OPTIMIZING THE LITIGATION FUNDING ECOSYSTEM

CASSANDRA BURKE ROBERTSON

OPTIMIZING THE LITIGATION FUNDING ECOSYSTEM

CASSANDRA BURKE ROBERTSON*

Abstract: Litigation finance has become increasingly prevalent in the United States, yet its regulation remains fragmented and contested. This Article challenges the conventional wisdom that uniform federal regulation is the solution to the issues posed by litigation funding. Instead, it argues that targeted improvements to the existing legal ecosystem can enhance predictability and fairness without requiring sweeping regulatory overhaul.

This Article makes three key contributions. First, it provides a comprehensive analysis of the growth and maturation of the U.S. litigation finance industry over the last decade and a half, distinguishing between commercial and consumer financing. Second, it explains why regulatory fragmentation persists, situating debates over litigation funding within the broader context of procedural advantage in civil litigation. The Article demonstrates that state-level policy variation reflects legitimate differences in judicial resources, economic conditions, and views about access to justice.

Finally, the Article identifies two concrete improvements that courts and practitioners can implement using existing legal frameworks: first, courts should treat litigation funders as agents who facilitate legal representation, bringing them within the established doctrine of attorney-client privilege; and second, parties can achieve greater certainty in priority rights by taking advantage of the UCC's existing Article 9 framework for secured transactions, thereby reducing uncertainty and decreasing dispute-related costs. These targeted enhancements can significantly improve the functioning of litigation finance while preserving state policy choices about regulation.

INTRODUCTION

When a mother and son filed a lawsuit against the City of Englewood and its police officers in 2015, they sought justice and compensation for alleged

* John Deaver Drinko-BakerHostetler Professor of Law and Director of the Center for Professional Ethics, Case Western Reserve University School of Law. Support for this Article was provided by the Henry G. Manne Program in Law & Economics Studies, Law & Economics Center, George Mason University Antonin Scalia Law School, and was presented at the Third-Party Financing Research Roundtable. Many thanks for comments and suggestions from Jonas Anderson, Yifat Naftali Ben Zion, Seth Katsuya Endo, Adrian Ivashkiv, Donald Kochan, Richard Marcus, Luke Martin, Gary Myers, Samir D. Parikh, Francesco Parisi, Omer Pelled, Anthony Sebok, and Robert F. Weber.

excessive force during a confrontation at Englewood Hospital.[1] Their case, however, would come to exemplify the complicated interplay between litigation, finance, and justice in modern legal practice. Facing financial pressures during their lawsuit, the plaintiffs turned to third-party funders for help.[2] The son received a $15,000 advance from CVP Funding in September 2015, while the mother obtained $15,000 from the same company a month later.[3] In 2018, seeking additional funds, Ifeoma entered into another agreement with LawCash for $59,776, $24,776 of which she used to pay off the earlier advance.[4]

These cash infusions provided much-needed financial support, but they came at a significant cost. When the case finally settled for $1.31 million in 2017, the plaintiffs found themselves at the center of a legal battle over the proceeds, with multiple parties staking their claims.[5] Their original attorneys, Maggiano and Romanucci, sought substantial contingency fees and expenses.[6] A third attorney, hired by the plaintiffs to challenge the settlement, claimed hourly fees for his services.[7] The two litigation funding companies, CVP Funding and LawCash, demanded repayment with a considerable premium.[8]

The ensuing interpleader action, filed by the City of Englewood to resolve these competing claims, brought to light several critical issues in litigation finance. First, it highlighted the potential for litigation funding to create conflicts between plaintiffs' interests and the interests of their funders and attorneys. The plaintiffs' initial refusal to sign the settlement agreement may have been influenced by concerns over how much they would ultimately receive after satisfying all claims against the settlement.[9] Second, the case underscored the high costs associated with litigation funding. LawCash's $59,776 advance to

---

[1] City of Englewood v. Ezekwo, No. CV 20-12799, 2022 WL 3021157, at *1 (D.N.J. July 6, 2022) ("[T]he Ezekwos asserted excessive force claims relating to a physical confrontation with three City of Englewood police officers at Englewood Hospital and Medical Center on May 5, 2013."), *report and recommendation adopted*, 2022 WL 3020110 (D.N.J. July 29, 2022), *vacated*, 2022 WL 3926059 (D.N.J. Aug. 31, 2022), *report and recommendation adopted*, 2022 WL 3926059 (D.N.J. Aug. 31, 2022).

[2] *Id.* at *3.

[3] *Id.* at *3–4.

[4] *Id.* at *4.

[5] *Id.*

[6] *See id.* at *5 ("Maggiano asserts a $338,112.36 lien against settlement funds allocated to Chukwuemeka Ezekwo, comprising a $319,344.70 contingency fee and $18,767.66 in unpaid expenses. Romanucci asserts a $148,640.95 lien against settlement funds allocated to Ifeoma Ezekwo, comprising a $103,333.33 contingency fee and $45,307.62 in unpaid expenses." (footnote omitted)).

[7] *See id.* ("Moskovitz asserts a $107,365.39 lien for legal services provided to the Ezekwos jointly, comprising $95,189 in unpaid attorneys' fees billed hourly and $12,176.39 in unpaid expenses.").

[8] *See id.* ("CVP Funding's claim against settlement funds allocated to Chukwuemeka Ezekwo amounts to $31,616 as of September 30, 2021. LawCash's claim against settlement funds allocated to Ifeoma Ezekwo amounts to $156,300.11.").

[9] *See id.* at *2 ("[T]he Ezekwos refused to sign the settlement agreement, and the City of Englewood filed a motion to enforce the settlement. In a letter dated July 7, 2017, the Ezekwos informed the Court that they had terminated their attorney-client relationships with Romanucci and Maggiano.").

Ifeoma, for instance, grew to a claim of over $156,000.[10] Third, the case revealed the thorny legal questions surrounding the validity and priority of various claims against settlement proceeds. The court had to navigate competing attorney liens, funding agreements, and challenges to their enforceability.

Ultimately, the court upheld the validity of both the attorney liens and the litigation funding agreements, with attorneys' fees and expenses taking priority over the litigation funding claims.[11] One of the funding companies, LawCash, saw its claim reduced after attorney payment when the settlement was insufficient to cover both the attorney liens and funders' claims.[12] The son ended up receiving about 57.7% of his original settlement amount of $1 million, while the mother found her $310,000 share depleted entirely by the claims against it.[13] Thus, her entire recovery from the lawsuit amounted to the $35,000 she had netted through the litigation finance agreements, about 10% of what the defendant paid to settle her claim.[14]

The plaintiffs' experience exemplifies the interplay between litigation, finance, and justice in modern legal practice. Their case brings to the forefront several leading issues in litigation finance: the potential for conflicts between plaintiffs' interests and those of their funders and attorneys, the high costs associated with litigation funding, and the tangled legal questions surrounding the validity and priority of various claims against settlement proceeds. These issues are not unique to this case, but rather reflect broader challenges in the evolving landscape of litigation finance.

While the Englewood case illustrates the challenges of consumer litigation funding, a recent bankruptcy decision illustrates the greater financial risks in commercial funding. In the case of *In re Harvest Sherwood Food Distributors, Inc.*, affiliates of Burford Capital—one of the world's largest and most sophisticated litigation funders—had provided $35 million to finance antitrust claims worth over $1.1 billion.[15] When the funded parties filed for bankruptcy, the funder sought a declaratory judgment that it held a "valid, first-priority interest" in the litigation proceeds based on contractual provisions including a payment "waterfall," language requiring proceeds to be held "in trust," and what it characterized as a "subordination agreement."[16] The bankruptcy court rejected each theory, holding that the funder was merely an unsecured credi-

---

[10] *Id.* at *3, *5.

[11] *Id*. at *11.

[12] *Id.* LawCash ultimately recovered $122,778.90, which amounted to a 105% return on its initial outlay of $59,776, but a reduction from its contractual claim of $156,300.11. *Id.*

[13] *See id.* (explaining that, after the attorney's liens were satisfied, "the remainder of Ifeoma Ezekwo's share of the settlement . . . should be distributed to LawCash").

[14] This calculation of her net recovery represents the $59,776 obtained from LawCash less the $24,776 she used to repay the earlier litigation advance from CVP, leaving her with $35,000.

[15] No. 25-80109, 2025 WL 3178864, *2 (Bankr. N.D. Tex. Nov. 13, 2025).

[16] *Id.* at *3–4.

tor—on par with trade creditors owed for food shipments.[17] The funder had entered into "an agreement that carried material credit risk and took no precautions to perfect or otherwise elevate its purported interest."[18] As the court observed, quoting the Second Circuit: "this is not injustice, it is bankruptcy."[19] A simple UCC-1 filing would have changed the outcome entirely.[20]

This Article examines these challenges in depth, considering both sides of the litigation funding market. Part I analyzes how litigation finance has grown from a novel concept into a multibillion-dollar industry over the last fifteen years.[21] It distinguishes between commercial funding, where sophisticated parties engage in multimillion-dollar transactions to finance complex litigation, and consumer funding, where individuals receive advances of a few thousand dollars to cover basic living expenses while their lawsuits proceed.[22]

Part II explores why efforts to achieve uniform regulation have failed to gain traction.[23] It reveals how debates over litigation funding reflect a deeper struggle between the defense and plaintiffs' bars—one that has long shaped procedural battles over tort reform, jurisdiction, and pleading standards.[24] The Article demonstrates that this political division, combined with legitimate differences in state judicial systems and economic needs, makes a one-size-fits-all regulatory approach both impractical and undesirable.[25]

Part III charts a path forward that preserves space for state-level policy experimentation while enhancing certainty for all stakeholders.[26] It argues that courts should recognize litigation funders as agents who facilitate legal representation, bringing them within the established doctrine of attorney-client privilege.[27] Finally, Part IV analyzes how parties can achieve greater certainty in priority rights by taking advantage of the Uniform Commercial Code's (UCC) Article 9 framework for secured transactions.[28] These targeted improvements work within existing legal frameworks to enhance predictability and fairness without requiring comprehensive regulation.

---

[17] *Id.* at *15 ("The reality for Burford is that it is a mere general unsecured creditor in this case.").
[18] *Id.*
[19] *Id.* (quoting *In re* First Cent. Fin. Corp., 377 F.3d 209, 217 (2d Cir. 2004)).
[20] *See infra* notes 250–325 and accompanying text.
[21] *See infra* notes 29–88 and accompanying text.
[22] *See infra* notes 66–88 and accompanying text.
[23] *See infra* notes 89–163 and accompanying text.
[24] *See infra* notes 98–127 and accompanying text.
[25] *See infra* notes 161–163 and accompanying text.
[26] *See infra* notes 164–255 and accompanying text.
[27] *See infra* notes 197–230 and accompanying text.
[28] *See infra* notes 256–341 and accompanying text.

I. THE GROWTH OF LITIGATION FINANCE

Litigation finance, also known as third-party litigation financing or legal funding, refers to the practice of an entity unrelated to a lawsuit providing funding to a plaintiff or plaintiff's attorney in exchange for a portion of the financial recovery from the lawsuit, if any.[29] Of course, as Professor Brad Wendel has pointed out, "[a]ll litigation is financed; the only question is how, and by whom."[30] Litigation may be financed by the parties themselves, by insurance companies, or by attorneys who agree to be paid with a contingency fee—all of which have been common practices for decades in the United States.[31] Section A of this Part details the origins of litigation funding in the United States, tracing back to its English common law roots.[32]

Litigation finance, however, as an industry—where companies unrelated to the parties agree to provide funds in exchange for a share of the proceeds—is still a relatively recent development in the American legal landscape. It first gained significant ground in the United States around 2010.[33] In the last decade and half, "finance has evolved into a new, 'mainstream' form" that is "rapidly having a larger and larger effect on the American legal system."[34] Whereas in 2010, the idea of for-profit litigation funding "was little more than an idea in a law review article," it is now "a multibillion-dollar industry."[35] Section B then delves into the two branches of litigation finance: commercial financing and consumer financing.[36]

---

[29] LAWS. FOR CIV. JUST. & U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, RULES SUGGESTION TO THE ADVISORY COMMITTEE ON CIVIL RULES: A NECESSARY DISCLOSURE: WHY RULE 7.1 SHOULD PROVIDE JUDGES INFORMATION ABOUT NON-PARTY CONTINGENT FINANCIAL INTERESTS THAT COULD REQUIRE RECUSAL 3 (2024), https://www.uscourts.gov/sites/default/files/24-cv-d_suggestion_from_lcj_and_ilr_-_rule_7.1.pdf [perma.cc/2LSB-6ZNF]; *see also* MICHAEL E. CLEMENTS, U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS (2022), https://www.gao.gov/products/gao-23-105210 [perma.cc/UUL7-YSUW] [hereinafter GAO REPORT].

[30] W. Bradley Wendel, *Litigation Trolls*, 12 N.Y.U. J.L. & BUS. 725, 748 (2016).

[31] Indeed, the historical acceptance of contingency fees in the United States has delayed the growth of an external funding industry; the industry took root in Australia, which lacked the contingency option, about a decade earlier. *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 340 (2010) ("In Australia, which does not permit contingent fees, litigation funding by private firms has become an accepted financial service industry, particularly since 2000." (footnote omitted)).

[32] *See infra* notes 38–54 and accompanying text.

[33] *See* GAO REPORT, *supra* note 29 (explaining that although third-party litigation financing "has been well established for decades in some countries, such as Australia and England," litigation funding "gained a foothold in the U.S. around 2010").

[34] W. Hunter Huffman, *A Great and Profitable Clause: Why the New York City Bar Association Says It Is Time to Pay Attention to Investors Behind the Curtain*, 98 N.C. L. REV. 973, 999 (2020) (footnote omitted).

[35] J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283, 1339 (2022).

[36] *See infra* notes 55–88 and accompanying text.

A. The Origins of Litigation Funding in the United States

Until relatively recently, third-party litigation funding was widely prohibited in the United States.[37] This prohibition traces its roots to feudal England, where the practice was bifurcated into two related concepts: "maintenance" and "champerty."[38] Maintenance referred to the funding of a lawsuit by an individual without a "pre-existing relationship with the case," while champerty specifically denoted maintenance "undertaken for profit."[39] At the time, such funding practices were viewed as detrimental to the nascent legal system, offering little compensatory benefit.[40]

In the feudal context, lords would often subsidize their subjects' litigation for both sport and profit, effectively "underwrit[ing] suits against their enemies as a form of private warfare to weaken their opponent's coffers."[41] This practice, however, extended beyond mere financial warfare for sport. Instead, it became a way to increase landholdings and consolidate wealth, as feudal lords frequently acquired an interest in the real property at issue in the litigation.[42] Blackstone, in his *Commentaries*, denounced maintenance as "an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression."[43]

As English common law migrated to the United States, these restrictions on champerty and maintenance were embedded in the legal ethics system, albeit with a lack of uniformity.[44] These prohibitions, however, underwent a gradual relaxation over the ensuing centuries. The first major shift occurred in the early twentieth century with the rise of the contingency fee—a practice that had been conventionally barred in England.[45] In the United States, unlike in England, parties were typically expected to pay for their own attorneys wheth-

---

[37] *See* Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 164 (2011) ("Restrictions on champerty and maintenance traveled with English common law into the U.S.").

[38] *See, e.g.*, *In re* Primus, 436 U.S. 412, 424 n.15 (1978) ("Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."); Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 579 (2010); Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 48 (1935).

[39] *See* Robertson, *supra* note 37, at 164.

[40] *Id.*

[41] Lyon, *supra* note 38, at 581.

[42] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1287 (2011).

[43] 4 WILLIAM BLACKSTONE, COMMENTARIES *127, *135.

[44] Thallhimer v. Brinckerhoff, 3 Cow. 623, 646 (N.Y. 1824) ("In many of the states of this union, these laws are not in force; and the want of them, is said to be no inconvenience.").

[45] *See, e.g.*, Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 100 (2011) ("Courts and legislatures quickly found an exception to the restrictions on champerty such that by 1930, even in those states that strictly prohibited maintenance, a lawyer was permitted to 'invest' in his client's civil litigation.").

er they won or lost their case.[46] But most plaintiffs, especially those who had suffered physical or financial harms, could not afford to do so.[47] Allowing attorneys to take cases on contingency opened the courthouse door to injured plaintiffs.[48] At the same time, attorneys were subject to fiduciary duties and legal ethics rules that kept the original Blackstonian concerns of oppression at bay.[49]

The civil rights movement of the mid-twentieth century catalyzed further loosening of funding restrictions. In a landmark decision, the Supreme Court held that organizations such as the NAACP possessed a constitutional right to support litigation that furthered the aims of the organization and its members.[50] This ruling effectively immunized such support from prohibition under the traditional rules against maintenance.[51] The Court's decision reflected a changing perception of litigation in American society: lawsuits, once viewed as a necessary evil, became seen as "a form of political expression" and an avenue by which less powerful members of society could enforce their rights.[52] By the turn of the millennium, traditional restrictions on maintenance and champerty no longer held a significant role in American law.[53]

---

[46] *See, e.g.*, Peter Karsten & Oliver Bateman, *Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules*, 66 DUKE L.J. 729, 730 (2016) (defining the "English Rule" for attorneys' fees as one "in which the losing party pays for both sides"); Seth Katsuya Endo, *Should Evidence of Settlement Negotiations Affect Attorneys' Fees Awards?*, 69 N.Y.U. ANN. SURV. AM. L. 417, 419 (2014) ("The American Rule requires parties to pay their own attorneys' fees in the usual course of civil litigation . . . . But there are more than 150 federal statutes that permit the award of attorneys' fees, most predicated on the party achieving some degree of success.").

[47] *See* Steve P. Calandrillo, Chryssa V. Deliganis & Neela Brocato, *Contingency Fee Conflicts: Attorneys Opt for Quick-Kill Settlements When Their Clients Would Be Better Off Going to Trial*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 7 (2023) ("The Industrial Revolution brought with it a surge in work-related and transportation accidents. During this time, many victims could not afford to hire attorneys. Their only means to pursue their legal claims was through the use of contingency fees." (footnotes omitted)).

[48] *See id.* ("By the late nineteenth century, contingency fees had become widely accepted in numerous states through case law. Even the U.S. Supreme Court had deemed contingency fees to be valid in the 1853 case, *Wylie v. Coxe*." (footnote omitted) (citing 56 U.S. 415 (1853))).

[49] Robertson, *supra* note 31, at 167.

[50] NAACP v. Button, 371 U.S. 415, 439 (1963).

[51] *See* Sebok, *supra* note 45, at 101 ("It can be taken as a given that, whatever a state might *want* to do with its maintenance law, it cannot, under the First Amendment, limit the power of laypersons to engage in selfless maintenance designed to protect constitutionally protected rights through litigation.").

[52] Stephen C. Yeazell, Brown*, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975, 1990 (2004).

[53] *See* Sebok, *supra* note 45, at 74 ("Today, the original common law rule of non-assignability has been almost fully abandoned."); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 876 (2015) ("Other laws and attorney ethical rules now address the intended purpose of the champerty laws, so champerty should no longer bar third-party funding."); David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102, 161 (2016) (explaining that "[o]ne of champerty's core purposes is to preclude 'financial overreaching by a party of superior bargaining position,'" and concluding that other consumer protection measures can

This evolution mirrors a broader shift in legal and societal attitudes toward the nature and purpose of litigation funding. What was once viewed as a potentially corrupting influence on the legal system has, in many jurisdictions, come to be seen as a tool for expanding access to justice and enabling the pursuit of complex, resource-intensive cases.[54] Nevertheless, the legacy of these historical prohibitions continues to inform contemporary debates about the proper role and regulation of third-party funding in the American legal system.

B. A Maturing Industry

The litigation funding market in the United States operates in two distinct spheres, commercial and consumer financing, that differ dramatically in both scale and function.[55] Commercial litigation finance typically involves funders providing capital directly to corporate plaintiffs or law firms to finance high-value litigation or arbitration.[56] In this sphere, the entities seeking funding tend to be "large and sophisticated entities" such as large corporations or law firms, who seek relatively large cash infusions and are likely to offer a percentage of the recovery in return.[57] In contrast, consumer legal funding provides much smaller amounts—typically a few thousand dollars—to individual plaintiffs, usually to cover basic living expenses while personal injury lawsuits are pending.[58]

The gap between commercial and consumer financing extends beyond transaction size. Commercial funders focus on complex business disputes and may take an active role in litigation strategy.[59] Consumer funders, on the other

better accomplish that goal (quoting Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997))); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 94 n.98 (2010) ("It is doubtful that the tort of champerty is available as a separate cause of action in any state, while prosecution of champerty as a criminal misdemeanor ended long ago." (quoting Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REGUL. 435, 464 (1995))).

[54] *See, e.g.*, Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 241 (Minn. 2020) (explaining that, even though "contingent fee agreements arguably affect a plaintiff's calculation regarding settlement in a similar manner [to litigation finance] because they reduce the plaintiff's ultimate recovery," contingency fees are still permitted "because they allow plaintiffs who would otherwise be priced out of the justice system to assert their rights," and concluding that "the same is true of litigation financing"); Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 422 (2017) (explaining that "the third-party funding industry exists because funders are uniquely positioned to handle financial risks that parties and law firms are less equipped to handle").

[55] Julianna Marandola, Note, *In for a Penny and Out for Profit: A Federal Approach to Consumer Third-Party Litigation Funding*, 64 B.C. L. REV. 1763, 1766 (2023).

[56] *See* Emily Samra, Comment, *The Business of Defense: Defense-Side Litigation Financing*, 83 U. CHI. L. REV. 2299, 2303 (2016) ("The majority of the time, the financier contracts directly with the party, rather than with the law firm.").

[57] Marandola, *supra* note 55, at 1766.

[58] *Id.* at 1767.

[59] *See infra* notes 65–78 and accompanying text.

hand, typically provide standardized funding in personal injury cases and are involved minimally in the underlying litigation.[60] Different companies serve these two markets, and their business models reflect the distinct needs and risks of each sector: a typical commercial case may see $3 million in financing, whereas a typical consumer case may see $3,000.[61]

In the last fifteen years, both sectors of the litigation finance industry have rapidly grown, though in different ways. The commercial sphere has seen increasing sophistication in funding structures and dramatic growth in assets under management.[62] The consumer sphere has evolved through standardization and securitization.[63] Financing for mass torts has also grown considerably.[64]

1. Commercial Litigation Finance

The commercial sphere constitutes the larger portion of the industry in overall dollar value and continues to grow. A recent report from the federal government's General Accounting Office (GAO) shows that between 2017 and 2021, the amount of litigation funding provided through single-case and portfolio[65] arrangements more than doubled.[66] Moreover, "formal requests for

---

[60] *See infra* notes 79–88 and accompanying text.

[61] *See* GAO REPORT, *supra* note 29, at 9–10, 13 (noting that commercial litigation funders typically invested a minimum of $2 million, and that in one study, the average single-case commercial financing deal was $3.5 million, while consumer cases are typically financed between $1,000 and $10,000).

[62] *See e.g.*, Robert F. Weber, Valuing Litigation Assets 13 (Dec. 1, 2024) (unpublished manuscript), https://ssrn.com/abstract=5040441 [perma.cc/6Y3N-T2EL] ("The commercial litigation finance industry can be thought of as a hybrid or bridge institution that links the commercial litigation system to Wall Street and the financial system.").

[63] *See, e.g.*, Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 179 (2021) (explaining that even with a rigorous underwriting process that denies nearly half of all funding request, the industry is still able to make most funding decisions quickly, within a median timeframe of nine to thirteen days); Emily R. Siegel, *Opioids Lawyers Offer Investors Piece of $100 Million-Plus Win*, BLOOMBERG L. (June 17, 2024), https://news.bloomberglaw.com/business-and-practice/opioids-lawyers-offer-investors-piece-of-100-million-plus-win [perma.cc/WY5Z-Q7EV] ("Securitization is an increasingly common tool in litigation finance.").

[64] *See, e.g.*, Samir D. Parikh, *The Alchemist's Inversion*, 110 CORN. L. REV. (forthcoming 2025) (manuscript at 111), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4944361 [perma.cc/U5VR-ZLLC] ("Litigation financiers discovered the benefits of investing in general litigation matters decades ago. But the unique allure of mass-torts investing is something new.").

[65] In portfolio agreements, law firms pledge the proceeds of a portfolio of cases as collateral for larger loans as opposed to seeking financing for a single case. *See* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J.F. 32, 41 (2023), https://yalelawjournal.org/essay/opaque-capital-and-mass-tort-financing [perma.cc/G33L-EC5H] (explaining that commercial litigation loans "are typically made against one pending case," but that sometimes they "may be secured by a portfolio of cases where a law firm is the borrower").

[66] *See* Jonathan Stroud, *Patent Assertion Finance Is Big Business but No One Knows Who Profits*, 15 LANDSLIDE 34, 35 (2023) (explaining that in "the litigation finance boom of the past 20 years . . . private equity now also undergirds huge swaths of bankruptcy, class action, trademark, and tort litiga-

funding agreements increased by 27 percent, while total new agreements increased by 19 percent."[67]

This is a fast-growing investment sector with high returns, and large law firms are creating practice groups aimed at helping their business clients evaluate and access litigation finance options.[68] Although commercial litigation finance involves far fewer cases than consumer-based finance, the cases are much larger. A 2021 market report discovered forty-seven practicing "commercial litigation funders" in the United States, totaling $12.4 billion in distributed assets and $2.8 billion committed to oncoming financing agreements for that year.[69]

The maturation of the commercial litigation funding market is evident in several trends. First, there has been a shift towards more complex funding structures, with portfolio financing becoming increasingly common.[70] According to the GAO report, portfolio agreements made up nearly 39% of new litigation financing contracts in 2021, up from 19% in 2017.[71] The percentage of total capital provided by portfolio agreements increased from 28% ("$28 million of $101 million") in 2017 to 51% ("$124 million of $240 million") four years later.[72]

Second, there has also been an increase in the deployment of "opaque capital" in recent years—that is, "aggressive hedge funds and private-equity firms that have established a litigation-finance group or have a group that acts as the functional equivalent."[73] Rather than invest in case portfolios, these entities chase higher risk and higher returns through "direct engagement in high-stakes, big-ticket disputes."[74] Such entities may take a stronger role in litigation strategy, including a direct role in deciding whether to settle a case.[75]

In the commercial sector overall, the GAO report indicates that commercial litigation "funders typically provide millions of dollars in funding for

---

tion, to the tune of $50 to $100 billion in investments annually," and noting that for patent litigation in particular, "today third-party patent litigation and assertion financing undergirds about 30% of all patent litigation").

[67] GAO REPORT, *supra* note 29, at 11.

[68] *E.g.*, Jeremy Nobile, *McDonald Hopkins Creates Litigation Finance Group*, CRAIN'S CLEVELAND BUS. (May 5, 2019), https://www.crainscleveland.com/finance/mcdonald-hopkins-creates-litigation-finance-group [perma.cc/6Z9C-WNRZ].

[69] GAO Report, *supra* note 29, at 11–12.

[70] *See id.* at 12 (noting "a shift from single-case agreements towards portfolio financing over the last 5 years").

[71] *Id.*

[72] *Id.*

[73] Parikh, *supra* note 65, at 44.

[74] *Id.*

[75] *See id.* at 58–59 ("Indeed, opaque capital can require a plaintiff to assign all decision-making authority regarding her claim. With such authority, opaque capital would have the affirmative right to accept or reject a settlement offer as long as its decision was made in good faith." (footnote omitted)).

high-value litigation and arbitration."[76] Data collected from three commercial funders showed they deployed, "on average, about $2.3 million per single-case agreement and $4.5 million per portfolio agreement over the last 5 years."[77] Another market report cited in the GAO study reported slightly larger numbers but still similar in scale, finding that "in 2021, the average value of new single-case arrangements . . . was $3.5 million and the average value of portfolio arrangements was $8.5 million."[78]

2. Consumer Legal Funding

With consumer legal funding, money generally flows to the client directly, to cover everyday living expenses while the lawsuit (most commonly, a personal injury lawsuit arising out of a motor vehicle accident) is ongoing.[79] Funders in the consumer sphere point out that the term "litigation finance" is inapt in this sphere because funds are not used to directly pay for the costs of litigation as they are in the commercial sphere.[80] As in the commercial sphere, however, the funder generally obtains a non-recourse right to repayment from the proceeds of the litigation, along with a premium that reflects the value of both risk and time.[81]

Consumer legal funding typically involves much smaller amounts than commercial litigation finance. The GAO report cites average funding amounts ranging between $1,000 and $10,000.[82] One study found that funders provided about 7% of the "estimated value of a case in funding," with some funders stating that "they typically provided clients with no more than 10 percent of the estimated value of a case."[83] Recent empirical research has concluded that consumer legal funding "is likely 'funding of last resort' for the clients who seek it," usually providing only a few thousand dollars to the client.[84]

---

[76] GAO REPORT, *supra* note 29, at 9.

[77] *Id.* at 10.

[78] *Id.*

[79] *See* Avraham et al., *supra* note 63, at 163 n.48 (explaining that the most common lawsuit types in their dataset were motor vehicle accidents, slip-and-fall claims, mass torts, premises liability, medical malpractice, assault/police brutality, and labor law claims).

[80] Eric Schuller, *Let's Set The Record Straight: Consumer Legal Funding Is Not Litigation Finance*, LEGAL FUNDING J. (Feb. 20 2024), https://legalfundingjournal.com/lets-set-the-record-straight-consumer-legal-funding-is-not-litigation-finance/ [perma.cc/YN6T-W8M5] ("Consumer Legal Funding . . . . covers living expenses, such as rent, food, clothes and keeping the lights on . . . . It has nothing to do with financing of the litigation.")

[81] *See supra* note 12 and accompanying text (providing an example of a litigation funder's contractual risk premium).

[82] GAO REPORT, *supra* note 29, at 13.

[83] *Id.*

[84] Avraham et al., *supra* note 63, at 181–82.

In the consumer legal funding market, growth trends are less clear due to limited publicly available data.[85] There are, however, other indications of market maturity. For example, consumer funders reported increased familiarity with litigation funding among potential clients.[86] Additionally, the emergence of securitization in consumer litigation funding, where some funders have shifted towards providing funding through securities, indicates that the market is attracting more diverse investors.[87] Notably, all four of the largest consumer funders have securitized their funding operations within the last decade.[88]

II. THE CHALLENGES OF UNIFORM REGULATION

Despite the rapid growth of litigation funding in the United States, the industry remains largely unregulated at the federal level.[89] Although individual states have been more proactive in regulating litigation finance, their approaches vary widely.[90] State regulations, where they exist, typically focus on consumer-sector issues such as disclosures and fee limitations.[91] Many scholars have advocated for uniform regulation, arguing that it would be preferable

---

[85] *See* GAO REPORT, *supra* note 29, at 15 ("Five stakeholders told us they were not clear on whether the industry had grown over the last 5 years.").

[86] *See id.* at 14 (noting that some funders have pointed to consumers' increased familiarity with litigation finance as a factor in increasing competition among funders and lowering costs for consumers).

[87] *Id.* at 14–15.

[88] *Id.* at 14 n.36.

[89] *See, e.g.*, Jeffrey James Grosholz, Note, *In the Shadows: Third-Party Litigation Funding Agreements and the Effect Their Nondisclosure Has on Civil Trials*, 47 FLA. ST. U. L. REV. 481, 499–500 (2020) ("[G]iven the current lax state of regulation—both in federal and state courts—opponents argue TPLF allows wealthy financiers to remain in the shadows and pull the strings of litigation, impermissibly affecting the course of litigation and drawing out suits unnecessarily."); *see also* Marandola, *supra* note 55, at 1766 (proposing that federal securities law expand to meet the challenge of regulating litigation financing).

[90] *See* Shannon, *supra* note 53, at 912 (concluding that "the existing regime of piecemeal regulation is inadequate to ensure that new entrants to the third-party funding market know what behavior is appropriate and to ensure that existing players in this market do not exploit one another's vulnerabilities"); Victoria Shannon Sahani, *"Keep to the Code": A Global Code of Conduct for Third-Party Funders*, 102 B.U. L. REV. 2331, 2344 (2022) ("The proliferation of third-party funders and funding arrangements strikes a sharp contrast to the comparatively minimal and noncomprehensive regulation of the industry at present. The existing regulations governing the third-party funding industry worldwide are complex, disjointed, and divergent." (footnote omitted)); Samra, *supra* note 56, at 2302 (noting that "[t]here has been almost no proposed legislation for regulation of commercial litigation financing").

[91] *See* Michael Faure & Jef De Mot, *Comparing Third-Party Financing of Litigation and Legal Expenses Insurance*, 8 J.L. ECON. & POL'Y 743, 756 (2012) (noting that state statutes regulating litigation finance "generally focus on loans in personal injury cases, not on commercial litigation"); GAO REPORT, *supra* note 29, at 15 (summarizing efforts to regulate the industry).

to the current patchwork of state approaches.[92] Efforts to achieve a unified approach to third-party finance regulation, however, have yet to succeed.

This Article suggests that such uniform regulation is neither necessary nor desirable for several reasons. First, the policies underlying litigation funding are deeply political, with divisions not along traditional partisan lines but between the organized defense bar and plaintiffs' bar. This politicization means that attempts to unify regulatory approaches would likely face intense political resistance.[93] Second, even if a unified approach did emerge from such political battles, it is not at all clear that the resulting equilibrium would be appropriate across the country.[94] States' diverging approaches to litigation funding may reasonably reflect differences in their economic landscapes, judicial resources, and legal frameworks. Section A of this Part clarifies the differing approaches to litigation financing taken by the plaintiffs' bar and the defense bar.[95] From there, Section B of this Part proposes that uniform legislation may be a blunt tool to address the varying needs of the states.[96] Lastly, Section C of this Part proposes a path forward for litigation financing in an environment of political and socioeconomic gridlock.[97]

A. Rivalry Between the Defense Bar and the Plaintiffs' Bar

As litigation funding has proliferated in the United States over the last decade and a half, it has also become increasingly politicized.[98] Overall, support for litigation financing has increased, as reflected in the rapid growth of the industry.[99] Three "overarching global forces" have increased litigation financing: growing concern for plaintiffs' access to justice, an increasing number of com-

---

[92] *See, e.g.*, Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 39 (2014) ("LFCs [Litigation Finance Companies] should be regulated at the national level so that consumers in every state will enjoy the same core level of protection, and every LFC in the country will have to abide by the same core set of rules and regulations."); Stephen Giller et al., *Panel 4: Litigation Funding and the Federal Rules of Civil Procedure*, 12 N.Y.U. J.L. & BUS. 603, 623, 625 (2016), https://www.nyujlb.org/_files/ugd/716e9c_15e2feff5cb84ca59728b17561ef5d68.pdf [perma.cc/8UU7-HFM8] ("I think if you're going to regulate the industry, it should be at the federal level so there's uniform regulation . . . I agree with Michael that uniformity is crucial." (quoting Michael Fishbein & J. Maria Glover)); David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1066 (2016) ("The most logical approach to regulation of the TPLF industry is, for all of the reasons discussed in the ILR proposal, to establish a new statutory scheme authorizing a federal administrative agency to regulate the industry.").

[93] *See infra* notes 126–127 and accompanying text.

[94] *See infra* notes 144–160 and accompanying text.

[95] *See infra* notes 99–127 and accompanying text.

[96] *See infra* notes 128–160 and accompanying text.

[97] *See infra* notes 160–162 and accompanying text.

[98] *See, e.g.*, Adrian Ivashkiv, *Intermediation Effects in Litigation Finance*, 58 CONN. L. REV. 23, 34 (2025) ("The desirability of litigation finance is fiercely debated.").

[99] *See supra* notes 62–64 and accompanying text.

panies who want to maintain cashflow while facing or pursuing large claims in litigation, and global economic conditions of "turmoil and uncertainty."[100]

At the same time, however, organized opposition to litigation finance has both solidified and increased in sophistication. This opposition comes primarily from the defense bar, which views litigation funding as a threat to its traditional strategic advantages in civil litigation.[101] The resulting political divide does not fall along traditional partisan lines, but instead reflects a longstanding rivalry between the defense and plaintiffs' bars that spans various areas of substantive and procedural law. This split has created some unlikely allies, as the defense bar raises consumer-protection issues in litigation funding while simultaneously opposing increased regulation in other contexts.[102]

This political division manifests in concrete ways. The plaintiffs' bar, viewing it as a tool to level the playing field against well-resourced defendants, typically supports litigation funding.[103] Funders on the consumer side of the industry have also become a powerful organized force, lobbying for permissive regulations that allow for market expansion and innovation in funding structures.[104] The defense bar, often aligned with business interests, generally advo-

---

[100] Shannon, *supra* note 53, at 869.

[101] *See* Jennifer Anglim Kreder & Benjamin A. Bauer, *Litigation Finance Ethics: Paying Interest*, 2013 J. PROF. LAW. 1, 9 ("[T]here is, at best, 'very little' litigation financing available for defense attorneys." (citation omitted)); Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISCOURSE 110, 121 (2013), https://www.uclalawreview.org/re-re-financing-civil-litigation-how-lawyer-lending-might-remake-the-american-litigation-landscape-again/ [perma.cc/EW5K-52FN] ("The final—and arguably most significant—way lawyer lending seems poised to transform the civil litigation environment is by unsettling hierarchies within the plaintiffs' bar, and specifically, by decoupling a firm's access to capital from its reservoir of expertise."); Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation*, 34 GEO. J. LEGAL ETHICS 1383, 1401 (2021) ("Litigation financing allows 'lawsuits to be decided on their merits, and not based on which party has deeper pockets.'" (quoting Hamilton Cap. VII, LLC. I v. Khorrami, LLP, 22 N.Y.S.3d 137 (Sup. Ct. 2015) (internal citation omitted))).

[102] *See* Edward Truant, *U.S. Commercial Litigation Finance Industry—Call to Association!*, LEGAL FUNDING J. (Sep. 5, 2019), https://legalfundingjournal.com/u-s-commercial-litigation-finance-industry-call-association/ [perma.cc/9JEE-6JHG] (noting that "the consumer side of the litigation finance industry has astutely created both the American Legal Finance Association ('ALFA') and the Alliance for Responsible Consumer Legal Funding ('ARC') to represent its best interests," and that the "ALFA and ARC have proactively created a code of conduct, and have organized efforts to lobby, where appropriate, at the state and federal levels"). The commercial side of the industry is less organized in the United States, but it has similar organizations in England and Australia. *Id.*

[103] *See* MP McQueen, *Inside the Battle Over Litigation Funding Regulation*, LAW.COM (July 12, 2019), https://www.law.com/newyorklawjournal/2019/07/12/inside-the-battle-over-litigation-funding-regulation/ [perma.cc/T3DW-RVYK].

[104] *See* Jeremy Kidd, *Probate Funding and the Litigation Funding Debate*, 76 WASH. & LEE L. REV. 261, 264 (2019) ("Consumer advocates worry that litigation funding is exploitative, similar to payday lenders, aligning them with the U.S. Chamber of Commerce, which believes that litigation financing exploits plaintiffs— reducing beneficial settlements, distorting the attorney-client relationship, increasing frivolous claims—for profits.").

cates for stringent regulation or outright prohibition of litigation funding, arguing that it increases frivolous litigation and complicates settlements.[105]

This split is not unique to litigation funding, but instead reflects a longstanding rivalry between the defense and plaintiffs' bars that spans various areas of substantive and procedural law. Thus, for example, one member of the Defense Research Institute (DRI) describes the organization as "serv[ing] as an important check on the American Association of Justice and the plaintiffs' bar in addition to DRI's role in keeping defense lawyers educated and providing superior networking opportunities."[106] In a DRI publication, one member warned that "the contingency fee lawyers . . . are kicking our collective butts in the political and legislative arenas, all to the detriment of defense bar and our clients."[107] It described the plaintiffs' bar as "[f]ueled by literally billions of dollars from tobacco and other large class action settlements and judgments," and stated that "they are pouring millions of dollars into well-organized campaigns to defeat tort reform legislation, oust conservative judges and promote state and federal legislation that ultimately will further line their pockets."[108] In response, DRI created a "Rapid Response Task Force" to be able to "put more than 100 letters on any given legislator's desk within 10-days' notice."[109]

The concerns of the defense bar arise from a very real shift in the balance of power. Plaintiffs' attorneys have their own influential interest groups, most famously the American Association of Justice (AAJ) [110] Professor Stephen Yeazell pointed out that "[c]ompared with the situation seventy-five years ago, the plaintiffs' bar is today better financed, both absolutely and relative to the defense bar. Using the same reference point, the defense bar, in ordinary cases, is more constrained than it was when Model Ts came only in black."[111] According to Professor Yeazell, this shift in the balance of power happened gradually. First, the spread of liability insurance increased the number of potential defendants that it could be financially viable to sue.[112] Second, although plain-

[105] *See* Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sep. 1, 2016), http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about [perma.cc/59Y6-ZZ3X] (noting that "[b]ig businesses, like those represented by the Chamber of Commerce, can be expected to hate litigation finance").

[106] *Election 2020: New Leaders to Be Elected Next Month During DRI's First-Ever Virtual Annual Meeting*, 62 NO. 9 DRI FOR DEF. *8, *17 (Sep. 2020).

[107] Gregory C. Read, *Stand Up and Be Counted*, 67 DEF. COUNS. J. 423, 423 (2000).

[108] *Id.*

[109] *Id.* at 424.

[110] *About Us*, AM. ASS'N FOR JUST. (Sep. 17, 2025), https://www.justice.org/about-us [perma.cc/K88P-6C9D]; *see also* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 707 (2006) ("Nowadays, plaintiffs' tort lawyers are famously well-organized and influential, through the national and local branches of the Association of Trial Lawyers of America (ATLA)."). The American Association for Justice was previously known as the Association of Trial Lawyers of America.

[111] Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 183 (2001).

[112] *Id.* at 189.

tiffs were initially disadvantaged by the discovery regime adopted in the Federal Rules of Civil Procedure, the plaintiffs' bar became "better capitalized and diversified" to meet "the demands of a procedural regime requiring greater investment."[113] And in recent years, financial pressure from the insurance companies funding much of the defense-side litigation expense became much more cost conscious, putting pressure on defense counsel to rein in costs.[114]

As a result, the defense bar is both organized and highly motivated to fight any policy proposals that either make it easier for plaintiffs to sue or increase the costs for defendants to exit a lawsuit. Indeed, the defense bar has mobilized "to testify on behalf of legislative measures that would limit or repeal 'private attorney general' statutes, the terms of contingency-fee contracts, and the American Rule regarding attorney's fees."[115]

The plaintiffs' bar is equally motivated to preserve access to civil litigation. An AAJ publication offered a "Guide to Political Activism," vowing to "fight tort 'reform' in its every ugly iteration," "challenge credit card companies' mandatory arbitration clauses" by supporting the group's lobbying efforts on Capitol Hill, and "show our support for legitimate class action cases."[116]

It was perhaps quite predictable that support for, and opposition to, litigation finance would fall into the pre-existing division between the plaintiffs' and defense bars.[117] After all, "[t]he primary import of the industry is its propensity to increase the number of cases brought," which "is either a positive or a negative depending on whether one focuses on the potential to increase access to justice for deserving but under-resourced plaintiffs, or on the potential to increase non-meritorious litigation."[118] In Professor Yeazell's colorful turn of phrase, litigation financiers are "the nightmare zombies of the anti-civil litigation world,"[119] and the defense bar was prepared to go to battle.[120]

---

[113] *Id.* at 194–95.

[114] *See id.* at 197–98 ("A few insurance defense bars have argued that these constraints are so severe as to impair their ability adequately to represent their nominal clients, the insured. Those contentions may be exaggerated, but they reflect a sea-change in the balance of litigative power." (footnote omitted)).

[115] Karsten & Bateman, *supra* note 46, at 750.

[116] LORI E. ANDRUS, AM. ASS'N FOR JUST. WOMEN TRIAL LAWS. CAUCUS, AAJ ANNUAL CONVENTION REFERENCE MATERIALS, A LEVER LONG ENOUGH TO MOVE THE WORLD: A GUIDE TO POLITICAL ACTIVISM (2007).

[117] *See* N.Y.C. BAR, REPORT TO THE PRESIDENT BY THE NEW YORK CITY BAR ASSOCIATION WORKING GROUP ON LITIGATION FUNDING 55 (2020), http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf [perma.cc/8TDD-S27N] (explaining that the plaintiffs' bar generally opposes litigation funding disclosures, and the defense bar generally supports them).

[118] Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1084 (2019).

[119] Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA L. REV. 1752, 1780 (2013).

As a result, the defense bar and allied organizations have been creative in offering regulatory proposals that would decrease industry profits or otherwise slow industry growth.[121] They have also been quick to oppose proposals favored by the industry.[122] Thus, for example, there are hotly contested proposals to apply usury restrictions to third-party finance agreements, to prohibit the use of third-party funding in class action lawsuits, and to require disclosure of funding agreements.[123]

The defense bar has also highlighted issues of perceived abuse and mismanagement involving litigation finance.[124] Such issues range from the relatively mundane ("[w]hen companies face higher litigation costs, they are often forced to raise prices for consumers") to more headline-grabbing arguments ("[t]he lack of safeguards in third party litigation funding (TPLF) provides a

[120] Lana A. Olson, *There Has Never Been a More Important Time to Be a DRI Member*, 64 No. 10 DRI FOR DEF. 3 (2022) ("Coupled with the exponential increase in the investment in civil cases by third party litigation funding companies—billions of dollars' worth—the civil defense bar and its business clients are under siege like never before.").

[121] JOHN H. BEISNER, JESSICA D. MILLER & JORDAN M. SCHWARTZ, U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER 32 (2020), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf [perma.cc/Z3J7-TF2L].

[122] *See e.g.*, Steinitz, *supra* note 118, at 1083 n.43 (noting that "[c]ritics include the U.S. Chamber of Commerce, through its publications"); Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171, 190–91 (2014) ("The U.S. Chamber of Commerce has come out in opposition to litigation finance because it perceives (incorrectly) that its members are most likely to be pitted *against* beneficiaries of litigation funding."); Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 954 (2015) (suggesting that "[t]hird-party litigation financing's critics should first acknowledge that many of their concerns are with specific legal doctrines or business torts"); Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499, 509 (2014) ("The critique of third-party litigation financing in class actions echoes both the traditional normative concerns about champerty and maintenance and the political attack on contingency fee litigation.").

[123] *See* Emily R. Siegel, *Comer Urges Chief Justice Roberts to Examine Litigation Funding*, BLOOMBERG L. (July 12, 2024) (on file with the author), https://news.bloomberglaw.com/business-and-practice/comer-urges-chief-justice-roberts-to-examine-litigation-funding [perma.cc/VV2Q-AHF9] ("Mostly Republican lawmakers have pushed for legislation that would require parties to publicly disclose whether they are receiving outside funding."); BEISNER ET AL., *supra* note 121, at 32 ("[P]olicymakers must now take concrete action to mitigate the abuses posed by this increasingly pervasive feature of our civil justice system.").

[124] *See* Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The Mysterious Market for Post-Settlement Litigant Finance*, 96 N.Y.U. L. REV. ONLINE 181, 188 n.17 (2021), https://nyulawreview.org/wp-content/uploads/2021/09/AvrahamBakerSebok-fin.pdf [perma.cc/443Z-FWN4] ("Ironically, these criticisms often come from business-funded 'tort reform' groups . . . entities not known for their great concern for consumer plaintiffs.").

clear path for foreign adversaries to undermine U.S. national economic and security interests through the infiltration of the American litigation system”).[125]

This highly charged political division poses real challenges to regulation. Scholars have noted that, especially in the litigation rulemaking process, decisionmakers demonstrate “a desire for balance between plaintiffs and defense bar,” explaining that these competing interests constitute “a factor of litigation sociology that has tended to be understood as central to understanding the dynamics of litigation and debates about procedural reform.”[126] Such a balance can be difficult to find, however, with the positions so clearly staked. Although some scholars have argued that litigation funding should be non-controversial, it is clear that any doctrine that shifts the balance of power between plaintiffs and defendants is likely to remain hotly contested.[127]

B. Diversity of State Judicial Systems and Resources

Beyond the political challenges, the vast differences in state judicial systems and economic resources make a one-size-fits-all regulatory approach both impractical and potentially counterproductive.[128] States have adopted widely varying regulatory approaches that reflect their distinct policy goals and economic needs. Although policymakers could theoretically attempt to balance competing interests or choose between opposing positions, any unified approach faces two insurmountable obstacles. First, such an approach would be politically infeasible given the varying influence of the plaintiffs’ and defense bars across different states. Second, and more fundamentally, a uniform approach would fail to account for the different policy preferences, risk tolerances, and judicial resources that shape each state’s civil justice system.

---

[125] *What You Need to Know About Third Party Litigation Funding*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (June 7, 2024), https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/ [perma.cc/HWS5-AXHM].

[126] Danya Shocair Reda, *Producing Procedural Inequality Through the Empirical Turn*, 94 U. COLO. L. REV. 899, 962 (2023); *see also* Elizabeth G. Thornburg, *Giving the Haves a Little More: Considering the 1998 Discovery Proposals*, 52 SMU L. REV. 229, 245–46 (1999) (“The kinds of amendments proposed by the Advisory Committee, then, are those sought by groups that tend to appear in court as defendants and by their lawyers.”); Stephen B. Burbank & Sean Farhang, *Politics, Identity, and Class Certification on the U.S. Courts of Appeals*, 119 MICH. L. REV. 231, 237 (2020) (mapping political ideology onto procedural decision making in federal court).

[127] *See* Eugene Kontorovich, *Peter Thiel’s Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST (May 26, 2016) (on file with author), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/ [perma.cc/KQ7N-7QGR] (suggesting that a billionaire’s third-party finance of litigation “should raise no eyebrows—unless one also wants to revisit public interest litigation, class actions and contingent fees . . . . if the lawsuit is not frivolous, it is hard to see how the motivations of funders are relevant (or discernible)”).

[128] *See supra* notes 127–159 and accompanying text.

1. A Patchwork Approach to the Regulation of Litigation Funding

Accordingly, states vary significantly in how receptive they are to litigation finance. Some of the more hospitable states include Florida, Texas, and Ohio.[129] Neither Florida nor Texas have statutes expressly covering litigation funding. Ohio does have such a statute,[130] which it adopted to supersede an Ohio Supreme Court decision that applied the common-law doctrine of champerty.[131] Ohio's statute is relatively permissive.[132]

On the other end of the spectrum, Alabama, Colorado, Kentucky, and Pennsylvania are reported to be among the least hospitable.[133] Alabama courts have held that litigation finance agreements are a form of speculating on litigation and are therefore void as against public policy.[134] Several years ago, a Pennsylvania court reaffirmed its prohibition on champerty and applied it to invalidate a litigation financing agreement.[135] Kentucky has a statute that has been held to bar litigation finance.[136] Colorado has applied state usury laws to litigation finance, rendering the state unattractive to funders.[137]

State statutory enactments reflect these underlying approaches, with some increasing their state's receptivity to litigation finance while others discourage it. Thus, for example, between 2007 and 2010, Maine, Nebraska and Ohio all passed legislation that permitted litigation funding with few restrictions on funders.[138] Indiana, Oklahoma, Vermont, and Nevada passed statutes with a slightly stronger regulatory tilt.[139] Tennessee and Arkansas adopted regulatory statutes that impose strict caps on financial returns to funders, thereby making those states less attractive to litigation funders.[140] West Virginia, Wisconsin,

[129] Michael McDonald, *The Best and Worst States for Litigation Finance (Part II)*, ABOVE THE L. (July 11, 2017), https://abovethelaw.com/2017/07/the-best-and-worst-states-for-litigation-finance-part-ii/ [perma.cc/LW9Z-YTU2].

[130] OHIO REV. CODE ANN. § 1349.55(B) (LexisNexis 2026).

[131] Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220–21 (Ohio 2003); *see* Robertson, *supra* note 37, at 166–67 (discussing the adoption of the Ohio statute).

[132] § 1349.55(B).

[133] McDonald, *supra* note 129.

[134] Wilson v. Harris, 688 So. 2d 265, 270 (Ala. Civ. App. 1996).

[135] WFIC, LLC v. LaBarre, 148 A.3d 812, 819 (Pa. Super. Ct. 2016).

[136] KY. REV. STAT. ANN. § 372.060 (West 2024); Boling v. Prospect Funding Holdings, LLC, 771 F. App'x. 562, 581–82 (6th Cir. 2019) (holding a contract contrary to public policy when "[t]he Agreements contemplated that Prospect would, in exchange for providing funding to Boling to assist him in pursuing litigation, receive compensation from Boling's award").

[137] Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 410 (Colo. 2015).

[138] McQueen, *supra* note 103.

[139] GAO REPORT, *supra* note 29, at 44–45; Mark Popolizio, *Indiana Passes New TPLF Law Regulating Commercial Litigation Financing*, VERISK ANALYTICS (Mar. 20, 2024), https://www.verisk.com/blog/indiana-passes-new-tplf-law-regulating-commercial-litigation-financing/ [perma.cc/HBZ5-Q72X].

[140] *E.g.*, ARK. CODE ANN. § 4-57-109 (2025) (prohibiting annual interest rates greater than 17% by cross-referencing to other portions of the Arkansas Code); TENN. CODE. ANN. § 47-16-110 (2025)

and Louisiana require disclosure of litigation finance, whereas other states largely leave disclosure to judicial discretion.[141]

On the national level, there is no uniform requirement to disclose litigation funding agreements to either courts or opposing parties in U.S. federal litigation.[142] Some federal courts, however, have implemented local rules requiring disclosure of litigation funding arrangements in certain circumstances. For example, in November 2018, the Northern District of California began requiring parties in any "proposed class, collective, or representative action," to disclose the identity of "any person or entity that is funding the prosecution of any claim or counterclaim."[143]

2. The Benefits of Non-Uniformity

Given the competing policy interests at stake, it is not surprising that states have forged different regulatory paths. This lack of uniformity, however, should not necessarily be viewed as a problem to be solved. Instead, the diversity in state approaches to litigation finance regulation can be seen as a feature rather than a bug of the system, allowing for the political process to hash out an equilibrium between plaintiffs' and defendants' interests that reflects the individual needs and conditions of each state.

As scholars and economists have pointed out, litigation finance can change litigation practices and incentives.[144] Most notably, supporters of litigation finance suggest that it helps low- and middle-income consumers afford to

---

(prohibiting annual fees of greater than 10%); *State Legislation*, ARC LEGAL FUNDING, https://arclegalfunding.org/legislative-issues/ [perma.cc/QSM7-KRQX] ("[A] few states have passed laws that have hurt everyday people–Tennessee (2014) and Arkansas (2015).").

[141] *E.g.*, WIS. STAT. ANN. § 804.01(2)(bg) (West 2025) (requiring disclosure of any contingent interest in litigation proceeds); W. VA. CODE ANN. § 46A-6N-4 (LexisNexis 2025) (requiring disclosure of interest and limiting fees and charges); Sara Merken, *Louisiana Law Places New Rules on Litigation Funders*, REUTERS (June 24, 2024), https://www.reuters.com/legal/government/louisiana-law-places-new-rules-litigation-funders-2024-06-24/ [perma.cc/BMP5-QD8G] (subjecting foreign third-party funders to attorney general disclosure and forbidding third-party funders from directly influencing the parties to the action).

[142] GAO REPORT, *supra* note 29, at 12.

[143] *See* N.D. Cal. Standing Order on Joint Case Mgmt. Statement § 19 (effective Nov. 1, 2018), https://cand.uscourts.gov/sites/default/files/standing-orders/Standing_Order_All_Judges-11-30-2023.pdf [perma.cc/8YQ2-T4WR].

[144] *See, e.g.*, Shepherd & Stone, *supra* note 122, at 941–42 (explaining that funders' "'first money out' policy disproportionately front-loads the financier's expected fraction of payment in the case both to discourage the business client from settling for too little as well as to ensure the business plaintiff retains some incentive to maximize the total recovery"); J.B. Heaton, *Litigation Funding: An Economic Analysis*, 42 AM. J. TRIAL ADVOC. 307, 329–30 (2019) ("An interesting feature of litigation funding . . . is that it allows risk-averse plaintiffs to act more like they would act if they were risk-neutral, allowing them to pursue meritorious cases they would otherwise forego simply because of risk aversion.").

access remedies in the civil justice system.[145] But litigation finance is not the only (or even the primary[146]) procedural shaper of litigation incentives.[147] Instead, the myriad economic and litigation policies already in place in the states play an even greater role—and that existing litigation context will affect how, and how much, litigation finance policy ultimately plays a role.[148]

The variation in regulatory approaches reflects the interplay of economic, legal, and social factors that differ from state to state. For instance, states with a high concentration of corporate headquarters may lean towards stricter regulation of litigation finance, viewing it as a potential threat to businesses that are important economic engines.[149] This concern is particularly salient given recent changes in personal jurisdiction doctrine that have concentrated litigation against large corporations in their home states.[150]

---

[145] *See* Hamilton Capital VII, LLC, I v. Khorrami, LLP, 22 N.Y.S.3d 137, at *5 (Sup. Ct. 2015) ("Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case."); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 618 (2012) ("Those with lower levels of wealth and income, for example, will face higher opportunity costs when choosing to pursue a legal claim, especially when doing so requires forgoing wage income that is needed for food, shelter, and even recuperation."); Molot, *supra* note 53, at 115 ("Where a one-time, risk-averse plaintiff accepts too little from a repeat-player, risk-neutral defendant, this is just as much a market failure as a failure of procedure.").

[146] A case can be made that discovery policy holds first place in the contest to shape litigation incentives:

> Discovery is the backbone of American litigation and sits at the center of a constellation of procedural doctrines. It has shaped pleading standards, qualified immunity, and summary judgment jurisprudence and, as a practical matter, determines settlement negotiations, case outcomes, and the prevalence of trials. Across a range of contexts, from civil rights to antitrust and employment claims, discovery is often outcome determinative. Perhaps because of its centrality in the system, no single procedure generates more controversy.

Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71, 72–73 (2020) (footnote omitted).

[147] *See* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1613 (2014) ("An institutional perspective that recognizes interactions and competition for power also enables us to see how the judiciary's control of procedure can be, and has been, central to the campaign to retrench private enforcement, particularly in the last decade.").

[148] *See* Megan M. La Belle, *Influencing Juries in Litigation "Hot Spots,"* 94 IND. L.J. 901, 930 (2019) (explaining how various contextual factors affect whether particular venues become litigation "hot spots"); *see also* U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, RANKING THE STATES: A SURVEY OF THE FAIRNESS AND REASONABLENESS OF STATE LIABILITY SYSTEMS 5–6 (2019), https://instituteforlegalreform.com/research/2019-lawsuit-climate-survey-ranking-the-states/ [perma.cc/3S4S-LRP2] (considering factors such as venue requirements, class action practice, damage awards, discovery policy, judges' competence, and the quality of appellate review).

[149] *See* Gideon Parchomovsky & Alex Stein, *Preliminary Damages*, 75 VAND. L. REV. 239, 255 (2022) (noting that "many corporate defendants are repeat players in the litigation field").

[150] *See, e.g.*, Charles W. Rhodes, Cassandra Burke Robertson & Linda Sandstrom Simard, Ford*'s Jurisdictional Crossroads*, 109 GEO. L.J. ONLINE 102, 104 (2020), https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2020/10/Rhodes-Robertson-Simard-Fords-Jurisdictional-Crossroads.pdf [perma.cc/DV7U-DCKZ] ("In the Supreme Court's 2014 decision

Conversely, states with a significant percentage of citizens living in poverty might view litigation finance more favorably. In these states, allowing people to obtain funding of last resort to pursue litigation can reduce public expenditure, particularly in cases involving medical costs after injury.[151] This approach can help alleviate strain on the hospital system and other public resources.[152]

The existing tort reform landscape in each state also plays a crucial role in shaping the role of litigation finance. Tort reform affects the damage amounts that a plaintiff can recover, which in turn affects the potential profits of litigation funders and thus their incentives to participate in the marketplace.[153] Here, both substantive and procedural changes can blunt some of the more undesirable incentives in litigation finance. For example, one criticism of litigation finance is that it incentivizes small-dollar-value frivolous claims that defendants might settle for nuisance value.[154] One of the strongest deterrents to bringing such claims is a procedural hurdle—the federal courts, and some states, have adopted heighted pleading requirements that require a showing of "plausibility" to even make it to discovery.[155] If the plaintiff's claim is too weak to pass the plausibility hurdle, it will not reach discovery.[156]

Daimler AG v. Bauman, however, general jurisdiction was explicitly limited to those states where the defendant was 'at home'—typically the defendant's domicile." (quoting 571 U.S. 117, 137 (2014) (internal citation omitted))).

[151] *See* Hernandez v. Suburban Hosp. Ass'n, Inc., 572 A.2d 144, 148 (Md. 1990) ("[P]atients injured by the actions of others are often not in a position to pay for that care at the time they need and receive it. Those costs are frequently the major element of special damage in the tort case.").

[152] *See id.* ("Enforcement of an assignment can avoid this problem; if given some assurance of payment from the proceeds received from the tort action, the hospital may forego immediate collection efforts and thus allow the patient a measure of financial stability.").

[153] *See* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 232 (2014) ("In equilibrium, litigation finance companies will lend money whenever they think it will be profitable for them to do so. Even if this is on the whole beneficial, there may be incentives to fund some low-probability, high-damages cases in the hope of receiving either a settlement or the possibility of a windfall at trial."); Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1511 (2021) ("[F]unders' (perfectly rational) preference for lucrative cases can skew court dockets in favor of those cases likely to result in the biggest awards or settlements, as opposed to those that might be more 'deserving' according to some other criterion.").

[154] *See* Michael K. Velchik & Jeffery Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J.L. BUS. & FIN. 1, 40 (2019) ("Plaintiffs therefore have a rational profit-maximizing incentive to bring unmeritorious suits that impose discovery costs on defendants, and then offer to settle for less than discovery costs to the defendant, provided this sum is greater than the filing fee and attorney costs of the plaintiff.").

[155] *See, e.g.*, William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 695 (2016) ("[I]f 'pleading is the key to the courthouse door,' then changing pleading standards means changing the number of plaintiffs who will be turned away from court." (footnote omitted)); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2285 (2012) (explaining that "[t]he underlying issue animating not only the Supreme Court's decisions in *Twombly* and *Iqbal*, but also the controversy surrounding them, is discovery access," and noting that "[w]hen discovery costs are asymmetrically

Nuisance-value claims are more likely to be problematic at the lower end of the finance market, rather than the high end.[157] But even at the high end, incentives matter. For example, even high-end firms might be willing to take on a case where the claim for liability is very weak, but the damages are very large if the liability hurdle can be surmounted—thus offering a positive expected value even to a case with long-shot odds of success.[158] In this situation, the state's tort-reform policies (and in particular, the adoption of damage caps) are likely to play a large role in determining if such cases are funded; if the damage caps reduce the risk of a so-called nuclear verdict, then the chances are much lower that a case with very low odds of liability would still have positive expected value.[159]

The plaintiffs' experience in the Englewood excessive force case illustrates how a uniform approach is ill-suited to address the complexities of litigation funding across different jurisdictions thrice over. First, states (and their constituent voters) may reasonably differ on what constitutes an acceptable risk premium for funding companies. LawCash's $59,776 advance to the mother grew to a claim of over $156,000—a return some states might view as excessive, while others might see it as a fair reflection of the risk undertaken. Second, states may reach different conclusions about the fairness of a transaction where a plaintiff, like the one in this case, ultimately recovers nothing beyond the original advance. Third, jurisdictions may weigh differently the public benefit of pursuing police misconduct cases such as the Englewood case, especially when attorneys and funders claim a substantial portion of the settlement. While some may argue that there is a benefit in requiring cities to internalize the costs of police misconduct regardless of how litigation proceeds

---

high for defendants, a plaintiff's ability to get through the answer/MTD stage can be a powerful club").

[156] *See* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2168 (2015) (analyzing how plausibility pleading might change the defendant's strategy in both offering settlements and seeking dismissal).

[157] *See supra* note 61 and accompanying text (explaining that commercial claims generally require an investment of $2 million for more).

[158] *See* Abramowicz*, supra* note 153, at 202 ("[A] lawsuit that the vast majority of judges and juries would reject might still have positive expected value, if a rogue judge or idiosyncratic jury on occasion might grant a significant damages award."); Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 100–01 (1996) ("[T]here is an extortive aspect to these cases. Although most are not straight holdups for litigation costs, they combine the certain threat of litigation costs with the more remote threat of a plaintiff's verdict.").

[159] *See* Scott DeVito & Andrew W. Jurs, *"Doubling-Down" for Defendants: The Pernicious Effects of Tort Reform*, 118 PENN ST. L. REV. 543, 546 (2014) (explaining how the authors "measured how a particular type of tort reform measure—medical malpractice damages caps—affected the filing of medical malpractice cases," and "found that adoption of a damages cap lowered the probability of filing a medical malpractice tort case by a statistically significant margin of 23 percent").

are ultimately distributed, others may see the role of litigation finance as a driver of increased municipal costs that are ultimately borne by the taxpayer.[160]

These policy considerations underscore the potential benefits of a flexible, state-level approach to regulation over a uniform approach. The current diversity in state approaches to litigation finance allows for policy experimentation in light of the state's individual economic and judicial context. There may one day be a convergence of interests that allows for a more uniform regulatory approach, but, for the time being, such uniformity is neither necessary nor desirable.

C. Ecosystem Improvement in the Absence of Uniform Regulation

While debates over direct regulation continue at the state level, courts and practitioners can enhance the predictability and effectiveness of litigation funding through improvements to the broader legal ecosystem. The political battles over litigation finance have often resulted in legislative gridlock.[161] And even when states do take action, they frequently adopt widely divergent approaches that reflect their different policy preferences and economic conditions.[162] Some states have embraced litigation funding as a tool for increasing access to justice, while others view it with skepticism and impose strict limits on funding arrangements.[163]

The absence of uniform regulation, however, need not impede progress in improving the legal landscape for litigation funding. Rather than waiting for regulatory consensus that may never materialize, courts and practitioners can work within existing legal frameworks to create greater certainty for all stakeholders. This approach recognizes that many of the practical challenges in litigation funding—from protecting confidential communications to establishing priority in proceeds—can be addressed through the application of established

[160] *See* M. Todd Henderson, *The Justice Case for Litigation Finance*, 49 LITIGATION 33, 35 (2022) (noting that litigation finance can "level the field for the search for truth," by focusing on the merits of the claim, regardless of the wealth of the parties); Francesco Parisi, *Rent-Seeking Through Litigation: Adversarial and Inquisitorial Systems Compared*, 22 INT'L REV. L. & ECON. 193, 208–09 (2002) ("[A]dversarial efforts may have a direct social value, insofar as they make the tribunal better informed about the case and therefore increase the likelihood of a correct decision.").

[161] Victoria Shannon Sahani & Maya Steinitz, *Navigating the Sea Change in Law Firm Finance and Ownership in the U.S.*, KLUWER ARB. BLOG (Nov. 18, 2021), https://legalblogs.wolterskluwer.com/arbitration-blog/navigating-the-sea-change-in-law-firm-finance-and-ownership-in-the-us/ [perma.cc/J3Z9-B829] (explaining how even after substantial efforts to reach agreement on litigation finance policy, the state of New York remained mired in gridlock: "[d]ue to the controversial nature of the emerging practice and its implications to law firms and lawyers, especially among different factions of the New York legal profession, no consensus was achieved on a concrete proposal for a change of the rules").

[162] *See supra* notes 128–140 and accompanying text.

[163] *See* GAO REPORT, *supra* note 29, at 15 (summarizing varying state approaches to regulation).

legal doctrine. Such ecosystem improvements can enhance predictability while still preserving space for state-level political bargaining over direct regulation.

The following sections examine two areas where improvements can be made without new legislation. First, courts should recognize litigation funders as agents who facilitate legal representation, bringing them within the established doctrine of attorney-client privilege. Second, parties can achieve greater certainty in priority rights by taking advantage of the UCC's Article 9 framework for secured transactions. In both areas, courts can draw on existing legal frameworks to provide greater certainty while respecting the policy choices of individual states.

III. PROTECTING ATTORNEY CLIENT PRIVILEGE

When it comes to regulation of litigation finance, one of the hardest-fought battles is over transparency.[164] The defense bar has advocated persistently for mandatory disclosure of funding agreements, submitting numerous proposals at both the state and federal level.[165] Recently, the U.S. Judicial Conference's Advisory Committee on Civil Rules agreed to take up the issue, creating a subcommittee to study disclosure requirements over the next few years.[166] This push for transparency exemplifies the ongoing tension between the defense and plaintiffs' bars discussed in Part II—but as with other aspects

---

[164] *See supra* note 123 and accompanying text (describing the need for change and the current partisan divide in pushing for that change).

[165] *See* Richard Marcus, *Through A Glass Darkly: TPLF Viewed Through a Procedural Lens*, 25 THEORETICAL INQUIRIES L. 165, 170 (2024), https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=3023&context=faculty_scholarship [perma.cc/T4LQ-R9YV] ("Defendants argue that discovery or disclosure should be required until it is clear that no misconduct has occurred."); *Setting the Record Straight on Third-Party Litigation Funding*, U.S. CHAMBER OF COM. (Oct. 15, 2024), https://www.uschamber.com/lawsuits/setting-the-record-straight-on-third-party-litigation-funding [perma.cc/2JD8-G88C] (labeling several proposed benefits of third-party litigation financing as "myths"). Although there is no uniform federal approach, some states have adopted disclosure legislation, and some courts have adopted rules requiring disclosure. *E.g.*, WIS. STAT. ANN. § 804.01(2)(bg) (West 2025); MONT. CODE ANN. § 31-4-108 (West 2025); IND. CODE ANN. § 24-12-11-5 (West 2025); W. VA. CODE ANN. § 46A-6N-6 (LexisNexis 2025); LA. STAT. ANN. § 9:3580.12(b) (West 2025); D. Del. Standing Order Regarding Third-Party Litigation Funding Arrangements (effective Apr. 18, 2022), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf [perma.cc/C8B3-B4K5]; Nimitz Techs. LLC v. CNET Media, Inc., No. CV 21-1247-CFC, 2022 WL 17338396, at *3 (D. Del. Nov. 30, 2022) ("I was (and am) confident about the appropriateness of the Third-Party Funding Order. My confidence is reinforced by the fact that as of 2018, six federal courts of appeals and 24 district courts had third-party funding disclosure requirements of some kind."); *In re* Nat'l Prescription Opiate Litig., No. 17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[166] *See* Nate Raymond, *US Judicial Panel to Examine Litigation Finance Disclosure*, REUTERS (Oct. 10, 2024), https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/ [perma.cc/K2CH-ZZHF] ("The creation of a subcommittee, which will be chaired by Chief U.S. District Judge R. David Proctor of the Northern District of Alabama, does not guarantee a rule will be issued in what is likely to be a years-long process.").

of litigation finance, there may be room for ecosystem improvement even without regulatory consensus.[167]

The transparency debate reflects deeper concerns about privilege and confidentiality in the funding relationship. Proponents of litigation finance argue that agreements between clients and their funders have no substantive relation to the merits of a case and therefore fall outside the scope of discovery.[168] The real concern for many plaintiffs, however, is likely not the disclosure of the funding agreement itself, but rather the risk that sharing case-related information with funders might waive attorney-client privilege.[169] This creates a practical dilemma: funders need detailed information about cases to make informed investment decisions, but sharing such information could leave it vulnerable to discovery by opposing parties. As one author has explained, "[t]he risk is both substantial and clear: information shared with a lender may be subject to discovery on the basis that the attorney-client privilege has been waived."[170]

This is another area where courts could achieve greater predictability and fairness by applying existing legal doctrines more expansively, even without new legislation.[171] This Part sets out a path that would allow funders to main-

---

[167] *See* W. Bradley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 41 (2018) ("Transparency is not valuable for its own sake, but as a means to some other end. The most obvious end is that which is also served by the discovery rules – namely, obtaining information that will lead to admissible evidence at trial.").

[168] *See id.* ("[T]he ways the parties finance litigation [are] peripheral to the claims and defenses they raise."); Seth Katsuya Endo, *Preventive Transparency in Third-Party Litigation Funding*, 120 NW. U. L. REV. 501, 504 (2025) (explaining that "the main source of opposition to funding disclosure are the funders themselves"); Cosimo L. Fabrizio & Harshit Patel, *Litigation Finance Under Scrutiny: Navigating Mandatory Disclosure and Risks of Funder Influence*, 15 HARV. BUS. L. REV. 313, 323 (2025) ("[P]roponents of disclosure regimes have not made clear why *in camera* disclosure would be insufficient.").

[169] *See* Amy St. Eve et al., *A Bridge Too Far?*, 103 JUDICATURE 48, 54–55 (2019) (quoting "a plaintiff class action attorney," who rhetorically asked, "If it isn't important information for litigating the case or settling it, why do you need to know that?" and then suggested "I think when you've been doing this long enough, you realize that what it really comes down to is corporations' desire to know whether you've got the staying power to litigate against the big defendant companies in big cases").

[170] Kreder & Bauer, *supra* note 101, at 21; *see also* Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, 87 DEF. COUNS. J. 1, 14 (2020) ("Of the courts that have reached the question of waiver of the attorney-client privilege, a majority have held that the disclosure of privileged information to a litigation funder waives the attorney-client privilege."); *see also* Robert F. Weber, *The Securities Law Disclosure Conundrum for Publicly Traded Litigation Finance Companies*, 56 U. MICH. J.L. REFORM 699, 703 (2023) (explaining that "[t]he risk here is that even a partial disclosure of privileged, protected information might open the door to court-ordered unveiling of materials that will materially prejudice and undermine the financed lawsuit").

[171] Of course, this proposal would not preclude legislation; in fact, some states have extended privilege protection to funders by statute. *See, e.g.*, NEV. REV. STAT. ANN. § 604C.240 (LexisNexis 2025) (providing that privilege and work product apply to communications between an attorney, representing a consumer, and a consumer litigation funding company that relates to a consumer litigation funding transaction); *see also* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 445–46 (2016) (recommending that "funders should be included within the exceptions to

tain privilege while still obtaining the information they need to make funding decisions. A broader interpretation of privilege that recognizes funders as agents who facilitate litigation would not only protect legitimate communication needs but could also reduce resistance to reasonable transparency requirements.[172] Like the Article 9 framework discussed in Part I this doctrinal clarification would improve the functioning of litigation finance without requiring comprehensive regulation. Section A of this Part explains how the narrow attorney-client privilege is ill-suited, in its current form, to protect access to justice through litigation financing.[173] Then, Section B of this Part states why the work product doctrine is an imperfect substitute.[174] Section C of this Part seeks to resolve this tension by arguing for a return to the fundamentals of the Supreme Court's holding in *Upjohn v. United States*.[175] With litigation financing under *Upjohn*, Section D of this Part contends that framing litigating financiers as an agent of the financing party to the litigation would enhance access to justice.[176]

A. Attorney Client Privilege in the Funding Relationship

The attorney-client privilege is a fundamental principle of the legal system, designed to promote full and frank communication between attorneys and their clients.[177] Traditionally, this privilege protects confidential communications between a client and their attorney made for the purpose of obtaining or providing legal advice.[178] Courts have long recognized that the privilege is essential to the proper functioning of the legal system, as it allows clients to dis-

---

the waiver of evidentiary privileges, which would require amending state and federal common law rather than the Federal Rules").

[172] Although the defense bar may have ulterior motives in pushing for transparency, it is true that industry opacity leaves room for abuse. For example, the SEC has recently brought charges against one individual who sought investment, purportedly to provide financing for mass tort cases, but instead allegedly absconded with funds. Jack Karp, *SEC Accuses Fla. Men of Mass Tort Litigation Financing Fraud*, LAW360 (Sep. 6, 2024), https://www.law360.com/articles/1877481/sec-accuses-fla-men-of-mass-tort-litigation-financing-fraud [perma.cc/55XL-TDLN].

[173] *See infra* notes 177–185 and accompanying text.

[174] *See infra* notes 186–195 and accompanying text.

[175] *See infra* notes 197–230 and accompanying text.

[176] *See infra* notes 231–255 and accompanying text.

[177] *See, e.g.*, Nicholas Evan Hakun, *Clarifying the* Kovel *Conundrum*, 15 DREXEL L. REV. 1, 4–5 (2023) ("The attorney-client privilege was founded on the concept that if the law allows a client to speak freely to her attorney, even about potentially detrimental information, the attorney will be able to provide better legal advice.").

[178] *See* Paula Schaefer, *Technology's Triple Threat to the Attorney-Client Privilege*, 2013 J. PRO. LAW. 171, 173 (explaining that attorney-client privilege arises when there is "[a] confidential communication between attorney and client for the purpose of seeking or giving legal advice is privileged information").

close all relevant information to their attorneys without fear that this information will be used against them.[179]

The scope of attorney-client privilege, however, has always been carefully circumscribed. Courts have generally been reluctant to extend the privilege beyond direct communications between the attorney and client, based on the principle that the privilege should be narrowly construed because it withholds relevant information from the factfinder.[180] As a result, the presence of third parties during attorney-client communications typically waives the privilege, unless the third party's presence is necessary for the provision of legal advice.[181]

So far, courts have applied this traditional waiver doctrine to hold that disclosing privileged information to funders and potential funders waives the attorney-client privilege.[182] This traditional approach to attorney-client privilege creates tension when applied to the modern reality of litigation funding. Funders often need access to privileged information to make informed decisions about whether to invest in a case.[183] This information may include the attorney's assessment of the strengths and weaknesses of the case, potential settlement values, and litigation strategy.[184] Without access to this information, funders would be unable to properly evaluate the merits and risks of potential investments.[185]

B. Why Work-Product Protection Is No Substitute

At the current time, litigation funders largely rely on work-product protection to maintain the confidentiality of their strategy and funding decisions.[186] The work product doctrine protects materials prepared in anticipation

---

[179] *See* Hakun, *supra* note 177, at 6 ("The attorney-client privilege, upon closer technical examination, is a composition of two distinct privileges: one that protects what the client says to her attorney and another that protects the attorney's advice back to that client.").

[180] *See, e.g.*, Daniel Schwarcz, Josephine Wolff & Daniel W. Woods, *How Privilege Undermines Cybersecurity*, 36 HARV. J.L. & TECH. 421, 444 (2023) ("[D]isclosure of privileged information to any third party can constitute waiver of privilege.").

[181] *Id.* at 444–45 ("Some courts have even suggested that disclosure of otherwise-privileged information to employees outside of the firm's control group could result in waiver if those employees did not need to know the information for purposes of managing the firm's legal affairs.").

[182] Stroble & Welikson, *supra* note 170, at 14; Kreder & Bauer, *supra* note 101, at 35 ("[S]haring information with a lender may compromise the attorney-client privilege and attorney work product doctrine, which could render the information subject to discovery and have possible ethical ramifications for the attorney.").

[183] *See, e.g.*, Jihyun Yoo, *Protecting Confidential Information Disclosed to Alternative Litigation Finance Entities*, 27 GEO. J. LEGAL ETHICS 1005, 1008 (2014) ("Due to the amount of funding and stake in litigation, the ALF entities conduct extensive due diligence and may require otherwise privileged information to make informed decisions.").

[184] *See id.* ("The ALF entities would assess the merits of the claim and likelihood of success.").

[185] *See id.* (proposing the necessity of this privileged information).

[186] *See, e.g.*, J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 912 (2016) (explaining that work-product protection "limits the otherwise open and liberal system of discovery under the Federal Rules by shielding from production

of litigation from discovery by opposing parties.[187] The work product doctrine therefore offers some protection for confidentiality, though somewhat less than attorney-client privilege would provide. Work-product protection is primarily concerned with maintaining the adversarial nature of the legal system and preventing one side from free-riding on the other's efforts.[188] This is a narrower protection than that offered by attorney-client privilege, which instead serves the more fundamental purpose of ensuring open communication between lawyers and clients.[189]

Work-product doctrine is often found to cover documents shared with funders, even when courts deny attorney-client privilege protection for the same materials.[190] This inconsistency is problematic because the rationale for protecting attorney-client communications is, if anything, stronger than that for ordinary work product. Unlike privilege, which is absolute, work product protection can be overcome if the requestor is able to show a substantial need for the information.[191]

---

materials created 'in anticipation of litigation'"); Lisa Miller, *Perils of Third-Party Funding*, 40 L.A. LAW. 19, 23 (2017) ("The trend is to protect financing-related disclosures as protected attorney work product, prepared in anticipation of litigation. Unfortunately, counsel may unexpectedly waive work-product protection by disclosing counsel's work product to a third party with no interest in maintaining confidentiality." (footnote omitted)).

[187] *See* FED. R. CIV. P. 26(b)(3) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent).").

[188] *See* Glover, *supra* note 186, at 912 (explaining that the work-product doctrine is based on the idea that "attorneys should be afforded a 'zone of privacy' in which to prepare their cases," and "that adversaries should not be able to intrude upon that zone of privacy in order to free-load off the efforts of their opponents").

[189] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

[190] *See* Glover, *supra* note 186, at 913 ("[T]he general trend so far has been in favor of extending work-product protection to litigation funding materials."); Paul A. Stewart, *Ethically Speaking—Ethical Concerns Arising from Litigation Funding Agreements*, ORANGE CNTY. BAR ASS'N (Feb. 2020), https://www.ocbar.org/All-News/News-View/ArticleId/3763/February-2020-Ethically-Speaking-Ethical-Concerns-Arising-From-Litigation-Funding-Agreements [perma.cc/7LFD-VKLA] ("Many courts, including those that find the attorney-client privilege to be waived, have found that communications with the third-party funder are protected by the work product doctrine."); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 730–31 (N.D. Ill. 2014) (applying the work product doctrine but not the attorney-client privilege to documents disclosed to the funder); Viamedia, Inc. v. Comcast Corp., No. 16-cv-5486, 2017 WL 2834535, at *1, *3 (N.D. Ill. June 30, 2017) (holding that documents a party "had disclosed to prospective litigation financing firms" were covered by work-product protection, but declining to reach the question of whether they were also protected by attorney-client privilege).

[191] *See* FED. R. CIV. P. 26(b)(3)(A)(ii) (providing that ordinary work product is discoverable upon a finding that the party seeking the material "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means"); *see also* Kenneth R. Berman, *The Upside-Down World of Privilege Waivers*, 49 LITIGATION 56, 58 (2023) (asking "[w]hy, then, do we have a rule that kills the attorney-client privilege, but not

In one case, a court held that work-product protection generally covered documents shared with a litigation funder in a patent case, but also found that the requesting party had shown "substantial need" to obtain materials shared with the funder of a patent suit because there was no other way that the party could "learn about valuations placed on the Odyssey patents prior to the present litigation."[192] But this type of conversation about the value of claims in litigation is key to both the attorney's strategy in litigation and the ability to get funding to pursue litigation.

Core work product ("the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation") is not subject to the "substantial need," analysis.[193] Even for core work product, however, the rule's protection covers only "documents and tangible things."[194] This means that, unlike attorney-client privilege, core work product does not cover oral communications. In theory, then, a party could be asked questions during a deposition such as "Did you discuss the strengths and weaknesses of this case with your litigation funder?" in an attempt to probe for potential vulnerabilities in the case. Of course, any discussion of the case's strengths and weaknesses with the funder would also implicate the lawyer's analysis of the case as well.

Requiring this type of information to be turned over to opposing parties thus directly conflicts with the privilege's core aim of promoting candid lawyer-client communications.[195] It puts the client in a bind: if the attorney and client cannot share key valuation information with a funder, then they may not be able to get funding that allows them to pursue the claim. But if sharing the information leaves it vulnerable to discovery by the opposing party, then the party is also put at a significant disadvantage in litigation.

C. A Doctrinal Framework for Attorney-Client Privilege

At a conceptual level, applying the attorney-client privilege to communications between attorneys, clients, and funders makes sense. The doctrinal path

work-product protection, if the confidential information is exposed to third parties in circumstances unlikely to reach the party's adversary?" and concluding that the answer is likely an accident of history "because the two doctrines evolved independently," and "[b]y the time courts realized they were treating similar and closely connected types of confidential information very differently, it was easier to develop a justification for the difference than to rethink it and treat them alike").

[192] Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd, Nos. 15-cv-01735-H, 15- 01743-H, 15-01735-H, 2016 WL 7665898, at *7 (S.D. Cal. Sep. 20, 2016).

[193] FED. R. CIV. P. 26(b)(3)(B); *id.* 26(b)(3)(A)(ii).

[194] *Id.* 26(b)(3)(A).

[195] The court held that Odyssey's attorney had waived attorney-client privilege when a corporate representative failed to raise the privilege in response to deposition questions. *Odyssey Wireless, Inc.*, 2016 WL 7665898, at *3. It was not clear from the court's opinion, however, why the deposition answers would waive privilege for the documents themselves. *Id.*

forward, however, is murkier. Early decisions about litigation funding examined privilege through the lens of a "common interest," analysis which led to inconsistent application of the privilege. A more fruitful approach may start with the Supreme Court's leading decision on attorney-client privilege, *Upjohn Co. v. United States*, which focuses instead on the roles played by related parties in the litigation process.[196] This approach leads to a view of clients and funders not as separate parties with their own interests, but instead focuses on the funders as agents of the parties whose role is to facilitate litigation.

1. Courts' Failure to Embrace the Common Interest Approach

The common interest doctrine in attorney-client privilege originally grew out of the joint defense doctrine. Whereas the joint defense doctrine allowed co-defendants to coordinate and share information without waiving privilege, the common interest doctrine allowed privileged communications that "co-plaintiffs or even non-parties shared in the presence of counsel to further a joint prosecution strategy" to be protected under the privilege umbrella.[197] As time passed, however, the doctrine's application to non-parties failed to gain widespread acceptance.[198] Even when jurisdictions did recognize the doctrine, they often applied it in different ways.[199]

Early on, some scholars recommended pursuing a "common interest" approach to attorney-client privilege in litigation funding.[200] At least one court has taken this approach; in 2012, in *Devon IT v. IBM Corp.*, the U.S. District Court for the Eastern District of Pennsylvania granted a protective order against the disclosure of information provided to Burford Group, who had pro-

---

[196] 449 U.S. 383 (1981).

[197] Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49, 61 (2005); *see also id.* at 64 ("The reasoning behind the extension of the privilege enjoyed by counsel to co-defendants is that the basic principles underlying the attorney-client privilege . . . are no less relevant when discussing co-plaintiffs in a civil case or even non-parties.").

[198] *See id.* at 65–66 ("The overwhelming majority of courts, however, have yet to consider recognizing the doctrine to protect attorney-client privileged communications that are disclosed by or in the presence of counsel for plaintiffs or non-parties sharing a common legal interest.").

[199] *See id.* at 68–69 ("Even in those jurisdictions that have adopted the common interest doctrine, uncertainty prevails concerning the application of the privilege.").

[200] *See, e.g.*, Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?*, 63 DEPAUL L. REV. 305, 372 (2014) (recommending that courts adopt the test used in the Ninth Circuit: "[i]f the disclosed communication helps facilitate a commercial deal between the parties, the common-interest doctrine can apply as long as the disclosed communication helps 'further a common legal strategy in connection with the instant litigation'" (quoting Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 579-80 (N.D. Cal. 2007))); Jeffrey Schacknow, Comment, *Applying the Common Interest Doctrine to Third-Party Litigation Funding*, 66 EMORY L.J. 1461, 1491 (2017) ("[C]ourts developed the common interest doctrine to create an exemption from normal waiver rules for a disclosure of privileged information made to a third-party sharing a common legal interest with the privilege holder.").

vided funding to the plaintiffs.[201] The court acknowledged that the plaintiffs had provided information about "[l]itigation strategy, matters concerning merits of claims and defenses and damages," and it concluded that "the production of the items subpoenaed would intrude upon attorney-client privilege under the 'common-interest' doctrine."[202]

Other courts, however, were more reluctant to apply the doctrine in the litigation-funding context—perhaps not surprising given the doctrine's lack of general acceptance or uniform interpretation. Thus, for example, in 2010, in *Leader Technologies v. Facebook*, the U.S. District Court for the District of Delaware ordered a plaintiff in a patent infringement case to produce documents that it had shared with litigation financing companies.[203] The plaintiff had argued that the common-interest doctrine should avoid a finding of privilege waiver. Although the court found it to be a "close question," it ultimately disagreed, holding that "for a communication to be protected, the interests must be 'identical, not similar, and be legal, not solely commercial.'"[204]

The idea that funders share only a commercial interest with the client, not a legal interest, also precluded other courts from applying the common-interest doctrine. One case involved a lawsuit for the misappropriation of trade secrets.[205] The court ordered disclosure of "documents that were provided to the actual and any potential funders by Miller and its counsel."[206] The court emphasized the commercial relationship between the client and the funders, asserting that the plaintiff "was looking for money from prospective funders, not legal advice or litigation strategies" and that the "funders, for their part, were interested in profit."[207] Likewise, in *Grochocinski v. Mayer Brown Rowe & Maw LLP*, a 2008 malpractice case where Spehar Capital was hired to secure funding for the plaintiff, the U.S. District Court for the Northern District of Illinois held that sharing privileged materials with Spehar waived the privilege.[208] The court declined to employ the privilege because "SC only has a financial interest in this case, but does not share a common litigation interest."[209] The doctrine was also found inapplicable by the U.S. District Court for the Northern District of Illinois in 2020, in *In re Dealer Management System Anti-*

[201] Devon IT, Inc. v. IBM Corp., No. CIV.A. 10-2899, 2012 WL 4748160, at *1 (E.D. Pa. Sep. 27, 2012).

[202] *Id.* at *1 n.1.

[203] 719 F. Supp. 2d 373, 378–79 (D. Del. 2010).

[204] *Id.* at 376 (quoting Union Carbide Corp. v. Dow Chem. Co., 619 F. Supp. 1036, 1047 (D. Del. 1985) and *In re* Regents of the Univ. of Cal., 101 F.3d 1386, 1390 (Fed.Cir.1996)).

[205] *See* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 717 (N.D. Ill. 2014) (explaining the facts of the case).

[206] *Id.* at 730.

[207] *Id.* at 733.

[208] 251 F.R.D. 316, 319, 328 (N.D. Ill. 2008).

[209] *Id.* at 328.

trust Litigation.[210] There, the court concluded that "any interest Authenticom shared with BMO Harris is purely financial, and not a common legal interest."[211]

Finally, some courts have looked to the origin of the common interest doctrine ("situations where two clients were represented by a single attorney") to conclude that the mere alignment of interest between client and funder is not enough to avoid waiver of the attorney-client privilege.[212]

Thus, for example, in 2015, in *Cohen v. Cohen*, a case alleging the fraudulent concealment of marital assets, the U.S. District Court for the Southern District of New York ordered emails to a litigation funder, hired "to provide litigation support" to the team, be disclosed in discovery.[213] The court held that the litigation funder did not have "any legal claim against Defendants whatsoever" and therefore "cannot possibly share any legal interest with Plaintiff sufficient to invoke the common interest doctrine."[214]

2. Back to Basics: Applying *Upjohn* to Litigation Finance

The idea that clients and their litigation funders are separate entities that share a common interest in the litigation has so far not been persuasive to the judiciary. In part, this likely stems from a lack of uniform acceptance or interpretation of the common interest doctrine itself. A more fruitful path to establishing privilege may be to return to more basic settled law by basing the argument more squarely within Supreme Court precedent.

The Supreme Court's reasoning in 1981, in *Upjohn Co. v. United States*, offers a useful framework for analogizing an extension of the attorney-client privilege to communications between litigation funders and clients.[215] In *Upjohn*, a pharmaceutical manufacturer conducted an internal investigation regarding legally questionable payments made by one of its foreign subsidiaries to government officials.[216] The company's attorneys sent questionnaires to employees and conducted interviews as part of this investigation.[217] When the Internal Revenue Service (IRS) began investigating the tax consequences of these payments, it demanded access to the questionnaires and interview

[210] 335 F.R.D. 510, 516 (N.D. Ill. 2020).

[211] *Id.*

[212] *See, e.g.*, Berger v. Seyfarth Shaw LLP, No. C07-05279JSW, 2008 WL 4681834, at *2 (N.D. Cal. Oct. 22, 2008) ("Though Branton is the Plaintiff's advisor and financier, the Bergers and Branton are not co-plaintiffs and they are not involved in joint litigation. The common-interest exception to waiver does not apply.").

[213] No. 09 CIV. 10230, 2015 WL 745712, at *1 (S.D.N.Y. Jan. 30, 2015), *subsequent determination*, 2015 WL 4469704, at *6–7 (S.D.N.Y. June 29, 2015).

[214] *Id.* at *4.

[215] 449 U.S. 383, 392 (1981) (examining the purpose of the communications in determining whether to protect them under the attorney-client privilege).

[216] *Id.* at 386.

[217] Id. at 386–87.

notes.[218] Upjohn refused, claiming attorney-client privilege and work-product protection.[219]

The issue before the Supreme Court was whether attorney communications with relatively low-level employees could be covered by attorney-client privilege.[220] The Court rejected the narrow "control group" test for corporate attorney-client privilege.[221] Instead, the Court looked to the purpose of the communications, not to the status of the individuals involved, and held that communications between corporate counsel and company employees, made to obtain legal advice for the corporation, are protected by attorney-client privilege.[222]

Central to the Court's analysis in *Upjohn* was the recognition that lower-level employees often possess information crucial for attorneys to render effective legal advice.[223] This conclusion would apply to litigation funders as well; litigation funders both require detailed information about a case to make informed funding decisions, and have relevant information of their own about the financial prospects of litigation that can be usefully shared with both attorneys and clients.[224] This information comes from experience funding numerous cases over a long period of time, and therefore frequently goes beyond what is publicly available or known only to the client's top management.[225]

The Court in *Upjohn* also emphasized the importance of encouraging "full and frank communication," noting that uncertainty about the scope of privilege would discourage candid discussions.[226] Extending privilege protection to funder communications serves a similar purpose: encouraging candid

---

[218] *Id.* at 387–88.

[219] *Id.* at 388.

[220] *Id*. at 386.

[221] *Id.* at 391–92.

[222] *Id.* at 397–98.

[223] *See id.* at 392 ("The attorney's advice will also frequently be more significant to noncontrol group members than to those who officially sanction the advice, and the control group test makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation's policy." (citing Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (D.S.C. 1974))).

[224] *See* Sahani, *supra* note 171, at 417 ("In order to determine whether to fund a case, funders may require parties to divulge information about their case that may be privileged under applicable law."); Andrew Strickler, *Burford's NYSE Launch Presages 'Securitized' Case Financing*, LAW360 (Oct. 15, 2020), https://bit.ly/3kqdWnS [perma.cc/6TLB-673B] (explaining that funders face difficulty because "selling interest in individual pieces of litigation" means that investors must "know enough about the case to buy an interest in it . . . but a lot of that information is privileged"); Ronen Avraham & Abraham L. Wickelgren, *Third-Party Litigation Funding with Informative Signals: Equilibrium Characterization and the Effects of Admissibility*, 61 J.L. & ECON. 637, 638–39 (2018) ("[S]ince there is still a chance the company will receive nothing if the plaintiff loses, litigation-financing companies evaluate each request for funding on the basis of information received about the claim and their determination of the strength of the claim.").

[225] *See* DeStefano, *supra* note 200, at 337 (explaining that "there is value in the analysis that funders provide," as funders may "spend up to three months scrubbing and analyzing cases . . . assessing the merits of the case, the credibility of the witnesses, and the value of the evidence").

[226] *Upjohn*, 449 U.S. at 389, 392.

assessments of a case's strengths and weaknesses. Without such protection, clients might hesitate to disclose potential weaknesses, leading to less informed funding decisions as well as less informed settlement negotiations, thus potentially hindering access to justice. The *Upjohn* Court also stressed the need for predictability in applying privilege, observing that an uncertain privilege is "little better than no privilege at all."[227] This concern is equally valid in the funding context, where a clear rule extending privilege to funding communications would provide the certainty necessary for productive discussions without fear of compelled disclosure.[228]

Finally, the communications in *Upjohn* were made to counsel for the purpose of securing legal advice, at the direction of corporate superiors, and with the understanding of their confidential nature.[229] Similarly, communications with funders are made to secure funding that enables the pursuit of legal claims, typically at the direction of those managing the litigation, and with a clear expectation of confidentiality. In this regard, funders are not outsiders to the case—instead, they play a role as agents of clients (and sometimes agents of the attorneys) who facilitate litigation.[230]

D. Making the Case for Funders as Agents Who Facilitate Litigation

Parties seeking to include funders under the umbrella of the attorney-client privilege should build on *Upjohn* by emphasizing that funders are agents who facilitate litigation of the funded rather than true outsiders. Instead of relying on the common interest doctrine, which courts have been reluctant to apply in the litigation funding context, a more promising approach is to focus on the role that funders play rather than their ultimate interest in the case. This approach aligns more closely with existing privilege doctrine and offers a stronger rationale for protecting communications with funders.[231] It also aligns with arguments made in support of extending the privilege to insurance brokers and parties more commonly associated with the defense side of the litigation, giving the argument a broader potential base of support.[232]

---

[227] *Id.* at 393.

[228] *See id.* ("But if the purpose of the attorney–client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.").

[229] *Id.* at 394.

[230] *See* DeStefano, *supra* note 200, at 337 (explaining that funders employ "top notch experienced lawyers and multidisciplinary professionals on their teams," including "ex-lawyers with vast litigation experience").

[231] *See* JOHN W. GERGACZ, ATTORNEY-CORPORATE CLIENT PRIVILEGE § 5:20 (Spring 2024 ed.) (noting that "disclosures to the funder do not raise the type of fairness considerations that underlie waiver").

[232] *See infra* notes 236–240 and accompanying text.

1. Common Ground with the Defense Bar

The agency characterization benefits from the defense bar's similar interest in the recognition of agency relationships for attorney-client privilege, especially when it comes to the role of insurance brokers and other insurance professionals who often play a role in funding litigation defense.[233] Although courts have not always upheld attorney-client privilege in this context, there is still an established framework to make the case for privilege.[234] A leading insurance treatise describes the "majority view" that an insured's communications with their insurance agent about incidents giving rise to potential liability will be privileged because "communications of this nature are predominantly intended to be transmitted to the insurer's attorney, or one assigned by it, to defend the ultimate claim."[235]

Scholar Douglas Richmond has similarly argued that insurance brokers should fall within the scope of attorney-client privilege when discussing potential liability, pointing out that "brokers are generally considered to be the agents of the insureds they serve."[236] Brokers have specialized insight into how

---

[233] DeStefano, *supra* note 200, at 349 ("[T]here is a strong analogy between claim funding agreements and insurance contracts. The relationship between the claim holder and funder is very similar to that between the insured and the insurer in terms of structure, degree of control, and influence." (footnote omitted)).

[234] *See* Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resol. Tr. Corp., 5 F.3d 1508, 1515 (D.C. Cir. 1993) (holding that "where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim," or in "aiding an insurer-provided attorney in preparing a specific legal case," then "the law would exalt form over substance if it were to deny application of the attorney-client privilege"). Moreover, in *Miller v. Haulmark Transportation Systems*, the court for the Eastern District of Pennsylvania stated:

> The purpose of the meeting attended by Mr. Dunn [the insurance company representative] was to prepare an answer and possible defense to the complaint. The underlying nature of the suit here is one involving the scope of plaintiff's insurance coverage. I conclude that the presence of Mr. Dunn at the meeting does not constitute a waiver of the privilege as to the contents of that meeting, or the other material sought. Mr. Dunn was instrumental in arranging that coverage, and his purpose at the meeting was to aid in the preparation of an answer[, and t]he presence of one so closely related to Haulmark and this lawsuit for the limited purpose of aiding the attorneys involved in defending the lawsuit does not void the privilege.

104 F.R.D. 442, 445 (E.D. Pa. 1984).

[235] 17A JORDAN R. PLITT, STEVEN PLITT, DANIEL MALDONADO & JOSHUA D. ROGERS, COUCH ON INSURANCE § 250:19 (3d ed. 2025); *see also* Asbury v. Beerbower, 589 S.W.2d 216, 217 (Ky. 1979) (concluding that "[t]he prevailing view, though something less than an avalanche of authority," supports a finding of attorney-client privilege for information communicated by an insured to the insurance company).

[236] Douglas R. Richmond, *Insurance Brokers and the Attorney-Client Privilege*, 35 INS. LITIG. REP. 153, 157 (2013).

insurance coverage issues may play out in litigation.[237] This insight makes them uniquely able to facilitate communication between attorneys and clients, especially when it comes to evaluating and negotiating potential settlements.[238] They also have a duty of confidentiality toward insureds and insurers "which fits hand-in-glove with the attorney-client privilege."[239] Finally, Richmond has also argued that brokers play an important role in facilitating attorney-client communication. He explains that "[s]ome insurance concepts or practices are so technical or specialized, or are otherwise so foreign to lawyers' and clients' business and legal experiences, that a broker's participation in attorney-client communications may be necessary for the lawyer to deliver responsible advice to the insured."[240]

2. Funders as Agents

The agency theory of privilege has a long-standing basis in law. Courts have consistently held that the presence of a client's agent during attorney-client communications does not waive privilege, provided that the agent's presence is necessary to facilitate the legal representation.[241] This principle has been applied to various types of agents, including translators, accountants, and insurance representatives.[242] In some cases, the principle has even been extended to public relations firms[243] and treating psychiatrists.[244] As a leading treatise on

---

[237] *See id.* ("They are often vital sources of information for lawyers representing insureds and frequently are able to communicate information, the effect or implications of insurance-related decisions, coverage considerations, and so on more knowledgeably and effectively than are insureds.").

[238] *See id.* ("[I]nsureds often look to their brokers to speak on their behalf or to facilitate communications with their lawyers; to advise them on values, settlements, and other key issues; and, in the first party context, to negotiate with insurers on their behalf.").

[239] *Id.*

[240] *Id.*

[241] *See* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961) ("[T]he complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts.").

[242] *See, e.g.*, *In re* Int'l Oil Trading Co., LLC, 548 B.R. 825, 834 (Bankr. S.D. Fla. 2016) (explaining that even under more restrictive interpretations of the privilege, translators and facilitators fall under the attorney-client privilege, and that "[i]n this category fall paralegals, law clerks, secretaries, and language translators, in addition to some non-attorney professionals such as accountants, depending on the tasks performed").

[243] *See In re* Grand Jury Subpoenas Dated Mar. 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (explaining that the firm "ha[d] a close nexus to the attorney's role in advocating the client's cause before a court or other decision-making body").

[244] *See* United States v. Alvarez, 519 F.2d 1036, 1046 (3d Cir.1975) (holding that "the effective assistance of counsel with respect to the preparation of an insanity defense demands recognition that a defendant be as free to communicate with a psychiatric expert as with the attorney").

attorney-client privilege points out, there is a strong argument that claim funders fit well within this framework.[245]

First and foremost, funders facilitate legal representation in a manner akin to an interpreter facilitating communication between an attorney and a non-English speaking client.[246] A funder enables the client to pursue legal action by providing necessary financial resources. Without the funder's involvement, many clients would be unable to effectively assert their legal rights. This role is particularly crucial in complex commercial litigation, where the costs of pursuing a claim are often prohibitive for many potential plaintiffs.[247] The purpose of revealing information to a funder, therefore, is "for the purpose of obtaining legal advice."[248] Providing such information should not waive any attorney-client privilege that would otherwise exist.

Moreover, funders play a role in evaluating and managing risk that is comparable to the function of insurance representatives in insured litigation.[249] To fulfill this function, funders require access to privileged information to make informed decisions about whether to invest in a case and how to structure that investment.[250] This need for information is not merely a matter of business convenience; it is essential to the funder's role in facilitating access to justice.[251]

The characterization of funders as agents has not yet been evaluated by many courts. At least one court, however, has found such a characterization appropriate, holding that "[t]he Court believes the case law applying the broader approach to the 'agency exception' is more consistent with the purpose

---

[245] *See* GERGACZ, *supra* note 231 ("[T]he litigation funder should not be considered an 'outsider' under the waiver doctrine."). *But see* Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 DENV. U. L. REV. 95, 139 (2014) ("Any court that requires the third party to be in 'an interpretive role' would reject any claim of privilege summarily." (footnote omitted)).

[246] *See Kovel*, 296 F.2d at 921 (stating that "we can see no significant difference between a case where the attorney sends a client speaking a foreign language to an interpreter to make a literal translation of the client's story" and a case where the attorney sends the client to a person proficient in the language "with instructions to interview the client on the attorney's behalf and then render his own summary of the situation, perhaps drawing on his own knowledge in the process, so that the attorney can give the client proper legal advice").

[247] *See* Shepherd & Stone, *supra* note 122, at 921 ("Third-party litigation financing arises to resolve an otherwise adverse economic relationship between capital-constrained attorneys and litigation-cost-averse clients.").

[248] *See Kovel*, 296 F.2d at 922 ("What is vital to the privilege is that the communication be made in *confidence* for the purpose of obtaining *legal* advice from *the lawyer*." (emphasis added)).

[249] *See* Keith N. Hylton, *The Economics of Third-Party Financed Litigation*, 8 J.L. ECON. & POL'Y 701, 719 (2012) ("[B]ecause they are repeat players in litigation, they may be superior monitors and managers of attorneys.").

[250] *See supra* notes 183–185 and accompanying text.

[251] It is, perhaps, more of a bug than a feature that some meritorious claims could not be litigated in the absence of outside funding. *See* GERGACZ, *supra* note 231 ("Although the funding is necessary for participation in the adversary system, this rationale focuses on a system flaw rather than a privilege policy."). Nonetheless, privilege policy exists to serve the needs of the litigants and to ensure the smooth functioning of the adversary system, even with its flaws.

for the exception and thus better reasoned" than the "common interest" approach.[252] Equally important, some states define agency relationships in attorney-client privilege rules or statutes in ways that make it more likely that courts would be receptive to such a characterization.[253]

Courts should recognize that in the modern legal landscape, litigation funders often serve as essential agents in the litigation process. Just as the presence of an insurance representative does not waive privilege in communications about an insured's case, the presence of a funder should not waive privilege when discussing case strategy or legal advice.[254] This approach offers several advantages over the common interest doctrine. It aligns more closely with existing privilege doctrine, making it easier for courts to adopt without significant departures from established law. It also focuses on the functional role of the funder in facilitating legal representation, rather than on the more nebulous concept of "common interest."

By recognizing funders as agents for privilege purposes, courts can protect the full scope of communications that attorney-client privilege is designed to promote while acknowledging that effective legal representation often requires third-party financing in today's litigation environment. Of course, parties and funders should also do their part too. Executing formal confidentiality agreements demonstrates the parties' lack of intent to share confidential information outside of the litigation team. Likewise, setting out contractual agreements explaining how the funding will assist in the litigation process (either to directly pay the expenses of litigation or to ensure that the client can pay for basic living expenses while the case is being litigated) will also help courts understand why the funders should be viewed as part of the litigation team rather than as outsiders.[255] This approach would provide a clearer standard for when communications with funders should be protected, potentially leading to more consistent judicial decisions and greater certainty for all parties involved in litigation funding arrangements.

---

[252] *In re* Int'l Oil Trading Co., LLC, 548 B.R. 825, 834 (Bankr. S.D. Fla. 2016).

[253] TEX. R. EVID. 503(a)(2) (West 2025) (defining a "client's representative" as (in addition to legal counsel) a "person who, to facilitate the rendition of professional legal services to the client, makes or receives a confidential communication while acting in the scope of employment for the client"); FLA. STAT. ANN. § 90.502 (West 2025) (including shared communications with "[t]hose to whom disclosure is in furtherance of the rendition of legal services to the client" within the ambit of attorney-client privilege).

[254] *See* GERGACZ, *supra* note 231 (concluding that disclosures to litigation funders "further privilege policies").

[255] *See* Acceleration Bay LLC v. Activision Blizzard, Inc., Nos. CV 16-453, 16–454, 16–455, 2018 WL 798731, at *3 (D. Del. Feb. 9, 2018) (denying privilege in part because "it [does not] appear that there was any written agreement at [the time of the communications] to have a legally 'common interest' in whatever was provided by Plaintiff" (alterations in original)).

IV. CLARIFYING PRIORITY IN LITIGATION PROCEEDS

A broader interpretation of attorney-client privilege that encompasses funders represents one important way to improve the litigation funding ecosystem without waiting for regulatory consensus. It is not, however, the only area where existing legal frameworks can enhance predictability. The Uniform Commercial Code (UCC or the Code) offers another powerful tool for clarifying rights and responsibilities in funding relationships, particularly regarding priority in litigation proceeds.

Over a decade ago, scholars posed the question, "What happens to investors if the plaintiff goes bankrupt and the proceeds of the funded litigation become part of the estate?"[256] As discussed in Part II, this type of practical concern transcends the political divide between supporters and opponents of litigation funding.[257] Both funders and funded parties benefit from clarity about their respective rights and obligations.[258] Yet in the decade since that question was first posed, courts have reached inconsistent conclusions about the priority of funding arrangements in bankruptcy and other contexts where multiple parties claim rights to litigation proceeds.[259]

This inconsistency stems in part from a failure to fully utilize existing commercial law frameworks.[260] Article 9 of the Uniform Commercial Code already provides a comprehensive system for establishing and ordering competing claims to personal property, including litigation proceeds. By understanding how Article 9 applies to funding arrangements and taking appropriate steps like filing UCC-1 financing statements, parties can achieve greater predictability without waiting for new regulation.[261] Section A of this Part contends that litigation financing agreements fall firmly within Article 9's orbit.[262] With litigating financ-

---

[256] Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 721 (2014).

[257] *See supra* notes 143–160 and accompanying text.

[258] *See supra* notes 161–163 and accompanying text.

[259] *E.g.*, *In re* Andrade, Nos. 10-42877, 07-46595, 2010 WL 5347535, at *2 (Bankr. E.D.N.Y. Dec. 21, 2010); *see also* Dunlap–McCuller v. Riese Org., No. 87 CIV. 3961, 1995 WL 42241, at *1 (S.D.N.Y. July 18, 1995); *In re* Mucelli, 21 B.R. 601, 604 (Bankr. S.D.N.Y. 1982).

[260] *See infra* notes 315–341 and accompanying text.

[261] Enhancing payment security might also help reduce the pressure on plaintiffs' attorneys to sign a side contract with funders that guarantees priority to payment out of litigation proceeds. *See* Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 827 (2022) (arguing that "too little attention has been paid to the fact that funders seek to bind lawyers with agreements intended to protect the funder's interest in receiving their property held by the lawyer after the resolution of their clients' matters," and explaining that "[t]his is especially true in the case of consumer legal finance, where the client may not fully appreciate the acknowledgements and side contracts that lawyers are asked to sign at the same time the client contracts with the funder").

[262] *See infra* notes 265–313 and accompanying text.

ing agreements entrenched into UCC purview, Section B of this Part charts a path for clarifying litigation funders' priority in the claims process.[263]

A. Litigation Finance as an Article 9 Security Interest

The application of Article 9 of the UCC can be easily overlooked.[264] Article 9 is often the domain of specialized practice, meaning that "[a]ttorneys who practice outside the commercial law or bankruptcy realms may not realize the protection that Article 9 offers and may not have taken any affirmative steps to comply with the UCC's requirements."[265] Because of its broad application to commercial transactions, however, Article 9 applies more often than parties realize. Accordingly, failing to understand when and how it comes into play can mean that funders are not able to take advantage of the priority in proceeds that the law grants to them.[266]

Article 9 of the Uniform Commercial Code governs secured transactions in personal property.[267] It provides a comprehensive framework for the creation, perfection, and priority of security interests in a wide range of assets, from tangible goods to intangible rights (such as, for example, the right to sue or the right to be paid from a settlement).[268] Likewise, Article 9 applies to the sale of certain payment rights, recognizing that the sale of a payment right looks very similar in essence to the use of such payment rights as collateral.[269]

No particular language or "magic words" are necessary in an Article 9 transaction.[270] Instead, the comments to Article 9 provide that it will apply "regardless of the form of the transaction or the name that parties have given to

---

[263] *See infra* notes 315–341 and accompanying text.

[264] *See* Anthony J. Sebok, *Some Realism About Litigation Finance* (Cardozo Legal Stud. Rsch. Paper No. 2025-25) (unpublished manuscript at 42), https://ssrn.com/abstract=5634370 [perma.cc/3T84-MDB8] ("[I]t should be noted the U.C.C.'s terminology does not reflect how laypersons and even many lawyers use terms like 'debt' and 'collateral.'"); Kenneth C. Kettering, *True Sale of Receivables: A Purposive Analysis*, 16 AM. BANKR. INST. L. REV. 511, 515 (2008) (explaining that "the definition of fundamental terms of Article 9 to do double duty, for reasons of drafting efficiency").

[265] Cassandra Burke Robertson & Jesse Wynn, *Untangling Attorney Retainers from Creditor Claims*, 12 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 142, 155 (2021).

[266] Analogously, lawyers often do not realize that they likely have a perfected security interest in the money fronted by client retainers and are therefore unable to effectively assert their claim for priority. *See id.* at 159 (citing Hadassah v. Schwartz, 966 N.E.2d 298 (Ohio App. 1st Dist. 2011) (acknowledging the potential applicability of Article 9 but concluded—likely erroneously—that the lawyers had failed to comply with its provisions)).

[267] U.C.C. § 9-109(a)(1) (A.L.I. & UNIF. L. COMM'N 2024).

[268] *Id.*; *id.* § 9-102(a)(12) (defining terms, including types of collateral).

[269] *Id.* § 9-109(a)(3) (providing that Article 9 will apply to "a sale of accounts, chattel paper, payment intangibles, or promissory notes").

[270] *See, e.g.*, Silver Creek Supply v. Powell, 521 N.E.2d 828, 832 (Ohio Ct. App. 1987) ("The creation of a security interest does not mandate the usage of a form or document so entitled, nor does it require any magical recitation of language to establish the existence of a security interest.").

it."[271] As long as the transaction offers "an interest in personal property . . . which secures payment or a performance of an obligation," it qualifies as a security interest under the UCC.[272] The definition encompasses many litigation funding agreements.[273]

Attorneys and funders possessing a passing familiarity with Article 9 may raise concerns about whether applying Article 9 necessarily means treating litigation funding as a loan, rather than an asset purchase—one of the key areas of disagreement on the regulatory front.[274] Nevertheless, this should not discourage parties from seeking the benefit of compliance with the UCC for several reasons. First, as discussed in Subsection 1, some funding transactions undisputedly fit under the Article 9 framework.[275] Second, even where the characterization is more arguable, the funding transaction may share enough characteristics with secured lending that the "loan" label may fit, even if the contingent and non-recourse nature of the transaction otherwise make lending regulations inapt. Third, if the transaction would be better characterized as a purchase of rights, it may well qualify as the purchase of a "payment intangible"—which is itself treated as a security interest under Article 9 even when the underlying transaction is not characterized as a loan at all.

1. The Easy Inclusions: Secured Lending and Portfolio Finance

Some transactions explicitly fall within Article 9's ambit. The easiest of these situations is where a funder lends money to a party who has a claim for breach of contract and secures repayment of the loan by taking a security interest in that breach-of-contract claim.[276] This scenario was explicitly included under the Article 9 framework even before Article 9's 1998 rewrite, and even before litigation funding became more broadly available in the twenty-first century; the right to pursue the lawsuit is considered personal property (specifically, a "general intangible" that can be subject to an Article 9 security interest.[277] Commercial entities have long needed the occasional loan to support

[271] U.C.C. § 9-109 cmt. 2.

[272] *Id* § 1-201(35); *see also id.* § 9-109(d) (offering certain exceptions not relevant here).

[273] § 1-201(35). Personal property, importantly, can include both the cause of action itself and a right to payment that arises when the cause of action is settled.

[274] *See supra* notes 297–301 and accompanying text.

[275] *See infra* notes 276–289 and accompanying text.

[276] *See, e.g.*, *In re* Bell Fuel Corp., 99 B.R. 602, 607 (Bankr. E.D. Pa. 1989), *aff'd sub nom.*, Meridian Bank v. Bell Fuel Corp., 891 F.2d 281 (3d Cir. 1989), *aff'd sub nom.*, Appeal of Off. Creditors' Comm. of Bell Fuel Corp., 891 F.2d 282 (3d Cir. 1989) (holding that a breach-of-contract lawsuit is a chose in action that can be subject to a security interest in general intangibles); Corcoran v. Land O'Lakes, Inc., 39 F. Supp. 2d 1139, 1147–48 (N.D. Iowa 1999) (holding that breach-of-contract claims can be collateral for loans secured by anticipated lawsuit proceeds).

[277] *In re Bell Fuel*, 99 B.R. at 607.

litigation activities, and Article 9 allowed for it.[278] It does not matter whether the loan is recourse or non-recourse (that is, whether or not the client would have any obligation to repay if no lawsuit proceeds were realized): Article 9 incorporates both types of loans.[279]

The 1998 revision of Article 9 drew security interests in "commercial tort claims" within the scope of the UCC.[280] Commercial tort claims are defined as tort claims in which either (1) "the claimant is an organization" or (2) the claimant is an individual, but the claim "arose in the course of the claimant's business or profession" but "does not include damages arising out of personal injury to or the death of an individual."[281] The UCC originally excluded all tort claims because "at the time the UCC was initially drafted, they were considered to be 'noncommercial assets inappropriate for inclusion as collateral within the scope of a commercial financing statute.'"[282] When it became clear that certain tort claims, such as patent infringement cases or large fraud cases, were indeed commercial assets, the Code was revised to include them.[283] Unlike breach-of-contract claims, however, which may be swept up as collateral under the larger heading of "general intangibles," commercial tort claims must be identified explicitly—meaning that the security interest in commercial tort claims will not attach automatically to a pre-existing interest.[284]

---

[278] *See* First Am. Bank Valley v. Hegstrom Co., 551 N.W.2d 288, 292 (N.D. 1996) ("Courts uniformly hold that, under the UCC, proceeds of an anticipated recovery from an impending lawsuit constitute general intangibles," and holding that "[l]ogically, the proceeds of a resulting settlement agreement are also considered general intangibles").

[279] *See, e.g.*, *In re* Com. Money Ctr., Inc., 350 B.R. 465, 488 (B.A.P. 9th Cir. 2006) (concluding that "the transactions between NetBank and Debtor are not sales but are secured, non-recourse loans instead" and holding that NetBank had a valid, though unperfected, security interest in Debtor's payment streams); Kettering, *supra* note 264, at 552 ("By ancient tradition, a pawn of goods is a nonrecourse loan by the pawnbroker to the customer, with strict foreclosure on the maturity date if the pledge has not been redeemed.").

[280] *See* Michael Reese, *The Use of Legal Malpractice Claims as Security Under the UCC Revised Article 9*, 20 REV. LITIG. 529, 532 (2001) ("Formerly, Article 9 excluded from its scope 'a transfer in whole or in part of any claim arising out of tort.' That exclusion was narrowed during revisions, when the drafters specifically excepted commercial tort claims from the exclusion." (footnote omitted) (quoting U.C.C. § 9-104(k) (A.L.I. & UNIF. L. COMM'N 1972))).

[281] U.C.C. § 9-102(a)(13) (A.L.I. & UNIF. L. COMM'N 2024).

[282] *In re* Shangin, No. A97-00723-DMD, 2007 WL 2903020, at *3 n.14 (Bankr. D. Alaska Oct. 2, 2007) (quoting Harold R. Weinberg, *They Came from "Beyond the Pale": Security Interests in Tort Claims,* 83 KY. L.J. 443, 444 (1995)).

[283] *Id.*; *see also* Weinberg, *supra* note 282, at 443, 444 n.2 ("According to Professor Grant Gilmore, a principal drafter of Article Nine, the extent to which tort claims were actually used as collateral was never investigated. The drafters were told or assumed they were not so used.").

[284] *See, e.g.*, *In re* EPD Inv. Co., LLC, No. 10-BK-62208, 2020 WL 6937351, at *26 (Bankr. C.D. Cal. Oct. 29, 2020) ("Even if a security agreement could attach to after-acquired commercial tort claims (which it cannot), a description such as 'all tort claims arising from actions or inactions taken by Kirkland' would be necessary in order for the security interest to attach."); *In re* E. Coast Custom Coaches, Inc., 624 B.R. 390, 399 (Bankr. E.D. Va. 2020) (explaining that after-acquired collateral clauses do not apply to commercial tort claims). Thus, for example, the result in a case like *Claire*

Portfolio lending and investment to law firms similarly fall easily within Article 9's ambit. When an attorney or law firm is the counterparty, the litigation financer isn't taking an interest directly in the lawsuit itself, but rather in the law firm's right to proceeds of the lawsuit (or, more commonly, the proceeds of a portfolio of lawsuits).[285] Under the Article 9 framework, the attorney's rights to payment are considered "accounts,"—that is, "a right to payment of a monetary obligation, whether or not earned by performance . . . for services rendered or to be rendered."[286]

Thus, when the counterparty is the attorney or law firm, the loan collateral will nearly always be considered an "account" that falls within Article 9.[287] Importantly, for Article 9 purposes, it does not matter whether the financing deal is structured as a loan or a sale—both the use of payment rights as collateral and the sale of those payment rights are considered to be Article 9 transactions.[288] Because both types of transactions look very similar from the outside and give rise to similar risks (especially the risk that competing creditors may be misled by the existence of a secret interest in the right to payment), both transactions are treated similarly under Article 9.[289]

Murray, Inc. v. Reed would still be good law—a breach of contract claim arising after a security interest in "general intangibles" would attach automatically, but a fraud claim arising from the same facts would not, because the commercial tort claim must be separately identified. *See* 656 A.2d 822, 824 (N.H. 1995) (holding that a tort claim is neither transferable under the UCC or Massachusetts law); Reese, *supra* note 280, at 536 ("The result under the revised Article 9 would have been the same because the alleged tort occurred after the security agreement was signed. No security interest in the alleged tort claim would have attached under the after-acquired property clause.").

[285] The situation may be different if the portfolio finance involves the direct participation of clients as parties to the transaction. *See* Steinitz, *supra* note 118, at 1109 (explaining that with portfolio financing, "funders often contract directly with the law firm and plaintiffs may not even be aware that their cases are being funded" and "may therefore not be aware of salient features of their case such as the resulting conflicts of interest and how the interest formula may affect their lawyers' recommendations on whether, when, and for how much to settle" (footnote omitted)).

[286] U.C.C. § 9-102(a)(2) (A.L.I. & UNIF. L. COMM'N 2024); Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 1207, 1230 ("[T]here appears to be a consensus that an unmatured legal fee, when it is factored, is an "account" under U.C.C. section 9-102.")

[287] *See* ROY D. SIMON JR., SIMON'S N.Y. RULES OF PROF. CONDUCT § 1.8:48 (2024 ed.) (stating that a "less visible category of the litigation funding business advances funds directly to law firms, for all kinds of plaintiff-side litigation, secured by the law firm's accounts receivable, including the proceeds of all or specified lawsuits the firm is prosecuting" before concluding that "New York courts have consistently held that these arrangements do not violate the prohibition on fee sharing with nonlawyers").

[288] U.C.C. § 9-109(a)(3) (providing that "a sale of accounts, chattel paper, payment intangibles, or promissory notes" falls within the scope of Article 9).

[289] *See* Octagon Gas Sys., Inc. v. Rimmer, 995 F.2d 948, 954 (10th Cir. 1993) ("Although Article 9 applies mainly to transactions intended to create security interests, it also applies to sales of accounts because sales of wholly intangible interests in accounts create the same risks of secret liens inherent in secured transactions." (citation omitted)); Dan T. Coenen, *Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform*, 45 VAND. L. REV. 1061, 1073–74 (1992) (explaining that the Code's drafters "extended Article Nine's rules of attachment, perfection, and priorities not only to *collateral* transfers, but also to *outright sales* of accounts," in part because "they saw the distinction

2. The Exclusions: Non-Commercial Tort Claims

Just as there are some easy cases for inclusion in Article 9, there are also easy cases for exclusion. Article 9 of the UCC is focused on commercial finance. Consequently, consumer legal finance will not fall under the Article 9 umbrella. Tort claims that do not fall within the "commercial tort claim" definition remain outside the Article 9 purview.[290] By definition, any claim involving personal injury or death cannot qualify as a commercial tort claim, even if it arises in the course of an individual's commercial activity.[291]

Nevertheless, it is still important to note that this exclusion ends as soon as the claim is settled even if non-commercial tort cases are excluded from Article 9.[292] The comments to Article 9 clarify that the right to payment under a settlement agreement should be treated differently; such a right to payment is characterized as a "payment intangible."[293] As with accounts discussed above, both the sale of payment intangibles and their use as collateral would be considered Article 9 transactions. Thus, while a security interest in a personal-injury claim would not be an Article 9 transaction, the sale of payment rights based on that settlement, or a loan taken out against that settlement, would fall under Article 9.[294]

Characterization as a non-Article 9 transaction may make it easier for funders to argue that the transaction was an assignment of lawsuit proceeds and not a secured loan—which in turn may make it easier to avoid state usury law.[295] But

between account sales and account security transfers as murky in many cases" and were concerned about the possibility of "'secret interest[s]'" (citation omitted)).

[290] U.C.C. § 9-109(d)(12) (excluding "an assignment of a claim arising in tort, other than a commercial tort claim"). Even with this exclusion, personal-injury tort claims can still serve as collateral, but "a consumer financer wishing to encumber a personal injury claim would have to do so under extra-Code assignment law." Harold R. Weinberg, *Tort Claims as Collateral: Impact on Consumer Finance*, 49 CONSUMER FIN. L.Q. REP. 153, 161–62 (1995); *see also In re* Webb, 187 B.R. 221, 228 (Bankr. E.D. Tenn. 1995) (holding that even though the assignment of tort claim was excluded from UCC and there was therefore no requirement to record the assignment, the interest would not be effective against a bankruptcy trustee unless notice of the assignment was given).

[291] U.C.C. § 9-102(a)(13) (A.L.I. & UNIF. L. COMM'N 2024).

[292] *Id.* § 9-109 cmt. 15; *see also* Reese, *supra* note 280, at 532 ("In addition, the revised Article 9 clearly contemplates that a security interest in the proceeds of a tort claim is conceptually distinct from one in the tort claim itself." (footnote omitted)).

[293] *See* U.C.C. § 9-109 cmt. 15 ("Note that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and ceases to be a claim arising in tort.").

[294] *See* Avraham et al., *supra* note 124, at 214 (noting that post-settlement litigation funding raises different risks from pre-settlement funding, and proposing that post-settlement funding "be treated like ordinary loans, with the interest rates subject to applicable state consumer credit regulations").

[295] *See, e.g.*, Ruth v. Cherokee Funding, LLC, 820 S.E.2d 704, 710 (Ga. 2018) (holding that litigation finance transactions are not loans subject to usury law because "repayment is required only upon the occurrence of a contingency"); Fast Trak Inv. Co., LLC v. Sax, 962 F.3d 455, 469 (9th Cir. 2020) (certifying a question to the New York Court of Appeals regarding whether litigation financing agreements would "qualify as a 'loan' or a 'cover for usury' where the obligation of repayment arises

there is a flipside to this: some courts have held that characterization as an assignment of future proceeds "operates as a future lien which only comes into existence when a judgment is entered," meaning that if the client files for bankruptcy before the lawsuit is settled, lawsuit proceeds become the property of the bankruptcy estate and the funder's claim on those proceeds is extinguished.[296]

3. The Harder Cases: Sale of General Intangibles and Commercial Tort Claims

Litigation funders may argue that their transactions are not subject to Article 9 because the underlying transaction is not a secured loan—instead, the client is selling a share of the underlying cause of action.[297] If courts accept that characterization, then this is likely a fair conclusion. Although the scope of Article 9 encompasses the sale of some payment rights, it does not generally encompass the sale of personal property.[298] At least one scholar has recommended treating the sale or full assignment of a commercial tort claim on par with the sale or assignment of accounts and payment intangibles.[299] Nevertheless, under today's jurisprudence, Article 9 still treats them differently.

---

not only upon and from the client's recovery of proceeds from such litigation but also upon and from the attorney's fees the client's lawyer may recover in unrelated litigation").

[296] *In re* Andrade, Nos. 10-42877, 07-46595, 2010 WL 5347535, at *2 (Bankr. E.D.N.Y. Dec. 21, 2010); *see also* Dunlap–McCuller v. Riese Org., No. 87 CIV. 3961, 1995 WL 42241, at *1 (S.D.N.Y. July 18, 1995); *In re* Mucelli, 21 B.R. 601, 604 (Bankr. S.D.N.Y. 1982); WFIC, LLC v. LaBarre, No. 03183 SEPT.TERM 2011, 2013 WL 10871943, at *3 (Pa. Commw. Ct. Nov. 7, 2013) ("[T]he assignment of a payment intangible requires a *current* debtor with an *existing* obligation. The mere likelihood that PDI would receive damages is insufficient"); *In re* Cohen, 305 B.R. 886, 904 (B.A.P. 9th Cir. 2004) ("For a payment intangible to exist, there must be a 'monetary obligation.'. . . Until there is a contractual obligation to pay a judgment, a tort claim cannot be a payment intangible because the required 'monetary obligation' is lacking.").

[297] *See* Shannon, *supra* note 53, at 896 (arguing that "third-party litigation funding transactions should be regulated as investments, not loans").

[298] *See* Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORN. L. REV. 1133, 1168 (2019) (characterizing third-party litigation finance as "the sale of a general intangible" under the UCC). Of course, as noted above, only breach-of-contract claims are properly characterized a general intangibles under the UCC; commercial tort claims are specifically excluded from the definition of general intangibles. *See* U.C.C. § 9-102(a)(42) (A.L.I. & UNIF. L. COMM'N 2024) ("'General intangible' means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims.").

[299] Dan Schechter, *Absolute Assignment of Commercial Tort Claim Is Invalid as Unperfected Security Interest Because Assignee Failed to File Financing Statement*, COMM. FIN. NEWS. (Thomson Reuters), June 20, 2011:

> I would conclude that an outright assignment of a commercial tort claim does not fall within current Article 9 and need not be perfected by the filing of a financing statement. (Of course, an outright assignee of a commercial tort claim would be foolhardy not to file a precautionary financing statement.) However, given that the absolute assignment of a commercial tort claim gives rise to the specter of a secret lien or interest in favor of an undisclosed assignee, it may make sense someday to amend § 9-109(a)(3) to treat

It's far from guaranteed, however, that courts will accept that categorization. Litigation finance has elements in common with both secured loans and with the true sale or assignment of property rights.[300] Professor Victoria Shannon Sahani has set out a strong argument that commercial litigation finance bears little in common with traditional loans: there is no absolute repayment requirement; the funds advanced are non-recourse, meaning that there is no requirement to repay if the case is lost; and "the funder is taking on more risk than" most secured lenders.[301]

Professor Kara Bruce has set out the other side of the argument, arguing that litigation finance bears more in common with secured lending than with the true sale of property, and arguing that "the fact that TPLF arrangements are non-recourse may cause some courts to determine that they are properly characterized as sales."[302] Bruce acknowledges that "the TPLF funder has no rights to recover if the underlying litigation fails, and thereby takes on the ultimate litigation risk."[303] Nonetheless, she points out that generally when property is sold, the buyer takes on the full risk of asset performance, whereas "[w]ith a secured loan . . . the lender's contractual entitlement to payment remains fixed, no matter what happens to the underlying asset."[304] With litigation finance, the funder accepts the risk of loss but not necessarily the risk (or rewards) of fluctuations in value—instead, "to the extent that the litigation is remotely successful, each dollar paid returns to the funder before anyone else," a "risk profile [that] is not clearly inconsistent with a secured loan, as several non-bankruptcy courts have held."[305]

There is also a third possibility: that the transaction is not a loan, but that it nevertheless acts to create a security interest under Article 9. The transaction may look more like a venture capital arrangement, where the financing party accepts the non-recourse risk but also shares in some part of the litigation gains. For example, the funder may take a percentage gain after the claimhold-

---

> commercial tort claims on par with accounts, chattel paper, payment intangibles, and promissory notes.

Id.

[300] *See infra* notes 301–305 and accompanying text.

[301] Shannon, *supra* note 53, at 892–93.

[302] Kara J. Bruce, *The Promise and Peril of Third-Party Litigation Finance in Bankruptcy*, BANKR. L. LETTER (Thomson Reuters), Apr. 2024.

[303] *Id.*

[304] *Id.* Some litigation finance contracts, however, do allow funder to share in the upside through a payment of a percentage of the litigation proceeds or a hybrid model that blends a fixed multiple with a percentage recovery. Marla Decker, *Litigation Finance: Pricing*, LAKE WHILLANS, https://lakewhillans.com/articles/litigation-finance-pricing/ [perma.cc/Z5UH-ZMJP].

[305] Bruce, *supra* note 302; *see also, e.g.*, Echeverria v. Est. of Lindner, 801 N.Y.S.2d 233, No. 018666/2002, 2005 WL 1083704, at *7–*8 (Sup. Ct. Nassau Cnty. Mar. 2, 2005), *judgment entered sub nom.*, Echeverria v. Lindner, No. 018666/02, 2005 WL 6050781 (N.Y. Sup. Ct. Mar. 18, 2005); Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 780–81 (N.C. App. 2008).

er is paid a set amount, or the funder and the claimholder may alternate taking the next dollar out until a threshold is reached. In this case, the underlying transaction wouldn't satisfy the traditional conception of a loan. To the extent that the funder is taking an interest in the litigation proceeds to secure payment of the underlying agreement, Article 9 would define the arrangement as a security interest regardless of whether the funding agreement was loan, joint venture, or other arrangement.[306]

The distinction was raised in the District of New Mexico in 2011 with the court in *In re K-Ram, Inc.* landing on the "secured loan" interpretation. A real-estate developer filed a slander-of-title claim to clear the title of a lot it was developing and then declared bankruptcy some time thereafter.[307] The bankruptcy court characterized the claim as a commercial tort claim, and it noted that a funder "claims that it is not merely a creditor holding an unperfected security interest" but rather "claims to be the owner of the asset by way of the Assignment."[308] The court, somewhat questionably,[309] held that Article 9 covers even the absolute assignment of commercial tort claims.[310] The court was on firmer ground, however, in the alternative holding that "even if Article 9 does not apply to 'absolute' assignments of commercial tort claims . . . the assignment in this case was not absolute" and should be characterized as a secured loan because the "Debtor retained complete control over the asset," thus "suggest[ing] that it was an assignment for security."[311]

Finally, this is an area where differences in state law will affect the characterization. In some states, but not others, loans require an unconditional obligation to repay.[312] In these states, nonrecourse transactions are less likely to be treated as loans.[313]

---

[306] *See* U.C.C. § 9-109(a)(1) (A.L.I. & UNIF. L. COMM'N 2024) (applying Article 9 to "a transaction, *regardless of its form*, that creates a security interest in personal property or fixtures by contract" (emphasis added)); *id.* § 1-201(35) (defining a security interest as "an interest in personal property or fixtures which secures payment or performance of an obligation").

[307] *In re* K-Ram, Inc., 451 B.R. 154, 165 (Bankr. D.N.M. 2011).

[308] *Id.*

[309] Schechter, *supra* note 299 (discussing *In re K-Ram*, and explaining that "the court may have misconstrued the statute: an outright assignee of a commercial tort claim is apparently not required to file a financing statement").

[310] *In re K-Ram*, 451 B.R. at 166 ("[A]ssignments of commercial tort claims are subject to Article 9.").

[311] *Id.* at 166, 169.

[312] *See, e.g.*, Odell v. Legal Bucks, LLC, 665 S.E.2d 767, 776–77 (N.C. Ct. App. 2008) (holding that the transaction at issue was not a loan, because under North Carolina law loans carry an unconditional obligation to repay); Oasis Legal Fin. Grp., LLC v. Suthers, 369 P.3d 631, 635 (Colo. App. 2013), *aff'd sub nom.*, Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400 (Colo. 2015) (distinguishing the case from *Odell* because "in Colorado, a loan does not require an unconditional obligation to repay").

[313] *Compare* Cash4Cases, Inc. v. Brunetti, 90 N.Y.S.3d 154, 155 (Sup. Ct. 2018) ("Assignment agreements such as the agreement at issue here are not loans, because the repayment of principal is

B. Ensuring Funder Priority in Proceeds

The application of Article 9 to litigation funding arrangements carries significant implications for funders seeking to secure their priority in lawsuit proceeds. First, funders must be aware that other parties could have an interest—possibly an interest with priority—in the proceeds of litigation. Second, funders should protect their priority by filing a UCC-1 financing statement. Such a filing would protect the funder's interest in the event that a court found the transaction to be a secured loan and would carry little downside otherwise.[314]

1. Be Aware of Competing Claimants

Funders are certainly aware of some competing interests in lawsuit proceeds, but many do not always understand of the full scope of potential interests. The first and most obvious interest belongs to the attorneys litigating the case, who likely have a charging lien on the lawsuit proceeds.[315] Funding contracts typically take the attorney's interest into account in the contracting process.[316] One potential area of concern, however, may be the question of what happens if the client fires the first attorney and hires new counsel after having signed a third-party funding agreement—as in fact happened in the Englewood case.[317]

---

entirely contingent on the success of the underlying lawsuit."), Kelly, Grossman & Flanigan, LLP v. Quick Cash, Inc., 950 N.Y.S.2d 723, at *6 (Sup. Ct. 2012) (unpublished table decision) ("[T]he transactions between the parties create ownership interests in proceeds of claims, contingent on the actual existence of any proceeds . . . . [U]nder the circumstances, usury does not apply."); MoneyForLawsuits V LP v. Rowe, No. 10-CV-11537, 2012 WL 1068171, at *2, *12 (E.D. Mich. Jan. 23, 2012) (applying New York law), *aff'd sub nom.*, Money for Lawsuits V LP v. Rowe, 570 F. App'x 442 (6th Cir. 2014), *and* Lynx Strategies, LLC v. Ferreira, 957 N.Y.S.2d 636, at *2 (Sup. Ct. N.Y. Cnty. July 6, 2010) (unpublished table decision) ("The concept of usury applies to loans, which are typically paid at a fixed or variable rate over a term. The instant transaction, by contrast, is an ownership interest in proceeds for a claim, contingent on the actual existence of any proceeds"), *with* Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 410 (Colo. 2015) (concluding that a litigation finance agreement was a loan where "the tort plaintiffs continue to control the pending litigation even though they are purportedly selling their rights to a portion of the proceeds from that litigation," and "the agreements provide [the funders] only with the rights that any creditor would have to receive payment of the amount due").

[314] *See In re* Harvest Sherwood Food Distribs., Inc., No. 25-80109, 2025 WL 3178864, at *9 (Bankr. N.D. Tex. Nov. 13, 2025) (holding that a litigation funder lacked priority in bankruptcy "in the face of no public lien, no UCC financing statement, and no other public filing that might put the universe on notice of" their potential interest in litigation proceeds).

[315] *See, e.g.*, Analisa Salon, Ltd. v. Elide Properties, LLC, 61 N.Y.S.3d 106, 108 (Sup. Ct. 2017) (holding that the attorney's charging lien "is created by operation of law and does not require notice to bring it into existence" and that it "attaches at the time the action is commenced" (citations omitted)).

[316] *See* Minott v. Lee Alan Bryant Health Care Facilities, Inc., 998 N.E.2d 273, 278 (Ind. App. 2013) (holding that "an attorney's lien . . . take[s] priority over the rights of other creditors" (citing *In re* Marriage of Hollingsworth, 671 N.E.2d 165, 168 (Ind. App. 1996))).

[317] *See supra* note 7 and accompanying text.

Although state law can vary, both the first and second attorneys may have charging liens that outrank the funder's interest.[318]

Secured creditors can also have non-obvious claims to lawsuit proceeds. As discussed above, breach-of-contract claims are considered "general intangibles" for Article 9 purposes, and such claims need not have matured prior to the execution of a valid security agreement.[319] When the contract claim matures, the security interest attaches to it automatically, and priority in the lawsuit proceeds would generally go to the secured party who was first to file a UCC-1 financing statement or otherwise perfect their interest.[320] Thus, a litigation funder considering financing a company's breach-of-contract action would be well advised to search the filing system to ensure that there is no secured party with a prior interest in general intangibles. If there is one, the funder should either seek a subordination agreement from the secured lender or decline to make the investment.[321]

In some cases, competing liens may arise through fraud. Yet again, Article 9's reliance on public filing can help parties avoid this risk. In one case, for example, an attorney (who was ultimately convicted of felony securities fraud) "sold investors the rights to recoveries of certain lawsuits that had already been pledged to other investors, transferred to other entities, or been concluded."[322] One of the fundamental purposes of Article 9 of the Uniform Commercial Code, after all, is to eliminate hidden liens and enhance predictability in secured transactions.[323] This transparency guards against both fraud and mistake, and would have prevented investors from purchasing the previously sold interests in a case like this.

Finally, litigation funders should be aware of the risk of bankruptcy. Bankruptcy trustees and debtors-in-possession have a duty to maximize the funds available to the debtor's general creditors and are therefore incentivized argue that litigation funding agreements are unperfected secured loans, as the

---

318 Froelich v. Graham, 80 S.W.3d 360, 363 (Ark. 2002) (holding that an attorney's lien "takes priority over debts that the attorney's client owes to other creditors even if the creditor's claim predates the assertion of a right to enforce the attorney's lien").

319 *See supra* note 277 and accompanying text.

320 U.C.C. § 9-322(a)(1) (A.L.I. & UNIF. L. COMM'N 2024); Robertson & Wynn, *supra* note 265, at 157 ("The general priority rule under Article 9 for competing security interests is 'the first to file or perfect.'"); Corcoran v. Land O'Lakes, Inc., 39 F. Supp. 2d 1139, 1149 (N.D. Iowa 1999) (holding that Norwest's security interest in the Corcorans' "general intangibles" meant that "Norwest obtained a first priority lien, superior even to the Corcorans' interest, in the proceeds of any judgment from the Corcorans' breach-of-contract claim against Land O' Lakes").

321 Robert K. Rasmussen, *Temporal Priority*, 20 BERKELEY BUS. L.J. 53, 57 (2023) ("A creditor that has executed a subordination agreement with another creditor will see that agreement enforced. And a creditor that has structural priority over another creditor to the assets of a part of a corporate group will enjoy the value of those assets first.").

322 *In re* Birnbaum, 206 A.D.3d 122, 123 (N.Y. App. Div. 2022) (per curium).

323 *See* Coenen, *supra* note 289, at 1073–74 (noting that the Code's drafters were concerned about the possibility of "secret interest[s]").

trustee successfully argued in *In re Reviss*.[324] The case exemplifies the potential pitfalls for funders who neglect to properly perfect their security interests: unperfected claims are subject to the trustee's strong-arm policies, wiping away unperfected liens and adding the litigation proceeds to the bankruptcy estate for the benefit of unsecured creditors.[325] Ultimately, the funder's failure to file a UCC-1 financing statement resulted in the loss of its claim to the proceeds.[326]

Another recent decision similarly illustrates the consequences of this analysis. In the case of *In re Harvest Sherwood Food Distributors*, Burford Capital affiliates had provided $35 million to fund antitrust litigation against major food producers.[327] The Capital Provision Agreement contained numerous provisions that the funder believed would protect its interest: a "waterfall" directing that the first $35 million in proceeds would go to the funder; a requirement that proceeds be paid to a "Payment Agent" rather than directly to the funded parties; and language stating that any proceeds received by the funded parties would be held "in trust" for the funder's benefit.[328] Yet the court held that none of these provisions created an enforceable priority interest.

The court rejected the funder's express trust theory because the agreement expressly disclaimed any fiduciary relationship, the funded parties would themselves be beneficiaries of the alleged trust (disqualifying them as trustees under New York law), and there had been no "actual delivery" of a trust res—since the litigation proceeds did not yet exist.[329] The court likewise rejected the constructive trust theory, emphasizing that constructive trusts are "highly disfavored" in bankruptcy and require a showing of unjust enrichment—which Burford had not pleaded and which cannot exist where a written contract governs the parties' relationship.[330] As for the "subordination agreement" theory, the court noted that a true subordination agreement requires a creditor to agree to subordinate its rights, yet "no creditor signed the document to effectuate a subordination of its rights, and the document was not recorded in any public record."[331]

---

[324] *See* 628 B.R. 386, 402 (Bankr. E.D.N.Y. 2021) (holding that the litigation financier had only an unsecured claim that was wiped out in bankruptcy "but that is all that it holds—not the proceeds, and not a claim secured by those proceeds, but an unsecured claim to be administered in the course of the bankruptcy case" (citing *In re* Andrade, Nos. 10-42877, 07-46595, 2010 WL 5347535, at *3 (Bankr. E.D.N.Y. Dec. 21, 2010))).

[325] 11 U.S.C. § 544; *see* Heather L. Ries, *Unperfected Liens Can Leave Creditor's Claim Unsecured*, FOX ROTHSCHILD (Jan. 19, 2012), https://www.foxrothschild.com/publications/unperfected-liens-can-leave-creditors-claim-unsecured [perma.cc/79PP-NPW5] ("In bankruptcy a trustee or debtor-in-possession can avoid an unperfected lien, leaving the creditor's claim unsecured.").

[326] *See supra* notes 317–325 and accompanying text.

[327] *In re* Harvest Sherwood Food Distribs., Inc., No. 25-80109, 2025 WL 3178864, *3 (Bankr. N.D. Tex. Nov. 13, 2025).

[328] *Id*. at *3–4.

[329] *Id*. at *9.

[330] Id. at *10.

[331] *Id*. at *8.

Ultimately, the court concluded that the funder "entered into an agreement that carried material credit risk and took no precautions to perfect or otherwise elevate its purported interest."[332] The funding agreement was "not complicated or ambiguous"—it was simply "a contract to provide the Debtors with funds in exchange for a promise that future proceeds of litigation would be remitted" to the funder.[333] As the court explained, "[t]his results in a simple unsecured contract claim."[334] The court further noted that the funder had initially fought to keep the agreement under seal, observing that "[i]t would be an entirely novel legal principle to hold that debtors could subordinate estate stakeholders with secret agreements."[335]

2. File to Ensure Bankruptcy Protection and Funder Priority

The bankruptcy outcome also offers a path forward for litigation funders who want to be sure of priority, even in bankruptcy: that is, even when uncertainty exists about a transaction's categorization under Article 9, it is prudent to file a UCC-1 financing statement as a precautionary measure. This approach is particularly vital because courts may characterize the transaction differently than the parties intended. As discussed above, a court might determine that a transaction structured as a sale of litigation rights is actually a non-recourse loan with a security interest.[336]

Filing can protect the funder's interest in a variety of scenarios even beyond a court's decision to re-characterize a funding transaction as a secured loan. As noted above, the sale of accounts qualifies as an Article 9 transaction as well—and again, a seller can ensure priority over later claimants by filing a UCC-1 financing statement.[337] The sale of a payment intangible (as with the sale of an interest in an existing settlement agreement) is covered by Article 9, but is considered to be "automatically . . . perfected," meaning that the buyer would have priority in proceeds even without such a filing.[338] But the use of the settlement agreement as collateral for a loan, though also covered by Article 9, would not be automatically perfected—meaning that a filing would be required to protect the funder's right to priority in the proceeds.[339] Again, the

---

[332] *Id*. at *15.
[333] *Id*.
[334] *Id*.
[335] *Id*.
[336] *See supra* notes 297–313 and accompanying text.
[337] U.C.C. § 9-310(a) (A.L.I. & UNIF. L. COMM'N 2024).
[338] *Id.* § 9-309 cmt. 4.
[339] *Id.*; *see also In re* Cohen, 305 B.R. 886, 904 (B.A.P. 9th Cir. 2004) (holding that in a pre-settlement litigation finance agreement "the transaction created a security interest governed by Revised Article 9 and did not qualify for any of the automatic perfection provisions," so that "the absence of a filed UCC financing statement has the consequence that appellants' security interest in the settlement proceeds was unperfected and vulnerable to § 544 'strong-arm' avoidance").

risk that a court might characterize the transaction as a secured loan makes it worth making a precautionary filing.

Finally, there is little downside to filing. First, and most importantly, the funder would not be making an admission as to the status of the transaction or agreeing that it should be viewed as a loan.[340] Second, filing is relatively inexpensive and straightforward, and it provides clear notice to other potential creditors.[341] Although there may be concerns about disclosing the existence of litigation funding, the UCC-1 financing statement itself does not require detailed information about the underlying transaction. Filing a financing statement—whether the funder believes that one is needed or not—is therefore the most important thing that a funder can do to protect itself. This precautionary step can help ensure priority in proceeds and avoid potential losses in bankruptcy or other creditor disputes.

The *Harvest Sherwood Food Distributors* decision underscores the asymmetry between the minimal cost of filing and the expensive consequences of failing to do so.[342] There, Burford Capital's counsel had drafted a Capital Provision Agreement numerous provisions designed to ensure the funder's priority in litigation proceeds.[343] However, none of these contractual mechanisms protected the funder in bankruptcy.[344] As one bankruptcy judge observed, litigation funders "have multiple tools available which will insure their recovery at some level if a case is successful" that were not used in the case.[345] For the cost of a $12 to $20 filing fee, the funder could have perfected a security interest and avoided litigating—and losing—a declaratory judgment action over a $35 million investment.

[340] *See* U.C.C. § 9-505 cmt. 2 (stating that the "precautionary filing" of a U.C.C. financing statement under Article 9 does not affect "the substantive question of classification of the transaction"); Donald K.S. Peterson, *Hidden Security Interests: A Secured Transaction When You Least Expect It*, 10 T.M. COOLEY J. PRAC. & CLINICAL L. 33, 59 (2007) ("Article 9, under § 9-505, permits a party to file a precautionary financing statement. Again, rather than acknowledging that a transaction is a secured transaction under Article 9, the form puts the world on notice that the consignor is protected regardless of how a court rules.").

[341] *See, e.g.*, OHIO REV. CODE ANN.§ 1309.525(A) (LexisNexis 2025) (providing that in Ohio "the fee for filing and indexing a [UCC-1 financing statement] is twelve dollars"); *File a UCC Financing Statement*, N.Y. DEP'T OF STATE, https://dos.ny.gov/file-ucc-financing-statement [perma.cc/HYM9-2V6H] (explaining that the cost of online filing in New York is $20).

[342] *In re* Harvest Sherwood Food Distribs., Inc., No. 25-80109, 2025 WL 3178864 (Bankr. N.D. Tex. Nov. 13, 2025).

[343] *Id.* at *3–4.

[344] *Id.* at *15.

[345] Meredith Jury, *Texas Bankruptcy Court Rejects Arguments of Litigation Funder That It Held Rights Superior to Those of Debtors' Secured Lenders,* COM. FIN. NEWSL. (Thomson Reuters), Dec. 1, 2025.

CONCLUSION

The plaintiffs in the excessive force case against the City of Englewood, from their initial cash advances to the contested distribution of their settlement proceeds, experienced both the promise and the challenges of litigation finance in the American legal system.[346] Their case underscores the need for improvements to the litigation funding ecosystem—improvements that can enhance predictability and fairness without necessitating uniform federal regulation or a one-size-fits-all approach across states.

Indeed, this case highlights several underlying policy issues that states may reasonably approach in different ways. For instance, states may differ in how they balance the need for access to justice against concerns about high-cost cash advances on litigation proceeds. States may also have varying perspectives on the role of litigation finance in cases involving alleged police misconduct or excessive force. Whether the plaintiffs' funding ultimately facilitated accountability for police misconduct or merely prolonged the dispute and impeded settlement is largely a matter of perspective and opinion. Such matters are, and should be, subject to state-level political deliberation.

This Article proposes a path forward that preserves space for state-level policy experimentation while enhancing certainty for all stakeholders. First, courts should adopt a broader interpretation of attorney-client privilege that recognizes funders as agents who facilitate litigation. This approach would protect legitimate communications without compromising the adversarial process or preventing appropriate disclosure of funding arrangements. Second, parties can achieve greater certainty in priority rights by taking advantage of the UCC's existing Article 9 framework for secured transactions. The simple step of filing UCC-1 financing statements could help prevent protracted disputes over settlement proceeds.

These ecosystem improvements aim to enhance the effectiveness and fairness of litigation finance without a complete regulatory overhaul. They recognize that litigation finance reflects deeper changes in civil litigation and access to justice in the United States.[347] As the Englewood case demonstrates, even small changes to litigants' resources and incentives can profoundly affect how cases are litigated, settled, and resolved.[348] Ultimately, optimizing the litigation funding ecosystem is about adapting our legal frameworks to ensure they serve the goals of fairness, efficiency, and access for all.

---

[346] *See supra* notes 1–14 and accompanying text.

[347] *See supra* notes 89–163 and accompanying text.

[348] *See* Engstrom, *supra* note 101, at 125 ("Seemingly small changes to actors' resources and incentives can spark profound changes in our dynamic and interconnected civil litigation environment. These changes will affect not just *how* cases are litigated but also litigation's quality and quantity—and ultimately, its direction and success.").