

UNIVERSITÀ DEGLI STUDI DI MILANO

SCUOLA DI DOTTORATO IN SCIENZE GIURIDICHE

DIPARTIMENTO DI DIRITTO PRIVATO E STORIA DEL DIRITTO

CURRICULUM DIRITTO COMPARATO – XXVI CICLO

**Tesi di Dottorato di Ricerca
(IUS/02)**

**PROFIT VS. FROM JUSTICE:
COMPARATIVE LEGAL AND REGULATORY APPROACHES TO
THIRD-PARTY LITIGATION FUNDING**

Tutor:

Chiar.ma Prof.ssa ALBINA CANDIAN

Dottorando:

MARCO DE MORPURGO

Co-Tutor:

Chiar.mo Prof. MAURO BUSSANI

Coordinatrice:

Chiar.ma Prof.ssa BARBARA POZZO

A.A. 2012-2013

TABLE OF CONTENTS

Preface	7
---------------	---

CHAPTER I INTRODUCING THIRD-PARTY LITIGATION FUNDING (TPLF)

A. TPLF Explained.....	17
B. Emergence, Developments, and Current (Global) Market	19

CHAPTER II THE LAW OF TPLF: A COMPARATIVE ANALYSIS

A. Common Law	30
1. Traditional Prohibitions: Maintenance and Champerty.....	30
2. Opening Up to TPLF	35
a. Australia.....	35
b. United States	39
c. United Kingdom	43
d. Other Common Law Jurisdictions	49
B. Civil Law World	50
1. General Absence of Prohibitions	50
2. A Case Study: Germany	53
C. Common Law vs. Civil Law.....	59
1. Narrowing the Distance	59
2. Different Extents of Market Development	62
3. Possibilities of Expansion of TPLF in the Civil Law World.....	66

CHAPTER III SHAPING THE LAW OF TPLF (AKA: THE POLITICS OF TPLF)

A. Some Context.....	70
B. Some Examples	72
C. The Policy Debate on TPLF	75
1. Industry Lobbying	76

a. Sides and Strategies	76
b. Main Arguments	80
2. Academic Debate	84
3. Bar Associations	90
4. Governmental Reactions	93
a. Lord Justice Jackson’s Report	94
b. Court Opinions	96
c. Legislators	98

CHAPTER IV
LIFTING THE VEIL ON THE POLITICAL DEBATE

A. Statement of Purpose	100
B. Economic Analysis of TPLF	102
1. Property Rights in Litigation	102
2. Economic Model of TPLF	104
a. American Rule	105
b. English Rule	108
3. Lessons from the Economic Model	111
a. Why the Parties Enter into a TPLF Agreement	111
b. Efficiency of TPLF	115
4. The Costs and Benefits of TPLF: Myths and Realities	115
a. ‘Negative’ Externalities	116
b. ‘Positive’ Externalities	124
c. Re-assessing the Costs and Benefits of TPLF	127
C. TPLF through the Lenses of Sociological Analysis	128
D. “ <i>Adelante, con Juicio</i> ”	134

Conclusions	136
-------------------	-----

References	141
------------------	-----

Table of Cases	153
----------------------	-----

**PROFIT VS. FROM JUSTICE:
COMPARATIVE LEGAL AND REGULATORY APPROACHES TO
THIRD-PARTY LITIGATION FUNDING**

PREFACE

New trends in civil litigation financing are transforming the way in which we conceive the civil justice system. If, on the one hand, academic and political discourses directly concerning the substance of legal rights are of fundamental importance, equally significant are any discourses about how those rights are then to be enforced in practice. Litigation is an expensive process and its costs are often prohibitive. Hence, questions on the ways in which people and other economic actors can finance litigation to obtain the fulfillment of their rights are perhaps as important as the questions on the content of those rights themselves.

Third-party litigation funding (also referred to as third-party litigation financing—hereinafter TPLF)¹ is likely the most significant among the aforementioned new trends. TPLF consists of a practice where an independent third party, with no prior connection to a claimholder, covers all or some of a claimholder's costs of civil litigation on a non-recourse basis, in exchange for a share of any damage award or settlement that is contractually determined ex-ante

¹ Some scholars, especially in the United States, prefer using the expression Alternative Litigation Financing (ALF), which was introduced by a report prepared in 2010 by Steven Garber for RAND (*Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns*, RAND Corporation: Santa Monica, 2010). However, I prefer using the expression third-party litigation funding (TPLF) because, even if this term may also comprise other mechanisms of litigation financing by third parties (e.g., litigation expenses insurance), it is much consolidated in the literature, and it is less vague than 'alternative litigation financing' (ALF).

between the claimholder and the third-party funder. This means that, if the litigation is successful, the funder will obtain the contractually determined share of damage award or settlement. By contrast, if the litigation is unsuccessful, the claimholder will bear no cost for the litigation, and the third-party funder will lose his investment.

Modern TPLF first emerged in Australia around twenty years ago. It has since then developed mostly in the United Kingdom (UK) and the United States (US), but also in other common law jurisdictions, as well as—though to a lesser extent—in the civil law world.

On the supply side, TPLF represents a new and attractive business opportunity for the financial sector, positioning itself as a new trend at the most advanced frontiers of finance. However, TPLF is not walking in a vacuum. By contrast, interrelationships between the civil justice system and the world of finance are increasingly acquiring importance, in a process where financial investors and capital markets play a more and more fundamental role in (directly or indirectly) supporting litigant parties interacting with the civil justice system. Those trends, together with TPLF, contribute to breaking away from the traditional view of the litigation process, which—at least in the Western legal tradition²—contemplates the opposition of two parties, plaintiff and defendant, represented by their respective lawyers, in front of an adjudicating authority, and covering the costs of the litigation

² Which includes both the common law and civil law traditions. See DIEGO E. LÓPEZ MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA* (Legis, 3rd prtg. 2004), 12.

out of their own pockets or—at most, in some jurisdictions—from their lawyers’ assets.³

On the demand side, TPLF is an empowering tool for budget-constrained or risk-averse plaintiffs, which allows them to pursue enforcement of their rights even where they are frightened by the often-prohibitive costs of litigation. In this perspective, TPLF levels the playing field between plaintiffs and defendants, and it is capable of increasing access to justice.

The meeting of supply and demand for TPLF has determined a boom of this innovative industry in recent years. More and more litigation financing companies are being incorporated around the world. These companies have been expanding their frontiers, both geographically, reaching new markets, and in terms of the areas of litigation in which they invest, spanning across contract disputes, personal injury litigation, securities litigation, bankruptcy proceedings, private enforcement of antitrust laws, international arbitration, intellectual property litigation, and more.

However, this flourishing industry is constantly under attack. Opponents of TPLF have heavily criticized it, and brought numerous frontal attacks in the policy debate that has emerged around this practice, proposing arguments supporting the idea that TPLF should be banned or at least regulated in order to minimize its social costs.

These attacks have contributed generating a heated debate on TPLF. In short, this debate can be roughed out in three extreme positions: (i) TPLF should be

³ I am referring to contingency fee schemes, on which see e.g. Neil Rickman, *Contingent Fees and Litigation Settlement*, 19 INT’L REV. L. & ECON. 295 (1999).

permitted and left unregulated; (ii) TPLF should be completely banned; or (iii) TPLF should be permitted subject to regulation. Which is the way to go?

Dissertation Questions and Purpose of the Work

The purpose of this work is to address two key questions: (i) should TPLF be permitted?; and, if so, (ii) should it be regulated?

In addition, and from a broader perspective, this dissertation presents itself as a monographic work aiming to provide a thorough understanding of TPLF from a comparative perspective, in order to serve as a basis for any legal or policy discussion on TPLF.

The use of the lenses of comparative in the study of TPLF law is crucial. TPLF is a truly transnational phenomenon; it is a practice that poses challenges calling for comparative law analysis, and which by no means may only be looked at from an isolated national or local perspective. This is at least for the following reasons.

First, TPLF is a transnational business trend: not only it exists in different countries, but it is also following a coordinated and simultaneous evolution in those jurisdictions, often steered by the same driving forces. In particular, the nature of the TPLF industry's business is transnational, as TPLF companies constantly invest in litigation overseas as well as in cross-border litigation. Countless examples could be mentioned: from UK or Chinese companies investing in litigation in the US,⁴ Australian companies opening branches in New York for the management of their

⁴ Julie Bédard (Skadden, Arps, Slate, Meagher & Flom LLP), at a talk at Columbia Law School on 27 March 2013, reported on a case in which she was involved where the plaintiff was backed by a Chinese litigation funding company.

US investments,⁵ to US companies investing in litigation against US defendants before courts of law in Latin America.⁶

Second, the debate on the legality and desirability of TPLF is a truly transnational one. Academics, industry, and institutions are involved in a debate that extends to both sides of the Ocean and beyond. The positions of e.g. the US bar associations, or of the UK judicial institutions, inevitably influence the policy on TPLF beyond the borders where they originate. Similarly, transnational and global academic conferences have been organized with a view to learn from each other's experiences, and generate transnational scholarly knowledge on TPLF.⁷

Third, TPLF calls for a transnationally coherent legal and regulatory approach, in the absence of which strong unbalances would be produced. For example, lawyers are bound by different ethics and professional responsibility rules depending on the jurisdiction in which they are qualified, often independently of where they practice. TPLF raises a number of ethical issues that are likely to be addressed by the professional responsibility rules issued by each jurisdiction's regulatory body for the legal profession. In the context of international arbitration, for example, if lawyers qualified in different jurisdictions are involved in the same arbitration, each lawyer will have to comply with the ethical rules established by the legal profession regulator where she is qualified. Therefore, a lack of coherence in

⁵ I am referring to Bentham IMF (<http://www.imf.com.au>), an Australian litigation funding company that recently opened a US subsidiary with offices in New York and Los Angeles.

⁶ See e.g. the famous 'Lago Agrio' case, brought by Aguinda and other Ecuadorian citizens, backed by litigation funding firm Burford, against Chevron Corporation before the Court of Nueva Loja (Ecuador), which resulted in decision No. 2003-0002 (2011).

⁷ See e.g. the two-event Global Conference on TPLF, organized by Searle Civil Justice Institute at George Mason University's Law & Economics Center, which comprised an event in New York and one in Brussels in the fall 2011.

the professional responsibility rules on TPLF may create strong unbalances among the lawyers involved in the same funded arbitration.⁸

Methodology

In this work I use the analytical methods provided by the scholarly discipline of comparative law. In particular, not only I compare the law and policy of TPLF across different jurisdictions, but I use comparative law as an anti-formalistic and anti-positivistic methodological approach to the study of law, including economic, sociological, and political analysis of law and policy in order to uncover what hides behind the façade of the existing rhetoric on TPLF. After presenting the law of TPLF and the policy debate on its face, I use some of the tools provided by comparative law in order to unveil the politics that stand behind it. Moreover, after identifying the main arguments in the debate either supporting or opposing TPLF, I use economic analysis to test the appearances and reassess the costs and benefits of TPLF, and I propose sociological arguments in order to further explain certain political oppositions to TPLF.

Comparative law also proves useful in order to address the issue of whether TPLF should be regulated. In particular, throughout the work and with respect to the several concerns related to TPLF that may require regulation, I discuss the regulatory alternatives that have been proposed or discussed in different jurisdictions in a comparative perspective. In this exercise, I try to the extent possible not to do a blind comparison between different regulatory solutions or

⁸ This issue was raised and discussed by Julie Bédard (Skadden, Arps, Slate, Meagher & Flom LLP), at a talk at Columbia Law School on 27 March 2013.

approaches adopted in different jurisdictions, but rather to keep an eye on the context in which a particular rule operates, and proceed with a comparative analysis that takes such different contexts into account.⁹

Scope of this Work

As stated, TPLF is only one among the many practices that have emerged from the increasing interrelation between the civil justice system and the world of finance. Other practices include the tendency of law firms—traditionally organized as partnerships and poorly capitalized—devise new solutions to raise capital, e.g., through private placements¹⁰ or public offerings.¹¹ Additional practices, which are conceptually and structurally even more similar to TPLF, are i.a. contingency fee schemes, insurance based solutions, assignment of claims,¹² and recourse litigation ‘loans’.¹³ Although some of these practices are interesting and pose very important challenges, this dissertation only addresses TPLF strictly intended as the practice

⁹ On the need for such an approach see Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93 (2013), 95.

¹⁰ Dewey & LeBoeuf LLP—an ex New York-based, 1200-attorney law firm—raised \$125 million in a bond offering in April 2010. The firm filed for bankruptcy in New York on May 28, 2012. Peter Lattman, *Dewey & LeBoeuf Files for Bankruptcy*, THE NEW YORK TIMES, 28 May 2012, available at http://dealbook.nytimes.com/2012/05/28/dewey-leboeuf-files-for-bankruptcy/?_php=true&_type=blogs&hp&_r=0

¹¹ Australia’s Slater & Gordon held the world’s first IPO for a law firm in May 2007.

¹² On the idea of a ‘market for legal claims,’ based on the mechanism of assignment, see Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987); Michael Abramowicz, *On The Alienability of Legal Claims*, 114 YALE L. J. 697 (2004); Isaac M. Marcusshamer, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543 (2005); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009); Andrea Pinna, *Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims* (2009) NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE, available at <http://ssrn.com/abstract=1396682>.

¹³ For a survey see Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-party Litigation Funding*, 19 CARDOZO J. INT’L & COMP. L. 343, 351-359. For a comparison between TPLF and legal expenses insurance see Michael Faure & Jef De Mot, *Comparing Third-Party Financing of Litigation and Legal Expenses Insurance*, 8 J. L. ECON. & POL’Y 743 (2012).

contemplating a third-party investing in a claimholder's litigation, covering all or some of her litigation costs in exchange for a share of any proceeds if the suit is successful, or nothing if the case is lost. All other means of civil litigation financing shall be deemed outside the scope of this work.

Contribution to Legal Scholarship

Until a few years ago the literature on TPLF was rather scarce, at least compared to the long-term consequences that the establishment of this innovative practice might produce both on the legal and civil justice system and on the economy and society as a whole.¹⁴ More recently, there has been a significant increase in scholarly production on the topic. However, at least two shortcomings can be identified in the existing literature on TPLF. First, much of the scholarly work on TPLF addresses specific legal, policy, or economic issues, but fails to provide a broad view on the phenomenon as a whole. Secondly, most of the existing work hardly takes a true comparative perspective to the study of TPLF, and only focuses on one or more specific jurisdictions. Moreover, even for scholarly articles whose claim is to propose comparative analysis, the approach is rather formalistic, and hardly critical (i.e., those authors limit themselves to comparing legal rules across national experiences, but fail to use the anti-formalistic analytical tools provided by comparative law).

¹⁴ On the influences that different rules governing the costs of litigation exert on the development of substantive law see J. Robert. S. Prichard, *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEGAL STUD. 451 (1988).

In contrast, this dissertation aims at a high-level reflection on TPLF within a monographic-type work product. It of course addresses specific issues, but it tries to look at the forest that spreads beyond the trees. Importantly, it also represent an attempt to do real comparative analysis of the problems arising from TPLF, looking beyond the façade of formal legal and policy narratives, and taking a detached view on the politics of TPLF, trying to present ideas and conclusions in an unbiased way, except where I expressly state my own opinion.

Finally, by proposing a high-level comprehensive comparative work on TPLF, this dissertation aims at becoming a basis for a consistent transnational legal and regulatory policy concerning TPLF.

Structure of the Work

In order to address the two main questions of the dissertation and achieve its broader general objectives, the work is organized as follows.

First, Chapter I describes what TPLF is, why it has emerged, and what the industry and current market look like.

Chapter II describes the evolution of the law of TPLF in a comparative perspective. It addresses both the common law and civil law experiences, which are apparently very different, but eventually reconciling such difference using the comparative law theory of legal formants. The Chapter also advances some hypotheses, partly based on the theory of cryptotypes, on why TPLF has developed to a larger extent in the common law world than it has in the civil law world.

Chapter III reveals the real driving forces that stand behind and shape the law of TPLF. In other words, it is a journey into the politics of TPLF. It therefore discusses the arguments (at least on their face) used by proponents and critics of TPLF supporting or opposing the admissibility of this practice.

The purpose of Chapter IV is to lift the veil that lays on the debate around TPLF. I do so by using two anti-formalistic methodological approaches to the study of law offered by comparative legal scholarship. First, I use economic analysis in order to uncover the myths and realities standing behind the arguments in favor and against TPLF: I do so by developing an economic model of TPLF, and looking at the parties' incentives in order to test what is really likely to happen according to the principles of the economic analysis of law; I thus propose a reassessment of the costs and benefits of TPLF. Then, I bring forward some sociological considerations that somehow balance out the economic arguments, in order to explain why TPLF has been countered by some parties and why perhaps it should be limited, thus representing a critique to the very economic arguments that I bring forward in the first part of the Chapter. Chapter IV will come to the conclusion that TPLF should be permitted, while some concerns arise that may require regulation.

Finally, the dissertation closes with some conclusive thoughts and recommendations.

CHAPTER I
INTRODUCING THIRD-PARTY LITIGATION FUNDING (TPLF)

A. TPLF EXPLAINED

Emily is a twenty-five-year-old single mother who used to work at the local ice cream shop. A few months ago, while driving her car on a Sunday, she was hit by a truck driver who ran the red light. As a result of that she became unable to work for at least one year, and was therefore fired by her employer. Emily now has a \$1 million claim against the truck driver, but she cannot afford to hire a lawyer to represent her in the litigation. In particular, Emily has some savings that she may invest in a lawsuit against the truck driver, but she is concerned that, if she loses the lawsuit, she will lose everything she has, finding herself incapable of paying for her own living expenses and her child's school until she recovers.

One year ago, X-Conductors, Inc., a small high-tech start-up company based in the Silicon Valley, obtained a patent on an innovative chip that is used in new-generation touchless credit card readers. About a month ago, X-Conductors found out that Giant Electronics, Inc., the largest manufacturer of electronic chips in the world, has been marketing credit card readers that contain a chip that violates X-Conductors's patent rights. Larry, X-Conductors's General Counsel, has tried to convince the CEO that they have a very strong case against Giant Electronics, and

that X-Conductors is likely to obtain a \$15 million damage award from Giant Electronics. However, X-Conductors has little liquidity and the CEO is concerned that if they lose the case, the company may go bankrupt. Therefore, the CEO intends not to approve Larry's budget request for the litigation. Larry understands the CEO's concerns, although he feels very frustrated by the situation.

Today, Peter, the legal representative of YLF, Inc., a new litigation financing company, separately approached Emily and Larry, and proposed them to cover the entire cost of their respective litigation, in exchange of one third of any damage award or settlement. Peter explained Emily and Larry that, if their case turns out to be unsuccessful, YLF will ask no money from them. Emily thought about it for a short while and accepted Peter's offer. Larry immediately called the CEO of X-Conductors to discuss the proposal. The CEO realized that the budget for this (potentially fruitful) litigation will remain off the balance sheet, and gave Larry the green light to sue Giant Electronics.

The two stories above exemplify what TPLF is and how it may work in practice.

From a legal point of view, TPLF is based on a contract between a claimholder and a litigation funder, pursuant to which the litigation funder takes on the obligation to cover all or some of the claimholder's litigation expenses (including filing fees, expert and witness fees, attorney fees, and so on) and, in exchange, the claimholder promises the funder to pay him a share of any sum he obtains if the outcome of the litigation is positive, or nothing if the case is lost.

A TPLF contract may foresee a variety of clauses. For example, it may provide for different percentages of awards depending on whether the case is settled

before trial, wins at trial, or goes before an appellate court. It may grant to the funder some oversight or control rights, e.g. over the choice of counsel or other litigation strategy.

The reasons for a TPLF agreement are quite self-evident. For the funder, a TPLF agreement is essentially an investment: the funder expects to spend less than the amount he expects to obtain, discounted by the probability to lose the case (i.e., the funder sees an overall positive expected return from the TPLF agreement). For the claimholder, the reasons for signing a TPLF agreement may be at least two: (i) she has the resources to bring the case, but prefers not to invest them (in this case, a TPLF agreement is a way to manage litigation risk); or (ii) she does not even have the necessary resources to bring the case (in which case the claimholder's only alternative is between bringing a funded case or not bringing the case at all). In both cases, the claimholder will turn to a litigation funder when she finds it convenient for her.

B. EMERGENCE, DEVELOPMENTS, AND CURRENT (GLOBAL) MARKET

Modern TPLF¹⁵ originated in Australia at the beginning of the 1990s. After having emerged in the specific context of insolvency,¹⁶ it successively extended to other

¹⁵ The fact that ancient prohibitions to TPLF exist in the common law (see Chapter II below) suggests that some form of third-party funding of litigation existed back in the day. For example, in the South African 1894 judgment *Hugo & Möller N.O. v Transvaal Loan, Finance and Mortgage Co.*, [1894] (1) OR 336, the court addressed the case of an agreement to provide the necessary funds to enable an action to be proceeded with, in consideration for which the person lending the money was to receive an interest in the property sought to be recovered. The court concluded that such an agreement had not to be considered per se to be contra bonos mores or champertous.

¹⁶ LITIGATION FUNDING IN AUSTRALIA, Discussion Paper, Standing Committee of Attorneys General (May 2006) available at http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/l1_lpd.nsf/pages/lp_dp, 4; VICKI WAYE, TRADING IN LEGAL CLAIMS: LAW, POLICY & FUTURE DIRECTIONS IN AUSTRALIA, UK & US

areas, though generally remaining largely confined within the boundaries of commercial litigation.¹⁷ Among other factors, the fairly favorable endorsement by Australian courts¹⁸ of non-recourse litigation lending practices allowed the industry to find rapid success and growth in Australia. Since then, several companies, such as Bentham IMF Limited (formerly known as IMF (Australia) Ltd),¹⁹ Litigation Lending Services Ltd²⁰ and LCM Litigation Fund Pty Ltd²¹ are engaged in the business of professional litigation funding.²² Much of TPLF in Australia is still conducted under the statutory exception for insolvency, involving e.g. pursuing voidable transactions and misfeasance by company officers. Outside the insolvency context, litigation funding is usually limited to commercial litigation with large claims (over \$500,000 or, for some companies, over \$2 million), although an exception is constituted by class actions, where a large number of smaller claims can be processed economically. Litigation funding firms in Australia are generally not involved in personal injury-type matters.

(Presidian, 2008), 55. For an example of an insolvency matter for which TPLF was provided see *Anstella Nominees Pty Ltd v St George Motor Finance Ltd* [2003] FCA 466.

¹⁷ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 5, 18, 133; LITIGATION FUNDING IN AUSTRALIA, *supra* note 16, 4-6. For two examples see *QPSX Ltd v Ericsson Australia Pty Ltd* [2005] FCA 933; *Fostif v Campbell Cash and Carry* [2005] NSWCA 83.

¹⁸ *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219 ALR 1, 54; *Campbell's Cash & Carry P/L v Fostif P/L* (2006) 299 ALR 200.

¹⁹ Bentham IMF, which provides funding of legal claims and other related services where the claim size is over \$2 million, is the largest litigation funder in Australia and the first to be listed on the Australian Stock Exchange (<http://www.imf.com.au>).

²⁰ Litigation Lending Services Ltd, set up in Sidney in 1999, has traditionally focused on the provision of litigation funding for insolvency market actions typically ranging from claims of between \$200,000 and \$10 million, though extending their services beyond insolvency to general commercial litigation, class actions and representative proceedings (<http://www.litigationlending.com.au>).

²¹ LCM Litigation Fund Pty Ltd ("LCM") has been in business since 1998 and was previously known as Australian Litigation Fund Pty Ltd (until April 2008). "LCM primarily provides litigation funding to insolvency practitioners. However, LCM also provides funding to solvent companies and individuals with worthwhile commercial legal claims. [...] LCM prefers to undertake projects in which the relevant legal claim is for at least \$2.5 million" (<http://www.lcmlitigation.com.au>).

²² As of 2006, five companies operated in the business of commercial litigation funding. LITIGATION FUNDING IN AUSTRALIA, *supra* note 16, 4. As of today, six active funders operate in the market.

In addition to the favorable statutory regulation and case law that has permitted the development of TPLF in Australia, several structural reasons explain why the Australian TPLF industry has turned into a flourishing one. Some of these reasons are the considerably high costs of litigation in relation to the value of the case,²³ the limited availability of lawyer funding opportunities as a result of the prohibition on contingency fee agreements,²⁴ the cost rule that operates in most areas of civil litigation, which usually requires the losing party to pay for the other party's costs,²⁵ and the decrease in the availability of legal aid in civil litigation cases that has taken place in recent years.²⁶

Some of the companies based in Australia also invest funding claims in foreign jurisdictions. Among them, Litigation Lending Services Ltd, based in Sidney, was the company involved in the funding agreement that was at issue in the first decision dealing with TPLF in New Zealand, given by the New Zealand High Court in 2000.²⁷ Moreover, Bentham IMF Ltd, the major TPLF company in Australia, recently opened subsidiaries in New York and Los Angeles to manage their US litigation business.²⁸

²³ Christopher Hodges, Stefan Vogenauer & Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, Oxford Legal Studies Research Paper No. 55-2009 (2009), 19.

²⁴ Michael Legg, Edmond Park, Nicholas Turner & Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia*, 38 N. KY. L. REV. 625 (2011), 630.

²⁵ J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 98. This rule increases the expected costs derived from a potential unfavorable ruling and hence encourages parties to disputes to resort to ways of financing litigation which minimize or even eliminate such expected costs.

²⁶ J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 97; George R. Barker, *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON & POL'Y 451, (2012), 468.

²⁷ *Re Nautilus Developments Ltd (in liquidation); Montgomerie v Davison* (M1285/99; HC, Akld; 14 April 2000).

²⁸ See <http://www.benthamimf.com/about-us>.

After its Australian debut, TPLF soon and rapidly expanded in the common law world, especially in the US and the UK, but also in other jurisdictions such as Bermuda,²⁹ the British Virgin Islands,³⁰ Canada,³¹ Hong Kong,³² Ireland,³³ Jersey,³⁴ New Zealand,³⁵ Singapore,³⁶ and South Africa.³⁷

In the United States the industry of third-party investment in litigation started to develop in the mid 1990s. Differently from Australia, where TPLF has mainly operated in a commercial environment, in the US the industry of third-party investments in litigation was initially small scale and consumer oriented.³⁸ On the one hand, litigation funders were active in consumer litigation such as personal injury cases. On the other hand, a significant market for investments in legal claims

²⁹ For a recent decision of the Supreme Court of Bermuda see *Stiftung Salle Modulable v Butterfield Trist (Bermuda) Limited* ([2012] SC (Bda) 165).

³⁰ See e.g. *Hugh Brown & Associates (Pty) Ltd v Kermas Limited* [2011] (BVIHCV(COM)).

³¹ For some recent cases see: *E. Eddy Bayens and others v Kinross Gold Corporation and others*, 2013 ONSC 4974; *Stanway v Wyeth Canada Inc.* [2013] BCSC 1585; *The Trustees of the Labourers' Pension Fund of Central & eastern Canada v Sino-Forest Corporation* [2012] ONSC 2937; *Dugal v Manulife Financial Corporation* [2011] ONSC 1785 (SCJ); *MacQueen et al v Sydney Steel Corporation et al* [2010] Halifax no 218010; *Metzler Investment GMBH v Gildan Activewear Inc* [2009] OJ no 3315 (SCJ); *Hobsbawn v ATCO Gas and Pipelines Ltd* [2009] Calgary 0101-04999 (QB); *Holmes v London Life Insurance Co* [2007] CarswellOnt 268 (SCJ) (WL).

³² For some court decision see: *Re Po Yuen (To's) Machine Factory Limited* [2012] HKCU 816; *Geoffrey L. Berman (In His Capacity as Trustee of the Lender Trust) v. SPF CDO I, Ltd and Others*, HCMP1321/2010, 14 March 2011; *Akai Holdings Ltd v Ho Wing On Christopher* [2009] HKCU 172; *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* [2007] HKCU 246.

³³ See e.g. *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Limited* [2011] IEHC 357.

³⁴ See e.g. *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2013] JRC094; *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2012] JRC; *The Valetta Trust* [2011] JRC.

³⁵ For recent case law see: *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89; *Saunders v Houghton* [2012] NZCA 545; *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399; *Houghton v Saunders* [2011] HC Christchurch CIV-2008-409-000348; *Saunders v Houghton* [2010] 3 NZLR 331; *Waterhouse v Contractors Bonding Ltd* [2010] HC Auckland CIV-2010-404-3074; *Houghton v Saunders* [2008] NZCCLR 13.

³⁶ For some recent case law see: *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] SGHC 135; *Otech Pakistan Pvt Ltd v Clough Engineering Ltd.* [2007] 1 SLR (R) 989; *Lim Lie Hoa v Ong Jane Rebecca & Ors* [2005] SGCA 24.

³⁷ See *Litigation Funding in South Africa*, LITIGATION FUNDING MAGAZINE (UK), August 2010. For some case law see: *PriceWaterHouse Coopers Inc and Others v National Potato Co-operative Ltd* [2004] (6) SA 66 (SCA); *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others* [2001] (4) SA 360 (W).

³⁸ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 5; George S. Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805 (2001).

in the US was one for ‘litigation loans,’ in which the funder would make a cash advance to a plaintiff in economic needs in order for her to pay for her medical and living expenses (and not for the litigation), using the claim as a collateral.³⁹ Nevertheless, a market also developed in the US that is specifically centered around commercial TPLF. As a consequence, the US market for TPLF is now divided in two broad branches: a traditional consumer litigation funding market, composed of many small firms that fund low-stakes litigation involving their clients,⁴⁰ and a commercially-focused ‘upper’ market, where a small number of companies provide large dollar amounts to corporate actors that prefer turning to TPLF than risking their own assets to cover litigation costs. As the moment, six corporations invest in commercial lawsuits in the US. Of these six corporations, two are publicly traded corporations (Juridica Investment and Burford Capital). Since then, a few more companies have been incorporated as well as divisions of large institutions have been created to invest in commercial litigation in the US.⁴¹

Juridica Investments Limited, one among the largest companies operating in the commercial sector in the US, is a Guernsey-based investment company that only invests in commercial claims (including IP, antitrust, commercial contracts, bankruptcy and insolvency, securities and finance). The typically investment size for Juridica amounts between \$3 and 10+ million into claims of the size of at least \$25-

³⁹ See e.g. Terry Carter, *Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers*, 90 A.B.A. J. 34 (2004); James T. Moliterno, *Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003).

⁴⁰ A group of US companies providing non-recourse litigation funding to personal injury victims formed the American Legal Finance Association (ALFA) in 2004. ALFA is now comprised of 31 companies nationwide. One of ALFA’s first goals was to establish industry standards in the TPLF industry, especially regarding transparency in transactions and clear disclosure to consumers (<http://www.americanlegalfin.com>).

⁴¹ Joanna M. Shepherd, *Ideal versus Reality in Third-Party Litigation Financing*, 8 J. L. ECON. & POL’Y 593 (2012), 3.

100+ million.⁴² Another one of the largest litigation-finance firms, Burford Capital Limited, also based in Guernsey, also invests in commercial litigation, providing financing in support of high-stakes and sophisticated corporate litigation, arbitration, and other disputes, working with clients in both the United States and internationally.⁴³ Law Finance Group Inc, created in 1994, advances sums between \$25,000 and \$15 million, and up to \$50 million for appeal cases. Law Funds LLC, advances between \$500 and \$20 million in exchange for an assignment of the proceeds of a judgment or settlement.⁴⁴ These are just some examples of companies operating in the TPLF market in the US, but others include Parabellum Capital LLC (a spinoff of Credit Suisse⁴⁵), and more specifically oriented companies like General Patent Corporation.⁴⁶

The other crucial market for litigation funding in the common law world is the UK. The UK experience—similarly to the US one—is marked by a twofold litigation funding market, demonstrating that there is no reason to believe that TPLF should be limited to commercial matters. Indeed, litigation funding in the UK has

⁴² <http://www.juridicacapital.com/investments.php>

⁴³ <http://www.burfordgrouppltd.com/purpose.html>.

⁴⁴ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 45.

⁴⁵ <http://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group>

⁴⁶ “General Patent Corporation (GPC), for example, works on a 100% contingency basis. That means that if GPC accepts you as a client, the company covers ALL [emphasis in the original] fees and costs involved in the litigation. General Patent Corporation is not a law firm, so it will retain a law firm to actually try the case. It will, however, underwrite all legal fees and out-of-pocket expenses related to the lawsuit(s). [...] Patent enforcement firms recoup their expenses and earn their fees from the proceeds of the settlements or judgments that result from the lawsuit and share in license fees and royalty payments obtained by them through licensing the patent. General Patent’s arrangement is a 50/50 split of all net recoveries. Should the patent enforcement firm fail to secure a settlement for the patent owner, however, they are out the money they invested in the case and the patent owner owes the patent enforcement firm nothing!” *Financing Patent Infringement Litigation*, General Patent Corporation, February 2009, <http://www.generalpatent.com/financing-patent-infringement-litigation-0>.

come to cover such areas as personal injury and family matters.⁴⁷ However, the commercial litigation sector is the one expanding more rapidly and significantly.

Private litigation funding in the UK is mainly the product of a combination of two factors that contributed to its development: on the one hand, a public policy trend during the 1980s and 1990s that focused on the reduction of publicly funded instruments for easing access to justice (legal aid); on the other, a judicial endorsement of private funding practices justified under the rationale of access to justice. Since the 1980s, the English government started reducing legal aid on the grounds that it was too expensive. Meanwhile, government policy encouraged privately funded access to justice by way of conditional fee agreements and after the event (ATE) insurance agreements, though not mentioning in principle TPLF.⁴⁸ The new policy setting was thought precisely to shift the funding of non-commercial injury claims, i.e. damages claims involving physical or mental injuries, away from the public purse (legal aid) to the private sector.⁴⁹ Later on, however, litigation funding has expanded to the commercial realm, in particular—like in Australia—in the field of insolvency,⁵⁰ thus transforming the UK in an attractive market, where companies are willing to invest in a variety of fields that include even family matters (divorces),⁵¹ favoring access to justice in a highly expensive legal system like the

⁴⁷ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 81.

⁴⁸ UNITED KINGDOM, LORD CHANCELLOR'S DEPARTMENT, ACCESS TO JUSTICE WITH CONDITIONAL FEES (March 1998), 3.3. However, third party funding was introduced as a result of an amendment sought in the House of Lords.

⁴⁹ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 82.

⁵⁰ *Seear v Lawson* (1880) 15 Ch D 729; *In re Park Gate Waggon Works Co.* (1881) 17 Ch D 234; *Guy v. Churchill* (1888) 40 Ch D 481; *Ramsey v Hartley* [1977] 1 WLR 686; *Norglen Ltd (in liq) v Reeds Rains Prudential Ltd* [1999] 2 AC 1.

⁵¹ A famous case is that of “Harbour Litigation Funding [...] financing the legal battle of Michelle Young, wife of the property tycoon Scot Young, [claiming] to have lost most of what was once a £400m fortune.” Elena Moya, *Hedge Funds, Investors and Divorce Lawyers – It’s a Match Made in*

UK one.⁵² Companies operating in the UK litigation funding market include IM Litigation Funding, Harbour Litigation Funding LTD,⁵³ Juridica Investment Limited,⁵⁴ among others. While initially the market was only composed of ‘alternative investment firms,’⁵⁵ in 2007 Allianz Litigation Funding⁵⁶ had become “the first mainstream institution to enter the UK’s fledgling market for third-party litigation funding.”⁵⁷ However, at the beginning of 2012 Allianz decided to discontinue its TPLF business in the UK and continental Europe.⁵⁸ Furthermore, the rapid expansion of TPLF in the UK arguably also benefited from the recent global financial crisis, as the flood of litigation triggered by the credit crunch prompted the formation of new companies that finance lawsuits.⁵⁹

TPLF in Europe is not at all limited to the UK. Claims Funding International, for instance, “is a litigation funding company incorporated in Ireland and managed from its office in Dublin. [Its] mandate is to identify, fund, manage,

Heaven, GUARDIAN.CO.UK, 16 October 2009
(<http://www.guardian.co.uk/business/2009/oct/16/hedge-funds-divorce-litigation-funding>).

⁵² For the most recent and exhaustive report on the costs of the UK civil justice system see RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (The Stationary Office, 2010).

⁵³ “Harbour Litigation funds claims with a claim value in excess of £3,000,000,” <http://www.harbourlitigationfunding.com>.

⁵⁴ Juridica predominantly invests in the US, the UK, and in international arbitrations cases, <http://www.juridicainvestments.com>.

⁵⁵ Juridica Investment Limited, for example, with over US\$200 million of assets under management, is listed on the London Stock Exchange’s Alternative Investment Market (AIM: JIL).

⁵⁶ Allianz Litigation Funding was the UK branch of Munich-based Allianz ProzessFinanz GmbH.

⁵⁷ Michael Herman, *Allianz to Fund UK Court Cases*, TIMES ONLINE, Oct. 18, 2007, available at <http://business.timesonline.co.uk/tol/business/law/article2688587.ece>.

⁵⁸ See Christian Stuerwald, *An Analysis of Allianz’ [sic] Decision to Discontinue its Litigation Funding Business*, Calunius Capital, January 2012, available at <http://www.calunius.com/media/2747/cs%20-%20calunius%20article%20on%20allianz%204%20january%202012.pdf> (last visited on January 31, 2014).

⁵⁹ Jane Croft, *Litigation Finance Follows Credit Crunch*, FINANCIAL TIMES (Online version), 27 January 2010, available at <http://www.ft.com/cms/s/0/7c98c38a-0ab1-11df-b35f-00144feabdc0.html>.

and resolve multi party (class action) and other significant legal claims in Europe and elsewhere.”⁶⁰

However, there is more than that. Third-party litigation funding is also growing in some continental Europe’s civil law countries. Apart from (and before)⁶¹ the UK, Allianz Prozessfinanzierung⁶² used to fund litigation costs to plaintiffs in Germany, Austria and Switzerland, when these held claims of at least €100,000, with high probability of success and with a potentially divisible award which the company can share in, in exchange of a 20-30% of the proceeds (if any).⁶³ Although Allianz has terminated its TPLF business, other companies still exist and have since then been created that are actively funding litigation in Europe.

Germany is likely the most consolidated market in continental Europe for TPLF. FORIS Finanziert Prozesse⁶⁴ was the first company operating in the TPLF business in Germany, and still today it offers both to advance the court costs and fees necessary to initiate an action as well as to assume the risk of a cost award if the plaintiff loses.⁶⁵ There are also other companies in Germany that offer similar services, including DAS Prozessfinanzierung AG,⁶⁶ Roland Prozessfinanz,⁶⁷ Juragent,⁶⁸ and Exactor AG.⁶⁹ It is interesting to notice that, while initially FORIS

⁶⁰ <http://www.claims-funding.eu>

⁶¹ Allianz had entered the UK market in 2007.

⁶² <http://www.allianz-profi.com>

⁶³ <http://www.allianz-profi.de>

⁶⁴ www.foris.de

⁶⁵ Roland Kirstein & Neil Rickman, *FORIS Contracts: Litigation Cost Shifting and Contingent Fees in Germany*, Centre for the Study of Law and Economics, Discussion paper 2001-04 available at <http://econpapers.repec.org/paper/zbwcsledp/200104.htm>(2001); Michael Coester & Dagobert Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, 24 CIV. JUST. Q. 83, 84 (2005).

⁶⁶ www.das-profi.de

⁶⁷ http://www.roland-prozessfinanz.de/de/roland_prozessfinanz

⁶⁸ <http://www.juragent.de>

⁶⁹ www.exactor.de

demanded 50 percent of the client's return from settlement or trial, nowadays—with more competition in the market—it only claims 30 percent.⁷⁰

In the civil law world, as will be discussed in the next chapter, TPLF is not as developed as in the common law world. However, there are signs pointing to an increasing market in those jurisdictions as well. For example, companies have been funding litigation in Austria,⁷¹ France,⁷² the Netherlands,⁷³ and Switzerland.⁷⁴

In addition to the geographic expansion of the TPLF industry, it is worth noting that TPLF companies have been expanding the scope of the types of claims they support. Leaving aside the world of consumer litigation finance (typical of the US market, and of the UK to some extent), in the commercial realm companies have financed litigation and (international) arbitration in cases involving contract breach claims, bankruptcy cases,⁷⁵ securities litigation, class actions (but only in some jurisdictions), damage claims for antitrust laws violations,⁷⁶ and went even farther,

⁷⁰ R. Kirstein & N. Rickman, *FORIS Contracts: Litigation Cost Shifting and Contingent Fees in Germany*, *supra* note 65, 3-4.

⁷¹ See e.g. AdvoFin Prozessfinanzierung AG, <http://www.advo-fin.at>, or Lexdroit, <http://www.lexdroit.at>.

⁷² For example, Alter Litigation (<http://www.alterlitigation.com>) is the first litigation funding company in France: <http://www.alterlitigation.com>.

⁷³ See e.g. Liesker Legal (<http://www.lieskerlegal.nl/index.php?lang=en>). The company claims to be the market leader in litigation funding in the Netherlands.

⁷⁴ The first Swiss litigation financing company was Prozessfinanz—www.prozessfinanz.ch: see Christian Toggenburger, *Financing Private Litigation – A European Alternative to Contingency Fees*, 4 EUR. J. LAW REFORM 603 (2002). Reportedly, a draft law proposed by resolution of the Cantonal Council of Zurich in 2003 and i.a. prohibiting TPLF was challenged before the Swiss courts. In a decision of 10 December 2004, the Federal Supreme Court in Lausanne ruled that the relevant provision of the draft law prohibiting TPLF should be set aside, on the basis that it would restrict freedom of commerce in a way that was disproportionate to its intended purpose.

⁷⁵ See Patrick M. Jones, *Third-Party Litigation Funding In Bankruptcy Cases*, LAW JOURNAL NEWSLETTERS, ALM Media Properties, LLC (2013).

⁷⁶ On TPLF in antitrust private enforcement actions in Europe see e.g. *E.V.O. (Dutch Shippers' Council) Endorses Claims Funding International to Companies Claiming Against Air Freight Cartels*, Claims Funding International (September 2009), available at [http://www.claims-funding.eu/10.html?&tx_ttnews\[tt_news\]=18&tx_ttnews\[backPid\]=4&cHash=ff631a4986](http://www.claims-funding.eu/10.html?&tx_ttnews[tt_news]=18&tx_ttnews[backPid]=4&cHash=ff631a4986).

e.g. financing cases for the recovery of funds stolen through corruption in emerging markets, as recently reported.⁷⁷

Finally, it is worth mentioning that TPLF not only has given rise to an investment industry directly interested in funding litigation for profit, but also to an array of related services. These include e.g. due diligence services by law firms or other service providers who assess legal claims on behalf of litigation funders. Moreover, they also include other consulting businesses: for example, Tim Scrantom, former founder and managing director of Juridica and later of BlackRobe Capital Partners LLC (a no longer existing litigation funding company) recently co-launched a consultancy firm with specific expertise on TPLF in order to assist clients better navigate the market and its players.⁷⁸

⁷⁷ See Joe Leahy, *Fund Sees Brazilian Fraud as Next Big Thing in Emerging Markets*, FINANCIAL TIMES, 8 December 2013, available at <http://www.ft.com/cms/s/0/cd441484-5e8a-11e3-8621-00144feabdc0.html#axzz2sTK3VoCM> (last visited on February 5, 2014).

⁷⁸ Scrantom Dulles International PLLC (<http://www.sdils.com>).

CHAPTER II
THE LAW OF TPLF: A COMPARATIVE ANALYSIS

A. COMMON LAW

1. *Traditional Prohibitions: Maintenance and Champerty*

The common law has witnessed a significant expansion of TPLF during the past twenty years.⁷⁹ However, this development has not taken place at a pace determined by free market forces, but the industry has encountered resistance from courts of law that have long been debating the legal status of TPLF. In particular, TPLF has encountered its harshest obstacle in the common law doctrines of maintenance and champerty.⁸⁰

In the words of the US Supreme Court, “[p]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a

⁷⁹ See i.a. Nicholas Dietsch, *Litigation Financing in the U.S., the U.K., and Australia: How The Industry Has Evolved In Three Countries*, 38 N. KY. L. REV. 687 (2011).

⁸⁰ See Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002); Susan L. Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004), 55; Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005), 650; Mariel Rodak, *It’s About Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement*, 155 U. PA. L. REV. 503 (2006); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007), 646-647; Courtney R. Barksdale, *All that Glitter Isn’t Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707 (2007) 735; Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011) 63-67.

financial interest in the outcome”.⁸¹ By definition, therefore, maintenance and champerty prohibit TPLF.⁸²

Many common law jurisdictions have abolished maintenance and champerty as both torts and criminal offences.⁸³ However, some continue to recognize and enforce these doctrines and thus limit the expansion of TPLF.⁸⁴ In addition, even where maintenance and champerty have been abolished, these doctrines continue to survive as rules of public policy that can be raised to render TPLF agreements void and unenforceable.⁸⁵ In some cases, courts have also been able to make use of this leverage to exercise control on the terms of TPLF agreements. As a result, the legal status of TPLF is disputed in many common law jurisdictions.

In general terms, what characterizes the experience of TPLF in the common law world is a tendency which traces back from an original broad prohibition of

⁸¹ *In re Primus*, 436 US 412 n. 15 (1978).

⁸² NEW YORK STATE BAR ASSOCIATION, ETHICS COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING, 16 April 2013, 11.

⁸³ England: *Criminal Law Act 1967* (UK) s 13. Identical provision was made for Northern Ireland by s. 16 of the *Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968*. Australian states: *Maintenance, Champerty and Barratry Act 1993* (North South Wales); *Civil Law (Wrongs) Act 2002* (Australian Capital Territory) s 229; *Criminal Law Consolidation Act 1935* (South Australia) Sch 11, 1 (3); V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 14. In the United States only a few cases seem to have applied champerty as a tort in the last hundred years (*ibid.*).

⁸⁴ Hong Kong is one example. See e.g. *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* [2007] HKCU 246, in which the Court of Final Appeal in Hong Kong noted that the “the common law rules making maintenance and champerty criminal offences, torts and a ground for public policy for invalidating tainted contracts were part of Hong Kong law prior to 1997 and remain applicable by virtue of Article 8 of the Basic Law.” See also the more recent decision *Winnie Lo v HKSAR* [2011] FACC 2/2011, where the Court of Final Appeal made clear that the prohibition on champerty and maintenance is not unconstitutional and remains part of the law in Hong Kong. However, the Court also indicated that reform should be considered with regards to this area of law. As Ribeiro PJ stated: “I wish to raise for consideration the question whether and to what extent criminal liability for maintenance should be retained in Hong Kong [...]. The issues are, however, of some complexity and may involve taking a different view in respect of maintenance as opposed to champerty; and of criminal as opposed to tortious liability. It is in my view a fit topic to be referred to the Law Reform Commission.”

⁸⁵ *Wallersteiner v Moir (No 2)* (1975) QB 373; *Trendtex Trading Corp v Credit Suisse* (1982) AC 679, 702; *Roux v Australian Broadcasting Commission* (1992) 2 VR 577, 605; *Quach v Hunt P/L* (2000) 32 MVR 263; *Smith v Roach* (2002) 42 ACSR 148.

champertous agreements towards a gradually increasing relaxation of that doctrine and contextual liberalization of the practice of TPLF. Before entering the exploration of how such relaxations have taken place in the three main common law jurisdictions where TPLF has developed (Australia, the US, and the UK), and how—by contrast—courts still use them to strike down TPLF agreements (or at least impose that those agreements be structured according to certain standards) in certain other jurisdictions, it is useful to briefly explain what maintenance and champerty are as well as their rationale and historical origins.

Champerty is considered a *species* within the wider category of maintenance, where to ‘maintain’ indicates the action of who “assist[s] a litigant in prosecuting or defending a claim.”⁸⁶ In particular, champerty (“an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds.”⁸⁷) is considered to be an illegal form of maintenance.⁸⁸ In the words of NY Court of Appeals Judge Cardozo, “maintenance inspired by charity or benevolence has been sharply set apart from maintenance for spite or envy or the promise or hope of gain”,⁸⁹ being the former considered legal while the latter, today simply identified as ‘champerty,’ illegal.⁹⁰ An agreement in which a third party supports another’s litigation in exchange for a share of the proceeds in case of success and nothing in case of loss, where therefore the funder has no other interest than financial, is

⁸⁶ BLACK’S LAW DICTIONARY 1039 (9th ed. 2009).

⁸⁷ *Ibid.* 262.

⁸⁸ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

⁸⁹ *In the Matter of the Estate of Gilman* 251 N.Y. 265, 271 (1929).

⁹⁰ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

understood to fall under the category of champertous agreements and is thus, at least in principle, considered void.

The doctrine of champerty is an ancient one. According to a majority opinion, it developed in medieval England as the merchant class was growing in importance and the economic power of the feudal nobles was beginning to decline.⁹¹ In particular, the doctrine of champerty developed as a judicial and statutory⁹² reaction to a practice that was taking place among feudal lords, whereby these would underwrite the costs of suits carried out by others for the recovery of land in exchange for a share of the result. By this means the lords could become joint owners of estates at investment prices well below the market value of the land, increasing the size of their retinues and thus aggrandizing their political power.⁹³

In light of this background, the doctrine of champerty seems to owe much of its rationale to a particular historical, economic and social context that no longer subsists in the modern world. Legal rules are not insensible to social and economic changes, but they follow those and adapt throughout time depending on new social contexts.⁹⁴ Due to the changes that differentiate current times from the Middle age, the doctrine of champerty seems to have lost its importance, which justifies loosening its severity and allowing TPLF to develop.

⁹¹ Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 51-52 (1935).

⁹² The English legislature passed a series of statutory instruments prohibiting champerty between 1275 and 1541, which are well described in PERCY H. WINFIELD, *HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCESS* 151 (1921), and in SIR W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 395-400 (5th ed., Vol. 3, 1942).

⁹³ V. WAYE, *TRADING IN LEGAL CLAIMS*, *supra* note 16, 12-13.

⁹⁴ See for all Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

Many commentators and judges have supported the idea that champerty is an obsolete doctrine that should be abandoned from the common law.⁹⁵ Jeremy Bentham, writing in 1787, argued that these prohibitions were no longer necessary.⁹⁶ However, according to a different view, valid reasons for prohibiting champerty still subsist and include a desire to discourage frivolous litigation, quarrels, resistance to settlement and interference with the attorney-client relationship,⁹⁷ which explains why courts from time to time continue to apply the prohibition of champerty to void TPLF agreements.

In addition to maintenance and champerty, some argue that the other chief potential legal impediment to TPLF are usury statutes.⁹⁸ Usury, the act of lending money at an unlawfully high rate of interest, is another ancient legal doctrine.⁹⁹ In its common conception, a fundamental element of usury that distinguishes it from TPLF is the borrower's absolute obligation to repay the lender, with repayment not contingent on any other event or circumstance: in TPLF, the repayment is

⁹⁵ See e.g. in Australia, *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; in the UK, *Arkin v Borchard Lines Ltd* [2005] 2 Lloyd's Rep 187; in the US, *Saladini v Righellis* 687 NE 2d 1224 (1997); *Osprey, Inc v Cabana Ltd Partnership* 340 SC 367, 523 SE 2d 269 (2000); *Hardick v Homol* 795 So 2d 1107 (2001).

⁹⁶ Keith N. Hylton, *The Economics of Third-party Financed Litigation*, Boston University Working Paper No. 11-57 (2011), 5.

⁹⁷ A.L.G., *The Effect of Champerty in Contractual Liability* 79 L. Q. REV. 493, 494 (1963).

⁹⁸ See Susan L. Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 89-90 (2002). Other opinions that consider the relevance of usury for TPLF include J.H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, *supra* note 80; M. Rodak, *It's About Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement*, *supra* note 80; C.R. Barksdale, *All that Glitter Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, *supra* note 80; D.R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, *supra* note 80; S.L. Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, *supra* note 80; V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 126-130. See also Sheri P. Adler, *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329 (2012); and Jenna W. Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750 (2012).

⁹⁹ The world's first recorded usury law was part of the Babylonian Code of Hammurabi written in 1790 B.C.

contingent to the plaintiff's recovery of any proceeds. In other words, usury laws apply to loans but not to TPLF agreements, which cannot be qualified as loans.¹⁰⁰

2. *Opening Up to TPLF*

In the following sections I briefly survey how and to what extent the law in Australia, the US, and the UK respectively has been moving away from a strict application of the prohibition of champerty, thus embracing an increasing liberalization of the practice of TPLF. Thereafter, I briefly discuss a number of other minor experiences of common law jurisdictions that have liberalized TPLF, as well as some examples of countries that have retained maintenance and champerty to varying extents, allowing courts to restrict TPLF to certain types of transactions considered in line with public policy interests.

a) Australia

Maintenance and champerty were once torts and crimes in all Australian jurisdictions.¹⁰¹ However, courts allowed TPLF pursuant to settled common law exceptions: if there was a *bona fide* community of interest between the plaintiff and

¹⁰⁰ See *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at *6 (N.Y. Sup. Ct. Mar. 2, 2005), where Judge Warshawsky wrongfully considered a litigation funding agreement a 'loan' based on the fact that a positive outcome of the suit was a 'sure thing,' given that the plaintiff was suing under a statute that imposed strict liability. That judgment has to be considered wrong, because it cannot be said that all civil cases based on strict liability can be said to be 'sure things.' See A. Sebok, *A New York Decision That May Imperil Plaintiffs' Ability to Finance Their Lawsuits: Why It Should Be Repudiated, or Limited to Its Facts*, FINDLAW, 18 April 2005, available at <http://writ.news.findlaw.com/sebok/20050418.html>.

¹⁰¹ In Australia, the common law prohibition of litigation funding was justified in part by the concern that the judicial system should not be the site of speculative business ventures. However, the primary aim was to prevent abuses of court process (vexatious or oppressive litigation, elevated damages, suppressed evidence, suborned witnesses) for personal gain. LITIGATION FUNDING IN AUSTRALIA, *supra* note 16, 4.

the funder, or if the plaintiff was impecunious and the funder was not acting with any collateral motive.¹⁰² Today, legislation in the Australian Capital Territory, New South Wales, South Australia, and Victoria has expressly abolished maintenance and champerty both as a crime and as a tort.¹⁰³ In these jurisdictions, however, courts could set aside a TPLF agreement if it is found to be inconsistent with public policy considerations upon which the prohibition was based at common law.¹⁰⁴

Since 1995, a new statutory exception to the rule against champerty has developed. Under their statutory powers of sale,¹⁰⁵ insolvency practitioners may now contract for the funding of lawsuits if these are characterized as company property. Many such actions are for voidable transactions or misfeasance by company officers.¹⁰⁶ Litigation funding companies emerged to serve this market, and much of litigation funding in Australia continues to be under the statutory exception for insolvency. However, a number of companies have begun to fund non-insolvency plaintiff lawsuits.¹⁰⁷

The legitimacy of TPLF agreements outside insolvency was challenged before the Australian courts, producing a series of conflicting judicial decisions.¹⁰⁸ Central to the question on the legitimacy of TPLF is a series of conflicting public

¹⁰² LITIGATION FUNDING IN AUSTRALIA, *supra* note 16, 4.

¹⁰³ *Civil Law (Wrongs) Act 2002* (ACT) s 221; *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) 3, 4, 6; *Criminal Law Consolidation Act 1935* (SA) Sch 11 ss 1(3), 3; *Wrongs Act 1958* (Vic) s32 and *Crimes Act 1958* (Vic) s322A.

¹⁰⁴ See e.g. *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW) s 6; *Wrongs Act 1958* (Vic) s32 (2).

¹⁰⁵ For example, the powers of disposal given to a receiver to dispose of a company's property under the *Corporations Act 2001* (Cth): s 420(2)(b) and (g). See also the powers of disposal accorded to a liquidator by *Corporations Act 2001* (Cth) s 477(2)(c). Statutory powers of sale also arise from provisions of the *Bankruptcy Act 1966* (Cth), and for trustees in all jurisdictions.

¹⁰⁶ LITIGATION FUNDING IN AUSTRALIA, *supra* note 16, 5.

¹⁰⁷ For two examples see *QPSX Ltd v Ericsson Australia Pty Ltd* [2005] FCA 933; *Fostif v Campbell Cash and Carry* [2005] NSWCA 83.

¹⁰⁸ The key cases are discussed in *Fostif v. Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83.

policy arguments. On the one hand, access to justice has become a powerful consideration for courts in approving funding arrangements. On the other hand, courts have been challenged by defendants on the grounds of the arguments underpinning the traditional prohibitions of maintenance and champerty, based on the doctrine of abuse of process.¹⁰⁹ Access to justice has played a fundamental role in leading courts in Australia (as well as in the UK) to approve funded proceedings¹¹⁰ to such an extent that, despite numerous challenges in the last decade, no funding agreements have been struck down in Australian courts. Until recently, however, TPLF in cases other than insolvency cases was still uncertain.

In 2006, the Australian High Court in *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd*¹¹¹ resolved the conflict and gave its imprimatur to litigation funding.¹¹² Since then, TPLF has been growing and other judges have endorsed commercial litigation funding for its potential to “inject a welcome element of commercial objectivity into the way in which [litigation] budgets are framed,”¹¹³ to increase the efficiency with which litigation is conducted and to foster the aims of Australian class action legislation.¹¹⁴ Support for commercial litigation funding has

¹⁰⁹ J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 107.

¹¹⁰ See also V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 63-67.

¹¹¹ *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41.

¹¹² V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 55.

¹¹³ *QPSX Limited v. Ericsson Australia Pty Ltd* [2005] FCA 933, [54].

¹¹⁴ *Kirby v. Centro* [2008] FCA 1505.

also come from outside the courts, namely from the Law Council of Australia¹¹⁵ and the Law Institute of Victoria,¹¹⁶ among others.¹¹⁷

While *Campbells v. Fostif* made clear that TPLF is admissible in Australia, TPLF has continued to be a controversial issue, although controversy has turned to matters of regulation. In this regard, a 2011 majority decision of the New South Wales Court of Appeal in *Chameleon*¹¹⁸ stated that TPLF agreements constitute *prima facie* a financial product. The basis for such conclusion was that TPLF agreements are a facility through which financial risk is managed. Consequently, TPLF funders should hold an Australian Financial Services License in order to operate.¹¹⁹ However, the High Court overturned this decision by holding that TPLF agreements can be best described as a credit facility and thus are excluded from the definition of financial product.¹²⁰

The last decade has witnessed an expansion of TPLF agreements in the area of class actions.¹²¹ The development in this area has been so remarkable that TPLF has actually become the main way of financing class action litigation in Australia.¹²²

¹¹⁵ LAW COUNCIL OF AUSTRALIA, SUBMISSION TO STANDING COMMITTEE OF ATTORNEYS-GENERAL (14 September 2006) available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C744AB2-1C23-CACD-2297-5D181CEBB545&siteName=lca

¹¹⁶ See Bernard Murphy and Camille Cameron, *Access to Justice and the Evolution of Class Actions in Australia*, 30 MELB. U. L. REV. 399 (2006); John North, *Litigation Funding: Much to be Achieved with the Right Approach*, 43 LAW SOCIETY JOURNAL 66, 69 (2005).

¹¹⁷ See e.g. NSW YOUNG LAWYERS CIVIL LITIGATION COMMITTEE & NSW YOUNG LAWYERS PRO BONO TASKFORCE, JOINT SUBMISSION TO THE STANDING COMMITTEE OF ATTORNEY GENERALS' REVIEW INTO LITIGATION FUNDING IN AUSTRALIA (2006) available at <http://www.lawsociety.com.au/idc/groups/public/documents/internetyounglawyers/025814.pdf>

¹¹⁸ *International Litigation Partners Pte Ltd v. Chameleon Mining NL* [2011] NSWCA 50.

¹¹⁹ J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, at 107-108.

¹²⁰ *International Litigation Partners Pte Ltd v. Chameleon Mining NL & Others* [2012] HCA 45.

¹²¹ J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 96.

¹²² *Ibid.*, 100.

Importantly, in *Brookfield Multiplex v. International Litigation Funding Partners*,¹²³ the Federal Court of Australia ruled that TPLF agreements amount to managed investment schemes. The qualification of TPLF agreements as managed investment schemes made funders and TPLF agreements subject to a wide range of burdensome requirements. The Australian Securities and Investment Commission initially provided a provisional exemption from compliance with such requirements.¹²⁴ Subsequently, the *Corporations Amendment Regulation 2012 (No. 6)* excluded litigation funding schemes and similar arrangements from the definition of managed investment schemes.¹²⁵

b) United States

The doctrines of maintenance and champerty traditionally also belong to the US states' common law, where they are typically related back to the English common law doctrines that were received by US states and maintained after the American revolution.¹²⁶

Restrictions to maintenance exist to varying degrees across US states. All states now permit at least one form of maintenance, lawyer's contingency fees,¹²⁷ while—conversely—all states prohibit at least what is referred to as 'malice maintenance,' i.e. when a third party supports a stranger litigant for pure spite of

¹²³ *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147.

¹²⁴ J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 110.

¹²⁵ *Corporations Amendment Regulation No. 6* (2012), §1(1).

¹²⁶ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

¹²⁷ Lawyer's contingency fees have also been defined as an exception to the prohibition of champerty, but that does not seem the right interpretation. On contingency fees as an exception to the prohibition of champerty see S.L. Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, *supra* note 80, 57; *contra* see A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

malevolence toward the target of the person aided by the maintainer.¹²⁸ As it appears from these two examples, many conceptions of maintenance exist that are prohibited to varying degrees across US states.¹²⁹ What is of our interest here is what is referred to as ‘profit maintenance,’ or champerty.

The legal status of champerty in the US is not uniform and its picture is quite complex.¹³⁰ For the purpose of this section of the dissertation—that of providing an overview of the status of TPLF in the common law world—I will use the following paragraphs to summarize the evolution of the legal status of TPLF in the US helping myself with some approximations, referring to the existing literature for more detailed observations.¹³¹

Like in Australia, champerty is neither a tort nor a crime in most US states, but its most visible impact is as a contract defense.¹³² Until the emergence of TPLF, US courts rarely enforced the doctrine of champerty. When TPLF emerged, American courts initially rarely used this doctrine to void TPLF agreements. Furthermore, some courts expressly took the position in favor of the abolition of maintenance and champerty on the grounds that those doctrines no longer responded to the need of protecting against speculations in lawsuits, the bringing of frivolous

¹²⁸ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

¹²⁹ For a detailed discussion see A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

¹³⁰ For an in-depth analysis see A.J. Sebok, *The Inauthentic Claim*, *supra* note 80. According to Sebok, restriction on champerty can be categorized under three categories: restrictions on *what* lawsuits may be maintained for profit; restrictions on *how* lawsuits may be maintained for profit; restrictions on the *cause* of the maintenance for profit.

¹³¹ See in particular A.J. Sebok, *The Inauthentic Claim*, *supra* note 80; and P. Bond, *Making Champerty Work: An Invitation to State Action*, *supra* note 80, 1333-1341 (who offers in the Appendix an overview of champerty law in all fifty-one states).

¹³² As such, its visibility in case law is somehow proportional to the amount of champertous agreements. P. Bond, *Making Champerty Work: An Invitation to State Action*, *supra* note 80, 1304.

claims and other public policy concerns that could be addressed more efficiently by other means.¹³³

At the turn of the new millennium there has been a judicial backlash against commercial investment in litigation in the United States.¹³⁴ A number of US courts have taken a negative view and have used champerty¹³⁵ and other doctrines—in particular usury¹³⁶—as significant obstructions to commercial investments in litigation.

The recent situation in the US is not uniform and can be roughly portrayed as follows: in some states champerty is subject to statutory prohibition,¹³⁷ in some others its prohibition is embodied in the common law,¹³⁸ in some other states it remains relevant only as principle of public policy, and in others it is permitted,¹³⁹ among which in a number of cases it is explicitly permitted.¹⁴⁰

¹³³ *Saladini v Righellis* 687 NE 2d 1224 (1997); *Osprey, Inc v Cabana Ltd Partnership* 340 SC 367, 523 SE 2d 269 (2000); *Hardick v Homol* 795 So 2d 1107 (2001).

¹³⁴ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 111.

¹³⁵ *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721.

¹³⁶ See e.g. the position of the lower courts then reversed by the Ohio Supreme Court in *Rancman v. Interim Settlement Funding Corp.*, *supra* note 135.

¹³⁷ See e.g. Louisiana: *Law Civ Code Ann Art 2447* (but only applies to purchases by attorneys and officers of the court); Mississippi: *Miss Code Ann § 97-9-11*; Kentucky: *KRS 372.060*; Georgia: *OCGA § 13-8-2*.

¹³⁸ For example, IL: *Midtown Chiropractic v Illinois Farmers Ins Co* 812 NE 2d 851 (2004); PA, *Fleetwood Area School District v Berks County Bd of Assessment Appeals* 821 A 2d 1268 (2003); MN, *Johnson v Wright* 682 NW 2d 671 (2004); RI, *Toste Farm Corp v Hadbury Inc* 798 A 2d 901 (2002). The examples are among those reported by V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 112.

¹³⁹ Based upon the survey offered by P. Bond, *Making Champerty Work: An Invitation to State Action*, *supra* note 80 (Appendix), reported and updated by A.J. Sebok, *The Inauthentic Claim*, *supra* note 80, twenty-eight U.S. states permitted champerty as of 2002: AZ, *Landi v. Arkules*, 835 P.2d 458 (Ariz. App. 1992); CA, *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124 (Cal. 1987); CO, *Fastenau v. Engel*, 240 P.2d 1173 (Col. 1952); CT, *Robertson v. Town of Stonington*, 750 A.2d 460 (Conn. 2000); FL, *Kraft v. Mason*, 668 So.2d 679 (Fla. 1996); HI, *TMJ Hawaii, Inc. v. Nippon Trust Bank*, 153 P.3d 444 (Haw. 2007); IA, *Wright v. Meek*, 3 Greene 472 (Iowa 1852); KS, *Boettcher v. Criscione*, 299 P.2d 806 (Kan. 1956); LA, *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598 (6th Cir. 1982); ME, ME. REV. STAT. tit. 9A §12-101 (2009) (partially amending ME. REV. STAT. 17A §516(1) (2009)); MD, *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112 (Md. 1998); MA, *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997); MI, *Smith v. Childs*, 497 N.W.2d 538 (Mich. App. 1993); MO, *Schnabel v. Taft Broad. Co.*, 525 S.W.2d 819 (Mo. App. 1975); MT, *Green v. Gremaux*, 945 P.2d 903 (Mont. 1997); NH, *Adkin Plumbing & Heating Supply Co. v.*

Even in states that have retained champerty, it has been argued that the doctrine is on the wane, in the light of developments that have considerably broadened the exceptions to the champerty prohibition.¹⁴¹ First, champerty generally only applies to TPLF where the party sharing in the proceeds has no legitimate interest in the outcome of the action.¹⁴² Second, champerty (and maintenance) cannot be established unless there is officious intermeddling. Thus, the doctrines may not apply where the maintained party has initiated suit prior to entering a TPLF agreement, where the funder plays no role in the conduct of the litigation and where the terms of the financing agreements are fair.¹⁴³

From the observation of these exceptions derives that the doctrine of champerty may cover situations that go beyond TPLF agreement where the funder acquires no control of the litigation. The issue of who retains control of the litigation

Harwell, 606 A.2d 802 (N.H. 1992); NJ, *Polo v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987); NY, *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994), NC, *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. App. 2008); ND, *Interstate Collection Agency v. Kuntz*, 181 N.W.2d 234 (N.D. 1970); OH, ORC ANN. 1349.55 (2009) (reversing *Rancman v. Interim Settlement Funding Corp.* (99 Ohio St.3d 121(2003))), OK, *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441 (Okla. 1981); OR, *Brown v. Bigne*, 28 P. 11 (Or. 1891); SC, *Osprey, Inc. v. Cabana Ltd.*, 532 S.E.2d 269 (S.C. 2000); TN, *Record v. Ins. Co. of N. Am.*, 438 S.W.2d 743 (Tenn. 1969); TX, *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App. 2006); WA, *Giambattista v. Nat'l Bank of Commerce of Seattle*, 586 P.2d 1180 (Wash. App. 1978); and WV, *Currence v. Ralphsnyder*, 151 S.E. 700 (W. Va. 1929).

¹⁴⁰ As reported by A. Sebok, sixteen U.S. states now explicitly permit champerty as a form of maintenance for profit: CO, *Fastenau v. Engel*, 240 P.2d 1173 (Col. 1952); CT, *Robertson v. Town of Stonington*, 750 A.2d 460 (Conn. 2000); FL, *Kraft v. Mason*, 668 So. 2d 679 (Fla. 1996); IA, *Wright v. Meek*, 3 Greene 472 (Iowa 1852); KS, *Boettcher v. Criscione*, 299 P.2d 806 (Kan. 1956); ME, ME. REV. STAT. tit. 9A §12- 101 (2009) (partially amending ME. REV. STAT. 17A §516(1) (2009)); MD, *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112 (Md. 1998); MA, *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997); MO, *Schnabel v. Taft Broad. Co.*, 525 S.W.2d 819 (Mo. App. 1975); NH, *Adkin Plumbing & Heating Supply Co. v. Harwell*, 606 A.2d 802 (N.H. 1992); NC, *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. App. 2008); OH, ORC ANN. 1349.55 (2009) (reversing *Rancman v. Interim Settlement Funding Corp.* (99 Ohio St.3d 121(2003))); OK, *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441 (Okla. 1981); OR, *Brown v. Bigne*, 28 P. 11 (Or. 1891); WA, *Giambattista v. Nat'l Bank of Commerce of Seattle*, 586 P.2d 1180 (Wash. App. 1978); and WV, *Currence v. Ralphsnyder*, 151 S.E. 700 (W. Va. 1929). A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

¹⁴¹ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16,113.

¹⁴² For examples and cases see *ibid.*, 113.

¹⁴³ *Ibid.*, 114.

is of fundamental relevance for the law on TPLF. Assume to represent with a line the leitmotif of a series of situations. On one end is TPLF narrowly considered, where no control is transferred from the claimholder to the funder. On the opposite end is a funding agreement in which the claimholder transfers to the funder complete control over the lawsuit: this extreme situation coincides with what is referred to as ‘assignment’ of claims. The assignment of a claim falls under a different doctrine, the common law rule of non-assignability.¹⁴⁴ Between these two extreme solutions is an indefinite quantity of intermediate situations that can fall under the realm of either common law doctrine. The distinction between, on the one hand, maintenance and champerty and, on the other, assignment is extremely faded, and as such it is of critical importance for who attempts to study future perspectives of development of TPLF.

c) United Kingdom

The experience of the UK is similar to the Australian one to the extent that TPLF first developed in the context of insolvency, then expanding to the whole realm of commercial litigation.¹⁴⁵ However, differently from Australia, the UK experience has demonstrated that TPLF needs not to be so confined, but it can expand beyond the commercial context into what is commonly referred to as the personal or consumer sphere.¹⁴⁶

¹⁴⁴ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

¹⁴⁵ Cento Veljanovski, *Third-Party Litigation Funding in Europe*, 8 J. L. ECON. & POL’Y 405 (2012), 418.

¹⁴⁶ V. WAYE, *TRADING IN LEGAL CLAIMS*, *supra* note 16, 105.

Apart from the development of case law on litigation funding, the English government's substantial shift in public policy from public mechanisms of financing poor people's litigation (legal aid) towards market-based alternatives during the 1990s was an important factor that contributed to the expansion of TPLF in the UK, especially for non-commercial matters. The reforms that were enacted at the end of the 1990s were stimulated by the raises in legal aid expenditure and were specifically adopted in order to shift the funding of non-commercial litigation away from the public purse. The *Access to Justice Act of 1999* removed legal aid for all civil cases involving money claims and introduced conditional fees and after-the-event insurance as new, private and market-based alternatives to finance litigation.¹⁴⁷ The *Act* in principle did not mention litigation funding, which was introduced as a result of an amendment sought in the House of Lords,¹⁴⁸ which however has never been brought into effect.¹⁴⁹ The *Access to Justice Act of 1999* can be considered the outcome of a general shift in public policy that matured during the 1990s concerning access to justice, which has been of important background relevance for the development of TPLF.

Until the beginning of the 1990s, the law on champerty and maintenance in the UK looked as follows: the common law principle was that contracts involving maintenance or champerty were void for public policy unless they fell within

¹⁴⁷ See UNITED KINGDOM, LORD CHANCELLOR'S DEPARTMENT, ACCESS TO JUSTICE WITH CONDITIONAL FEES, *supra* note 48.

¹⁴⁸ See United Kingdom Parliament Standing Committee E, *Access to Justice Bill [Lords]*, 13 May 1999, available at <http://www.publications.parliament.uk/pa/cm199899/cmstand/e/st990513/am/90513s01.htm>.

¹⁴⁹ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 87.

recognized exceptions, such as the common interest exception¹⁵⁰ or the statutory insolvency exceptions.¹⁵¹

In 1994, *Giles v Thompson*¹⁵² represented a fundamental change in British judicial thinking with respect to maintenance and champerty. Following *Giles*, English courts tend to consider that there are no longer public policy reasons supporting the general prohibition of third-party funding agreements limited by some exceptions. Conversely the new position of UK courts is that no prohibition on maintenance and champerty applies, with the exception of the case of wanton and officious intermeddling¹⁵³ and the case of trafficking in legal claims,¹⁵⁴ which are often intertwined.¹⁵⁵

Once again, central to the evaluation of the validity of a litigation funding agreement is the issue of who controls the litigation. English courts maintain strong resistance against the cession of control from the claimholder to the funder. A TPLF agreement that contemplates full transfer of control to the funder is void for champerty.¹⁵⁶ By contrast, absent the cession of control, TPLF agreements are fully

¹⁵⁰ Traditionally the common interest had to derive from the subject matter of the claim, rather than being a commercial interest coincidental to the claim (*Alabaster v. Harness* [1895] 1 QB 339). However, in the 1990s that requirement was relaxed allowing for any genuine commercial interest to be the basis for an exception to the common law position (see comments in *Giles v Thompson* [1993] 3 All ER 321, 333).

¹⁵¹ As noted by V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 106-107, in England, the general position in relation to insolvency office holders such as liquidators or trustees in bankruptcy is that those office holders are exempt from prohibitions arising in champerty and maintenance preventing the assignment of legal claims. *Seear v Lawson* (1880) 15 Ch D 729; *In re Park Gate Waggon Works Co.* (1881) 17 Ch D 234; *Guy v. Churchill* (1888) 40 Ch D 481; *Ramsey v Hartley* [1977] 1 WLR 686; *Norglen Ltd (in liq) v Reeds Rains Prudential Ltd* [1999] 2 AC 1.

¹⁵² *Giles v Thompson* [1994] 1 AC 142.

¹⁵³ *Ahmed v Powell* [2003] PNLR 22; *Factortame & Ors v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] QB 381.

¹⁵⁴ *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679.

¹⁵⁵ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 104.

¹⁵⁶ *Ahmed v Powell* [2003] PNLR 22.

valid under current UK law,¹⁵⁷ provided that they do not involve litigators subject to the conditional fee regime.¹⁵⁸

The TPLF industry is rapidly growing in the UK in a climate that is moving towards increasing liberalization. This trend is supported both by the government through public policy and by courts through case law. Five years ago, *Arkin v Borchard Lines Ltd*¹⁵⁹ was the first case where court indicated that third-party funding should not only be tolerated but also encouraged as a useful tool for facilitating access to justice.¹⁶⁰ Furthermore, the climate of support that reigns in the UK has found expression in the report by the Rt. Hon. Lord Justice Jackson on the costs of civil litigation that was published in January 2010. Justice Jackson stated that “[i]n some areas of civil litigation costs are disproportionate and impede access to justice.”¹⁶¹ With the scope in mind of “propos[ing] a coherent package of interlocking reforms, designed to control costs and promote access to justice,”¹⁶² he

¹⁵⁷ This approach has been confirmed by the Code of Conduct for Litigation Funders adopted by the Association of Litigation Funders of England and Wales (ALF) in November 2011. See THE ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND AND WALES, CODE OF CONDUCT FOR LITIGATION FUNDERS (November 2011) and further discussions below. An updated version of the Code (January 2014) is available at <http://associationoflitigationfunders.com/wordpress/wp-content/uploads/2014/02/Code-of-conduct-Jan-2014-Final-PDFv2-2.pdf>. For a discussion on the contents of an initial draft of the Code that was proposed for consultation by the Civil Justice Council to stakeholders in the Summer of 2010, see CIVIL JUSTICE COUNCIL, CONSULTATION PAPER. A SELF-REGULATORY CODE FOR THIRD PARTY FUNDING (2010).

¹⁵⁸ If a conditional fee regime applies, funding agreements must conform to its requirements (*Awwad v Geraghy & Co* [2001] QB 570 (CA); *Factortame & Ors v Secretary of State for Transport, Local Government and the Regions* (No. 8) [2003] QB 381).

¹⁵⁹ *Arkin v Borchard Lines Ltd* [2005] 2 Lloyd’s Rep 187.

¹⁶⁰ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 105.

¹⁶¹ RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, *supra* note 52, i.

¹⁶² *Ibid.*, i.

stated that third-party funding is beneficial and should be supported in that it promotes access to justice.¹⁶³

While it could safely be said that TPLF has been ‘accepted’ in the UK and it is there to stay, there continues to be some controversy with respect to this practice in the UK. However, such a controversy has shifted from whether or not TPLF should be permitted to whether or not TPLF should be regulated, and how.

Lord Justice Jackson specifically dealt with this issue in his Report. Perhaps as a result of the lobbying efforts by the TPLF industry,¹⁶⁴ Justice Jackson acknowledged that, at the present stage of the development of the TPLF market, parties who use such services are generally sophisticated enterprises with access to full legal advice. Hence, he argued that regulation is not yet required. However, he conceded that full statutory regulation may be required in case the use of TPLF expands on a larger scale.¹⁶⁵ Furthermore, Justice Jackson indicated that a satisfactory voluntary code should be drawn up and that such code should contain such provisions as effective capital adequacy requirements and restrictions to TPLF funders’ ability to withdraw support from ongoing litigation.¹⁶⁶

As a result of this ‘concession’ by Justice Jackson, the TPLF industry active on the UK market created the Association of Litigation Funders of England and Wales (ALF), and adopted a Code of Conduct for Litigation Funders in November

¹⁶³ *Ibid.*, 117. The Civil Justice Council (the “CJC”) has expressed a similar view. See the CJC report IMPROVED ACCESS TO JUSTICE – FUNDING OPTIONS AND PROPORTIONATE COSTS (June 2007) Recommendation 3 and Chapter C.

¹⁶⁴ Christopher Hodges, *Self-regulation (Jackson Report, Code of Conduct)*, in LE FINANCEMENT DE CONTENTIEUX PAR UN TIERS – THIRD PARTY LITIGATION FUNDING 151 (CATHERINE KESSEDIAN ed., Éditions Panthéon-Assas, 2012), 155.

¹⁶⁵ RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, *supra* note 52, 119.

¹⁶⁶ *Ibid.*, 124.

2011.¹⁶⁷ The contents of the Code are very much adapted to the recommendations advanced by Lord Justice Jackson. Particularly relevant is paragraph 8, which holds that TPLF providers may be liable for the full amount of adverse costs. This provision contravenes the ruling of the Court of Appeal in *Arkin v. Borchard*, where the court stated that the funder should be potentially liable for the costs of the opposing party only to the extent of the funding provided.¹⁶⁸

How the adoption of the Code of Conduct will impact the development of the TPLF industry in the UK remains to be seen. For example, the incorporation in the Code of the provision that holds TPLF potentially liable for the full amount of adverse costs may be an issue affecting the industry. It might be expected, however, that this change will not be detrimental to TPLF, as there seems not to be evidence proving that full liability for adverse costs may hamper TPLF.¹⁶⁹ In fact, the prospect of indemnifying defendants for the full adverse costs is not a major preoccupation for TPLF providers.¹⁷⁰

Another event that may influence the future development of TPLF in the UK is the reform on civil litigation costs that came into effect on 1 April 2013.¹⁷¹ In particular, the introduction of damages-based agreements (i.e., contingency fees) in civil litigation¹⁷² provides plaintiffs with a new way of financing litigation, which may pose a challenge to the TPLF industry.

¹⁶⁷ ALF, CODE OF CONDUCT FOR LITIGATION FUNDERS, *supra* note 157.

¹⁶⁸ *Arkin v Borchard Lines Ltd* [2005] 2 Lloyd's Rep 187.

¹⁶⁹ RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, *supra* note 52, 123.

¹⁷⁰ Cento Veljanovski, *Third-Party Litigation Funding in Europe*, *supra* note 145, 444.

¹⁷¹ LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT (2012).

¹⁷² *Ibid.*, Section 45.

d) Other Common Law Jurisdictions

In addition to Australia, the US, and the UK, TPLF has witnessed a trend of increasing liberalization also in other common law jurisdictions. All these jurisdictions share the traditional presence of the doctrines of maintenance and champerty, which are increasingly being abandoned. Among these, it is worth mentioning Bermuda,¹⁷³ Canada (though limited to the funding of class actions),¹⁷⁴ Jersey,¹⁷⁵ New Zealand,¹⁷⁶ and South Africa.¹⁷⁷

By contrast, other common law jurisdictions have received TPLF with less enthusiasm, and continue to enforce the champerty and maintenance prohibitions in order to limit the establishment of the practice in their territories.

A first major example is Ireland, where TPLF is not acceptable unless the TPLF agreement falls within one of the exceptions to the rules of champerty and maintenance. In particular, for a TPLF agreement to be permitted, the funder must

¹⁷³ According to Harbour Litigation Funding, TPLF “is provided to litigants in Bermuda on a fairly regular basis” (<http://www.harbourlitigationfunding.com/funding-map>). For a recent decision of the Supreme Court of Bermuda see *Stiftung Salle Modulable v Butterfield Trist (Bermuda) Limited* [2012] SC (Bda) 165.

¹⁷⁴ For some recent cases see: *E. Eddy Bayens and others v Kinross Gold Corporation and others*, 2013 ONSC 4974; *Stanway v Wyeth Canada Inc.* [2013] BCSC 1585; *The Trustees of the Labourers' Pension Fund of Central & eastern Canada v Sino-Forest Corporation* [2012] ONSC 2937; *Dugal v Manulife Financial Corporation* [2011] ONSC 1785 (SCJ); *MacQueen et al v Sydney Steel Corporation et al* [2010] Halifax no 218010; *Metzler Investment GMBH v Gildan Activewear Inc* [2009] OJ no 3315 (SCJ); *Hobsbawn v ATCO Gas and Pipelines Ltd* [2009] Calgary 0101-04999 (QB); *Holmes v London Life Insurance Co* [2007] CarswellOnt 268 (SCJ) (WL).

¹⁷⁵ See e.g. *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2013] JRC094; *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2012] JRC; *The Valetta Trust* [2011] JRC.

¹⁷⁶ For recent case law see: *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89; *Saunders v Houghton* [2012] NZCA 545; *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399; *Houghton v Saunders* [2011] HC Christchurch CIV-2008-409-000348; *Saunders v Houghton* [2010] 3 NZLR 331; *Waterhouse v Contractors Bonding Ltd* [2010] HC Auckland CIV-2010-404-3074; *Houghton v Saunders* [2008] NZCCLR 13.

¹⁷⁷ See *Litigation Funding in South Africa*, *supra* note 37. For some case law see: *PriceWaterHouse Coopers Inc and Others v National Potato Co-operative Ltd* [2004] (6) SA 66 (SCA); *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others* [2001] (4) SA 360 (W).

have a legitimate interest in the outcome of the litigation. For example, in the context of insolvency, if an insolvent company has a good cause of action, then its shareholders are likely to be permitted to fund the litigation, because they are creditors who have a legitimate interest in any recovery from the lawsuit. By contrast, if a professional litigation funder simply ‘buys into’ someone else’s litigation without having any legitimate interest other than financial, in this case the TPLF agreement is likely to be void.¹⁷⁸

Singapore has taken a very similar approach to Ireland. In particular, the Court of Appeal of Singapore recognized that a TPLF agreement is valid when the funder has a commercial interest in the proceedings.¹⁷⁹ By contrast, courts have invalidated TPLF agreements that were a mere sale of a bare cause of action to a third party who had no genuine commercial interest in the claim, in return for a division of the award.¹⁸⁰

B. CIVIL LAW WORLD

1. General Absence of Prohibitions

In the civil law world no specific legislative or judicial prohibitions seem to apply to TPLF. However, the industry is by no means as developed as it is in the common law world.

¹⁷⁸ See Harbour Litigation Funding’s report on Ireland, available at <http://www.harbourlitigationfunding.com/funding-map/IE>.

¹⁷⁹ *Lim Lie Hoa v Ong Jane Rebecca & Ors* [2005] SGCA 24.

¹⁸⁰ See Harbour Litigation Funding’s report on Singapore, available at <http://www.harbourlitigationfunding.com/funding-map/SG>.

According to a 2010 report, in the civil law world:¹⁸¹ in Argentina “there is no regulation on this issue;” in Brazil “third party funding is not prohibited;” in Bulgaria “neither special regulation nor restrictions on third party funding are provided;” in Estonia “third party funding of claims is permitted based on the general rules governing the performance of obligation by third party;” in Finland “generally speaking, third party funding of claims is not restricted but not very common;” in France “third-party funding is not forbidden *per se*. As French lawyers can only be paid by their clients or the clients’ agent (article 11.3 of the National Bar Association Rules), third-party funding appears possible under French law provided that the private party concludes a contract with the plaintiff governing the funding and apportioning of the damages obtained, and does not directly pay the lawyers’ fees;” in Italy “third party funding is possible but not frequent;” in Latvia “there are no restrictions on third party funding of claims; however it is not common practice in Latvia;” in Mexico “there is no express prohibition about third party funding neither on the Federal Bill nor in the Mexico City Bill;” in Slovakia “although third party funding is not prohibited (however not regulated) under Slovak law, if at all, it is rarely used;” in Spain¹⁸² “although nothing under Spanish law prohibits it, there is no experience of third party funding in the Spanish day-to-day practice.”¹⁸³

¹⁸¹ Here I am following the classification of legal systems offered by the research group JuriGlobe at the University of Ottawa, available at <http://www.juriglobe.ca/eng/index.php>.

¹⁸² For an opinion on a potential interest by international litigation funders in the Spanish market see Mercedes Serraller, *Los Fondos de Inversión Quieren Financiar Pleitos en España*, EXPANSIÓN, 26 October 2012, available at www.expansion.com/2012/10/26/juridico/1351270637.html.

¹⁸³ CLASS & GROUP ACTION 2010, INTERNATIONAL COMPARATIVE LEGAL GUIDE SERIES, Global Legal Group Ltd, London 2010, available at http://www.iclg.co.uk/index.php?area=4&kh_publications_id=119.

The rare exceptions to the absence of TPLF in continental European civil law countries—at least in the everyday practice—seem to be Austria, Belgium, France, Germany, the Netherlands, and Switzerland.¹⁸⁴ Furthermore, while in most Asian countries TPLF is not officially available, some countries belonging to the civil law tradition, such as China and Japan,¹⁸⁵ have introduced it¹⁸⁶ or are considering introducing it.¹⁸⁷

Because no prohibitions seem to apply, the reasons why TPLF has not developed in the civil law world are not clear. I argue that possible explanations should be looked for in some general structural and cultural characteristics of civil law jurisdictions, rather than in any rules of positive law. A number of factors are worth underlying that might have significance in the explanation of why TPLF has not developed in the civil law world. Before entering that inquiry, however, it is worth briefly analyzing the law of TPLF in the civil law world. In order to do so, I will discuss the law of TPLF in Germany, the most consolidated market for TPLF in the civil law world.¹⁸⁸

¹⁸⁴ According to CLASS & GROUP ACTION 2010, *supra* note 183, “In Switzerland, a third party can agree to cover the costs of a litigation. In return, the third party may agree to accept a share of the outcome of the litigation.”

¹⁸⁵ China and Japan are considered belonging to the civil law world, though as “mixed systems of civil law and customary law”, see the classification made available by JuriGlobe, *supra* note 247.

¹⁸⁶ Julie Bédard (Skadden, Arps, Slate, Meagher & Flom LLP), at a talk at Columbia Law School on 27 March 2013, stated that she had been involved in a litigation in the US where plaintiff was funded by a Chinese litigation funding company.

¹⁸⁷ Yue Qiao, *Legal-Expenses Insurance and Settlement*, ASIAN J. L. & ECON. Vol. 1: Iss. 1, Art. 4 (2010).

¹⁸⁸ It is likely that, from a private law perspective, TPLF agreements are structured in different ways depending on the jurisdiction. For example, Christopher Hodges suggests that in Belgium and the Netherlands (and Germany) the claims are assigned to the funders, even though payment is delayed until the success of the litigation. See *Discussion Partie III*, in LE FINANCEMENT DE CONTENTIEUX PAR UN TIERS – THIRD PARTY LITIGATION FUNDING, *supra* note 164, 175.

2. *A Case Study: Germany*

TPLF in Germany operates in the framework of the following context: as a rule, legal costs are borne by the losing party¹⁸⁹ (or apportioned between the parties); costs are often high, are fixed by law¹⁹⁰ and include court fees¹⁹¹ and attorney fees;¹⁹² additional costs particular to a case, including e.g. witnesses and expert reports, may arise for the means of proof. In the light of this context, high litigation costs determine a financial risk that can be prohibitive for the plaintiff. Contingency fees, which might be a solution for the elimination of the plaintiff's risk, have traditionally been prohibited in Germany, although the German legislator recently introduced a narrowly interpreted exception to this prohibition, which allows for contingency fees in limited circumstances where the plaintiff is actually financially unable to bear the costs of litigation.¹⁹³

¹⁸⁹ §§ 91 ff. ZPO. For an economic model, see Chapter IV, Section B. 2 (b).

¹⁹⁰ Court Fees Act (*Gerichtskostengesetz*) and Attorney Remuneration Act (*Rechtsanwaltsvergütungsgesetz*).

¹⁹¹ Court fees are directly proportional to the value of the claim, increasing at a diminishing marginal rate.

¹⁹² MATHIAS REIMANN & JOACHIM ZEKOLL (eds.), *INTRODUCTION TO GERMAN LAW* 377 (2nd ed., 2005).

¹⁹³ German law traditionally prohibited fee agreements that linked the compensation of an attorney to the outcome of a lawsuit, as well as agreements that provided a participation of an attorney in the rewards of a lawsuit (see § 49b Federal Attorney Act [BRAO] in the version valid until December 17, 2007). A ruling of the German Federal Constitutional Court (BVerfG) on December 12, 2006 marked the beginning of a new era, by ruling that an unconditional prohibition of contingency fee arrangements is disproportional as it hinders the access to justice in some situations (see BVerfG, December 12, 2006 – 1 BvR 2576/04 = NJW 2007, 979). The court therefore demanded that the legislator provide an exception and allow contingency fees in situations where “special circumstances in the person of the litigant [...] otherwise would prevent him from pursuing his rights.” The German legislator revised the legal framework for attorney fees and, following the court decision, reluctantly decided to lift the principle ban on contingency fees but only as far as necessary to comply with the court's demands. On July 1, 2008 the revised § 49b para. 2, sentence 1 of the BRAO became effective. Fee arrangements that link the fee or its amount to the outcome of the legal proceedings as well as arrangements that reward the attorney with a percentage of the recovery are still inadmissible unless such arrangements are authorized by a provision in the Attorneys Compensation Act (RVG). The newly implanted § 4a RVG who picked up the wording of the court decision provides such an exception. In order to fulfill the constitutional minimal requirements, it allows contingency fee arrangement when they are concluded “on a case by case basis provided that the party's financial conditions would otherwise prevent her from pursuing her rights.” This exception is interpreted

This background scenario seems to have favored the emergence of TPLF, which was introduced in Germany by FORIS in 1998 and is now offered by a number of companies.¹⁹⁴

TPLF agreements, unknown before in Germany, seem now to have taken a quite harmonious default structure within the industry.¹⁹⁵ What is of our interest here, however, are not the contractual rules that govern the relationship between the parties, but rather the nature of TPLF agreements and their enforceability under German law.

As far as the legal nature of TPLF contracts is concerned, the prevailing opinion in German literature¹⁹⁶ is that a TPLF contract creates a silent partnership under the German Civil Code (*Stille Gesellschaft bürgerlichen Rechts*) between the funder and the plaintiff.¹⁹⁷ This partnership is not registered in the commercial

narrowly, and its application depends on the objective financial circumstances of the individual client. A mere declaration of the client that he will not pursue his rights unless he is offered a contingency fee arrangement is insufficient (see, e.g. Joachim Teubel, in RVG: HANDKOMMENTAR (LUDWIG KROIB & HANS-JOCHEM MAYER eds., 5th ed., Nomos, 2102), § 4a RVG point 29). Attorneys are only allowed to conclude contingency fee arrangements if their client is either actually financially unable to bear the costs of litigation or if the potential costs are outweighed by the gains due to the small likelihood of success (see *ibid*, points 27 ff.). Michael Herwig, *Third Party Litigation Funding Under German Law – Mechanisms to Shift the Financial Risks and the Costs of Litigation*, Columbia Law School LL.M. paper 2013 (on file with author).

¹⁹⁴ See Chapter I, Section B.

¹⁹⁵ For an in-depth analysis of the contractual agreements regulating the relationship between a plaintiff and a funder see M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 87-94.

¹⁹⁶ See for all M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 95 and N. Dethloff, *Verträge zur Prozessfinanzierung gegen Erfolgsbeteiligung*, NEUE JURISTISCHE WOCHENSCHRIFT 2225, 2227 (2000). See also DIRK BÖTTGER, GEWERBLICHE PROZESSFINANZIERUNG UND STAATLICHE PROZESSKOSTENHILFE: AM BEISPIEL DER PROZESSFÜHRUNG DURCH INSOLVENZVERWALTER (2008).

¹⁹⁷ It is interesting to notice here the typical civil lawyers' attitude toward trying to bring back innovative contractual agreements within the pre-determined contractual 'types' designed in the civil code. See MAURO BUSSANI, LIBERTÀ CONTRATTUALE E DIRITTO EUROPEO (2005), 28-35.

register and the personal liability of the parties is unlimited.¹⁹⁸ The financing contract is neither considered a loan agreement¹⁹⁹ nor an insurance contract.²⁰⁰

It is argued that a silent partnership under the German Civil Code arises in TPLF because the funder and the claimholder are pursuing a joint aim, that being the common goal of both parties to assert the plaintiff's claim before a court and to achieve the highest possible award. A comment deserves attention here. The existing literature on TPLF, both in the common law and civil law world, has highlighted the existence of possible conflicts of interests between the funder and the plaintiff. Consequently, if on the one hand it is true that the funder and the plaintiff are moved by a common scope, on the other hand at some point their interests and goals may diverge.²⁰¹

The possible solution to this apparent contradiction concerns, once again, the issue of control, and—in my opinion—it moves from a descriptive toward a normative dimension. It has been argued that the partnership created by a TPLF contract is an undisclosed partnership, i.e. one in which only one partner—the plaintiff—is entitled to represent the partnership *vis-à-vis* third parties. Moreover, the plaintiff asserts the claim in his own name and decides on all steps to be taken

¹⁹⁸ M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 94.

¹⁹⁹ A loan exists only where the borrower is obliged to pay back the received amounts under no contingency. In TPLF contracts, the plaintiff is only obliged to repay if he is successful and receives from the defendant the amount advanced by the funder. The same argument has been made in the context of U.S. law: see *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at *6 (N.Y. Sup. Ct. Mar. 2, 2005) and the comments *supra* at note 100.

²⁰⁰ An insurance contract requires that the insurance coverage is provided in return for a premium. See M. HENSSLER, *RISIKO ALS VERTRAGSGEGENSTAND* 373 (1994); M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 95.

²⁰¹ Common law: see for all Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 BOND L. REV. 225 (2007). Civil law: see C. Toggenburger, *Financing Private Litigation – A European Alternative to Contingency Fees*, *supra* note 74, 627.

independently.²⁰² This might certainly be a descriptive assertion (in that it describes what in fact happens), but in my view it is relevant from a normative point of view: that is to say that a TPLF agreement should be considered a silent partnership, and—thus—valid, as long as the funder does not acquire any control over the lawsuit. Once again—like in most of the common law world—central to the validity of TPLF is the issue of control: if no control is transferred to the funder, TPLF does not seem to present any particular problem.

Another reason to interpret TPLF contracts as creating silent partnerships—as opposed to normal partnerships—is that no partnership asset exists. Notwithstanding the conclusion of a TPLF contract, the plaintiff's and the funder's assets remain strictly separate. The financing company, which is the silent partner, contributes to the partnership through the assumption of financial risk (through the advancement of payments) relating to the claimholder's lawsuit, facilitating the latter. After the final court decision, the partnership is liquidated according to the rules established in the contract.²⁰³

As far as the validity of TPLF is concerned, the prevailing opinion is that TPLF is permissible. The main problem²⁰⁴ TPLF encounters lies in its relationship with the prohibition of lawyers' contingency fees. Contingency fees, according to which a lawyer advances all litigation costs of his client in exchange for a share of the proceeds in case of success and nothing in the case of loss, are generally prohibited in Germany (subject to the limited exceptions discussed above).²⁰⁵ Critics of TPLF have argued that TPLF essentially serves the same function of contingency

²⁰² M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 95.

²⁰³ *Ibid.*, 95.

²⁰⁴ For a description of other minor problems, see *ibid.*, 98-101.

²⁰⁵ See note 193.

fees. In fact, from the perspective of the plaintiff, having the lawsuit financed by the lawyer or by a third party funder is essentially the same, the result being the elimination of his litigation cost risk.

The first issue is whether the prohibition of contingency fees should apply to TPLF. The answer is no, because the *Bundesrechtsanwaltsordnung*²⁰⁶ contains ethical regulations for the Bar, and thus only applies to contractual relationships between lawyers and clients.²⁰⁷ The financing contract is between the plaintiff and the funder only and the lawyer is neither a party to the contract nor does he have any obligation under such contract.

The second issue is whether TPLF contracts should be considered void because TPLF contracts circumvent the prohibition against contingency fees. In fact, under German law, legal acts circumventing a prohibition are null and void if the regulation is designed to avoid the result reached by the circumventing legal act. This argument is based on the assumption that the prohibition against contingency fees is designed to prevent the plaintiff from eliminating his litigation cost risk through recourse to external capital. This assumption is wrong. The sole aim of the prohibition of contingency fees is to preserve the independence of the lawyer from his client, i.e. no acts taken by the lawyer when representing his client should relate to his own profit and economic interest. It is not the interest of the client that is protected by the prohibition of contingency fees, but only the independence of lawyers.²⁰⁸ Because, under German law, legal acts circumventing a prohibition are

²⁰⁶ German Act on the Ethics of the Profession of Lawyers (*Bundesrechtsanwaltsordnung*).

²⁰⁷ See N. Dethloff, *Verträge zur Prozessfinanzierung gegen Erfolgsbeteiligung*, *supra* note 196, 2228; M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 96.

²⁰⁸ See *Deutscher Bundestag* (German Parliament), BT-Dr. 12/4993, S.31.

null and void only if the act reaches the aim that the regulation is designed to avoid, TPLF shall not be considered void, because TPLF does not *per se* interfere with the independence of the legal profession.²⁰⁹

The problem of the independence of lawyers, from a broader perspective than the one considered with respect to contingency fees, is the third major validity issue faced by TPLF. Apart from the specific prohibition of contingency fees, judicial decisions mandate that each lawyer must be personally and professionally independent from any third parties.²¹⁰ Accordingly, the validity of TPLF is challenged by the possibility that TPLF creates conflicts of interests between lawyers and clients. A client's financing contract, however, does not create a conflict of interests. The lawyer is not bound in any respect to instructions from the financing firm and may completely disregard them.²¹¹

From the observation of the three main issues that jeopardize the validity of TPLF contracts, a common leitmotif exists: TPLF is deemed valid because of the fact that the lawyer's incentives in carrying out his work are not altered by the existence of the TPLF contract. This is only apparently a descriptive argument. In my view, once again, it is a normative argument, which is essentially based on the problematic issue of the control of the litigation.

²⁰⁹ M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 97.

²¹⁰ See Federal Constitutional Court, BVerfGE 76, 184 ff; see also BUuse, *Freie Advokatur*, AnwBl. 2001, 135, Federal Court of Justice, BGH, BGHSt 22, 157.

²¹¹ M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 1000.

C. COMMON LAW VS. CIVIL LAW

The review of the law of TPLF in the main common law and civil law experiences has revealed a number of differences in the legal framework regulating such practice. In particular, while in the common law TPLF has found its way dribbling among the traditional prohibitions of maintenance and champerty, in the civil law there is generally no legal obstacle to the external financing of civil litigation. This scenario has, however, determined counterintuitive consequences in terms of the development of the TPLF market. While legal prohibitions to TPLF exist in the common law, the industry is rapidly developing. By contrast, while in the civil law world TPLF is unregulated, a TPLF market is almost inexistent.

This section addresses both the legal and regulatory divergence between the common law and the civil law regarding TPLF, and the counterintuitive consequences of such divergence with respect to the development of the TPLF market in the two legal traditions. It does so by using two core analytical tools provided by comparative law: the theory of legal formants for the former issue, and the theory of cryptotypes (and more generally of structural, contextual, and cultural factors as impacting the law) for the latter.

1. *Narrowing the Distance*

Comparative law scholars have long become aware of the fact that a legal provision not necessarily (and in fact, hardly) corresponds to how the law on the matter covered works in practice. In particular, there is almost necessarily a divergence between any legal provision and the corresponding operating rule. Comparative law

scholars achieve this conclusion by using the theory of legal formants.²¹² In any legal system, a legal rule subject to observation is the result of the interplay of a number of legal formants, which together shape an operative rule. Legal formants mainly include statutory law, court decisions, and scholarly interpretations, among others. It is the interplay of all formants that shape an actual operative rule. Therefore, an identical statutory provision in force in two separate legal systems may give rise to different operative rules, depending on the legal formants with which it combines in the respective system (e.g., court decisions, scholarly interpretations). Similarly, an identical operative rule may be in force in two legal systems that have different declamatory provisions in their statutory laws on the matter.

When it comes to TPLF, we have seen up to this point that completely different legal and regulatory environments deal with TPLF in the common law and civil law world, respectively. The common law knows doctrines such as maintenance and champerty; the civil law has no provisions directly on point.

In the common law, champerty normally makes a TPLF agreement void. However, virtually in all common law jurisdictions, courts (or legislators) have intervened and relaxed the application of this doctrine. This has happened in

²¹² See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991), 21-23; *Id.*, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991); P. G. Monateri and R. Sacco, *Legal Formants*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW, vol. 1 (P. NEWMAN ed., Groves Dictionaries Inc, 1998). Sacco identifies as 'legal formants' the different formative elements of a legal system. These include at least statutory declamations, their interpretation and application by courts, and their interpretation by legal scholarship. Contrasting the traditional 'static' approach to the study of legal rules, which is based on the false assumption that all legal formants are coherent with each other, Sacco argues that different legal formants may determine different operative rules for the same question of law, and that only through a dynamic and anti-formalistic approach, whereby legal formants are in a competitive relationship with each other, it is possible to unveil the real and operative essence of a legal rule.

different ways and to varying extents in each common law jurisdiction. Making a gross generalization, however, we notice that in many common law jurisdictions champerty no longer prevents parties from concluding a TPLF agreement, except in the case of a complete takeover of the control of the lawsuit by the third-party funder. Therefore, in most common law jurisdictions purely ‘passive’ TPLF is likely to be acceptable.

Let us now reconsider the conditions under which TPLF is deemed valid in the civil law jurisdiction we analyzed, namely Germany, under the perspective of the three issues raised above: (i) the financing contract is between the plaintiff and the funder only and the lawyer is neither a party to the contract nor does he have any obligation under the contract; (ii) TPLF does not interfere with the independence of the legal profession, which safeguard is the aim of the prohibition against contingency fees; and (iii) a client’s financing contract does not create a conflict of interests between the lawyer and the client.

The three conditions above clearly do not matter in their descriptive dimension, but they do so in their normative dimension. In other words, the point is not that TPLF is permissible because that is what happens in fact, but rather that TPLF contracts, in order to be valid, must respect the above conditions. Just like in the common law, also under German law the transfer of control of the litigation is what creates problems for the validity of TPLF. If control is transferred from the claimholder to the funder, then it is not true that the financing contract does not have an impact on the lawyer. The lawyer will follow instructions from the funder, will make the funder’s interest and not the plaintiff’s (when diverging), he will have obligations towards the funder (e.g. duties to inform and provide documents), and

conflicts of interest will exist when the plaintiff and the funder have divergent interests.²¹³ This is to say that, also under German law, the legal system is concerned with the issue of control. Importantly, however, purely ‘passive’ TPLF is likely to be permitted.

The operative rules as described above are significantly different from the declamatory provisions that we find in the common law and under German law. The theory of legal formants allows us to reach an understanding of the real essence of the law of TPLF, well beyond the appearances of formal legal provisions. This approach allows us to look comparatively at apparently very different legal experiences, and to ‘narrow the distance’ between them, realizing that both the common law and civil law share common issues and operative solutions to them.

2. *Different Extents of Market Development*

I mentioned earlier that TPLF is virtually inexistent in the civil law world with few exceptions. Because no specific prohibition seems to apply,²¹⁴ it is unclear why TPLF has not taken off. I argue that a number of structural and cultural factors, characteristic of the civil law tradition, should be taken into consideration in order to explain the fact that TPLF has not (yet) developed much in the civil law world.

²¹³ It is true—in principle—that both the plaintiff’s and the funder’s interest is to achieve the maximum possible awards. However, their interests might diverge with respect to timing and—eventually—also to the amount of the awards. While a plaintiff is usually a one-shot player, who will then try to maximize the awards, a financing company is a repeated player. The amount of awards it is interested in is a function of the investment, not at all related to the merit of the claim. Possibly, if things get ‘complicated’ during the course of the litigation, the funder will be willing to accept any amount that is superior to the costs he incurred in, and will prefer to bring that case to conclusion soon instead of investing further resources.

²¹⁴ See Section B. 1 in this Chapter.

On the one hand, structural differences include the costs of the legal system and of the civil justice system, which in some cases mirror different litigation models and procedural rules.²¹⁵ On the other hand, cultural differences include deep cultural models that are rooted in a legal system, sometimes even in a way that is ‘unconscious’—not realized by the people within that legal system—, but that play a significant role in the evolution of the law and legal culture (cryptotypes).²¹⁶

In the first place, litigation in common law jurisdictions is normally more expensive than in civil law countries. For example, the very structure of the American judicial process decentralizes power and activity: a large variety of activities within litigation which are labeled ‘official’ in European legal systems, such as service of process, discovery,²¹⁷ and questioning of witnesses, are private matters in American law and are therefore paid by the parties.²¹⁸ Furthermore, punitive damages are not contemplated in civil law countries, which reduces the margin of profit from funding litigation.²¹⁹

In the second place, some have argued that common law systems are more favorable environments for litigation funding investments, because common law

²¹⁵ Some skepticism has been expressed with respect to the economical viability of the TPLF industry in Europe by C. Toggenburger, *Financing Private Litigation – A European Alternative to Contingency Fees*, *supra* note 74.

²¹⁶ See RODOLFO SACCO, INTRODUZIONE AL DIRITTO COMPARATO 125 ff., in TRATTATO DI DIRITTO COMPARATO (R. SACCO ed., 5th ed., 2005).

²¹⁷ FED. R. CIV. P. 26.

²¹⁸ See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES, TEXTS, MATERIALS* 428, 448 (6th ed., 1998); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 3 *GLOBAL JURIST FRONTIERS* Art. 1, 9, 36 (2003), available at <http://www.bepress.com/gj/frontiers/vol3/iss2/art1>.

²¹⁹ C. Toggenburger, *Financing Private Litigation – A European Alternative to Contingency Fees*, *supra* note 74, 620.

judges are more predictable than civil law judges, with evident benefit for litigation funders.²²⁰

In the third place, from a broader viewpoint, within the civil law-common law divide the civil law culture is considered to be less ‘litigious’ compared to the common law counterpart,²²¹ which reduces the potential volume of business that attracts the TPLF industry.

In the fourth place, and from an even broader perspective, common law legal systems—especially the US—are the ones that have reached the highest level of ‘commodification’ of justice and legal services among the world’s legal traditions, a trend according to which legal services are treated as ‘commodities’ and which has found further epiphanies e.g. in contingency fee schemes, advertisement of legal services, aggregate litigation and a generally more entrepreneurial class of legal

²²⁰ In my direct experience in relation to TPLF, this idea emerged at least twice: once in a private conversation with Selvyn Seidel, former Chairman of the Burford group, in Washington, DC, on 21 May 2010; once during the floor discussion following my intervention at the Global Conference on ‘Third-Party Financing of Litigation: Civil Justice Friend or Foe?’, organized by the Searle Civil Justice Institute at George Mason University’s Law & Economics Center in New York, NY, on 5 October 2011. On the predictability of civil litigation, see i.a. Evan Osborne, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation*, 28 J. LEGAL STUD. 187 (1999); Gretchen A. Bender, *Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for a Consistent Claim Construction Methodology*, 8 J. INTELL. PROP. L. 175 (2001); ROBERT B. CALIHAN, JOHN R. DENT & MARC B. VICTOR, AMERICAN BAR ASSOCIATION, THE ROLE OF RISK ANALYSIS IN DISPUTE AND LITIGATION MANAGEMENT (2004); Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN L. REV. 1267 (2006).

²²¹ According to the data offered by Marc Galanter in 1983, the only countries out of a group of 15 that presented more than 40 yearly civil cases per 1000 people were Australia, Canada (Ontario only), Denmark, England/Wales, New Zealand and the United States. Among them, Denmark was the only civil law country (according to the classification of legal systems provided by the University of Ottawa, *supra* note 181). Among the others, Belgium, France, Japan, Norway, Sweden and W. Germany were between 20 and 31 per 1000 people, while Italy, The Netherlands and Spain were below 10. See Marc Galanter, *Reading the Landscape of Disputes: What we Know and Don’t Know (and Think we Know) about our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (Table 3) (1983). On the litigiousness of the United States see WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970); B. Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977). See also THOMAS F. BURKE, LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002) and, on a more recent view on the level of litigation in a comparative perspective, STEPHEN C. YEAZELL, CONTEMPORARY CIVIL LITIGATION 39-64 (2009).

professionals.²²² The increasing commodification of civil justice in the common law probably creates a cultural environment that is fertile ground for the development of markets based on the transferability of property rights in litigation like those for TPLF and other similar practices.

In the civil law world, the use of the legal system is traditionally seen more as a way for the victim of a wrong to get compensation having his day in court rather than a system through which private incentives and commodified legal services combine within a market-inspired logic for the pursue of social welfare and efficiency.²²³ I hypothesize that the trend towards this conception of the role of the legal system, which I argue to be increasingly dominant in the US, may in part have been determined by (or at least gone hand-in-hand with) the success of the economic analysis of law in American contemporary legal thinking. The economic analysis of law, which has come to dominate American legal thought, has not reached an equal degree of success in the civil law world.²²⁴

²²² See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008).

²²³ This approach is also visible in other fields of the law and perhaps it mirrors a general attitude. Consider, for example, breach of contract: while in the United States the primary remedy for breach of contract is compensatory monetary damages, being specific performance the 'exception,' in the civil law world it is the other way around.

²²⁴ For an early comprehensive work discussing the success of the Economic Analysis of Law in civil law countries, see Vol. 11 (Iss. 3) *INT'L REV. L. & ECON.* (1991), containing R. Cooter & J.R. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 261; U. Mattei & R. Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 265; C. Kirchner, *The Difficult Reception of Law and Economics in Germany*, 277; G. Hertig, *Switzerland*, 293; S. Ota, *Law and Economics in Japan: Hatching Stage*, 301; S. Pastor, *Law and Economics in Spain*, 309; G. Skogh, *Law and Economics in Sweden*, 319; W. Weigel, *Prospects for Law and Economics in Civil Law Countries: Austria*, 325; G. Hertig, *The European Community*, 331. For later works see UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* (1997); BRUNO DEFFAINS & THIERRY KIRAT (eds.), *LAW AND ECONOMICS IN CIVIL LAW COUNTRIES* (2001); EDGARDO BUSCAGLIA & WILLIAM RATLIFF, *LAW AND ECONOMICS IN DEVELOPING COUNTRIES* (2000); Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 *RATIO JURIS* 66 (2004); Aristides N. Hatzis, *Civil Contract Law and Economic Reasoning: An Unlikely Pair?*, in *THE ARCHITECTURE OF EUROPEAN CODES AND CONTRACT LAW* 159 (STEFAN GRUNDMANN AND MARTIN SCHAUER eds., 2006).

Traditionally in civil law legal systems, the claim is considered something very ‘personal,’ which cannot be sold or assigned an interest on (as in TPLF) in exchange for money. The origin of that can be traced back to ancient Rome and Greek jurisprudence, dominated by the view according to which only the litigants and judges should participate in the judicial process.²²⁵ Under that jurisprudence, if an action was pursued on behalf of someone other than the party affected, the maintained action was unworthy and seen as a vehicle of oppression.²²⁶

3. *Possibilities of Expansion of TPLF in the Civil Law World*

The factors and broad trends I proposed above might be some among the reasons why TPLF is not developing in civil law countries as it is in the common law world. However, it does not seem unlikely that TPLF will soon develop also in continental Europe and other parts of the world, especially in countries that are devoting efforts to strengthening access to justice, but that are simultaneously experiencing difficulties in the publicly-funded systems for financing civil litigation for the poor (legal aid).²²⁷ These prospects of growth are suggested by the observation that TPLF is economically viable in the context of the civil law world, as demonstrated both by the economic model studied below²²⁸ and by the experience of Germany and other

²²⁵ M. Radin, *Maintenance by Champerty*, *supra* note 91, 51-52.

²²⁶ V. WAYE, *TRADING IN LEGAL CLAIMS*, *supra* note 16, 12.

²²⁷ Russia, for example, is showing interest in learning about best practices in (and alternatives to) legal aid. See e.g. the project “Strengthening Access to Justice for the Poor in the Russian Federation” of the Institute of Law and Public Policy (2008-2012); <http://www.ilpp.ru>. See also Marco de Morpurgo, *Финансирование гражданского иска третьими лицами: частная альтернатива бесплатной юридической помощи как способ повышения доступности правосудия*, in *LEGAL AID IN CIVIL MATTERS: MODELS OF INTERACTION BETWEEN STATE AND CIVIL SOCIETY – INTERNATIONAL AND RUSSIAN EXPERIENCE* (INSTITUTE OF LAW AND PUBLIC POLICY ed.), Access to Justice Series (Akvarrel, Moscow 2011).

²²⁸ See Chapter IV, Section B.

civil law countries where TPLF exists. Moreover, the recognition of the fact that “[l]itigation funding by private third parties is practiced successfully in some Member States” has also come from the European Commission.²²⁹

TPLF seems to have development potentials in the civil law world. Apart from the likelihood that favorable economic conditions exist for the development of the industry, which deserves to be carefully studied, what appears to be true is that claimholders would largely benefit from TPLF in many civil law countries, and that could create a high demand for TPLF. Take the example of Italy, and consider the following quotation:

The Italian John Doe who needs the support of a court in order to obtain the fulfillment of a right or of a legally protected interest is in a very unfortunate situation. [...] In Italy, contingent fees are forbidden by the law and lawyers will not bear the costs of a case by themselves without being paid for their work throughout the entire proceedings. Therefore, our John Doe will be required to pay in advance, and in the course of the process, all the money necessary to cover the costs of the case and at least a part of the attorney’s fees, until the moment when the judgment allocates all these costs according to the “loser pays all” rule. This would not be a great problem if the time required to achieve the judgment were short. On the contrary, however, the length of civil proceedings in Italy is, in most cases, excessive. An average case may require three or four years to proceed through the court of first instance. [...] This means

²²⁹ European Commission, *Green Paper on Consumer Collective Redress*, EU:COM(2008) 794, s.51.

that our John Doe must be able to bear all the costs for several years, until the case comes to a conclusion in the court of first instance.²³⁰

The length of Italian civil proceedings generates high costs for plaintiffs, which are often prohibitive. Although the effects of TPLF on the length of civil proceedings are not easy to predict, TPLF might represent a solution to the problems faced by claimholders who cannot afford to bring a lawsuit or who, considering its outcome uncertain and indeterminable in time, choose not to bring suit because the expected value of the claim does not outweigh its expected costs. The possibility for claimholders to bargain over property rights in litigation with third parties, in a way that allows them to promise a share of the awards in exchange for having all litigation costs covered, would allow them to eliminate the risks connected with bringing suit, thus increasing the expected value of the claim and making them better off.

If TPLF were to develop in the civil law world, who should be investing in litigation? It has been argued that TPLF is a tough business:²³¹ it is a risky business that can lead to large losses very quickly.²³² The risk of litigation has to be evaluated very carefully.²³³ In the first place, a tendency has been the establishment of financing companies by large insurance companies.²³⁴ This development is not surprising as the business model of TPLF is similar to that of legal expenses

²³⁰ M. Taruffo, *Civil Procedure and the Path of a Civil Case*, in INTRODUCTION TO ITALIAN LAW 159,159-160 (JEFFREY S. LENA & UGO MATTEI eds., 2002).

²³¹ C. Toggenburger, *Financing Private Litigation – A European Alternative to Contingency Fees*, *supra* note 74, 627.

²³² M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 101.

²³³ On the role of risk analysis in claim evaluation and litigation management see R.B. CALIHAN, J.R. DENT & M.B. VICTOR, ABA, THE ROLE OF RISK ANALYSIS IN DISPUTE AND LITIGATION MANAGEMENT, *supra* note 220.

²³⁴ See e.g. Allianz Prozessfinanzierung's TPLF business (now terminated).

insurance policies and therefore fit into the product lines of many insurance companies. In the second place, another trend has been the creation of litigation financing companies by large well-capitalized financial companies that raise capital on stock markets.²³⁵ Finally, in the third place, privately held companies have also been created to invest in the TPLF market.

²³⁵ See e.g. Juridica and Burford, both listed on the London Stock Exchange.

CHAPTER III

SHAPING THE LAW OF TPLF (AKA: THE POLITICS OF TPLF)

A. SOME CONTEXT

TPLF is based on a contractual agreement freely entered into by two parties, who decide to stipulate the agreement acting within their freedom of contract attributed to them by the legal system. In this perspective, why would it be necessary or even appropriate to ban or regulate this practice?

Modern legal systems are built around the central role of freedom of contract. A person's freedom to contract with another for the exchange of a good or a service, or for the management of his economic interests, is in principle unlimited.²³⁶ The legal system (expression of the political power within a certain society) is only called, and has the power, to restrict such freedom of contract where there is a concern that must be dealt with. For example, both under the common law and in civil law systems the sale of controlled substances is typically restricted. If two or more people contract for the sale of controlled substances in violation of those restrictions, courts will refuse to enforce that contract (which in some jurisdictions would be considered void). In the common law, another example is the doctrine of unconscionability, which allows the court not to enforce a contract when

²³⁶ See PATRICK ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (Oxford University Press, 1985); MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (Harvard University Press, 1997); MAURO BUSSANI, *LIBERTÀ CONTRATTUALE E DIRITTO EUROPEO*, *supra* note 197.

its terms are so one-sided at the time of contract formation that they are contrary to good conscience.²³⁷ In the civil law world, moreover, civil codes typically provide for pre-designed contract ‘types’ that the parties may use in order to regulate their interests. However, the parties may also decide to distance themselves from those ‘types’ and create their own ‘atypical’ contract. In this case, however, the parties’ freedom of contract is not limitless, but the law leaves to the court the power to scrutinize whether the specific agreement concluded by the parties deserves protection.²³⁸

Where does TPLF fit in this picture? Is there any reason that justifies prohibiting or regulating TPLF? What is the rationale, if any at all, that legitimizes the legislator or the courts to limit the individual freedom of the parties to a TPLF contract? Originally, the common law doctrines of champerty and maintenance responded to the needs, discussed above, to discourage feudal lords from unduly turning to the judicial system in order to aggrandize their economic and political power. However, it has also been stated that this reason no longer exists in modern societies.²³⁹

A heated debate (for now very much focused on the common law experience) has emerged around TPLF, in response, on the one hand, to a very aggressive TPLF industry willing to invest in litigation and, on the other hand, to an

²³⁷ In the US context, see Article 2-302 Uniform Commercial Code; for case law see i.a. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (C.A. D.C. 1965); see also e.g. Clinton A. Stuntebeck, *The Doctrine of Unconscionability*, 19 ME. L. REV. 81 (1967).

²³⁸ In Italy, for example, the civil code legislator construed this limitation by using the concept of ‘cause’ (*causa*) of the contract. Simply stated, the court can strike down an ‘atypical’ contract where he considers (looking at the contract’s cause) that the contract overall does not deserve protection by the legal system (Article 1322 Italian Civil Code).

²³⁹ See above Chapter II, Section A.

equally aggressive reaction by some interest groups that are alarmed by the expansion of TPLF.

Importantly, this debate is not really on whether TPLF is legal or not, i.e. whether it is permissible on legal grounds. Rather, the debate is concerned with whether TPLF *should be* legal or not, i.e. whether it should be permitted or not on *policy* grounds.

B. SOME EXAMPLES

In Chapter II I introduced the fictional character of Emily, a single mother who had been struck by a truck driver and lost her job as a consequence of the fact that she would be unable to work for one year or more. Emily had a valid cause of action against the truck driver to recover \$1 million in damages. However, Emily was not able to bring suit against the truck driver either because her savings were insufficient to finance the lawsuit, or simply because taking the case to trial was too risky due to her economic situation: if she finally lost her case, she would end up penniless.

In Emily's case, and that of many other plaintiffs in economic needs, TPLF represents an unprecedented opportunity to have their day in court and seek enforcement of their rights. TPLF provides plaintiffs with the necessary economic resources to start and maintain a lawsuit that they would otherwise not be able to afford. In addition, given that a funded plaintiff bears no risk associated with losing the case, TPLF encourages access to the courts where the system would otherwise

fail to facilitate justice. In this sense, TPLF is capable of increasing access to justice, and this has been one of the major arguments in favor of this practice.

In the former chapter I also introduced another fictional character, X-Conductors, a start-up company with limited liquidity who obtained a patent on an innovative chip for credit card readers, which had been infringed by a large and well-funded corporation, Giant Electronics. Also in this case, many real life characters find themselves in exactly X-Conductors's position. For example, in 2010 Devon IT, a Pennsylvania computer company, sued the International Business Machines Corporation (IBM), ranked the No. 20 largest company in the US by revenue by Fortune in 2013,²⁴⁰ to recover damages for an alleged \$12 million fraud.²⁴¹

It can be argued that there is no difference at all between Emily's case, i.e. that of a poor individual that has been injured in a car accident, and that of a small company facing a large and well-financed corporation. In both cases, TPLF is a means that allows the small player to sue the big player for the pursuit of justice, and therefore support the view that TPLF is a powerful tool to increase access to justice.

A hypothetical application of TPLF to 'public interest' litigation would make the above argument even stronger. Indeed, TPLF could (and perhaps should) be used as a tool to support litigation in areas such as environmental law or human rights law. In these areas, plaintiffs often lack the necessary economic resources to start a lawsuit, therefore making the justice system incapable to provide a remedy to

²⁴⁰ <http://money.cnn.com/magazines/fortune/fortune500/2013/snapshots/225.html>

²⁴¹ *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, *1 n.1 (E.D. Pa. Sept. 27, 2012).

many environmental torts and human rights violations. In particular, an increasing liberalization of TPLF on a global scale might produce beneficial effects on access to justice in the context of transnational public interest litigation, where alternative means to finance poor people's litigation—such as legal aid or similar state-sponsored programs—are less likely to be available.

This could be seen, however, from a different angle. Imagine a small village in a country in Africa or Latin America that is populated by a community of indigenous people. A large US extracting company is conducting extracting operations in the village and, due to their negligence, an oil spill damages the entire village, its inhabitants, and their property. The local people of course realize to have suffered damages, but are not aware that under US law they could sue the extracting company in a US court and seek recovery on a theory of negligence. A US litigation funding investor pays a visit to the villagers, explains them that they have the chance to obtain monetary compensation for the harm they suffered, and proposes them the following: the villagers will not have to advance any money, but only to formally present the lawsuit in their own name; the investor will manage the entire case and will pay for all costs involved; if they lose the case, the investor will have lost the investment; while, if they win the case, the investor will keep 80% of the recovery, and 20% will be for the villagers. The villagers agree, and the funder invests a total of \$20 million in the case.

The case goes to trial and the villagers obtain a favorable judgment against the US extracting company for \$200 million. Therefore, as per the TPLF agreement between the investor and the villagers, the villagers keep \$40 million, and the

investor receives \$160 million. Discounting the initial investment, the third-party funder made a profit of \$140 million by only investing a sum of \$20 million.

The examples I brought in the above paragraphs show some of the benefits and the concerns associated with TPLF. The last scenario envisaged, for example, raises a number of potential concerns, among which are at least the following: (i) the investor made an excessive profit at the expense of the (unaware) claimholders; (ii) there has been a switch of roles between the claimholders and the investor, both as to who had the initiative to bring the case and to who controlled the litigation; (iii) the extracting company was sued on a case where it would hardly have been sued but for the external capital made available by the funder; and (iv) those who invested in funds that in turn own the litigation funding company found themselves supporting this case without even knowing it.²⁴² These are only some of the several concerns that TPLF raises and that have been subject of debate.

C. THE POLICY DEBATE ON TPLF

The debate on TPLF has involved many interested stakeholders. Notwithstanding the fact that this practice poses some challenging legal issues, lawyers have not been the only players in the debate on TPLF. Rather, lawyers have somehow been put on a side, while policy makers (including economists, political scientists, government and business representatives) have stepped forward.

At the center of the debate, and thus of the evolution of the law of TPLF, are true lobbying battles between the TPLF industry and the resisting business

²⁴² On this issue see Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE, 13 June 2011.

community (of potential defendants) that is against TPLF. From there, the discussion extends to academics, bar associations, and governmental institutions (including courts and legislators).

The debate on TPLF is very transnationally intertwined, as voices expressed in one jurisdiction often migrate and influence policy in other jurisdictions. Nevertheless, some local specialties exist due to the fact that practices such as TPLF do not operate in a vacuum, but are affected by the surrounding context. There is an increasing awareness in the debate of the fact that these differences must be taken into account when approaching the study of TPLF, which certainly poses a limit to the transnationality of the debate on TPLF.²⁴³

In order to present the debate that is shaping the law of TPLF, I will use the following format. I start by describing the industry lobbying activity. Then, I describe the academic debate and the interventions by some major bar associations in the US. For each of these clusters, I first give an overview of the main actors involved and the dynamics that govern their relationships, and then I address some specific arguments that are brought in favor or against TPLF. Finally, I discuss some major governmental reactions to TPLF.

1. *Industry Lobbying*

a) Sides and Strategies

Companies generally spend lots of resources into effective marketing strategies that they expect to be useful not only to directly increase their business, but also to create

²⁴³ See e.g. J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 95.

a favorable reputation of themselves, with a view to be better positioned on the market in the long term. Similarly, companies typically invest resources into proactively presenting themselves and their business in a way that is both more in line with the regulatory trends of the moment, and also more strategic in terms of their ability to influence the regulator and obtain a more favorable environment where they will operate in the future.

Most companies in the TPLF industry have certainly adopted such precautions. Many of these companies have websites where they present TPLF as an undisputedly good thing, which is beneficial and makes no harm to society. For example, the website of Harbour Litigation Funding states that “litigation funding allows good claims to be pursued that would otherwise simply not be possible”;²⁴⁴ Alter Litigation’s website even states that “[l]itigation funding is all about *access to justice*” (emphasis in the original), and that the company helps client “to litigate on an equal footing”.²⁴⁵ Other companies have published position papers where they describe what TPLF is and how it works, and at the same time clearly present their business in a favorable light.²⁴⁶ By publishing this type of information, TPLF companies expect both to generate more business, and also to create a favorable perception of them and this debated practice in both the general and specialized public.

A noteworthy example of this strategy is given by Harbour Litigation Funding, who publishes on his website an updated survey of the law of TPLF in all

²⁴⁴ <http://www.harbourlitigationfunding.com>

²⁴⁵ <http://www.alterlitigation.com/#our-value-proposition>

²⁴⁶ See e.g. the White Paper published by Burford and prepared by its CIO Jonathan T. Molot, *Theory and Practice in Litigation Risk* (2012); or more recently, Burford’s paper authored by its CEO Christopher Bogart, *Litigation Finance: A Smart and Sound Strategy to Reduce Legal Department Expenses* (2013). Both papers are available on the company’s website.

jurisdictions where it is practiced. This way Harbour not only provides evidence of the legality of TPLF where available, but it is also able to highlight where a court has issued a ‘favorable’ precedent that simply ‘suggests’ the establishment of a future favorable legal landscape.²⁴⁷ The information is supposed to be accurate, but this strategy leaves Harbour ample room to emphasize the favorable trends, while remaining silent on any unfavorable developments that are not settled law yet.

Another way for companies to advance their interest is through joining industry association and pursuing concerted strategies. In the US, around thirty consumer litigation finance companies (only funding personal injury litigation) form part of the American Legal Finance Association (ALFA).²⁴⁸ Among other things, ALFA is the channel through which member companies express uniform views on the issues that are debated, and therefore increase the credibility of the industry. In particular, as some scholars have argued, ALFA’s primary focus is not regulating its members, but lobbying state legislatures to leave the industry alone.²⁴⁹ In addition, ALFA aims at improving the reputation and public perception of the consumer litigation finance industry. In line with this advocacy objective, one of ALFA’s mottos is “Helping people when they need it most”.²⁵⁰

In the UK, an industry association was also created by the main litigation funding companies active in the UK, the Association of Litigation Funders

²⁴⁷ <http://www.harbourlitigationfunding.com/funding-map>

²⁴⁸ <http://www.americanlegalfin.com>

²⁴⁹ Martin J. Estevas, *The Litigation Financing Industry: Regulation to Protect and Inform Consumers*, 84 U. COLO. L. REV. 467 (2013), 477-478; Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT. L. REV. 11 (2014), 15.

²⁵⁰ See a journal ad available on ALFA’s website at <http://www.americanlegalfin.com/press/ALFA%20NY%20Law%20Journal%20ad.pdf>.

(ALF).²⁵¹ ALF is, however, different from ALFA. First, its members are not limited to consumer litigation funding companies, but rather include among the major corporate litigation funders investing in the UK. Then, the main reason why ALF was created was the adoption of a self-regulatory code for the TPLF industry. I will discuss the code more in detail below, after speaking of Lord Justice Jackson's Report.²⁵² For now, it is interesting to note that ALF's website, in line with the general industry's trend just described, defines TPLF as "an additional resource for Access to Justice and rational management of financial risk in making claims".²⁵³

On the other side of the spectrum stand the 'enemies' of TPLF, typically represented by the large corporate business community. In the US, the US Chamber of Commerce is the main voice of 'corporate America' in its fight against TPLF. The Chamber Institute for Legal Reform (ILR), in particular, issued two very influential reports attacking TPLF. In the 2009 report, the ILR set forth a series of arguments against TPLF, calling for a total prohibition of TPLF in the US or, "at the very least, [its prohibition] in the context [of class actions and] other aggregate litigation".²⁵⁴

Three years later, the ILR came out with a new report, this time no longer arguing for the prohibition of TPLF (perhaps they realized that they are fighting a lost battle), but rather supporting the establishment of "a robust oversight regime to

²⁵¹ <http://associationoflitigationfunders.com>

²⁵² See Section 4 (a) in this Chapter.

²⁵³ <http://associationoflitigationfunders.com/banner-3>

²⁵⁴ US CHAMBER INSTITUTE FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES* (US Chamber Institute for Legal Reform: Washington, DC, 2009), 12.

govern this type of TPLF at the federal level” and favoring “legislation that appoints a federal agency to regulate third-party investments in litigation”.²⁵⁵

The US Chamber of Commerce is a channel through which ‘corporate America’ expresses itself in a concerted way, through one single channel of communication, as well as in a coherent way, expressing all arguments against TPLF in one place. However, industry lobbying against TPLF is everywhere in the public debate. Often, any fact or event involving TPLF triggers a reaction in the press that is always a good opportunity for companies to make their voice heard. For example, shortly after the US District Court in Philadelphia issued an order for the plaintiff on the issue of privilege in the *Devon IT v IBM* case,²⁵⁶ IBM general counsel Robert C. Weber published a post on Forbes attacking TPLF, calling TPLF “a seemingly benign term that camouflages a real risk to clients, our court system and to the lawyer professionalism itself”.²⁵⁷

b) Main Arguments

On one side of the spectrum of the debate, TPLF supporters argue that the practice is beneficial on the grounds that it increases access to justice. This is because, by providing resources to who cannot afford to pay for litigation or bear the risks

²⁵⁵ US CHAMBER INSTITUTE FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION (US Chamber Institute for Legal Reform: Washington, DC, 2012), 2.

²⁵⁶ *Devon IT, Inc. v. IBM Corp*, *supra* note 241.

²⁵⁷ Daniel Fisher, *IBM GC Says: Beware Of Lenders Offering To Finance Your Lawsuit*, FORBES, 12 February 2013, available at <http://www.forbes.com/sites/danielfisher/2013/02/12/ibm-gc-says-beware-of-lenders-offering-to-finance-your-lawsuit>

associated with it, TPLF enables those people to approach a court for the enforcement of their rights.²⁵⁸

Closely connected to the former is another argument in favor of TPLF, and namely that TPLF plays a beneficial equalizing function—“levels the playing field”²⁵⁹—between plaintiffs and defendants, providing the former, who is typically financially weaker, with the necessary resources to face typically wealthy and powerful defendants. This ‘David vs. Goliath’ argument is well exemplified in the X-Conductors case hypothesized earlier, or in the actual *Devon IT v. IBM* case.²⁶⁰ A balanced distribution of resources between plaintiff and defendant is key to a fair trial. Furthermore, a plaintiff who can rely on solid financial resources is assumed to be more credible in pre-trial negotiations than a plaintiff who is experiencing financial pressures, therefore making the chances of an accurate settlement between the parties more likely.²⁶¹

On the other side of the spectrum, critics have raised objections on a variety of grounds. The first and major ground for criticism has to do with the social costs TPLF produces on society. In particular, opponents argued that, because TPLF increases the amount of money available to pay attorneys to litigate claims, TPLF encourages frivolous and unmeritorious litigation, and, in general, increases the overall level of civil litigation and its consequent costs for society.²⁶²

²⁵⁸ *Devon IT, Inc. v. IBM Corp*, *supra* note 241.

²⁵⁹ LITIGATION FUNDING IN AUSTRALIA, *supra* note 16.

²⁶⁰ *Devon IT, Inc. v. IBM Corp*, *supra* note 241.

²⁶¹ J.T. Molot, *Theory and Practice in Litigation Risk*, *supra* note 246, 5.

²⁶² SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES, *supra* note 254, 5. This is the argument that the US Chamber of Commerce has made its forte. See e.g. the recent ILR’s report THIRD PARTY LITIGATION FINANCING IN AUSTRALIA (US Chamber Institute for Legal Reform, October 2013), at 12 ff, where the ILR uses statistical data from the Australian experience to substantiate their claim the TPLF increases the volume of litigation.

Another ground for criticism is that ethical violations are associated with TPLF, and namely that TPLF can create confusion concerning the party who controls the lawsuit and concerning the attorney-client relationship.²⁶³

A third ground for criticism is based on the concern that TPLF allows the funder to take undue advantage of the claimholder, e.g. by contracting an excessively high percentage of awards in his favor, in particular in the light of the fact that the industry does not operate in a competitive environment.²⁶⁴

Finally, TPLF has been criticized based on the simple idea that it would be undesirable that litigation funders make a profit out of someone else's litigation, i.e., ultimately, from someone else's rights and attempts to obtain justice. As the ILR put it, the interest of a litigation funder "lies in maximizing its return on that investment, not in vindicating a plaintiff's rights".²⁶⁵ This approach supports the folkloristic idea that profit-motive and justice are incompatible concepts.

In addition to the arguments listed above, which concern whether TPLF should be permitted or prohibited, the industry debate has also dealt with some other issues that are more specific, covering technical aspects of the way in which TPLF ought to operate if permitted. Therefore, these arguments are not on the desirability of TPLF tout court, but rather deal with operative aspects of the practice. Even if this is not the place to analyze the details of these discussions, it is worth mentioning them here. The main issues are two: the first one is whether communications

²⁶³ SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES, *supra* note 254, 7-8; THIRD PARTY LITIGATION FINANCING IN AUSTRALIA, *supra* note 262, 15 ff., making the claim that "the nature of TPLF increases the risk that a lawyer's loyalty will be divided between the client and the Funder." See also on this issue *Fausone v. U.S. Claims, Inc.* 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005).

²⁶⁴ Mariel Rodak, *It's About Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement*, *supra* note 80.

²⁶⁵ SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES, *supra* note 254, 2.

between funders and their clients should be privileged;²⁶⁶ the second is whether the existence or even the terms of a TPLF agreement should be disclosed to the court.²⁶⁷

²⁶⁶ The law on whether communications with the TPLF provider are privileged is not settled in the US. US courts generally take a strict approach to privilege waivers, finding that any voluntary disclosure of privileged information with a non-privileged party will waive the privilege. Therefore, sharing information with a TPLF company may be deemed a voluntary disclosure that waives privilege on the information shared. In *Leader Technologies, Inc. v. Facebook, Inc.*, 2010 WL 2545960 (D. Del. June 24, 2010), Leader had engaged in discussions with multiple TPLF companies regarding a potential investment in Leader's lawsuit against Facebook for patent infringement. Leader had entered non-disclosure agreements with the potential investors, and shared documents with them. Upon learning that Facebook had shared documents with the TPLF companies, Facebook filed a motion to compel the documents' production, arguing that any privilege had been waived by the release to potential investors. The Magistrate Judge concluded, and the District Judge affirmed, that privilege did not extend to documents shared between Leader and TPLF companies, and that Leader had waived privilege protection with regard to the documents it gave to potential investors. The court noted that this is an unsettled area of the law, and ruled that when a party's interest in litigation is commercial, the common interest privilege does not attach. See NYSBA, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING, *supra* note 82, 8-9. A subsequent Delaware case, *Xerox Corp. v. Google Inc.*, 801 F.Supp.2d 293, 303-304 (D. Del. 2011), distinguished its facts from *Leader*, and held that common interest privilege was not waived when Xerox provided documents to a company hired to assist in monetizing Xerox's patent portfolio. The court indicated that in *Leader* the funders were negotiating at arm's length and had not engaged in a relationship yet. In *Xerox*, the third party was already engaged and had been intimately involved in the process, having retained its own lawyers and taken an interest in the outcome of the litigation proceedings. In *Mondis Technology Ltd. v. LG Electronics, Inc.*, 2011 WL 1714304 (E.D. Tex. May 4, 2011), the Eastern District of Texas declined to compel production of documents provided to TPLF investors, and held that materials provided to prospective funders in advance of litigation were protected under the work product doctrine. More recently, in *Devon IT, Inc. v. IBM Corp.*, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012), the Eastern District of Pennsylvania found that common interest privilege existed between a plaintiff and its funder to protect documents from production ("[Funder] and Devon now have a common interest in the successful outcome of the litigation which otherwise Devon may not have been able to pursue without the financial assistance of [funder]"). In a further decision, *Walker Digital, LLC v. Google Inc.*, Civ. No. 11-309-SLR (D. Del. Feb. 12, 2013) common interest privilege was upheld under the same circumstances as *Xerox*, but without discussion. See Bentham IMF, *Disclosure of Documents in Litigation Finance* (November 2013), available at <http://www.benthamimf.com/what-we-do/disclosure-of-documents-in-litigation-finance>.

²⁶⁷ On this issue see the December 2013 decision by the Supreme Court of New Zealand in *Waterhouse v. Contractors Bonding Ltd* [2013] NZSC 89. Further to this judgment, plaintiffs that are financed by a third-party litigation funder will be required to disclose to defendants, at the outset of a proceeding, the identity of the funder and whether the funder is subject to New Zealand jurisdiction. Provision of this information may lead to applications by defendants for security for costs or for a stay on the basis of abuse of process. If such applications are made, the terms of the funding agreement may have to be disclosed (subject to certain redactions). For further comments on this decision see Chris Brown and Felicity Monteiro, *Supreme Court Mandates Disclosure of Litigation Funding Agreements*, Wilson Harle, December 2013, available at <http://www.wilsonharle.com/supreme-court-mandates-disclosure-of-litigation-funding-agreements>. See also generally Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083 (2012).

2. *Academic Debate*

The controversial practice of TPLF and the advocacy debate that has emerged around it have certainly caught the attention of legal academia. While at the beginning the scholarly production on TPLF was scarce, especially compared to the potential long-term consequences of this practice, in recent years more and more scholarly papers have been published, especially in US law journals. At the same time, many academic conferences on TPLF have been organized and research projects launched, some of which with the ambition of having a transnational or global scope.²⁶⁸

Among the scholarly work that has been published, some approaches TPLF from a rather scientific point of view. By this I mean that the purpose of such work is to analyze, distill, and deconstruct TPLF in order to obtain a better understanding

²⁶⁸ Among them, the RAND Law, Finance, and Capital Markets Program was launched in 2009 in order to “analyze an emerging development in civil dispute resolution in the United States, namely, the providing of capital and capital market products for claim holders and those defending against claims, and their respective lawyers.” An “International Conference on Litigation Costs and Funding” was held in July 2009 in Oxford, UK, organized by the Centre for Socio-Legal Studies and the Institute of European and Comparative Law University of Oxford. A conference titled “Collective Redress and Litigation Funding” was held in Sydney and Canberra in December 2009, organized by the Centre for Law and Economics at The Australian National University, which aims at “coordinating a major research program examining collective redress and litigation funding globally with a focus on the US, Europe, Australia and Asia.” The conference “New Trends in Financing Civil Litigation in Europe: al Legal, Empirical and Economic Analysis” was held at the Erasmus University in Rotterdam on April 24, 2009. The conference “Third Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System” was presented by RAND Institute for Civil Justice and UCLA School of Law in June 2009. On May 20-21, 2010 in Washington, D.C. the Conference “Alternative Litigation Finance in the U.S.: Where Are We and Where Are We Headed with Practice and Policy?” organized by the RAND Institute for Civil Justice was held, which brought together litigation finance investors, legal practitioners, policymakers, academics and researchers to discuss and debate issues and trends related to alternative litigation finance in the United States and in other common law jurisdictions. In 2011, the Searle Civil Justice Institute at George Mason University’s Law & Economics Center organized a Global Conference on TPLF, which comprised two events, one in New York and one in Brussels. It should be noted that, when any academic work or conference refers to the comparison between the US, Australia, and Europe, often times this comparison is reduced to a US vs. Australia vs. UK one. This is somehow ironic, because, even though the UK is certainly in Europe, from a legal point of view UK law is much closer to US law and Australian law than to the rest of European law. By contrast, an interesting comparison is the one I proposed in Chapter II, i.e. between the law of TPLF in the common law and in the civil law. However, little work has been done in this direction.

of its functioning and implications.²⁶⁹ The works belonging to this category have used both legal analysis, in some cases also making comparative efforts,²⁷⁰ and economic analysis, including both an analysis of the incentives of the actors involved in TPLF and empirical studies of available data.²⁷¹

Another chunk of scholarly work in the area has taken a different approach. Rather than a descriptive approach to the study of TPLF, they have taken an advocacy approach, arguing either in favor or against TPLF.²⁷² Importantly, in some cases academics have genuinely supported or opposed TPLF based on their own beliefs, advancing the public interest as often academics are inclined to do. By contrast, however, some scholars have produced biased work products, as a result of either the funding they received or their own interests as members of the TPLF industry. In fact, some of the academics commenting on TPLF are also involved in the industry. The resulting situation might be somewhere between genuine academic work and industry lobbying efforts. For example, a 2011 Fortune article criticized Georgetown Law professor Jonathan Molot for wearing two hats, both writing on

²⁶⁹ See e.g. Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012).

²⁷⁰ See i.a. CHRISTOPHER HODGES, STEFAN VOGENAUER AND MAGDALENA TULIBACKA (eds.), *THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE* (Hart Publishing, 2010).

²⁷¹ Keith N. Hylton, *The Economics of Third-party Financed Litigation*, *supra* note 96; *id.*, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, Boston University School of Law Working Paper No. 13-27 (21 June 2013, Revised 9 July 2013); Cento Veljanovski, *Third-Party Litigation Funding in Europe*, *supra* note 145; Andrew Daughety and Jennifer Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, Vanderbilt University Department of Economics Working Papers, VUECON-14-00002 (2014); Geoffrey J. Lysaught and D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J. L. ECON. & POL'Y 645 (2012).

²⁷² See e.g. Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 667 (2010), 669 (arguing that US courts' concept of champerty has promoted injustice and prevented legitimate investment in legal claims); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571 (2010) (arguing that the critiques to TPLF are flawed and that TPLF should be permitted but regulated to guard against its fairly limited dangers); Poonam Puri, *Financing of Litigation by Third-Party Investors: A Share of Justice*, 36 OSGOODE HALL LAW JOURNAL 515 (1998).

TPLF as an academic and acting as Burford's chief investment officer.²⁷³ Similarly, the RAND Law, Finance, and Capital Markets Program—an influential research project in the US—receives generous financial support by Juridica.²⁷⁴

The arguments that the scholarly work on TPLF has brought forward are pretty much the same as the ones we discussed above that have been raised by industry.²⁷⁵ Below I re-propose the main arguments in the debate, highlighting any peculiar angle these may take in the academic context.

Access to justice remains the core argument in support of TPLF. Also in the academic debate, however, scholars have pretty much limited themselves to argue that TPLF is beneficial because it is capable of increasing access to justice. While the intuition is simple, scholars have not explored the reasons and the ways in which exactly TPLF increases access to justice. In other words, they stick to the rhetoric of this argument (just like the industry does).

Scholars have also brought the argument that TPLF is beneficial in that it would level the playing field between plaintiff and defendant. However, a dissenting opinion also exists in this respect. In particular, some scholars have argued that TPLF may also produce the opposite effect, namely to allow powerful plaintiffs, backed by litigation funders, to oppress small and economically weak defendants that are unable to resist to litigation due to their financial difficulties.²⁷⁶ Indeed, this may become very dangerous. Companies may take advantage of defendants that are in situations of economic difficulties to threaten litigation and obtain an easy

²⁷³ R. Parloff, *Have You Got a Piece of This Lawsuit?*, *supra* note 242.

²⁷⁴ Steven Garber, *Alternative Litigation Financing in the United States: Issues, Knowns and Unknowns*, *supra* note 1, ii.

²⁷⁵ See for an overview Stuart L. Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U. C. DAVIS BUS. L. J. 65 (2011).

²⁷⁶ See Joanna M. Shepherd, *Ideal versus Reality in Third-Party Litigation Financing*, *supra* note 41.

settlement even when they would otherwise not be entitled to any compensation, just because the defendant is aware that it may not bear the burdens to defend a lawsuit, especially when the plaintiff is backed by a litigation funder.

An additional argument brought by supporters of TPLF in the academic world is that the industry is beneficial because of the positive deterrent effects it produces on potential defendants' behavior, thereby contributing to the social goal of minimization of the total costs of accidents in society.²⁷⁷ Under the law and economics literature, if victims do not have the resources to sue injurers, or if risk-averse victims prefer to avoid risking their own resources and thus do not bring suit, the resulting scenarios are similar to the reality in which there is no liability for wrongdoers.²⁷⁸ As that literature points out, if there is no liability, injurers will not exercise any care, for doing so would entail costs but not yield a benefit to them.²⁷⁹ Potential injurers, who are aware that the victims of their harmful behavior may be able to count on solid financial resources through TPLF, will have an incentive to take more care in order to avoid liability.

We mentioned above easy settlements. Some scholars argued that there is a risk that TPLF, rather than encouraging accurate and fair settlements,²⁸⁰ facilitates abuses. This is because a defendant that has been sued prefers to settle and avoid paying for defending himself than going to trial. Plaintiffs backed by litigation funders—and therefore with no risk of loss—may take advantage of this set of incentives. This in turn may lead to a risk of over-deterrence, where potential

²⁷⁷ See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* (Harvard University Press, 2004), 178.

²⁷⁸ *Ibid.*, 179.

²⁷⁹ *Ibid.*

²⁸⁰ J.T. Molot, *Theory and Practice in Litigation Risk*, *supra* note 246.

defendants carry out their activities to an extent that is below the socially optimal one, just in order to minimize the chances to be sued.²⁸¹

Also in the academic setting, TPLF has been criticized on the grounds that it encourages frivolous and unmeritorious litigation.²⁸² It has been argued that, as a matter of simple economics, increasing the amount of money available to plaintiffs makes litigation cheaper and thus, as it happens when something becomes cheaper, there is more demand of it and that results into an increase of the volume of claims litigated.²⁸³ Moreover, “third-party financing particularly increases the volume of questionable claims”,²⁸⁴ because such financing eliminates the incentives not to invest on non-meritorious litigation.²⁸⁵

Proponents of TPLF have discredited this argument.²⁸⁶ The central counterargument underpinning this position is that investors carefully scrutinize the cases brought to them by their potential clients.²⁸⁷ Litigation financing firms “engage in stringent due diligence when evaluating potential investments,”²⁸⁸ and only invest in claims with good prospect of success. The selection of cases by the financing company works as a ‘filter’ that leaves out frivolous and unmeritorious claims,²⁸⁹ similarly to how attorneys working on contingency do not accept cases

²⁸¹ Gary Young, *Two Setbacks for Lawsuit Financing: But the Practice is Still Alive*, NEW JERSEY LAW JOURNAL, 18 August 2003, 21.

²⁸² On the idea of ‘frivolous’ claims see Robert G. Bone, *Modeling Frivolous Suits*, 14 U. PA. L. REV. 519, 529-33 (1997).

²⁸³ Paul H. Rubin, *Third Party Financing of Litigation*, 38 N. KY. L. REV. 673 (2011).

²⁸⁴ SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES, *supra* note 254, 5.

²⁸⁵ *Ibid.*

²⁸⁶ See generally A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

²⁸⁷ In particular on the pre-check by financing companies in Germany: M. Coester & D. Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, *supra* note 65, 89.

²⁸⁸ Juridica Capital Management, <http://www.juridicacapital.com/how.php>

²⁸⁹ At the present status of the industry, the selection is often very stringent. For example, IMF (Australia) Ltd (now Bentham IMF Limited), in its 2001-2010 experience, only funded 5% of the matters considered. Similarly, Juridica Capital Management only funded 6% of the cases considered.

that are not likely to be successful. The result of this is that TPLF could be beneficial (both for ‘society’ and for defendants) because it allows ‘good’ claims to be litigated, while it does not support unmeritorious claims.²⁹⁰

But what is a ‘good’ claim? A counterargument against the one according to which litigation-funding firms only invest in ‘good’ claims (identified as claims with high probability of success) is that funders, being risk neutral and being able to spread the risk on large pools of cases, reason in terms of expected values. For a risk neutral investor, the expected value of a \$500 million claim with only a 5% chance of success is equal to that of a \$25 million claim with 100% probability to win. Since investors make their decision to invest based on the comparison between the expected revenue and the expected cost, they might be attracted by highly risky (unmeritorious) claims with huge damage awards at stake.²⁹¹

Closely connected to the issue of frivolous litigation is the concern for the increasing overall (frivolous or not) volume of litigation. This is perhaps the most problematic negative externality discussed by the scholarship on TPLF.²⁹² Roughly speaking, by increasing the funds available to claimholders to pursue litigation, TPLF would cause an increase in the overall number of claims, resulting in a more costly civil justice system.²⁹³

(Data provided at the RAND ICJ Conference “Alternative Litigation Finance in the U.S.: Where Are We and Where Are We Headed with Practice and Policy?,” Washington, D.C., May 20-21 2010).

²⁹⁰ On this point see RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, *supra* note 52, 117.

²⁹¹ SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES, *supra* note 254, 6.

²⁹² P.H. Rubin, *Third Party Financing of Litigation*, *supra* note 283; David Abrams and Daniel L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes* (2009) (working paper on file with author).

²⁹³ For the first attempt of empirical investigation in this direction, considering the experience of Australia, D. Abrams & D.L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes*, *supra* note 292.

Some scholars have been able to strengthen this argument by producing some evidence that confirms it. In particular, Abram and Chen reviewed the experience of Australia, the market where TPLF has been developed for the longest time and therefore where most data is available, and came to the conclusion that the volume of litigation in Australia in fact increased since the introduction of TPLF.²⁹⁴

To this argument, it has been countered that “[e]ven if this were true, why would this be a bad thing?”²⁹⁵ If the claims that are funded are not fraudulent and reflect claims based on valid law, then it would not be a bad thing for these cases to increase in number, as that would mean that more legal wrongs are repaired and more wrongdoers held to account.²⁹⁶ Perhaps, society should think of devoting more resources to the civil justice system.

3. *Bar Associations*

TPLF has a significant impact on the legal profession. Lawyers are very likely to find themselves involved in issues concerning TPLF, because they represent clients whose litigation is being funded by a TPLF supplier, or because clients approach them asking for their advice on the matter, or because a client may ask a lawyer for a referral to a litigation funding company. Moreover, in the context of negotiations between a claimholder and a funding company, the funder may approach the potential client’s lawyer asking for (privileged) information on the case, in order to

²⁹⁴ David S. Abrams and Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, University of Pennsylvania Law School Working Paper (January 2012), available at <https://www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf>.

²⁹⁵ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80, 68.

²⁹⁶ *Ibid.*; *New Hampshire Ins. Co. v. McCann*, 707 N.E.2d 332, 337 (Mass. 1999); Kevin Pennell, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481, 494-496 (2003).

take a decision on whether to invest or not in the lawsuit. Finally, a funder may seek to influence a lawyer's decisions regarding the strategy to adopt in the litigation, e.g. to require additional discovery at the client's cost, or on whether to accept or reject a settlement offer (even if this is typically a decision for the client²⁹⁷).

Because of the many ethical questions TPLF raises for lawyers, several bar associations in the US have issued advisory opinions in order to provide guidance to the members of the profession on how to proceed in order to behave ethically.

The American Bar Association (ABA) Commission on Ethics 20/20 formed a Working Group on Alternative Litigation Finance to study the impact of TPLF on the attorney-client relationship and on the professional responsibilities of lawyers. The Working Group was instructed only to consider the duties of lawyers representing clients who are considering or have obtained external funding to TPLF suppliers. By contrast, the Working Group did not consider any social policy or normative issues such as the desirability of TPLF or any related empirical controversies. In October 2011, the Working Group published a Draft White Paper on Alternative Litigation Finance as an Informational Report to the ABA House of Delegates.²⁹⁸ Below I summarize the main conclusions of the Draft White Paper.

First, attorneys must approach any situation where TPLF is involved with care, mindful of their professional obligations as members of the legal profession.

Second, an attorney must always exercise independent professional judgment on behalf of his client, and not be influenced by financial or other considerations. Therefore, a lawyer must not permit a third party (in particular, in

²⁹⁷ For example, Rule 1.2 of the ABA Model Rules of Professional Conduct provides that "A lawyer shall abide by a client's decision whether to settle a matter."

²⁹⁸ AMERICAN BAR ASSOCIATION, COMMISSION ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE (2011).

this case, a third-party funder) to interfere with the lawyer's exercise of professional judgment.

Third, the lawyer must be vigilant to prevent disclosure of any confidential information. He must also use reasonable care to safeguard against a waiver of the attorney-client privilege or other protection on the communications with his client (an issue on which the law is unsettled).²⁹⁹

Finally, the attorney must advise his client on the terms of the funding transaction; if the client is not an expert, the lawyer must become fully informed and provide competent advice to the client.³⁰⁰

Bar associations in the US have expressed advisory opinions also at the state and local levels. For example, the New York City Bar Association (NYCBA) issued a Formal Opinion on TPLF in 2011.³⁰¹ In its Opinion, the NYCBA advises lawyers on how to behave in order to comply with their professional responsibility obligations if they find themselves in a situation that involves TPLF.

First of all—and importantly for the purpose of the policy debate on TPLF—, the NYCBA acknowledged that it is not unethical per se for a lawyer to represent a client whose case is funded by a TPLF supplier. However, the lawyer must be aware of the various ethical issues that may arise from the transaction, and advise the client accordingly.³⁰²

²⁹⁹ See note 266.

³⁰⁰ ABA, COMMISSION ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE, *supra* note 298, 4.

³⁰¹ NEW YORK CITY BAR ASSOCIATION, FORMAL OPINION 2011-2: THIRD PARTY LITIGATION FINANCING (2011). The Opinion is available at <http://www.nycbar.org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02>

³⁰² *Ibid.*

According to the NYCBA, the two main issues that arise include: (i) the compromise of confidentiality and waiver of attorney-client privilege; (ii) the potential impact of the TPLF agreement on a lawyer's exercise of independent judgment. The NYCBA proposes the following solutions, which would allow lawyers to behave ethically before these issues: (i) the lawyer may not reveal client information to the TPLF supplier without the client's informed consent; (ii) while the client may agree to permit the financing company to direct the strategy or other aspects of the lawsuit, the lawyer may not permit the funder to do so unless he has obtained the client's informed consent.³⁰³

4. *Governmental Reactions*

To complete the picture of the policy debate on TPLF that I have tried to draw in this chapter, it is now time to see what have been some major reactions by governmental institutions. Among these, I include both courts and legislators. With respect to the former, this is not the context to discuss any case law on TPLF. Rather, I will briefly survey some other ways in which courts have expressed views that are relevant for the policy debate on TPLF. In particular I will address, on the one hand, UK Rt. Hon. Lord Justice Jackson's Report on the costs of civil litigation of 2009, and, on the other, examples of courts' dicta and other policy statements by judges that are likely to influence future case law on TPLF.

³⁰³ *Ibid.*

a) *Lord Justice Jackson's Report*

Rt. Hon. Lord Justice Jackson was appointed to carry out an independent review of the rules and principles governing the costs of civil litigation in the UK, and to make recommendations in order to promote access to justice at proportionate cost. The review lasted one year, commencing in January 2009 until December 2009, and the findings were presented in the form of a published report in January 2010.³⁰⁴

The Report carries out a thorough review of civil litigation costs in the UK, and is by no means limited to the topic of TPLF. It discusses the costs involved in virtually all areas of civil litigation—from personal injury to intellectual property—, and it discusses alternative ways in which litigation is financed. The Report concludes with some recommendations on what are valuable ways to finance civil litigation, which should be encouraged, and other proposals to improve the efficiency of the legal system and promote access to justice.

Importantly for the TPLF industry, the Report endorses TPLF as a beneficial practice. In particular, the Report states that “[i]n some areas of civil litigation costs are disproportionate and impede access to justice”.³⁰⁵ With the scope in mind of “propos[ing] a coherent package of interlocking reforms, designed to control costs and promote access to justice”,³⁰⁶ Justice Jackson stated that “third-party funding is beneficial and should be supported,” in part because it “promotes access to justice,” and in particular for the following main reasons.

³⁰⁴ RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, *supra* note 52.

³⁰⁵ *Ibid.*, i.

³⁰⁶ *Ibid.*

First, TPLF provides an additional means of funding litigation and, for some parties, the only means of funding litigation (hence the argument that TPLF promotes access to justice). Second, although a successful claimant with third party funding foregoes a percentage of his damages, it is better for him to recover a substantial part of his damages than to recover nothing at all. Third, the use of TPLF does not impose additional financial burdens upon opposing parties. Finally, TPLF tends to filter out unmeritorious cases, because funders will not take on the risk of such cases, which also benefits opposing parties.³⁰⁷

The section of the Report on TPLF goes on and Jackson LJ discusses whether any regulation of the TPLF industry is required in the UK and, in case it were, whether full statutory regulation is necessary or whether an industry self-regulatory code may be sufficient. Jackson LJ acknowledges that some form of regulation of the industry is necessary (in line with the advice by the Law Society of England and Wales). However, no statutory regulation is required for the time being. This is because the TPLF industry is still nascent in the UK, and the typical users of TPLF services are sophisticated enterprises with full access to legal advice. Therefore, an appropriate self-regulatory code will be sufficient for the time being.³⁰⁸ In particular, Jackson LJ noted that the draft voluntary code that had been developed by the TPLF industry association (ALF's predecessor) was not sufficient to ensure a proper functioning of TPLF on the market, and required that a stricter approach be taken. The Civil Justice Council consulted on a new draft code on 2011,

³⁰⁷ *Ibid.*, 117. The Civil Justice Council (the "CJC") has expressed a similar view. See the CJC report IMPROVED ACCESS TO JUSTICE – FUNDING OPTIONS AND PROPORTIONATE COSTS, *supra* note 163, Recommendation 3 and Chapter C.

³⁰⁸ RT. HON. LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT, *supra* note 52, 118-124.

which was voluntarily adopted by the industry's newly created trade association (ALF).³⁰⁹

Interestingly, Christopher Hodges published an article where he sheds some light on the dynamics that led to the adoption of a self-regulatory code for litigation funders in the UK. He notes that “[t]he litigation funding industry has lobbied Jackson LJ to permit them to operate more freely and extensively. In return, he put pressure on the industry to create a self-regulatory regime, since historical examples of consumer abuse could clearly be repeated”.³¹⁰

b) Court Opinions

By reviewing the case law on TPLF, one notices that in addition to the relevant rulings, which contribute shaping the law of TPLF in many common law countries, courts sometimes expressed policy statements on TPLF. These statements are sometimes part of the reasoning of the court, other times they are provided as dicta or comments within a court decision. While the nature of these comments is certainly not that of a binding precedent, these statements are useful in order to understand what the position of the court is with respect to TPLF, and possibly to predict future decisions.

For example, in 2007 the Lords of the Judicial Committee of the Privy Council of Bahamas considered a case that involved the assignment of a claim.³¹¹

The issue was whether the assignment was void as involving maintenance and

³⁰⁹ ALF, CODE OF CONDUCT FOR LITIGATION FUNDERS, *supra* note 157.

³¹⁰ Christopher Hodges, *Self-regulation (Jackson Report, Code of Conduct)*, *supra* note 164, 155.

³¹¹ *Masai Aviation Services & Aerostar Limited vs. Attorney General & Bahamasair Holdings Limited* [2007] UKPC 12.

champerty. While the case did not involve a TPLF transaction, the Lords narrated the diminishing relevance of the law of champerty and maintenance in modern society. This may suggest that the Courts of the Commonwealth of Bahamas may, in the future, look at TPLF with these lenses.

In 2011, the Royal Court of Jersey heard a case that involved a TPLF agreement, and it was required to consider the issue of champerty under the law of Jersey. In its judgment, the court held i.a. that the funding agreement facilitated access to justice by plaintiffs who would not otherwise be able to afford to bring the litigation in question.³¹²

Moreover, in 2004 the Supreme Court of Appeal of South Africa stated that the need for the rules of maintenance and champerty had diminished, if not entirely disappeared, in the light of the right of access to justice enshrined in the Constitution of South Africa and the coming into force of the Contingency Fees Act 66 of 1997, which made speculative litigation possible by permitting ‘no win, no fee’ arrangements between lawyers and their clients.³¹³

By contrast, in some cases courts have expressed themselves in the opposing direction. For example, in 2006 the Court of Appeals of Singapore indicated (in dicta) that it considers the doctrine of champerty to continue to be useful in preventing a perversion of justice.³¹⁴

³¹² *The Valletta Trust* [2011] JRC.

³¹³ *PricewaterhouseCoopers Inc and Others v. National Potato Co-operative Ltd* [2004] (6) SA 66 (SCA).

³¹⁴ *Otech Pakistan Pvt Ltd v Clough Engineering Ltd* [2007] 1 SLR (R) 989.

c) Legislators

While in the UK the regulation of TPLF has been left to an industry voluntary code, in the US some states have adopted statutory regulation on the matter. In most cases these statutes, where adopted, abolish the traditional prohibitions on champerty and maintenance and, in some cases, establish a regulatory regime to which TPLF suppliers are subject.

For example, Maine requires that TPLF companies register with the state and include specific funding provisions in their agreements with clients. Similarly, Ohio recently enacted a law that expressly requires all TPLF contracts to include language stating that the investor “shall have no right and will not make any decision with respect to the conduct of the underlying civil action or claim or any settlement or resolution thereof”.³¹⁵ Moreover, Texas state Representative Senfronia Thomson (D-Houston) recently proposed setting up a regulatory scheme in Texas to allow companies or individuals with no stake in litigation to take a share of potential proceeds in exchange for an upfront payment.³¹⁶

However, not all state assemblies are moving in the direction of a more liberal approach to TPLF. Instead, some states are attempting to address some of the concerns arising from TPLF with statutory regulation. For example, a bill that would place limits on the interest charged by litigation funders passed a Senate vote in Louisiana in April 2013. The bill, which is still waiting for a House vote, would set a cap at 35% to the size of the share that the funder would be entitled to if the

³¹⁵ NYSBA, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING, *supra* note 82, 3-4.

³¹⁶ Jess Davis, *3rd-Party Litigation Funding Regs Proposed In Texas*, LAW360.COM (14 February 2013); NYSBA, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING, *supra* note 82, 3-4.

litigation is successful. Reportedly, eleven other US states are considering similar legislation.³¹⁷

³¹⁷ Kyle Barnett, *Lawsuit Lending Bill Aimed at Putting Caps on Predatory Lenders Passes State Senate*, THE LOUISIANA RECORD, 30 April 2013.

CHAPTER IV
LIFTING THE VEIL ON THE POLITICAL DEBATE

A. STATEMENT OF PURPOSE

In chapter III we saw the main policy arguments raised by the debate on TPLF regarding whether this practice should be liberalized, regulated or prohibited. In particular, we identified the key players taking part to the political debate, and analyzed their arguments as they present them.

As often in the realm of law and politics, some arguments proposed by stakeholders reflect legitimate business, economic or political interest. These arguments come in confrontation with those brought by opposing interest holders through a process of (more or less transparent) lobbying before the institutions that are entitled to take decisions for the community. Lobbying works as a sieve of stakeholders' interests in a process that leads to the formation of a legal rule that is supposed to mirror the outcome of that process. Seen in this way, lobbying is an essential part of the functioning of modern democracies.

In other cases, however, interested stakeholders advocate for their interests by creating 'fake' arguments, constructed in such a way to have political grasp, with a view to prevail in the aforementioned process vis-à-vis other stakeholders, and

eventually obtain a more favorable regulatory environment where to conduct their business more profitably.

In this respect, it is the job of academics—and the purpose of this work—to lift the veil of appearance of policy arguments that are structured in a way that they make sense on their face, and deconstruct those arguments in order to uncover whether they are genuine arguments (which should be acknowledged), or not (in which case they should be disregarded).

In order to do so, in Section B of this chapter I test the main arguments described in Chapter III by using economic analysis, a methodological approach that can be traced under the umbrella of comparative law—meant as an anti-formalistic and critical approach to the study of law and policy.³¹⁸

Moreover, in Section C, I use sociological analysis in order to explain some other grounds (i.e., in addition to those provided by economic analysis) that may explain or justify the regulation of TPLF. In particular, first, and from a descriptive perspective, I discuss what may explain an interest in the regulation of TPLF that the economic analysis cannot explain. Secondly, and from a normative perspective, I discuss other grounds that should inform a regulator's decision as to whether to regulate TPLF, and thus eventually justify the regulation of TPLF, in addition to the grounds provided by economic analysis—which conclusions may not be sufficient per se to lead to optimal regulation—or even in contradiction with them.

³¹⁸ On the benefits deriving from the interaction between the two “strongest nonpositivistic approaches to legal analysis,” namely comparative law and law and economics, see UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS*, *supra* note 224.

B. ECONOMIC ANALYSIS OF TPLF

1. *Property Rights in Litigation*

In the law and economics literature on property law,³¹⁹ consideration is given to how alternative ‘bundles of rights’ create incentives to use resources efficiently.³²⁰ Property is not understood as a monolithic institution, but rather as a multifaceted right that describes what people can and cannot do with the resources they own. Modern law permits forms of property that were unthought-of in the past, being the history of property a story of increasing complexity that mirrors increasing opportunities of wealth creation.³²¹ Often a new form of property is created in order to take advantage of a previously unseen market opportunity.³²² The law sometimes reacts to such innovations by imposing limitations to what can be transferred as property. That usually happens when, for a variety of reasons, such innovations are considered undesirable. In particular, on the one hand, private law imposes limitations on the right to transfer that is inherent to property by denying contract enforcement and/or the protection that in principle it affords to “entitlements” through injunction or money judgments.³²³ On the other hand, the legal system uses regulation as a means to correct market failures.³²⁴

³¹⁹ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 7-176; ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (5th Int'l ed. 2008), 74-118.

³²⁰ R. COOTER & T. ULEN, LAW & ECONOMICS, *supra* note 319, 78.

³²¹ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80.

³²² *Ibid.*

³²³ Guido Calabresi & A Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

³²⁴ See Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954); Francis M. Bator, *The Anatomy of Market Failure*, 72 QUARTERLY JOURNAL OF ECONOMICS 351 (1958); Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960); Bruce C. Greenwald & Joseph E. Stiglitz, *Externalities in Economies with Imperfect Information and Incomplete Markets*, 101 QUARTERLY JOURNAL OF ECONOMICS 229 (1986); ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, Vol. 1, 1-19 (1988);

In the language of legal economists, a plaintiff (or potential plaintiff) holding a claim can be said to have ‘property rights’ in it, including possessory rights and rights to transfer, being the lawsuit qualifiable as object of property.³²⁵ By selling his claim to an assignor, or by selling an interest in the outcome of the litigation to an investor, a plaintiff transfers all or part of his property rights in litigation.³²⁶

Under the economic approach, a rational claimholder—by definition—will be willing to maximize the value of his property right in the lawsuit. In order to do so, among the rights included in the ‘bundle,’ he will only decide to keep those specific rights that he evaluates more than others, while he will prefer to bargain over the other rights he holds with another person who evaluates them more. In this way the claimholder will maximize the expected value of his claim. Furthermore, given that litigants are usually risk averse,³²⁷ the elimination by a claimholder of the risk connected to the litigation is something a claimholder may be willing to pay a price for, resulting in a factor capable of increasing the expected value of his claim.

TPLF is a practice through which claimholders can eliminate the risk connected to the possible unfavorable outcome of the litigation. A plaintiff may be willing to transfer part of his property rights in the lawsuit to a third party in exchange of having that risk eliminated, thus increasing the expected value of his claim.

SAMUEL BOWLES, MICROECONOMICS: BEHAVIOR, INSTITUTIONS AND EVOLUTION 205-232 (2004); John O. Ledyard, *Market Failure*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (S.N. DURLAUF & L.E. BLUME eds., 2nd ed., 2008).

³²⁵ On the use of the term ‘property rights’ in the Law & Economics literature see S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 9-11.

³²⁶ On this view see also Michael I. Krauss, *Alternative Dispute Financing and Legal Ethics: Free the Lawyers!*, 33 MISS. C. L. REV. (2014) (forthcoming).

³²⁷ See S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 258-259, 406-407, 430; W. Kip Viscusi, *Product Liability Litigation with Risk Aversion*, 17 J. LEGAL STUD. 101 (1988); A. Heyes, N. Rickman & D. Tzavara, *Legal Expenses Insurance, Risk Aversion and Litigation*, 24 INT’L REV. L. & ECON. 107 (2004).

On these premises, the next sections of this chapter aim to explain the functioning of TPLF by using economic analysis. Understanding the economic logics of TPLF will be essential as background information in order to fully understand the legal issues posed by TPLF and the policy arguments in favor and against TPLF. Section 2 provides an economic model of TPLF, showing the array of incentives of the parties of a TPLF contract. Section 3 explains why and under what conditions the parties form a TPLF contract, and shows that TPLF is Pareto efficient. Section 4 critically looks at the main arguments advanced by supporters and critics of TPLF, unveiling the myths and realities of this practice, and reconciling the debate by re-assessing the costs and benefits of TPLF.

2. *Economic Model of TPLF*

In this section I provide a basic economic model of TPLF. I adopt as my starting point Shavell's basic theory of litigation,³²⁸ and I analyze the incentives of the funder and the plaintiff with respect to TPLF, respectively under the 'American' rule and the 'English' rule for the allocation of legal costs.

The economic model is based on the following assumptions: *a*) all parties are rational and risk neutral, *b*) if a plaintiff brings suit, there will definitively be a trial (i.e., I abstract from the possibility of settlement before trial); *c*) we are in a simplified world model, with only two time dimensions: T0 and T1 (the time of the TPLF agreement and the time of the judgment), *d*) at T1 there are only two possible

³²⁸ See S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 387-443; Kathryn E. Spier, *Litigation*, in THE HANDBOOK OF LAW & ECONOMICS 262 (A.M. POLINSKY & S. SHAVELL eds., North Holland, 2007).

scenarios: plaintiff wins or plaintiff loses, *e)* the lawyer is paid on a hourly basis, and that is included in the costs of litigation, and *f)* there are no transaction costs.

*a) American Rule*³²⁹

The Third-party Funder

The funder, a profit maximizer, will be willing to fund a plaintiff's suit when his expected revenue $E(R)$ from his investment is higher than his expected costs $E(C)$, i.e. when his expected profit $E(\pi)$ is positive, being $E(\pi) = E(R) - E(C)$. The funder will evaluate—with careful scrutiny—the merit of the plaintiff's claim, and estimate the size of the claim (R), i.e. the dollar amount likely to be won, and the probability of success of the claim (λ).³³⁰ Furthermore, the funder and the plaintiff will determine, contractually, the share of awards that the funder will be entitled to get after a judgment is reached (σ). The funder's expected revenue is the share of the amount likely to be won times the probability to win.

$$E(R) = \sigma(\lambda R)$$

The funder's expected costs are the plaintiff's legal expenses associated with the suit, which he is obliging himself to cover by signing the contract. The funder will invest if and only if $E(R) > E(C)$.

Suppose the plaintiff holds a claim worth \$100,000, the funder believes that the plaintiff will win at trial with probability 70 percent, the contractually

³²⁹ Under the 'American rule' each party pays for its own costs of litigation. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT. & COMP. L. REV. 583 (2005), 585.

³³⁰ On the use of risk analysis applied to litigation see R.B. CALIHAN, J.R. DENT & M.B. VICTOR, ABA, THE ROLE OF RISK ANALYSIS IN DISPUTE AND LITIGATION MANAGEMENT, *supra* note 220, 5-33.

determined share of the proceeds for the funder is 30 percent, and the expected litigation costs are \$20,000. Here, we will have

$$R = 100,000 \quad \sigma = 30\% \quad \lambda = 70\% \quad E(C) = 20,000$$

Thus, applying $E(R) = \sigma(\lambda R)$ we will have

$$E(R) = .3(.7(100,000)) = 21,000$$

Under the given conditions, the funder will invest, because $E(R) > E(C)$.

The Plaintiff

Assuming that the plaintiff is also a profit maximizer, being his reason for bringing suit that of receiving the highest possible amount of money (and not, for example, personal vindication which he may even be willing to pay for), we know from the basic economics of litigation that, in absence of third-party funding, the plaintiff will bring suit if his expected return from suit is higher than his expected costs.³³¹ In other words, the plaintiff tries to maximize his $E(\pi)$, being $E(\pi) = E(R) - E(C)$.

If TPLF is available, we have two possible scenarios. In the first scenario, one with no TPLF, plaintiff's $E(\pi) = E(R) - E(C) = \lambda R - E(C)$. In the second scenario, in which the plaintiff receives TPLF, we indicate the respective variables as $E(\pi)' = E(R)' - E(C)'$. Because the funder is entitled to a share σ of the awards, for the plaintiff $E(R)' = E(R) (1-\sigma) = \lambda R (1-\sigma)$. Because by turning to TPLF the plaintiff eliminates his expected costs (because he does not advance any money and bears no risk), his $E(C)' = 0$, and therefore $E(\pi)' = \lambda R (1-\sigma)$.

³³¹ S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 390.

The plaintiff will be seeking third-party funding if and only if

$$E(\pi) < E(\pi)'$$

or,

$$\lambda R - E(C) < \lambda R (1-\sigma)$$

In other words, the plaintiff will be willing to contract with a litigation financing company only in the case he expects to lose less by giving away a share of the proceeds than by risking his own money funding his own litigation.

Before continuing with the explanation, it is necessary to notice that we can distinguish between two types of plaintiffs: *a)* the plaintiff under a budget constraint (the ‘poor’ plaintiff), who cannot afford to bring suit without TPLF,³³² and *b)* the plaintiff who does have the resources, but decides to receive external funding because he prefers it as a strategy, as a way to manage his risk associated with the litigation, because he does not want to risk his own money and is willing to pay for purchasing that protection against risk.

The ‘poor’ plaintiff’s expected profit under a litigation funding agreement will always be equal or higher than without external funding. The intuition is simple, and the reason is that without any external funding he would not be able to bring suit and thus his $E(R)$ would be zero. Instead, if he receives third-party funding, his $E(C)$ will be zero and his $E(R)$ will always be ≥ 0 . Thus, the ‘poor’ plaintiff is always better off (or *rectius*: is not worse off) by getting third-party funding than by getting nothing.³³³

³³² Apart from poor people, this category includes creditors in the insolvency context, for which it would be impossible to pursue wrongdoers due to lack of funds.

³³³ Here the comparison is only between with or without TPLF: I am not discussing other alternatives for financing poor people’s litigation.

Coming back to the plaintiff who is not under a budget constraint, consider the following numerical example:

$$R = 100,000 \quad \sigma = 30\% \quad \lambda = 70\% \quad E(C) = 25,000$$

The plaintiff will be willing to receive external financing when

$$E(\pi) < E(\pi)'$$

Thus,

$$\lambda R - E(C) < \lambda R (1 - \sigma)$$

$$[(.7) 100,000 - (25,000)] < [(.7)(.7) 100,000]$$

$$45,000 < 49,000$$

In the example, we can conclude that the ‘non-poor’ plaintiff would get third-party financing for covering all the costs of his litigation (so to eliminate any risk) and give up 30 percent of the award, rather than risking his own money hoping to get the keep the entire award. After all, the plaintiff’s expected profit with TPLF is higher than his expected profit without TPLF. Under all assumptions of the model he will get TPLF.

*b) English Rule*³³⁴

The Third-party Funder

Under the English rule—just like under the American rule—the funder will be willing to invest as long as his $E(\pi)$ from the investment is positive, i.e. when his $E(R) > E(C)$. Because under the English rule all costs are paid by the losing party,

³³⁴ Under the ‘English rule’ the losing party pays for all litigation costs. D.A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* *supra* note 329, 584. See also Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J. L. ECON. & ORG. 143 (1987).

the expectancies are not as linear as under the American rule. The funder will have no costs in the case the plaintiff wins, but his costs will include the defendant's litigation costs if the plaintiff loses ($C_p + C_d$). Thus, for the funder, the $E(R)$ from the investment will be $\lambda(\sigma R)$, and his $E(C)$ will be $(1-\lambda)(C_p + C_d)$. Consequently, the $E(\pi)$ for the funder looks as follows:

$$E(\pi) = \lambda(\sigma R) - (1-\lambda)(C_p + C_d)$$

Consider the following numerical example

$$R = 100,000 \quad \lambda = 60\% \quad \sigma = 30\% \quad C_p = C_d = 20,000$$

Applying $E(\pi) = \lambda(\sigma R) - (1-\lambda)(C_p + C_d)$, we will have:

$$E(\pi) = (.6)(.3)(100,000) - (.4)(40,000)$$

$$E(\pi) = 18,000 - 16,000$$

$$E(\pi) = 2000$$

In this numerical example, because a positive expected profit of 2000 exists, the funder will decide to fund the lawsuit.

The Plaintiff

From the viewpoint of the plaintiff, the decision to turn to TPLF depends on whether the $E(\pi)$ with TPLF is higher than the $E(\pi)$ without TPLF. That is to say, recalling that the apostrophe (') is used to make reference to the scenario with TPLF, the plaintiff will turn to TPLF when

$$E(\pi) < E(\pi)'$$

If the plaintiff sues the defendant with no external funding, then his $E(\pi) = \lambda R - (1-\lambda)(C_p + C_d)$. If the plaintiff decides to turn to TPLF, then his $E(\pi)' = \lambda R (1-\sigma)$.

Consequently, because the plaintiff will turn to TPLF as long as $E(\pi) < E(\pi)'$, he will do so when

$$\lambda R - (1-\lambda)(C_p + C_d) < \lambda R (1-\sigma)$$

Consider the following numerical example:

$$R = 100,000 \quad \lambda = 60\% \quad \sigma = 30\% \quad C_p = 20,000 \quad C_d = 30,000$$

Here, the plaintiff will turn to TPLF because

$$(.6) 100,000 - (.4) 50,000 < (.6)(.7) 100,000$$

$$40,000 < 42,000$$

In other words, in this example, the plaintiff will be better off by turning to TPLF than by financing his lawsuit with his own resources.

A few words are worth mention here with respect to what I earlier referred to as the 'poor' plaintiff, i.e. the claimholder under a budget constraint that prevents him from the possibility to sue the defendant. Also under the English rule the 'poor' plaintiff will be better off by turning to TPLF, because, with no external funding, he will not bring suit and thus his $E(\pi)$ will be zero. With TPLF, instead, his $E(\pi)' = \lambda R (1-\sigma) \geq E(\pi)$.

Under the English rule, one further possible scenario exists: that of a claimholder who does have the resources to start a lawsuit (*i.e.* to pay for his own legal expenses), but who would not be able to bear the costs of an adverse cost order in case of loss. A claimholder in such situation would find TPLF beneficial because it eliminates the risk of an adverse cost order that would oblige him to pay for the winning defendant's litigation costs.

3. *Lessons from the Economic Model*

a) *Why the Parties Enter into a TPLF Agreement*

The economic model has served the function of explaining when the funder and the plaintiff are individually willing to enter into a TPLF agreement. As a common intuition suggests, they will actually form a contract when the expected utilities of both are increased by the contract,³³⁵ i.e. when there is room for a Pareto superior allocation of property rights in litigation.³³⁶ However, it is worth considering under what conditions both parties' expected utilities may in fact be increased by TPLF, in order to see when and why the parties will actually form a contract.

If we assume that the two parties of a financing contract have symmetric information,³³⁷ have equal predictions about the outcome of the case and are equally risk neutral, there is no room for gains from the financing contract, because there is no possible σ that can be agreed upon that makes both parties better off. This is true under both the American rule and the English rule for the allocation of legal expenses, as it is demonstrated in the following subsections.

American Rule

Assume both the funder and the plaintiff believe that the outcome of the case will be favorable by a certain percentage λ , the value of the claim is of a certain amount R

³³⁵ See S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 293.

³³⁶ A change from one allocation to another is *Pareto superior* when at least one party is better off and no one else is worse off. See ROBERT PINDYCK & DANIEL RUBINFELD, MICROECONOMICS, 590 ff. (7th ed. int'l 2009).

³³⁷ For a model of parties' litigation and settlement decisions under imperfect information see Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND JOURNAL OF ECONOMICS 404 (1984). See also, specifically on the effects of legal-expenses insurance (including after-the-event legal-expenses insurance) on settlement under asymmetric information, Y. Qiao, *Legal-Expenses Insurance and Settlement*, *supra* note 187.

and so are each party's litigation costs (say \$20,000). Under these conditions of perfectly symmetric information there will be no possible σ the parties will be agreeing upon, because there will always be a σ by which one party gains and the other loses unless their respective expected profit under the financing contract is equal to that without the contract.

Consider the following table, using apostrophe (') to indicate the situation with a TPLF agreement:

	Funder		Plaintiff	
No TPLF	$E(R) = 0$	$E(C) = 0$	$E(R) = \lambda R$	$E(C) = 20,000$
Yes TPLF	$E(R)' = \sigma(\lambda R)$	$E(C)' = 20,000$	$E(R)' = (1-\sigma)\lambda R$	$E(C)' = 0$

Put in terms of $E(\pi)$, the following can be stated:

	Funder	Plaintiff
No TPLF	$E(\pi) = 0$	$E(\pi) = \lambda R - 20,000$
Yes TPLF	$E(\pi)' = \sigma(\lambda R) - 20,000$	$E(\pi)' = (1-\sigma)\lambda R$

Since both the funder and the plaintiff will be willing to enter into a contract as long as their respective $E(\pi)' > E(\pi)$, then the following can be said about the two parties as to whether they will be willing to form a TPLF contract:

Funder if	Plaintiff if
$\sigma(\lambda R) - 20,000 > 0$	$(1-\sigma)\lambda R > \lambda R - 20,000$

Or,

$$\sigma(\lambda R) > 20,000$$

$$\lambda R - \sigma(\lambda R) > \lambda R - 20,000$$

$$\sigma(\lambda R) > 20,000$$

$$\sigma(\lambda R) < 20,000$$

As a result, under the American rule, if both the funder and the plaintiff have perfectly symmetric information and are risk neutral, they will never enter into a TPLF agreement.

English Rule

In this subsection I do the same test under the English rule. An equivalent conclusion is reached.

Assume that both the funder and the plaintiff believe that the claim is of a certain value R , the probability to win λ is 60%, and the total litigation costs $C = (C_p + C_d)$ are 40,000. Now consider the following table, which shows the expected payoffs of alternative scenarios (with and without TPLF) for the funder and the plaintiff respectively:

	Funder	Plaintiff
No TPLF	$E(\pi) = 0$	$E(\pi) = \lambda R - (1-\lambda) C$
Yes TPLF	$E(\pi)' = \lambda\sigma R - (1-\lambda) C$	$E(\pi)' = \lambda R (1-\sigma)$

Because both the funder and the plaintiff will be willing to come into contract if and only if their respective $E(\pi)' > E(\pi)$, then the following can be said with respect to their willingness to enter into a contract:

Funder iff

$$\lambda\sigma R - (1-\lambda)C > 0$$

Plaintiff iff

$$\lambda R (1-\sigma) > \lambda R - (1-\lambda)C$$

Or,

$$\lambda\sigma R - C + \lambda C > 0$$

$$\lambda R - \lambda\sigma R > \lambda R - C + \lambda C$$

$$(.6)\sigma R - 40,000 + 24,000 > 0$$

$$-\lambda\sigma R > -C + \lambda C$$

$$(.6)\sigma R - 16,000 > 0$$

$$- (.6)\sigma R > -16,000$$

$$(.6)\sigma R > 16,000$$

$$(.6)\sigma R < 16,000$$

As a result, under the described conditions, the funder and the plaintiff will never form a TPLF contract.

Different Perceptions and Attitudes Towards Risk

If under symmetric information the parties cannot agree on any σ and thus do not enter into contract, what is it that makes them do so? The reasons why the parties come into contract seem to be of two orders. On the one hand, the parties are likely to have different perceptions of R and, even more likely, of λ .³³⁸ On the other hand, they have different attitudes towards risk (and different marginal disutility of loss).³³⁹ While for an individual plaintiff a dispute is a single episode, a litigation

³³⁸ Compared to the individual plaintiff, litigation financing firms are likely to have greater expertise and thus higher ability to evaluate the probability of success of a claim.

³³⁹ In fact, a \$20,000 loss is likely to negatively affect an individual plaintiff more than a well-financed litigation funding company, for which such a loss might not be as significant.

financing company is repeated player that is able to spread the risk across a large pool of cases it decides to finance. Consequently, a financing firm is more risk neutral, while the individual claimholder is likely risk averse.

b) Efficiency of TPLF

We have learnt from the economic model discussed above that TPLF is in principle efficient. At this point the following question comes up: if TPLF is efficient, why has it received judicial and institutional resistance? And why is the question of its desirability receiving scholarly attention? The former chapter shed light on the hidden ‘driving forces’ of the law of TPLF, showing the opposite interest groups that have influenced the evolution of the case law and policy initiatives concerning TPLF through (sometimes aggressive) lobbying efforts. Speaking in economic terms, TPLF has been attacked on the grounds that it creates negative externalities.³⁴⁰ To be accurate, the debate on TPLF has highlighted both positive and negative externalities, which are in fact what the most recent scholarship has pivoted on. The next section of this chapter critically discusses these externalities, in order to lift the veil on the current debate and re-assess the costs and benefits of TPLF.

4. *The Costs and Benefits of TPLF: Myths and Realities*

This section addresses some of the main issues raised by the debate on TPLF and it reconsiders them in light of the lessons we have learnt from the economic analysis

³⁴⁰ See P.H. Rubin, *Third Party Financing of Litigation*, *supra* note 283.

of TPLF. In particular, it deals with the major issues that represent grounds for the potential ban or restriction of TPLF. By contrast, it does not discuss minor issues that may require regulation had the admissibility of TPLF been taken for granted, and merely dealing with the way in which TPLF should be conducted in order for the TPLF market to function properly, such as the protection of confidential and privileged information, solvency requirements for TPLF suppliers, and similar issues.

a) 'Negative' Externalities

Increasing Overall Volume of Litigation

It has been argued that, as a matter of simple economics, increasing the amount of money available to plaintiffs makes litigation cheaper and thus, as it happens when something becomes cheaper, there is more demand of it and that results into an increase of the volume of claims litigated.³⁴¹ This is perhaps the most problematic negative externality discussed by the debate on TPLF.

Roughly speaking, by increasing the funds available to claimholders to pursue litigation, TPLF would cause an increase in the overall number of claims, resulting in a more costly civil justice system.³⁴² It has been countered that if the claims that are funded are not fraudulent and reflect claims based on valid law, then it would not be a bad thing for these cases to increase in number, since that would

³⁴¹ SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES, *supra* note 254, 5; See P.H. Rubin, *Third Party Financing of Litigation*, *supra* note 283.

³⁴² For the first attempt of empirical investigation in this direction, considering the experience of Australia, D. Abrams & D.L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes*, *supra* note 292.

mean that more legal wrongs are repaired and more wrongdoers held to account,³⁴³ and therefore, society should devote more resources to the civil justice system.

The question regarding the volume of litigation can also be addressed from a different perspective, namely that of the social versus the private incentive to bring suit in a costly legal system.³⁴⁴ This perspective does not focus on the costs of the courts system that are born by taxpayers, but rather it focuses on the relationships between, on the one hand, the private and social costs of litigation, respectively (C_p) and ($C_p + C_d$), and, on the other, the private and social benefits of litigation, respectively λR and the external effect on the behavior of potential defendants generally.³⁴⁵ Assuming that the overall level of litigation increases due to TPLF, the question to address is whether the absolute value of the increasing social costs ($C_p + C_d$) determined by the amount of litigation that depends on the private incentive to litigate under TPLF (which in turn depends on the private costs and benefits) outweighs the absolute value of the social benefits of litigation, identifiable as the decrease of social costs due to the precaution activity of defendants that makes the probability of loss to victims decrease from p to q , where $p > q$. If the absolute value of litigation costs outweighs the absolute value of the deterrence benefits, then TPLF is socially undesirable; in the opposite case, TPLF is desirable. This is true under a perspective which criterion of desirability is assumed to be the minimization of total social costs, which equals the sum of expected losses, prevention costs and expected legal expenses.³⁴⁶

³⁴³ A.J. Sebok, *The Inauthentic Claim*, *supra* note 80, 68.

³⁴⁴ Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).

³⁴⁵ *Ibid.*, 334.

³⁴⁶ *Ibid.*, 335.

I now draw a model of the social desirability of TPLF from the perspective of the social versus private incentive to bring suit, adopting as my starting point Shavell's model³⁴⁷ and assuming the American rule for allocations of legal costs applies.

Define l = loss suffered by plaintiff, where $l > 0$; p = probability of loss if defendants do not engage in preventing activity, $p > 0$; q = probability of loss if defendants do engage in preventing activity, $p > q > 0$; x = cost to a defendant of prevention activity; a = plaintiff's legal expenses, $a > 0$; b = defendant's legal expenses, $b > 0$.

Under Shavell's model, legal expenses apart, a social interest in affecting defendants' behavior exists when

$$x + all < pl$$

Now two scenarios will be modeled.

The first is one in which plaintiffs are expected to bring suit (because of their private incentives), and thus defendants will engage in prevention activities. The social costs are

$$x + q(l + a + b)$$

In the second scenario plaintiffs are not expected to bring suit, thus defendants will not engage in precaution activities. The social costs are

$$pl$$

Consequently, considering legal expenses, a social interest in that plaintiffs bring suit exists when

$$x + q(l + a + b) < pl$$

³⁴⁷ *Ibid.*, 334-336.

TPLF is capable of affecting plaintiffs' private incentives to bring suit. I have shown in the basic model of TPLF³⁴⁸ that, with no TPLF available, the plaintiff will bring suit when $\lambda R - C_p > 0$ and, if TPLF is available, he will turn to TPLF when $\lambda R (1-\sigma) > \lambda R - C_p$. As a consequence of what has been said, TPLF might become problematic when it creates higher incentives for the plaintiff to bring suit. When $\lambda R (1-\sigma) > \lambda R - C_p$, the plaintiff will have higher an incentive to bring suit if TPLF is available than if it is not available. This point is crucial when it comes about questioning the social desirability of TPLF. Allowing a claimholder to bargain over his property rights in litigation with a third party increases his incentives to bring suit when there are gains from trade. Thus, allowing TPLF permits the possibility of higher incentives to bring suit; prohibiting TPLF does not permit it.

In the light of the theory of the social versus private incentive to bring suit, the question of the social desirability of TPLF looks as follow: does TPLF increase plaintiffs' incentives to bring suit to such an extent that the total increasing social costs, which amount depends on the 'new' incentive, outweigh the social benefits, which derive from the deterrence effect determined by TPLF on the behavior of potential defendants? If the answer is no, then TPLF is to be considered desirable. If the answer is yes, then TPLF results socially undesirable under this theory. The question, however, cannot be answered univocally in general terms. Instead, it is an empirical question: the social desirability of TPLF depends on many factors to be taken into consideration on a case-by-case basis. The answer will depend, apart from the costs of litigation, on the nature of defendants' activities, which could be activities which harmfulness can be reduced substantially with little marginal efforts

³⁴⁸ I consider the model under the American rule. See note 329.

or vice versa.

Ethical Issues

TPLF agreements give rise to a number of ethical issues from a variety of perspectives. First of all, at first glance it might seem that the funder unduly profits at the expenses of the plaintiff, who would be worse off because he has to give up a share of the awards upon winning the case. Instead, both parties are made better off by the contract. In fact, in terms of expectations—at the time of the agreement—also the plaintiff is better off. Of course, he will eventually find himself with less money after the judgment, but that is the price he has decided to pay in exchange for the elimination of risk. The plaintiff prefers to eliminate the risk of an unfavorable outcome of the litigation and is willing to pay for that. By bargaining over property rights in litigation, the expected value of his claim increases. TPLF creates gains from trade in property rights in litigation and is thus efficient.

Another problem might exist from the perspective of the plaintiff, concerning the issue of whether he comes into contract voluntarily. A first example is that of the ‘poor’ plaintiff who finds himself in the necessity to receive TPLF in order to bring suit. I have earlier demonstrated that in these cases the plaintiff is by definition better off with TPLF rather than without it. However, the plaintiff might have agreed on contractual conditions that he would not have agreed upon had he not found himself in a state of necessity.

A second example is that of a plaintiff holding a claim with high probability of success, who though might be unaware of the high value of his claim and

bargains with a funder for a disproportionately high σ in case of success. In such case the funder might be taking advantage of the plaintiff's unawareness. This issue becomes problematic especially in the case of individual plaintiffs outside the commercial context (not corporate actors or professionals), who may not have access to full legal advice.

Both situations in the two examples are problematic. However, they are not distinct from other problems that commonly emerge in social and economic life and which are addressed by the legal system in a variety of ways. A number of alternative solutions can be thought of. In the first place, standard remedies available under contract law can be applied to TPLF contracts: for example, the common law doctrine of unconscionability could apply to vitiate particular instances of unfair TPLF dealings.³⁴⁹ In the second place, regulatory strategies like mandatory provisions of information, licensing, default rules, codes of conduct³⁵⁰ and others might be implemented.³⁵¹ In the third place, the benefits from a competitive market for litigation financing could be substantial, as competition among litigation financing companies would induce them to offer financing for percentages of awards closer to the real expected costs of financing. Moreover, as far the benefits from competition are concerned, the availability of TPLF to plaintiffs would force attorneys working under contingency fee agreements—where available—to compete with litigation funders, thus taking out the monopoly enjoyed by lawyers on the determination of the percentage of their retainer, which could thus be lowered under

³⁴⁹ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 153.

³⁵⁰ See e.g. the consultation paper produced by the Civil Justice Council in the UK: CJC, A SELF-REGULATORY CODE FOR THIRD PARTY FUNDING, *supra* note 157.

³⁵¹ V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 161-188.

the pressure of competition.³⁵² The same is true the other way around too. For example, in a jurisdiction like the UK, which has recently opened to contingency fees,³⁵³ TPLF providers will suffer the pressures of competition, and thus are likely to lower the shares of awards they contractually demand, in order to stay competitive.

Another ethical issue concerns who controls the litigation when a litigation funder is involved, and whose interests the lawyer will represent in a funded litigation—whether the client’s or the funder’s. The review of the policy debate and economic analysis has shown that TPLF per se is not capable of affecting either of the ethical concerns under analysis. With respect to the attorney’s obligation, she remains bound to serve the client’s interest even in the presence of a TPLF agreement. Specific professional responsibility rules are in place to ensure that the lawyer is loyal to her client. In this respect, TPLF is no different from other situations that may impair the lawyer’s loyalty to her client in favor of a third party. Therefore, TPLF may and should be addressed with the same tools.

With respect to who controls the litigation, once again this is a false problem. This is for the following reasons. First, where transfer of control is perceived as a problematic issue, legal systems do not permit such transfer of control, and therefore, a TPLF agreement that contemplates such transfer is void.³⁵⁴ Second, if we abandon the prohibition to transfer control rights to the funder, control becomes a valuable good subject to negotiation between the claimholder and the funder. According to the economic model of TPLF designed here, control will

³⁵² *Ibid.*, 134-5.

³⁵³ LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT (2012), Sec. 45.

³⁵⁴ See Chapter II.

normally be allocated efficiently between the parties, generating gains from trade. In fact, the funder certainly benefits from acquiring control. However, that does not necessarily mean that the transfer of control harms the claimholder: the more control the funder acquires over the litigation, the lower will be the price (i.e., share of awards) that he will require from the claimholder in exchange. This is not to say that the conflict of interest problems that can derive from the transfer of control should be overlooked. Rather, I suggest that they be looked at under a different light, attributing an economic value to the rights to control the lawsuit, which should be given a price.³⁵⁵ If the parties to a TPLF agreement were allowed to bargain over the transfer of control, this would likely lead to Pareto improvements and eventually to efficient allocations of resources.

Finally, from the point of view of the funder, a TPLF contract is essentially an investment. Some concerns have been raised with respect to the fact that third parties can profit from other people's litigation in which they have no interest other than financial.³⁵⁶ However, investing in litigation is something that already happens—more or less directly—in other markets that have developed around property rights in litigation.³⁵⁷ Furthermore, in the business world, virtually any risk other than litigation risk can be spread or eliminated via the market.³⁵⁸ There is no actual difference between other markets and TPLF that would justify its prohibition

³⁵⁵ See also on this point M. Steinitz, *The Litigation Finance Contract*, *supra* note 269, 501-502. Generally on pricing legal claims see Maya Steinitz, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. R. 1889 (2013).

³⁵⁶ In fact, this possibility is restricted in some jurisdictions, such as Ireland or Singapore. See above notes 176 and 177.

³⁵⁷ E.g. contingency fees and litigation expenses insurance, among others. See Preface and note 12 above.

³⁵⁸ As J.T. Molot puts it, “companies not only spread business risk through the capital markets, but also dispose of some risk that they simply do not want to bear.” J.T. Molot, *A Market in Litigation Risk*, *supra* note 12, 367.

on purely ethical grounds. Instead, TPLF is a system that allows claimholders and investors to efficiently manage litigation risk, because it allows the risk to be transferred from the risk-averse individual claimholder to an investor who is able to spread the risk over a large pool of cases.

b) 'Positive' Externalities

Access to Justice

Access to justice is a vague concept. Both terms 'access' and 'justice' can be interpreted in various ways, which can then combine into a variety of meanings of the concept.³⁵⁹ In broad terms, access to justice is defined as the set of conditions that allows those who wish to enforce or defend their legal rights to reasonable opportunity to do so.³⁶⁰ In particular, access to justice has been framed in terms of access to the legal process and access to the courts.³⁶¹ Furthermore, access to justice has been defined as access to due redress.³⁶² This work does not enter the question of what should be meant by access to justice, and it will limit itself to consider access to justice in the general sense referring to one's opportunities to defend his legal rights and to obtain due redress for the wrongs received.

I mentioned earlier that TPLF increases the chances that a claimholder will act for the protection of his rights. In fact, both the 'poor' plaintiff and the 'non-

³⁵⁹ See MAURO CAPPELLETTI (gen. ed.) ACCESS TO JUSTICE, 4 v. (Milan, 1978-1979); CHRISTINE PARKER, JUST LAWYERS AND REGULATION OF ACCESS TO JUSTICE (1999); DEBORAH L. RHODE, ACCESS TO JUSTICE (Oxford University Press, 2004); Ugo Mattei, *Access to Justice. A Renewed Global Issue?* 11.3 ELECTRONIC J. COMP. L., 2-4 (2007), available at <http://www.ejcl.org/113/article113-14.pdf>.

³⁶⁰ D.L. RHODE, ACCESS TO JUSTICE, *supra* note 359, 5.

³⁶¹ See RT. HON. LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT, HMSO, London 1996.

³⁶² V. WAYE, TRADING IN LEGAL CLAIMS, *supra* note 16, 16.

poor' plaintiff benefit from TPLF.³⁶³ On the one hand, a claimholder who cannot afford to bring suit will do so if he has external funding available. On the other hand, the chances that a risk-averse 'non-poor' plaintiff brings suit against a wrongdoer may also increase if he does not bear the risk of litigation. This beneficial effect (from the viewpoint of the claimholder) is though not to be considered an externality, because it is 'included' in the Pareto improvement obtained through TPLF in relation to the parties involved.

Conversely, it can be inferred that the existence of a system that provides broader access to justice, which as such increases the level of equality within a given society, produces the external effect of increasing all individuals' utilities, because individuals possess, in connection with a notion of morality that includes equality, a set of tastes that affect their utility.³⁶⁴ Under the classical utilitarian measure of social welfare, the overall level of social welfare raises when any individual's utility increases. Furthermore, under other measures, not just the sum, but also the distribution of utilities generally matters, and more equal distributions of utility may be superior to less equal distributions.³⁶⁵ In the light of those arguments, TPLF produces a positive external effect that increases social welfare.

Social Benefits of Deterrence

The possibility for a claimholder and an investor to bargain over property rights in litigation and to come to a TPLF agreement, apart from making both parties better off, produces an external effect on potential defendants that the law and economics

³⁶³ See Section B. 2 (a) in this Chapter.

³⁶⁴ S. SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW, *supra* note 277, 601.

³⁶⁵ See *ibid.*, 597.

literature refers to as the ‘deterrence’ effect.³⁶⁶

If potential defendants know in advance or reasonably expect that individuals, who might potentially sue them, will not do so because of lack of funds or risk aversion, then the former will have no or lesser incentive to avoid the happening of those events that would entitle the latter with a legal claim against the former. Optimal deterrence requires potential injurers to be aware of the fact that they will bear full costs of the harm they produce.³⁶⁷ If potential injurers are aware of that, they will optimally internalize the costs of their actions so to engage in their harmful activities to the extent that the private benefits are not outweighed by the costs, which, if they are held fully liable, become private costs. The rationale that applies here is similar to that which explains why strict liability induces injurers to choose socially optimal levels of care in the economic analysis of tort law.³⁶⁸ If a potential injurer expects that potential victims will not sue them because of lack of funds or risk aversion, then they will be led to take a sub-optimal level of care that will result in too many wrongs.

TPLF provides funds to claimholders under a budget constraint and increases the expected value of a claim held by risk-averse plaintiffs. Consequently, the availability on the market of TPLF functions as a signal for potential defendants of the fact that their counterparts will count on solid financial resources to sue them. Thus, behaviors likely to create more losses than benefits, which their actors would be held responsible for, are discouraged by the availability of TPLF.

³⁶⁶ See Steven Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

³⁶⁷ Robert Cooter, *Commodifying Liability*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 139, 141-142 (F.H. Buckley ed., 1999).

³⁶⁸ See S. SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW*, *supra* note 277, 179-180; S. Shavell, *Strict Liability versus Negligence*, *supra* note 366.

c) Re-assessing the Costs and Benefits of TPLF

The economic analysis developed in this section has allowed us to test some of the core arguments brought by supporters and opponents of TPLF, who use them to advocate for either an increasing liberalization or a restriction of this practice, respectively. Testing those arguments through the lenses of the economic analysis of law is useful in order to understand whether they are genuine arguments, to be taken into account when taking policy decisions on TPLF, or whether they are false arguments constructed by stakeholders in order to lobby for a more favorable regulatory environment.

The first conclusion that the economic analysis led to is that TPLF is Pareto efficient. In other words, TPLF allows for mutually beneficial trades in property rights in litigation between the parties to a TPLF agreement, in a way that allows both parties to be better off, and no one worse off. By definition, if either one of the party would be made worse off by the agreement, there would be no agreement. From this point of view, therefore, TPLF deserves approval.

The economic analysis also proved some of the beneficial effects that TPLF supporters attribute to this practice, namely access to justice and deterrence.

In contrast, the economic analysis was capable to dismantle the main arguments concerning potential negative externalities associated with TPLF. In particular, the economic analysis has shown that the alleged ethical issues are pure rhetoric and not real issues to be concerned about. With particular respect to the issue of control, our analysis has shown that it is not a sufficient concern to ban TPLF. In particular, either the parties are allowed to bargain over control rights, thus

likely reaching efficient allocations of those rights, or—if we prefer not to allow parties to do so—the law (and professional responsibility rules) may play a role and restrict the transferability of control rights to litigation funders.

Importantly, also, our analysis dismantled the argument that TPLF determines an increase in the volume of litigation that would be detrimental for society. Specifically, from an economic point of view, whether TPLF increases the volume of litigation to socially undesirable levels is an empirical question. TPLF may well generate positive deterrence in a way that more litigation corresponds to fewer accidents, determining a total saved cost that exceeds the cost of litigation, in which case social welfare would be increased. However, this is an empirical question; it is not a matter of principle on which a regulator can blindly base any policy intervention.

C. TPLF THROUGH THE LENSES OF SOCIOLOGICAL ANALYSIS

While economic analysis is a very useful tool in addressing policy issues, it may alone not be sufficient. When economic analysis reveals that a certain practice is efficient, then according to its own ‘internal rules’ it creates no problem and there is no need for regulation.³⁶⁹ However, other reasons external to economic ones may exist justifying regulation. In order to find if there are any such reasons, sociological analysis is a useful tool, both in a descriptive perspective (i.e., to understand the existence of other interest in regulation than economic), and in a normative perspective (i.e., because regulators should take into account the products of

³⁶⁹ See e.g. R.H. Coase, *The Problem of Social Cost*, *supra* note 324.

sociological analysis when taking policy decisions). This is because regulators should act by balancing out different values of political life, of which economic values are just one set out of many others.

A scholastic example concerns the sale of children. In a transaction for the sale of a child, both parties are made better off from the deal. In particular, one party wants to get rid of his child in exchange for cash, while the other party is willing to pay in order to have a child. Therefore, there are gains from trade in this situation and a transaction for the sale of a child would be efficient. However, ethical limits justify the prohibition of this practice in most existing societies and legal systems. This can be explained by the fact that we do not only look at economics when taking policy decisions.³⁷⁰

Another example of something that ‘works’ from an economic perspective, but may not be desirable on other grounds, concerns the reduction of government expenditure on the national health system for reimbursed drugs. Imagine a poor sick man, who must take an expensive treatment in order to recover and cannot afford it. The drug is currently reimbursed by the national health system, but the government is considering deleting this drug from the list of reimbursed drugs in order to reduce public expenditure. The government argues that private investors will make up for the government’s de-listing of the drug. In particular, a private investor may decide to finance the patient’s cure in exchange for a 30% of any remuneration the man will earn during his working lifetime. If the patient survives the treatment and is

³⁷⁰ We may in fact construe the prohibition to trade in children in economic terms. A child market would likely create widespread mental suffering by people for simply knowing that such a market is in place. It is likely that the costs produced by this mental suffering would decrease social welfare (measured as the sum of individual levels of welfare) to an extent larger than the benefit to the parties to a transaction for the sale of a child. Therefore, a child market would be Kaldor-Hicks inefficient.

successful on his job, the investor will have made a good deal and a high profit. By contrast, if the patient dies or will make little money during his life, the investor will have made a bad deal. In any case, in this example the incentives of the parties to the agreement are aligned. Should the government go ahead with this policy? Is this something we would want to take place in our society?

It should be noted that TPLF may be similar to the example just described. In particular, it is easy to compare the above example with the government reduction of legal aid expenditure and the concomitant opening to TPLF as a private means to finance litigation. However, the comparison with TPLF may stand even without the reference to the reimbursement and de-listing issue (compared to a reduction in legal aid).

The concluding question we ask ourselves therefore is: is TPLF something we like, comparable to 'normal' financial investments, or does it involve a dynamic that is similar to the example of the pharmaceutical product, which most people are likely neither to like nor want in our society?

Most policy arguments in the debate on TPLF are of a legal or economic nature. However, some scholars have brought forward a sociological argument raising the concern that TPLF risks to generate excessive commodification of the legal system and commercialization of the practice of law.³⁷¹ In particular, this process would lead to a replacement of the idea of the legal claim as a means towards the fulfillment of a right with that of the legal claim as a commodity, as a business opportunity, or even a pretext, for an investor (and in turn its shareholders,

³⁷¹ E.g. J. Kalajdzic, P. Cashman & A. Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, *supra* note 9, 104.

i.e. ultimately taxpayers) to seek a profit. Similarly, the practice of law would no longer be a profession serving the needs of clients and the interest of justice, but it would become a business purely devoted to the service of capital.

Roughly speaking, this problem is likely to be felt more in the civil law world than in common law systems (especially the US), as the latter are typically more accustomed to the vicinity of the legal profession to the business world, and are perhaps more commodified than the civil law counterparts (think of the widespread acceptance of contingency fees in the US, the more liberal regime for lawyer advertising, the existence of class actions led by entrepreneurial plaintiff lawyers, among other things).

Within this perspective, a lot depends on the type of claim that is financed by the investor: a personal injury claim is certainly different from a corporate claim for the infringement of a patent. Businesses have fewer feelings than physical persons, and all corporate activity is perceived as an emotionally neutral activity that is conducted for profit, including litigation. People hardly think of corporate litigation as a way to fulfill 'rights,' but rather as a way to recover cash as part of the overall business's goal to maximize profits. In this light, TPLF is morally less shocking when applied to corporate litigation. Think, by contrast, of someone investing in a rich man's wife's divorce, or in a succession case. This immediately shows that there are some types of claims where TPLF may result morally odd.

However, morals evolve with time, and activities that today are commonly accepted might have seemed unethical in the past. If TPLF becomes part of our daily routine, perhaps one day people will walk into claim stores and sell them in

exchange for cash just like we do today when we walk into a bank to take out a loan to buy a new house, and the bank makes a profit from the transaction.

Different from the concern for the economic costs resulting from an increased volume of litigation, discussed above, is a concern for the increased role of litigation in social dynamics. This may be relevant from a sociological perspective in the context of TPLF.

This concern deals with the idea that TPLF would make all social relationships more commodified, in a way that litigation arises more easily if TPLF is available. That would be because, due to the third-party funder's initiative, litigation arises even where it would otherwise not have arisen absent TPLF. Some people are concerned with this trend, and prefer that society use other ways to deter and solve controversies, in accordance with culture, which would be politically preferable although economically inefficient.

This evolution would walk hand-in-hand with a society that is more and more individualistic. In the absence of TPLF, a plaintiff has to risk his own money in order to sue somebody, and he also has to publicly stand up for his own cause against the defendant. By contrast, with TPLF, everything becomes de-personalized, because the plaintiff hides behind an operation in which the funder has a legitimate economic interest. Therefore, while with no TPLF the litigation is rooted in the plaintiff's initiative alone (who is seen as interested and greedy), if the litigation is financed by a third party the attention shifts onto the TPLF provider: the litigation becomes justified by the funder's legitimate business (it is the funder's job), and therefore the plaintiff is somehow protected from a social point of view. It is possible that society does not like this trend, at least in certain cultures, because this

is capable to tamper with social equilibriums, creating a more individualistic society, where conflicts are solved in new ways (and with new justifications) that are efficient (though with the caveat of the social v. private incentives to bring suit), but are politically not desirable.

Nevertheless, even in light of the present sociological argument, TPLF finds a moment of redemption when it concerns either pure business litigation, which is a less sensible type of litigation for the collective conscience, or poor people's litigation, where litigation that otherwise would not be possible may be seen as being for a 'noble cause.' In fact, on the one hand, society is more likely to tolerate the idea that investors finance business litigation, because this remains within the realm of business. On the other hand, society may even like the idea that external funding makes possible poor people's litigation, where otherwise weak and harmed parties would not be able to use the channel of private enforcement in order to obtain redress for the harms suffered. In those cases, society might like externally funded litigation as a means to solve controversies.

As a concluding comment, generally speaking, many people look at TPLF with suspicion because they do not know where to locate it conceptually within the relationship between profit motive and justice. Behind this mental attitude stands the cultural tendency of many people to reject the idea that profit motive and justice are two compatible concepts. Some people tend to believe that everything that deals with profit be somehow incompatible with a higher degree of justice and welfare (think, for example, of the perception of oil extracting companies or pharmaceutical companies as evil players!).

Instead, at the basis of this view of TPLF is a fundamental trick. In my view, TPLF provides the funder with an economic incentive to make profit from a higher level of justice. Profit and justice are not incompatible: TPLF does not put the two concepts in a relationship of the type ‘profit vs. justice,’ but rather it makes it possible to ‘profit from justice.’

D. “ADELANTE, CON JUICIO”³⁷²

We have come to a point where we can look back at TPLF and try to address our two key questions (should TPLF be permitted? / if so, should it be regulated?), after having uncovered the debate on TPLF and tested the main arguments used by stakeholders to lobby in their respective favor.

Overall, the reassessment leads to the conclusion that TPLF is desirable and it should be permitted. This is because (i) TPLF is Pareto efficient, and (ii) any concerns regarding the relationship between the parties to a TPLF agreement (e.g., abuse by the funder, excessive profits) may and should be addressed using normal contract law remedies made available by the legal system.

With respect to other concerns raised by the debate, namely the externalities allegedly produced by TPLF on the collectivity (e.g., increased volume of litigation), economic analysis has shown that most of such concerns are not real issue and therefore do not require regulation.

³⁷² This Spanish expression (English: “Go ahead, with caution”) appears in Alessandro Manzoni’s 1827 novel *The Betrothed* (*I Promessi Sposi*) (Chapter XII). In particular, the Grand Chancellor Ferrer pronounces this phrase to his coachman while his carriage passes through a crowd of protesters while entering Milan.

By contrast, regulation may be justified in order to ensure a proper functioning of the TPLF market. For example, regulation may be desirable in order to: (i) protect the interests of claimholders and funders, e.g. by granting privileged status to their communications; and (ii) protect the interest of consumers and users of TPLF services, by requiring clear and transparent contractual terms from funders (this favoring competition in the market), as well as solvency or similar requirements. Further analysis will be required to review how in detail TPLF should be regulated.

In addition, appropriate professional responsibility rules should be in place to ensure that lawyers are loyal to their client even in the presence of a third-party funder. And finally, with respect to the issue of control, transfer rights may be restricted in order to protect claimholders, although a liberalization in this respect would allow efficient allocations of control rights, and thus may be beneficial.

With respect to the sociological concerns outlines above, policymakers shall take them into account when thinking of how to regulate TPLF. However, in this work I limited myself to what I believe should be the role of academics, i.e. identifying and explaining the nature of problems. The sociological issues I discussed help explain some stakeholders' interest in regulation, and may as well justify regulatory intervention. However, these are matters for politics to decide, not a matter for scholarship.

CONCLUSIONS

TPLF is a rapidly expanding phenomenon and it is here to stay. Its importance should not be underestimated. On the one hand, TPLF breaks with the traditional view of litigation, by adding a third party alongside the claimholder and her lawyer on the plaintiff side. On the other hand, TPLF is likely to have a long-term impact on the civil justice system as a whole, by increasing the interrelations between the latter and the world of finance, adding an entrepreneurial flavor to the business that orbits around the pursuit of civil justice, and ultimately changing the way in which litigation is perceived in both business and social dynamics.

Faced with the arrival on the scene of TPLF, the law was unprepared to welcome it. In the common law world, courts reacted by pulling out ancient doctrines such as maintenance and champerty, which were originally designed to prevent practices that on their face resembled TPLF. However, the rationale justifying the prohibitions on maintenance and champerty had faded away in modern societies. This has determined fluctuating court decisions across the common law world in this rapidly evolving area of the law. Recently, this uncertainty has come closer to an end. In some of the main common law jurisdictions, the traditional legal obstacles to TPLF are gradually being abandoned, and the current trend points in the direction of permitting TPLF and favoring its

establishment. Some minor jurisdictions are following shortly behind, while others are showing a higher degree of hostility with respect to this practice.

Throughout the common law world, public policy considerations have played a major role in directing the courts in dealing with TPLF. In this context, access to justice has been the core argument opening the field to TPLF. By contrast, courts' fears for abuses of process have put a break to the accelerating TPLF industry.

In the civil law world, the picture is quite different. On the one hand, no prohibitions to TPLF seem to exist on the face of the law. On the other hand, the TPLF industry has thus far been much less interested in investing in litigation in civil law countries, and only timidly entered selected markets therein.

The analysis of the law of TPLF in Chapter II revealed that the legal and regulatory divergence between the common law and civil law experiences is striking on its face. However, looking beyond the surface of declamatory provisions, the comparative analysis of the operative rules governing TPLF (carried out through an observation of the interplay of different legal formants) led to the conclusion that both traditions share common problems and similar solutions to the challenges posed by TPLF, thus 'narrowing the distance' between the two legal traditions. In particular, the analysis of the problem concerning the transfer of control rights from the claimholder to the funder, and the observation that passive funding is admissible in all jurisdictions under analysis, led to this conclusion.

The counterintuitive fact that TPLF is much more developed in the common law than in the civil law world also found an explanation through comparative analysis. In particular, the reasons for this state of facts should not be looked for in

any positive rule of law, but rather they may be found in the context in which TPLF operates. On the one hand, structural features—such as the costs of litigation and the predictability of courts—help explain why the common law markets might have attracted the TPLF industry more than their civil law counterparts. On the other hand, cultural attitudes and cryptotypes—such as the entrepreneurial temperament of the legal profession and the extent of ‘commodification’ of the legal system—play a fundamental role in determining this divergence in the development of the TPLF market. However, the theoretical and practical conditions for a successful expansion of TPLF in the civil law world are present, and the fact that more and more companies are being incorporated to invest in litigation in the Old Continent suggests that we will soon see evidence of such an expansion.

After reviewing the status of the law of TPLF, I started a journey into the politics of TPLF. I analyzed the political debate that stands behind the evolution of the law of TPLF, identifying the key actors involved and the real driving forces that steer the law in the area. On the one hand, the TPLF industry is pushing towards a favorable legal and regulatory environment, running away from government regulation. On the other hand, the community of potential large corporate defendants (represented in the US by the Chamber of Commerce) has launched sharp attacks against the TPLF industry by engaging in intense lobbying activities.

A heated academic debate over the desirability of TPLF has arisen around these lobbying battles. While some scholars limit their efforts to analyzing the legal or economic essence of TPLF, others openly advocate for either a liberalization or a restriction of this practice. Moreover, bar associations and governmental institutions also expressed their views on TPLF, contributing to shaping the law in this area.

In the last chapter, I attempted to lift the veil on the political debate on TPLF, by decomposing the main policy arguments raised in favor and against this practice, and revealing which are genuine policy arguments and which are false rhetoric narratives. First, I did so by testing these arguments using economic analysis. The results revealed that TPLF is Pareto efficient, and no economic reasons are per se sufficient to justify a ban or restriction of this practice. Moreover, the economic analysis revealed that no further regulation is required in addition to the ordinary legal remedies and regulatory schemes normally provided by the legal system.

Secondly, I proposed some sociological arguments that might help explain and find a justification for the regulation of TPLF notwithstanding the results of the economic analysis (which might per se not be sufficient to determine public policy decisions). However, these justifications are the mirror of political preferences. The role of scholarship in this respect should be limited to identifying and explaining such sociological arguments. From there, whether those sociological concerns should serve as foundations for public policy is a question that should be left to politics to decide.

We have come to the conclusion of this journey. At this point, we are ready to answer the two key questions that this work is intended to address, and namely: (i) whether TPLF should be permitted; and, if so, (ii) whether it should be regulated. With respect to the former question, I came to the conclusion that TPLF should be permitted, as a further liberalization of TPLF would ultimately be socially beneficial. With respect to the second question, regulation should be not be adopted to restrict the practice of TPLF. However, some form of regulation may be

appropriate in order to ensure the proper functioning of the industry in a fair, transparent, and competitive environment.

I hope that the reader will have enjoyed reading this dissertation, and I hope that she or he will have understood most of what I had to say on TPLF. However, there is one message that I really hope went through, as I believe that it will distinguish the people who read this thesis from those that did not. While many people out there perceive litigation funders as greedy players, who take advantage of the justice system in order to aggrandize their pockets, thus placing themselves in a competitive relationship with the idea of justice, I challenge this view. TPLF provides litigation funders with an economic incentive to profit from a higher level of justice. Therefore, in my opinion, profit-motive and justice are not incompatible concepts. Rather, when it comes to TPLF, this practice makes it possible to ‘profit from justice.’

REFERENCES

- A.L.G., *The Effect of Champerty in Contractual Liability* 79 L. Q. REV. 493 (1963).
- Abramowicz, Michael, *On The Alienability of Legal Claims*, 114 YALE L. J. 697 (2004).
- Abrams, David & Daniel L. Chen, *A Market for Justice: The Effect of Litigation Funding on Legal Outcomes* (2009).
- Abrams, David S. & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, University of Pennsylvania Law School Working Paper (January 2012).
- Adler, Sheri P., *Alternative Litigation Finance and the Usury Challenge: A Multi-Factor Approach*, 34 CARDOZO L. REV. 329 (2012).
- AMERICAN BAR ASSOCIATION, COMMISSION ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE (2011).
- Arrow, Kenneth J. & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954).
- ATIYAH, PATRICK, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (Oxford University Press, 1985).
- Barker, George R., *Third-Party Litigation Funding in Australia and Europe*, 8 J. L. ECON & POL'Y, 451 (2012).
- Barksdale, Courtney R., *All that Glitter Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707 (2007).
- Barnett, Kyle, *Lawsuit Lending Bill Aimed at Putting Caps on Predatory Lenders Passes State Senate*, THE LOUISIANA RECORD, 30 April 2013.
- Bator, Francis M., *The Anatomy of Market Failure*, 72 QUARTERLY JOURNAL OF ECONOMICS 351 (1958).

- Bebachuk, Lucian A., *Litigation and Settlement Under Imperfect Information*, 15 RAND JOURNAL OF ECONOMICS 404 (1984).
- Bender, Gretchen A., *Uncertainty and Unpredictability in Patent Litigation: The Time is Ripe for a Consistent Claim Construction Methodology*, 8 J. INTELL. PROP. L. 175 (2001).
- Bentham IMF, *Disclosure of Documents in Litigation Finance* (November 2013).
- BLACK'S LAW DICTIONARY (9th ed. 2009).
- Bogart, Christopher, *Litigation Finance: A Smart and Sound Strategy to Reduce Legal Department Expenses* (Burford, 2013).
- Bond, Paul, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002).
- Bone, Robert G., *Modeling Frivolous Suits*, 14 U. PA. L. REV. 519 (1997).
- BÖTTGER, DIRK, GEWERBLICHE PROZESSFINANZIERUNG UND STAATLICHE PROZESSKOSTENHILFE: AM BEISPIEL DER PROZESSFÜHRUNG DURCH INSOLVENZVERWALTER (2008).
- BOWLES, SAMUEL, MICROECONOMICS: BEHAVIOR, INSTITUTIONS AND EVOLUTION (2004).
- Brown, Chris and Felicity Monteiro, *Supreme Court Mandates Disclosure of Litigation Funding Agreements*, Wilson Harle, December 2013.
- BURKE, THOMAS F., LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002).
- BUSCAGLIA, EDGARDO & WILLIAM RATLIFF, LAW AND ECONOMICS IN DEVELOPING COUNTRIES (2000).
- BUSSANI, MAURO, LIBERTÀ CONTRATTUALE E DIRITTO EUROPEO (2005).
- Cain, Terrence, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT. L. REV. 11 (2014).
- Calabresi, Guido & A Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
- CALIHAN, ROBERT B., JOHN R. DENT & MARC B. VICTOR, AMERICAN BAR ASSOCIATION, THE ROLE OF RISK ANALYSIS IN DISPUTE AND LITIGATION MANAGEMENT (2004).
- CAPPELLETTI, MAURO (gen. ed.) ACCESS TO JUSTICE, 4 v. (Milan, 1978-1979).

- Carter, Terry, *Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers*, 90 A.B.A. J. 34 (2004).
- CIVIL JUSTICE COUNCIL, CONSULTATION PAPER. A SELF-REGULATORY CODE FOR THIRD PARTY FUNDING (2010).
- CIVIL JUSTICE COUNCIL, IMPROVED ACCESS TO JUSTICE – FUNDING OPTIONS AND PROPORTIONATE COSTS (June 2007).
- CLASS & GROUP ACTION 2010, INTERNATIONAL COMPARATIVE LEGAL GUIDE SERIES, Global Legal Group Ltd, London 2010.
- Coase, Ronald H., *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).
- Coester, Michael & Dagobert Nitzsche, *Alternative Ways to Finance a Lawsuit in Germany*, 24 CIV. JUST. Q. 83 (2005).
- Cooter, R. & J.R. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 INT’L REV. L. & ECON. 261 (1991).
- COOTER, ROBERT & THOMAS ULEN, LAW & ECONOMICS (5th Int’l ed. 2008).
- Cooter, Robert, *Commodifying Liability*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 139 (F.H. Buckley ed., 1999).
- Croft, Jane, *Litigation Finance Follows Credit Crunch*, FINANCIAL TIMES (Online version), 27 January 2010.
- Daughety, Andrew & Jennifer Reinganum, *The Effect of Third-Party Funding of Plaintiffs on Settlement*, Vanderbilt University Department of Economics Working Papers, VUECON-14-00002 (2014).
- Davis, Jess, *3rd-Party Litigation Funding Regs Proposed In Texas*, LAW360.COM (14 February 2013).
- de Morpurgo, Marco, *A Comparative Legal and Economic Approach to Third-party Litigation Funding*, 19 CARDOZO J. INT’L & COMP. L. 343.
- de Morpurgo, Marco, *Финансирование гражданского иска третьими лицами: частная альтернатива бесплатной юридической помощи как способ повышения доступности правосудия*, in LEGAL AID IN CIVIL MATTERS: MODELS OF INTERACTION BETWEEN STATE AND CIVIL SOCIETY – INTERNATIONAL AND RUSSIAN EXPERIENCE (INSTITUTE OF LAW AND PUBLIC POLICY ed.), Access to Justice Series (Akvarel, Moscow 2011).
- DEFFAINS, BRUNO & THIERRY KIRAT (eds.), LAW AND ECONOMICS IN CIVIL LAW COUNTRIES (2001).

- Dethloff, N., *Verträge zur Prozessfinanzierung gegen Erfolgsbeteiligung*, NEUE JURISTISCHE WOCHENSCHRIFT 2225 (2000).
- Dietsch, Nicholas, *Litigation Financing in the U.S., the U.K., and Australia: How The Industry Has Evolved In Three Countries*, 38 N. KY. L. REV. 687 (2011).
- *E.V.O. (Dutch Shippers' Council) Endorses Claims Funding International to Companies Claiming Against Air Freight Cartels*, Claims Funding International (September 2009).
- Estevao, Martin J., *The Litigation Financing Industry: Regulation to Protect and Inform Consumers*, 84 U. COLO. L. REV. 467 (2013).
- European Commission, *Green Paper on Consumer Collective Redress*, EU:COM(2008)794.
- Faure, Michael & Jef De Mot, *Comparing Third-Party Financing of Litigation and Legal Expenses Insurance*, 8 J. L. ECON. & POL'Y 743 (2012).
- *Financing Patent Infringement Litigation*, General Patent Corporation (February 2009).
- Fisher, Daniel, *IBM GC Says: Beware Of Lenders Offering To Finance Your Lawsuit*, FORBES, 12 February 2013.
- Fleming, Macklin, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970).
- Galanter, Marc, *Reading the Landscape of Disputes: What we Know and Don't Know (and Think we Know) about our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983).
- GARBER, STEVEN, *ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN AND UNKNOWN* (RAND Corporation: Santa Monica, 2010).
- Giesel, Grace M., *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083 (2012).
- Gillers, Stephen, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 AKRON L. REV. 667 (2010).
- Greenwald, Bruce C. & Joseph E. Stiglitz, *Externalities in Economies with Imperfect Information and Incomplete Markets*, 101 QUARTERLY JOURNAL OF ECONOMICS 229 (1986).
- Grundfest, Joseph A. & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN L. REV. 1267 (2006).

- Hashway, Jenna W., *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750 (2012).
- Hatzis, Aristides N., *Civil Contract Law and Economic Reasoning: An Unlikely Pair?*, in THE ARCHITECTURE OF EUROPEAN CODES AND CONTRACT LAW 159 (Stefan Grundmann and Martin Schauer eds., 2006).
- HENSSLER, M., RISIKO ALS VERTRAGSGEGENSTAND 373 (1994).
- Herman, Michael, *Allianz to Fund UK Court Cases*, TIMES ONLINE, Oct. 18, 2007.
- Hertig, G., *Switzerland*, 11 INT'L REV. L. & ECON. 293 (1991).
- Herwig, Michael, *Third Party Litigation Funding Under German Law – Mechanisms to Shift the Financial Risks and the Costs of Litigation*, Columbia Law School LL.M. paper 2013.
- Heyes, A., N. Rickman & D. Tzavara, *Legal Expenses Insurance, Risk Aversion and Litigation*, 24 INT'L REV. L. & ECON. 107 (2004).
- Hodges, Christopher, *Self-regulation (Jackson Report, Code of Conduct)*, in LE FINANCEMENT DE CONTENTIEUX PAR UN TIERS – THIRD PARTY LITIGATION FUNDING 151 (CATHERINE KESSEDIAN ed., Éditions Panthéon-Assas, 2012).
- HODGES, CHRISTOPHER, STEFAN VOGENAUER & MAGDALENA TULIBACKA (eds.), THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE (Hart Publishing, 2010).
- Hodges, Christopher, Stefan Vogenauer & Magdalena Tulibacka, *Costs and Funding of Civil Litigation: A Comparative Study*, Oxford Legal Studies Research Paper No. 55-2009 (2009).
- Holmes, Oliver W., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
- Hylton, Keith N., *The Economics of Third-party Financed Litigation*, Boston University Working Paper No. 11-57 (2011).
- Hylton, Keith N., *Toward a Regulatory Framework for Third-Party Funding of Litigation*, Boston University School of Law Working Paper No. 13-27 (21 June 2013, Revised 9 July 2013).
- Jones, Patrick M., *Third-Party Litigation Funding In Bankruptcy Cases*, LAW JOURNAL NEWSLETTERS, ALM Media Properties, LLC (2013).
- KAHN, ALFRED E., THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1988).

- Kalajdzic, Jasminka, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93 (2013).
- Katz, Avery, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143 (1987).
- KESSEDJIAN, CATHERINE (ed.), LE FINANCEMENT DE CONTENTIEUX PAR UN TIERS – THIRD PARTY LITIGATION FUNDING (Éditions Panthéon-Assas, 2012).
- Kirchner, C., *The Difficult Reception of Law and Economics in Germany*, 11 INT’L REV. L. & ECON. 277 (1991).
- Kirstein, Roland & Neil Rickman, *FORIS Contracts: Litigation Cost Shifting and Contingent Fees in Germany*, Centre for the Study of Law and Economics, Discussion paper 2001-04.
- Krauss, Michael I., *Alternative Dispute Financing and Legal Ethics: Free the Lawyers!*, 33 MISS. C. L. REV. (2014) (forthcoming).
- Lattman, Peter, *Dewey & LeBoeuf Files for Bankruptcy*, THE NEW YORK TIMES, 28 May 2012.
- LAW COUNCIL OF AUSTRALIA, SUBMISSION TO STANDING COMMITTEE OF ATTORNEYS-GENERAL (2006).
- Leahy, Joe, *Fund Sees Brazilian Fraud as Next Big Thing in Emerging Markets*, FINANCIAL TIMES, 8 December 2013.
- Ledyard, John O., *Market Failure*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (S.N. Durlauf & L.E. Blume eds., 2nd ed., 2008).
- Legg, Michael, Edmond Park, Nicholas Turner & Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia*, 38 N. KY. L. REV. 625 (2011),
- LITIGATION FUNDING IN AUSTRALIA, Discussion Paper, Standing Committee of Attorneys General (May 2006).
- *Litigation Funding in South Africa*, LITIGATION FUNDING MAGAZINE (UK), August 2010.
- LÓPEZ MEDINA, DIEGO E., TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA (Legis, 3rd prtg. 2004).
- Lyon, Jason, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA LAW REV 571 (2010).

- Lysaught, Geoffrey J. & D. Scott Hazelgrove, *Economic Implications of Third-Party Litigation Financing on the U.S. Civil Justice System*, 8 J. L. ECON. & POL'Y 645 (2012).
- Manning, B., *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977).
- Marcushamer, Isaac M., *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543 (2005).
- Martin, Susan L., *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85 (2002).
- Martin, Susan L., *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004).
- Mattei, U. & R. Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265 (1991).
- Mattei, Ugo, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 3 GLOBAL JURIST FRONTIERS Art. 1 (2003).
- Mattei, Ugo, *Access to Justice. A Renewed Global Issue?* 11.3 ELECTRONIC J. COMP. L. (2007).
- MATTEI, UGO, *COMPARATIVE LAW AND ECONOMICS* (1997).
- McLaughilin, Julia H., *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007).
- Moliterno, James T., *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003).
- Molot, Jonathan T., *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009).
- Molot, Jonathan T., *Theory and Practice in Litigation Risk* (Burford White Paper, 2012).
- Monateri, Pier Giuseppe & Rodolfo Sacco, *Legal Formants*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (P. Newman ed., Vol. 1, 1998).
- Moya, Elena, *Hedge Funds, Investors and Divorce Lawyers – It's a Match Made in Heaven*, GUARDIAN.CO.UK, 16 October 2009.
- Murphy, Bernard and Camille Cameron, *Access to Justice and the Evolution of Class Actions in Australia*, 30 MELB. U. L. REV. 399 (2006).

- NEW YORK CITY BAR ASSOCIATION, FORMAL OPINION 2011-2: THIRD PARTY LITIGATION FINANCING (2011).
- NEW YORK STATE BAR ASSOCIATION, ETHICS COMMITTEE OF THE COMMERCIAL AND FEDERAL LITIGATION SECTION, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING, 16 April 2013.
- North, John, *Litigation Funding: Much to be Achieved with the Right Approach*, 43 LAW SOCIETY JOURNAL 66 (2005).
- NSW YOUNG LAWYERS CIVIL LITIGATION COMMITTEE & NSW YOUNG LAWYERS PRO BONO TASKFORCE, JOINT SUBMISSION TO THE STANDING COMMITTEE OF ATTORNEY GENERALS' REVIEW INTO LITIGATION FUNDING IN AUSTRALIA (2006).
- OLSON, WALTER K., THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991).
- Osborne, Evan, *Courts as Casinos? An Empirical Investigation of Randomness and Efficiency in Civil Litigation*, 28 J. LEGAL STUD. 187 (1999).
- Ota, S., *Law and Economics in Japan: Hatching Stage*, 11 INT'L REV. L. & ECON. 301 (1991).
- Pardau, Stuart L., *Alternative Litigation Financing: Perils and Opportunities*, 12 U. C. DAVIS BUS. L. J. 65 (2011).
- PARKER, CHRISTINE, JUST LAWYERS AND REGULATION OF ACCESS TO JUSTICE (1999).
- Parloff, Roger, *Have You Got a Piece of This Lawsuit?*, FORTUNE, 13 June 2011.
- Pastor, S., *Law and Economics in Spain*, 11 INT'L REV. L. & ECON. 309 (1991).
- Pennell, Kevin, *On the Assignment of Legal Malpractice Claims: A Contractual Solution to a Contractual Problem*, 82 TEX. L. REV. 481 (2003).
- PINDYCK, ROBERT & DANIEL RUBINFELD, MICROECONOMICS, 590 ff. (7th ed. int'l 2009).
- Pinna, Andrea, *Financing Civil Litigation: The Case for the Assignment and Securitization of Liability Claims*, in NEW TRENDS IN FINANCING CIVIL LITIGATION IN EUROPE (2009).
- Posner, Richard A., *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 RATIO JURIS 66 (2004).

- Prichard, J. Robert. S., *A Systemic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEGAL STUD. 451 (1988).
- Puri, Poonam, *Financing of Litigation by Third-party Investors: A Share of Justice?*, 36 OSGOODE HALL LAW J. 515 (1998).
- Qiao, Yue, *Legal-Expenses Insurance and Settlement*, ASIAN J. L. & ECON. Vol. 1: Iss. 1, Art. 4 (2010).
- Radin, Max, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935).
- REIMANN, MATHIAS & JOACHIM ZEKOLL (eds.), *INTRODUCTION TO GERMAN LAW 377* (2nd ed., 2005).
- RHODE, DEBORAH L., *ACCESS TO JUSTICE* (Oxford University Press, 2004).
- Richmond, Douglas R., *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649 (2005).
- Rickman, Heyes, N. & D. Tzavara, *Legal Expenses Insurance, Risk Aversion and Litigation*, 24 INT'L REV. L. & ECON. 107 (2004).
- Rickman, Neil, *Contingent Fees and Litigation Settlement*, 19 INT'L REV. L. & ECON. 295 (1999).
- Rodak, Mariel, *It's About Time: A System Thinking Analysis of the Litigation Finance Industry and Its Effects on Settlement*, 155 U. PA. L. REV. 503 (2006).
- Root, David A., *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT. & COMP. L. REV. 583 (2005).
- RT. HON. LORD JUSTICE JACKSON, *REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT* (The Stationary Office, 2010).
- RT. HON. LORD WOOLF, *ACCESS TO JUSTICE: FINAL REPORT*, HMSO, London 1996.
- Rubin, Paul H., *Third Party Financing of Litigation*, 38 N. KY. L. REV. 673 (2011).
- Sacco, Rodolfo, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991).
- Sacco, Rodolfo, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991).

- SACCO, RODOLFO, INTRODUZIONE AL DIRITTO COMPARATO, in TRATTATO DI DIRITTO COMPARATO (R. SACCO ed., 5th ed., 2005).
- SCHLESINGER, RUDOLF B. ET AL., COMPARATIVE LAW: CASES, TEXTS, MATERIALS (6th ed., 1998).
- Sebok, Anthony J., *A New York Decision That May Imperil Plaintiffs' Ability to Finance Their Lawsuits: Why It Should Be Repudiated, or Limited to Its Facts*, FINDLAW, 18 April 2005.
- Sebok, Anthony J., *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011).
- Serraller, Mercedes, *Los Fondos de Inversión Quieren Financiar Pleitos en España*, EXPANSIÓN, 26 October 2012.
- SHAVELL, STEVEN, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (Harvard University Press, 2004).
- Shavell, Steven, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).
- Shavell, Steven, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).
- Shepherd, Joanna M., *Ideal versus Reality in Third-Party Litigation Financing*, 8 J. L. ECON. & POL'Y 593 (2012).
- Shukaitis, Marc J., *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).
- SIR W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (5th ed., Vol. 3, 1942).
- Skogh, G., *Law and Economics in Sweden*, 11 INT'L REV. L. & ECON. 319 (1991).
- Spier, Kathryn E., *Litigation*, in THE HANDBOOK OF LAW & ECONOMICS 262 (A.M. POLINSKY & S. SHAVELL eds., North Holland, 2007).
- Steinitz, Maya, *How Much Is That Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. R. 1889 (2013).
- Steinitz, Maya, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012).
- Stuerwald, Christian, *An Analysis of Allianz' [sic] Decision to Discontinue its Litigation Funding Business*, Calunius Capital, January 2012.
- Stuntebeck, Clinton A., *The Doctrine of Unconscionability*, 19 ME. L. REV. 81 (1967).

- SUSSKIND, RICHARD, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008).
- Swan, George S., *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 *NEW ENG. L. REV.* 805 (2001).
- Taruffo, M., *Civil Procedure and the Path of a Civil Case*, in *INTRODUCTION TO ITALIAN LAW* 159 (JEFFREY S. LENA & UGO MATTEI eds., 2002).
- Teubel, Joachim, in *RVG: HANDKOMMENTAR* (LUDWIG KROIB & HANS-JOCHEM MAYER eds., 5th ed., Nomos, 2102).
- THE ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND AND WALES, *CODE OF CONDUCT FOR LITIGATION FUNDERS* (November 2011; updated January 2014).
- Toggenburger, Christian, *Financing Private Litigation – A European Alternative to Contingency Fees*, 4 *EUR. J. LAW REFORM* 603 (2002).
- TREBILCOCK, MICHAEL J., *THE LIMITS OF FREEDOM OF CONTRACT* (Harvard University Press, 1997).
- US CHAMBER INSTITUTE FOR LEGAL REFORM, *SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FINANCING IN THE UNITED STATES* (US Chamber Institute for Legal Reform: Washington, DC, 2009).
- US CHAMBER INSTITUTE FOR LEGAL REFORM, *STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION* (US Chamber Institute for Legal Reform: Washington, DC, 2012).
- US CHAMBER INSTITUTE FOR LEGAL REFORM, *THIRD PARTY LITIGATION FINANCING IN AUSTRALIA* (US Chamber Institute for Legal Reform, October 2013).
- United Kingdom Parliament Standing Committee E, *Access to Justice Bill [Lords]*, 13 May 1999.
- UNITED KINGDOM, LORD CHANCELLOR'S DEPARTMENT, *ACCESS TO JUSTICE WITH CONDITIONAL FEES* (March 1998).
- Veljanovski, Cento, *Third-Party Litigation Funding in Europe*, 8 *J. L. ECON. & POL'Y* 405 (2012).
- Viscusi, W. Kip, *Product Liability Litigation with Risk Aversion*, 17 *J. LEGAL STUD.* 101 (1988).
- Waye, Vicki, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 *BOND L. REV.* 225 (2007).

- WAYE, VICKI, TRADING IN LEGAL CLAIMS: LAW, POLICY & FUTURE DIRECTIONS IN AUSTRALIA, UK & US (Presidian, 2008).
- Weigel, W., *Prospects for Law and Economics in Civil Law Countries: Austria*, 11 INT'L REV. L. & ECON. 325 (1991).
- WINFIELD, PERCY H., HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCESS 151 (1921).
- YEAZELL, STEPHEN C., CONTEMPORARY CIVIL LITIGATION (2009).
- Young, Gary, *Two Setbacks for Lawsuit Financing: But the Practice is Still Alive*, NEW JERSEY LAW JOURNAL, 18 August 2003.

TABLE OF CASES

AUSTRALIA

- *Anstella Nominees Pty Ltd v St George Motor Finance Ltd* [2003] FCA 466
- *Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd* [2009] FCAFC 147
- *Campbell's Cash & Carry P/L v Fostif P/L* (2006) 299 ALR 200
- *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41
- *Fostif v Campbell Cash and Carry* [2005] NSWCA 83
- *Kirby v. Centro* [2008] FCA 1505
- *QPSX Ltd v Ericsson Australia Pty Ltd* (2005) 219 ALR 1
- *QPSX Ltd v Ericsson Australia Pty Ltd* [2005] FCA 933
- *Quach v Hunt of P/L* (2000) 32 MVR 263
- *Roux v Australian Broadcasting Commission* (1992) 2 VR 577
- *Smith v Roach* (2002) 42 ACSR 148

BAHAMAS

- *Masai Aviation Services & Aerostar Limited vs. Attorney General & Bahamasair Holdings Limited* [2007] UKPC 12

BERMUDA

- *Stiftung Salle Modulable v Butterfield Trist (Bermuda) Limited* [2012] SC (Bda) 165

BRITISH VIRGIN ISLANDS

- *Hugh Brown & Associates (Pty) Ltd v Kermas Limited* [2011] (BVIHCV(COM))

CANADA

- *Dugal v Manulife Financial Corporation* [2011] ONSC 1785 (SCJ)
- *E. Eddy Bayens and others v Kinross Gold Corporation and others*, 2013 ONSC 4974
- *Hobsbawn v ATCO Gas and Pipelines Ltd* [2009] Calgary 0101-04999 (QB)
- *Holmes v London Life Insurance Co* [2007] CarswellOnt 268 (SCJ) (WL)
- *MacQueen et al v Sydney Steel Corporation et al* [2010] Halifax no 218010
- *Metzler Investment GMBH v Gildan Activewear Inc* [2009] OJ no 3315 (SCJ)
- *Stanway v Wyeth Canada Inc.* [2013] BCSC 1585
- *The Trustees of the Labourers' Pension Fund of Central & eastern Canada v Sino-Forest Corporation* [2012] ONSC 2937

ECUADOR

- *Aguinda et al. vs. Chevron Corporation*, Nueva Loja (Ecuador), No. 2003-0002 (2011)

GERMANY

- BGH, BGHSt 22, 157
- BVerfG, 12.12.2006 - 1 BvR 2576/04
- BVerfGE 76

HONG KONG

- *Akai Holdings Ltd v Ho Wing On Christopher* [2009] HKCU 172
- *Geoffrey L. Berman (In His Capacity as Trustee of the Lender Trust) v. SPF CDO I, Ltd and Others*, HCMP1321/2010, 14 March 2011

- *Re Po Yuen (To's) Machine Factory Limited* [2012] HKCU 816
- *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* [2007] HKCU 246
- *Winnie Lo v HKSAR* [2011] FACCC 2/2011

IRELAND

- *Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Limited* [2011] IEHC 357

JERSEY

- *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2013] JRC094
- *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited* [2012] JRC
- *The Valetta Trust* [2011] JRC

NEW ZEALAND

- *Contractors Bonding Ltd v Waterhouse* [2012] NZCA 399
- *Houghton v Saunders* [2008] NZCCLR 13
- *Houghton v Saunders* [2011] HC Christchurch CIV-2008-409-000348
- *Montgomerie v Davison* (M1285/99; HC, Akld; 14 April 2000)
- *Re Nautilus Developments Ltd (in liquidation)*
- *Saunders v Houghton* [2010] 3 NZLR 331
- *Saunders v Houghton* [2012] NZCA 545
- *Waterhouse v Contractors Bonding Ltd* [2010] HC Auckland CIV-2010-404-3074
- *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89

SINGAPORE

- *Law Society of Singapore v Kurubalan s/o Manickam Rengaraju* [2013] SGHC 135
- *Lim Lie Hoa v Ong Jane Rebecca & Ors* [2005] SGCA 24
- *Otech Pakistan Pvt Ltd v Clough Engineering Ltd.* [2007] 1 SLR (R) 989

SOUTH AFRICA

- *Headleigh Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning Attorneys and Others* [2001] (4) SA 360 (W)
- *Hugo & Möller N.O. v Transvaal Loan, Finance and Mortgage Co.*, [1894] (1) OR 336
- *PricewaterhouseCoopers Inc and Others v. National Potato Co-operative Ltd* [2004] (6) SA 66 (SCA)

UNITED KINGDOM

- *Ahmed v Powell* [2003] PNLR 22; *Factortame & Ors v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] QB 381
- *Alabaster v. Harness* [1895] 1 QB 339
- *Arkin v Borchard Lines Ltd* [2005] 2 Lloyd's Rep 187
- *Awwad v Geraghy & Co* [2001] QB 570 (CA)
- *Factortame & Ors v Secretary of State for Transport, Local Government and the Regions (No. 8)* [2003] QB 381
- *Giles v Thompson* [1993] 3 All ER
- *Giles v Thompson* [1994] 1 AC 142
- *Guy v. Churchill* (1888) 40 Ch D 481
- *In re Park Gate Waggon Works Co.* (1881) 17 Ch D 234
- *Norglen Ltd (in liq) v Reeds Rains Prudential Ltd* [1999] 2 AC 1
- *Ramsey v Hartley* [1977] 1 WLR 686

- *Seear v Lawson* (1880) 15 Ch D 729
- *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679
- *Wallersteiner v Moir (No 2)* (1975) QB 373

UNITED STATES

- *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124 (Cal. 1987)
- *Adkin Plumbing & Heating Supply Co. v. Harwell*, 606 A.2d 802 (N.H. 1992)
- *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App. 2006)
- *Boettcher v. Criscione*, 299 P.2d 806 (Kan. 1956)
- *Brown v. Bigne*, 28 P. 11 (Or. 1891)
- *Currence v. Ralphsnnyder*, 151 S.E. 700 (W. Va. 1929).
- *Devon IT, Inc. v. IBM Corp.*, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012)
- *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at *6 (N.Y. Sup. Ct. Mar. 2, 2005)
- *Fastenau v. Engel*, 240 P.2d 1173 (Col. 1952)
- *Fausone v. U.S. Claims, Inc.* 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005)
- *Fleetwood Area School District v Berks County Bd of Assessment Appeals* 821 A 2d 1268 (2003)
- *Giambattista v. Nat'l Bank of Commerce of Seattle*, 586 P.2d 1180 (Wash. App. 1978)
- *Green v. Gremaux*, 945 P.2d 903 (Mont. 1997)
- *Hardick v Homol* 795 So 2d 1107 (2001).
- *In re Primus*, 436 US 412 n. 15 (1978)
- *In the Matter of the Estate of Gilman* 251 N.Y. 265, 271 (1929)
- *Interstate Collection Agency v. Kuntz*, 181 N.W.2d 234 (N.D. 1970)
- *Johnson v Wright* 682 NW 2d 671 (2004)
- *Kraft v. Mason*, 668 So.2d 679 (Fla. 1996)

- *Landi v. Arkules*, 835 P.2d 458 (Ariz. App. 1992)
- *Leader Technologies, Inc. v. Facebook, Inc.*, 2010 WL 2545960 (D. Del. June 24, 2010)
- *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994)
- *Martin v. Morgan Drive Away, Inc.*, 665 F.2d 598 (6th Cir. 1982)
- ME. REV. STAT. 17A §516(1) (2009)
- ME. REV. STAT. tit. 9A §12-101 (2009)
- *Midtown Chiropractic v Illinois Farmers Ins Co* 812 NE 2d 851 (2004)
- *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441 (Okla. 1981)
- *Mondis Technology Ltd. v. LG Electronics, Inc.*, 2011 WL 1714304 (E.D. Tex. May 4, 2011)
- *New Hampshire Ins. Co. v. McCann*, 707 N.E.2d 332, 337 (Mass. 1999)
- *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767 (N.C. App. 2008)
- ORC ANN. 1349.55 (2009)
- *Osprey, Inc. v. Cabana Ltd.*, 532 S.E.2d 269 (S.C. 2000)
- *Polo v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987)
- *Rancman v. Interim Settlement Funding Corp.* (99 Ohio St.3d 121(2003)
- *Record v. Ins. Co. of N. Am.*, 438 S.W.2d 743 (Tenn. 1969)
- *Robertson v. Town of Stonington*, 750 A.2d 460 (Conn. 2000)
- *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)
- *Schnabel v. Taft Broad. Co.*, 525 S.W.2d 819 (Mo. App. 1975)
- *Smith v. Childs*, 497 N.W.2d 538 (Mich. App. 1993)
- *Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112 (Md. 1998)
- *TMJ Hawaii, Inc. v. Nippon Trust Bank*, 153 P.3d 444 (Haw. 2007)
- *Toste Farm Corp v Hadbury Inc* 798 A 2d 901 (2002)
- *Walker Digital, LLC v. Google Inc.*, Civ. No. 11-309-SLR (D. Del. Feb. 12, 2013)

- *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (C.A. D.C. 1965)
- *Wright v. Meek*, 3 Greene 472 (Iowa 1852)
- *Xerox Corp. v. Google Inc.*, 801 F.Supp.2d 293, 303-304 (D. Del. 2011)

