

Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?

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INTRODUCTION

Americans have become disillusioned with lawyers.¹ Over time, the price of retaining an attorney has risen significantly.² Due to its high prices, one of the most scrutinized legal service is litigation.³ Because of discovery requests and lengthy trials, litigation can last for years and incur significant costs for clients.⁴ To avoid paying such high fees and costs associated with litigation, those who require legal services have begun turning to alternative legal resources.⁵ Lawyers have begun attempting to retain business by providing flexible financing terms other than billable hours.⁶ One of the industries attempting to provide flexible financial terms is the third-party litigation funding industry. Third-party litigation funding companies supply capital to litigators in exchange for a portion of the settlement or other remedy.⁷ Third-party litigation funding is non-recourse, meaning that if the lawsuit fails, the funded party is not required to pay their source of funding after the case.⁸

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1. Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for the Lawyers*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 304, 322 (2017) (stating how a large percentage of the population deliberately avoid lawyers and opt for do it yourself legal service products).

2. Elizabeth Olson, *Higher Fees Increase Law Firm Revenue by 4.1 Percent*, N.Y. TIMES (Aug. 15, 2016), <https://www.nytimes.com/2016/08/16/business/dealbook/higher-fees-increase-law-firm-revenue-by-4-1-percent.html> [<https://perma.cc/RZ44-HRU6>].

3. Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies* (2010), https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf [<https://perma.cc/TVJ9-2SQC>].

4. See Brittany Kauffman, *Study on Estimating the Cost of Litigation Provides Insight into Court Access*, IAALS BLOG <https://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access> [<https://perma.cc/57QP-37KZ>].

5. Meg McEvoy, *Analysis: The Big 4 Is Knocking—Are State Bars Answering?*, BLOOMBERG L. (Sept. 18, 2019), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-the-big-4-is-knocking-are-state-bars-answering> [<https://perma.cc/F4GZ-PGRT>].

6. Sam Skolnik, *Law Firm Sites Talk About Alternative Fees, but Use Appears Thin*, BLOOMBERG L. (June 19, 2019), <https://biglawbusiness.com/law-firm-sites-talk-about-alternative-fees-but-use-appears-thin> [<https://perma.cc/YWC9-BM79>].

7. David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1044 (2016).

8. *Id.*

Third-party litigation funding has become more popular as potential litigants seek to pursue their claims without incurring the high costs.⁹ Even esteemed members of the legal community have begun to take notice and weigh in on litigation funding's viability as a way to tackle civil access to justice issues.¹⁰ Nevertheless, third-party litigation funding's popularity has also come with scrutiny as the U.S. Chamber of Commerce has come out against the ethical implications of the practice.¹¹ The Chamber of Commerce has brought up ancient common law doctrines of champerty and maintenance, which bar interference in lawsuits by non-parties.¹² They have also stated that third-party litigation funding contracts violate the *Model Rules of Professional Conduct* with respect to conflicts of interest and fee-splitting.¹³ Some bar associations believe that because third-party litigation funding contracts result in litigants sharing their information and case strategies with a third party, they will result in a waiver of work-product protection and attorney-client privilege.¹⁴

The legal profession is currently shifting. Attorneys and law firms want to provide their clients with flexible and dynamic financing agreements to ensure that their clients are satisfied.¹⁵ The public wants to access legal services at prices that they are capable of paying.¹⁶ Third-party litigation funding alleviates some of the issues associated with litigation prices, but the law regarding litigation funding is currently unintelligible.¹⁷

This Note will address why third-party litigation funding documents are subject to work-product protection. It will then posit that even though some portions of the third-party litigation funding business model may be in opposition to the current *Model Rules*, their transgressions do not harm clients or the legal profession. In addition, due to the current access to civil justice issues in America, the

9. Paul Barrett, *The Business of Litigation Finance is Booming*, BLOOMBERG (May 30, 2017), <https://www.bloomberg.com/news/articles/2017-05-30/the-business-of-litigation-finance-is-booming> [<https://perma.cc/NW54-FZU4>].

10. Dan Packel, *Posner Casts Lot with Litigation Funding Underdog Legalist*, AM. LAW. (June 20, 2019), <https://www.law.com/americanlawyer/2019/06/20/posner-casts-lot-with-litigation-funding-underdog-legalist/> [<https://perma.cc/VB3Z-7JDJ>].

11. Letter from Lisa A. Rickard, President of U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Sec'y of Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. Courts (June 1, 2017).

12. *Id.*

13. *Id.*

14. *Id.*

15. Barry P. Goldberg, "Hybrid" Fee Agreements for Business Litigation, PLAINTIFF MAG., (June 2011) <https://www.plaintiffmagazine.com/recent-issues/item/hybrid-fee-agreements-for-business-litigation> [<https://perma.cc/CW29-HVZF>].

16. Martha Bergmark Editorial, *We Don't Need Fewer Lawyers. We Need Cheaper Ones*, WASH. POST (June 2, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/06/02/we-dont-need-fewer-lawyers-we-need-cheaper-ones/> [<https://perma.cc/PPW8-XBUK>].

17. See MP McQueen, *Inside the Battle Over Litigation Funding Regulation*, N.Y. L.J. (July 12, 2019), <https://www.law.com/newyorklawjournal/2019/07/12/inside-the-battle-over-litigation-funding-regulation/> [<https://perma.cc/24NY-CGBH>].

Model Rules should carve out exceptions in cases of third-party litigation funding, especially when these exceptions condone conduct that adheres to the purpose of the *Model Rules* and further the legal professions goal of providing civil legal services to all.¹⁸

In Part I, this Note will discuss the history of third-party litigation funding in western countries with comparable legal systems to the United States, and the rise of litigation funding within the United States. In Part II, this Note will further discuss the legal and ethical arguments for and against third-party litigation funding in the United States. In Part III, this Note will discuss why third-party litigation funding contracts are protected by work-product privilege. The Note will finally conclude with an argument for why the United States should attempt to assist with the proliferation of third-party litigation funding from a policy perspective.

I. HISTORY OF LITIGATION FUNDING

While third-party litigation funding is a newer business model in the United States, it has been used overseas for decades, where it has been a way for litigants and those seeking international arbitration to secure financing to pursue their claims.¹⁹ Over time, litigation funding has had varying degrees of approval in these countries that have found the practice to be legal. Two of the countries with comparable legal landscapes are Australia and the United Kingdom, both of which have legalized litigation funding.

A. AUSTRALIAN & UNITED KINGDOM LITIGATION FUNDING

In Australia, since 1995, litigation funding has been a way to raise capital specifically for insolvency cases.²⁰ Over time, litigation funding has started to be used by litigants in securities and antitrust class action suits.²¹ Australia's status as a pioneer in the modern litigation funding movement has resulted in its litigation funding organizations being used abroad in countries like South Africa, New Zealand, the United States, and the United Kingdom.²²

Initially, legal professionals in Australia were apprehensive about allowing third party litigation funding.²³ Their primary concerns were that litigation

18. MODEL RULES OF PROF'L CONDUCT pmbl. (2019) [hereinafter MODEL RULES].

19. Michael Legg, Edmond Park, Nicholas Turner & Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia*, 38 N. KY. L. REV. 625, 628 (2011).

20. *Id.*

21. *Id.*

22. *Id.*; see, e.g., John Freund, *Litigation Funding Pops Up in Another South African IP Claim*, LITIG. FIN. J. (June 19, 2019), <https://litigationfinancejournal.com/litigation-funding-pops-another-south-african-ip-claim/> [<https://perma.cc/5NB8-XE3Q>]; Niki Mandow, *Mainzeal and Kiwifruit Cases Show Value of Litigation Funding in NZ*, N.Z. HERALD (Mar. 2019), https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12208428 [<https://perma.cc/UQ4L-B3DN>].

23. Justice Sarah Derrington, Speech to Australian Academy of Law Lecture, Brisbane (Oct. 14, 2018), <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-s-derrington/s-derrington-j-20181004> [<https://perma.cc/QX7Z-HBN6>].

funding was an attack on the traditional method of exercising legal rights, that the changes would foster a litigious culture in Australia, it would change the nature of legal practice as lawyers begin promoting litigation funding, and lastly it was an overreaction to Australian's concerns regarding litigation costs.²⁴ All of these arguments were rebutted. Australia found that the number of class actions grew steadily as opposed to exponentially, and the fear of a change in the status quo within the legal profession did not come to fruition.²⁵

Modern litigation funding in the United Kingdom started in 2002.²⁶ Over time, the United Kingdom's judicial system has looked at litigation funding more favorably. More recently, a United Kingdom court has acknowledged that litigation funding was "accepted and perceived to be in the public interest."²⁷

Before allowing litigation funding, the United Kingdom prohibited the practices due to champerty and maintenance.²⁸ Champerty and maintenance are medieval doctrines created to avoid frivolous litigation.²⁹ This view was dismissed by the United Kingdom over time to reflect the United Kingdom's changing views in policy regarding litigation financing.³⁰

B. LITIGATION FUNDING IN THE UNITED STATES

Litigation funding is newer in the United States than in Australia and the United Kingdom.³¹ Litigation funding in its current state is around a decade old in the United States.³² There are currently two forms of third-party litigation funding: commercial and consumer litigation funding.³³ Consumer litigation funding covers torts and personal injury cases in which unsophisticated parties seek financial assistance to pursue their legal claims.³⁴ In exchange, the litigants agree to provide the funding company with a portion of their remedy.³⁵

24. *Id.*

25. *Id.*

26. Leslie Perrin, *England and Wales*, in THE LAWS. REV., THE THIRD PARTY LITIGATION FUNDING REVIEW 55 (Leslie Perrin ed., 2019), https://thelawreviews.co.uk/digital_assets/d7db7ca7-7471-48d0-a10e-8b15a22b6a46/Third-Party-Litigation-Funding-3rd-edition.pdf [<https://perma.cc/8GCM-ANH6>].

27. *Excalibur Ventures LLC v. Texas Keystone Inc. & Ors* (Rev 2) [2014] EWHC 3436 (Comm) (Oct. 23, 2014).

28. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1278–1279 (2011).

29. *See, e.g., Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 731 N.E.2d 581, 585 (N.Y. 2000); *Osprey, Inc. v. Cabana Ltd. Partnership*, 532 S.E.2d 269, 273 (S.C. 2000).

30. Steintz, *supra* note 28 at 1278–1279.

31. Sean Thompson, Dai Wai Chin Feman & Aaron Katz, United States, in THE LAWS. REV., THE THIRD PARTY LITIGATION FUNDING REVIEW 55 (Leslie Perrin ed., 2019) https://thelawreviews.co.uk/digital_assets/d7db7ca7-7471-48d0-a10e-8b15a22b6a46/Third-Party-Litigation-Funding-3rd-edition.pdf [<https://perma.cc/8GCM-ANH6>].

32. *Id.* at 217.

33. *Id.*

34. *Id.*

35. *Id.* at 218–19.

Commercial litigation funding usually covers sophisticated business entities in legal disputes against other sophisticated parties.³⁶

Over time, to accommodate the organizations that commercial litigation funders were servicing, and to ensure the litigation funding industry collaborated with funded parties and outside counsel, litigation funding organizations created different types of funding and payment structures. One of the more popular funding structures is a portfolio.³⁷ A portfolio usually allows a law firm to receive funding for multiple cases in a variety of practice areas.³⁸ While the return for each individual case is lower, the litigation funding organization has the opportunity to recover from a variety of cases in unrelated areas of law via cross-collateralization.³⁹ These disputes can be over millions of dollars, but the payment structure stays similar to consumer litigation funding, in that the organization assisting in funding the litigation will receive a portion of the remedy.⁴⁰ Litigation funding in the United States has grown quickly, and numerous organizations that started in the United Kingdom and Australia are now funding cases in the United States. Litigation funding in the United States has increased by twenty-nine percent from 2013 to 2017.⁴¹

II. ARGUMENTS FOR AND AGAINST LITIGATION FUNDING IN THE UNITED STATES

While third-party litigation funding in the United States is growing, its current position in the American legal landscape depends on the state in which the plaintiff brings litigation. Some states have banned litigation funding.⁴² In other states, courts have chosen to allow litigation funding, while their bar associations have been apprehensive of the practice.⁴³ Two arguments underpin the current landscape. The first argument stems from the common law doctrines of champerty and maintenance. Second are concerns about the American Bar Association's *Model Rules* related to confidentiality and disclosure, professional independence, and conflict of interests.

36. *Id.* at 217.

37. *Id.* at 218–19.

38. *Id.*

39. *Id.*

40. *Id.*

41. Shari Klevins & Alanna Clair, *Litigation Finance in Today's Legal Industry*, DAILY J. (Jan. 10, 2020), <https://www.dailyjournal.com/articles/355798-litigation-finance-in-today-s-legal-industry> [<https://perma.cc/H4NA-Z4BU>].

42. *See, e.g.*, *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756, 769 (Minn. 2017); *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003).

43. *See, e.g.*, *Kraft v. Mason*, 668 So.2d 679, 683 (Fla. 4th DCA 1996); *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 631 (N.Y. Sup. Ct. 2018). *But see* N.Y. Co. Bar. Ass'n, Committee on Prof'l Ethics, Formal Op. 2018-5 (2018) (stating litigation funding contracts violate the New York prohibition on fee sharing with non-lawyers); Fla. Eth. Op. 00-3 (stating the Florida Bar discourages the use of non-recourse advance funding companies).

A. CHAMPERTY & MAINTENANCE

Champerty and maintenance are medieval doctrines created to avoid frivolous litigation.⁴⁴ Multiple states still have champerty and maintenance laws.⁴⁵ Champerty is “an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.”⁴⁶ Maintenance is defined as “[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else’s litigation.”⁴⁷ On its face, litigation funding is, by definition, champerty *and* maintenance, and thus illegal. Multiple states agree with this reading of champerty and maintenance and have banned litigation funding because of it. One of the states that vehemently opposes any violation of their champerty laws is Minnesota. Minnesota’s seminal case regarding litigation funding is *Maslowski v. Prospect Funding Partners LLC*.⁴⁸ In *Maslowski*, a litigation funding company gave Maslowski \$6,000 to pursue a personal-injury action.⁴⁹ The Minnesota Court of Appeals followed the common law rule against champerty without exception, stating that the champerty prohibition was to discourage “intrusion for the purpose of mere speculation in the troubles of others.”⁵⁰ The court recognized how other states have chosen to stop following champerty laws, but the court charted its own path.⁵¹

Alternatively, some states have more stringent readings of champerty and maintenance, but do not consider litigation funding to be within those boundaries.⁵² An example of one of those states is New York. In New York, the statutory rule is that champerty is illegal.⁵³ However, New York has a safe harbor provision in its statute that allows the assignment of portions of a claim as long as it is above \$500,000.⁵⁴ This safe harbor opens the door for commercial litigation funding, but not consumer litigation funding, which usually only covers claims that range between \$500 and \$100,000.⁵⁵ Even without the safe harbor provision in New York’s champerty statute, New York has defined champerty more stringently

44. See, e.g., *Bluebird Partners, L.P. v. First Fidelity Bank, N.A.*, 731 N.E.2d 581, 585 (N.Y. 2000); *Osprey, Inc. v. Cabana Ltd. Partnership*, 532 S.E.2d 269, 273 (S.C. 2000).

45. Wis. Stat. Ann. § 895.375 (West 2019); Me. Stat. Ann. 17-A §516 (West 2019); Ill. Stat. Ann 720 § 5/32-12 (West 2019).

46. *Champerty*, BLACK’S LAW DICTIONARY (11th ed. 2019).

47. *Maintenance*, BLACK’S LAW DICTIONARY (11th ed. 2019).

48. 890 N.W.2d 756 (Minn. 2017).

49. *Id.* at 759.

50. *Id.* at 763 (quoting *Hackett v. Hammel*, 185 Minn. 387, 388 (1932)).

51. *Id.*

52. See, e.g., *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997); *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 631–32 (N.Y. Sup. Ct. 2018).

53. N.Y. Jud. Law. Ann. § 489 (West 2019).

54. N.Y. Jud. Law. Ann. § 489(2) (West 2019).

55. Paige Marta Skiba, Jean Xiao, *Consumer Litigation Funding: Just Another Form of Payday Lending?*, 80 L. & CONTEMP. PROBS. 117, 122 (2017).

than some other states and has addressed this more stringent reading of champerty in cases involving third-party litigation funding.⁵⁶

A case that illustrates New York's view of champerty in light of litigation funding is *Gowen v. Helly Nahmad Gallery, Inc.*⁵⁷ In *Gowen*, the plaintiff financed his legal action to recover a painting through the use of a third-party funder.⁵⁸ The defendant argued that under the doctrine of champerty, the third-party funding barred the current lawsuit.⁵⁹ The court ruled otherwise and found that because the plaintiff was asserting his claim on his behalf and not in the name of the third-party, the financing arrangement did not amount to champerty.⁶⁰ Even if there were to have been an assignment, the New York high court has stated that the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim.⁶¹ Other states subscribe to a viewpoint similar to that of the New York courts, which either constrains champerty's role in litigation or abolishes it as a defense.⁶²

B. MODEL RULES ARGUMENTS

The U.S. Chamber Institute for Legal Reform addressed the ethical issues associated with litigation funding in a letter attempting to renew an amendment to the Federal Rules of Civil Procedure that would require the disclosure of litigation funding in any civil lawsuits.⁶³ While the letter discussed potential issues associated with champerty and maintenance, the letter also addresses the ways litigation funding agreements violate the *Model Rules*.⁶⁴ Most notably, Model Rule 5.4, Model Rule 1.7, and Model Rule 1.6.⁶⁵

Model Rule 5.4(a) bars lawyers from sharing legal fees with non-lawyers.⁶⁶ As noted by the U.S. Chamber Institute for Legal Reform's letter, the comment to Model Rule 5.4 states that the prohibition on fee-splitting is to protect a lawyer's professional independence of judgment.⁶⁷ Litigation funding's detractors believe

56. *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605, 631–32 (N.Y. Sup. Ct. 2018).

57. *Id.*

58. *Id.* at 630–31.

59. *Id.*

60. *Id.* at 631.

61. *Id.* (quoting *Trust for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 918 N.E.2d 889, 895 (N.Y. 2009)).

62. *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008) (citing *Smith v. Hartsell*, 150 N.C. 71, 76 (1908)) (stating champerty or maintenance only applies when third-party interference is “clearly officious and for the purpose of stirring up strife and continuing litigation”); *Brown v. Bigne*, 28 P. 11, 13 (Or. 1891) (stating champerty only applies to when a person stirs up strife and litigation); *Ospery, Inc. v. Cabana Ltd. Partnership*, 532 S.E.2d 269, 279 (S.C. 2000) (stating that statutory law has developed to the point where a medieval doctrine such as champerty no longer needs enforcement).

63. Letter from Lisa A. Rickard to Rebecca A. Womeldorf, *supra* note 11.

64. *Id.*

65. *Id.*

66. MODEL RULES R. 5.4.

67. MODEL RULES R. 5.4 cmt. 1.

that when a lawyer or law firm works with a litigation funder, the litigation funder's investment in the case will result in them pushing those taking on the representation to settle at an inopportune time to cut losses, or push a case past the client's wishes to garner a more substantial return. Even New York, a state that has allowed litigation funding in the past, has issued ethics opinions decrying the danger of fee-splitting in the litigation funding context.⁶⁸

Model Rule 1.7(a) bans lawyers from taking on representations of clients with conflicts of interests, except in limited circumstances.⁶⁹ These limited circumstances are when the representation of a client will be "directly adverse to another client," or when there is "a significant risk that the representation of a client will materially limit the lawyer's responsibilities to another client."⁷⁰ The U.S. Chamber Institute for Legal Reform notes that when a funder and a client make a litigation funding agreement, attorneys must abide by contractual stipulations.⁷¹ These stipulations can be inconsistent with a client's goals and thus result in a contract that is directly adverse to the client's representation.⁷²

The final criticism of litigation funding contracts is their potential to waive attorney-client privilege and work-product protection. The attorney-client privilege is an evidentiary rule that prohibits disclosure of communications made in confidence by a client to obtain legal advice.⁷³ In *Upjohn Co. v. United States*, the Supreme Court discussed the importance of attorney-client privilege:

The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law. 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. The privilege recognizes that sound legal advice or advocacy depends upon clients fully informing their lawyers.⁷⁴

Regardless of the importance of the attorney-client privilege, when there is voluntary disclosure to a third party of privileged communications, the attorney-client privilege will be waived.⁷⁵ Detractors of litigation funding believe that for litigation funders to evaluate which claims they wish to fund, they must use confidential and privileged information supplied by an attorney.⁷⁶ This is predicated on the belief that if a litigation finance company is a third party in the litigation, the transmission of client information from an attorney to a litigation funder will

68. N.Y. Co. Bar. Ass'n, Committee on Prof'l Ethics, Formal Op. 2018-5 (2018).

69. MODEL RULES R. 1.7.

70. MODEL RULES R. 1.7.

71. Letter from Lisa A. Rickard to Rebecca A. Womeldorf, *supra* note 11.

72. *Id.*

73. *See, e.g.,* *Catler v. Arent Fox, LLP*, 71 A.3d 155, 165 (Md. Ct. Spec. App. 2013).

74. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

75. *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 280 P.3d 240, 306–07 (Mont. 2012).

76. Letter from Lisa A. Rickard to Rebecca A. Womeldorf, *supra* note 11.

result in a waiver of the privilege, which will severely harm the client's position in litigation.⁷⁷

Because of the growing popularity of litigation funding, litigation funders and their proponents have had no choice but to mount rebuttals of their detractors' apprehension regarding the business model. In regards to Rule 5.4(a), the rule against fee-splitting, the litigation funding community does not believe that the use of a financial product to fund litigation would be considered an example of fee-splitting.⁷⁸ They argue that law firms are permitted to take out credit, and pay down that credit with legal fee revenues without invoking Rule 5.4(a).⁷⁹ Litigation funders also argue that through contracting directly with clients as opposed to their attorneys, they are avoiding the prohibition against fee-splitting.⁸⁰

Litigation funding proponents argue that issues associated with Model Rule 1.7(a) can be dealt with by the exceptions to the rule listed under Model Rule 1.7(b).⁸¹ Under Model Rule 1.7(b), a client may waive a conflict if the lawyer receives informed written consent after full disclosure of the existence and nature of the possible conflict, and the lawyer "reasonably believes that they will be able to provide competent and diligent representation to each affected client."⁸² Litigation funding organizations and their proponents state that if a client wants litigation funding services after the client waived the conflict, Rule 1.7 is no longer an issue. Proponents of litigation funding also believe that their documents are created in preparation for litigation, and thus protected under the work-product doctrine.⁸³ Lastly, in regards to attorney-client privilege, litigation funding organizations state that by effectuating non-disclosure agreements that cover all information relayed to the litigation funding organization, the organizations protect their clients' privilege.⁸⁴

77. *Id.*

78. David Gallagher, *How Commercial Litigation Funding Can Help Small Firms and Solo Practitioners*, BENTHAM IMF, (Jan. 8, 2020), https://www.benthamimf.com/docs/default-source/default-document-library/dg-39-s-article-in-calbar-magazine-part-2.pdf?sfvrsn=409ed0cd_2 [<https://perma.cc/H2AM-BJC3>].

79. *Id.*

80. Steinitz, *supra* note 28, at 1274.

81. David P. Atkins & Marcy Tench Stovall, *Litigation Funding: Ethical Considerations for the Plaintiff's Lawyer*, CONN. LAW. (Jan. 8, 2020), <https://www.pullcom.com/newsroom-publications-Litigation-Funding-Ethical-Considerations-for-the-Plaintiffs-Lawyer-Co-author> [<https://perma.cc/959H-S4E5>].

82. MODEL RULES R. 1.7 (2018).

83. Alison Frankel, *Judges Keep Shielding Litigation Funding Agreements, Despite Demands for Transparency*, REUTERS (Jan. 9, 2020), <https://www.reuters.com/article/legal-us-otc-funding/judges-keep-shielding-litigation-funding-agreements-despite-demands-for-transparency-idUSKBN1FC2WB> [<https://perma.cc/575C-4YWQ>].

84. *See, e.g., How to Protect Confidentiality During Litigation Funding*, VALIDITY FIN. (Jan 8, 2020), <https://validity-finance.com/insights/protecting-confidential-information/> [<https://perma.cc/25D7-9RTB>]; *Document Disclosure Overview*, BENTHAM IMF (Jan 8, 2020), https://www.benthamimf.com/docs/default-source/default-document-library/disclosure-of-documents-in-litigation-finance-jan2019.pdf?sfvrsn=33f0d1cd_22 [<https://perma.cc/MS6M-TF8V>]; Boaz Weinstein, *Protecting Privilege in Litigation Finance*, LAKE WHILLANS (Jan 8, 2020), <https://lakewhillans.com/articles/protecting-privilege-in-litigation-finance/> [<https://perma.cc/C4MP-S4NB>].

Proponents and detractors of litigation funding have expressed coherent arguments for why their solutions to the current questions regarding litigation funding are the most advantageous for the legal system. However, the question remains whether litigation funding is a new business model working out its flaws or an industry incapable of meshing with the American legal landscape. The former is more likely. By squaring litigation funding with past jurisprudence regarding the work-product doctrine, reconciling litigation funding with the purpose of the *Model Rules*, and considering the policy implications of banning litigation funding, it becomes evident regardless of the industry's flaws: litigation funding can become a boon to the current American civil legal system.

III. WHY LITIGATION FUNDING WORKS IN THE CURRENT ETHICAL LANDSCAPE

A. WORK-PRODUCT, ATTORNEY-CLIENT PRIVILEGE, AND CONFIDENTIALITY OF INFORMATION

The most persuasive argument against the proliferation of litigation finance is the argument that the dissemination of documents will result in attorneys waiving the work-product and attorney-client privileges. Courts have differed in whether third-party litigation funding results in a waiver of work-product protection.⁸⁵ To solve the uncertainty related to litigation funding and the work-product doctrine, courts should look at the purpose of the work-product doctrine and the jurisprudence surrounding it. Through that lens, it is evident that litigation funding contracts deserve work-product protection. While the work-product doctrine can be reconciled with litigation funding, the attorney-client privilege is at risk in a litigation funding context.

Work-product privilege shelters the mental processes of the attorney, to “provid[e] a privileged area where he can analyze and prepare his client’s case.”⁸⁶ Work-product protection applies only to documents that were created primarily “to aid in possible future litigation.”⁸⁷ Attorneys waive work-product protection when they treat their work-product in a manner that increases the likelihood that an adversary would come into possession of the material.⁸⁸ Disseminating information to third parties is an example of a way in which the likelihood of an adversary gaining the information is more likely. However, even in a third-party

85. Compare *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 738 (N.D. Ill. 2014) (holding that documents containing mental impressions and strategies were protected by work-product even though they were shared with funders); and *Carlyle Investment Management L.L.C. v. Moonmouth Company S.A.*, 2015 WL 778846, at *9 (Del. Ch. 2015) (holding that regardless of business purpose, litigation funding documents have work-product protection); with *Doe v. Soc’y of Missionaries of Sacred Heart*, 2014 WL 1715376, at *5 (N.D. Ill. 2014) (holding all non-privileged funding documents must be produced by plaintiff).

86. *United States v. Nobles*, 422 U.S. 225, 238 (1975).

87. *In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (quoting *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982)).

88. *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 170 (S.D.N.Y. 2002).

context, lawyers only waive work-product protection “if disclosure to a third party substantially increases the risk that it will be obtained by an adversary.”⁸⁹ Litigation funding would not result in such risk. Litigation funders are careful with client information, usually requiring non-disclosure agreements to be signed before signing any deals.⁹⁰ Courts have found that non-disclosure agreements show that dissemination to third parties will not increase the likelihood that an adversary could come to possess work-product protected materials.⁹¹ For these reasons, a reputable litigation funding organization’s use of non-disclosure agreements should always protect documents sent to them through the work-product privilege.

While litigation funding contracts do protect work-product privilege, this is not the case for attorney-client privilege. Lawyers implicitly waive attorney-client privilege when they “disclose privileged communications to a third party.”⁹² However, when the third party is necessary for communication or clarification of legal matters or has a common interest with the parties litigating, the implicit waiver is negated.⁹³ Those common interests must be identical, legal, and not solely commercial.⁹⁴ Litigation funders are not operating to clarify languages or business topics, and their sole purpose for existing is to assist litigators in securing funding and thus would not be subject to the common interest exception.⁹⁵ Fortunately, the litigation funding community does not believe that they require information privileged by an attorney-client relationship to make decisions regarding which cases to fund, and some actively advise their potential clients not to share this information.⁹⁶ So while attorney-client privileged information would be beneficial for litigation funders to possess, it is not necessary and should not be a substantial worry in the debate regarding litigation funding.

B. MODEL RULE 5.4

It is hard to argue that litigation does not fall under the prohibition against fee-splitting. Under Model Rule 5.4(a), lawyers are not allowed to split legal fees with non-lawyers except under specific circumstances.⁹⁷ However, litigation funding should be an exception to the rule. An exception is warranted because litigation funding not only comports to the purpose of the rule against fee-splitting,

89. *United States v. Ghavami*, 882 F. Supp. 2d 532, 541 (S.D.N.Y. 2012).

90. See *supra* note 84 and all accompanying text.

91. *Mondis Tech. Ltd. v. LG Elec. Inc.*, 2011 WL 1714304, at *3 (E.D. Tex. 2011).

92. *People v. Trujillo*, 144 P.3d 539, 544 (Colo. 2006) (en banc) (citing *Wesp v. Everson*, 33 P.3d 191, 198 (Colo. 2001)).

93. See *United States v. Kovel*, 296 F.2d 918, 921 (2nd Cir. 1961) (stating that foreign languages, and business terms need to be understood by lawyers for representation); *Leader Technologies v. Facebook*, 719 F. Supp. 2d 373, 377 (D. Del. 2010).

94. *Facebook*, 710 F. Supp. 2d at 376.

95. Glickman, *supra* note 7 at 1044.

96. See *supra* note 84 and all accompanying text.

97. MODEL RULES R. 5.4.

but the rule against fee-splitting in its current iteration, which bars litigation funding, unjustifiably stifles the legal profession's ability to grow.

The rule against fee-splitting in its current iteration was created by the ABA to serve two purposes, to avoid the unauthorized practice of law by those whom lawyers are splitting their fees with, and ensuring lawyers' financial incentives do not harm their clients.⁹⁸ These are well-placed concerns; however the complete prohibition is also based on protecting what is considered the legal profession's core values.⁹⁹ The core values of the legal profession are independence of judgment, loyalty, confidentiality, and competence.¹⁰⁰ Concerning third-party financing and legal services, the core values rationale for disallowing specific business arrangements rests on the belief that lawyers are more ethical than businesses, lawyers are better trained, lawyers are not corrupt, non-lawyers will corrupt lawyers, and lawyer norms are non-negotiable, meaning that lawyers can never allow arrangements that can compromise their judgment, loyalty, confidentiality, or competence.¹⁰¹ None of these reasons for core value adherence are persuasive in relation to litigation funding, especially when acknowledging that economic interests are not the antithesis of lawyers' ethical obligations.

In her article, *Alternative Business Structures: Good for the Public, Good for Lawyers*, Jayne Reardon discusses how alternative financing does not misalign the current incentives in the legal industry.¹⁰² Reardon states that the profit motive is inherent in lawyering because lawyers go into the legal field expecting to make a profit.¹⁰³ Reardon also states that incentives for lawyers to prioritize profits at the detriment of their clients can potentially already exist through contingency fee cases.¹⁰⁴ In the current legal landscape, lawyers also answer to third parties other than a client through insurance companies who usually have separate economic incentives than the lawyer's clients.¹⁰⁵

When looking through Reardon's lens, it becomes apparent that litigation funding, in addition to other alternative business structures for lawyers, have the same incentives that the current legal system has in place. Just because contingency fees and insurance indemnification are older than litigation funding, and thus better understood within the confines of the legal systems core values, does not mean that litigations funding's newness should result in the whole industry's prohibition.

98. Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 1207, 1221 (2018).

99. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1117 (2000).

100. *Id.* (citing Executive Committee of the Association of the Bar of the City of New York, Statement of Position on Multidisciplinary Practice, 54 Record Ass'n B. City N.Y. (1999)).

101. *Id.*

102. Reardon, *supra* note 1, at 344.

103. *Id.* at 344-45.

104. *Id.* at 345.

105. *Id.*

IV. LITIGATION FUNDING AND THE CIVIL ACCESS TO JUSTICE CRISIS

Regardless of litigation funding's current ethical issues, the defense bar and proponents of a staunch core value approach to legal ethics devalue the potential benefits litigation funding has in tackling the United States current access to justice problems. The Supreme Court held over a century ago that the right to sue and defend oneself in the court is "one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states."¹⁰⁶ Unfortunately, the words of the Supreme Court and the realities of everyday America are not in sync.

Approximately fifty percent of American households per year confront a problem that may potentially raise a legal issue that may be cognizable under civil law.¹⁰⁷ The legal system does not meet eighty percent of the legal service needs for low-income people, and forty to sixty percent of the legal service needs for middle-income people.¹⁰⁸ Legal Service Organizations, and pro bono legal efforts at law firms, have attempted to alleviate these needs.¹⁰⁹ However, these organizations have restrictions.¹¹⁰ Legal service organizations, whose primary goal is to assist those with low incomes, have income ceilings that are potentially too high for even those under the poverty level.¹¹¹ Even if someone were to be under that income ceiling, the waitlist for legal services organizations is long, due to the sheer volume of clients they must assist.¹¹² Pro bono legal work at law firms usually avoids clients with environmental or labor interests.¹¹³

Civil access to justice issues do not only apply to low-income individuals that consumer litigation funding would cover; there are also issues regarding small and medium-sized corporations with lawsuits that could potentially garner commercial litigation funding in amounts upwards of one million dollars. The total cost of lawsuits and outside counsel for corporations has risen over time.¹¹⁴ These large price tags affect not only large companies but medium and small businesses alike. These organizations are deprived of their right to sue in civil courts, as enumerated by the Supreme Court, when they are priced out of civil lawsuits, a reality that lawyers should find untenable.¹¹⁵

106. *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907); see David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91–92 (1983) (stating 98% of litigation costs for organizations are out of pocket).

107. Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 134 (2010).

108. Reardon, *supra* note 1, at 319–20.

109. Robert W. Gordon, *Lawyers, the Legal Profession & Access to Justice in the United States: A Brief History* 148 DAEDALUS 177, 181 (2019).

110. Sara Stenberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1269 (2016).

111. *Id.* at 1269–70.

112. *Id.*

113. Gordon, *supra* note 109, at 181.

114. Lawyers for Civil Justice, *supra* note 3.

115. *Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148 (1907).

Litigation funding, even with its flaws, can alleviate the current issues in the United States related to civil justice access. At the consumer and commercial levels, litigation funding allows people to convert their legal claims into investments.¹¹⁶ Assuming the claim is meritorious, litigation funders large and small would be happy to step in to fund the claim for a fraction of the reward. Detractors would argue that converting legal claims into financial assets harms the purity of the civil justice system.¹¹⁷ This view does not take into account the economic realities of the twenty-first century and the expenses associated with litigation. Litigation funding allows disenfranchised peoples as well as companies to pursue their meritorious cases, as opposed to being priced out of a system that they have a legal right to access.

CONCLUSION

The legal profession harkens back to ancient times.¹¹⁸ The American Bar Association created the current *Model Rules* in 1983 with adjustments instituted over time.¹¹⁹ One thing that has stayed consistent in the preamble to the *Model Rules* is that lawyers “shall seek improvement of the law, access to the legal system, the administration of justice and the quality of services rendered by the legal profession.”¹²⁰ Commercial and consumer litigation funding is a way to further the *Model Rules’* preamble through alleviating some of the issues associated with accessing the legal system through monetizing meritorious legal claims and lifting some of the cost burdens people who wish to use the legal system face. However, ancient doctrines such as champerty and maintenance, the current *Model Rules*, and the fear of waiving attorney-client privilege and work-product protection stand in the way of litigation funding’s broad usage in the United States.¹²¹ Fortunately, critics of litigation funding overstate these fears. By looking at the purpose of the fee-splitting rule, and past jurisprudence regarding the work-product doctrine, it is possible for litigation funding to survive in the United States while staying within the purpose of the *Model Rules*.

Even if reconciliation with the current legal landscape were impossible, allowing litigation funding would better serve the legal profession. In the past, the belief that the legal system’s core values would be inhibited stopped the legal profession from becoming a multidisciplinary practice involving business and other

116. Dai Wai Chin Feman & Sean Thompson, *Claim Monetization: A Lesser Known Use of Litigation Finance*, CORP. COUNS., <https://www.law.com/corpcounsel/2019/02/14/claim-monetization-a-lesser-known-use-of-litigation-finance/> [https://perma.cc/24ZF-8UGV].

117. McQueen, *supra* note 17.

118. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1389 (2004).

119. CEF Funding, L.L.C. v. Sher Garner Cahill Richter Klein & Hilbert, L.L.C., 2010 WL 2773116, at n.11 (E. D. La. 2010).

120. MODEL RULES pmb1.

121. Letter from Lisa A. Rickard to Rebecca A. Womeldorf, *supra* note 11.

disciplines.¹²² But this strict adherence to the core values poses a question: what good are these core values when they constrain people's ability to engage in the legal system?¹²³ Litigation funding, with or without its problems, is a way that the United States can help solve its access to civil justice problems, and stopping the development of progress in the legal system due to antiquated applications of the legal systems core values keeps the profession from progressing with the changing world.

122. Jack A. Guttenberg, *Practicing Law in a Twenty-First Century in a Twentieth (Nineteenth) Century Straitjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 457 (2012).

123. *Id.* at 459.