Davis, "Comparing Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws," 2011 B.Y.U. L. Rev. 315 (offering evidence and analysis that private antitrust enforcement may have a greater deterrent effect than criminal antitrust enforcement by the federal government).

These three points taken together suggest that third-party litigation funding might enhance diversity among plaintiffs' counsel by making capital available to lawyers who are not white men.

1. The Importance of Capital for Plaintiffs' Counsel

Courts and commentators have recognized that prosecuting class actions and other forms of complex litigation is expensive. Andrew Bradt and Theodore Rave, for example, note the potential benefits to plaintiffs from having repeat players in charge of multidistrict litigation (MDL).[109] One of the points they make is that repeat players have access to capital that others lack. They note that in a single science-heavy case (such as a drug-defect case) costs can run above $250,000, in bellwether cases that may set a benchmark for settlement for large numbers of individual cases those costs can easily exceed $1 million, and a plaintiffs' steering committee in a mass tort case may spend tens of millions of dollars (in *Vioxx* they spent about $41 million).[110]

Similarly, in the federal antitrust class actions that settled between 2009 and 2021, the out-of-pocket expenses were as follows:[111]

Figure 14: **Class Recovery by Settlement Size - Median**
2009 - 2021

Settlement Amount	Class Recovery	Attys Fees	Expenses	Total
>$1B	85%	14%	1%	100%
$500-$999M	73%	26%	1%	100%
$250-$499M	74%	25%	1%	100%
$100-$249M	68%	30%	2%	100%
$50-$99M	67%	30%	3%	100%
$10-$49M	66%	30%	4%	100%
<$10M	64%	30%	6%	100%
All Settlements	67%	30%	3%	100%

As a result, we would expect a federal antitrust class action that settles for $25 million typically to require the plaintiffs' lawyers to pay about $1 million in hard costs, and one that settles for $70 million to involve over $2 million in costs. And in antitrust cases, as in mass torts, some very large cases can involve more than $10 million in costs.[112]

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[109] See Andrew D. Bradt & D. Theodore Rave, It's Good to have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation, 108 Geo. L. J. 73 (2019).
[110] Id. at 95 & nn.141-43.
[111] Davis & Kohles, 2021 Antitrust Annual Report (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117930), at 28.
[112] For example, in *In re Capacitors Antitrust Litigation*, (N.D. Cal.), No. 17-md-2801, the Court has awarded class counsel more than $9 million in costs and is all but certain to award millions more once the settlements with the last remaining defendants are finally approved. See

2. Disparities in Capital by Race and Sex

Financial capital is not spread evenly across demographics. Certain groups—notably white men—tend to have far more capital than others—notably people of color and women. Compare two financial gaps between white people and people of color: according to one analysis, white people in 2019 earned about 1.6 times as much as African Americans—a striking disparity—while the wealth of white people was 6.7 times as much as the wealth of African Americans—a much more striking disparity.[113]

Similarly, a study in 2021 estimated that women who were never married had only 36% of the wealth of men who were never married.[114] An older study similarly found that single women have about 32% of the wealth of single men.[115]

The results are even more extreme at the intersection of sex and race. One study from 2010 suggests that single African American and Latinx women have a median wealth that is, respectively, less than 10% of the median wealth and less than 5% of the median wealth of single white men.[116] (According to the same study, single white women have a median wealth of about 81% of single white men.[117])

3. The Lack of Diversity in Lead Counsel

White men dominate the ranks of plaintiffs' lawyers in class actions and other complex litigation, including leadership positions. One relatively recent study based on data from 2015 to 2019 found that only about 5% of attorneys appointed as counsel in MDLs identify as non-white.[118] An earlier study based on data from 2011 to 2015 found that women were appointed to

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https://news.bloomberglaw.com/antitrust/capacitor-antitrust-case-nears-end-with-deals-worth-165-million.

[113] Joshua P. Davis, Eric L. Cramer, Reginald L. Streater, and Mark R. Suter, Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racims (and Other Systemic "Isms"), 66 Antitrust Bull. 359, 363-64 (2021).

[114] Gender Wealth Gap: Families Headed by Women Have Lower Wealth (available at https://www.stlouisfed.org/publications/in-the-balance/2021/gender-wealth-gap-families-women-lower-wealth).

[115] Women and Wealth: Insights for Grantmakers (available at https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c54781a8165f5b8546f8a34/1549039642955/AFN_Women_and_Wealth_Brief_2015.pdf).

[116] Lifting as We Climb: Women of Color, Wealth, and America's Future (Spring 2010) at 7 (available at https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting_As_We_Climb_InsightCCED_2010.pdf)

[117] Id.

[118] Amanda Bronstad, Despite Diversity Efforts, Fewer Than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White, Law.com, Aug. 17, 2020,

less than 17% of leadership positions in MDLs.[119] Another study that considered a sample of cases in the Northern District of Illinois in 2013 found that only 13% of lawyers in class actions were women.[120] Yet another study based on 73 MDL proceedings that were pending in 2013 found that about 63% of the plaintiffs' leadership positions were occupied by the same white men.[121]

Courts and academics have taken note. In one striking example, the judge in the *Robinhood Outage Litigation* in 2020 rejected a proposed leadership structure because all the attorneys put forward to represent the class were men.[122] Similarly, in 2016 the judge in what has become the *Generic Pharmaceutical Pricing Antitrust Litigation* rejected a proposed leadership structure and appointed one female attorney as lead counsel for the direct purchaser plaintiffs and another female attorney as lead counsel for the indirect purchaser plaintiffs.[123] Meanwhile, law professors and academic institutions have endorsed various measures to promote greater diversity among plaintiffs' counsel in class actions and complex litigation.[124]

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The above propositions suggest that disparities in capital may contribute to the lack of diversity among plaintiffs' counsel in class action and other complex litigation, including when it comes to leadership positions. It might follow, then, that third-party litigation funding might help to improve diversity by making capital available to women and people of color.

Of course, there is no guarantee that third-play litigation funding would have that effect. It is possible that white men would have greater access to third-party litigation funding than women and people of color, even if it became more accepted and widely available. It is also

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https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/.

[119] Dana Alvaré, Vying for Lead in the "Boys' Club: Understanding the Gender Gap in Multidistrict Litigation Leadership Appointments, Temple Univ. Beazley Sch. L., 5-6 (2017), https://www2.law.temple.edu/csj/publication/mdl-study/ (women were appointed in a lead role only 16.55% of 145 multidistrict litigation cases between 2011 to 2016 where formal leadership appointments were made by a court of the time).

[120] Stephani A. Scharf and Roberta D. Liebenberg, First Chairs at Trial More Women Need Seats at the Table, Am. Bar Assoc., 13 (2015).

[121] Elizabeth Chamblee Burch and Margaret S. Williams, Repeat Players in Multidistrict Litigation: The Social Network, 102 Cornell L. Rev. 1445, 1450, 1471 (2017).

[122] In re Robinhood Outage Litigation, No. 20-cv-01626-JD, at *2 (N.D. Cal. July 14, 2020).

[123] See https://judicialstudies.duke.edu/sites/default/files/centers/judicialstudies/panel_3-article_two_women_appointed_to_lead_antitrust_mdl_www.thelegalintelligencer.pdf

[124] See, e.g., Inclusivity and Excellence: Guidelines and Best Practices for Judges Appointing Lawyers to Leadership Positions in MDL and Class-Action Litigation, James F. Humphreys Complex Litig. Ctr. G.W. L. Sch., Mar. 15, 2021, at 7, https://www.law.gwu.edu/sites/g/files/zaxdzs2351/f/downloads/Diversity%20Master%20Revised_1123.pdf; Brooke D. Coleman, A Legal Empire: Women In Complex Litigation, 93 Ind. L. J. 617, 618 (2018); Brooke D. Coleman, One Percent Procedure, 91 Wash. L. Rev. 1005, 1011, 1026 (2016).

possible that access to capital plays only a small role in the lack of diversity among plaintiffs' counsel in complex litigation.

Our point in this regard is modest. First, we suggest that it is at least conceivable that third-party litigation funding could enhance the diversity of plaintiffs' counsel in class actions and other complex litigation. Second, if it would—and if it would not have other, more significant adverse effects—that would be a reason to encourage—or at least permit—third-party litigation funding. We ask only that courts, regulators and others approach the issue with an open mind, and that they not assume that traditional ways of funding litigation are necessarily superior to funding by third parties, just because we are more accustomed to them.

IV. Conclusion

Our goal has been to challenge a standard reaction to the third-party litigation funding—that it necessarily does more harm than good by creating tensions that otherwise would not exist between lawyers and their clients, or between lawyers' incentives and the needs of society. In reality, tensions always exist between lawyers, on the one hand, and their clients and the greater good. What is beneficial to attorneys—at least from a financial perspective—may harm others. Third-party litigation funding may exacerbate or ameliorate those tensions. We believe that we should cast aside any bias against third-party litigation funding and start with a clean slate in deciding whether third-party litigation funding is ethical. In some contexts—perhaps including optimizing antitrust enforcement and promoting diversity—third-party litigation funding may do more good than harm.