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THE CIVIL JUSTICE BUSINESS

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Our civil justice system rests on foundational commitments: to make rights real for those the law protects, whatever their station; to hold wrongdoers accountable, whatever their power; and to deter misconduct in a system that depends heavily on private enforcement. We put great faith in these values.

Civil justice, for all its lofty goals, is also a business. Attorneys and liability insurers have long held economic stakes in litigation, bounded by their own professional and regulatory norms. Now, a new litigation finance industry has arisen: outside investors supply equity capital—divorced from legal representation and liability management—and take returns directly from claim proceeds.

That institutionalizes the matter. Civil justice is a business, on both sides of the "v." This development has occasioned fierce, often intractable, debate. Critics insist that funders will put profit over plaintiffs, take over litigation and settlement, and extract payouts for meritless claims. As a political matter, these concerns have become weapons in the familiar class-action wars. As a regulatory matter, they manifest as efforts to prevent civil justice from becoming a business—or at least this *kind of business. What debates about the new litigation finance obscure is that it raises old questions characteristic of civil justice—about claimant control and autonomy; access to justice for meritorious claims and screens for meritless ones; and potential conflicts introduced into litigation by the agency of money.*

Absent a framework addressed to these core problematics, judges and lawmakers have been left to grapple with this new entrant through ancient constructs, or through atomized rules and policies repurposed to channel inherited restrictions. Such approaches constrain them to essentialist binaries of permission and prohibition, hinder engagement with foundational civil justice concerns, and often frustrate the system's core commitments.

This Article develops a theoretical framework for meeting litigation finance at the level of its core problematics, conceptualized along the critical relationships in funded litigation, and drawing on modern relational contract theory. Malleable to those relationships, it allows judges, lawmakers, and scholars to reach the foundational questions across the industry's materially different market segments and the diverse institutional settings and dynamics of modern civil justice. This

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relational-institutional framework thus situates litigation finance within the traditional areas of scholarship in civil procedure, complex litigation, and private law.

More broadly, this Article synthesizes and extends prior work toward a unified theory of civil justice as realized law: an account centered on the system's capacity to give substantive rights real meaning—or to leave them without it. What emerges is an integrated account of litigation finance that charts the course for harnessing any *civil justice innovation to effectuate the system's core commitments—to do the* business *of civil justice.*

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INTRODUCTION

What is civil justice? Let's begin with a civil justice story. Wednesday, February 11, 2004, began as a normal day for Phil and Fiona Cowen, sub-postmasters for the British Post Office.[1] Sub-postmasters are independent contractors for the British government, and their contracts make them liable, civilly and criminally, for any shortfall caused by "carelessness or error."[2] Fiona ran the branch day-to-day, and over the years she had managed their accounts scrupulously. Yet in the weeks leading up to February 11, Fiona had noticed growing and inexplicable discrepancies. She had assumed that these would be fixed by corrections issued by the national office — that is, until Phil received a call notifying him that their branch was short £30,000 in a single week.[3]

The regional manager, to Phil's surprise, immediately suspended their contract and closed the branch. When investigators from the Post Office later interrogated Phil, he raised the possibility that the shortfalls may have been caused by computer error, from a software product called Horizon made by Fujitsu, which the Post Office had implemented in 1999 as part of the largest non-military tech rollout in the history of the European Union.[4] Government investigators flatly denied Phil's suggestion about the possibility of a technological glitch, and they told him—falsely—that no other sub-postmaster had experienced issues with the software.[5] Their remaining branch franchises

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[1] The following account is derived from Richard Brooks & Nick Wallis, *Justice Lost in the Post*, PRIVATE EYE, 2020, at 3, https://www.private-eye.co.uk/pictures/special_reports/justice-lost-in-the-post.pdf.
[2] *Id.* at 1.
[3] *Id.* at 3.
[4] *Id.*
[5] In a colossal failure that augured the scandal to come, the project as initially conceived fell prey to sluggishness and bloat, costing British taxpayers £700 million and never coming to fruition. Desperate to salvage something from the project, the Post Office issued a new contract to convert Horizon into an account management software, to replace its branches' reliance on paper records. The result was the largest non-military IT contract in Europe. The Post Office entered into the contract even though, as its Board of Directors noted in 1999, the year of the rollout, serious doubts

were terminated, and the couple's business was ruined.[6] Even worse, Fiona was criminally charged for false accounting and told that not a single other sub-postmaster had experienced issues with the Horizon software. On January 21, 2009, nearly five years after that fateful phone call, Fiona Cowen fatally overdosed on antidepressants. She was 47.[7]

Between 1999 and 2015, more than nine hundred sub-postmasters in the United Kingdom were criminally convicted for stealing from the British Post Office.[8] Many were jailed, all were fined.[9] Some took out second and third mortgages on their homes to repay the discrepancies; others went into bankruptcy. Four committed suicide.[10] Countless reputations and lives were ruined in a miscarriage of justice that took twenty years to vindicate.[11] All were convicted based on a lie, the same lie the Post Office investigators told Phil Cowen in 2004. As it turned out, the Horizon software was, in fact, systematically faulty.[12] Worse, the Post Office knew it all along.[13] Phantom errors paid by real blood.

The hero amongst our villains is a man named Alan Bates, a sub-postmaster who first experienced shortfalls in 2000, shortly after the software's release. After getting stonewalled on

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over the reliability of the software remained. As the years progressed, pressure inside the Post Office to retain fiscal order merged with pressure inside Fujitsu to retain its reputation amid the possibilities of obtaining future lucrative government contracts. *Post Office Horizon scandal: Why hundreds were wrongly*, BBC NEWS (Oct. 9, 2025), https://www.bbc.com/news/business-56718036.

[6] Brooks & Wallis, *supra* note 1.

[7] *Id.*

[8] *Post Office Scandal Explained*, *supra* note 5.

[9] *Id.*

[10] Charlotte Tobit, *Attention to Post Office Horizon IT Scandal Follows 14 Years of Dogged Journalism*, PRESS GAZETTE, Jan. 14, 2024, https://pressgazette.co.uk/news/post-office-horizon-it-scandal-journalists.

[11] The software was rolled out in 1999 with false shortfalls being pursued that year. *See* Brooks & Wallis, *supra* note 1, at 1. The final judgment came down in December of 2019. *See* Bates v. Post Office (No 6) [2019] EWHC (QB) 3408 (Eng.).

[12] Brooks & Wallis, *supra* note 1, at 1, 4.

[13] *Id*.

any request to investigate the accounts underlying his supposed shortfalls—and likewise being told that he was the only sub-postmaster to experience issues with it—Bates turned to the body that was supposed to represent people like him, the National Federation of Sub-Postmasters, which expressed no interest in helping.[14] Undeterred, Bates launched efforts to find other sub-postmasters and build media momentum, which eventually led Members of Parliament to investigate.[15] What resulted from the Parliamentary investigation was a toothless and ineffectual mediation scheme: only twelve of the 150 filed cases went to mediation.[16] But individual sub-postmasters learned what the Postal Service had denied, namely, that none of them were alone. In 2017, the High court gave 555 claimants a "Group Litigation Order," giving the now-named "Justice for Sub-Postmasters' Alliance" a path to jointly sue the Post Office.[17]

On December 16, 2019, Justice Fraser announced a staggering judgment for the sub-postmasters, sharply rebuking the Post Office's deceitful and perjurious litigation tactics, referring employees of Fujitsu for prosecution, and emphasizing that his civil order in no way barred sub-postmasters from pursuing malicious prosecution claims against the Post Office.[18] To date, the British government has budgeted £1 billion to compensate victims.[19] Crucially, the judgment

[14] *Id.* at 3.
[15] Bates was able to get a story in *Computer Weekly* in 2009, and in the BBC in 2012. *See* Rebecca Thomson, *Bankruptcy, Prosecution and Disrupted Livelihoods - Postmasters Tell Their Story*, COMPUTER WEEKLY (May 11, 2009), https://www.computerweekly.com/news/2240089230/Bankruptcy-prosecution-and-disrupted-livelihoods-Postmasters-tell-their-story; *Post Office Computer Campaigner Backs Inquiry*, BBC NEWS (June 23, 2012), https://www.bbc.com/news/uk-wales-18546914.
[16] The mediation scheme provided a vehicle for government officials to fend off the press storm and avoid accountability. *Post Office Scandal Explained*, *supra* note 5.
[17] *Id.*
[18] Transcript of Record at 2, 4, Bates v. The Post Office (No 6) [2019] EWHC (QB) 3408 (Eng.) (No. QB-2016-004710), https://journals.sas.ac.uk/deeslr/article/view/5364/5162.
[19] *Id.*

enabled sub-postmasters who were wrongly convicted to appeal their criminal convictions. By 2024, at least one hundred convictions had been overturned.[20]

At one level, the tale of Alan Bates and his fellow sub-postmasters is a great civil justice story. It highlights, in dramatic fashion, the achievement of fundamental goals: access to justice; vindication of rights; holding wrongdoers accountable, no matter how powerful. And it demonstrates the structural role that private civil enforcement can (and often must) play in public law.[21] We put a lot of faith in these values, in the civil justice system we entrust to uphold them.

The tale of Alan Bates is also a terrible civil justice story. It highlights, also in dramatic fashion, a present-day access-to-justice crisis.[22] Solicitors were unwilling to take the claims of Alan Bates and his fellow sub-postmasters, even when aggregated by way of a court-issued Collective Action Order, and even by way of Solicitor Contingency Agreements.[23] The legal

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[20] *Id.*

[21] *See generally* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137 (2012) (describing the important role of private litigation in the American regulatory system); *see also* SEAN FARHANG, THE LITIGATION STATE (2010) (describing US dependence on private litigation for statutory enforcement as a legislative choice); *Q&A with Prof. Stephen Burbank: "Procedure is Power"*, U. PA. CAREY L. SCH. (July 18, 2011) (describing private enforcement as "a phenomenon that results when a legislature determines that there is an unremedied, systemic problem, and that incentives should be provided for privately-initiated litigation in place of or in addition to litigation brought by the executive branch or administrative proceedings"), https://www.law.upenn.edu/live/news/1965-qa-with-prof-stephen-burbank-procedure-is-power.

[22] *See, e.g.*, Nora Freeman Engstrom & James Stone, *Auto Clubs and the Origins of the Access-to-Justice Crisis*, 134 YALE L.J. 123 (2024); J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1238, 1305 (2022) ("Eliminating aggregate claims also tends to eliminate claims generally."); Law Society Access to Justice Campaign, *21st Century Justice,* available at http://lawsociety.org.uk/policy-campaigns/campaigns/access-to-justice; Andrew Higgins, *The Costs of Civil Justice and Who Pays?*, 37 OXFORD J. LEGAL STUD. 687, 687 (2017); Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605 (2018) (describing the adverse effects that mandatory arbitration clauses have on the vindication of employee rights).

[23] Travers Smith LLP, *Litigation funding: to regulate or not to regulate?*, LEXOLOGY (last visited Jan 25. 2026), https://www.lexology.com/library/detail.aspx?g=7865f33d-75de-47e2-abdd-

strategy of the Post Office in the UK was designed around exhausting claimants' resources and prolonging litigation, making the postmasters' complex claims not economically viable for attorneys—the massive injustices they represented notwithstanding. Faith is failing.[24]

Finally, the story of Alan Bates and his fellow sub-postmasters is about the unspoken side of civil justice.[25] It introduces us to a new, increasingly prevalent, and highly controversial actor in the landscape, one that responds to the "unspoken" question in the equation:[26] Who is going to pay for all this? Civil justice requires funding if its goals are to be met. Contrary to formalistic theoretical accounts of "legal justice,"[27] these commitments matter if rights are to have any meaning.[28] Funding does not come out of the public purse (as it does, of course, in criminal law).

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dbe29c335cd1 ("Sir Alan Bates, one of the former sub-postmasters and first claimant in the proceedings, has publicly stated that without litigation funding, the sub-postmasters could not have brought their case and exposed the wrongdoing of the Post Office."). *See also* Bates v. Post Office, *supra* note 11 ("The claimants are funded by means of litigation funding").

[24] *See, e.g.*, Engstrom & Stone, *supra* note 22, at 182-84; ROBIN WEST, LAWLESS (forthcoming 2026) (manuscript at 12) (on file with author) (describing how the "law's message is clear: … [citizens] are on [their] own."); Glover, *supra* note 22, at 1308-11; Judith Resnik, *Mature Aggregation and Angst: Reframing Complex Litigation by Echoing Francis McGovern's Early Insights into Remedial Innovation*, 84 L. & CONTEMP. PROBS. 231, 238–39 (2021) ("Of some 260,000 civil cases filed annually [in federal courts], about twenty-five percent are brought by people without lawyers, and more than half the cases before the federal appellate courts are brought by self-represented parties"); *See also generally,* STEPHEN B. BURBANK & SEAN P. FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017). As Engstrom and Stone traced in 2024, moreover, a "thicket" of laws that limit access to and provision of legal services contributes to the access-to-justice crisis in civil justice. Engstrom & Stone, *supra* note 22, at 134 n.14.

[25] Brooks & Wallis, *supra* note 1, at 1.

[26] *See, e.g.*, Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561, 561 (2014) (noting that the financial aspect of litigation is not mentioned "in polite company").

[27] Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 48 (1935); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 181 (2011) ("[T]he conceptual structure of private right can only be made to apply to particulars if it is applied in the same way for everyone.").

[28] *See infra* Part IV.

Civil cases must be privately funded. But where is the money for all this "civil justice" coming from? For Alan Bates and his fellow postmasters, it came from a private legal financier, Therium Capital, which put up some £16 million in non-recourse capital for the postmasters' case.[29] Following successful litigation, Therium and the Freeths law firm shared a £46 million payout.[30]

The story of Alan Bates and the postmasters is thus not just a story of wrongdoing, redress, and regulation of large-scale public misconduct by way of private enforcement. It also points to a broader development across the substantial, monetizable segments of the civil justice landscape—principally, commercial disputes, large numbers of related but individualized consumer claims against common defendants, and formalized mass-dispute settings. Indeed, equity finance has entered civil justice. Unlike the litigation "funding" of yesteryear, this new form of litigation finance introduces a cast of institutional investors—typically private firms or hedge funds—who make non-recourse capital investments into civil litigation in exchange for eventual profit. Equity funders evaluate claims and cases as potentially worthwhile assets for capital deployment; case outcomes as potential returns on investment.

In short, certain segments of civil justice are viewed as a business—on both sides of the "v." This development reshapes the landscape—introducing a new form of equity capital and, at least in commercial arrangements, establishing a locus of autonomy and decision-making over claim financing with claimants, alongside their attorneys, rather than exclusively within the bar. The shift in funding from debt to equity, following the trajectory of business firms over the centuries, institutionalizes the matter: In turn, these new forms of capital, expanded claimant

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[29] *See And The Winner Is....?*, POST OFFICE TRIAL (Dec. 11, 2019), https://www.postofficetrial.com/2019/12/further-questions.html.

[30] *What is the Post Office Scandal, why were postmasters prosecuted, and what is Horizon?*, SKY NEWS (Jan. 9, 2024), https://news.sky.com/story/what-is-the-post-office-scandal-why-were-postmasters-prosecuted-and-what-is-horizon-12542573.

autonomy, and their interaction with emerging generative artificial intelligence alter the conditions under which claims are brought, financed, and pursued—lowering barriers to entry while enabling scale in claim production and prosecution. This Article elucidates and takes up directly these dynamics—opening pathways for lawyers to participate in large-scale and complex litigation, expanding access to courts where attorneys cannot or will not fund claims, and enabling claimants to better match the capital and sophistication of insurer-backed defendants—while also centering whether and to what extent mechanisms that tether outcomes to merit and effectuate valid claims continue to function under conditions of expanding capital, lower barriers, and scalable claim production.

But what is not new should not be missed: Litigation funders are not the first actors in civil justice to approach claims on these terms. Lawyers have long done so, including through contingency fees, portfolio judgment, case screening, and settlement valuation. Insurers have done so as well, building institutional structures around litigation risk and expected payout. Each has a distinct role, of course, governed by different professional norms and obligations. A fulsome account of modern civil justice does not treat lawyers or insurers as strangers to cost, risk, and return; it recognizes that these actors have long priced and managed litigation risk in ways that also effectuate rights and operate within professional norms—commitments this Article clarifies and situates within their proper relational and legal domains.

Funders approach claims with explicit attention to cost, risk, and return, but they are far from the normless interlopers some of the literature and policy advocacy suggest.[31] Funders, too,

[31] *See generally*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES, 5 (2009) (describing funders as encouraging frivolous and abusive litigation.); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1286-88 (2011);

operate within a structured set of obligations drawn from long-established corporate law and doctrine.[32] That well-settled body of corporate law is largely unengaged in the litigation finance literature and policy advocacy,[33] even as it defines the duties at issue. This Article thus further contributes by correcting a persistent mischaracterization of those obligations—often cast in the academic literature and policy advocacy as requiring short-term, transaction-specific profit maximization on pain of fiduciary breach. It does so by disciplining the analysis with long-established corporate law and doctrine, which define these duties as fiduciary and discretionary

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David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1090 (2013). These and related accounts are examined more fully in Part II.B.

[32] *See, e.g.*, Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147–48 (2012) (explaining that corporate law assumes profit-seeking behavior but operates through legal constraints rather than imposing a simple command of profit maximization); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. Rev. 733, 738–40 (2005) (demonstrating that corporate law permits profit-sacrificing decisions where consistent with law and fiduciary duty); Ian B. Lee, *Corporate Law, Profit Maximization and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 34–36 (2005) (arguing that corporate law does not mandate strict shareholder wealth maximization and instead leaves managers broad discretion subject to market and governance constraints); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–39 (1991) (articulating shareholder value maximization as an organizing principle while emphasizing the role of legal and market constraints); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1645–47 (2016) (describing the breadth of managerial discretion under the business judgment rule and the limited role of courts in policing corporate purpose); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1292–94 (2001) (explaining that fiduciary duties constrain self-dealing and bad faith rather than mandate specific substantive outcomes such as profit maximization).

[33] While portions of the literature address investor incentives and potential conflicts, the corporate law account of fiduciary duties governing investor-facing relationships has not been systematically integrated into analyses of litigation finance. *See, generally,* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011); W. Bradley Wendel, A*lternative Litigation Financing and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655 (2014) (discussing the roots of prohibitions against assignment and maintenance without discussing the fiduciary relations of funders); Steinitz, *supra* note 31 (discussing the fiduciary duties that funders have to shareholders, but unengaging in the body of literature that argues that shareholder value maximization is not the only goal of corporations); Abrams & Chen, *supra* note 31 (same). This gap is developed in Part II.B.

and require managerial judgment in pursuing the firm's long-term interests,[34] rather than maximization in any individual case. By situating that body of corporate law doctrine and scholarship defining funder-investor facing duties within the relationships among funders, claimants, and attorneys that structure civil litigation, it clarifies how those obligations bear on questions of claim control, disclosure, and the generation and resolution of claims at scale.

Against that backdrop, the current moment reflects not only conceptual stakes but political and economic ones. Regulatory energy comes from multiple directions: from those seeking to constrain aggregation—an updated version of familiar "class action wars" aimed at eliminating claims or depressing their value[35]—and from those seeking to facilitate rights effectuation and

[34] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (articulating the business judgment rule and the presumption that directors act on an informed basis, in good faith, and in the honest belief that their actions are in the best interests of the corporation); *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 52–57 (Del. 2006) (emphasizing the role of good-faith, informed managerial discretion in corporate decision-making); Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 85–90 (2004) (explaining that corporate law vests managers with broad discretion rather than imposing transaction-specific mandates). These authorities reflect the settled understanding that fiduciary duties do not require profit maximization in any particular transaction or at any moment, but instead require the exercise of informed, good-faith managerial judgment in pursuit of the firm's long-term interests.

[35] A substantial body of legal scholarship has long described and theorized recurring conflicts over aggregation—what John Coffee famously termed the "class wars"—and, more broadly, has situated procedure as a site of contestation over access, aggregation, and institutional authority. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344–45 (1995) (coining the "class wars" framing to describe strategic resistance to mass claims). *See also* Judith Resnik, *From "Cases" to "Litigation"*, 54 L. & CONTEMP. PROBS. 5, 18–23 (1991) (locating aggregate litigation within broader institutional struggles over procedure and access); Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View,* 156 U. PA. L. REV. 1439, 1442–45 (2008) (situating aggregation debates within political contests over jurisdiction and procedural control); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform,* 156 U. PA. L. REV. 1823, 1825–28 (2008) (tracing legislative efforts to reshape aggregation through jurisdictional design and forum allocation); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3056–59 (2015) (explaining how procedural constraints suppress claim assertion and distort the enforcement of substantive law). These accounts are descriptive and analytic rather than prescriptive. By contrast, contemporary regulatory and

deterrence of wrongdoing. These competing regulatory impulses reflect not only policy disagreement, but contests over the structure, control, and institutional role of civil justice itself. At the same time, the scale of underlying injury, the rise of new capital, and the advent of technologies capable of generating claims at volume are converging to both expand and strain civil justice's capacity to process, evaluate, and resolve claims on terms tied to the effectuation of meritorious claims.

The scale of the business underscores these stakes. Litigation finance is a "massive," global, multi-billion-dollar industry,[36] with predictions of "explosive" growth.[37] Recent projections indicate a global market between 30 to 60 billion Euros (around 35 to 70 billion U.S. dollars) by 2030.[38] The United States was the late mover globally. Already, however, there are at

litigation efforts often seek affirmatively to constrain aggregation and claiming. *See, e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 31, at 2–4 (advocating restrictions on litigation finance and aggregate litigation as mechanisms that inflate or distort claims); Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action,* 64 EMORY L.J. 399, 424–27, 466–67 (2014) (criticizing the expansion of class action mechanisms and opposing the introduction of third-party litigation funding into class litigation); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350–52 (2011) (enforcing arbitration agreements that preclude class proceedings, thereby limiting aggregation); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–52 (2011) (tightening FRCP Rule 23(a) commonality in ways that restrict class certification).

[36] In the United States, the Government Accountability Office describes legal finance as a "massive" industry, characterized by "explosive" growth. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS, 8 (2022) [hereinafter GAO 2022 Report] (reporting additionally that the amount of third-party funding more than doubled between 2017 and 2021). *See also,* ANTHONY J. SEBOK, THIRD-PARTY LITIGATION FINANCE: LAW, POLICY, AND PRACTICE (1st ed., Aspen Publishing 2024); Michael Legg, Edmond Park, Nicholas Turner & Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia*, 38 N. KY. L. REV. 625, 628 (2011); Steinitz, *supra* note 31; J. Maria Glover, *Asking the Right Questions About Third-Party Legal Finance in United States Aggregate Litigation*, 25 THEORETICAL INQUIRIES L. 81, 87 (2025).

[37] GAO 2022 Report, supra note 36, at 8.

[38] Eur. Comm'n High-Level Forum on Justice for Growth, Report of the High-Level Forum on Justice for Growth, 8 (Nov. 18, 2025). These figures represent a fraction of the overall potential value-capture in this high-risk, high-reward segment of the larger global financial industry. Consider, for instance, Burford Capital's calculated $6.2 billion share in the $16 billion verdict

least forty-two active litigation funders in the U.S.,[39] and the two largest players in the industry—Burford Capital and Omni Bridgeway—are now publicly traded. Top law firms in the United States initially steered clear, but by 2025, "Big Law" accounted for around 35% of recent capital commitments in the industry.[40] Litigation finance is now deployed across state[41] and federal courts,[42] and spans a wide range of subject areas, including antitrust and trade regulation, asset

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against the Republic of Argentina in 2023, a sum that represents a 37,000% return on Burford's initial outlay of $16.6 million. Robert Dillard, *Analysis: Expect to See Targeted Growth in Litigation Finance*, BLOOMBERG NEWS (Nov. 5, 2023), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-expect-to-see-targeted-growth-in-litigation-finance. Or the Hong-Kong-based funder Noble Prestige's $500,000 investment in a commercial dispute against AT&T, which resulted in a $57 million settlement in 2017, of which Noble's contractual share was $5 million. *See* Roy Strom, Unlikely Colorado Court Vexes 8 Million Litigation Finance Win, BLOOMBERG NEWS (Oct. 19, 2023), https://news.bloomberglaw.com/business-and-practice/unlikely-colorado-court-vexes-8-million-litigation-finance-win. The $8 million dollar figure reported in the headline is after interest stemming from delay of payment.

[39] WESTFLEET, THE WESTFLEET INSIDER: 2024 LITIGATION FINANCE MARKET REPORT, at 3 (Mar. 2025).

[40] Video: Conference on Litigation Funding: What's Driving Funding and the Reasons Behind Investor Decisions Panel, held by IMN (June 3, 2025) (on file with author) [hereinafter IMN Conference]; Emily R. Siegel, *Litigation Finance Industry Shrinks After Years of Growth*, BLOOMBERG LAW (Mar. 27, 2024), https://news.bloomberglaw.com/business-and-practice/litigation-finance-industry-shrinks-after-years-of-growth.

[41] *See, e.g.*, Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. 07C-12-134-JRJ, 2015 Del. Super. LEXIS 166, at *2; Fox Paine & Co., LLC v Houston Cas. Co., 37 N.Y.S.3d 207, 2016 N.Y. Misc. LEXIS 1485, at *64 (Westchester County Supreme Court 2016) (discussing funding documents reviewed *in camera*); RP Holdings Grp., LLC v. Kirkland & Ellis LLP, No. 14CV31937, 2015 Colo. Dist. LEXIS 886, at *8–9, (discussing third-party funding).

[42] *See, e.g.*, United States *ex rel.* Fisher v. Homeward Residential, Inc., 2016 U.S. Dist. LEXIS 32910, *10 (E.D. Tex. 2016) (discussing discovery dispute over funder disclosures.); Cont'l Circuits LLC v. Intel Corp., 435 F.Supp.3d 1014, 1022 (D. Ariz. 2020) (discussing discovery dispute over funder disclosures.); Impact Engine, Inc. v. Google LLC, No. 3:19-cv-01301-CAB-DEB, 2020 U.S. Dist. LEXIS 194517, at *4 (S.D. Cal 2020) (discussing third-party funding reviewed by the court); GoTV Streaming, LLC v. Netflix, Inc., 2023 U.S. Dist. LEXIS 91168, at *27 (C.D. Cal 2023) (discussing discovery dispute over funder disclosures.); In re Int'l Oil Trading Co., LLC, 548 B.R. 825, 839; Morley v. Square, Inc., 2015 U.S. Dist. LEXIS 155569, at *7 (E.D. Mo. 2015) (discussing, in discovery dispute, plaintiffs attempt to secure litigation funding); *In re* Valsartan N-Nitrosodimethylamine (N.D. Ma.) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612, 620 (D.N.J. 2019) (ordering *in camera* review of funding documents); Fulton v. Foley, No.

recovery, bankruptcy and liquidation, commercial contract, intellectual property (including patent, trademark, copyright, and trade secret), mass torts, securities, and whistleblower actions, among

17-CV-8696, 2019 U.S. Dist. LEXIS 209585 (N.D. Ill. 2019) (discussing funding agreements in context of motion to quash subpoena to funder); Acceleration Bay LLC v. Activision Blizzard, Inc., No. 16-453-RGA, 2018 U.S. Dist. LEXIS 21506, at *8 (discussing discovery dispute over funder disclosures); RevoLaze LLC v. Dentons US LLP, 2022-Ohio-1392, P9, 191 N.E.3d 475, 480; Kroll Ontrack v. Devon It, 2015 U.S. Dist. LEXIS 198180, *2 (D. Minn. 2015); Hologram USA, Inc. v. Pulse Evolution Corp., No. 2:14-cv-00772-GMN-NJK, 2016 U.S. Dist. LEXIS 87323, at *4 (discussing discovery dispute over identity of funder) (D. Nev. 2016); 3rd Eye Surveillance, LLC v. United States, 158 Fed. Cl. 216, 229 (Fed. Cl. 2022) ("[P]laintiffs have already admitted on the record to having a relationship with a litigation funder.").

others.[43] Importantly, the use of equity capital in civil justice is outpacing judicial engagement and theoretical development.[44]

[43] *See* GAO 2022 Report, *supra* note 36, at 9. Litigation finance has been used to fund some of the most high-profile cases in civil justice, including the British Post Office scandal, the Camp Lejeune Water Contamination Litigation, A breach-of-contract shareholder litigation against the Republic of Argentina, which initially resulted in a $16.1 billion verdict against the Republic in the U.S. District Court for the Southern District of New York before being reversed on appeal, and major mass-dispute proceedings such as the National Opioids Litigation and Talcum Powder Litigation. Emily R. Siegel & Kaustuv Basu, *Litigation Funders Bet Billions on Veterans' Toxic Water Claims*, BLOOMBERG LAW (July 20, 2023), https://news.bloomberglaw.com/us-law-week/litigation-funders-bet-billions-on-veterans-toxic-water-claims; Petersen Energía Inversora S.A.U. v. Argentine Republic, Nos. 23-7370 (L), 23-7376 (L) (2d Cir. Mar. 27, 2026) (reversing the district court's judgment, though plaintiffs are likely to seek en banc review). For the District Court's judgment, see Petersen Energía Inversora, S.A.U. v. Argentine Republic, No. 15-cv-2739, 2023 U.S. Dist. LEXIS 158966 (S.D.N.Y. Sep. 8, 2023); Order Regarding Third-Party Contingent Litigation Financing, *In re* National Prescription Opioids Litig., No. 1:17-MD-2804 (N.D. Ohio May 7, 2018) (ECF No. 383) (Polster, J.) In the ongoing Camp Lejeune lawsuits, wherein the government estimates it will have to eventually pay out $21 billion dollars to compensate victims who fell ill from contaminated water on a Marine Base, litigation funders have already committed at least $2 billion to firms representing claimants. Siegel & Basu*,* supra*. See also,* Samir D. Parikh, *The Alchemist's Inversion*, 110 CORNELL L. REV. 1693, 1731 n.172 (2026) (noting that Johnson & Johnson believed that litigation surrounding its talcum powder had been spurred—at least in part—by "the unregulated and surreptitious financing of product litigation by financial institution . . ."). Analysts predict a sharp increase in claimant need for litigation finance to pursue claims against, or arising from the actions of, the current Trump administration. *See* IMN Conference, *supra* note 40. Indeed, DOGE's reshaping of the entire federal government alone has left countless corporations with valid breach-of-contract claims for large receivables. Daniel Seiden, USAID Contractors Can Proceed With DOGE Terminations Lawsuit, BLOOMBERG LAW (April 13, 2026), https://news.bloomberglaw.com/litigation/usaid-contractors-can-proceed-with-doge-terminations-lawsuit.

[44] *See generally*, Kenneth S. Abraham & Catherine M. Sharkey, *The Glaring Gap in Tort Theory*, 133 YALE L.J. 2165 (2024) (emphasizing the role that liability insurance plays for defendants in the civil justice landscape); David A. Hyman & Charles Silver, *Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?*, 87 CHI.-KENT L. REV. 163 (2012) (describing how the traditional mechanisms for managing civil justice risks and expenses have created a system that is expensive and slow, leaving it viable only for cases with damages large enough to justify the massive financial risks borne by attorneys).

This Article begins with a descriptive claim: There is a new civil justice business model in town. Self-interested market players finance claims on the claimant side, decentering attorneys as the exclusive source of capital. That model is defined by the structure of litigation costs and the market's capacity to price claims. Part I provides a taxonomy of the litigation finance industry, identifying its analytically distinct central markets—consumer litigation finance, commercial litigation finance, and the mass-dispute market—and their core subsegments. Additionally, Part I traces and taxonomizes the regulatory responses that the new litigation finance industry has received, both globally and in the U.S. from actors across the academic, political, and judicial spheres. Part II shows that this new civil justice actor raises old civil justice questions—questions about the potential conflicts that come through the agency of money, about control of civil litigation, about providing access to justice for meritorious claims and screening meritless ones. It also raises anew, and in new civil justice context, the prospect of litigant autonomy on the claimant's side.

This Article does not ask the conventional normative question: How can the law prohibit civil justice from becoming a business? Nor does it adopt the conventional descriptive frameworks that attempt to assimilate litigation finance to inherited doctrines or existing rules[45] designed to

[45] Unlike other common-law countries, such as Australia, Canada, and even the United Kingdom, the United States still clings to its ancient inheritance of laws prohibiting champerty, maintenance, and barratry. It is also an outlier in other ways: Forced arbitration agreements, such as those in employment contracts, are not enforced by most other countries; in contrast, litigation finance is to be regulated with a light touch, and trending towards differentiation in the market segments taxonomized in Part I here. *See* Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 309 (2020); Restatement of Consumer Contracts (A.L.I. 2024) (observing that "[m]andatory rules are significantly less common in the United States than in many other countries . . . in the area of labor and employment law."); CIVIL JUSTICE COUNCIL, REVIEW OF LITIGATION FUNDING: FINAL REPORT 7 (June 2025). Of course, the U.S. civil justice system may be viewed as unique in other regards—plenary discovery, opt-out class actions, and juries. Stephen J. Ware, *Contracting Away Constitutional Rights in the United States: Adhesive*

restrict or exclude its entry into civil litigation.[46] Instead, this Article asks an entirely different normative question: When civil justice becomes a business—on both sides of the "v."—what law should regulate it, by whom, and at what level of granularity? Part II conceptualizes a relational framework for litigation finance, grounded in modern strains of contract theory oriented along relational lines. By attending to the nature of the critical relationships in funded litigation—between funder and claimant, funder and firm, claimant and attorney, and all of these actors and the court—the framework moves beyond the binary of permissibility and prohibition that has constrained the field, illustrating how civil justice concerns must be evaluated differently across institutional settings of dispute resolution. What emerges is one of this Article's core claims: a framework for litigation finance grounded in these relationships and their operation across institutional settings can and should chart the course for judges and regulators faced with litigation finance.

This Article's relational-institutional framework reframes the regulatory inquiry: The question is no longer the permissibility of the exchange for finance, but whether and to what extent the court system demands features of transparency, disclosure, or contractual boundaries unique to the litigation setting. It also makes clear that prevailing approaches misallocate regulatory tools across distinct relationships and market contexts, generating the very distortions they seek to avoid.

Consent (Blanket Assent) to Arbitration and Other Agreements, 26 GERMAN L.J. 904, 906 (2025) (identifying "(1) The civil jury, (2) Opt-out class actions, and (3) Extensive discovery" as "peculiarities of civil litigation in the U.S.").

[46] *See, e.g.*, Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 317–18 (1950) (recognizing procedures for binding numerous claimants as consistent with due process where notice is reasonably calculated, reflecting the system's accommodation of aggregated claims); *cf.* Resnik, *supra* note 35, at 18–23 (describing the transformation from individual adjudication to aggregate litigation and its institutional implications); Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 554 (2013) (analyzing the structural role of aggregation in modern civil justice and its implications for dispute resolution).

Part III applies this framework directly to three of the most heated and seemingly intractable debates in litigation finance—disclosure, claim control, and mass-dispute funding. In doing so, it operationalizes the framework across institutional settings, recasting these debates around relational alignment, institutional context, and the conditions that tether claim production to merit. It thereby generates targeted regulatory pathways for judges, legislators, and scholars that depart markedly from dominant proposals and point the way toward harnessing civil justice innovations to vindicate meritorious claims, effectuate rights, and regulate wrongdoing. This framework also exposes and corrects a persistent asymmetry: Civil justice routinely accommodates capital, control, and risk management on the defense side while restricting them on the claimant side, often under the guise of protecting claimants.

A word on scope. This Article makes many contributions—descriptive, conceptual, analytic, and theoretical—directed to a specific domain of civil justice: the capital-intensive, monetizable segments in which litigation finance operates. Its breadth and depth is deliberate, and it is necessary. The absence of an integrative account has often left litigation finance debates free-floating and intractable, susceptible to capture both by frameworks designed for other purposes and by actors with other agendas. Engagement at the level of litigation finance's core problematics requires that these contributions be developed together: It is their integration that gives the framework its analytical, theoretical, and normative force.

Moreover, the work here reaches beyond litigation finance. The real question in all of this is what *any* innovation in civil justice—indeed, what civil justice itself—is meant to do. To return to the title of this Article, and to explicate its double meaning: What, exactly, *is* the *business* of civil justice? Part IV answers that question by developing a theory of civil justice as realized law—an institutional, capacity-based account of how substantive rights are made operative. On this

account, rights, remedies, and institutional capacity are co-determinative: Law does not exist apart from the systems that render it operative. Evaluated against this account, civil justice innovations must be judged by whether they can be harnessed to make rights real. Absent that, what remains is, at best, formalized justice—not civil justice at all. Ours is a golden age of rights,[47] but a dark age of enforcement—and it is the work of civil justice to close that gap—in theory, in doctrine, and in practice—if rights are to have any meaning at all.

I. THE LITIGATION FINANCE INDUSTRY IN MODERN CIVIL JUSTICE

The modern litigation finance industry first entered the civil-justice landscape in Australia in the 1990s.[48] It made its next major appearance in the United Kingdom in the early 2000s.[49] By 2008, eight of London's top ten law firms were making use of litigation finance, principally for commercial litigation and arbitration.[50] The United States lags more than a decade behind Australia and the UK, in which the modern industry only began to gain a real foothold in the mid-2010s.[51]

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[47] *See* Judith Resnik, *The Capital of and the Investments in Courts, State and Federal*, 99 N.Y.U. L. REV. 1958, 1966 (2024) ("Congress has also opened federal courthouse doors through specific jurisdiction provisions attached to a panoply of statutory rights. . . . Across the political spectrum, members of Congress have sought to create new federal private causes of action to implement their views of what national norms should be."); *cf.* Fathali M. Moghaddam, Winnifred R. Louis & Robin Banks, *Runaway Rights: How Rights Become Expanded, Adopted, and Coopted*, 31 CULTURE & PSYCH. 19, 20–23 (tracing a global expansion in articulations of rights and proposing an explanatory model using the principles of social psychology).

[48] *See, e.g.*, 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, 96 (2013).

[49] W. Hunter Huffman, *A Great and Profitable Clause: Why the New York City Bar Association Says It Is Time to Pay Attention to Investors Behind the Curtain*, 98 N.C. L. REV. 973, 979 (2020).

[50] *See* Ashby Jones, *Third-Party Litigation Funding Stepping up in the U.K.*, WALL ST. J. L. BLOG (Mar. 20, 2008), https://www.wsj.com/articles/BL-LB-5506.

[51] *See* GAO 2022 Report, *supra* note 36, at 10 (noting that litigation funding only gained a foothold in the U.S. around 2010).

To be clear, by the modern litigation finance industry,[52] I mean the introduction of institutional equity-based investors, who provide non-recourse capital (largely, but not exclusively, to claimants) to litigate civil cases, in exchange for eventual profit. Importantly, I exclude decades-old, debt-based funding arrangements, like recourse bank loans, as well as the more recent development of private recourse loans to law firms, also known as law-firm lending.[53] The conceptual distinction between recourse-based law-firm lending and non-recourse litigation funding is of fundamental consequence: Recourse-based law-firm lending raises the specter of introducing, at the outset, structural conflicts of interest between funded counsel and their claimants. Counsel subject to recourse agreements are structurally incentivized to settle at amounts and pursuant to time horizons that minimize exposure to recourse-arrangement-based interest rates. Complicating matters for claimants and their counsel, this is a reality that defendants aware of such recourse arrangements are no doubt incentivized to exploit, either by dragging out proceedings such that interest rates accrue, or by weaponizing the threat of extended proceedings–either of which provide leverage for defendants to drive down any ultimate settlement value for claimants. This Article thus engages this conceptually distinct law-firm lending market only when comparatively relevant for theoretical and regulatory purposes vis-a-vis litigation funding.

The litigation funding industry, so clarified, is complex. Its complexity lies not only in the structure of funding arrangements, but in the distinct markets through which litigation finance operates. More than this, and despite its significance in the civil justice landscape, the market and its particularized contours, features, and segments are largely unfamiliar to scholars and civil

[52] Definitionally, legal finance is broader and would include capital infusions into legal services.
[53] *Compare, e.g.*, Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Legal Landscape, Again*, 61 UCLA L. Rev. Disc. 110 (2013) *with* Part I.A, *infra*.

justice commentators.[54] Part A therefore introduces the industry and taxonomizes its core elements and features. Part B provides a brief overview of the legal and regulatory landscape for this modern litigation finance industry in the United States. Current regulatory responses largely reflect a failure to differentiate across these markets and relationships, a tendency this Article corrects.

A. Taxonomy of the Litigation Finance Industry

Litigation finance takes many forms, but the core of the industry involves a well-capitalized funding entity—typically, a private firm or hedge fund comprised of finance analysts and lawyers—that provides capital in exchange for a return that consists of a share of the proceeds from the client's legal claims.[55] Often, that capital is used by claimants to fund the costs of the litigation, including attorneys' fees. In a typical litigation finance arrangement, if the claimant loses, the funder is out too—a model known as "non-recourse funding." The value proposition for a would-be funded entity, then, is litigation capital, liquidity, and the ability to spread risk.[56]

However, the litigation finance industry is not a monolith. It comprises distinct markets that operate through different relationships and raise different civil justice concerns. This Part thus develops a taxonomy of the industry and describes its core features. These distinctions structure the analysis that follows in Parts II and III. This taxonomy is pitched at a high level of generality, which is both sufficient and necessary for this Article's larger theoretical and regulatory

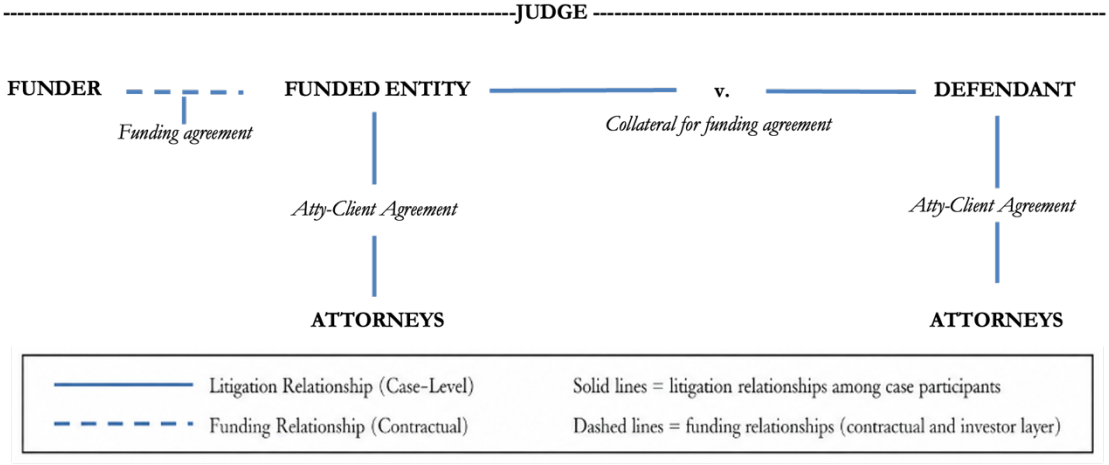
[54] Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 581 (2021) (describing litigation finance as "a 'nascent but fast-growing' industry").
[55] *See, e.g.*, Steinitz, *supra* note 31, at 1275–77 (2011); Emily Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83 U. CHI. L. REV. 2299, 2301 (2016); Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1134–35 (2019).
[56] *See, e.g.*, Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms when the Deal Breaks Down*, 66 VAND. L. REV. 1831, 1842 (2013) ("A litigation-investment transaction is a long-term commercial relationship in which the parties share ownership of an asset in circumstances that create risks for both parties.").

interventions. I leave in the capable hands of other scholars cited more detailed explication of and engagement with the often highly technical aspects of the industry.[57]

1. Litigation Finance Agreements: Core Structures

Contingency fees and liability insurance represent earlier iterations of capital provision and risk allocation in civil justice; litigation finance both builds on and departs from these structures. In the world of litigation finance, no two deals are precisely alike. At a general level, though, one can taxonomize the universe of common arrangement structures into three. First, and simplest, are "single-case" funding structures. A stylized visual helps illustrate:

Figure 1: Single-Case Funding Arrangement Litigation:



In the classic single-case-funding example, a funder provides capital on a non-recourse basis,[58] collateralized by the proceeds of the plaintiff's claims. The investment return for the funder typically comes in the form of a share of the amount recovered by the plaintiff on the claims—and if the plaintiff recovers nothing, so does the funder. That share can be calculated in several ways:

[57] *See, e.g.*, MAYA STEINITZ, LITIGATION FINANCE, LAW FIRM OWNERSHIP & THE FUTURE OF THE LEGAL PROFESSION (2026); Bedi & Marra, *supra* note 54; Sebok & Wendel, *supra* note 56; Engstrom, *supra* note 53.

[58] The forms of capital vary from deal to deal, e.g., working capital, debt satisfaction, expenses, etc. *See, e.g.*, Bedi & Marra, *supra* note 54, at 572-75.

as a percentage of the proceeds; as a multiple of the amount of capital advanced; or as a percentage annual rate of return on the amount of capital. And there are myriad variations of the classic "single-case" structure:[59] Notable, frequently encountered examples include judgment-protection arrangements; post-judgment capital advances to cover claimant expenses while awaiting payment; and after-the-event arrangements, on both the plaintiffs' and defense side, which somewhat resemble classic insurance agreements.[60]

Second are portfolio structures, through which a funder provides non-recourse capital to a claimant or, often, a law firm, cross-collateralized across a portfolio of cases. Similar to single-case-funding arrangements, the funder's investment return comes in the form of a share of the amount recovered, if any. Portfolio structures have come to occupy a dominant position in the funding industry, given their ability to help funders spread risk—not just of loss, but also those associated with the often-long time horizons of cases—across a wider range of matters.[61] For law firms, portfolio funding increases law-firm capacity—to take on additional cases and/or riskier cases, and to invest in developing and pursuing more complicated cases. From a funder's risk-management perspective, client-portfolio structures are preferable in part because they place the equity stakeholder (the funder) in privity with the decisionmaker in civil litigation (the claimant). For this and other reasons that tie to this Article's theoretical development of and engagement with new prospects of claimant autonomy in funded civil litigation, this Article focuses principally on claimholder arrangements.

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[59] *See, e.g.*, *id.*

[60] *See, e.g.*, Avraham & Sebok, *supra* note 55, at 1134–35 (mentioning arrangements that involve high fixed-interest rate payouts to the funder, among others); Bedi & Marra, *supra* note 54, at 573.

[61] "The ratio of portfolio deals to single-matter deals has remained approximately 2:1 consistently from 2019 through 2024." WESTFLEET, *supra* note 39, at 6.

Figure 2: Client Portfolio Structure Funding Arrangement Litigation:

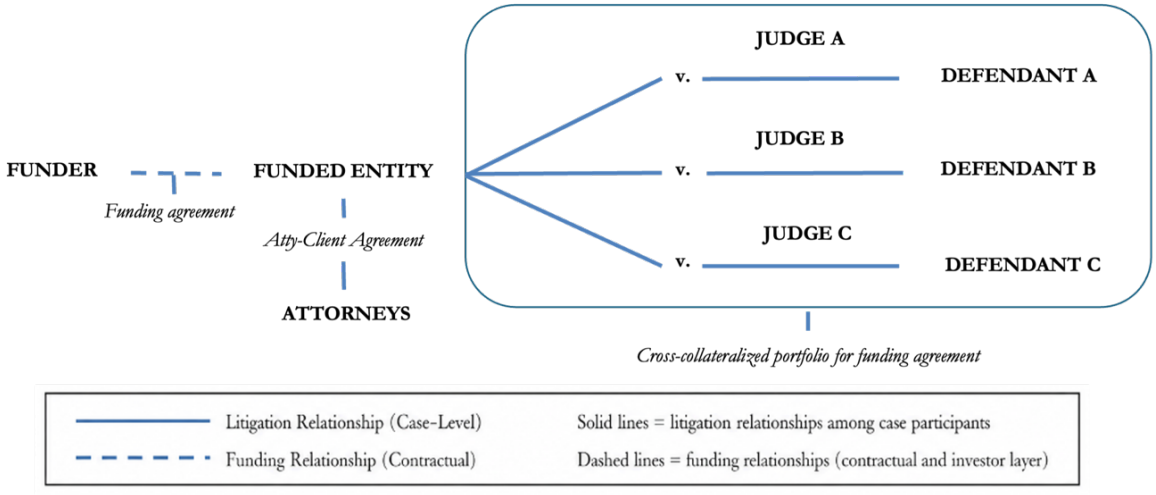
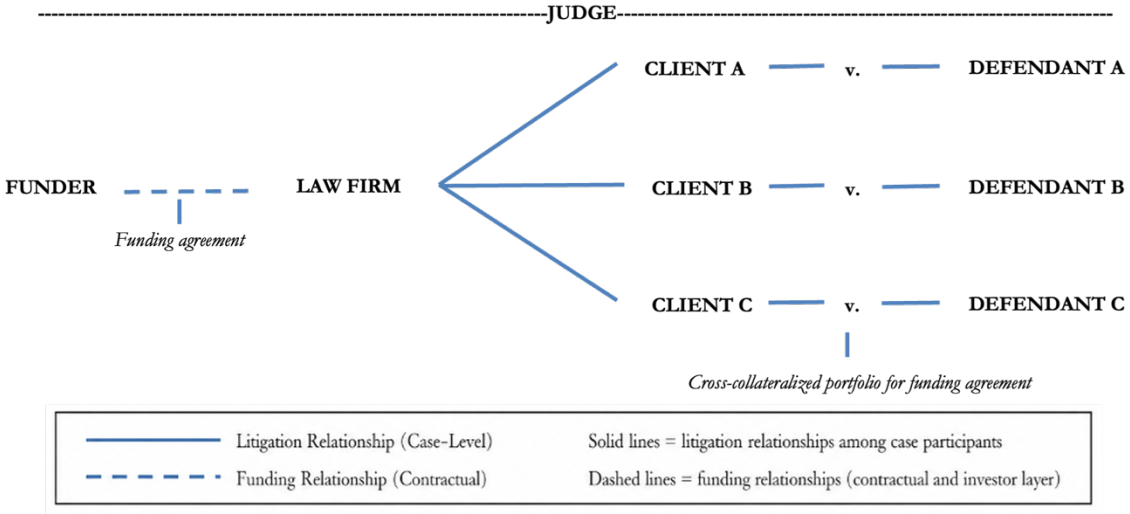


Figure 3: Law Firm Portfolio Structure Funding Arrangement Litigation:



2. Core Market Segments in Litigation Funding

At the highest level of categorization, litigation finance is divided into two principal market segments: the consumer market and the commercial market. Litigation finance firms tend to do one, but not both.[62] Scholarly work in litigation finance usually focuses on one or the other, but

[62] Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 878 (2015).

not both.[63] Nonetheless, litigants, interest groups, legislatures, courts, and even scholars often conflate them, or fail to distinguish their operationally distinct characteristics.[64]

One key similarity: Both commercial and consumer funding arrangements have thus far tended to arise on the claimant side.[65] Litigation finance is available to defendants as well as plaintiffs,[66] but these new funding arrangements have not been particularly common for

[63] *See, e.g.*, Steinitz, *supra* note 57 (commercial); Bedi & Marra, *supra* note 54, at 410; (commercial); Samir D. Parikh, *Opaque Capital and Mass Tort Financing*, 133 YALE L. J. F. 32, 47–56 (2023) (mass tort); Mullenix, *supra* note 35, at 414 (mass tort); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 149 (2021) (consumer); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 71 (2010) (commercial).

[64] Engstrom, *supra* note 53, at 112 (explicitly highlighting the need for precision in the description of the various types of legal finance); *see also* John Beisner et al., *Grim Realities: Debunking Myths in Third-Party Litigation Funding*, U.S. CHAMBER INST. FOR LEGAL REFORM (treating litigation funding as a monolith); *Standing Order Regarding Third-Party Litigation Funding Arrangements* (D. Del. Apr. 18, 2022) (Connolly, C.J.) (imposing disclosure requirements regardless of the type of funding); *Tackling Predatory Litigation Funding Act,* S. 1821, 119th Cong. (2025) (proposing a tax on income received by third-party litigation funders); Expert Report of Professor Maya Steinitz in Support of Sysco Corporation's Petition to Vacate Arbitration Award, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 at 9–11 (N.D. Ill. Mar. 8, 2023) [hereinafter Expert Report of Maya Steinitz] (suggesting oppression in the market for contracts for commercial funding along the lines of litigation and settlement control); Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FORREST 777, at 788 n.65 (2022) (stating that any control by a funder would be against public policy in all fifty states).

[65] *See* Eur. Comm'n High-Level Forum, *supra* note 34, at § 1.2.

[66] *See, e.g.*, Samra, *supra* note 55; Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL. INQ. L. 109, 111–12 (2018).

defendants—at least not yet.[67] Regardless, controversy over litigation finance centers almost exclusively on the funding of plaintiffs' claims.[68]

At this juncture, the commercial and consumer markets diverge along two meaningful lines—counterparty sophistication and claim value. They also separate, less cleanly, along the lines of claim- and expense-type. These distinctions are best understood against the baseline of unfinanced litigation. Typically, consumer litigation finance provides financial support to individual plaintiffs for small-dollar-value claims—e.g., personal injury, malpractice, discrimination, and employment actions.[69] Moreover, consumer finance arrangements typically involve unsophisticated, single-shot claimants without litigation experience, and who have

[67] *See, e.g.*, Charles Silver, *Litigation Funding versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 621 (2014) ("Liability insurers serve potential and actual defendants in civil litigation . . . . Third-party funders serve potential and actual plaintiffs"); Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727 (2019); Dennis Curtis and Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 432 (1998) (some lawyers "act as large-scale entrepreneurs, providing financing and administrative support for the substantial investments required in many mass torts").

[68] Three reasons for claimant-side focus: First, there is lesser need for defense-side funding. Defendants have long had access to and made use of other means of risk-management, principally liability insurance. *See, e.g.*, Silver, *supra* note 67, at 618–19; Fitzpatrick, *supra* note 66. Second, defense funding is a trickier market proposition for funders, because it is difficult to financially value a defendant's odds of success. *See* Popp, *supra* note 67, at 735. Neither of these seems fully explanatory, though, especially when one considers that around fifty-percent of the members of the United States Chamber of Commerce use legal finance. *See* Sebok, *supra* note 33. The Chamber of Commerce is among the most vocal critics of third-party legal funding for plaintiffs, both at home and (somewhat shockingly) abroad. *See* Christopher Niesche, *US Chamber of Commerce Accused of Meddling in Australian Class Action Reform*, LAW.COM INT'L (June 18, 2020), https://www.law.com/international-edition/2020/06/18/us-chamber-of-commerce-accused-of-meddling-in-australian-class-action-reform. The principal reason, then, is likely this: Access to risk-spreading on the plaintiffs' side is a newer—and one might say, field-leveling—phenomenon. Potentially field-leveling civil justice developments tend to be met with strident opposition. *See, e.g.*, Glover, *supra* note 22.

[69] *See* Popp, *Federal Regulation, supra* note 67, at 736.

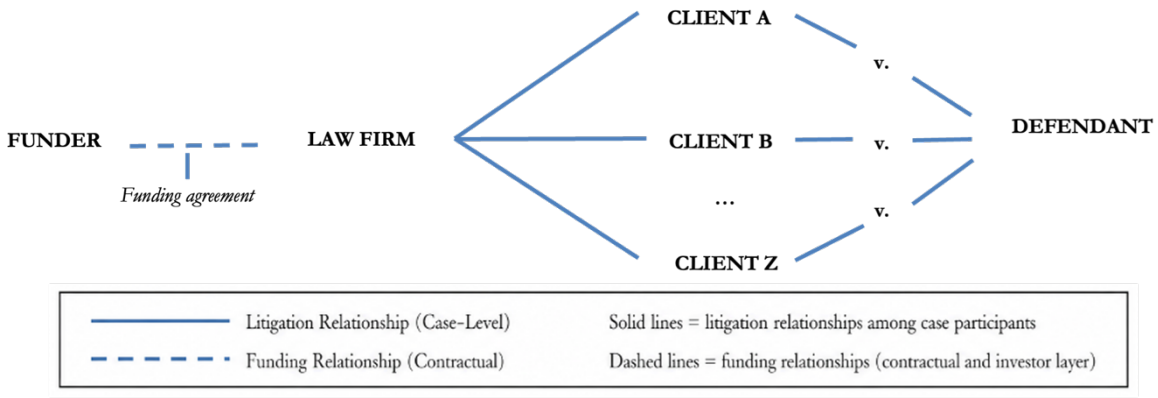
obtained legal representation on a contingency.[70] A consumer plaintiff's expected recovery is typically somewhere in the thousands or tens of thousands of dollars.[71] Commercial third-party funders, on the other hand, focus on complex, high-dollar-value disputes, typically involving sophisticated business entities as counterparties, worth potential recovery in the many millions.[72] According to one estimate, the average commercial funding deal size in 2022 was $8.6 million.[73] Other (still large) estimates differ: Between 2017–2022, the GAO reports that commercial funders deployed an average of $2.3 million per single-case agreement and $4.5 million per portfolio agreement.[74]

A third, emerging, market segment bears brief mention: the market for funding mass disputes.[75] This market, though sometimes mischaracterized as involving consumer-type arrangements with individual claimants,[76] is properly conceptualized as a sub-segment of the commercial market for litigation finance, stemming from the representative nature of aggregate litigation.[77] (One might also conceptualize a fourth sphere—law-firm lending—but that category, while related, falls outside the scope of this Article).

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[70] Avraham, et al., *supra* note 63 (studying a sample of consumer funding arrangements for motor vehicle injury claimants); Popp, *supra* note 67, at 737.
[71] Avraham, et al., *supra* note 63, at 168.
[72] Popp, *supra* note 67, at 739; *see, e.g.*, Ross Todd, *How to Evaluate a Case Like a Plaintiffs' Lawyer or Litigation Funder*, LITIG. DAILY (Feb. 27, 2024), https://www.law.com/litigationdaily/2024/02/27/how-to-evaluate-a-case-like-a-plaintiffs-lawyer-or-litigation-funder (Commercial funders are "going into big, big cases").
[73] WESTFLEET, *supra* note 39, at 4.
[74] GAO 2022 Report, *supra* note 36, at 10.
[75] *See, e.g.*, David S. Abrams & Tom Baker, *Don't Go Chasing Litigation Funding Waterfalls*, 2025 UTAH L. REV. 965, 966 (2025) ("The market can be divided into three primary categories: consumer litigation funding, mass-tort litigation funding, and commercial litigation funding.").
[76] *See* Part III, *infra*, and accompanying text.
[77] *See* Deborah Hensler, *Third-Party Financing of Class Actions in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499, 504 (2014).

Figure 4: Mass Dispute Funding Arrangement:



Mass disputes are not a monolith, but span a range of procedural forms and institutional configurations, each with distinct modes of aggregation, representation, and constraint. At one end are formal mechanisms such as Rule 23 class actions and bankruptcy proceedings, which impose structured safeguards and judicial oversight.[78] Multidistrict litigation operates as a quasi-aggregate system through centralized coordination and leadership-driven resolution.[79] Between and beyond these formal structures lies a spectrum of hybrid claiming models that are neither fully individualized nor fully collective, but instead combine elements of both—relying on coordinated activity, firm-level organization, and the economics of scale to enable and resolve large volumes

[78] *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 200 (2008); Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. PA. L. REV. 1711, 1712 (2017).

[79] *See generally* Bradt, *supra* note 78 (describing MDLs as less formal than Rule 23 class actions that still allows for coordination); Adam S. Zimmerman, *The Class Appeal*, 89 U. CHI. L. REV. 1419, 1427 (2022) (describing MDLs as possibly "avoid[ing] formal processes that courts traditionally use to make rules openly and fairly."); ELIZABETH CHAMBLEE BURCH, THE PAIN BROKERS: HOW CON MEN, CALL CENTERS, AND ROGUE DOCTORS FUEL AMERICA'S LAWSUIT FACTORY (2026).

of claims, with mass arbitration representing only one prominent instantiation of this broader category.[80]

In addition, some scholars and regulators treat funding for claims advertising and inventory collection as part of the mass-dispute landscape.[81] This Article treats claims generation and litigation funding as analytically distinct: the former concerns the production and aggregation of claims, while the latter concerns the financing of their pursuit and resolution. As traced in other work, I do not conflate funding for claims-advertisement and aggregation and funding for mass-dispute litigation and resolution.[82] Properly situated, however, the former practices occupy a distinct position along the spectrum—one that is oriented toward the generation and accumulation of claims at scale, rather than their coordinated adjudication or resolution. These functions may overlap at a high level of generality, as claim generation can serve coordinated resolution, but they remain analytically distinct.

And at this far end of the spectrum, in this market for claims-generation in mass disputes (which long predates third-party litigation finance), there are important differences between (a) claims-generation and inventory building by, or for, firms subject to some modicum of court scrutiny because of those firms' inclusion within (or relationship to) leadership counsel in MDL's, class actions, mass bankruptcies, or otherwise; and (b) claims-generation and inventory building by or for firms with little or no meaningful connection to formalized MDL and/or class-action

[80] Glover, *supra* note 22, at 1381. ("Mass arbitration is at once individualized (it centers around one-on-one arbitration) and collective (it relies on venture capital, technology, firm expertise, and mass claiming to enable and resolve disputes).").
[81] *See, e.g.*, Parikh, *supra* note 43; U.S. Chamber Inst. for Legal Reform, *Submission to the Australian Law Reform Commission, Inquiry Into Class Action Proceedings and Third-Party Litigation Funders,* https://www.alrc.gov.au/wp-content/uploads/2019/08/44_us_chamber_institute_for_legal_reform.pdf (last accessed Jan. 10, 2026).
[82] *See* Glover, *supra* note 36.

leadership structures; with little or no meaningful ability or intention to litigate claims whatsoever; and therefore, little to no meaningful connection to possible judicial supervision. In this Article and elsewhere, I refer to the latter as a "shadow market" for claims-generation, which differs in meaningful respects from the former, slightly more visible market for claims-generation that exists within or at least adjacent to adjudicative mass-claim structures.

B. Current Legal and Regulatory Landscape for Litigation Finance in the United States.

The introduction of litigation finance to the civil justice landscape opens new possibilities and pathways for civil redress—not by way of public provision, but by way of private profit. This is striking. Unsurprising, perhaps, this development has also generated a striking amount of controversy and debate among scholars, judges, legislators, and interest groups; indeed, litigation finance has quickly come to dominate academic and judicial conferences in civil procedure and complex litigation.[83] Just this summer, for instance, Senator Thom Tillis—North Carolina among the strongest bastions of champerty prohibition in the United States—introduced and pushed through the Senate Judiciary Committee a set of provisions offered for inclusion in "The One Big Beautiful Bill Act" that would have achieved near-total annihilation of the legal-finance industry by way of the United States tax code.[84] While heavy-handed measures like that proposed by Senator Tillis aim for outright prohibition, other recent federal proposals target transparency by imposing broad disclosure requirements.[85] At the time of this writing, there are at least fifty pieces of state legislation on litigation finance under consideration.[86]

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[83] Major annual conferences addressing litigation finance and third-party funding include LF Dealmakers Forum, LITFINCON, and the International Legal Finance Association (ILFA) Conference. *See* Dealmakers Forums, *Litigation Finance Events*, DEALMAKERS FORUMS (last visited Jul. 17, 2025), https://dealmakersforums.com/events/?events=past_events&sector=litigation-finance; LitFinCon, *LitFinCon Homepage*, LITFINCON (last visited Jul. 17, 2025), https://litfincon.com; Int'l Legal Fin. Ass'n, *ILFA Conference*, INT'L LEGAL FIN. ASS'N (last visited Jul. 17, 2025), https://conference.ilfa.com. Recent academic conferences on litigation finance have been hosted by many schools, including NYU, Yale, Harvard, and Tel Aviv University. *See* Harvard L. Sch., 2019 Litigation Finance Symposium, https://orgs.law.harvard.edu/techsoc/2019-litigation-finance-symposium (last visited July 17, 2025); Yale Law Sch., Commercial Litigation Financing: Challenges and Opportunities [2024 Panel], https://www.ccl.yale.edu/panelarchives-2/commercial-litigation-financing-challenges-and-opportunities-2023-2024; Univ. of Chi. Law Sch., 2023 Chicago Conference on Litigation Finance, https://www.law.uchicago.edu/2023-chicago-conference-litigation-finance; NYU Law Sch. Ctr. on Civ. Just., Emerging Trends in Third-Party Funding [2023 Conference], https://www.law.nyu.edu/centers/civiljustice/Emerging-

For an industry that has garnered so much attention, you might think there would be some substantial body of law on the subject. Instead, there is virtually no law well-tailored to this

Trends-in-Third-Party-Funding; NYU Law Sch. Ctr. on Civ. Just., Recent Legislative Responses to Litigation Finance [2024 Conference], https://www.law.nyu.edu/centers/civiljustice/legal-funding-legislation; Tel Aviv Univ., TIL Conference: Third Party Litigation Funding: The Past, The Present & The Future [2023 Conference], https://en-law.tau.ac.il/TIL/The_Past_The_resent%26The_Future_Conference/?tab=0; Eur. Comm'n High-Level Forum, *supra* note 34; Civil Justice Council, Review of Litigation Funding, *supra* note 43; R (PACCAR Inc) v. Competition Appeal Trib. [2023] UKSC 28 (Eng.); Litigation Funding Agreements (Enforceability) Bill 2024, HL Bill [72], 58th Parl., 4th Sess. (2024) (Eng.); Austl. L. Reform Comm'n, Integrity, Fairness and Efficiency—An Inquiry into Class Action Proceedings and Third-Party Litigation Funders, Rep. No. 134 (2018) *available at* https://nla.gov.au/nla.obj-2993377664/view; Parliament Austl., Joint Comm. on Corps. & Fin. Servs., Litigation Funding and the Regulation of the Class Action Industry (2020); U.S. Chamber Inst. for Legal Reform, *supra* note 81.

[84] *See, e.g.*, Ryan Boysen, *Litigation Funders Fight 'Kill Shot' In 'Big Beautiful Bill'*, LAW360 (June 23, 2025, 4:58 PM EDT), https://www.law360.com/articles/2356515.

[85] *See, e.g.*, Litigation Transparency Act of 2025, H.R. 1109, 119th Cong. (2025) (imposing a blanket disclosure requirement for all litigation funding); Protecting Our Courts from Foreign Manipulation Act of 2025, H.R. 2675, 119th Cong. (2025) (requiring disclosure for funding provided by foreign persons); Protecting TPLF From Abuse Act, H.R. 7015, 119th Cong. (2026) (imposing a blanket disclosure requirement); Litigation Funding Transparency Act of 2026, S. 3826, 119th Cong. (2026) (requiring disclosure regarding funding in MDLs and class actions or if funding is provided by a foreign entity). As of April 2026, none of these bills have been enacted: H.R. 1109, H.R. 7015, and S. 3826 have not made it out of committee, and H.R. 2675 has not received a floor vote.

[86] *See* [Tracking Spreadsheet (on file with author)]; *see also*, Jon Campisi, *Oklahoma Joins States Legislating Transparency in Litigation Finance*, AM. LAW. (May 27, 2025), https://www.law.com/americanlawyer/2025/05/27/oklahoma-joins-states-legislating-transparency-in-litigation-finance; Clark Mindock, *At Least 35 litigation funding bills being considered in states this year*, INS. INSIDER U.S. (Apr. 4, 2025), https://www.insuranceinsiderus.com/article/2emnekvpd5pj2mvwti0hs/industry-wide/at-least-35-litigation-funding-billsh.r.-being-considered-in-states-this-year. After this Article was written, but before final publication of it, North Carolina and Tennessee passed laws that ban litigation funding. *See* 2026 N.C. Sess. Laws 14 (banning "litigation investment", defined as "[t]he provision of money, … related to a pending or potential civil proceeding in exchange for a right to receive repayment or other consideration that is contingent in any respect on the outcome of the pending or potential civil proceeding."); TENN. CODE. ANN. §47-16-102 (2026) (requiring "commercial litigation financiers" to register in the state by putting up a $50,000 bond and prohibiting any involvement in the decisions related to the funded litigation, effectively banning litigation funding.)

development. In the United States, judges have been left to grapple with this significant new civil-justice actor by way of ancient common-law doctrines of champerty, barratry, and maintenance, or by way of various civil justice rules and policies developed for other, often very different, aspects of civil justice—principally, policies underlying the Rules of Professional Conduct for attorneys, usury laws, and the general civil-justice policy favoring settlement.[87] The United States is an outlier here. Canada and Australia, both of which come out of the same British inherited common-law tradition as the United States, pioneered the movement away from ancient common law doctrines and prohibitions in litigation finance. Even the British, whence came common-law prohibitions on champerty, maintenance, and barratry,[88] have abandoned them. Despite their long, sometimes ancient, historical roots—or perhaps, because of them—readers will likely have little familiarity with many of these rules, doctrines, and policies. This Part therefore introduces them briefly.

First, and perhaps oddly for an industry that has only begun to boom, ancient doctrines nominally purport to prohibit the support or prosecution of lawsuits on another's behalf. These prohibitions date as far back as Greek and Roman times; they made their first common-law

[87] *See infra* Part III.A.2.

[88] *See* Civil Justice Council, Review of Litigation Funding, *supra* note 43, at 25 (noting the "abolition of the criminal offences and torts of maintenance and champerty"); Criminal Law Act 1967 (Eng.). That said, Europe and the UK are in very early stages of industry regulation: In November of 2025, the High-Level Forum on Justice for Growth decided to wait on regulation of legal finance except the little guidance set forth in the Representative Action Directive (EU) 2020/1828. *See* Eur. Comm'n High-Level Forum, *supra* note 34. In December of 2025, the Civil Justice Council in the UK released a statement that it would overturn *R (PACCAR Inc) v. Competition Appeal Tribunal*, which held that litigation funding agreements where the funder receives a percentage of the damages recovered are unenforceable. *See* Civil Justice Council, Review of Litigation Funding, *supra* note 43, at 12. Beyond this, regulation will be left to judges, with the guidance to proceed with a "light-touch" approach. *Id.* at 7.

appearance in medieval England as doctrines of maintenance, champerty, and barratry.[89] In the English common law, these doctrines were developed to deter vexatious disputes carried out through feudal-lord proxies, often at the expense of claimants, and they existed alongside other formalistic procedural norms now considered vestigial, such as writ-pleading. At bottom, these doctrines prohibit the provision of assistance in civil suits in exchange for a financial interest in the outcome.[90] These medieval doctrines have largely been abandoned by common-law countries.[91]

The United States, however, clings to its inheritance. While there is no doctrine of champerty at the federal level (and generally, federal claims are freely assignable[92]), many states retain these prohibitions—despite having relaxed them for arrangements like the contingency-fee and insurance on the defense side.[93] And these ancient doctrines have been stretched in the United

[89] Maintenance is defined by Blackstone as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it." Champerty is defined as a "species of maintenance, . . . being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them if they prevail at law." 4 Bl. Comm. 134.

[90] Sebok & Wendel, *supra* note 56, at 1839 (citing Osprey, Inc. v. Cabana, L.P., 532 S.E.2d 269 (S.C. 2000)).

[91] *See* Civil Justice Council, Review of Litigation Funding, *supra* note 43.

[92] Sprint Commc'ns Co., L.P. v. APCC Services, Inc., 554 U.S. 269 (2008) (treating assignability of federal Communications Act claims as federal question, not subject to state law); Mojave Desert Holdings, LLC v. Crocs, Inc., 995 F.3d 969 (Fed. Cir. 2021) (*Sprint* holds that federal causes of action are freely assignable unless there is contrary indication in federal statute); John Wiley & Sons, Inc. v. DRK Photo, 882 F.3d 394 (2d Cir. 2018) (*Sprint* generally permits assignment of federal claims, but Copyright Act § 501(b) and the "special features" of the copyright laws limit suit for infringement to the holder of the "exclusive rights" under the Act); Spiller v. Atchison, 253 U.S. 117, 135 (1920) (Federal claim for damages for excessive rates "must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary").

[93] If the doctrine of champerty sounds familiar, it should: It has been invoked in debates about and in opposition to the contingency fee arrangement on the plaintiffs' side and liability insurer involvement in litigation and settlement, principally on the defense side. Silver, *supra* note 67, at 632. Support of lawsuits—including by way of attorneys representing clients in the medieval period up to contingency fee arrangements of more modern times—are champertous. Richard W.

States to include litigation investment, including in situations where the claimant retains some ownership in the claims.[94]

There is substantial non-uniformity among state champerty laws, as scholarly efforts attempting to capture the rapidly evolving landscape lament.[95] However, here, I divide the panoply of divergent laws into three distinct categories, drawn along the lines of the critical relationships in litigation finance—an approach that not only adds clarity to the scholarship but also previews some of this Article's theoretical contribution. First are states that prohibit champerty, and provide for the enforcement of those prohibitions by way of a defense for defendants to assert against a plaintiff.[96] Second are states that retain prohibitions on champerty, but only by way of a potential action by the funded entity against the funder.[97] Third are states that have explicitly abolished champerty,[98] wherein such doctrines provide no direct grounds for a dispute against the funder either by the funded entity, or by the defendant.

Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI.-KENT L. REV. 625 (1995). Scholars, chief among them Tom Baker, have argued that litigation funding is similar (and similar enough) to defense-side insurance arrangements. *See, e.g.*, Tom Baker, *What Litigation Funders Can Learn About Settlement Rights From the Law of Liability Insurance*, 25 THEORETICAL INQUIRIES L. 17 (2024).

[94] *See generally* Avraham, Sebok & Shepherd, *The Whac-A-Mole Game: An Empirical Analysis of the Regulation of Litigant Third Party Financing*, 25 THEORETICAL INQ. L. 117 (2025) (providing a fifty-state empirical survey of prohibitions on champerty).

[95] *See id.*

[96] *See, e.g.*, Sebok, *supra* note 33, at 63 (2011) (discussing champerty as a defense analogous to the doctrine of "unclean hands").

[97] *See, e.g.*, Oil, Inc. v. Martin, 44 N.E.2d 596, 600 (Ill. 1942) ("[T]he defense of champerty can only be interposed in an action between the parties to the champertous contract, and does not furnish any reason for refusing relief in the proceeding to which the champertous agreement relates."); *see also infra* Part III.A.2.

[98] *ee, e.g.*, Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 384 (2000) (abolishing champerty as a defense in South Carolina); Strahan v. Haynes, 33 Ariz. 128, 134 (1928) (stating that the doctrine of champerty and maintenance does not apply in Arizona); Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 241 (Minn. 2020) (abolishing Minnesota's common law prohibition against champerty).

Building on this non-uniformity is a related and increasingly contested question: the extent to which non-lawyers may participate in the provision and financing of legal services. A small but growing number of jurisdictions have begun to relax traditional prohibitions on non-lawyer ownership grounded in the ABA's Attorney Rule of Professional Conduct 5.4, largely in response to access-to-justice concerns and the need to facilitate capital formation in legal services markets.[99] As of the publication of this article, four jurisdictions—Arizona, Utah, District of Columbia, and Puerto Rico—have adopted regulatory changes to allow non-attorneys to own and control law firms through "alternative business structures" (ABS).[100]

Arizona,[101] D.C.,[102] and Puerto Rico[103] represent variants of a more permissive approach. Both jurisdictions allow some degree of non-lawyer ownership of law firms, with Arizona and D.C. adopting a comparatively open model that permits licensed entities with non-lawyer

[99] William Tyler Lowman, *Navigating the Changing Tides in the Legal Service Landscape: An Assessment of Alternative Business Structures*, 8 BUS. & FIN. L. REV. 1, 3 (2025).

[100] *See* ARIZ. R. SUP. CT. 31.1(c) (authorizing "Alternative Business Structures" that allow entities "that includes nonlawyers who have an economic interest or decision-making authority" to "employ, associate with, or engage a lawyer or lawyers to provide legal services"); Utah Sup. Ct. Standing Order No. 15 (Aug. 14, 2020) (establishing a "regulatory sandbox" allowing "the practice of law by nontraditional legal service providers").

[101] *Alternative Business Structures (ABS) Frequently Asked Questions*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs. Under its amended Rules of Professional Conduct, a non-lawyer may own a minority share of a law firm, strictly capped at 49%.

[102] D.C. RULES OF PRO. CONDUCT r. 5.4(b) ("A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients . . . .").

[103] Unlike Arizona or Utah, Puerto Rico mandates that the non-lawyer's contribution must be purely monetary; non-lawyer owners are explicitly barred from providing any services to the firm, such as marketing, and cannot engage in the unauthorized practice of law. The firm must be operated by a Puerto Rico-licensed attorney who exercises all voting rights and related matters on behalf of the non-lawyer. To monitor the impact of these changes, the Puerto Rico Supreme Court mandated a review period, requiring an evaluation of these rules' effectiveness within three years of their enactment.

ownership and control, and Puerto Rico allowing more limited participation through minority equity stakes subject to strict constraints on non-lawyer involvement.[104] Utah, by contrast, has adopted a more explicitly regulatory approach. Through its time-limited "regulatory sandbox," Utah permits non-lawyer participation and alternative business structures under conditions of ongoing oversight, data collection, and evaluation. It has complemented this experiment with legislation that differentiates between consumer and commercial litigation finance, imposing stronger protections in the former while allowing greater flexibility in the latter. Taken together, Utah's model reflects an effort not merely to permit innovation, but to study and structure it.[105] These state-level experiments with Alternative Business Structures (ABS), however, have begun to generate friction in federal courts that strictly adhere to traditional prohibitions on non-lawyer ownership.[106]

In addition, judges, lawmakers, and scholars have also tried to grapple with litigation finance with various civil justice rules and policies designed for other, sometimes very different, aspects of civil justice. Among them, the civil-justice policy favoring settlement,[107] which is

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[104] P.R. RULES OF PRO. CONDUCT r. 5.4(b).

[105] This Sandbox only runs until August 2027, at which point the Court will assess the authorized entities to determine whether to terminate, extend, or make the program permanent. To oversee these entities, the Utah Supreme Court created the Office of Legal Services Innovation, which operates as an independent regulator. The Innovation Office uses a consumer-oriented, "risk-based" regulatory framework to collect data, monitor for consumer harm, and manage compliance.

[106] *See Standing Order Regarding Pro Hac Vice Motions* (D. Del. Apr. 7, 2026) (Connolly, C.J.) (requiring *pro hac vice* applicants to certify that no non-lawyer owns an interest in their firm or shares in legal fees).

[107] *See, e.g.*, Samuel Issacharoff & Robert Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1195-99 (2009); Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1620 (2008) (arguing that the policy in favor of settlement was so strong that it distorted the intended application of rule 68); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 3 (1992) ("It is a truism that the law favors a policy of settlement and compromise").

largely understood as protecting "the integrity of a negotiated settlement."[108] Second, the Rules of Professional Conduct and the Law Governing Lawyers, under which attorneys are obligated to assert their client's position regarding settlement, and to abide by a client's decision whether to accept or reject a settlement proposal.[109] Together, these rules and policies have been described, most prominently by Professor Maya Steinitz, as establishing a "universally recognized public policy *in favor of* client control over settlement and *against* any interference with that control" and thus have largely prohibitive force of many sorts of litigation finance arrangements.[110] Repurposed for litigation finance, invocation of these rules and policies proceeds on the premise that they require settlement authority in civil justice to be maintained exclusively by the claimant, and can operate similarly, as a functional matter, to ancient prohibitions on litigation funding arrangements.[111]

Among scholars, there is substantial engagement—and disagreement—about the scope and prohibitive force of these various doctrines, rules, and policies to litigation finance. Much of that work focuses on ancient common-law doctrines and their modern extensions,[112] producing a wide

[108] *In re* Pork Antitrust Litig., No. 18-cv-1776 (JRT/JFD) (D. Minn. Feb. 9, 2024) (Order Denying Motion for Substitution), at 20.
[109] MODEL RULES OF PRO. CONDUCT r. 1.2(a) (2020).
[110] Expert Report of Maya Steinitz, *supra* note 64. Litigation funders would be much less likely to provide financing to claimants if they can settle their case for less than it is worth, potentially to win future business with defendants.
[111] *See infra* Part III.A.2.
[112] *See, e.g.*, Sebok, *supra* note 33; Steinitz, *supra* note 31.

range of historical,[113] normative,[114] and empirical[115] accounts. Judges, lawmakers, and scholars have come to divergent conclusions on these questions—unsurprising given the binary of permissiveness and prohibition directed by the application of ancient doctrines and atomized civil-justice policies to this new civil justice phenomenon.[116] These approaches proceed along a binary that obscures the relationships and market distinctions within which litigation finance operates. The most prominent regulatory efforts and calls for reform proceed along this same axis, often aiming to prevent or limit a "civil justice business" rather than to address how claimants might access capital and manage risk consistent with civil justice commitments.[117] They therefore miss the conditions under which capital can support, rather than distort, civil justice, as well as the pathways for curbing excesses.

I do not treat these debates as first-order. They reflect a misframed inquiry—one that asks whether litigation finance should be allowed at all, rather than about its proper role within the civil justice system and what demands and constraints that system places on it. The more productive

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[113] Sebok, *supra* note 33; Steinitz, *supra* note 31.

[114] *See, e.g.*, Sebok & Wendel, *supra* note 56, at 1837–40 (elucidating the anti-commodification norms underlying doctrines of champerty, maintenance, and barratry). Scholars disagree about the prohibitive force of the Rules of Professional Ethics for legal finance. Charles Silver and David Hyman argue that third-party legal funding can potentially advance the interests of a client as a general matter, without creating undue problems under the Rules of Professional Ethics. Charles Silver & David A. Hyman, *Third Party Litigation Funding: Panacea or More Problems?*, 25 THEORETICAL INQ. L. 41 (2025). Brad Wendel has argued that shared control between a funder and client over settlement can operate harmoniously with the Rules of Professional Ethics, as any potential conflict of interest can be stabilized by a separate obligation under those Rules, namely, the attorney's duty of independent judgment. W. Bradley Wendel, *Controlling the Delegation of Control*, 25 THEORETICAL INQ. L. 63 (2024).

[115] *See, e.g.*, Avraham, Sebok & Shepherd, *supra* note 94 (providing a fifty-state empirical survey of prohibitions on champerty).

[116] *See infra* Part III.

[117] Such approaches can be situated alongside other regulatory efforts styled along the lines of "tort reform," "class action reform," and similar—efforts whose aim and function is to eliminate civil claims by dismantling the architecture for bringing them. *See, e.g.*, Glover, *supra* note 35; BURBANK & FARHANG, *supra* note 24; Glover, *supra* note 22.

starting point is the business of civil justice: what the system is doing, what functions it must perform, and the conditions under which it can render rights meaningful. This Part supplies the descriptive and conceptual foundation for that inquiry.[118]

Nonetheless, because the legal and scholarly landscape remains organized around these inherited constraints, judges have been left to address questions about funding, control, and claim generation through binary frameworks that constrain regulatory choices and hinder engagement with core civil justice concerns. Judges increasingly faced with litigation funding in their cases are left to grapple with this new civil justice actor by way of ancient constructs and ill-fitting proxies, which fail to account for the complexities of the modern civil justice landscape, and—as the next section elucidates—often do more harm than good. Accepting that the litigation finance industry is here, and that the exigencies of civil litigation and the related access-to-justice crisis in civil justice means that demands for litigation capital and risk management will remain and likely grow, we need to develop a framework for grappling with this new development and to confront core civil justice concerns it raises. The most notable among them are concerns about conflicts, claim and litigation control, and the appropriate conception and scope of judicial supervision over this increasingly commodified system. Parts II and III take up these concerns by locating them in the relationships and settings in which they arise and attending to their implications.

To start, Part II constructs a framework for litigation finance oriented around and attuned to both the type and the nature of a series of critical relationships in funded litigation—among claimants, funders, attorneys, defendants, and courts—and situates those relationships within and further refines their precise contours by reference to the particularized litigation settings in which those relationships operate. Part III extends that framework across these institutional settings and

[118] *See infra* Part II, III, and IV.

works through its implications for the central debates in the field. This framework, which the Article terms a relational-institutional framework, shows where existing doctrines properly apply, where they do not, and why current approaches misallocate legal rules across those relationships, creating category errors and frustrating civil justice commitments. Part III applies that framework to the most persistent and high-profile debates in the field—about disclosure, control, and claim volume—recasting them as questions about conflicts, decision-making authority, and claim production within specific litigation contexts, and, in doing so, identifies the conditions under which these dynamics support, rather than undermine, civil justice. The broader point, however, is methodological: no civil justice innovation, including litigation finance, can be evaluated in the abstract. It must be evaluated against the demands of the civil justice system in which it operates, and assessed against a theory of civil justice itself. Part IV develops that account—civil justice as realized law—and provides the basis for judging the "civil justice business."

II. CONCEPTUALIZING A RELATIONAL-INSTITUTIONAL FRAMEWORK FOR LITIGATION FINANCE

Litigation finance sees the civil justice landscape as a business. Whatever business-like features of civil justice one could identify before,[119] when the form of funding passes from debt to equity, following the trajectory of the development of business firms over the centuries, it seals

[119] *See, e.g.*, Silver, *supra* note 67, at 619, ("[liability insurers] became active litigation managers rather than passive indemnitors"); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 850 (2011) (analyzing the role of high-volume personal injury law firms in processing claims efficiently but often at the expense of individual justice); *see also* JUDITH RESNIK AND HELEN HERSHKOFF, THE CONTRACTUALIZATION OF CIVIL LITIGATION IN THE UNITED STATES (Cambridge 2023) (noting that parties in civil litigation frequently contract around legal uncertainty, paying to avoid risk, which may disincentivize the adjudication of potentially meritorious legal claims with large potential for public good); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1717 (2012); Judith Resnik, *The Public in the Private,* 124 YALE L.J. 2804 (2015); Glover, *Disappearing Claims*, *supra* note 35; Abraham & Sharkey, *supra* note 44.

the deal. And when civil justice becomes a "business"—when claims are commodified by way of capital infusions from self-interested market actors—it ushers in a host of problems. Indeed, one need not look far outside of civil justice to find examples of what can go wrong when largely unregulated private investors enter the picture.[120]

The crux of concerns expressed about a civil justice "business" can be distilled into three: First, that funders will be enriched at the expense of claimants ("profits over plaintiffs"); second, that funders will control litigation; and third, that the civil justice system should not be available for making money.[121] These concerns manifest in the legal landscape more granularly, by way of a series of recurring debates—for instance, whether claimants and funders must disclose their litigation finance arrangements to the defendant, to the court, or both; whether claimant access to

[120] From the housing market to the medical industry, to corporate structure and ethos, the (often largely unregulated) arrival of self-motivated financial actors does not always further what might be thought of as foundational goals and commitments in those arenas; in many instances, it is said to exchange those goals for profit. *See, e.g.*, Atul Gupta et al., *Owner Incentives and Performance in Healthcare: Private Equity Investment in Nursing Homes*, 37 REV. FIN. STUD. 1029 (2024). Antitrust litigation against Johnson & Johnson revealed how financial pressures led the company to violate antitrust laws by withholding clinical support to hospitals using more affordable third-party reprocessed catheters, prioritizing market control over patient access despite the company's stated ethical commitments. *See* Elise Reuter, *Judge Rules J&J Unit Must Pay $442 M in Antitrust Case*, MEDTECH DIVE (June 9, 2025), https://www.medtechdive.com/news/jnj-pay-442m-antitrust-lawsuit/750155. Wall Street's creation of mortgage-backed securities transformed homeownership from a cornerstone of middle-class stability into a vehicle for financial speculation, incentivizing quantity over quality in lending, leading to predatory practices that subordinated stable housing to high-yield investment products. *See* Tomasz Piskorski et al., *Asset Quality Misrepresentation by Financial Intermediaries: Evidence from the RMBS Market*, 70 J. FIN. 2635 (2015). Similarly, Martin Shkreli's 5,000% price increase of life-saving drug Daraprim from $13.50 to $750 per pill, combined with schemes to block generic competition, represented a complete inversion of the pharmaceutical industry's mission to provide accessible treatments. *See* Andrew Pollack, *Drug Goes From $13.50 a Tablet to $750, Overnight*, N.Y. TIMES (Sept. 20, 2015), https://www.nytimes.com/2015/09/21/business/a-huge-overnight-increase-in-a-drugs-price-raises-protests.html; Dolan Bortner, *Private Inequity: Business-Law Solutions for Better PE Healthcare,* 112 IOWA L. REV. (forthcoming 2027) https://ssrn.com/abstract=5254721.

[121] *See, e.g.*, Glover, *supra* note 36, at 90; Steinitz, *supra* note 31, at 1299.

litigation finance ought to be prohibited because it conflicts with attorneys' ethical duties to clients; and whether and to what extent a funder can take charge of litigation and settlement decisions.

These debates raise characteristic civil justice questions—about potential conflicts introduced into litigation, control of litigation and claimant autonomy over their claims, and claim resolution in line with claim merit. Grappling with litigation finance within the constraints of inherited doctrinal categories or repurposed civil justice policies structured around permissibility and prohibition hinders engagement with these underlying concerns. Often, these frameworks do more harm than good. This Part advances the Article's central theoretical contribution by conceptualizing and constructing a framework for engaging litigation finance at the level of these core civil justice problematics. It does so by locating those problems in the relationships and institutional settings in which they arise.

Against a contested regulatory landscape shaped by competing institutional and political interests, the work here unfolds in three steps. Section II.A sets the stage through two illustrative disputes in litigation finance, which surface the core civil justice questions at issue. Section II.B then conceptualizes and develops the core framework, organized around the critical relationships litigation finance introduces—among claimants, funders, attorneys, defendants, and courts—and the litigation contexts in which those relationships operate. This framework identifies the proper domains of relevant law, distinguishes among materially different market segments, and situates litigation finance within civil justice, procedure, and private law. It further clarifies how those relationships take on different significance across institutional settings of dispute resolution. Finally, it extends the framework across the principal market segments for litigation finance—commercial, consumer, and mass-dispute contexts—clarifying the nature of the relationships at issue and the bodies of law and theory that properly govern them. These segments are not

interchangeable; they give rise to different relational configurations and, accordingly, different civil justice concerns. Section II.C concludes by synthesizing the key implications for law and theory.

A. Setting the Stage: New Civil Justice Actor; Old Civil Justice Problems

Let us begin by briefly concretizing matters. Most examples of litigation funding arrangements are not public (in part because, as scholars have traced, at least in the commercial realm, most proceed without dispute).[122] A few recent disputes have surfaced and help illustrate the key civil justice pressure points. I have already introduced one (very) public example of funded litigation at the outset, that of Alan Bates and the Postmasters in the United Kingdom. Briefly, I add two examples from the United States:

Nimitz Technologies LLC v. CNET Media, et al.

Recent, high-profile, and (rare) public examples of litigation finance arrangements confronted by Judge Colm Connolly, Chief Judge for the District of Delaware, help concretize matters. By way of necessary context, the District of Delaware has historically been a popular district for patent litigation. In 2022, in fact, it was the second-most popular district for patent litigation, and such cases comprised 46 percent of its docket.[123] Patent litigation is a useful entry point for litigation finance, because many claimant firms involved had no real assets other than their patent claims—a ripe opportunity for funders to offer an equity stake in the claimant firms overall.

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[122] *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 463 (2012); Avraham & Sebok, *supra* note 55, at 1137 ("[T]here is very little publicly available information about the terms of commercial [third-party financing], given that commercial TPF firms do not make their rates available to the public, do not report the details of their business practices to their shareholders (if they are publicly traded), and fight to protect the details of their contracts and contract negotiations from adverse parties in discovery.").

[123] *See, e.g.*, Morris & Nichols, D. Del. Patent Litigation Review (2022), https://www.morrisnichols.com/media/publication/15192_MorrisNichols_2022-DDel-Patent-Litigation-Review.pdf (last accessed June 13, 2025).

A recent set of cases, styled as *Nimitz Technologies LLC v. CNET Media, et al*.,[124] illustrates. In *Nimitz*, Judge Connolly sanctioned a funder, Mavexar, and its associated lawyers, and referred them for disciplinary action by bar associations as well as for investigation by the Department of Justice.[125] The court found that the nominal funder was actually the true owner of a set of patents, litigating through shell entities operated by unsophisticated individuals who were unaware of the nature of their patents, or the risks contained in the contracts with Mavexar for their patent claims.[126] The lawyers for the nominal patent holders, meanwhile, were beholden to Mavexar, and undertook consequential litigation decisions without ever communicating with their "clients."[127] Deposition testimony from one of these ostensible clients illustrates the extent of the sham. The following is an exchange with a Mr. Bui, the owner of one of the shell entities litigating a set of patent claims:

Q .... What did you have to give up in value for you to be able to assume ownership of these patents?

A. I didn't give nothing.

Q. You didn't give them anything. So they were a gift?

A. No. It's-

Q. So what's the-then help me. I'm just trying to understand this concept. If it's not a gift, you're not paying anything, why is someone giving you these patents?

A. You would have to ask Mavexar that.

Q. Did you take on any liability as a result of assuming ownership of the patents?

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[124] Nimitz Technologies LLC v. CNET Media, et al. Civ. No. 21-1247; 1362; 1855-CFC; Civ. No. 22-413; 244; 541; 418; 1017-CFC (D. Del. Nov. 27, 2023).
[125] *Id.*
[126] *Id.* at 101.
[127] *Id.* at 26, 49, 50, 69, 86–88, 92, 93 (lack of communication); *id.* at 102 (beholden to funder).

A. What do you mean by "liability"?

Q. Well, so you don't know?

A. What's that?

Q. You don't know what "liability" means?

A. I mean, I have a general idea, but ...

* * *

Q. Who pays for the lawyer fees to go out and sue people using the patents owned by [shell entity]?

A. Mavexar.

Q. And what is-do they loan you the money for that?

A. Yes. It's a recourse.

Q. What do you mean by "recourse"?

A. Like a loan.

Q. Well, how did you come up with the terms "recourse"? I'm just-what does that mean?

A. All I know is it's like a loan.

There is real cause for concern about profits over plaintiffs when it comes to funding arrangements involving unsophisticated, non-commercial entities. Indeed, under the terms of the funding agreement, Mavexar took 90% (and in one case 95%) of the stakes in the proceeds of the underlying patent litigation.[128] Mavexar also explicitly assumed none of the risk, providing that

[128] *Nimitz, supra* note 124, at 43.

individuals like Mr. Bui were on the hook for costs and expenses.[129] Judge Connolly issued a broad standing order requiring disclosure of third-party litigation funding in all cases before him.[130]

Burford/Sysco Dispute in Animal Protein Products Antitrust Litigation

An unusually contentious, and unusually public series of disputes between a funder, Burford Capital, LLC, and a funded entity, Sysco Foods, Inc., occurred in the context of antitrust litigation against the country's largest animal-protein-products suppliers. Sysco Corporation is one of the world's largest wholesale food distributors,[131] and it purchases food, like protein products, from a variety of food suppliers.[132] Sysco was thus one of the largest plaintiffs in the ongoing, sprawling multi-district litigation (MDL)[133] against the country's largest protein-product suppliers, including

[129] *Id.* at 88–89 ("That liability has at least three forms. First, under 35 U.S.C. § 285, Nimitz can be required to pay the attorney fees of any defendant that prevails in an infringement case brought in Nimitz's name. Second, Nimitz can be required to pay any sanctions imposed by a court pursuant to Federal Rule of Civil Procedure or the court's inherent powers. Third, Nimitz is required under the Mavexar consulting services agreement to reimburse Mavexar for the "Costs and Expenses" (which are defined in the agreement to include attorney fees as well as costs and expenses) advanced by Mavexar to litigate the #328 patent[.]").

[130] *Standing Order Regarding Third-Party Litigation Funding*, *supra* note 64. *See also Nimitz v. CNET Technologies, et al*., Civ. No. 21-1247-CFC (D. Del. 2023) (expressing concern about hidden shell entities in patent litigation in Delaware). There has been a decline in patent cases in Delaware recently. It is possible that Judge Connolly's standing order disincentivized filings in Delaware; an additional possibility is that the Texas rocket dockets, which do not require disclosure of legal finance, have taken over much of the load. Note that other judges in Delaware have taken a different approach. *See* Design with Friends, Inc. v. Target Corp., No. 1:21-cv-01376-SB, 2024 U.S. Dist. LEXIS 175505, at *9 (D. Del. Sep. 27, 2024) (denying discovery requests regarding litigation funding because the information was "either protected or disproportionately burdensome").

[131] *Sysco Homepage*, SYSCO, https://www.sysco.com (last visited February 23, 2024).

[132] Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 (N.D. Ill. 2023) (Petition to Vacate Arbitration Award).

[133] Some of the cases have been consolidated in Multi-District Litigation (MDL) proceedings in the Northern District of Illinois. Others have been consolidated in MDL proceedings in the District of Minnesota.

Tyson Foods, alleging violations of the federal antitrust laws.[134] To bear significant litigation costs, spread risk, and monetize part of its claims up-front for needed liquidity during the COVID-19 pandemic, Sysco entered into a series of agreements with Burford,[135] which provided $140 million in capital to Sysco,[136] collateralized by a portion of eventual proceeds from Sysco's antitrust claims.[137]

Sysco breached the anti-assignment provision of the initial funding agreement when it assigned some thirty percent of its antitrust claims to customers.[138] In subsequent agreements renegotiated after Sysco's first breach,[139] Burford hedged further against downstream market risk by taking a higher share, approaching 100%, of any remaining recoveries by Sysco.[140] This increase in Burford's stake, however, heightened its exposure to the risk that Sysco would cut deals with upstream business partners by way of low-ball settlements; thus, the parties included a shared-

[134] Sysco Petition to Vacate Arbitral Award, *supra* note 128 at 7–8. Specifically, Sysco alleges that protein suppliers like Tyson Foods conspired to raise the price of protein it charged Sysco, thereby making it liable to Sysco (the direct purchaser). *Id.* Sysco passes down whatever price hikes it experiences to its own customers (the indirect purchasers), in the form of distributor fees. *Cf.* Illinois Brick Co. v. Illinois, 431 U.S. 720, 726–29 (1977) (describing the "pass-on" theory).
[135] *About Us*, BURFORD CAPITAL, burfordcapital.com/about-us (last visited Aug. 9, 2024).
[136] Per the agreements, a portion of that $140 million was provided to Sysco to capitalize the litigation against the animal protein defendants; some of that sum was provided because Sysco needed liquidity during the COVID-19 pandemic, at which time Sysco intended to wind down its operations (a decision it has since abandoned). *See* Petition to Confirm Arbitration Award (Glaz LLC et al v. Sysco Corporation), ¶ 8 Index No. 651289/2023 (N.Y. Sup. Ct. 2023) [hereinafter Glaz Petition to Confirm].
[137] Glaz Petition to Confirm, *supra* note 136.
[138] Sysco does not dispute this breach, which the arbitrator credited. Glaz LLC v. Sysco Corp., L.C.I.A. No. 225609 (Mar. 10, 2023) (Shore, Arb.) (Order), No. 651289/2023 (Sup. Ct. N.Y. Cnty. Mar. 10, 2023), NYSCEF No. 5) and Memorandum of Law in Support of Motion to Confirm Arbitration Award at p. 5 (asserting that Sysco "assigned away [to its customers] nearly 30% of it claims against chicken suppliers, and a substantial percentage of its claims against pork, beef, and turkey suppliers").
[139] In kind, this is no different than a mortgagor policing subsequent mortgages by a mortgagee or a bank policing the maintenance of business assets that secure a loan.
[140] *See* Baker, *supra* note 93; Glaz Petition to Confirm, *supra* note 136.

control provision providing that Sysco "shall not accept a settlement offer without the [Burford's] written consent, which shall not be unreasonably withheld."[141] Sysco did exactly this, on grounds that so undersold the claims that the arbitrator concluded that Sysco had violated its contractual duty of good faith.[142] The United States District Court for the Southern District of New York, following removal from New York state court, agreed.[143] Following Sysco's repeated breaches, the parties contracted for Burford to take full control of the antitrust claims. Sysco agreed to assign its antitrust claims to a special-purpose vehicle of Burford's called Carina, which would prosecute the claims, enabling Sysco to fade to the background.[144] Carina then sought substitution for Sysco in its antitrust suit pending in the District of Minnesota as well as its suit pending in the District of Illinois.[145] The two courts reached directly opposite conclusions about substitution under Federal Rule of Civil Procedure 25, which governs substitution of parties in civil litigation in federal courts.

These examples illustrate the entry of a new actor into the civil justice landscape—one that raises familiar, and characteristic, civil justice questions: what conflicts are introduced by the agency of money; who controls civil claims and litigation; how to resolve claims in line with the merits. Hovering over all of this is the judge, who must oversee an increasingly commodified system. Defense-side liability insurance and recourse lending raise related concerns,[146] but litigation finance brings them into renewed focus by introducing capital, risk management, and

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[141] Glaz Petition to Confirm, *supra* note 136 ¶ 13; Swiber Decl. Exhibit B at 5, *Glaz v. Sysco Corp.*, No. 1:23-cv-02489 (S.D. N.Y. filed May 3, 2023)
[142] Glaz Petition to Confirm, *supra* note 136 ¶¶ 13–31.
[143] *See, e.g.*, Joint Motion for Substitution of Plaintiff, In re Pork Antitrust Litigation, No. 18-cv-1776-JRT-JFD (D. Minn. June 29, 2023) [hereinafter Carina's Petition for Substitution].
[144] *Id.*
[145] *Id.*
[146] *See, e.g.*, H.M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2053 (2019).

control on the claimant's side of the "v."—where access to such tools has historically been constrained.

The introduction of litigation finance implicates an additional, and likewise foundational, civil justice inquiry—one that flows from the relationship between funder and claimant: the prospect of a new form of litigant autonomy. While analogous questions arise in contexts such as labor law and other frameworks that mediate individual control through collective or contractual arrangements,[147] litigation finance places those questions squarely within the structure of civil adjudication.[148]

The traditional model of litigant autonomy for claimants as the "master of [their] claims"[149] is deeply entrenched in the civil justice landscape.[150] The word autonomy itself means, literally, self-regulation. The traditional notion of autonomy thus connotes the claimant's right of self-control. Rather than serving as a "master of [their] complaint,"[151] what if a claimant wishes, for any number of potential reasons (including financial ones) to provide an equity stake in their claim to another party–here, a funder? Cede a share of control of the litigation to a funder? Assign their

[147] *See, e.g.*, Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 321 (2005); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 2 (2016); ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55, 56 (1963); Ian R. MacNeil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 747 (1974).

[148] *See, e.g.*, David Shapiro, *The Class as Party and Client*, 73 NOTRE DAME L. REV. 913 (1998); Edward Brunet, *The Triumph of Efficiency and Discretion in Complex Litigation Policies*, 10 REV. LITIG. 273, 297 (1991); J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221 (2017).

[149] Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987).

[150] Indeed, this traditional conception of litigant autonomy undergirds several of our procedural rules (and their interpretations), certain ethical rules constraining attorneys' decision-making about the prosecution and settlement of claims, due process protections of a claimants' "day in court," and (to greater and lesser degrees), constitutional and prudential doctrines of standing.

[151] *Caterpillar Inc.*, 482 U.S. at 392.

claims to a funder? We have long allowed the exercise of this sort of autonomy by corporate defendants, who may let insurers step into their shoes.[152] Although this inquiry often simply floats in the background in other civil-justice contexts,[153] litigation finance brings the question front and center: This new prospect of claimant autonomy is central—and in any sound theory of litigation finance, must be confronted directly. Is there room in the law for this conception of litigant autonomy on a claimholder's side? Should there be?

Absent a theoretical framework for grappling with these core questions, it has been tempting to lament the passing of a simpler civil justice landscape (or at least the perception of one), and to force new realities into the molds of ancient conflicts.[154] Whatever the independent merits of ancient doctrines and civil justice policies, neither ancient doctrines of champerty, maintenance, and barratry, nor the proxies by which those doctrines are ushered in, provide much (and certainly not enough) for judges and scholars to work with on these core questions. They constrict judges to a dichotomous set of choices: either to permit use of litigation finance or to prohibit it. Both choices obscure from view and hinder engagement with core questions. Further, expanding the mono-normative force of various civil-justice rules and policies outside of their appropriate relational domains creates category errors and distorts (or upends) foundational civil justice commitments and values. And the layering of proxies oriented around a dichotomous set of choices—either litigation finance arrangements are permissible, or they are not—hinders engagement with, and distorts the dictates and function of, other areas of substantive law unrelated

[152] *See supra* Part II, Figure 1; *see, e.g.*, Baker, *supra* note 93, at 18.
[153] *See* Baker, *supra* note 93, at 18 (noting that insurance companies having the right to settle claims was historically taken for granted); *see also, e.g.*, Campbell-Ewald v. Gomez, 577 U.S. 153 (2016) (decision to settle by named representative in a class action does not moot the claims of other class members); *see also* Shapiro, *supra* note 144; Lynn Baker, *Alienability of Mass Tort Claims*, 63 DEPAUL L. REV. 265 (2014).
[154] *See supra* Part I.B.

to litigation finance. This state of affairs is difficult for judges, claimants, attorneys, funders, and arbitrators, all of whom are flying somewhat blind in the design, construction, and execution of litigation finance arrangements whose prevalence in civil justice is quickly outpacing regulatory guidance or theoretical development.

Nostalgia is not a strategy.[155] The question now is what do we do when the fixed claimholding rules of a bygone era do not correspond to the complexities of these new litigation-finance relationships for claimants, attorneys, funders, and for judges presiding over this changing landscape? What happens when we depart from domains of categorical impermissibility and into realms of improper, in whole or in part, in certain circumstances? What are the appropriate pathways for addressing core civil justice questions of litigation control, conflicts, access to justice for meritorious claims, and claimant autonomy raised by litigation finance arrangements, while also being malleable to major differences—such as those between consumer claimants and commercial claimants; between arrangements involving sophisticated businesses on both sides of the deal versus those characterized by power imbalances between the parties that more resemble payday-loan structures? And must we start from scratch, or are there tools and legal theories available to deploy?

B. Conceptualizing a Relational-Institutional Framework for Litigation Funding

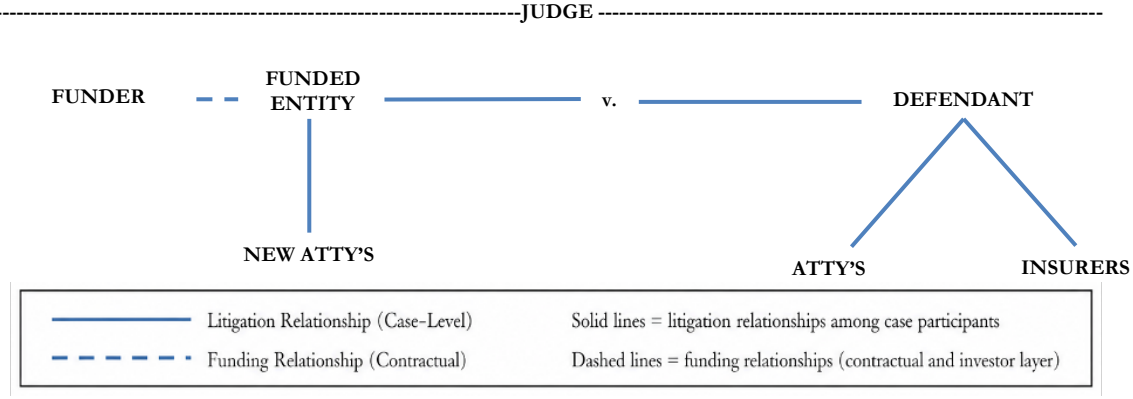
It's often said that "business is all about relationships."[156] A more meta formulation: "The business of business is relationships." That formulation is a useful rhetorical starting point for this

[155] *See generally, e.g.*, Mark Carney, Prime Minister of Can., *Principled and Pragmatic: Canada's Path, Special Address at the World Economic Forum Annual Meeting* (Jan. 20, 2026) https://www.pm.gc.ca/en/news/speeches/2026/01/20/principled-and-pragmatic-canadas-path-prime-minister-carney-addresses.

[156] *Cf.* Andrei Petrik, *Small Business Is All About Relationships,* https://www.forbes.com/councils/forbesbusinesscouncil/2021/11/22/small-business-is-all-about-

Article's intervention into what it calls the "civil justice business." To wit: The theoretical framework for litigation finance this Article conceptualizes and constructs is one oriented around a series of critical relationships involved in funded litigation.[157] For the moment, put aside the market for funding of mass disputes. The critical relationships in litigation finance in single-case (and/or non-aggregate) litigation may be depicted by way of the following stylized model[158]:

Figure 5: Litigation Funding Relational Framework:



As this graphic illustrates, the principal relationships involved are (1) The claimant and the funder, which is contractual; (2) the claimant and its attorneys, which is contractual, as well as representational and fiduciary per the Rules of Professional Ethics; (3) the funder and the claimant's attorneys; and—almost never mentioned, but critical to appreciate—(4) the claimant

relationships; Alex Williamson, *What Does Responsible Business Mean to You?* https://www.fordham.edu/fordham-stories/business-and-entrepreneurship/what-does-responsible-business-mean-to-you; *Build Your Business with Relationships: Leadership, Sales, Inclusion, and More*, UNION CNTY., N.J. (Feb. 11, 2020) https://ucnj.org/press-releases/public-info/2020/02/11/build-your-business-with-relationships-leadership-sales-inclusion-and-more.

[157] Professor Wendel orients thinking about control delegation along relational lines as well, an approach I endorse and expand upon here. *See* Wendel, *supra* note 114.

[158] This stylized model can be used to capture the critical relationships in funded litigation in both the commercial and consumer segments of the legal finance market, but not the mass-litigation segment. This stylized model can be expanded to include client-side portfolio investments by way of additional litigation against additional defendants, overseen by (likely) different judges, as illustrated in Part I.

and the defendant, whose relationship is adversarial. This model also references the defendant's own relationships with its attorneys (representational and fiduciary), and, in many cases, their insurers (contractual). Notably, litigation finance introduces a new relationship—that between the funder and the funded entity. At the same time, the introduction of that relationship does not alter, fundamentally, any of the other relational orientations in the litigation.[159] Overseeing all this is the judge.

1. Relational Domain Alignment in Civil Litigation

A theoretical framework for litigation finance governed by relational orientation and norms must begin by aligning engagement with core pressure points and potential regulatory pathways along the lines of these relationships. The first order of business, then, is to restore civil-justice rules and doctrines that have been repurposed and jerry-rigged for litigation finance to their appropriate relational and policy domains within the overall relational set-ups in funded litigation—e.g., the attorney-client relationship; the adversarial relationship between the claimant and defendant; and the relationships between and among attorneys, claimholders, and the judge. To see why, consider the operation of current approaches to regulation by way of ancient constructs and atomized civil justice policies, which tend to confuse and conflate these relationships. The

[159] The introduction of a funder-funded relationship potentially ushers in additional relationships and intra-relationship duties. *See, e.g.*, Parikh, *supra* note 43, at 39 (noting a funder's potential fiduciary duties to its investors). Client-side investment, as opposed to law-firm investment, tends to minimize the potential conflict between those relationships and duties and the independent ethical duties attorneys have to their clients, as the funder is in direct privity with the client as decision-maker, not the attorney (and vice versa). The fundamental task here is to lay foundational architecture, which can be built out to include ever-more-complicated arrangements, and to help navigate a correspondingly complex web of legal frameworks–some of which extend beyond the scope one Article. Accordingly, while this Article will occasionally flag these additional potential complexities, its principal focus here is the introduction of legal finance actors into the relationship with the claimant.

result is category error upon category error, destroying adversarial protections in civil litigation and distorting fundamental civil justice policies and values.

For instance, to get at basic concerns that litigation finance means "profit over plaintiffs," and often in reflexive operationalizing of the conventional position that whatever else funders may do, they may not control claims or litigation, courts and scholars alike have sought to expand the reach of the rules of professional ethics governing the attorney-client relationship—and in particular, rules making clear that claimants, and not their attorneys, have ultimate authority over settlement decisions. In funded litigation, these rules are invoked by defendants, in an adversarial relationship with claimants (ostensibly to "safeguard" the relationship between its claimant adversary and the funder). This is a category error. It is hard to imagine a set of rules whose relational domain is clearer: The Rules of Professional Conduct govern and safeguard the attorney-client relationship (as do self-help options, like firing one's attorneys[160]). Under the Rules of Professional Conduct, attorneys are obligated to assert their client's position, and it is the client who has the right to accept or reject a settlement proposal.[161] An attorney is similarly bound to abide by a client's decision whether to settle a matter.[162] Whether and to what extent a claimant ought to be able (or allowed) to impair their own interest is a separate question that implicates the nature and dynamics of the relationship between the funder and the funded entity, not that of the attorney and client. Attorneys take their clients as they are.

Remedial consequences compound errors and generate troubling civil-justice results: To wit, defendants can obtain dismissal of the claims against them, by way of restricting the claimant's

[160] *See* Emily R. Siegel, *Sysco Hires New Lawyers in Price-Fixing Cases Amid Funding Fight*, BLOOMBERG LAW (Apr. 19, 2023, 2:42 PM PDT), https://news.bloomberglaw.com/business-and-practice/sysco-hires-new-lawyers-in-price-fixing-cases-amid-funding-fight.
[161] MODEL RULES OF PRO. CONDUCT r. 1.2(a) (2020).
[162] *Id*.

potential autonomy to sell an equity interest in their claims to a funder. To the extent there is something problematic about a claimant's contractual relationship with a funder, the injury is not one flowing from an attorney-client-relationship; moreover, any remedy that flows from claimant injury here inures to the funded entity, not to the defendant in the litigation.[163] In other words, the claim-dismissal remedy for violation of the Rules of Professional Ethics governing attorneys by way of a funding agreement between two parties not in an attorney-client relationship—namely, the funder and the claimant—flows to the defendant (the claimant's adversary). Of course, the remedy of dismissal is one any defendant would welcome. The appropriate civil-justice remedy for any potential violation of law prohibiting sale of an equity stake in claims is not dismissal of claims and elimination of defendants' adversarial burdens—a result that brings about an odd windfall for defendants, without speaking to any potential conflicts in the funding relationship.[164] Indeed, claims to prohibit third-party funding citing claimant autonomy are largely invoked by *defendants* for their own benefit. They do not police concerns about potential conflicts and claimant oppression by a funder —or at least, they regulate them indirectly. Nor do they answer questions about the permissible scope of litigant autonomy on both sides of the v.—instead, they frustrate them. (To be sure, similar dynamics arise elsewhere in the law—for instance, in voting rights and class action jurisprudence—though the nature of those constraints, and the interests they serve, differ in important respects beyond the scope of discussion here).

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[163] *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2024 WL 1214568, at *1 (N.D. Ill. Mar. 21, 2024) (Durkin, J.) ("Ironically, standing is key to Defendants' next argument that the assignment is champertous. This is because Defendants lack standing to make it. The Illinois Supreme Court has explained that in Illinois, champerty is only available as a defense by a party to a contract.").

[164] This Article puts to the side whether there are frameworks under which defendants might raise anti-control arguments in other contexts. *Cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985).

As another example, current frameworks for litigation finance invoke the general civil justice policy favoring settlement to bar a claimant from selling an equity stake in litigation to a funder. The policy favoring settlement implicates, primarily, the relationship between the claimholder and the defendant (and secondarily, the relationship between both adversarial parties and the judge, who has limited resources). It does not implicate the relationship between the claimholder and a third party, funder or otherwise. Even judges must respect the adversarial parties' decisions to settle—or not. Indeed, the chief purpose of the policy in favor of settlement—and the rules effectuating it—is to ensure that judicial rules promote the decisional sovereignty of parties (claimants and defendants) to settle cases.[165] Critically, what the policy favoring settlement does not do is per force regulate a claimholder's voluntary dealings with a third party as to selling an equity stake, or, separately, to use litigation control provisions as counterparty risk management tools. The policy favoring settlement has nothing to say about whether a claimant can limit or impede its own freedom to settle by way of a separate and contractual relationship—here, with a funder.[166]

The more fundamental civil justice problem is that invoking the policy favoring settlement to limit a claimholder's right to share litigation control with third parties effectively turns a policy designed to promote a claimant's litigation autonomy into one that restricts it. Here, a relational norm problem intersects with and impacts directly higher-order questions of civil-justice theory: Expansion of the policy favoring settlement out of its claimant-defendant relational domain, as

[165] Thus, the policy favors rules, for example, that protect the confidentiality of settlement discussions (so as not to deter parties from attempting to settle). *See, e.g.*, FED. R. EVID. 408. Likewise, the policy promotes judicial rules designed to enforce settlements that are voluntarily agreed to by the claimant and defendant. *See*, e.g., Jeffrey W. Stempel, *Motions to Enforce Settlements: An Important Procedural Tool*, 8 AM. J. TRIAL ADVOC. 1 (1984).

[166] It is worth noting again (briefly) that courts routinely enforce defense-side insurers (themselves perhaps accurately described as funders) right to control litigation and settlement.

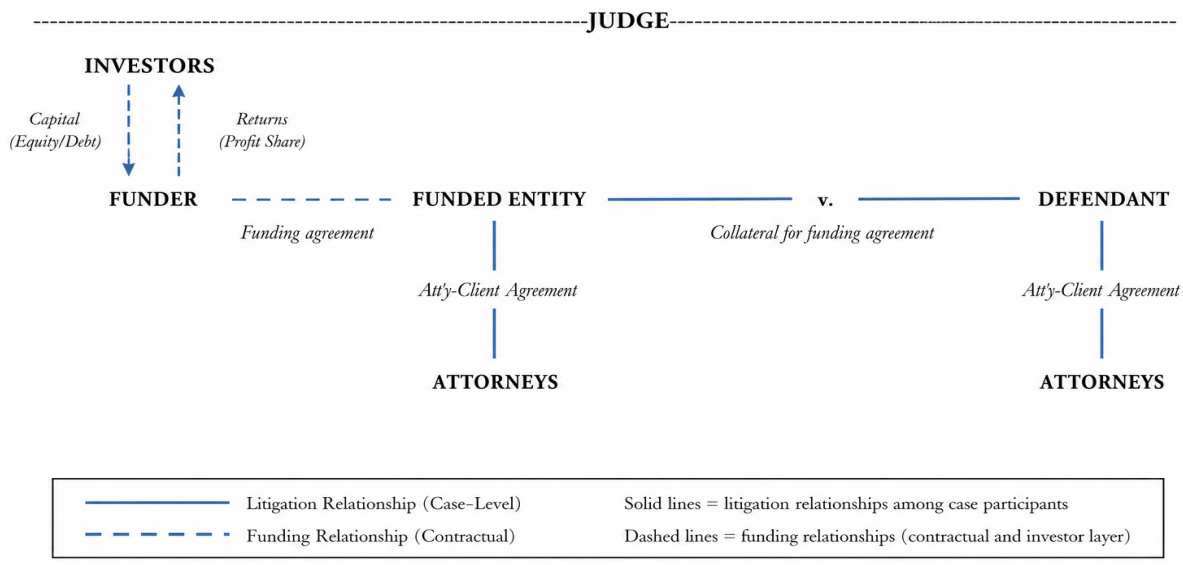
some scholars in litigation finance advocate,[167] elevates it to a broad, free-floating policy, namely, that settlements are quite simply and always a good thing. But if settlements are undisputed, normatively good things, period, then that normative superiority would simply trump everything.[168] Such a view is of course consistent with formalistic approaches to "legal justice" that tend to divorce right and remedy,[169] and—as I have argued in other work—has been used as principal jurisprudential tools of and theoretical underpinnings for the broad dismantling of the architecture of private enforcement and the hollowing out of a wide swath of substantive law.[170] Importantly, the normative desirability of cutting back on litigation depends on whether and how much injustice is being addressed through the litigation.[171] If all settlement is of "the lion lies down

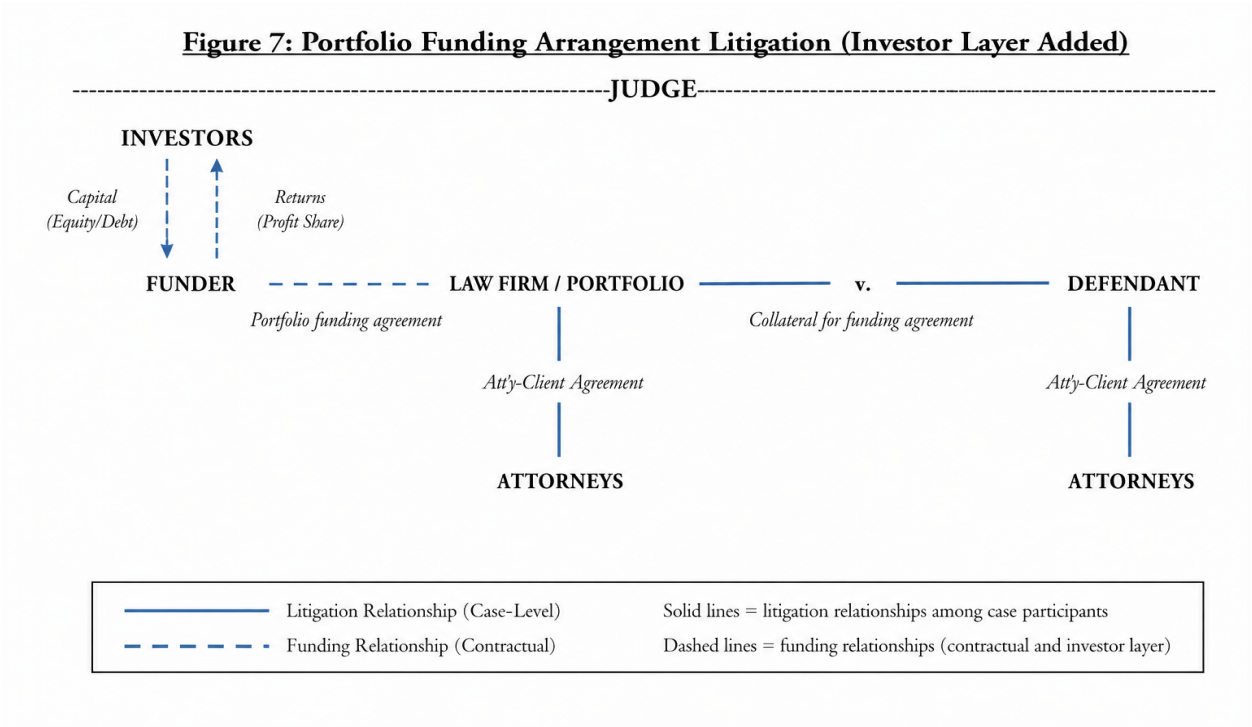
[167] *See, e.g.*, Expert Report of Maya Steinitz, *supra* note 64.
[168] In re Pork Antitrust Litig., No. 18-cv-1776 (JRT/JFD) (D. Minn. Feb. 9, 2024) (Order Denying Motion for Substitution); Expert Report of Maya Steinitz, *supra* note 64.
[169] *See generally, e.g.*, SCALIA, *supra* note 27, at 6 (1997) ("In the grand scheme of things, whether the right party won is really secondary. Famous old cases are famous, you see, not because they came out right, but because the rule of law they announced was the intelligent one"); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (enforcing an arbitration agreement's class action waiver even though doing so effectively eliminated the plaintiffs' only economically viable remedy for vindicating their substantive rights). For robust discussion along these lines, see, e.g., JOHN C. P. GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS 15 (2020) (noting that the "legal system's commitment to *ubi jus* is arguably waning"); Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (arguing that "rights can be talked about and understood—indeed, can be best understood—in complete isolation from (merely) remedial concerns"); JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE (2023); AZIZ HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES (2021) (describing how Section 1983 has failed to achieve the goals of compensation and deterrence); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (arguing that the current constitutional remedies precludes victims of state coercion from obtaining meaningful relief).
[170] Glover, *supra* note 35; Glover, *supra* note 22.
[171] *See generally*, Robin West, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION (2019) (articulating a "modernized" vision of civil rights that includes both the law as it is and as it should be); Glover, *supra* note 119 (arguing that the Federal Rules of Civil Procedure ought to be reoriented around settlement to achieve, among other things, closer alignment of settlement values with the underlying merits of claims).

with the lamb and then eats the lamb for lunch" variety, and there are a lot of lions out there doing injustice to a lot of lambs, then why should settlement be a prima facie good? It is not.

One critical relationship remains to be placed: that between funders and their investors. The stylized models situate that relationship within the relational–institutional framework for a single-case-funding arrangement (Figure 6) and for a portfolio-case funding arrangement (Figure 7):

Figure 6: Single-Case Funding Arrangement Litigation (Investor Layer Added)





While new to the civil justice landscape, the relationship between capital-deployment firms and their investors is a familiar one in business law. At the high level of generality needed here, this relationship is typically organized through corporate or fund structures and governed by a well-developed set of fiduciary, contractual, and governance principles.[172] Managers owe duties of loyalty and care to the entity and its investors, and are generally expected to pursue the long-term economic interests of the firm and its owners; importantly, the duty is not to maximize returns in any particular transaction, at any particular moment, or without regard to other legally

[172] *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34–35 (Del. Ch. 2010) (requiring directors to pursue stockholder value but not mandating profit maximization in every decision or on a short-term basis); STEPHEN M. BAINBRIDGE, CORPORATE LAW 93–130 (4th ed. 2020) (explaining that fiduciary duties and the business judgment rule confer broad managerial discretion, not a mandate of transaction-specific profit maximization); LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH 25–31 (2012) (rejecting the claim that corporate law imposes a legal duty of strict profit maximization); WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 211–60 (5th ed. 2016) (describing fiduciary duties, governance structures, and the role of managerial judgment in corporate decision-making).

cognizable constraints.[173] These relationships operate within defined and well-developed investment mandates in corporate and fund law (including partnership and limited liability company law[174]) and are required by fiduciary doctrine and contractual governance to exercise informed, good-faith business judgment—protected by the business judgment rule in corporate law—over how to deploy capital across a portfolio of opportunities, whether across multiple matters or within the lifecycle of a single investment.[175] Profit-seeking is thus structured, mediated, and constrained by these doctrines, rather than reduced to a per-claim mandate to maximize returns. This distinction bears emphasis. Describing funders as "profit-seeking" captures an economic orientation, not the content of the legal duties that govern their conduct. The latter are

[173] See Paramount Commc'ns Inc. v. Time Inc., 571 A.2d 1140, 1150–55 (Del. 1989) (holding that directors may pursue long-term corporate strategy over higher short-term returns); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 102–03 (Del. Ch. 2011) (affirming board discretion to reject a premium offer in favor of long-term corporate interests); Stout, *supra* note 172, at 63–69 (explaining that corporate law does not impose a duty of short-term or transaction-specific profit maximization); Strine, *supra* note 32, at 147–50 (clarifying that profit-seeking is mediated by fiduciary duties and managerial discretion, not a mechanical maximization mandate); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441–42 (2001) (describing shareholder primacy as a governance norm rather than a transaction-level legal command).

[174] *See, e.g.*, TAMAR FRANKEL & ANN TAYLOR SCHWING, THE REGULATION OF MONEY MANAGERS: MUTUAL FUNDS AND ADVISERS 5–12 (2d ed. 2001) (describing fund governance structures and investment mandates constraining capital deployment); Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism*, 113 COLUM. L. REV. 863, 885–92 (2013) (explaining how institutional investment structures shape managerial incentives and decision-making); William W. Bratton, *Private Equity's Three Lessons for Agency Theory*, 3 BROOK. J. CORP. FIN. & COM. L. 1, 7–16 (2008) (analyzing how fund structures and investor expectations discipline managerial discretion).

[175] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (defining the business judgment rule as a presumption that directors act on an informed basis, in good faith, and in the best interests of the company); *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 52–55 (Del. 2006) (emphasizing the breadth of managerial discretion protected by the business judgment rule); Bainbridge, *supra* note 34, at 87–89 (explaining that the rule shields managerial decisions from judicial second-guessing absent breach of fiduciary duty).

defined by fiduciary and contractual principles that structure how return-seeking may be pursued, not by a transaction-specific command to maximize returns in any individual matter.

The funder-investor relationship is often described as in tension with—and sometimes incompatible with—a funder's contractual relationship with funded entities, a claimant's authority over settlement decisions, and attorneys' exercise of independent judgment.[176] These concerns rest on a misstatement of the funder–investor duty—treating it as a transaction-specific mandate to maximize returns without regard to fiduciary constraints or the portfolio-based and discretionary structure of investment decision-making—and in turn overstate the effects of this new relationship on the distinct relationships and duties among claimants, attorneys, and courts. Indeed, some leading accounts state the funder–investor duty in these terms—as a duty to investors "to maximize profit."[177] Similar formulations appear in legislative and regulatory efforts and in organized business-backed advocacy, where the language of profit maximization is deployed not only to describe funder incentives, but also to argue against mechanisms that facilitate claiming and

[176] *See* Steinitz, *supra* note 31, at 1326–34 (discussing how funders' profit-seeking obligations to investors can create pressure on settlement and litigation decision-making); U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 31, at 12–18 (asserting that investor-driven funding incentives threaten attorney independence and claimant control); ; *see also* MODEL RULES OF PRO. CONDUCT r. 1.2(a), 5.4(c) (A.B.A 2020) (providing the doctrinal baseline—client control and attorney independence—against which investor-driven pressures are evaluated).

[177] *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 739–40 (2014) (stating that funders "have a duty to their investors to maximize profit" and identifying resulting tensions with plaintiffs); *see also* Steinitz, *supra* note 122, at 501–03 (usefully analogizing litigation-finance structures to venture-capital fund arrangements, but stating a "duty to maximize profit" without engaging the fiduciary, discretionary, and portfolio-based constraints that govern such arrangements under corporate and fund law); Parikh, *supra* note 176, at 1072–80 (arguing that funder incentives may distort litigation and settlement decisionmaking, in ways that assume strong investor-facing pressure to generate returns without fully parsing the fiduciary and portfolio constraints that structure such incentives);; Parikh, *supra* note 63 (raising concerns about "opaque capital" in mass litigation and its potential to influence claim generation and resolution, without distinguishing among the legal constraints that govern investor-facing duties across funding structures).

aggregation, as part of an updated version of familiar "class action wars" aimed at eliminating claims or depressing their value. These same actors participate actively in the venues where litigation finance is studied and regulated, including academic conferences (some open, some closed),[178] proceedings before rules advisory bodies, and international policy debates concerning litigation funding.[179] And the funder–investor relationship is also framed in profit-driven terms by a distinct set of repeat-player plaintiffs' attorneys and other claims-generating actors, who emphasize its potential to distort case selection, fee structures, and control of litigation, without accounting for the legal constraints that structure investor-facing obligations.[180]

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[178] *See, e.g.*, New York University School of Law, Charting the Future of Litigation Finance (Apr. 17, 2026) (conference examining contemporary developments in litigation funding, including investor incentives and regulatory responses); *see also* conferences and symposia addressing litigation finance and related issues at Cornell Law School (2024) and University of Chicago Law School (2023) (bringing together academics, practitioners, and policymakers to examine litigation funding, aggregation, and regulation); *cf.* invitation-only academic and policy convenings addressing litigation finance and mass-tort practice, including closed conferences hosted at George Washington University Law School (2025).

[179] *See, e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 31 (arguing that litigation funding introduces profit-driven incentives that may distort litigation and supporting regulatory constraints); Litigation Funding Transparency Act of 2018: Hearing on H.R. 808 Before the Subcomm. on Cts., Intell. Prop., & the Internet of the H. Comm. on the Judiciary, 115th Cong. (2018) (statement of Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform) (advocating disclosure and regulation of third-party litigation funding and emphasizing investor-facing profit incentives); Unsuitable Litigation: Oversight of Third-Party Litigation Funding: Hearing Before the H. Comm. on Oversight & Accountability, 118th Cong. (2023) (statement of Aviva Wein) (describing litigation finance and mass tort litigation as driven by financial actors and asserting that claimants are used to generate profits for investors and attorneys); see also Letter from National Association of Manufacturers to Members of Congress (on file with author) (raising concerns about third-party litigation funding as driven by investor profit incentives and urging regulatory intervention); Letter from Pharmaceutical Research and Manufacturers of America to Members of Congress (on file with author) (same).

[180] *See, e.g.*, *J&J Allies With Mass-Tort Specialists to Seal $8 Billion Talc Settlement*, WALL ST. J. (May 2024), https://www.wsj.com/articles/j-j-allies-with-mass-tort-specialists-to-seal-8-billion-talc-settlement-30304ebb (describing opposition by plaintiffs' lawyers, including Mike Papantonio, to a talc bankruptcy settlement supported by other plaintiffs' firms, and quoting Papantonio's concern that firms with limited resources had amassed large inventories of claims through advertising and aggregation practices); Mike Papantonio, *5 Reasons Why Personal Injury*

It is imperative that scholars of litigation finance, civil justice, procedure, and private law draw on the well-developed corporate and business law account of duties governing profit generation in capital-deployment relationships, as opposed to treating those duties as transaction-specific mandates to maximize returns. That clarification is a prerequisite to evaluating the effects of litigation finance on other relationships in civil justice. A wide range of scholarship takes up the question whether the funder–investor relationship distorts, reshapes, or can coexist with the obligations that govern claimants, attorneys, defendants, and courts.[181] Importantly, the work of Professors Sebok and Wendel do not misstate the nature of the funder–investor duty as a transaction-specific mandate to maximize returns; their accounts instead treat investor-facing incentives as part of a broader system of interacting legal roles. But they stop short of specifying the legal content of the duty of profit generation in the funder–investor relationship.

This Article's distinct and indispensable contribution here is to integrate from well-established corporate law, doctrine, and theory the precise nature of the duties between funders and investors vis-a-vis profit generation: Specifically, the duty of profit generation in the funder–investor relationship is fiduciary and discretionary, not constrained to short-term or transaction-specific return maximization.

For now, this contribution yields three immediate takeaways. First, properly specifying the funder–investor duty reveals that prevailing prescriptions that rest on the premise that investor-

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Law Firms Expand into Mass Torts, LEVIN PAPANTONIO (Mar. 19, 2025), https://levinlaw.com/newsroom/pi-firms-expand-into-mass-torts/ (describing mass tort practice as offering "substantial financial returns," portfolio diversification, and strategic partnership opportunities); *cf. Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*, WALL ST. J. (Nov. 25, 2019), https://www.wsj.com/articles/inside-the-mass-tort-machine-that-powers-thousands-of-roundup-lawsuits-11574700480 (quoting Papantonio's description of mass-tort practice as operating "just like any other industry").

[181] *See, e.g.*, Steinitz, *supra* note 31, at 1276–77; ; Parikh, *supra* note 63; Sebok, *supra* note 33; Wendel, *supra* note 33.

facing duties require funders to press for maximum returns in individual cases—and therefore justify broad disclosure mandates, categorical limits on funding arrangements, or binary or proxy-based judicial intervention—are overstated. Second, it enables a more rigorous evaluation of the claims advanced by W. Bradley Wendel and Anthony J. Sebok that litigation finance can coexist with the obligations that govern claimants, attorneys, defendants, and courts, by assessing those claims against the properly specified duty of profit generation in the funder–investor relationship. Third, it shows that the interaction among these relationships is not limited to coexistence: when investor-facing obligations are properly specified and bounded, they can operate in ways that are complementary to the operation of other duties—for example, by supporting the resourcing, screening, and stability of claims—without displacing claimant authority, attorney judgment, or judicial supervision. Part III proceeds on that footing, showing how a properly specified account of the funder–investor duty avoids the distortions that otherwise dominate analysis of disclosure, litigation control, and judicial oversight.

2. Relational Norms Structuring Market Differentiation in Litigation Finance

Understanding civil justice rules, policies, and doctrines along relational lines paves the way for direct engagement with the new claimant-funder relationship in litigation finance and provides a framework for engaging with civil-justice concerns that arise from these new arrangements. I start with the somewhat obvious, if underappreciated or ignored, character of the new relationship introduced by litigation finance between the claimant and the funder, which is plainly contractual, and—critically—–neither adversarial nor representational.

The complex market for litigation finance involves myriad different contractual relationships.[182] Thus, I conceptualize an approach to legal-finance relationships that begins by orienting around, and requiring malleability to, the nature of the underlying funder-funded relationships, in line with strains of modern contract theory and law similarly oriented.[183] To the extent the structural and categorical differences among the relationships in litigation finance matter to the scope and application of various rules and policies within and outside of civil justice, they matter to courts' ability to navigate the complexities of litigation finance in the modern civil justice landscape. And to the extent structural differences in contractual relationships matter to contract law and theory, they matter to courts' ability to oversee and regulate the different sorts of legal-finance relationships that come before them.

One can recruit as an ally here strains of modern contract theory which insist that contract law must be malleable to the relationships involved in the bargaining transaction. Thought leaders here are Professors Alan Schwartz and Robert Scott, whose contract-law theory partitions parties to contractual transactions into individuals and firms, yielding four transactional categories: (1) A firm sells to another firm; (2) an individual sells to another individual (e.g., antenuptial agreements

[182] *See supra* Part I.A. To wit, in the 2024 Restatement of Consumer Contracts, the ALI addresses the substantial risk of consumer abuse by businesses, stemming from asymmetries in the parties' information, sophistication, and incentives, and given the practice of standard-form contracting. RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 2 cmt. 1 (A.L.I. 2024). The 2024 Restatement then sets out various techniques that courts have developed to police this abuse, while still endorsing and enforcing standard-form contracts. *Id.*

[183] Scott and Schwartz's efficiency theory, tied to the welfare-maximization norm as applied to contracts involving sophisticated actors, was a clear rejoinder to existing proposals and scholarship unmalleable to the underlying relationships involved. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 544 (2003); *see also* RESTATEMENT OF THE LAW, CONSUMER CONTRACTS, Adam J. Levitin, *The Death of Consumer Contract,* 68 ARIZONA L. REV. 55, 84–86 (2026); Gregory Klass, C*onvergence by Design: Who Contracts and the Plural Purposes of Contract Law,* GEO. L. FAC. PUBL'NS & OTHER WORKS, Working Paper No. 2577, 2023), https://papers.ssrn.com/abstract=4634324.

and divorce settlements, governed principally by family law); (3) a firm sells to an individual (regulated largely by consumer protection law, real property law, and the securities laws); and (4) an individual sells to a firm (governed largely by the law governing employment relations).[184] To be clear, the entirety of contract law and theory along relational lines need not be imported here (nor could it, if for no other reason than it is not a monolith) to see the initial usefulness of a framework that is sensitive to the nature and dynamics of the underlying contractual relationships at issue.[185] Conceptually, this distinction in contract law and theory between sophisticated contractual parties on the one hand and unsophisticated claimholders (often consumers) on the other will often dovetail with the distinction between the market for commercial litigation finance

[184] Schwartz & Scott, *supra,* note 183.

[185] There is much to work with in the way of contract law and theory in general, and in those strains oriented around the nature of the underlying relationships involved, that we can recruit as regulatory allies here (along with a robust body of scholarship that responds to the influx of contracts that tend to dismantle the architecture for civil justice in particular. *See, e.g.,* RESTATEMENT OF THE LAW, CONSUMER CONTRACTS, § 2 cmt. 1 (formalizing a framework of consumer contracts that accounts for the relational asymmetry between parties); *see also* Glover, *Disappearing Claims*, *supra* note 35 (noting how contractual procedure waivers weaken the infrastructure for private enforcement of law); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration*, *the Private in the Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2937 (2015) (arguing that with the rise of private contractual resolutions, judges become "just another set of actors in the dispute resolution market."). Category-1 contracts then break down into two sub-types—those involving sophisticated firms and those with firms that look more like ordinary persons. The operational characteristics of the former—namely, an entity organized as a corporate form with more than five employees, a limited partnership, or a professional partnership like a law firm—form a boundary between the two. Flowing from this boundary is a limitation to Category-1 characterization only those contracts involving entities who can be expected to know how to make "business" contracts—i.e., contracts for which the maximum surplus parties could create jointly is set prior to formation—and who exercise their bargaining power, determined prior to contract formation, in the division of the maximum surplus the parties could generate jointly. *Id.* at 545. That framework in contract theory, and its commands for contract law, conflicted with, and was offered to counter, the common theory and law of contracts in the Uniform Commercial Code (UCC), the Restatement (Second) of Contracts, and much of the existing contract scholarship. *Id.* at 550. Perhaps forefront in the minds of Professors Scott and Schwartz was the American Law Institute's endeavor at the time to rewrite the overall law of consumer contracts *without* sensitivity to the underlying relationships to the contracts.

in single-funded cases on the one hand and the market for single-funded consumer cases on the other,[186] which I will discuss in turn. I will then briefly trace some special relational considerations at the intersection of the consumer and mass-dispute market in litigation finance. I will also highlight questions for law and theory that emerge along these relational lines.

3. Relational Structure and Dynamics in the Commercial Litigation Finance Market

The high-level implication of this relational strain of contract theory for litigation finance is that in the context of litigation finance arrangements between sophisticated entities—a market uncharacterized by evidence of oppression—business actors ought largely to be free to bargain as they see fit, and for judges to presume that the contract is the realization of their considered judgments about those entities' personal interests.[187] As a matter of litigation finance, concerns about "profit over plaintiffs" will be less pronounced, or even absent, when sophisticated business claimants exercise autonomy by way of informed choices about risk-management and liquidity. Accordingly, interpretation, construction, and enforcement of Category-1-type arrangements in litigation finance ought not occur by way of heavily protectionist interventions, either from contract law or elsewhere (that would include by way of ancient common-law doctrines of champerty).

And in the realm of commercial contract law, there is much for judges to work with. This framework would enable (but not require) judges to take a fully libertarian[188] approach to the

[186] *See supra* Part I.
[187] Category 1 actors, because of their sophistication, should be governed by a contract law that restricts itself to promoting efficiency, rather than engaging in paternalistic intervention or fairness inquiries. Schwartz & Scott, *supra,* note 183, at 545–46.
[188] *See, e.g.*, Gregory Klass, *Two Forms of Formalism in Contract Law*, 46 CARDOZO L. REV. 369 (2025); Sebok & Wendel, *supra* note 56, at 1386–87 (arguing that legal finance is a "relational contract" and thus is "subject to an overarching implied norm of mutual good faith and fair dealing.").

construction, interpretation, and enforcement of B2B funding arrangements. Professors Wendel and Sebok, for instance, have proceeded along these more libertarian lines, arguing that implied contractual duties of good faith and fair dealing in contract law are sufficient to address risks to both the funder and funded entity in litigation finance arrangements.[189] In forthcoming work, for instance, Professor Sebok details how, in the context of commercial litigation finance, the Uniform Commercial Code already builds into its default rules the power for funders to take "commercially reasonable" steps to protect their security interests.[190] Others, like Maya Steinitz and Samir Parikh (in relation to the mass-claims market), have generally argued for the imposition of fiduciary duties between funders and funded entities to police conflicts of interest.[191] Diverging views on these duties align with the split in approaches by scholars (and states) to insurance agreements in civil litigation on the defense side—analogous to litigation finance arrangements at least as a matter of the potential for conflicts of interest regarding settlement decisions and shared control of litigation.[192]

At a higher level of generality, the contractual dynamics between funders and funded entities in the commercial market replicate a familiar pattern in law and political economy: the tension between those who provide capital and those who deploy it. The master-servant

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[189] *See* Wendel, *supra* note 114 (arguing that claimant's delegation of control to a funder raises no independent duty in legal ethics, and is best addressed, if at all, through contractual good faith and fair dealing); Sebok & Wendel, *supra* note 56 (arguing that commercial litigation-investment agreements are best governed as relational contracts, not through regulation or tort liability).

[190] Anthony J. Sebok, *Some Realism About Litigation Finance* 48–50 (unpublished manuscript), https://ssrn.com/abstract=5634370.

[191] *See* Steinitz, *supra* note 31, at 1322 (The solution "may require . . . imposing certain fiduciary duties on the funder."); Parikh, *supra* note 63, at 64 ("Proposals may focus on . . . imposing fiduciary duties on financiers.)

[192] Some states turn to implied duties of good faith and fear dealing to police matters; others impose fiduciary duties between the insurers and the insured. *See, e.g.*, Wendel, *supra* note 114; Silver & Hyman, *supra* note 114.

relationship, long a foundational construct in agency law, provides a useful, if imperfect, analogue. Here, as in other contexts, the critical regulatory question is not whether the relationship should exist, but what duties, constraints, and default rules should govern the exercise of authority within it.

This split among scholars begs questions about whether particularized features and dynamics of funded civil litigation through contract may (or may not) call for heightened protections and potential mandatory rules, even within Category-1-type contractual relationships. Specifically, on the one hand, even sophisticated corporate entities enter a civil justice system characterized by substantial and asymmetric costs, informational asymmetries, and risk[193]—not to mention potential day-to-day financial and cash-flow demands. Were this not so, the market for litigation finance would have few customers. It is both an empirical and theoretical question whether these dynamics, where claimants depend on financing provided by funders, translate into the sort of systematic imbalances in contractual dealings that warrant protectionist interventions within the Category-1 landscape, when both parties are sophisticated entities capable of making rational decisions before entering into funding agreements.[194] As an empirical matter, there is simply too little information regarding the extent to which sophisticated entities seek litigation funding because of financial need as opposed to, say, the desire for liquidity and/or risk sharing.[195]

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[193] *See generally, e.g.*, Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change,* 9 LAW & SOC'Y REV. 95 (1974); Glover, *supra* note 119; Engstrom & Stone, *supra* note 22*;* Glover, supra note 22.

[194] *See* Schwartz & Scott, *supra* note 183, at 553–54.

[195] Early accounts suggest the latter is more prevalent, but studies are nascent and data is scarce. Glover, *supra* note 36, at 105 (noting the limits of past scholarship on third party litigation funding, namely that the data used for a prominent study came from a single firm). This reliance on a single source creates an inherent selection bias, particularly as the "growth of the industry seems to have outpaced the access and time required for data collection and study." *Id.* at 84. And this is to say little about whether such dynamics are sufficiently similar, or not, to insurance on the defense side, to justify protectionist approaches.

To the extent even Category-1 funded entities for litigation finance arrangements are systematically financially impecunious at the time of contracting (a possible categorical distinction between the litigation finance and the insurance market, by the way), that might suggest a need for protections above and beyond implied duties and self-help remedies of, say, firing counsel and/or bringing separate actions against a funder.[196]

On the other hand, and perhaps counter-intuitively, the nature and dynamics of the civil litigation landscape suggest potential systemic imbalances in the funder-funded relationship in Category-1-type-scenarios that disfavors funders in ways that call for something less than a fully laissez-faire approach. Assumption of risk in funded litigation stems from the nature of the collateralizing assets (e.g., litigation outcomes), and places into tension the funder's interests and those of the funded entity. Generalized duties of good faith may therefore be insufficient to protect funders against the risk that a funded entity will breach by way of impairing the assets, having either insufficient "skin in the game" by virtue of the nature of funding arrangements themselves, or having insufficient incentives to vigorously pursue meritorious claims through the adversarial relationship with the defendant in litigation—a defendant who may also be in a cooperative, business relationship outside the litigation (indeed, this is the situation that the law of antitrust frequently sets up). To the extent these exigencies—if present, if systemic—require contract law to provide more robust regulation of the funder-funded relationship here, the funder-funded enterprise is potentially analogous to a temporary joint venture, and thus better approached by way of the law of business venture contracts.[197] In business-venture-contract law, the fiduciary duty of

[196] *Id*. at 103 (noting the "novel structures" for litigation funding used in the protein antitrust cases). *See also Our Approach*, LEGACY LIABILITY, https://legacyliability.com/our-approach (last visited Jan. 15, 2026).

[197] *See generally, e.g.*, Andrzej Burzynski, *The Concept of a Joint Venture and the Legal Context for Joint Ventures in CMEA Countries*, 5 FL. J. INT'L LAW 183 (1990).

loyalty stabilizes the possibility of misaligned interests and requires that joint venturers must work for the goal of the venture and avoid self-dealing vis-à-vis that venture.[198] Of course, such protections would be reciprocal: As a matter of contract law along these lines, any fiduciary-type duties would apply to both parties to the relationship. If a contract risks the claimant being unduly pressured, contract law can and should be responsive to that pressure here, as elsewhere.

As a regulatory matter, recruiting modern relational approaches to contract as an ally in litigation finance gives judges and lawmakers much more in the way of law to work with for the funder-funded relationship—usually, that will be contract law. The emphasis here is on law—not mere contract; giving claimants the power to cede control via contract, for instance, does not mean we throw claimants to the proverbial wolves. Contract law—far from being the "wild west," especially in business-to-business contracts—can be recruited as a regulatory ally in policing core civil justice concerns in litigation finance regarding conflicts and claimant oppression while also permitting some degree of claimant sovereignty. Further, it provides room for judges to supervise funded litigation without conflating the obligations of attorneys to clients with the obligations between the funder and funded entity, and without conferring unfair advantage to the defendant along the lines of the adversarial relationship with the claimant.

4. Relational Structure and Dynamics in the Consumer Litigation Finance Market

Viewed through the lens of the vastly different dynamics of contractual relationships across these categories, "old" civil justice questions about conflicts, control, and judicial supervision in the "new" litigation finance implicate concerns in contract law and theory about claimant oppression, particularly within Category 2, 3, and 4-type contractual arrangements. For the sorts of litigation finance arrangements that resemble payday-loan agreements between a highly

[198] *See, e.g.*, *Duty of Loyalty*, Legal Info. Inst., https://www.law.cornell.edu/wex/duty_of_loyalty.

sophisticated entity and an ordinary individual, the common view in contract law that "parties exercise bargaining power by requiring weaker contracting partners to take unfavorable terms"[199] will tend to hold true. Indeed, the relative weakness of the consumer claimant in this market likely calls for more stringent scrutiny of and protections within that claimant's relationship with an attorney.

At a high level of generality, the funder-funded relationship in the consumer realm ought to be governed by more protectionist law in and around contract law, rather than treated as arms-length, negotiated contract. Moreover, the judge's relationship with the funded consumer claimant ought to be one of transparency[200] and protectionism—an implication that has import for civil-justice contracts more broadly.[201] (Indeed, whatever else one might think about the value of

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[199] *See* Schwartz & Scott, *supra,* note 183, at 554 (using § 2-302(1) of the UCC as a mode of regulatory intervention into contract interpretation and enforcement flowing from this premise about bargaining power).

[200] *See infra* Part III.B. (applying this Article's relational framework to disclosure debates in legal finance, and discussing the integration of this Article's regulatory directives for legal finance arrangements with the judge's need to obtain *in camera* disclosures).

[201] Schwartz & Scott, *supra,* note 183, at 546 (noting that cognitive error and the creation of negative externalities are more likely to occur as a result of contract between unsophisticated actors). There is a robust body of scholarship regarding the existence and effects of power imbalances in the realm of consumer contracts, and what the law could or should do about them. *See, e.g.*, Hanoch Dagan and Michael A. Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 JERUSALEM REV. OF LEGAL STUD. 148, 151 (2019) ("Inalienability rules are premised . . . not only on a response to contingent (and surely important) welfarist reasons. [T]hey are based also . . . on the commitment to self-determination"); Oren Bar-Gill, *Choice Theory and the Economic Analysis of Contracts, 20* JERUSALEM REV. OF LEGAL STUD. 79, 85–86 (2019); Ohad Somech, *The Uneasy Move from Autonomy to Alternatives: Self-Determination, Regret, and the Process of Autonomous Choice*, 20 JERUSALEM REV. OF LEGAL STUD. 133, 145 (2019); Oren Bar-Gill and Omri Ben-Shahar, *Optimal Defaults in Consumer Markets*, 45 J. LEGAL STUD. S137, S137-38 (2016); HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017); Oren Bar-Gill, *The Behavioral Economics of Consumer Contract*, 92 MINN. L. REV. 749, 750 (2008) ("[I]n certain markets, consumer mistakes and sellers' strategic response to these mistakes are responsible for a substantial welfare loss, potentially justifying legal intervention"); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations on the ALI's Law of Consumer Contracts*, 78 U. CHI. L. REV. 165, 165–66 (2011); Lucian A. Bebchuk

claimant autonomy to sell an equity stake in their claims more generally,[202] the typical take-it-or-leave-it consumer contracts in the civil justice landscape are not characterized by any real notions of consent[203]). And this is to say nothing of the depression (or elimination) of claim value by way of such market oppression,[204] whatever value might have been exchanged between the stronger party—who extracts what they can—and the weaker–who suffers what they must. That is not claimant "self-determination;" that is claimant exploitation.

& Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828–30, 833–34 (2006); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 679–81 (2004). This Article does not enter these debates—the more modest points are one, there are numerous theories justifying restrictions on consumer contracting for claim alienation, and two, the entry of litigation finance into the landscape highlights and adds a new dimension to questions for theorists and scholars at the particularized intersection of contract theory and law for consumer contracts *for* legal rights and claiming architecture. *See e.g.*, Florencia Marotta-Wurgler & Samuel Issacharoff, *The Hollowed-Out Common Law*, 67 UCLA L. REV. 600, 636 (2020) ("When dispute resolution is privatized so that no published legal rulings ensue, this process of creating law as a public good is potentially arrested."); Resnik, *supra* note 185, at 2811 ("the Court's expansion of the FAA—diffusing disputes through outsourcing to deregulated and variable processes—strips individuals of access to courts to enforce state and federal rights, strips the public of its rights of audience to observe state-empowered decision makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries"); Glover, *supra* note 35; *see also generally,* Glover, *supra* note 22 (tracing the ineffectiveness of disclosure requirements in forced arbitration agreements, given the absence of competition in the realm of take-it-or-leave-it contracts, the lack of consumer contractual sophistication, and lack of term salience of dispute-resolution provisions).

[202] Michael B. Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 701 (2005) ("consider[ing] the normative question of whether legal claims generally should be alienable."); Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 834, 838 (2015) (stating "arguments against the sale of party control based on the structure or nature of the common law are anachronistic" and that "courts have permitted parties to give up control over their claims in litigation and have not blocked the party's choice because it violated a formal legal value intrinsic to the law known as party control"); Glover, *A Regulatory Theory of Legal Claims, supra,* note 148, at 221 ("In litigation finance, individual-autonomy conceptions are critical to access"); *see also* Linda S. Mullenix, *Competing Values: Preserving Litigant Autonomy in an Age of Collective Redress*, 64 DEPAUL L. REV. 601 (2015) (proposing the adoption of the opt-in principle to balance autonomy and collective redress). *But see* Mullenix, *supra* note 35, at 445 (calling for a prohibition of litigation finance in class actions).

[203] *See, e.g.*, Levitin, *supra* note 183.

[204] *See generally, e.g.*, Abramowicz, *supra* note 202.

Unlike a robust law for commercial contracts, however, there is much less in the way of current law and jurisprudence for policing contractual oppression that also accounts for both the ubiquity and necessity of adhesive agreements, a problem the recently published Restatement of Consumer Contracts highlights up front.[205] There are other reasons, however, that contract law may not be the best (or at least not the only) lens through which we engage the claimant-funder relationship in the consumer market. This is in no small part because the ex post orientation of contract law may insufficiently address concerns about oppression as a matter of civil justice dynamics. Indeed, the law of consumer contracts–whatever its content–cannot and frequently does not enforce itself in a civil-justice world in which the very consumers who need litigation finance to afford primary litigation would be required to fund additional contract disputes (a problem only exacerbated by the ubiquity of forced arbitration provisions, as I have traced extensively in other work[206]).

Importantly, policing potential conflicts between an unsophisticated claimant and a funder by way of disclosures and remedies to defendants creates new agency problems and regulatory mismatches: Funded claimants in the consumer market are already impecunious and unable, without assistance, to pursue their claims against defendants. Providing avenues for adversarial advantage and remedy to defendants for conflicts within the funder-funded relationship further penalizes those impecunious claimants for being impecunious. These sorts of consumer arrangements in litigation finance—like other consumer arrangements in civil justice—call upon judges, lawmakers, and scholars to theorize and construct ex ante guardrails, in consumer contract

[205] *See, e.g.*, Levitin, supra note 183.
[206] Glover, *supra* note 35.

law or elsewhere, to police systemic power imbalances.[207] In the absence of such correctives, and against the current backdrop of the near-wholesale elimination of consumer access-to-justice by way of a contract jurisprudence that inverts both the structure and implications of modern strains of contract theory drawn along these relational lines, this Article's framework for approaching funded litigation in the consumer market would, at a minimum,[208] amplify calls about the need for development of law at the intersection of contracts and civil justice generally, and contracts and civil litigation finance in particular,[209] to address core concerns about conflicts and claimant oppression. It is worth noting that one state–Utah–has just recently taken strides in this direction, and along the trendline of modern contract theory: In March of 2026, the Utah legislature passed House Bill 280 to regulate third-party litigation funding through a bifurcated approach, separating consumer and commercial agreements, mandating strict guardrails for consumer funding agreements to protect against consumer oppression on the one hand, and allowing for relatively large contractual leeway in the commercial sector.[210]

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[207] Professors Heller and Dagan, for instance, have suggested the need in contracts for choices among pre-packaged contractual arrangements. *See* Dagan & Heller, THE CHOICE THEORY OF CONTRACTS, *supra* note 201, an idea that intersects with Dagan and Dorfman's "just relationships" theory of contracts. *See infra* Part III.B. There is robust debate among theorists regarding the *purpose* of contract law. *See generally, e.g.*, Ian Ayres & Gregory Klass, INSINCERE PROMISES: THE LAW OF MISREPRESENTED INTENT (2005).

[208] *See infra* Part IV (tracing relational-framework implications for disclosure and judicial supervision).

[209] Contract scholars operating within relational frameworks take different views; I leave those first-order debates with them. *See, e.g.*, Zamir & Ayres, *supra* note 45; *see also infra* III.A (accepting room in Category-1 contractual interpretation for a judge to read into contracts a duty of good faith).

[210] H.B. 280, 2026 Gen. Sess. (Utah 2026). The protections guaranteed by the law include explicit rights disclosures, a guaranteed right to rescind, and a non-recourse structure ensuring consumers only pay from their court awards. *Id.* Additionally, a lawyer must represent the consumer for the agreement to be valid. *Id.* For commercial contracts, the legislation takes a more laissez-faire approach. *Id.* It establishes three primary restrictions: banning funding from foreign entities of concern, prohibiting the sharing of sealed case information without court approval, and preventing funders from controlling the litigation. *Id.*

Normatively, the problem is that the case for claimant autonomy to access litigation finance is in many ways more compelling, as an access-to-justice matter, in the consumer context. Along these lines, an important contribution of this Article's relational framework is to reveal that, in the United States at least, litigation finance ought to be situated within and understood as implicating one of modern civil justice's greatest ironies: How easily and expansively our civil justice system permits the waiving of rights, both procedural and substantive, through contracts of adhesion, by litigation's most disempowered entities (such as consumers and employees), [211] while simultaneously stepping in to prohibit some of the most empowered bargaining entities, as litigants, from contracting about their claims to manage risk, obtain liquidity, or otherwise. In both instances, the consequence (and as civil procedure scholars have unearthed in these and other contexts, the intent) is to hinder access-to-justice and private rights vindication.[212] This Article's

[211] As with its clinging to ancient common-law doctrines, the United States is the outlier, globally. Forced arbitration agreements, such as those in employment contracts, aren't enforced by most other countries; in contrast, lit finance is to be regulated with a "light touch," and trending towards differentiation in the market segments taxonomized in Part I here. *See* Zamir & Ayres, *supra* note 45, at 309 (observing that "[m]andatory rules are significantly less common in the United States than in many other countries . . . in the area of labor and employment law"); Civil Justice Council Review of Litigation Funding *supra* note 43, at 7. Of course, the U.S. civil justice system may be viewed as unique in other regards—plenary discovery, opt-out class actions, and juries. Ware, *supra* note 45, at 906 (identifying "(1) The civil jury, (2) Opt-out class actions, and (3) Extensive discovery" as "peculiarities of civil litigation in the U.S.")

[212] *See* Andrew D. Bradt, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 876–77 (2017) (quoting Letter from William H. Becker, Judge, U.S. Dist. Court for the W. Dist. of Mo., to Edwin A. Robson, Judge, U.S. Dist. Court for the N. Dist. of Ill. (Oct. 26, 1964) (on file at the National Archives at Kansas City, Records of the Administrative Office of the United States Courts, Record Group 116), in which Judge Becker argues that defense counsel opposed coordination in hopes that the "litigation would overwhelm the Courts and demonstrate the unworkability of the antitrust laws," and more broadly, to call into question the capability of judicial institutions in private law regulation). These historical precedents align with current developments in the complex litigation landscape that cast aspersions (now sometimes publicly) upon MDL judges, the MDL process, and the Article III branch to resolve mass tort cases. *See, e.g.*, *In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022); *In re* AEARO TECHNOLOGIES LLC, Debtor; *In re* Aearo Holding LLC, Debtor; *In re* Aearo Intermediate

relational framework, however, could chart something of a course forward in the subset of the market for consumer-finance agreements in which any given claimant agreement is simply one of many in an informal collective—a hybridized claim model of individualized and collective—as I discuss in the next sub-section.

5. Relational Structure and Dynamics in the Mass-Dispute Market and Hybrid Contexts

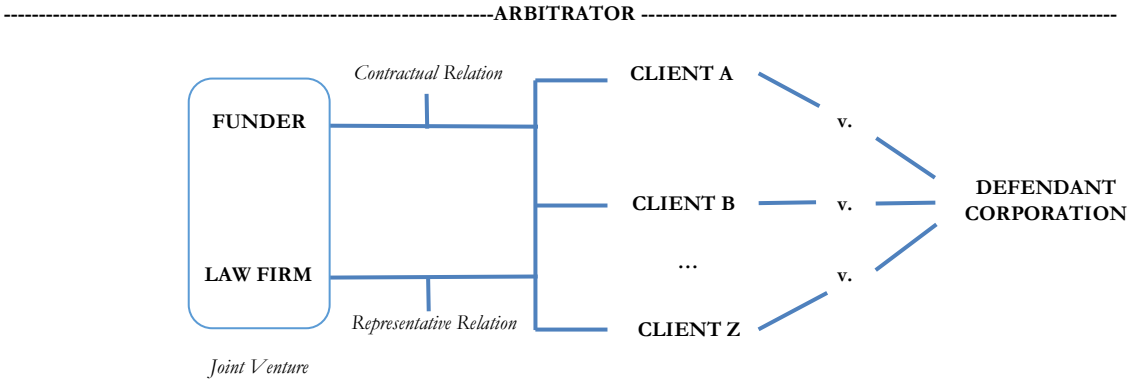
In the context of low-value consumer-type claims, the relationship between the claimant and funder is contractual as a formal matter; it is also, as a formal matter, representational—and, where counsel is present, fiduciary—vis-à-vis the attorney. But this is to miss, or even misunderstand, the nature of the funder-funded relationship, the claimant-attorney relationship, and the funder-attorney relationship in the context of low-value claims. In many such cases, however, claimants lack counsel altogether absent aggregation. To the extent the funder is in a contractual relationship with a consumer claimant, you would expect that contract to be one of many, organized and aggregated by attorneys (potentially in conjunction with the funder)–as Mavexar exemplifies. Low-value claims, however meritorious, however representative of "real money to real people," are rarely economically viable for attorneys (however procedurally operationalized as parts of a formal or informal aggregate).[213] This analysis focuses on the segment of the civil justice system in which resources are mobilized to pursue such claims. As I have modeled elsewhere, the claim-value threshold for economic viability, to attorneys, even for individual claimants part of a larger informal aggregate unit, is often high enough to exclude from

LLC, Debtor; *In re* Aearo LLC, Debtor; *In re* Aearo Mexico Holding Corp, Debtor; *In re* Cabot Safety Intermediate LLC, Debtor; *In re* 3M Occupational Safety LLC, Debtor., 2023 WL 11921506 (Debtors' Omnibus Objection to Motions to Dismiss Chapter 11 Cases) (Bankr. S.D. Ind. 2023).

[213] Glover, *supra* note 22, at 1384; *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1883 (2006); Coffee, *supra* note 35, at 1345.

the civil-justice system a vast percentage of consumer claims.[214] To overcome this economic barrier, these claims operate under a hybrid model of claiming that is "at once individualized . . . and collective."[215] Thus, and as a robust body of scholarship in civil procedure and complex litigation clarifies, the nature of the relationship between a consumer claimant and the attorney is less representational in any individualized conception of that term, but instead is, or at least

Figure 8: Mass Dispute Funding Arrangement:



additionally is, representative,[216] however procedurally operationalized.

As a civil-justice-business matter, moreover, funders are valuable directly to law firms to the extent they can enable increased capacity or take on the shared risk across a wide-range of formal and hybrid models of aggregate claiming (or both); they are valuable indirectly to claimants who otherwise may have been shut out of access to attorneys, compensation, or both. To the extent there is any conception of a "joint venture" here, it is properly understood to exist, at least as a functional matter, between the funder and the attorneys. Indeed, the new Alternative Business

[214] Glover, *supra* note 22, at 1354.
[215] *Id.* at 1381.
[216] *See generally*, Curtis & Resnik, *supra* note 67; Howard M. Erichson & Benjamin C. Zipursky, *Consent versus Closure*, 96 CORNELL L. REV. 265 (2011); J. Maria Glover, *Mass Litigation Governance in the Post-Class Action Era: The Problems and Promise of Non-Removable State Actions in Multi-District Litigation,* 5 J. TORT L. 3 (2012); Issacharoff, *supra* note 78.

Structure statutes in a handful of states recognize—and, with greater and lesser degrees of regulation—formalize this relational understanding.[217] Accordingly, whatever obligations and duties between the funder and firm in these claim models, the obligations and duties to claimants ought to be drawn, first, from well-established law and theory in complex litigation.

At this juncture, the critical importance of conceptual clarity about differentiation of various sub-markets for mass-dispute funding intersects with the conceptual clarity about different forms of aggregation in mass disputes provided in complex litigation scholarship. In formalized aggregate structures, and in particular class actions, counsel owe to claimants duties of loyalty and adequate representation as a matter of Constitutional due process.[218] The absence of individualized consent to settlement by class members places important pressure on these due process safeguards; along these lines, judges, acting as "fiduciaries" of the class, must ensure that structural safeguards against conflicts of interest between class counsel and class members are in place at class certification and remain in place throughout litigation.[219] Judges also must review class settlement agreements for fairness, and they exercise authority over the award of class fees. The formalized protections required by the class action mechanism create a context in which the relationship between a funder and a firm on the one hand, and claimants on the other, must operate transparently, at least to the judge and to the claimants, and be subject to judicial scrutiny to ensure

[217] *See supra* Part I.B.2

[218] FED. R. CIV. P. 23 (g)(4) ("Class counsel must fairly and adequately represent the interests of the class").

[219] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.")

compliance—certainly with Rule 23.[220] This comports with and provides regulatory pathways along the lines of the nature of the relationships this Article's framework for funded litigation conceptualizes.

Along these lines, therefore, the contractual relationship between the funder and funded law firm is distinct from the firm's representative relationship and duties to class members, but that contractual relationship is also subject to ongoing judicial supervision by the judge, who acts as a fiduciary to class members—including, where necessary, supervision of conflicts that emerge after settlement or resolution. Any contractual disputes between the funder and funded entity, then, would be resolved as a matter of contract law and theory for Category-1 type relationships; the Rule 23 overlay for the funding agreement would impose constraints on contract formation, interpretation, and remedies for breach when they would operate to the detriment of class members, whose interests cannot and should not be impeded by any disputes between the funder and firm.[221]

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[220] In jurisdictions that have not abandoned ethical prohibitions on fee-splitting between attorneys and lawyers, such prohibitions can be operationalized by way of structural separation between costs and attorney in funding agreements for class disputes under Rule 23.

[221] Rule 23 and the due process clause of the Constitution require that certain structural protections be imposed throughout the litigation to protect the interests of class members. Funding agreements in class-action litigation can and should be designed to provide structural protections. For example, and agreement might provide that any ultimate fee award be allocated along the lines of costs and expenses (for the funder) and fees for representation (for the attorneys), all subject to judicial supervision throughout Because funder and attorney award "pools" are kept separate, lawyers make independent litigation and settlement-related decisions, while making capital calls to funders who simply provide capital. Such structural safeguards, imposed at the outset of the litigation and supervised throughout by the judge, would help satisfy Rule 23's requirements while also enabling complex class actions to be funded and seen to resolution. And of course, the court overseeing the settlement maintain their authority and duty to override unreasonable awards to class representatives or their funders under Rules 23(e) and (h). *See* FED. R. CIV. P. 23(e)(2) ("If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate."); FED. R. CIV. P. 23(h) ("In a certified class action, the court may award *reasonable* attorney's fees.") (emphasis added). This scheme ultimately incentivizes funders to provide capital necessary for complex class actions to continue, especially those that require significant capital expenditure in the form of obtaining expert witnesses and

As a matter of contract formation, then, funding agreements for class actions could (and likely should) provide expressly that litigation and settlement decisions remain the sole province of class counsel; contractual fee structures ought to segregate attorney labor from capital provision. Importantly, though, precise percentage allocation of any eventual court-approved fee award need not—and ought not under Rule 23—be set in contractual stone ex ante: Whatever the ultimate contributions to a potentially successful class-wide resolution by the law firm on the one hand and the funder on the other would be determined by the actual demands and contours of the class litigation, which are at best imperfectly knowable ex ante. Just as a judge in a non-funded class action is not bound by class-counsel percentages set forth in any ex ante contractual agreement with claimants, a judge's allocation of fees between attorneys and funders at the conclusion of a class-wide resolution under Rule 23 should result from a careful review of the relative contributions of the contracting firm and funder to the class-wide result.[222] Any funding contract provision that purported to usurp the judge's supervisory authority would be unenforceable—not because the funder and firm are not sophisticated parties, but because no party, sophisticated or otherwise, has the power via private contract to rewrite Fed. R. Civ. P. 23.

Moreover, unlike in individualized litigation, representative litigation—formally or functionally—contemplates relational dynamics and structures in which it is entirely appropriate for claimants, claimants' attorneys, funders, and defendants to insist upon structural protections. To be clear, the defendant's interest here does not flow from binary conceptions of funding as

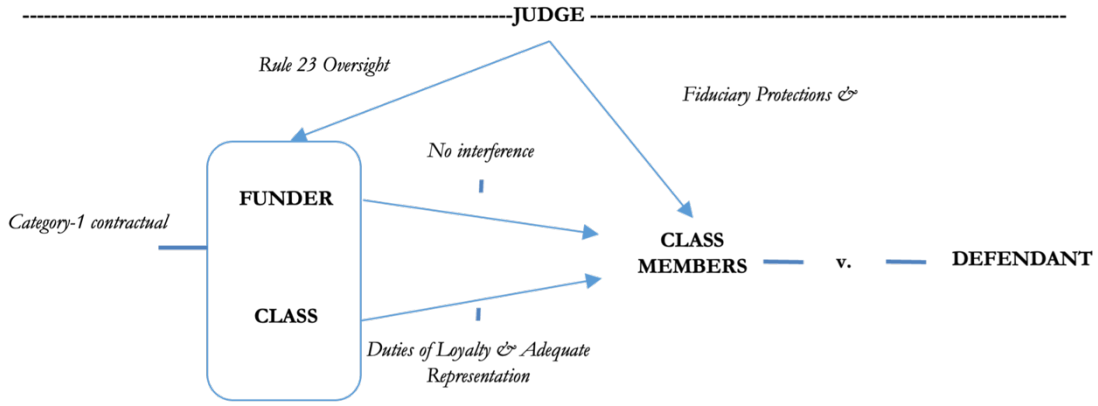
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processing an immense amount of discovered material. It also allows funders to invest without having to demanding contractual protections such as discretion to decline capital calls, which potentially threatens the ability for class members to pursue and resolve their claims.

[222] *See, e.g.*, Advisory Committee Note to Fed. R. Civ. P. 23(h) (2003) ("In a class action, a district court must ensure that the amount and mode of attorneys' fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.").

permissible or prohibited, and along the lines of a new adversarial relationship between the defendant and funder such binary frameworks impose, to the detriment of funded entities. Instead, the defendant's interest in structural protections flows from the long-recognized due process interest of class defendants in securing the finality and preclusive effect of class-wide settlements, including the reliable resolution and distribution of claims—interests not present in non-representative litigation.

Figure 9: Class Action Funding Arrangement:



The regulatory implications of this relational recharacterization—including its application to the most heated debates about conflicts, disclosure, and claim control in mass-dispute litigation finance—are developed in Part III.C., infra.

Finally, a brief word about what this Article terms "shadow markets" for claims-generation and resolution—markets characterized by the absence of meaningful connection to adjudicative processes, judicial supervision, or representative litigation structures. As I have explained in other work, and as I reiterated in Part I, markets for claim-generation in the realm of mass harm are neither new nor do they necessarily involve third-party funding. These shadow markets are largely beyond the scope of this Article; they are, however, conceptually important as a point of regulatory contrast, and their implications for volume-driven distortion of settlement values, claimant

oppression, and the outer limits of settlement's normative value are engaged directly in Part III.C.2., infra.

C. Key Implications and Core Contributions of the Relational-Institutional Framework

The relational–institutional framework conceptualized and constructed in this Part does the principal theoretical work of this Article and, in doing so, substantially advances the literature on litigation finance and civil justice, providing a coherent framework for judges, lawmakers, and theorists grappling with this significant civil justice actor. Several core implications and contributions follow. First, the framework reveals that prevailing approaches to litigation finance are driven by category errors—misapplying legal doctrines across distinct relational domains and thereby distorting both civil justice policy and the private law rules brought to bear. By restoring legal doctrines to their proper relational domains, the framework corrects these distortions and provides a more coherent basis for analysis and regulation.

Second, this Article's framework integrates, critically, the governing corporate law account of fiduciary duty into the analysis of investor-facing obligations in litigation finance. Properly specified, the funder–investor relationship is fiduciary and discretionary, not a mandate of transaction-specific profit maximization. By exposing and correcting a persistent mischaracterization in both the literature and policy advocacy,[223] this framework reshapes how

[223] Samir D. Parikh, *Crossing the Rubicon: Assembling a Litigation Colossus in Mass Torts,* 124 MICH L. REV. ONLINE 1 (2025) ("Nonattorneys are fixated on maximizing profits, regardless of the risk of disadvantaging clients."); U.S. Chamber, *Statement for the Record for the House Oversight hearing, "Unsuitable Litigation: Oversight of Third-Party Litigation Funding"*, (2023) ("[Third-party funding] prevents the client from reaching a resolution that is in their best interest because what is in their best interest does not maximize the profit that the third-party funder desires."); https://www.uschamber.com/lawsuits/statement-for-the-record-for-the-house-oversight-hearing-unsuitable-litigation-oversight-of-third-party-litigation-funding; However, the critique that funders will and must always prioritize profit maximization over preserving plaintiff autonomy and attorney ethics is a misconception, and a mischaracterization or misunderstanding of long-

concerns about claim control, disclosure, and the generation and resolution of claims at scale are understood and addressed across the relevant relational domains, as Part III will demonstrate concretely.

Third, in the commercial market and other Category 1–type arrangements involving sophisticated actors, the funder–funded relationship is properly understood as contractual, and existing bodies of contract law—applied with sensitivity to relational context—provide a substantial framework for addressing concerns about risk, control, and conflict. In the consumer market, that same framing reveals its limits, as asymmetries in information, bargaining power, and access to enforcement render contract law alone insufficient to address risks of claimant oppression calling for more protective, ex ante interventions by courts and lawmakers."[224] Consumer contract law has not yet fully developed (for litigation finance or otherwise), but it has substantial support in contract theory and in the directionality of contract law along relational lines. The regulatory task for courts and lawmakers in the consumer market, then, is not to prohibit but to develop—remaining attentive to the relational asymmetries that consumer funding agreements present.

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standing and established literature regarding corporate fiduciary duty. *See, e.g.,* STOUT, *SUPRA* NOTE 172 (describing the harms caused by shareholder primacy); Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008) (arguing that the maxim that corporations should always prioritize shareholder benefit maximization does not reflect actual corporate practice or reflect corporate law); David E. Schrader, *The Corporation and Profits,* 6 J. OF BUS. ETHICS. 589, 589 (1987) (arguing that "firms in the actual economy neither are nor should be maximizers of profit.")

[224] Courts operate primarily through ex post supervision of contractual relationships and enforcement of existing legal constraints, consistent with contract law's private enforcement structure. Where those mechanisms prove insufficient in the face of structural asymmetries in consumer-facing agreements, additional ex ante protections reflect a distinct regulatory choice rather than an extension of contract law itself. *See generally*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26–31 (1970) (distinguishing the market-based "general deterrence" approach, which relies on ex post liability and private litigation to allocate costs, from "specific deterrence," which utilizes collective ex ante regulations); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 153 (2002) (noting that "the need for tort liability as a deterrent has been diminished by the increasing use of regulatory controls by the state").

Fourth, at the intersection of the consumer and mass-dispute markets—an intersection this Article's grounding in civil justice and complex litigation scholarship elucidates—low-value claims typically operate within larger, informally aggregate structures, such that the operative relationships resemble coordinated or representative litigation and call for engagement with the tools and theory of complex litigation. In the mass-dispute market more broadly, the framework distinguishes between settings in which judicial supervision and procedural safeguards remain operative and those in which claim generation and resolution occur outside such constraints.

Fifth, and perhaps the most counterintuitive, implication of this Part's relational–institutional analysis emerges at the intersection of litigation finance and representative litigation. The counterintuitive payoff: while calls for prohibition on funding are most fever-pitched when mentioned in the same breath as class actions, this is precisely the wrong direction for regulation. If anything, creating a third-rail out of funding for class actions has driven funding into the shadows of more informal aggregate litigation structures with less established mechanisms of judicial control ex ante and ex post, or off the litigation and judicial grid altogether.

In sum, the relational–institutional framework reconceptualizes litigation finance within civil justice and provides the framework for grappling with it at the level of core civil justice concerns. It does so by orienting analysis around the critical relationships it introduces—among claimants, funders, attorneys, defendants, and courts—and the institutional settings in which those relationships operate. It restores legal doctrines to their proper domains, clarifies the duties and obligations within those relationships, and situates those insights within the litigation contexts in which they arise. In doing so, it shifts the analysis of litigation finance from a largely acontextual question of permissibility to one of alignment—among relationships, governing laws, and institutional settings in civil litigation. Together, this framework provides pathways for scholars,

judges, and lawmakers to engage litigation finance at the level of its central problematics. Finally, it grounds debates over disclosure, claim control, and the generation and resolution of claims at scale in questions of relational alignment, institutional setting, and the conditions that tether claim production to claimant fairness and claim merit. Part III takes up those debates directly.

III. RECASTING CENTRAL DEBATES IN LITIGATION FINANCE: APPLYING THE RELATIONAL-INSTITUTIONAL FRAMEWORK

The foregoing establishes a relational-institutional framework for understanding litigation finance and situating it within the broader structure of civil justice. This Part applies that framework to three central and recurring debates in litigation finance—disclosure, control, and volume. Each of these debates has been shaped by the same basic constraint: Analysis has proceeded along the binary of permissibility and prohibition, rather than by reference to the relationships and institutional settings in which the relevant civil justice concerns arise.

Viewed through the relational framework developed in Part II, these debates take on a different form. Questions of disclosure are revealed as questions about the proper relational domain of transparency obligations and the preservation of adversarial norms. With the litigation finance market now differentiated, questions of control are recast as questions of claimant autonomy, contractual counterparty risk management, and the limits imposed by the civil justice system on private ordering. And concerns about volume and mass-dispute litigation are clarified as questions of market equilibration, institutional setting, and the conditions that can and should tether settlement value and claim merit.

The analysis proceeds in three parts. Section III.A engages debates about disclosure, demonstrating how undifferentiated transparency mandates misallocate relational obligations and generate adversarial distortions. Section III.B turns to questions of claim control, distinguishing

between control as a contractual mechanism for managing counterparty risk and control as a feature of initial exchange, and situating both within broader frameworks of private law and civil justice. Section III.C addresses concerns about mass-dispute litigation and claim generation, showing how these concerns are not unique to litigation finance but are sharpened by it, and how existing institutional structures—including class actions—provide more coherent regulatory pathways than those currently proposed. Section III.D then distills the key implications of this analysis and clarifies some limits of the framework, including where further development is needed in law and theory.

A. Disclosure: Relational Domains, Adversarial Equity, and the Proper Role of Transparency

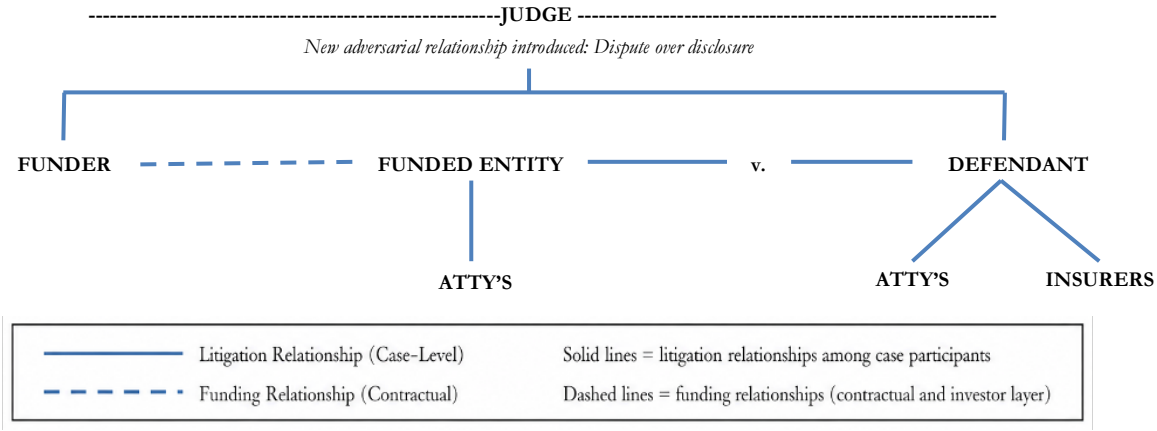
Properly understood, debates about disclosure in litigation finance are best approached through the relational framework developed here, which clarifies where transparency can be most useful and how disclosure obligations can be aligned with the civil justice concerns they are meant to address. This analysis proceeds on the properly specified account of investor-facing obligations developed in Part II. Concerns about conflicts and funder control underlie much of the fervor behind constant calls for litigation-finance disclosure requirements. But many judicial disclosure orders, as well as various legislative enactments and proposals, operate along the lines of the binary of permissiveness and non-permissiveness of litigation finance, unmalleable to the nature of the underlying contractual relationships involved. For instance, the conventional mechanism at Judge Connolly's disposal for getting at concerns about claimant oppression in Nimitz was to issue a broad disclosure order under Fed. R. Civ. P. 7.1—the sort of order that tends to function as a de facto prohibition on litigation finance.[225] Defendants, of course, are themselves subject to disclosure obligations in a range of contexts, including under Rule 7.1 and, in bankruptcy

[225] *See infra* Part III A.

proceedings, through far more expansive financial disclosures that are designed to surface ownership, control, and financial interests relevant to the court's oversight. Yet those disclosure regimes operate within established relational and institutional settings—most prominently, the debtor–creditor and court–supervised restructuring context—and do not create a new adversarial relationship between a non-party capital provider and an opposing litigant.

This is because such disclosure orders and requirements, currently constituted, generate disputes between, and impose a previously non-existent adversarial relationship upon, the funder and the defendant, as the following model illustrates:

Figure 10: New Adversarial Relationship by Way of Disclosure Dispute



Along the lines of this new adversarial relationship, defendants succeed in disclosure disputes narrowly and in the overall funded litigation broadly in two ways: First, by winning the disclosure dispute, defendants may obtain from the funder and funded entity information that would otherwise be protected as core work-product—e.g., the impressions and evaluations of the claims themselves, including their strengths and weaknesses, and all the (unfair) adversarial advantages such work-product confers.[226] Second, defendants win disclosure disputes before they

[226] *See* J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 925 (2016).

win them: Funded claimants are funded because they cannot afford litigation; even the prospect of a lengthy disclosure dispute between the defendant and the funder—who must pass those costs to the impecunious claimant—often functions as a kill-shot to litigation finance, or at the very least, as a significant one-way tax on funded litigants.[227] In neither case does the newly introduced adversarial relationship respond directly to possible conflicts of interest between the funder and the funded entity like those that were revealed in Nimitz.[228] At the same time, they tend to undermine undesirable adversarial norms and protections at the core of our system of civil justice.[229] Viewed in this way, disclosure questions resolve into a more precise inquiry: along which relationship should transparency obligations run, and what civil justice concerns are they meant to serve.

In this regard, this Article's relational framework grounds free-floating debates about the disclosure of litigation finance arrangements. Disclosure mandates, currently constituted, feed litigation finance arrangements to the yes-or-no frameworks of permissibility, or not. Alternatively, these mandates function as the regulatory prohibition. These realities explain the heated, and often intractable feel, of ongoing debates about disclosure in funded litigation. This Article's theory recasts existing disclosure debates, which are best understood, fundamentally, as debates about prohibition versus permission. Free-floating disclosure requirements, insensitive to

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[227] *Id.*

[228] *See, e.g.*, Connolly Standing Order, *supra* note 64.

[229] *See generally*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (1st ed. 2001) (describing the outsized role of adversarial litigation in the implementation of policy and realization of rights in the United States); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 441 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2010) (describing the role of lawyers and jurists as core to the American political system; "There is hardly any political question in the United States that sooner or later does not turn into a judicial question."); Hickman v. Taylor, 329 U.S. 495 (1947) (recognizing the work-product doctrine); Glover, *supra* note 226, at 915–22 (describing concern for the adversarial system as lying at the "heart of the work-product doctrine").

the different types of relationships involved in funded litigation, tend to discourage transparency.[230] Nor are such mandates meaningfully symmetrical: defendants are not required to disclose litigation budgets, internal valuations, or the strategic deployment of hourly resources, even though those inputs may bear directly on settlement dynamics and adjudicative posture.

Theoretically, information generated by disclosure mandates could be used by judges, lawmakers, and scholars to better understand and respond to this new civil justice actor. However, unguided by any theoretical framework either for crafting disclosure mandates or for grappling with any civil-justice concerns those disclosures reveal, the result has been a series of disclosure orders that either generate a lot of information, but function like a broad legal-finance prohibition,[231] or which generate almost no information at all.[232] For example, the District of New

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[230] Among scholars and lawmakers, it is asserted over and again that broad-sweeping disclosure is needed to generate comprehensive datasets for empirical study and to provide information so that regulatory frameworks for grappling with legal finance can be formulated. *See, e.g.*, Avraham & Sebok, *supra* note 55; Avraham, Sebok & Shepherd, *supra* note 94; Litigation Funding Conference in Tel Aviv, *supra* note 83; State Legislative Approaches to Litigation Funding Conference, N.Y.U. School of Law (Fall 2024). The former is undoubtedly true: Datasets that form the basis of existing empirical studies are far from comprehensive; they are just the most we currently have. Glover, *supra* note 36, at 105. On the latter, I take nearly the opposite view: Judges need a more nuanced set of choices about what to *do* with legal finance arrangements, once disclosed—not just regarding the fact of them, but also regarding the provisions within them.

[231] *See* Connolly Standing Order, *supra* note 64.

[232] For example, starting in 2017, the Northern District of California required in its district-wide standing order that parties disclose "[n]on-party [i]nterested [e]ntities or [p]ersons" in "any proposed class, collective, or representative action." N.D. Cal. Civ. Loc. R. 3-15. *See also*, Fitzpatrick, *supra* note 66, at 117. This order's focus on class actions operationalizes the generalized fear, expressed by scholars and interest groups, that the new legal finance industry would enter the United States landscape much as it did in Australia—by way of class actions. *See, e.g.*, Parliament Austl., Joint Comm. on Corps. & Fin. Servs., Litigation Funding and the Regulation of the Class Action Industry (2020); Mullenix, *supra* note 35, at 445 (calling for prohibition of legal finance in class actions); U.S. Chamber Inst. for Legal Reform, Submission to the Australian Law Reform Commission, Inquiry Into Class Action Proceedings and Third-Party Litigation Funders, https://www.alrc.gov.au/wp-content/uploads/2019/08/44_us_chamber_institute_for_legal_reform.pdf (last accessed Jan 10, 2026); Ben Hancock, *New Litigation Funding Rule Seen as 'Harbinger' for Shadowy Industry*,

Jersey in 2021 issued a local disclosure rule applicable to all litigants before the court, which was aimed largely at uncovering the presence of legal-finance arrangements in large mass-tort actions against Johnson and Johnson.[233] The New Jersey disclosure order was searching for information in the wrong place—specifically, along the lines of a potential contractual relationship between an individual claimant in a large aggregate dispute on the one hand, and a funder on the other. Notably, it did not mandate disclosure of arrangements along the lines of the contractual relationship one would expect in a representative mass-tort scenario—that between the funder and the law firms representing those individual claimants, a point about the need for robust approaches to relational conceptions made above.[234] The results of this Article's original, comprehensive manual study of all responses to that broad order in In re Johnson & Johnson Talcum Powder were striking: The order generated almost no disclosures of funding agreements.[235] The current wave of federal transparency legislation introduced this year takes similarly undifferentiated approaches; the result is a combination of both under-inclusive and over-inclusive proposals.[236]

THE RECORDER (Jan. 25, 2017, 2:55 AM) https://www.law.com/article/almID/1202777609784/. *See also, e.g.*, Issacharoff, *supra* note 26, at 563. The particular dynamics of the class-action landscape *in the United States*, though, is rather hostile to the entry of legal finance—which made such a development unlikely. *See* Fitzpatrick, *supra* note 66, at 120; Glover, *supra* note 36, at 90. It is possible that this disclosure order, limited to the class-action context, represented a regulatory choice of permissiveness vis-à-vis legal finance. Whatever the regulatory intent (or lack thereof), this disclosure order has not yet uncovered a noteworthy case.

[233] D.N.J. Civ. R. 7.1.1. *See* Alison Frankel, *New Jersey Now Has a Sweeping Lit Funding Disclosure Rule. Does it Matter?*, REUTERS (June 23, 2021), https://www.reuters.com/legal/transactional/new-jersey-now-has-sweeping-lit-funding-disclosure-rule-does-it-matter-2021-06-23/.

[234] *See supra* Part II.

[235] *See* Glover, *supra* note 36, at 106.

[236] Current federal transparency proposals repeat the regulatory failures discussed *supra* Part I.B by imposing undifferentiated blanket disclosure mandates. For example, the Protecting TPLF From Abuse Act, supra note 81, requires disclosing funding agreements to all parties, exempting only privileged information. Policing the boundaries of these exemptions inevitably spawns costly satellite litigation, severely deterring under-resourced plaintiffs. Similarly, proposals to amend

Notably, these approaches focus almost exclusively on the financing of plaintiffs, without comparable attention to the financing, budgeting, and resource deployment of defendants, despite the similarly consequential role those inputs play in shaping litigation dynamics and outcomes.

Moreover, while transparency tends to sound like a good thing, nothing about disclosure itself gives judges any guidance about what to do with information, once disclosed.[237] Specific features of the civil-justice landscape generally, and the adversarial relationship between the claimant and defendant, are additionally instructive. Where disclosure mandates are needed—either to police potential claimant oppression or to place before the court the entity with ultimate settlement authority in cases, particularly those involving B2B arrangements—such mandates should not orient around the adversarial relationship between claimant and defendant, much less a newly created adversarial relationship between the defendant and funder created by the disclosure dispute itself. Attempts at disclosure of litigation finance arrangements by way of the wrong relationship—the claimant and the defendant—replicates the regulatory binary through yet another civil-justice procedural rule, a gambit many judges now see through.[238] Disclosure flowing from, and in service of, regulation along the line of the contractual funding relationship, however, does not risk

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Rule 26(a)(1)(A) to mandate automatic disclosure constitute a structural category error. *See* Lawyers for Civil Justice & U.S. Chamber Inst. for Legal Reform, Rules Suggestion 26-CV-8 (Mar. 10, 2026). Using adversarial discovery tools to police a collateral contractual relationship invents disputes where none naturally exist, granting defendants a procedural windfall detached from the merits. Fact-specific circumstances may independently merit disclosure, but only when rooted in substantive allegations rather than the mere presence of a funder. *See* Lituma v. Liberty Coca-Cola Beverages LLC, 246 N.Y.S.3d 336, 338 (App. Div. 2025) (upholding disclosure where defendants affirmatively alleged plaintiffs conspired to fabricate the underlying accident).

[237] *See also* Parikh, *supra* note 43; Glover, *supra* note 36. *See generally* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011) (arguing that mandated disclosure "chronically fails to accomplish its purpose").

[238] *See,* Design with Friends, Inc. v. Target Corp., 2024 WL 4333114, at *2 (D. Del. 2024) (citing Glover, *supra* note 226 (theorizing adversarially generated disclosures in legal finance as in tension with the foundations of the work-product doctrine, and listing cases exploring the matter along these lines)).

imposing the same adversarial consequences: It does not constrain judges to regulatory choices between transparency versus adversarial-norm-protection narrowly, nor prohibition versus permission of litigation finance more broadly.

Viewing the problem of disclosure through a relational framework, then, one lesson for the courts, lawmakers, and procedural rule-makers would be to steer away from disclosure orders or rule amendments that flow through adversarial mechanisms like Fed. R. Civ. P. 26,[239] which facilitates the potential policing of civil-justice concerns along the lines of the funder-claimant relationship indirectly, by way of eliminating core adversarial protections inequitably at the expense of the funded claimant.[240] Another is that disclosure tailored along non-adversarial lines should likely be made in camera. This approach promotes transparency by removing the potential for disclosure to be used as a Trojan Horse for prohibition, or as an end-run for around foundational adversarial norms in civil justice.[241]

B. Claim Control: Contract, Claimant Autonomy, and Managing Counterparty Risk

[239] The chief adversarial mechanism here, at least in the federal system, is Fed. R. of Civ. P. 26, which institutionalizes the foundational commitment to adversarialism set forth in Hickman v. Taylor, 329 U.S. 495 (1947).

[240] Glover, *supra* note 226, at 912.

[241] To be very clear, though, nothing about this Article's suggested regulatory framework would prevent judges interested in obtaining disclosure from doing so. When approached by way of this Article's relational framework for legal finance, there can be—indeed, ought to be—some non-insubstantial level of disclosure of legal finance arrangements. For instance, this Article's framework would not prevent judges from using mechanisms like Orders under Rule 7.1 of the Federal Rules of Civil Procedure, covering "disclosure statements." Fed. R. Civ. P. 7.1. Rule 7.1 disclosure orders are not inherently adversarial; they need not create pathways for disclosure demands by the defendant. Instead, Rule 7.1 operates along the lines of the relationship between the judge and the contracting parties. Any potential conflicts within one or more of those relationships—say, the judge has a financial interest in one of the entities with involvement in the litigation; or there are fractures along the lines of the relationship between the funder and the funded entity—are separate and apart from any claims or defenses a defendant might have, under ancient champerty prohibitions or otherwise.

A central civil justice question in litigation finance is about funder control of litigation, and relatedly, about the prospect of litigant autonomy, on the claimant's side, to share or cede control of claims to a funder.[242] Once the funder–investor relationship is understood as fiduciary and discretionary rather than transaction-specific profit maximizing, concerns about funder control take on a different character. Thus, the relational framework developed here, together with the realities of the civil justice business in the commercial market, clarifies that these debates are not about control in the abstract, but about the contractual allocation of decision-making authority and the limits the civil justice system places on that allocation. Indeed, the Mavexar example raised—but did not engage—these questions. The question of control is among the most controversial—if not the most controversial—posed by the entry of litigation finance into the civil justice landscape.[243] The common view, asserted by judges and scholars alike, is that whatever else litigation finance can do, it can never inject into litigation any modicum of control by the funder,[244] under the rules of attorney ethics, the general civil justice policy favoring settlement, contract doctrines of unconscionability, and/or champerty prohibitions.[245]

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[242] *See supra* Part II.

[243] As a preliminary matter, it is important to distinguish the level of *controversy* about funder control in civil litigation from its *prevalence.* At least in the commercial market, the (admittedly limited) empirical evidence of commercial funding arrangements reveals that funders do not want, nor seek, control over litigation and settlement decisions. *See* Sebok, 202, at 892 n.273 (observing that "commercial litigation investment funders do not seek enforceable contract rights to control major aspects of the litigation they fund.")

[244] Wendel, *supra* note 114. ("the conventional answer [to the question of funder control] is 'none whatsoever,'" a position Wendel goes on to challenge in his 2025 piece). *See* Sebok, *supra* note 64, at 11 n.41 (setting forth the common view against control, and further advising, explicitly, that "a lawyer should counsel a client to refuse any funding agreement that allows a funder to take control of a settlement, which would be seen as against public policy in every state, or withdraw from representation if the client persists in granting the funder control"). A tendency in the commercial litigation finance market towards portfolio-funding arrangements, combined with insights from theoretical work that reveal an overall unlikelihood towards any widespread, systematic occurrence of claim alienation and sale in general. *See* Abramowicz, *supra* note 202.

[245] *See supra* Part II.

This Section challenges the conventional view. A critical starting point: The relational framework conceptualized here, which first restores the aforementioned civil justice rules and policies to their appropriate relational domains, reveals the question about control at the heart of the contractual relationship between the funder and sophisticated claimants is substantially, if not principally, a question of its utility to the contracting parties—perhaps even its necessity—in managing counterparty risk. In other words, what is often described as "control" is not the object of exchange in litigation finance, but a contingent mechanism for managing counterparty risk. It is therefore critical to ground debates about "funder control" of litigation—and the so-called "zombie litigation"[246] said to result from separating claims from injured claimants—at the more precise intersection of counterparty risk management in business and remedies for contractual breach in civil litigation. Assumption of partial control, or full control by way of claim alienation, is as among the steps a funder may take in response to realized counterparty risk arising from contractual breach.

The Burford/Sysco example traced in Part II helps surface, concretely, how questions about counterparty risk can manifest in the legal landscape by way of breach-of-contract disputes. To wit: If a sophisticated funded entity breaches its contract with a funder, to what extent, if at all, may a funder further hedge against counter-party risk by taking some modicum of control over the litigation? As remedy for clear breach by a sophisticated counterparty like Sysco, is an increased stake in the underlying claims properly conceptualized as control, or as one of many potential mechanisms for managing the increased counterparty risk being introduced by way of repeated contractual breaches of Sysco's contractual duty of good faith? Should even that remedial response

[246] Maya Steinitz, *Zombie Litigation: Claim Aggregation, Litigant Autonomy and Funders' Intermeddling* (Boston Univ. Sch. of L. Research Paper No. 24-40, 2024), https://ssrn.com/abstract=5054864.

prove insufficient to prevent another breach, may the funder take full assignment of the claims by way of alienation and pursue the litigation itself?[247] And again, is such a remedy for counterparty breach properly characterized as "funder control," as opposed to the only sufficient remedy for Sysco's repeated contractual breaches? Does the court system or related civil justice considerations–including those stemming from the substantive law from which the claims arise–demand certain contractual boundaries?

Engagement with the core civil justice questions about claimant autonomy and control in litigation finance is particularly important given their intersection with, and implications for, substantive law unrelated to litigation finance, as well as various strains of private theory and regulation. To be sure, the premise of "claimant autonomy" in this context is itself complex: as in other domains—most notably patient autonomy in medical decision-making—formal choice does not necessarily map onto meaningful or informed control, particularly where claimants are dependent on counsel or lack access to alternative representation within the market. Yet these dynamics—and the limits they expose in any meaningful account of claimant autonomy—remain largely hidden from judicial view and doctrinal development. Disputes between funders and funded entities in the commercial market segment, whatever their (in)frequency generally, will very rarely tend to percolate to and through courts, much less produce adjudicative pronouncements of law, given the prevalence of arbitration provisions in those same agreements. To the extent there might be outer boundaries or limitations on control provisions in funding agreements drawn from either the exigencies of civil litigation and/or theories of civil justice and

[247] *See* Steinitz, *supra* note 246. Steinitz describes the Burford/Sysco example, but only hypothetically, introducing the players as "BigCorp" (Sysco) and "BigFin" (Burford). Importantly, Steinitz glosses over the contractual breach points and instead characterizes Sysco as having simply decided its claims were worth much less than originally thought in order to justify settling.

private law, we cannot reasonably expect them to be articulated and refined through common-law-like development in the courts. This is suboptimal, as a regulatory matter: Uncertainty along these lines is difficult—for arbitrators, claimants, and funders currently flying largely blind in the construction, interpretation, and enforcement of any agreement.

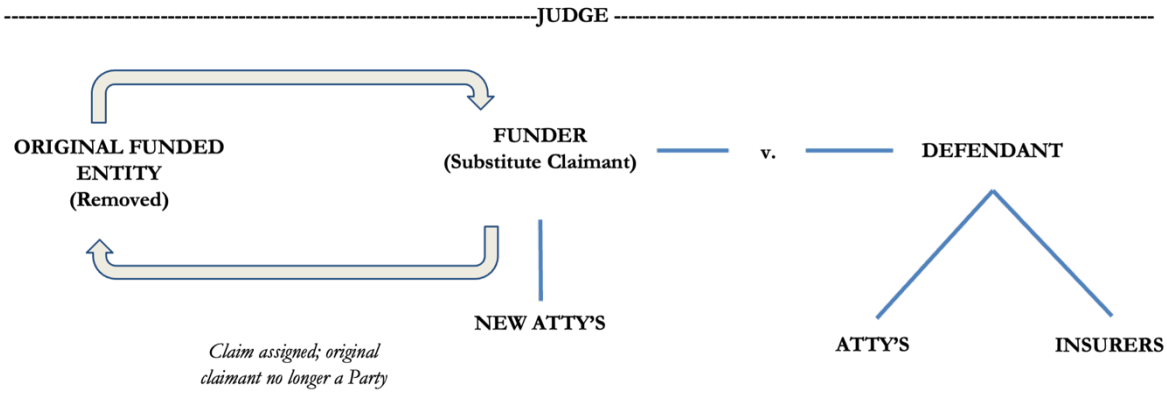
The analysis that follows is best understood along a spectrum of possible control. These questions about control are not monolithic: They contemplate a spectrum of potential litigation control by a funder—from no control, to shared control, to full control by way of claim assignment and substitution of a funder as a party to the litigation.[248] This section engages these questions

[248] *In re* Pork Antitrust Litig., No. 18-cv-1776 (JRT/JFD) (D. Minn. Feb. 9, 2024) (Order Denying Motion for Substitution); *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2024 WL 1214568 (N.D. Ill. Mar. 21, 2024) (Order Granting Motion to Substitute). By way of brief and necessary background: Sysco Corporation is one of the world's largest wholesale food distributors, and it purchases food, like protein products, from a variety of food suppliers. Sysco, *Sysco Homepage*, SYSCO https://www.sysco.com (last visited February 23, 2024); Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 (N.D. Ill. 2023) (Petition to Vacate Arbitration Award). Sysco was thus one of the largest plaintiffs in an ongoing, sprawling multi-district litigation (MDL) against the country's largest protein-product suppliers, including Tyson Foods, alleging violations of the federal antitrust laws. Sysco Petition to Vacate Arbitral Award, supra note 128. Specifically, Sysco alleges that protein suppliers like Tyson Foods conspired to raise the price of protein it charged Sysco, thereby making it liable to Sysco (the direct purchaser). Sysco passes down whatever price hikes it experiences to its own customers (the indirect purchasers), in the form of distributor fees. Some of the cases have been consolidated in Multi-District Litigation (MDL) proceedings in the Northern District of Illinois. Others have been consolidated in MDL proceedings in the District of Minnesota. To bear significant litigation costs, spread risk, and monetize part of its claims up-front for needed liquidity during the COVID-19 pandemic, Sysco entered into a series of agreements with Burford, which provided $140 million in capital to Sysco, collateralized by a portion of eventual proceeds from Sysco's antitrust claims. Burford Capital, *About Us*, BURFORD CAPITAL, www.burfordcapital.com/about-us (last visited Feb. 8, 2024). Per the agreements, a portion of that $140 million was provided to Sysco to capitalize the litigation against the animal protein defendants; some of that sum was provided because Sysco needed liquidity during the COVID-19 pandemic. *See* Glaz Petition to Confirm, *supra* note 136 at 2 ("During the financial crisis caused by the COVID pandemic, Sysco again turned to Petitioners as a source of much-needed liquidity"); Sysco, Sysco Reports Third Quarter Fiscal 2020 Results, ("In the fourth quarter of fiscal 2020 alone, we have removed more than $500 million of expenses from the business, which includes the difficult decision to reduce our staffing levels by approximately 33%"), https://investors.sysco.com/annual-reports-and-sec-filings/news-releases/2020/05-05-2020-130240788.

about litigant autonomy and control with the broad spectrum of possible control in mind.[249] They also distinguish, importantly, between transfer of control that emerges as a potential remedy for contractual breach versus a transfer that emerges from an initial funding agreement.

Substitution—that is to say, the prospect of full control by a funder—effectuates two important shifts in the basic relational setup of funded litigation provided in Part II. First, substitution (if permitted) streamlines the relational set up in a fundamental way, by removing entirely the funded entity, as well as the contractual relationship between that entity and the funder:

Figure 11: Funder Substitution:



[249] This of course layers atop and intersects with a large body of scholarship, spanning a wide swath of methodological, theoretical, and doctrinal perspectives, about the alienability of claims as a general matter. *See generally*, Abramowicz, *supra* note 202, at 701 (considering "the normative question of whether legal claims generally should be alienable"); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (developing a general theory of what is and is not alienable); Molot, *supra* note 63, at 73 (arguing that "the ability to off-load litigation risk via the market to someone better able to bear it, [the plaintiff] might be able to counter the stronger party's bargaining advantage"); Peter Charles Choharis, *A Comprehensive Market Solution for Tort Reform*, 12 YALE J. REG. 435, 435 (1995) (arguing that "a market approach will benefit tort victims with quicker, higher, and certain damage awards; offer defendants numerous ways to hedge their liability; reduce crowded court dockets and induce faster, fairer settlements; and help society by retaining appropriate safety incentives and allocating the costs of accidents to those most able to bear them"); Jonathan R. Macey & Geoffrey P. Miller, *A Market Approach to Tort Reform via Rule 23*, 80 CORNELL L. REV. 909, 912–15 (1995) (proposing an auction approach to tort class actions); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 728 (2012) ("inalienability can prevent market failures that would result from poor information or negative externalities").

As this additional stylization illustrates, a new adversarial relationship has now been introduced into the picture, namely, one between the funder (who substitutes as a claimant) and the defendant. Importantly, this "new" adversarial relationship is not akin to the one introduced by way of disclosure disputes between an off-stage funder and a defendant[250]; instead, it looks no different than the "old" adversarial relationship everyone learns in their first week in law school: Claimant v. Defendant.

The key implications from the relational framework in Part II are three. First is that these control questions are no longer ones of permissibility of contractual exchange, at least for sophisticated actors (I will briefly discuss the normative civil justice considerations for claim-control exchange at the intersection of the consumer and mass-dispute market, and the potential implications for law and theory in contract, torts, and civil procedure in Part III.C.). Nor are they questions about control captured by way of attorneys' ethical obligations to refrain from making settlement decisions on behalf of their client, impaired or otherwise by separate contractual arrangements for pursuing their claims. The question of control is not one that trains along the representational relationship between an attorney and client. If a claimant wishes to hand final decision-making authority over settlement to, say, a trusted family member, an attorney has a duty of candor vis-à-vis the wisdom of the client's choice,[251] but it interferes with the claimant's autonomy to prohibit, by way of the attorney-client relationship, the client's decision to enter a

[250] *Supra*, part II.B.

[251] The relational framework offered here would incorporate Professor Wendel's important insight about the stabilization of one ethical concern between clients and attorneys re: client control over settlement with the imposition of other ethical limitations on the independent judgment of attorneys: To the extent that additional limitation on the attorneys' conduct vis-à-vis the funded entity insufficiently polices the attorney conduct, or to the extent a sophisticated claimant has concerns about attorney compliance with ethical obligations, they can and should seek protection under these rules along the lines of the attorney-client relationship. *See* Wendel, supra note 114, at 18.

separate contractual relationship that speaks to settlement control. The lawyer-client relationship respects the client's autonomy; it does not limit it. Finally, the question of control is not one that is properly harnessed, by a defendant, against funded claimants or funders, to obtain dismissal of claims unrelated to the merits and avoid adversarial burdens.

As an initial matter, transparency demands of the court system, in conjunction with the guidance and limitations of adversarial protections traced in Part III.A, would likely differ between situations of alienation and substitution on the one hand, and circumstances of partial control for managing counter-party risk on the other. To wit, the demands of transparency for judges, who must know and have before them the parties with authority to make decisions, would be straightforward (and likely straightforwardly effectuated) either by way of formal substitution of parties under Fed. R. Civ. P. 25, or by way of the initial filing by a funder who took a property interest in a claim by way of claim alienation at the outset. Situations of partial control would thus call for transparency to the court, at least as to the fact of funding, and at least to the extent the funder took a majority stake.[252] Ultimately, such demands, narrowly-tailored to preserve adversarial norms and procedural equity in the adversarial relationship, might be incorporated by way of amendments to the Federal Rules of Civil Procedure. Both the potential need for and appropriateness of transparency demands of the judge as to the details of a funding arrangement—which implicate core adversarial commitments in civil justice, and should thus be approached with far more reserve—would depend upon whether and to what extent those terms need policing, either

[252] Civil Justice Council, *supra* note 43, at 14 ("The fact of litigation funding, the name of the litigation funder and the ultimate source of the funding should be disclosed to the court and the other parties to proceedings at the earliest opportunity after the funding agreement is entered into."); *see also* Sarah Sackman, Minister of State for Justice, Third-Party Litigation Funding (Dec. 17, 2025) https://questions-statements.parliament.uk/written-statements/detail/2025-12-17/hcws1192 (announcing the UK Government's intention to adopt the Civil Justice Council's recommendations regarding litigation funding agreements).

as a matter of contract law malleable to the nature of the contractual relationship, or as a way for judges to ensure compliance with and interpret and apply other potential limitations on permissible contract terms in a rapidly-evolving legal and regulatory landscape. The immediate lesson for judges along these lines would be to proceed, as the UK Ministry of Justice recently advised, with a "light touch."[253] This approach is consistent with broader literatures on institutional reliance on regulated professionals, which emphasize calibrated oversight that leverages, rather than displaces, the expertise and role-based obligations of intermediaries such as attorneys.[254]

Beyond transparency demands, and however permissible the contractual creation of this new relational setting may be as a matter of contract law and theory, the prospect of a new claimant autonomy in civil justice along the lines of this newly introduced relationship between a funder as claimant implicates more foundational questions about claim ownership and assignment—first as a matter of substantive law unrelated to litigation finance, then as a matter of other potential exigencies unique to the civil litigation setting that might call for outer boundaries to the ceding of control either as a remedy for breach or more broadly. Both inquiries, moreover, will intersect to greater and lesser degrees with more foundational theoretical inquiries in and conceptions of

[253] Civil Justice Council, *supra* note 48, at 7.

[254] *See, e.g.*, DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 9–15 (2d ed. 1998) (describing the regulatory model of professional self-governance and the role of lawyers as intermediaries within legal institutions); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 71–77 (1992) (advocating calibrated oversight that escalates only as needed, rather than displacing professional judgment); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 58–66 (1982) (critiquing rigid enforcement and endorsing context-sensitive, flexible regulation of professional actors); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–80 (1982) (analyzing judicial reliance on lawyers and party presentation within evolving models of court supervision); *cf.* Gillian K. Hadfield & Deborah L. Rhode, *How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Lawyering*, 67 HASTINGS L.J. 1191, 1196–1203 (2016) (arguing for regulatory approaches that leverage professional expertise while maintaining oversight).

civil justice and private law, which an approach to litigation finance by way of this Article's framework helps reveal and clarify, thus paving the way for more refined theoretical inquiry.

As to the former, the entry of litigation finance on the claimant side has muddied the waters of substantive law questions unrelated to litigation finance, as directly conflicting opinions from different federal judges about potential substitution by Burford/Carina under Rule 25 illustrate.[255] Under most federal laws—for example, antitrust—claims are freely assignable. The most streamlined way to view the question of assignability is to accept into the litigation the new adversarial relationship setup. Indeed, the way courts typically approach substitution via claim assignment is to permit it so long as the relevant claim assignment was valid.

In the realm of litigation finance, questions of assignability between a claimant and third party as a matter of underlying substantive law have been obscured, and effectively converted into, questions of the permissiveness, or not, of litigation finance—by courts and scholars alike.[256] Such

[255] Order Denying Motion for Substitution, *supra* note 108.

[256] When confronted with the prospect of litigant autonomy to cede control (fully or partially) to a funder, judges have been left to grapple either with ancient prohibitions of maintenance and champerty; or, in states without champerty prohibitions, to channel those prohibitions and formalistic conceptions of "legal justice" premised on the non-severability of the injured claimant and legal claims through other mechanisms–e.g., ordering disclosure to the claimant's adversary under Fed. R. Civ. P. 26; rejecting substitution of a funder-party under Fed. R. Civ. P. 25 on the grounds that substitution violates the letter and spirit of Rules of Professional Responsibility and law governing lawyers and the general policy favoring settlement. Order Denying Motion for Substitution, *supra* note 108; *see also* MAX RADIN, LAW AS LOGIC AND EXPERIENCE 160 (London 1940) (concluding justice is ultimately "a process of moral valuation tinged with a kind of humane emotion"); Defendants' Memorandum in Opposition to Joint Motion for Substitution of Plaintiff at 9, 20, *In re* Pork Antitrust Litigation, No. 18-cv-1776-JRT-JFD (D. Minn. July 21, 2023) ("[A] lawyer should counsel a client to refuse any funding agreement that allows a funder to take control of settlement, which would be seen as against public policy in every state, or withdraw from representation if the client persists in granting the funder control.") (citing Expert Report of Professor Maya Steinitz in Support of Sysco's Petition to Vacate Arbitration Award, Glaz LLC v. Sysco Corp., No. 1:23-cv-02489 (S.D.N.Y. May 3, 2023) (Dkt. No. 21-4). *But see* Steinitz, *supra* note 122. Such approaches track, substantially, the specific guidance of Professor Steinitz, who has maintained that the exercise of *any* modicum of claim control by a funder violates champerty

conversions have produced results inconsistent with the substantive law itself.[257] Moreover, functionally, substantive-law frameworks are potentially neutered by a regime that declines substitution of an assignee into ongoing litigation by way of a procedural rule, doctrine, or policy used to channel champerty's basic prohibitions, as theorists have traced.[258] Indeed, substantive regimes are undermined by the ex ante effect induced by such an approach to alienation more generally—viz., fewer suits will be brought by those directly injured if funders are disinclined to fund otherwise assignable claims for which they could not ever take assignment, for counterparty risk-management reasons or otherwise.

Of course, nothing would foreclose a legislative prohibition on the alienability of certain types of statutory claims, for regulatory, public-interest, or public policy reasons, as a legal matter—whatever the normative valence. Indeed, particular strains of private-law theory and civil and procedural-justice theory largely beyond the scope of this Article (including in my own prior work)[259] might well impose demands or limitations—and certainly should inform the thinking of

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prohibitions; represents contractual unconscionability; and violates the "spirit" of the rules of professional ethics—positions that conflicted with her prior work, and both substituted for, and constitutes much of the entirety of normative academic theory of funder control available for the judiciary to draw on at the time. Such approaches also track, the more general and widely held position of various scholars and commentators, who maintain that allowing claim control by funders would violate attorneys' duties of independent judgment; offend prohibitions in the Rules of Professional Ethics against attorney-fee-splitting with non-lawyers; create conflicts of interest between funders and claimants; and foment meritless litigation.

[257] A closely related point is that the Rules Enabling Act prohibits federal rules from abridging substantive rights. *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17 (2010); J. Maria Glover, *The Supreme Court's "Non-Transsubstantive" Class Action*, 165 U. PA. L. REV. 1625 (2017).

[258] Abramowicz, *supra* note 202.

[259] Private Law: *see, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010) (offering an alternative to efficient allocation conceptions of tort law); Ronald Dworkin, TAKING RIGHTS SERIOUSLY (1977); Arthur Ripstein & Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L. REV. 349 (1992); Jules L. Coleman, RISKS AND

lawmakers and scholars about potential demands or limitations[260]) on the content and structure of any particular area of substantive law (including its procedural framework). The more modest claim for present purposes is that whatever else the substantive law structure should or should not be, mechanisms and frameworks along the binary of the permissibility of litigation finance cannot be substituted for engagement with substantive law, thereby potentially distorting by way of indirection the content and operation of law unrelated to litigation finance.

Full control of claims by a funder is formally unproblematic, as a matter of underlying substantive laws, like antitrust and other federal claims, which permit the free assignment of claims, and as a matter of the well-established and frequent practice of assignment in the modern civil justice landscape. And one might conceptualize this setup as litigation finance at its least

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WRONGS 306 (1992); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992); Ernest J. Weinrib, *Understanding Tort Law,* 23 VAL. L. REV. 485, 514–26 (1989) (focusing on the relationship between a wrongdoer and a victim and specifying a "framework of rights and responsibilities between individuals" to restore equity between them); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Ian Ayres & J.M. Belkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703 (1996); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis,* 109 HARV. L. REV. 713 (1996); Daphna Lewinson-Zamir, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies,* 80 TEX. L. REV. 219 (2001); Radin, *supra* note 249. Civil justice realm of private law: Baker, *supra* note 153 (normative and economic reasons for allowing the alienability of mass tort claims); J. Maria Glover, *supra* note 21 (tracing implications of this structural role for the content of the substantive law of antitrust and indirect purchaser standing); Robert J. Bies & Deborah I. Shapiro, *Voice and Justification: Their Influence on Procedural Fairness Judgments*, 31 ACAD. MGMT. J. 676 (1988); Robert Folger, *Distributive and Procedural Justice*, 35 J. PERSONALITY & SOC. PSYCHOL. 108 (1977); BURCH, *supra* note 79; Robert G. Bone, *Procedure, Participation, Rights*, 90 B.U. L. REV. 1011 (2010); Ronen Avraham & William H. J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1 (2022).

[260] I include this qualification principally for the reason that, under current law, tort claims are largely inalienable. *See, e.g.*, Baker, *supra* note 153.

problematic; it is funders, now simply claimants, at their least relevant as funders who might control matters outside the view of the court.[261]

But this is deeply ironic: The entry of litigation finance through alienation is arguably the fullest expression of the business of civil justice. To put the point bluntly, when claim ownership is passed to an investor, the civil justice system tends to look like a purely money-generating activity—just as its prohibitionist critics have lamented. Without diminishing the force of the validity of assignment under relevant substantive laws—and, in the parlance of litigation finance in civil justice, the ceding to a funder full control of litigation—resolving matters of funder entry into civil litigation purely by reference to the assignability of claims simply sidesteps some of the core civil justice questions elucidated here, and which are found in a large body of scholarship that pre-dates the entry of litigation finance—about general claim alienability and monetization, insurer control of claims on the defense-side, and contingency-fee arrangements for attorneys, among others.[262] The prospect of funder control places into direct conflict the normative force of ancient prohibitions and anti-commodification norms on the one hand, and a super-charged version of the new litigant autonomy on the other, adding modern urgency to old questions in law and theory.

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[261] Indeed, under commercial-law frameworks like that advanced by Professor Sebok, modern contract theory offers normative grounds for sophisticated parties to grant funders partial control to protect their investments—such as requiring the counterparty to conduct the litigation consistent with the representations that accompanied the funding contract—without necessitating heavy-handed judicial intervention. Sebok, *Some Realism, supra* note 190.

[262] *See, e.g.*, Abramowicz, *On the Alienability of Legal Claims*, *supra* note 202, at 37–57; Radin, *supra* note 249, at 1903–36; Radin, *supra* note 27, at 70–78; Silver & Hyman, *supra* note 114, at 41–44; Curtis & Resnik, *supra* note 67, at 425–28; Painter, *supra* note 93, 626–32; Levitin, *supra* note 183, at 66–74; Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*, 158 U. PA. L. REV. 2043, 2775–82 (2010); Macey & Miller, *supra* note 249, at 911–15; Tom Baker & Charles Silver, *How Liability Insurers Protect Patients and Improve Safety*, 68 DEPAUL L. REV. 209, 216–36 (2019); David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 393–98 (2000).

Exigencies specific to the litigation context in which the potential ceding of control occurs in litigation finance—as remedy for counterparty contractual breach versus initial contractual exchange—is a helpful re-entry point for engagement by both judges and theorists. As a remedy for contractual breach, the questions of a sophisticated claimant's autonomy to cede control as remedy for contractual breach are ones of its utility (or necessity) in managing and remediating counterparty risk, weighed against its potential to disrupt ongoing litigation and impact other actors in a given funded litigation—particularly the judge and the defendant. This is not best understood as "control;"—it is a contractual remedy for breach, no different in kind from the remedies available in any commercial relationship where one party has failed to perform. What is often framed as an expansion of funder power is, in fact, the ordinary operation of contract law in response to counterparty risk.

Of course, certain exigencies unique to the civil litigation setting might call for outer boundaries. Judges, defendants, and other parties to substantially progressed litigation have an interest in restraining exercises of claimant autonomy that would cede control to a funder and effectively restart fulsome litigation procedures. Yet any heavy-handed limitations along these lines would be difficult to square with the many permissible (and manageable) forms of party substitution already embedded in civil litigation, including changes in corporate ownership, divisive mergers, a defendant's entry into bankruptcy, and—most analogously—the substitution of defense-side liability insurers. This comparative framing—placing funder-related control alongside familiar forms of party substitution and risk allocation in civil litigation—is a central move of this Article, revealing that what appears novel in litigation finance is often continuous with longstanding civil justice practices.

As a matter of civil justice—where equality of arms and adversarial protections are core commitments—there is little basis for categorical prohibitions. At the same time, the system relies on professional intermediaries, particularly attorneys, whose role both enables and constrains claimant decision-making in ways that complicate any simple account of autonomy. Judges thus have much in contract law and the law of liability insurance to work with in calibrating appropriate limits. In the context of Category-1 actors, and in the absence of evidence of oppression, contract law would ordinarily leave questions of utility or necessity to the parties, who may bargain for alternative remedies. The "zombie litigation" concern is therefore substantially overstated, at least in the commercial market: what critics characterize as funder-driven litigation persisting beyond its natural life is, when grounded in the relational framework, better understood as a straightforward exercise of contractual remedies in the face of breach.

Further, where misalignment of interests flow from the general substantive-law market context of the collateralizing assets (in civil-justice parlance, legal claims), there is a descriptive and normative case for claimant autonomy not just as a remedy for breach–where the need for counterparty risk-management by way of ceded control seems particularly salient for a litigation finance industry (and not, for instance, a chicken nuggets industry)—but perhaps also slightly more broadly.[263] The law of antitrust is a good example of a sub-optimally calibrated regime along these

[263] Whether certain pockets of the substantive law would—or should–call for greater latitude in claimant autonomy to cede control *as a regulatory matter* depends of course on one's theories either about a particular substantive private-law regime or about private-law claims and enforcement more broadly and whether any such theoretical account places demands on the substantive law itself as opposed to the architecture for its enforcement (or, as I have argued in other work, potentially both). *See, e.g.*, Goldberg & Zipursky, *supra* note 169; Coleman, *supra* note 259; Calabresi & Malamed, *supra* note 259. David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1890–91 (2002); Glover, *supra* note 21.

lines, as I have argued in prior work.[264] (It is within this substantive-law context of antitrust that Sysco was incentivized to breach its funding agreement—repeatedly.[265]) Indeed, and at least to the extent the key concern for judges is to mitigate the potentially disruptive effects of mid-stream funder substitution in civil litigation, a more expansive conception of claimant autonomy to alienate claims to a funder may be justified (or even desirable—along the lines of litigation exigencies, and perhaps more broadly as a regulatory matter) in the context of substantive frameworks whose structure is embedded with a misalignment of interests between those with private enforcement power on the one hand, and adversarial and regulatory incentives on the other (This is putting aside whether funders in particular would want to do this at all, much less systematically). At the very least, the interests of the contracting parties and perhaps the courts in having the option of addressing structural risks like moral hazard and adverse selection up front is not so clearly outweighed by countervailing and broad anti-commodification concerns inconsistent with the assignability of the claims under substantive law.

Outside the more limited context remedy for contractual breach, and perhaps by way of initial exchange within a narrow subset of substantive claims traced above, it may be too early in the development of the industry—and our empirical understanding of its contours—to make broad

[264] Glover, *supra* note 21.

[265] The market context of the collateralizing assets—Sysco's antitrust claims—injected risk into the investment, of which Sysco and Burford were aware up-front. Sysco, as a food distributor, has longstanding upstream business relationships with the defendant protein suppliers, meaning that Sysco's adversaries inside litigation are its most important business partners outside of litigation. As is often the risk with a direct purchaser in antitrust actions, Sysco had the incentive to prioritize its business relationships and future contracts with suppliers, at the expense of the settlement value of the litigation, and for reasons unrelated to the merits of the claims. Further, Sysco has longstanding downstream business relationships with its own customers. To the extent defendants inflated prices of protein products, as the suits allege, Sysco would have passed on that inflation to customers, who would then expect Sysco to share with them some portion of any settlement proceeds. Sysco thus had some incentive to assign its claims to its customers, and perhaps at a significant discount.

regulatory or normative pronouncements about claimant autonomy in litigation finance. Such prudence is especially warranted in the absence of any compelling need, particularly in the commercial market segment, that could not be addressed by the more measured approaches recommended above.

As this Article's framework clarifies, the normative valence of claimant autonomy, allowances, or limitations in litigation finance would derive from the centrality (or not) of claimant control over settlement decisions not as a matter of attorneys' ethical constraints, but as a matter of the nature of the claimant's contractual relationship with the funder;[266] the relationship between the nature of the litigation decision-maker and other civil justice actors in funded litigation; the relationship between the nature of the litigant decision-maker and funder-claimant on the one hand, and the substantive-law rights (including any theoretical conceptions of those rights one might accept or reject) on the other; and the relationship between the nature of the settlement decision-maker and funder-claimant and the civil justice system itself.

These clarifications shift the analysis of control away from categorical prohibitions and toward the relational and contractual contexts in which questions of autonomy, risk, and authority arise. As a starting point, our civil justice system has long permitted claim monetization in various scenarios, and for different reasons: Claimants may of course liquidate their claims in full to defendants prior to resolution; represented claimants may cede a partial stake to attorneys who are

[266] The far end of the spectrum would full claimant autonomy–the non-infringement by contract law or otherwise of the decision-making by sophisticated bargaining agents to include provisions for claim control. *See, e.g.*, Schwartz & Scott, *supra* note 183; Such an approach would align with strains of private-law property theory that reject interference with alienability generally, as well as conceptions of legal claims as inherently transient property untethered substantively (and likely procedurally) from personhood. *See, e.g.*, Abramowicz, *supra* note 202, at 704–11 (rejecting Radin's account of legal claims as inextricably tied to personhood on the grounds of the nature of legal claims as inherently transient property).

permitted to take an (often significant) contingent interest in their claims. Even in states that retain champerty prohibitions, claim monetization is routinely allowed in bankruptcy, and frequently justified on access-to-justice grounds. Claimants may take advance funding from finance institutions that they are obligated to repay, usually with interest, with proceeds from litigation. And there is little question that a sophisticated claimant could assign its claims to any number of entities, including a bank that had financed some unrelated part of its business ventures. Should it make a difference that the original relationship between a claimant and third party was to finance litigation rather than to expand business?

In other civil justice contexts, and along the lines of other civil-justice relationships that involve transfers of equity stakes, we do impose some outer limits. For instance, in the contingency-fee context, the law permits an enforceable stake in litigation proceeds by a lawyer without ceding control over settlement, and courts tend to cap the effective maximum recovery for attorneys at something close to fifty percent.[267] Whether contingency percentage limits or methods for calculation get it "right" is a point of considerable debate among scholars. I do not rehash those debates here; an initial hurdle stems from the fact that the relational domain of attorney ethical constraints does not govern the relationship between a claimant and one to whom that claimant might cede claim control. (At the same time, it is worth noting here that rules of attorney ethics, although they do not bind funders and claimants, suggest a more general discomfort in civil justice—both here and in other countries—towards any non-party taking the lion's share of the claims).

[267] *See, e.g.*, Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, 89 FORDHAM L. REV. 1151, 1164–70 (2021); Fitzpatrick, *supra* note 262, at 2775–82. Contingency fee caps also exist in the UK, which limits recovery to 50% for commercial cases and 35% for employment.

At least to the extent funders do not seek to be law firms and providers of legal services—and in the commercial market, at least, they do not—the closer relational analogue is that of defendant-liability insurers, as Professors Silver and Baker have traced. And judges have a lot in the way of law to work with in contract and the law of liability insurance; against the backdrop of similar legal frameworks we could develop for litigation finance, a more general conception of claimant autonomy along these lines would likely not prove unduly burdensome for courts, and it would be more consistent with notions of adversarial equity as an access-to-justice matter, on both sides of the "v." I would leave to insurance law theorists and experts the details of such frameworks—including potential funder caps on equity stakes for policy or other reasons that might stem from a difference between liability imposition versus liability defense.

The core criticism of funder control of litigation along these lines is that it will drive up settlement values and potentially prolong litigation, in line with the profit motives of funders. As evidence for this claim, opponents of litigation finance have reported instances of increased liability-insurance premiums.[268] Putting aside questions of causation and taking the objection at face value, the critique assumes that the insurance market "accurately" captures claim values—an assumption that scholars have challenged in various contexts.[269] And as I have explored in other work, there are a number of dynamics and forces in civil litigation, including insurance on the defense side, that may tend to drive down settlement values, unrelated to the merits of claims.[270]

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[268] For a general consideration of the relationship of liability insurance in tort law, *see* Kenneth Abraham, THE LIABILITY CENTURY (Harv. Univ. Press 2008); *see also, e.g.*, Abraham & Sharkey, *supra* note 44, at 2176–2227 (detailing the role of liability insurance in influencing the "shape and scope" of tort liability).

[269] *See, e.g.*, Charles Silver, David Hyman, Bernard Black, and Myunghai Paik, *Policy Limits, Payouts, and Blood Money*, 5 U.C. IRVINE L. REV. 559 (2015) (medical malpractice); Tom Baker and Sean Griffith, *How the Merits Matter: D&O Insurance and Securities Settlements*, 157 U. PA. L. REV. 755 (2009).

[270] Glover, *supra* note 119; Glover, *supra* note 22.

As with all questions in the law, the answer to whether litigation finance is a market correction or a market distortion in settlement, in most instances, is likely that it depends. As a civil justice matter, answers would depend on the extent to which ability to bear the costs and risks of adjudicative procedures and to access high-quality counsel are relevant to claimant outcomes along access-to-justice lines, as Marc Galanter famously traced.[271] Whether the introduction of funders with the capacity to proceed farther in litigation and to retain high-quality counsel would produce "better" settlement values would depend at least in part on the extent to which it creates balance across the v. or tips the balance in the funded direction, in any given case. At least to the extent the presence of a funding arrangement with a sophisticated claimant would tend to diminish the outcome-distortive force of litigation cost asymmetries, differentials in risk tolerance, and the anchoring heuristics brought in by way of insurance, who's to say that any resulting upward shift in settlement values is a normatively bad thing as a civil justice matter, much less something to fear?

C. Mass Disputes: Conflicts, Claims Generation, and the Conditions of Merit

This subpart engages two sets of civil justice questions raised by litigation finance in mass-dispute litigation. The interaction of capital, scale, and relational structure frames the analysis here. The first concerns conflicts within representative or quasi-representative structures—how the introduction of a funder may affect the alignment among claimants, counsel, and the court. The second concerns the role of capital in claim generation and aggregation, including its relationship to claim volume and the emergence of shadow markets in which claims are produced and

[271] And we take these realities seriously enough, at least in the context of aggregate litigation, that we formalize them by way of the factors judges consider in appointing lead counsel.

circulated outside adjudicative structures. These inquiries proceed in turn to disentangle analytically distinct dynamics that existing debates tend to conflate.

Having separated these inquiries for analytical clarity because each operates through distinct mechanisms that would otherwise be obscured, this Article makes a deeper contribution in showing that both domains ultimately raise the same underlying concerns about how capital operates within institutional settings to shape alignment, claim production, and outcomes. Conflicts in mass-dispute settings are best understood through the lens of representative litigation and addressed through structural protections, while concerns about claim generation and volume turn on whether claim production remains tethered to merit, particularly where adjudicative constraints are weak or absent. The regulatory implications are therefore context-dependent: where existing structures—most notably class actions—provide mechanisms for managing conflicts and supervising settlement, they should be used rather than displaced; where they do not reach, particularly in informal aggregate settings and shadow markets, courts and lawmakers must turn to more targeted interventions tailored to those settings. The appropriate form and timing of such interventions will vary with the nature of the underlying claims and the stage of litigation, particularly as disputes evolve and mature, but may include claim-registration requirements, cost-sharing for claim validation, lodestar crosschecks and other adjustments in fee award methodologies, and potential legislative restrictions on contractual arrangements for claim generation not contingent on claim vetting.

1. Conflicts in Representative and Quasi-Representative Litigation

In mass-dispute settings, the central conflict is not introduced by litigation finance itself, but by the representative or quasi-representative structure of the litigation. One important implication of engaging these inquiries by way of this Article's relational framework is that it

reveals clearly that justifications for broad latitude in the exercise of claimant autonomy drawn from the nature of the contractual relationship between claimant and funder align less well with the justifications for such latitude as a matter of an urgent access-to-justice crisis more broadly. For unsophisticated actors, any notion of true "autonomy" in contracting with funders is less entitled to a presumption as such. But the normative case for funding access and even potential ex ante claim alienation by claimants with low-value claims in the consumer markets and mass dispute markets –assuming one could create a regulated market responsive to concerns about claimant oppression–is more compelling as an access-to-justice matter. The Bates example illustrates this: Attorneys were unwilling to take the claims of Alan Bates and his fellow post-masters on contingency, even when aggregated by way of the court's Collective Action Order. This dynamic also raises the further question of when access-to-justice concerns should be addressed through public mechanisms, such as fee shifting or direct state support, rather than through private capital markets[272]—a question that largely extends beyond the scope of this Article and beyond the United States. In the absence of such mechanisms—and with little indication that they will be forthcoming—the legal strategy of the post-office in the UK was designed around

[272] *See, e.g.*, Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 528–35 (1986) (examining the role of public provision and procedural design in securing access to justice); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1790–1802 (2001) (discussing limits of market-based provision of legal services and the role of public subsidies); Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 45–48 (2014) (analyzing institutional alternatives for financing legal services); Civil Justice Council, Review of Litigation Funding: Final Report ¶¶ 2.19, 14.1 (2025) (recommending consideration of an "Access to Justice Fund" to supplement civil legal aid and support early advice and dispute resolution); U.K. Parliament Office of Sci. & Tech., Access to Justice: Legal Aid and Services POSTnote 758, at 10–18 (2026) (documenting persistent funding constraints, provider shortages, and calls for increased public investment in civil legal aid); Access to Justice Foundation, Response to the Access to Justice Inquiry (2025) (describing a funding "crisis" in legal advice provision and urging development of additional funding sources for access-to-justice services).

exhausting claimants' resources and prolonging litigation, making the postmasters' complex claims economically viable for attorneys–the massive injustices they represented notwithstanding.

One of the contributions of Part II was to identify, with precision, the true conceptual nature of the relationships between low-dollar consumer claimants similarly situated, third-party funders, and law firms by surfacing their true relational characters as the types familiar in aggregate, representative-type litigation. Orienting focus on the precise nature of the relationships at issue in potential mass-dispute funding structures leads judges, scholars, and regulators out of the binary constraints of ancient constructs and proxies and towards the more developed procedural, regulatory, and theoretical frameworks in complex litigation—considered for and tailored to the exigencies of modern aggregate litigation dynamics. The most robust and lasting of those frameworks, is, of course, Fed. R. Civ. P. 23 (and state law analogues) for class actions. Ironically—and in contrast with many fellow common-law countries—it is the well-regulated airspace of class-action litigation in particular, but not the wilder altitudes of mass-disputes more generally, that scholars and judges in the United States have declared a no-fly zone.[273] Viewed through the relational framework, this leads to a counterintuitive but central conclusion: the most robust mechanisms for managing conflicts in funded litigation already exist within class actions, and it is precisely there that funding has been most restricted.

In formalized aggregate structures, and in particular class actions, counsel owe to claimants duties of loyalty and adequate representation as a matter of constitutional due process. As the Court

[273] Mullenix, *supra* note 35, at 445 (advocating for a strict ban on third-party funding within class action suits); Tyler W. Hill, Note, *Financing the Class: Strengthening the Class Action through Third-Party Investment*, 125 YALE L.J. 484, 524 (2015) (highlighting the uniquely intense opposition sparked by the combination of external investment and class action mechanisms); Hensler, *supra* note 77, at 500 (observing that class actions remain the primary target for proponents of litigation finance bans).

emphasized in *Wal-Mart Stores, Inc. v. Dukes*, the procedural demands of aggregation cannot displace the need for adequate representation, even as defendants press for individualized determinations. The absence of individualized consent to settlement by class members places important pressure on these due process safeguards; along these lines, judges, acting as "fiduciaries" of the class, must ensure that structural safeguards against conflicts of interest between class counsel and class members are in place at class certification and remain in place throughout litigation.[274] Judges also must review class settlement agreements for fairness, and they exercise authority over the award of class fees. The formalized protections required by the class action mechanism create a context in which the relationship between a funder and a firm on the one hand, and claimants on the other, must operate transparently, at least to the judge and to the claimants; further, it must be subject to ongoing judicial scrutiny to ensure compliance with Rule 23.

Along these lines, therefore, the contractual relationship between the funder and funded law firm is distinct from the firm's representative relationship and duties to class members, but that contractual relationship is also supervised throughout by the judge, who acts as a fiduciary to class members. Any contractual disputes between the funder and funded entity, then, would be resolved as a matter of contract law and theory for Category-1 type relationships; the Rule 23 overlay for the funding agreement would impose constraints on contract formation, interpretation, and remedies for breach when they would operate to the detriment of class members, whose interests cannot and should not be impeded by any disputes between the funder and firm.

[274] Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 279–80 (7th Cir. 2002) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.")

The Rule 23 implications for contract formation, then, are that funding agreements for class actions could (and likely should) provide expressly that litigation and settlement decisions remain the sole province of class counsel; contractual fee structures ought to segregate attorney labor from capital provision. Importantly, however, precise percentage allocations of any eventual court-approved fee award need not—and under Rule 23 ought not—be fixed ex ante. The relative contributions of the law firm and the funder to a class-wide resolution are determined by the actual demands and contours of the litigation, which are inherently uncertain. Just as a judge in a non-funded class action is not bound by fee percentages set forth in ex ante agreements between counsel and claimants, a judge's allocation of fees between attorneys and funders under Rule 23 should result from a careful, ex post assessment of their respective contributions to the class-wide result. Any funding contract provision that purported to fix or constrain that allocation ex ante would be unenforceable—not because the funder and firm are not sophisticated parties, but because Rule 23 preserves judicial authority over fee awards in service of the class. At the same time, however, contractual and procedural innovations may, in practice, place pressure on the exercise of that authority, reinforcing the need for vigilant judicial oversight and for resisting shifts of these questions into less transparent fora—such as bankruptcy or forced arbitration—that risk pushing them further from meaningful scrutiny.[275] Notably, many of the calls for greater scrutiny in these

[275] *See* Maria Glover, *Due Process Discontents in Mass Tort Bankruptcy*, 72 DEPAUL L. REV. 535, 148–60 (2023) (critiquing the displacement of claims into bankruptcy proceedings with attenuated procedural protections); Glover, *supra* note 22, at 1338–45 (examining aggregation outside traditional judicial fora and its implications for transparency and oversight); Brief of Law & Civil Procedure Professors as Amici Curiae in Opposition to Debtor's Motion for Stay Pending Appeal and to Extend the Automatic Stay to Non-Debtors, *In re* Aearo Techs. LLC, No. 22-02890 (JJG-11) (Bankr. S.D. Ind. Aug. 26, 2022); Brief of Law & Civil Procedure Professors as Amici Curiae in Opposition to Debtor's Motion for Stay Pending Appeal and to Extend the Automatic Stay to Non-Debtors, *In re* LTL Mgmt., LLC, No. 21-30589 (MBK) (Bankr. D.N.J. Nov. 15, 2021); Brief of Professors Samir D. Parikh & Sergio J. Campos as Amici Curiae in Opposition to Debtor's

settings come from actors who have actively engineered the migration of disputes into less transparent fora, including mandatory arbitration regimes and strategic uses of bankruptcy that likely extend beyond what Congress has authorized in the Bankruptcy Code, as recently clarified by the Supreme Court in *Harrington v. Purdue Pharma L.P.*[276]

Outside the strictures of Rule 23, judicial scrutiny and policing of potential conflicts between and among counsel, claimants, and funders is less formalized; nonetheless, the conceptual reframing of the relationship between individual low-value claimants in the consumer finance market and their attorneys not so much as representational as it is representative, as well as an understanding of the attorneys' and funders' relationship as the true joint venture (as opposed to the nature of the contractual relationship between consumer claimants' and funders), still paves the ways towards regulatory pathways and possibilities in the realm of complex litigation that address more directly core civil justice concerns. I return briefly to the Mavexar example to conceptualize the relational framework and regulatory payoffs. The core civil justice concern in Mavexar was not that any individual, nominal patent claimholder was deprived of individually pursuing her claim, as required by laws of champerty and maintenance. Indeed, imposition of funding prohibitions would not provide some fulsome day-in-court ideal; they would most likely

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Motion for Stay Pending Appeal and to Extend the Automatic Stay to Non-Debtors, *In re* LTL Mgmt., LLC, No. 21-30589 (MBK) (Bankr. D.N.J. Nov. 15, 2021); Judith Resnik, *Courts: In and Out of Sight, Site, and Cite – The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 773–80 (2008) (analyzing how the visibility and location of adjudication shape public oversight); *see also* U.S. Chamber Inst. for Legal Reform, Mass Torts and Bankruptcy: Preventing Abuse and Protecting Claimants 6–12 (2023) (asserting that mass-tort bankruptcy may facilitate non-meritorious claims).

[276] *See* Harrington v. Purdue Pharma L.P., 603 U.S. 204, 212–231 (2024) (holding that the Bankruptcy Code does not authorize nonconsensual third-party releases of claims against nondebtors); 11 U.S.C. §§ 524(e), 524(g), 1123(b) (reflecting Congress's express authorization of certain channeling injunctions in asbestos cases while otherwise limiting the scope of discharge and plan provisions); Lindsay Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1160–68 (2022) (describing strategic uses of bankruptcy to manage and contain mass-tort liability).

just eliminate the low-dollar-value claims altogether. Policing contractual oppression along the lines of the relationship between any individual claimant and the funder is an important first step, and one this Article's relational framework for consumer-market contracts commends in figure 1, but it would operate at best as a claim-by-claim-by-claim solution to oppression in consumer-funding contracts if the individual agreements are not situated within the larger relational framework of an informal aggregate, representative litigation as illustrated in figures 2 and 3.[277]

So situated, the funding contracts in Mavexar were not just one-sided as a matter of the funder-claimant relationship; they were collusive as a matter of the funder-firm relationship, revealing self-dealing by both the law firm and the funder at the expense of a large group of similarly situated claimants—classic conflicts problems well known to complex litigation. Thus, Judge Connolly's order requiring all funded parties to disclose the identity of the funder, the nature of the funder's financial interest in the litigation, whether the funder's approval is necessary for litigation or settlement decisions, and, if so, the terms and conditions of that approval, was no doubt warranted as a means3 of penalizing bad behavior. To be sure, such disclosure may also advantage defendants by providing access to information and strategic leverage in litigation. Those fully justified penalties, however, flowing as they did from disclosure pursuant to state-law prohibitions on champerty, at best only indirectly police attorney and funder self-dealing and collusion at the expense of claimants.

2. Settlement Values and Claim Merit, In and Out of the Shadows

[277] As a practical matter, however, such individualized policing raises difficult questions of visibility and enforcement, because, absent aggregation or judicial supervision, it is unclear who would have the information, incentives, or institutional capacity to identify and remedy such oppression—questions beyond the scope of this Article.

A small but growing body of scholarship and commentary warns that capital will generate claim volume that extracts settlement payouts from defendants untethered from claim merit or validity. The clearest articulation appears in the work of Professor Samir Parikh, who theorizes that third-party capital, coupled with aggregation and opacity, could enable the conversion of claim volume into settlement pressure in mass-tort bankruptcies—what he terms a potential "alchemist's inversion."[278] More policy-oriented critiques—advanced by the U.S. Chamber Institute for Legal Reform, the investor–state dispute settlement literature, and earlier treatments of litigation finance—raise similar concerns, but typically do so less precisely, assembling examples across distinct and often non-overlapping contexts and invoking familiar dynamics of aggregation, repeat play, and asymmetric costs.[279] These accounts often move between capital used to finance existing claims and capital used to generate or aggregate claims at scale, without specifying the mechanisms by which either form of capital deployment would displace merit as a constraint on settlement value.

The first question, then, is whether and under what conditions claim volume can operate independently of merit as a constraint on settlement value. Complex litigation scholarship dating back to the 1960s has long identified high-volume claiming models in which firms construct and

[278] *See, e.g.*, Parikh, *supra* note 63; Parikh, *supra* note 43.

[279] U.S. CHAMBER INST. FOR LEGAL REFORM, MASS ARBITRATION SHAKEDOWN: COERCING UNJUSTIFIED SETTLEMENTS 5 (2023) (asserting that mass arbitration is used to coerce settlements unrelated to the claims' merits); *see also* Parikh, *supra* note 63 (arguing that "opaque capital" has been used to advance nonmeritorious claims and extract settlements).

maintain inventories of claims through routinized processes[280]—models that might generate settlement value independent of claim merit.[281]

New accounts about "alchemy" reintroduce longstanding concerns in the mass-dispute literature about "blackmail settlements," concerns that had largely receded and have limited empirical support.[282] Parikh's account, explicated across three Articles,[283] is conceptually rich in its contemporaneity and clarity, identifies litigation finance as a mechanism through which claim volume might be harnessed to distort settlement payouts in a new mass-tort landscape wherein corporate defendants seek to expand the reach of bankruptcy and channel claims against fully solvent defendants into mandatory resolution frameworks.[284] As with earlier scholarship, however,

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[280] *See e.g.*, ELIZABETH CHAMBLEE BURCH, MASS TORT DEALS: BACKROOM BARGAINING IN MULTIDISTRICT LITIGATION (2019) (arguing that lawyers and defendants alike exploit MDLs for financial gain at the expense of plaintiffs); Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 70 (2017); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009); Engstrom, *supra* note 119.

[281] *See* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits--The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 8–9 (1971) (describing class actions as "legalized blackmail"); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (arguing that discovery can generate settlement pressure independent of claim merit)

[282] *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1359 (2003) (systematically rejecting the theory that aggregate litigation inherently forces corporate defendants into "blackmail settlements" and finding such claims lack empirical support).

[283] Parikh, *supra* note 63; Parikh, *supra* note 40; Samir D. Parikh, *Mass-Tort Trusts and the Faustian Bargain*, 110 CORNELL L. REV. 1596 (2026).

[284] *See, e.g.*, Simon, *supra* note 276, at 1159 (arguing that corporate defendant misuse bankruptcy law to evade mass tort liability); *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204 (2024) (ruling against nonconsensual third party channeling injunctions); Memorandum of Law of Amici Curiae by Certain Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case, *In re* LTL Mgmt., LLC, No. 3:21-bk-30589, at 2, 5 (Bankr. D.N.J. Feb. 4, 2022) (arguing that the purpose of Chapter 11 was "protect[ing] honest but unfortunate debtors who are willing to subject themselves and their assets to the supervision of the Court" by way of a "good faith filing" with a "valid reorganizational purpose," and that J&J's creation of LTL Management, and subsequent placement of LTL Management into bankruptcy, serves no reorganizational or rehabilitative purpose for an "honest, unfortunate debtor.").

the account remains largely theoretical, rather than empirical. It articulates mechanisms through which claim volume might distort settlement outcomes without systematic evidence that non-meritorious claims generate payouts or that such claims secure positions of influence within aggregate litigation structures.

The emergence of equity finance for claimants, and even more consequentially generative artificial intelligence places renewed pressure on this familiar concern. Importantly, the shift is not simply the increased volume Parikh identifies, but the reduced barriers to entry into claim generation brought about by access to capital and sophisticated technology, placing strain on the system's existing mechanisms for maintaining the link between merit and settlement value.[285] Lower barriers to entry in civil justice bring clear benefits for claimants and for the diversification of the bar, but innovations that reduce the costs of generating and sustaining claims simultaneously put pressure on the capacity of current approaches and market forces to align settlement payouts with valid claims. The speed at which technological innovations (particularly in artificial intelligence) can expand the capacity for scalable claim generation threatens to outpace the system's ability to discipline settlement outcomes through merit-based constraints.

In the face of transformational changes that carry the potential for great virtue but also great vice, this Article adds needed refinement to the "old" civil justice concerns about settlement value and claim merit by integrating contemporary pressures of scalable claim production and by making explicit the institutional and relational conditions that existing accounts tend to obscure. The critical inquiry now is whether *and under what conditions* merit remains a meaningful constraint on settlement value in an environment of increasingly accessible and scalable claim

[285] *See, e.g.*, Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions,* 43 STAN. L. REV. 497 (1991).

production. Scholars, judges, and lawmakers alike must question whether and to what extent existing mechanisms and market equilibrations can continue to perform two critical and related functions: (1) Whether they can continue to largely stave off the encroachment into claimant leadership structure firms with high-volume-but-low-validated claim inventories; and (2) whether they can secure the tethering of settlement payouts to valid claims.

Regarding the former, and as I have stressed in prior work, volume *alone* means little for settlement leverage if those holding the volume have no real seat at the settlement table.[286] While empirical evidence is underdeveloped, complex litigation scholars have raised an alarm that firms presenting high-volume inventories may be starting to squeeze into appointed leadership roles in mass disputes, thus highlighting the continued importance of front-end scrutiny by judges selecting class counsel.[287] Regarding the latter, currently, empirical evidence of payouts for invalid claims is thin, even in the cases most frequently cited by funding opponents as exemplars of the claimed merit-payout distortion, like In re *3M Combat Arms Earplug Products Liability Litigation* and In re *Oil Spill by the Oil Rig "Deepwater Horizon"*.[288] Moreover, eligibility criteria and settlement distribution mechanisms tend to prevent payouts to bogus claimants.[289]

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[286] *See* Glover, *supra* note 36, at 109 (noting that leadership positions in MDLs are given to "top repeat-player firms in the plaintiffs' bar" not necessarily to those who simply have most volume).
[287] Nora Freeman Engstrom, *Comments at the NYU Law Review Centennial Symposium: Charting the Future of Litigation Finance* (Apr. 17, 2026).
[288] Comments of Aviva Wein, Assistant General Counsel, Johnson & Johnson, Charting the Future of Litigation Finance, NYU Law Review Centennial Symposium, New York, NY (April 17, 2026) (stating that the 3M earplugs litigation, at least when that dispute was briefly in bankruptcy court, was flooded with invalid claims that distorted settlement, though not providing evidence that any such invalid claims were inadequately screened at the distribution phase, or that invalid claims were extracting payouts).
[289] *See, e.g.*, *In re* 3M Combat Arms Earplug Prods. Liab. Litig., 282 F. Supp. 3d 1374 (J.P.M.L. 2019); *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, 731 F. Supp. 2d 1352 (J.P.M.L. 2010). While both multidistrict litigations experienced an influx of highly questionable or outright bogus claims—including claims filed on behalf of

Looking forward, these questions require direct engagement. This Article contributes a needed framework of relational structures through which capital, control, and oversight shape outcomes; importantly, moreover, it situates these inquiries within the different institutional settings in which mass-dispute claims are generated, aggregated, and resolved. This second point bears emphasis. Current literature isolates claim volume and capital as drivers of settlement distortion without situating those dynamics within the institutional settings in mass disputes in which a third-party funder relationship would be interposed. Although framed in broader terms, concerns that claim volume—untethered to merit—can generate settlement pressure are developed primarily through the lens of mass-tort bankruptcy and closely related aggregation contexts.[290] Scholars and interest groups in turn invoke what Professor Parikh has termed an "alchemist's inversion," while flattening distinctions across institutional settings and placing beyond the frame—if not foreclosing discussion of—how those settings are strategically selected and used.

This is a foundational, structurally distorting framing error: The institutional settings—and their selection or imposition—are not neutral baselines. The modern mass-dispute landscape operates across a spectrum of institutional mechanisms—class actions, MDLs, bankruptcy, arbitration, and hybrid models—each with different levels of aggregation, scrutiny, and procedural formality.[291] Movement across that spectrum is not incidental: As I have argued elsewhere, claims are strategically channeled into fora that can depress settlement values and diminish settlement

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deceased individuals and even pets—leadership counsel and the overseeing judges successfully cabined these issues. *See, e.g.*, Janet McConnaughey, *Indictment: Claims Included 4 Dead Before Explosion, 1 Dog*, AP NEWS (Oct. 29, 2015), https://apnews.com/general-news-319ac6d544114b4a8944f014b5acc88b (noting fraudulent damages claims including one where a dog was purported to be a deckhand).

[290] Parikh, *supra* note 63; Parikh, *The Alchemist's Inversion*, supra note 4340; Parikh, *supra* note 266.

[291] *See* Alexandra D. Lahav, *The Continuum of Aggregation*, 53 GA. L. REV. 1393 (2019).

leverage, fragment claimant representation, or eliminate claims altogether.[292] Objections to litigation finance as a mechanism for producing claim volume that are grounded in opacity, insufficient scrutiny, or untethered claim volume often draw from bankruptcy and, increasingly, mass arbitration.[293] These same corporate actors, including major product manufacturers and groups such as the U.S. Chamber of Commerce, invoke concerns about transparency and claim quality in those fora–a pattern echoed in portions of the academic literature, which advances similar concerns without fully accounting for the institutional pathways through which claims have been redirected.

This Article's framework centers the relationship between forum selection, institutional oversight, and claim valuation. When confronted with procedural mechanisms that provide more transparent and structured oversight—most prominently MDLs and class actions—the same actors who call for prohibitions on litigation finance because it might generate unscrutinized, meritless claims resist participation, seek to exit, or work to displace those fora altogether.[294] The pattern is

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[292] *See, e.g.*, Glover, *supra* note 275; Glover, *supra* note 22.

[293] *See, e.g.*, Mass Tort Panel, *Charting the Future of Litigation Finance*, NYU Law Review Centennial Symposium (April 17, 2026); *see also, e.g.*, U.S. CHAMBER INST. FOR LEGAL REFORM, MASS ARBITRATION SHAKEDOWN: COERCING UNJUSTIFIED SETTLEMENTS 5 (2023) ("[A]busive arbitrations are the 21st-century equivalent of the abusive class actions that characterized the last half of the 20th century"); Brief of the Chamber of Commerce of the United States of America et al. as Amici Curiae at 25–31, Wallrich v. Samsung Elecs. Am., Inc., 106 F.4th 609 (7th Cir. 2024) (No. 23-2842) (characterizing mass arbitration as a vehicle for "abusive gamesmanship" and "blackmail settlements"); Zachary D. Miller, Kevin S. Ranlett, & Rachel R. Friedman, *Mass Arbitration: Altering the Litigation Landscape,* 78 BUS. LAW. 515, 516–17 (2023) (noting the adoption of mass arbitration as a "tool for extracting settlements from companies").

[294] *See, e.g.*, Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017); Informational Brief of Aearo Technologies LLC at 5, *In re* Aearo Techs. LLC, 642 B.R. 891 (Bankr. S.D. Ind. 2022); Memorandum of Law of Amici Curiae by Certain Law Professors in Support of Motion of the Official Committee of Talc Claimants to Dismiss Debtor's Chapter 11 Case, *In re* LTL Mgmt., LLC, No. 3:21-bk-30589, at 2, 5 (Bankr. D.N.J. Feb. 4, 2022); Simon, *supra* note 276; BURBANK & FARHANG, *supra* note 24; Glover, *supra* note 21; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012).

difficult to ignore: Scrutiny is demanded where it may constrain claimants' access to capital or litigation leverage, but avoided where institutional mechanisms would subject claims and settlements to sustained judicial supervision. Whatever the merits of these concerns about settlement payouts untethered to merit in the abstract, they are *least likely* to be resolved in the very settings to which claims have been redirected. If mischief is said to flourish in the shadows, the answer is not to invoke the concern while avoiding the cure of illumination–to bring claims into institutional fora with transparent, structured vetting—most prominently MDLs and class actions.

Within formalized litigation structures—such as multidistrict litigation and class actions—there remain meaningful constraints on the translation of volume into settlement leverage. Civil justice has long contended with high-volume claiming, and the settlement literature reflects that the system has developed fairly effective—if imperfect—mechanisms for tethering settlement value to claim merit. Indeed, empirical support for the oft-invoked "flood of meritless litigation" concern remains thin—more rhetorical than reality.[295] Existing MDL tools—including fact sheets, Lone Pine orders, and judicial oversight—can and often do cabin weak claims before resolution.[296] Courts have also responded to concerns about insufficiently vetted claim inventories in mass litigation through procedural mechanisms such as Lone Pine orders, claim-validation

[295] D. Theodore Rave, *Multidistrict Litigation and the Field of Dreams*, 101 TEX. L. REV. 1595, 1597 (2023).
[296] Rave, *supra* note 295, at 1605–06.

requirements,[297] lodestar cross-checks,[298] and claim registries and census mechanisms.[299] These mechanisms are not perfect, but they have been shown to improve data quality and facilitate early case assessment; more to the point here, when combined with *active* judicial scrutiny and enforcement, they can help ensure claim validity.[300]

These mechanisms likely ought to be refined and expanded for a world of litigation funding and, increasingly, artificial intelligence. It is beyond the scope of this Article to identify all such possibilities, much less defend and solidify them; nonetheless, grappling with core concerns by way of this Article's relational frameworks and institutional attenuation points towards potential reforms I offer for further consideration by scholars, judges, procedural reformers, and lawmakers. For instance, and building on prior work, reformers ought to consider formalized periods of claim vetting at different stages of aggregate litigation. Relatedly, Professor Engstrom has proposed that judges impose sliding-scale common-benefit fee calculations that would explicitly align attorneys' fees with validated claim inventories.[301] More radically, it is perhaps long past time to develop formalized cost-sharing mechanisms for claim validation in aggregate disputes–particularly when

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[297] Pretrial Order No. 15 (PTO 15), *In re Zantac (Ranitidine) Prods. Liab. Litig*., No. 9:20-md-02924 (S.D. Fla. Apr. 2, 2020) (establishing an initial claim census and registry process).

[298] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 832 (2010) (exploring the differences between the lodestar approach and the percentage-of-the-settlement approach); Fitzpatrick, *supra* note 262, at 2082 ("Although lower percentages might be justified in large-stakes class actions, current compensation practices underpay class counsel in the small-stakes actions); *see also* Lynn A. Baker, Michael A. Perino & Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015).

[299] *See* Resnik, *supra* note 254 (describing the role of judges in managing MDLs).

[300] *See* DUKE JUD. STUD. CTR., STANDARDS AND BEST PRACTICES FOR LARGE AND MASS-TORT MDLS (Duke Jud. Stud. Ctr. 2014); Rave, *supra* note 295.

[301] Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 TEX. L. REV. 1623, 1644 (2023) (proposing a sliding scale approach to common benefit fees); *see also* Nora Freeman Engstrom & Brianne Holland-Stergar, *Competition and Contingency Fees*, 3 GEO. L.J. 581 (2026) (arguing that contingency fees are not price competitive and suggesting that reforms should be targeted at eliminating information asymmetries).

defendants possess substantial information advantages, and where defendant-run cross-checking is neither technologically nor financially over-burdensome.[302] Such mechanisms would, and must, explicitly reject the formalistic constraints of plaintiff's initial pleading burdens in one-on-one litigation and attenuate instead to the exigencies of the modern mass dispute landscape, at least one that takes claim merit, claim resolution, and rights effectuation seriously.

A final point follows from these institutional prescriptions: light cannot reach all shadows. A very different—and more acute—version of these problems arises in what this Article's taxonomy identifies as "shadow markets" for claim generation and resolution. Again, the introduction of litigation funding does not introduce these shadow markets, nor is the only concern about such markets one of the capacity to impose settlement pressure upon defendants by way of a high volume of unvetted claims. Most poignant along these lines is recent work by Professor Burch in the arena of pelvic mesh litigation, which traces an appalling and altogether tragic scheme by certain actors within shadow markets in mass torts, finance, and medicine that treated personal-injury claimants as "cash cows," their bodies as profit generators by way of dangerous and medically inadvisable surgical procedures, all to generate profit for various shadow actors acting well outside the view or supervision of courts or legal processes.

None of the market constraints in aggregate dispute resolution mentioned above, existing or proposed, would reach the "shadow markets." The entire point is that these shadow actors act outside of any formal mass-dispute market. As developed in Part II, these markets are characterized by the absence of meaningful connection to adjudicative processes, judicial supervision, or representative litigation structures. They are thus distinct, both conceptually and institutionally, from funded litigation markets. The core insight, then, is that litigation finance does not create the

[302] Glover, *supra* note 119.

risk of volume-driven distortion; it sharpens and reveals it. The task for civil justice is not to eliminate volume or capital, but to preserve, across relational settings, the conditions under which claim generation remains meaningfully tethered to merit.

That critical conceptual distinction is the chief contribution of this single Article, and it provides an important boundary upon scope. It also clarifies the limits of the framework, including where further doctrinal, theoretical, and empirical development is required.

D. Implications and Limitations

In debates about disclosure, claim control, and mass-dispute funding, application of this Article's relational framework identifies where civil justice concerns arise and directs regulatory responses to the relationships in which those concerns are situated, rather than to the binary of permissibility and prohibition that has long imposed constraints in the field. In the realm of disclosure, this means moving away from adversarial discovery mechanisms—such as broad Rule 26 mandates—that create collateral disputes between funders and defendants, and instead using targeted, non-adversarial disclosure to the court, including in camera review where necessary to police funder–claimant conflicts without undermining work-product protections. In the domain of claim control, it means understanding "control" as a question of contract and counterparty risk, distinguishing between control as a negotiated term and control as a remedy for breach, and evaluating both against existing contract doctrine and analogues in liability insurance rather than through categorical prohibitions. And in mass-dispute litigation, it means using existing representative structures—most notably class actions—to manage conflicts and supervise settlement; in less formal aggregate settings and shadow markets, it may mean introducing more targeted interventions, including lodestar cross-checks or other fee-limiting mechanisms, claim-registration requirements, cost-sharing for claim validation, or even more generalized restrictions

on non-contingent contracts for claim-generation. The result is a set of regulatory pathways that are both more concrete and more responsive to the distinct civil justice concerns presented in each context.

For theorists, the framework redirects attention to a set of more precise inquiries. The questions raised by litigation finance are not about its permissibility, but about how civil justice allocates authority and risk across actors: the extent to which claim ownership is separable from control; how and when litigant autonomy may be shared or ceded through contract; the conditions under which settlement remains legitimate when decision-making authority is distributed; and how private ordering operates within, and is constrained by, a public adjudicatory system. These questions are familiar to contract theory, civil procedure, and private law, but litigation finance brings them into sharper focus by situating them within concrete relationships among claimants, funders, attorneys, and courts. The relational framework thus provides a more precise analytic structure for engaging these questions, and a foundation for the fuller account of civil justice developed in Part IV.

These contributions are likely most immediately helpful to United States judges and scholars, given its continued adherence, either formally or functionally, to its ancient common-law inheritance. It may also have some purchase for judges, scholars, and regulators abroad. Although jurisdictions such as the United Kingdom and those within the European Union have moved beyond historical prohibitions, the practical reality remains that the "law" of litigation finance will be shaped primarily by judges operating under recent and broad "light-touch" regulatory mandates.[303]

[303] *See* RACHAEL MULHERON, A REVIEW OF LITIGATION FUNDING IN ENGLAND AND WALES: A LEGAL LITERATURE AND EMPIRICAL STUDY 49–63 (Legal Servs. Bd. 2024); *cf.*, CIVIL JUSTICE

Now, some limitations. To start, a word about scope and ambition. This Article's breadth is deliberate. The litigation finance landscape is sprawling and fast-moving, and the regulatory, theoretical, and doctrinal questions it raises cut across contract law, civil procedure, complex litigation, private law theory, and institutional design. The temptation is to address each question in isolation—and indeed, each of the regulatory pathways and theoretical inquiries developed here could sustain a separate article. But the central claim of this Article is that a unified framework is more valuable than its discrete parts: it is precisely the lack of an overarching theoretical account that has allowed litigation finance debates to remain free-floating, intractable, and susceptible to capture by frameworks designed for other purposes. This Article provides the forest; the trees—and there are many—are identified and situated within it.

At the same time, this Article does not attempt to resolve every debate or to forecast the development of a rapidly evolving industry. Its contribution is more modest: to provide a framework that clarifies the civil justice questions at stake and offers a basis for engaging them. That framework also marks its own limits. It identifies where existing doctrine and institutional structures can be deployed, but also where further doctrinal, theoretical, and empirical development is required—particularly at the intersection of contract law and civil justice, and in the regulation of informal aggregate litigation and shadow markets.

More broadly, the relational framework developed here provides a foundation for engaging the civil justice "business" on terms that extend beyond litigation finance. Parts II and III have shown how a relational account enables more precise engagement with the civil justice concerns

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COUNCIL, IMPROVED ACCESS TO JUSTICE – FUNDING OPTIONS & PROPORTIONATE COSTS 31–55 (2005) (recommending a lighter regulatory approach to contingency fees and third-party financing in the UK); Association of Litigation Funders of England and Wales, Code of Conduct for Litigation Funders (2018),

raised by this particular market innovation. The ultimate question, however, is not about litigation finance alone, but about the role any such innovation should play in civil justice. Answering that question requires an account of what the civil justice system is, what it is designed to do, and what it must do. It is to that account that this Article now turns.

IV. CIVIL JUSTICE AS REALIZED LAW: BUILDING A THEORY OF THE *BUSINESS* OF CIVIL JUSTICE

The title of this Article, The Civil Justice Business, carries a deliberate double meaning. With the advent of the litigation finance industry, a new market actor has entered the civil justice landscape: self-interested players offering equity-based capital rather than legal advice. On both sides of the "v." This new "civil justice business" raises serious and foundational civil justice questions for judges, lawmakers, and theorists—and this Article has elucidated them and provided a relational framework for grappling with them directly. But the deeper question, to which the foregoing analysis ultimately points, is this: What is the business of civil justice? What is the civil justice system designed to do, what must it do, and by what metrics should any innovation within it—not just a civil justice business—be judged?

This concluding Part synthesizes and extends prior work to continue building toward a unified, infrastructural theory of civil justice as realized law.[304] On this account, grounded in a long-standing tradition and pedigree in procedural theory and design, the institutional and procedural architecture of civil adjudication is not merely a second-order condition for the operation of private law (and also public law, for that matter), but a constitutive feature of it.

[304] *See* Glover, *supra* note 22; Glover*, supra* note 35; J. Maria Glover, *Encroachments and Oppressions: The Corporatization of Procedure and the Decline of Rule of Law*, 86 FORDHAM L. REV. 2113 (2018); J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, 2019 J. DISP. RESOL. 129 (2019).

Rights, remedies, and institutional capacity are co-determinative: the content and meaning of private law cannot be specified independently of the systems that render it enforceable. Civil justice is not, then, defined by adjudication alone, nor by the formal articulation or clarification of rights, but by the structure and contours of an integrated system through which claims are processed, resolved, and given effect across institutional forms, fora, and modalities (including adjudication, arbitration, settlement, and administrative pathways).[305] Instead, the civil justice system is an institutional apparatus that gives substantive legal rights practical effect—or leaves them inert. On this account, the content and design of procedural mechanisms, the allocation of institutional resources, and the market structures that support or impede claiming are not merely background conditions for the operation of law. They are constitutive of it. Where that system lacks the capacity to make legal rights actionable, the law those rights embody cannot function as law in any meaningful sense. It is by these civil justice metrics—not formalist conceptions, ancient or modern, of legal justice, civil procedure, and private and public rights that separate right from remedy—that any civil justice development ought to be judged. Constrained and clarified by this Article's relational framework, litigation finance can be harnessed and calibrated to further core civil justice goals.

This understanding of civil justice has a distinguished procedural pedigree. The architects of the Federal Rules of Civil Procedure, and Charles E. Clark foremost among them, conceived of procedural rules not as a self-contained technical apparatus but as the institutional architecture through which substantive law is delivered to those who need it.[306] Clark's vision, rooted in the

[305] Glover, *supra* note 119, at 1776–78; Glover, *supra* note 22, at 1382–85; Zimmerman, *supra* note 79, at 1478–83.

[306] *See* David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 436–51 (2010) (situating Clark's draftsmanship of the Federal

legal realism of his era, was to strip procedure of unnecessary technicalities and formalist encumbrances so that causes could advance to decision on their merits—to ensure, that is, that substantive law would no longer be viewed "through the envelope of its technical forms" or left "secreted in the interstices of procedure."[307] Federal Rule of Civil Procedure 1 mandates that the Rules "be construed, administered, and employed . . . to secure the just, speedy, and inexpensive determination of every action and proceeding" codified this aspiration: justice is not an abstraction hovering above procedure but a product that procedure is built to deliver.[308] Moving towards what this Article terms a theory of civil justice as realized law takes up and expands upon that procedural tradition. Where Clark and the original framers focused on the design of procedural rules as the mechanism of delivery, this Article extends the inquiry to the full institutional ecosystem—including markets, financing structures, and private ordering—through which substantive legal rights are either realized or left fallow.

An important clarification is in order. In legal scholarship, civil justice is often analyzed through the lens of rights, remedies, or liability, and private law theorists have long debated whether tort law is best oriented normatively around corrective justice, civil recourse, or instrumentalist measures like deterrence and regulation. At a very high level of generality, and simply for present purposes, these differing theories can be understood not as freestanding, but as

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Rules within the legal-realist program of stripping procedural technicality to enable the vindication of substantive rights); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987). Clark served as Reporter to the Advisory Committee on the Federal Rules and was the principal architect of the 1938 Rules.

[307] Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 298–99 (1938) (arguing that procedure should serve as the "handmaid" of substantive justice rather than its master); *see also* Marcus, *supra* note 306, at 448–51 (tracing Clark's realist commitment to the view that substantive law should not be "secreted in the interstices of procedure").

[308] FED. R. CIV. P. 1.

accounts of a legal system whose central function is to sustain the conditions under which repair, accountability, and regulation can occur. The theoretical contribution here is not to offer alternative theoretical justifications for liability, but instead to continue the work of theorizing the civil justice system itself—and more particularly, to ask what it takes for that system to function as a vehicle for realized law.

To do so, I start by tracing at a high level the ways in which this institutional account of civil justice intersects with leading theoretical accounts of private law. At the dissonant end of the spectrum, the account of civil justice I seek to crystallize here is incompatible with formalist, Kantian theories of private law. Professor Weinrib's influential account of private law as an internally coherent system of rights, insulated from politics and policy,[309] exemplifies the tension: under formalist accounts, liability and remedy exist in a bipolar structure whose rigidity this Article rejects. That which private-law formalism ushers offstage (as does procedural "legal formalism" and "neoliberalism"),[310] for instance, aggregation, settlement dominance, institutional capacity and tradeoffs, the neutrality (or not) of procedural architecture—is directed to center stage by a realized law account of civil justice. Strong formalism is structurally incompatible with this theoretical account; indeed, it is these very sorts of formalist conceptions that have provided both the functional fuel and proffered justifications for the systematic dismantling of the infrastructure for effectuating legal rights by courts, and in particular, the United States Supreme Court.[311]

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[309] ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1–21 (1995) (theorizing private law as a "harmony of parts making up a coherent whole").
[310] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Luke Norris, *Neoliberal Civil Procedure*, 12 U.C. IRVINE L. REV. 471 (2022).
[311] Glover, *Disappearing Claims*, *supra* note 35; Resnik, *supra*, note 185; BURBANK & FARHANG, *supra* note 24.

Corrective justice theories occupy a middle position. Corrective justice accounts, espoused prominently by Professors Coleman, Weinrib, and Sebok,[312] proceed from the premise that tort is fundamentally about a wrongdoer injuring the wronged. A realized law account of civil justice is likely compatible with corrective justice at the level of aspiration—the availability of adjudication and resolution of wrongs—but in marked tension at the level of institutional function, where the realities of aggregation, managerial judging, and privatization of resolution strain corrective justice's foundationally bilateral framework.

At the harmonious end of the spectrum are instrumentalist accounts and civil-recourse theories. Instrumentalist accounts, exemplified by Professor Sharkey's work on tort's regulatory function and punitive damages as "societal damages,"[313] and Professor Abraham's analysis of tort's deterrence, compensation, and loss-distribution functions,[314] emphasize the institutional mechanisms through which liability translates into real-world consequences. There is obvious harmony here, though not identity: instrumentalist accounts orient toward the outputs of the tort system—deterrence, cost internalization, gap filling—while this Article focuses on the inputs and structure of the civil justice system, the institutional conditions necessary for private enforcement

[312] *See* Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15, 15–18 (1995); Weinrib, *supra* note 259, at 498–523; Anthony J. Sebok, *What Is Wrong About Wrongdoing?*, 39 FLA. ST. U. L. REV. 209, 217–225 (2011).

[313] *See* Catherine M. Sharkey, *Modern Tort Law: Preventing Harms, Not Recognizing Wrongs*, 134 HARV. L. REV. 1423 (2021) (reviewing JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020)). *See also* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 359 (2003) ("Ideally, from a deterrence perspective the law should require a defendant to internalize the full expected cost of its conduct to others. In so doing, the law gives the defendant, and others like it, appropriate incentives to avoid such conduct in the future").

[314] KENNETH ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14–21 (Foundation Press, 6th ed. 2022)

to function as a legitimate form of governance.[315] Civil-recourse accounts, particularly Professors Goldberg and Zipursky's insistence that tort is structured around a claimant's right to seek redress for a legal wrong,[316] converge with this Article's emphasis on courts as fora for accountability and on the structure of adjudication, not just outcomes.[317] But the civil-recourse account presupposes a system in which that right can be meaningfully exercised; it does not take on the question of whether competent and capable institutional infrastructure is or ought to be required.

This account of civil justice also intersects with public law. Civil justice is of course a system of private enforcement—but it also frequently operates as the architecture for public law enforcement, as I have articulated in prior work.[318] Statutory regimes in antitrust, civil rights, labor, and consumer protection rely extensively on private litigants to vindicate public norms.[319] Of particular resonance here are the frameworks of Professors Levinson and Fallon, who insist that rights cannot be understood independently of the remedies and institutional mechanisms through which they are enforced,[320] and the work of Judith Resnik on courts' role in structuring participation, visibility, and accountability within a broader system of governance.[321]

This Article builds on these insights but departs from adjudication-centered approaches by identifying the system of private enforcement itself as the relevant object of analysis. Civil justice

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[315] *Accord* Richard H. Pildes, *The Neglected Value of Effective Government*, 2023 U. CHI. LEGAL F. 185, 235 (2023).
[316] Sebok, *supra* note 33; Steinitz, *supra* note 246.
[317] Goldberg & Zipursky, *supra* note 259.
[318] Glover, *supra* note 21; Glover, *supra* note 35.
[319] Catherine M. Sharkey, *The Administrative State and the Common Law: Regulatory Substitutes or Complements?*, 65 EMORY L.J. 1705 (2016); Issacharoff, *supra* note 78; FARHANG, *supra* note 21.
[320] Levinson, *Rights Essentialism, supra* note 169; Richard H. Fallon, *The Linkage Between Justiciability and Remedies–And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2013).
[321] *See* Resnik, *supra* note 254; Resnik, *supra* note 185.

is not merely the site at which rights are enforced, but the capacity-bearing system that renders both private and public law operative—or not.[322] The distinct theoretical contribution along these lines is this shift in analytic lens from the grounds of liability to the conditions of its realization. Private enforcement regimes are best understood as components of a broader institutional ecosystem—one that must sustain not only doctrinal coherence but also the capacity, legitimacy, and accountability necessary to render law operative. The business of civil justice is not simply to provide a system for recognizing or explaining law, but for realizing it.

A realized law account understands civil justice not merely as a set of doctrines and rules, but as a system in which the content and design of procedural mechanisms are as integral to the rule of law as the content, structure, and normative justifications for liability. Such an account necessarily rejects any first-order definitional or legitimacy-based commitment to a binary between public and private fora, or between public and private modes of resolution. It neither privileges nor rejects individualized claiming structures, nor does it treat any particular institutional pathway as inherently superior. And it does not impose bipolar litigation structures in which claimants and defendants alike must traverse the full panoply of adjudicative procedures in fully participatory form—bearing attendant costs and risks themselves—in service of a formalized conception of "civil justice" upon which the system need not, and should not, depend for its legitimacy.

This analysis pushes towards a series of conclusions that run counter to many conventional accounts and approaches to litigation finance. First, a theory of civil justice as realized law rejects explicitly the public policies behind prohibitions on litigation finance as well as formalistic

[322] Norris, *supra* note 310; Glover, *supra* note 21.

accounts of "legal justice"[323] that view the connection between injured and injurer as unseverable.[324] Such conceptions, which call to mind old notions of the Hohfeldian plaintiff securing justice against the one who wronged him,[325] or ancient conceptions of claims so severed as "inauthentic,"[326] are premised upon insufficient commitment to the "business of civil justice," and tend to perpetuate and exacerbate modern civil justice's failures. Indeed, insistence that litigation finance fit formalist constraints perpetuates a theory of civil justice unresponsive to one of civil justice's most deep-seated modern problems: for most people, and in increasing areas of substantive law,[327] there is no such thing as civil justice.[328] These accounts exclude the fact that

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[323] Radin, *supra* note 27, at 48; *see also* SCALIA, *supra* note 27; Am. Express Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013). For robust discussion along these lines, *see, e.g.*, Goldberg & Zipursky, *supra,* note 169; Levinson, *supra* note 169; Schwartz, *supra* note 169, at 225–41; Huq, *supra* note 169, at 76–135; Stuntz, *supra* note 169, at 63–99; *see also* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1396–1401 (2016) (describing certain strains of theory that associate private law with "values that dissociate it entirely from politics (broadly defined) which are formal," e.g., libertarian, modern Kantians "understand[] private law as a realm of prepolitical or apolitical interactions.").

[324] *See, e.g.*, Radin, *supra* note 27.

[325] *See* Goldberg & Zipursky, *supra* note 259 (distancing and distinguishing from formalistic theories).

[326] *See, e.g.*, Radin, *supra* note 27; Sebok, *supra* note 33.

[327] *See, e.g.*, Glover, *supra* note 35; Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011) (finding that arbitration clauses in employment contracts favor employers at the cost of employees); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 699 (2018) (noting that "a very large majority of aggrieved individuals who face the prospect of mandatory arbitration give up their claims before filing"); WEST, LAWLESS, *supra* note 24, at 7 (describing "pockets of lawlessness" wherein various legal or civil rights are rendered meaningless because the law does not provide a means to protect those rights, even while they are recognized to exist).

[328] Even formalist theories of private law account for *some* segment of the social system to secure justice: John Rawl's command for private law institutions to "leave individuals and associations free to act effectively in pursuit of their ends without excessive constraints" contains a core qualifier, namely that those individuals are "secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made." JOHN RAWLS, POLITICAL LIBERALISM 268–69 (1993). Some scholars have argued the need to expand the Rawlsian framework for justice beyond the "basic structure" of society, and to consider inequalities with private relationships. *See, e.g.*, Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, L. & PHIL. (2017).

substantive rights in private law have little meaning without pathways for redress,[329] procedural opportunity,[330] and facilitative civil-justice architecture.[331] This is why robust civil justice cannot be divorced from access to justice.[332]

Second, and judged against this metric, litigation finance—when approached through this Article's relational framework—can enhance the fundamental commitments of access-to-justice while constraining its potential excesses. Central to any robust conception is recognition of access-to-justice's inherent trade-offs [333] and the importance of holding wrongdoers accountable,

[329] *See, e.g.*, WEST, *supra* note 171, at 148–81 (theorizing civil rights as "a civil right *to* law" rather than merely right to be free *from* public or private discrimination); WEST, LAWLESS, *supra* note 24 (describing how protections against attempts to redress violence works as protections around the violence itself); Glover, *supra* note 21, at 1148–60; Glover, *supra* note 35, at 3074–83; BURBANK & FARHANG, *supra* note 24, at 217–47; Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1706–14 (2004). The sorts of debates about rights and effectuation, the "pure" and the "concrete," are not merely the province of public law. *See, e.g.* Levinson, *supra* note 169, at 857–70. In the private law domain, there are scores of civil rights without remedies, a result of the systematic hollowing out of the architecture of "civil justice," often ushered in by way of formalist "legal justice." *Italian Colors* ("too darn bad"); to *Epic Systems* (doesn't matter if the statute gives you this right). Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); Epic Sys. Corp. v. Lewis, 584 U.S. 497 (2018). *See also* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393 (2010); Comcast Corp. v. Behrend, 569 U.S. 27 (2013); TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

[330] *See generally*, ADRIAN A.S. ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 1–50 (3d ed. OUP 2013) (describing the core function of civil courts as providing the opportunity to enforce civil rights).

[331] *See, e.g.*, GOLDBERG & ZIPURSKY, *supra* note 169.

[332] *See, e.g.*, Martha Minow, *Access to Justice*, 2 AM. J.L. & EQUAL. 293 (2022); Rhode, *supra* note 272; Resnik, supra note 22; Glover, *supra* note 148. Such formalistic conceptions of "civil justice" are especially ill-fitting in a civil justice landscape whose facilitative architecture has been systematically and systemically retrenched by litigation opponents, and in which private enforcement plays such a dominant role. *See, e.g.*, BURBANK & FARHANG, *supra* note 24; Glover, *supra* note 35. Importantly, access to justice is not a singular commitment, nor is it susceptible to singular definition*;* it implicates multiple goods, whose distribution will inevitably involve trading some goods for others. Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L. J. 1473 (2021).

[333] *See* Shapiro, *supra* note 332; Steinitz, *supra* note 57.

regardless of their power.[334] Civil justice systems, especially but not exclusively in the United States, face a profound access-to-justice crisis. Access to courts and counsel, the ability to pursue and defend claims, and the outcomes of those claims are increasingly shaped by escalating and non-neutral impositions of cost and risk, procedural barriers, and unequal capacity. [335] Given the costs of claiming alone, access to justice has long depended, critically, on the integration into the civil justice landscape mechanisms and innovations responsive to claiming economics (e.g., mechanisms of aggregation; innovative claiming models like mass arbitration; access to equity-based finance) and risk-management mechanisms (e.g., liability insurance; access to litigation finance). To this, I would add an additional commitment in a robust conception of "access-to-justice," which emerges clearly from this Article's engagement with litigation finance: efforts toward neutralized, equitable access, on both sides of the "v.," to mechanisms responsive to the economics of claiming and for managing risk—a commitment that would of course, cut both ways in litigation.

Moreover, "civil justice" as articulated in this Article requires structural architecture–architecture for pursuing and defending claims—as a matter of both procedural and substantive law.[336] Here at home, the civil-justice architecture—the infrastructure for rule of law—is under enormous strain. Two reasons are of primary importance here. One ironic reason for this is that

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[334] My conception of wrongdoer accountability can be situated along the lines of Goldberg and Zipursky's theory of civil recourse in private law, including and especially with their efforts to distance their theory from an account of wrongdoer accountability in civil recourse as requiring revenge. Its conception of wrongdoer accountability in civil justice thus differs from the view of corrective justice scholar Tony Sebok that the civil justice system is "underwriting the victim's right to decide whether and how the wrongdoer will suffer punishment." Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1028 (2007).

[335] Glover, *supra* note 119, 1729–34 (2012); *see also* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2000); Galanter, *supra* note 193.

[336] *See, e.g.*, 3 WILLIAM BLACKSTONE, COMMENTARIES *105.

the conditions that generate increased need for private enforcement and undergird both normative and structural theories in private law and procedure are also the very same conditions that strain the institutional capacity to deliver justice at all (much less on an individualized, full adjudicative basis).[337] Other branches of government, particularly Congress, delegate the lion's share of rights-realization responsibility to that system, as Professors Burbank, Farhang, and I have traced. At the same time, Congress (as recently as 2024) continues to abrogate the responsibility to allocate critical resources to the system it entrusts with upholding the foundational rule of law norm that rights can be a realized things, as opposed to mere formalist abstractions, and without reference to the non-neutrality of the rule-of-law infrastructure.[338]

The second reason is that the consequence, and sometimes the aim, of orienting "civil justice" around the dictates and constraints of formalized accounts and definitions of "legal justice," "rights" and "law" is to exclude from or at least demote as unnecessary to civil justice's domain rights with remedies; substance with procedure; law with systems for achieving rule of law. Indeed, the significant theoretical and conceptual gains in substantive law theory, which have long eschewed often disabling and disoperationalizing formalistic constraints[339] and whose

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[337] *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004); Engstrom & Stone, *supra* note 22; Nora Freeman Engstrom & David Freeman Engstrom, *The Making of the A2J Crisis*, 75 STAN. L. REV. ONLINE 146 (2024).

[338] *See* JUDGES Act of 2024, S. 4199, 118th Cong. (2024) (creating 63 new permanent U.S. district court judgeships over a 10-year period and 3 temporary U.S. district court judgeships in 2025) (vetoed by President Biden).

[339] Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) (discussing the role of the workplace in civil society as supporting democratic values); Estlund, *supra* note 327, at 699 (exploring the negative effect arbitration clauses have on employees bringing labor-related disputes.); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 420–21 (2016) (arguing that arbitration clauses allow corporate defendants to "disregard federal civil rights statutes"); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 489–499 (2011) (exploring the tension between

insights provide further institutional and theoretical support for this Article's conception of civil justice, have been eroded not by way of direct rejection and destruction in the courts or Congress of the substantive rights themselves, but indirectly, and by way of the systematic destruction of the infrastructure for claiming.[340]

As both I and other scholars have traced extensively, however, civil justice architecture has been systematically dismantled–in no small part by the overtake of private contracts, especially for forced arbitration. This "arbitration revolution" was operationalized and effectuated in large part by way of the Supreme Court's laissez-faire, relationally insensitive approach to contract law and theory in contracts of adhesion in civil justice, developed with explicit invocations of formalized conceptions of "legal justice" that separate right from remedy, right from redress.[341] The effects on claiming and the hollowing-out of substantive rights along with it has been staggering.[342] And this elimination of claiming across wide swaths of the substantive law by way of decades-long campaign of stabbing affected rights in the procedural back has given way towards a greater willingness by private parties, emboldened by the Supreme Court, to go ahead and stab those substantive rights directly in the front–by way of a panoply of immunities, waiver provisions vis-a-vis a number of substantive rights, and other bars on private actions for violations of legal

strict contractual formalism in arbitration doctrine and the realities of unequal bargaining power in employment and consumer contracts); Resnik, *supra* note 185 (detailing the structural movement away from public, aggregate adjudication toward privatized, bilateral dispute resolution mechanisms and the resulting impact on statutory enforcement).

[340] Glover, *supra* note 35; David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

[341] *See* Glover, *supra* note 22; Resnik, *supra* note 185, at 2863–74.

[342] Glover, *supra* note 22; *see also*, *supra* Part II; Estlund, *supra* note 327 (arguing that Supreme Court-sanctioned mandatory arbitration clauses in employment contracts lead most would-be plaintiffs to abandon their claims altogether); Colvin, *supra* note 327 (finding that employment arbitration resulted in lower award amounts than comparable litigation, with a significant repeat-player benefit for employers).

and civil rights, effectuated often (and again) by way of private contract,[343] sanctioned under these same laissez-faire contract approaches drawn from the same formalist conceptions of "formal rights" and "legal justice."[344]

This reality about the costs of civil justice generally, and its impacts on litigation "have-nots" in particular, co-exists alongside, and often replicates, ever-growing and staggering economic inequality in society more broadly.[345] There is much scholarship devoted to grappling with the implications of economic equality for public law; the task is no less important (or straightforward) private law and procedure. To the extent a hollowed-out civil-justice landscape depresses or eliminates claiming and rights enforcement and thus access-to-justice, that civil-justice system is being used to make money, day in and day out—by the very entities who engineered, or at least substantially benefit from, the hollowing. This is not simply a matter of an out-resourced "have-not" coming out behind in a civil-justice battle; in some areas of the civil-justice landscape, it represents a striking institutional non-neutrality, to the well-studied benefit of a moneyed corporate majority that has won a broader "civil justice" war by eliminating it.[346] Regardless of whether civil justice requires a distributional account, the work of scholars along these lines spotlights the bit of absurdity underlying the straight-faced assertion by litigation

[343] WEST, LAWLESS, *supra* note 24 (describing the way liability waivers reshape the meaning of tort law).
[344] WEST, LAWLESS, *supra* note 24 (tracing waiver jurisprudence in the United States).
[345] The now canonical citation is THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 237–467 (Arthur Goldhammer trans., Harv. Univ. Press 2014) (detailing the rise in global wealth inequality since the late twentieth century).
[346] *See* Glover, *supra* note 22; ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 324–77 (2018) (describing *Citizens United* as the crowning victory of the movement for corporate rights).

finance opponents that the civil justice system should not be available for making money.[347] Nonetheless, nothing in the foregoing is offered as an adoption of a distributive account of civil justice or civil procedure, but rather to draw insights about institutional inputs and their (non)-neutrality as relevant to a particularly troubling inconsistency in the civil justice landscape that provides for widespread acceptance of cost- and risk-spreading on the defense side (which we associate with a somewhat loose conception of defense-side access-to-justice), but shudders at a similar prospect across the "v."

Fundamentally, further, access-to-justice is not simply a function of having some degree of adversarial parity in financial resources; it is also a function of equality in weaponry.[348] This cannot be emphasized enough. The relevant weapons in an adversarial system: The advocates, at least in adjudication-to-resolution claiming structures.[349] Access-to-justice in an adversarial system, then, often means access to advocates with a realistic shot at prevailing in the suit—a reality inextricably intertwined with the ability to pay for those advocates. For under-resourced claimants, elite law firms and lawyers are routinely out of reach. The "haves," again, come out ahead. Here, litigation finance uniquely effectuates and secures alignment with this more nuanced understanding of access-to justice: Litigation finance does not simply open a pathway to legal representation on both sides of the "v.," it also tends to depend for its very survival upon highly effective representation. Indeed, as Professor Engstrom has also traced, litigation finance may hold

[347] That third concern is not simply an objection to profit as such; it echoes broader anxieties about private actors extracting value from institutions that perform public-regarding functions, and thus requires greater precision about who is making money, from what, and under what constraints.
[348] *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 843 (1985) (In the German context, this defect in adversary theory is called "Waffenungleichheit"—inequality of arms).
[349] *Cf.* Engstrom, *supra* note 119, at 850 (describing high-volume personal injury practices that provide nominal access to the legal system but rely on quick, informal settlements rather than robust, adversarial advocacy).

particular promise for reducing inequities between litigation's "haves" on the one hand, and litigation's "have-nots" on the other.[350] On the ground, one can already see this happening in the legal-finance market, as a number of "Big Law" firms broaden their portfolio of work to include both plaintiffs' and defense-side cases.[351] Even large and highly capitalized entities can be boxed out by way of these access-to-justice imbalances—unable financially to pursue or defend claims against the legal apparatus of million- and billion-dollar corporations, an apparatus that includes access to its own forms of litigation finance.[352] To be sure, litigation finance is no panacea for a civil justice system in an access-to-justice and regulatory crisis;[353] The problems are deeper and more structural. But properly understood, litigation finance sharpens the lens for viewing the conditions under which civil justice operates, and in doing so, provides a concrete occasion for needed theoretical analysis and development. More than this, litigation finance explicitly acknowledges and responds—in its own, and not entirely unproblematic ways—to this fundamental reality about litigation costs, as well as to the reality that, in private law, access to justice is also about the ability to bear risk (and this would include settlement effects, as pronounced risk-differentials can drive down the value of settlements).[354]

It bears emphasis at this juncture that litigation finance does little to answer the privatization critiques pressed by both Professors Resnik and Fiss—in many ways it exacerbates them. No doubt, as I have explained in other work, the civil justice landscape has become "at Congress and the Supreme Court's behest, a product of (and battlefield for) a mutually destructive

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[350] Engstrom, *supra* note 53; Galanter, *supra* note 193, at 144.
[351] *See supra* Introduction; *see also* Sebok, *supra* note 202, at 840 n.17 (explaining the increasing prevalence of contingent fee arrangements at Am Law 100 firms).
[352] *See, e.g.*, Baker, *supra* note 93; Silver, *supra* note 67.
[353] *See, e.g.*, Engstrom & Stone, *supra* note 22.
[354] Glover, *supra* note 119, at 1735; Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267 (2006).

private procedural arms race."[355] The realized law account, however, diverges from these frameworks at just this point: its institutional tent is considerably wider, making room for privatized mechanisms so long as they serve the realization of substantive law. Indeed, and perhaps particularly important to emphasize at this precarious moment in time, Robert Kagan's proclamation that "the rule of law is a very good thing."[356] However, in myriad respects–including beyond the realm of civil litigation–the rule of law is far from free. And for decades, public procedural reform has produced virtually nothing in response to this access-to-justice crisis or to counterbalance the large-scale outsourcing of civil justice to a moneyed private majority–much less to shift the dynamics of civil litigation in ways that would produce more adjudicative precedent. For good and ill, it has been private innovations in civil justice, including those that harness the economic potential of claims, that have responded to an ever-growing imbalance between the "haves" and "have-nots" in civil litigation. While not absolving any civil justice innovation from scrutiny as a matter of civil justice's core aims, a theory of civil justice as realized law does not–cannot, should not–impose a binary choice between public and private adjudication, between public and private resolution as a matter of institutional legitimacy, however preferable one or the other might be to the parties, the attorneys, the resource-strapped courts, or state and federal legislatures (who are of course free to impose such procedural dictates should they deem them integral to the substantive regulatory regime at issue).

Of course, there are other public concerns in civil justice—about private enforcement, private rights and private power, and the role of private civil justice in an overall public society.

[355] Glover, *supra* note 22.
[356] Kagan, *supra* note 229, at 3.

As traced above, there is a decidedly regulatory element to civil claiming.[357] And there is something far deeper going on than formal conceptions of who owes who money pursuant to a legal claim.[358] There are many substantive laws for which the allowance of access to litigation finance and exercise of claimant autonomy over their claims would facilitate the regulation of substantive wrongdoing—and without which, such regulation would not occur.[359]

Litigation finance narrowly, and the new conception of litigant autonomy this Article introduces more broadly, confronts directly the reality of private enforcement in the United States, which has long been asked to take the laboring oar of regulation.[360] In the United States, private enforcement plays a structural role in the regulation of wrongdoing.[361] To put the point conversely, and bluntly: In a different world, much regulation of wrongdoing could be achieved by other mechanisms; by other regulators.[362] In the world we actually live in, private claimants have been

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[357] *See, e.g.*, Alan M. Trammell, *Demystifying Nationwide Injunctions*, 98 TEX. L. REV. 67 (2019); Alan M. Trammell, *The Constitutionality of Nationwide Injunctions*, 91 U. COLO. L. REV. 977 (2020); *see also* Glover, *supra* note 148 (arguing that regulation is a core purpose and function of civil litigation).

[358] A theory of "civil justice" I am developing here, and building on prior work, would tend to contrast with formal theories of private law as a publicly rightful set of norms that governs the relations between parties, and no more. *See, e.g.*, Weinrib, *supra* note 259. A full account of such a departure from the juridical approach to corrective justice is beyond the scope of this Article.

[359] Deregulationists, of course, find this normatively desirable: Many think certain substantive laws should not be on the books, and/or that the civil justice system returns too many false positives and hands money to plaintiffs irrespective of the merits. As discussed above, a lot of these are empirical questions whose answers could well dictate more merits-based intervention in the adjudicative process. This Article does not re-enter those debates here.

[360] BURBANK & FARHANG, *supra* note 24.

[361] *See* Glover, *supra* note 21; Glover, *supra* note 148. *See also* Shapiro*, supra* note 148 (noting that class actions provide a means of private enforcement to deter wrongdoing and contribute to "social welfare"); BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 29–47, 58–73 (2019) (arguing that private enforcement, and class actions in particular, are crucial regulatory tools in the American context).

[362] We could beef up the regulatory state—unlikely generally, much less in the era of DOGE. We could toss the court system for a wide swath of claims, and set up something like a no-fault compensation regime, like New Zealand did. *See, e.g.*, Goldberg & Zipursky, *supra* note 169.

given not just the right, but the responsibility—and, given the financial realities, one might say the burden—to address widespread and often public harms,[363] to deter wrongdoing by sometimes billion-dollar corporations,[364] and to pay for all of it themselves.

And whatever the "right" level of regulation of any given law, broad-sweeping deregulation through the backdoor—by way of formalist insistence on the inseverability of the injured and the injurer—is particularly troubling in the specific context of substantive laws that expressly permit the exercise of litigant autonomy via claim assignment for regulatory reasons.[365] It is not consistent with a conception of "civil justice" that takes rights seriously to disregard either substantive laws or the doctrine and policies that have built up around them for the achievement of clear regulatory aims. That is not "balls and strikes" restraint; it is not consistent with a conception of civil justice that takes rights seriously.

CONCLUSION

Civil justice is a lofty idea. Civil justice aspires to vindicate rights, no matter the plaintiff's resources, and to hold wrongdoers accountable, no matter their power. We place a great deal of faith in those commitments. But as this Article has shown, those commitments do not operate in the abstract. They depend on a system capable of rendering legal rights actionable and of consequence—of transforming law on the books into law as realized.

This Article has argued that civil justice is not merely a set of doctrines or ideals, but a capacity-bearing system through which law is made operative. Rights, remedies, and institutional design are co-determinative. The structure of civil justice—its procedures, its allocation of

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[363] *See generally*, Elizabeth Chamblee Burch, Abbe Gluck, & Adam Zimmerman, *Against Bankruptcy: Public Litigation Values Versus the Endless Quest for Global Peace in Mass Litigation*, 133 YALE L.J. FORUM 525 (2024).
[364] *See, e.g.*, Simon, *supra* note 276.
[365] *See supra* Part II.A.2.

decision-making authority, its mechanisms for aggregation and risk management—is not incidental to law; it is constitutive of it.

Litigation finance enters this system not as an external disruption, but as a structural intervention. It reshapes the conditions under which claims are brought, pursued, and resolved, and in doing so exposes the extent to which civil justice has always depended on the allocation of resources, the management of risk, and the design of institutional pathways for enforcement. The question, then, is not whether this new "civil justice business" conforms to formalist conceptions of legal justice, nor whether private profit is normatively comfortable in civil litigation. It is whether, to what extent, and under what circumstances, these arrangements sustain or undermine civil justice as realized law.

The relational-institutional framework developed in this Article provides a way of engaging that question. By restoring civil justice rules and policies to their proper domains and aligning regulatory responses with the relationships that structure funded litigation, it moves analysis beyond binary debates about permissibility and toward relationally grounded engagement with the core, characteristic civil justice problems. Litigation finance, in this view, is neither panacea nor pathology. It is a development that both responds to and reshapes a civil justice system under strain.

That strain is real. Litigation finance does not resolve it. But it both clarifies and reshapes it. By redistributing access to capital and risk management—on both sides of the "v."—it expands who is able to pursue and defend claims, and under what conditions. In that sense, it bears directly on whether civil justice can function as a system that takes rights seriously, for it is that capacity which grounds civil justice's legitimacy in the rule of law. The civil justice business must therefore be judged by the extent to which, and the circumstances under which, it strengthens or undermines

that capacity. That is the measure of civil justice—whether law is made real, not left at declaration, and thus able to sustain the rule of law.