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Intermediation Effects in Litigation Finance

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Litigation finance now bankrolls some of the highest-profile lawsuits, attracting both attention and controversy. Because this new market facilitates lawsuits, it might serve either to promote access to justice or to facilitate frivolous, speculative litigation. This Article offers two insights for that ongoing debate. First, it argues that the market for investable lawsuits may be much smaller than is often imagined, muting its social impact in either direction. Second, it provides new reasons to think that, to the degree that litigation finance facilitates new lawsuits, those suits are unlikely to be frivolous.

These insights come from a novel analysis of the mechanics and parties involved in litigation finance—its ecosystem. This Article maps the chain of transactions that together facilitate investment from a far-removed investor into a lawsuit. The chain includes some actors that have received minimal scholarly attention: the funds and their own investors. And it includes others whose roles have not been fully explored: law firms, which often act as financial intermediaries. Each actor sits between distinct markets and so has distinct constraints. Those constraints influence which transactions happen and on what terms—in other words, how many and which suits get funded.

ARTICLE CONTENTS

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INTRODUCTION

A public company worth tens of billions of dollars is not the classic picture of a litigation underdog. Nevertheless, the Sysco Corporation looked like one in 2018. The executives of the food-distribution giant suspected that its meat suppliers had banded together to fix prices and that it had strong antitrust claims against them.[1] But antitrust claims are expensive to prosecute, requiring lengthy discovery and costly experts, and Sysco did not have that kind of money on hand.[2] Its lawyers had an idea. They connected Sysco with Burford Capital, a company that directs investments into lawsuits.[3] Through a fund, Burford paid $140 million of Sysco's litigation expenses in exchange for the promise that it would receive a portion of any economic recovery as a return on its investment.[4] And so, one of the largest antitrust lawsuits of the century went forward.

But the relationship soured. Sysco and Burford are different kinds of businesses that respond to different kinds of incentives. Sysco—sensitive to the risk of suing its suppliers and damaging its relationships—was amenable to an earlier, lower settlement.[5] Burford—sensitive to the investment returns it offers to its clients—preferred to hold out for a larger one.[6] And so, when Sysco wanted to accept an early settlement in 2022, Burford refused to go

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[1] *See* Order on Joint Motions for Substitution of Plaintiff at *5–6, In Re Pork Antitrust Litig., No. 18-cv-1776 (D. Minn. Feb. 9, 2024) (surmising the allegations of Sysco's complaint).

[2] Samir D. Parikh, *The Alchemist's Inversion*, 110 CORNELL L. REV. (forthcoming 2025) (manuscript at 41) (on file with author).

[3] Ross Todd, *How a Boies Schiller Litigator Got Caught Up in the Fracas Between a Litigation Funder and a Client*, THE AMLAW: LITIGATION DAILY (Mar. 15, 2023), https://www.law.com/litigationdaily/2023/03/15/how-a-boies-schiller-litigator-got-caught-up-in-the-fracas-between-a-litigation-funder-and-a-client.

[4] Petition to Vacate Arbitration Award at 8, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 8, 2023).

[5] *See* Tom Baker, *What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance*, 25 THEORETICAL INQUIRIES L. 17, 22–23 (2024) (discussing the parties' incentives).

[6] *Id.*

along.[7] A new dispute arose. Burford initiated a collateral proceeding in front of an arbitration tribunal and got an injunction to stop Sysco from settling.[8] Then, Burford petitioned the New York Supreme Court to confirm the injunction.[9] Sysco responded with its own collateral proceeding, asking a federal district court in Illinois to vacate the tribunal's injunction instead.[10] In the end, it was Burford who settled with Sysco, rather than Sysco who settled with the suppliers.[11]

The dispute between Sysco and Burford reveals the tip of the iceberg that is modern litigation funding. In the last few years, some of the largest lawsuits have been funded not by plaintiffs or law firms alone, but with the help of investment funds. A suit resulting in a $16 billion judgment against Argentina in late 2023 was backed by an investment fund.[12] Same with the Camp Lejeune and 3M earplug cases, two of the largest mass torts lawsuits in history, which together stand to pay out close to $30 billion.[13]

This practice is controversial. Its critics argue that it will encourage frivolous litigation and intermeddling in litigation by funds (like Burford did in Sysco's suits).[14] Its proponents characterize it instead as an important tool that facilitates access to legal representation, and so, access to justice (which in a sense is also the story of Burford and Sysco).[15] This suite of potential risks and benefits has raised the specter of regulatory intervention. At the state level, bar associations are considering how to square litigation finance

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[7] Alison Frankel, *Sysco Sues Litigation Funder Burford, Blasts Boies Schiller Over $140 Million Soured Deal*, REUTERS (Mar. 9, 2023, 6:10 PM), https://www.reuters.com/legal/legalindustry/sysco-sues-litigation-funder-burford-blasts-boies-schiller-over-140-million-2023-03-09.

[8] Order On Claimants' Preliminary Injunction Application (Corrected) at ¶ ¶ 21, 24, 35, 38, 230 Glaz LLC v. Sysco Corp., No. 225609 (LCIA Mar. 10, 2023).

[9] Petition to Confirm Arbitration Award, Glaz LLC v. Sysco Corp., No. 651289/2023 (N.Y. Sup. Ct. Mar. 10, 2023).

[10] Petition to Vacate Arbitration Award, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 8, 2023).

[11] Stipulation of Dismissal, Glaz LLC v. Sysco Corp., No. 23-cv-02489 (S.D.N.Y. June 28, 2023). As part of that settlement, Sysco and Burford have jointly asked the relevant courts hearing the antitrust suits to substitute Sysco with a corporate entity controlled by Burford so it can continue prosecuting the claims. *See* Emily R. Siegel, *Burford Foiled in Bid to Undo Sysco Price-Fixing Settlement*, BLOOMBERG L. (June 14, 2024, 3:17 PM), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/XCP47DMS000000?bna_news filter=business-and-practice#jcite.

[12] Emily R. Siegel & Bob Van Voris, *Burford Eyes 37,000% Return in $16 Billion Argentina Award (1)*, BLOOMBERG L. (Sept. 11, 2023, 4:37 PM), https://news.bloomberglaw.com/business-and-practice/burford-eyes-37-000-return-in-16-billion-win-over-argentina.

[13] *See generally* Emily R. Siegel & Kaustuv Basu, *Litigation Funders Bet Billions on Veterans' Toxic Water Claims*, BLOOMBERG L. (July 20, 2023, 5:01 AM), https://news.bloomberglaw.com/us-law-week/litigation-funders-bet-billions-on-veterans-toxic-water-claims (discussing the Camp Lejeune lawsuits); Alison Frankel, *3M Judge Issues Extraordinary Order to Shut Down "Predatory" Litigation Funding*, REUTERS (Sept. 5, 2023, 5:20 PM), https://www.reuters.com/legal/transactional/3m-judge-issues-extraordinary-order-shut-down-predatory-litigation-funding-2023-09-05 (discussing the 3M lawsuits).

[14] Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petition to Vacate the Arbitral Award at 10, Sysco Corp. v. Glaz LLC, No. 23-cv-01451 (N.D. Ill. Mar. 27, 2023).

[15] M. Todd Henderson, *The Justice Case for Litigation Finance*, A.B.A. LITIG. J. (Oct. 18, 2022), https://www.americanbar.org/groups/litigation/resources/litigation-journal/2022-fall/justice-case-litigation-finance.

with the ethical rules that bind lawyers, and several state legislatures are drafting regulations.[16] At the national level, Congress is considering intervention, calling on Chief Justice Roberts to "examine these unaffiliated funders of litigation."[17] In the meantime, the market for litigation finance is now estimated to have grown to $15 billion.[18]

The mass under the tip of the iceberg remains to be fully uncovered. Thus far, scholarship has examined the subtle ways in which the presence of funding can alter the dynamics between litigants—by increasing plaintiffs' bargaining leverage,[19] by signaling the quality of a lawsuit,[20] or by deterring would-be defendants before an injury occurs.[21] It has also explored how litigation finance interacts with legal doctrines that well predate it—for example, prohibitions on funding other people's lawsuits (champerty),[22] the allocation of control rights,[23] and the work product protection or privilege afforded to funders' documents.[24] More recently, scholarship has shifted attention to the "finance" side of "litigation finance," uncovering how plaintiff-companies can use litigation finance as part of their broader corporate strategies.[25] This Article builds on and advances that work by mapping the chain of intermediation to provide a novel account of the ecosystem of entities and financial transactions that work behind the scenes to facilitate investment into lawsuits.

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[16] *See* Suneal Bedi & William C. Marra, *Litigation Finance in the Market Square*, S. CAL. L. REV. 14, 15–17 (forthcoming) (on file with author) (cataloguing state level efforts to regulate litigation financing as provided to consumers*,* rather than companies*,* in Arkansas, Indiana, Nebraska, Vermont, and other states, and efforts to regulate the commercial market in Indiana, Louisiana, and Florida).

[17] Letter from James Comer, Chairman, House Comm. on Oversight and Accountability, to John Roberts, Chief Justice, Supreme Court of the United States (July 12, 2024), https://oversight.house.gov/wp-content/uploads/2024/07/TPLF-Letter-07122499.pdf.

[18] This number is not to be confused with the numbers provided *supra* describing size of the *judgments*. The judgments represent the *return* on the investment while this number represents the amount of money managed by litigation funds. WESTFLEET ADVISORS, THE WESTFLEET INSIDER: 2023 LITIGATION FINANCE MARKET REPORT 3 (2023).

[19] *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 101 (2010) (evaluating the effects of the contingent fee system on risk-averse plaintiffs).

[20] *See generally* Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233 (2014) (analyzing the effects of admitting consumer financing agreements to the court record).

[21] *See* Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 607 (2021) ("If a claimholder and law firm seek financing but are unable to secure funding, they may view this as a signal about the merits of the case and decline to self-finance the matter.").

[22] *See generally* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) (analyzing legal doctrines that "prohibit or limit property rights in litigation").

[23] *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV 455, 501–02 (2012) (analyzing incentives in transactions between funders and plaintiffs with respect to control).

[24] J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 926–41 (2016).

[25] Bedi & Marra, *Litigation Finance in the Market Square*, *supra* note 16, at 14 ("Scholars and policymakers have focused too narrowly on the 'litigation' part of litigation finance, *i.e*., on how funding impacts the legal system. We shift the focus to the 'finance' implications of litigation finance.").

That ecosystem is built on a central concept: litigation risk.[26] Bringing a lawsuit is expensive and even the strongest claims are not guaranteed to pay out. A plaintiff could spend a small fortune on lawyers' bills to bring a claim and end up with nothing to show for it. The contingency fee arrangement emerged in the 20th century to address that risk.[27] The plaintiff could instead hire a lawyer who takes the case on the agreement that the lawyer is paid only if the claim succeeds. In that setup, the lawyer holds the risk that she invests her time and resources into a lawsuit with nothing to show for it. But what if the lawyer does not want to hold all that risk either? Enter financial markets. Financial markets work to distribute risks to parties that are better situated to bear them. For example, insurance companies make a business of holding risks that customers do not want—that a house will burn down, a car will crash, or somebody will get sick—for a fee. Like with any financial market, a basic promise of the litigation finance market is to introduce new parties that want to hold a risk that others do not: here, litigation risk.

Today, those parties are investment funds.[28] An investment fund is a vehicle that facilitates the movement of capital from upstream investors to a downstream use for their capital. A fund's clients purchase limited partnership interests in the fund, putting up their money in exchange for an eventual return (minus fees).[29] The fund is run by a sponsor, an investment advisory business that directs how the fund invests the capital.[30] Well-known names like Apollo Global Management, KKR, and Blackstone are fund sponsors that direct money from funds into investments generally. In litigation finance, the names are a bit more obscure: Burford Capital, Omni Bridgeway, Parabellum Capital.

The funds and their sponsors are middlemen between their own clients and the investment opportunities—they are "financial intermediaries."[31] Because they sit between two groups, they operate in two distinct markets. The first is a market to attract capital from the potential clients who will become limited partners. There, funds must generate investment returns that are competitive with the other options that a client could invest in—for

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[26] *See generally* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009) (evaluating the feasibility, desirability, and development of a litigation-risk market).

[27] *See* John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473, 475–82 (1981) (discussing the development of contingency fees in lawyering).

[28] *See infra* Part III.B (discussing the role of investment funds further).

[29] John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1253, 1275–76 (2014).

[30] *Id.* at 1255.

[31] *See* Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1, 8–10 (2010) (describing the dynamics of financial intermediation). *See also infra* Part II.A (discussing financial intermediaries further).

example, with a fund sponsored by Blackstone.[32] The second is a market for identifying and successfully investing in attractive lawsuits.[33]

The two markets are interlinked. Which lawsuits are "attractive" in the second market will depend on the competitive dynamics between funds in the first. The competitive landscape in the first market is populated not only with funds that invest in lawsuits, but also with funds that pursue all sorts of other investment strategies—for instance, private equity or venture capital. A lawsuit that looks like a surefire bet to return some money might not be an attractive investment to a fund because it returns *too little* compared with the other investment strategies on offer.[34] The interaction between the two markets is visible in the dispute between Sysco and Burford, in which the incentives of a fund sponsor to hold out for a higher settlement (and a higher return on investment) influenced even the litigation strategy.[35]

Funds are not the only intermediaries involved in litigation finance. In both markets they operate in, the funds often transact with *other* financial intermediaries.

Start with when funds raise capital from clients. These clients are often themselves investment funds of various sorts—pension funds, charitable foundations, university endowments, sovereign wealth funds, or even funds that operate for a profit by investing in other funds.[36] Just as the litigation funds and their sponsors sit between the investments in lawsuits and their own clients, these clients sit between the investment in the litigation fund and *their own* clients or stakeholders. Those clients or stakeholders might be pensioners, a charity, a university, or a sovereign nation.[37] In other investment markets, this phenomenon has been dubbed "double intermediation."[38] The second intermediary has incentives to respond to its own stakeholders or clients, and that can influence which litigation funds receive funding and on what terms.[39] Litigation is intertwined with conflict, and clients might worry about embroiling themselves in a conflict of interest or bad press. For example, a conflict could arise if the pension fund of one of Sysco's competitors was invested in the Burford fund that supported the

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[32] For more discussion of the factors that drive competition in this market, see *infra* Part III.B. The proceeds from lawsuits likely have a low correlation with those from other investments, making litigation risk attractive to funds even at lower levels of returns.

[33] *See infra* Parts II.B, III.B (discussing litigation financing and investment funds further).

[34] As described *infra* in Part III.B, this dynamic is a substantial constraint on the ability of litigation funds to invest in many types of riskier lawsuits and implies that risk-taking is more likely in suits with outsized damages awards—specifically, those in which statutory treble damages are available, or those in which damages are calculated on a per-breach basis. That explanation is consistent with the observed concentration of litigation-finance-backed suits in areas like patent, antitrust, and copyright.

[35] *See supra* Introduction (discussing the dispute between Sysco and Burford).

[36] *See infra* Part III.C (documenting the identities of investors in litigation funds from press releases, SEC filings, and other publicly available information).

[37] *Id.*

[38] Dorothy S. Lund, *Asset Managers as Regulators*, 171 U. PA. L. REV. 77, 83 (2023).

[39] *See id.* at 83–84 (discussing how these dynamics might affect corporate governance decisions by companies invested in through a double layer of intermediation).

lawsuit against Sysco's suppliers.[40] Some institutional investors, like pensions, foundations, and university endowments, are sensitive to bad press, and may be reluctant to commit capital without assurances that it will not end up deployed in unsavory lawsuits.

On the other side, litigation funds often contract with financial intermediaries to invest the capital that they raised. Although the phrase "litigation finance" most immediately conjures the image of a cash-strapped plaintiff dealing with a fund that pays the bills, that image does not capture most transactions. Instead, around two-thirds of litigation finance deals are not between a fund and a litigant but between a fund and a law firm.[41] And, counter-intuitively, the law firms are often not those that bill hourly, but instead those that take cases on contingency fee arrangements. These firms are important beneficiaries from litigation finance.[42] Recall that a contingency fee arrangement shifts the litigation risk from the plaintiff to the lawyer. But the lawyer might not want to hold all the risk. Even a very attractive lawsuit could require such a large investment of time and money that the firm is unwilling to risk the small chance that it does not pay out. For the law firm, the solution is to sell a part of that litigation risk to a fund that instead wants to shoulder it. In this role, the law firm is a financial intermediary that trades in litigation risk. It sits between the litigants (from whom it acquires litigation risk) and the litigation funds (to whom it sells litigation risk). These contingency-fee firms act in part as gatekeepers, vetting lawsuits before they reach the fund and absorbing some whole, without passing them on.[43]

Following the money in litigation finance uncovers a web of transactions and financial intermediaries. Because each operates between two markets, each transacts in one market according to the constraints it faces in the other. And because each intermediary is linked to the others through a chain of transactions, the constraints on any one intermediary will flow through and affect which lawsuits are funded and by whom.

That lens sheds new light on the scholarly and policy debates about litigation finance. First, it helps explain the current size of the litigation finance market, which remains a smaller portion of all litigation spending but is overrepresented in blockbuster lawsuits.[44] Understanding why litigation finance looks the way it does today is an important first step to understanding where it will go next. This Article suggests that the current

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[40] As discussed *infra*, the risks of these conflicts of interest led to a prominent early litigation funder to leave the industry entirely. *See infra* Part III.C.

[41] WESTFLEET ADVISORS, *supra* note 18.

[42] *Id. See also infra* Part III.A (documenting the practices of contingency fee firms in the litigation finance market by drawing on their publicly available statements and websites).

[43] This dynamic builds on those documented in the rich legal literature on attorneys acting as gatekeepers. *See generally* John C. Coffee Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003); JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (2006).

[44] *See infra* Part IV.A.

state of the industry does not reflect an *external* constraint, but instead the set of constraints *internal* to the funding ecosystem. This explanation helps to displace another potential one that never quite fit, which is that old common law restrictions on champerty, maintenance, or usury slowed the modern industry down.[45] That insight undergirds the stakes of each normative debate about litigation finance. If its potential spread will be limited, then—regardless of whether its impacts are positive or negative—their magnitude will be limited too.

Second, this lens clarifies whether litigation finance enhances access to justice, or instead mostly encourages frivolous litigation. The two inquiries are two sides of the same coin that turns on which suits litigation funding might awaken that otherwise would have laid dormant. An understanding of the ecosystem of litigation finance suggests that the new marginal suit is not likely to cleanly map onto either of these concerns. Instead, these suits are likely to be those that are very expensive to bring. Those are the suits that firms are unlikely to take on a contingency fee arrangement unless they can offload some of the risk to a fund.[46] Moreover, a deeper understanding of how fund sponsors must construct portfolios to offer competitive investment products suggests that the funds face pressures to avoid riskier lawsuits (with the exception of certain areas in which the expected damages are likely much higher, like those that allow for treble damages).[47] That in turn suggests that regulators concerned about risk-taking and frivolous lawsuits in litigation finance might instead focus more narrowly on the causes of action with outsized damages awards.

Finally, the role of law firms as intermediaries lends insight into the ongoing debates about how control over litigation decisions is and should be allocated between a law firm and a fund. The dispute between Burford and Sysco highlights the importance of that debate. Understanding law firms as intermediaries that the funds often *rely on* to source lawsuits suggests that funds may try to preserve their reputation as repeat players and typically will not interfere with litigation.[48] That lens reveals that the Burford/Sysco dispute might be highly atypical, perhaps defraying some concerns about control.

Litigation finance cannot be properly understood without taking its entire ecosystem into consideration. This Article offers a framework to do so.

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[45] On a closer look, these restraints do not appear to have been practically effective at constraining investment by the modern litigation finance industry. This is explained further *infra* at Part IV.A.

[46] *See infra* Parts III.A, IV.B.

[47] *See infra* Parts III.B, IV.B.

[48] *See infra* Part IV.C.

I. BACKGROUND

This Part explains how litigation finance works and some of the controversies that surround it. It then provides an account of the modern history of litigation finance in the United States and how lawsuits became investments.

A. *What is Litigation Finance?*

Bringing a lawsuit is risky. Hiring a lawyer is expensive and there is no guarantee that even a meritorious claim will be successful. A plaintiff could end up spending her life savings on a suit with nothing to show for it. Some people look at the risks and "lump it," not bothering to sue at all.[49] To remedy that gap in legal services, people have devised arrangements that help these potential lumpers bring lawsuits without risking financial ruin. These arrangements help distribute risk to parties who are better suited to bear it, lowering the barriers to bringing suits. Under traditional risk-shifting arrangements, a law firm might take payment only if a suit is successful (a contingency fee) or might provide services entirely free of charge (pro bono representation).[50] That shifts the cost of bringing an unsuccessful claim from the party to the lawyer, who will bear the full cost of her services if the suit is unsuccessful. Over the last thirty years, however, a "new" arrangement has become popular for redistributing the risks of litigation: litigation finance. In litigation finance, a third party—somebody other than the lawyers or parties to the suit—assumes some of the litigation risk. In exchange, that third party is compensated. The compensation is typically tied to any eventual proceeds from the lawsuit—either from a damages award or settlement. And, because plaintiffs stand to win something that they can partially give away, litigation finance is most commonly a plaintiff-side phenomenon.[51]

Plaintiff-side litigation financing happens in two markets: commercial and consumer.[52] The commercial market involves large, expensive lawsuits,

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[49] *See generally* William L. F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 81 (1974) ("Between outsiders who have some contact with a large organization and the organization, a significant amount of dispute processing may be a special form of avoidance termed 'lumping it.'"). *See also* Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 NW. J.L. & SOC. POL'Y 149, 151 (2019).

[50] Michael K. Velchik & Jeffrey Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J.L. BUS. & FIN. 1, 46 (2019).

[51] There is also a small market for defense-side litigation finance. Defense funders act as ex-post insurers against the downside risk of judgements, in exchange for a fee. A stylized explanation of the difference is that the risk/return profile of defense-side funding looks more like risky debt while the profile of plaintiff-side funding looks more like risky equity. *See generally* Molot, *Litigation Finance*, *supra* note 19 (discussing risk transfers by plaintiffs); Emily Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83 U. CHI. L. REV. 2299, 2301 (2016) ("highlighting the potential benefits of consumer defense-side financing . . .").

[52] *See generally* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J.F. 32 (2023) (arguing that mass tort funding should be considered a third market for litigation finance).

often brought by companies. These suits can pay out hundreds of millions of dollars.[53] In this market, the lawsuit is treated as a financial asset. It is a claim on the future cash flows generated by a lawsuit, and investors purchase a right to those cash flows. In its simplest form, the arrangement resembles a contingency-fee model. The third-party investor pays for the lawyer's services and then takes a cut of any winnings.[54] But in practice, there are many variations on the theme. The funding contract might specify the compensation as an interest rate on capital provided.[55] Or it can be a fixed multiple of the invested capital, regardless of how big the damages award ends up.[56] And just as the terms of the payout differ, so can the terms of the funding. A funder can pay for the fees and costs of bringing a lawsuit (fees and costs funding) or it can directly fund a business, which then uses the money to cover operations while the lawsuit is ongoing (working capital funding).[57] But all these structures share something in common: if the lawsuit fails, the funder gets nothing.[58]

By contrast, the consumer market resembles subprime lending. In a consumer transaction, an individual with little experience with litigation seeks out funding for his lawsuit. These are not blockbuster commercial claims. Instead, they are overwhelmingly torts arising from car accidents or other general negligence torts.[59] And, unlike with a commercial transaction, the funder's return mostly does not depend on the success of the suit.[60] Instead, the transaction is usually structured as a loan to the would-be plaintiff at a set interest rate, which can be very high. One analysis of a consumer lender's portfolio found an average effective interest rate of about 50% per year, driven by the widespread use of compounding monthly interest.[61] That rate reflects in part the riskiness of the loan.[62]

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[53] *See id.* at 52, n.96 (mentioning a $650 million class settlement against Facebook).

[54] David J. Kerstein & Wendie Childress, *Mechanics of Litigation Finance*, BLOOMBERG L. (Nov. 2019), https://static.validityfinance.com/docs/LitigationFinanceMechanics.pdf.

[55] *Id.*

[56] *Id.*

[57] Bedi & Marra, *Shadows of Litigation Finance, supra* note 21, at 565; *see also* Bedi & Marra, *Litigation Finance in the Market Square*, *supra* note 16, at 3 (discussing the use of litigation finance as a competitive strategy for companies that receive it).

[58] Bedi & Marra, *Litigation Finance in the Market Square*, *supra* note 16, at 6.

[59] Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1147 (2019) (analyzing a dataset obtained from a major provider of consumer litigation finance and observing that 59% involved car accidents, 12% were general negligence suits, and 6% involved premises liability).

[60] These firms still often charge a "success fee" but it comprises less of their overall return. Sebok and Avraham note that it is "unclear" why "this is not simply counted as overhead that the interest rate charged is supposed to cover." *Id.* at 1154.

[61] *Id.* at 1151 ("[I]n about 88% of the completed cases, the interest is compounded on a monthly basis.").

[62] *Id.* at 1152. Consumers pay back less than the full amount they owe only about half of the time. The degree to which this is driven by the consumer's underlying risk or by the size of the interest rate is not clear. *Id.* In 10% of cases, the firm received nothing from the borrower. *Id.* In 2% of cases, it received less than it originally lent. *Id.* In another approximately 45% of cases, it received more than it lent, but less than was due. *Id.* And in the remaining approximately 44% of cases it received what it was due. *Id.*

Today, most attention is paid to the larger commercial market. That is where the costs of litigation are highest and where the damages awards appear the most promising. It is also where litigation finance is most clearly an investment product. And so, this Article takes the commercial market as its primary focus.

The desirability of litigation finance is fiercely debated. A market for lawsuits can connect litigants (who do not want to hold litigation risk) with well-capitalized funds (who want to hold it), facilitating lawsuits that would not otherwise have been brought.[63] If those claims are meritorious yet barred by a lack of capital, facilitating lawsuits is a win for access to justice. The threat of more widespread lawsuits might even deter repeat defendants from violating the law in the first place, reducing the total number of legal injuries—a win for everybody.[64] And even if new suits are not brought, litigation finance might still allow capital to be spent more productively. Financiers can provide upfront capital to plaintiff-companies, freeing up company capital that would have otherwise been tied up in a lawsuit. That allows the company to put that money to more productive uses—a win for the economy.[65]

Not everybody agrees. Critics of litigation finance predict that many of these new suits will be frivolous.[66] Inviting speculators in, the logic goes, will lead to speculative suits. And, regardless of whether the suits are frivolous, litigation drives up costs for companies, thereby raising costs for consumers across the board.[67] Even worse, the critics argue, litigation finance will invite "foreign adversaries to undermine U.S. national economic and security interests through the infiltration of the American litigation system."[68]

At the heart of these debates sit twin questions: how many lawsuits will be funded this way, and which ones?

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[63] *See, e.g.*, Molot, *A Market in Litigation Risk*, *supra* note 26, at 370 (discussing how lawyers can put a price risk and find well-capitalized partners to take on the risks of litigation).

[64] Bedi & Marra, *Shadows of Litigation Finance*, *supra* note 21, at 591–605.

[65] *See* Bedi & Marra, *Litigation Finance in the Market Square*, *supra* note 16, at 4 (arguing that smaller companies are more likely than larger ones to use litigation finance as a course of capital, ultimately enhancing competition).

[66] *See* Emily R. Siegel, *Litigation Finance Industry Faces Fresh Calls for Disclosure (2)*, BLOOMBERG L. (Oct. 7, 2024, 10:44 AM), https://news.bloomberglaw.com/business-and-practice/litigation-finance-industry-faces-fresh-calls-for-disclosure ("Many of the bills [to regulate litigation finance] are backed by the US Chamber of Commerce, a group representing the interests of major corporations, arguing that litigation funding contributes to the filing of frivolous lawsuits."). *But see* Samuel Antill & Steven R. Grenadier, *Financing the Litigation Arms Race*, (Apr. 25, 2023) (research paper), https://ssrn.com/abstract=3719238 (developing a formalized model for litigation that suggests "litigation financing does not necessarily encourage high-risk frivolous suits").

[67] *What is Tort Inflation?*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Oct. 23, 2024), https://instituteforlegalreform.com/blog/what-is-tort-inflation-2.

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

B. *How Lawsuits Became Investments*

To understand where litigation finance might go, it is important to start with where it has been. The first wave of commercial litigation finance in the United States likely began in the late 1980s or early 1990s. A 1993 Bloomberg article opened with: "Looking for an exotic investment? Forget about rare coins, race horses, and celebrity autographs. How about a lawsuit? You don't even have to sue anybody—you just have to put your money down on somebody who is."[69] It proceeded to describe a practice almost identical to the modern industry: a "handful of companies" invest in lawsuits, sometimes "for their own account" and other times for "individuals through limited partnerships."[70] This article was not a one-off: "In the late eighties and early nineties, articles about investing in other people's lawsuits started appearing in journals, magazines, and newspapers with some regularity."[71]

Many of these early examples were concentrated in patent claims brought against large companies.[72] It is unsurprising that commercial litigation finance developed early on in patents. In the 1990s, patent litigation may have been unsuited to contingency fee arrangements, necessitating new mechanisms to spread risk. Patent suits often turn on complicated questions of technical design and can be complex and lengthy, requiring both a great deal of attorney time and high expert-witness fees.[73] Without any other party to help share the risk, many firms might not consider taking on otherwise attractive patent suits because the up-front investment is just too high. At the extremes, a single lost suit could wipe out a large portion of a firm's capital. That left a void into which investors could step: a set of attractive patent infringement suits begging to be brought. And so, investors began to buy up the underlying patents.[74]

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[69] Linda Himelstein, *Investors Wanted For Lawsuits*, BLOOMBERG (Nov. 15, 1993, 12:00 AM), https://www.bloomberg.com/news/articles/1993-11-14/investors-wanted-for-lawsuits?embedded-checkout=true&lead.

[70] *Id.*

[71] Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 57 (1999). *See also* Edmund L. Andrews, *Patents; Financing Investors' Lawsuits*, N.Y. TIMES (Mar. 11, 1989), https://www.nytimes.com/1989/03/11/business/pat-nts-financing-inventors-lawsuits.html (showing that litigation finance articles were appearing as early as the 1980s); Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1529 (1996) (explaining that "[i]n recent years, several litigation investment companies have appeared.").

[72] There is some evidence that other types of lawsuits were successfully syndicated as early as the late 1970s and early 1980s. *See e.g.,* Dobner, *supra* note 71, at 1530 (noting examples of successful lawsuit syndication from 1978 and 1991).

[73] Duane Burton, *Reducing the High Costs of Patent Litigation: A Practical Guide*, 30 DEPAUL L. REV. 857, 857, 862 n.17 (1981).

[74] Today, of course, patent cases are often brought by contingency fee firms, but that was not always true. Contingency fee firms did not enter the patent arena in force until the dawn of the 21st century, due in part to cultural changes in patent bar, in part to changes in patent litigation, and in part to the availability of litigation funding. *See* David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 351–56 (2012) (describing the high costs and long length of patent litigation as reasons why "until the late 1990s, contingent representation in patent law was very confined").

As the patent-litigation market developed in the 1990s, another market developed alongside it. But—unlike the patent funds that typically invested by purchasing the underlying patents—these investors directly funded lawsuits. Most visibly, a man named Perry Walton ran a litigation finance operation as early as 1996.[75] Walton is emblematic of the entrepreneurial, freewheeling spirit of the first wave of litigation finance. His Future Settlement Funding Corporation operated out of a "small warren of offices near the Las Vegas airport" to offer potential plaintiffs capital in exchange for a monthly interest rate—the model often associated today with consumer litigation lending.[76]

Perhaps most importantly, Walton was an evangelist. He taught seminars on litigation finance to "hundreds of aspiring entrepreneurs,"[77] in exchange for a fee, of course.[78] His evangelism worked. By the late 1990s, other companies followed in Walton's footsteps. In New York alone, litigation finance companies started up in Manhattan, Brooklyn, and Buffalo.[79] The aim—according to one of their CEOs—was to "institutionalize this young industry."[80]

By 2004, this nascent market was receiving scholarly attention. According to one law review article, "[l]ending money to plaintiffs to finance their lawsuits has become an industry within the last ten years."[81] That article documented the growing markets for litigation in intellectual property and lending to contingency fee law firms, as well as investment firms like Walton's that offered consumer funding for personal injury cases.[82] This scholarship, however, focused heavily on the subprime nature of the market—loans with high interest rates subject to little-to-no regulation.[83] That picked up some additional attention.[84] But—perhaps attesting to the backward-looking nature of scholarship—this spotlight on

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[75] Richard B. Schmitt, *Las Vegas Man Lends Against Lawsuits, Forms an Industry*, LAS VEGAS SUN (Sept. 15, 2000, 11:13 AM), https://lasvegassun.com/news/2000/sep/15/las-vegas-man-lends-against-lawsuits-forms-an-indu.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] Cristina Merrill, *Judgement Call*, CRAIN'S N.Y. BUS. (Jan. 26, 2003, 11:00 PM), https://perma.cc/4XHG-HSA4.

[80] *Id.*

[81] Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 55 (2004).

[82] *Id.* at 72.

[83] *See, e.g.*, *id.* at 67 (discussing how some deals in the early litigation finance industry qualified as subprime).

[84] *See, e.g.*, Dobner, *supra* note 71, at 1530 (showing that syndicated lawsuits have fended off legal challenges); *see also* Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1309 (2002) (arguing that the contingency fee system is already a form of champerty); *see generally* Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and its Effect on Settlement*, 155 U. PA. L. REV 503 (2006) (advocating for litigation finance reform and proposing solutions).

the consumer market coincided with a new dynamic that has since been called the "second wave" of litigation finance.[85]

The second wave of litigation finance differs from the first most starkly in *who* the litigation funders are. This is when the true institutional investors entered the arena. These institutions looked to invest in high-dollar commercial claims rather than low-dollar individual torts, contributing to the emergence of the commercial market for litigation finance. Around 2006, the investment bank Credit Suisse created a group in the United States to invest in lawsuits.[86] A year later, Juridica Investments—a U.K.-registered investment company that invested in lawsuits in the United States—listed on the London Stock Exchange's Alternative Investment Market.[87] Other companies were not far behind. Burford Capital listed on the London Stock Exchange in October, 2009.[88] Credit Suisse's internal fund spun out and dubbed itself "Parabellum Capital" in 2012.[89] Gerchen Keller opened its doors in 2013.[90] More recently, the universe of funders has expanded beyond dedicated litigation finance firms to include multi-strategy investment managers, including prominent names like D.E. Shaw[91] and Fortress.[92] Private equity has followed—headlines document the potential involvement of large private equity firms like Apollo Global Management or Centerbridge in financing mass torts.[93]

Unsurprisingly, the language of this second wave stands in stark contrast with that of the first. Here, the coverage of litigation finance does not emphasize "extortionate" or "predatory" behavior, but instead focuses on the characteristics of a lawsuit as an "investment class."[94] Lawsuits

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[85] Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1283 (2011).

[86] Victoria Shannon Sahan*, A* Brief *History of Litigation Finance*, PRACTICE (Sept. 2019), https://clp.law.harvard.edu/knowledgehub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance; Jennifer Smith, *Credit Suisse Parts with Litigation Finance Group*, WALL ST. J. (Jan. 9, 2012, 6:13 PM), https://www.wsj.com/articles/BL-LB-41680.

[87] Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, *supra* note 85, at 1282 n.41.

[88] *Burford Capital Announces Completion of IPO and Commencement of Trading*, BURFORD CAP. (Oct. 21, 2009), https://investors.burfordcapital.com/news/news-details/2009/Burford-Capital-announces-completion-of-IPO-and-commencement-of-trading/default.aspx.

[89] *About Us*, PARABELLUM CAP., https://parabellumcap.com/about-us (last visited July 20, 2025).

[90] *Adam Gerchen*, GERCHEN CAP. PARTNERS, https://www.gerchen.com/adam-gerchen/#:~:text=Adam%20co%2Dfounded%20and%20was,its%20acquisition%20in%20December%202016 (last visited July 20, 2025).

[91] Charles Agee & Gretchen Lowe, *Litigation Finance Buyer's Guide*, WESTFLEET ADVISORS, https://www.westfleetadvisors.com/wpcontent/uploads/2021/12/Westfleet_Buyers_Guide_-2020-01-30.pdf (last visited Aug. 10, 2025).

[92] In 2021, it acquired a litigation finance fund and described the acquisition as intended to "further strengthen [its] leadership position in the litigation finance market." Jack Neumark, *Fortress Announces Integration of Vannin Capital into Fortress Legal Assets Business*, FORTRESS (Oct. 5, 2021), https://www.fortress.com/shareholders/news/2021-10-05-fortress-announces-integration-of-vannin-capital-into-fortress-legal-assets-business.

[93] Parikh, *The Alchemist's Inversion*, *supra* note 2, at 5 n.26 (collecting headlines documenting private equity funds financing mass torts).

[94] *See, e.g.*, John Pierce, David Burnett & Quinn Emanuel, *The Emerging Market for Litigation*

offer "double-digit returns."[95] A fund can offer a "diversified" portfolio of lawsuits.[96] Perhaps more importantly, the returns from lawsuits are allegedly "uncorrelated" with those from other financial assets.[97] This is the classic language of investment and marks the shift toward funds that market themselves to institutional clients that allocate capital between investment strategies.

Because litigation finance now operates in the traditional financial system, it must be understood as part of that system.

II. THE FINANCIAL ECOSYSTEM

Litigation finance is not one transaction, but a series of transactions between intermediaries. This Part explains financial intermediation and then describes how litigation finance transactions are properly conceived of as an instantiation of that more general dynamic. It then provides an account of intermediation in litigation finance and of each of the parties involved.

A. *What is Financial Intermediation?*

An intermediary is a middleman. One problem that financial markets aim to solve is a mismatch between those who have capital (but no productive use for it) and those who have productive uses for capital (but no capital). It can be difficult for those with capital to find those without it (a coordination problem), to determine which uses of capital *should* be funded and at what cost (an information problem), and to diversify the capital amongst borrowers (a scale problem that creates a risk problem).[98] Consider a bank. A bank is a financial intermediary that bridges these gaps. In simplified terms, it sits between two parties and provides each with a service. On behalf of the depositors, it finds and vets potential borrowers. On behalf of the borrowers, it offers a centralized source of capital. And in exchange for these services, it charges a fee that can be stylized as the difference between the income it gets on its loans and the interest it pays depositors.[99]

Investment funds are also intermediaries.[100] Like vetting which borrowers are worth lending to, identifying good investments takes time and

Funding, HEDGE FUND J. (June 2013), https://thehedgefundjournal.com/the-emerging-market-for-litigation-funding (describing lawsuits as a "non-correlated, alternative investment class that offers the prospect of double-digit returns . . . .").

95 *Id.*; *see also*, Sarah O'Brien, *Litigation Financing May Tempt with High Returns. What to Know Before Buying In*, CNBC (June 25, 2020, 11:35 AM), https://www.cnbc.com/2020/06/25/litigation-financing-tempts-with-high-returns-tips-before-buying-in.html (describing how LexShares, since its inception in 2014, has a median annualized return of 52%).

96 O'Brien, *supra* note 95.

97 *Id.*

98 *See* Whitehead, *supra* note 31, at 8–10 (discussing the benefits financial intermediaries provide).

99 *See generally* Arnold A. Heggestad, *Market Structure, Risk and Profitability in Commercial Banking*, 32 J. FIN. 1207 (1977) (discussing how banks operate and take profit).

100 Kathryn Judge, *Intermediary Influence*, 82 U. CHI. L. REV. 573, 602–04 (2015).

expertise. Funds pool money from savers who want a return on their investment but are either unable or unwilling to invest in the right opportunities directly. So, like a bank, an investment fund facilitates the flow of capital from people with capital but no productive use for it to people with productive enterprises but no capital. And, like a bank, it charges for its services, typically through a fee.[101]

Investments made through funds often involve more than one intermediary. For example, funds' clients are often *themselves* funds of various sorts. Many funds have pension funds, charitable foundations, university endowment funds, or sovereign wealth funds as clients, which in turn invest on behalf of *their own* clients—pensioners, a charity, a university, or a country's government. So, although the direct investment is made by one fund, the initial source of capital might be far-removed. This phenomenon has been dubbed "double intermediation."[102]

The addition of even a single intermediary between two parties introduces agency costs. The intermediary could have its own goals, changing which transactions occur and on what terms. For example, a recurring concern in bank lending is that the bank (the intermediary) has incentives to engage in unduly risky activities because its shareholders share in all of the upside from risk but have their downside capped at the value of their equity investment.[103] The introduction of an intermediary changes how the capital is used because the bank's goals and constraints differ from those of the depositors. Funds present a similar concern: that the incentives of the fund will distort how capital is allocated. For example, funds compete with each other to attract clients on the basis of performance and so sometimes face incentives to maximize short-term gains, potentially at the expense of longer-term opportunities.[104]

As described in the following Section, litigation finance also involves multiple layers of financial intermediaries. And—just as the addition of intermediaries has important implications for the functioning of other markets—litigation finance is no exception. So far, the influence of these intermediaries has gone mostly unnoticed. Scholarship on litigation finance has extensively probed the facets that most implicate legal practice.[105] That work suggests good reasons to think that the presence of funding distorts

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[101] Morley, *supra* note 29, at 1238.

[102] Lund, *supra* note 38, at 83 (describing the system of "double intermediation" in which funds manage money on behalf of corporate pensions, which in turn manage the money of individual pensioners, the beneficial owners of the securities).

[103] ANAT ADMATI & MARTIN HELLWIG, THE BANKERS' NEW CLOTHES: WHAT'S WRONG WITH BANKING AND WHAT TO DO ABOUT IT 58 (2013).

[104] *See* Diane Del Guercio & Jonathan Reuter, *Mutual Fund Performance and the Incentive to Generate Alpha*, 69 J. FIN. 1673, 1674 (2014) (noting "a variety of strategic choices by mutual fund families are consistent with the revealed preferences of their target clienteles").

[105] As two scholars have put it: "Scholars and policymakers have focused too narrowly on the 'litigat -ion' part of litigation finance." Bedi & Marra¸ *Litigation Finance in the Market Square*, *supra* note 16.

the practice of litigation.[106] It further explores open questions about the potential applications of funding[107] and its compatibility with doctrines of evidence and ethics.[108] But litigation funding is also an *investment* made by a *fund*. The dynamics of that relationship have long been the subject of more general legal scholarship. By contrast, much less has been written about how intermediation affects the funding of lawsuits. Some scholars have identified elements of the phenomena that arise due to intermediation effects.[109] Other more recent work points to the potential entrance of private equity funds into mass tort litigation, highlighting the importance of understanding the mechanics of how these funds work.[110] This Article builds on that prior scholarship by zooming out to provide an account of how these funds work, situating prior work in that account, and explaining the consequences of these intermediation dynamics for the related debates about litigation finance.

B. *The Series of Transactions that Fund a Lawsuit*

Litigation finance is often envisioned as a simple transaction between a cash-strapped plaintiff and the litigation funder.[111] Legal representation is expensive, and plaintiffs often do not have enough money. Enter the fund. The fund pays for some portion of a plaintiff's legal fees in exchange for a slice of the proceeds from any eventual settlement or judgment. As discussed

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[106] *See generally* Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357 (2018) (describing the policy and economics behind civil litigation crowdfunding); Bedi & Marra, *Shadows of Litigation Finance*, *supra* note 21, at 563; Laura Inglis & Kevin McCabe, *The Effects of Litigation Financing Rules on Settlement Rates*, 18 SUP. CT. ECON. REV. 135 (2010); Molot, *Litigation Finance*, *supra* note 51, at 65.

[107] *See generally* Samra, *supra* note 51, at 2299–301 (describing the market barriers to consumer defense-side financing); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The Mysterious Market for Post-Settlement Litigation Finance*, 96 N.Y.U. L. REV ONLINE 181 (2021) (outlining a more comprehensive perspective on post-settlement litigant funding through data).

[108] *See, e.g.*, W. Bradley Wendel & Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, 74 HASTINGS L.J. 1459 (2023) (analyzing how funding alters the attorney client relationship); *see also* Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833 (2015) (arguing that policy should not incentivize parties to sell their litigation control that is adversary to their rights); W. Brandley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1 (2018) (discussing the dilemma associated with litigation financers that are motivated by political, ideological, or personal reasons, rather than by profit); J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. (SPECIAL ISSUE) 911 (2016) (analyzing the dynamic between litigation financing and the work-product doctrine).

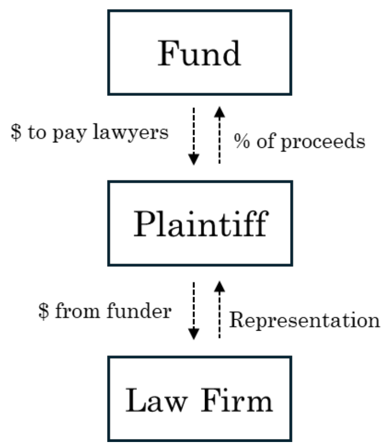
[109] For example, the problems of adverse selection and information asymmetry in lawsuit investment and how they compare to those in venture capital investment. *See, e.g.*, J.B. Heaton, *The Siren Song of Litigation Funding*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 139 (2019) (describing information asymmetry and adverse selection); Maya Steinitz, *How Much is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1893–95 (describing an analogy to venture capital).

[110] *See generally* Parikh, *Opaque Capital and Mass-Tort Financing*, *supra* note 52 (describing the contours of litigation finance that are not often highlighted, such as opaque capital and mass-tort financing); Parikh, *The Alchemist's Inversion*, *supra* note 2.

[111] Defense-side funding exists as well but is a smaller market. *See supra* note 51 and accompanying text.

supra, funding could be tied to the costs of a lawsuit ("fees and costs" funding) or it may be unrestricted for the plaintiff to use as they see fit ("working capital" funding).[112] Regardless of what the money is used for, the economics of the transaction involve a transfer of funds in exchange for a parcel of risk and a potential reward from the judgment. In turn, the plaintiff uses the funds (or funds freed up) to hire a lawyer to pursue their claim. This is represented below.

Fig. 1



That is not the only possible arrangement, or even the most common one. A fund can also contract with a law firm instead of with a litigant. When the fund does so, the law firm acts as an intermediary. Some firms take cases on contingency but sell off portions of their interests in the lawsuits to reduce their exposure to the risk that they invest their time and effort with nothing to show for it—litigation risk.[113] For example, a firm might find a suit promising but too expensive to invest in exclusively (the firm's investment is the firm's labor). And in many cases, the firm cannot "co-invest" with another law firm because the first firm is already providing all the legal services. What it can do is offload some of the litigation risk to a fund. It can

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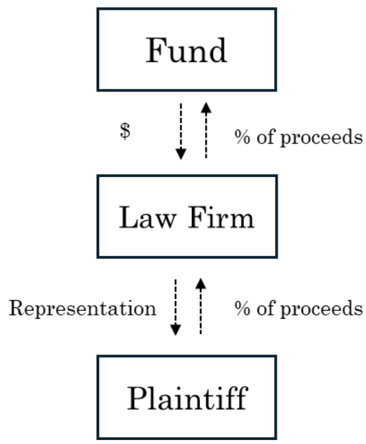
[112] Bedi & Marra, *Shadows of Litigation Finance*, *supra* note 21.

[113] This practice has received scant treatment in academic literature but is featured prominently both on the websites of law firms that take cases on contingency fee and on those of litigation funds. *See, e.g.*, *Law Firms Seeking Litigation Finance*, MCDONALD HOPKINS, https://www.mcdonaldhopkins.com/services/Litigation/Litigation-finance/Law-firms-seeking-litigation-finance (last visited June 20, 2025) (explaining a contingency fee firm); *Litigation Finance for Law Firms*, CURIAM, https://www.curiam.com/litigation-finance-for-law-firms (last visited June 20, 2025) (discussing the benefit of law firm funding for firms that take cases on a contingency fee).

either sell a portion of one lawsuit or a portion of a basket of lawsuits, a practice called "portfolio funding."[114] Because the law firm sits between the fund and the plaintiff, the firm acts an intermediary.

Fig. 2



But there is an important part of the picture missing from these simple models. The heart of a lawsuit is a conflict between two parties. Conflict is definitionally antagonistic. But the potential for bargaining operates in the background through the prospect of settlement. As has been documented extensively, settlement decisions are guided by both parties' estimates of the likelihood of success, the damages, their respective risk preferences, and a slew of other factors.[115] This interaction is important because it influences when claims settle and, as a result, how much money must be invested. Here, that relationship can be represented as another transaction in the structure. It is shown below both for a model in which a fund contracts with a plaintiff and for one in which it contracts with a law firm. Of course, litigants do not typically negotiate directly; their lawyers do so on their behalf. But that detail is elided for simplicity's sake and because—at the end of the day—the decision to settle is made by the client, not the lawyer.[116] Below, the vertical

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[114] *Portfolio Litigation Finance*, BURFORD CAPITAL, https://www.burfordcapital.com/what-we-do/portfolio-finance (last visited June 20, 2025). This is not only a common industry practice but the dominant mode of litigation finance. Two-thirds of litigation finance deals have involved portfolio investments over the last few years. WESTFLEET ADVISORS, *supra* note 18, at 8.

[115] *See generally* George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (providing the process of litigation); Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT. REV. L. & ECON. 59 (2016) (discussing the Fifty-Percent Limit Hypothesis); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1 (2002) (discussing the role a party's aspirations have in settlement negotiations).

[116] *See* Model Rules of Pro. Conduct r. 1.2 (Am. Bar Ass'n, 1983) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").

axis continues to track the flow of funds from source to its final use. The defendant is added on the horizontal axis because it is not an intermediary, but instead a sort of counterparty with one of the intermediaries.

Fig. 3

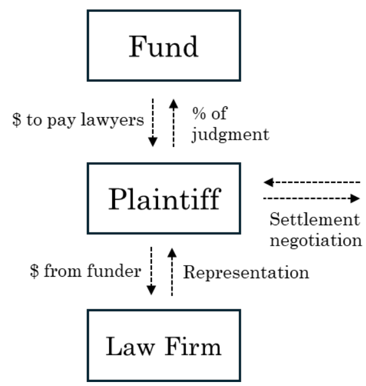
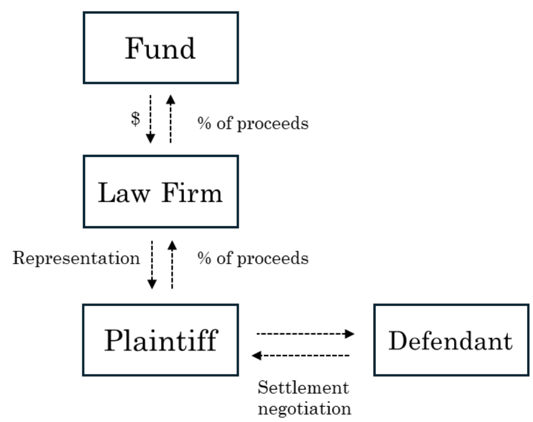


Fig. 4



This picture is still incomplete. Litigation finance funds need a source of capital. Like other investment funds, they raise capital from clients. The most common way for funds to raise money is through limited partnerships.[117] The fund can be structured as a partnership with its clients serving as limited partners.[118] Then, there is a general partner that manages the fund and makes investments.[119] The general partner is a legal entity created by the investment manager/fund sponsor that receives a share of the profits generated by the fund. The general partner typically has a contract

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[117] John Morley, *The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation*, 123 YALE L.J. 1228, 1275–76 (2014).

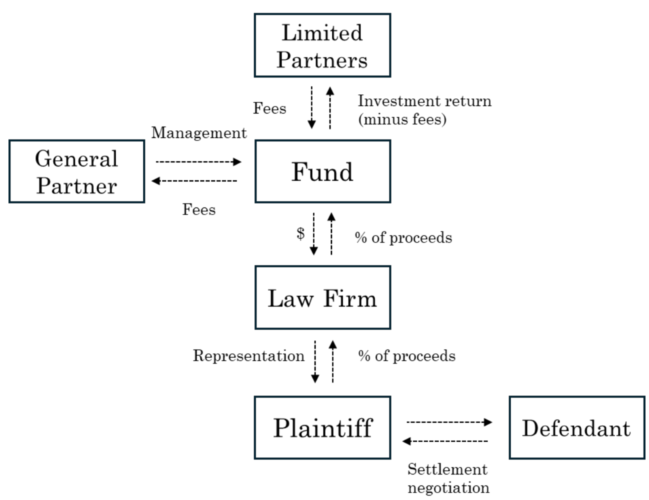
[118] A limited partner contributes capital and participates in the profits from the partnership but is not involved in the operation of the business. *Id.*

[119] *Id.*

with the investment manager.[120] Under that contract, the investment manager will provide its services to the general partner in exchange for a fee.[121] Functionally, the investment manager acts as the general partner, but the two are legally separated for reasons that relate to liability and tax.[122] While this is a popular arrangement in fund investing more generally, it's also common in litigation finance to structure this arrangement by using an LLC instead of a partnership.[123]

Funds compete for clients in that market along the dimensions of returns and, to a diminished degree, fees.[124] This dynamic is mapped below. Limited partners are introduced as counterparties to the investment fund. And the entity previously marked "Fund" is split out into two entities: the fund (which holds the assets and contracts with the limited partners) and the general partner (which provides management services to the fund).[125] The fund sponsor, which contracts with the general partner, is omitted because the liability and tax reasons that drive the separate legal structures are not directly relevant here. This is shown below. From here forward, only the iteration in which the fund transacts with the law firm is visually depicted.[126]

Fig. 5



[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] The dynamics described in this Article do not turn on whether an LLC or partnership is used; either way, the transactions are subject to similar constraints.

[124] *Global Private Equity Report 2024*, BAIN & CO. (2024), https://www.bain.com/globalassets/noindex/2024/bain_report_global-private-equity-report-2024.pdf (observing that "[c]ompetition for capital has never been more intense" and that "performance is everything"); *see generally* Juliane Begenau & Emil N. Siriwardane, *Fee Variation in Private Equity*, 79 J. FIN. 1199 (2024) (finding that fees differ between investors within the same funds, suggesting negotiation).

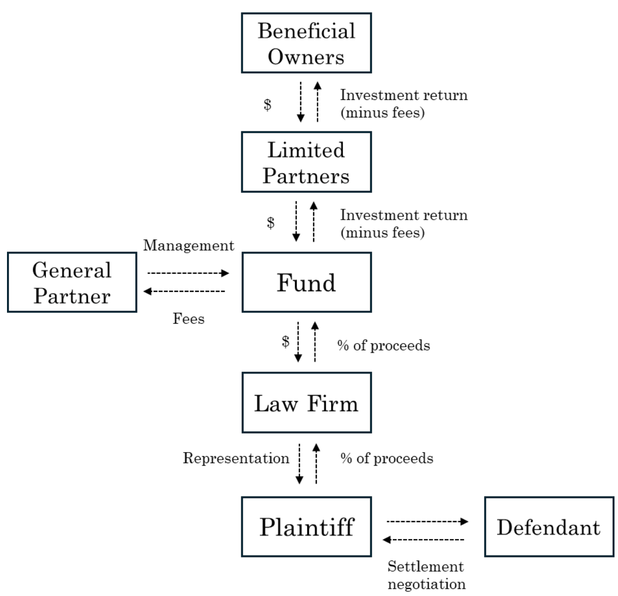
[125] Morley, *supra* note 117.

[126] This is primarily for visual simplicity. However, the configuration in which law firms act as intermediaries is chosen because it accounts for around two-thirds of litigation finance transactions.

While raising money by selling limited partnership interests to clients is the typical way to invest through funds, there is also an alternative. The fund sponsor that contracts with the fund can instead raise equity or debt on its own balance sheet, then invest that money directly. Curiously, the largest funder of lawsuits often invests this way.[127] This dynamic can be visualized on the prior diagram by imagining an investment manager to the left of the general partner that raises money and uses that to invest alongside the limited partners.

There is still an important party missing. The limited partners need to get their money from somewhere too. Sometimes the limited partners are wealthy individuals. But as a general matter, investment funds more often target as their clients those institutional investors with substantial assets under management. These institutional investors are sovereign wealth funds, pension funds, foundations, endowments, insurance companies, and funds-of-funds.[128] Many of these institutional investors have their own clients, and those clients have distinct desires and sometimes social goals—for example, charitable foundations are cautious to maintain their public reputation and may avoid unsavory investment strategies.[129] A full picture of actors that might influence litigation funding must include these clients as well.

Fig. 6



[127] *See* Robert F. Weber, *Valuing Litigation Assets* 18–19 (Dec. 1, 2024) (forthcoming) (available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5040441).

[128] *Investor Report: Full Year 2022*, PRIV. EQUITY INT'L (Feb. 20, 2023), https://www.privateequityinternational.com/download-who-were-private-equitys-biggest-lps-in-2022/.

[129] *See, e.g.*, Darren Walker, *Aligning Our Investments and Our Values*, FORD FOUNDATION (Oct. 18, 2021), https://www.fordfoundation.org/news-and-stories/stories/aligning-our-investments-and-our-values (stating the Ford Foundation's endowment will no longer invest in fossil-fuel related industries).

This illustration is still stylized, and some details are omitted. The institutional investors who are limited partners in funds are also composed of separate legal entities, one for the fund and one for the fund sponsor that directs the fund's allocation. Sometimes, limited partners will contract directly with investment managers.[130] Although stylized, Figure 6 captures the major transactions and counterparties in the litigation finance ecosystem. It highlights how money flows from one end of the ecosystem to the other and then back again. Beneficial owners entrust money to limited partners, who invest with funds. Funds allocate money to plaintiffs or to law firms, who use that money (directly or indirectly) to litigate against a defendant. Then, it flips around. If a suit is successful, the defendant pays the plaintiff or law firm, who pays the fund. The fund then distributes that money back to the limited partners who ultimately return it to their own clients.

The illustration is easily adjusted to reflect more complex transactions. For example, sometimes multiple funds invest in a single portfolio of lawsuits offered by a firm.[131] So then additional funds should be added to the visualization of the ecosystem. Or, sometimes, a fund will sell some of its lawsuits to another fund in a secondary market transaction.[132] So then another fund should be added as a counterparty to the one that funded the suit in the primary market. And of course, the litigants themselves have their own contracts with third parties, and the obligations of those contracts might affect their need for financing.[133] But, this illustration captures the basic important transactions and serves to frame the analysis of any one of those transactions.

That lens brings into clearer focus that litigation finance is not just a vehicle for access to justice or a market strategy deployed by firms. It is a series of transactions that together channel investment from sources of capital to uses for capital by way of multiple intermediaries. However, each of these intermediaries brings its own incentives and goals to the table. These influence how investments are made into lawsuits; and so, which lawsuits are funded and on what terms.

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[130] For example, in Investment Management Agreements that govern the adviser's obligations as a manager.

[131] *Five Common Questions About Portfolio Financing*, VALIDITY (July 16, 2019), https://www.validityfinance.com/news/thought-leadership/2019-07-16-legal-portfolio-finance.

[132] Over the last few years, this practice has become more common. The largest secondary market purchaser is Gerchen Capital Partners. Although these are typically referred to as "secondary market" sales, it might be more accurate to note that if the fund originally transacted with a law firm rather than a plaintiff, then this is the *third* sale of some of the underlying litigation risk. *See supra* Gerchen, note 90.

[133] The competitive dynamics in the market might also affect the use of litigation funding. *See generally* Bedi & Marra, *Litigation Finance in the Market Square*, *supra* note 16.

III. THE HIDDEN INCENTIVES AND CONSTRAINTS

This Part explains how each intermediary's incentives and goals translate into constraints on contracting. It does so by starting with the law firms, which often act as the first financial intermediary in the chain. It then follows the money up through the system, to the litigation funds and then to their own investors.

A. *The Law Firms*

Around two-thirds of litigation finance deals are made not between fund and litigant, but between fund and law firm.[134] In many of these deals, the law firm acts as an intermediary by being the *primary* purchaser of the litigation risk. It then (or sometimes concurrently with the purchase) sells some of the risk in the lawsuit to a litigation fund. That makes the fund the *secondary* purchaser of litigation risk—a dynamic that has not yet been identified in scholarship—and means that the law firm is often another financial intermediary.

That dynamic is most pronounced when funds deal with firms that take cases on contingency fee. The dynamic differs when funds deal with firms that bill hourly—then, as explained below, the funds more resemble competitors to the contingency fee model.

1. *Contingency*

When litigation funds work with law firms that take cases on contingency fee, the fund acts as a secondary market purchaser of litigation risk—the risk that a lawsuit does not generate proceeds but only a great deal of expense. Consider a law firm that strikes a deal with a litigant to fund part of a lawsuit in exchange for a portion of the judgment. At a high level, that exchange closely resembles that between a fund and a litigant; the primary difference is that the law firm invests with its labor instead of with money. Selling a portion of the lawsuit effectively narrows the range of outcomes for the firm: the downside (in costs) is defrayed but the upside (in damages) is compressed. That is a sort of financial engineering, but that financial engineering occurs under constraining conditions.

Because funds often purchase litigation risk from the law firm that initially took it on, they face adverse selection problems common to secondary markets.[135] Adverse selection problems arise when the seller and buyer have asymmetric information about the subject of the transaction (here, the lawsuit). If the seller (here, the law firm) has inside information about the quality of her wares, then a buyer might be skeptical that the price

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[134] WESTFLEET ADVISORS, *supra* note 18.

[135] *See, e.g.*, V.V. Chari, Ali Shourideh & Ariel Zetlin-Jones, *Reputation and Persistence of Adverse Selection in Secondary Loan Markets*, 104 AM. ECON. REV. 4027 (2014) (providing a model that includes adverse election and reputation in secondary loan markets).

on offer is appropriate. That suspicion can lead buyers to demand discounts in *all* cases, even when the price is fair and a discount unwarranted. In the extreme cases, adverse selection can create a so-called "market for lemons" problem in which the sellers of higher-quality products leave the market because they cannot sell at an appropriate price, leaving only the lower-quality products.[136] That in turn leads buyers to demand even higher discounts, creating a downward spiral.[137] Litigation finance is no exception to this problem. Law firms might sell stakes in lawsuits to manage their risk or instead to offload the lemons. The law firm is likely to know more about the case than the fund does (for instance, from talking directly to the litigant), so funds must be careful to avoid purchasing bad stock.

Like in other markets with information asymmetries, players in the litigation finance market address this risk in two ways.

First, if law firms are repeat players they can develop their reputation over time based on the quality of suits that they sell on to funds.[138] If funds can distinguish between the poor outcomes that were the result of an unknown risk and the poor outcomes that the law firm knew about beforehand, they can discipline law firms by taking their business elsewhere or demanding a discount. However, it is more expensive to monitor many intermediary-firms than it is to monitor a few trusted ones.[139] That might help explain why litigation funds sometimes work only with a few "preferred" firms.[140] But relying on fewer intermediaries has tradeoffs. It might contribute to a bottleneck in the available supply of lawsuits.[141]

Second, litigation funds typically do not buy stakes in single lawsuits, but instead in multiple lawsuits at a time in "portfolio deals."[142] Although investing in an individual suit might risk buying a lemon, investing in a representative sample of a law firm's portfolio of lawsuits defrays that risk. Portfolio deals involve just that. They account for about two-thirds of litigation finance transactions, implying that they account for an overwhelming majority of deals between law firms and funds.[143]

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[136] The phrase "market for lemons" comes from a seminal paper written by George A. Akerlof. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970) (describing that the "market for lemons" is when the used car market is an analogy to illustrate how information asymmetry can cause market failures when only lower quality goods are sold and buyers leave the market).

[137] *Id.*

[138] *See id.* at 499–500.

[139] The expense of monitoring many counterparties is a recurring concern in financial regulation. It justifies in part why only broker-dealers can trade on national securities exchanges, limiting the number of counterparties that clearinghouses must monitor.

[140] *See, e.g.*, *Preferred Partners Program*, VALIDITY FINANCE, https://www.validityfinance.com/our-approach/preferred-partnerships ("Validity has a small number of close relationships with elite law firms called 'preferred partners.'").

[141] This is explored more *infra* in Part IV.A.

[142] *See* WESTFLEET ADVISORS, *supra* note 18.

[143] Portfolio deals are less likely between individual litigants and funds because litigants—unlike law firms—do not typically have multiple, diversified claims to sell. *See id.* at 6 ("The allocation of

Interestingly, despite the theoretical promise of portfolio deals to defray adverse selection, some preliminary evidence suggests that they instead often work in practice for a different purpose. To guard against adverse selection, the portfolio should be representative of a firm's overall representations. Indeed, the word "portfolio" suggests a large basket of lawsuits; but, more often, these deals contain only a few. Materials from litigation funds typically specify that they will invest in "portfolios" that contain at least three lawsuits[144]—and industry surveys show that the average value of a portfolio deal is only about twice as large as that of a single matter deal.[145] This suggests that the "portfolios" are typically only a handful of lawsuits.

Moreover, funds offer to pay a *premium* for these portfolios.[146] At first glance, that should not be surprising—if the litigation fund faces lower risks because of diversification, a higher price should reflect that. But the risk diversified here is the *idiosyncratic* risk particular to each lawsuit. Typically, investors are not compensated for holding idiosyncratic risks because they are easily diversifiable.[147] If investors can diversify cheaply, they should be unwilling to offer a higher price because it is easy to diversify the risk, so a discount is not necessary to compensate for that additional work.[148]

In light of those two puzzles, it is likely that portfolio deals are often intended to address a different problem from adverse selection: a difficulty that litigation funds face in sourcing enough lawsuits. If the cost of finding additional diversifying investments is high, a buyer instead should be willing to pay more for a pre-packaged bundle—even if that bundle is not large enough to totally defray the risk of buying lemons. Taken together, the number of suits in each portfolio deal and the pricing structure suggest something interesting about this market: that funds are unable to source enough lawsuits to keep up with their investment appetite and are willing to pay a premium for a larger bundle.

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capital between single-matter and portfolio deals remained consistent in 2023 compared with prior years, with portfolios comprising 66% of new capital commitments. The ratio of portfolio deals to single-matter deals has remained approximately 2:1 consistently from 2019 through 2023.").

[144] *See, e.g.*, *Law Firm Financing*, OMNI BRIDGEWAY, https://omnibridgeway.com/who-we-help/law-firm-financing (last visited July 21, 2025) ("Criteria[:] Three or more cases in law firm's portfolio."); *Portfolio Finance*, CURIAM, https://www.curiam.com/portfolio-finance (last visited July 21, 2025) ("The portfolio must include three or more cases.").

[145] The average portfolio deal in 2023 was $9.9M while the average single matter deal was $4.8M. Although the lawsuits that support single matter deals may be selected to be larger, the comparison suggests that portfolios are not composed of very many suits. *See* WESTFLEET ADVISORS, *supra* note 18.

[146] *See, e.g.*, *Portfolio Finance*, BURFORD CAPITAL, https://www.burfordcapital.com/what-we-do/portfolio-finance (stating that law firms can "[s]ecure more favorable pricing for capital, because risk is diversified across multiple matters."); Marla Decker, *Litigation Finance: Pricing*, LAKE WHILLANS, https://lakewhillans.com/articles/litigation-finance-pricing (last visited July 21, 2025) ("When claims are bundled in a portfolio, the risk of loss is generally mitigated to a degree (as long as the claims do not all turn on the same risk), and therefore portfolios will generally receive lower pricing than a single claim.").

[147] This theory is a basic building block of modern portfolio theory. William F. Sharpe, *Capital Asset Prices: A Theory of Market Equilibrium Under Conditions of Risk*, 19 J. FIN. 425 (1964).

[148] *Id.*

The role of the law firm as an intermediary and primary purchaser of litigation risk has important implications for the normative debate about litigation finance. A common argument—raised by the Chamber of Commerce—is that litigation finance will *change* the composition of filed lawsuits, namely by picking out weaker claims. But those effects might be limited if funds are dependent on law firms to find lawsuits in the first place. An account of the changed composition of lawsuits should include an explanation for why law firms' behavior as primary purchasers of litigation risk would *change* to take on riskier lawsuits with the *addition* of a secondary market. That is not unheard of. For example, in the leadup to the 2008 Great Financial Crisis, lenders may have made riskier loans when they could sell the loans afterward and avoid holding the credit risk themselves.[149] Here, unlike a lender selling *all* of a loan, a contingency firm still typically retains a substantial stake in the litigation. That role of law firms as *risk-bearing* intermediaries might mitigate some of the potential for riskier investment, but these dynamics are complex. The bottom line is that future attempts to formally model the effects of litigation funding on lawsuits would be improved by taking into account the role of law firms as risk-bearing intermediaries.[150]

2. *Hourly*

Although arrangements with contingency fee firms are the most common, an exclusive focus on those arrangements risks not telling the whole tale. One of the promises of litigation finance is to use financial engineering to move lawsuit funding beyond its traditional reliance on firms taking cases on contingency. To that end, a litigation fund can pay a law firm's bills while negotiating with a litigant for a cut of the proceeds. This arrangement can transform a contingency fee arrangement (from the perspective of the litigant) to an hourly arrangement (from the perspective of the law firm). From the firm's perspective, it gets paid by the hour; and from the litigant's perspective, he only pays if he wins. The result is a "synthetic contingency fee" that allows litigants to access a greater selection of legal representation.[151] Now, a cash-strapped plaintiff can hire a firm that bills by the hour, as Sysco did in its antitrust litigation, as long as the firm is

[149] *See* Antje Berndt & Anurag Gupta, *Moral Hazard and Adverse Selection in the Originate-to-Distribute Model of Bank Credit*, 56 J. MON. ECON. 725, 741 (2009) (finding that "borrowers whose loans are sold in the secondary market underperform their peers by about 9% per year").

[150] For example, there have been several theoretical contributions that revolve around mathematical dynamics in litigation finance. These models rely on assumptions about the relevant parties and nature of the transaction. *See* Samuel Antill & Steven Grenadier, *Financing the Litigation Arms Race*, 149 J. FIN. ECON. 218 (2023) (describing a formal theoretical model of the effects of litigation finance that assumes the relevant parties are the plaintiff, defendant, and fund); Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239 (2016) (providing a theoretical model that similarly assumes that litigants contract with funds).

[151] *See* Aviva Will & David M. Perla, *Litigation Funding Comparative Guide*, MONDAQ (Feb. 8, 2024), https://www.mondaq.com/unitedstates/finance-andbanking/1285398/litigation-funding-comparative-guide.

open to the arrangement with the financier. In this arena, the funds play more of a role in sourcing suits than they do when investing in suits litigated by contingency fee firms.[152]

The relationship between fund and firm is often characterized as cooperative, but it is also competitive.[153] The competition is for attractive lawsuits. If a law firm gets there first, it acts as a filter—it absorbs many of the initial lawsuits whole, and the funds get exposure only to what is left over that the firm wants to sell. A fund's alternative is to work with a law firm that uses a different billing arrangement. In theory, these transactions could originate either with the litigant meeting with a law firm or with a litigant going directly to a litigation fund. But a drive down a typical U.S. highway reveals that law firms are specialists in marketing and that the market to source legal claims is highly competitive. That helps explain why so much of the capital allocated in litigation finance is through transactions between law firms and funds rather than between litigants and funds.[154]

The evolution of this practice remains to be seen. In practice, these arrangements are rarely structured to completely transform a contingency-fee payment structure into an hourly-rate structure. Instead, funds and firms will agree to hybrid fee structures in which the firm gets paid a reduced hourly rate but also receives a portion of the judgment.[155] These hybrid structures introduce and acclimatize firms that historically have only charged by the hour to the contingency fee. If big law firms become amenable to taking cases partially on contingency, then they could go further and take them on contingency entirely. Big firms might be able to bear more risk and might not need to rely so heavily on litigation financing to shoulder expensive suits. Of course, such a move would not wholly eliminate the need for litigation funds, as risk-engineering might still be required to bring some suits. But it might change the *scale* of suit for which funding will be necessary and could also affect whether lawsuits are initially found by firms or found by funds. That could impact how many cases end up eligible for litigation finance.

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[152] Fifty-nine percent of capital commitments in 2023 in deals involving big law firms were directed by clients instead of by firms. *See* WESTFLEET ADVISORS, *supra* note 18.

[153] *See, e.g.*, *Preferred Partners Program*, VALIDITY FINANCE, https://www.validityfinance.com/our-approach/preferred-partnerships (last visited Sept. 14, 2025) ("Validity has a small number of close relationships with elite law firms called 'preferred partners.'"); *Law Firm Financing*, OMNI BRIDGEWAY, https://omnibridgeway.com/who-we-help/law-firm-financing (last visited Sept. 14, 2025) ("Let's work together[.] We look forward to learning about your needs and how we can help you accomplish your key financial goals.").

[154] This number understates the portion allocated by contingency fee law firms because it includes capital allocated in deals involving big law firms, which are directed by the client fifty-nine percent of the time. WESTFLEET ADVISORS, *supra* note 18.

[155] Brian T. Fitzpatrick & William Marra, *How Litigation Finance Strengthens the Attorney-Client Relationship*, CLS BLUE SKY BLOG (Dec. 15, 2023), https://clsbluesky.law.columbia.edu/2023/12/15/how-litigation-finance-strengthens-the-attorney-client-relationship/#:~:text=Hybrid%20Fee%20Arrangements,-The%20hourly%20fee&text=With%20the%20contingency%20fee%2C%20the,proceeds%20if%20the%20case%20succeeds.

* * *

The upshot is that when law firms act as financial intermediaries, the firms' incentives affect which lawsuits are funded. To invest in lawsuits, funds often must rely on law firms as gatekeepers who initially find the lawsuits. Then, the funds can invest only in those suits in which the firms choose to sell stakes, a selection pressure that shapes which lawsuits are available to litigation funds. The selection pressure could be adverse, filtering for lemons. To mitigate that worry, funds might work only with a few law firms, further restricting how many lawsuits they can easily access. Or the selection pressure might not be adverse and instead pick out those cases with litigation risk so large that a firm cannot shoulder it alone. That would leave only the larger and more expensive lawsuits viable candidates for litigation finance.

The alternative is for a fund to work with law firms that bill hourly. But even here, firms often use hybrid billing arrangements that integrate a contingency fee. If big, hourly-billing law firms become acclimatized and comfortable with both contingency fee arrangements and litigation funding, they might become unwilling to sell stakes in their most promising suits, instead utilizing the classic contingency fee arrangement. That would resurface the same selection pressures identified above.

B. *The Funds*

The fund sits between either a plaintiff or a law firm and its own limited partners, who provide the capital. On one side, the providers of capital demand return from their investments. Investment performance is a relative concept. The limited partners in investment funds choose between funds and investment strategies, creating pressure for litigation funds to deliver an investment product that is competitive with other illiquid strategies like private equity or venture capital.[156] To deliver that, funds must construct profitable portfolios, which means picking the right lawsuits on the other side. But investing in lawsuits presents unique challenges that create incentives for investors to fund only certain kinds.

The causes of those dynamics lie in how lawsuits are funded. The structures of both the funding and payout of a lawsuit are likely to constrain risk-taking for many investments in lawsuits. And the contractual

[156] Investments in funds that invest in lawsuits are illiquid because investors cannot easily access their capital after investing in the fund. The money is then invested in lawsuits, which typically take years before generating a financial return. In the meantime, the money is subject to a "lock-up" period of multiple years, restricting investors from withdrawing at will. These investments mirror the common practice in other investment strategies like private equity or venture capital. *Illiquid*, CORPORATE FINANCE INSTITUTE, https://corporatefinanceinstitute.com/resources/career-map/sell-side/capitalmarkets/illiquid/#:~:text=Illiquid%20is%20a%20term%20commonly,primarily%20hold%20only%20illiquid%20assets (last visited July 21, 2025).

mechanisms used in other investment markets to reduce risk are unlikely to be similarly effective in litigation finance.

1. *The Structure of a Lawsuit*

Lawsuits differ structurally from other types of investments in ways that limit the ability of a litigation fund to take risk. Litigation funds typically structure their investments as an offer of funding in exchange for a payout tied to the outcome of a lawsuit. Because the payout depends on a binary event (whether money is recovered), the return that a fund demands in case of success should reflect the probability of success and the amount recovered if successful. That allows the return to reflect the risk of the investment. A simplified example illustrates how important this is. Consider a fund that wants to invest in a basket of uniform lawsuits that will all yield the same damages.[157] To remain competitive with other funds that invest in illiquid assets, the litigation fund wants to offer its clients a 15% annualized return on invested capital.[158] If the investment is structured as a single commitment of capital at the outset and all lawsuits will take five years to pay out, the fund will need to demand about a two-times return on its investment in every lawsuit, *even if every suit is guaranteed to win*. But not every suit will win. Say instead that the fund is merely very good at picking lawsuits, significantly better than chance but not perfect—it gets it right 75% of the time. In that case, the fund demanding a two-times return will get only about 1.5 times its original investment—that translates to a much lower 8.4% annualized return over five years.[159] That means a 25% error rate can cut the annual returns almost in half. Because litigation funds compete with alternative investment strategies (and with each other), they will have to price risk at least somewhat accurately.

As others have observed, however, lawsuits are difficult to price.[160] There is extreme uncertainty about both the question of liability and the amount that could be awarded in damages. At the outset, before discovery, very little is known. But once discovery begins, Pandora's box opens. Depositions and document discovery might reveal unpleasant surprises.[161] And if a case advances all the way to trial, surprise is latent in the format. It is difficult to know what jurors will think of a key witness or how they will

[157] As explained *infra* Part III.B.2, the amount of damages available is also an important variable, but it is elided here to illustrate the basic intuition that investors must price risk accurately.

[158] Assume that this is before fees are subtracted for performance. This number is higher than the median investor in private equity might expect but is used for clarity.

[159] The overall return is substantially even at a 75% win rate because each loss loses *all* of the capital invested in that lost suit.

[160] *See* Heaton, *supra* note 109, at 148; Steinitz, *Pricing Legal Claims*, *supra* note 109, at 1892 (discussing the difficulty in pricing litigation).

[161] *See* Heaton, *supra* note 109, at 147–49 (using a hypothetical simple case to illustrate the hundreds of potential outcomes in a lawsuit, each of which affects its pricing).

interpret an important document. These are information problems—they make it difficult for an investor to price risk appropriately because they introduce so much uncertainty around the key variables.

But information problems alone do not render a potential investment nonviable. Investors in other markets—like venture capital—operate successfully in environments of limited information and high risk. If an investment is risky and hard to price accurately, that can be reflected in the price through a risk premium.[162] In the earlier example, the investor could negotiate for a better price by demanding a three-times return instead of a two-times return to account for some uncertainty. Even if the investor believes that 100% of the cases he has picked will win, he might recognize the limits of his forecast and price risk appropriately. Then, if only 75% of cases win, he will take home a bit better than a two-times return, or around a 17% annualized return over five years, beating his original target. If the investor has an unlucky year and instead only 67% of the lawsuits pay out, he will still hit his 15% target. But if that same unlucky year happened while demanding a two-times return, his annualized returns would be a much lower 6%. This example illustrates that the important question is not whether an *individual* asset is hard to accurately price, but whether it is possible to price assets *in aggregate* such that the total investment yields a desirable return.

Litigation funds are constrained in their ability to allow pricing to compensate for risk, even in aggregate. That likely also constrains their ability to fund riskier lawsuits.[163] The reason why lies in how lawsuits generate returns. The return generated by an investment in a lawsuit differs from that in a company. One influential way to conceptualize the price of a share in a company is that it reflects the future cashflows that a shareholder is entitled to, discounted back to the present to account for the time value of money.[164] Importantly, the company *generates* those cash flows. There is no theoretical cap to the profits that a company can generate if it grows enough. This characteristic plays a fundamental role in venture capital investing, which has sometimes been described as a close analogue for litigation

[162] *See* Andrew Metrick & Ayako Yasuda, *The Economics of Private Equity Funds*, 23 REV. FIN. STUD. 2303, 2336 (2010) (illustrating the use of risk premiums in venture capital and buyout funds).

[163] This conclusion is contrary to that reached by at least one other scholar. *See* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 205 (2014) (advancing a theoretical argument that lower probability lawsuits might get funded as "lottery tickets" if the damages are high enough). This Article departs from that model by introducing real-world constraints: the competitive constraints on litigation funds in the commercial market, the structure of lawsuit payout, and the difficulty involved in pricing risk and conducting due diligence for each lawsuit. Together, these explain why the investments of litigation funds in practice would diverge from those in Abramowicz's model.

[164] *See* IRVING FISHER, THE THEORY OF INTEREST 12–14 (1930).

funding.[165] It allows early investors to receive disproportionately high returns on small, early investments if the company is successful and goes from "Zero to One."[166] And so, a handful of astronomic successes—for example, an early investment in Google—can offset a much greater proportion of losses. That venture capital strategy is often referred to as the "Power Law of Returns."[167] The losses are bounded while the wins are not.[168]

Not so for a lawsuit. A lawsuit is a claim to a sum of money held by another party—and typically that sum is well-bounded because damages are finite,[169] and because the pockets of a defendant are not bottomless.[170] A lawsuit cannot generate limitless cashflows because it does not generate them at all. A successful lawsuit is almost always a one-time transfer of wealth from defendant to plaintiff.[171] And its potential range of damages is estimable *ex ante*—even if only very roughly.

Because lawsuits generate finite returns, there are fewer astronomical winning bets. Without astronomical winning bets, the high-risk losing bets will drag down the entire portfolio. Accordingly, funds will avoid riskier lawsuits unless the fund can somehow account for its ratio of risk to return. That could be done either by taking a safer lawsuit and increasing the return for the fund (while keeping it safe) or by taking a risky lawsuit and making it safer by reducing how much the fund invests (while preserving the return the fund is entitled to). Neither of these options is likely.

First, a fund is unlikely to successfully bargain for a greater portion of the damages. That is because litigants often want to keep some portion of the damages, and a fund also wants the litigant to do so to ensure "skin in

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[165] *See* Steinitz, *Pricing Legal Claims*, *supra* note 109, at 1893–94 (arguing that the conditions of low information, high risk, and high adverse selection make the two investments similar). Ultimately, private equity investments may serve as a better comparator, for reasons explained *infra*.

[166] *See generally,* PETER THIEL & BLAKE MASTERS, ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE (2014) (explaining startup building and financing).

[167] *See, e.g.*, *Understanding the Power Law: Do Venture Capitalists Take Enough Risks?*, VC FACTORY, https://thevcfactory.com/power-law-venture-capital/#:~:text=In%20the%20context%20of%20Venture,the%20entire%20fund%20or%20more (last visited Aug. 6, 2025) (describing Power Law); *The Power Law in VC*, VENTURE INSTITUTE, https://govclab.com/2023/08/09/the-power-law-in-vc (last visited Aug. 6, 2025) ("Power Law in venture capital (VC) is a principle where one single investment yields returns larger than all other investments combined, often by order of magnitude."); *Is Venture Capital Going Back to the Future? Reemergence of the Power Law of Returns*, COMMON FUND PRIV. EQUITY (Oct. 20, 2023), https://www.commonfund.org/cf-private-equity/is-venture-capital-going-back-to-the-future-reemergence-of-the-power-law-of-returns (discussing the Power Law of Returns).

[168] This idea can be made more intuitive by modifying the running example. If the litigation funder instead demands a 10-times return if a lawsuit succeeds, he can lower his hit rate all the way to 27% and still deliver a 15% annualized return.

[169] In some cases, the pot of available money might be larger—for example, where statutory treble damages are available or punitive damages expected. These situations are discussed *infra*.

[170] This concern is pressing for some of the largest lawsuits, including mass tort suits, in which the judgments may be so high against the defendant that not every defendant can be paid out. *See* Anthony J. Casey & Joshua C. Macey, *In Defense of Chapter 11 for Mass Torts*, 90 U. CHI. L. REV. 973, 994–1001 (2023).

[171] Although rare, courts have provided remedies that allow for unbounded payments. *See, e.g.*, Enhabit, Inc. v. Nautic Partners IX, L.P., No. 2022-0837-LLW, 2024 WL 4929729 at *1 (Del. Ch. Dec. 2, 2024) (granting a remedy of an "equitable payment stream from [defendant's] future gains.").

the game."[172] Second, it is not likely that a fund can lower its investment while keeping its demand for payment constant (increasing the multiple on invested capital), because that would lead to the suit being *underfunded*. Somebody else would have to fill the remaining funding needs, but the diminished damages left over to compensate the second funder would make it a bad deal—they would be buying into the deal that the first funder avoided. Because a fund's ability to demand higher compensation to offset losing bets is limited, its ability to fund riskier suits is similarly limited.[173] And so, funds have powerful incentives to look for cases that they deem strong, good cases, and then to fund them in exchange for a fairly constant multiple of invested capital.

The alternative is to seek out suits with outsized potential for damages, allowing the fund to take on more risk—the suits that look more like moonshot winners. These do exist, but within a limited universe. For instance, there are claims that allow plaintiffs to receive statutory treble damages, like those brought under the Sherman Act, Patent Act, or Lanham Act.[174] The potential for outsized damage awards in these areas might facilitate greater risk-taking by funds in search of investable claims. It appears that some funds have followed this path. According to investors at one leading fund, "in many cases" investments in litigation finance "are concentrated in certain areas."[175] Another large litigation fund named Juridica previously publicized its portfolio, revealing that 90% of it was invested in claims eligible for treble damages.[176] A search for investable claims may push funds toward these types of suits, but they are limited in number, and they are not without risk. A few years later, Juridica closed its doors.[177] Explaining the situation, it cited overconcentration in a few types of claims.[178] But it may also have pushed the limits of risk-taking that treble damages could offset. Similarly, Validity Finance announced in 2023 that it

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[172] If the litigant is entirely immunized to the risk of the lawsuit, there is little incentive to cooperate with a multi-year litigation. Requiring the litigant to keep some exposure to the lawsuit is analogous to paying a startup founder with equity or options to keep them invested in the success of the company.

[173] The zero-sum element of the lawsuit payout may further shrink how many high-reward lawsuits are available. A sufficiently large judgment against a corporate defendant might decrease the ability of that defendant to pay large judgments in the future by impairing its balance sheet. Casey & Macey, *supra* note 170, at 994–1001.

[174] *See* 15 U.S.C. § 15(a) (treble damages for antitrust violations under Sherman Act); 35 U.S.C. § 284 (2012) (treble damages for willful patent violations); 15 U.S.C. § 1117(a)–(b) (2008) (treble damages for trademark violations under Lanham Act).

[175] Darnell Stanislaus & Dai Wai Chin Feman, *Doing Due Diligence on Litigation Funders*, BLOOMBERG L. (Jan. 2021), https://www.bloomberglaw.com/external/document/X2P9RVJG000000/litigation-professional-perspective-doing-due-diligence-on-litig.

[176] Joanna M. Shephard, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J. L. ECON & POL'Y 593, 606–07 (2012).

[177] Julie Triedman, *Litigation Funder Juridica Pulls Back After Bad Bets*, ALM (Nov. 19, 2015, 2:28 PM), https://www.law.com/almID/1202742910720.

[178] *Id.*

would invest only in patent cases going forward, after it lost one of its major sources of funding because of lackluster returns.[179]

Incentives to avoid risk are amplified further if portfolios have fewer lawsuits and risk is more difficult to diversify. In theory, a portfolio with fewer investments faces a higher probability that a large portion of the portfolio's value could default simultaneously—an enhanced risk of ruin. That may restrict risk-taking for many funds in practice because "many funders consummate[] only a handful of transactions per year . . . ."[180]

2. *The Limits on Contracting*

Investors in other markets have developed contractual tools to facilitate risk taking when faced with information problems and adverse selection. But these tools, while useful elsewhere, have a more limited effect for lawsuits. Three merit discussion: a payment waterfall, staged funding, and control over the investment.

First, a payment waterfall. Litigation finance transactions often structure their payouts according to a "waterfall" provision that specifies the priority in which parties will receive proceeds from the lawsuit.[181] For example, a waterfall provision might grant the fund priority to receive payment from the lawsuit's proceeds until it recovers the amount it invested into the lawsuit, then the rest of the proceeds would be divided between the law firm and fund. A waterfall provision can reduce risk for one party to an investment agreement by granting preferential rights to get paid, shifting risk to the other party. It resembles contractual mechanisms used in other financial markets like dividing the cash flows from an investment into tranches in order of priority.[182] For example, not every payment owed by a low-credit borrower is equally risky. The borrower might be more likely to make the initial few payments and less likely to make the last few, which come years later. An investor who has priority over the first payments has a safer investment than one who gets only the last payments.

It is unlikely that waterfall provisions meaningfully enable risk-taking by litigation funds. The outcome of a lawsuit can be uncertain with respect to two questions: liability and the amount of damages. Waterfall provisions

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[179] Roy Strom, *Litigation Funder Cuts Staff as Backer Slashes Future Commitment*, BLOOMBERG L. (June 2, 2023, 5:30 AM), https://news.bloomberglaw.com/business-and-practice/litigation-funder-cuts-staff-as-backer-slashes-future-commitment. This may also have been driven by a decision to focus on a domain-specific area of lawsuits to better overcome information problems and reliably identify strong lawsuits.

[180] Stanislaus & Feman *supra* note 175.

[181] Allen Fagin & Ralph Sutton, *Tips for Negotiating Litigation Funding Agreements*, VALIDITY FINANCE (Apr. 4, 2022), https://www.validityfinance.com/news/thought-leadership/2022-04-04-tips-for-negotiating-lfas; Marla Decker, *Litigation Finance: Pricing*, LAKE WHILLANS, https://lakewhillans.com/articles/litigation-finance-pricing/#:~:text=The%20waterfall%20is%20the%20order,contingent%20stake%20in%20the%20litigation (last visited Aug. 7, 2025).

[182] For example, in credit markets, see generally Spiros Bougheas, *Pooling, Tranching, and Credit Expansion*, 66 OXFORD. ECON. PAPERS. 557 (2014) (explaining contractual mechanisms in credit markets).

mitigate the risk that the payment made by the other party is lower than expected. But if the other party does not pay at *all* (because it is not held liable), then a waterfall provision does not protect the litigation fund from the downside. So, waterfall provisions may enable some additional risk-taking when liability is certain but damages are highly disputed—but not when the risk concerns a finding of liability. If waterfall provisions *do* substantially allocate risk away from litigation funds, that would raise questions. If the fund does not bear these risks, then the law firm must instead—and it is unlikely it would do so for free. More likely, it would require additional compensation for holding that risk, suggesting that waterfall provisions cannot reduce risk for litigation funds without also reducing their reward. There is no free lunch.

Second, staged funding. In venture capital investments, contracts often use a staged funding mechanism to reduce risk.[183] In a staged funding arrangement, the venture capital fund makes an initial investment and conditions future funding on the company using the initial investment to meet specific milestones—for example, achieving some annual sales benchmark by a given date.[184] If that is not met, the investor can abandon the investment. The result dampens the effects of the limited information available at the outset of the investment because each key event reveals more information to investors, at which point they can reassess.[185] It can also help align the entrepreneur's incentives with those of the investors. Because funding is kept on the sidelines, she will want to perform well according to the benchmarks to unlock more of it.[186]

This mechanism has been suggested in litigation finance to address similar information and agency problems.[187] Limited evidence from public statements by funders and publicly released funding agreements suggests that funders do (at least sometimes) use staged funding.[188] But even if these terms dampen risk, they are unlikely to drench it entirely. That is for two reasons. First, it is comparatively much more difficult to define a "success" term for a lawsuit *ex ante* than it is for a company. Although a company can easily be measured by sales or profit, the easily measurable information about a lawsuit is composed of more discrete binary events—for example, whether a suit survives a motion to dismiss. When information is revealed in an easily measurable way, it is often too late to act on—for example, the motion to dismiss has been granted, disposing of the suit. An alternative is

[183] Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067, 1078–81 (2003).

[184] *Id.*

[185] *Id.* at 1079.

[186] *Id.*

[187] *See* Steinitz, *Pricing Legal Claims*, *supra* note 109, at 1885–1903 (describing the use of staged funding for information and agency problems).

[188] *See generally* Steinitz, *The Litigation Finance Contract*, *supra* note 23 (utilizing case studies to show the use of litigation funding strategies).

to give the funder discretion to define "success" *ex post*. That may grant funders flexibility but—because they are repeat players—they may hesitate to use it outside of the most extreme situations. A reputation for renegotiating on your counterparties makes it harder to attract new business. Second, staged funding in venture capital is likely effective because it addresses conditions and risks that do not exist in litigation finance. Founders of companies may be incentivized to continue pushing their company forward even while it is faltering because they personally enjoy financial or social benefits from running a company, even if that company is ultimately unsuccessful. Lawsuits, however, do not grant the same social or financial benefits *before* the litigation is successful.

Third, control. In other markets, investors often bargain for provisions that allocate some control over a company to the investor. For example, venture capital firms often negotiate for seats on a company's board.[189] At least one scholar has proposed that control mechanisms should be used in litigation finance to address risk.[190] In the lawsuit context, control rights might mean the ability to make decisions about legal strategy.[191]

Control is controversial in litigation finance. The decision whether to settle a case is one that canonically belongs to the litigant, not the lawyer.[192] But there is worry that litigation funds might interfere with the litigant's decision to settle. Recall the dispute between Burford Capital and Sysco. That dispute between fund (Burford Capital) and the recipient of funds (Sysco) was one about control: Sysco wanted to settle and Burford wanted to hold out for more money.[193] This dispute is the centerpiece of a broader debate about the allocation of control rights between litigants and funders of lawsuits.[194]

Despite that controversy, funder control over litigation may not mitigate risk as effectively in lawsuits as in venture investments. Control works to mitigate a risk in venture capital that is not equally present in litigation funding. In venture investing, insiders, like a founder CEO with the bulk of the equity, drive corporation decisions. Bringing in independent outsiders with control helps to mitigate agency problems. But, unlike in venture investments, in litigation finance an *independent* intermediary already controls many tactical decisions from the outset—a law firm. Because insiders do not drive those decisions, the marginal value of additional independence in a lawsuit is substantially lower. And, although the ability to pick a law firm is important, the litigation fund must often take the law firm together with the lawsuit because firms are often the originators and primary

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189 Natee Amornsiripanitch, Paul A. Gompers & Yuhai Xuan, *More than Money: Venture Capitalists on Boards*, 35 J.L. ECON. & ORG. 513, 515, 517–18, 528, 530, 539 (2019).

190 *See generally* Steinitz, *The Litigation Finance Contract*, supra note 23 (discussing the potential use of different contractual mechanisms and strategies in litigation funding).

191 *Id.* at 508–09.

192 Model Rules of Pro. Conduct r. 1.2 (Am. Bar Ass'n 1983).

193 *See supra* Introduction (discussing the dispute between Burford Capital and Sysco).

194 *See infra* Part IV.C (discussing the role of control in litigation funds).

purchasers of litigation risk.[195] The decisions that still rest in the hands of the litigants—for example, settlement—might still present a risk. But that risk is specific only to the scenario in which a litigant settles too early—it is not directly related to the underlying unknown uncertainty in the lawsuit.[196]

In sum, tools like payment waterfalls, staged funding, and control provisions might mitigate some risk, but they likely do so only on the margins. The information problems and pricing structure present obstacles to risk-taking that are much more difficult to overcome.

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The upshot is that funds and fund sponsors face two substantial sources of constraint that affect which lawsuits get investment. The first is the competitive pressure to attract clients in the fund. In that market, the litigation funds compete not only with each other, but also with different investment strategies. Through that channel, the attractiveness of the *alternatives* to litigation finance affects which lawsuits are ultimately funded. That pressure is compounded by the second source of constraint: adequately pricing risk. Lawsuits are difficult to price because the information is opaque. That should lead funds to demand a discount to compensate for risk. But the potential size of that discount is limited. Lawsuits differ from equity investments in companies because damages are bounded and limited further by what a defendant can pay—that constrains the ability of funds to invest in riskier lawsuits. Contractual mechanisms, a common solution in other markets, are unlikely to substantially defray the risks in this one.

These constraints are consistent with observed evidence. Litigation funds report "success rates" on their funded suits between 75% and 90%.[197] As investment opportunities in the least risky suits dry up, funds are likely pushed toward the suits with the highest potential payouts—a more limited universe composed largely of those claims with statutory treble damages. Some funds appear to have concentrated in these suits; and aggregate

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[195] *See supra* Part III.A.1 (discussing the motivations and limitations in law firms for litigation finance).

[196] Of course, however, the decision to settle early may be a response to how a lawsuit plays out over time and what new information is revealed. So, the two are not entirely unrelated.

[197] *See* Ross Todd, *Another Look at How AI Is Shaping Litigation Finance*, LITIG. DAILY (Mar. 19, 2024), https://www.law.com/litigationdaily/2024/03/19/another-look-at-how-ai-is-shaping-litigation-finance (reporting a 75% win rate of successful verdicts or settlements at Legalist); Stephan Klebes, *Litigation Financing – How Companies Can Enforce Their Legal Claims Without Burdening the Balance Sheet*, DEMINOR LITIGATION FUNDING, (Dec. 19, 2024), https://www.deminor.com/en/news-insights/litigation-financing-how-companies-can-enforce-their-legal-claims-without-burdening-the-balance-sheet#:~:text=Litigation%20financing%20is%20superior%20to,and%20outcomes%20of%20the%20proceedings; *About Us*, BURFORD CAPITAL, https://www.burfordcapital.com/about-us (last visited Aug. 8, 2025) ("Burford has reviewed thousands of matters, committed cumulatively $11 billion and 93% of concluded matters (calculated based on deployed capital) in our portfolio have generated recoveries for clients.").

statistics show that at least a quarter of litigation finance investments are concentrated in them.[198]

C. *The Funds' Own Investors*

Just as litigants need a source of capital, so do funds. A fund sponsor can either raise money for funds from external clients (as limited partners in a partnership) or invest its own money.[199] To do the latter, it can raise money by either issuing equity or borrowing. The former method is more common. Because one of the largest litigation financiers often invests by using capital raised on its own balance sheet, however, both possibilities are discussed here.

1. *Limited Partners*

Investment managers typically raise money for investment funds from limited partners. The limited partners could be wealthy individuals but are more typically funds of various sorts. These funds each fit into one of two general categories. The first category consists of funds operated with the express purpose of some mission, for example, a university endowment or a pension fund. The second category consists of funds that offer a purchasable investment product. These funds *invest in other funds*, pool those returns, and offer that pooled product to potential investors (in exchange for a fee). This structure is now recognizable within the broader framework articulated *supra*—these funds of funds are additional intermediaries, and they might take as their own clients the institutional investment funds in the first category.

Many litigation funds receive capital from funds in the second category—the fund-pickers for hire. In 2022, a litigation fund named LexShares raised capital for a new fund from Titan Advisors (an investment manager that specializes in alternative investments) along with some family offices (smaller investment managers that manage money on behalf wealthy individuals).[200] This is a common arrangement. Omni Bridgeway, another large litigation fund, disclosed a partial list of some of the external investors in its funds, which included a mix of funds that invest only in other funds and others that make direct investments as well as fund investments.[201]

The other potential source of capital is the funds in the first category: institutional investors. The largest pools of institutional capital in the world

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[198] Patent claims alone make up about a quarter of all litigation finance investments. These are among the most lucrative, because of the potential for treble damages coupled with other ways that damages are calculated. *See* WESTFLEET ADVISORS, *supra* note 91.

[199] *See* Weber, *supra* note 127, at 23.

[200] *LexShares Raises $100 Million Litigation Finance Fund*, PR NEWSWIRE (Jan. 25, 2022, 9:00 AM), https://www.prnewswire.com/news-releases/lexshares-raises-100-million-litigation-finance-fund-301467552.html#:~:text=In%202021%2C%20LexShares%20received%20a,technology%20entrepreneur%20and%20investor%2C%20Mr.

[201] *See* Jeremy Sambrook, *Release to Australian Securities Exchange,* IMF BENTHAM (June 20, 2019) (documenting Harvard's investment in disclosure document filed by IMF Bentham, which does business under the name Omni Bridgeway globally).

are sovereign wealth funds, pension funds, insurance companies, endowments, and foundations. These are the usual suspects who invest with alternative asset managers,[202] and they are the most desirable clients because they can allocate large amounts of capital. Consider some of the largest investors in private equity: Temasek (sovereign wealth fund), CPP Investments (pension fund), and the California Public Employees' Retirement System (pension fund).[203] Some of these organizations manage wealth on behalf of an organization committed to a mission: a country, a university, a charity. Others manage wealth on behalf of other investors who are the true beneficial owners of the investments.[204]

According to the funds, many institutional investors have already committed. Press bulletins about successful new fundraising efforts document the involvement of institutional investors in litigation finance. In 2021, Longford Capital raised money for its third fund from "state and municipal pension funds, university endowments, [and] foundations."[205] Omni Bridgeway similarly touts the Harvard University endowment as an investor.[206] Parabellum Capital notes that the limited partners in its funds include "endowments, foundations, pension funds, and other institutional investors."[207] And Burford Capital, while less specific than other funds, notes the involvement of "institutional investors" as limited partners in its new funds.[208] These specific examples are representative of a broader market practice.[209]

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[202] Of the investors in the largest 100 investment managers pursuing alternative investment strategies, 33% of the money comes from pension funds, 15% from wealth managers, 12% from insurance companies, and 5% from sovereign wealth funds. *Global Alternatives Survey 2017*, WILLIS TOWERS WATSON (July 2017), https://www.wtwco.com/-/media/wtw/insights/2017/07/global-alternatives-survey-2017-final.pdf.

[203] *The World's Biggest Private Equity Investors*, PRIV. EQUITY INT'L (July 1, 2025), https://www.privateequityinternational.com/global-investor-ranking.

[204] Lund, *supra* note 38, at 90–95.

[205] *Longford Capital Raises $682 Million for New Investment Fund*, LONGFORD CAP. (Sept. 22, 2021), https://www.longfordcapital.com/media/longford-capital-raises-682-million-for-new-investment-fund.

[206] Sambrook, *supra* note 201.

[207] *Parabellum Capital Announces Final Close of Latest Litigation Finance Fund*, BUS. WIRE (June 16, 2020, 12:13 PM), https://www.businesswire.com/news/home/20200616005840/en/Parabellum-Capital-Announces-Final-Close-of-Latest-Litigation-Finance-Fund.

[208] *Burford Capital Closes New $360 Million Private Investment Fund*, BURFORD CAP. (Mar. 28, 2022), https://investors.burfordcapital.com/news/news-details/2022/Burford-Capital-closes-new-360-million-private-investment-fund/default.aspx.

[209] *See also* Paloma Castro, *Litigation Financing as an Opportunity in the Investment Market*, DEMINOR LITIG. FUNDING (Jan. 15, 2024), https://www.deminor.com/en/news-insights/litigation-financing-as-an-opportunity-in-the-investment-market ("Deminor is immensely proud of its diverse client base, which includes some of the most innovative and entrepreneurial companies in the world, as well as leading public and private pension funds, asset managers, and sovereign wealth funds. Of the top ten investors in the world, four are recurring clients of Deminor."); Matt Wirz, *The 26-Year-Old Dropout Lapping the Hedge-Fund Field*, WALL ST. J. (Apr. 16, 2022, 12:39 PM), https://www.wsj.com/finance/investing/the-26-year-old-dropout-lapping-the-hedge-fund-field-11650114049 (documenting the involvement of institutional investors in funds raised by Legalist, an investment manager that funds lawsuits).

The influence of institutional investors as an upstream source of capital can affect which lawsuits are funded. As purchasers of investment products from litigation funds, their preferences and constraints are likely to influence which products are offered and on what terms.

Institutional investors often face non-economic pressures to stay away from investments that might be viewed as controversial or socially undesirable. Endowments face pressure from stakeholders at universities to avoid "icky" investments. Most prominently, that manifests through campaigns by students or alumni to divest from asset classes, be they fossil fuels or otherwise. These campaigns put endowments in a difficult spot and are often embarrassing. Foundations and pensions, although they lack identical stakeholder pressures, often act similarly in consideration of their mission. The Ford Foundation announced in 2017 that it intended to align its investment portfolio with the ethical concerns that motivate its charitable work.[210] And New York State Common Retirement Fund has divested from investments in private prisons.[211]

While divestment pressures often single out specific investments, institutional investors are also concerned with the individual practices of the funds that they invest with. In 2019, institutional investors pulled funds from Fisher Investments after it surfaced that its founder had made lewd comments at an industry event.[212] The flight was *en masse*. Fleeing pension funds withdrew $3 billion within a few weeks.[213] Elsewhere, CalPERS recently announced its withdrawal from private equity funds because of the labor practices at the portfolio companies the funds invested in.[214]

These pressures have intensified in the last few years. The failures of Theranos and FTX were front page news, kept in the national conversation as federal prosecutions played out. The news coverage was not cabined to

[210] *Mission Investments*, FORD FOUND., https://www.fordfoundation.org/work/challenging-inequality/mission-investments (last visited July 23, 2025). *See also* Alex Park, *Is the Gates Foundation Still Investing in Private Prisons?*, MOTHER JONES (Dec. 8, 2014), https://www.motherjones.com/politics/2014/12/gates-foundation-still-investing-private-prisons (documenting the position of the foundation that it won ot invest in "companies whose profit model is centrally tied to corporate activity that [Bill and Melinda Gates] find egregious."); *Ethical Investment Advisory Group*, CHURCH ENG., https://www.churchofengland.org/about/leadership-and-governance/ethical-investment-advisory-group (last visited July 23, 2025) (explaining the role of the Ethical Investment Advisory Group).

[211] Robert Steyer, *New York State Common Divests Publicly Traded Prison Holdings*, PENSIONS & INVS. (July 16, 2018, 1:00 AM), https://www.pionline.com/article/20180716/ONLINE/180719906/new-york-state-common-divests-publicly-traded-prison-holdings/.

[212] Jack Kelly, *Billionaire Money Manager Ken Fisher Made Provocative, Sexist Comments and Lost $1 Billion In Investments Here's What He Said*, FORBES (Oct. 18, 2019, 1:26 PM), https://www.forbes.com/sites/jackkelly/2019/10/18/billionaire-money-manager-ken-fisher-made-provocative-sexist-comments-and-lost-1-billionheres-what-he-said/.

[213] Darla Mercado, *Fisher Withdrawals Top $3 Billion as Texas Retirement Plan Exits*, CNBC (Oct. 25, 2019, 2:12 PM), https://www.cnbc.com/2019/10/25/fisher-withdrawals-top-3-billion-as-texas-retirement-plan-exits.html.

[214] Heather Gillers, *Calpers Trims Investments Over Labor Practices*, WALL ST. J. (June 10, 2024, 6:23 PM), https://www.wsj.com/livecoverage/stock-market-today-dow-sp500-nasdaq-live-06-10-2024/card/calpers-trims-investments-over-labor-practices-1ML2053ApIkleKAUQvbK.

the companies themselves, but also stretched to the funds that backed them.[215] And since then, institutional investors have publicly stressed the importance of caution and diligence.[216]

Litigation finance might pose these same concerns. Although not all lawsuits are unsavory, they explicitly represent conflict. A litigation funder embroils herself in a dispute between two other parties, a dispute that in many cases will have personal or ethical dimensions that extend well beyond the legal merits. And she does so in a way that perhaps no other investor does. Even in distressed debt investing, the battle in bankruptcy court does not impugn anybody's conduct or character to the same degree. Lawsuits differ in that regard. Getting involved could publicly tie reputation-conscious institutions to charged, controversial, or disreputable behavior.

These concerns are not hypothetical. Allianz, a major insurance company, started a litigation finance subsidiary in 2002.[217] Although it grew to one of the largest litigation funders in Europe, it did not remain one.[218] Instead, it shuttered altogether in 2011 because of the "potential business embarrassment risks . . . ."[219] It ran the risk of funding litigation against clients or important corporate stakeholders, jeopardizing important relationships.[220] And due to its size as a business, it had limited ability to screen lawsuits for conflicts.[221] Although Allianz invested its own money (and generated conflicts with its own business activities), the risks are analogous to the embarrassment risks for outside investors in litigation funds.

These considerations likely pressure litigation funds to present their products as ethical with minimal reputational risks. And the best way for them to do that convincingly is to adopt criteria for excluding lawsuits that, while presenting opportunities for outsized profit, might break some negative headlines. Lawsuits, unlike companies, are inherently bundled together with conflict and drama.[222]

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[215] *See, e.g.*, Sophia Kunthara, *A Closer Look at Theranos' Big-Name Investors, Partners And Board as Elizabeth Holmes' Criminal Trial Begins*, CRUNCHBASE NEWS (Sep. 14, 2021), https://news.crunchbase.com/health-wellness-biotech/theranos-elizabeth-holmes-trial-investors-board (discussing the largest investors of Theranos); Kia Kokalitcheva, *Sequoia Capital Partner Says Firm Was "Misled" by FTX*, AXIOS (Jan. 13, 2023), https://www.axios.com/2023/01/13/sequoia-capital-partner-says-firm-was-misled-by-ftx (discussing the investors of Theranos and FTX).

[216] *See Global ESG Due Diligence + Study 2024*, KPMG (2024), https://assets.kpmg.com/content/dam/kpmg/xx/pdf/2024/06/esg-due-diligence-study-2024.pdf (discussing the recent importance of due diligence and best practices in M&A transactions).

[217] CHRISTOPHER HODGES, JOHN PEYSNER & ANGUS NURSE, LITIGATION FUNDING: STATUS AND ISSUES, RESEARCH REPORT, CENTRE FOR SOCIO LEGAL STUDIES, OXFORD 63 (2012), https://www.law.ox.ac.uk/sites/default/files/migrated/litigation_funding_here_1_0.pdf.

[218] *Id.* at 42.

[219] Christian Stuerwald, *An Analysis of Allianz' Decision to Discontinue its Litigation Funding Business*, CALUNIUS CAP. (2012), https://www.calunius.com/media/2747/cs%20-%20calunius%20article%20on%20allianz%204%20january%202012.pdf.

[220] *Id.*

[221] *Id.*

[222] These concerns may explain in part why litigation funders try to avoid publicly disclosing their

This dynamic may be less pronounced when investment is first intermediated by a fund of funds that sits between the institutional investor and the litigation fund. The additional level of intermediation makes the link between the institutional investor and the funding of any individual lawsuit more opaque, potentially reducing the risk that an institutional investor is publicly linked with controversy. In theory, that could dampen reputational constraints. But the effects would be limited if the institutional investors invest in the same funds *alongside* the funds of funds. Bulletins from litigation funds suggest that this is often the case.[223] And if so, a fund might still face incentives to avoid headline risk to cater to one part of its client-base, even if another part is insensitive to it.

2. *Investors in the Fund Sponsor*

The alternative to raising money from limited partners is for an investment manager to directly invest in a fund using its own capital.[224] To do so, it can raise money directly from the *investment manager's* investors and the returns show up on the books of the manager. The investors, then, get the residual returns from the business of the investment manager, not from an individual fund.

Curiously, the largest litigation financier in the United States is a public company that often invests this way—Burford Capital, listed on the London AIM Stock Exchange in 2009 and on the New York Stock Exchange in 2020.[225] That allows Burford to invest both money raised in limited partnerships and money raised directly from the public, through equity or debt issuance.[226] The advantage of going public is increased access to capital from the broad public. But it also comes with significant burdens. It must comply with expensive public company reporting requirements and is exposed to securities fraud liability. In 2019, that exposure led to a class action securities suit against Burford after a short-selling hedge fund released a report alleging that Burford had manipulated its accounting to obscure that it was "arguably insolvent."[227] These concerns are the tip of the

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involvement with lawsuits during litigation. Preliminary evidence suggests that law firms bringing patent suits backed by litigation funders engage in some forum-shopping to avoid publicly disclosing the fact they are funded.

[223] *See supra* note 208 and accompanying text.

[224] This practice is referred to as "balance sheet investing" because the investment manager invests by using money from its own balance sheet. *See* Weber, *supra* note 126, at 16–17 (explaining how the largest litigation financing companies focus on "balance sheet investing").

[225] Stephanie Russell-Kraft, *Burford Capital Makes Debut On New York Stock Exchange (2)*, BLOOMBERG L. (Oct. 19, 2020, 5:34 PM), https://news.bloomberglaw.com/business-and-practice/burford-capital-makes-debut-on-new-york-stock-exchange.

[226] Burford Capital still uses limited partnership structures to invest directly in its funds; it engages in a blend of investing its own balance sheet and investors' funds. Weber, *supra* note 127, at 16.

[227] Alaina Lancaster, *Burford Slapped with Class Action Securities Suit After Muddy Waters Dustup*, BLOOMBERG L. (Aug. 22, 2019), https://www.law.com/2019/08/22/burford-slapped-with-class-action-securities-suit-after-muddy-waters-dustup.

iceberg for public litigation finance companies. As one scholar has pointed out, the problems go beyond legal compliance. The valuation and accounting process for litigation assets is not straightforward, so litigation funders can report internally-generated numbers that are difficult to understand or trust.[228] And, while this problem also affects other investment managers of private assets, those publicly traded fund sponsors have multi-decade track records of success and proven management teams that can inspire confidence.[229] Unsurprisingly, raising equity from the public is not the majority approach; instead, most funds are private.[230]

That leaves questions about why an investment manager in litigation finance would choose to go public. Because Burford invests money both from limited partners (institutional investors) and through its own balance sheet, it is unlikely that Burford was driven to public equity markets to avoid reputational concerns. Instead, it may indicate that Burford believes that the market for litigation finance remains inefficiently priced and that it can gain an above-market return for itself that it prefers to the income it generates through fees.[231]

* * *

The upshot is that the ways that funds obtain capital can also influence which lawsuits are ultimately funded. When funds raise money from limited partners and tap into pools of institutional capital, they introduce constraints imposed by the stakeholders or clients of the institutional investors. These constraints could either be reputational, steering funds away from unsavory lawsuits, or related to potential conflicts of interest. There are two plausible alternatives. The first is to raise money from funds that make a business of investing in other funds, introducing an additional layer of intermediation and opacity. And the second is to invest from a sponsor's own balance sheet, as Burford Capital has. Of these, the second option might not be feasible for much longer if the returns in litigation finance are bid down such that sponsors look to their limited partners instead of to their own balance sheets.

Taking a step back, this Part has shown that litigation finance is not a single transaction but instead a series of transactions between intermediaries who shepherd money from its source to its ultimate use: litigation. This more comprehensive view of litigation finance reveals a web of contracting incentives and constraints. Together, these dynamics work to shape the litigation finance market, and—as a result—understanding them is crucial to

[228] Weber, *supra* note 127, at 40.

[229] Robert F. Weber, *Third-Party Litigation Finance and Public Capital Markets: The Case of the Muddy Waters Short Attack on Burford Capital*, FINREG BLOG (May 13, 2022), https://sites.duke.edu/thefinregblog/2022/05/13/third-party-litigation-finance-and-public-capital-markets-the-case-of-the-muddy-waters-short-attack-on-burford-capital.

[230] *Id.*

[231] Weber, *supra* note 127, at 50–51.

understanding how the market for legal services might transform and what regulatory interventions might be justified.

IV. Insights for Puzzles in Litigation Finance

The role of intermediaries in litigation finance transactions reframes important questions about both how widespread the practice will be in the future and about its effects on the legal system—how it will affect access to justice, the efficiency of the courts, and the relationship between litigant and law firm. This Part explains the implications for each in turn.

A. *The Size of the Litigation Finance Market*

The degree that litigation finance will change litigation or access to justice will depend on how many lawsuits it affects. However, a quiet puzzle in litigation finance is that—even though many of the *largest* lawsuits brought today are backed by funding—the overall market remains relatively small. An instinctive explanation for the market's size might be that its growth was held back by legal barriers that have now faded—for example, the common law doctrine of champerty. By that reasoning, the market's current size is not reflective of its potential; and now that those barriers have receded, the market could be poised for explosive growth. But an explanation purely rooted in legal restrictions is insufficient. Instead, the market's size is better explained by the constraints on lawsuit funding imposed by intermediation.

1. *Litigation Finance Has Not Yet Affected Many Lawsuits*

Putting together all assets under management by litigation finance funds, the sum is around $15 billion. That number is typically reported as evidence that litigation finance is established and "here to stay."[232] But these accounts lack context. The size of the litigation finance market can be compared either to the total amount of litigation spending in the United States or to other investment markets. Under either approach, the comparison is not flattering.

The amount spent each year by litigants in the United States is not centrally measured or reported, but it is likely at least hundreds of billions of dollars. One estimate of the annual litigation costs (excluding the cost of settlements and judgments) puts the number close to $200 billion for tort suits alone.[233] Another estimate of the annual litigation costs of just the

[232] *See* Heather Thompson, *ABTL 2015: Litigation Finance is Here to Stay*, ABOVE L. (Oct. 12, 2015, 2:12 PM), https://abovethelaw.com/2015/10/abtl-2015-litigation-finance-is-here-to-stay (explaining why litigation finance is "here to stay"); *Inside the Multi-Billion Dollar Litigation Finance Industry*, FIN. MONTHLY (Aug. 29, 2023, 2:30 AM), https://www.finance-monthly.com/inside-the-multi-billion-dollar-litigation-finance-industry (stating that "the multi-billion dollar litigation finance industry has emerged as a game-changing force.").

[233] David McKnight & Paul Hinton, *Tort Costs in America, An Empirical Analysis of Costs and*

Fortune 500 is about $210 billion, although that number is inclusive of damages.[234] These estimates are conservative—they likely omit a great deal of spending by plaintiffs.[235] The total amount invested in lawsuits each year pales by comparison. The $15.2 billion sum represents the total sum entrusted to litigation finance funds—it should not be equated to the annual investment in lawsuits. The annual investment in lawsuits in 2023 was a much smaller number: $2.7 billion.[236] At first glance, that comprises only a meager percentage of the total amount spent on litigation.

The market for litigation finance is also small compared with other investment markets. If the assets under management of every litigation finance fund were added together and combined into a single fund, that fund would not be in the list of the largest 100 funds that invest using alternative investment strategies.[237] As reference points, consider the assets under management of some of the largest alternative asset managers: $1.2 trillion (Blackstone),[238] $300 billion (Brookfield),[239] $650 billion (Apollo),[240] and $637.6 billion (KKR).[241] Or consider an alternative perspective: If litigation finance were a company, its combined market capitalization would not put it in the top one thousand companies globally.[242] As an investment market, litigation finance remains niche.[243]

More importantly, it is not clear how much of the $15.2 billion in assets under management has been invested in lawsuits. It is common for investors in private assets to raise capital and then have difficulty deploying it into attractive investments. Accumulated capital in search of a home is dubbed

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Compensation of the U.S. Tort System, CHAMBER OF COM. INST. FOR LEGAL REFORM (2022) (estimating that 47% of $443 billion spent in connection with tort suits went to litigant expenses and costs).

[234] John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, CORP. COUNS. BUS. J. (Feb. 1, 2008), https://ccbjournal.com/articles/fortune-500-total-cost-litigation-estimated-one-third-profits.

[235] Large companies are more typically defendants in high-dollar litigation than plaintiffs.

[236] WESTFLEET ADVISORS, *supra* note 91, at 7. The amount invested in preceding years is similar. *Id.* at 3.

[237] *See Top 100 Alternative Investment Managers of Pension Fund Assets*, FIN. TIMES (2010), https://media.ft.com/cms/6ce7489e-a704-11e0-a808-00144feabdc0.pdf (showing the total assets under management for the top 100 alternative investment managers of pension fund assets in 2010 was $1,903,507,800,000). This category sweeps in private equity funds and hedge funds—the closest comparators for litigation finance. *Id.*

[238] *Delivering for Investors*, BLACKSTONE (June 30, 2025), https://www.blackstone.com/#:~:text=Blackstone%20is%20the%20world's%20largest,businesses%20that%20deliver%20lasting%20value.

[239] *2023 BAM Annual Report*, BROOKFIELD ASSET MGMT., https://www.brookfield.com/2023-bam-annual-report (last visited July 25, 2025).

[240] Apollo Glob. Mgmt., Annual Report (Form 10-K) 84, (Feb. 27, 2024), https://www.sec.gov/ix?doc=/Archives/edgar/data/1858681/000185868124000031/apo-20231231.htm.

[241] KKR, Annual Report (Form 10-K) 11, 17, 23, (Feb. 28, 2025).

[242] *Largest Companies by Marketcap*, COMPANIES MKT. CAP, https://companiesmarketcap.com (last visited July 25, 2025).

[243] *See* Emily R. Siegel, *Disclosure Order Targeting Funders Stunts Delaware Patent Suits*, BLOOMBERG L. (Dec. 6, 2024, 5:00 AM), https://news.bloomberglaw.com/business-and-practice/disclosure-order-targeting-funders-stunts-delaware-patent-suits (quoting a litigation funder that "only a very small percentage of cases" get litigation funding and that "[l]itigation finance remains a relatively small but mighty feature of our civil justice system").

"dry powder."[244] There appears to be a lot of dry powder in litigation finance. While the industry's assets under management grew by just $100 million between 2022 and 2023, the industry deployed $2.7 billion in capital.[245] While $100 million of that could have come from newly raised capital, where did the other $2.6 billion come from? Dry powder. Since these numbers started being reported in 2019, litigation finance funds deployed more capital each year than they raised, implying that the $15.2 billion dollar sum may be obscuring large sums of undeployed capital in search of a good use.[246] In total, the industry deployed $5.5 billion more than it raised between 2020 and 2023.[247] That money must have come from prior dry powder, suggesting some difficulty in finding new lawsuits to invest in.

Of course, the important question is about the future. Perhaps the industry's current size is misleading and rapid growth lies just ahead.[248] One scholar has identified the entrance of private equity funds financing mass tort claims as a potential new frontier, suggesting that a third wave of litigation finance might be on the way.[249] This is possible, but to understand where litigation finance will go it is important to first understand where it has been, and why—given the history of the last twenty years—the market has not already grown more.

2. *Champerty is Not a Sufficient Explanation*

The conventional wisdom is that litigation finance was held back in the United States by common law barriers. The alleged culprit is the common law restriction on champerty.[250] Champerty, a dated legal term, simply means a third party financing a lawsuit in exchange for a share of the proceeds.[251] It is a subcategory of the broader category of maintenance: funding or helping with a lawsuit in which you are not a party, regardless of compensation.[252]

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[244] Adam Hayes, *Dry Powder: Definition, What it Means in Trading, and Types*, INVESTOPEDIA (Mar. 24, 2020), https://www.investopedia.com/terms/d/drypowder.asp#:~:text=Dry%20powder%20is%20a%20slang,purchase%20assets%20or%20make%20acquisitions.

[245] WESTFLEET ADVISORS, *supra* note 91, at 3.

[246] This information is gathered from Westfleet Insider's industry reports from 2019 to 2023. *See supra* note 91.

[247] *Id.*

[248] Some estimates predict growth to approximately $30 billion over the next half decade or so—this would require a substantial acceleration in the rate of growth. *See* Parikh, *supra* note 52, at 39 (citing a study by the Swiss Re Institute).

[249] *Id.* at 36.

[250] Some scholars have pointed to usury laws as another form of restriction. *See, e.g.*, Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 87–94 (2002); Martin, *supra* note 81, at 57–59; Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 634–39 (2007) (discussing the restrictions of usury and champerty on litigation finance). But usury laws do not play a part in this analysis. Although usury laws matter for consumer litigation lending—which more often takes the form of a loan with an interest rate—they are less relevant for the commercial litigation finance market, which instead is structured as a percentage of the proceeds.

[251] 14 AM. JUR. 2D CHAMPERTY, MAINTENANCE, ETC. § 1 (2025); Anthony Sebok, *Going Bare in the Law of Assignments: When is an Assignment Champertous?*, 14 FIU L. REV. 85, 86 (2020).

[252] Anthony Sebok, *supra* note 251, at 86.

Maintenance and champerty have a rocky relationship with the law. Even under Roman law, there was a strong expectation that litigation was a private affair between "no one but the litigants and the members and officers of the court . . . ."[253] As a result, "it was generally provided that there should be no traffic in litigation" with an exception for claims that had not yet been brought.[254] In the early 20th century, Max Radin identified how these norms calcified into the stricter formal prohibitions on champerty in 15th century England.[255] Funding another person's lawsuit for profit was punished as a crime in Medieval England, a practice which persisted until the middle of the 20th century.[256] The United States—at least in theory—inherited that English tradition along with the rest of the common law.[257] The invention of the contingency fee pushed against the limits of these doctrines in the early 20th century, before its proponents eventually won the day.[258]

But what of more recent history? Champerty restrictions appear today on the books of many states.[259] But even the scholars who suggest that champerty restrictions were an effective deterrent against litigation funds have trouble explaining the puzzling fact that so many litigation finance funds have successfully established their businesses.[260] Indeed, there is a growing scholarly consensus that restrictions on champerty are no longer practically relevant for litigation funds.[261] But when did "no longer" begin? Modern

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[253] Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 48 (1935).

[254] *Id.* at 54 (drawing on Diocletian at COD. JUST. 2, 12, 15).

[255] *Id.* at 51, 56–58 (observing that ancient Greek and Roman norms have "an astounding resemblance to the form which 'maintenance,' proper, took in fifteenth-century England.").

[256] RACHAEL MULLHERON, THE MODERN DOCTRINES OF CHAMPERTY & MAINTENANCE 6–8, 11 (2023). The functional history of the concept of champerty goes back further to Ancient Greek and Roman law. Steinitz, *supra* note 85, at 1287.

[257] Radin, *supra* note 253, at 67–70.

[258] Arthur L. Kraut, *Contingent Fee: Champerty or Champion?*, 21 CLEV. ST. L. REV. 15, 16–17 (1972); Sebok, *supra* note 22, at 99–100 ("At the turn of the twentieth century lawyers began to offer to take cases without payment unless they obtained a settlement or a judgment for their clients, a practice that was flatly illegal under the doctrines of maintenance and champerty. Courts and legislatures quickly found an exception to the restrictions on champerty such that by 1930, even in those states that strictly prohibited maintenance, a lawyer was permitted to 'invest' in his client's civil litigation." (footnotes omitted)).

[259] *See, e.g.*, Sebok, *supra* note 251, at 87 ("After all, champerty is still technically illegal in almost half of American states . . . ."); Steinitz, *supra* note 85, at 1289 ("[W]hile a minority of states have abandoned champerty restrictions, the majority of states retain and enforce the prohibition with varying degrees of zeal." (footnote omitted)).

[260] *See* Bond, *supra* note 84, at 1309 (concluding that "the prohibition on champerty remains an irreplaceable prophylactic" because no "private market in legal judgments" has been formally recognized in any state). Other scholarship identifies instances in which funding agreements were invalidated, but these cases often involved an unusual procedural posture: a fund sues the recipient of funding, who refuses to pay and invokes champerty as a defense. *See* Sebok, *supra* note 22, at 107, 110 (discussing how states limit maintenance agreements).

[261] *See* David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1052 (2016) ("[M]any courts around the country nowadays are unwilling to bar modern TPLF agreements under these ancient doctrines." (citation omitted)); Julia Gewolb & Joshua Libling, *INSIGHT: The Fall of Champerty and the Future of Litigation Funding*, BLOOMBERG L. (June 16, 2020, 4:00 AM), https://news.bloomberglaw.com/us-law-week/insight-the-fall-of-champerty-and-the-future-

academic work surveying state laws restricting champerty often identify cases from before the 21st century.[262] That lens does not help determine when *in* the 21st century the restrictions eased. As discussed *supra*, commercial litigation finance has been established in the United States for nearly twenty years.[263] The relevant question is whether the industry was held back over that period. That question is better answered by looking at how the doctrines and practice developed over time in specific states.

A closer look at the states with the largest markets for litigation reveals that the doctrines barring champerty and maintenance did not do much to hold back the development of modern commercial litigation finance. California, New York, Texas, and Florida are the largest states measured by gross domestic product (GDP). Together, they comprise about 40% of U.S. GDP.[264] Commercial activity begets disputes and disputes beget litigation. Although an imperfect proxy, a state's economic output is a reasonable measure of how large the market for legal claims is in that state.[265] Unsurprisingly, these are also the four states with the highest numbers of registered attorneys.[266] In each of them, litigation finance proceeded unrestricted for decades. Specifically, during the last two decades—the period in which commercial litigation finance became established—there do not appear to have been restrictions.

California: California comprises about 15% of U.S. GDP and is a global center for technology and entertainment. Big disputes are likely to follow. And, luckily for the plaintiffs in lawsuits stemming from those disputes, they can legally get their suits funded. As early as 1863, California courts declared that "the offense of maintenance does not exist in America as a part

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of-litigation-funding ("[Champerty] has long been in decline in the U.S.: some states never adopted it, some states did and abandoned it, and some states—notably, New York—continue to have champerty laws on their books but have so limited their scope that they rarely apply. This abandonment of champerty and its close relation, maintenance, has helped fuel the growing demand for litigation funding in the United States in recent decades.").

262 *See, e.g.*, Sebok, *supra* note 22, at 101–02 (citing cases). This extensive and foundational survey cites fourteen jurisdictions that explicitly prohibit maintenance. *Id.* Of those, it provides cases as examples for nine states. *Id.* Of those nine cases, four come from before 2000 and two more from before 2004. *Id.*

263 *Supra* Part II.B.

264 BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COM., GROSS DOMESTIC PRODUCT BY STATE AND PERSONAL INCOME BY STATE, 1ST QUARTER 2025 tbl.1 (2025), https://www.bea.gov/sites/default/files/2025-06/stgdppi1q25.pdf.

265 Empirical research supports this commonsense observation. *See* Gerhard Clemenz & Klaus Gugler, *Macroeconomic Development and Civil Litigation*, 9 EUR. J.L. & ECON. 215, 215 (2000) ("[W]e find that the number of transactions per individual as proxied by the level of real per capita GDP positively influences the amount of litigation per capita."). Separately, Richard Posner identifies multiple factors that predict variation in litigation volume between states; many of these—household income, urbanization, and the number of lawyers per capita—correlate strongly with economic activity. *See* Richard A. Posner, *Explaining the Variance in the Number of Tort Suits Across U.S. States and Between the United States and England*, 26 J. LEGAL STUD. 477, 480–82 (1997) (identifying seven factors which influence the rate at which tort suits are brought).

266 *Profile of the Legal Profession 2024: Demographics*, A.B.A., https://www.americanbar.org/news/profile-legal-profession/demographics (last visited Aug. 4, 2025).

of the common law,"[267] and the same went for maintenance-for-profit: champerty.[268] That stance was re-articulated in 1944.[269] Then, fifty years later, it was publicly recognized by the Los Angeles County Bar Association in 1999.[270] And finally, reaffirmed by the California bar in 2020.[271] California has instead traditionally regulated the potentially undesirable *effects* of litigation finance through bars against frivolous litigation or malicious prosecution.[272] But those are the typical common law restraints that apply to all lawsuits; they do not pick out litigation finance in particular.

New York: New York wrestled more with the problem than California but did not land in such a different place. Unlike in California, champerty and maintenance were traditionally prohibited in New York. However, they have never been enforced to prevent a pure investment in a lawsuit.[273] Instead, champerty and maintenance doctrines in New York apply to transfers of a lawsuit for the *sole purpose* of transferring the legal right to sue.[274] That differs from the structure of a litigation finance contract. In a litigation finance contract, the investor typically acquires a claim to some of the *proceeds* of a lawsuit—a distinction courts respect.[275] This distinction was enshrined by New York's legislature in 2004 in Judiciary Law Section 489, which also creates a safe harbor for transactions over $500,000.[276] Courts in New York have primarily found problems with litigation funding when the transaction is structured as a loan repayable *without* respect to the outcome of the litigation; in other words, when it is *not* an investment in the

[267] Mathewson v. Fitch, 22 Cal. 86, 95 (1863). The court went on to clarify that "[t]here is no statute upon the subject in this State, and we have no doubt that the Legislature of 1850, when it adopted the statutes which were deemed necessary to organize the legal system of the State, by omitting to enact any such statute, acted in the spirit of the decisions which hold such laws inapplicable to this country, and with the direct purpose that there should be no law relating to the subject." *Id.*

[268] *Id.* at 94–95.

[269] *In re* Cohen's Est., 152 P.2d 485, 489 (Cal. Dist. Ct. App. 1944) ("California is one of the many states that has never adopted the common law doctrines of champerty and maintenance.").

[270] L.A. Cnty. Bar Ass'n Pro. Resp. & Ethics Comm., Formal Op. 500 (1999) ("A member of the State Bar of California may establish a business to finance the legal expenses of another person's lawsuit in exchange for an assignment of an interest in the proceeds of the claim. . . .").

[271] State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Formal Op. 2020-204, at 4 (2020) ("California has never recognized prohibitions against champerty or its variants. . . .Such laws should not be a barrier to a litigation funder enforcing a litigation funding contract in California." (citation omitted)).

[272] L.A. Cnty. Bar Ass'n Pro. Resp. & Ethics Comm., *supra* note 270.

[273] LITIGATION FUNDING, LEXOLOGY: GETTING THE DEAL THROUGH 6 (Dec. 10, 2021), https://woodsford.com/wp-content/uploads/sites/3/2022/01/2022-Litigation-Funding-USA-New-York.pdf.

[274] Echeverria v. Est. of Lindner, No. 018666/2002, 2005 WL 1083704, at *7 (N.Y. Sup. Ct. 2005) (citing Knobel v. Est. of Hoffman, 432 N.Y.S.2d 66, 68 (N.Y. Sup. Ct. 1980)) ("Under New York law these assignments [of rights in lawsuits] are allowed as long as the primary purpose and intent of the assignment was for some reason other then [sic] bringing suit on that assignment.").

[275] *E.g.*, *id.* at *5–6 (determining that one party's purchase of a judgment in another's favor did not constitute champerty).

[276] N.Y. JUD. LAW § 489 (McKinney 2025); *see also* Justinian Cap. SPC v. WESTLB AG, 65 N.E.3d 1253, 1254 (N.Y. 2016) (interpreting and applying Section 489).

lawsuit, but instead more resembles a loan to a person.[277] In sum, New York's stance toward litigation finance has long-been permissive.[278] That has earned it the designation as a "judicial hellhole," bestowed by some critics of litigation funding.[279]

Texas: Texas has taken a liberal approach to litigation finance since at least the 1870s. In 1873, the Supreme Court of Texas was clear that "[t]here is no law prohibiting champerty in force in this state."[280] The legislature went further in 1889. It codified a statute deeming causes in action "property."[281] As property, legal claims could be transferred freely or even inherited.[282] In the last half-century, Texas has walked back a bit from this extreme position. But not that far back. Although "[a]s a general rule a cause of action may be assigned,"[283] Texas doctrine now more resembles that of California or New York. That is to say, litigation finance is presumptively permitted with the caveat that courts reserve the right to invalidate contracts that are plainly against public policy for other reasons.[284]

Florida: In the mid-twentieth century, it appeared that Florida restricted champerty. Early cases emphasized the role of the "intermeddler." In 1959, a man convinced a widow to sue the man managing her estate—the two signed a contract giving him a right to the proceeds of the lawsuit. That arrangement, a Florida court held, was prohibited champerty.[285] Later decisions also picked up on the importance of "intermeddling." A decade afterward, a Florida court emphasized that champerty includes both the funding of a lawsuit and "intermeddling" with how it was brought or litigated.[286] But by 1996, that element became entirely dispositive: a

[277] *See, e.g.*, *Echeverria*, 2005 WL 1083704, at *5 (stating that an agreement which required a person to repay an advancement from the proceeds of any eventual judgement was not champertous).

[278] The New York City Bar Association wrote an advisory opinion that purported to advise against transactions in which contingency fee lawyers shared their fee with outsiders. *See* Ass'n of the Bar of the City of N.Y. Comm. on Pro. Ethics, Formal Op. 2018-5 (2018). However, that letter unlikely had much effect. Funds can avoid this problem by instead structuring transactions as agreements for a forward sale of the proceeds of litigation with the litigant as a party to the agreement.

[279] *Predatory 'Lawsuit Loans' Rotting New York's Civil Courts*, JUD. HELLHOLES (May 28, 2024), https://www.judicialhellholes.org/2024/05/28/predatory-lawsuit-loans-rotting-new-yorks-civil-courts/ ("The Big Apple's civil courts are a hotbed for nuclear verdicts and liability-expanding laws that attract opportunistic litigation — enabled and perpetuated by the litigation funding industry.").

[280] Bentinck v. Franklin, 38 Tex. 458, 458 (1873).

[281] Christy B. Bushnell, *Champerty Is Still No Excuse in Texas: Why Texas Courts (and the Legislature) Should Uphold Litigation Funding Agreements*, 7 HOU. BUS. & TAX L.J. 358, 374 (2007) (citing Act of Mar. 26, 1889, 1889 Tex. Gen. Laws 103).

[282] *Id.* at 374–75.

[283] Int'l Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932, 934 (Tex. 1988).

[284] *See, e.g.*, Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 103–04 (Tex. App. 2006) (citing State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707 (Tex. 1996)) (noting that champertous agreements are presumptively valid but can be invalidated for public policy reasons).

[285] Brown v. Dyrnes, 109 So. 2d 788, 790 (Fla. Dist. Ct. App. 1959) (affirming lower court's finding that contract was champertous).

[286] Anderson v. Trade Winds Corp., 241 So. 2d 174, 177 (Fla. Dist. Ct. App. 1970) ("Unless we have missed something very fundamental here, we cannot see how the facts of this case even remotely resemble maintenance or champerty. In the first place there was obviously no officious intermeddling by anyone in a law suit.").

litigation funding arrangement in which the funder was "not intermeddling" and "did not instigate the litigation" could not count as prohibited champerty.[287] Then the restrictions relaxed further. Within five years, another Florida court concluded that "the causes of action for maintenance and champerty have been supplanted by causes of action for malicious prosecution and abuse of process, frivolous litigation statues, and rules of professional conduct for attorneys . . . ."[288] For its part, the Florida Bar has endorsed litigation finance. In a 2002 ethics opinion, it blessed lawyers referring parties to litigation funders.[289]

Today, these four states are no outliers. As of 2020, litigation finance was "permitted in most American states, the federal system, and most major arbitration tribunals."[290] In that environment, one yet-unsettled legal question is whether litigation funding should be discoverable in the course of litigation.[291] And, if it should be, which documents in particular should be discoverable?[292] Although the answers to those questions still pose legal risks, on balance they are not as existential for the industry as would be a total prohibition. Perhaps that is why name-brand, multi-strategy investment funds have been willing to enter this arena. D.E. Shaw and Fortress are a far cry from the entrepreneurs of the 1990s, and, as established financial institutions with legal departments, are likely to have considered the risks and rewards before entering.

So, the question remains: why has litigation finance not spread more widely?

3. *A Focus on Intermediation Provides a Potential Answer*

Many of the constraints on litigation finance intermediaries work to limit the pool of lawsuits eligible for litigation funding. The smaller size of the litigation finance market can be explained, at least in part, by a paucity of lawsuits that are both attractive investments and available for funds to invest in.

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

[288] Hardick v. Homol, 795 So. 2d 1107, 1111–12 (Fla. Dist. Ct. App. 2001).

[289] Fla. Bar Pro. Ethics Comm., Formal Op. 00-3 (2002) ("An attorney may provide a client with information about companies that offer nonrecourse advance funding and other financial assistance in exchange for an interest in the proceeds of the client's case if it is in the client's interests.").

[290] David J. Kerstein & Wendie Childress, *Practical Guidance: Litigation Finance Industry*, BLOOMBERG L. (Jan. 2, 2020), https://pro.bloomberglaw.com/insights/litigation/practical-guidance-litigation-finance-industry.

[291] Some lawmakers believe that litigation funding arrangements should be disclosed. *See, e.g.*, *Lawmakers Reintroduce Litigation Funding Transparency Bill*, CHUCK GRASSLEY (Mar. 19, 2021), https://www.grassley.senate.gov/news/news-releases/lawmakers-reintroduce-litigation-funding-transparency-bill (stating that disclosure of litigation financing arrangements will combat conflicts of interest and improve transparency and oversight).

[292] There is one debate that centers on whether the *presence* of funding should be discoverable. Another on which documents, *themselves* (including those assessing the suit's valuation), should be discoverable.

First, the role of law firms as gatekeepers constrains the pool of lawsuits available for investment in the first instance. As explained in Part III.A., *supra*, funds rely on law firms to source lawsuits, but firms will not always need to sell stakes in suits to litigation funds. When firms sell litigation risk, they likely do so to manage their own risk exposure (a sort of financial engineering). But that is not always necessary, and firms absorb many lawsuits whole before a litigation fund can reach them. The alternative, for a fund, is to reach prospective litigants directly and compete with the law firms for new business. Although funds do transact with litigants, reported figures and statements suggest that they have difficulty doing so in sufficient number; thus, they deal with firms more often, and are willing to pay a premium to those firms in exchange for the service of assembling portfolios of lawsuits to invest in.[293]

Second, of the lawsuits available to invest in, litigation funds likely can only invest in a few suits that fall within a narrow sliver of the litigation risk distribution. As described in Part III.B., *supra*, investment managers who run litigation funds compete with other investments and strategies, and so must deliver a competitive product on that market. A lawsuit is not an attractive investment to a fund simply because it has a high chance of winning or high damages—when added to a portfolio it has to offer a balance of risk and reward that is *competitive* with other investment products. But investments from lawsuits differ from those in companies because the returns are finite and capped; so, the ability for outsized reward to compensate for greater risk is limited, unlike in venture capital. Accordingly, funds may steer toward the safest investments and away from risk, unless outsized damages can be expected.

Third, litigation funds may face pressure from their own investors to avoid lawsuits that generate headline risk or that could embroil them in conflicts of interest. As described in Part III.A., *supra*, institutional investors have already become a significant source of capital for litigation funds. These investors are often concerned about headlines and potential conflicts of interest. These pressures, which influence investments in other investment strategies, may be especially acute in lawsuit-investing because litigation represents direct conflict, which begets controversy.

B. *Access to Justice and Frivolous Litigation*

Promoters of litigation finance tout access to justice as one of its primary benefits.[294] Access to justice also takes center stage in academic debates

[293] *See supra* Part III.B, III.C (explaining how the goals of funds and their investors translate into constraints on contracting).

[294] *See, e.g.*, *How Litigation Funding Provides Access to Justice*, OMNI BRIDGEWAY (Mar. 22,

about litigation finance. A common argument is that "third-party funding promotes access to justice by enabling plaintiffs who have meritorious cases to bring litigation they would otherwise be unable to bring and to avoid premature settlements at a discount due to the exhaustion of funds."[295] Some papers have proposed theoretical models of litigant and fund behavior to answer whether, under certain assumptions, litigation finance promotes access to justice.[296] These arguments often assume that litigants will transact directly with litigation funds.

The other side of increasing access to justice is increasing the risk of frivolous litigation, one of the primary criticisms leveled against litigation finance.[297] Frivolous litigation threatens to clog courts with additional claims, slowing down access to justice for all *other* litigants. Policymakers have publicly echoed these concerns and proposed legislation designed to regulate litigation finance.[298]

Academic scholarship has offered arguments on both sides of this question too. Some scholars note that law firms taking cases on contingency fee arrangements typically try to pick the strongest suits and posit that litigation funds should act similarly.[299] On the other side, some academics have proposed that funds might differ from law firms, and so might fund different cases. Professor Michael Abramowicz suggests that some lawsuits may represent low probabilities of success but extremely high potential payouts, justifying investment.[300] Further, litigation funds might be able to

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2017), https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2017/03/22/how-litigation-funding-provides-access-to-justice (stating that litigation funding "allows lawsuits to be decided on their merits"); *Innovators in Litigation Finance*, STATERA CAP., https://stateracap.com (last visited Aug. 5, 2025) ("Statera Capital is [i]ncreasing [a]ccess to [j]ustice[.] The cost of litigation restricts harmed parties from accessing courts and justice . . . . Litigation finance enables harmed parties to access justice."); *Leveling the Legal Playing Field*, LITFI, https://litfi.com (last visited Aug. 5, 2025) ("Level the playing field: Empowering plaintiffs with the resources to pursue justice, regardless of their financial means.").

[295] Steinitz, *supra* note 85, at 1276 (footnote omitted).

[296] *See* Bruno Deffains & Claudine Desrieux, *To Litigate or Not to Litigate? The Impacts of Third-Party Financing on Litigation*, 43 INT'L. REV. L. & ECON. 178, 188 (2015).

[297] *See, e.g.*, U.S. Chamber Staff, *Setting the Record Straight on Third-Party Litigation Funding*, U.S. CHAMBER COM. (Oct. 15, 2024), https://www.uschamber.com/lawsuits/setting-the-record-straight-on-third-party-litigation-funding (describing three "common myths" about third-party litigation funding); *Hidden Influence: How Third-Party Litigation Financing Fuels Lawsuit Abuse*, AM. TORT REFORM ASS'N (Oct. 9, 2024), https://atra.org/hidden-influence-how-third-party-litigation-financing-fuels-lawsuit-abuse (calling third-party litigation financing "one of the most significant . . . forces driving frivolous litigation today. . . .").

[298] *See* Sara Merken, *US Lawmaker Calls for Litigation Funding Disclosures*, REUTERS (Oct. 7, 2024, 5:22 PM), https://www.reuters.com/legal/government/us-lawmaker-calls-litigation-funding-disclosures-2024-10-07 (discussing a bill, introduced by California Representative Darrell Issa, that would require parties to civil lawsuits to disclose the identity of any third-party that has the right to receive payment depending on the outcome of a case); *see also supra* note 17 and accompanying text (discussing congressional intervention).

[299] Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DEPAUL L. REV. 611, 625 (2020) ("Attorneys and law firms will generally only enter into a contingent or conditional fee agreement if they believe the case is a likely winner.").

[300] *See* Abramowicz, *supra* note 163, at 197 ("Lenders, however, might still finance some low-probability cases if the expected recovery will be great enough to pay off the loan with a sufficient return.").

build large enough portfolios of lawsuits such that they can afford to fund riskier claims, diversified by safer ones.[301] Finally, some scholars contend that funding can act as a deterrent, decreasing the number of legal injuries, and so the total number of lawsuits.[302]

Both increased access to justice and the risks of frivolous litigation rest in part on the same inquiry: which suits will be brought because of litigation funding that would not have previously been brought? The role of intermediaries in litigation finance sheds new light on that inquiry.

Because law firms are often intermediaries between the litigant and the fund, they act as initial filters for which lawsuits are funded. The role of the litigation fund often comes only later, after the firm has already agreed to take on a case. That does not mean that the presence of litigation funding does not change which suits are funded. Instead, it means that an account of *how* those changes will happen must explain how a fund—as a secondary market purchaser of litigation risk—influences the decisions made in the primary market for litigation risk. For example, if law firms know that they can successfully offload lemons to funds, then they might be willing to take on riskier cases. But if firms are constrained by reputation (as discussed in Part III.C., *supra*), then this may not happen.

The clearest impact of the presence of a secondary market is on the *size* of the risk exposure to law firms. Firms may find cases with attractive risk-to-reward profiles but be unable to fund them because the risks are simply *too large* relative to the size of the firm. If the suit goes poorly, it would constitute too great of a loss in spent time and labor. Selling some of that risk to a fund can make the lawsuit viable for the firm to take, facilitating a suit that otherwise would not have been brought.

That helps cut through much of the debate about frivolous litigation. There is no indication that these *larger* suits are less meritorious or frivolous, and their facilitation may enhance access to justice on the margins. A claim brought by a firm taking the case on a contingency basis facilitated by litigation funding may well be one in which the plaintiff lacked the resources to pay a firm by the hour. That suggests that the overall quantity of new cases brought may be small, but those cases may be brought by plaintiffs who were previously priced out of legal representation.

This clarifies where the effects on access to justice are likely greatest. When litigants can hire law firms that they prefer, but previously could not afford, expanded lawyer-choice enhances access to justice.[303] These arrange

[301] *See id.* ("For any given level of damages, a lawyer may be able to find a large number of cases with a low probability of winning for each single case with at least a 50% chance of winning.").

[302] *See* Bedi & Marra, *supra* note 21, at 606–08 (arguing that litigation financing could reduce the number of claims filed).

[303] For this reason, Suneal Bedi and William Marra suggest that access to justice can be a question of *degree*. *See id.* at 578 (explaining that even non-destitute individuals may be prevented from bringing claims by "liquidity" constraints).

ments, which are becoming increasingly common,[304] are where the access to justice arguments are apparently strongest in favor of litigation finance.

However, the analysis in Part III, *supra*, should qualify an understanding of which lawsuits are funded. It suggests that—to the degree that litigation finance does flow into riskier lawsuits—those suits will be concentrated in predictable areas. Because the cash flow from a lawsuit is not generated but is instead a finite sum distributed from one party to another, it is difficult for a lawsuit's reward to justify taking a substantial risk (as discussed in Part III.B., *supra*). However, there are some suits in which the damages might be outsized relative to risk—for example, suits with statutory treble damages like antitrust, patent, and trademark claims.[305] If litigation funds channel capital into riskier—or, put differently, frivolous—claims, then these are the most likely avenues. As discussed *supra*, this is consistent with publicly available information about litigation funds' portfolios.

That yields insights for regulators. If concern about frivolous litigation motivates legislative intervention, then regulators might focus more narrowly on those areas in which riskier litigation is more likely to be funded. Otherwise, regulators may risk reducing some of the access to justice benefits of litigation funding.

C. *Interference with Litigation*

A final concern is whether law firms will interfere with litigation. There is no academic consensus about the role of control. Some argue that litigation funds have strong incentives to retain control over litigation decisions because the introduction of litigation finance can incentivize litigants—who then have less to gain—to invest less into litigation.[306] On the other hand, it is typically accepted that ethical rules prohibit law firms from allowing litigation funds to exert control.[307] However, the clash between Sysco and Burford Capital, discussed *supra*, raises concerns that litigation funds may influence litigation despite those ethical prohibitions,

[304] *See* Emily R. Siegel, *Big Law Grows Litigation Finance to Cut Risk, Please Clients*, BLOOMBERG L. (Sept. 4, 2024, 5:00 AM), https://news.bloomberglaw.com/business-and-practice/big-law-grows-litigation-finance-to-cut-risk-please-clients (documenting usage of litigation finance by firms including Mayer Brown, Quinn Emanuel, and Cadwalader).

[305] *See supra* Part III.B (discussing how funds deliver profitable portfolios).

[306] *See* Yifat Naftali Ben Zion & Omer Pelled, *Litigation Funding as Quasi-Partnerships* (forthcoming) (manuscript at 13–14) (on file with author) (citations omitted) ("The litigant's incentive to invest in the case diminishes once a portion of the proceeds is allocated to the TPLF firm."); *see generally* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711 (2014) (discussing the benefits of requiring a litigant to disclose all material information and cooperate with funder).

[307] W. Bradley Wendel & Joshua P. Davis, *Complex Litigation Funding: Ethical Problem or Ethical Solution?*, 74 HASTINGS L.J. 1459, 1469, 1472 (2023) ("In the U.S., . . . funders must be strictly passive investors, at least when funding lawyers. . . ." (footnote omitted)).

potentially in novel or unusual ways.[308] Some scholars have argued that this influence might be explained by litigation funds operating according to their *own* fiduciary duties to their investors.[309] These concerns suggest that ethical rules may not be as constraining as previously thought.

Again, intermediation lends insight into when and why funds might exert undue influence. Just as many law firms are repeat players in their dealings with litigation funds, so too are the funds. And, just as law firms have incentives to preserve their reputation (as described in Part III.C., *supra*), so too do the funds. As described in Part III, *supra*, law firms are often *sources* of investable lawsuits for funds, rather than simply contracted legal representation. The reliance of funds on firms to source investments suggests that funds have incentives not to jeopardize that relationship by putting undue pressure on either the litigant or on the firm. However, those incentives may not always carry the day. In sufficiently large cases, when enough is at risk, funds may still try to exert influence—Burford Capital, for example, had invested $140 million into the Sysco litigation.[310] When that much money is on the line, a fund may rationally prioritize payment over reputational damage. That, again, steers attention back to where it should be in litigation finance: on the very largest lawsuits, where the returns are the highest and risk-taking may also be at its peak. The dispute between Burford and Sysco highlights exactly these dynamics and—while the constraints on financial intermediation may prevent litigation finance from being commonplace in all litigation—it underscores how some of the largest and highest profile litigation may be uniquely affected by it.

This account might also reassure those who worry that litigation finance could result in big financial interests strongarming unsophisticated or small-time plaintiffs. In the commercial market, the combination of lawyers-as-gatekeepers (who are bound by ethical rules) and the reputational constraints on fund sponsors can defray some of these concerns by reducing both the opportunities and the incentives to take advantage of litigants. That points to the consumer market—where these dynamics are not as pronounced—as the most worrying portion of litigation finance, and a place where more scholarly attention is due.

[308] *See* Tyler Lowman, *The Dark Side of Litigation Finance: How Investors Can Influence and Control the Outcome of Litigation*, UNIV. MIA. BUS. L. REV. (Nov. 30, 2023), https://business-law-review.law.miami.edu/the-darkside-of-litigation-finance-how-investors-can-influence-and-control-the-outcome-of-litigation/? (stating that, although the ABA has issued an opinion providing guidance on litigation financing, the Association did not denounce it).

[309] *See* Parikh, *supra* note 2, at 39 ("You could argue that financiers actually have a duty to intervene. Fund managers – including private equity managers – owe a duty to the fund they manage and the fund's investors.").

[310] Mike Scarcella, *Litigation Funder Burford Sues Sysco over $140 Mln Antitrust Investment*, REUTERS (Mar. 13, 2023, 4:43 PM), https://www.reuters.com/legal/litigation-funder-burford-sues-sysco-over-140-mln-antitrust-investment-2023-03-13.

CONCLUSION

Litigation finance now permeates many of the largest lawsuits brought each year, raising significant questions about its potential implications. To understand those implications, it is important to first understand how litigation finance *works*. So far, the funds and transactions behind the scenes have not garnered attention. But, as this Article has shown, those backstage interactions influence how many and which lawsuits receive funding—the very two same questions that sit at the base of the debate about litigation finance.

Much is still unknown about how litigation finance will evolve and how it will affect the legal world as it does. This Article offers a framework to understand those changes and to help situate arguments made about litigation finance. Without a comprehensive picture of how investments into lawsuits are made, any regulatory intervention might miss the mark.