SUPERIOR COURT
OF THE
STATE OF DELAWARE

ERIC M. DAVIS
JUDGE

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June 30, 2023

Chief Justice Collin J. Seitz, Jr.
Supreme Court of the State of Delaware
The Renaissance Center
405 N. King Street, Suite 505
Wilmington, Delaware 19801

Re: Third Party Litigation Funding Committee—Report and Recommendations

Dear Chief Justice:

On November 18, 2022, Your Honor entered the Order Establishing A Committee To Study Transparency In Third Party Litigation Funding (the "Order"). The Order set June 30 2023 as the date by which the Committee would submit its report and recommendations (the "Report") to Your Honor and the Presiding Judges. As the Co-Chairs of the Committee, Vice Chancellor Laster and I submit the Report.

If there are any questions as to the Report, we are available at Your Honor's convenience. We would be pleased to meet with Your Honor or any of the Presiding Judges to discuss the Report.

Respectfully,

Eric M. Davis, Judge

Respectfully,

J. Travis Laster, Vice Chancellor

EMD/li

cc: Presiding Judges (w/encl.)
Committee Members (w/o encl.)

REPORT TO THE CHIEF JUSTICE AND THE PRESIDING JUDGES OF THE STATE OF DELAWARE FROM THE COMMITTEE TO STUDY TRANSPARENCY IN THIRD-PARTY LITIGATION FUNDING

I. Executive Summary

The Supreme Court of Delaware established a committee to study transparency in third-party litigation funding in the Delaware state courts (the "Committee").

The Committee has completed its work and presents the Delaware Supreme Court and the Presiding Judges with its recommendations for addressing transparency issues in third party litigation funding in the Delaware state courts.

On the subject of transparency, the Committee finds as follows:

- There do not appear to be any issues with the current use of third-party litigation funding in the Delaware state courts.

- There could be value in considering a court rule that would authorize limited discovery into third-party litigation funding and limit broader discovery on that subject. A rule could provide helpful guidance to litigants and judges in this area. For purposes of discoverability, the Committee would recommend a rule, comparable to Superior Court Rule 26(b)(2) on insurance agreements, but which would only authorize discovery regarding whether there is any arrangement that gives a third party control over the litigation. The Committee would recommend that the rule not permit broader discovery into third party litigation funding absent some additional showing of need. The Committee would recommend that the rule make clear that some third-party litigation funding material, such as case analysis, is work product.

- The task of considering a court rule could be for the Committee or a future committee. There may be value in having each court prepare its own rule, because different courts may have different needs.

Because the Committee was only charged with examining issues relating to transparency, the Committee has not made recommendations regarding the substantive regulation of litigation funding.

II. The Committee

On June 28, 2022, the Delaware State Senate adopted a resolution titled, "ENCOURAGING THE DELAWARE JUDICIARY TO STUDY TRANSPARENCY IN THIRD-PARTY LITIGATION FUNDING."

On November 18, 2022, Chief Justice Collins J. Seitz, Jr. signed an administrative order on behalf of the Delaware Supreme Court that formed a "Committee to Study Transparency in Third Party Litigation Funding." The Committee was asked to consider transparency issues in litigation funding in the Delaware courts and make recommendations to the Chief Justice and the Presiding Judges regarding adoption of statutes or court rules to require public disclosure of third-party litigation funding.

The Committee is composed of the following members:

The Honorable J. Travis Laster, Co-Chair
The Honorable Eric M. Davis, Co-Chair
The Honorable N. Christopher Griffiths
The Honorable Craig A. Karsnitz
The Honorable Reneta Green-Streett
Christine Azar, Esquire
Megan Ward Cascio, Esquire
Anne C. Foster, Esquire
Kurt M. Heyman, Esquire
Kelley M. Huff, Esquire
Carla M. Jones, Esquire
Blake Rohrbacher, Esquire
David Soldo, Esquire

The Committee met via Zoom on January 11, 2023, February 14, 2023, March 27, 2023, and June 21, 2023. Two subcommittees were formed: a subcommittee to conduct a survey of attorneys and others in Delaware to determine the nature and extent of the use of third-party funding in Delaware courts and a subcommittee to survey how other jurisdictions have approached third-party funding.

A survey was sent out to select sections of the Delaware State Bar Association on March 13, 2023. The survey was also sent to the Delaware chapter of the Federal Bar Association. The results of the survey and information gathered from other jurisdictions are compiled and analyzed in this Report along with the Committee's recommendations.

The co-Chairs of the Committee met with Chief Judge Colm Connolly to understand his concerns about litigation funding in the District of Delaware. The co-Chairs met with State Senator Kyle Gay to understand any concerns that the General Assembly might have about litigation funding. The co-Chairs met with Stuart Grant, a co-founder of Bench Walk Advisors, a leading provider of third-party litigation funding.

III. Overview of Litigation Funding

Third-party litigation funding is an arrangement where a third-party funder provides funding to a litigant or law firm in exchange for an interest in the potential recovery. *See generally*, Am. Bar. Ass'n, ABA Best Practices for Third-Party Litigation Funding (Aug. 2020) (the "ABA Report").

a. Types of Third-Party Litigation Funding

Third-party litigation funding is a broad term that can refer to a range of different things. When someone refers to third-party litigation funding, they often have a particular scenario in mind, rather than the general concept.

Third-party litigation funding is just one of many ways that parties obtain the funds to conduct litigation. An individual or business may draw on a line of credit and use the proceeds to pay for a lawsuit. Technically, that is a form of litigation funding, although one in which the lender can seek repayment from the borrower and its assets generally, rather than only from the proceeds of litigation. Insurance for defense costs is another form of litigation funding, albeit one in which the insured pays for the funding up front through a premium that covers both the litigation funding and other policy benefits. A full or partial contingency fee arrangement is yet another form of litigation funding. In a contingency fee arrangement, the law firm accepting the contingent fee arrangement acts as both counsel and lender by advancing the expenses necessary to pursue the case and not charging a fee unless there is a recovery. A contingency fee arrangement most closely resembles third-party litigation funding as discussed in this report, because the law firm can only recover from the proceeds of the case. For purposes of this report, third-party litigation funding refers to a lender advancing money to a party on a non-recourse basis, secured by an interest in a claim that the party holds.

There are two common models for litigation funding:

- The Traditional Model: The funder pays all litigation expenses and some or all of the attorneys' fees in exchange for a share of the

recovery. No funds go directly to the borrower. Under this model, outside counsel often operates under a discounted-fee arrangement and receives a share of the recovery.

- The Monetization Model: The funder makes one or more lump-sum payments to the borrower in exchange for a share of the recovery.

Under either model, the return to the funder can be calculated as a percentage of the recovery or based on a return of the principal advanced plus a rate of interest.

Consumers, businesses, and law firms use litigation funding. The different models raise different issues.

In consumer funding, a funder loans money to an individual plaintiff, often for a personal injury claim. The consumer is often represented on a contingent basis. If the funder uses the Traditional Model, then the funds are typically used to pay for litigation expenses, such as an expert. If the funder uses the Monetization Model, then the claimant receives the funds as a way of accelerating the receipt of proceeds. The borrower often uses the funds to pay for medical or living expenses while the case is ongoing. Consumer litigation funding can involve disparities in sophistication and bargaining power, and it raises issues typically associated with consumer lending, and particularly with high-interest consumer loan products.

In commercial funding, a funder loans money to a business, often for breach of contract, antitrust, or patent claims. Businesses that have retained counsel on a traditional hourly basis may use the Monetization Model to pay legal fees or to cover litigation expenses, such as expert fees. Businesses also may use the Traditional Model to create a constructive contingent fee relationship in which the funder pays counsel in return for a contingent share of the recovery. From the law firm's side, the arrangement looks like an hourly fee arrangement. From the business's standpoint, the arrangement looks like a contingency fee arrangement. Another use of the Monetization Model is as a form of insurance against an adverse result, such as reversal on appeal. A business that has prevailed in the trial court may borrow a sum of money secured only by the judgment, such that if the judgment is reversed, there is no collateral on which the funder can recover. A business may secure funding based on an individual case or on a portfolio basis. Commercial funding typically involves sophisticated parties bargaining at arm's length.

In law firm funding, a law firm that pursues cases on contingency may secure funding secured by its share of a recovery. Under the Traditional Model, a firm may secure funding to reduce its risk. Under the Monetization Model, a firm may use

funding to cover other firm expenses, such as fixed costs. A law firm may secure funding based on an individual case or a portfolio of cases.

b. Concerns about Third-Party Litigation Funding

From the standpoint of a court and other litigants in a case, litigation funding creates two types of concerns.

One concern is that litigation funding may result in the filing of additional cases that otherwise would not be brought. If the additional claims lack merit, then litigation funding creates a drag on the system. If, however, the funding is enabling individuals or businesses to pursue legitimate claims, then the funding is providing access to justice for those who otherwise could not obtain it. Because funders underwrite cases with the intent of obtaining a return, it is unlikely that litigation funding would result in meritless cases on average. It is nevertheless possible that in some areas of the law, litigation funding could be used to generate strike suits. One area where that concern may have some basis is for patent lawsuits. It does not appear to present a risk for the Delaware state courts.

A second concern is that litigation funding may result in a third party having control over decisions involving the litigation, including settlement, such that the litigation is not being controlled by the party before the court. The same issue exists for insurance coverage and is a valid theoretical concern. In practice, litigation funders do not obtain rights concerning control over a lawsuit or over settlement. This issue does not appear to be of present concern in the Delaware courts, but it is an area addressed by the Committee's recommendation.

c. Best Practices for Litigation Funding

Litigation funding raises a variety of substantive issues. The Committee was tasked with addressing litigation funding from the standpoint of transparency in the Delaware state courts, placing the substantive aspects of regulating litigation funding outside of the Committee's remit.

The ABA Report addresses a series of substantive issues and provides best practices. The ABA Report specifies that its recommended best practices are not meant to represent standards of professional conduct.

One area that the ABA Report addresses is the terms of a litigation funding arrangement. Key recommendations include:

- Any litigation funding arrangement should be spelled out in writing and written in clear, understandable terms.
- The arrangement must specify who is responsible for repaying the funder, from what source, and when.
- The arrangement should clearly address the termination or withdrawal of funding.
- The claimant must retain control over the litigation.
- The funder cannot direct the claimant's counsel or override the lawyer's professional judgment.

The ABA Report also raises issues that may arise in discovery and contains recommendations to head off privilege disputes. They include the following:

- The borrower's lawyers should exercise caution in making case-related reports or predictions to litigation funders.
- The borrower's lawyers should only supply the funder with public documents.
- The borrower should obtain written acknowledgements from funders that no privileged materials have been supplied.
- The borrower should not offer any opinion about the underlying litigation.
- The funder should use its own counsel to assess the underlying litigation.

IV. How Other Jurisdictions Have Treated Litigation Funding

Many states have begun regulating litigation funding agreements. Four approaches have emerged: (1) banning all forms of litigation funding, (2) regulating

the agreements by statute,[1] (3) permitting but regulating the funding agreements via common law and ethics opinions,[2] and (4) remaining silent on the issue.[3]

a. Banning Litigation Funding

Only two states—Kentucky and Montana—have banned litigation funding agreements, both by statute. *See* Ky. Rev. Stat. § 372.060; Mont. Code. Ann. § 37-61-408 (2021). The Kentucky statute addresses the funding while the Montana statute forbids attorneys from participating in such arrangements. The Alabama courts have declared litigation funding agreements void as contrary to public policy or under usury statutes. *See e.g.*, *Wilson v. Harris*, 688 So. 2d 265 (Ala. Civ. App. 1996) (holding that funding agreements were invalid on public policy grounds because they amounted to illegal gambling contracts). Notably, the Alabama legislature has remained silent; thus, agreements are not *per se* prohibited but may be unenforceable. In contrast, Georgia has a statute that seemingly prevents litigation funding, but its courts have not enforced the statute since 1933. *See, e.g.*, Ga. Code Ann. § 13-8-2 (West); *Sapp v. Davids*, 168 S.E. 62 (Ga. 1933).

b. Regulating Agreements By Statute

A growing number of states have passed statutes aimed at regulating, but not preventing, litigation funding agreements. These statutes are generally aimed at disclosure and/or consumer safety. Wisconsin, for example, requires litigation funding agreements be disclosed to the courts even if no discovery has been made. *See* Wisconsin Act § 235. Almost every statute passed is aimed at protecting

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[1] The following states regulate litigation funding agreements expressly by statute: Arkansas, Illinois, Indiana, Louisiana, Maine, Nebraska, Nevada, Ohio, Oklahoma, Tennessee, Utah, Vermont, West Virginia, and Wisconsin.

[2] A minority of states regulate litigation funding agreements via their ethics rules. Alaska, Arkansas, California, Florida, New Jersey, Texas, and Washington are all examples. Judges across the country have, likewise, permitted and in some instances endorsed the use of litigation funding agreements. Arizona and Hawaii, for example, both permit the use of such agreements. *See Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020); *TMJ Hawaii, Inc. v. Nippon Tr. Bank*, 153 P.3d 444, 450 (Haw. 2007). A majority of those jurisdictions have permitted but regulated litigation funding. California, Colorado, Connecticut, Florida, Idaho, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, New York, North Carolina, Rhode Island, South Carolina, and Texas courts have all commented on litigation funding agreements, permitting them in some form.

[3] Kansas, North Dakota, South Dakota, Virginia, and Wyoming have not provided any guidance regarding litigation funding agreements.

consumers and serving public policy interests. New regulation in Indiana requires a claimant to provide written notice that the claimant entered into a funding agreement. *See* Ind. Code § 24-12-4-2 (2023); Ind. H.B. 1124. Arkansas adopted a rate for consumer lending transactions. *See* AR Code § 4-57-109. Maine, Nebraska, Nevada, Oklahoma, Tennessee, Vermont, and West Virginia all require certain disclosure statements be present in the agreements. *See* Me. Rev. Stat. Ann. tit. 9-A, § 12-101; Neb. Rev. Stat. §§ 25-3301-25-3309 (2010), Nev. Rev. Stat. ch. 604C (2021); Ohio Rev. Code §. 1349.55(B); Okla. Stat. Ann. tit. 14A §§ 3-801-817; Okla. Admin. Code §§ 160:75-1-1-160:75-9-1; Okla. Admin. Code § 160:75 App. A; Tenn. Code Ann. § 47-16-101; Vermont Code Ann. §§ 08-74-2251-2260; West Virginia Code Ann. § 46A-6N-3. New York regulates the agreements via champerty statutes, N.Y. JUD § 489, but the statute is construed narrowly and does not apply when the primary purpose was not to acquire assets but instead to bring a claim. *Id.*

Missouri and Texas currently have legislation pending that would regulate litigation funding agreements. *See* H.B. 2771 (Missouri); H.B. 2096 (Texas) and S.B. 1567 (Texas).

c. Court Regulation of Litigation Funding Agreements

Some states have regulated the enforceability of litigation funding agreements via judge-made common law and/or ethics opinions. For example, a Colorado court held that litigation funding agreements created debt to be governed by the Uniform Consumer Credit Code. *See, e.g., Oasis Legal Fin. Grp., LLC*, 2015 Colo. 63, 361 P.3d 400 (Colo. 2015). Maryland and Michigan took a similar approach. *See In re Plaintiff Funding Holding, Inc.*, 2015 WL 5637481 (MD. Comm. Fin. Reg. Aug. 18, 2015) (finding that "Respondents' business activities constitute usurious and unlicensed lending to Maryland consumers in violation of Maryland law, and that it is in the public interest that Respondents immediately Cease and Desist from making litigation funding advances or other types of loans to, or otherwise engaging in lending activities with, Maryland consumers"); *see also Lawsuit Fin., L.L.C. v. Curry*, 683 N.W.2d 233, 239-40 (Mich. Ct. App. 2004) (voiding a litigation financing agreement on a finding that plaintiff held an absolute right to repayment on the "advances" and thus constituted a usurious loan for exceeding the legal interest rate).

Other jurisdictions have looked at funding agreements through the scope of public policy and fairness. *See Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 278 (S.C. 2000) (The court may examine "(1) whether the respective bargaining position of the parties at the time the agreement was made was relatively equal; (2) whether both parties were aware of the terms and consequences of the agreement;

(3) whether the borrowing party may have been unable to pursue the lawsuit at all without the financier's help; (4) whether the financier would retain a disproportionate share of the recovery; and (5) whether the financier engaged in officious intermeddling."); *see also Anglo-Dutch Petroleum Int'l, Inc v. Smith*, 243 S.W.3d 776, 782 (Tex. App. 2007) (finding that litigation funding agreements were permissible as long as "they did not vest control over the litigation in uninterested third parties.").

Opponents of litigation funding regularly assert that it violates the ancient doctrines of champerty and maintenance. Like Delaware, many jurisdictions have rejected that argument. *See Charge Injection Techs., Inc. v. E.I. duPont de Nemours & Co.,* 2016 WL 937400 at *3-6 (Del. Super. Mar. 9, 2016); *Schomp v. Schenck*, 40 N.J.L. 195, 206 (N.J. 1878) (rejecting common law prohibitions on champerty and maintenance); *Maslowski v. Prospect Funding P'rs LLC*, 944 N.W.2d 235, 241 (Minn. 2020) (abolishing champerty doctrine and holding that litigation funding agreements are enforceable); *TMJ Hawaii,* 153 P.3d 444, 450 ("[T]he common law doctrines of champerty and maintenance are not impediments to the assignability of the claims" for professional malpractice, breach of fiduciary duty, and fraud."); *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997) (enforcing third-party litigation funding agreement and nullifying the doctrines of champerty and maintenance; further holding that it would evaluate such agreements by determining whether the agreement was fair and reasonable when made); *Landi v. Arkules*, 835 P.2d 458, 464 (Ct. App. 1992); *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 141 n.26 (Cal. 1987) ("California, however, has never adopted the common law doctrines of champerty and maintenance.") (citations omitted)); *Weller v. Jersey City H&P St. Ry. Co.*, 57 A. 730, 732 (N.J. Ch. 1904) (explaining that the law of champerty and maintenance has never prevailed in New Jersey).

An increasing number of states' ethics opinions have addressed issues associated with litigation funding. An advisory ethics opinion from State of Washington Bar explicitly stated that, "[a] lawyer cannot disclose client secrets or confidence to a third party. . . providing funding." Wash. Committee on Professional Ethics Op. 208 (2005). Florida has also issued an ethics opinion regulating attorney conduct regarding litigation funding. *See* Florida Bar Ethics Op. 00-3 (2002) (allowing an attorney to provide a client with information and resources regarding litigation funding but noting that such an agreement must comply with applicable statutes).

Some courts have addressed the issue through standing orders. For example, the Northern District of California issued a standing order for all judges that requires party disclosure to the Court of any entity or individual with a financial interest in

the litigation. *See* N.D. Cal. Standing Order for All Judges (2023). Chief Judge Connolly's standing order is another example.

d. States That have Not Yet Spoken on the Issues

A few states have not yet addressed litigation funding. *See Supra*, n.3.

V. The Use of Litigation Funding in the Delaware Courts

The Committee was charged with evaluating measures to address transparency in litigation funding in Delaware state courts. At present, the most prominent use of litigation funding in Delaware appears to be taking place in the United States District Court for the District of Delaware, where Chief Judge Connolly has placed a spotlight on the issue. The Committee also conducted a survey to understand the prevalence of litigation funding in the Delaware state courts.

a. Chief Judge Connolly's Standing Order and Subsequent Developments

On April 18, 2022, Chief Judge Colm F. Connolly of the United States District Court for the District of Delaware issued an order entitled "Standing Order Regarding Third-Party Litigation Funding Arrangements" (the "Standing Order"). The Standing Order applies to "all cases assigned to Chief Judge Connolly." The Standing Order garnered local and national attention.

The Standing Order applies where "a party has made arrangements to receive from a person or entity that is not a party (a 'Third-Party Funder') funding for some or all of the party's attorney fees and/or expenses to litigate this action on a non-recourse basis in exchange for (1) a financial interest that is contingent upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal loan, bank loan, or insurance[.]"

The Standing Order requires the party receiving such funding to disclose:

- the identity and address of the funder;
- the place of formation for any funder that is a legal entity;
- the nature of the financial interest of the funder in the litigation; and
- whether approval by the funder is necessary for litigation or settlement decisions and, if the answer is yes, disclosure of the nature of the terms and conditions relating to that approval.

The Standing Order also provides that parties may seek additional discovery of the terms of any funding arrangement "upon a showing that the Third-Party Funder has authority to make material litigation decisions or settlement decisions, the interests of any funded parties or the class (if applicable) are not being promoted or protected by the arrangement, conflicts of interest exist as a result of the arrangement, or other such good cause exists."

After issuing the Standing Order, Chief Judge Connolly observed that several cases before him appeared to be related notwithstanding having been brought by facially different plaintiffs and *sua sponte* ordered a hearing, on November 4, 2022, in *Nimitz Tech. LLC v. CNET Media, Inc.* Civ. No. 21-1247-CFC (D. Del.). Chief Judge Connolly concluded that the plaintiffs were shell companies and had little involvement in the conduct of the litigation and ordered plaintiffs to disclose information related to third-party interests, including engagement letters, assets and bank account information, and correspondence between plaintiffs' attorneys and the third-party funder.[4] Plaintiffs filed a petition for a writ of mandamus with the Federal Circuit asking for reversal of Chief Judge Connolly's order. Chief Judge Connolly filed a memorandum in the appeals court defending his authority to issue the order. The Federal Circuit denied plaintiffs' writ of mandamus.

The co-Chairs met with Chief Judge Connolly to understand his concerns. As his rulings imply, Chief Judge Connolly is concerned that litigation funders are forming entities and using them to bring strike suits based on patent claims. The Standing Order is designed to generate information on this subject so that Chief Judge Connolly can determine whether action needs to be taken.

The Committee considered Chief Judge Connolly's rulings and concluded that the issues Chief Judge Connolly is exploring are disproportionately associated with patent cases. The Committee does not believe that they affect practice before the Delaware state courts.

b. The Survey About Litigation Funding in the Delaware State Courts

The Committee members sought to determine whether (1) there is an issue in Delaware regarding transparency in litigation funding, and (2) the issue is one that needs to be addressed. While the Committee is composed of judges and lawyers from a variety of courts and substantive expertise, the Committee wanted to solicit and obtain a broader range of feedback on the issue. As a result, the decision was made to seek input from members of the Delaware bar.

[4] *Nimitz Tech. LLC. V. CNET Media, Inc.*, 2022 WL 17338396 (D. Del Nov. 30, 2022).

A subcommittee was formed to develop a questionnaire to be sent out to members of the bar most likely to have had relevant experience. In drafting the questionnaire, the subcommittee balanced the goal of trying to receive relevant information against the likelihood that sending a relatively short questionnaire would increase the response rate.

Ultimately, the subcommittee drafted a 12-question survey. For the purposes of the survey, the term "litigation funder" was defined as "a third-party litigation financing firm that agrees to provide funding to a litigant or law firm in exchange for an interest in the potential recovery in a lawsuit. Litigants and law firms do not have to repay the funding if the lawsuit is not successful." The definition is similar to that used in Chief Judge Connolly's Standing Order. The same definition is used in this report.

An explanatory cover note and the survey link were sent to the following Delaware State Bar Association sections: (1) the Litigation Section; (2) the Corporation Law Section; (3) the Small Firms and Solo Practitioners Section and (4) the Intellectual Property Section. The same communication was also sent to the Delaware chapter of the Federal Bar Association.

As of the date of this report, 184 responses to the survey have been received. Three quarters of the responses received were from law firm partners or counsel. Another 17% were submitted by law firm associates, while 4% were from solo practitioners and 3% came from in-house counsel. The remaining responses came from government and public service attorneys, retired lawyers and judges and an outside consultant. In terms of law firm size, 39% of the responses were from firms with 1-25 lawyers, 20% came from firms of 101-250 lawyers, 18% came from firms of 51-100 lawyers, 16% were from firms of more than 250 lawyers[5] and 7% came from firms of 26-50 lawyers.

Of the 184 responses received by the Committee, 80 indicated that they had been involved in a matter in which a party had received funding provided by a litigation funder. In those situations, approximately half of the parties in question had been entities, with another third involving individuals who had received litigation funding, while the remaining situations involved clients who were a combination of individuals and entities. In all but a handful of the matters, the party obtaining litigation funding was a plaintiff/petitioner, a counterclaimant, or a third-

[5] The Committee notes that those respondents must have been lawyers at a firm with offices located in multiple jurisdictions, since no law firm with an office in Delaware has more than 250 lawyers in its Delaware office.

party plaintiff. In eight matters, the funding was obtained by either a defendant or a law firm itself. In two instances, the survey respondent was retained by either the litigation funder itself or by someone who had invested in a litigation funder.

The survey responses indicated that the use of litigation funding in matters is relatively evenly distributed across the Delaware courts. A plurality of responses cited the United States District Court for the District of Delaware (35 matters), but there were similar levels of use in the Superior Court of the State of Delaware (25 matters), and the Court of Chancery of the State of Delaware (24 matters). There were few reports of litigation funding in the Supreme Court of the State of Delaware (4 matters). The remaining 13 matters took place in a combination of other federal and state courts and international courts and arbitrations.

The subject matter of the proceedings varied. A plurality (21 situations) involved business or corporate litigation. The next two significant categories were personal injury litigation (12 matters) and patent litigation (10 matters). The remainder involved consumer class actions, mass torts or employment discrimination.

Out of the 184 responders, 35 had firsthand experience working with a litigation funder. About half of those had done so once or twice, with most of the remainder having done so between three and six times. A handful of those responding had worked with litigation funders more than six times.

In 16 instances, the fact of the litigation funding became known to the lawyer's litigation adversaries. In most of those situations, the fact of the funding was disclosed or revealed during discovery or trial. Twice, disclosure was ordered by a judicial officer, while in one instance, the fact was disclosed as part of a motion for approval in a bankruptcy court proceeding. One respondent noted that "funding might have to be disclosed in order to settle the claim as the interest on the funding is very high."

Although the Committee recognized that most survey respondents would be unwilling or unable to provide names of litigation funders, the following question was included in the survey:

> "Q: If you have ever been involved in a matter or matters (a) in which any party received funding provided by a litigation funder, (b) the fact and identity of the litigation funder became known in the litigation and (c) the information is not subject to a confidentiality designation in the litigation, please insert the name or names of the litigation funders."

A variety of names were provided in 13 responses.[6] None appeared more than twice.

c. Specific Feedback

In a reminder message about the Committee's survey, members of the DSBA sections previously contacted were told that if any of them wanted to be in touch with any of the members of the Committee to discuss their views on the topic of transparency in litigation funding, they should do so.

To date, Committee members have received direct feedback from two members of the Delaware bar.

One member of the bar expressed concern about whether the survey would generate reliable results from the solicited groups. That member felt that firms that "accept third party funding but do not favor transparency are less likely to respond, skewing the results."

Another member of the bar expressed the view that litigation funding is beneficial in many circumstances, particularly (a) for plaintiffs who cannot bear the costs of litigation themselves, and (b) for sophisticated companies in their capacities both as plaintiffs and defendants. That member of the bar would support a rule requiring disclosure of the existence of litigation funding and whether a funder has the right to control settlement, but did not believe any other disclosure or regulation is warranted.

d. Overall Assessment of the Survey Results

The information learned by the Committee through its survey and request for information from practitioners did not suggest a pressing need for additional guidance in the Delaware state court rules or procedures on the subject of disclosures of third-party funding arrangements. It appears as if the existing procedures and frameworks have provided a path to disclosure.

VI. The Alternatives Available in Delaware

To assist the Delaware Supreme Court and the Presiding Judges, the Committee sought to identify a range of alternatives that could be considered for addressing litigation funding in Delaware.

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[6] *See* Appendix A.

a. The Range of Alternatives

Possible alternatives range from substantive regulation to disclosure to leaving the developments in this area to the common law.

i. Substantive Regulation

At the most intrusive, options for substantive regulation might include limits on the returns received by funders (like to usury laws), restrictions on fee sharing with non-lawyers, licensing requirements for a finance provider to operate in the state, or restrictions on the role a funder can play in the litigation.

Consideration of any proposed regulation should first account for any relevant safeguards already in place such as lawyers' duties of professional responsibility (including the duties to maintain client confidentiality and independent judgment), rules of civil procedure addressing disclosure and discovery, and even common law contract defenses.

Any regulation should also consider existing incentives. For example, funders are naturally incentivized to avoid weak claims because funders can lose their entire investment if the suit is unsuccessful. Rulemaking that aims to police funders' selection of cases thus would be unnecessary and risk limiting the value funding provides to meritorious claimants.

Consideration should also be given to the difference between consumer funding and commercial funding. The latter involves sophisticated parties, often with counsel well versed in litigation funding, and thus without the need for heavy-handed policing.

ii. Disclosure Requirements

Most discussion of the regulation of litigation funding involves disclosure requirements. Disclosure is necessary, according to some, to prevent finance providers from "hiding" their influence over litigation and settlement. Others argue that disclosure is a red herring designed to give defendants insight into plaintiffs' cases.

What disclosure means in practice will vary depending on how far the disclosures go. The more detail required, the more insight the defense may have into the plaintiff's case. Access to information about funding could reveal the resources available to plaintiffs, giving defendants leverage in settlement when they know the money is running low.

Disclosure can be accomplished by requiring disclosure or by providing that the matter is an appropriate topic for discovery. An analogous rule appears in Rule 26 and permits the discovery of the existence and contents of an insurance agreement.

Options for disclosure or discovery include:

The Existence of a Funding Relationship. The least intrusive disclosure would be for the parties to reveal simply that a funding arrangement exists without disclosing any details. With that knowledge, the court and the parties can be alert during the litigation for any indication that the funding arrangement is adversely affecting the case. Disclosing the existence of litigation funding should not be burdensome.

Control Over the Litigation. A second level of disclosure would require a party to disclose whether the litigation funder has any control over the litigation. Disclosure on this topic would address the chief concern about litigation funding. The Committee understands that most litigation funders do not have any right to control litigation, so typically the response would be reassuring. If a funder did have a control right or if there was ambiguity about the issue, a redacted form of the funding agreement could be produced, or the agreement could be reviewed in camera by the court.

The Name of the Litigation Funder. A third level of disclosure would require that a party reveal the name of the finance provider. This would enable the court to determine if it has any conflict of interest such as investments in the fund at issue. It also allows the court to determine if the particular funder has had prior issues with inappropriate interference in the litigation. Disclosing the name of a funder should not be burdensome.

The Funding Agreement. An intrusive level of disclosure would require production of the funding agreement. Such a requirement could reveal information that would give an unfair advantage to the opposing party. For example, the financial return structure set out in the agreement could indicate how risky (or not) the funder believes the case to be. Opposing parties could make tactical decisions based on that information. It could also reveal how long the funder expects the case to go before resolution.

Case Analysis. The most intrusive level of disclosure would require production of case analysis. Courts have almost universally held that this material is shielded by the work product doctrine. Requiring disclosure of this material would

be highly disruptive and may lead to significant curtailing of funding available for meritorious claims.

iii. Do Nothing

A final option is to do nothing. That would not mean that litigation funding arrangements would not be subject to regulation. Instead, it would mean that the rules would be developed by the common law.

b. The Available Means

There are several means available to implement regulation over litigation financing if that is viewed as desirable.

A readily available route is the adoption of court rules. A rule-based approach is also flexible and can be revised based on future developments. Because rules are not designed to establish substantive law, they are not an apt method for substantive regulation. They would be effective for promoting disclosure. Rules could be adopted by individual courts or by the courts as a whole.

Standing orders are an alternative to court rules. Standing orders are easier to implement than rules, but they can be less effective, because it is more difficult for litigants to learn about them and comply. Standing orders can be implemented by individual judges, as Chief Judge Connolly's Standing Order shows. If there is a desire to gather information before adopting court rules, then standing orders could be a viable approach.

A statute is likely necessary for substantive regulation. That path would require coordinating with the political branches.

c. Recommendation

- The Committee has not identified any issues with the current use of third-party litigation funding in the Delaware state courts.

- The Committee does not believe that substantive regulation of litigation financing is necessary.

- The Committee believes there could be value in considering a court rule that would authorize limited discovery into third-party litigation funding and limit broader discovery on that subject. A rule could provide helpful guidance to litigants and judges in this area. For

purposes of discoverability, the Committee would recommend a rule, comparable to Superior Court Rule 26(b)(2) on insurance agreements, but which would only authorize discovery regarding whether there is any arrangement that gives a third party control over the litigation. The Committee would recommend that the rule not permit broader discovery into third-party litigation funding absent some additional showing of need. The Committee would recommend that the rule make clear that some third-party litigation funding material, such as case analysis, is work product.

- The task of considering a court rule could be for the Committee or a future committee. There may be value in having each court prepare its own rule, because different courts may have different needs.

VII. Appendices

a. Appendix A: The Bar Survey and Results

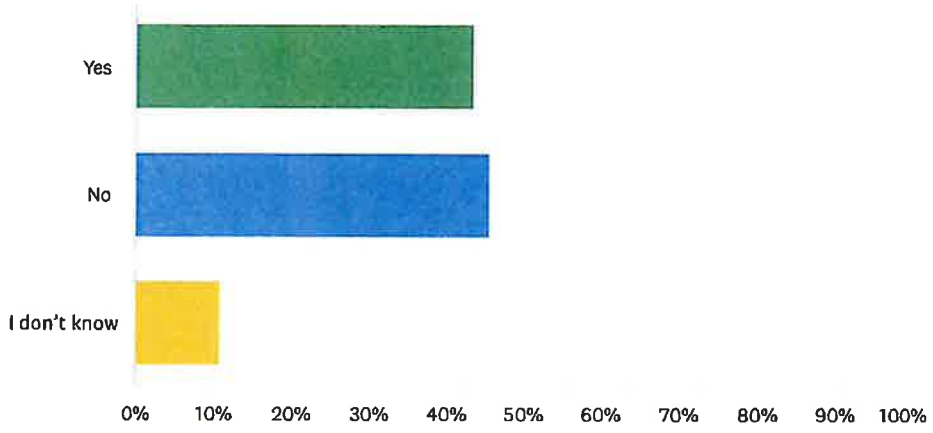
b. Appendix B: Table of Other Jurisdictions

June 30, 2023

APPENDIX A

Q1 Have you ever been involved in a matter in which you knew that either your client or the client of another party received funding provided by a litigation funder?

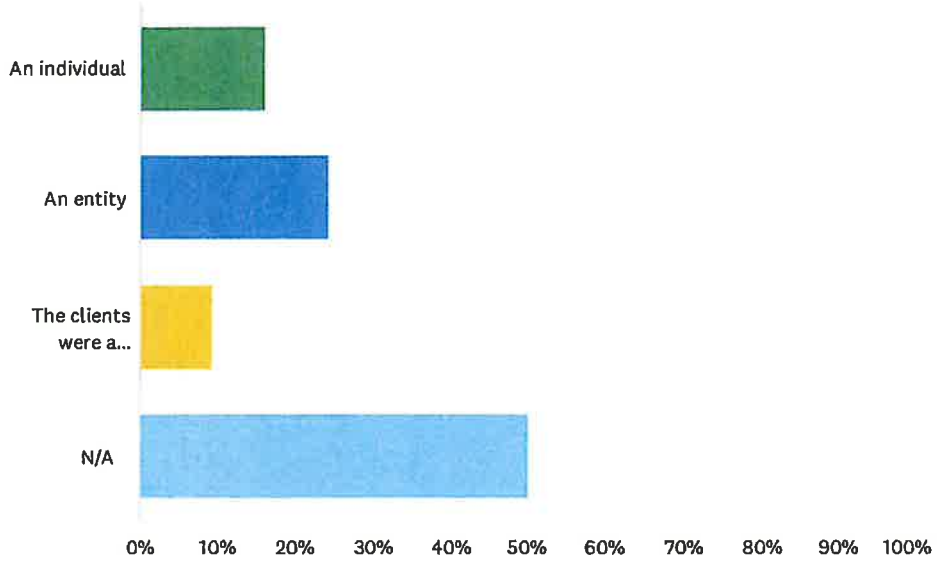
Answered: 184 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	43.48%	80
No	45.65%	84
I don't know	10.87%	20
TOTAL		184

Q2 If the answer to question 1 is yes, was the client in question an individual or an entity?

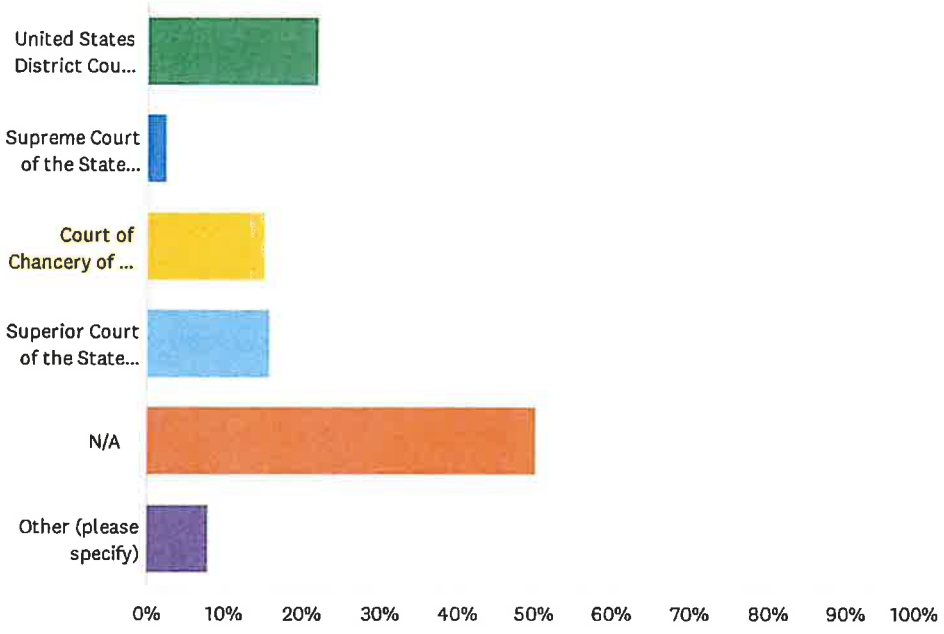
Answered: 161 Skipped: 23



ANSWER CHOICES	RESPONSES	
An individual	16.15%	26
An entity	24.22%	39
The clients were a combination of individuals and entities.	9.32%	15
N/A	50.31%	81
TOTAL		161

Q3 If the answer to question 1 is yes, in what courts were those matters? Please choose all that apply.

Answered: 159 Skipped: 25



ANSWER CHOICES	RESPONSES	
United States District Court for the District of Delaware	22.01%	35
Supreme Court of the State of Delaware	2.52%	4
Court of Chancery of the State of Delaware	15.09%	24
Superior Court of the State of Delaware	15.72%	25
N/A	50.31%	80
Other (please specify)	8.18%	13

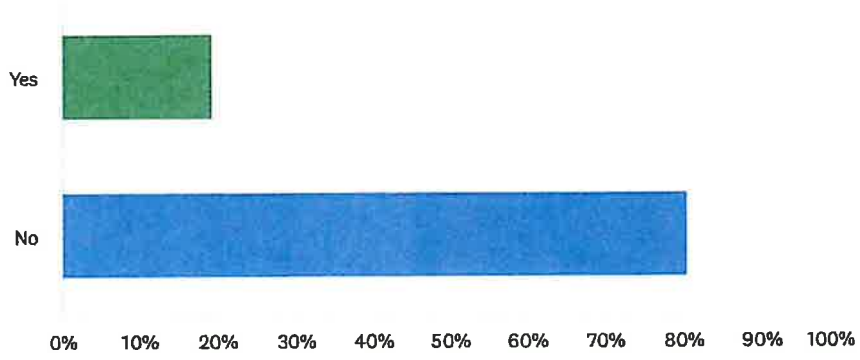
Total Respondents: 159

#	OTHER (PLEASE SPECIFY)	DATE
1	I have long suspected that some of my clients' adversaries have had litigation funding, but do not know for sure.	5/1/2023 11:25 AM
2	US Bankruptcy Court for District of Delaware	4/27/2023 9:09 AM
3	U.S. District Court, M.D. FL; and 11th Cir. Court of Appeals	3/15/2023 3:21 PM
4	New York State Court	3/14/2023 1:51 PM
5	Cecil County Circuit Court in Elkton, MD (I was pro hac'd in for the trial)	3/14/2023 12:20 PM
6	International Arbitration	3/14/2023 11:48 AM

7	Cayman Islands; C.D. Cal.	3/14/2023 11:36 AM
8	Other federal courts, including E.D. Va	3/14/2023 11:35 AM
9	Cayman Courts	3/14/2023 11:30 AM
10	United States Bankruptcy Court for the District of Delaware	3/14/2023 11:24 AM
11	Netherlands court	3/14/2023 11:24 AM
12	United States Bankruptcy Court for the Southern District of New York	3/14/2023 11:23 AM
13	Federal Court	3/14/2023 11:20 AM

Q4 Do you have firsthand experience working with a litigation funder?

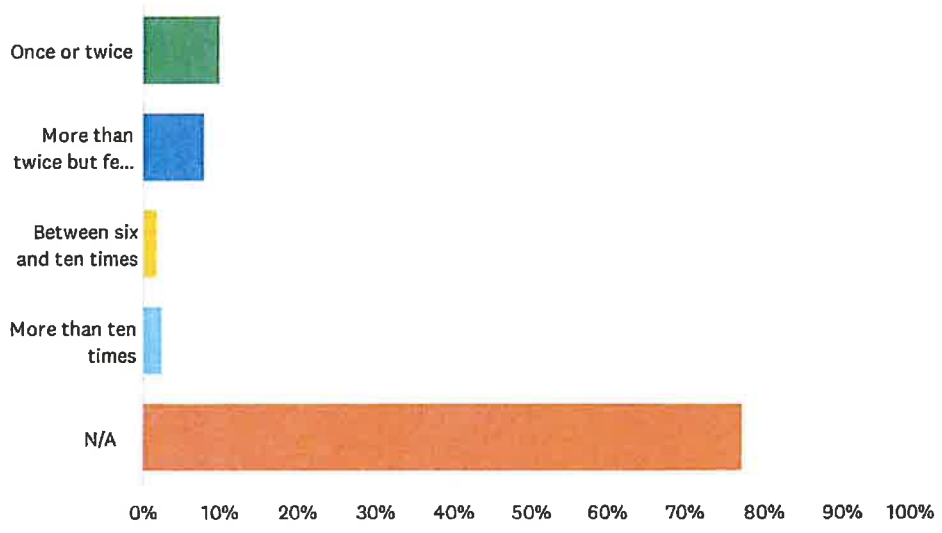
Answered: 181 Skipped: 3



ANSWER CHOICES	RESPONSES	
Yes	19.34%	35
No	80.66%	146
TOTAL		181

Q5 If the answer to question 4 is yes, how many times have you done so?

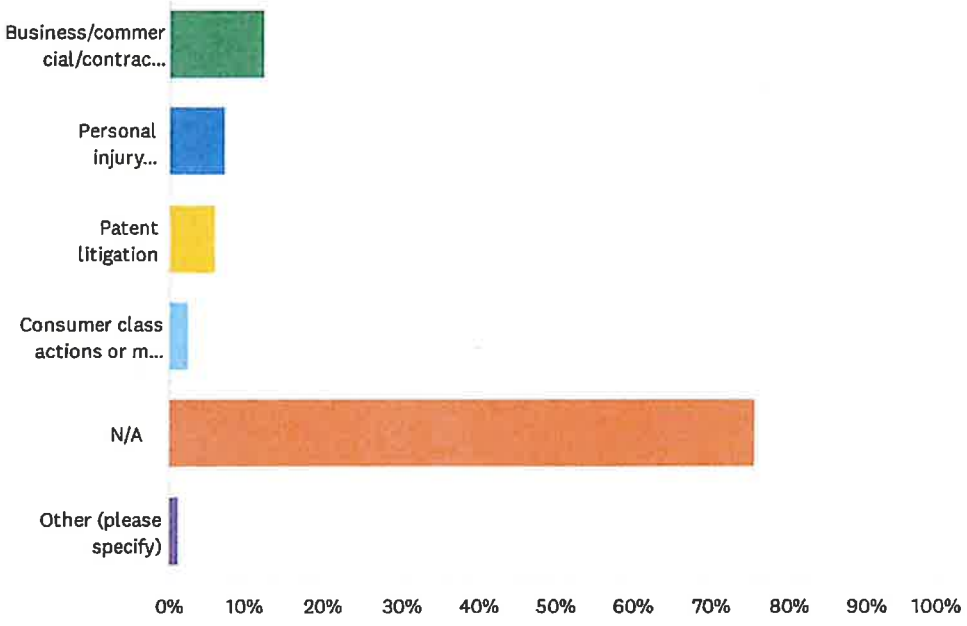
Answered: 160 Skipped: 24



ANSWER CHOICES	RESPONSES	
Once or twice	10.00%	16
More than twice but fewer than six times	8.13%	13
Between six and ten times	1.88%	3
More than ten times	2.50%	4
N/A	77.50%	124
TOTAL		160

Q6 If the answer to question 4 is yes, what was the type of matter(s)? Please choose all that apply.

Answered: 160 Skipped: 24



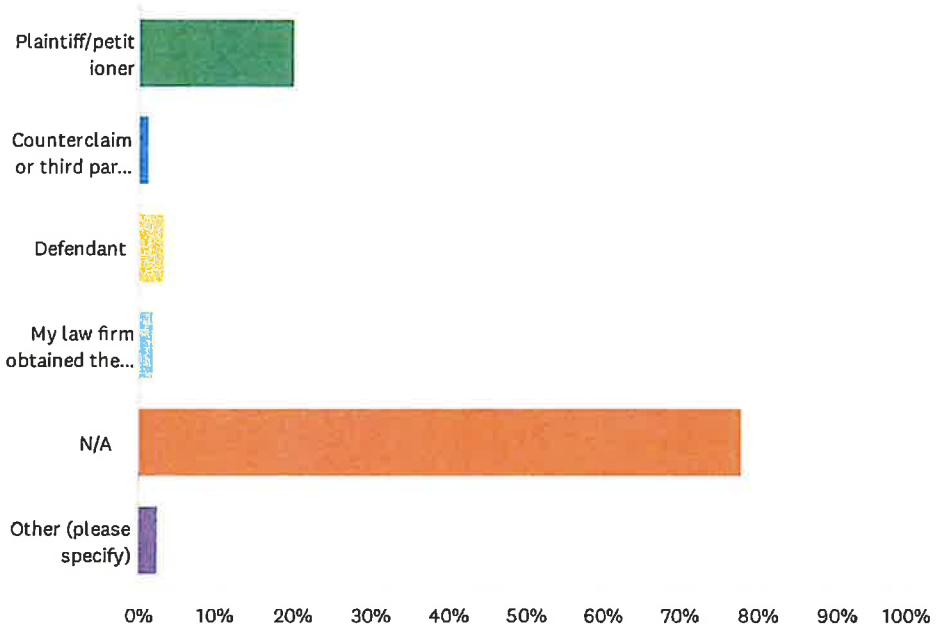
ANSWER CHOICES	RESPONSES	
Business/commercial/contract/corporate litigation	12.50%	20
Personal injury litigation	7.50%	12
Patent litigation	6.25%	10
Consumer class actions or mass tort litigation	2.50%	4
N/A	75.63%	121
Other (please specify)	1.25%	2

Total Respondents: 160

#	OTHER (PLEASE SPECIFY)	DATE
1	employment discrimination	3/15/2023 11:10 AM
2	Cayman appraisal	3/14/2023 11:36 AM

Q7 If the answer to question 4 is yes, what was the position type of your client? Please choose all that apply.

Answered: 160 Skipped: 24



ANSWER CHOICES	RESPONSES	
Plaintiff/petitioner	20.00%	32
Counterclaim or third party plaintiff	1.25%	2
Defendant	3.13%	5
My law firm obtained the funding	1.88%	3
N/A	78.13%	125
Other (please specify)	2.50%	4

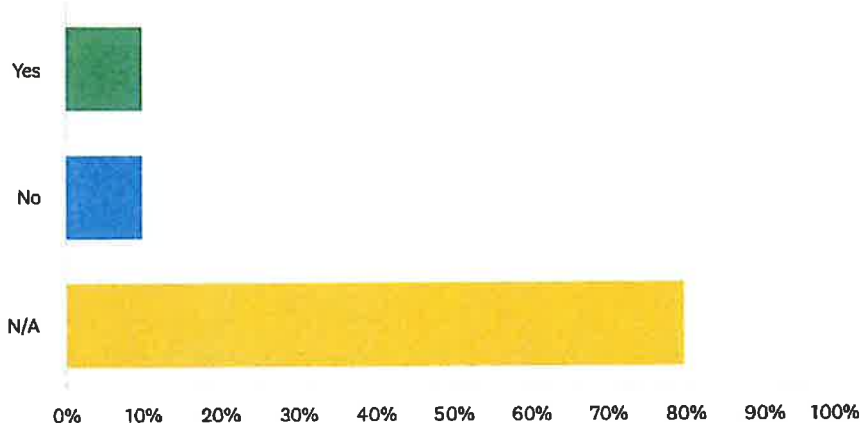
Total Respondents: 160

#	OTHER (PLEASE SPECIFY)	DATE
1	Most personal injury defense cases are funded by third-party insurance carriers. The material difference insurance company funding and other third party finders is the process for the latter requires the funded party to complete a case evaluation. For reasons not clear to me, that questionnaire is subject to discovery or disclosure.	4/27/2023 11:24 AM
2	Situations involved client investing with a litigation funder. In one, my client sued the litigation funder contending the PPM omitted material information. In others, I advised the client in connection with his investment decision.	3/22/2023 9:08 AM
3	Engaged by a litigation funder to assist in an evaluation of whether or not to finance pending litigation.	3/14/2023 10:54 PM

4	Note that I have investigated funding for specific risks in contingent litigation on behalf of stockholder classes but never actually secured it because the economics were not sufficiently favorable	3/14/2023 11:32 AM

Q8 If the answer to question 4 is yes, did the funding ever become known to your client's litigation adversaries?

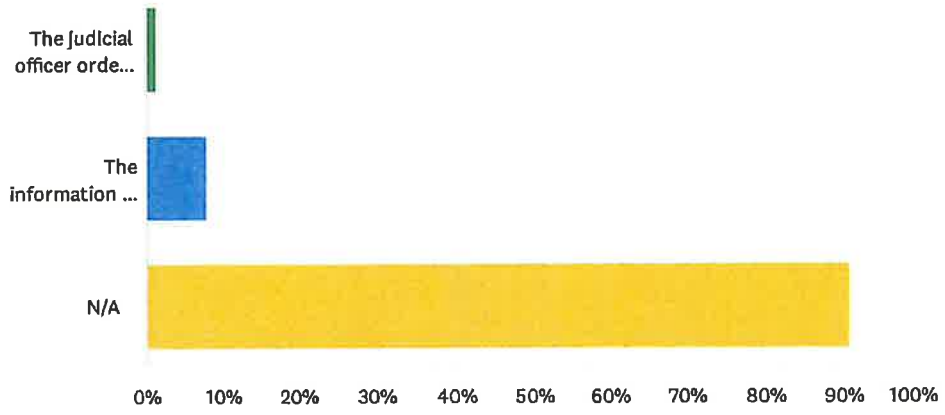
Answered: 160 Skipped: 24



ANSWER CHOICES	RESPONSES	
Yes	10.00%	16
No	10.00%	16
N/A	80.00%	128
TOTAL		160

Q9 If the answer to question 8 is yes, how did that information become known? Please choose all that apply.

Answered: 154 Skipped: 30



ANSWER CHOICES	RESPONSES	
The judicial officer ordered disclosure of the information.	1.30%	2
The information was disclosed or revealed during discovery or trial.	7.79%	12
N/A	90.91%	140
TOTAL		154

#	OTHER (PLEASE SPECIFY)	DATE
1	Funding was in bankruptcy court and needed court approval, so our client voluntarily disclosed it in a motion for approval.	4/27/2023 8:55 AM
2	In one matter, we had preliminary discussions with a funder that did not result in any funding. In another matter, advice was provided to a law firm involved with litigation funding.	3/15/2023 11:10 AM
3	Some defense attorneys seek this information during discovery. I object.	3/14/2023 12:58 PM
4	Funding might have to be disclosed in order to settle the claim as the interest on the funding is very high	3/14/2023 12:47 PM

Q10 If you have ever been involved in a matter or matters (a) in which any party received funding provided by a litigation funder, (b) the fact and identity of the litigation funder became known in the litigation and (c) the information is not subject to a confidentiality designation in the litigation, please insert the name or names of the litigation funders.

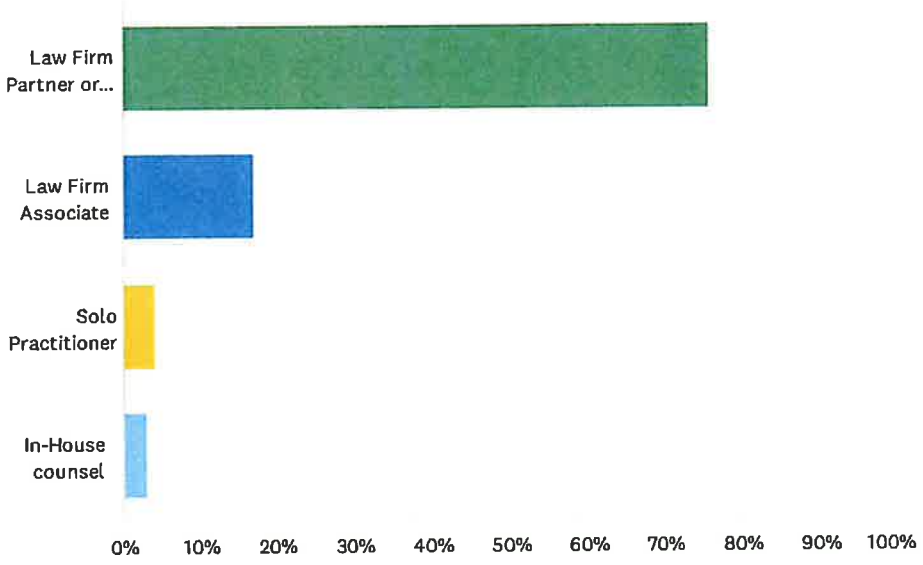
Answered: 32 Skipped: 152

#	RESPONSES	DATE
1	Baker Street Funding	4/27/2023 11:24 AM
2	Our role was to provide Delaware legal opinions for a Delaware entity entering into a loan arrangement which I recall was to be used to fund litigation costs. I don't recall the identities of the parties and I was not involved in the litigation.	4/27/2023 8:57 AM
3	n/a	3/22/2023 3:00 PM
4	N/A	3/22/2023 1:57 PM
5	N/A	3/21/2023 12:00 PM
6	NA	3/20/2023 3:44 PM
7	I have not	3/19/2023 12:01 PM
8	Burford Capital	3/15/2023 6:45 PM
9	Ruckh v. CMC II, LLC et al, No. 8:2011cv01303 (M.D. Fla. 2018), and on appeal to the 11th Circuit. The funder's name is disclosed in the 11th Circuit decision as ARUS 1705-556 LLC.	3/15/2023 3:21 PM
10	Fortress / Fortress Investments Woodsford Curiam Capital	3/15/2023 3:14 PM
11	Mavexar	3/15/2023 11:10 AM
12	NA	3/14/2023 8:18 PM
13	N/A NOTE -- we were involved in a case where the nominal plaintiffs/challengers to an administrative decision had they attorneys' fees paid by a third party that wanted the challenge to go forward, but did not want their identity disclosed; this was not for a "piece of the action" (i.e., a portion of any monetary award) but was a group opposed to the administrative decision whose involvement, if known, would have weakened the legal challenge; we were defending the decision and prevailed	3/14/2023 3:17 PM
14	NA	3/14/2023 1:10 PM
15	No	3/14/2023 12:55 PM
16	No, I thought purchasing an interest in the outcome of a lawsuit was prohibited as champerty.	3/14/2023 12:50 PM
17	Oasis Legal Funding	3/14/2023 12:47 PM
18	My client entered into the contract without my knowledge or consultation.	3/14/2023 12:20 PM
19	Can't recall.	3/14/2023 12:17 PM
20	N/A	3/14/2023 12:13 PM
21	Delaware Collateral and Security, LLC	3/14/2023 12:08 PM
22	N/A	3/14/2023 11:59 AM
23	Advocate Capital, and Oasis	3/14/2023 11:47 AM
24	Benchwalk	3/14/2023 11:36 AM

25	Burford Capital	3/14/2023 11:31 AM
26	N/A	3/14/2023 11:31 AM
27	Omnibridge Burford	3/14/2023 11:30 AM
28	None	3/14/2023 11:26 AM
29	Attestor Limited	3/14/2023 11:24 AM
30	N/A	3/14/2023 11:23 AM
31	Unfortunately, I do not recall.	3/14/2023 11:23 AM
32	Bentham	3/14/2023 11:21 AM

Q11 What is your position at your law firm?

Answered: 170 Skipped: 14



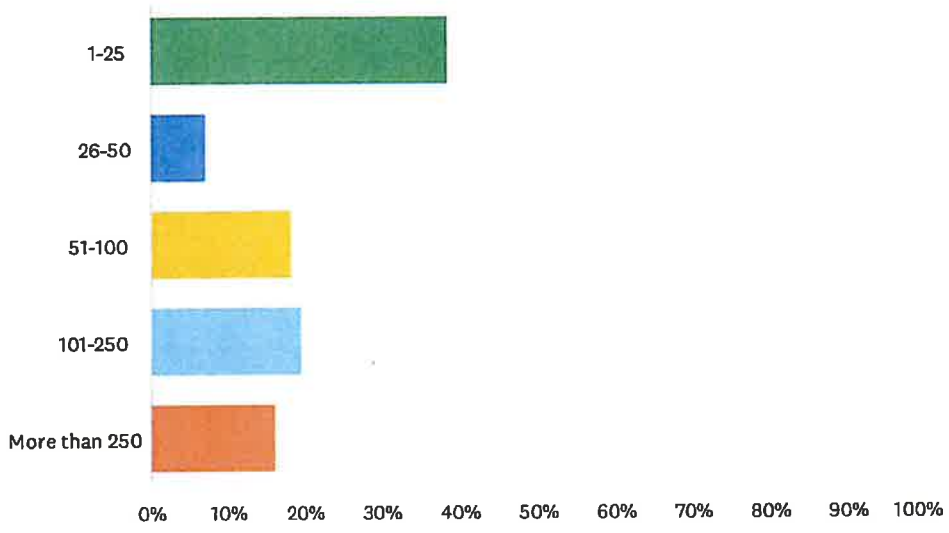
ANSWER CHOICES	RESPONSES	
Law Firm Partner or Counsel	75.88%	129
Law Firm Associate	17.06%	29
Solo Practitioner	4.12%	7
In-House counsel	2.94%	5
TOTAL		170

#	OTHER (PLEASE SPECIFY)	DATE
1	director	5/1/2023 9:00 AM
2	retired judge	4/1/2023 2:42 PM
3	Government	3/15/2023 5:26 PM
4	retired partner	3/15/2023 12:16 PM
5	In-House counsel (formerly Law Firm Counsel)	3/14/2023 2:20 PM
6	Retired	3/14/2023 12:55 PM
7	Delaware DAG	3/14/2023 12:50 PM
8	Government	3/14/2023 11:46 AM
9	outside consultant	3/14/2023 11:24 AM
10	Deputy Attorney General, my experience was back when I was a partner at a law firm.	3/14/2023 11:23 AM
11	retired from private practice	3/14/2023 11:22 AM

12	Public Service	3/14/2023 11:22 AM

Q12 What is the size of your law firm (no. of attorneys)?

Answered: 179 Skipped: 5



ANSWER CHOICES	RESPONSES	
1-25	38.55%	69
26-50	7.26%	13
51-100	18.44%	33
101-250	19.55%	35
More than 250	16.20%	29
TOTAL		179

APPENDIX B

State	Statutes/Case law
Alabama (AL)	Not regulated *Wilson v. Harris*, 688 So 2d 265 (Ala. Civ. App. 1996) (holding that a funding agreement was void on public policy grounds because the agreement was a 'gambling contract . . . and its speculative characteristics make it closely akin to champerty'.) Despite the *Wilson* decision, Alabama has failed to adopt any rules regulating consumer legal funding. See generally Student Commentary: Consumer Legal Funding in Alabama, 36 J. Legal Prof. 529 (Spring, 2012) Several Bills considered, none passed.
Alaska (AK)	Not regulated Alaska R. Prof. Conduct 1.8, Conflict of Interest (prohibiting lawyers from acquiring a proprietary interest in litigation, arising out of the common law rules on champerty and maintenance.)
Arizona (AZ)	Not regulated Champerty is not recognized in the state of Arizona, and thus the doctrine does not bar litigation funding agreements. *See Landi v. Arkules*, 835 P2d 458, 464 (Ct. App. 1992). Litigation funding agreements are privileged. The District of Arizona has held that litigation funding agreements fit within the Ninth Circuit's standard of materials 'created because of litigation'. This protection was held to extend to situations where a plaintiff is receiving financing from a third-party funder to support both litigation and operating expenses, where litigation is the scope of operation for that business. *See Cont'l Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1021 (D. Ariz. 2020). However, disclosure of the identity of the litigation funder itself was not protectable information under the work product doctrine. *Id.*
Arkansas (AR)	Regulated Arkansas adopted a rate cap for consumer lawsuit lending transitions. *See* AR Code § 4-57-109. Ark. R. Prof. Conduct 1.8, Conflict of Interest (prohibiting lawyers from acquiring a proprietary interest in litigation, arising out of the common law rules on champerty and maintenance.)
California (CA)	Not regulated

	LA County Bar Assn. Ethics Op. No. 500 (1999) (discussing the permissibility of funding arrangement under California law and legal ethics regime) Pursuant to the Standing Order for all Judges in the Northern District of California, the parties must include in the Joint Case Management Statement the following information: "Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the 'Certification of Interested Entities or Persons' required by Civil Local Rule 3-15. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim." N.D. Cal. Standing Order for All Judges (2023). Communications with a litigation funder have been shielded from disclosure and, where subject to a properly executed non-disclosure agreement, should not result in a waiver. *See Odyssey Wireless, Inc. v. Samsung Elecs. Co.*, No. 3:15-cv-01738-H (RBB), 2016 U.S. Dist. LEXIS 188611 (S.D. Cal. Sep. 19, 2016); *see also Space Data Corporation v Google LLC*, No. 16–CV–03260, 2018 WL 3054797, at *1 (N.D. Cal. 11 June 2018) (communications with potential funders are not relevant).) The California State Bar established a Task Force on Access Through Innovation of Legal Services, which published several alternate proposed revisions to the ethical rules that would, if adopted, either allow limited non-attorney ownership in law practices or largely do away with the traditional restrictions on fee-sharing. Instead of adopting widespread revisions to the ethical rules, however, the California Supreme Court approved a narrowly revised rule with respect to non-lawyer fee sharing.
Colorado (CO)	*Oasis Legal Fin. Grp., LLC v. Coffman*, 2015 Colo. 63, 361 P.3d. 400 (Colo. 2015) (litigation financing transactions created debt to be governed by the Uniform Consumer Credit Code where the agreements provided the litigation finance companies only with the rights that any creditor would have) "A lender who engages in such transactions, variously called 'litigation,' lawsuit,' or 'legal' 'funding', 'financing', or 'advances', with Colorado consumers must comply fully with Colorado's Uniform Consumer Credit

	Code, §§5-1-101, et seq., C.R.S. 2009 (Code), including licensure." *See* Atty. Gen. Ltr. RE: Pre-Settlement Lender Licensing.
Connecticut (CT)	*Ankerman v. Mancuso*, 271 Conn. 772 (Conn. 2004) (finding that attorney did not violate Rules of Professional Conduct 1.8 where a client to a title action executed a promissory note for legal fees owed secured by the property in the title action and the attorney sought enforcement of the note only and did not foreclose on the mortgage). Bills considered, none passed. Principle of Champerty recognized in state: "Champerty is simply a specialized form of maintenance in which the person assisting another's litigation becomes an interested investor because of a promise by the assisted person to repay the investor with a share of any recovery." C. Wolfram, Modern Legal Ethics (1986) § 8.13, p. 490; see also *Richardson v. Rowland*, 40 Conn. 565, 570 (1873).
Florida (FL)	Florida Bar Ethics Op. 00-3 (March 15, 2002) (addressing attorney conduct regarding litigation finance) *Kraft v. Mason*, 668 So. 2d 679 (Fla. Dist. Ct. App. 1996) (concluding that where the financier did not intermeddle, instigate litigation, or exert control of the lawsuit after making the loan, the litigation contract was not void as champertous.) "Maintenance is an officious intermeddling in a suit which in no way belongs to the intermeddler, by maintaining or assisting either party to the action, with money or otherwise, to prosecute or defend it." 9 Fla. Jur. 2d Champerty and Maintenance § 1 (1979). Champerty is a form of maintenance wherein one will carry on a suit in which he has no subject-matter interest at his own expense or will aid in doing so in consideration of receiving, if successful, some part of the benefits recovered. 14 C.J.S. Champerty and Maintenance § 1a (1991).

Georgia (GA)	Pursuant to Georgia legislation, "[a] contract that is against the policy of the law cannot be enforced." Ga. Code Ann. § 13-8-2 (West). The statute illustrates the following contracts as contrary to public policy: "(1) Contracts tending to corrupt legislation or the judiciary; (2) Contracts in general restraint of trade, as distinguished from contracts which restrict certain competitive activities, as provided in Article 4 of this chapter; (3) Contracts to evade or oppose the revenue laws of another country; (4) Wagering contracts; or (5) Contracts of maintenance or champerty. . . . " *Sapp v. Davids*, 168 S.E. 62 (Ga. 1933) (invalidated champertous contract under common law). It does not appear that any Georgia court has invalidated any contract as violative of the statutory prohibition against champaerty since 1933.
Hawaii (HI)	There is little case law addressing litigation financing issues in Hawaii. At least one court in Hawaii has held that "the common law doctrines of champerty and maintenance are not impediments to the assignability of the claims" for professional malpractice, breach of fiduciary duty, and fraud. *TMJ Hawaii, Inc. v. Nippon Tr. Bank*, 153 P.3d 444, 450 (Haw. 2007)
Idaho (ID)	There is little case law addressing litigation financing issues in Idaho. However, Idaho precedent holds that while "Idaho law does not recognize champerty and maintenance, Idaho law is in accord with the many states which continue to recognize that the goals of champerty and maintenance provisions are still around and well, both defensively and offensively, in the form of actions or defenses based on abuse of process or malicious prosecution of civil actions." *Wolford v. Tankersley*, 695 P.2d 1201, 1222 (Idaho 1984).
Illinois (IL)	Regulated by statute Recently adopted the Consumer Legal Funding Act (815 Ill. Comp. Stat. Ann. 121 (West 2022) et. seq.). The Consumer Legal Funding Act implements licensing and contractual requirements on financers, imposes limits on fees, and prohibits funder control of litigation and settlement decisions.
Indiana (IN)	Regulated by statute New regulation in Indiana requires a claimant to provide written notice of a funding agreement. *See* Ind. Code § 24-12-4-2 (2023); Ind. H.B 1124.

Iowa (IA)	There is little case law addressing litigation financing issues in Iowa. To the extent Iowa case law has addressed issues relating to litigation financing, Iowa courts have held that the "law now generally favors the assignability of choses in action . . . ." *Conrad Bros. v. John Deere Ins. Co.*, 640 N.W.2d 231, 236 (Iowa 2001). The Supreme Court of Iowa has held that the law generally "prohibit[s] the involuntary assignment of a claim for legal malpractice and prohibit[s] the assignment of a claim for legal malpractice to the adverse party in the underlying litigation." *Gray v. Oliver*, 943 N.W.2d 617, 628 (Iowa 2020).
Kansas (KS)	There is little case law addressing litigation financing issues in Kansas.
Kentucky (KY)	Litigation funding is prohibited by statute under Kentucky law. *See* Ky. Rev. Stat. Ann. § 372.060 (West) ("Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party on record in the suit, whereby the thing sued for or in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void.")
Louisiana (LA)	Pursuant to Louisiana statute, the assignment and sale of litigious rights is permitted. *See* La. Civ. Code Ann. art. 2652 ("When a litigious right is assigned, the debtor may extinguish his obligation by paying to the assignee the price the assignee paid for the assignment, with interest from the time of the assignment.") Comment (g) to the statute notes that "a contingency fee agreement between an attorney and his client is not a prohibited sale of a litigious right. See R.S. 37:218."
Maine (ME)	Regulated by statute The Maine Consumer Credit Code Legal Funding Practices (Me. Rev. Stat. Ann. tit. 9-A, § 12-101, et. seq). Maine's legislation requires litigation funders to register with the state authorities and mandates specific provisions that must be included in financing contracts, including a disclosure form setting forth the fees and interest rate charged and a representation that the company has no right to make, and will not make, any decisions regarding the course of the litigation.
Maryland (MD)	Maryland law does not prohibit litigation funding, but litigation financers must comply with lending laws which restrict the kind of interest rates that can be charged. *See e.g., In the Matter of: American Legal Funding, LLC A/k/a American Legal Funding, L.l.c., A/k/a American Legal Funding, LLC, D/b/a American Legal Funding Llc/alfund Az1, LLC, D/b/a American Legal Funding Llc/alfund Az1, Llc/al*, 2011 WL 1540473 (Feb. 4, 2011) (state investigation by the Maryland Department of Labor, Licensing and

	Regulation, Office of the Commissioner of Financial Regulation found that litigation funder "activities constitute usurious and unlicensed lending to Maryland consumers in violation of Maryland law"); *In the Matter of: Plaintiff Funding Holding, Inc. D/b/a Lawcash, Plaintiff Holding V LLC, Dennis Shields, Harvey R. Hirschfeld, and Jason Younger, Respondents*, 2015 WL 5637481 (Aug. 18, 2015) (finding that "Respondents' business activities constitute usurious and unlicensed lending to Maryland consumers in violation of Maryland law, and that it is in the public interest that Respondents immediately Cease and Desist from making litigation funding advances or other types of loans to, or otherwise engaging in lending activities with, Maryland consumers").
Massachusetts (MA)	*Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997) (enforcing third-party litigation funding agreement and nullifying the doctrines of champerty and maintenance; the court further held that it would evaluate such agreements by determining whether the agreement was fair and reasonable when made); *id.* at 1226 ("We have long abandoned the view that litigation is suspect, and have recognized that agreements to purchase an interest in an action may actually foster resolution for a dispute."); *id.* at 1227 ("[R]relevant factors might have included the respective bargaining position of the parties at the time the agreement was made, whether both parties were aware of the terms and consequences of the agreement, whether [fundee] may have been unable to pursue the lawsuit at all without [fundor]'s funds, and whether the [fees] is unreasonable in the circumstances.").
Michigan (MI)	*Smith v. Childs*, 497 N.W.2d 538, 540 (Mich. Ct. App. 1993) (holding that champerty is not a defense to the enforcement of a contract) *Lawsuit Fin., L.L.C. v. Curry*, 683 N.W.2d 233, 239-40 (Mich. Ct. App. 2004) (voiding a litigation financing agreement on a finding that plaintiff held an absolute right to repayment on the "advances" and thus constituted a usurious loan for exceeding the legal interest rate) *usury laws and interest restrictions are another way that states/courts regulate third party litigation finance agreements. *See*, *e.g.* Mich. Comp. Laws §§ 438.31-438.32.*
Minnesota (MN)	*Maslowski v. Prospect Funding P'rs LLC*, 944 N.W.2d 235, 241 (Minn. 2020) (abolishing champerty doctrine and holding that litigation funding agreements are enforceable); *id.* at 241 ("[c]ourts and attorneys should likewise be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation....") (citing *Huber v. Johnson*, 70 N.W. 806, 808 (1897) (stating that 'it is difficult to conceive of any stipulation more against public policy' than a contract term requiring the litigation financier's permission to settle the underlying litigation)); *id.* ("There is also the possibility of further regulation by the Legislature...").

	On remand, the trial court ultimately held the litigation financing agreement was usurious under Minn. Stat. § 334.01 and thus unenforceable *see Maslowski v. Prospect Funding P'rs LLC*, 978 N.W.2d 447 (Minn. Ct. App. 2022).
Mississippi (MS)	No guidance.
Missouri (MO)	Pending Legislation: H.B. 2771, *Consumer Legal Funding Model Act and the Civil Litigation Funding Act*, 101st Gen. Ass., 2d Reg. Sess. (Mo. 2022) (Passed by special committee, currently in rules & legislative oversight committee). Would require disclosure of all participants in litigation financing arrangements in personal injury suits during the discovery process: § 436.575(1): "[A] consumer or the consumer's legal representative shall, without awaiting a discovery request, provide to all parties to the litigation, including the consumer's insurer if prior to litigation, any litigation financing contract or agreement under which anyone, other than a legal representative permitted to charge a contingent fee representating a party, has a right to receive compensation or proceeds from the consumer that are contingent on and sourced from any proceeds of the civil action by settlement, judgment, or otherwise."
Montana (MT)	Mont. Code Ann. § 37-61-408 (2021) (statute prohibiting attorneys from involvement in litigation funding) *Lussy v. Bennett*, 692 P.2d 1232, 1235-36 (Mont. 1984) (explaining that Mont. Code Ann. § 37-61-408 also applies to a party prosecuting in person an action instead of acting through an attorney, and dismissing plaintiff's claim for "smack[ing] of champerty" and being against public policy).
Nebraska (NE)	Regulated by statute Neb. Rev. Stat. §§ 25-3301-25-3309 (2010) (statute imposing restrictions on third-party litigation funding and requiring mandatory disclosure statements)
Nevada (NV)	Regulated by statute Nev. Rev. Stat. ch. 604C (2021), Consumer Litigation Funding (statute imposing restrictions on third-party litigation funding and requiring litigation funders to be licensed).

New Hampshire (NH)	*Markarian v. Bartis*, 199 A. 573, 577 (N.H. 1938) (concluding that champerty and maintenance doctrines are not in force in New Hampshire). *Adkin Plumbing & Heating Supply Co., Inc. v. Harwell*, 606 A.2d 802, 804-05 (N.H. 1992) (allowing attorney to recover on a contingent fee agreement when he was discharged without cause prior to the disposition of the case, even though the contingency never occurred).
New Jersey (NJ)	New Jersey Advisory Committee on Professional Ethics, Opinion 691 (2001) (concluding that a lawyer may ethically refer a client to a factor concerning an advance against an anticipated personal injury judgment or settlement, provided that the lawyer follows the standards and limitations laid out by the Committee). *Schomp v. Schenck*, 40 N.J.L. 195, 206 (N.J. 1878) (rejecting common law prohibitions on champerty and maintenance). *Weller v. Jersey City H&P St. Ry. Co.*, 57 A. 730, 732 (N.J. Ch. 1904) (explaining that the law of champerty and maintenance has never prevailed in New Jersey). *Cohen as Tr. of Robert B. Cohen Living Tr. v. Perelman*, 2018 WL 6034978, at *19 (N.J. Super. Ct. App. Div. Nov. 19, 2018) (observing that third-party litigation funding is fine so long as it does not run contrary to the public interest).
New Mexico (NM)	New Mexico has not extensively dealt with modern litigation finance. To the extent it has addressed issues relating to litigation finance, New Mexico courts have stated that personal injury claims cannot be assigned and the proceeds from those claims cannot be assigned. However, commercial claims are assignable. *Quality Chiropractic, PC v. Farmers Ins. Co. of Am.*, 51 P.3d 1172, 1183 (N.M. Ct. App. 2002) ("We decline to abrogate the common law rule prohibiting the assignment of personal injury claims, and we reject any distinction between an assignment of the proceeds of a claim and an assignment of the claim itself"); *Wilson v. Berger Briggs Real Estate & Ins. Inc.*, 497 P.3d 654, 660 (N.M. Ct. App. 2021) ("Because we agree with the district court that none of the causes of action brought by Wilson against Berger Briggs state injuries or claims of a personal nature, but are instead commercial in nature, and our jurisprudence suggests and common law establishes that such commercial claims are assignable, we conclude there to be no error in the district court ruling in this regard and hold that commercial claims of the nature at issue in this case are assignable")

New York (NY)	New York has a champerty statute. The statute contains a safe harbor and will not apply when the purchase price is at least $500,000. Furthermore, the champerty statute is construed narrowly and will not apply when the purpose of an assignment is the collection of a legitimate claim. The statute will also not apply when the primary purpose in acquiring the assets was not to bring a claim. The Southern District of New York has also stated that under New York law that personal injury claims cannot be assigned but that plaintiffs can enter into agreements to conditionally assign settlement proceeds. Furthermore, one New York decision, as part of its reasoning, stated that a party could not get discovery into litigation funding because it could not show how it would be relevant into any claim or defense. The Southern District and Eastern Districts for New York have ruled similarly. New York courts have also dismissed cases regarding litigation financing agreements that are under New York law that include New York forum provisions when almost all of the aspects of the transaction took place in another state. Lastly, in 2005, the attorney general for New York and several litigation funding companies settled and entered into an agreement. As part of this agreement, the litigation funding companies would have to comply with various requirements including disclosing the amount to be advanced, an itemization of one-time fees, and the total amount to be repaid. N.Y. JUD § 489; *Tr. for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 918 N.E.2d 889 (N.Y. 2009) ("the champerty statute does not apply when the purpose of an assignment is the collection of a legitimate claim"); *Fairchild Hiller Corp. v. McDonnel Douglas Corp.*, 270 N.E.2d 691 (N.Y. 1971); *Evans v. City of N.Y.*, 2021 WL 3617269 (S.D.N.Y. July 15, 2021); *Worldview Entm't Holdings, Inc. v. Woodrow*, 204 A.D.3d 629, 630 (N.Y. Sup. Ct. 2022) ("defendant has not explained how discovery about litigation financing and witness payments would support or undermine any particular claim or defense"); *Kaplan v. S.A.C. Capital Advisors, L.P.*, 2015 WL 5730101 (S.D.N.Y. Sep. 10, 2015); *Benitez v. Lopez*, 2019 WL 1578167 (E.D.N.Y. Mar. 14, 2009) ("Defendants do not explain how any litigation funding impacts Plaintiff's credibility or how it could be used to impeach his trial testimony"); *Prospect Funding Holdings L.L.C. v. Maslowski*, 146 A.D.3d 535 (N.Y. Sup. Ct. 2017); *Application of Whitehaven S.F., LLC v. Spangler*, 45 F.Supp.3d 333 (S.D.N.Y. 2014).
North Carolina (NC)	North Carolina has not extensively dealt with modern litigation finance. To the extent is had addressed this issue, North Carolina courts have stated that the assignment of litigation proceeds are not *per se* champertous but can constitute champerty if some other aspect grants control over the litigation. A federal bankruptcy court in North Carolina also held that an agreement did constitute champerty under North Carolina

	law because the agreement allowed the funder to revaluate the litigation and discontinue funding and give the funder other controls over the litigation. *Odell v. Legal Buck, LLC*, 665 S.E.2d 767, 774 (N.C. Ct. App. 2008); *In re DesignLine Corp.*, 565 B.R. 341, 348-49 (Bankr. W.D.N.C. 2017)
North Dakota (ND)	North Dakota has not extensively dealt with modern litigation financing.
Ohio (OH)	Regulated by statute. *See* Ohio Rev. Code §. 1349.55. Ohio's Supreme Court initially held that litigation financing constituted champerty. In response to this decision, Ohio's legislature passed a statute allowing for litigation financing in the state and outlining the rules regarding litigation financing. This statute requires the contract to disclose the total dollar amount advanced, an itemization of one-time fees, the total dollar amount to be repaid in six-month intervals for thirty-six months including fees, and the annual percentage rate of return. The contract must also provide that the consumer can cancel within five days of receipt of the funds without penalty. The contract must also include language that the company will not have a right in making decisions relating to the litigation. The contract must also include a written acknowledgement by the attorney representing the consumer giving several assurances. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003) ("Except as otherwise permitted by legislative enactment or the Code of Professional Responsibility, a contract making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case is void as champerty and maintenance. Such an advance constitutes champerty and maintenance"), *superseded by statute*, Ohio Rev. Code Ann. § 1349.55; Ohio Rev. Code Ann. § 1349.55.
Oklahoma (OK)	Regulated by statute Part of an article of Oklahoma's code is dedicated to litigation finance. These sections include provisions that allow a consumer to cancel the contract within 5 days of the funding date without penalty. The agreement must also contain certain disclosures including the amount to be paid to the consumer, an itemization of one-time charges, the total amount to be assigned by the consumer to funder, and a payment schedule. The agreement must also disclose that the funder will not participate in determining settlement of the claim or interfere with the attorney's professional judgment. It must also state that charges will only be paid from the proceeds of the claim. In addition to this, Oklahoma requires all litigation funders to become licensed in order to do business in the state. The license must be renewed every two years. Lastly, Oklahoma provides a

	model form for a funding agreement. Using this form creates a presumption that the funder has complied with the required disclosures of the statute. Okla. St. Ann. 14A §§ 3-801-817; Okla. Admin. Code §§ 160:75-1-1-160:75-9-1; Okla. Admin. Code § 160:75 App. A
Oregon (OR)	Oregon has not extensively dealt with modern litigation financing.
Pennsylvania (PA)	Champerty is still in effect in Pennsylvania. To establish a *prima facie* case for champerty the party involved must have no interest in the suit, the party must spend its own money in prosecuting the suit, and the party must be entitled by bargain to share in the proceeds of the suit. Under this standard, some litigation funding agreements have been held to be invalid. The Eastern District of Pennsylvania granted a protective order for documents that were sent to a litigation funding company because they were work product and were protected by the common interest doctrine. The Western District of Pennsylvania held similarly and found that communications with litigation funders were protected by the work product doctrine. Lastly, the third circuit reversed in part a decision by the Eastern District of Pennsylvania, which voided litigation funding agreements in connection with a class action and instead held that only true assignments that allowed the lender to seek funds directly from the claim administrator were void but that other litigation funding companies could pursue their claims outside of the claim administration process. *Clark v. Cambria Cty. Bd. of Assessment Appeals*, 747 A.2d 1242, 1246 (Pa. Commw. Ct. 2000) ("The common law doctrine against champerty and maintenance continues to be a viable doctrine in Pennsylvania and can be raised as a defense"); *WFIC, LLC v. LaBarre*, 148 A.3d 812, 818 (Pa. Super. Ct. 2016) ("In order to establish a prima facie case of champerty, the following three elements must exist: (1) the party involved must be one who has no legitimate interest in the suit; (2) the party must expend its own money in prosecuting the suit; and (3) the party must be entitled by the bargain to share in the proceeds of the suit"); *Devon It, Inc. v. IBM Corp.*, 2012 WL 4748160 (E.D. Pa. Sep. 27, 2012); *Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc.*, 2018 WL 466045 (W.D. Pa. Jan. 18, 2018); *Nat'l Football League Players' Concussion Injury Litig.*, 923 F.3d 96 (3d. Cir. 2019).
Rhode Island (RI)	Rhode Island has not extensively dealt with modern litigation financing. However, the District Court of Rhode Island has held that under Rhode Island law that an agreement to provide information in return for a percentage of any money that was recovered did not constitute champerty. *Progressive Gaming Intern., Inc. v. Venturi*, 563 F.Supp.2d 321 (D.R.I. 2008).

South Carolina (SC)	South Carolina has not extensively dealt with modern litigation financing. To the extent it has, South Carolina has held that champerty is no longer recognized as a defense to a loan. Instead, when examining an agreement "The court may examine (1) whether the respective bargaining position of the parties at the time the agreement was made was relatively equal, (2) whether both parties were aware of the terms and consequences of the agreement, (3) whether the borrowing party may have been unable to pursue the lawsuit at all without the financier's help, (4) whether the financier would retain a disproportionate share of the recovery, and (5) whether the financier engaged in officious intermeddling." *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 278 (S.C. 2000).
South Dakota (SD)	No guidance
Tennessee (TN)	Regulated by statute (Tenn. Code Ann. § 47-16-101) A litigation financier shall fulfill each of the following requirements when engaged in litigation financing: (1) The terms of the litigation financing transaction shall be set forth in a written contract that is completely filled-in with no incomplete sections when the contract is offered or presented to the consumer; (2) The litigation financing contract shall contain a right of rescission, allowing the consumer to cancel the litigation financing contract without penalty or further obligation if, within five (5) business days following the consumer's receipt of the funds or goods, or execution of the litigation financing contract, whichever is later, the consumer gives notice of the rescission and returns any money or goods already provided to the consumer by the litigation financier; (3) The litigation financing contract shall contain a written acknowledgment by the consumer of whether the consumer is represented by an attorney in the dispute; (4) If the consumer acknowledges that the consumer is represented by an attorney in the dispute, the litigation financing contract shall include a written acknowledgment executed by the consumer's attorney in the dispute in which the attorney acknowledges all of the following: (A) The attorney has had the opportunity to review the litigation financing contract on behalf of the consumer; (B) Whether the attorney is being paid on a contingency basis pursuant to a written fee agreement; (C) That all proceeds of the legal claim shall be disbursed by either the trust account of the attorney representing the consumer in the dispute or a settlement fund established to receive the proceeds of the dispute from the defendant on behalf of the consumer; (D) The attorney is representing the consumer with regard to the dispute that is the subject of the litigation financing contract; and

	(E) The attorney has neither received nor paid a referral fee or any other consideration from or to the litigation financier, nor will the attorney in the future; and (5) In the event that proceeds are paid into a settlement fund or trust, the litigation financier shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation financing contract. Tenn. Code Ann. § 47-16-104 Non-members of the Tennessee bar are not able to access informal ethics opinions from the Tennessee Supreme Court. There did not appear to any formal opinions from the Tennessee Supreme Court on the topic; however, in *Shoughrue v. St. Mary's Medical Center, Inc.*, 152, S.W.3d 577, 587 (Tenn. Ct. App. 2004) the Court found an attorney acted improperly by entering into a litigation funding agreement without the fully informed consent of this client. *Id.*
Texas (TX)	Permitted but regulated. The Texas Court of Appeals explicitly upheld the use of litigation funding agreements in *Anglo-Dutch Petroleum Int'l Inc. v. Haskell*, 193 S.W.3d 87, 100-04 (Tex. App. 2006), There, the Court found that an alternative litigation funding agreement was enforceable as long as the rules of professional responsibility are observed by the lawyers. *Id.* at 104. A lawyer can even assist a client in finding third party funding. *Id.* The Texas Court noted, "that, "[litigation funding agreements] did not violate public policy because they did not vest control over the litigation in uninterested third parties." *Anglo-Dutch Petroleum Intern., Inc v. Smith*, 243 S.W.3d 776, 782 (Tex. App. 2007). However, the Texas Committee on Professional Ethics regulates how a third-party funder can receive his investment. *Compare* Tex. Comm. On Professional Ethics, Op. 5558 (2005) (finding a loan agreement that allows a finance company to recover a portion of an attorney's contingency fee constitutes fee-splitting and violates Rule 5.05(a)) *with* Tex. Comm. On Professional Ethics, Op. 481 (1994) (finding a client paying for legal services by borrowing money from a third-party is permissible). Thus, in Texas, litigation funding agreements cannot allow the investor to recover funding from contingency fees. Tex. Comm. On Professional Ethics, Op. 576 (2006). Additionally, a lawyer may not share a client's confidential information with third parties "unless the client provides effective consent after consultation or another exception to the lawyer's duty of confidentiality applies." Tex. Comm. On Professional Ethics, Op. 695 (2022).

	Currently, bills that would require mandatory disclosure of third-party litigation are pending in the Texas legislature but are stuck pending committee review. *See* H.B. 2096 and S.B. 1567.
Utah (UT)	Permitted with mandatory disclosures and governed by statute The Supreme Court of Utah ruled that there is a strong presumption that the voluntary assignment of a legal malpractice claim does not violate public policy. *Eagle Mountain City v. Parsons Kinghorn & Harris, P.C.*, 408 P.3d 322 (Utah 2017) (holding legal malpractice claims are assignable) (*sic.*). The Utah court reasoned that Fed. R. Civ. Pro. 11 adequately deters frivolous litigation; thus, fears that third-party funded litigation would result in bad-faith filings are speculative. *Id.* at 328-329. The Utah Supreme Court doubled down in 2021 and emphasized, "there are strong public policy interest[s] in allowing access to our courts." *Matter of Estate of Osguthorpe*, 491 P.3d 894, 923 (Utah 2021). Utah did pass a statute, effective as of May 5, 2020, requiring mandatory disclosures. *See* Utah Code Ann. §13-57. Section 201 requires business entities who fund litigation to register with the state. *Id.* §13-57-201. Further, funders may not solicit attorneys, health care provides, or employees. *Id.* §13-57-202. The agreements must be in writing, contain a right of recission and contain proper disclosures as well as meet other requirements specified by statute. *Id.* §13-57-301–302.
Vermont (VT)	Permitted and governed by statute Vermont has passed a statute that governs consumer litigation funding companies. *See* Vermont Code Ann. §§ 08-74-2251-2260. The companies must register with the Commissioner and submit a registration fee. *Id.* § 2252. Disclosures are required to appear on the front page of the contract. The required disclosures include: (a) A contract shall be written in a clear and coherent manner using words with common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional. (b) Each contract shall include consumer disclosures on the front page. The consumer disclosures shall be in a form prescribed by the Commissioner and shall include: (1) a description of possible alternatives to a litigation funding contract, including secured or unsecured personal loans, and life insurance policies; (2) notification that some or all of the funded amount may be taxable; (3) a description of the consumer's right of rescission; (4) the total funded amount provided to the consumer under the contract;

	(5) an itemization of charges; (6) the annual percentage rate of return; (7) the total amount due from the consumer, including charges, if repayment is made any time after the funding contract is executed; (8) a statement that there are no fees or charges to be paid by the consumer other than what is disclosed on the disclosure form; (9) in the event the consumer seeks more than one litigation funding contract, a disclosure providing the cumulative amount due from the consumer for all transactions, including charges under all contracts, if repayment is made any time after the contracts are executed; (10) a statement that the company has no right to make any decisions regarding the conduct of the legal claim or any settlement or resolution thereof and that the right to make such decisions remains solely with the consumer and his or her attorney; (11) a statement that, if there is no recovery of any money from the consumer's legal claim, the consumer shall owe nothing to the company and that, if the net proceeds of the claim are insufficient to repay the consumer's indebtedness to the company, then the consumer shall owe the company no money in excess of the net proceeds; and (12) any other statements or disclosures deemed necessary or appropriate by the Commissioner. (c) Each contract shall include the following provisions: (1) Definitions of the terms "consumer," "consumer litigation funding," and "consumer litigation funding company." (2) A right of rescission, allowing the consumer to cancel the contract without penalty or further obligation if, within five business days following the execution of the contract or the consumer's receipt of any portion of the funded amount, the consumer gives notice of the rescission to the company and returns any funds provided to the consumer by the company. (3) A provision specifying that, in the event of litigation involving the contract and at the election of the consumer, venue shall lie in the Vermont Superior Court for the county where the consumer resides. (4) An acknowledgment that the consumer is represented by an attorney in the legal claim and has had an opportunity to discuss the contract with his or her attorney. (Added 2015, No. 128 (Adj. Sess.), § A.1.) *Id.* § 2253. The Vermont statute specifically defines the impact of litigation funding on attorney-client privilege. *Id.* § 2255. The statute states, "A communication between a consumer's attorney and the company shall not be discoverable or limit, waive, or abrogate the scope or nature of any . . . common-law privilege." *Id.*
Virginia (VA)	No guidance but appears to be permitted.

Washington (WA)	Permitted with regulations via advisory ethics opinions Washington does not appear to have a statute that governs litigation funding agreements but the Washington Court of Appeals endorsed the use of such agreements. See *Giambattista v. Nat'l Bank of Commerce of Seattle*, 586 P.2d 1180 (Wash. Ct. App. 1978) (finding that litigation agreements were not champertous). Washington State's Ethics Opinions also provide guidance. The Ethics Committee, via advisory opinions have held that confidential information, including client-identifying information, may not be provided to third parties funding the litigation unless the client has given informed consent. Wash. Committee on Professional Ethics Op. 183 (1990); *see also* Wash. Committee on Professional Ethics Op. 1319 (1989). In 2005, the Ethics Committee found, "[a] lawyer cannot disclose client secrets or confidence to a third party which provides funding." Wash. Committee on Professional Ethics Op. 2081 (2005).
West Virginia (WV)	Permitted and governed by statute West Virginia permits litigation funding agreements as long as the agreements comply with applicable statute. *See* West Virginia Code Ann. § 46A-6N-3. The statute requires a litigation financier to: (1) The terms of the litigation financing transaction shall be set forth in a written contract that is completely filled in with no incomplete sections when the contract is offered or presented to the consumer; (2) The litigation financing contract shall contain a right of rescission, allowing the consumer to cancel the litigation financing contract without penalty or further obligation if, within five business days following the consumer's receipt of the funds, or execution of the litigation financing contract, whichever is later, the consumer gives notice of the rescission and returns any money already provided to the consumer by the litigation financier; (3) The litigation financing contract shall contain a written acknowledgment by the consumer of whether the consumer is represented by an attorney in the dispute; (4) If the consumer acknowledges that the consumer is represented by an attorney in the dispute, the litigation financing contract shall include a written acknowledgment executed by the consumer's attorney in the dispute in which the attorney acknowledges all of the following: (A) The attorney has had the opportunity to review the litigation financing contract on behalf of the consumer;

	(B) The attorney is representing the consumer with regard to the dispute that is the subject of the litigation financing contract; (C) The attorney has neither received nor paid a referral fee or any other consideration from or to the litigation financier, nor will the attorney receive or pay such a fee in the future; and (D) In the event that proceeds are paid into a settlement fund or trust, the litigation financier shall notify the administrator of the fund or trust of any outstanding liens arising from the litigation financing contract. Imposes cap on the interest rates consumer litigation funders may charge. West Virginia Code Ann. § 46A-6N-3.
Wisconsin (WI)	Permitted and governed by statute Permitted but governed by statute. The Wisconsin statute was the first statute passed that required litigation funding agreements to contain mandatory disclosures. *See* Wisconsin Act § 235. The Act requires all agreements to be disclosed to the courts even if no discovery request has been made. *Id.*
Wyoming (WY)	No guidance