

## COMMENT

### IT'S ABOUT TIME: A SYSTEMS THINKING ANALYSIS OF THE LITIGATION FINANCE INDUSTRY AND ITS EFFECT ON SETTLEMENT

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#### INTRODUCTION

The developing litigation finance industry is applauded by those who champion its access-granting and bargaining-power-equalizing functions for low-income plaintiffs in civil suits, and derided by those who warn of its unsavory business practices and interference with settlement efforts. With no current body of law adequately addressing the potential problems this burgeoning industry creates, it is vital to develop an approach to litigation finance that protects both the integrity of the settlement process and consumer interests. Such an approach simultaneously must avoid excessive regulation that effectively hinders court access by precluding disadvantaged plaintiffs with viable claims from having their days in court. Applying systems thinking to the field of litigation finance and its effect on settlement reveals a simple objective that would best achieve the necessary balance between this new field's angels and demons: reducing the time delay currently plaguing civil courts.

Part I of this Comment explores the general structure, history, and current status of litigation finance, identifying the circumstances that stimulated its creation and describing its prototypical operation. Part I also briefly reviews existing legal doctrines that have been, or could potentially be, used to regulate litigation finance, including champerty, usury, and contract law. Part II examines the widely diverging viewpoints about the litigation finance industry, focusing in

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particular on the industry's effect on settlement. Ultimately, Part II concludes that, despite the positive aspects of litigation finance—particularly, increased court access and bargaining power—a modicum of reform is nonetheless necessary to alleviate its negative aspects, which include dubious ethical practices, consumer exploitation, and arguable encouragement of frivolous litigation.

Finally, Part III provides an explanation of the general principles of systems thinking, posits that systems thinking is the best way to approach any attempt to regulate the litigation finance industry, and argues that the best method of regulation is for courts to work to reduce the time between when a claim is brought and when it is terminated by either settlement or trial. A reduction in time delay would curtail the negative effects of litigation finance by limiting the number of plaintiffs who require such financial assistance, the sum required by those plaintiffs who do need assistance, and the accumulation of interest on the principal amount advanced. The industry would nevertheless be able to continue to provide its service to those plaintiffs most in need.

## I. THE LITIGATION FINANCE INDUSTRY: AN OVERVIEW

### A. *History and Structure*

Litigation financing, the provision of cash advances to plaintiffs prior to the resolution of their claims,<sup>1</sup> has evolved from a virtually unknown and relatively isolated practice to a veritable and thriving industry.<sup>2</sup> The litigation finance industry owes its development to a convergence of factors that left fertile soil for its explosive growth. Astounding technological and informational innovations and their ensuing availability to the masses—particularly the ability to use the Inter-

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<sup>1</sup> See Terry Carter, *Cash Up Front: New Funding Sources Ease Financial Strains on Plaintiffs Lawyers*, A.B.A.J., Oct. 2004, at 34, 34 (describing litigation financing, or “pre-settlement funding,” as the business of giving cash advances to plaintiffs “before trial or settlement”). There are several variations on litigation financing. For example, some companies aggregate the claims they acquire and sell shares of the composite funds. Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795, 798 (2004). In addition, some litigation financiers provide cash advances to plaintiffs' attorneys. Carter, *supra*, at 34. For the purposes of this Comment, though, the phrase “litigation financing” will mean a direct cash-advance arrangement between a litigation finance company and a plaintiff in a civil action.

<sup>2</sup> See Kirk Hansen, *New Schemes Target Potential Settlements*, CLAIMS MAG., Nov. 2003, at 48, 48 (noting that, as of the article's publication, there were more than one hundred litigation finance businesses).

net to establish a business and the accompanying proliferation of methods allowing for more, faster, and cheaper communication with potential customers—certainly comprise one such factor, as they removed previously existing barriers to entering the marketplace.<sup>3</sup> Skyrocketing litigation costs,<sup>4</sup> combined with both the prohibition on attorneys advancing living expenses to their clients<sup>5</sup> and the refusal of traditional lenders to recognize pending litigation as an asset when determining qualification for borrowing, left an increasing number of plaintiffs financially unable to pursue their claims.<sup>6</sup> Finally, a significant deterioration of laws against champerty—the acquisition of financial interest in a legal claim by a third party—removed any immediate fear of liability that may otherwise have prevented entrepreneurs from embarking upon the business of litigation finance.<sup>7</sup>

The self-proclaimed father of the modern litigation finance industry is former “rock musician and mobile-home park developer” Perry Walton.<sup>8</sup> Walton was convicted of extortionate collection of debt in 1997 and then turned to litigation finance for his new career, conducting instructional seminars on how to successfully get started in

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<sup>3</sup> See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 *FORDHAM J. CORP. & FIN. L.* 55, 56 (2004) (remarking upon the role of technology in the creation of the litigation finance industry); see also Hansen, *supra* note 2, at 48 (describing a now-defunct website, modeled after eBay, that operated as an online marketplace for unsettled claims).

<sup>4</sup> See Donald L. Abraham, *Investor-Financed Lawsuits: A Proposal To Remove Two Barriers to an Alternative Form of Litigation Financing*, 43 *SYRACUSE L. REV.* 1297, 1300 (1992) (dividing fiscal burdens on plaintiffs into access fees, such as filing fees, and equipage costs, such as attorney and expert witness fees, and noting that, while access fees have declined, “significant equipage barriers remain”).

<sup>5</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.8(e) (2003) (forbidding attorneys from providing financial assistance beyond litigation costs to clients). For an argument that such rules should be changed to allow attorneys to offer financial support to their clients, see James E. Moliterno, *Broad Prohibition, Thin Rationale: The “Acquisition of an Interest and Financial Assistance in Litigation” Rules*, 16 *GEO. J. LEGAL ETHICS* 223, 246-47 (2003).

<sup>6</sup> See Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 *MERCER L. REV.* 649, 650 (2005) (“[M]ost traditional lenders are unwilling to lend money with only a potential litigation recovery as collateral because such loans are deemed to be too risky.”).

<sup>7</sup> See Adam Liptak, *Lenders to Those Who Sue Are Challenged on Rates: In Ohio Case, Court Says Fees Are Too High*, *N.Y. TIMES*, May 19, 2003, at A15 (“[A]n erosion of the prohibition on investing in others’ lawsuits, or champerty, has helped create the industry.”). For a definition of champerty and assessment of its current application, see *infra* Part I.C.1.

<sup>8</sup> Richard B. Schmitt, *Staking Claims: A Las Vegas Lender Tests Odds in Court—And Forms an Industry*, *WALL ST. J.*, Sept. 15, 2000, at A1.

the business as well as managing a firm of his own.<sup>9</sup> Litigation financing is a recent innovation, with its seeds sowed “on a small scale little more than a decade ago with cash advances to individual plaintiffs needing money to keep their lives or their lawsuits going.”<sup>10</sup> Since its inception, the field has grown considerably, garnering attention from the bench, the bar, and external analysts alike.

The litigation finance process typically begins when a plaintiff is referred to a litigation finance company by her attorney; however, such businesses frequently employ advertising techniques that facilitate direct contact from potential clients as well.<sup>11</sup> After a plaintiff seeking funding submits an application to a particular company, an employee (only in some instances an attorney) solicits information about and reviews the applicant’s legal claim to determine whether or not the application will be accepted and a financing contract subsequently executed.<sup>12</sup> Described as promoting a “new twist on legalized gambling,”<sup>13</sup> litigation financiers offer nonrecourse funding—if the plaintiff ultimately loses her case at trial she has no obligation to repay

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<sup>9</sup> See Martin, *supra* note 3, at 70 (quoting Walton as asserting that “[p]retty much everybody who got their start in the industry got it from me”); Schmitt, *supra* note 8, at A1 (describing Walton’s nefarious entrance into litigation funding and the uncertain legality of his actions). Walton has since faced legal troubles in his new career as well: he and his Future Settlement Funding Corporation were held liable for wrongful interference with a contract and unfair and deceptive trade practices by a North Carolina jury. Gary Young, *Two Setbacks for Lawsuit Financing: But the Practice Is Still Alive*, N.J. L.J., Aug. 18, 2003, at 21. Stories such as this lend support to the arguments of those who condemn the litigation finance industry as inherently disreputable. See *infra* Part II.B for a further discussion of these viewpoints.

<sup>10</sup> Carter, *supra* note 1, at 34.

<sup>11</sup> See Hananel & Staubitz, *supra* note 1, at 799 (characterizing the litigation finance claim-acquisition process as including both attorney referrals and advertisements on websites and in professional journals); Am. Legal Fin. Ass’n, FAQs, <http://www.americanlegalfin.com/alfasite2/faqs.asp> (last visited Dec. 2, 2006) [hereinafter ALFA FAQs] (“ALFA receives much of its business from attorney referrals.”).

<sup>12</sup> See ALFA FAQs, *supra* note 11 (“Each ALFA member employs legal analysts or attorneys who review the pending case of each applicant by examining legal documents and speaking with the client’s attorney. Only those plaintiffs with meritorious cases and a good likelihood of success become eligible for advance funding support.”); *infra* notes 77-80 and accompanying text (discussing how this process may create ethical concerns relating to confidentiality and the attorney-client privilege).

<sup>13</sup> Elizabeth Sniegocki, *The Advanced Litigation Funding Industry: Gambling on Justice?*, FLA. UNDERWRITER, May 2003, at 29, 29.

the amount advanced, and the company thus forfeits its entire investment.<sup>14</sup>

The procedure following a plaintiff's successful resolution of her claim, be it through settlement or at trial, varies according to the structure of the agreement, which can fluctuate across the industry. Some lenders take a flat fee based on a percentage of the plaintiff's recovery,<sup>15</sup> but most charge interest rates that can be up to 15% monthly and can approach 200% annually when compounded.<sup>16</sup> These extraordinarily high rates are often justified by those in the litigation finance industry as necessary to compensate for the significant risk they assume by advancing money on a nonrecourse basis.<sup>17</sup>

In order to combat negative attention accorded the litigation finance industry due to such high rates, and spurred by an investigation into the industry by then-New York Attorney General Eliot Spitzer<sup>18</sup>—who later reached an agreement with nine litigation finance organizations to institute certain reforms<sup>19</sup>—the American Litigation Finance Association (ALFA) was formed in March 2005.<sup>20</sup> The first national trade association in the field of litigation finance, ALFA was formed by eleven member companies that agreed upon joining to abide by “best practices.”<sup>21</sup> Its creation represented a significant step by the indus-

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<sup>14</sup> See Eileen Libby, *Whose Lawsuit Is It?: Ethics Opinions Express Mixed Attitudes About Litigation Funding Arrangements*, A.B.A. J., May 2003, at 36, 36 (explaining the basic structure of nonrecourse funding).

<sup>15</sup> Sniegocki, *supra* note 13, at 30.

<sup>16</sup> Carter, *supra* note 1, at 34.

<sup>17</sup> See Martin, *supra* note 3, at 66 (characterizing the justification for higher interest rates as compensation for excessive risk); ALFA FAQs, *supra* note 11 (responding to a question about the high rates charged on advances against lawsuits by citing the greater amount of risk involved in addition to high transaction costs). For information on the debate over how much risk is actually involved in these transactions, see *infra* note 85.

<sup>18</sup> See Dee McAree, *Legal Cash-Advance Businesses Form Group*, NAT'L L.J., Mar. 28, 2005, at 4 (describing the causes behind ALFA's formation).

<sup>19</sup> See Press Release, Office of N.Y. Att'y Gen. Eliot Spitzer, Personal Injury Cash Advance Firms Agree to Reforms (Feb. 28, 2005), available at [http://www.oag.state.ny.us/press/2005/feb/feb28a\\_05.html](http://www.oag.state.ny.us/press/2005/feb/feb28a_05.html) (listing reforms agreed to by participating companies, including “[c]lear and conspicuous disclosure statements,” a “five-business-day right to cancel the contract without obligation or penalty,” and a “notarized acknowledgment by the consumer’s attorney that the contract has been reviewed and explained to the client,” among others).

<sup>20</sup> See McAree, *supra* note 18, at 4 (reporting on the formation of ALFA).

<sup>21</sup> *Id.*

try—symbolically if not substantively—to self-regulate and improve its public image.<sup>22</sup>

A young field that, until recently, existed relatively unnoticed, litigation finance has fallen under continuously increasing scrutiny and has incited debate over its virtues and vices and, accordingly, over how (or whether) it should be regulated.<sup>23</sup>

### B. *Current Status: In Legal Limbo*

This debate is further complicated by the states' disparate treatment of litigation finance, by an uncertainty concerning which existing legal doctrines are applicable, and by a general lack of modern law directly addressing the industry or analogous enterprises.<sup>24</sup> In Florida, litigation finance cleared its first appellate level hurdle when a court reluctantly upheld the deal being challenged, reasoning that it did not have the authority to void the deal under state law.<sup>25</sup> However, the court, recognizing the potential risks created by financial participation in litigation by parties otherwise extrinsic to the suit, suggested legislative intervention.<sup>26</sup> Similarly, a New York court expressed frustration at being left no choice but to enforce a litigation finance contract due to the fact that “under New York law [litigation finance arrangements] are allowed as long as the primary purpose and intent of the assignment was for some reason other than bringing

<sup>22</sup> See *id.* (characterizing the member companies' purpose of forming ALFA as “an attempt to raise standards and improve [the litigation finance industry's] image”). For other examples of the industry's attempts to improve its reputation, see Martin, *supra* note 3, at 73 (“Litigation finance firms . . . are making attempts to institutionalize their industry, to improve their image by being more forthcoming on the rates they are charging, to keep those rates closer to credit card rates, and to become more involved in their communities.”); Cristina Merrill, *Judgment Call: Firms That Lend to Personal-Injury Plaintiffs Take Steps To Improve Their Bad-Guy Image*, CRAIN'S N.Y. BUS., Jan. 27, 2003, at 1 (describing support of the industry by the Association of Community Organizations for Reform Now, an “advocacy group for low-income New Yorkers”).

<sup>23</sup> See *infra* Part II for a detailed analysis of the debate over the positive and negative effects of the litigation finance industry, and see *infra* notes 180-184 and accompanying text for a description of various proposals advanced for the industry's regulation.

<sup>24</sup> See *infra* Part I.C for a review of these various doctrines and their application in certain states.

<sup>25</sup> See *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 629 (Fla. Dist. Ct. App. 2005) (upholding agreement between plaintiff and litigation finance company due to a lack of Florida law regulating such agreements).

<sup>26</sup> See *id.* at 630 (“This court has no authority to regulate these agreements. However, if the Florida Bar is going to allow lawyers to promote and provide such agreements to their clients . . . the legislature might wish to examine this industry to determine whether Florida's citizens are in need of any statutory protection.”).

suit *on that assignment*.”<sup>27</sup> The court thus called for action by the state’s Attorney General.<sup>28</sup>

Courts in other states have approached litigation finance with greater hostility. In North Carolina, a federal court awarded more than \$500,000 to a law firm claiming that a litigation finance company interfered with the attorney-client relationship in one of the firm’s cases.<sup>29</sup> In that case, two litigation finance companies and five individuals (including the aforementioned Perry Walton) were found liable for “wrongful interference with a contract and for unfair and deceptive trade practices.”<sup>30</sup> In Ohio, a surprising and oft-criticized decision declared litigation finance arrangements to be champertous and thus void under Ohio law.<sup>31</sup>

The ethical ramifications of litigation financing are similarly ambiguous, and vary state by state. Ethics opinions issued in Arizona, Florida, New York, Ohio, South Carolina, Utah, and Virginia reflect the generally uncertain ethical status of litigation finance.<sup>32</sup> These opinions alternately declare that litigation finance contracts violate the prohibition of fee splitting among attorneys and nonattorneys, permit attorneys to provide litigation finance companies with information about a client’s case with the client’s consent, and enigmatically allow an attorney to offer a client information about litigation financing companies only when doing so is “in the client’s interests.”<sup>33</sup>

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<sup>27</sup> *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at \*6 (N.Y. Sup. Ct. Mar. 2, 2005) (emphasis added).

<sup>28</sup> *Id.* at \*8 (“If the Attorney General was to formally legalize these arrangements by an ‘opinion letter’ rather than merely allow them to operate pursuant to an ‘agreement’ . . . that would be appreciated by the court.”).

<sup>29</sup> Young, *supra* note 9, at 21.

<sup>30</sup> *Id.* at 22.

<sup>31</sup> See *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 221 (Ohio 2003) (holding contracts “making the repayment of funds advanced to a party to a pending case contingent upon the outcome of that case” void as champerty and maintenance); *infra* notes 34-37 and accompanying text (providing further discussion of the doctrine of champerty). For a criticism of the court’s decision in *Rancman*, see Richmond, *supra* note 6, at 658-60.

<sup>32</sup> See Libby, *supra* note 14, at 36 (providing an overview of how various state ethics committees have addressed litigation financing). For further discussion of the ethical implications of litigation finance, see *infra* Part II.B.

<sup>33</sup> Libby, *supra* note 14, at 36.

### C. *Related Legal Doctrines*

Several areas of the law currently are, or could potentially be, applied to the litigation finance industry—in particular, champerty prohibitions, usury statutes, and certain elements of contract law. Upon closer examination, however, it is evident that these laws materially predate contemporary business and legal practices, and are, therefore, less than ideal frameworks with which to analyze litigation finance.

#### 1. Champerty

The doctrine of champerty, which forbids “the sale of the fruit of legal judgment or settlement, in advance of such judgment or settlement, to an otherwise disinterested party,”<sup>34</sup> has deeply embedded historical roots, dating back to ancient Greece and Rome.<sup>35</sup> The ancient doctrine developed during the rise of Christianity, in part to categorically deter even meritorious litigation.<sup>36</sup> The doctrine of champerty continued to gain strength, and was incorporated into the common law during the Renaissance in opposition to the rise of capitalism.<sup>37</sup> Today, the cited policies justifying champerty prohibitions include discouraging frivolous litigation, diminishing resistance to settlement, reducing interference with the attorney-client relationship, and preventing “strife, discord, and harassment.”<sup>38</sup> In *Rancman v. Interim Settlement Funding Corp.*, a recent decision reviving the dormant prohibition of champerty in Ohio law, the Ohio Supreme Court eloquently and enthusiastically described the doctrine’s purpose as preventing “‘officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of

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<sup>34</sup> Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1297 (2002) (emphasis omitted). For a useful survey of state champerty laws, see *id.* at 1333-41.

<sup>35</sup> See Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1543 (1996) (detailing the historical origins of champerty).

<sup>36</sup> *Id.* at 1544 (linking the general goal of discouraging litigation to the rise of Christianity and its accompanying encouragement of debt forgiveness).

<sup>37</sup> *Id.* at 1543.

<sup>38</sup> *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at \*7 (N.Y. Sup. Ct. Mar. 2, 2005); see Martin, *supra* note 3, at 57 (delineating various justifications offered in support of champerty prohibitions); Dobner, *supra* note 35, at 1546 (same).



society, lead to corrupt practices, and prevent the remedial process of the law.”<sup>39</sup>

States diverge wildly in their definitions of and approaches to champerty.<sup>40</sup> Some continue to recognize (or have resuscitated) the doctrine,<sup>41</sup> citing the policies mentioned above as support.<sup>42</sup> Conversely, others have eliminated the prohibition and therefore enforce champertous agreements,<sup>43</sup> arguing that the champerty doctrine is inapplicable to modern business<sup>44</sup> and that other principles of law can more effectively achieve the doctrine's goals.<sup>45</sup> Many regard champerty prohibitions as fossils—relics of an earlier age for which there truly are no contemporary justifications.<sup>46</sup>

The inconsistency of its form, substance, and application among states; its lack of relevance to modern business transactions; and the potential for its purposes to be served in other ways render the doc-

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<sup>39</sup> 789 N.E.2d 217, 219-20 (Ohio 2003) (quoting 14 C.J.S. *Champerty and Maintenance* § 3 (1991)).

<sup>40</sup> See Bond, *supra* note 34, at 1333-41 (surveying champerty laws in the fifty states); *cf. id.* at 1304 (“[C]onfusion reigns over what the doctrine of champerty is and to whom it applies.”). Note that contingent fee arrangements are exceptions to the prohibition of champerty. Historically, champertors were attorneys. *Rancman*, 789 N.E.2d at 220. These practices are now regulated by MODEL RULES OF PROF'L CONDUCT R. 1.8(i).

<sup>41</sup> See, e.g., *Hall v. State*, 655 A.2d 827, 830 (Del. Super. Ct. 1994) (“[T]he doctrine [of champerty] continues to have vitality in this State.”); *Rancman*, 789 N.E.2d at 220 (acknowledging that while the doctrine of champerty has “in recent years . . . lain dormant in Ohio courts,” it is nevertheless still a part of the common law); *id.* at 221 (holding a contract void as champerty).

<sup>42</sup> See, e.g., *Rancman*, 789 N.E.2d at 220-21 (describing the disincentives to settlement and tendencies to prolong litigation created by champertous agreements); *id.* at 221 (“An intermeddler is not permitted to gorge upon the fruits of litigation.”).

<sup>43</sup> See *Saladini v. Righellis*, 687 N.E.2d 1224, 1224 (Mass. 1997) (“We rule that the common law doctrines of champerty, barratry, and maintenance no longer shall be recognized in Massachusetts.”); *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 277 (S.C. 2000) (abolishing champerty as a defense in South Carolina); *Martin*, *supra* note 3, at 57 (“New Jersey has always permitted and enforced champertous agreements.”); *cf. id.* at 58 (commenting that “other common law countries have increasingly been relaxing prohibitions on champerty”).

<sup>44</sup> See *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at \*6 (N.Y. Sup. Ct. Mar. 2, 2005) (“Champerty law was not written to deal with the situation that has developed from this modern form of business . . .”).

<sup>45</sup> See *Richmond*, *supra* note 6, at 653 (“[O]ther well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits' than can these dated doctrines.” (quoting *Osprey, Inc.*, 532 S.E.2d at 277)).

<sup>46</sup> See, e.g., *Dobner*, *supra* note 35, at 1545 (discussing changes that render “[t]he contemporary justification for laws against champerty and maintenance . . . far from obvious”).

trine of champerty in its current incarnation an unpromising vehicle for regulation of the litigation finance industry.<sup>47</sup>

## 2. Usury

Usury laws, which prohibit lending money at an unlawfully high interest rate,<sup>48</sup> are akin to champerty prohibitions in their historical significance. The first recorded version of a usury statute can be found in the 1750 B.C.E. Code of Hammurabi.<sup>49</sup> Enacted to “protect vulnerable borrowers from predatory or unscrupulous lenders,”<sup>50</sup> usury laws have been criticized for their paternalism and for the impediment they pose to people seeking to borrow money,<sup>51</sup> as well as for their economic illogic.<sup>52</sup>

Although at first glance usury regulations appear to render most litigation finance contracts illegal,<sup>53</sup> the law in most states likely considers such contracts to be *investments* rather than loans due to their contingent nature, and litigation finance companies are therefore exempt from compliance with statutory limits on interest rates.<sup>54</sup> While

<sup>47</sup> In addition, some commentators note that refusing to enforce litigation finance contracts by invoking champerty prohibitions would result in a windfall for the plaintiff, who, without the contract, would presumably not have been able to pursue her case in the first place. See Hananel & Staubitz, *supra* note 1, at 812.

<sup>48</sup> See George Steven Swan, *The Economics of Usury and the Litigation Funding Industry*: *Rancman v. Interim Settlement Funding Corp.*, 28 OKLA. CITY. U. L. REV. 753, 765 n.102 (2003) (“Regulations that specify a maximum rate of interest that an institution can charge for lending money are known as usury laws.”); *id.* at 765 (noting that the term “usury” often is associated with “any level of interest felt to be unjust and unfair”).

<sup>49</sup> See Martin, *supra* note 3, at 58 (describing the historical background of usury laws).

<sup>50</sup> Richmond, *supra* note 6, at 665.

<sup>51</sup> See Swan, *supra* note 48, at 778 (describing one rationale of usury law as preventing “poor persons . . . from so overindulging themselves in debt”); *id.* at 768 (observing the irony that, while the purpose of usury law is to protect risky borrowers, “it is precisely these borrowers who are most hurt by usury laws,” in that “they are deprived of all credit facilities”).

<sup>52</sup> See *id.* at 778 (“Consistent with *economic* logic is the welcome of the litigation funding industry into a state’s marketplace.”); *id.* at 768 (noting that usury laws “create an artificial ‘shortage’ of credit” that results in a contrived and economically inefficient meting out of credit); *id.* at 769 (“On its face, usury law . . . is economically illogical.”).

<sup>53</sup> See *supra* note 16 and accompanying text (estimating the extremely high interest rates charged by litigation finance companies).

<sup>54</sup> See Martin, *supra* note 3, at 58-59 (generalizing that most states include an absolute obligation for the borrower to repay as a necessary element of usury); Sniegocki, *supra* note 13, at 30 (“The critical distinction is the contingent nature of the transaction.”). The *Rancman* court explicitly avoided deciding whether the contract in ques-

this theory has not yet been directly tested in court, under such an analysis, usury laws in their current form are simply inapplicable to nonrecourse funding arrangements.

### 3. Contract

Traditional common law contract defenses such as duress and unconscionability could potentially be employed to make contracts between litigation finance companies and plaintiffs in civil suits ineffective in situations where the courts deem such relief appropriate.<sup>55</sup> However, due to the rather strict requirements for satisfying such doctrines,<sup>56</sup> few courts have applied them to litigation finance as of yet.

## II. DIVERGENT OPINIONS ABOUT LITIGATION FINANCE

The recent expansion of the litigation finance industry<sup>57</sup> and the uncertainty surrounding the legal environment in which it exists<sup>58</sup> have prompted an extensive dialogue about the industry's value. Supporters praise the litigation finance industry for performing a necessary service by enabling those who might otherwise be excluded from the judicial process to pursue their days in court; detractors disparage the industry for taking advantage of consumers and operating

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tion was a loan and thus subject to usury laws by voiding it on champerty grounds. *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 219 (Ohio 2003) ("It is unnecessary for the resolution of this case to determine the threshold level of risk necessary for a contingent advance to be treated as an investment rather than a loan. The advances here are void as champerty and maintenance regardless of whether they are loans or investments."). *But see* *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at \*8 (N.Y. Sup. Ct. Mar. 2, 2005) ("[I]t is ludicrous to consider this transaction anything else but a loan.").

<sup>55</sup> See *Bond*, *supra* note 34, at 1307-08 (discussing how such doctrines have been used to accomplish the same policy goals as the prohibition of champerty).

<sup>56</sup> See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981) ("If a party's manifestation of assent is *induced by an improper threat* by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.") (emphasis added); *id.* § 208 ("If a contract or term thereof is *unconscionable at the time the contract is made* a court may refuse to enforce the contract . . .") (emphasis added); *id.* § 208 cmt. d ("A bargain is not unconscionable merely because the parties to it are unequal in bargaining position . . . Factors which may contribute to a finding of unconscionability . . . include . . . knowledge of the stronger party that the weaker party is unable reasonably to protect his interests.").

<sup>57</sup> See *supra* note 2 and accompanying text (identifying dramatic growth in litigation finance).

<sup>58</sup> See *supra* notes 24-31 and accompanying text (depicting the unresolved legality of the industry).

in an ethical no-man's land; and participants on both sides of the debate cite the industry's effect on settlement efforts as support for their respective positions.

#### A. *Proponents*

Supporters of litigation finance argue that the industry performs an equalizing function by allotting plaintiffs the resources necessary to see their claims through to resolution and increase their credibility in pretrial negotiations. This is a relevant concern, since a plaintiff experiencing financial pressure has an incentive to accept a less-than-reasonable settlement offer and may even have to abandon her case. While a contingent fee arrangement—whereby the attorney's fee is only paid out of any judgment or settlement obtained—can relieve the plaintiff of the up-front cost of obtaining legal representation, she will still need the means to satisfy everyday expenses (and medical bills, if injured) while her claim pends.<sup>59</sup> As support for this position, ALFA states that when “money quickly becomes tight and victims find it difficult to pay bills, purchase food and basic supplies, or keep their homes,” litigation finance “gives them the means they need to keep their families and lives intact while they await a complete and fair resolution of their case.”<sup>60</sup> Litigation finance is thus analogized to other forms of subprime lending, which “provide[] opportunities for low-income borrowers to buy homes, cars and other goods by obtaining credit that is unavailable to them in the prime market.”<sup>61</sup> A plaintiff unable to meet her financial needs by obtaining such “credit”—in this

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<sup>59</sup> See *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005) (“Grocery stores and home mortgage lenders do not wait for payment merely because a person is unable to work due to an automobile accident or other injury.”); Abraham, *supra* note 4, at 1301 (“Even with [a contingent fee] arrangement . . . potential plaintiffs are sometimes excluded due to the fact that an attorney who takes a lawsuit on a contingency fee basis does not ensure that sufficient funds will be available to carry the plaintiff's claim to court.”); Richmond, *supra* note 6, at 649-50 (recognizing that while the contingent fee system “address[es] attorney compensation issues,” it does not “help a plaintiff with the costs of daily living”).

<sup>60</sup> ALFA FAQs, *supra* note 11.

<sup>61</sup> Martin, *supra* note 3, at 66; see also Richmond, *supra* note 6, at 650 (acknowledging that “most traditional lenders are unwilling to lend money with only a potential litigation recovery as collateral because such loans are deemed to be too risky”); ALFA FAQs, *supra* note 11 (“Pending lawsuits are not assets that banks recognize when determining an individual's qualification for a loan.”).

case a cash advance from a litigation finance firm—may be forced to accept an unfair settlement offer or relinquish her claim.<sup>62</sup>

Viewed in this light, litigation finance companies are the white knights of the tort system, opening up the judicial process to the less fortunate and even evoking the noble principles of the American legal system,<sup>63</sup> while those who seek to regulate or eliminate the industry are portrayed as heartlessly pro-big business and unsympathetic to individual plaintiffs.<sup>64</sup>

Industry proponents argue that, in addition to allowing greater access to the courts, litigation financing gives plaintiffs increased leverage and bargaining power against typically large, wealthy defendant corporations with seemingly unlimited resources and time.<sup>65</sup> Since otherwise, “[a] tort victim aiming at compensation from her tortfeasor is often in a very weak bargaining position,”<sup>66</sup> a litigation finance arrangement that relieves pressure on the plaintiff’s assets provides her with the ability to credibly threaten litigation and thus, ideally, reach a more favorable result.<sup>67</sup>

<sup>62</sup> See, e.g., Libby, *supra* note 14, at 36 (“[A] plaintiff may feel so financially strapped by legal expenses along with the costs of dealing with the injury that he or she is willing to take a smaller amount in settlement rather go through the long wait for a day in court.”); Richmond, *supra* note 6, at 649 (“[A] wealthy litigant, who can outspend a poorer litigant, is generally at an advantage and may be able to obtain a favorable settlement through attrition.”); George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 819 (2001) (“[T]he typical tortfeasor prefers to delay any settlement.”); Swan, *supra* note 48, at 758 (“Nearly without exception, time favors a defendant. . . . Most plaintiffs settle because they are unable to wait the nearly two years elapsing before the average case comes to trial.”).

<sup>63</sup> See Carter, *supra* note 1, at 36 (“‘People who don’t like nonrecourse funding are really saying they don’t like our legal system. Poor people often have to prematurely end litigation or settle for less because of the expense.’” (quoting Brooklyn Law School Professor Anthony J. Sebok)); see also Martin, *supra* note 3, at 68 (“It would be bad policy and unfair to poor plaintiffs with good cases to regulate litigation financing firms out of business.”); Richmond, *supra* note 6, at 661 (positing that forbidding litigation funding would discourage some meritorious suits).

<sup>64</sup> See, e.g., Martin, *supra* note 3, at 75 (“Discouraging litigation financing is but one more example of business defendants’ attempts to ‘reform’ tort law, that is, to rig the game so that plaintiffs have to forfeit before they have their full and fair day on the playing field.”).

<sup>65</sup> See *id.* at 77 (describing litigation finance as “leveling the playing field”); Sniegocki, *supra* note 13, at 29 (describing litigation finance as “bringing the scales of justice into balance”).

<sup>66</sup> Swan, *supra* note 62, at 819.

<sup>67</sup> See Dobner, *supra* note 35, at 1536-37 (summarizing the advantages of wealthier plaintiffs in the bargaining process).

Several other themes resonate among supporters of litigation finance. One such theme is that the industry is economically beneficial, since it “supports a tort system that deters negligence and encourages a corporate interest in safety”<sup>68</sup> and thus serves the general welfare through its deterrent function.<sup>69</sup> Some supporters liken litigation finance to the widely accepted contingent fee system and reason that it, likewise, should be welcomed into the mainstream.<sup>70</sup> Others insist that the practice of litigation finance does not constitute predatory lending since a potential client has her attorney to help her understand any agreement into which she may enter.<sup>71</sup> There are also litigation finance proponents who defend the industry on freedom of contract grounds,<sup>72</sup> argue that the industry’s legal troubles are caused by a discrete minority and are not widespread,<sup>73</sup> and even submit that the industry is protected by the Constitution.<sup>74</sup> An oft-reported success story of litigation financing is the case of Abner Louima, a Haitian immigrant who won a widely publicized lawsuit against the New York

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<sup>68</sup> Martin, *supra* note 3, at 77.

<sup>69</sup> See Swan, *supra* note 48, at 783 (arguing that the litigation finance industry “can fuel deterrence,” which in turn serves the general welfare).

<sup>70</sup> See Swan, *supra* note 62, at 823 (“Boosters of the litigation funding industry posit that it differs very little from the contingent fee arrangement whereby an attorney files suit in exchange for a claim against the damage award (or settlement).”); *id.* at 834 (classifying the contingent fee structure as an “economic precedent” for litigation financing); *cf.* Moliterno, *supra* note 5, at 246 (recognizing the positive effects of contingent fees, which align the lawyer’s interests with her client’s, and recommending similarly allowing a lawyer to provide her client with financial assistance). *But see* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65, 71 (2003) (“[C]ontingent fee lawyers charging standard contingent fees are routinely overcharging some claimants because, in many instances, the representation involves no meaningful risk of no or low recovery and therefore the substantial risk premium in these instances yields unearned and unethical windfall fees . . .”).

<sup>71</sup> See Martin, *supra* note 3, at 67 (arguing that litigation finance is not predatory in nature since “the lawyers [that borrowers] already have are going to be involved automatically, and they will have an ethical obligation to provide advice to their clients about the financing”). *But see id.* at 68 (“Nevertheless, merely having access to legal advice does not necessarily protect buyers from litigation financing firms that may be charging too much.”).

<sup>72</sup> See Richmond, *supra* note 6, at 659 n.68 (“The general rule of freedom of contract includes the freedom to make a bad bargain.” (quoting *Christeson v. Burba*, 714 S.W.2d 183, 195 (Mo. Ct. App. 1986))).

<sup>73</sup> See Young, *supra* note 9, at 21 (citing the owner of a litigation firm as insisting that “the industry’s legal troubles have often been the fault of unscrupulous dealers and are not inherent to the industry”).

<sup>74</sup> See *id.* at 21 (describing the argument that the First Amendment, in protecting freedom of association, protects those who want to finance lawsuits).

City Police Department for police brutality, and turned to litigation finance for assistance in paying his living expenses.<sup>75</sup>

### B. Critics

Critics of litigation finance, an industry dubbed the “Wild West of finance,”<sup>76</sup> warn of potential ethical violations associated with the practice. They argue, for example, that litigation finance contracts can “create confusion concerning the party who actually owns and controls the lawsuit, and create risks that the attorney-client privilege will be waived unintentionally.”<sup>77</sup> In the first scenario, the plaintiff’s lawyer may be affected in her judgment by a litigation finance entity attempting to protect its investment.<sup>78</sup> In the second, a litigation finance company seeking information about a plaintiff’s case in order to decide whether to take her on as a client may obtain such information from the plaintiff’s attorney in a way that violates confidentiality rules or forfeits the attorney-client privilege.<sup>79</sup> Both of these scenarios invoke the Model Rules of Professional Conduct; an attorney counseling a client who enters into a litigation finance contract must be extremely vigilant to avoid violating the Rules.<sup>80</sup> In addition to these tangible ethical concerns, there is also a general element of suspicion and skepticism that plagues litigation finance: many courts and prac-

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<sup>75</sup> See Merrill, *supra* note 22, at 1 (detailing Louima’s use of litigation financing while awaiting his settlement). Note, however, that Louima did not obtain any advance until after he had already settled his case; he entered into a litigation finance arrangement to cover living expenses while waiting to receive his \$8.75 million settlement. *Id.*

<sup>76</sup> Martin, *supra* note 3, at 55 (quoting Michael Pollick, *Business & Money: Betting on the Verdict; Lawyers Advance Plaintiffs Money to Keep Lawsuits Going, in Hopes of Cashing in If a Suit Succeeds*, SARASOTA HERALD-TRIB., Jan. 12, 2003, at D1).

<sup>77</sup> *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005).

<sup>78</sup> See Richmond, *supra* note 6, at 651-52 (mentioning the potential for manipulation of parties or attorneys by litigation financiers); Swan, *supra* note 62, at 831-32 (acknowledging the risk that the existence of a litigation finance agreement could potentially compromise an attorney’s independence).

<sup>79</sup> *But see* Richmond, *supra* note 6, at 652 (“Litigation funding companies do not, by their ordinary practices, create serious professional responsibility problems for attorneys.”).

<sup>80</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.6 (2003) (laying out confidentiality rules); Hananel & Staubitz, *supra* note 1, at 806-09 (discussing how the Model Rules are implicated in litigation finance scenarios); Richmond, *supra* note 6, at 669-74 (same). Analogous provisions exist in the Model Code of Professional Responsibility, the predecessor to the Model Rules, which is still followed by a small number of states. See MODEL CODE OF PROF’L RESPONSIBILITY Canon 4 (1983).

tioners are opposed to the industry due to its perceived unprincipled nature.<sup>81</sup>

A second major criticism of litigation finance is that it wrongfully takes advantage of consumers. With some contracts calling for annual interest charges as high as 200% of the amount advanced,<sup>82</sup> there is concern that the victim of an accident will be “further victimized” by a finance company charging such exorbitant rates.<sup>83</sup> While these rates are frequently justified as appropriate in relation to the high risk of nonrecourse financing,<sup>84</sup> there is disagreement over exactly how much risk is involved.<sup>85</sup> Additionally, since litigation finance does not have the same structural protections as the prime lending market, which is heavily regulated and operates in an environment of healthy competition, critics worry that litigation financiers are able to target and swindle vulnerable borrowers.<sup>86</sup>

Critics of litigation finance also express concern that the industry encourages frivolous claims.<sup>87</sup> However, this argument is frequently rebutted by reasoning that it is in a litigation finance company’s best interest to advance money only to those plaintiffs who, in its determi-

<sup>81</sup> See Martin, *supra* note 3, at 63 (describing the “emotional problems faced by the litigation financing industry,” namely, that “courts just do not like it”); see also Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003) (“[A] lawsuit is not an investment vehicle.”). But see Dobner, *supra* note 35, at 1531 (“Litigation is an investment process.”).

<sup>82</sup> Carter, *supra* note 1, at 34; see also Carl Jones, *Caveat Plaintiff Panel Says Legislature Should Consider Regulating Litigation Funding Companies*, BROWARD DAILY BUS. REV., Sept. 20, 2005, at 1.

<sup>83</sup> Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005).

<sup>84</sup> See *supra* note 17 and accompanying text.

<sup>85</sup> See, e.g., Rancman, 789 N.E.2d at 219 (noting that “the appellants incurred virtually no risk in the transactions”); Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at \*8 (N.Y. Sup. Ct. Mar. 2, 2005) (indicating that the case at bar was a “strict liability labor law case” where there was “low, if any risk”); see also Merrill, *supra* note 22, at 1 (describing how a particular litigation finance company “uses strict underwriting screening rules that ensure only about 4% of the cases it advances money on are lost in court,” by using a strategy of targeting “cases in the midresolution stage”).

<sup>86</sup> See Liptak, *supra* note 7 (mentioning the argument that litigation financiers “exploit vulnerable people”); Martin, *supra* note 3, at 64 (commenting on the general lack of predatory lending in the mainstream market); see also Melissa Nann Burke, *Companies That Fund Lawsuits Organize, Set Standards*, BROWARD DAILY BUS. REV., Mar. 31, 2005, at 11 (noting that the structure of the litigation finance industry and its lack of interest rate reporting requirements “makes it difficult for consumers to shop around”).

<sup>87</sup> See Young, *supra* note 9, at 21 (discussing the concern that litigation financiers “will become Goliaths who can bankroll frivolous lawsuits against more vulnerable defendants”).



nation, have a reasonable chance of succeeding, since its investment will otherwise be for naught.<sup>88</sup> The “promotes frivolous litigation” argument is further weakened by the fact that litigation finance agreements are entered into *after* the plaintiff has decided to pursue her claim and has retained an attorney; as such, litigation finance companies simply become involved with current litigation and do not encourage new claims.<sup>89</sup> Furthermore, while it is conceivable that the mere knowledge that a litigation finance company could potentially provide funding at a later date may encourage a plaintiff to sue, the fact remains that the industry receives much of its business through attorney referrals<sup>90</sup> and likely is not recognized enough among the general public to cause any significant increase in the number of frivolous claims.

A corollary to the “promotes frivolous litigation” criticism of litigation finance stems from the observation that the industry creates an increase in the amount of litigation overall (whether frivolous or not) by granting prospective plaintiffs access to the system that they would not otherwise have had. In doing so, litigation finance may overdeter risky activities from which the market, and society as a whole, could benefit.<sup>91</sup>

### C. Settlement

Both supporters and critics of litigation finance invoke the industry's effect on the settlement of claims as support for their particular positions. Indeed, settlement is a vital part of the American justice system, as most disputes that come to the courts are resolved by means other than trial—in fact, less than ten percent of cases are tried.<sup>92</sup>

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<sup>88</sup> See Martin, *supra* note 3, at 77 (“No one is going to invest in a frivolous lawsuit because any money thus invested will be lost.”); Richmond, *supra* note 6, at 660-61 (disputing the concern that litigation financing will result in frivolous litigation by noting the lack of incentive for a company to advance money in an unfounded case).

<sup>89</sup> See Carter, *supra* note 1, at 36 (quoting Cardozo Law School Professor Lester Brickman as asserting that litigation finance companies “come in after the lawyer, so it has nothing to do with frivolous litigation”). According to this line of reasoning, litigation finance does not catalyze the *origination* of claims; however, it conceivably affects decisions concerning whether or not to continue the claim or accept a settlement. See *infra* notes 107-109 and accompanying text (outlining the negative effects of litigation finance arrangements on settlement efforts).

<sup>90</sup> ALFA FAQs, *supra* note 11.

<sup>91</sup> See Young, *supra* note 9, at 21 (recognizing the possibility of overdeterrence).

<sup>92</sup> Marc Galanter, “. . . A Settlement Judge, Not a Trial Judge.” *Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 1 (1985).

This proliferation of settlement activity is owed to various factors, including revisions to the Federal Rules of Civil Procedure expressly including settlement as a purpose of the pretrial conference,<sup>93</sup> judges' increasing inclination to actively encourage and participate in settlement negotiations, and a recognition of the administrative convenience and arguably superior results achieved by the resolution of claims by settlement.<sup>94</sup> A general rise in alternative dispute resolution (ADR), of which settlement is a subset, coincides with and is attributed to the high costs of conventional civil litigation and the prolonged uncertainty created by both the wait until trial and the potentially ensuing appellate process, among other factors.<sup>95</sup>

Settlement is preferable for several reasons, both economic and substantive. Analyzed economically, trials are viewed as failures, since "[t]he longer play continues, the less the participants' aggregate wealth because they must expend on litigation money they could save by settling."<sup>96</sup> Encouraging settlement preserves scarce judicial resources for only the most deserving cases.<sup>97</sup> In addition, courts that promote settlement should be able to allocate resources in such a way that they can handle a larger number of cases and operate more efficiently.<sup>98</sup> The costs reduced by settlement are not just monetary, though; they also include, among others, the emotional cost of stress related to impending trials and lengthy disputes as well as the opportunity cost of what is forsaken by devoting time to preparing for and attending trial.<sup>99</sup>

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<sup>93</sup> *Id.* at 7. Similar rules exist at the state level. See, e.g., CAL. R. CT. 1210; DEL. SUPER. CT. R. 16; N.Y. R. CT. 202.12 (specifically listing settlement as a matter for consideration at a pretrial conference).

<sup>94</sup> See *id.* Galanter, *supra* note 92, at 2-3 (discussing various reasons for the increase in settlement activity).

<sup>95</sup> See Erika S. Fine & Elizabeth S. Plapinger, *ADR Overview*, in CONTAINING LEGAL COSTS: ADR STRATEGIES FOR CORPORATIONS, LAW FIRMS, AND GOVERNMENT 7, 7 (Erika S. Fine ed., 1988) (explaining the reasons for the growth of ADR).

<sup>96</sup> Samuel Issacharoff et al., *Bargaining Impediments and Settlement Behavior*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 51-52 (David A. Anderson ed., 1996) (citations omitted); see also Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, in DISPUTE RESOLUTION, *supra*, at 17, 17 ("Economic models of litigation often view trial as a costly failure to achieve a mutually beneficial settlement.").

<sup>97</sup> See Galanter, *supra* note 92, at 2 (describing justifications for settlement).

<sup>98</sup> See *id.* at 8 (presenting the prosettlement argument that "courts that promote settlements will as a result handle more cases").

<sup>99</sup> See WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 2-3 (1988) (enumerating the various costs lessened by settlement).

In substantive terms, settlement is advocated as a “higher quality of justice” with increased fulfillment enjoyed among participants.<sup>100</sup> Because of the unavoidable uncertainty of a jury trial, the resulting verdict may be universally regarded as inappropriate.<sup>101</sup> Settlement, however, offers the opportunity to customize case resolution to the participants’ various needs, and may therefore result in “greater party satisfaction and enforcement reliability” due to its collaborative, rather than winner-take-all, nature.<sup>102</sup> Furthermore, settlements involving active participation by judges may be even more successful than those without such participation.<sup>103</sup>

The view that settlement is preferable to trial, however, is certainly not unanimous. On one hand, trials are beneficial because they educate the public,<sup>104</sup> and the shift to the largely private process of settlement dampens public debate and decreases the general public’s access to the legal system.<sup>105</sup> Additionally, the focus on settlement as a way to maximize efficiency in the courts may come at the steep price of equal justice.<sup>106</sup> In spite of these concerns, however, settlement is embraced by the modern civil court system due to its optimization of economic efficiency and, arguably, of substantive results, and is thus often encouraged as a preferred alternative to trial.

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<sup>100</sup> Galanter, *supra* note 92, at 3 (quoting an outline distributed to new federal judges at a training session, as explaining that “[i]n most controversies, most court cases, the highest quality of justice is not the all or nothing, black or white end result of a trial but is in the grey area—in most cases a freely negotiated settlement is a higher quality of justice”).

<sup>101</sup> *See id.* at 2 (“[A] trial might lead to results that are unacceptably harsh or calamitous . . .”).

<sup>102</sup> Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLAL. REV. 485, 487 (1985).

<sup>103</sup> *See* Galanter, *supra* note 92, at 8 (setting forth the argument that “judicial promotion of settlements will result in outcomes that are superior to those that would occur in its absence,” but noting that additional empirical evidence is needed to support this claim).

<sup>104</sup> *See* Issacharoff et al., *supra* note 96, at 68 (discussing, as a benefit of trial and thus a drawback of settlement, the fact that trials “can be a source of education and information about law to the public” and “can provide an opportunity to vindicate public goals”).

<sup>105</sup> *See* Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 999-1000 (lamenting the increase in settlement and its negative effect on public involvement in and connection with the judicial process).

<sup>106</sup> *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075-76 (1984) (describing the potential of settlement to be coercive, especially when the parties are of disparate wealth).

Litigation finance is regarded by many as an obstacle to settlement. A rational plaintiff will not settle for any amount offered by the defendant that is less than the aggregate of the principal amount advanced to her and the current interest accrued, which is often immense due to the staggering rates charged by many litigation finance companies.<sup>107</sup> This artificially inflated minimum acceptable offer and the nonrecourse character of the arrangement will lead the rational plaintiff to reject otherwise reasonable settlement offers, since, if she loses at trial, she will owe nothing.<sup>108</sup> In this way, litigation finance gives plaintiffs disincentives to settle and instead encourages disputes to progress to trial.<sup>109</sup>

An opposing view posits that litigation financing actually encourages settlement, or at least more *just* settlement.<sup>110</sup> Since entering into a litigation finance contract presumably gives the plaintiff the resources and “threat credibility” to carry her claim to trial, litigation financing may draw an otherwise obstinate defendant to the bargaining table and result in a fairer settlement award.<sup>111</sup> Additionally, the interest on the advance, which accrues while the case is pending, creates an added incentive for the plaintiff to settle (and to do so as soon as

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<sup>107</sup> See, e.g., *Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217, 220-21 (Ohio 2003) (providing an example of how a plaintiff’s settlement options were affected by her litigation finance arrangement).

<sup>108</sup> See Young, *supra* note 9, at 21 (“[A] plaintiff bankrolled by a lender has an incentive to reject modest, but reasonable, settlement offers. At worst, she risks a total loss in the courts, in which case she owes nothing and can even keep the amount advanced.”).

<sup>109</sup> See *Rancman*, 789 N.E.2d at 221 (listing its impediment of settlement as a reason for declaring a litigation finance contract void as champerty); Swan, *supra* note 48, at 779 (presenting the view that the nonrecourse nature of litigation financing provides plaintiffs an incentive to go to trial, because “[i]f they settle most of the money will go to their lawyers and the litigation funding companies” (quotation marks omitted)). ALFA notes that its members have agreed to fund at most ten percent of the estimated net value of any case so as not to “disincentivize the client from settling the case.” ALFA FAQs, *supra* note 11.

<sup>110</sup> See Richmond, *supra* note 6, at 661 (“The law favors fair and just settlements, not unfair or unjust settlements brought about by a party’s economic desperation . . .”).

<sup>111</sup> See Hananel & Staubitz, *supra* note 1, at 811 (positing that litigation financing gives a plaintiff “threat credibility,” in that a defendant cannot ignore the threat of litigation by a plaintiff with sufficient resources to litigate); Richmond, *supra* note 6, at 661 (noting that litigation finance “may even promote settlement . . . by forcing a recalcitrant defendant to approach a case reasonably and pragmatically in light of the fact that its adversary has the resources to meaningfully prosecute the matter”).

possible) so as to avoid accumulating continuously higher debts.<sup>112</sup> Finally, an advance that lessens the pressure on the plaintiff to meet her immediate financial commitments likewise reduces the temporal burden on her attorney, who will have more time to prepare the case and negotiate the most favorable settlement offer possible.<sup>113</sup> Despite these arguments advanced by those who believe litigation finance encourages settlement, the reality nonetheless remains that a plaintiff who owes a consequential debt (which may be significantly higher than the objective value of her claim) will not be inclined to accept a settlement offer lower than such an amount.

After considering both sides of the debate, it is clear that while litigation finance satisfies a heretofore unfulfilled need by giving plaintiffs the resources necessary to pursue their claims and increase their bargaining power, some measure of reform that ensures consumer protection and the effectiveness of the settlement process must be instituted to prevent the industry from flourishing at the high cost of equity.<sup>114</sup> The principles of systems thinking, set forth below, offer unique insight into how such reform might best be framed.

### III. SYSTEMS THINKING

#### A. *Systems Thinking Explained*

Systems thinking is an amalgam of a discipline loosely defined as the study of “how a number of different things act together when ex-

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<sup>112</sup> See *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at \*3 (N.Y. Sup. Ct. Mar. 2, 2005) (“[T]he interest on the advance, obviously of sizeable nature . . . creates an added incentive to settle . . .”).

<sup>113</sup> See *Sniegocki*, *supra* note 13, at 29-30 (“[A] cash advance . . . allows [the plaintiff’s] attorney time to prepare the case and negotiate a just and adequate settlement.”).

<sup>114</sup> As Susan Lorde Martin notes:

There is little doubt that a litigation financing industry that acts professionally and ethically in attempting to earn a reasonable return for the risk it is undertaking, fills a need that has not been served by more traditional lenders. The industry can be improved by some regulation, but it would be unfortunate if the entire industry became the victim of a political movement of so-called tort reform that dwells on the outlier cases in which plaintiffs receive unwarranted windfalls but ignores the much more numerous situations where fairness and justice are absent because meritorious plaintiffs do not have the funds to sustain routine expenses as well as medical costs during the years that it may take to bring their cases to a final conclusion.

Martin, *supra* note 3, at 74.

posed to a number of different influences at the same time"<sup>115</sup> and colloquially explained by the maxim "the whole is more than the sum of its parts."<sup>116</sup> It gained popularity among mainstream academics in the 1970s and 80s, although a survey of history shows its presence much earlier in time.<sup>117</sup> Systems thinking has its roots amidst a modern scientific revolution, in which the Newtonian, mechanistic view of the world as "an exquisitely designed giant mechanism" divisible into discrete parts gave way to a "science of organized complexity," with the so-called "new scientist" focusing on "relationships and situations" rather than on "atomistic facts and events."<sup>118</sup> As such, the systems view treats things as "integrated wholes of their subsidiary components and never as the mechanistic aggregate of parts in isolable causal relations."<sup>119</sup>

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<sup>115</sup> ERVIN LASZLO, *THE SYSTEMS VIEW OF THE WORLD* 5 (1972). This Comment seeks to apply theoretically the general, overarching principles of systems thinking to the field of litigation finance; it does not attempt to engage in detailed empirical analysis or modeling.

<sup>116</sup> NIC J.T.A. KRAMER & JACOB DE SMIT, *SYSTEMS THINKING: CONCEPTS AND NOTIONS* 3 (H.E. Stenfert Kroese B.V. trans., 1977); *see also* PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* 68 (1990) (describing systems thinking as "a discipline for seeing wholes . . . a framework for seeing interrelationships rather than things, for seeing patterns of change rather than static 'snapshots'").

<sup>117</sup> *See* JAMES E. HERGET, *CONTEMPORARY GERMAN LEGAL PHILOSOPHY* 73 (1996) (citing historical examples of systems thinking, including "Adam Smith's eighteenth-century view of the economy" in which "individual human beings separately pursuing their personal economic goals . . . gave rise to a 'system' in which the distribution of goods and services was arranged for everyone's benefit").

<sup>118</sup> LASZLO, *supra* note 115, at 11-13; *see id.* at 3 ("Until very recently, contemporary Western science was shaped by a mode of thinking which placed rigorous detailed knowledge above all other considerations."); MARGARET J. WHEATLEY, *LEADERSHIP AND THE NEW SCIENCE: LEARNING ABOUT ORGANIZATION FROM AN ORDERLY UNIVERSE* 9 (1992) ("The Newtonian model of the world is characterized by . . . a focus on things rather than relationships . . . . In new science, the underlying currents are a movement toward holism, toward understanding the system as a system and giving primary value to the relationships that exist among seemingly discrete parts."). For a general account of changes in scientific thought throughout history, *see* PETER CHECKLAND, *SYSTEMS THINKING, SYSTEMS PRACTICE* 36-50 (1981).

<sup>119</sup> LASZLO, *supra* note 115, at 14-15. The systems literature often illustrates its holistic orientation by pointing to the human body as an example:

Living systems are organized in such a way that they form multi-leveled structures, each level consisting of subsystems which are wholes in regard to their parts, and parts with respect to the larger wholes. Thus molecules combine to form organelles, which in turn combine to form cells. The cells form tissues and organs, which themselves form larger systems, like the digestive system or the nervous system. These, finally, combine to form the living woman or man . . . . People form families, tribes, societies, nations.

A radical departure from the way most of us approach the world,<sup>120</sup> systems thinking encourages a new way of analyzing problems; in fact, it even suggests a new way of determining what is (or is not) a problem in the first place.<sup>121</sup> This paradigm shift<sup>122</sup> entails various overarching principles of how to conduct analysis as a systems thinker, in particular approaching problems as subsets of their larger environments rather than in isolation; rejecting a linear, “either-or” view of the world, instead recognizing its inevitable complexity and interrelation;<sup>123</sup> and acknowledging that seemingly small events or changes can cause extreme outcomes.<sup>124</sup>

Systems thinking has been applied to many disciplines, enjoying especially warm reception in management scholarship, where systems thinkers have recommended that businesses adopt a fluid leadership structure instead of adhering to traditional models of hierarchical management.<sup>125</sup> Other applications in the management context have emphasized the importance of embracing the inevitability and positivity of change, including all stakeholders in management and decision-making processes, creating working groups and networks instead of formalized standing committees,<sup>126</sup> and balancing work with family

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FRITJOF CAPRA, *THE TURNING POINT: SCIENCE, SOCIETY, AND THE RISING CULTURE* 43 (1982).

<sup>120</sup> See SENGE, *supra* note 116, at 3 (“From a very early age, we are taught to break apart problems, to fragment the world.”).

<sup>121</sup> See, e.g., WHEATLEY, *supra* note 118, at 20-21 (observing that “*disorder* can be a source of *order*,” and that “if we look at [a chaotic] system long enough and with the perspective of time, it always demonstrates its inherent orderliness”).

<sup>122</sup> See T. IRENE SANDERS, *STRATEGIC THINKING AND THE NEW SCIENCE: PLANNING IN THE MIDST OF CHAOS, COMPLEXITY, AND CHANGE* 144-46 (1998) (citing examples of paradigm shifts and explaining that a paradigm shift “proposes new questions, redefines old questions, and opens the door for further exploration, discovery, and experimentation”).

<sup>123</sup> See *id.* at 65 (noting that “*most of the world is made up of nonlinear systems*”); *id.* at 147 (advocating a shift from linear to nonlinear, from separateness to relatedness).

<sup>124</sup> See *id.* at 57-61 (describing the “Butterfly Effect,” in which a butterfly flapping its wings in Asia causes a hurricane in the Atlantic, as a metaphor for how “small changes or events create complex results”); SENGE, *supra* note 116, at 64 (“[S]mall, well-focused actions can sometimes produce significant, enduring improvements . . .”).

<sup>125</sup> See, e.g., WHEATLEY, *supra* note 118, at 22-23 (describing informal leadership and its responsiveness to change, and stating that “[i]f organizations are machines, control makes sense [and i]f organizations are process structures, then seeking to impose control through permanent structure is suicide”).

<sup>126</sup> See SANDERS, *supra* note 122, at 136, 147-50 (listing systems thinking’s applications to business management).

life.<sup>127</sup> Systems thinking in one form or another has also been used to analyze foreign policy initiatives,<sup>128</sup> the public's concern with current events,<sup>129</sup> and negotiation techniques.<sup>130</sup>

Despite such developments in other disciplines, the application of systems thinking to law has been comparatively limited.<sup>131</sup> Niklas Luhmann, a German scholar who has done much of the theoretical systems analysis in the field, defines law as "a social system of communication that serves to secure normative expectations."<sup>132</sup> The law is an "autopoietic," or self-maintaining and self-renewing, system because "[l]aw comes out of law" and "absorbs change" "as the system receives stimuli from its environment and as the law reflects upon itself."<sup>133</sup> Thus, viewed systemically, the law is a living, breathing organism constantly in flux.

Because of the realistic view it counsels of the legal system as a complex and ever-changing entity (particularly when performing its conflict resolution function<sup>134</sup>), systems thinking is a useful way to analyze litigation finance and to approach the decision that courts and state legislatures now face concerning whether the industry should be

<sup>127</sup> See SENGE, *supra* note 116, at 307 ("Traditional organizations undeniably foster conflict between work and family . . . the artificial boundary between work and family is anathema to systems thinking.").

<sup>128</sup> See, e.g., *id.* at 59 (noting the failure of certain food assistance programs in developing countries because of compensating feedback, whereby the aid, albeit well-intentioned, has systemic effects resulting in a worsening of the problem).

<sup>129</sup> See, e.g., SANDERS, *supra* note 122, at 75 (describing "strange attractors," or events that "quickly give visibility to unrecognized initial conditions," such as the Clarence Thomas-Anita Hill hearings shedding light on sexual harassment and the O.J. Simpson trial creating public concern about the role of wealth in judicial proceedings).

<sup>130</sup> See, e.g., PHYLLIS BECK KRITIK, NEGOTIATING AT AN UNEVEN TABLE: DEVELOPING MORAL COURAGE IN RESOLVING OUR CONFLICTS 178-81 (2d ed. 2002) (advocating a paradigm shift in the approach to negotiations involving unequal bargaining power).

<sup>131</sup> For examples of how systems thinking has been used in legal scholarship, see Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV. 1077, 1091 (2005) (applying systems thinking to complex contractual transactions); Larry I. Palmer, *Patient Safety, Risk Reduction, and the Law*, 36 HOUS. L. REV. 1609, 1637 (1999) (relating systems thinking to health care law).

<sup>132</sup> HERGET, *supra* note 117, at 75.

<sup>133</sup> *Id.* at 77-78.

<sup>134</sup> On the complex, systemic nature of conflict resolution, see Issacharoff et al., *supra* note 96, at 72 ("There are inherent difficulties in the resolution of conflict in a world of complicated interactions, counterposing interests, and fragmented control of decisions. That is the world we live in, a world in which intricate social, commercial, and legal relations undergird everyday conduct and influence the conduct of many disputes.").



“left alone, regulated to some extent, or regulated out of business.”<sup>135</sup> Many of the proposals seeking to reform litigation finance advanced thus far have involved narrowly targeted, mechanistic changes to the law that, standing alone, do not account for their potential effects on the legal system and society as a whole or address anything more than the surface of litigation finance’s negative effects.<sup>136</sup> A systems thinking analysis, in contrast, suggests the implementation of highly leveraged change<sup>137</sup> that would shift the very position litigation finance occupies in the civil justice arena.

### B. Proposal: Reduce Time Delay

Taking into account the principles of systems thinking, reducing the time between when a claim originates and when it is resolved is an advantageous way to address the consumer protection and settlement-obstruction concerns about litigation finance<sup>138</sup> without overregulating the industry and thus depriving a sector of the American public of court access or the opportunity for elevated bargaining power.<sup>139</sup> With delays in the civil justice system omnipresent,<sup>140</sup> and often favoring the usually wealthier defendant,<sup>141</sup> a reduction in time delay would address the underlying issues that induce a plaintiff to enter a litigation finance contract in the first place. When such a contract *is* formed, a shorter period until disposition of the claim would reduce the amount of time that interest accrues and any accompanying disincentive to settle. This solution nonetheless allows the industry to enjoy continuity of existence without heavy-handed interference.

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<sup>135</sup> Martin, *supra* note 3, at 56.

<sup>136</sup> See *infra* notes 180-184 and accompanying text (listing proposals).

<sup>137</sup> See SENGE, *supra* note 116, at 114 (defining the principle of leverage as making changes consistent with the “economy of means” that “lead to significant, enduring improvements”).

<sup>138</sup> See *supra* Parts II.B.-C (detailing concerns of industry critics).

<sup>139</sup> See *supra* Part II.A (describing the positive effects of litigation finance).

<sup>140</sup> See ABA DIV. FOR JUDICIAL SERVS., DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM 6-7 (1986) [hereinafter DEFEATING DELAY] (“In most jurisdictions, delay . . . is the norm.”); Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814-15 (2000) (discussing the length of time for civil cases to reach disposition by trial, and noting that the Sixth Amendment right to a “speedy trial” applies only to criminal cases).

<sup>141</sup> See *supra* note 62 and accompanying text (comparing the typical financial positions of plaintiffs and defendants).

Delay is an element indigenous to many systems, and one that can have significant implications unless recognized and accounted for. Consider the widespread existence of delay in daily personal and business situations: the time between eating a meal and feeling full, adjusting the shower faucet and sensing the change in temperature, and ordering new inventory and having it on hand to sell to customers.<sup>142</sup> An especially enlightening exercise, frequently used in business classes, requires participants to simulate managing inventory through a supply chain.<sup>143</sup> Participants are organized into teams of four, with one person each representing the factory, distributor, wholesaler, and retailer; consumer demand is determined at random by a deck of cards.<sup>144</sup> Because most do not understand the effects of the time delays inherent to the process or the effects of fluctuating demand on the entirety of the supply chain, the hypothetical average costs among first-time participants are ten times greater than optimal.<sup>145</sup>

In the litigation context, delay is not only of practical concern, as it results in a decrease in evidentiary quality and witness availability, but also of social concern, as it is cost prohibitive and threatens the credibility of the justice system.<sup>146</sup> It is thus evident that time delay can introduce problems into the systems it pervades, and accordingly, “[o]ne of the highest leverage points for improving system perform-

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<sup>142</sup> See SENGÉ, *supra* note 116, at 89-92 (providing examples of time delay).

<sup>143</sup> See *e.g.*, JOHN D. STERMAN, BUSINESS DYNAMICS: SYSTEMS THINKING AND MODELING FOR A COMPLEX WORLD 684-94 (2000) (describing the “Beer Distribution Game” and its illustration of how delay creates inefficient, choleric systems characterized by severe oscillation—in this case, extremely large orders of inventory during periods of high demand followed by orders of zero once participants realize they are overstocked).

<sup>144</sup> *Id.* at 684.

<sup>145</sup> *Id.* at 686.

<sup>146</sup> As Michael Heise notes:

Prolonged case disposition time frequently correlates with an increase in litigation costs and threatens evidentiary quality as memories fade, evidence spoils, and witnesses and litigants die. Delays in the resolution of civil disputes erode public confidence in the civil justice system, disappoint and frustrate those seeking compensation through the legal system, and generate benefits for those with the financial ability to withstand delays or otherwise benefit from them. Such factors, individually and collectively, undermine public faith and confidence in the ability of our civil justice system to operate efficiently and, more importantly, equitably.

Heise, *supra* note 140, at 814-15. Note also the effects of delay on the amount at stake. Any amount expected to be received in the future must be discounted to its present value, which will be substantially less. See generally George Priest, *The Simple Economics of Civil Procedure*, 9 KAN. J.L. & PUB. POL’Y 389, 392-93 (2000) (explaining the impact of delay on financial awards).

ance . . . is the minimization of system delays.”<sup>147</sup> Viewing reduction in delay as a manifestation of the leverage principle, which counsels that “the best results come not from large-scale efforts but from small well-focused actions,”<sup>148</sup> suggests that reducing the time that a civil claim is pending is a less intrusive and more promising alternative to other possible litigation finance reforms.

Faster disposition of claims would reduce the gap between a plaintiff’s assets and her financial needs, since as each month arrives, so do another rent or mortgage payment and slew of additional bills. Resolving claims more quickly would alter the way the system works by reducing the pressure on plaintiffs to continuously muster additional resources in order to see their claims through to completion. In this way, plaintiffs would have to turn to litigation financiers less often and for smaller amounts.

A reduction in time delay would also address the concerns of those stakeholders who emphatically support the litigation finance industry for providing a necessary service to people who might otherwise not be able to pursue justice,<sup>149</sup> in addition to addressing the concerns of those who advocate a free-market approach to legal claims.<sup>150</sup> As a practical matter, no reduction in delay could completely eliminate the disparity between every plaintiff’s resources and needs; there will always be certain plaintiffs who simply cannot stretch their limited means over the length of their litigation. However, a briefer disposition time would confine the litigation finance industry to the clients who most need its services and thus mitigate its impact on the civil litigation process. By allowing the industry to survive and instead adjusting the larger environment within which it operates, the proposed approach would preserve the benefits of litigation finance.<sup>151</sup>

When a plaintiff *does* employ the services of a litigation financier, a reduction in time delay would likewise reduce her aggregate amount owed, as there would be a generally smaller amount borrowed as well

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<sup>147</sup> SENGE, *supra* note 116, at 89 (quoting Ray Stata, CEO of Analog Devices).

<sup>148</sup> *Id.* at 114.

<sup>149</sup> See *supra* notes 61-63 and accompanying text (advancing the argument that litigation finance increases court access).

<sup>150</sup> See, e.g., Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 443 (advocating a “market for the sale and exchange of tort claims”); Swan, *supra* note 62, at 817 (“Competitive exchange affords a promising remedy for inefficient tort laws.”).

<sup>151</sup> See Martin, *supra* note 3, at 68 (“It would be bad policy and unfair to poor plaintiffs with good cases to regulate litigation financing firms out of business.”).

as less time for interest to accumulate and compound. A faster disposition thereby should appease, at least to some extent, consumer protection advocates who condemn the usually extreme differential between the amount a plaintiff receives as an advance and the amount she owes following resolution of her claim.<sup>152</sup>

The existence of a nonrecourse litigation financing arrangement has serious implications for the settlement process, often causing plaintiffs to refuse to settle for an objectively reasonable amount and thus forcing an inflated number of cases to trial. As discussed above, this results in increased costs and inefficiencies in the court system.<sup>153</sup> A reduction in disposition time would lessen, or perhaps even eliminate, the impediments to settlement, since interest would not have as much time to accrue, and the plaintiff would thus owe a more reasonable total amount. The simultaneous reduction in accumulation of living expenses would address the problem of a plaintiff feeling compelled to accept an unreasonably low settlement offer just to make ends meet.<sup>154</sup> In an archetypal example of systemic interrelation, just as a reduction in time delay encourages settlement, settlement in turn results in quicker disposition of cases.<sup>155</sup>

There are numerous ways a reduction in time delay could be implemented in the civil court system. Process-oriented<sup>156</sup> changes, such as the institution of efficient caseflow-management systems,<sup>157</sup> firm enforcement of scheduling policies,<sup>158</sup> and a flexible allowance for the incorporation of additional adjudicators<sup>159</sup> are practical ways to lessen the burden of delay on the courts. More drastically, some have advocated a shift from the traditional civil jury trial paradigm to increased reliance on other methods of case disposition, including more fre-

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<sup>152</sup> See *supra* notes 82-85 and accompanying text (detailing consumer protection concerns).

<sup>153</sup> See *supra* Part II.C (indicating how settlement is affected by nonrecourse arrangements).

<sup>154</sup> See *supra* note 62 and accompanying text (identifying financial pressures on plaintiffs).

<sup>155</sup> See Heise, *supra* note 140, at 816.

<sup>156</sup> See *id.* at 816 (characterizing particular delay-reduction techniques as “process-oriented” rather than structural).

<sup>157</sup> See DEFEATING DELAY, *supra* note 140, at 42 (discussing various permutations of case assignment systems designed to reduce delays).

<sup>158</sup> See *id.* at 43 (explaining administrative approaches to delay reduction, such as firm-continuance policies and date-certain scheduling).

<sup>159</sup> See *id.* at 43-44 (recommending the use of retired and visiting judges, when necessary, to relieve court congestion).

quent use of bench trials<sup>160</sup> and the “short trial.”<sup>161</sup> In addition to the reduction in time delay that bench trials offer due to their exclusion of potentially lengthy undertakings such as jury selection, an increase in bench trials is positively correlated with increased settlement rates, and, “[t]ypically, case disposition times for cases that settle are less than that for those cases that reach full trial.”<sup>162</sup> Admittedly, the Seventh Amendment right to a jury trial in federal court and corresponding rights at the state level limit the feasibility of drastically increasing bench trials. However, the suggestion nonetheless remains as a potential step toward reducing time delay in the court system in certain cases.

Another innovative time-saving technique is the experimental use of “short trials,” one-day trials decided by a four-person jury.<sup>163</sup> Jurors are given a notebook containing the evidence relevant to their case; they then have the opportunity to ask questions of the witnesses.<sup>164</sup> Three of the four jury members must agree on the verdict, which is binding.<sup>165</sup>

Many of these delay-reduction approaches, which can conceivably be varied and expanded upon in any number of ways, have been implemented with success in certain state court systems. For example, the Philadelphia Court of Common Pleas has garnered accolades for recent changes that have increased efficiency and reduced delay<sup>166</sup> and that provide a potential model for other courts to follow. In 1992, there was a backlog of over 28,000 civil cases in the Court of Common Pleas; now, ninety percent of lawsuits are cleared in two years or less.<sup>167</sup> The changes instrumental in bringing about such

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<sup>160</sup> See Heise, *supra* note 140, at 815 (setting forth a delay-reduction strategy of increased reliance on bench trials).

<sup>161</sup> G. Thomas Munsterman, *A Cost Free Civil Jury Trial?*, 18 CT. MANAGER 35, 35-36 (2003).

<sup>162</sup> Heise, *supra* note 140, at 816. *But see* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1173-74 (1992) (noting the existence of selection bias between judge and jury trials).

<sup>163</sup> See Munsterman, *supra* note 161, at 35-36.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* The short trial has been particularly popular in Maricopa County, Arizona and Clark County, Nevada. *Id.*

<sup>166</sup> See NAT'L CTR. FOR STATE COURTS, CIVIL PROGRAMS IN THE PHILADELPHIA COURT OF COMMON PLEAS FINAL REPORT 58 (Sept. 2004) (describing the Philadelphia Court of Common Pleas as “arguably the best-managed large urban civil trial court operation in the nation”); L. Stuart Ditzen, *Civil Courts in City Hailed as a Model*, PHILA. INQUIRER, Nov. 27, 2004, at A1 (summarizing changes in the Philadelphia courts).

<sup>167</sup> Ditzen, *supra* note 166, at A1.

radical improvement include the institution of a commerce court to specialize in disputes among businesses and a complex litigation center to handle mass tort cases;<sup>168</sup> the placement of all incoming cases on case-management tracks with strict deadlines; and the creation of a “Day Backward” and a “Day Forward” program whereby judges are assigned to teams organized by case year, with each team led by a “team leader.”<sup>169</sup> These changes have been met with praise not only from outside analysts, but also from trial lawyers, who appreciate the certainty accorded by “the firmness of trial dates . . . and the quick disposition of cases.”<sup>170</sup>

Similarly, initiatives undertaken by the Los Angeles Superior Court aimed at minimizing delays have resulted in a reduction of the four- or five-year time lapse until trial prevalent in the 1980s and early 1990s to a system where, as of 2002, ninety percent of cases were resolved within one year and ninety-eight percent were resolved within eighteen months.<sup>171</sup> Such drastic improvement was attained through the implementation of a flexible “Fast Track” program, improvements in pretrial procedures, increased use of technological resources such as electronic filing, and procedural unification efforts that simplified and standardized court rules.<sup>172</sup>

While there are obviously a great number of practical manifestations of the time-delay-reduction principle and virtually endless permutations of reform initiatives, certain elements are prerequisites for the success of any such effort. Thorough statistical analysis should be undertaken prior to the institution of any modifications to the current system to identify the nature, extent, and causes of the existing delay.<sup>173</sup> Implementation of effective and sustainable delay-reduction techniques also requires the support and education of all relevant constituencies,<sup>174</sup> particularly judges, “who must be the formal leaders

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<sup>168</sup> *Id.*

<sup>169</sup> NAT’L CTR. FOR STATE COURTS, *supra* note 166, at 17-20. The “Day Backward” program was instituted to systematically address backlogged cases while the “Day Forward” program was created to schedule currently incoming cases for prompt trials. *Id.*

<sup>170</sup> *Id.* at 24.

<sup>171</sup> Robert H. O’Brien, *The Success of Delay Reduction in the Civil Trial Courts*, 25 L.A. LAW., Mar. 2002, at 64.

<sup>172</sup> *Id.* at 64-66.

<sup>173</sup> *See, e.g.*, DEFEATING DELAY, *supra* note 140, at 14-18 (emphasizing the importance of data collection and analysis).

<sup>174</sup> *See id.* at 66-68 (discussing the necessity of involving as many participants as possible and educating them about the goals and operation of any changes).

of the reform effort.”<sup>175</sup> Finally, “[i]n choosing the change tactics, the team must understand the nature of the *system*.”<sup>176</sup> Keeping the systemic effects of any proposed reforms at the forefront of the discussion would ensure that improvements do not result in unintended consequences that exacerbate the problem they are intended to ameliorate.<sup>177</sup> This includes recognizing when the expedited disposition of a case is *not* appropriate. Whether due to injuries sustained by the plaintiff that need time to stabilize or discovery-related time requirements, there are certainly instances when delay is necessary and even desirable.<sup>178</sup> Therefore, a successful delay-reducing initiative must include a screening mechanism for the “identification of those cases that need special handling.”<sup>179</sup>

A minimization of case disposition time *alone* would not achieve perfect equilibrium between the litigation finance industry’s strengths and weaknesses. Other proposals for improving the litigation finance industry include such diverse ideas as forming a state-run public auction market for champerty, in which litigation finance companies bid on claims and the defendant retains the right to match the highest bid;<sup>180</sup> applying truth-in-lending requirements to the industry;<sup>181</sup> creating a competitive exchange market for tort claims;<sup>182</sup> allowing attorneys to invest in their clients’ suits;<sup>183</sup> and instituting consumer-

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<sup>175</sup> *Id.* at 8; *see also id.* at 40 (“The most important concept for delay reduction is the acceptance by the *court*, rather than the lawyers or the litigants, of the responsibility for the pace of litigation.” (emphasis added)); *id.* at 41 (“[T]he techniques designed must make the most efficient use of the scarcest resource of the court system, the judge’s time.”).

<sup>176</sup> *Id.* at 62 (emphasis added).

<sup>177</sup> Failing to take a systems view may cause unintended results. For example, cigarettes with lower nicotine content actually *increase* the intake of carcinogens “as smokers compensate for the low nicotine content by smoking more cigarettes per day.” STERMAN, *supra* note 143, at 9. Other examples include certain antibiotics, which have the unintended effect of stimulating “drug-resistant pathogens” and antilock brakes, which “cause some people to drive more aggressively, offsetting some of their benefits.” *Id.*

<sup>178</sup> *See* Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL’Y & L. 880, 895-96 (2000) (identifying situations where delay is appropriate).

<sup>179</sup> O’Brien, *supra* note 171, at 65.

<sup>180</sup> *See* Bond, *supra* note 34, at 1320-22 (setting forth his proposed system of “public champerty”).

<sup>181</sup> *See* Martin, *supra* note 3, at 68-69 (suggesting that the Truth in Lending Act be amended to include litigation finance).

<sup>182</sup> *See* Swan, *supra* note 62, at 817 (advocating a free market for legal claims).

<sup>183</sup> *See* Moliterno, *supra* note 5, at 256-57 (proposing changes to the Model Rules of Professional Conduct).

friendly policies such as a rescission period and a notarization requirement to ensure that a plaintiff's attorney reviews any litigation finance agreement.<sup>184</sup> While each of these proposals may very well prove useful to regulate litigation finance, without confronting the broader reality of a civil court system laden with backlog, none will lead to sustainable success for either the litigation finance industry or the people it purports to serve.

If implemented in isolation, these proposals, by virtue of their failure to take a systems approach, would be left vulnerable to a multitude of problems. One likely pitfall is the systemic phenomenon of unintended consequences and burden shifting,<sup>185</sup> in which supposed solutions simply transfer a problem to another area rather than truly eradicating it. Others include "compensating feedback," which occurs when "well-intentioned interventions call forth responses from the system that offset the benefits;"<sup>186</sup> the "easy way out" leading back in;<sup>187</sup> and the "cure [proving] worse than the disease," when "short-term improvements lead[] to long-term dependency."<sup>188</sup> The usefulness of systems analysis and the delay reduction it counsels lie in the awareness of and preparation for these possibilities that it affords.

When combined with other potential changes to the litigation finance industry (such as those mentioned above), a time delay reduction would address the root, rather than merely the symptoms, of the problems a plaintiff seeking justice faces. Due to their cognizance of the systemic nature of the civil justice process, efforts to decrease disposition time thus would set the stage for sustainable reform.<sup>189</sup>

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<sup>184</sup> See Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 353 (2004) (laying out suggested reforms); Press Release, *supra* note 19 (publicizing consumer-friendly changes agreed to by certain litigation finance companies).

<sup>185</sup> See SENGE, *supra* note 116, at 57 ("Today's problems come from yesterday's 'solutions.'"); *supra* note 177 and accompanying text (providing examples of unintended side effects). This principle leaves linear thinkers intent on reform with a choice between Scylla and Charybdis, as the avoidance of one problem simply creates another, potentially worse, one.

<sup>186</sup> SENGE, *supra* note 116, at 58 ("[T]he harder you push, the harder the system pushes back; the more effort you expend trying to improve matters, the more effort seems to be required.").

<sup>187</sup> *Id.* at 60-61 (acknowledging that while it is comforting to apply "familiar solutions," they often result in aggravation of the underlying problem).

<sup>188</sup> *Id.* at 61.

<sup>189</sup> *Id.* at 62 ("[A]ny long-term solution must . . . strengthen the ability of the system to shoulder its own burdens.").



## CONCLUSION

An efficacious long-term approach to litigation finance must ensure that consumers are protected and remove obstacles to settlement while still permitting the industry to fulfill its role in the marketplace of providing a necessary financial service. Although there are several existing legal doctrines—such as champerty, usury, and contract principles—that could potentially be used or modified to regulate litigation finance, as well as a multitude of other proposals for addressing the industry's shortcomings, no reform is likely to be successful unless accompanied by a decrease in the disposition time for civil claims. A reduction in time delay would make the civil court system drastically more efficient and would provide a holistic measure of required control over the litigation finance industry.