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VOL 49, NO 2
WINTER 2020

THE BRIEF

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION | TORT TRIAL AND INSURANCE PRACTICE SECTION

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Champerty, Usury, and Third-Party Litigation Funding

By William J. Harrington

Third-party litigation-funding agreements, in which a third-party funder agrees to pay the attorney fees and costs of prosecuting a lawsuit in exchange for a share of the underlying claimant's recovery, are the subject of emerging case law addressing whether courts will enforce such agreements.[1]

Parties who successfully recover money in third-party-funded lawsuits sometimes challenge their contractual obligations to repay funders based on two defenses. First, they argue that the agreements violate the common-law doctrine of champerty. Second, they argue that the agreements violate state usury laws because the funders' returns exceed allowable interest rates. Courts have been split on the viability of these defenses, with different courts holding that the agreements are champertous, usurious, both, or neither.

TIP: If you are considering outside funding for a lawsuit you may prosecute, learn the risks posed by champerty and usury.

Most jurisdictions, however, have not addressed whether third-party litigation-funding agreements are enforceable. This makes it important for funders and other interested parties to inform themselves about the typical challenges to funding agreements so that they are ready when a funding agreement is challenged in their state.

This article first discusses the typical attributes of litigation-funding agreements, i.e., the parties, the financial advances made, and the terms of repayment to the funder. It then discusses the two most common defenses to their enforcement: champerty and usury. Third-party litigation-funding agreements should be enforced, this article contends, because the agreements do not cause the problems that champerty was designed to address and because they should not be considered loans subject to usury laws. The article concludes that litigation funding is beneficial: from a policy perspective, third-party litigation-funding agreements level the playing field for resource-poor plaintiffs, helping to ensure that disputes are resolved on their merits and not based on the parties' wealth.

Attributes of the Funding Agreements

In litigation-funding agreements, one party advances money used for the fees and costs of prosecuting a civil lawsuit (or, in some cases, for the claimant's personal expenses), in exchange for an assignment of a share of the lawsuit's recovery. Litigation funding is now a $5 billion industry.[2]

The size of the advances varies widely. The amount of money advanced can range from less than $1,500[3] to nearly $1 million,[4] if not more.

The terms of repayment vary widely, too. The funder's return may be a fixed percentage of the recovery, e.g., 27 percent.[5] It also may provide for the greater of a sum certain or a percentage of the recovery. For example, in one case, the funder advanced $177,500 to the claimant in a serious personal injury lawsuit in exchange for the greater of 10 percent of the recovery or $887,500.[6] Furthermore, the funding agreement may provide for the funder's recovery to increase the longer the underlying case lasts. In one such case, the funder advanced the claimant $6,000 in exchange for $16,800 of the recovery if the case resolved within 12 months, $22,200 if it resolved within 18 months, and $27,600 if it resolved within 24 months.[7]

According to the reported case law, the funding agreements usually prohibit the funder from interfering with the claimant's choice of counsel, settlement decisions, and litigation strategy.[8]

Absent a recovery, the funder usually is not entitled to any payment. In the event of a recovery, the funder's rights are typically secured and nonrecourse, i.e., the funder has a security interest in the funds recovered but may not satisfy the debt through other assets of the claimant.[9]

Defense to Litigation-Funding Agreements: Champerty

After prevailing in underlying suits, claimants sometimes attempt to avoid paying funders their agreed-upon share of the recovery. Claimants have resurrected the ancient doctrine of champerty as one defense to paying funders under litigation-funding agreements. *Champerty* has been defined as an "'agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant's claims as consideration for receiving part of any judgment proceeds.'"[10]

Some jurisdictions, but not all, include an additional, scienter element, requiring that the champertor be an "officious intermeddler," or someone who objectionably intervenes with a purpose to "stir up" litigation or strife.[11] Officious conduct has been construed as acting with such purpose,[12] exerting control over the claimant or her attorney in the prosecution of the lawsuit,[13] preying upon the claimant,[14] or prolonging the proceedings.[15]

The officious intermeddler element, or lack thereof, usually determines whether a funding agreement will be voided as champertous. If the jurisdiction's definition of *champerty* includes this element, courts usually enforce litigation-funding agreements because it is difficult to prove officious intermeddling. If the jurisdiction's definition of *champerty* does not include the officious intermeddler element, courts tend to void funding agreements on champerty grounds because the other elements are easily satisfied: the funders (1) are not parties to the lawsuit (i.e., they are "strangers" thereto), (2) "pursue" the claims by funding them, and (3) fund the claims in consideration for receiving a part of the proceeds.

Cases accepting champerty defense. For example, the Minnesota Court of Appeals voided a litigation-funding agreement between an employment discrimination claimant and a funder even though the funder (1) did not encourage the filing of the lawsuit but furnished the money after the lawsuit was commenced, (2) did not pick the attorney, and (3) did not control the litigation or settlement decisions.[16] These considerations, in the Minnesota court's view, did not bear on the straightforward issue of whether the funder (a stranger to the lawsuit) advanced money to prosecute the

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suit in exchange for a cut of the recovery, which on its own constituted champerty under Minnesota law.[17]

The Ohio Supreme Court reached a similar result, concluding that "a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance," regardless of the intent of the funder.[18]

Cases rejecting champerty defense. Courts that have rejected the champerty defense reason that for an agreement to be champertous, the funder must "officiously" involve itself in the suit by, for example, inciting the decision to file suit, controlling litigation strategy or choice of counsel, or multiplying the proceedings.

In *Odell v. Legal Bucks, LLC*, while the agreement ultimately was held to violate usury laws (discussed below), the court rejected the claimant's champerty defense.[19] The court reasoned that the funding agreement did not give the funder the right to control the suit and, citing the claimant's testimony, found that the funder did not influence the claimant's choice of counsel or decisions regarding settlement.[20] The court therefore distinguished both *Johnson v. Wright* and *Rancman v. Interim Settlement Funding Corp.* and concluded that North Carolina law required a further showing that the funder has the purpose of stirring up litigation:

> The cases cited by Plaintiff, however, do not purport to require as a prerequisite for champerty and maintenance that a litigation lender act with a purpose of stirring up strife and continuing litigation. North Carolina law thus appears to require a higher level of intermeddling for a lender's actions to be considered champertous.[21]

Like the *Odell* court, the Texas Court of Appeals declined to void a litigation-funding agreement on champerty grounds because there was no showing that the funders controlled the litigation, that such agreements increase or prolong litigation, or that the funders "preyed" on the party being funded.[22]

And in *Kraft v. Mason*, Florida's intermediate appellate court concluded that the funder did not "officiously intermeddle" because she did not instigate the lawsuit, did not attempt to control litigation strategy, and did not choose counsel.[23] The provision of funds in exchange for a share of the recovery, without additional "officious" conduct, did not constitute champerty.[24]

Defense to Litigation-Funding Agreements: Usury

Usury is another defense to paying funders under litigation-funding agreements. Usury prohibits a lender from charging loan interest that exceeds a certain rate. The maximum rate varies. For example, subject to a number of exceptions, Maryland's maximum interest rate is 6 percent per annum.[25] Claimants in litigation-funding agreement cases oftentimes invoke state usury laws as a defense to enforcement of litigation-funding agreements, arguing that the funders' returns—if viewed as interest paid on a loan—exceed allowable rates.

The success of such a usury defense usually will turn on whether the litigation-funding agreement is viewed as a loan or whether it is viewed as a different type of transaction, like an investment. If the transaction is viewed as a loan, it probably will be subject to state usury laws. If the transaction is viewed as an investment, it probably will not be.

So, what constitutes a "loan"? Typically, the "hallmark of a loan is the *absolute* right to repayment. The word 'loan' implies an advance of money with an absolute promise to repay."[26] By contrast, if the right to repayment is contingent on a future event, it is not absolute, and the agreement is not a loan.[27] As a result, the inquiry usually turns on whether the funder's right to repayment is absolute (making the agreement a loan) or contingent (making the agreement something other than a loan, like an investment).

Courts that have rejected the champerty defense reason that for an agreement to be champertous, the funder must "officiously" involve itself in the suit.

Cases rejecting usury defense. Courts concluding that litigation-funding agreements are not loans typically reason that the funder's right to repayment is contingent on the claimant's recovery from the underlying defendant. The funder therefore does not have an absolute (or unconditional) right to repayment.

The U.S. District Court for the District of New Jersey, predicting New Jersey law, reached this result in *Dopp v. Yari*.[28] Paul Dopp had been in a long-running dispute with a hotel businessman named Jay Pritzker concerning Dopp's ownership rights in a company that owned a number of hotels and golf courses along the northern shore of Puerto Rico.[29] Bob Yari, a third party not involved in the Dopp-Pritzker dispute, advanced Dopp over $700,000 to fund a lawsuit against Pritzker.[30] In exchange, Dopp agreed to pay Yari the greater of $1.5 million or 16 percent of the recovery.[31] Dopp sued Pritzker and, after an exceptionally protracted legal battle, recovered $5.3 million from him.[32] After Dopp recovered from Pritzker, Dopp declined to pay Yari, and Yari sued seeking $1.5 million.

Dopp argued that the agreement was a usurious loan, which under New Jersey law would limit Yari's recovery to the principal.[33] Yari countered that a loan requires an absolute obligation to repay; but because his recovery was contingent on Dopp prevailing against Pritzker, the agreement was not a loan but a "joint undertaking" that was not subject to usury laws.[34] The court agreed with Yari and entered summary judgment in his favor:

> The collection of interest in excess of the lawful rate is not usurious if collection of the entire interest is at risk and depends upon a contingent event and provided . . . the contract was entered into in good faith and without the intent to evade the usury laws.[35]

A Texas intermediate appellate court reached a similar result in *Anglo-Dutch Petroleum International, Inc. v. Haskell*.[36] There, many funders contributed a total of approximately $560,000 to fund claimant Anglo-Dutch's trade secret lawsuit against an oil services company. Their agreed-upon returns ranged from 62 percent to 186 percent of their initial advances, and the "'driving factor' in determining the Investor's Total Return [was] the amount of time that has elapsed since the date of investment."[37] Anglo-Dutch secured an $81 million judgment in the underlying suit but sought to avoid paying its litigation funders on usury grounds.[38] Anglo-Dutch argued that its claims against the oil services company were so strong that the funders' advances "involved 'no risk.'"[39] As a result, Anglo-Dutch argued, the funders' rights to repayment were absolute, and the funding agreements constituted loans subject to Texas's usury laws.[40] The court rejected this contention and enforced the agreements, concluding that "we cannot . . . characterize the outcome of the [underlying] lawsuit at the time the appellees signed the investment agreements as a 'sure thing.'"[41] The court held that the funding agreements were not subject to Texas usury laws.[42]

Similarly, Florida's intermediate appellate court concluded that a litigation-funding agreement was not usurious because a "loan agreement is not usurious when payment depends upon [the] contingency" of the claimant recovering in the underlying suit.[43]

Cases accepting usury defense. Other courts, however, have voided litigation-funding agreements on usury grounds, either taking a broad view of the "absolute" repayment feature of a loan or concluding that usury applies whether the agreement is viewed as a loan or not.

Of the courts that have voided funding agreements on the grounds that they are likely to "stir up" litigation and strife, none pointed to factual findings that the agreements actually did cause such strife.

In *Lawsuit Financial, LLC v. Curry*, for example, a funder advanced the claimant $177,500 in exchange for the greater of $887,500 or 10 percent of any recovery in a serious personal injury lawsuit.[44] But the *Curry* case had a wrinkle to it: the funder advanced the money after the underlying defendant conceded liability and after the claimant obtained a $27 million verdict pursuant to a damages trial.[45] The underlying defendant filed a motion for a remittitur; and while that motion was pending, the funder advanced the $177,500.[46] The underlying court then granted the motion for a remittitur, reducing the verdict to $4.8 million. The funder then demanded $887,500, which was clearly a usurious return if the $177,500 advance were viewed as a loan, and the claimant declined to pay.[47]

The funder brought breach of contract and conversion claims against the claimant.[48] The funder argued that because its right to repayment was contingent upon the plaintiff recovering on the verdict, the funder did not have an absolute right to payment, and the transaction therefore was not a loan subject to Michigan's usury laws.[49] The court rejected this argument, holding that "[b]ecause liability had already been admitted when plaintiff advanced the funds, the fact that defendant Curry would recover some damages for her injuries was already known."[50] As a result, the court held that the transaction was a usurious loan. Under Michigan law, a lender that issues a usurious loan is entitled to recoup only the principal, so the litigation funder's recovery was limited to the $177,500 initially advanced.[51]

The Court of Appeals of North Carolina reached a similar result in *Odell*, which concerned an agreement to fund not litigation costs but the claimant's living expenses in exchange for a cut of any winnings.[52] After the claimant prevailed in the underlying suit, she declined to pay the funder its agreed-upon share.[53] The claimant sued the funder on her own behalf and on behalf of a putative class, contending that the funding agreement was usurious.[54] The funder countered that the agreement was not subject to usury laws because a loan entails an absolute right to repayment, and the funder's recovery was contingent upon the claimant prevailing in the underlying suit.[55]

Unfortunately for the funder, the North Carolina usury statute applied to both "loan[s]" and, separately, "advance[s]."[56] While the court concluded that the transaction was not a loan because the funder's right to repayment was contingent on the claimant recovering, the court held that it was an advance under the usury statute. Because the funding agreement was a usurious advance, the court held that the funding agreement was unenforceable.[57]

Similarly, in *Oasis Legal Finance Group, LLC v. Coffman*, the Colorado Supreme Court held that low-value litigation-funding agreements were subject to Colorado's consumer lending statutes.[58] A Colorado regulator had issued an "opinion letter" contending that small advances issued for claimants' living expenses were "supervised loans" under Colorado's Uniform Consumer Credit Code (UCCC).[59] Such a designation would trigger a host of regulations,[60] including the requirement that the lender be licensed.[61]

In response, two funders filed a declaratory judgment action seeking a declaration that funding agreements were not subject to the UCCC. Like funders have done in the face of usury challenges, the funders argued that the agreements were not loans because there was no absolute obligation to repay.[62] The court rejected this contention, holding that *loan* is defined broadly as "the creation of a debt" and that the term *debt* also is broad, including in some circumstances any "liability on a claim."[63] Neither concept required, in the court's view, an unconditional obligation to repay, and the court held that the low-value funding agreements were subject to the UCCC, thereby obligating the funders to obtain certain licenses or cease advancing the funds.[64]

Champerty: Not a Valid Defense

Litigation-funding agreements frequently are challenged on the grounds that (1) they will generate the filing of frivolous (or vexatious) lawsuits and (2) they will usurp control of the case from the client in favor of the funder—two problems that are thought to be prevented by champerty.[65] However, the first argument ignores funders' market incentive to invest in strong claims, and the second discounts attorneys' professional obligations to their clients, regardless of who pays the bill. These realities counsel against the usage or revival of champerty.[66]

Frivolous/vexatious lawsuits. At common law, champerty was viewed as a bulwark against the commencement or maintenance of frivolous/vexatious suits.[67]

But litigation funders have every incentive to vet potential claims for merit before agreeing to advance money to fund their prosecution. Indeed, anecdotal evidence indicates that sophisticated funders turn down the vast majority of requests for funding. For example, in an interview with *ABA Journal*, David Perla, managing director of funding giant Burford Capital, said that of the 1,500 inbound requests that Burford received for capital in 2017, the firm funded only 60.[68] LexShares, a Boston- and New York–based funder, also brings a discriminating eye to the litigants who request funding. The company uses artificial intelligence to search online dockets. When that process has turned up leads, the company asks litigants whether they are interested in funding. In the first half of 2018, 436 of those litigants requested funding, but LexShares funded only 20 of those 436.[69] These examples support the logical inference that a funder who desires to make money will not attempt to do so by funding baseless claims.[70]

Additionally, funders lack the emotional attachment that may cause parties to litigate vexatiously. Civil lawsuits oftentimes arise out of difficult experiences—e.g., acrimonious business divorces, severe personal injury, discrimination—which cause litigants to pursue proceedings seeking the proverbial "pound of flesh." It is implausible to imagine a funder—who lacks a connection to the underlying facts and seeks only a return on investment—exacerbating such conduct.

Moreover, of the courts that have voided funding agreements on the grounds that they are likely to "stir up" litigation and strife, none pointed to factual findings that the agreements actually did cause such strife. For example, in *Johnson*, the Minnesota Court of Appeals voided a funding agreement on champerty grounds, reasoning that champerty was needed to deter speculation in groundless lawsuits.[71] But the *Johnson* court did not offer any factual basis for its conclusion that litigation funding generates frivolous suits. In fact, the funding agreement in *Johnson* permitted the claimant, who otherwise could not afford her attorney's retainer, to pursue a meritorious suit that the court acknowledged achieved a "substantial monetary recovery."[72]

In another example, the Ohio Supreme Court invalidated a funding agreement on champerty and maintenance grounds, reasoning that funding agreements would dissuade claimants from accepting early settlement offers because the funders would be entitled to a portion of the recovery off the top.[73] In *Rancman*, a funder advanced $6,000 to an auto-tort claimant suing an uninsured motorist carrier—in exchange for $16,800 if the case resolved within 12 months, $22,200 if it resolved within 18 months, or $27,600 if it resolved within 24 months.[74] The court reasoned that the claimant would hold out until she received a settlement offer big enough to pay the funders and have enough for herself. As a result, the court concluded that funding agreements "can prolong litigation and reduce settlement incentives—an evil that prohibitions against maintenance seek to eliminate."[75]

The facts of *Rancman* suggest that the court had it backward, however: the claimant settled within 12 months for the applicable policy limits of $100,000, a prompt and favorable result for her.[76] The court also overlooked the fact that the structure of the funding agreement encouraged settlement within 12 months and discouraged later settlements as the claimant would owe incrementally more to the funder if the case persisted beyond 12 or 18 months.[77] Other courts have

recognized that such agreements may encourage prompt settlement.[78]

Moreover, far from being frivolous, claims funded by litigation-funding agreements further the policy of equal access to justice. In other words, they permit resource-poor plaintiffs to fully prosecute a claim rather than accept an early (and probably low) settlement offer because they cannot afford to weather an expensive legal fight.

When evaluating champerty defenses to funding agreements, courts carefully scrutinize whether third-party funding erodes client control.

Aside from the economic considerations suggesting that funding agreements do not lead to frivolous suits, champerty has been obviated by other rules and law designed to reduce frivolous suits.[79] Sanctions deter attorneys and parties from filing or maintaining suits in bad faith.[80] The torts of malicious prosecution and abuse of process also protect against such claims.[81] Furthermore, attorneys are subject to rules of professional conduct that prohibit them from asserting claims or defenses that are frivolous or in bad faith.[82] Absent a showing that lawsuits funded by third parties are more prone to abuse than party-funded lawsuits, there is no reason that these rules and doctrines would fail to prevent frivolous lawsuits funded by third parties. Accordingly, there is no reason that third-party-funded lawsuits should be subject to an additional rule like champerty.

Usurpation of client control. When evaluating champerty defenses to funding agreements, courts carefully scrutinize whether third-party funding erodes client control, concerned that a funder's financial leverage over a case will enable the funder to influence the plaintiff or her attorney.[83] Many courts have concluded that champerty is not needed to fend off these ills.[84] Two considerations guide these conclusions. First, attorneys' rules of professional conduct establish clear guidelines for attorneys to maintain the client's control of a case even where a third party is paying the bills. Second, ample evidence, particularly in the area of insurance defense, shows that attorneys are able to represent their clients ethically when a third party funds litigation.

It is axiomatic that a lawyer owes professional obligations to her client, not to the funder, and may not accept money for the representation if it would interfere with those duties.[85] ABA Model Rule of Professional Conduct 1.8(f) provides thus:

> (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
> (1) the client gives informed consent;
> (2) there is no interference with the lawyer's independence of
> professional judgment or with the client-lawyer relationship; and
> (3) information relating to representation of a client is protected as required by Rule 1.6.[86]

Relatedly, Rule 5.4(c) provides thus:

> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.[87]

These rules should suffice to protect the lawyer-client relationship in multiple circumstances in which a third party pays the attorney fees.

In addition to rules of professional conduct, the ubiquity and acceptance of third parties paying for legal fees in other contexts supports the notion that attorneys are capable of adhering to their professional responsibilities when accepting payment from a litigation funder. Furthermore, the civil legal system's comfort with such arrangements contradicts the notion that litigation funders will distort attorneys' prosecution of their clients' claims.

The most common example of third-party funding occurs in the insurance industry, where insurers compensate defense attorneys under a liability policy.[88] In such cases, the insurer-retained defense attorney may defend covered claims (for example, a claim alleging negligence) and uncovered claims (for example, a claim alleging intentional wrongdoing).[89] Furthermore, the attorney may have a long-standing relationship with the insurer and wish to continue to receive business from the insurer.[90] This situation presents an arguable conflict, in which the defense attorney may seek to "steer" the litigation toward uncovered claims so that the insurer (from whom the attorney receives repeat business) does not have an indemnity obligation.[91] As a result, insureds oftentimes request "independent" counsel of their choosing to ensure that the defense they receive places their interests above those of the insurer. But even in these circumstances, "the majority of courts confronted with the conflict of interest issue have declined to adopt a black-and-white rule" mandating independent counsel.[92]

Some states, moreover, conclude that an insured is not entitled to independent counsel "because of the safeguards

inherent in the Rules of Professional Conduct, as well as alternate remedies existing in the case of attorney misconduct."[93] The protections provided by the rules of professional conduct with respect to an insured defendant show that the same rules should suffice to protect any claimant when a third party funds the prosecution of her lawsuit, particularly given that a litigation funder's interests align with those of the claimant (both want a large, prompt recovery).

Other examples of court-condoned third-party funding abound, including attorneys paid by a client's employer, union, or family member.[94] In addition, civil rights organizations have a long history of funding lawsuits on behalf of others, and courts have rejected attempts to control their advocacy on champerty or similar grounds.[95]

Usury: Not a Valid Defense

Usury should not bar the enforcement of ligation-funding agreements because the agreements are not loans; rather, they are uncertain investments with high risk. Because a funder's right to repayment is contingent on a very uncertain proposition—obtaining a judgment or settlement and recovering thereon—funding agreements lack an essential attribute of a loan, rendering usury inapplicable to those transactions. Moreover, these uncertainties entitle funders to returns at higher rates than state usury laws would permit.

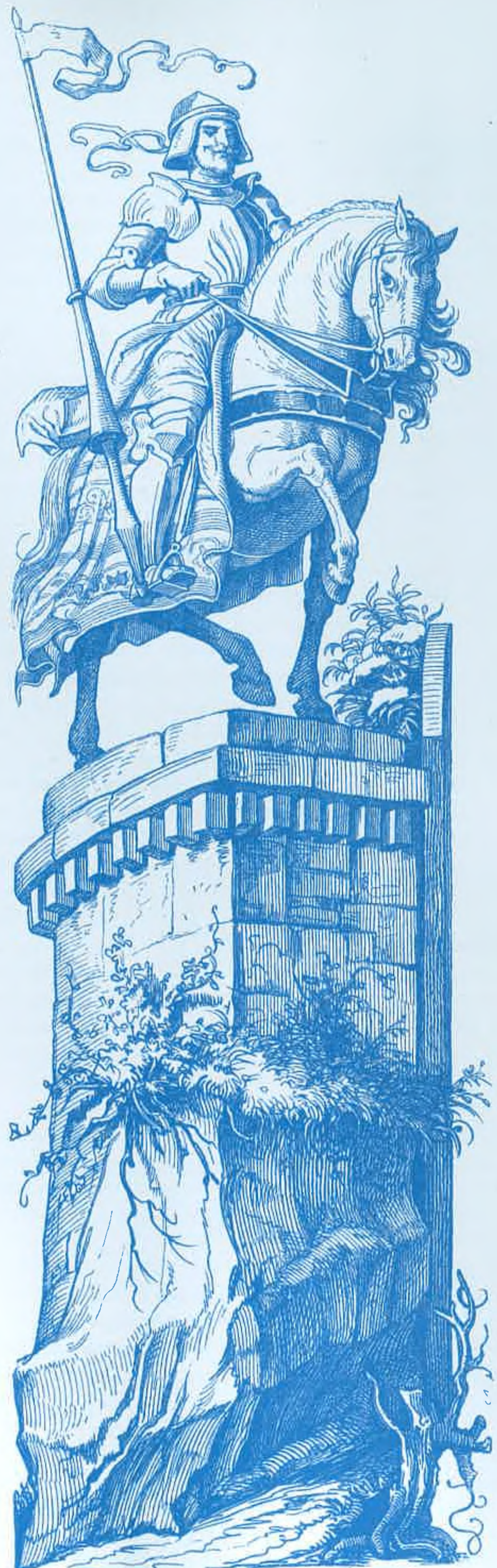
Loan versus litigation funding. As noted above, *loan* is typically defined as an advance of money in exchange for an absolute right of repayment.[96] Litigation funding, in contrast, is replete with risk and uncertainty, and those risks belie the notion that a repayment obligation is absolute.

***Curry*: misguided ruling.** Most courts recognize the innate risks of litigation funding.[97] *Curry*, one decision that did not, deserves a closer look.

The court in *Curry* concluded that the potential recovery in a serious personal injury lawsuit was so certain that the funder had an absolute right to repayment. This case is representative of the maxim that "hard cases make bad law"; moreover, the court arguably overlooked two important considerations.

First, despite the funder's promising investment, recovery in civil litigation is never a sure thing, and a funder's right to repayment (if conditional on the plaintiff's recovery) is never absolute. In *Curry*, the defendant had conceded liability, contesting only the damages award, and the funder did not advance the money until the claimant had obtained a $27 million verdict.[98] After the advancement of the funding, however, the $27 million verdict was reduced to $4.8 million.[99] This shows that even in a situation where, according to the court, the funder's rights were ironclad, a posttrial motion could reduce the funder's potential return by more than 66 percent.

Second, even if a judgment is certain, recovering on that judgment is uncertain. A judgment debtor may have no assets from which a judgment may be recovered. Even if it does, the debtor may hide or fraudulently convey assets. More



likely, the judgment debtor may seek bankruptcy protection, immediately staying the judgment creditor's (and any funder's) efforts to impose a levy on any assets.[100] Thus, even in a case like *Curry* where a funder has managed to minimize its risks, a funder's right to repayment—and the amount of any repayment—is contingent on events beyond its control and therefore is not absolute.

Conclusion

Although commonly used as defenses to litigation-funding agreements, champerty and usury are ill-suited to the task—a fact that most courts have recognized. Rules of professional conduct allay concerns that funding agreements lead to frivolous suits or prolonged litigation or wrest control of litigation from a claimant, calling into question whether champerty is an appropriate doctrine to protect against such problems. Market forces, which encourage funders to invest in only meritorious claims, also suggest that champerty is not needed to prevent the prosecution of frivolous suits. Furthermore, because litigation funders' rights to repayment are not absolute and because these transactions carry tremendous risk, the agreements do not bear the hallmark of loans, making usury an inappropriate doctrine to regulate litigation funding.

Litigation-funding agreements are a helpful tool to correct the disparity of resources available to financially poor plaintiffs and wealthy defendants. By enforcing these agreements, courts will ensure that funders feel secure in their ability to obtain legal recourse should they need it—and the end result will be expanded access to legal services. ◀

Notes

1. A note on terminology: The question of whether a litigation funder is a lender, investor, or something else oftentimes is disputed and may be material to whether the agreements are enforceable; thus, this article uses the neutral term *funder* to describe the party that advances the money to prosecute a lawsuit and the term *claimant* to describe the underlying plaintiff that receives the funding.

2. David H. Levitt et al., DRI Ctr. for Law & Pub. Policy, Third Party Litigation Funding: Civil Justice and the Need for Transparency 1 (Oct. 17, 2018), www.dri.org/docs/default-source/dri-white-papers-and-reports/third_party_litigation_10-17-18-(1).pdf?sfvrsn=2.

3. *E.g.*, Oasis Legal Fin. Group, LLC v. Coffman, 361 P.3d 400, 407 (Colo. 2015).

4. *E.g.*, Dopp v. Yari, 927 F. Supp. 814, 820 (D.N.J. 1996).

5. Johnson v. Wright, 682 N.W.2d 671, 674 (Minn. Ct. App. 2004).

6. Lawsuit Fin., LLC v. Curry, 683 N.W.2d 233, 236 (Mich. Ct. App. 2004).

7. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 218–19 (Ohio 2003). See also *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. Ct. App. 2008), in which the agreement entitled the funder to recoup its initial advance plus a percentage of recovery that increased the longer the case lasted. Specifically, the funder advanced $3,000 and was entitled to repayment of $4,200 if the case resolved within 95 days. For every month beyond that 95 days, the funder was entitled to another 7.8 percent of the advance ($234), capped at 325 percent of the initial advance ($9,750). *Id.* at 770–71.

8. *Odell*, 665 S.E.2d at 775; *Coffman*, 361 P.3d at 402.

9. *E.g.*, *Odell*, 665 S.E.2d at 771.

10. *Johnson*, 682 N.W.2d at 675 (quoting Black's Law Dictionary 224 (7th ed. 1999)); *see also Rancman*, 789 N.E.2d at 219 (noting that champerty is an agreement in which a "nonparty undertakes to further another's interest in a suit in exchange for a part of the litigated matter if a favorable result ensues").

11. Schackow v. Med.-Legal Consulting Serv., Inc., 416 A.2d 1303, 1313 (Md. App. 1980); *see also Champerty*, Black's Law Dictionary 209 (9th ed. 2009) ("An agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds.").

12. *Odell*, 665 S.E.2d at 773, 775; Kraft v. Mason, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996).

13. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 278 (S.C. 2000) (abolishing defense of champerty in South Carolina) ("A financier becomes an officious intermeddler when he or she offers unwanted advice or otherwise attempts to control the litigation for

the purpose of stirring up strife or continuing a frivolous lawsuit."); *see also Odell*, 665 S.E.2d at 774.

14. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87 (Tex. Ct. App. 2006).

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

16. Johnson v. Wright, 682 N.W.2d 671, 681 (Minn. Ct. App. 2004).

17. *Id.* at 678. *See also Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 767 (Minn. Ct. App. 2017) (declining to enforce litigation funding agreement's New York forum selection and choice of law clauses because they would evade Minnesota's public policy against champerty) ("Given the choice-of-law provision in this case—and Prospect's intent to enforce it—enforcement of the forum-selection clause could be the first step in thwarting Minnesota's policy against champerty.").

18. *Rancman*, 789 N.E.2d ¶ 19. "Maintenance," which is related to champerty, is the act of assisting another to prosecute a lawsuit with which the assister has no connection. It commonly is described as champerty but without the element of sharing in the recovery. *E.g.*, Schackow v. Med.-Legal Consulting Serv., Inc., 416 A.2d 1303, 1312 (Md. App. 1980) ("Maintenance exists when a person 'without interest' in a suit officiously intermeddles by assisting either party, . . . champerty adds the element of an agreement for payment from the subject matter of the suit." (quoting Black's Law Dictionary (5th ed. 1979))).

19. 665 S.E.2d 767, 775–76 (N.C. Ct. App. 2008).

20. *Id.* at 775.

21. *Id.*

22. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. Ct. App. 2006).

23. Kraft v. Mason, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996).

24. *Id.*

25. Md. Code Ann., Com. Law § 12-102 (West 2019)..

26. Lawsuit Fin., LLC v. Curry, 683 N.W.2d 233, 239 (Mich. Ct. App. 2004) (emphasis in original) (internal quotations omitted).

27. *E.g.*, MoneyForLawsuits V LP v. Rowe, 10-CV-11537, 2012 WL 1068760, at *5 (E.D. Mich. Mar. 29, 2012) (applying New York law) (holding that agreement to invest money in plaintiffs' prosecution of class-action lawsuit was not subject to usury laws because funder did not make a "loan," reasoning that funder did not have absolute right to repayment because it was not entitled to any payment if plaintiffs did not recover), *aff'd sub nom.* Money for Lawsuits V LP v. Rowe, 570 F. App'x 442 (6th Cir. 2014).

28. 927 F. Supp. 814, 823 (D.N.J. 1996) (citing 14 Williston on Contracts 1692 (3d ed. 1972)).

29. *Id.* at 815.

30. *Id.* at 817. The funds also were advanced so that Dopp could maintain his "lifestyle." *Id.*

31. *Id.*

32. *Id.* at 818.

33. *Id.* at 820.

34. *Id.* at 821.

35. *Id.* at 823 (citing Williston, *supra* note 28).

36. 193 S.W.3d 87 (Tex. Ct. App. 2006).

37. *Id.* at 92 n.5.

38. *Id.* at 93.

39. *Id.* at 95.

40. *Id.* at 96.

41. *Id.* at 100.

42. *Id.*

43. Kraft v. Mason, 668 So. 2d 679, 684 (Fla. Dist. Ct. App. 1996); *see also* MoneyForLawsuits V LP v. Rowe, 10-CV-11537, 2012 WL 1068760, at *5 (E.D. Mich. Mar. 29, 2012) (applying New York law) (holding that agreement to invest money in plaintiffs' prosecution of class-action lawsuit was not subject to usury laws because funder did not make a "loan," reasoning that funder did not have absolute right to repayment because it was not entitled to any payment if plaintiffs did not recover), *aff'd sub nom.* Money for Lawsuits V LP v. Rowe, 570 F. App'x 442 (6th Cir. 2014).

44. 683 N.W.2d 233, 236 (Mich. Ct. App. 2004).

45. *Id.* at 239 (internal quotations omitted).

46. *Id.*

47. *Id.* at 236–37.

48. *Id.* at 235. The funder also sued the attorney who represented the claimant in the underlying personal injury suit, a claim that was dismissed and affirmed on appeal. *Id.*

49. *Id.*

50. *Id.* The court did not address the matter of collectability, i.e., whether the underlying defendant would or could pay the judgment or, for example, might file for bankruptcy.

51. *Id.* at 240.

52. 665 S.E.2d 767, 770 (N.C. Ct. App. 2008).

53. *Id.* at 771.

54. *Id.*

55. *Id.* at 776.

56. N.C. Gen. Stat. Ann. § 24-1.1 (West 2019).

57. *Odell*, 665 S.E.2d at 779.

58. 361 P.3d 400 (Colo. 2015).

59. *Id.* at 403.

60. *Id.* at 402. Under the UCCC, a "'[s]upervised loan' means a consumer loan . . . in which the rate of the finance charge exceeds twelve percent per year. . . ." Colo. Rev. Stat. Ann. § 5-1-301(47) (West 2019). Generally speaking, a "consumer loan" is a loan to an individual for personal use that does not exceed $75,000. Colo. Rev. Stat. Ann. § 5-1-301(15)(a) (West 2019). The statute also "limits creditors' collection remedies, and restricts what parties can agree to." *Oasis Legal Fin.*, 361 P.3d at 406.

61. Colo. Rev. Stat. Ann. § 5-2-301.

62. *Oasis Legal Fin.*, 361 P.3d at 408.

63. *Id.* at 407.

64. *Id.* at 409.

65. *E.g.*, Mary Ellen Egan, *Other People's Money: The Rise of Litigation Finance Companies Raises Legal and Ethical Concerns*, A.B.A. J., Dec. 2018, at 56 ("Critics, on the other hand, contend that litigation funding disrupts the legal process by bringing in an outside party that can potentially exert control, encourages the filing of frivolous suits, and gives plaintiff attorneys an unfair advantage in settlement talks.").

66. In many states, champerty is a doctrine that has lain dormant for quite some time.

67. Johnson v. Wright, 682 N.W.2d 671, 675–76 (Minn. Ct. App. 2004) (quoting Huber v. Johnson, 70 N.W. 806, 807 (Minn. 1897)).

68. Egan, *supra* note 65, at 57.

69. *Id.* at 61.

70. *See, e.g.*, Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 105 (Tex. Ct. App. 2006) ("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.").

71. 682 N.W.2d at 679–80 (evaluating cases from other states abolishing champerty and declining to do the same in Minnesota).

72. *Id.* at 674. The terms of the settlement were sealed. *Id.*

73. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220–21 (Ohio 2003).

74. *Id.* at 218–19.

75. *Id.* at 221.

76. *Id.* at 219 (noting that the case settled for $100,000 within 12 months of the advance); Reply Brief for Appellants, *Rancman*, 2002 WL 32506713, at *14 (Ohio) (noting that the uninsured motorist coverage was $100,000).

77. *Rancman*, 789 N.E.2d at 218–19.

78. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 105 (Tex. Ct. App. 2006) ("[I]n regard to Anglo-Dutch's argument that the agreements serve to prolong litigation, it appears here, because of the increasing returns to which [funders] were entitled [the longer the case persisted], the manner in which the agreements were structured may actually have encouraged settlement.").

79. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277 (S.C. 2000) (abolishing defense of champerty because, among other reasons, rules of professional conduct and rules of civil procedure prohibit an attorney from commencing or maintaining a claim in bad faith) ("We are convinced that other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits than dated notions of champerty.").

80. *See* Fed. R. Civ. P. 11 and state analogues; Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990) (describing "Rule [11's] central goal of deterrence").

81. *Cooter & Gell*, 496 U.S. at 413 (Stevens, J. concurring in part and dissenting in part) (noting that attorneys that file frivolous suits "can be dealt with in appropriate disciplinary proceedings, state-law actions for malicious prosecution or abuse of process, or, in extreme cases, contempt proceedings").

82. Model Rules of Prof'l Conduct r. 3.1 (Am. Bar Ass'n 2019) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.").

83. *E.g.*, Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003) ("Equally troubling is a champertor's . . . potentially manipulating a party to the suit.").

84. *E.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997) ("We also no longer are persuaded that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. There are now other devices that more effectively accomplish these ends.").

85. Model Rules of Prof'l Conduct r. 1.8 (Am. Bar Ass'n 2019).

86. *Id.* Rule 1.6 provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent," subject to exceptions. *Id.* r. 1.6 (Am. Bar Ass'n 2019).

87. *Id.* r. 5.4 (Am. Bar Ass'n 2019).

88. Ellen J. Bennett, Elizabeth J. Cohen & Helen W. Gunnarsson, Ctr. for Prof'l Responsibility, Annotated Model Rules of Professional Conduct, at ann. to r. 1.8, para. f (8th ed. 2015) ("The most common situation in which someone other than the client pays a lawyer is insurance defense work, but the situation also arises when parents hire counsel for their children, when employers pay employees' legal expenses, and when friends or relatives pay for counsel for criminal defendants.").

89. *E.g.*, Randy Maniloff & Jeffrey Stempel, 1 General Liability Insurance Coverage: Key Issues in Every State 219–20 (4th ed. 2018) ("Indeed, some law firms have served as panel counsel for certain insurers for years, receiving hundreds, if not thousands of case assignments.").

90. *Id.* at 218.

91. *Id.* at 219–20.

92. *Id.* at 221.

93. *Id.* (citing Finley v. Home Ins. Co., 975 P.2d 1145, 1154 (Haw. 1998)).

94. Bennett et al., *supra* note 88.

95. *E.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963) (holding that a Virginia law curtailing NAACP efforts to find and represent parents seeking desegregated schools for their children violated the First Amendment) ("However, the State's attempt to equate the activities of the NAACP and its lawyers with common-law barratry, maintenance and champerty, and to outlaw them accordingly, cannot obscure the serious encroachment worked by Chapter 33 upon protected freedoms of expression."); Am. Civil Liberties Union of Tenn. v. Tennessee, 496 F. Supp. 218, 222 (M.D. Tenn. 1980) (holding that Tennessee's barratry statute, which prohibited funding the lawsuit of another, was unconstitutional on First Amendment grounds).

96. *E.g.*, Lawsuit Fin., LLC v. Curry, 683 N.W.2d 233, 239 (Mich. Ct. App. 2004).

97. *E.g.*, Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 98 (Tex. Ct. App. 2006) (noting "the very real contingency that existed in the agreements themselves"); Kraft v. Mason, 668 So. 2d 679, 684 (Fla. Dist. Ct. App. 1996) ("Here, when the loan was given, any talk of recovery was pure speculation. Quite possibly, there would be *no* successful recovery from the antitrust litigation. . . ." (emphasis in original)).

98. 683 N.W.2d at 239 (internal quotations omitted).

99. *Id.* at 236–37.

100. 11 U.S.C. § 362. (2012).