

# Litigation Financing *Demystified*

# Presenters



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# The Roadmap

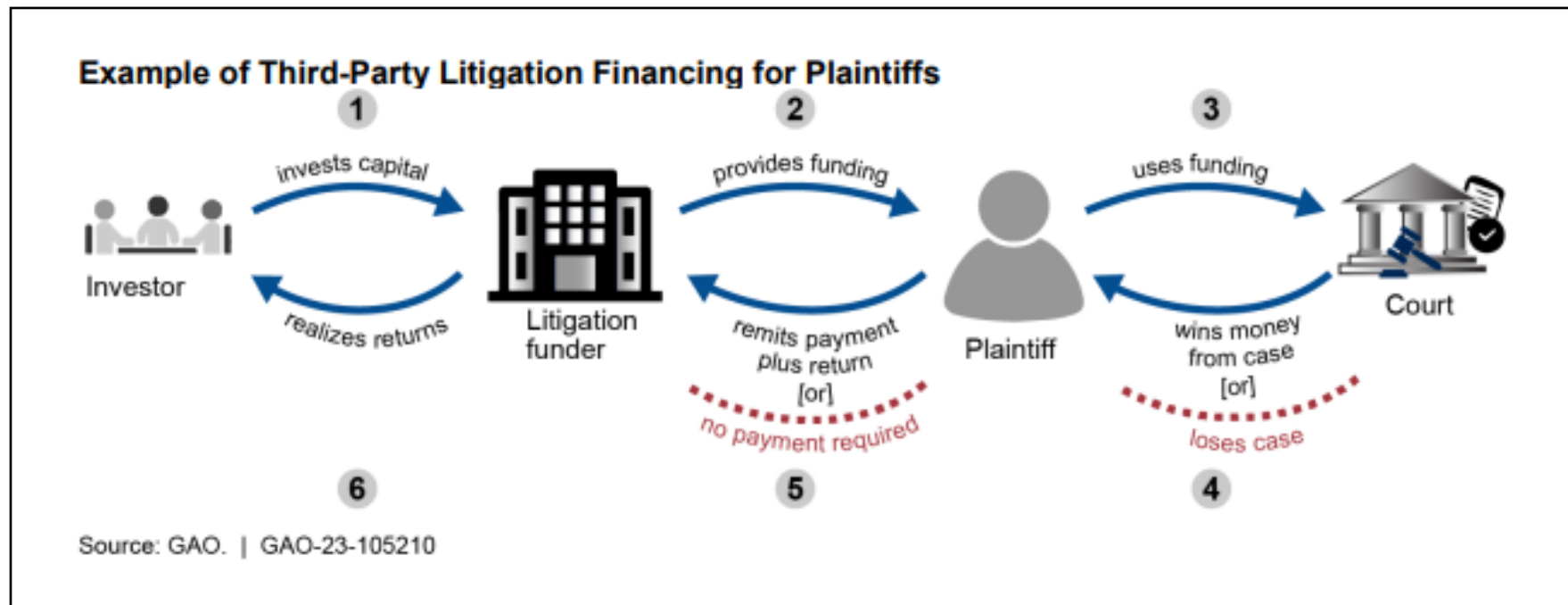
- What is Litigation Financing?
- Origins of Litigation Financing
- Impacts of Litigation Financing
- Disclosure/Discovery of Litigation Financing
- Jurisdictional Specifics – NC, SC and GA
- Ethical Considerations
- Recent Developments



# What is Litigation Financing?

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A transaction in which a third party, that is neither a party to a legal claim nor their legal counsel, provides capital to a party (or counsel) in exchange for a financial interest in the outcome of the legal claim



# Financing Models

- Single-case agreements between a funder and a plaintiff who exchanges a portion of the value of an individual case for funding
- Portfolio arrangements in which a law firm or corporation exchanges a portion of the value of a group of cases for funding



# Features of Litigation Financing

- The signature feature of this form of capital is that repayment of the financing is usually contingent upon a successful outcome of the underlying legal claim
- Third-parties can fund a single case or a portfolio of cases
- Litigation financing is primarily being used to pursue plaintiff-side or affirmative claims
- Commercial litigation funding vs consumer litigation funding

# Origin of Litigation Financing



# Origin of Litigation Financing

- Historically, doctrines such as champerty and maintenance have stood as barriers to third-party litigation funding
- The doctrines of champerty and maintenance originated in medieval times
- Litigation financing began in Australia in the 1990s, followed by the U.K., U.S., Canada, Europe and parts of Asia, as modern courts began relaxing notion of champerty



# What are “Champerty” & “Maintenance”?

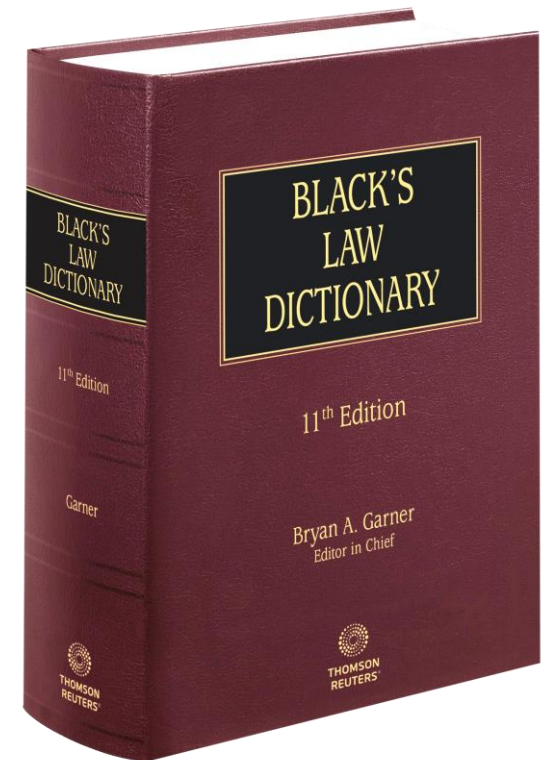
## Champerty

“[a] bargain by a stranger with a party to a suit, by which such *third person undertakes to carry on the litigation at his own cost and risk*, in consideration of receiving, if successful, a part of the proceeds or subject sought to be recovered.” Black's Law Dictionary

## Maintenance

“maintaining, supporting, or promoting the litigation of another.” Black's Law Dictionary

*Example: Malice maintenance*



## Origin (cont.)

- The common law doctrine of champerty was codified by many states
- In practice, this meant that third parties could not help a claimant commence or prosecute a civil suit in exchange for a portion of the monetary recovery
- Today, this is not the case in most jurisdictions

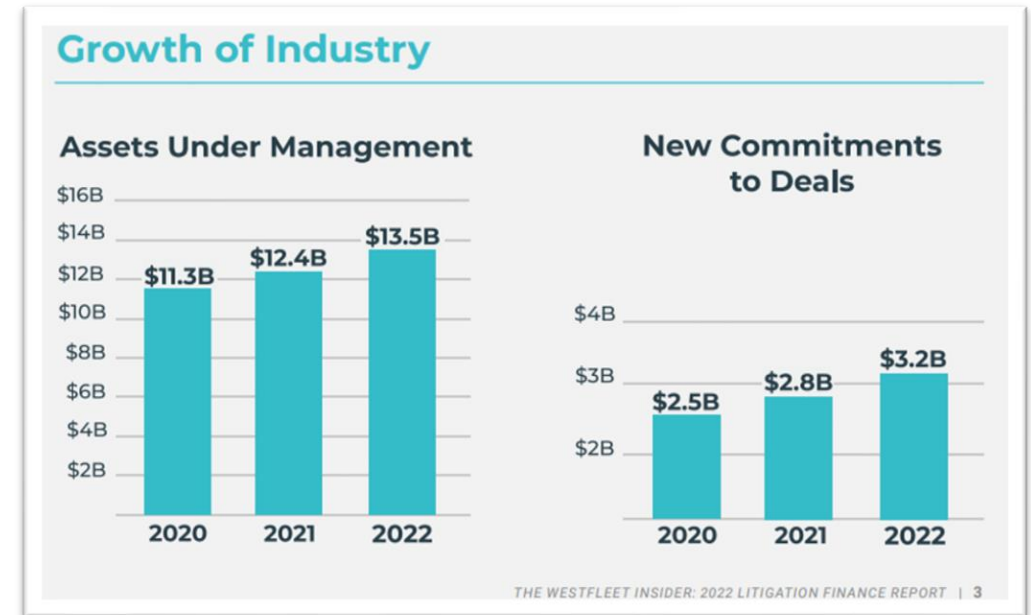
# Modern Trend Towards Relaxing Champerty

- The trend is towards relaxing the once rigid bars to litigation funding
- The effect is to allow third-parties to “buy in” to litigation
- Champerty lives on and serves as the basis for most restrictions to TPLF in the United States

# Impacts of Litigation Financing

# A Growing Industry

- A survey of litigation funders by Westfleet Advisors shows that financing commitments have grown quickly in the past four years.
- According to Bloomberg Law surveys, patent, antitrust, commercial litigation, and bankruptcy lawsuits have attracted the most litigation financing activity



# Real Life Examples

- *Gawker*, Terry Bollea (aka The Hulk), funded by Peter Thiel
- *NFL Concussion cases* (players lawsuit against the NFL's concussion protocols), funded by multiple sources, like Balanced Bridge (formerly Thrivest)
- Ongoing cases related to Camp Lejeune pollution have attracted nearly \$2 billion in funding



# Pros and Cons of Litigation Financing

- Provides underfunded plaintiffs resources to litigate cases against well-funded defendants
- Allows plaintiffs to realize the value of their claim upfront instead of having to wait
- Plaintiff firms ensure they are paid
- Transfers risk to a third party





## Pros and Cons (cont.)

- Expensive
- May deter plaintiffs from accepting a settlement offer because they may want to make up the amount they will repay the funder
- Could result in increased litigation costs for defendants
- Risk that a funder may attempt to exert control over the case
- Conflicts of interest
- Litigation funders may take advantage of vulnerable consumers

# Pros and Cons (cont.)

- *In re: Pork Antitrust Litigation - Sysco and Burford Capital*
  - In March 2023, food distributor Sysco Corp. filed a complaint in Illinois federal court accusing its litigation funder Burford Capital of blocking it from entering into reasonable settlements with suppliers in price-fixing litigation
  - Sysco also accused Burford of trying to "improperly influence" Boies Schiller Flexner LLP, Sysco's counsel in the ongoing litigation, to betray the firm's duties to its client and assist Burford in preventing the settlements
  - Prior to the filing of the Complaint, Burford and Sysco had completed a confidential arbitration before the London Court of International Arbitration, which found that Sysco had given Burford settlement approval authority and therefore couldn't settle without Burford's approval
  - Burford then filed a petition in New York state court asking the arbitration award be confirmed.

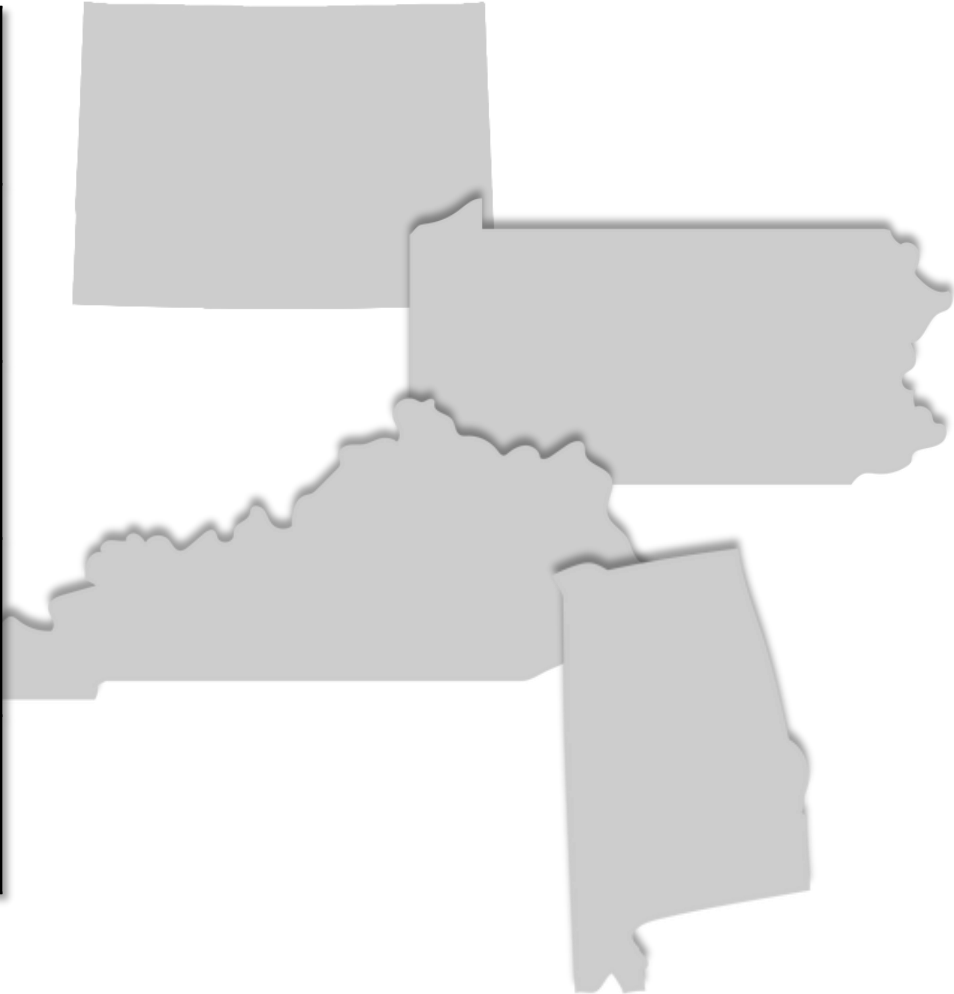
# Pros and Cons (cont.)

- *In re: Pork Antitrust Litigation - Sysco and Burford Capital*
  - Both parties voluntarily dismissed their suits in late June 2023
  - Terms of the settlement are not public
  - Sysco asked for permission to substitute a Burford affiliate as plaintiff in the underlying price-fixing litigation. In a joint motion, the parties stated Sysco fully assigned its claims and causes of action to the affiliate.
  - However, last week, the motion to substitute was denied by the presiding magistrate judge. The magistrate judge concluded the substitution would be against public policy because the affiliate seeks to extend the litigation to extract larger settlements and to avoid setting a low benchmark by which future settlements will be measured.
  - "Sysco and Carina frankly admit that their motive to substitute Carina for Sysco is that Sysco was planning to settle these antitrust claims for lower amounts than Burford wanted," Judge Docherty said. "Put more starkly, a non-party has interfered with the decision of a party to settle that party's claims, because of reasons specific to the non-party."

# Jurisdictional Considerations

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| Broadly Disfavored |
|--------------------|
| Colorado           |
| Pennsylvania       |
| Kentucky           |
| Alabama            |



# Jurisdictional Considerations: South Carolina

- South Carolina
  - Proposed legislation failed in 2017
    - [2017-2018 Bill 390: Consumer litigation funding company - South Carolina Legislature Online \(scstatehouse.gov\)](https://www.scstatehouse.gov/bills/2017-2018/bills/390/)
  - Loan to *claimant* is considered a “loan” as defined under the Consumer Protection Code, and subject to limitations (e.g., must be <\$90K)
    - [3.104,106-1403 Litigation FundingTransactions.pdf \(sc.gov\)](#)



# Jurisdictional Considerations: North Carolina

- North Carolina law prohibits companies from charging more than 16% per year for legal financing
- While attorneys may refer clients to litigation funding companies, and may offer on-site access to a financial brokerage company as a payment option for legal fees, attorneys may not invest in a litigation funding company if the lawyer accepts clients who obtain litigation financing



# Jurisdictional Considerations: North Carolina

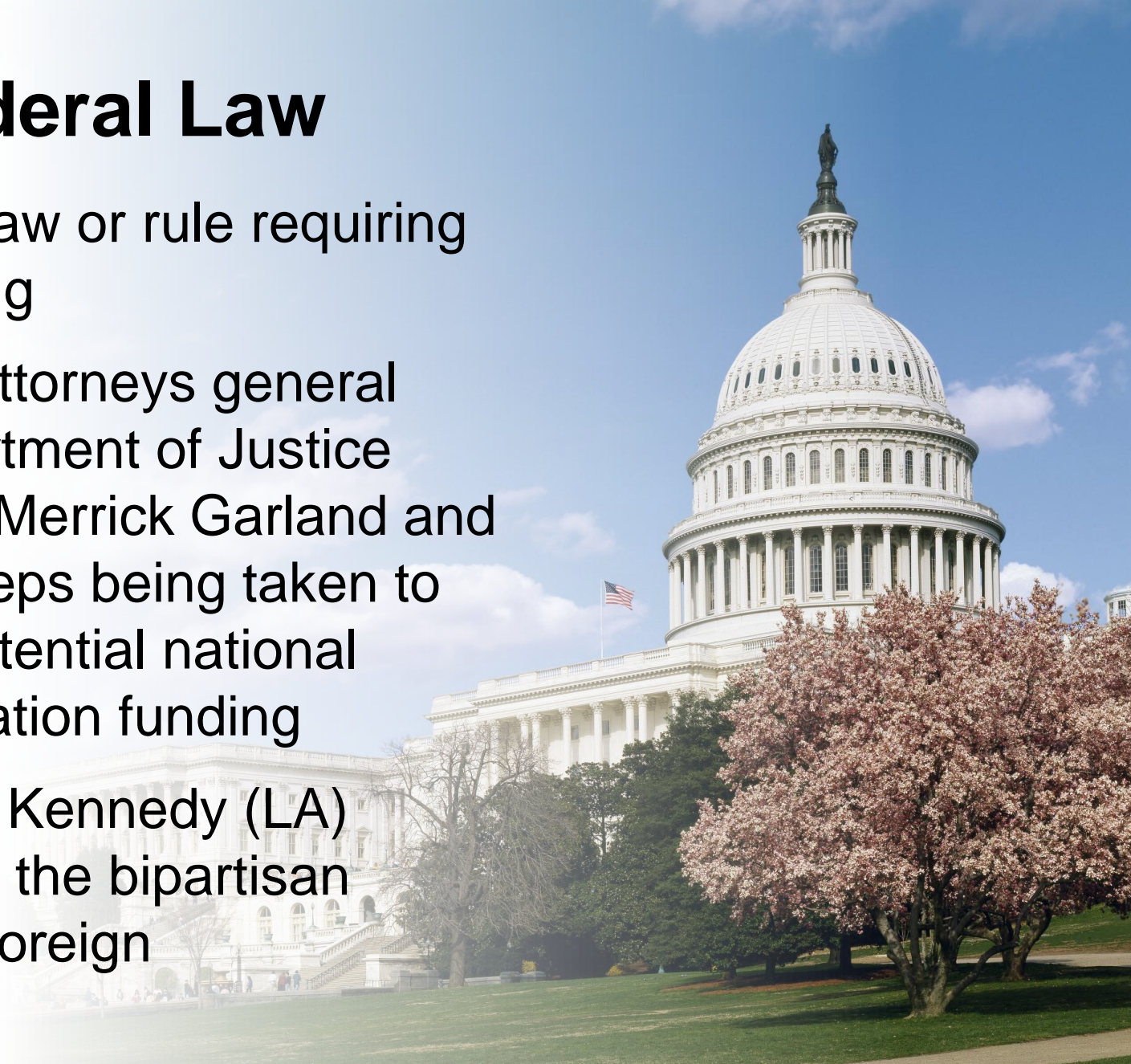
- Proposed “Consumers in Crisis Protection Act” - SB 176
  - Would regulate the operations of persons engaged in consumer legal funding transactions. Among other things, it would require a consumer legal funding company to register with the Commissioner of Insurance and would authorize a registered company to advance up to \$400,000 to a consumer who is pursuing a legal claim, to be used for expenses other than those related to the legal claim.
  - The consumer would repay the funded amount together with any charges due under the contract entirely out of any net proceeds recovered in the legal claim, without recourse in the event that the net proceeds are insufficient to fully repay the amounts due.



# Discovery/Disclosure of Litigation Financing

# Federal Law

- Currently, there is no federal law or rule requiring disclosure of litigation financing
- In December 2022, 14 state attorneys general sent a letter to the U.S. Department of Justice asking U.S. Attorney General Merrick Garland and other top officials about the steps being taken to protect the country against potential national security threats posed by litigation funding
- In September 2023, Senators Kennedy (LA) and Manchin (WV) introduced the bipartisan “Protecting Our Courts from Foreign Manipulation Act of 2023”



# Federal Law (cont.)

- The *Protecting Our Courts from Foreign Manipulation Act* would:
  - Require disclosure from any foreign person or entity participating in civil litigation as a third-party litigation funder in U.S. federal courts.
  - Ban sovereign wealth funds and foreign governments from participating in litigation finance as a third-party litigation funder, either directly or indirectly.
  - Require the Department of Justice's National Security Division to submit a report on foreign third-party litigation funding throughout the federal judiciary.

# Federal Law (cont.)

- Proposed Revisions to Rule 26(a)(1)(A)

“a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.”

- Notwithstanding lack of federal law, certain federal courts require disclosure of individuals with a financial interest in the litigation

|                                           |                       |                     |                     |
|-------------------------------------------|-----------------------|---------------------|---------------------|
| D. New Jersey                             | N.D. and S.D. Georgia | E. D. Michigan      | N.D. and S.D. Ohio  |
| D. Delaware<br>(Judge Colm Connelly only) | N.D. and S.D. Iowa    | D. Nevada           | N.D. and W.D. Texas |
| C.D. and N.D. California                  | D. Maryland           | E.D. North Carolina |                     |

# State Law

- At least four states – Wisconsin, Montana, Indiana, and West Virginia – have enacted laws requiring disclosure of litigation financing agreements in civil actions
- Texas, California, Louisiana, Mississippi, Kansas, and Florida have considered similar legislation.
- A California bill would have required all parties in lawsuits in California state courts to disclose investment or lending from third parties. The bill was ultimately watered down to require disclosure only if a judge orders it.
- Louisiana’s legislature passed a bill requiring disclosure of funding agreements that was vetoed by the governor.

# Ethical Considerations

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Commission on Ethics 20/20, including Working Group on Alternative Litigation Financing, concluded Model Rules of Professional Conduct do not need to be amended to address litigation financing.

# Ethics Considerations

- ABA Model Rules of Professional Conduct
  - Rule 5.4: Professional Independence of a Lawyer: (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another **to direct or regulate the lawyer's professional judgment** in rendering such legal services.
  - **Rule 1.7: Conflict of Interest: Current Clients**
    - (a) Except as provided in paragraph (b), ***a lawyer shall not represent a client if the representation involves a concurrent conflict of interest.*** A concurrent conflict of interest exists if:
      - (2) ***there is a significant risk that the representation of one or more clients will be materially limited by*** the lawyer's responsibilities to another client, a former client or a third person or ***by a personal interest of the lawyer.***



# Ethics Considerations (cont.)

## • Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

- (a) **A lawyer shall** not enter into a business transaction with a client or **knowingly acquire** an ownership, possessory, security or other **pecuniary interest adverse to a client** unless:
- (1) the **transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed** and transmitted in writing in a manner that can be reasonably understood by the client;
  - (2) the client is advised in writing of the desirability of seeking and is given a reasonable **opportunity to seek the advice of independent legal counsel** on the transaction; and
  - (3) the **client gives informed consent, in a writing signed by the client**, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

## • Rule 8.3: Reporting Professional Misconduct

- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that **raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer** in other respects, **shall inform** the appropriate professional authority.

# Recent Developments

# Current State of Play

- The litigation financing industry continues to grow
- *Protecting Our Courts from Foreign Manipulation Act* is Pending in Congress
  - Addresses third-party litigation funding disclosure
- Proposal to amend Rule 26 to include automatic disclosure of litigation funding
  - Supported by many organizations
- Individual courts are also taking action
- States are taking action

**Questions?**

**Thank You**