Chapter 15

Third-Party Litigation Financing

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THE TEXAS BUSINESS COURT

Because the Texas Business Court has just passed its one-year anniversary of existence, on September 1, 2025, it is not surprising that no reported decisions exist involving litigation funding. Defendants in the Texas Business Court have apparently not focused on attempting to get judicial rulings on learning the identity of plaintiffs' litigation funders, although (as discussed in detail in this chapter) the majority of federal and state courts do not allow discovery into the issue of whether the plaintiff is using litigation finance to help pay lawyer and case costs.

Given the Texas Business Court's focus on high-stakes commercial litigation,[1] it is likely just a matter of time before this specialized Business Court analyzes issues surrounding litigation finance.

1. *Texas Business Court Could Make Litigation Faster, More Efficient* Bloomberg Law (June 4, 2024) *available at* https://www.velaw.com/insights/texas-business-court-could-make-litigation-faster-more-efficient/

15-1 INTRODUCTION: WHAT IS THIRD-PARTY LITIGATION FINANCING?

15-1:1 Overview

Third-party litigation financing (also known as litigation funding or alternative litigation finance) refers to non-recourse funding provided by an outside party with no prior interest in a lawsuit, in exchange for a contingent return tied to the lawsuit's outcome.

Unlike a traditional loan, the litigant has no obligation to repay the funder if the case yields no recovery—the funder's return comes only from a successful judgment or settlement. Litigation funding can take several forms. On the plaintiff's side, it often involves a funder advancing money to cover legal fees or living expenses, to be repaid from any recovery. By contrast, defendants typically receive indirect support through liability insurers paying defense costs (a traditional practice not usually seen as "third-party financing" because the insurer has a preexisting duty to defend). What distinguishes modern litigation financing is that the financier is a specialized outside entity investing in the case, rather than an insurer or the lawyer working on contingency.

These forms of financing are now routine and well understood, although they were once viewed with suspicion, for many of the reasons third-party financing is sometimes regarded with skepticism.

The rationale behind third-party funding is that it can improve access to justice by enabling cash-strapped claimants or law firms to pursue meritorious claims that might otherwise be dropped or under-resourced. For example, a severely injured plaintiff who cannot work might use consumer legal funding to pay rent and medical bills while awaiting trial. By leveling the playing field, such funding may allow plaintiffs to resist low settlement offers and litigate cases to a fair value.[2] On a larger scale, litigation funding has become a significant industry in the last decade. It attracts capital from hedge funds, private equity, and institutional investors seeking high returns uncorrelated with market trends. A 2022 U.S. Government Accountability Office (GAO) report noted increased acceptance of litigation finance in the United States and substantial

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[2] U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), https://www.gao.gov/products/gao-23-105210.

growth in the commercial funding market.[3] The industry's rise has been especially pronounced since around 2010, with funders now routinely financing large-scale commercial litigation, international arbitration, and portfolio arrangements for law firms.[4]

> **PRACTICE POINTER:**
> Third-party litigation financing differs from contingency fee and liability-insurance financing in the identity of the party providing support. Instead of a liability insurer or the plaintiff's counsel, the financier is a specialized entity formed to invest in lawsuits

It may be a division of a larger financial institution—investment bank Credit Suisse was one of the pioneers of commercial litigation financing in the United States—or it may be a freestanding company or private fund.

Some financing firms specialize in acquiring claims pursued by individuals, often personal-injury or other relatively uncomplicated matters. Firms in the consumer-claim sector of the market generally invest a modest amount and receive in exchange a share of the proceeds of any eventual judgment or settlement. The investments are without recourse against the individual claimant, so if there is no recovery, the financing firm loses its investment.

Other firms concentrate on large, complex commercial claims, investing significantly larger amounts in pending litigation. This segment of the market is growing. One major financing firm, Burford Capital, was recently listed on the New York Stock Exchange, and another firm, Bentham IMF, merged with Omni Bridgeway to form a global litigation financing company. According to Westfleet Advisors, in 2024 there were approximately 42 litigation funding entities with $16.1 billion under management.[5]

Despite its benefits, litigation financing has provoked ethical and legal questions from its inception. Observers have asked,

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3. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), https://www.gao.gov/products/gao-23-105210.

4. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), https://www.gao.gov/products/gao-23-105210.

5. Westfleet Advisors, *The Westfleet Insider: 2024 Litigation Finance Report* at 3 (Sept. 30, 2025), https://www.westfleetadvisors.com/wp-content/uploads/2025/03/WestfleetInsider-2024-Litigation-Finance-Report.pdf.

"Can they do that?" This reflects a discomfort with the notion of outsiders investing in lawsuits. Historically, the common law doctrines of champerty and maintenance forbade assisting a lawsuit in exchange for profit, out of fear of encouraging frivolous litigation. As detailed below, those doctrines have been narrowed or abolished in many jurisdictions, but they highlight the tension between traditional public policy and modern litigation funding. Today's litigation finance agreements raise concerns about potential impacts on attorney professional responsibilities, client control of litigation strategy, duties of confidentiality, and the fairness of the judicial process. The following sections provide an updated examination of the litigation finance market and these legal issues, incorporating developments through 2025.

> **PRACTICE POINTER:**
> Third-party investments in pending lawsuits raise numerous questions about the effect on the attorney-client relationship and the litigation process, as well as the more basic issue of what kind of transaction this is, exactly.

In economic substance, litigation investment is no different from contingent fee financing or an insurer's contractual obligation to indemnify an insured and pay defense costs. All these transactions involve the shared economic interest in a particular thing that has value—a lawsuit.

> **PRACTICE POINTER:**
> Although Texas has a fairly broad rule of non-assignability for claims that are personal in nature, including those for legal malpractice,[6]

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[6] *See*, *e.g.*, *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners L.P.*, 146 S.W.3d 79 (Tex. 2004) (Deceptive Trade Practices Act claim is "personal" for non-assignability purposes, unlike breach of warranty claim); *Mallios v. Baker*, 1 S.W.3d 157 (Tex. 2000) (legal malpractice not assignable); *State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696 (Tex. 1996) (insurance bad-faith claim not assignable); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App.—San Antonio 1994, no pet.) (legal malpractice claim not assignable); *Elbaor v. Smith*, 845 S.W.2d 240 (Tex.1992) (so-called "Mary Carter" agreements, in which one defendant settles in exchange for a share of plaintiff's recovery against a co-defendant, are not enforceable). An insurer may be equitably subrogated to its insurer's action against an attorney, however. *See American Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 484 n.6, 484-85 (Tex.1992).

lawsuits involving claims to property are freely assignable. Yet, the shared ownership of a lawsuit, by the plaintiff and a financing firm, still seems a bit out of the ordinary.

Because third-party litigation financing is still a rapidly changing area, many issues have not yet been litigated at all, let alone in Texas. Moreover, many financing agreements contain choice-of-law provisions or pertain to litigation pending in jurisdictions other than Texas. Because of favorable law on several important issues, including the definition of champerty and maintenance, New York is often selected as the state whose law governs the interpretation of litigation financing agreements. Important cases and state bar ethics opinions are scattered around the country, and lawyers who advise on litigation financing deals tend to work with a nationwide body of law, of course with particular attention to any authority in a jurisdiction whose law is potentially applicable to the transaction. Thus, it is important for Texas attorneys to take a nationwide perspective to understand the law governing litigation financing. This chapter will highlight Texas authority where it exists, but will rely on authority from many different states.

15-1:2 The Litigation Financing Market

PRACTICE POINTER:
The litigation financing market can be differentiated into three sectors: (1) funding of consumer claims (often personal-injury but not limited to these claims); (2) funding of commercial claims; and (3) financing provided directly to law firms.[7]

7. For this division, see Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns* (RAND Corp. 2010).

Each sector has evolved in recent years:

- **Consumer Legal Funding:** This sector involves relatively small, non-recourse advances to individual plaintiffs, often in personal injury or similar cases. Companies with names like "LawCash" or "Cash 4 Cases" offer upfront cash to injured plaintiffs to cover living expenses during litigation. The plaintiff typically assigns a portion of any settlement or judgment to the funder; if the case yields nothing, the plaintiff owes nothing. Because many injured or low-income plaintiffs lack access to traditional credit—and ethics rules bar lawyers from directly subsidizing clients' living expenses—consumer funding emerged to fill that gap. However, the cost is high. These advances accrue sizeable fees. It is not uncommon for a plaintiff who borrows $10,000 to owe many times that amount (often three to four times) if the case lasts a year or more. For instance, interest or "usage" fees of 2 to 4% per month (compounded) are reported in this sector, which can equate to effective annual rates well over 40%.[8] Recent data indicate consumer legal funding transactions often carry annualized rates of 36 to 60%, raising consumer protection concerns.[9]
- **Commercial Litigation Funding**: Commercial funding deals with larger claims, typically involving businesses or substantial damages. Funders in this space provide multimillion-dollar

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8. *See Martin v. Stewart*, 499 S.W.3d 81, 86-87 (Ky. 2016) (noting typical litigation funding contracts charge 3-4% compounded monthly, resulting in effective annual interest rates above 40%); *In re Oasis Legal Fin. Group, LLC*, 2013 IL 115738, ¶¶ 4-10 (Ill. 2013) (describing funding contracts with 60% annualized rates). These high rates have drawn comparisons to payday loans and prompted legislative caps in some states.

9. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends*, GAO-23-105210, at 19 (Dec. 2022) (noting consumer legal funding transactions often carry monthly fees equivalent to 2.5–3.5% of the advanced amount, compounding, which translates to 30-50% or more per annum). The GAO report cites stakeholder concerns that unsophisticated consumers may not fully understand the cost of such funding.

investments to support commercial lawsuits (e.g. contract disputes, IP litigation, antitrust claims) in exchange for a share of the proceeds. This segment has expanded rapidly. Major players include Burford Capital, Omni Bridgeway, Parabellum, and others. Burford, for example, grew into a market leader and in 2020 became listed on the New York Stock Exchange (the first litigation finance firm publicly traded in the United States). Another prominent funder, Bentham IMF, merged into Omni Bridgeway, creating a global funding company. According to a leading industry survey by Westfleet Advisors, as of 2024 there were forty-two active commercial litigation funders managing roughly $16.1 billion in assets under management (AUM)[10]. These funders committed about $2.3 billion in new investments in United States commercial cases in 2024 alone.[11] Although growth has tempered slightly in recent years (new investments in 2024 were down about sixteen percent from a 2022 peak, amid tighter capital markets),[12] demand remains strong, and the overall market size has more than doubled since the late 2010s. (By comparison, in 2017 there were under thirty funders with about $5 billion in assets.) Funders now routinely finance portfolios of cases for law firms or companies, rather than just single-case deals, to diversify risk. Commercial funding deals have also grown larger: the average single-case investment topped $6 million in recent years, and some portfolio deals exceed $15-20 million each.

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10. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), *available at* https://www.gao.gov/products/gao-23-105210.

11. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), *available at* https://www.gao.gov/products/gao-23-105210.

12. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), *available at* https://www.gao.gov/products/gao-23-105210.

- **Law Firm Financing:** In addition to case-specific funding, some financiers provide capital directly to law firms. This can take the form of loans or credit lines secured by the firm's contingent fee receivables (for instance, a funder lends money to a contingency-fee law firm, with repayment coming from the firm's future case settlements). Traditional bank lending to law firms has existed for decades (often structured as recourse loans with the firm's assets as collateral), and these arrangements generally do not violate ethics rules so long as the lender has no control over legal decisions. Modern law firm finance has expanded to include non-bank actors and creative structures. Some deals resemble sales of a portion of the firm's case portfolio: e.g., the funder advances cash and is entitled to a percentage of fees from a pool of cases. These arrangements must be carefully structured to avoid implicating Rule 5.4's ban on fee-splitting with non-lawyers, as discussed later. Notably, client-directed funding—where the client takes the advance and agrees to pay the funder from any recovery—is distinguished from lawyer-directed funding (where the obligation is tied to the lawyer's fees) for ethics purposes. As of 2025, law firm financing is a growing but less-publicized part of the market. Many large firms have begun to partner with funders for big-ticket litigation or to offload some risk in contingency matters. Industry reports show Big Law firms accounted for over one-third of capital commitments in 2024, as more established firms embrace funding for select cases or monetization of claims.[13]

13. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* (Sept. 30, 2025), *available at* https://www.gao.gov/products/gao-23-105210.

15-1:2.1 Consumer Claims

Consumer-sector litigation financing is often marketed as a way for personal-injury claimants to receive some of the value of a pending claim at an earlier stage in the process. The paradigm case of someone in need of a type of funding is a person of modest income with an injury that has made continued employment difficult or impossible, but who has a reasonably strong case on liability and damages. Plaintiffs with pending lawsuits are sought by companies with attention-getting names like Speedy Bucks, Law Cash, Cash for Lawsuits, and 48 Hour Lawsuit Cash. The transactions are structured not to be loans although, as discussed in 20-2:2, one state supreme court has found that they are loans in substance.[14] In a typical transaction, a financer makes a non-recourse investment in the plaintiff's cause of action. If the plaintiff recovers nothing, the financer has no right to recover from the plaintiff personally. If the plaintiff does recover, by way of judgment or settlement, the financer receives a share of the proceeds. The amount of return is generally computed as a percentage of the amount invested, with the percentage increasing over time. A two to four percent monthly increase in the rate of return is not uncommon, so that a plaintiff who received a $10,000 advance may owe as much as $48,000 to the financer at the end of one year.[15]

Because many poor and working-class people may lack access to capital through bank loans and credit cards, and since lawyers are prohibited by rules of professional conduct from providing financial assistance to clients to help with living expenses,[16] defendants often have leverage to offer low settlements which would be hard for plaintiffs to reject.

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14. *Oasis Legal Finance Group, LLC v. Coffman*, 361 P.3d 400 (Colo. 2015).

15. In *Fausone v. U.S. Claims, Inc.*, 915 So.2d 626, 628 (Fla. Ct. App. 2005), the plaintiff received advances totaling $30,000, and was obligated to repay $42,890 during the first year, $46,808 between 12 and 18 months, and $50,937 from 18 to 24 months.

16. *See* Model Rules of Prof'l Conduct, Rule 1.8(e). The rule permits lawyers to advance court costs and expenses of litigation, but in most states, lawyers are forbidden to pay or loan living expenses for clients.

PRACTICE POINTER:
Under standard contingency fee financing the costs of legal services are advanced by the lawyer, but litigation financing helps further level the playing field and allow plaintiffs to take meritorious cases to trial.

Criticism of consumer-sector litigation financing focuses on the lack of understanding by many consumers of the terms of the transactions as well as the amount of the return due to the financer.[17] A state appellate court summarized the need for, and potential abuse associated with, consumer litigation funding:

> A person who suffers a severe personal injury will often need money to care for herself and her family during the pendency of litigation. Lawsuits take time and come with few guarantees. Grocery stores and home mortgage lenders do not wait for payment merely because a person is unable to work due to an automobile accident or other injury. Thus, it cannot be denied that people like Ms. Fausone may need a credit source during litigation. On the other hand, a person who is the victim of an accident should not be further victimized by loan companies charging interest rates that are higher than the risks associated with the transaction. We emphasize that the record does not reflect the value of Ms. Fausone's claim when U.S. Claims negotiated with her, but a company that only loaned money when it was secured by high-grade personal injury claims would seem to be able to charge a lower interest rate than some of the rates described in this opinion, even when the arrangement is a nonrecourse loan.[18]

The court did not explain how a funder could differentiate "high-grade" personal injury claims from average-quality claims, particularly where the amounts invested are relatively

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17. Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns*, p. 12 (RAND Corp. 2010).

18. *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 630 (Fla. Ct. App. 2005).

small. Advances in the range of $3,000 to $20,000 are typical in consumer financing transactions. Consumer-sector funders therefore rely on diversification to reduce their risk. Given the relatively low amount invested in a typical case, information costs would prohibit extensive due diligence on claims to ascertain their quality, although funders often do seek permission to speak with the plaintiff's attorney about a case before agreeing to invest in it. The passage also illustrates a common criticism of consumer-sector funding, namely that funders may engage in predatory practices such as imposing sky-high rates of return on advances and failing to provide clear explanations of transactional terms to unsophisticated claimants.

Market Trends: The trend in both consumer and commercial sectors is toward normalization and institutional presence. Litigation finance is now discussed openly in law firm business development and even at shareholder meetings of public companies (as a tool to monetize legal claims). Annual market reports (e.g., Westfleet) and analyses by groups like RAND Institute and GAO have improved transparency. The GAO's 2022 report noted persistent data gaps—there is no mandatory reporting of funders' returns or total funding volume—but confirmed that the market has grown significantly and attracted a diverse range of investors. By 2021, the GAO found at least forty-seven funders active in the United States, with an estimated $12-$13 billion in assets then deployed.[19] Industry insiders report that, despite a slight recent slowdown, new funding inquiries remain high in areas like patent litigation, international arbitration, and large judgment enforcement. One notable 2023 trend is funders being more selective with new deals due to higher interest rates and a "harvest" phase for some mature funds.[20] Overall, litigation finance is firmly entrenched in the United States legal landscape going into 2025, even as it faces calls for greater regulation and transparency.

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19. U.S. Gov't Accountability Off., *Third-Party Litigation Financing: Market Characteristics, Data, and Trends* 11 (GAO-23-105210, 2022), https://www.gao.gov/assets/gao-23-105210.pdf.

20. Westfleet Advisors, *The Westfleet Insider: 2024 Litigation Finance Report* 1–2 (Sept. 30, 2025), https://www.westfleetadvisors.com/wp-content/uploads/2025/03/WestfleetInsider-2024-Litigation-Finance-Report.pdf.

15-1:2.2 Commercial Litigation Financing

PRACTICE POINTER:
Commercial-sector litigation financing transactions differ in several important respects from consumer financing. As the name suggestions, most commercial litigation financing transactions involve claimants with larger, more complex commercial claims. Breach of contract, antitrust, international arbitration, patent infringement, insurance bad faith, business tort, environmental, and whistleblower claims have all attracted third-party financing.

The amount invested is significantly greater than in consumer claims, with $500,000 to $20 million being the range of most investments. Claimants who receive funding are already represented by outside counsel in virtually every financing transaction and may also have an in-house legal staff. As a result, commercial financing transactions are extensively negotiated. Unlike “off-the-rack” consumer transactions, commercial litigation financing transactions are “bespoke” deals. Instead of relying on scale and diversification to control risk, commercial-sector funders rely on extensive due diligence to ensure the quality of claims in which they invest.

Commercial-sector litigation financing is attractive to commercial parties who, finding themselves short of cash or wishing to avoid tying up capital in relatively unproductive litigation expenses, are willing to share in the upside of a lawsuit with a financing entity.

PRACTICE POINTER:
The paradigmatic consumer of commercial litigation financing is a small or cash-strapped company, lacking the deep pool of capital of its competitors, involved in a complex legal dispute.

The small company cannot afford to pay a sophisticated law firm on an hourly basis, and many large firms do not accept cases on a contingency basis. Conventional sources of financing, such as commercial banks, are reluctant to extend large unsecured loans to new businesses. The bank could obtain security in the subject matter of the litigation, but the value of the collateral depends on the quality of the plaintiff's claim, and for the most part banks are not experts in evaluating the strength of lawsuits.

> **PRACTICE POINTER:**
> Commercial litigation financing companies with expertise in valuing legal claims provide a vital alternative source of financing. As a result, this form of financing can help level the playing field between parties who differ substantially in wealth and the amount of capital they can commit to litigating a dispute.

For example, third-party financing helped support a breach of trade secrets claim by a small English company against a much larger multinational manufacturer that allegedly misappropriated the plaintiff's intellectual property. 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."[21]

Similarly, a small technology company explained that it sought third-party financing in order to be able to withstand prolonged litigation against a much larger company that it alleged had misused its confidential technology.[22]

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

22. *See Charge Injection Techs., Inc. v. E.I. DuPont de Nemours & Co.*, 2016 WL 937400, at *1 (Del. Super. Ct. Mar. 9, 2016) ("CIT filed suit against DuPont in December 2007, alleging that DuPont wrongfully used and disclosed CIT's proprietary and confidential technology. Lacking adequate resources to pursue what became costly and protracted litigation . . . CIT's Chief Executive Officer, sought third-party financing in 2008 to help cover the costs of this litigation as well as other business expenses.").

PRACTICE POINTER:
Finally, in a leading Texas case on commercial litigation financing, 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.[23]

15-1:2.3 Lending to Law Firms

Finally, the least visible (and least controversial) form of litigation financing is secured lending to law firms, with the firm's receivables as collateral. State ethics opinions generally permit lawyers to grant a security interest to a lender, although they do caution lawyers that providing client identities to a lender may violate their duty of confidentiality.[24] Lawyers may borrow from a commercial bank or other financing entity to fund the expenses of litigation, and with full disclosure to the client may even bill the client for the cost of capital as an expense of litigation.[25] Commercial funding companies may also offer loans to law firms that are secured by a portfolio of cases which is a subset of the firm's overall accounts receivable.

The most significant recent development in litigation financing occurred in Arizona in 2020.[26] A state Task Force on the Delivery of Legal Services, seeking to expand access to legal services, proposed a number of reforms which were adopted by the Arizona Supreme Court. One reform was to abolish the Arizona version of Model Rule 5.4 (the Texas counterpart is Tex. R. Disc. P. 5.04), which had prohibited lawyers from practicing in a partnership with non-lawyers or permitting non-lawyer investment in a professional

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23. *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 90-91 (Tex. App.—Houston [1st Dist.] 2006).

24. *See*, *e.g.*, Maine Bar Opinion 152 (1995); Texas Bar Opinion 479 (1991); Michigan Bar Opinion RI-77 (1991).

25. *See*, *e.g.*, *Chittenden v. State Farm Mut. Auto. Ins. Co.*, 788 So.2d 1140, 1144 (La. 2001); Ariz. Bar Op. 2001-07 (2001); Phila. Bar Op. 99-4; Georgia Bar Op. 92-1; N.J. Bar Op. 603 (1987). *See* § 20-2:3 *below*, for a discussion of the application of the fee-splitting rule to non-recourse financing of law firms.

26. Although it is not as far along as Arizona in creating a statutory regime for the regulation of Alternative Business Structures, Utah has established a "sandbox" in which participants may experiment with entities to deliver legal services in circumstances that would otherwise violate the prohibition on sharing legal fees with nonlawyers or entering into partnerships or corporations with nonlawyer partners or equity owners. *See* https://utahinnovationoffice.org/frequently-asked-questions/.

corporation. In place of Rule 5.4, the Task Force proposed new court rules and a new statute, which permits the creation of an Alternative Business Structure (ABS). An ABS is defined as "a business entity that includes nonlawyers who have an economic interest or decision-making authority in the firm and provides legal services."[27] The statute requires a number of safeguards, including supervision by an Arizona-licensed lawyer.[28] However, it permits non-lawyers to have an economic interest in the ABS, including owning shares of a professional corporation's stock.[29] Arizona law firms seeking financing now have the option of qualifying as an ABS and seeking non-lawyer equity investors. Out-of-state firms may be able to access capital raised by Arizona ABS's and share legal fees under their state's version of Model Rule 1.5(e) (Tex. Discip. R. Prof'l Conduct 1.04(f)).[30]

15-1:3 Criticisms of Third-Party Financing

Litigation funding's rise has fueled debate among policymakers, the bar, and courts. Critics often analogize consumer legal funding to "payday loans" and argue that third-party investments could encourage abusive litigation practices. Proponents respond that many criticisms are speculative or reflect misconceptions. Below are key points in the debate:

- **Promotion of Frivolous Lawsuits:** Opponents contend that outside funding creates incentives to file marginal or frivolous claims, since funders can spread risk across a portfolio and still profit even if some cases are weak. There is a fear that "speculating in lawsuits" could increase vexatious litigation. For instance, the Ohio Supreme Court once expressed concern about a funder "earning a handsome profit by speculating in a lawsuit" and potentially manipulating a party for gain.

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27. Ariz. Code of Jud. Admin. § 7-209(A).
28. Ariz. Code of Jud. Admin. § 7-209(G)(3).
29. Ariz. Code of Jud. Admin. § 7-209(A).
30. *See* ABA Standing Comm. on Ethics and Prof'l Resp., *Formal Op.* 13-464 (2013) (lawyer in jurisdiction with a rule prohibiting sharing fees with non-lawyers may share fees with a law firm in a jurisdiction, such as D.C., the United Kingdom, or now Arizona, which permits sharing legal fees with non-lawyers).

- **Rebuttal:** Funders have a profit motive to back strong cases, not frivolous ones – a meritless claim is unlikely to yield any recovery, meaning the funder loses its investment. Empirically, funders perform due diligence and reject the vast majority of cases offered. Funding a frivolous suit has been likened to "buying swampland in Florida"—it's a bad investment. Moreover, ethical rules and judicial sanctions (Rule 11, etc.) already exist to deter baseless litigation, regardless of funding. Recent studies (including the 2021 GAO report) did not find clear evidence that litigation funding has increased filing rates of non-meritorious suits, though comprehensive data are lacking.[31]
- **Prolonged Litigation and Higher Settlements:** Defense-side groups (insurers, chambers of commerce) argue that funding artificially prolongs disputes. They claim a plaintiff with funding feels less financial pressure to settle, holding out for a larger award and driving up the cost of litigation for defendants.[32] There is also concern that funders, aiming for a target return, might discourage reasonable settlements or push for higher damages. Indeed, a funded plaintiff can afford to be patient, potentially leading to longer litigation timelines or refusals to settle early.
- **Rebuttal:** While it's true that funding strengthens a plaintiff's bargaining position, this is precisely

[31] John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *Selling More Lawsuits, Buying More Trouble: Third Party Litigation Funding A Decade Later* 5-6 (U.S. Chamber Inst. for Legal Reform 2020) (asserting that litigation funding increases the volume of litigation, but providing mainly anecdotal evidence); *But see* Matthew Dubois**,** *Litigation Finance: A Market Solution to a Market Problem*, 13 J. L. Econ. & Pol'y 477, 489 (2020) (empirical study suggesting no clear link between third-party funding availability and increase in non-meritorious case filings, noting funders' screening function).

[32] Jim Sams, *Lawmakers in Mont. and La. Pass Bills to Require Disclosure of Litigation Funding Contracts*, Claims J. (June 12, 2023), https://www.claimsjournal.com/news/national/2023/06/12/317433.htm (summarizing business community arguments that litigation funding drives up settlement values and verdicts, and describing recent state legislative efforts for transparency). The article notes the insurance industry's view that funding "leads to higher damage awards and increased settlement costs.

the point—to level the field against well-funded defendants. Plaintiffs with legitimate claims should not be forced into low settlements due to financial distress. Empirical evidence on settlement length is mixed. Some defense analysts cite anecdotes of extended litigation, but funders note that a rational financier wants an efficient resolution (unduly dragging on a case increases the funder's risk and expense). A 2010 RAND paper concluded that it is unclear whether funding systematically delays settlements or simply prevents premature low-value settlements.[33]

- **Control and Ethical Influence:** A major concern is whether funders will interfere in lawyers' independent judgment or clients' decision-making. United States ethical rules (Model Rule 2.1, 5.4, etc.) require that the lawyer's duty is to the client, not to a third-party payor. Critics worry that funders might demand a say in strategy, selection of counsel, or whether to accept a settlement. One well-known example emerged in 2023 involving Sysco Corporation. Burford Capital had funded Sysco's price-fixing lawsuits and allegedly vetoed a proposed settlement that Burford deemed too low, even though Sysco wanted to settle.[34] Burford went so far as to seek an injunction to block the settlement, prompting the United States Chamber

33. *See* Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns* 23-25 (RAND Corp. 2010) (concluding that while third-party funding could, in theory, prolong litigation or increase plaintiffs' reservation prices, data was insufficient to confirm such effects; also noting that funding could equally lead defendants to adjust strategy knowing plaintiff is financially supported). Recent commentary suggests that in some mass tort contexts, funding has prolonged litigation by reducing plaintiffs' urgency to settle, but these observations remain anecdotal. *Cf.* Gina Passarella, *What Litigation Funding Means for Defense Lawyers*, *Law.com* (Mar. 2021) (no longer available) (defense attorneys reporting longer timelines in some funded cases).

34. Jim Sams, *Lawmakers in Mont. and La. Pass Bills to Require Disclosure of Litigation Funding Contracts*, Claims J. (June 12, 2023), https://www.claimsjournal.com/news/national/2023/06/12/317433.htm.

of Commerce to highlight this as a cautionary tale of funder control gone awry.[35]

- **On the other hand:** Leading funders assert they do not control litigation tactics or settlement decisions, and many funding contracts explicitly disavow any right to direct the lawyer or client (both to comply with champerty laws and to avoid fee-splitting issues). In the *Sysco* case, Burford responded that it intervened only because Sysco's secret settlement violated contractual rights (allegedly undermining Burford's expected return). Generally, well-structured agreements give funders economic rights (to a portion of proceeds) but no decision-making authority over the conduct of the case. Nonetheless, to maintain best practices, funders typically include covenants or consultation rights (for example, requiring notice of settlement offers) but stop short of controlling outcomes. Ongoing ethical guidance (discussed later) emphasizes that lawyers must ensure funders do not usurp the lawyer's independent professional judgment.[36]
- **Transparency and "Secret" Funding:** Another contentious issue is whether litigation funding arrangements should be disclosed to courts and opponents. Defense proponents argue that nondisclosure of funding conceals real parties in interest and possible biases (e.g., a witness might have ties to a funder, or a plaintiff's settlement decisions might be driven by repayment

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35. *See* Jim Sams, *Lawmakers in Mont. and La. Pass Bills to Require Disclosure of Litigation Funding Contracts*, Claims J. (June 12, 2023), https://www.claimsjournal.com/news/national/2023/06/12/317433.htm.

36. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, *Formal Op.* 2018-5, *Litigation Funders' Contingent Interest in Legal Fees* 2 (2018), https://www.nycbar.org/wp-content/uploads/2023/05/2018416-Litigation_Funding.pdf (finding that a lawyer may advise a client about litigation funding but must ensure the funding arrangement does not impair the lawyer's independent judgment or the tripartite attorney-client-funder interactions violate confidentiality; also forbidding arrangements where repayment to funder is directly contingent on legal fees). The opinion cautions that lawyers should not allow funders to direct or regulate their professional judgment.

obligations). They also claim that knowledge of funding is relevant for assessing potential conflicts of interest (a judge might unwittingly be financially interested if they own stock in a funding company, for instance). The United States Chamber and insurance associations have lobbied for mandatory disclosure of third-party funding in litigation.[37] Some point to the federal rule requiring disclosure of indemnity insurance (Fed. R. Civ. P. 26(a)(1)(A)(iv)) and ask why funding shouldn't be similarly disclosed.

- **Rebuttal:** Plaintiffs and funders counter that disclosure is a ploy by defendants to gain a tactical advantage. Knowledge of a plaintiff's funding could lead defendants to stonewall in discovery or lowball settlement offers, assuming the plaintiff has resources to hold out. Moreover, funding agreements usually contain sensitive information (about case valuation and strategy) that could be prejudicial if revealed to the opponent. There is no general requirement in federal civil procedure to disclose funding, and courts have been split on this issue. Many jurisdictions treat funding arrangements as irrelevant to the merits and thus not discoverable absent special circumstances (similar to how attorney retainer agreements or contingency fee contracts are typically not discoverable). We discuss current disclosure rules and proposals in a later section on regulatory developments.

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37. Jim Sams, *Lawmakers in Mont. and La. Pass Bills to Require Disclosure of Litigation Funding Contracts*, Claims J. (June 12, 2023), https://www.claimsjournal.com/news/national/2023/06/12/317433.htm (summarizing business community arguments that litigation funding drives up settlement values and verdicts, and describing recent state legislative efforts for transparency).

PRACTICE POINTER:
In sum, the policy debate on litigation finance weighs access to justice and party equality against concerns about potential abuse and market transparency. The American Bar Association has acknowledged both sides. A 2020 ABA *Best Practices* report on litigation funding noted that while funding can help clients, lawyers must navigate ethical pitfalls.[38] As the industry matures, there is increasing pressure for a balanced regulatory approach that preserves the benefits of funding while mitigating risks of client overreaching or systemic harm.

Some firms in the consumer litigation financing industry – members of the American Legal Finance Association – have accordingly agreed to industry self-regulation, including a set of best practices for meaningfully disclosing the essential terms of transactions to consumers.[39]

PRACTICE POINTER:
The United States Chamber of Commerce's Institute for Legal Reform has waged a protracted war against litigation financing, particularly in the commercial sector. In addition to lobbying in the United States Congress, numerous state legislatures and the U.K. Parliament[40] have prepared a lengthy position paper setting out its objections.[41]

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38. A.B.A. Comm'n on Ethics 20/20, *Informational Report to the House of Delegates* (2012), https://lowellmilkeninstitute.law.ucla.edu/wp-content/uploads/2019/02/ABA-White-Paper-on-Litigation-Finance.pdf (acknowledging rise of "Alternative Litigation Finance" and providing best practice guidelines; notably, the ABA chose not to propose new Model Rules, instead emphasizing existing rules cover most issues). In 2020, the ABA published informal guidance noting that while third-party funding can aid clients, attorneys must navigate conflicts, privilege, and communication carefully. *See* Anthony J. Sebok & W. Bradley Wendel, *Ethical Issues in Third-Party Litigation Funding*, 1 BNA Legal Ethics Newsl. 1 (Jan. 2020).

39. On February 17, 2015, members of ALFA entered into an agreement with the New York State Attorney General respecting disclosures of transaction terms.

40. In April 2016 the Chamber submitted a paper entitled *Before the Flood: An Outline of Oversight Options for Third Party Litigation Funding in England & Wales to Parliament*. *See U.S. Chamber Inst. for Legal Reform, Before the Flood: An Outline of Oversight Options for Third-Party Litigation Funding in England & Wales* (Apr. 2016), https://instituteforlegalreform.com/research/before-the-flood-an-outline-of-oversight-options-for-third-party-litigation-funding-in-england-and-wales/.

41. The paper is entitled *Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* and was published by the U.S. Chamber of Commerce, Institute for Legal Reform (2012). *See* U.S. Chamber Inst. for Legal Reform, *Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* (2012).

In it, the Chamber sets out three principal objections to commercial litigation financing:

1. Third-party financing can be expected to increase frivolous or abusive litigation. Financers can hedge their risk by investing in a portfolio of cases, thereby allowing them to invest in riskier (which is to say, less meritorious) claims that have a potentially high damages payoff. There may be many cases where a risk-adverse plaintiff would not bring but for the risk-spreading effect of litigation financing.[42]

2. In order to protect their investment, litigation financing companies will attempt to exercise control over the conduct of litigation. This will interfere with the attorney-client relationship and diminish the professional independence of attorneys. Attorneys are just as subject as anyone to the folk wisdom that who pays the piper calls the tune; thus, they will defer to the wishes of the entity actually funding the expenses of litigation.[43] A variation on this argument is the claim that third-party financing will inevitably misalign the interests of the claimant and the funder.[44]

3. Funded claimants have a disincentive to settle, so third-party litigation financing will prolong litigation.[45] A plaintiff, who ultimately has the sole authority to accept or reject a settlement offer, may reject a reasonable settlement because the terms of the financing agreement provide a favorable return to the funder out of any recovery. Thus, the plaintiff may desire to go to trial and

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42. U.S. Chamber Inst. for Legal Reform, *Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* 4 (2012).

43. U.S. Chamber Inst. for Legal Reform, *Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* 5 (2012).

44. Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. Econ. & Pol'y 673 (2012).

45. U.S. Chamber Inst. for Legal Reform, *Stopping the Sale of Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* 5 (2012).

seek to "ring the bell" in order to realize a greater proportion of the upside of the case.

To these arguments, proponents of third-party litigation financing generally reply something like the following:

1. Third-party financing is unlikely to increase frivolous or non-meritorious litigation, because the only recourse for a third-party investor is the proceeds of the claim itself. A claim without merit has no value. Purchasing a share of a frivolous lawsuit is like buying swampland in Florida. As the Texas Court of Civil Appeals recognized, "An investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit."[46] In fact, commercial litigation funders reject approximately 95% of the cases brought to them for possible financing. To the extent litigation financing allows plaintiffs to assume more risk, this may be a good thing if plaintiffs have potentially meritorious, though risky, claims to assert. In any event, defendants have always had access to the risk-spreading mechanism of liability insurance. In economic substance, litigation financing is no different from liability insurance; the only difference is that its benefits go to plaintiffs, not defendants.

2. The premise of the argument is simply false. Commercial funding companies 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. In fact, litigation financing contracts expressly disclaim any right to interfere with counsel's handling of litigation.[47] As discussed in Section 20-2:1.1,

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46. *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 105 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

47. *See*, *e.g.*, *Charge Injection Technologies, 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.*,

the common law doctrines of champerty and maintenance require that a third-party funder be a purely passive investor. On the defense side, by contrast, there is often a party providing financial support that has the right to control the conduct of litigation – it is called a liability insurer. The extent of third-party control over the *defendant's* conduct of litigation would raise difficulties for the litigation system if the insurer's treatment of the insured's interests were not extensively regulated by state law; however, refusing to settle a case within policy limits can subject an insurer to tort liability if the insurer acted in bad faith.[48] Regulation of duties owed in the insurer-insured relationship can mitigate potential misalignment of interests. Although it has not yet been litigated in the United States, it is conceivable that some modest degree of control by a funder would be permissible if it were similarly subject to a duty to exercise control in good faith.

3. To the extent litigation financing does prolong litigation by avoiding early settlement, this may be a feature, not a bug, of the system. Well-funded defendants enjoy considerable leverage due to their ability to finance protracted, expensive litigation. Smaller, less wealthy opponents in litigation lack the resources to take a case all the way to trial. Third-party financing may help level the playing field and give smaller litigants the wherewithal to reject early, low-dollar settlement offers.[49]

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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).

48. *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).

49. *See, e.g.*, *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 718 (N.D. Ill. 2014) (third-party financing may avoid the plaintiff being "forced to abandon the case or settle on distinctly disadvantageous terms"); *Lawsuit Funding, LLC v. Lessoff*, 2013 WL 6409971,

The Chamber has had considerable success in the last few years insofar as several states have, citing the Chamber's arguments and enacted legislation around consumer funding. During the last few years, criticism has sharpened.

Other critics of litigation financing detect something distasteful about the involvement of a stranger in litigation. In a well-known decision invalidating a litigation financing transaction under the doctrines of champerty and maintenance (*see* Section 20-2:1 below), the Ohio Supreme Court said:

> "Equally troubling is [the funder] earning a handsome profit by speculating in a lawsuit and by potentially manipulating a party to the suit.... However, a lawsuit is not an investment vehicle. Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the fruits of litigation."[50]

The vivid metaphor of "gorging upon the fruits of litigation" calls to mind pigs at a trough, or a Roman orgy – something disgusting by nature, regardless of its economic substance.[51] Imagery of pollution and defilement is a theme in the history of prohibitions on champerty and maintenance. The South Carolina Supreme Court, for example, had this to say in an 1830 case:

> "The temple erected and consecrated to Justice is not, however, to be polluted with impunity, by those who would prostitute the rules regulating its police to base and unworthy purposes."[52]

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at *6 (Sup. Ct. N.Y. Cty. Dec. 04, 2013) (litigation financing "allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation").

50. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003).

51. *See* W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 62 DePaul L. Rev. 655 (2014).

52. *State v. Chitty*, 17 S.C.L. (1 Bail.) 379, 399-401 (1830).

PRACTICE POINTER:
Modern courts, however, do not regard litigation per se as an evil, and therefore are less inclined to see supporting meritorious litigation as a practice to be condemned. If third-party financing has the effect of promoting baseless litigation, that problem can be addressed directly, through litigation sanctions, prohibitions in attorney rules of professional conduct on bringing frivolous lawsuits, and other doctrines, rather than indirectly by attempting to stamp out third-party financing of the expenses of litigation.[53]

Nevertheless, an attitude of suspicion lingers in some quarters regarding the sale of certain types of claims. A leading Texas case on the non-assignability of legal malpractice claims expressed reservations about the free alienability of causes of action:

> "Most of the authorities disallowing assignment have reasoned that to allow assignability would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession. This is a legitimate concern. We do not relish the thought of entrepreneurs purchasing the legal rights of clients against their attorneys as an ordinary business transaction in pursuit of profit."[54]

It is important to understand, however, that the principal reason for the court's opposition to the assignment of a legal malpractice claim is that it was transparently an attempt to substitute a solvent defendant (the law firm) for the insolvent manufacturer that was the defendant in the underlying personal injury lawsuit.[55] The concern about entrepreneurs purchasing legal claims as an ordinary business transaction is merely window-dressing in the opinion. That the court included it shows that litigation financing may strike some courts as novel and potentially dangerous. As the market continues to mature, and judges and lawyers increasingly

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53. *See*, *e.g.*, *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997).

54. *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 316 (Tex. App.—San Antonio 1994, no pet.).

55. *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App.—San Antonio 1994, no pet.).

familiarize themselves with litigation financing transactions, it may come to seem more like a once strange, but now accepted feature of civil litigation, much like the contingency fee once did.

15-2 LEGALITY OF LITIGATION FINANCING

15-2:1 Champerty, Maintenance, and Barratry

As previously discussed, the debate surrounding litigation finance, in both the consumer and commercial context, has shifted from legality to regulation.

Nevertheless, it is important to note for context regarding the current debate landscape that initial encounters with litigation financing often send lawyers scrambling for a law dictionary to look up the terms champerty, maintenance, and barratry. These common law doctrines have deep roots in Greek and Roman times when the intervention in disputes by strangers was viewed with great suspicion.[56] The parties themselves, personal friends, and the court were the only people who had any business being involved with disputes. English common law picked up the mistrust of disinterested parties and blended it with a general attitude of aversion toward litigation. The result were prohibitions on certain forms of assistance to litigants by third parties. Blackstone defined the public wrong of maintenance as "intermeddling in a suit that no way belongs to one."[57] The prohibition was really aimed, however, at wealthy men who bought an interest in a lawsuit over land, hoping to obtain a share of a landed estate as part of the recovery in the lawsuit; combined with medieval abhorrence of usury and speculation, the prospect of men with capital but no land elbowing their way into the propertied classes accounts for much of the force of the common law prohibition on maintenance and champerty.[58]

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56. *See* the classic and fascinating historical account in Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48 (1935).

57. 3 William Blackstone, *Commentaries on the Laws of England* 134.

58. Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48, 60-61 (1935); *see also Charge Injection Technologies, Inc. v. E.I. Dupont De Nemours & Co.*, No. N07C-12-134-JRJ, 2016 WL 937400, at *2 (Del. Super. Mar. 9, 2016) ("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 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

Maintenance is defined as "officious intermeddling in a suit which in no way belongs to the intermeddler, by . . . assisting either party to the action, with money or otherwise, to prosecute or defend it."[59] Notice that it refers to any form of assistance, including such non-financial means as helping procure evidence or witnesses for a proceeding. Champerty is a subset of maintenance – "maintaining a suit [i.e., providing financial assistance] in return for a financial interest in the outcome."[60] Or, as the leading modern academic treatment of these doctrines defines them: "Champerty occurs when the intermeddler provides something of value to a party in a lawsuit in return for a portion of the recovery. Champerty is considered a type of maintenance.[61] Barratry has been defined as the offense of frequently exciting or stirring up suits and quarrels between others, and is also a species of maintenance."[62] Barratry is a pattern of conduct – it does not really make sense to speak of a single transaction as violating the prohibition on barratry, at least as defined at common law.[63] For this reason, prohibitions on barratry can be safely ignored when thinking about single litigation financing transactions; the only reason to remember the doctrine of barratry is that prohibitions on champerty and maintenance are sometimes contained within a general anti-barratry statute.[64]

The doctrines of maintenance and champerty came out of their long hibernation in 2003 when the Ohio Supreme Court held a consumer litigation financing transaction void under state law.[65] The plaintiff in a lawsuit against an insurance company sought to monetize the value of her claim against the defendant, so she obtained advances totaling $7,000 from two funding companies. When her case settled, she refused to pay the amounts owed to the

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to land, which meant that the champertor would grow richer by becoming a joint owner of the landed estate.").

59. *Charge Injection Tech., Inc. v. E.I. Dupont De Nemours & Co.*, No. N07C-12-134-JRJ, 2016 WL 937400, at *3 (Del. Super. Mar. 9, 2016); *Kraft v. Mason*, 668 So.2d 679, 682 (Fla. Ct. App. 1996) (internal citations omitted).

60. *Osprey, Inc. v. Cabana*, L.P., 532 S.E.2d 269, 273 (S.C. 2000) (quoting *In re Primus*, 436 U.S. 412, 424 n.15 (1978)).

61. *Osprey, Inc. v. Cabana*, L.P., 532 S.E.2d 269, 273 (S.C. 2000).

62. Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 98 (2011).

63. *See*, *e.g.*, *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112, 120 (Md. Ct. App. 1998).

64. *See*, *e.g.*, 720 Ill. Comp. Stat. 5/32-11 to -12.

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

funding companies, and initiated an action seeking to rescind the transactions.

At trial the magistrate found that the transactions were loans, and the returns due the funders violated state usury limitations. On appeal the funding companies argued that the transactions were investments, not loans, but the Ohio Supreme Court took the case in a wholly unexpected direction by finding that the financing contracts were void as champerty and maintenance. The court had some unkind things to say about these practices, quoting a case from 1823 stating 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."[66] Not only that, said the court, but the financing contracts created a disincentive for the plaintiff to settle the case against the insurance company. 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 in order to settle. This adverse incentive "can prolong litigation and reduce settlement incentives—an evil that prohibitions against maintenance seek to eliminate."[67] Although the Ohio legislature quickly overruled the *Rancman* decision by passing a statute permitting consumer litigation financing,[68] the case remains important and influential. In particular, the argument that a transaction is prohibited as champerty and maintenance if and to the extent that it creates a disincentive to settle remains helpful as an analytical tool. However, *Rancman* is best viewed as an outlier, given "[t]he consistent trend across the country . . . toward limiting, not expanding, champerty's reach."[69]

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66. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220 (Ohio 2003) (quoting *Key v. Vattier*, 1 Ohio 132, 136 (1823)).

67. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003).

68. Ohio Rev. Code § 1349.55 ("Non-Recourse Civil Litigation Advance Contracts").

69. *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145 (9th Cir. 2011) (*quoted in Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 727 (N.D. Ill. 2014)).

Where the doctrines are still recognized, champerty and maintenance are sometimes freestanding torts and even crimes,[70] but more commonly are asserted as a basis for holding a contract unenforceable.[71]

PRACTICE POINTER:
Companies that engage in the business of financing litigation must therefore exercise extreme caution to ensure that the financing agreement will not run afoul of prohibitions on champerty and maintenance, because the result would be to lose the entitlement to recover on the contract.

Even where champerty and maintenance are still recognized, however, the doctrines do not serve as a defense in the underlying action.[72] The claim that a contract is champertous can be generally invoked only by the parties to the agreement, and only in an action to enforce the contract.[73]

An important distinction is between the acquisition of a cause of action, which might constitute champerty, and acquisition of a right to the *proceeds* of a claim.[74] The latter is excluded from the definition of champerty. Also excluded from the scope of champerty prohibitions is the bringing of a lawsuit pursuant to a pre-existing legal interest, such as a lien, assignment, or security interest.[75] The latter exclusion is often expressed in terms of whether

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70. *See, e.g.*, the Illinois anti-barratry statute, 720 Ill. Comp. Stat. 5/32-11 to -12, which is part of the state criminal code.

71. *See*, *e.g.*, *Osprey, Inc. v. Cabana, L.P.*, 532 S.E.2d 269, 273 (S.C. 2000) ("A champertous agreement is unlawful and void where the rule of champerty is recognized, and the tainted agreement is unenforceable," although the doctrine is no longer recognized in South Carolina).

72. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 726 (N.D. Ill. 2014).

73. *See*, *e.g.*, *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145 (9th Cir. 2011).

74. *See*, *e.g.*, *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008); *Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co.*, 455 S.E.2d 655 (N.C. 1995); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (investors obtained assignment of share of plaintiff's recovery in pending lawsuit).

75. *See*, *e.g.*, *In re Perrysburg Marketplace Co.*, 208 B.R. 148 (Bankr. N.D. Ohio 1997) (secured claim against debtor in bankruptcy by party who had purchased debtor's loan from a receiver); *Schwartz v. Eliades*, 939 P.2d 1034 (Nev. 1997) (no champerty where there was a preexisting agreement between two taxicab company owners to share litigation expenses and any proceeds in defamation suit, and an assignment of interests in the lawsuit);

the funder of litigation is a stranger to the underlying controversy. Under the law of some states, funding by non-strangers may not be maintenance or champerty.[76]

Note that, strictly speaking, representing a plaintiff on a contingency fee basis is a form of champerty. Rule 1.8(i) of the Model Rules of Professional Conduct (the counterpart in Texas is Rule 1.08(h) of the Texas Disciplinary Rules of Professional Conduct) prohibits a lawyer acquiring a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for the client. As Comment [16] to the rule (Comment 7 to the Texas rule) acknowledges, this rule simply makes applicable to lawyers the common-law prohibition on champerty. But the rule then goes on to expressly permit lawyers to contract with a client for a reasonable contingent fee in a civil case. That the rule had to create an exemption from the prohibition on champerty for contingency fees shows that contingency fees and third-party investment are identical in economic substance.[77]

Many states have abolished the doctrines of champerty and maintenance altogether, or did not receive it into their law from the common law of England.[78] Other states have defined it narrowly enough to avoid most transactions in which it might be raised as a defense to enforceability of an agreement. In New York, for example, champerty is defined as an investment made for at least the primary purpose, if not the sole purpose, of bringing suit by a purchaser of distressed debt seeking to profit from the transaction and does not commit champerty

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Temeron, Inc. v. Ferraro Energy Corp., 861 P.2d 319, 325-26 (Okla. Ct. App. 1993) (party had a right, under a consulting contract it signed with gas supplier to review supplier's records, to bring suit on supplier's behalf to recover underpayments and retain percentage of proceeds); *Puckett v. Empire Stove Co.*, 539 N.E.2d 420 (Ill. Ct. App. 1989).

76. *See*, *e.g.*, *Vosburg Equipment v. Zupancic*, 737 P.2d 522 (Nev. 1987) (since all the parties to the funding contract had an interest in the underlying lawsuit, there could be no champerty).

77. *See Osprey, Inc. v. Cabana, L.P.*, 532 S.E.2d 269, 278 n.4 (S.C. 2000) (observing that contingency fee lawyers would technically be subject to the doctrine of champerty); *see also* Charles W. Wolfram, *Modern Legal Ethics* § 9.4.1, at 527 (1986) (observing that historically "[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)).

78. *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 decision to omit champerty statutes when organizing state is clear statement of doctrine's inapplicability).

just because it may need to resort to litigation in order to realize the value of its investment.[79] In other instances, the doctrines are never mentioned in the course of litigation over a transaction that, at common law, would have been considered maintenance.[80]

Over the past five years, several states revisited champerty rules. Notably, in Minnesota, the Supreme Court abolished the common law doctrine of champerty in *Maslowski v. Prospect Funding Partners LLC*.[81] In *Maslowski*, a woman had received a $6,000 advance from a funder for her personal injury case in exchange for a share of any settlement. The contract was champertous under Minnesota's old common law (and the court indeed found it void for champerty as to that case), but the Supreme Court took the occasion to declare that such agreements are no longer categorically against public policy going forward.[82] The court reasoned that modern legal ethics and procedural rules are better suited to address any abuse, and that litigation funding can increase access to justice by enabling claims to be heard.[83] Because Minnesota's champerty bar was judge-made, the court had power to abolish it prospectively—a luxury not available in states like New York where champerty is codified.[84] South Carolina's Supreme Court similarly discarded champerty in 2000, and Massachusetts did so in 1997.[85]

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79. *See*, *e.g.*, *Bluebird Partners v. First Fidelity Bank*, 731 N.E.2d 581, 587 (N.Y. 2000)*; see also Trust for the Certificate Holders of the Merrill Lynch Mortgage Investors, Inc. v. Love Funding Corp.*, 918 N.E.2d 889 (N.Y. 2009). A New York statute exempts transactions valued in excess of $500,000 from the definition of champerty. *See* N.Y. Jud. L. § 489(2). New York courts do occasionally find that an investment is made solely for the purpose of bringing suit, and therefore constitutes champerty, although the statutory safe harbor would still apply. *See Justinian Capital SPC v. WestLB AG*, 65 N.E.3d 1253 (N.Y. 2016).

80. *See*, *e.g.*, *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994) (involving grant by the plaintiff in a personal-injury lawsuit of a share of the recovery to three persons who provided financial support to the litigation).

81. *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235 (Minn. 2020).

82. Steven K. Davidson *et al.*, *Litigation Funding Update – Abolishing Common Law Champerty*, Steptoe (Oct. 2, 2025), https://www.steptoe.com/en/news-publications/litigation-funding-update-abolishing-common-law.html.

83. Steven K. Davidson *et al.*, *Litigation Funding Update – Abolishing Common Law Champerty*, Steptoe (Oct. 2, 2025), https://www.steptoe.com/en/news-publications/litigation-funding-update-abolishing-common-law.html.

84. Steven K. Davidson *et al.*, *Litigation Funding Update – Abolishing Common Law Champerty*, Steptoe (Oct. 2, 2025), https://www.steptoe.com/en/news-publications/litigation-funding-update-abolishing-common-law.html.

85. Steven K. Davidson *et al.*, *Litigation Funding Update – Abolishing Common Law Champerty*, Steptoe (Oct. 2, 2025), https://www.steptoe.com/en/news-publications/litigation-funding-update-abolishing-common-law.html.

By contrast, a few states still have broad champerty rules: Ohio had a statute abrogating champerty,[86] and Florida has a common law champerty defense (though rarely invoked in recent times).

Texas historically had maintenance and champerty prohibitions in its common law, but today Texas courts have scant recent precedent—it is generally assumed that as long as a funding arrangement does not involve an officious intermeddler stirring up litigation, Texas would not void it. Texas, for example, allows assignment of property damage claims and other choses in action, even if personal injury claims cannot be assigned. The Texas Court of Appeals' leading case on litigation funding, *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*,[87] enforced a funding contract over arguments that it violated public policy, implicitly rejecting a broad champerty rule. In sum, by 2025 the clear trajectory in the United States is that courts tolerate litigation funding so long as funders remain passive financiers and do not usurp control or improperly encourage frivolous suits. Champerty, where still alive, is a narrow defense. As one court observed, if there are concerns about frivolous litigation, it is "better to deal with that problem directly, rather than attempting to mold an ancient doctrine to modern circumstances."[88]

PRACTICE POINTER:
In states that continue to prohibit maintenance and champerty, it is important to drill down into state law to determine what features of a transaction will bring it within these prohibitions. The three most common factors are (1) the exercise by the funder of control over the conduct of litigation by the plaintiff's lawyer; (2) an improper purpose for bringing the lawsuit; and (3) bringing litigation that is objectively lacking in legal merit.

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86. Ohio Rev. Code §1349.55 (2008)

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

88. *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997) (abolishing champerty in Massachusetts). The quote in context: if frivolous litigation is a concern, "resort should be had to other devices [like sanctions for frivolous suits] rather than the disinterment of doctrines whose applicability to modern situations is speculative at best." *See also Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 277 (S.C. 2000) (abandoning champerty, observing that "[o]ur modern rules of civil procedure are better suited to handle issues of frivolous litigation")

15-2:1.1 Control

PRACTICE POINTER:
Assumption by a third-party 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 true in Australia, where third-party financers can assume significant control over the litigation.[89] In the United States, however, the financer must be a purely passive investor, at least with respect to the law firm, although there is a significant open question concerning the degree of control the funder may have over the *claimant's* conduct of litigation.[90]

PRACTICE POINTER:
Case law establishes the principle that the assignment of a right to the proceeds of litigation, coupled with control over the conduct of the litigation, may be prohibited as champerty. Conversely, lack of control by the financer is an important factor supporting the conclusion that a financing agreement is not champertous.[91]

For example, the purchase of a claim was held not constitute champerty where the purchaser did not have the purpose of stirring up strife and did not acquire any "control, input, influence, right or involvement of any kind" in the conduct of the litigation.[92] Similarly, in a vigorously litigated Delaware case, the trial court held that a third-party financing agreement did not constitute champerty or maintenance because the funder did not have the

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89. See *Campbells Cash & Carry Pty. Ltd. v. Fostif Pty. Ltd.*, (2006) 229 C.L.R. 386, [2006] HCA 41 (Austl.) (Known in the literature as the *Fostif* case).

90. *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 . . . .").

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

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

contractual right to control the litigation, nor did it have *de facto* control over the conduct by counsel of the litigation.[93] On the other hand, the *Rancman* case from Ohio, discussed above, expressed concern that a third-party funder may potentially manipulate a party to the suit.[94] And a Florida case concluded that a third-party funder of the plaintiff's claim could be a "party" for the purposes of an award of attorneys' fees to the defendant where the funder "had to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements."[95]

PRACTICE POINTER:
Whether it is evaluated under champerty and maintenance or other doctrines, that degree of control by a third-party funder over the conduct of litigation by an attorney is intolerable in the United States.

In May 2016, the *New York Times* reported that the professional wrestler known as Hulk Hogan may have had undisclosed financial backing in his lawsuit against Gawker Media, an online media company, for publishing a sex tape featuring Hogan and the wife of his best friend, Bubba "The Love Sponge" Clem (really).[96] Hogan's lawyer had at one point dismissed a claim for negligent infliction of emotional distress, which had the effect of letting Gawker's insurer off the hook for coverage. Hogan also turned

93. *Charge Injection Technologies, Inc. v. E.I. Dupont De Nemours & Co.*, No. N07C-12-134-JRJ, 2016 WL 937400, at *5 (Del. Super. Mar. 9, 2016). Although it was relevant to the issue of whether a litigation financing firm was the real party in interest – analogous to an assignee or subrogee – and not strictly to champerty and maintenance, it is significant that the district court's *in camera* review of a litigation financing agreement revealed that the funder had no control over the conduct of litigation or settlement. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 740 (N.D. Ill. 2014).

94. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003).

95. *Abu-Ghazaleh v. Chaul*, 36 So.3d 691, 693 (Fla. Ct. App. 2009). *See also Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901, 906 (R.I. 2002) ("If Morash can prove that third-party defendants engaged in such conduct, the implication is that third-party defendants acted as a party, and not as counsel, in directing the lawsuit to the extent that Acebes needed their approval to finalize the settlement agreement with Morash. This is exactly the type of agreement that is prohibited by the doctrine of maintenance.").

96. *See* Andrew Ross Sorkin, *Gawker Founder Suspects a Common Financer Behind Lawsuits*, N.Y. Times (May 23, 2016).

down several substantial settlement offers. The financial backer of the suit was rumored to be billionaire Peter Thiel, co-founder of PayPal, who had a longstanding grudge against Gawker. Thiel apparently was motivated by the desire to put Gawker out of business, which is likely given its bankruptcy filing following the award of $140 million in damages to Hogan. As one of the articles about the case pointed out, "[t]here is nothing illegal about funding such legal cases; there is an entire industry known as litigation finance that often helps invest in and financially support lawyers working on contingency in small and large cases."[97] That is certainly true, but in states that still recognize the doctrine of champerty, the exercise of control by a funder like Thiel over the conduct of the case, including dismissing the negligence claim and rejecting settlement offers, could bring the financing within the prohibition on champerty.[98]

15-2:1.2 Purpose

Under the law of some states, the purpose for which a claim or proceeds was assigned makes all the difference to whether the transaction is prohibited as champerty. Under a New York statute, for example, an assignment is deemed champertous if the purchaser had the primary purpose of suing on the claim; if the purchaser had another purpose, such as making money on the deal, the transaction is not champerty.[99] North Carolina similarly requires that the purchaser of a claim act "with a purpose of stirring up strife and continuing litigation."[100] Finally, a Delaware court has held that a third-party financing agreement did not constitute champerty and maintenance for several reasons, including the lack of an improper purpose: "This is not a case in which [the funder] 'stirred up' litigation, is controlling or forcing [the plaintiff] to

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97. Andrew Ross Sorkin, *Peter Thiel is Said to Bankroll Hulk Hogan's Suit Against Gawker*, N.Y. Times (May 25, 2016).

98. *See*, *e.g.*, *Kraft v. Mason*, 668 So.2d 679 (Fla. Ct. App. 1996).

99. *Bluebird Partners v. First Fidelity Bank*, 731 N.E.2d 581, 587 (N.Y. 2000) ("[I]n order to constitute champertous conduct in the acquisition of rights that would then be nullified and to resolve the question at issue, the foundational intent to sue on that claim must at least have been the primary purpose for, if not the sole motivation behind, entering into the transaction."); *Echeverria v. Lindner*, 801 N.Y.S.2d 233 (Sup. Ct. Nassau Cty. 2005).

100. *Odell v. Legal Bucks LLC*, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008).

pursue litigation, or is controlling the litigation for the purpose of continuing a frivolous or unwanted lawsuit.[101]

15-2:1.3 Baseless Litigation

The term "officious intermeddling" is often used in the definition of maintenance, but it is not always defined. Looking closely at the facts of cases dealing with this definition, however, one can discern that courts tend to understanding 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.[102]

Consider the definition of officious intermeddling in a leading California case, *Martin v. Freeman*.[103] 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."[104] 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

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101. *Charge Injection Tech., Inc. v. E.I. Dupont De Nemours & Co.*, No. N07C-12-134-JRJ, 2016 WL 937400, at *5 (Del. Super. Mar. 9, 2016).

102. *See*, *e.g.*, *Charge Injection Tech., Inc. v. E.I. Dupont De Nemours & Co.*, No. N07C-12-134-JRJ, 2016 WL 937400 (Del. Super. Mar. 9, 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. Aug. 21, 1985); *Giambattista v. Nat'l Bank of Commerce*, 586 P.2d 1180 (Wash. App. 1978).

103. 216 Cal. App. 2d 639, 31 Cal. Rptr. 217 (1963).

104. *Martin v. Freeman*, 216 Cal. App. 2d 639, 643, 31 Cal. Rptr. 217, 219 (1963).

> 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."[105]

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 rules such as Rule 11 of the Federal Rules of Civil Procedure.[106] 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."[107]

15-2:2 Usury

PRACTICE POINTER:
Most litigation financing contracts are structured as an investment, not a loan.[108] In a typically-structured transaction, the third-party investor acquires a contingent interest in the proceeds of the lawsuit. The obligation to repay the investor is without recourse, meaning that the claimant has no obligation to pay the investor anything if the lawsuit is not successful. If the claimant does recover a judgment or settlement, the repayment obligation is often calculated as a multiplier of the amount invested, with the multiplier increasing over time.

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105. *Martin v. Freeman*, 216 Cal. App. 2d 639, 643, 31 Cal. Rptr. 217, 219 (1963).

106. *See*, *e.g.*, *Security Underground Storage, Inc. v. Anderson*, 347 F.2d 964, 969 (10th Cir. 1965) (Kansas law); *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).

107. *Saladini v. Righellis*, 687 N.E.2d 1224, 1227 (Mass. 1997).

108. *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).

For example, suppose a financer provides $10 million in funding. The litigation financing agreement generally provides that the financer first recovers the amount invested ($10 million), and then may be entitled to a return of twice the amount invested if the case is terminated within one year, three times the amount if the case terminates after one year but before two, and four times the amount invested for any time after that. If the financing transaction were a loan, returns this high would arguably be unenforceable as a violation of state usury statutes. For the prohibition on usurious interest to apply, the transaction must be a loan.[109] A transaction is not a loan unless there is an absolute obligation to repay.[110] For this reason, the parties usually seek to clarify that there is no absolute obligation to repay in the event that the litigation is unsuccessful.

In the leading Texas case on litigation financing, the court found that the investors' right to be repaid was contingent, not absolute.[111] If the plaintiff had lost its lawsuit against Halliburton, the investors would recover nothing. Thus, as a matter of law, the return due to the investors could not be usurious. The plaintiff, seeking to avoid an obligation to repay the investors, attempted to characterize the investment as risk-free, given the likelihood of success in the litigation. As the court pointed out, however, litigation is never without risk, and in fact the plaintiff recovered quite a bit less than it had sought in damages.[112] If, at the time the contract was formed, there was a genuine risk of non-recovery, an investment in a pending lawsuit should not be characterized as a loan to the plaintiff.

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109. "If the transaction is not a loan, 'there can be no usury, however unconscionable the contract may be.'" *Seidel v. 18 E. 17th St. Owners*, 79 N.Y.2d 735, 744, 586 N.Y.S.2d 240, 598 N.E.2d 7 (1992) (*quoting Orvis v. Curtiss*, 157 N.Y. 657, 661, 52 N.E. 690 (1899)).

110. *See* 9 *Williston on Contracts* § 20:18 (4th ed. 2014) ("[U]nder traditional usury statutes, one of the requisites of a usurious loan is that it be absolutely, not contingently, repayable.").

111. *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 96-97 (Tex. App.—Houston [1st Dist.] 2006).

112. *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 96-97 (Tex. App.—Houston [1st Dist.] 2006).

Notwithstanding the non-recourse structure of typical litigation financing transactions, the Colorado Supreme Court held in 2015 that *consumer* litigation financing is a loan subject to the usury limitations in the Colorado Uniform Consumer Credit Code.[113] The court defined debt, at least in the consumer lending context, as the creation of any obligation to repay, and further found that the transactions were loans because the obligation to repay the debt increases over time.[114] (Interestingly, given the importance of the funder's lack of control to the analysis of champerty and maintenance, considered above in Section 20-2.1, the fact that funders do absolutely abjure control over the conduct of litigation was one of the factors supporting the court's conclusion that the transactions did not involve the sale of a contingent share of the proceeds of the lawsuit.[115]) The Colorado decision said nothing about commercial-sector financing, nor could it, since it was in a declaratory judgment action filed by consumer-sector lenders regarding a state consumer credit statute. Other state courts have also found that consumer litigation funding agreements could potentially be unenforceable under state usury statutes.[116] What authority there is on *commercial* litigation financing, however, has held that the transactions are investments not subject to state usury limitations.[117]

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113. *Oasis Legal Finance Group, LLC v. Coffman*, 361 P.3d 400 (Colo. 2015).

114. *Oasis Legal Finance Group, LLC v. Coffman*, 361 P.3d 400, 407-09 (Colo. 2015).

115. *Oasis Legal Finance Group, LLC v. Coffman*, 361 P.3d 400, 410 (Colo. 2015).

116. *See*, *e.g.*, *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. Ct. App. 2008); *Lawsuit Financial, LLC v. Curry*, 683 N.W.2d 233 (Mich. App. 2004); *Echeverria v. Lindner*, 801 N.Y.S.2d 233 (N.Y. Sup. Ct. Nassau Cty. 2005). In *Echeverria*, the court held that an investment of $25,000 in a personal-injury claim, which provided for a return of 3.85% per month, constituted a loan under New York law, and the interest rate was usurious. Significantly, the court's conclusion was based on the "very low probability that judgment would not be in favor of the plaintiff," because the underlying claim was for a strict liability labor law violation by a contractor. As the court put it, "it is not a gamble, but a 'sure thing,' therefore, it is a loan, not an investment with great risk." The Texas court in *Anglo-Dutch Petroleum* distinguished *Echeverria* on the ground that the litigation was far from a sure thing. *See Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App.—Houston [1st Dist.] 2006); *see also Kelly, Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 950 N.Y.S.2d 723 (N.Y. Sup. Ct. Suffolk Cnty. 2012) (no violation of usury statute where litigation funder advanced funds in exchange for a share of the proceeds of personal injury claims, because there was a risk of non-recovery if the claims went to trial and the plaintiff did not recover).

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

15-2:3 Fee Splitting

PRACTICE POINTER:
Depending on how a financing transaction is structured, it may involve the lawyer in dividing his or her fees with a non-lawyer. All states have in effect a version of Model Rule 5.4(a), which states categorically that "[a] lawyer or law firm shall not share legal fees with a nonlawyer," with exceptions not relevant to litigation financing. The Texas disciplinary rule is numbered Rule 5.04(a), but is identical to Model Rule 5.4(a). Historically the core concern of the fee-splitting rule is not financing, but the impermissible solicitation of clients.[118] The rule appears to be implicated most frequently today in the context of referral arrangements and the compensation of client-development consultants and in-house employees.[119]

For example, the State Bar of Texas Professional Ethics Committee concluded, in Opinion 467, that a percentage-lease agreement between a lawyer and a landlord violated the fee-splitting rule because it created an incentive for the landlord to refer business to the lawyer.[120] The fee-splitting rule may formally apply to commercial financing transactions, but it must be applied with reference to its purpose to avoid absurd results. By definition (since partnerships with non-lawyers are prohibited by Tex. Discip. R. 5.04(b)), all income to a law firm consists of attorneys' fees. Thus, *any* payment to a landlord or vendor, or interest payments on an ordinary commercial loan, would formally violate the fee-splitting rule. Of course, no one seriously believes that ordinary commercial transactions raise fee-splitting

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118. *See* Charles W. Wolfram, *Modern Legal Ethics* § 16.5 (1986). For typical cases involving "runners" or "cappers" *see*, *e.g.*, *In re Nelson*, 1 Cal. State Bar Ct. Rptr. 178 (Review Dept. 1990); *Danzig v. Danzig*, 904 P.2d 312 (Wash. Ct. App. 1995). The underlying concern in the runner/solicitation cases is that there will be a bidding war among lawyers paying for client referrals. *See*, *e.g.*, *Crawford v. State Bar*, 7 Cal. Rptr. 746, 355 P.2d 490 (1960); *see also McIntosh v. Mills*, 117 Cal. Rptr. 3d 66, 74 (Cal. Ct. App. 2004) (summarizing purposes of fees-splitting rule and citing numerous cases).

119. *See*, *e.g.*, *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112 (Md. Ct. App. 1998); *Trotter v. Nelson*, 684 N.E.2d 1150 (Ind. 1997); *In re Rappaport*, 588 N.Y.S.2d 436 (App. Div. 1992); *State Bar of Texas v. Faubion*, 821 S.W.2d 203 (Tex. 1991); *In re Anonymous Member of the South Carolina Bar*, 367 S.E.2d 17 (S.C. 1988); N.Y. State Bar Op. 927 (2012); Penn. Bar Op. 2004-3 (2004); Fla. Op. 02-1 (2002); N.Y. State Bar Op. 727 (2000); N.C. Bar Op. 147 (1993).

120. Tex. Bar Op. 467 (1990).

issues. Law firms routinely borrow money from banks to finance their activities. It is even permissible for a lender to acquire a security interest in a law firm's receivables as collateral for a loan to the law firm,[121] and with appropriate safeguards, lawyers may pass along borrowing costs to clients as an expense of litigation.[122]

PRACTICE POINTER:
A State Bar of Texas ethics opinion, No. 481, permits lawyers to borrow an amount equal to the client's fee from a for-profit financing company, which would retain 10% of the borrowed amount as a financing charge.[123] The opinion referred to the transaction as a permissible financing arrangement, rather than a division of fees, although of course it was both. Thus, the issue is how to determine which financing transactions potentially run afoul of the fee-splitting rule.

The State Bar of Texas issued a subsequent opinion, No. 576, stating that it would violate the fee-splitting rule for a plaintiff's attorney to "enter into an agreement with a lending company owned by non-lawyers under the terms of which the lending company would agree to reimburse the lawyer for litigation expenses in the case as incurred and the lawyer would agree to repay, in the event of a recovery in the lawsuit, the amounts advanced plus a funding

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121. *See*, *e.g.*, *Core Funding Group v. McDonald*, No. L–05–1291, 2006 WL 832833 (Ohio Ct. App. Mar. 31, 2006); Cal. State Bar Formal Op. 2007-172 (permitting lawyers to accept payments of fees by credit card, even though the attorney makes a payment out of the earned fees by means of a service-charge debit, notwithstanding literal violation of California fee-splitting rule); Or. Bar Op. 2005-133 (2005) (establishing credit facility to pay lawyers' fee, in return for 10% financing charge, does not violate Rule 5.4(a); Phila. Bar Op. 96-14 (1998) (considering confidentiality issues raised by former shareholder in a firm, in collection action by bank which had security interest in firm's receivables); Maine Bar Op. 152 (1995) (permitting law firm to establish line of credit with bank, secured by firm's receivables); Ill. Op. 92-9 (1993) (same result as Oregon opinion, on a similarly structured transaction); Tex. Bar Op. 479 (1991) (also dealing with confidentiality issues associated with loan to law firm secured by accounts receivable); Mich. Bar Op. RI-77 (1991) (same). *See also* 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.").

122. *See*, *e.g.*, *Chittenden v. State Farm Mut. Auto. Ins. Co.*, 788 So.2d 1140 (La. 2001); Mich. Bar Op. RI-332 (2003); N.Y. State Bar Ass'n Op. 754 (2002); Kent. Bar Op. E-420 (2002); Ariz. Bar Op. 01-07 (2001); L.A. County Bar Op. 499 (1999); Ill. Bar Op. 94-06 (1994).

123. Tex. Bar Op. 481 (1994).

fee equal to a fixed percentage of any amount recovered in the case . . . ."[124] Other state bar opinions have concluded that the grant to a lender of a security interest in a single case would violate the fee-splitting rule in a *non-recourse* financing transaction—i.e., one in which a borrower is not obligated to repay the loan unless successful in the single case at issue.[125] It is permissible, however, for a borrower to obtain a security interest in the proceeds of a case in a recourse transaction, in which the attorney would be ultimately liable for repayment even in the event of no recovery in the case.[126] The Philadelphia Bar Association opinion permits *non-recourse* funding by a commercial lender of the expenses of litigation, as long as "the lawyer does not permit consideration of this arrangement to affect his or her decision to recommend settlement to the client."[127]

The Virginia State Bar Association advised that the fee-splitting rule cannot be interpreted literally or formalistically; rather, it should be understood in terms of its core concern, which is to "prohibit nonlawyer interference with a lawyer's professional judgment and ensure lawyer independence."[128] However, a recent opinion of the New York City Bar Association appeared to take a highly formalistic approach to Rule 5.4(a).[129] It concluded that a lawyer would violate the fee-splitting rule by entering into a financing transaction with a non-lawyer in which "the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters." The opinion acknowledged that lawyers frequently enter into debt obligations with commercial lenders, in which the obligation to repay is secured by current or future accounts receivable. Law firms also engage in factoring transactions,

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124. Tex. Bar Op. 576 (2006).

125. *See*, *e.g.*, Utah Bar Op. 97-11.

126. *See*, *e.g.*, Nev. Bar Op. 36 (2007); Mo. Bar Op. 2003-0022; Utah Bar Op. 02-01.

127. Phila. Bar Op. 03-15 (2003).

128. Va. Legal Ethics Op. 1783 (2003) (citing Va. Legal Ethics Op. 1744 (no violation of the fee-splitting rule in sharing portion of court awarded fees with nonprofit organization)); *see also* Los Angeles County Bar Ass'n Op. 523 (2009) (lawyer and client may agree to divide gross recovery in a case that includes statutory attorneys' fees; division is ethically permissible because it does not implicate the policy underlying the fee-splitting rule, *i.e.* to "prevent control over the services rendered by attorneys from being shifted to lay persons").

129. Ass'n of the Bar of the City of N.Y., Formal Opinion 2018-5.

involving sales of accounts receivable at a discount. These also do not violate the fee-splitting rule. On the other hand, "a litigation-funding arrangement involves impermissible fee sharing where the arrangement in effect makes the lawyer's payments contingent on the receipt or amount of fees, regardless of how the arrangement is worded." The committee's concern is that non-lawyers who have a stake in legal fees from particular matters may have an incentive to influence the lawyer's handling of the matter. The emphasis on a particular matter, and the concern with interfering with the lawyer's independence, suggest that the propriety of certain types of litigation financing transactions should be evaluated on a case-by-case basis, with careful attention paid to the structure of the transaction.

PRACTICE POINTER:
Taken together, the few ethics opinions nationwide that have addressed the fee-splitting rule in the context of litigation financing can be boiled down to the principle that a financing transaction may violate the fee-splitting rule if, and to the extent that, it creates a real possibility of interference by a non-lawyer with the lawyer's exercise of independent professional judgment.

As an example of a transaction that might raise fee-splitting concerns, consider a loan by a third-party litigation financing company to a law firm, with a conditional obligation on the part of the lawyer to repay out of the proceeds of any judgment or settlement received.[130] Because the obligation made reference to a single case for which the lawyer had borrowed from the third-party lender, there were foreseeable situations in which the lawyer would be better off financially if he lost the case and the client recovered nothing. For example, if the lawyer had borrowed $80,000 to finance $100,000 of litigation costs and expenses, and obtained a recovery of $100,000 for the client, the lawyer's obligation would be to repay the original $80,000, plus a funding fee of $80,000, for a total of $160,000. If, on the other hand, the lawyer "took a dive"

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130. This example is from Utah Bar Op. 06-03 (2006).

in the case and recovered nothing for the client, the lawyer would be obligated to pay the lender nothing. The adverse incentive created by the presence of third-party financing was an intolerable limitation on the lawyer's independence. On those grounds, the Utah State Bar opinion concluded that the investment violated the fee-splitting rule. In many litigation financing transactions, however, there would be sufficient safeguards to prevent a law firm from intentionally losing a case in order to avoid a repayment obligation. Most obviously, the firm would face a lawsuit for malpractice and breach of fiduciary duty. It would also incur substantial reputational harm as a result of tanking a client's case in order to protect its own financial interests.

It is likely that this principle also underlies the State Bar of Texas ethics opinion on fee-splitting, although the committee's reasoning is somewhat unclear.

PRACTICE POINTER:

Addressing the question of the distinction between permissible financing and impermissible fee-splitting, the Committee had this to say: "By tying the proposed funding fee to a percentage of the recovery, the lending company would be directly benefiting from the lawyer's knowledge, skill, experience and time expended to the detriment of the lawyer, who would be solely responsible for paying the funding fee. This would be tantamount to fee splitting.[131]

The language, "tantamount to fee splitting" is significant, because it shows the committee's awareness that all financing transactions involve the division of attorneys' fees, strictly speaking. The transaction in question is inappropriate because of the misalignment of incentives it creates – the lending company benefits from the lawyer's services to the detriment of the lawyer. It would have been helpful if the committee had said "to the detriment of the lawyer's *independent judgment*," but that may be what the committee had in mind.

The ultimate point of the rule, like all rules of professional conduct, is to protect the interests of clients, and so the transaction

131. Tex. Bar Op. 576 (2006).

operating to the detriment of the lawyer creates an ethical concern to the extent it affects the lawyer's capacity to exercise independent judgment for the protection of the client. The committee also made reference to the prior opinion, mentioned above, prohibiting an office lease in which the rent payment was computed as a percentage of the law firm's gross receipts, because it might create an incentive for the landlord to refer business to the lawyer.[132] The committee noted that the lender in this transaction might similarly have an incentive to refer cases to the lawyer. Thus, the interpretation of Texas Disciplinary Rule 5.04 appears to track the law in other jurisdictions that focused on the effect of a transaction on the lawyer's capacity to exercise independent professional judgment in the representation of a client.

Another legal hurdle is the ethical rule barring lawyers from sharing legal fees with non-lawyers. All states have some version of Model Rule 5.4(a), which provides that "a lawyer or law firm shall not share legal fees with a nonlawyer." This rule is meant to protect the lawyer's independent judgment and prevent nonlawyers (who are not bound by ethical duties) from having a financial stake in a lawyer's fee. At first glance, litigation funding might seem to implicate this rule—the funder's return could be seen as coming out of the lawyer's contingent fee. However, the structure of the transaction matters greatly.

Client's Proceeds vs. Lawyer's Fees: If the funder's right to payment is sourced from the client's recovery, then ethically it is viewed as the client assigning a portion of their property (the judgment) to the funder. That is generally permissible and not considered fee-sharing. By contrast, if a lawyer directly promises to pay the funder a portion of the lawyer's own fee, that can violate Rule 5.4. The New York City Bar's Ethics Committee addressed this in Formal Opinion 2018-5. It concluded that "lawyer-directed" funding—where a funder's return is contingent on the amount of fees the lawyer earns—is forbidden as an improper fee share.[133] But "client-directed" funding—where the obligation is on

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132. *See* Tex. Bar Op. 467 (1990).

133. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, *Formal Op. 2024-2: Ethical Issues Arising from Advice to Clients on Client-Funder Litigation Funding Agreements* (Oct. 2, 2025), https://www.nycbar.org/reports/formal-opinion-2024-2-ethical-issues-arising-from-advice-to-clients-on-client-funder-litigation-funding-agreements/.

the client and payable from the client's award—does not run afoul of Rule 5.4(a).[134] This distinction is now widely recognized. Most commercial funding deals are formally structured as with the client as the party to the contract, even if the practical effect is to support the attorney's litigation effort.

Texas Guidance: Texas Disciplinary Rule of Professional Conduct 5.04(a) mirrors the no fee-splitting rule. The Texas Professional Ethics Committee has opined on related scenarios. In Opinion 576 (2007), the committee found it impermissible for a lawyer to agree with a nonlawyer lender that repayment of advanced litigation expenses plus a "funding fee" would come out of any recovery.[135] Because the repayment was only from the case outcome and the lender's fee scaled with the result, the arrangement looked like the lender was sharing in the case proceeds (and essentially in the contingent fee). Similarly, other state bars[136] warned that giving a funder a stake in a single case's recovery could violate fee-splitting rules if the lawyer's obligation is contingent on success. However, ethics committees also acknowledge that not every financing transaction is truly a fee split—context and intent matter. The core purpose of Rule 5.4 is to prevent nonlawyer interference in the lawyer's professional judgment and to bar referrals-for-profit, not to outlaw legitimate financing.

Recent Ethics Updates: Since 2020, ethics authorities have continued to refine guidance. The NYC Bar issued Formal Opinion 2024-2 (2024) focusing on attorneys' duties when advising clients on funding agreements.[137] It reiterates that client-directed funding is generally permissible, but lawyers must be mindful of conflicts (Rule 1.7 if the lawyer has any personal interest or connection to the

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134. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, *Formal Op. 2024-2: Ethical Issues Arising from Advice to Clients on Client-Funder Litigation Funding Agreements* (Oct. 2, 2025), https://www.nycbar.org/reports/formal-opinion-2024-2-ethical-issues-arising-from-advice-to-clients-on-client-funder-litigation-funding-agreements/.

135. Tex. Comm. on Professional Ethics, Op. 576 (2007), https://www.law.uh.edu/libraries/ethics/opinions/501-600/eo576.pdf.

136. *See* Philadelphia Bar Ass'n Op. 2014-4 and the Virginia State Bar in Legal Ethics Op. 1818 (2005)).

137. N.Y.C. Bar Ass'n Comm. on Prof'l Ethics, *Formal Op. 2024-2: Ethical Issues Arising from Advice to Clients on Client-Funder Litigation Funding Agreements* (Oct. 2, 2025), https://www.nycbar.org/reports/formal-opinion-2024-2-ethical-issues-arising-from-advice-to-clients-on-client-funder-litigation-funding-agreements/.

funding source),[138] confidentiality (ensuring communications with funders are protected or at least done with client consent), and the scope of representation (a lawyer should clarify whether reviewing a financing contract is within the engagement). dThe opinion warns lawyers not to endorse or profit from a specific funding deal without full disclosure. Notably, if a lawyer refers a client to a funding company owned by the lawyer's relative or in which the lawyer has an interest, that creates a conflict. The New York State Bar Association on Professional Ethics held that a lawyer may refer a client to a funder owned by the lawyer's sibling only with informed written consent and only for legitimate case expenses (and even then, caution is urged).[139] The theme is transparency and loyalty: a lawyer must not let the funding relationship impair the duty of loyalty or independent judgment.

PRACTICE POINTER:
A few jurisdictions have experimented with loosening fee-splitting rules in general (for example, Arizona and Utah in 2021 allowed nonlawyer ownership of law firms in sandbox programs). Those changes are aimed at access to legal services and don't specifically target litigation funding, but they reflect an evolution. In such jurisdictions, a law firm could theoretically have nonlawyer investors (which is a form of outside funding). This remains a minority approach; most states (including Texas, NY, CA, DE) still strictly ban nonlawyer firm ownership. But if this reform trend grows, it may eventually normalize certain outside investment that currently would be called "fee-splitting."

In practice, reputable litigation funding arrangements take care to avoid triggering Rule 5.4 issues. The contract is with the client; the lawyer typically signs an acknowledgment (agreeing to honor the lien on any recovery) but not an agreement to pay fees to the funder. The funder's return is calculated from the client's proceeds, not as a portion of the attorney's fee. As long as those

138. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *Ethics Op. 1196* (Oct. 2, 2025), https://nysba.org/ethics-opinion-1196/.

139. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *Ethics Op. 1196* (Oct. 2, 2025), https://nysba.org/ethics-opinion-1196/.

lines are kept, courts have found no ethical breach. For example, the Colorado Supreme Court in *Oasis* (mentioned earlier) noted that the funders in consumer cases "abjure control" and are not receiving a direct fee split—though Colorado had other issues with the contracts, fee-splitting was not the focus.

Modern ethics opinions generally find that litigation funding is ethically permissible if properly structured. For example, the arrangement is fully disclosed to and agreed by the client, the funder has no control over legal strategy, the lawyer's fee is not directly shared or increased by the funder's involvement, and the lawyer continues to put the client's interests first when advising on settlement. Lawyers should consult their jurisdiction's ethics opinions and, when in doubt, obtain client consent or seek guidance from ethics boards. For example, if a plaintiff's lawyer is asked to personally guarantee repayment to a funder, that's a red flag (likely a fee-sharing or at least a conflict if the lawyer's finances become entangled). As a protective measure, many funding agreements include an attorney acknowledgment clause, and ABA Best Practices (2020) recommended that attorneys ensure the client remains the decision-maker and that any funding agreement does not interfere with the lawyer's professional responsibilities.[140]

15-3 DUTIES IN THE FINANCING CONTRACT

Commercial litigation financing transactions are specially negotiated among sophisticated parties, generally with separate legal counsel, and therefore vary considerably in their specific terms. They are also generally confidential, although occasionally a contract is disclosed in litigation. In an effort to bring some transparency to the commercial litigation financing industry, two scholars created a "crowd-sourced" commercial litigation financing transaction.[141] They used a web-based platform to allow litigation financers, lawyers, scholars, and even critics of

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140. A.B.A. Comm'n on Ethics 20/20, *Informational Report to the House of Delegates* (Feb. 2012) (acknowledging rise of "Alternative Litigation Finance" and providing best practice guidelines; notably, the ABA chose not to propose new Model Rules, instead emphasizing existing rules cover most issues). In 2020, the ABA published informal guidance noting that while third-party funding can aid clients, attorneys must navigate conflicts, privilege, and communication carefully.

141. Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711 (2014).

litigation finance to propose and comment on model contract terms. They identified several areas that should be the focus of negotiations in commercial litigation funding deals, including "accelerating investments between milestones, imposing fiduciary duties on funders, or requiring certain representations from the counterparty" as well as choice of law and arbitration clauses.[142] In addition, depending on applicable state law, contract terms may be designed to remove the transaction from any remaining prohibitions on champerty and maintenance.[143] Most commercial litigation financing contracts of which I am aware expressly and conspicuously disclaim any assertion of control by the funder over the conduct of litigation, the strategic decision making of counsel, and most importantly, the decision whether to accept or reject a settlement offer.

PRACTICE POINTER:
Like any contract, a litigation financing agreement seeks to allocate risks between the parties.[144] From the funder's point of view, the principal risks are (1) buying a pig in a poke—that is, investing in a claim that lacks legal merit; (2) the claimant accepting a low-value settlement offer, thereby reducing the repayment owed to the funder (although the return in many litigation investment agreements is computed not as a percentage of the proceeds of settlement or judgment, but as a multiplier of the amount invested, with the multiplier increasing with time); and (3) outright refusal to repay the funder as required, perhaps through the assertion of a claim that the financing agreement is unenforceable under doctrines of usury or champerty.

Funders can reduce these risks through diversification, and in the consumer sector this is their major strategy. For example, investments may be made in stages or tranches, with subsequent rounds of investment being contingent on the satisfaction of certain

142. Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711, 720-21, 725 (2014).

143. Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711, 725-29 (2014). *See* § 20-2:1 *above* for definitions of these doctrines.

144. *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 (2013).

conditions, such as perhaps reasonable ongoing efforts by the claimant and its counsel to prosecute the litigation. A "milestone" at which the funder may make an additional investment or choose to exit the relationship might be the close of discovery, at which time there will be substantial information available concerning the value of the claim.[145]

One of the pervasive features of litigation financing is information asymmetry. A funder may be concerned that a claimant with a weak claim will simply take the money and run.[146] Conversely, a claimant may wish to signal to a funder that it has a strong claim but may be inhibited by concerns that sharing confidential information will waive the attorney-client privilege or work-product protection. It should be possible, however, for the parties to agree upon an effective due diligence strategy without putting privileged communications at risk of waiver.[147] The parties may also employ contractual representations and warranties to mitigate asymmetries of information.

15-4 EFFECT ON THE LAWYER-CLIENT RELATIONSHIP

Litigation funding can affect the dynamics between lawyer and client. Attorneys must navigate confidentiality and privilege concerns, as well as ensure compliance with their professional duties of loyalty and communication. Two primary areas to watch are privilege and work product waivers and conflict of interest or control issues.

As part of its Ethics 20/20 Commission, formed to consider the impact of globalization and information technology on the practice of law, the American Bar Association formed a Working Group on Alternative Litigation Financing. The Working Group was tasked with studying the effect of litigation financing on the lawyer-client relationship and reporting back to the Ethics 20/20 Commission with any recommended changes to the Model Rules

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145. Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711, 744 (2014).

146. 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, 1849-51 (2013).

147. *See* Section 20-5:2 *below*, for a discussion of these waiver doctrines.

of Professional Conduct.[148] After several hearings, consideration of written submissions, and deliberation, the Working Group concluded that the then-existing Model Rules were adequate to regulate lawyers in connection with litigation financing. The Working Group decided to provide detailed guidance, in the form of an official *White Paper*, to lawyers regarding the impact of litigation financing on compliance with the Rules of Professional Conduct and other aspects of the law governing lawyers.[149] The *White Paper* used several hypotheticals to illustrate how litigation financing may implicate core professional obligations such as competent representation, confidentiality, loyalty and avoiding conflicts of interest, and above all, the lawyer's exercise of independent professional judgment.

PRACTICE POINTER:
Some of the duties of lawyers representing clients and dealing with litigation financing are fairly straightforward. The duty of competent representation may require lawyers to learn something about the terms of litigation financing transactions so they can advise their clients on whether their interests would be served by seeking this type of financing.[150] There is no ethical restriction on referring clients to litigation financing firms in an appropriate case.[151] Lawyers must always be vigilant to protect confidential client information from disclosure, particularly where the consequence of disclosure may be waiver of the attorney client privilege or work product protection. If a client is contemplating a deal with a litigation financing firm, the lawyer must advise the client about the risk of waiver.

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148. The Texas Disciplinary Rules of Professional Conduct diverge considerably from the ABA's Model Rules of Professional Conduct in numbering and, in many cases, in substance. This discussion will cite both the Texas Rules and the Model Rules, since many important cases and bar association opinions on litigation financing are from states other than Texas, with rules that generally more closely approximate the content and structure of the Model Rules.

149. *White Paper*, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

150. *White Paper*, pp. 38-39, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

151. *White Paper*, pp. 24-25, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

As discussed above, one of the most important conditions for the permissibility of third-party financing is that the funder not interfere with the attorney-client relationship.[152] Lawyers who have business relationships with litigation financing firms, including something seemingly innocuous like receiving referral fees, may have an incentive to recommend litigation financing to clients who may not benefit from it. This incentive would create a material limitation conflict of interest that must be disclosed, and the client's informed consent obtained.[153] If the lawyer is actually on the other side of the deal, for example as a holder of equity in a litigation financing firm, numerous rules of professional conduct are implicated, from the rule regulating business transactions with clients,[154] to prohibition on providing financial assistance to clients,[155] to the bar on acquiring a proprietary interest in the client's cause of action.[156]

This is an unlikely occurrence, however, since most litigation financing, in both the consumer and commercial sectors, is provided by firms in which lawyers do not have an ownership interest. The anti-interference principle can be found in Rule 2.1,[157] which requires lawyers to exercise independent professional judgment, but is better developed in the context of cases interpreting common-law doctrines such as champerty and maintenance, which discuss the extent to which a third party may expressly or tacitly seek to influence the client's settlement decisions.[158] The

152. *See*, *e.g.*, *Abu-Ghazaleh v. Chaul*, 36 So.3d 691 (Fla. Ct. App. 2009); *Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901, 906 (R.I. 2002).

153. *See White Paper*, pp. 16-18, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf. *See also* Model Rule 1.7(a)(2); Texas Rule 1.06(b).

154. *White Paper*, pp. 18-19, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf; Model Rule 1.8(a); Texas Rule 1.08(a).

155. *White Paper*, pp. 19-20, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf; Model Rule 1.8(e); Texas Rule 1.08(d).

156. *White Paper*, pp. 20-21, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf; Model Rule 1.8(i); Texas Rule 1.08(h).

157. Model Rule 2.1; Texas Rule 2.01.

158. *See*, *e.g.*, *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003).

White Paper takes the position that, in principle, there is no reason the claim-holder (i.e., the client) may not delegate authority to a third-party financing firm to make settlement decisions.[159] What is clearly impermissible, however, is for the lawyer to do anything that interferes with the client's right to make decisions regarding settlement.

Conflict of interest: If a lawyer has any financial interest in a funding entity or receives a referral fee or something from a funder (which should not happen if rules are followed), there is a serious conflict. Lawyers cannot take a stake in the funder or get kickbacks for sending business (that would violate Rules 1.7 and 1.8, and likely 7.2 on referrals). Several ethics opinions[160] have opined that a firm cannot represent a client funded by a company in which one of the firm's attorneys is an investor. The conflict was deemed unconsentable in that scenario. The safest course is to keep an arm's length with funders. For example, you can recommend reputable funders to a client as an option, but do not steer them due to personal interests.

Client control: Lawyers should document that the ultimate authority on settlement lies with the client.[161] Funding agreements sometimes state the client will not settle without the funder's consent—those provisions are unenforceable as they violate public policy (a client's right to settle is fundamental). Most funders avoid such clauses now. If a client agrees to "consider the funder's input" or "not unreasonably refuse a high settlement that would pay the funder," those are gray areas. If a conflict arises (client wants to accept a certain amount, but that gives funder a loss), the lawyer must counsel the client based on the client's interest alone. In extreme cases, if a funder's influence is overtly compromising the representation, the lawyer might need to withdraw (or the client might need to discharge the lawyer if they feel pressured). Thankfully, such scenarios are rare in practice. As noted, leading

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159. *White Paper*, p. 27, available on the ABA Ethics 20/20 Commission website, at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

160. N.Y. State Bar Ass'n, Op. 1145 (2018).

161. *See* Model Rules of Pro. Conduct r. 1.2 (Am. Bar Ass'n 2020) (client decides whether to settle).

funders maintain a hands-off approach on litigation decisions to avoid these problems.

15-5 RECENT REGULATORY AND LEGISLATIVE DEVELOPMENTS

In the last five years, there has been significant movement at the legislative and rule-making level regarding third-party litigation funding. Stakeholders have pushed for more transparency and regulation, especially in consumer funding and in large, aggregated litigations (like class actions and multidistrict litigation). Here we highlight key developments through 2025:

> **PRACTICE POINTER:**
> A number of states have enacted laws addressing litigation funding. The trend began with Wisconsin's 2018 law which required disclosure of third-party funding in civil actions.[162] Since 2020, momentum picked up.

- **West Virginia (2024)**: Enacted a statute requiring plaintiffs to disclose third-party funding agreements to the other parties and the court, while also capping fees and guaranteeing consumers a right of rescission.[163] West Virginia's law was part of a tort reform package and aligns with the Chamber of Commerce's model bill on funding transparency.
- **Illinois (2020):** Adopted the Consumer Legal Funding Act,[164] which imposes licensing on consumer legal funders, mandates plain-language disclosures in contracts, and sets a maximum rate (generally capping total recovery by the funder to I believe around thirty-six percent annualized, though Illinois's cap is nuanced by tier).
- **Nevada (2019):** Required registration of "civil litigation funding companies" with the state and

162. 2017 Wis. Act 235.
163. W. Va. Code § 46A-6N-6 (2024).
164. 815 ILCS 121.

set some contract requirements, including that funding contracts must state they are not loans and the consumer has certain rights.[165]

- **Montana (2023):** A major recent example, Montana's Litigation Financing Transparency and Consumer Protection Act[166] is one of the most stringent laws to date.[167] It requires any party who has a litigation funding arrangement to disclose it to all parties and the court, including the funder's identity and a copy of the agreement (amounts can be redacted). Montana's law also limits the funder's fees to twenty-five percent of the recovery (effectively capping the rate).[168] Notably, it makes funders jointly liable for costs and attorneys' fees that a funded party might be ordered to pay if the case is lost. This latter provision aims to stop funders from enjoying a one-way bet (Montana essentially says if you invest in the lawsuit, you're on the hook if it backfires with fee shifting). Montana's law applies broadly to all civil cases in the state courts.

In summary, by 2025 at least five states (Wisconsin, West Virginia, Nevada, Illinois, Montana,) have enacted statutes imposing some combination of disclosure requirements, fee caps, and oversight on litigation funding, primarily in the consumer context. More than a dozen other states have considered bills. This state-level patchwork means funders and attorneys must check local law wherever the case is litigated (or where the client resides, especially for consumer deals). For example, a funding contract that is fine in New York might violate Montana's new law if the case is filed there, due to the fee cap.

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165. Nev. Rev. Stat. § 604C.320 (2019).

166. (S.B. 269, signed May 2, 2023)

167. Jim Sams, *Lawmakers in Mont. and La. Pass Bills to Require Disclosure of Litigation Funding*, Claims J. (Oct. 2, 2025), https://www.claimsjournal.com/news/national/2023/06/12/317433.htm.

168. Jim Sams, *Lawmakers in Mont. and La. Pass Bills to Require Disclosure of Litigation Funding*, Claims J. (Oct. 2, 2025), https://www.claimsjournal.com/news/national/2023/06/12/317433.htm.

Federal Level—Rulemaking and Legislation: At the federal level, there is currently no blanket requirement to disclose litigation funding in all cases. In Congress, separate from disclosure, there was a novel angle in 2023: Senator Thom Tillis introduced the "Tackling Predatory Litigation Funding Act", which sought to impose a federal excise tax (roughly forty percent) on litigation funders' profits.[169] This was an unconventional approach (using tax law to deter funding). A version of it was briefly included in a large budget bill in 2025 (nicknamed the "One Big Beautiful Bill Act") but was removed from the final law after a parliamentarian ruled it didn't meet budget reconciliation rules.[170] So, as of 2025, no federal tax or disclosure statute has been enacted, but these efforts signal the increased scrutiny.

In conclusion, the period 2020-2025 has seen litigation finance move from a niche or novel concept toward mainstream acceptance, accompanied by a patchwork of new laws and ethical guidelines. Key jurisdictions continue to refine how to balance encouraging legitimate funding (improving access to justice) with preventing potential abuses (like excessive rates or undue influence on litigation). Lawyers advising on or using litigation funding must stay current on both the legal landscape and the practical implications for case management. With large pools of capital ready to invest in litigation and more clients aware of this option, third-party funding is poised to remain a significant feature of the civil justice system. The "full dress rehearsal" of its legal issues is ongoing, but the trend is clear: outright prohibitions have largely faded, and the focus is now on regulation, disclosure, and ethical vigilance rather than elimination of litigation finance.

15-6 IMPACT ON THE LITIGATED MATTER

15-6:1 Discovery: Relevance of Deal Documents

Courts are increasingly aware of funding. Some judges ask about it in case management conferences or require parties to

169. S. 1821, 119th Cong., 1st Sess. (2025).

170. Ryan P. Deane & Frances M. O'Meara, *Litigation Funding Reform Stalls Again: What It Means for California Businesses*, Wood Smith Henning Berman (Oct. 2, 2025), https://www.wshblaw.com/publication-litigation-funding-reform-stalls-again-what-it-means-for-california-businesses.

file a notice if a funder is involved (e.g., the Northern District of California's local rule for class actions now requires disclosure of a funder's identity in class action lawsuits). In one recent patent case,[171] the court demanded the plaintiff disclose any individuals or entities with an interest in the patent litigation, uncovering a web of funder-related entities that raised questions about who was directing the suits. The judge invoked ethics—suggesting a concern that lawyers were being controlled by undisclosed funders—and required transparency. This indicates that courts may use inherent authority to ensure no abuse or conflict arises from funding arrangements, even if formal rules don't yet mandate routine disclosure.

The seminal case on the discoverability of litigation financing agreements and supporting "deal documents" involved a lawsuit over misappropriation of trade secrets, filed by a small English manufacturing company against Caterpillar, Inc, in which Caterpillar sought production of deal documents.[172] Even if the financing transaction ran afoul of prohibitions on champerty and maintenance (and the court clearly believed they did not), these doctrines could be asserted only by a party to the transaction – not by the opposing party in the underlying litigation.[173] The deal documents are also not relevant to attempt to show that a third-party financer is the real party in interest. An insurer might become the real party in interest by exercising a right of subrogation under an insurance policy. That is not what occurs in a typical funding transaction, however, and after an *in camera* review of the deal documents, the district court found that "there is nothing in those agreements that remotely supports Caterpillar's attempt to equate Miller's funding agreement to the relationship between an insurer and its insured."[174]

A district court in California similarly denied a motion to compel discovery of minutes from a board meeting where the plaintiff in a trade-secrets case discussed litigation financing. In a brief order, the court expressed considerable skepticism concerning relevancy:

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171. *In re Nimitz Technologies LLC*, No. 2023-103, 2022 WL 17494845 (Fed. Cir. Dec. 8, 2022) (nonprecedential order).

172. *See generally Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014).

173. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 726 (N.D. Ill. 2014).

174. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 729 (N.D. Ill. 2014).

> "Defendants assert that the discovery is relevant, but do not articulate how. Space Data contests the relevance of the information requested and proffers an important piece of information: it does not have any third-party litigation financing . . . . The Court is not persuaded that the materials sought are relevant to any party's claim or defense and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Even if litigation funding were relevant (which is contestable), potential litigation funding is a side issue at best."[175]

As another district court put it succinctly, "Whether plaintiff is funding this litigation through savings, insurance proceeds, a Kickstarter campaign, or contributions from [a] union is not relevant to any claim or defense at issue."[176]

There may be circumstances under which deal documents are relevant to an issue in dispute in the litigation. For example, if the defendant asserts that a plaintiff's claim is time-barred, the date by which the plaintiff discovered his injury may be relevant to the statute of limitations defense. In that case, communication between the plaintiff and a litigation financing company on a certain date may support the defendant's argument that the limitations clock should start on that date. Discovery may be allowed in such a case.[177]

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175. *Space Data Corp. v. Google LLC*, No. 16-cv-03260, 2018 WL 3054797 (N.D. Cal. June 11, 2018). In the case of *In re Valsartan N-Nitrosodimethylamine (NDMA) Products Liability Litigation*, 405 F. Supp. 3d 612 (D.N.J., 2019), a district court summarizes the law that has developed on the discoverability of material related to litigation financing. The court stated that there is no carte blanche discovery of plaintiffs' litigation financing. Rather, the party seeking discovery must make an initial showing that "something untoward occurred." 405 F. Supp. 3d at 615. That may mean that a non-party is controlling settlement decisions or that the interests of the plaintiff or the class are not being protected. Absent such a showing, however, discovery into litigation financing should not be allowed. See also *Benitez v. Lopez*, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2019); *MLC Intellectual Property LLC v. Micron Technology, Inc.*, No. 14-cv-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019).

176. *Yousefi v. Delta Electric Motors, Inc.*, No. C13-1632RSL, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015).

177. *See Doe v. Soc'y of Missionaries of the Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376, at *2 (N.D. Ill. May 1, 2014) (finding relevance of deal documents, but granting plaintiff's motion for protective order on work product grounds).

> **PRACTICE POINTER:**
> Absent such exceptional circumstances, however, discovery is generally not permitted into deal documents. At the time of writing a few federal district courts have considered adopting local rules requiring mandatory disclosure of litigation funding, but in general the approach of courts is to consider on a case-by-case basis whether to inquire into funding.

15-6:2 Discovery of Underlying Documents: Privilege and Work Product

In addition to seeking discovery of the deal documents, the opponent of a funded party may want access to information shared by the party with the financer. A financing company conducting due diligence prior to an investment would naturally want to know as much as possible about the underlying asset. When the asset is a legal cause of action, the due diligence process may involve the review of pleadings and other court filings, discussions with the law firm representing the claimant, or access to the analysis by counsel of the quality of the case. Documents and other information are shared with the funder under a written non-disclosure agreement.

> **PRACTICE POINTER:**
> A client or lawyer who shares confidential communications or protected work product with a third-party risks waiving any applicable attorney-client privilege or work product protection. Lawyers must therefore proceed with extreme care when assisting a client in negotiating a litigation financing agreement and participating in the due diligence process.

The attorney-client privilege may be invoked to prevent discovery of (i) a communication (ii) made between privileged persons [generally attorney and client]; (iii) in confidence; (iv) for the purpose of obtaining or providing legal assistance for the client.[178] Similar elements are reflected in the Texas Rule of

178. Restatement (Third) of the Law Governing Lawyers § 68.

Evidence 503(b).[179] Privileged communications sought in discovery in civil cases are often memorialized in written form, or they may be electronically stored; these records of communications are covered by the attorney-client privilege to the same extent as the communications they record.[180]

By contrast, the work product doctrine only applies to documents and other tangible things. Under the Federal Rules of Civil Procedure, work product protection applies to "documents and other tangible things that are prepared in anticipation of litigation . . . by or for another party or its representative" including a lawyer for the party.[181] Work product that reflects the "mental impressions, conclusions, opinions, or legal theories" of an attorney—so-called opinion work product—is almost absolutely protected from discovery, while ordinary work product may be ordered produced on a showing of substantial need for the materials and inability to obtain their substantial equivalent through other means without undue hardship.[182] The trend in recent decisions has been to extend work-product protection to documents shared with litigation funders, as long as litigation was reasonably anticipated at the time.[183]

Recently, in Design With Friends, Inc. v. Target Corp.,[184] Judge Stephanos Bibas (sitting by designation) granted the funder's motion to quash Target's subpoena to Validity Finance. The court held that funder valuations and pre/post-agreement communications were opinion work product and that any residual asks were disproportionately burdensome on a non-party.

Most recently, in *Haptic, Inc. v. Apple Inc.*,[185] Judge Jacqueline Corley denied Apple's motion to compel and granted a motion to quash subpoenas seeking "all documents and communications"

179. *See*, *e.g.*, *Huie v. DeShazo*, 922 S.W.2d 920, 921 (Tex. 1996).

180. Restatement (Third) of the Law Governing Lawyers § 69, cmt. b.

181. Fed. R. Civ. P. 26(b)(3)(A); *see also* Tex. R. Civ. P. § 192.5(a).

182. Fed. R. Civ. P. 26(b)(3)(A)(ii), (B); *see also Hickman v. Taylor*, 329 U. S. 495 (1947). Opinion work product is referred to as "core" work product by the Texas rules. *See* Tex. R. Civ. P. § 192.5(b)(1).

183. *See, e.g., Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, Nos. 16-538, 16-541, 2018 WL 466045, at *5-6 (W.D. Pa. Jan. 18, 2018).

184. *Design With Friends, Inc. v. Target Corp.*, No. 1:21-cv-01376-SB, 2024 WL 4103737, at *1 (D. Del. Sept. 27, 2024).

185. *Haptic, Inc. v. Apple Inc.*, No. 24-cv-02296-JSC, 2025 WL 82305 (N.D. Cal. June 3, 2025).

with litigation funders.[186] The court found the materials protected by the work-product doctrine,[187] and that disclosure to prospective funders under NDAs did not waive protection.[188]

> **PRACTICE POINTER:**
> In litigation financing transactions, an analysis prepared of the strength of one's client's case, intended to help a financing company decide whether to invest in the lawsuit, would plainly be opinion work product.[189]

15-6:2.1 Common interest doctrine

> **PRACTICE POINTER:**
> Common interest "doctrine" is a bit of a misnomer. It is not a separate ground for an attorney-client privilege, but rather a rule of non-waiver.[190]

Ordinarily disclosure of privileged communications to anyone other than the client and attorney constitutes a waiver of the privilege.[191] Under the common interest doctrine, however, documents containing privileged communications may be shared with someone with interests in common with the privilege holder.

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186. *Haptic, Inc. v. Apple Inc.*, No. 24-cv-02296-JSC, 2025 WL 82305, at *3. (N.D. Cal. June 3, 2025) ("Apple now seeks discovery into all documents and communications between Haptic and any litigation funders.").

187. *Haptic, Inc. v. Apple Inc.*, No. 24-cv-02296-JSC, 2025 WL 82305, at *7. (N.D. Cal. June 3, 2025) ("So, Haptic has met its burden of showing its communications are, absent waiver, protected from disclosure by the work-product doctrine.")

188. *Haptic, Inc. v. Apple Inc.*, No. 24-cv-02296-JSC, 2025 WL 82305, at *10. (N.D. Cal. June 3, 2025) ("Haptic did not waive the work-product protections over its logged documents by sharing these with the Funder or with potential litigation funders.")

189. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 735 (N.D. Ill. 2014) ("Any documents containing Miller's lawyers' mental impressions, theories and strategies about Caterpillar's claimed misappropriation of trade secrets that were given to prospective funders were only prepared 'because of' the litigation."); *Doe v. Soc'y of Missionaries of the Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014) (after *in camera* review, protecting as opinion work product litigation financing documents that "incorporate opinions by Plaintiff's counsel regarding the strength of Plaintiff's claims, the existence and merit of certain of Defendants' defenses, and other observations and impressions regarding issues that have arisen in this litigation").

190. *See* I Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 274 (ABA Section on Litigation 2007).

191. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 731 (N.D. Ill. 2014) ("Since the purpose behind the attorney-client privilege is to encourage full disclosure to one's lawyer by assuring confidentiality, disclosure to a third party that eliminates that confidentiality constitutes a waiver of the privilege.").

It is most frequently encountered in the context of co-client representation – sometimes called "joint defense."[192] In litigation financing transactions, however, the same law firm does not represent the claimant and the funder. Nor are they aligned as co-parties in the litigation; in fact, funders would strenuously deny that they are parties to the litigation at all.[193]

PRACTICE POINTER:

Thus, a broader sense of common interest is being invoked in the context of litigation financing. Once the situation broadens from co-parties or parties aligned in legal interests, the application of the common interest doctrine becomes quite uncertain. Many courts take a hard line on how close the purportedly common interests must be.[194] For example, some state courts insist that the communication pertain to pending or contemplated litigation in order to come within the common-interest exception.[195]

The majority of decided cases in the litigation financing context deny the protection of the common interest doctrine.[196]

A 2010 federal district court decision from Delaware has been widely cited for the proposition that confidential communications shared with a litigation financing firm by a lawyer are not protected by the common interest doctrine.[197] For the common interest doctrine to apply, the party asserting the privilege must show that "the disclosures would not have been made but for the sake of securing, advancing, or supplying legal representation; in

192. *See*, *e.g.*, *In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50-51 (Tex. 2012); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 604-05 (N.D. Tex. 1981).

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

194. *See*, *e.g.*, *Ferko v. NASCAR, Inc.*, 219 F.R.D. 403, 406 (E.D. Tex. 2003) (no common interest between shareholder plaintiff and corporation in shareholder derivative action).

195. *See*, *e.g.*, *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30 (N.Y. 2016) (communications between Bank of America and Countrywide not within the common-interest exception in action filed by insurer against Countrywide and Bank of America, because communications pertained to pending merger, not litigation).

196. *See, e.g.*, *Acceleration Bay LLC v. Activision Blizzard, Inc.*, Nos. 16-453-RGA, 16-454-RGA, 16-455-RGA, 2018 WL 798731 (D. Del. 2018).

197. *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010).

addition, the interests must be "identical, not similar, and legal, not commercial."[198]

Unfortunately, there is not much analysis beyond that, because the district court opinion adopted an unpublished order by the magistrate judge overseeing discovery. There is an unpublished district court decision from the Eastern District of Texas similarly finding that attorney-client privileged communications shared between the buyer and seller of patent rights that subsequently were asserted in lawsuit were not protected by the common interest doctrine.[199] (As discussed in Section 20-5:2.2 *below*, however, the documents retained their status as protected work product.) Although that sale was not itself part of a litigation financing transaction, the court's reasoning likely applies to litigation financing as well. It noted that, although the buyer and seller had a common interest in the continuing validity of the patents, they were negotiating over the sale price and were therefore directly adverse to each other in the transaction.[200] Because commercial litigation funders and funded plaintiffs extensively negotiate the terms of the transaction, including such core financial issues as the rate of return owed to the funder, the court's reasoning would seem to apply to the common interest doctrine in a litigation financing transaction. Finally, there is the 2014 *Miller v. Caterpillar* case, which is thorough and well-reasoned, and which sharply distinguishes between a common legal interest and an alignment of business interests. A shared rooting interest in the successful outcome of a case . . . is not a common *legal* interest."[201]

The only case going the other way in the context of litigation financing is an unpublished district court decision from

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198. *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010); *see also* I Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 275 (ABA Section on Litigation 2007) ("As a general rule, courts require that the common interest be a legal and not merely a business one in order for the common interest privilege to permit free sharing of legal advice between them without risk of forfeiture."); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 756 N.Y.S.2d 367, 378 (Sup. Ct. 2003) (no common interest, and hence loss of privilege, where shared interest was commercial, not legal).

199. *Mondis Technology, Ltd. v. LG Electronics, Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW2011 2011 WL 1714304 (E.D. Tex. May 4, 2011).

200. *Mondis Technology, Ltd. v. LG Electronics, Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW2011 WL 1714304, at *4 (E.D. Tex. May 4, 2011).

201. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 732 (N.D. Ill. 2014).

Pennsylvania, stating in a footnote that information shared by the plaintiff with a funder would be within the common interest doctrine, because the plaintiff and the funder have a common interest in the successful outcome of the litigation.[202]

PRACTICE POINTER:
Given the fairly clear weight of authority against the common interest doctrine, it is extremely risky for an attorney to share attorney client privileged communications with a litigation financer with the hopes of subsequently asserting that there should be no waiver of the privilege.

15-6:2.2 Work Product vs. Privilege Waiver Standards

PRACTICE POINTER:
While the attorney-client privilege is waived by disclosing confidential communication to (with limited exceptions) parties other than the lawyer and client, waivers of work product protection are determined by a different standard. Because the purpose of the work product doctrine is to safeguard the adversary system, not protect the sanctity of the attorney-client relationship, work product protection is waived only by disclosures that are inconsistent with the adversary system.

That generally means disclosures that make it more likely that the opposing party or counsel will come into possession of the work product.[203] Attorneys would be well advised to ensure that any sharing of work product materials be done pursuant to a promptly executed, written confidentiality and non-disclosure agreement.[204]

A patent case from Texas illustrates the difference in the privilege and work-product waiver standards. The plaintiff in the case was

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202. *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160 (E.D. Pa. 2012).

203. *See*, *e.g.*, *United States v. Stewart*, 287 F. Supp. 2d 461, 464-65, 468-69 (S.D.N.Y. 2003) (email sent by Martha Stewart to her attorneys and forwarded to her daughter, containing her account of stock trades underlying insider-trading prosecution, waived attorney-client privilege but not work product protection).

204. *See Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 736-38 (N.D. Ill. 2014) (noting that work product materials were shared under written and oral confidentiality agreements, and stating that the inquiry is "whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential").

an entity owning several patents. It sought investors to support its litigation efforts, and provided them with "slide presentations and other documents that contained disclosures of [the plaintiff's] licensing and litigation strategies and also estimates of licensing and litigation revenues."[205] The court held that the documents were protected as work product even though shared with potential investors. The disclosure to investors "did not substantially increase the likelihood that an adversary would come into possession of the materials."[206] Similarly, in *Miller v. Caterpillar*, the common interest doctrine did not preserve the attorney-client privilege in materials provided by the plaintiff's lawyer to prospective funders, but the sharing with funders under oral and written confidentiality agreements did not substantially increase the likelihood that the defendant would learn of them; thus, protection of the work product doctrine was not waived.[207]

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205. *Mondis Technology, Ltd. v. LG Electronics, Inc.*, Nos. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW2011, 2011 WL 1714304, at *2 (E.D. Tex. May 11, 2011).

206. *Mondis Tech., Ltd. v. LG Electronics, Inc.*, Nos. 2:07–CV–565–TJW–CE, 2:08–CV–478–TJW, 2011 WL 1714304, at *3 (E.D. Tex. May 11, 2011).

207. *Miller U.K., Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 738 (N.D. Ill. 2014); *see also Doe v. Soc'y of Missionaries of the Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (noting that plaintiff shared documents with litigation financing company pursuant to a confidentiality agreement, and this agreement created additional incentive to protect documents from disclosure to adversary). Subsequent cases, including one from Texas, have reaffirmed the applicability of work product protection to litigation financing documents. *See, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017); *United States v. Homeward Residential, Inc.*, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016); and *Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd.*, 2016 WL 7665898 at *4-5 (S.D. Cal. Sept. 20, 2016).