What's Wrong with Third-party Litigation Funding?

Luther Munford

Over the past decade, investors have put billions of dollars into third-party litigation funding – advancing money to parties, usually plaintiffs, to pay lawsuit expenses in return for a promise to receive a share of any recovery.[1] They have done this even though litigation funding is criminal in some states,[2] and the agreements are unlawful and so unenforceable in many others.[3]

The recent rise of the litigation funding industry can be credited to two factors. First, there is a popular belief that litigation is a good thing, i.e., the "stain of litigation" has been replaced by the "romance of litigation."[4]

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[1] John H. Beisner, Jessica D. Miller, and Jordan M. Schwarz, *Selling More Lawsuits, Buying More Trouble/Third Party Litigation Funding a Decade Later* at 6 (U.S. Chamber of Commerce Institute for Legal Reform January 2020) (hereafter "*Selling More Lawsuits*") (at least $10 billion with room to grow).

[2] *See, e.g.*, Miss. Code Ann. § 97-9-11 ("champerty and stirring up litigation prohibited"); 720 Ill. Comp. Stat. 5/32-12 (maintenance a criminal offense).

[3] *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 102 n.171, 107 n.190, 102 n.171 (2011) (hereafter "*Inauthentic Claim*") (by the author's count, 16 states permit "maintenance for profit," 14 prohibit it, and other states prohibit it under certain conditions).

[4] *Inauthentic Claim, supra* note 3, at 120 n.244, *quoting* Stephen B. Presser, *A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective* (10th Annual Legal Re-

Second, those who profit from the industry have, so far, been able to prevent full public disclosure of the way it operates, a tactic which disarms would-be critics before any regulatory shots can be fired.

The first factor is a proposition that can and should be debated. As to the second factor, there is at least anecdotal evidence to suggest that litigation funding carries with it features that could ultimately undermine the public respect on which our justice system depends. Whether that danger is real can be determined only when the facts are known. Because individual adjudication may not shed any systematic light on litigation funding, administrative oversight is needed to determine whether and when funding should be allowed.

To understand why regulation is warranted, it is helpful to look at the historical objections to funding to see whether they have any continuing validity.

Litigation funding violates the historic prohibitions against both maintenance and champerty. Maintenance is, Bryan Garner tells us, the "act of sustaining a suit or litigant by a party who has no interest in the proceedings."[5] It is Californian Peter Thiel, angry at a website for what it published about him, funding a Florida wrestler's litigation against the website that bankrupted the website and put it out of business.[6] Champerty, a type of maintenance, occurs when the funder acquires a piece of the action, or, as Garner more politely puts it, a "person not naturally concerned in a lawsuit engages to help the plaintiff or defendant prosecute it on the condition that, if successful, that person will receive a share of the property in dispute."[7]

The historic objections to litigation funding sound quaint to the modern ear. For example, a 19th-century edition of William Blackstone's *Commentaries on the Laws of England* condemns it on the ground that it is "officious intermeddling in a suit that no way belongs to one" that causes "unnecessary strife and contention," turns litigation into an "engine of oppression," and "perverts the remedial process of the law."[8] There is a temptation to

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form Summit, U.S. Chamber Inst. for Legal Reform, Oct. 28, 2009).

[5] Bryan A. Garner, GARNER'S DICTIONARY OF LEGAL USAGE 148 (3d ed. 2011).

[6] W. Bradley Wendel, *Paying the Piper But Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 1, 5, 31 (2018) (describing Hulk Hogan case).

[7] Garner, *supra* note 5, at 146.

[8] COMMENTARIES ON THE LAWS OF ENGLAND 905 (George Chase, 3d ed. 1899).

conclude that these objections, like the language used to express them, belong to another era.

In fact, supporters of litigation funding have often made this argument, denouncing the prohibitions as remnants of medieval Christianity out of place in a modern capitalist society, or relics of a now-vanished system feudal landlords used to assert their powers.[9]

But, although quaintly phrased and admittedly historic, the objections are not irrelevant to modern litigation. In fact, they go to the most fundamental questions about the purpose and conduct of litigation.

The fundamental belief that undergirds the objection to litigation funding is that litigation is not a good in itself but is something that society permits as a last resort because it can resolve peacefully disputes between parties who would otherwise turn to violence.[10]

Certainly, the one thing courts must do in a free society is to resolve disputes peacefully. If courts do not resolve disputes peacefully, then either the society will not be free, because disputes will be resolved by a dictatorial state, or it will not be much of a society, because disputes will not be resolved at all. As Lon Fuller said, "The object of the rule of law is to substitute for violence peaceful ways of settling disputes."[11] This is true not just for individuals but also for the nation. The framers created the U.S. Supreme Court and gave the federal courts diversity jurisdiction over individual disputes in order to keep peace among the states. The hope was it would allow them to resolve their disputes in court and not "by the sword."[12]

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[9] *See* Dante Aligiheri, DIVINE COMEDY, Canto XXI (Inferno) (devil throws into boiling pitch "barrators" from a town where "no into yes for money there is changed"); *Inauthentic Claim, supra* note 3, at 126 (citing Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 71 (1935)); Osprey, Inc. v. Cabana Ltd. Partnership, 532 S.E. 2d 269, 274 (S.C. 2000) (champerty was a medieval practice used by feudal lords to deprive the poor of their land in an era that preceded capitalism and prohibition increased the king's power, was supported by clerics who opposed litigation generally and by those who disliked usury and thought litigation "was, to itself, an undesirable and distasteful affair").

[10] *See Inauthentic Claim, supra* note 3, at 124 (pursuit of legal rights not seen as a good in itself but as a "regrettable last resort"); Luther Munford, *The Peacemaker Test: Designing Legal Rights to Reduce Legal Warfare*, 12 HARV. NEG. L. REV. 377, 380-81 (2007) ("*Peacemaker Test*").

[11] Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L.REV. 353, 372 (1978).

[12] THE FEDERALIST PAPERS no. 39 (Madison); *see also Peacemaker Test, supra* note 10, at 381 &

OFFICIOUS INTERMEDDLING?

The peacemaking purpose of the courts gives rise to the objection against "officious intermeddling." Sociologists who have studied peacemaking say a peacemaker must be a convener, serve as a facilitator, and control who participates in resolution of a dispute.[13] The principle that dispute resolution requires the exclusion of outsiders is familiar. Othello and Desdemona might have been happy if it had not been for the intervention of Iago.[14] The United States are less tempted to fight among themselves because the Constitution prevents foreign states from making treaties with individual states.[15]

The law recognizes this principle when it refuses to allow the assignment to third parties of claims for personal injuries, especially for such "personal torts" as emotional distress, professional malpractice, and fraud.[16] Assignment takes away the power of the injured party to control the case and gives it to a stranger.

More to the point, our system of civil litigation more effectively resolves disputes because it gives courts the power to control who participates in litigation and who does not. Under the Constitution and our federal rules, the parties must have a case or controversy, only those with an interest can be joined, those with no interest are severed and are not allowed to intervene, and even the submission of amicus briefs is restricted.[17] In other words, the prohibition against "officious intermeddling" is at the very heart of the civil rules. Those rules limit who can participate in order to more effectively make peace among the real parties to the dispute.

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n.8 (2007) (Gouverneur Morris, author of the Preamble to the U.S. Constitution, linked "domestic tranquility" to diversity jurisdiction).

[13] *See Peacemaker Test, supra* note 10, at 391.

[14] *See* William Shakespeare, *Othello*.

[15] U.S. Const. Art. 1, § 10 (no state shall enter into any treaty); THE FEDERALIST PAPERS no. 4 (Jay) & no. 7 (Hamilton) (protect states from foreign influence).

[16] *Inauthentic Claim, supra* note 3, at 75-89. *See* Cherilus v. Federal Express, 87 A.2d 269, 273 (N.J. Super. 2014) ("the right to bring an action in the courts of this state is possessed by the injured person alone").

[17] U.S. Const. Art. III, § 2; Fed. R. Civ. P. 14, 18-22, 24; Fed. R. App. P. 29.

Finally, funding raises the possibility that funders, through advertising or outright payments to parties, might generate litigation by those who, absent funding, would have had no dispute at all. In multidistrict litigation, the aggregation of claims that lack merit for settlement purposes or to enhance the position of the funded attorney is a tactic for which funding would be well suited.[18]

Engine of Oppression?

The ability of a lawsuit to be an "engine of oppression" is often overlooked by those who believe the game is worth the candle. But, on the other hand, the ones who benefit from the game are not always the ones who pay for the candle.

Religions have long taught that litigation is an "evil."[19] The Supreme Court has refused to go that far,[20] and "evil" is probably the wrong word to use for something that plays an essential role in maintaining the peace of a free society, especially to the extent it actually plays that role.

Nevertheless, it cannot be denied that even meritorious litigation hurts people and its inherent nature is to cause hurt beyond what anyone might have originally thought reasonable. The psychological harm litigation inflicts is well-documented and is witnessed by the high rate of depression among lawyers.[21] But no survey is needed to document the injury that litigation causes because the law itself would characterize much of what goes on in litigation as a tort if it were not for litigation privilege. But for privilege, the prosecution of even the simplest and most professionally handled lawsuit could give rise to claims for defamation, invasion of privacy, infliction of emotional distress, false imprisonment, and negligence.[22] The parties

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[18] *See* Luther Munford, *Not Your Ordinary Lawsuit*, 14 Pro Te Solutio no. 4, at 9, 11 (2021), protesolutio.com/2021/12/20/not-your-ordinary-lawsuit-the-oddities-of-multidistrict-litigation/ (discussing meritless claims in multidistrict litigation).

[19] *See Peacemaker Test, supra* note 10, at 383, citing Proverbs 25:8 (not go "hastily into court"); Deuteronomy 19:16-21 (punishment for false witness); Matthew 5:25 (turn the other cheek); The Koran 42:37, 40, 43 (M. Pickthall trans., 1992) (forgiveness is rewarded by God).

[20] Bates v. State Bar of Arizona, 433 U.S. 350, 376 n.33 (1977).

[21] *Peacemaker Test, supra* note 10, at 386-88 (medical diagnosis of injury).

[22] *See* Luther Munford, *Litigation as a Tort*, 21 Green Bag 2d 35 (2017) (cataloging torts in a hypothetical average lawsuit for which litigation privilege bars any remedy).

accuse each other of wrong-doing, they seek discovery, they vigorously cross-examine witnesses, and they require witnesses and jurors to attend proceedings. Absent privilege, these things would be actionable torts. The actors in the justice system inflict these injuries for money, and the commission of a tort for money, is, of course, something that would otherwise give rise to punitive damages.

Nor is a just resolution guaranteed. Perjury is not an actionable tort and, while it is a crime, it is seldom prosecuted.[23] Even worse, judges enjoy immunity even if they are negligent, act in bad faith, or are corrupt.[24]

None of this is actionable because litigation privilege immunizes it. The privilege is essential in order to enable lawyers, judges, and witnesses to carry out their roles in an adversary system. It immunizes their conduct, but it does not diminish the injuries the conduct causes.

But that is not the sole reason why even litigation that has merit causes harm. Litigation frequently causes more harm than even the participants would think justified. Litigation is subject to the psychological problem captured in the "dollar auction game." In that game, a dollar is offered for auction on the condition that the losing bidder must forfeit the amount of that bid. As the bids approach $1.00, a party seeking to avoid losing $0.99 will bid more than a dollar, and then will go even higher in the hope of simply minimizing losses. At times, games have ended in bids over $6.00.[25] The result is that the parties end up in a position none would have chosen had they foreseen it when the game began.

Perhaps that is why Jesus said to surrender your cloak before you ever get to court and those who go to court will pay the last penny.[26] It also suggests that the tragedy of Charles Dickens's *Bleak House*, in which litigation dissipates the assets of the estate the parties seek to gain, cannot be wholly blamed on antiquated 19th-century English chancery practice.

Psychological and financial exhaustion contribute to the finality of dispute resolution. Loss of resources reduces the ability, and perhaps the will, to fight. To that extent, such losses serve a useful purpose. But no one

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[23] 60A Am. Jur. 2d *Perjury* § 7 (2021) (no civil liability).

[24] *Peacemaker Test, supra* note 10, at 384-85 (cataloging judicial actions that are immune from suit even if in bad faith, malicious, or corrupt).

[25] *See Peacemaker Test, supra* note 10, at 388-89.

[26] Matthew 5:25 (pay the last penny), 40 (give your cloak as well).

would prescribe them absent a compelling reason to do so. And it is not too much to say that even litigation that has merit can in some cases be an "engine of oppression."

Perversion of the Remedial Purpose?

If the compelling reason that supports litigation is that it can resolve disputes that would otherwise give rise to violence, then there can be little doubt that litigation funding "perverts" that "remedial purpose."

If the funder has no control over the litigation, then the funding makes the remedy of settlement less likely. It eliminates an expense that would otherwise encourage resolution of the dispute through settlement. It is as if the bidder in the dollar auction game were freed from the obligation to forfeit the amount of the bid and so could continue the game indefinitely.

Not only that, but because the funder will be entitled to recover from the proceeds of any settlement, the party funded has less of an incentive to settle. The Ohio Supreme Court recognized this and found it dispositive when it held a borrower had no duty to repay a litigation funder because the financing constituted champerty. Under the agreement, the plaintiff would receive nothing unless a settlement was for an amount greater than what was owed the funder plus the plaintiff's attorney's contingent fee. For that reason, the agreement discouraged settlement, encouraged litigation, and, among other things, perverted the remedial process.[27]

On the other hand, if the litigation funder does have control over the litigation, then that reduces the litigation to a money game. Potential remedies such as apology, reconciliation, a future business relationship, or simply giving up to gain peace of mind can no longer resolve the case. That is yet another perversion of the remedial process.

For these reasons, the historic objections to litigation funding remain valid. It introduces a stranger into litigation and so frustrates the elaborate machinery the courts have developed to keep strangers out. It allows that stranger to join in the game of inflicting injury for money when the law has struggled to minimize that injury. It reduces opportunities for settlement either by eliminating party costs or, if the funder has control, by eliminating non-monetary reasons for settlement. None of these are good things.

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[27] Rancman v. Interim Settlement Funding Corp., 789 N.W. 2d 217, 220-221 (Ohio 2003).

NEED FOR FUNDING?

Those who would defend litigation funding believe that litigation should serve purposes other than resolving existing disputes among parties who would otherwise be tempted to violence. Some look to the example of public interest litigation, where third-party funding has become common but does not usually involve champerty.[28] Litigation, especially tort litigation, has been seen as a form of social insurance that promotes safety.[29] The argument is also made that funding is needed to "level the playing field" for people who could not otherwise afford litigation to obtain redress for their injuries. It is seen on the plaintiffs' side as being comparable to the protection defendants receive from their insurance companies.[30]

Litigation may well serve other useful purposes, but there are reasons why those purposes should be subordinated to the resolution of disputes. Courts are the only way to resolve disputes in a free society. For other social problems, there are electoral and legislative remedies. Administrative agencies are better situated than courts to decide whether or not product designs are reasonably safe.[31] There are also more efficient ways to compensate individuals for the cost of accidents.[32] But there is no alternative to the use of the courts to resolve disputes peacefully. Anything that undercuts their ability to achieve that purpose should be subject to the most exacting scrutiny.

In addition, the argument that funding is needed to level the playing field or to make meritorious suits possible is subject to debate. It is not clear that persons with claims worth litigating are presently unable to find

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[28] One analysis refers to this as "selfless maintenance." *See Inauthentic Claim, supra* note 3, at 100.

[29] *See* David G. Owen, PRODUCT LIABILITY 281-282 (3rd ed. 2015) (cost internalization, safety, and risk spreading).

[30] William J. Harrington, *Champerty, Usury, and Third-Party Litigation Funding*, THE BRIEF 54, 56, 60 (Winter 2020).

[31] *See* Riegel v. Medtronic, Inc., 552 U.S. 312, 325 (2008) ("A jury . . . sees only the cost of a more dangerous design and is not concerned with its benefits; the patients who reaped those benefits are not represented in court."); John C.P. Goldberg and Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 979 (2010) (criticizing use of products liability law as insurance or as safety regulation).

[32] *See* Robert Keeton and Jeffrey O'Connell, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

a contingent-fee lawyer to take them. For example, it has been estimated that the effective hourly rate of plaintiffs' lawyers in auto accident litigation is approximately two-and-a-half times that of defense lawyers. Moreover, the type of mass consolidation suits likely to receive the largest amounts of litigation funding are also the cases where fees are highest, sometimes with effective hourly rates of tens of thousands of dollars.[33]

NO ANSWER WITHOUT DISCLOSURE

But, to date, public scrutiny of litigation funding has been blocked by courts that refuse to allow discovery of litigation finance agreements. The agreements are between the funder and the party or the party's lawyer. The opposing party ordinarily has no right to see them. There is no requirement that they be publicly filed and no requirement that they follow standard forms like those insurers are required to disclose to the state.

Courts have refused to allow opposing parties to discover litigation finance agreements for a variety of reasons. It has been said that the agreements are irrelevant to the underlying litigation, that they are protected attorney-client communications, or that they constitute confidential work product. They are said to be irrelevant because champerty is said not to give the opposing party a right to have the illicitly financed case dismissed.[34] At times, relevance can be established. For example, the funding agreement may support a statute of limitations claim. It may also establish the party's ability to pay costs or fees or show the bias of witnesses or inducements to the plaintiff whose "expenses" are paid.[35]

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[33] Lester Brickman, *Effective Hourly Rates of Contingent-Fee Lawyers: Competing Data and Non-competitive Fees*, 81 WASH. U.L.Q. 653, 664, 690 (2003). In a federal pelvic mesh MDL, settlements totaled more than $7 billion, and plaintiffs' counsel argued over the allocation of an estimated $550 million "common benefit" fee awarded in addition to fees attorneys had earned in their individual cases. *See* Petition for Writ of Certiorari, Katz v. Common Benefit Fee & Cost Comm., 2020 WL 598609, at *7-9; Paul H. Rubin, *Third Party Financing of Litigation*, 38 N. KY. L. REV. 673 (2011) (mass actions most likely to get funding).

[34] *See* Miller UK Ltd v. Caterpillar, Inc., 17 F.Supp.3d 711, 740 (N.D. Ill. 2014) (maintenance not a defense to funded party's cause of action and in camera review resulted in denial of discovery); Wilson v. Harris, 688 So.2d 265 (Ala. Ct. App. 1996) (funded party could invalidate champertous loan agreement).

[35] *See* David H. Levitt and Francis H. Brown III, *Third Party Litigation Funding/Civil Justice and the Need for Transparency* (Defense Research Institute 12-18 (2018) (listing issues that would

The critics and proponents of litigation funding dispute the future direction of discovery rights. A defense analysis suggests there may be a "trend toward discoverability,"[36] but a recent survey by counsel for a litigation finance broker looked at 52 reported cases on the issue and concluded that 30 had denied any discovery, nine had compelled significant discovery, and only two had required unredacted production of the finance agreements.[37]

While two states, Wisconsin and West Virginia, have adopted statutes requiring disclosure,[38] the federal courts, when they have addressed the issue at all, have generally only required that the name of a funder be disclosed.[39] Some have gone further by requiring attorneys to certify that lenders do not control litigation strategy or settlement terms, but the certification is all that is required, not disclosure of the actual terms of the agreements.[40] It is possible for an attorney to deny explicit "control" even though the funder may have indirect control through the power to choose counsel, referral relationships with counsel, solicitation of plaintiffs by the funder, the ability to accept or reject a settlement, the right to select experts, the right to refuse a party's request to abandon the lawsuit, the right to select the theory of the case, or a right to be notified of settlement discussions.[41] Also, in the usual case there is no indication that clients are

require discovery); Luther Munford & Katelyn Ashton, *Discoverability of Third-Party Litigation Financing*, PRO TE: SOLUTIO nn.32-43 (June 8, 2020), protesolutio.com/2020/06/08/discoverability-of-third-party-litigation-financing/ (issues include limitations, bad faith, fees, influence on experts, liens, discovery cost allocation, competence of class action counsel, collateral source, and need for realistic appraisal of the case).

[36] Levitt and Brown at 30; *see* Activision Blizzard Inc. v. Electronic Arts Inc., 2018 WL 798731 (D. Del. Feb. 9, 2018) (rejecting objections to discovery of finance agreements).

[37] Charles M. Agree, Lucian T. Pera, and Alex Agee, *Litigation Funding and Confidentiality: A Comprehensive Analysis of Current Case Law* 7, 23 (Westfleet Advisers LLC, Aug. 2021 rev. ed.).

[38] *See* Wis. Stat. Ann. § 804.01 (2019); W. Va. Code Ann. § 46A-6N-6 (2019).

[39] *See, e.g.*, 5th Cir. R. 28.2.1 ("all persons financially interested in the litigation"); C.D. Cal. L.R. 7.1-1.

[40] *See* In re Zantac (Ranitidine Prods. Liab. Litig., MDL No. 2924, 2020 WL 1669444, at *5-*6 (S.D. Fla. Apr. 3, 2020) (must answer questions concerning funder's control); *but see* U.S. Dist. Ct. N.J. L.R. 7.1-1 (requiring disclosure of the "terms and conditions relating to" any required funder approval and conflicts).

[41] *See Inauthentic Claim, supra* note 3, at 111 (listing types of control that have been held to render a financing agreement champertous).

receiving the independent legal advice that may be necessary to waive conflicts with the funder or to detect unethical fee splitting with the lawyer.[42]

One example of indirect control came to light in Florida through depositions of doctors who had performed surgery on plaintiffs in pelvic mesh cases. In September 2021, a Florida doctor and a medical consultant pled guilty to a criminal scheme in which litigation funders paid them to pressure women to undergo mesh implant removal surgery in order to establish damage claims against the mesh manufacturers.[43] None of these relevant facts would have been detected if explicit funder "control" of the litigation had been the only issue, yet they bore directly on not only the defendants' ability to settle with plaintiffs, but also the merits of the plaintiffs' claims.

The question is, what should be done about all of this. It seems highly unlikely that litigation funding will be stopped entirely. In this respect, it resembles "medical" marijuana, which is now lawful under the laws of 36 states even though the sale and possession of marijuana remains a federal crime.[44]

If it is not to be stopped, then it should be regulated, but the question is, by whom and how. Legislation requiring certain disclosures in individual cases has been introduced in Congress, and an appeal has been made to the federal rules committees to adopt disclosure requirements.[45] The rules require defendants to disclose insurance policies as a matter of course and logically disclosure of finance agreements would similarly aid what the advisory committee notes refer to as the "realistic appraisal" of the case.[46]

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[42] Model Rules of Prof. Conduct R.1.7 (client consent to conflict with lawyer must be knowing and informed), 1.8(a)(2) (client to have opportunity to seek advice of independent counsel in business transaction with lawyer), and 5.4(a) (fee splitting); ABA Op. 484 at 8-11 (Nov. 27, 2018) (discussing conflict between lawyer and client if lawyer recommends funder or has interest in funder).

[43] Matthew Goldstein, "Two men plead guilty in personal injury scheme involving pelvic mesh implants," N.Y. TIMES, Sept. 17, 2021.

[44] National Conference of State Legislatures, State Medical Cannabis Laws, www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited Jan. 13, 2022); 21 U.S.C. §§ 812(c)(10), 844a(a) (2022).

[45] H.R. 2025, Litigation Funding Transparency Act of 2021, 117 Cong. (2021-22); *Selling More Lawsuits, supra* note 1, at 29 n.154.

[46] Fed. R. Civ. P. 26(a)(1)(A)(iv) (initial disclosure of insurance agreements), 1970 Advisory Committee Note to former Rule 26(b)(2).

Both of these proposals would rely on the courts to deal with the problem.

But there are reasons why courts alone may not be able to solve the problem. Judges are not policemen, and there are good reasons not to give adversarial parties an opportunity to regulate each other's conduct. Satellite litigation over Rule 11 sanctions is but one illustration of that truth.[47] Opposing parties need to know who their true adversaries are, and what control they have, but their interests differ from those of funded parties and the public. The public, after all, has an interest in maintaining the integrity of the justice system and in minimizing the injury litigation does to society as a whole.

The only logical answer appears to be administrative regulation.[48] Both federal and state administrative bodies do, after all, regulate lending. The first step in regulation would be the disclosure necessary to determine both the risks and benefits of litigation funding.[49] A regulator could, for example, require public filing of all of the forms used by litigation funders so that their terms could be examined without reference to any application to any particular client or case. A regulator with expertise could take evidence and decide in what circumstances litigation funding was appropriate – for example, public interest litigation – and in what circumstances it might not be appropriate. The regulator would, of course, take into account the views of the legal community, but would act for the public as a whole and not be limited to those views, which have already reduced the issue to one of "best practices."[50]

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[47] *See* Luther Munford, *The Peacemaker Test: Application and Comparison*, 80 Miss. L.J. 639, 661-70 (2010) (criticizing "improper purpose" sanctions practice).

[48] *See, e.g.*, Tenn. Code Ann. § 47-16-101(3)(a)(3)(B)(vii) (registration with state required); John H. Beisner and Gary A. Rubin, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* 10 (U.S. Chamber of Commerce 2012) (FTC should regulate); Austin T. Popp, *Federal Regulation of Third Party Litigation Finance*, 72 VAND. L. REV. 727 (2019) (Consumer Financial Protection Bureau should regulate).

[49] One scholar who attempted to examine litigation funding was so perplexed that he subtitled his report "issues, knowns and unknowns." Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns* (Rand 2010).

[50] American Bar Association, *Best Practices for Third-Party Litigation Funding* (Aug. 2020), available at www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.

If litigation funding is not properly regulated, then there are reasons to believe that the "romance" of litigation will disappear and the opinion that lawsuits are pestilential aggression may again become popular. The problems created by intermeddling, oppression, and frustration of remedial purpose have not gone away. Regulation is needed to ensure the public respect that courts must have in order to accomplish their primary task, which is the peaceful resolution of disputes.

But surely full public disclosure is the first step in determining whether the benefits of litigation funding outweigh these risks and what regulation is needed.