Complex Litigation Funding: Ethical Problem or Ethical Solution?

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Commentators have worried that third-party funding, particularly in complex litigation, may give rise to ethical concerns. In this Essay, we explore an alternative possibility: third-party funding may solve ethical problems rather than cause them.

We explain why third-party funding can comply with the letter and spirit of the relevant ethical rules and why whether it causes or cures ethical problems depends on the setting. We note that if third-party funding agreements are properly structured—protecting, for example, lawyers' independent judgment—they should not pose ethical problems. On the contrary, in some contexts third-party litigation funding may ameliorate tensions between clients and counsel.

We identify two settings in which third-party litigation funding may do more good than harm: first, encouraging an optimal level of private enforcement of the antitrust laws, and second, diversifying the plaintiffs' lawyers who pursue class actions and other complex litigation.

A theme runs throughout our analysis: We should be careful to avoid a mistake that might be characterized as a variation on the naturalistic fallacy—that the practices to which we are accustomed are necessarily good. Instead, we suggest returning to first principles to determine whether third-party litigation funding is good, bad, or indifferent—a conclusion that may well vary by context.

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INTRODUCTION

Some commentators have worried that third-party funding, particularly in complex litigation, may give rise to ethical concerns. For that reason, various courts now require that plaintiffs' counsel reveal third-party funding in proposed class actions (or in litigation more generally).[1] In this Essay, we explore an alternative possibility: third-party funding may solve ethical problems rather than cause them.

Part II provides the bulk of our analysis. It explains why third-party funding can comply with the letter and spirit of the relevant ethical rules and why whether it causes or cures ethical problems depends on the setting. We note that if third-party funding agreements are properly structured—protecting, for example, lawyers' independent judgment—they should not pose ethical problems. We further contend that the scrutiny to which third-party funding is subjected often proceeds from a false premise: that more traditional forms of litigation funding do not raise ethical issues. The contrary is true. Every form of litigation funding has its pitfalls. Attorneys who are paid by the hour may maximize their profits by spending more time—and *billing* more time[2]—on legal work than is in their clients' interests. On the other hand, attorneys who are paid on a contingent basis may have an incentive to settle earlier in litigation and for a lesser amount than benefits their clients. We suggest that in some contexts third-party litigation funding may ameliorate these tensions between clients and counsel.

Part III identifies two settings in which third-party litigation funding *may* do more good than harm. The first example—the topic of Part III.A—involves private antitrust enforcement, primarily through class actions. This example may be counterintuitive. Various attributes of antitrust law suggest the potential for overenforcement: treble damages, civil and criminal enforcement, and claims under state and federal law. But there is substantial evidence that concern about overenforcement of the antitrust laws is not only unjustified, but also backward—that the real concern should be about *under*enforcement. In general, scholars have explained that complaints about overenforcement through class actions and other complex litigation—sometimes hyperbolically labeled

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1. *See, e.g.*, Standing Order for All Judges of the Northern District of California: Contents of Joint Case Management Statement 2 (N.D. Cal. Nov. 1, 2018), https://www.cand.uscourts.gov/wp-content/uploads/judges/Standing_Order_All_Judges_1.17.23.pdf; Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022), https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf; D.N.J. Civ. R. 7.1.1.

2. *See generally, e.g.*, Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOSFTRA L. REV. 847 (2006); Lisa G. Lerman, *Gross Profits? Questions About Lawyer Billing Practices*, 22 HOFSTRA L. REV. 645 (1994); Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659 (1990).

"legalized blackmail"[3]—are exaggerated, if they exist at all. Our analysis of antitrust enforcement is more granular than that. We note that even for the ban on antitrust cartels—agreements that are relatively easy to prosecute because they are subject to so-called per se condemnation—the best evidence suggests that the law is not *over*enforced, but rather *under*enforced. If so, third-party litigation funding could serve as a corrective, filling plaintiffs' lawyers' war chests, stiffening their spines, and giving them greater incentive to persist in litigation when doing so will benefit their clients. As a result, third-party litigation funding may help to solve an ethical problem for plaintiffs' antitrust lawyers rather than create one.

Part III.B suggests another possible benefit of third-party litigation funding. Such funding might help to diversify the plaintiffs' lawyers who pursue class actions and other complex litigation. Courts, scholars, and other commentators in recent years have lamented the lack of diversity among plaintiffs' counsel in complex litigation. The need for capital is a potential obstacle to such diversity. Plaintiffs' counsel incurs substantial expenses in both time and litigation costs. In society at large, women and people of color tend to have significantly less capital than white men. Enhancing their access to money could promote progress. That possibility is admittedly speculative. We do not mean to make any strong claims. However, we suggest that it is worth consideration and research as judges, regulators, and policymakers assess the costs and benefits of third-party litigation funding.

A theme runs throughout our analysis: We should be careful to avoid a mistake that might be characterized as a variation on the naturalistic fallacy—that the practices to which we are accustomed are necessarily good.[4] We may be so used to clients paying attorneys by the hour and, to a lesser extent, on a contingent basis that we assume those financial arrangements raise no potential ethical issues. If so, we may view third-party litigation funding as aberrant and thus suspect. We contend that we should resist this version of the naturalistic fallacy. Instead, we suggest returning to first principles to determine whether third-party litigation funding is good, bad, or indifferent—a conclusion that may well vary by context.

3. *See, e.g.*, Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1363 (2003).

4. To be sure, the term "naturalistic fallacy" is used in various ways. It can refer to G.E. Moore's discussion of efforts to reduce the good to natural properties (such as pleasurable or desirable) in G.E. MOORE, PRINICIPIA ETHICA (Cambridge Univ. Press 1903), and the is-ought problem dating back to DAVID HUME, A TREATISE OF HUMAN NATURE (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2000). More closely related to the discussion in the text, it can also refer to the view that whatever is found in nature is necessarily good. *See, e.g.*, Steve Sailer, *Q&A: Steven Pinker of 'Blank Slate,'* UNITED PRESS INT'L (Oct. 30, 2002, 10:20 AM), https://www.upi.com/Odd_News/2002/10/30/QA-Steven-Pinker-of-Blank-Slate/26021035991232/.

I. LITIGATION FINANCING FIRST PRINCIPLES

When properly structured, standard commercial litigation financing transactions do not cause claimants' counsel to violate any provision of the rules of professional conduct for lawyers. Nor do they lead to disloyalty under the common law of agency and fiduciary duties.

Note the qualifiers in those statements. They limit the claims to *commercial* and *standard* litigation financing transactions that are *properly* structured. Consumer litigation financing may raise distinctive concerns—akin to those related to payday lending—that we will not consider here.[5] We also assume, as we believe, that commercial litigation financing has become relatively standardized in response to commercial and legal ethics considerations. At this point in the development of the litigation financing industry, numerous highly sophisticated financing firms, whose officers are mostly former partners at large law firms, have become established. These financing firms are repeat players in this transactional space and obtain legal advice as needed from outside counsel. A substantial body of publicly available information—from academic articles to continuing legal education materials—explains the ethical pitfalls in litigation financing transactions and how to avoid them. In short, prominent, reputable litigation financing firms have addressed the potential ethical issues seriously and effectively. As the American legal profession considers expanding third-party litigation financing to new areas such as class actions or nonclass aggregate litigation, it is important to keep in mind some of the potential ethical issues and how they have been addressed.

When litigation financing was a relatively new industry, the few scholars studying it would often begin by explaining what this strange new thing was, sometimes analogizing it to the lawless Wild West.[6] It has since become a familiar part of the legal landscape.[7] This familiarity might not breed contempt,

5. *See*, *e.g.*, Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1160 (2019).

6. Influential early articles include Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273 (2012).

7. As part of its Ethics 20/20 Commission, the American Bar Association formed a Working Group on Alternative Litigation Financing, which prepared a report known as the White Paper on Alternative Litigation Financing; it was adopted by the House of Delegates in 2012. *See* ABA COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2012). In 2020, the Section of International Law of the ABA Section of Litigation proposed a set of Best Practices for Third-Party Litigation Funding. ABA, AM. BAR ASS'N BEST PRACTICES FOR THIRD-PARTY LITIGATION FUNDING (2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf. It was adopted by the House of Delegates in August 2020. *Id.*

but it does risk losing sight of some of the costs and benefits of litigation financing. The normative perspective one can take could be from the point of view of the litigation system, society as a whole, or the ethics of lawyers representing clients who have obtained litigation funding.

Some opposition to litigation financing echoes the policies underlying the common law doctrines of champerty and maintenance. Those doctrines sought to limit participation in litigation to those who had some connection with its subject matter.[8] Of course, how to define the right connection with the litigation's subject matter can be subject to reasonable disagreement. What about liability insurers, for example, or plaintiffs' lawyers representing clients on a contingent fee basis? For the most part, standard commercial litigation financing transactions avoid problems relating to strangers' involvement in litigation by prohibiting investors from having any say about how counsel conduct litigation.[9]

The rules of professional conduct provide partial or unsatisfactory solutions to problems that recur in modern complex litigation. Class action conflicts, both among class members[10] and between the class and counsel,[11] are fairly well understood. More challenging are conflicts arising within nonclass aggregate representations, where it is more difficult for clients to monitor the performance of their lawyers.[12] The rules are ineffective in providing guidance to lawyers in mass tort multidistrict litigation ("MDL") (and let's not even consider the problem of mass tort *bankruptcy* proceedings!).

That is not to say that lawyers can ignore the rules. Even if the drafters of Model Rule 5.4(a)—which prohibits the sharing of legal fees with nonlawyers—were thinking primarily about personal injury lawyers who send "runners" or "cappers" to solicit accident victims, and never considered alternatives to bank

8. *See generally* Max Radin, *Maintenance by Champerty*, 35 CALIF. L. REV. 48 (1935).

9. *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 738 (2014); *see also* Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. N07C-12-134, 2016 WL 937400, at *5 (Del. Super. Ct. Mar. 9, 2016) (finding that the financing agreement did not constitute maintenance); Miller U.K., Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 740 (N.D. Ill. 2014) (stating that in camera review of financing agreement showed no assertion of control over the case or settlement by the funder).

10. *See generally, e.g.*, Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581; Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, *in* ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 177 (Deborah L. Rhode ed., 2000); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805 (1997).

11. *See generally*, *e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products Inc., 80 CORNELL L. REV. 1045 (1995).

12. *See* ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 cmt. F, Westlaw (database updated Oct. 2022). *See generally* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

financing for law firms,[13] the Rule still says what it says, and lawyers must comply with it.

An opinion of the New York City Bar Association reaffirming the fee-splitting rule was a mini-bombshell within the litigation financing industry.[14] It created considerable uncertainty until a working group of the City Bar published a report acknowledging that a literal application of Rule 5.4(a) to litigation financing transactions may not reflect contemporary professional needs and realities.[15] The City Bar working group made a persuasive case that properly structured litigation financing transactions do not put undue pressure on these ethical duties.

We go slightly beyond the conclusion of the City Bar working group to argue that properly structured litigation financing transactions may be *good* from the professional ethics point of view. Before putting forward this affirmative argument in Part III, however, we consider counterarguments and address some of the ethical risks that may arise in connection with commercial litigation financing transactions.

In the following discussion, Subpart A presents a brief overview of some features of standard commercial litigation financing transactions. Subpart B then discusses the potential risks that litigation financing poses for the settlement process. Subpart C considers the risk of third-party interference driving a wedge between counsel and client.

A. STANDARD LITIGATION FINANCING TERMS

Commercial litigation financing transactions are structured as passive investments by the funder.[16] In exchange for money, either in a single lump sum or in several tranches, the funded party agrees to repay the funder out of the proceeds of any judgment or settlement obtained. The transaction is without recourse, so if the claim owner recovers nothing, then the funder loses the investment. The repayment is generally calculated as a multiplier of the amount invested, often with the coefficient increasing over time (e.g., by two times if

13. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2023); *see* W. Bradley Wendel, *Making Sense of the Fee-Splitting Rule*, JOTWELL LEGAL PRO. (Feb. 27, 2018), https://legalpro.jotwell.com/making-sense-fee-splitting-rule/ (reviewing Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 1207).

14. N.Y.C. BAR ASS'N COMM. ON PRO. RESP., FORMAL OPINION 2018-5: LITIGATION FUNDERS' CONTINGENT INTEREST IN LEGAL FEES (2018), https://s3.amazonaws.com/documents.nycbar.org/files/2018416-Litigation_Funding.pdf.

15. N.Y.C. BAR ASS'N WORKING GRP. ON LITIG. FUNDING, REPORT TO THE PRESIDENT 23 (2020), https://s3.amazonaws.com/documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf.

16. Much of the discussion in this Part is based on the Authors' experience advising law firms and litigation financing companies. In our experience, the terms described here are standard among major commercial litigation financing firms. Because the investment agreements are confidential, however, we cannot refer interested readers to original source documents backing up our assertions.

there is a recovery within one year, 2.5 times if between twelve to eighteen months, three times beyond eighteen months, etc.). A waterfall provision in the financing agreement specifies the order of payment, with the funder generally receiving "first money out" as repayment of the amount invested, followed by an allocation of proceeds among the funder, claim owner, and law firm.[17] Generally, the funder has a security interest in any proceeds recovered in the litigation.

The counterparty in litigation financing transactions may be either the claim owner or the law firm. Because the claim owner agrees to repay the funder out of the judgment or settlement proceeds, no issue arises under any state-adopted version of Model Rule 5.4(a), which prohibits only lawyers from sharing legal fees with nonlawyers.

In contrast, law firm financing transactions may raise fee-splitting issues under Rule 5.4(a). The funder's share of the proceeds may appear to be paid out of the attorneys' fees payable to the law firm under its engagement agreement with the claim owner. (Of course, *all* law firm payments to a nonlawyer providing financing, including payments of interest on an ordinary secured credit line, come out of fees that the law firm receives for representing clients.[18]) The practice of funding portfolios of cases in law firm financing deals, rather than single cases, has developed to avoid interfering with the law firm's exercise of independent professional judgment in the representation of its clients. Portfolio financing has achieved widespread acceptance. The idea is that the securitization of the funder's investment in the proceeds of multiple litigated matters brings the transaction closer to a standard secured line of credit with a commercial lender, which is generally accepted as not implicating the fee-splitting rule. However, litigation financing transactions with the law firm as counterparty differ from ordinary commercial lines of credit because the former are without recourse. Because nonrecourse financing is riskier for the investor,

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17. *See*, *e.g.*, Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 91–93 (Tex. App. 2006) (detailing terms of a transaction structured as an investment in a pending lawsuit, with the return to investors taking the form of a preferential partial assignment of the plaintiff's recovery). This differs from a law firm obtaining financing from a bank and seeking to pass the costs of borrowing on to the clients as an expense of litigation. The permissibility of the waterfall provision was an issue in the Eastern District of New York in the World Trade Center litigation, involving compensation for first responders and other workers at Ground Zero of the 9/11 attacks. *See* Burch, *supra* note 6, at 1278, 1290.

18. *See Ethics Opinion 322: Whether a Nonlawyer Employed by a Law Firm May Be Partly Compensated by a Percentage of the Profits of the Cases on Which He Works*, D.C. BAR (Feb. 17, 2004), https://dcbar.org/For-Lawyers/Legal-Ethics/Ethics-Opinions-210-Present/Ethics-Opinion-322 ("[A] law firm's profits result almost entirely from its fees."). But no one thinks paying interest to a commercial lender raises an issue under Rule 5.4(a). *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 45.5, illus. 45-1 (3d ed. 2008); Richmond, *supra* note 6, at 677 ("Of course there is no prohibition against attorneys borrowing from banks to finance their practices. No courts or disciplinary authorities have ever suggested that attorneys who finance aspects of their practices with bank loans 'share' or 'split' their fees with the banks when they make loan payments.").

the financing firm's effective rate of return is higher than the interest rate obtained by a commercial lender.[19]

In either claimant-funding or law firm–funding deals, the investment agreement includes numerous representations and warranties. In addition to the usual ones in any commercial transaction, the funder generally commits not to exert any control whatsoever over the conduct of the litigation or any actions taken by counsel for the claim holder, including decisions respecting settlement. Sometimes the funder will require periodic reporting on the status of the litigation. The funded party may also commit to using the invested amount to pay for the expenses of litigation, instead of blowing it on a lavish vacation or an Italian sports car.[20]

Many of the features of this admittedly schematic description are responsive to the ethical duties owed by counsel to the claim owner. Whether the counterparty is the law firm or the claim owner, sophisticated litigation financing firms know that lawyers will think about the impact of the financing transaction on their duties of loyalty, confidentiality, and independence.

The next two Subparts discuss some of the ethical risks implicated in financing that lawyers may think about, the ways that financing transactions respond to them, and some of the benefits of litigation financing. The first set of risks has to do with the potential that a litigation financing transaction might somehow interfere with the settlement process. The second concern has to do with the possibility that litigation funding will not only level the playing field, but also introduce strangers to the litigation who pursue their own idiosyncratic interests and may wish to control the conduct of litigation by counsel.

B. DECONFLICTING SETTLEMENT

All financial arrangements between lawyers and clients create conflicts of interest.[21] Hourly fees create well-known incentives to run the meter, overstaff matters, or engage in additional research, discovery, or motion practice without a corresponding benefit to the client. As the late legal ethics scholar Deborah Rhode memorably observed, diligent lawyers "will leave no stone unturned, provided, of course, they can charge by the stone."[22] Hourly fees also separate

19. *See* Burch, *supra* note 6, at 1303.

20. *See* Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831, 1847–48 (2013) (discussing one of several hypotheticals illustrating risks to the funder from the client's breach of the investment agreement).

21. *See generally*, *e.g.*, A. Mitchell Polinsky & Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 AM. L. & ECON. REV. 165 (2003); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL STUD. 503 (1996); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978).

22. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 635 (1985).

the lawyer's incentive to promote the successful resolution of the client's matter from the lawyer's financial motive, since the lawyer will be paid regardless of the outcome of the matter.[23]

On the other hand, contingent fees create conflicts by combining three roles—provider of legal services, financier, and insurer (that is, bearer of risk).[24] The contingency fee arrangement may create an incentive to depart from the role of faithful agent for the client by taking actions such as slanting the advice given to a client regarding settlement to protect the lawyer's financial investment.[25] Unlike hourly fees, which are often paid by institutional clients with in-house legal departments, contingency fees are often employed in the representation of individual, relatively unsophisticated clients. These clients are less capable of monitoring their lawyers' billing practices and pushing back if necessary. The monitoring problem increases in aggregate litigation, where individual clients tend to disappear into a collective "inventory" of cases handled by a law firm.[26]

When litigation financing was still something of a novelty, Beth Burch argued that some of the settlement-related conflicts that are endemic to contingency-fee financing could be mitigated by unbundling the lawyer's competing roles as investor and advisor.[27] Litigation financing firms have a straightforward interest, namely to make money.[28] Plaintiffs, on the other hand, have a wide range of financial and nonfinancial interests, varying risk preferences, and, in the case of aggregate litigation, potential difficulty in reaching consensus.[29] Attorneys have fiduciary duties to their clients, but abuses can crop up in class and nonclass aggregate litigation; these include pressuring clients to settle early, collusive settlements, and pressure to prevent clients from opting out of inventory settlements.[30] The detachment of litigation financing firms—passive investors in the claims—combined with their ability to diversify risk may relieve some of the financial pressure that can divert plaintiffs' attorneys from their fiduciary duties regarding settlement. There may be some tension with attorneys' ethical obligations, however, to the extent the financing

23. Clermont & Currivan, *supra* note 21, at 534.

24. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 35 cmt. b (AM. L. INST. 2000) ("[Contingent fees] enable a client to share the risk of losing with a lawyer, who is usually better able to assess the risk and to bear it by undertaking similar arrangements in other cases."); Burch, *supra* note 6, at 1291.

25. *See generally*, *e.g.*, Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 L. & SOC. INQUIRY 795 (1998).

26. Burch, *supra* note 6, at 1292.

27. *Id.* at 1277–79, 1315–16.

28. *Id.* at 1311.

29. *Id.* at 1306–11.

30. *Id.* at 1292–30.

firm wishes to monitor the performance of counsel, influence strategic decisionmaking, or weigh in on the desirability of a settlement.[31]

1. Authority

As a matter of the rules of professional conduct governing lawyers, as well as the law of agency, the authority to make, accept, or reject a settlement offer lies strictly with the client.[32] Further, as a matter of agency law, only the client has the authority to enter into a binding settlement agreement, unless the client has validly authorized the lawyer to make the decision.[33] As noted above, the agreements for third parties to fund plaintiffs' law firms generally respect that authority. They disavow any control of the funder over litigation. That should prevent lawyers from inappropriately pressuring their clients.

2. Independence

A related feature of the ethical landscape for lawyers representing clients who receive litigation financing is the professional duty of independence. This is recognized in several places in the American Bar Association's ("ABA") Model Rules of Professional Conduct, including a general duty to "exercise independent professional judgment,"[34] and a more specific provision stating that a lawyer "shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[35] Another Rule prohibits third-party payments of attorneys' fees, unless "there is no interference with the lawyer's independence of professional judgment."[36] The Rules demand professional independence, particularly where money is involved.

Independence is important not only within the lawyer-client relationship, but also for the adversarial presentation of a party's case. Courts thus may worry about an undisclosed third-party payor that has the right to direct the actions of counsel. In the opioid MDL pending in the Northern District of Ohio, U.S. District Judge Dan Polster caught wind that some of the firms representing plaintiffs in the proceedings might have obtained what he called "third-party

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31. *Id.* at 1315.

32. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023). Matters become more complicated in the class context, where not only class counsel, but also the class representative plaintiff serve in a representative capacity. *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 590–91 (3d Cir. 1999) (noting class counsel should act in the best interests of the class in supporting or opposing a class action settlement, even if the class representatives disagree).

33. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 22(1) (AM. L. INST. 2000).

34. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2023).

35. *Id.* r. 5.4(c).

36. *Id.* r. 1.8(f).

contingent litigation financing (3PCL)."[37] To safeguard the integrity of the proceedings, he ordered any attorney who had obtained 3PCL financing (or presumably had assisted a client in doing so) to disclose that fact and to submit affidavits from the funder and counsel, for the court's in camera review, indicating that the financing does not: "(1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement."[38]

In return, Judge Polster offered a significant quid pro quo for funders: He would not permit any discovery into third-party financing. Although the brief order did not state a reason for this limitation, an obvious explanation is that the only issues on which discovery would be reasonably calculated to lead to admissible evidence were already covered by the affidavits reviewed by the court in camera.[39]

C. Leveling the Playing Field While Not Handing Over Control

The modern doctrine of maintenance and its close cousin champerty survive in some U.S. states, although they have been abolished or significantly limited in most. Defined concisely, "maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome."[40] Champerty is a type of maintenance, and both involve participation in litigation by someone other than a party to the underlying dispute.[41] Under that definition, a lawyer receiving a contingency fee for representing the plaintiff in a lawsuit is engaging in champerty; indeed, when contingency fees were in their infancy, they were criticized for being a species of champerty.[42] There is

37. *See In re* Nat'l Prescription Opioid Litig., No. 17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

38. *Id.*

39. A sizeable body of case law addresses the discoverability of litigation financing documents. Courts have shown a strong tendency to reject overbroad claims of relevance in litigation financing documents. *See generally*, *e.g.*, *In re* Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612 (D.N.J. 2019); V5 Techs. v. Switch, Ltd., 334 F.R.D. 306 (D. Nev. 2019); VHT, Inc. v. Zillow Grp., Inc., No. C15-1096, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016); Kaplan v. S.A.C. Cap. Advisors, L.P., No. 12-CV-9350, 2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014). Courts sometimes observe that discovery may be proper if a party can raise a nonspeculative allegation of impropriety related to litigation financing. *See*, *e.g.*, *In re Valsartan*, 405 F. Supp. 3d at 619; *cf.* Acceleration Bay LLC v. Activision Blizzard, Inc., No. 16-453, 2018 WL 798731, at *5 (D. Del. Feb. 9, 2018).

40. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 273 (S.C. 2000) (quoting *In re* Primus, 436 U.S. 412, 424 n.15 (1978)).

41. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98 (2011).

42. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4 (1st ed. 1986).

now a "consistent trend across the country . . . toward limiting, not expanding, champerty's reach."[43]

1. Litigation Financing and Access to Justice

The legal prohibitions on champerty and maintenance made it more difficult for some "friendless" parties to sue for wrongs committed against them, and that was exactly the point. Contingency fees help mitigate this problem, but they are not an option in many instances. Many law firms that handle certain types of cases, including intellectual property and commercial litigation, refuse to take cases on a contingent basis. In economic terms, third-party litigation financing allows claim owners and lawyers to offload the burden of financing and risk bearing onto specialist firms who may be in a better position to perform those functions.[44] Litigation financing thus can expand access to the legal system. For example, in a Texas state court case, a smaller company needed to raise money to finance the costs of protracted litigation against oilfield equipment giant Halliburton and to keep its business running during the pendency of the lawsuit.[45]

The question is whether these benefits can be realized without the harms sought to be avoided by the prohibition on champerty and maintenance. For example, the term "officious intermeddling" is often used in the definition of maintenance but is not always defined. Looking closely at the cases dealing with this definition, however, one can discern that courts tend to understand officious intermeddling as akin to the tort of malicious prosecution or the promotion of

43. Del Webb Cmtys., Inc. v. Partington, 652 F.3d 1145, 1156 (9th Cir. 2011). Several states have abolished, or have never recognized, the doctrines of champerty and maintenance. *See*, *e.g.*, *Osprey*, 532 S.E.2d at 276; Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997); Rice v. Farrell, 28 A.2d 7, 8 (Conn. 1942) (stating that champerty was never adopted in Connecticut); Matthewson v. Fitch, 22 Cal. 86, 95 (1863) (stating that the California legislature's decision to omit champerty statutes when organizing the state is a clear statement of the doctrine's inapplicability). Other states define the doctrines narrowly enough that they do not affect litigation financing. *See*, *e.g.*, Bluebird Partners v. First Fidelity Bank, 731 N.E.2d 581, 587 (N.Y. 2000). A New York statute exempts transactions valued in excess of $500,000 from the definition of champerty. *See* N.Y. JUD. LAW § 489(2) (McKinney 2022).

44. W. Bradley Wendel, *The Miller-Becker Lecture: Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 7 (2019); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 370–72 (2009).

45. Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 90–91 (Tex. App. 2006); *see also* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014) ("Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent . . . . But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms.").

baseless litigation, such as filing a suit with intent to distress or harass, or a fake summons or subpoena.[46]

The doctrines of champerty and maintenance, as they are understood today, are essentially concerned with stirring up *baseless* litigation. Courts that have abolished champerty and maintenance may refer to other constraints on non-meritorious litigation, such as sanctions under Federal Rule of Civil Procedure 11 or its state equivalents.[47] As the Supreme Judicial Court of Massachusetts put it, if a court is concerned about baseless litigation, then it is better to deal with that problem directly "rather than attempting to mold an ancient doctrine to modern circumstances."[48]

2. The Control Critique, Again

In some states that continue to recognize the viability of champerty and maintenance, assertion by a funder of control over the conduct of litigation by counsel, including selection of counsel, case management, tactics, and particularly acceptance of settlement offers, is the "third rail" of litigation financing in the United States. Touch it, and the deal is dead. This is not the case in Australia, where third-party financiers are legally permitted to exert significant control over the litigation.[49] In the U.S., however, funders must be strictly passive investors, at least when funding lawyers[50] (though there is an interesting open question concerning the degree of control the funder may have over the *claimant's* conduct of litigation[51]). The funder's inability to control the litigation is an important factual consideration supporting the conclusion that the

46. *See*, *e.g.*, Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. CVN07C-12-134, 2016 WL 937400, at *4–5 (Del. Super. Ct. Mar. 9, 2016); *Miller UK*, 17 F. Supp. 3d at 725; Kraft v. Mason, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996); Weigel Broad. Co. v. Topel, No. 83 C 7921, 1985 WL 2360, at *6 (N.D. Ill. Aug. 21, 1985); Giambattista v. Nat'l Bank of Com., 586 P.2d 1180, 1186 (Wash. Ct. App. 1978); Martin v. Freeman, 31 Cal. Rptr. 217, 219 (Cal. Ct. App. 1963).

47. *See*, *e.g*., Hardick v. Homol, 795 So. 2d 1107, 1110–11 (Fla. Dist. Ct. App. 2001) (citing Alexander v. Unification Church of Am., 634 F.2d 673, 678 (2d Cir.1980) (New York law)); Saladini v. Righellis, 687 N.E.2d 1224, 1226–27 (Mass. 1997); McCullar v. Credit Bureau Sys., Inc., 832 S.W.2d 886, 887 (Ky. 1992); Sec. Underground Storage, Inc. v. Anderson, 347 F.2d 964, 969 (10th Cir. 1965) (Kansas law).

48. *Saladini*, 687 N.E.2d at 1227.

49. *See* Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd. [2006] HCA 41 (Austl.) (known in the literature as the *Fostif* case).

50. *See* MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2023)

51. *See* N.Y.C. BAR ASS'N COMM. ON PRO. ETHICS, FORMAL OP. 2011-2: THIRD PARTY LITIGATION FINANCING 7 (2011), https://www2.nycbar.org/pdf/report/uploads/20072132-FormalOpinion2011-2Third-party LitigationFinancing.pdf ("While a client may agree to permit a financing company to direct the strategy or other aspects of a lawsuit, absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation."). We believe that a sufficiently sophisticated claim owner, certainly including a corporation with in-house legal advice, could delegate a significant degree of control over litigation to a third-party litigation funder. *See* Wendel, *supra* note 44, at 18–31; W. Bradley Wendel, *A Legal Ethics Perspective on Alternative Litigation Financing*, 55 CAN. BUS. L.J. 133, 133–34 (2014).

financing transaction is not champertous.[52] For example, the purchase of a claim was held not to constitute champerty where the purchaser did not acquire any "control, input, influence, right or involvement of any kind" in the conduct of the litigation.[53] Similarly, in a prominent (albeit unpublished) Delaware case, the trial court held that a third-party financing agreement did not constitute champerty or maintenance because the funder had neither the contractual right to control the litigation nor de facto control over counsel's conduct in the litigation.[54]

When funding a law firm, reputable commercial financing firms do not attempt to exercise control over any aspect of litigation, from the selection of counsel to case strategy to the acceptance of settlement offers. In fact, representations and warranties made in standard commercial litigation financing contracts expressly disclaim any right to interfere with counsel's handling of litigation.[55] Ironically, on the defense side, there is often financial support provided by an entity that has extensive contractual rights to control the conduct of litigation, including settlement. That party is called a liability insurer.

3. Loosening Restrictions on Nonlawyer Investments

Model Rule 5.4 is a broad prohibition on the participation of nonlawyers in law firms as partners, shareholders, or even passive investors.[56] Believing that "'entrepreneurial lawyers and nonlawyers would pilot a range of different business forms' that will ultimately improve access to justice and the delivery of legal services,"[57] Arizona became a pioneer in alternative structures for legal practice, including permitting lawyers to share legal fees with nonlawyers. The Arizona Supreme Court eliminated Rule 5.4 from the Arizona Rules of Professional Conduct and established an approval and regulatory process for "Alternative Business Structures," entities in which nonlawyers have an economic interest or decisionmaking authority that Rule 5.4 would have prohibited.[58]

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52. *See*, *e.g.*, Anglo-Dutch Petrol. Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. App. 2006).

53. Odell v. Legal Bucks LLC, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008).

54. Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. CVN07C-12-134, 2016 WL 937400, at *5 (Del. Super. Ct. Mar. 9, 2016).

55. *See*, *e.g.*, Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 740 (N.D. Ill. 2014) (determining that in camera review of financing agreement showed no assertion of control over the case or settlement by the funder).

56. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2023).

57. *Alternative Business Structures*, AZCOURTS.GOV, https://www.azcourts.gov/cld/Alternative-Business-Structure (last visited May 12, 2023) (quoting ARIZONA SUPREME COURT TASK FORCE ON THE DELIVERY OF LEGAL SERVICES: REPORT AND RECOMMENDATIONS 12–13 (2019)).

58. ARIZ. CODE OF JUD. ADMIN. § 7-209 (2022).

II. How Third-Party Litigation Funding May Improve Litigation Dynamics

In this Part, we develop our two main points: (1) the letter of the ethical rules does not prohibit properly structured third-party funding agreements, and (2) the spirit of the rules may not either, depending on context. Indeed, third-party funding may turn out in some cases to be an ethical solution, not an ethical problem. We then explore two examples where that may be true.

The first example involves third-party funding of private antitrust class actions, and the second involves funding of class counsel from diverse backgrounds. To be clear, we are not contending that third-party funding *would* be an ethical solution in these contexts, just that it *might* be. Our goal is to illustrate that third-party funding may create desirable incentives and opportunities. A careful and extended analysis would be required to show that third-party funding *would* have these positive effects—or even that it already does.

A. Third-Party Funding of Private Antitrust Enforcement

Substantial empirical evidence and analysis suggest that antitrust litigation, on average, results in recovery of less than the actual harm antitrust violations cause and of less than the benefits antitrust violators receive.[59] That can give large corporations with market power an incentive to violate the antitrust laws. John Connor and Bob Lande capture this possibility succinctly: in antitrust, crime pays.[60]

Some commentators have challenged this point because plaintiffs in antitrust cases may recover nominal "treble" damages,[61] multiple plaintiffs may recover damages for the same conduct (including direct purchasers from antitrust violators, indirect (downstream) purchasers, and competitors), and, for some conduct, antitrust violators are subject to both civil and criminal liability.

Even taking those considerations into account, however, antitrust recoveries may be less than actual harm because:

59. *See generally, e.g.*, John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997 (2015) [hereinafter Connor & Lande, *Not Treble Damages*]; Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013); John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 CARDOZO L. REV. 427 (2012) [hereinafter Connor & Lande, *Crime Pays*]; Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

60. *See generally* Connor & Lande, *Crime Pays*, *supra* note 59 (explaining that monetary sanctions, even in cartel cases—the easiest antitrust cases to prosecute—are only 9% to 21% of what they should be for optimal deterrence).

61. We put the word "treble" in quotation marks because, as discussed below, treble damages in antitrust cases capture much less than three times the harm that an antitrust violation actually causes. *See generally* Connor & Lande, *Not Treble Damages*, *supra* note 59.

(1) procedural obstacles and other dynamics generally cause victims to recover less than single "antitrust" damages;

(2) "antitrust" damages are less than actual harm because they omit important categories of harm; and

(3) many antitrust violations are not discovered and, even if they are, cannot be successfully proven, including at times because the violators have destroyed the evidence.

Part of this dynamic is attributable to a power imbalance between plaintiffs in antitrust cases—or, more accurately, their attorneys—and the large corporations they sue. Plaintiffs' counsel in antitrust generally operate on a contingency basis. They pay the costs of litigation, which can amount to many millions of dollars in a single case. They also invest their time, which can be worth tens of millions of dollars in a single case. If they recover nothing, then they lose the money and time they invest. That can render plaintiffs' attorneys averse to risk. As a result, they may settle in a way that does not maximize their expected return but insures against a catastrophic loss. Only a limited number of plaintiffs' law firms have the capital to front the hard costs and the value of their legal services over the life of a long, complex litigated matter. In contrast, the large corporate defendants that tend to be defendants in antitrust cases may have a higher tolerance for risk, so they may settle on more favorable terms compared to the expected value of the litigation.

The aversion to risk of plaintiffs' attorneys can explain in part why they and third-party funders often can strike mutually beneficial deals. The third-party funders may be risk neutral or at least less risk averse than plaintiffs' attorneys. The plaintiffs' attorneys can trade some of their potential upside to the funders in exchange for some of their downside risk.

Given those dynamics, third-party funders may tend to right an imbalance in settlement negotiations, enabling plaintiffs to settle for an amount closer to the expected value of litigation. That could help plaintiffs' lawyers approach optimal levels of private antitrust enforcement.

With that framework in place, consider the evidence that plaintiffs recover less than the actual harm they suffer from antitrust violations.

1. Actual Recoveries Result in Less Than Single "Antitrust" Damages.

Cartel cases—which involve horizontal price fixing—would seem to be particularly susceptible to overenforcement. Cartelists face both civil and criminal liability. Moreover, the burden of proving a per se antitrust violation is relatively modest. Unlike so-called rule-of-reason cases, horizontal price fixing is subject to per se condemnation; plaintiffs do not have to prove that defendants have market power to establish an antitrust violation or that conduct has greater

anticompetitive than procompetitive effects.[62] If plaintiffs prove that defendants engaged in horizontal price fixing, then they have established an antitrust violation.[63] All that is left to show is that the conduct caused harm and, if it did, the amount of the resulting damages. Moreover, civil litigation may follow on the heels of criminal litigation and, quite possibly, guilty pleas. If so, defendants may lose on whether they violated the antitrust laws as a matter of issue preclusion.

Yet even in cartel cases—which involve a conspiracy among competitors to inflate prices above competitive levels—the cumulative financial penalties that corporations pay are almost always less than single "antitrust" damages.[64] Various procedural rules and litigation dynamics explain why that is so.[65] Courts have made it progressively more difficult for antitrust plaintiffs to escape mandatory arbitration,[66] survive motions to dismiss,[67] get classes certified,[68] or survive summary judgment.[69] Further, as noted above, the plaintiffs and their lawyers usually lack the resources of the conspirators—generally large, well-funded corporations.[70]

These and other reasons can explain why John Connor and Bob Lande—in the most rigorous analysis of this issue to date—found that on average (depending on how one measures), cartelists pay, in total, about 20% to 66% of single "antitrust" damages as a result of civil and criminal litigation.[71]

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62. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283–84 (2018).

63. *Id.*

64. *See generally* Connor & Lande, *Crime Pays*, *supra* note 59; Connor & Lande, *Not Treble Damages*, *supra* note 59.

65. *See generally* Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013) (discussing ways in which courts have made prosecuting class actions more difficult).

66. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).

67. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554–58 (2007).

68. *In re* Rail Freight Fuel Surcharge Antitrust Litig., 934 F.3d 619, 623–24 (D.C. Cir. 2019) (holding that class certification was inappropriate where 12.7% of absent class members were uninjured); *In re* Asacol Antitrust Litig., 907 F.3d 42, 45 (1st Cir. 2018) (suggesting that class certification may be inappropriate if a class contains uninjured members, and plaintiffs must rely on declarations or affidavits to determine which class members were injured); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 n.14 (3d Cir. 2008); *see also* Joshua P. Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 GEO. MASON L. REV. 969, 975–76 (2010) (explaining ways in which courts have made class certification more difficult, particularly in antitrust cases); Joshua P. Davis & Eric L. Cramer, *Of Vulnerable Monopolists: Questionable Innovation in the Standard for Class Certification in Antitrust Cases*, 41 RUTGERS L. REV. 355, 355–56 (2009) (explaining ways in which courts have made class certification more difficult, particularly in antitrust cases). *But see* Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651, 653 (9th Cir. 2022) (en banc) (holding that courts may certify classes containing uninjured members and approving practical approaches to establish common issues that predominate for purposes of certification).

69. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–87 (1986).

70. Davis & Cramer, *supra* note 68, at 356.

71. Connor & Lande, *Not Treble Damages*, *supra* note 59, at 2010.

2. *"Antitrust" Damages Do Not Include Much of the Harm Caused by Antitrust Violations.*

Antitrust victims are also unable to obtain compensation for various categories of their injuries. "Antitrust" damages—the damages available in antitrust litigation—are much less than the actual harm caused by antitrust violations.[72]

Consider a conspiracy to inflate prices above competitive levels. Plaintiffs who bring claims usually seek to recover the resulting overcharge damages—that is, the extra amount they paid because of the conspiracy. But price-fixing conspiracies cause many other kinds of harm. First, plaintiffs lose the use of the extra money they paid from the time of purchase to the time of recovery, but they cannot recover prejudgment interest in antitrust cases. In effect, plaintiffs are forced to give antitrust violators interest-free loans. Second, non-conspirator competitors often react to price inflation by raising their own prices, causing so-called umbrella effects. Plaintiffs very rarely pursue or recover umbrella damages in antitrust cases. Third, inflated prices discourage some purchasers from buying the good or service subject to the conspiracy, resulting in what is known as deadweight loss. Antitrust plaintiffs rarely, if ever, recover for deadweight loss.

Bob Lande has calculated that, for these and similar reasons, if a court were to award "antitrust" *treble* damages, then that would roughly amount to *single* damages or at most one-and-a-half times the actual harm.[73] It follows that if a court were to award—or the parties were to settle for—single "antitrust" damages, then that would amount only to about 33% to 50% of the actual harm.

3. *Victims of Antitrust Violations Recover Less Than the Harm They Suffer.*

The above analysis shows the potential for antitrust *under*enforcement. We noted (1) that cartelists on average pay—and victims receive—between about 20% to 67% of single "antitrust" damages, and (2) single "antitrust" damages range from 33% to 50% of the actual harm. Combining these points, we can infer that when defendants face litigation for an antitrust violation, they pay—and plaintiffs receive—*on average* between 7% and 33% of the actual harm.[74]

72. *See generally* Lande, *supra* note 59.

73. *See generally id.*

74. The lower bound should be calculated by multiplying the lowest percentages—20% times 33%—and the higher bound by multiplying the highest percentages—67% times 50%. The results range from about 7% to 33%.

4. Many Victims of Antitrust Violations Never Recover At All.

Another reason why antitrust victims may receive inadequate compensation—and antitrust violators face insufficient deterrence—is that antitrust violators escape detection. Further, antitrust enforcers—federal and state governments and the victims of antitrust violations—may discover insufficient *evidence* to initiate antitrust litigation. Taking detection and evidence problems into consideration, we should not be surprised that even in the easiest cases to prosecute (cartels), the total financial liability that antitrust violators incur—including government sanctions and private recoveries—is too low. John Connor and Bob Lande calculate that the total monetary sanctions in cartel cases are only 9% to 21% of what they should be to provide optimal deterrence.[75]

The above analysis suggests that victims of antitrust violations recover too little in antitrust litigation to achieve optimal compensation or deterrence. To be clear, private enforcement may nevertheless play a crucial role in compensating victims and deterring antitrust violations.[76] The total recovery of private plaintiffs in federal antitrust class actions from 2009 to 2021 was just shy of $30 billion.[77] Indeed, private antitrust enforcement may have a greater deterrent effect than does government criminal enforcement.[78] Still, the overall analysis suggests that optimal levels of deterrence and compensation would best be achieved by enhancing the recovery of antitrust victims.

Enter third-party litigation funders. Their tolerance for risk may stiffen the spines of plaintiffs' antitrust attorneys. The consequence could be private antitrust enforcement that yields compensation and deterrence closer to ideal levels.

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75. Connor & Lande, *Crime Pays*, *supra* note 59, at 430.

76. *See generally* Davis & Lande, *supra* note 59 (explaining that private antitrust enforcement provides valuable compensation and deterrence, but procedural and substantive obstacles to recovery cause compensation and deterrence to fall below optimal amounts).

77. The total recovery was $29.3 billion. JOSHUA P. DAVIS & ROSE KOHLES, 2021 ANTITRUST ANNUAL REPORT: CLASS ACTION FILINGS IN FEDERAL COURT 16 (2022). *See generally* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE U. L. REV. 2169 (2013) (analyzing sixty cases of successful private antitrust enforcement and drawing lessons from the evidence); Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2008) (analyzing forty cases of successful private antitrust enforcement and drawing lessons from the evidence).

78. *See generally* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315 (offering evidence and analysis that private antitrust enforcement may have a greater deterrent effect than criminal antitrust enforcement by the federal government).

B. DIVERSITY OF LEAD COUNSEL IN CLASS ACTIONS AND OTHER COMPLEX LITIGATION

A similar point applies to diversity among lawyers who prosecute class actions and other forms of complex litigation. It is possible that third-party funding would support diversity. Here, however, our analysis is more speculative. We make only three brief points.

(1) Capital is important for obtaining lead roles in complex litigation;

(2) white men, as a group, have much more capital than people of color and women; and

(3) plaintiffs' counsel in complex litigation, especially in lead roles, are disproportionately white and male.

These three points taken together suggest that third-party litigation funding may enhance diversity among plaintiffs' counsel.

1. *The Importance of Capital for Plaintiffs' Counsel*

Courts and commentators have recognized that prosecuting class actions and other forms of complex litigation is expensive. Andrew Bradt and Theodore Rave, for example, note the potential benefits to plaintiffs from having repeat players in charge of MDLs.[79] One of the points they make is that repeat players have access to capital that others lack. They note: (1) in a single science-heavy case (such as a drug-defect case), costs can run above $250,000; (2) in bellwether cases that may set a benchmark for settlement for large numbers of individual cases, costs can easily exceed $1 million; and (3) a plaintiffs' steering committee in a mass tort case may spend tens of millions of dollars (in the Vioxx MDL, they spent about $41 million).[80]

Similarly, in the federal antitrust class actions that settled between 2009 and 2021, the out-of-pocket expenses were[81]:

Settlement Amount	Class Recovery	Attys Fees	Expenses	Total
>$1B	85%	14%	1%	100%
$500-$999M	73%	26%	1%	100%
$250-$499M	74%	25%	1%	100%
$100-$249M	68%	30%	2%	100%
$50-$99M	67%	30%	3%	100%
$10-$49M	66%	30%	4%	100%
<$10M	64%	30%	6%	100%
All Settlements	67%	30%	3%	100%

79. *See generally* Andrew D. Bradt & D. Theodore Rave, *It's Good To Have the "Haves" on Your Side: A Defense of Repeat Players in Multidistrict Litigation*, 108 GEO. L.J. 73 (2019).

80. *Id.* at 95 nn.141–43.

81. DAVIS & KOHLES, *supra* note 77, at 28.

As a result, we would expect a federal antitrust class action that settles for $25 million typically to require the plaintiffs' lawyers to pay about $1 million in hard costs, and one that settles for $70 million to involve over $2 million in costs. In antitrust cases, as in mass torts, some very large cases can involve more than $10 million in costs.[82]

2. *Disparities in Capital by Race and Sex*

Financial capital is not spread evenly across demographics. Certain groups—notably white men—tend to have far more capital than others—notably people of color and women. For example, white people in 2019 earned about 1.6 times as much as African Americans—a striking disparity—while the wealth of white people was 6.7 times as much as the wealth of African Americans—an even more striking disparity.[83]

Similarly, a study in 2021 estimated that women who were never married had only 34% of the median wealth of men who were never married.[84] An older study similarly found that single women have about 32% of the wealth of single men.[85]

The results are more extreme at the intersection of sex and race. One study from 2010 suggests that single African American and Latina women have a median wealth that is, respectively, less than 10% and less than 5% of the median wealth of single white men.[86] (According to the same study, single white women have a median wealth of about 81% of single white men.[87])

82. For example, in *In re Capacitors Antitrust Litigation*, the district court awarded class counsel more than $9 million in costs and is all but certain to award millions more once the settlements with the last remaining defendants are finally approved. No. 14-cv-03264, 2022 WL 3137938, at *2 (N.D. Cal. July 26, 2022). *See* Mike Leonard, *Capacitor Antitrust Case Nears End with Deals Worth $165 Million*, BLOOMBERG L. (May 27, 2022), https://news.bloomberglaw.com/antitrust/capacitor-antitrust-case-nears-end-with-deals-worth-165-million.

83. Joshua P. Davis, Eric L. Cramer, Reginald L. Streater & Mark R. Suter, *Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic "Isms")*, 66 ANTITRUST BULL. 359, 363–64 (2021).

84. Ana Hernández Kent & Lowell R. Ricketts, *Gender Wealth Gap: Families Headed by Women Have Lower Wealth*, FED. RSRV. BANK OF ST. LOUIS (Jan. 12, 2021), www.stlouisfed.org/publications/in-the-balance/2021/gender-wealth-gap-families-women-lower-wealth. Note, however, that controlling for other factors—such as race and ethnicity, education, income, and inheritance—increased women's median wealth to 71% of men's. *Id.*

85. MARIKO CHANG, ASSET FUNDERS NETWORK, WOMEN AND WEALTH: INSIGHTS FOR GRANTMAKERS 5 (2015), https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c54781a8165f5b8546f8a34/1549039642955/AFN_Women_and_Wealth_Brief_2015.pdf.

86. MARIKO CHANG, INSIGHT CTR. FOR CMTY. ECON. DEV., LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA'S FUTURE 7 (2010), https://static1.squarespace.com/static/5c50b84131d4df5265e7392d/t/5c5c7801ec212d4fd499ba39/1549563907681/Lifting_As_We_Climb_InsightCCED_2010.pdf.

87. *Id.*

3. *Lack of Diversity in Lead Counsel*

White men dominate the ranks of plaintiffs' lawyers in class actions and other complex litigation, including leadership positions. One relatively recent study based on data from 2015 to 2019 found that only about 5% of attorneys appointed as counsel in MDLs identify as nonwhite.[88] An earlier study based on data from 2011 to 2015 found that women were appointed to less than 17% of leadership positions in MDLs.[89] In 2013, another study in the Northern District of Illinois found that only 13% of lawyers in class actions were women.[90] Yet another study based on seventy-three MDL proceedings pending in 2013 found that about 63% of the plaintiffs' leadership positions were occupied by the very same white men.[91]

Courts and commentators have taken note. In one striking example, the judge in *In re Robinhood Outage Litigation* in 2020 rejected a proposed leadership structure because all of the attorneys who were put forward to represent the class were men.[92] Similarly, in 2016, the judge in *In re Generic Pharmaceutical Pricing Antitrust Litigation* rejected a proposed leadership structure and appointed one female attorney as lead counsel for the direct-purchaser plaintiffs and another female attorney as lead counsel for the indirect-purchaser plaintiffs.[93] Meanwhile, law professors and academic institutions have argued for greater diversity among plaintiffs' counsel in class actions and complex litigation.[94]

The above propositions suggest that disparities in capital may contribute to the lack of diversity among plaintiffs' counsel in class action and other complex

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88. Amanda Bronstad, *Despite Diversity Efforts, Fewer Than 10% of MDL Leadership Posts Are Going to Attorneys Who Are Not White*, LAW.COM (Aug. 17, 2020), https://www.law.com/2020/08/17/despite-diversity-efforts-fewer-than-10-of-mdl-leadership-posts-are-going-to-attorneys-who-are-not-white/.

89. DANA ALVARÉ, VYING FOR LEAD IN THE "BOYS' CLUB": UNDERSTANDING THE GENDER GAP IN MULTIDISTRICT LITIGATION LEADERSHIP APPOINTMENTS 5–6 (2017), https://law.temple.edu/csj/wp-content/uploads/sites/3/2017/03/Vying-for-Lead-in-the-Boys-Club.pdf (finding that women were appointed in a lead role in only 16.55% of 145 multidistrict litigation cases between 2011 and 2016 where formal leadership appointments were made by a court of the time).

90. STEPHANI A. SCHARF & ROBERTA D. LIEBENBERG, ABA, FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE 13 (2015).

91. Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. 1445, 1450, 1471 (2017).

92. No. 20-cv-01626, 2020 WL 7330596, at *2 (N.D. Cal. July 14, 2020).

93. *See* Max Mitchell, *In 'Extremely Rare' Move, Two Women Appointed to Lead Antitrust MDL*, LAW.COM, https://www.law.com/thelegalintelligencer/almID/1202773459170/ (Nov. 30, 2016).

94. *See, e.g.*, JAMES F. HUMPHREYS COMPLEX LITIG. CTR., INCLUSIVITY AND EXCELLENCE: GUIDELINES AND BEST PRACTICES FOR JUDGES APPOINTING LAWYERS TO LEADERSHIP POSITIONS IN MDL AND CLASS-ACTION LITIGATION 7 (2021), https://law9.drupal.gwu.edu/sites/g/files/zaxdzs5421/files/downloads/Inclusivity_and_Excellence_Master_Draft.pdf; Brooke D. Coleman, *A Legal Fempire?: Women in Complex Litigation*, 93 IND. L.J. 617, 618 (2018); Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1011, 1026 (2016).

litigation, including leadership positions. It follows, then, that third-party litigation funding may help improve diversity by making capital available to women and people of color.

Our point in this regard is modest. We suggest that it is at least conceivable that third-party litigation funding could enhance the diversity of plaintiffs' counsel in class actions and other complex litigation. If it can, then that would be a reason to permit, and perhaps encourage, third-party litigation funding. We ask that courts, regulators, and others approach the issue with an open mind and that they not assume that traditional ways of funding litigation are necessarily superior to funding by third parties just because we are more accustomed to them.

CONCLUSION

Our goal has been to challenge a standard reaction to third-party litigation funding—that it necessarily does more harm than good by creating tensions that otherwise do not exist between, on the one hand, lawyers and, on the other, their clients and the public good. In reality, such tensions always exist. Third-party litigation funding may exacerbate or ameliorate those tensions. We believe that we should cast aside any bias against third-party litigation funding and start with a clean slate. In some contexts—including optimizing antitrust enforcement and promoting diversity—third-party litigation funding may do more good than harm.