Written Testimony

Victoria Sahani
Associate Provost for Community & Inclusion at Boston University and
Professor of Law at Boston University School of Law

Hearing on "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities"

House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
United States House of Representatives

Wednesday, June 12, 2024, at 2:00 p.m. Eastern Time

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I. An Overview of Modern Third-Party Funding[1]

What is third-party funding? In a sentence, third-party funding exists because financial investors have discovered that a monetizable legal claim is an asset with independent value, regardless of external economic, political, regulatory, or public health forces.[2] Classic third-party funding involves an outside entity—called a "third-party funder"—providing dispute-related financing to a party or a law firm.[3] This traditional funding relationship involves the funder contracting to receive a percentage of the proceeds from the case if the plaintiff or claimant wins in exchange

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[1] I excerpted this section from my own article, Victoria Shannon Sahani, *"Keep to the Code": A Global Code of Conduct for Third-Party Funders*, 102 B.U. L. Rev. 2331, 2338-2345 (2022), available at https://www.bu.edu/bulawreview/files/2023/02/SAHANI.pdf. Footnote numbering and cross-references have been modified for ease of reading in this excerpted format.

[2] *See infra* notes 29, 31-32 and accompanying text (discussing third-party funding's detachment from external economic conditions); *cf.* Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DEPAUL L. REV. 611, 628 (2020), available at: https://via.library.depaul.edu/law-review/vol69/iss2/13 [hereinafter Sahani, *Rethinking*] ("Damages claims are understandably attractive to dispute financiers, because there will be a pot of money to share if the party wins. Non-financial claims and 'no liability claims' (defenses) are less attractive, or may be completely unattractive, because such claims do not automatically create a pot of money to share, even though such claims may be worthy on the merits.").

[3] LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 1-8 (2d ed. 2017) (describing players in third-party funding, types of funding relationships, and effect of funder type on attorney-client relationship).

for providing nonrecourse funds to pursue the case.[4] The nonrecourse nature of the investment means that, unlike a loan, a funded plaintiff does not have to repay the funder if it loses the case or does not recover any money.[5] However, if the funded party is the defendant or respondent, the funder contracts to receive a predetermined payment from the client, similar to an insurance premium.[6] The agreement may also include an extra payment to the funder if the defendant wins the case.[7] Third-party funding is a controversial and evolving phenomenon that has attracted the attention of the news media and state and federal legislators.[8]
The financier—called a "third-party funder"—finances the party's legal representation in return for a profit.[9] Third-party funders are banks, hedge funds, insurance companies, parent corporations, high-net-worth individuals, nonprofit entities, and crowdfunded sources.[10] Most third-party funders are privately held entities, but a few are publicly traded companies.[11] Third-party funders provide a wide array of products, including consumer dispute funding,[12]

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4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *See* Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sept. 1, 2016), http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about (detailing support and criticism for third-party funding model); Mathew Ingram, *The Gawker vs. Hulk Hogan Case Just Got a Lot More Important*, FORTUNE (May 25, 2016, 2:19 PM), https://fortune.com/2016/05/25/gawker-hogan-thiel/ (reporting that billionaire Peter Thiel financed professional wrestler's lawsuit against media company); Roger Parloff, *Key Funder of Ecuadorians' Suit Against Chevron Quits*, FORTUNE (Feb. 16, 2015, 1:05 PM), https://fortune.com/2015/02/16/key-funder-ecuadorians-suit-vs-chevron-quits/ (reporting that third-party funder of Ecuadorian plaintiffs pledged to give no more money and turned over entire stake in judgment to defendant, Chevron, to settle another lawsuit that Chevron brought against him).

9 *See* NIEUWVELD & SAHANI, *supra* note 3**Error! Bookmark not defined.**, at 1-7.

10 *Id.*

11 *See* Sarah O'Brien, *Litigation Financing May Tempt Investors with High Returns. What To Know Before Buying in*, CNBC (June 25, 2020, 11:35 AM), https://www.cnbc.com/2020/06/25/litigation-financing-tempts-with-high-returns-tips-before-buying-in.html [https://perma.cc/29NG-L79J]. Publicly traded funders include Omni Bridgeway, an Australian company, and Burford, a company based in the United States but traded on the London Stock Exchange. *See About Us*, OMNI BRIDGEWAY [hereinafter OMNI BRIDGEWAY], https://omnibridgeway.com/about/overview [https://perma.cc/6HGH-NYQF] (last visited Dec. 7, 2022); *About Burford*, BURFORD, https://www.burfordcapital.com/about-burford/ [https://perma.cc/HLG2-X9HE] (last visited Dec. 7, 2022); *see also* News Release, Chuck Grassley, U.S. Sen., Grassley, Cornyn Seek Details on Obscure Third Party Litigation Financing Agreements (Aug. 27, 2015) [hereinafter News Release], https://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements [https://perma.cc/CW6S-JQEB].

12 Examples of consumer dispute funders include all the members of the American Legal Finance Association ("ALFA"). *See ALFA Member Companies*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/alfa-membership/alfa-member-companies/ [https://perma.cc/Z5PH-7MUW] (last visited Dec. 7, 2022).

commercial dispute funding,[13] class action funding,[14] lending to law firms,[15] defense-side funding,[16] litigation crowdfunding,[17] brokerage services between funders and potential clients,[18] and, in the case of "funders of funders," investment in litigation funders.[19]
Third-party funding is widespread globally in litigation, arbitration, and sometimes mediation if there is a multistage dispute settlement clause.[20] This phenomenon is a multibillion-dollar

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13 Examples of commercial dispute funders include all the "Funder Members" of the Association of Litigation Funders ("ALF") in the United Kingdom. *See Membership Directory*, ASS'N OF LITIG. FUNDERS, http://associationoflitigationfunders.com/membership/membership-directory/ [https://perma.cc/8EDF-K2RQ] (last visited Dec. 7, 2022). The listed "Associate Members" are brokers and law firms that regularly refer cases to funders, as well as one "Academic Member" who is Head of the School of Law at the University of West London. *See id.*

14 The key example is from Australia, which has opt-in class actions. IMF Bentham (now known as Omni Bridgeway) is the oldest funder in Australia and regularly funds class actions there. *See* OMNI BRIDGEWAY, *supra* note 11. Class action funding is practically nonexistent in the United States, except in the form of lawyer-lending to plaintiff-side law firms. *See* NIEUWVELD & SAHANI, *supra* note 3**Error! Bookmark not defined.**, at 132-33. Class a ction funding is more prevalent in a few countries in Europe—such as the Netherlands—and Australia. *See id.* at 79-82, 85-86, 193-94.

15 Law firm lenders that may take a security interest in the potential proceeds of the firm's portfolio include Amicus Capital Services, Momentum Funding, LawCash, and Advanced Legal Capital. *See* AMICUS CAP. GRP., LLC, https://amicuscapitalgroup.com [https://perma.cc/2KWM-NZW2] (last visited Dec. 7, 2022); MOMENTUM FUNDING, https://www.momentumfunding.com [https://perma.cc/2HZS-9ATY] (last visited Dec. 7, 2022); **LAWCASH,** https://lawcash.com [https://perma.cc/5PJ6-BZQR] (last visited Dec. 7, 2022); ADVANCED LEGAL CAP., https://www.advancedlegalcapital.com [https://perma.cc/27HV-XT8F] (last visited Dec. 7, 2022). Traditional banks also may offer loans to law firms secured by accounts receivable or tangible property owned by the firm.

16 An example of a defense-focused funder in the United States was Gerchen Keller Capital LLC (now Burford), which announced a defense-side and risk management focus when it launched. *See* Andrew Strickler, *Litigation Finance Co. Launches with Defense-Side Focus*, LAW360 (Apr. 8, 2013, 12:05 AM), http://www.law360.com/articles/429993/litigation-finance-co-launches-with-defense-side-focus. Burford acquired Gerchen Keller Capital in 2016. *See* Press Release, Burford, Burford Capital Adds Scale and Significant Private Capital Management Business Through Acquisition of Gerchen Keller Capital (Dec. 14, 2016), https://www.burfordcapital.com/media-room/media-room-container/burford-capital-adds-scale-and-significant-private-capital-management-business-through-acquisition-of-gerchen-keller-capital/ [https://perma.cc/3CQT-MV7E]. Defense-side funding is rarer in the United States and is more prevalent in the United Kingdom and European Union in the form of after-the-event or before-the-event insurance. *See* NIEUWVELD & SAHANI, *supra* note 3, *passim* (discussing use of such insurance in various jurisdictions around world, including United Kingdom and Germany).

17 Examples of litigation crowd-funders include Invest4Justice and LexShares. *See Invest4Justice*, CRUNCHBASE, https://www.crunchbase.com/organization/invest4justice (last visited Dec. 7, 2022); LEXSHARES, https://www.lexshares.com [https://perma.cc/EMR9-WB63] (last visited Dec. 7, 2022).

18 Examples of funding brokers include Fulbrook Capital Management, Mighty, and ClaimTrading Ltd. *See Fulbrook Capital Management*, CRUNCHBASE, https://www.crunchbase.com/organization/fulbrook-capital-management (last visited Dec. 7, 2022); MIGHTY, https://www.mighty.com [https://perma.cc/GX5Z-NK9J] (last visited Dec. 7, 2022); CLAIMTRADING, https://www.claimtrading.com/index/page?id=home [https://perma.cc/4J8A-MRL3] (last visited Dec. 7, 2022).

19 Fortress Investment Group LLC invests in litigation funding companies but does not directly finance litigation disputes itself. *See* FORTRESS, https://www.fortress.com [https://perma.cc/E3U5-94N5] (last visited Dec. 7, 2022). To describe entities like Fortress, the author coined the term "funder of funders," which is a play on the common financial term "fund of funds." *Cf.* Zoe Van Schyndel, *A Fund of Funds: High Society for the Little Guy*, INVESTOPEDIA (Aug. 25, 2021), http://www.investopedia.com/articles/mutualfund/08/fund-of-funds.asp [https://perma.cc/YBL3-B3NP] ("A fund of funds (FOF) is an investment product made up of various mutual funds . . . .").

20 *See* Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RSRV. J. INT'L L. 159, 162, 180-81 (2011); Elayne E. Greenberg, *Hey, Big Spender*: *Ethical Guidelines for Dispute*

industry both domestically and internationally.[21] In addition, depending on the structure of the funding arrangement, the funder may lawfully control or influence aspects of the legal representation or may completely take over the case and step into the shoes of the original party.[22] The United States alone is home to dozens of funders of consumer disputes, such as personal injury and other tort claims, and complex commercial disputes.[23] In light of its increasing prevalence, third-party funding has sparked a fascinating debate regarding its place both in the American legal system and in the context of international dispute resolution.[24]

Resolution Professionals when Parties Are Backed by Third-Party Funders, 51 ARIZ. ST. L.J. 131, 133 (2019) (describing general ethical issues in third-party mediation funding).

21 *See, e.g.*, Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, WALL ST. J. (Jan. 12, 2014, 7:48 PM), http://online.wsj.com/news/articles/SB10001424052702303819704579316621131535960 (noting several funders have hundreds of millions of dollars in assets under management); Jennifer Smith, *Investors Put Up Millions of Dollars To Fund Lawsuits*, WALL ST. J. (Apr. 7, 2013, 7:46 PM), http://online.wsj.com/news/articles/SB10001424127887323820304578408794155816934 ("Gerchen Keller Capital LLC, a Chicago-based team that includes former lawyers . . . . has raised more than $100 million and says there is plenty of room for newcomers given the size of the U.S. litigation market, which they put at more than $200 billion, measuring the money spent by plaintiffs and defendants on litigation."); Vanessa O'Connell, *Funds Spring Up To Invest in High-Stakes Litigation*, WALL ST. J. (Oct. 3, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052970204226204576598842318233996 ("The new breed of profit-seeker sees a huge, untapped market for betting on high-stakes commercial claims. After all, companies will spend about $15.5 billion this year on U.S. commercial litigation and an additional $2.6 billion on intellectual-property litigation . . . .").

22 *See* NIEUWVELD & SAHANI, *supra* note 3, at 6 (explaining that some third-party funding arrangements are structured as assignment in which third-party funder becomes claimant in case and original party is no longer involved). For an in-depth treatment of assignment and insurance policies in the third-party funding context, see generally Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453 (2011); Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297 (2002); Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11 (2014); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).

23 Regarding consumer disputes, there are over thirty members of the ALFA and several other non-ALFA third-party funding companies that fund consumer disputes. *See ALFA Member Companies*, *supra* note 12. Regarding commercial third-party funders, most of the members of the International Legal Finance Association ("ILFA") are U.S.-based funders. *See Membership Directory*, INT'L LEGAL FIN. ASS'N, https://www.ilfa.com/membership-directory [https://perma.cc/78H9-UX6K] (last visited Dec. 7, 2022). For a list of global commercial funders affiliated with ALF in the United Kingdom, see *supra* note 13.

24 *See, e.g.*, Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527, 527 (2014) [hereinafter Hylton, *Regulatory Framework*] (analyzing "economics of third-party funding relationships"); Keith N. Hylton, *The Economics of Third-Party Financed Litigation*, 8 J.L. ECON. & POL'Y 701, 704 (2012) [hereinafter Hylton, *Economics*] (identifying "likely sources of welfare gains and losses in a third-party litigation funding system"); Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 504, 508, 513-23, 526-27 (2006) (arguing "best method of [litigation finance] regulation" is shortening time for disposition of claims); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 56-57, 68, 74-75 (2004) [hereinafter Martin, *Wild West of Finance*] (defending regulated litigation financing industry with disclosure rules as protective of plaintiffs who lack resources to bring meritorious claims); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 83-95 (2008) [hereinafter Martin, *Subprime Industry*] (proposing that regulation of litigation financing industry should focus on data collection, transparency, and competition); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 72 n.36, 139 (2011) (arguing need for "careful policy-based research to draw boundaries and rules for a market in lawsuits"); Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and*

Moreover, third-party funding has many applications. First, funders can help resource-challenged individuals bring claims that they would not otherwise be able to, increasing access to justice for indigent or disadvantaged persons.[25] Second, third-party funding enables many insolvent or small companies to pursue valid claims that they could not otherwise afford to pursue and are too risky for contingency fee attorneys to accept.[26] Third, large companies that are constantly sued, like insurance companies and manufacturers of dangerous products, are looking to smooth out the litigation line item on their balance sheets.[27] Funders can offer these repeat-player[28] defendants a fixed payment system for managing their litigation costs. Fourth, the worldwide market turmoil during the global financial crisis began in 2008 and never quite seemed to reach its denouement due to the current economic side effects of the global pandemic and Russia's invasion of Ukraine in early 2022. This prolonged economic uncertainty has prompted many investors to seek investments not dependent upon the financial markets, supply chains, stock

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Benefits of Litigation Finance, 26 REV. LITIG. 707, 735 (2007) (advocating for greater access to information about litigation finance industry, more competition, and regulation of interest rates and lending practices); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1325-36 (2011) (proposing conceptual framework for litigation funding regulation); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 608-09 (2010) ("Third-party litigation lending is consistent with our values as a society."); Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 74-75 (1935) (arguing for regulation of contingency fees in a way similar to today's arguments for regulating third-party funding); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 377-439 (2009) (proposing defense-side funding in United States modeled on after-the-event insurance in Europe); 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, 349-61 (2004) (proposing statute to regulate third-party funding for individual consumers).

25 For example, the author served as an expert witness in a case in which a third-party funder financed an individual claimant in an investor-state arbitration against a government. Investor-state arbitrations are very expensive, and partly due to the expense, individuals are rarely claimants in investor-state arbitration. Similarly, Keith Hylton extensively analyzed the economic and social welfare benefits and costs of third-party funding, including the economics of waiver, subrogation, and sales and settlement agreements. *See* Hylton, *Regulatory Framework*, *supra* note 24, at 528; Hylton, *Economics*, *supra* note 24, at 702. Furthermore, David Abrams and Daniel Chen conducted an empirical study on third party funding's effect on claimants' ability to proceed in Australian courts. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1076 n.3, 1077 nn.6-7 (2013) (reporting results of their study on public third-party funding data available in Australia).

26 *See* Steinitz, *supra* note 24, at 1275-76, 1283-84; Martin, *Wild West of Finance*, *supra* note 24, at 67 n.93; Martin, *Subprime Industry*, *supra* note 24, at 85; James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349, 365-66 (1993); RALPH LINDEMAN, THIRD-PARTY INVESTORS OFFER NEW FUNDING SOURCE FOR MAJOR COMMERCIAL LAWSUITS 1-8 (2010), [https://perma.cc/JT3G-5QFW].

27 *See, e.g.*, Kevin LaCroix, *What's Happening Now? Litigation Funding, Apparently*, D&O DIARY (Apr. 9, 2013), http://www.dandodiary.com/2013/04/articles/securities-litigation/whats-happening-now-litigation-funding-apparently/ [https://perma.cc/4U37-M9F6] ("Litigation funding proponents contend that the funding arrangements helps [sic] to level the playing field by allowing litigants to pursue lawsuits against better financed opponents, or simply allowing litigants to keep litigation costs off their balance sheet."); David Lat, *Litigation Finance: The Next Hot Trend?*, ABOVE THE L. (Apr. 8, 2013, 1:59 PM), http://abovethelaw.com/2013/04/litigation-finance-the-next-hot-trend/ [https://perma.cc/A7UQ-DH56] (explaining third-party funding allows large companies to pursue claims without having lump sum litigation costs reduce earnings per share).

28 In 1974, Marc Galanter famously modeled the world of dispute resolution by dividing parties into "one-shotters" and "repeat players" and describing the advantages that repeat players have in the legal system over one-shotters. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-103 (1974). Third-party funding clearly increases the advantages of repeat-players even further.

prices, or company valuations.[29] Fifth, funders have begun taking equity stakes in law firms and clients in recent years and providing transaction structures that look more like ownership or partnership than an arms-length, passive investment.[30] Finally, each litigation or arbitration matter is independent of other disputes and detached from market conditions regarding the value of the underlying harm or liability.[31] This independence shields the third-party funder's investment and potential profit from the general uncertainty in the global financial markets.[32] The proliferation of third-party funders and funding arrangements strikes a sharp contrast to the comparatively minimal and noncomprehensive regulation of the industry at present.[33] The existing regulations governing the third-party funding industry worldwide are complex, disjointed, and divergent.[34] Creating a model code of conduct for funders would, at the very least, help inform consumers of the appropriate behavior for a reputable third-party funder. It would also educate noncompliant funders regarding how to bring their business practices into compliance, retain well-informed clients, and avoid sanctions.

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29 *See* Steinitz, *supra* note 24, at 1283-84 (discussing effects of global recession on rising demand for litigation funding).

30 *Cf.* Maya Steinitz & Victoria Sahani, *You No Longer Have To Be a Lawyer To Practice Law in Arizona. That's Good and Bad*, AZCENTRAL. (Feb. 6, 2021, 1:44 PM), https://www.azcentral.com/story/opinion/op-ed/2021/02/06/arizona-no-longer-restricts-law-lawyers-here-pro-con/4339871001/ (discussing jurisdictions that allow investors to own, invest in, and control law firms by creating alternative business structures ("ABS") that are allowed to practice law in those jurisdictions); Maya Steinitz & Victoria Sahani, *New Ariz. Law Practice Rules May Jump-Start National Reform*, LAW360 (Jan. 28, 2021, 4:19 PM) [hereinafter Steinitz & Sahani, *New Ariz. Law Practice Rules*], https://www.law360.com/articles/1349687/new-ariz-law-practice-rules-may-jump-start-national-reform (discussing jurisdictions that allow nonlawyers to own, invest in, and control law firms by creating "alternative business structures" that are allowed to practice law in those jurisdictions); Victoria Shannon Sahani & Maya Steinitz, *Navigating the Sea Change in Law Firm Finance and Ownership in the U.S.*, WOLTERS KLUWER: KLUWER ARB. BLOG (Nov. 18, 2021) [hereinafter Sahani & Steinitz, *Navigating*], http://arbitrationblog.kluwerarbitration.com/2021/11/18/navigating-the-sea-change-in-law-firm-finance-and-ownership-in-the-u-s/ [https://perma.cc/U4YY-6ABS] (addressing discussions among regulators regarding onlawyer ownership of law firms in Arizona, California, Utah, Illinois, Florida, and New York).

31 *See* NIEUWVELD & SAHANI, *supra* note 3, at 10-12.

32 *Id.*

33 This Article does not address the often debated question of whether third-party funding should exist at all. Instead, the author takes the view that, because the industry is growing rather than shrinking, the focus should be on creating sensible regulations for the industry rather than trying to dismantle it. *See id.* at 157-74 (presenting fifty-two-jurisdiction survey of existing state laws as of early 2017); Richard A. Blunk, *Have the States Properly Addressed the Evils of Consumer Litigation Finance?*, MODEL LITIG. FIN. CONT. (Jan. 20, 2014), http://litigationfinancecontract.com/have-the-states-properly-addressed-the-evils-of-consumer-litigation-finance/ [https://perma.cc/P6XP-WYBY] (describing third-party funding statutes in Maine, Ohio, Nebraska, and Oklahoma).

34 *See* NIEUWVELD & SAHANI, *supra* note 3, *passim* (discussing law of third-party funding in countries spanning six continents).

II. Third-Party Funding and Access to Justice[35]

INTRODUCTION

[T]hird-party funding indisputably puts a gold-weighted thumb on the scale in favor of funded parties, particularly since funded cases already tend to be calculable winners on the merits, and since third-party funders seeking a profit generally do not fund cases that are demonstrably likely to lose on the merits.[36]

Thus, we are left with the promising potential for winners to be more likely to win with third-party funding, and the alarming realization that not all parties are offered this same chance to win for several reasons. First, traditional for-profit third-party funders only fund cases from which they can make a profit.[37] Thus, many merit-based winners whose claims are too expensive to pursue relative to their claim value are turned down. Second, it is likely that longshot winners—cases too risky even for a third-party funder—are less likely to be funded as well. These cases include those that rightfully argue for a change in the law or rely on creative theories that require mental and verbal jujitsu to convince the decision-maker of their merit (i.e., the stuff of Hollywood films about courageous lawyers and citizens fighting against insurmountable odds). Third, defendant winners may be less likely to be funded unless those defendants already have hefty funds at their disposal through which to either pay the funder a periodic premium or pay the funder from their own pockets (rather than from the proceeds of an award) upon winning the case. Fourth, non-financial winners—parties seeking non-financial remedies—are not likely to be funded unless they are willing to pay the funder from their own pockets, since there will be no monetary judgment upon winning the case. Fifth, political winners are not likely to be funded, as many funders choose not to engage in funding of controversial positions, parties, or of cases involving governments—which may be viewed as courageous or cowardly, depending on the type of party or issue at stake in the case.

The foregoing examples collectively engender a larger, fundamental question: If funders are picking primarily winners—and more specifically winners that suit their profit-making business model—then what does real access to justice look like in an era of third-party funding? Would real access to justice need to involve third-party funders funding indigent or innocent defendants,

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[35] I excerpted this section from my own article, Victoria Shannon Sahani, *Rethinking the Impact Of Third-Party Funding On Access To Civil Justice*, 69 DEPAUL L. REV. (2020), available at: https://via.library.depaul.edu/law-review/vol69/iss2/13. Footnote numbering and cross-references have been modified for ease of reading in this excerpted format.

[36] *Cf.* NIEUWVELD & SAHANI, *supra* note 3, at 25 ("[I]t helps to look at a third-party funder's motivations. At any point in time, the third-party funder will be determining on which one of three paths the litigation sits: (1) is the third-party funder still likely to make a significant profit; (2) if not, does the third-party funder have a decent chance of emerging with some or all of its original investment intact (and possibly a modest profit) if it continues to fund; or (3) is it likely that any new money invested will be wasted, alongside the old money? Only in the latter case (path 3) is it likely that the third-party funder will want to terminate.").

[37] *Cf.* NIEUWVELD & SAHANI, *supra* note 3, at 33–34 (describing traditional commercial third-party funding investments as seeking "three times" or "3X" return on investment, at a minimum).

or expensive long-shot claimants, or righteous injunctions with no monetary recovery, or unprofitable cases that espouse some worthy yet controversial position?

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DEFINING "ACCESS TO JUSTICE"

What is access to justice in civil litigation?[38] Access to justice could be defined in many ways depending on the context. For this Essay, simple working definitions are appropriate. This Essay defines "justice" as the assumption that the system of civil dispute resolution, viewed as a whole, reliably and regularly decides cases in a fair and enforceable manner that upholds due process of the law for all parties involved (leaving aside the idiosyncratic errors or biases of individual judges or arbitrators). Of course, this is a naively rosy assumption that could easily be challenged by those critical of the civil litigation system. Nevertheless, for the purposes of this thought experiment, such an assumption is necessary—like a mathematical constant, if you will—to examine access from a purely financial perspective.

Moreover, it is important to note that the definition of "justice" used in this Essay does not address the merits of a particular claim or defense. In other words, this Essay assumes that losers have just as much right as winners to bring their claims or marshal their defenses and, therefore, losers deserve as much *procedural* justice as winners do—even though losers' substantive arguments on the merits may be less convincing to a judge or arbitrator. Again, such an assumption could be challenged, but this Essay adopts this assumption as necessary to the conclusions of this thought experiment, discussed further below.

This Essay also assumes that "access" relates to the *financial* ability to proceed forward in court proceedings. Thus, "access" in this context does not address non-financial barriers to adequate representation, such as jurisdictional requirements, unfavorable precedents, inadequate remedies, non-participating parties, the certifiability of a class, or any similar non-financial barrier. In sum, for the sake of the argument presented herein, this Essay limits the phrase "access to justice" to

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[38] This Essay does not address third-party funding as a way to increase access to justice for criminal defendants, because third-party funding is illegal in criminal cases in over 60 jurisdictions worldwide in which this Author has conducted research. *See* NIEUWVELD & SAHANI, *supra* note 3 (presenting research on third-party funding laws in over 60 jurisdictions). Nevertheless, it is undisputed that severe access to justice problems exist for criminal defendants as well. *See e.g.*, Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016); Michele Goodwin, *Race As Proxy: An Introduction*, 53 DEPAUL L. REV. 931 (2004); Erik Bergmanis, *Justice Underfunded Is Justice Denied*, 72 J. MO. B. 4 (2016); Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005). As a farfetched hypothetical, if third-party funding of criminal defense were allowed—and, to be clear, it is expressly *illegal* in all jurisdictions globally— criminal defendants might be able to subsidize the cost of their criminal defense using their related civil damages claims, with the financier funding both the criminal and civil proceedings. This would likely be prohibitively expensive and unprofitable, however, and therefore would not be an attractive target for investment by for-profit dispute financiers.

simply mean having or acquiring the *financial* resources needed to bring your claim or muster your defense in court.

* * *

Cost as a Component of "Access to Justice"

There is also a cost component to access to justice, namely, whether the financier's willingness to pay the costs of litigation is predicated on some relationship between the amount of the costs of litigation and the value of the claim. Some types of financiers—such as self-financiers, parent corporations, and liability insurers—will pay the costs of litigation regardless of the amount of the claim or the type of defense because of their pre-existing relationship. Other types of financiers—such as third-party funders or after-the-event insurers—might only agree to pay the costs of litigation if the costs are some order of magnitude less than the amount of the claim, or if the party provides the financier with some other alternative form of remuneration. Attorneys on contingent or conditional fees likely fall somewhere in the middle of those two extremes. An attorney on a contingency fee may turn down a case that might be too expensive to pursue relative to the amount the attorney could expect to be paid if the party wins the case, especially since most jurisdictions have a legislative cap on attorney contingent or conditional fees.[39] In light of this, the cost of litigation is a crucial component to consider in determining whether a party has adequate access to justice.

To further complicate the matter of costs, it is nearly impossible to calculate in advance precisely how much a case will cost. The only exception may be that certain types of financiers, such as third-party funders or law firms working on a contingent or conditional fee, may include provisions in their contracts capping the amount that they will spend on litigation costs. In addition, there are different fee provisions under the various arbitration rules—whether calculated on an hourly or daily rate or based on the amount in dispute—and for ad hoc arbitration[40] the basis for the fees is even more variable. Moreover, there are certain types of claims or remedies that may require more extensive resources, such as class litigation, or that may require the services of an emergency judge or arbitrator (besides the one deciding the merits of the case), such as an injunction. The costs of such types of proceedings may be highly variable and not at all connected to the economic value of the result. Furthermore, some types of remedies may have no damage award attached to them, such as injunctive or declarative relief, in which case the costs will always mathematically outweigh the dollars recoverable from the claim, even

[39] *See generally* NIEUWVELD & SAHANI, *supra* note 3 (citing contingent or conditional fee caps in the Canada, China, New Zealand, South Africa, the United Kingdom and United States). There are also likely many other countries that cap contingent or conditional fees, but which were not included in the aforementioned book due to the lack of information available from those countries regarding the availability of third-party funding.

[40] *Ad hoc* arbitration is arbitration administered solely by the arbitrator or arbitrators and is not overseen by the auspices of an arbitration institution or other administrative body. *See e.g.*, *UNCITRAL Arbitration Rules (as revised in 2010)*, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules-revised-2010-e.pdf (link updated Jun. 11, 2024) (exemplifying arbitral rules commonly used for *ad hoc* international arbitration).

if the claim is otherwise worthy and winnable. Finally, there is the question of timing and settlement. If all other parameters are equal, a case that settles early usually results in cheaper costs than a case that goes all the way to an award, which in turn results in cheaper costs than a case that leads to enforcement or appeal proceedings after the judgment or award.

In sum, a case may be wildly expensive or may settle cheaply. Usually, one cannot predict in advance exactly which of these scenarios will happen in a particular case. Considering the high variability in cost structures and amounts, the thought experiment in this Essay makes a simple assumption about costs. It assumes that the costs for a hypothetical party to a case are reasonable and proportional for the type of case and type of claim or defense at issue, even though many cases may be extraordinarily expensive or surprisingly inexpensive. This assumption regarding costs is necessary for there to be any generalizable conclusions to be drawn from this thought experiment regarding access to justice.

* * *

THE THOUGHT EXPERIMENT AND OUTCOMES

Most avenues for dispute financing that are available after the event are tied to the likelihood of winning. Attorneys and law firms will generally only enter into a contingent or conditional fee agreement if they believe the case is a likely winner. Similarly, after-the-event insurers and third-party funders will generally only enter into an arrangement in which they expect to make money, which is usually tied to the party winning the case. There are some structures for third-party funding or after-the-event insurance (often, but not exclusively, on the defense side) in which the financier receives some remuneration even if the party loses the case.[41] In most situations, however, financiers that enter into an agreement with a party after the dispute has arisen want to fund likely winners on the merits rather than likely losers, if such a characteristic can be gleaned at the outset. Thus, in contrast to the situation described in the prior paragraph in which the party is virtually guaranteed access to justice, a party with no preexisting financial relationship to the financier, and who is also likely to *lose* its claim or defense, has almost no access to justice. The word "almost" is used because there may be rare instances of financiers willing to back a case with a small chance of winning (a "long shot") but doing so on a regular basis would likely not be lucrative for such financiers. Thus, parties likely to lose are likely to remain largely unfunded unless a preexisting financier is available. Therefore, such parties are likely to lack access to justice, according to the framework presented in this thought experiment.

This lack of access to justice for these "likely losers" can be viewed in two different ways. On the one hand, one could argue that claimants who have a high likelihood of losing should not be able to bring their claims, perhaps (for example) because those claims might be frivolous. Similarly, one could argue that defendants who have a high likelihood of losing should not need

[41] These structures normally involve either the defendant making periodic fixed payments to the funder while the funder pays for the fluctuating legal costs, or the defendant making a "success payment" to the funder if the defendant wins the case and avoids liability, or both. *See e.g.*, Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 Tul. L. Rev. 405 (2017).

the wherewithal to muster a zealous defense, perhaps because they truly did injure the claimant and the magnitude of that injury is equal to the relief that the claimant alleges. On the other hand, one could argue that both claimants and defendants may have a high likelihood of losing, not because the claim or defense is invalid or frivolous, but rather due to a defect in the law applied to the case, or the party's lack of access to evidence to submit to the tribunal (for example, if the opposing party is in possession of the majority of the key evidence), or the party's (perhaps less expensive) legal counsel being inexperienced in litigation or arbitration. In addition, even losers deserve the opportunity to zealously advocate for reducing the magnitude of their losses by arguing in favor of a set-off claim, a partial award, a lower cost award to the winner, or a lower interest rate on the damages (if applicable).

Nevertheless, the lived experience of "winning" and "losing" feels more like a spectrum than a bucket, because all parties involved lose time in resolving the matter and most lose some money on costs. Thus, this study focuses purely on winners or losers on the *merits only*, rather than degrees of winning or losing measured by cost allocation or award setoffs. The result is that likely losers on the merits that need dispute financing typically do not obtain such financing and, therefore, lack access to justice. This is our first access to justice problem that this thought experiment has uncovered: "How can we provide access to justice for 'unfunded losers'"?

If we remove the foregoing parties with preexisting access to funding and remove the unfunded losers, we are left with what this Essay terms "unfunded winners," namely claims or defenses that are likely to win on the merits if the party is able to obtain dispute financing. In civil litigation, the parties are all fungible, meaning that any party can be on any side and bring any claim or counterclaim. In civil litigation, corporations, individuals, and states can all serve as claimants or defendants. In addition, defendants in civil litigation can bring counterclaims or set-off claims, which gives them the ability to simultaneously serve as claimants while also serving as defendants. Therefore, the type of party is irrelevant in determining whether access to justice is available to unfunded winners in civil litigation. This is also true in domestic arbitration and international commercial arbitration, although it is not true in international investment treaty arbitration, for reasons beyond the scope of this brief intervention.[42]

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[42] Under traditional international investment treaty arbitration, corporations or individuals are always claimants, and states are always defendants in investment arbitration. For arguments in favor of granting states jurisdiction to bring claims in investment litigation, see, for example, Victoria Shannon, *The Structural Challenge of Investment Litigation Viewed through the Lens of Third-Party Funding*, OXFORD UNIV. PRESS: INV. CLAIMS (Jun. 9, 2015), http://oxia.ouplaw.com/page/491/the-structural-challenge-of-investment-litigation-viewed-through-the-lens-of-thirdparty-funding; Gustavo Laborde, *The Case for Host State Claims in Investment Litigation*, 1 J. INT'L DISP. SETTLEMENT 97 (2010), https://doi.org/10.1093/jnlids/idp008. This is because traditional investment treaties do not provide for rights of the defendant state. For a basic explanation of jurisdiction in investment treaty litigation, see, for example, Christoph H. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RESOL. 1 (2014), *republished in*, TDM J. 6 (2015), https://www.transnational-dispute-management.com/article.asp?key=2293. However, some investment treaties negotiated in modern times do contain rights of defendant states and corresponding obligations of the individual or corporate investor. *See, e.g.*, Tarcisio Gazzini, *The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties*, INV. TREATY NEWS (Sep. 26, 2017), https://www.iisd.org/system/files/publications/iisd-itn-september-2017-english.pdf (link updated Jun. 11. 2024) (describing the innovations in this treaty, including putting obligations on investors to comply with the laws of the host state and providing a state the opportunity to sue an investor in the courts of its home

Instead, one must examine the type of claim in order to assess access to justice for "unfunded winners" in civil litigation. Damages claims are understandably attractive to dispute financiers, because there will be a pot of money to share if the party wins. Non-financial claims and "no liability claims" (defenses) are less attractive, or may be completely unattractive, because such claims do not automatically create a pot of money to share, even though such claims may be worthy on the merits. Dispute financiers that arrive on the scene after the dispute has arisen are typically looking for a cash profit. This is where the access to justice problem arises in civil litigation. The one exception is what one may call "not-for-profit" funders, which are funders that take an interest in the specific merits outcome of the case for non-financial reasons and do not expect to make a profit.[43] However, "not-for-profit" funders are not general market players

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country for violations of the treaty obligations). While this treaty does not allow for a state to bring an investment litigation claim against an investor, the treaty does provide a judicial route through which the state may be compensated for any wrongs the investor commits under the treaty. In addition, the treaty is silent regarding whether states may bring counterclaims against investors in investment treaty litigation, which may open the door to jurisdiction over such claims. The effects of these provisions will be tested if a case is eventually commenced under the treaty. Furthermore, jurisdictional constraints restrict the types of claims that can be brought. The treaty must specifically name the substantive rights that claimants may vindicate in investment litigation. In vindicating those rights, the claimant may request damages or non-financial relief, such as restitution in kind or specific performance, but only if such remedies are allowed by the treaty. *See, e.g.*, Michael E. Schneider, *Non-Monetary Relief in Litigation: Principles and Litigation Practice*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION: ASA SPECIAL SERIES NO. 30 (Juris 2011); Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, *in* PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION: ASA SPECIAL SERIES NO. 30 (Juris 2011); Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Litigation*, 20 ARB. INT'L 325, 325–32 (2004). Under more modern investment treaties, defendant states may have the jurisdictional ability to bring substantive counterclaims and the corresponding rights within the treaty that may be vindicated in investment litigation. For some examples of how tribunals have responded in cases in which host states have tried to bring counterclaims under traditional investment treaties, see Jean Kalicki, *Can States Assert Counterclaims Against Investors in BIT Proceedings?*, KLUWER ARB. BLOG (Jan. 16, 2012), http://arbitrationblog.kluwerarbitration.com/2012/01/16/can-states-assert-counterclaims-against-investors-in-bit-proceedings/. Nevertheless, the right to bring a counterclaim is necessarily predicated on the claimant bringing the original claim first. Thus, it is exceedingly rare to see a host state bring an initial claim (rather than a counterclaim) against an investor under a treaty. As mentioned in the main text above, such a scenario would most certainly be possible in a contractually agreed domestic arbitration or international commercial arbitration.

[43] *Cf. generally* Victoria Shannon Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in Investment Arbitration*, *in* CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 49 (Christina Beharry ed., 2018) ("In addition, not-for-profit funding may be a viable option for respondents in international arbitration—particularly respondent States in investment arbitration—since a financial return on investment would not normally be required."); Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, *supra* note 15; *Third-Party Funders as Stakeholders in International Arbitration*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Stefan Kröll, Andrea Bjorklund, Franco Ferrari & eds., 2023). For example, in *Philip Morris v. Uruguay*, Uruguay's defense was funded by a not-for-profit funder called the Campaign for Tobacco-Free Kids, and the Anti-Tobacco Litigation Fund (a Bloomberg Foundation and Gates Foundation collaboration) is funding defendant states facing similar challenges. *See* Bloomberg Philanthropies, *Bloomberg Philanthropies & The Bill & Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund*, PRESS & MEDIA (Mar. 18, 2015), www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/ (last visited Nov. 4, 2019). These are both not-for-profit funders, however, which invites the question, should only not-for-profit funders fund defendant governments? This Essay argues for answering this question in the negative, but cogent arguments could be made on the other side. For example, in the political campaign finance arena, arguments have been raised about the impropriety of corporate influence over elections and governmental functions through lobbying and financial contributions; one could argue that for-profit third-party funders funding governments, generally, could yield similar negative effects.

in this space; they typically fund cases on a one-off, case-by-case basis and cannot be counted on to fund large categories of cases. Thus, "not-for-profit" funders cannot provide a solution that is generalizable to litigation as a whole and, therefore, cannot solve the problem of access to justice in civil litigation. This brings us to our second access to justice problem that this thought experiment has uncovered: *How can we provide access to justice for "unfunded winners" with non-damages claims or defenses?*

SUGGESTIONS FOR INCREASING ACCESS TO JUSTICE

The thought experiment above has raised the following question: *How can we provide access to justice for two types of parties in civil dispute resolution: unfunded losers and unfunded winners with non-damages claims or defenses?* This Essay concludes with a few ideas regarding how to address this question and thereby improve access to justice in civil dispute resolution.

The first step is for our society to decide whether the concept of procedural due process requires that unfunded losers and unfunded winners have adequate access to dispute financing. This is more of a philosophical question and, thus, is largely beyond the scope of this brief Essay. The short answer, from this Author's point of view, is that the right to adequate resources for loss mitigation—i.e., a party's right to argue for a judge or arbitrator to reduce the amount of the party's loss—is a right that society should recognize as part of the concept of procedural due process. Arguing in favor of loss mitigation may take the form of pursuing a claim that is likely to lose, requesting an injunction or other non-monetary relief, arguing for paying less costs despite losing on the merits, or presenting a viable defense including mitigating factors. Note that likely losers as mentioned in this paragraph may include plaintiffs as well as defendants—a long shot could be on either side of a case. Yet, long shots can change the world, as we have seen in cases in which the right of minority groups facing longshot odds and unfavorable laws have led to judicial victories that have changed the course of history. In addition, even in the criminal context, the loser has the opportunity to mitigate his or her loss of liberty by taking a plea agreement to reduce the length of his or her prison sentence. Shouldn't losers in the civil context have similar access to loss mitigation resources? Losers have the right to "lose well," that is, to present the strongest case they can for their side, even if those arguments do not end up swaying the decisionmaker regarding the final decision on the merits. This Author believes that the concept of loss mitigation is as fundamental to assessing access to justice as the idea of meritorious claims. Thus, for the sake of argument, this Essay will assume that society would agree that the concept of procedural due process requires that unfunded parties in the three categories outlined in this Essay have adequate access to dispute financing in order to proceed to the next step in this analysis, although this Author recognizes that compelling arguments could certainly be made on the opposing side.[44] Assuming that unfunded losers and unfunded winners

[44] For example, in *Essar Oilfields Serv. v. Norscot Rig Mgmt.*, the High Court upheld an ICC tribunal's ruling requiring the defendant to pay the claimant's cost of third-party funding in addition to paying the underlying damage award, because the court found that the defendant so damaged the claimant's financial position as to require the

have a right to adequate financing for their claims or defenses, the next step in this analysis is figuring out how to pay for this. This Essay presents four categories of possible solutions.

The first potential solution is for the unfunded party to bring more than one claim in the litigation or arbitration. A party in civil litigation has the ability to subsidize the cost of bringing a non-financial claim or a lower damage claim via a higher damage claim, meaning that the marginal cost of bringing two (or three) claims instead of one is significantly reduced. In fact, most plaintiffs bring at least one damages claim even if they intend to raise non-financial claims as well. Thus, the potential recovery on the damages claim could be enough to cover the costs of the additional non-financial claims or low damages claims such that a dispute financier might agree to finance the representation. A drawback of this solution is that it would be limited to unfunded parties that have more than one viable claim, one of which is a damage claim that would be attractive enough to a dispute financier. This would therefore not include unfunded parties who may only have a nonfinancial claim that the court would entertain, even if the nonfinancial claim is strong on the merits.

The second category of potential solutions involves donations of time or money. For example, perhaps third-party funders and after-the-event insurers should engage in pro bono funding for a subset of worthy claims or defenses that may be long shot winners, which are seemingly worthy but likely to lose, or non-damages claims. One could include in this category worthy claims against judgment-proof defendants, meaning that the plaintiff would likely win the case but may be unlikely to be able to collect the award from the defendant. The reason for this is that an unpaid judgment or award could perhaps have symbolic, political, or public value that would make the endeavor worthwhile for non-monetary reasons. Plus, it could result in positive reputational effects for the funder or insurer that supports the plaintiff *pro bono* in the case. A drawback of this solution is that it would require a paradigm shift in the for-profit dispute financing industry to embrace its role in promoting widespread access to justice beyond its primary profit-making motive. Whether such a transition is possible remains to be seen.

Another way to frame this solution is by analogizing dispute financing pro bono efforts to attorney pro bono obligations. The attorney bar in many countries asks attorneys to donate a small percentage of their annual hours (e.g., fifty hours per year on average in the United States)[45] to pro bono efforts or for attorneys to donate money to the pro bono efforts of other attorneys in lieu of performing the work directly. Similarly, law firms regularly take on some litigation cases pro bono, without any expectation of reimbursement. By analogy, third-party funders or after-the-event insurers should donate some small percentage of their portfolio funds

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claimant to seek third-party funding in the first place. [2016] EWHC 2361 (Comm). For a description of the *Essar* case, see, for example, Maximilian Szymanski, *Recovery of Third Party Funding Ordered by ICC Tribunal and Confirmed by the English High Court – An Under-Theorised Area of the Law*, KLUWER ARB. BLOG (Oct. 8, 2016), http://arbitrationblog.kluwerarbitration.com/2016/10/08/recovery-of-third-party-funding-ordered-by-icc-tribunal-and-confirmed-by-the-english-high-court-an-under-theorised-area-of-the-law/.

[45] *See* A.B.A., MODEL RULES OF PROF'L CONDUCT r. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year . . . . In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.").

toward pro bono efforts without an expectation of a return on investment. In addition, a defense fund for needy defendants could be established, perhaps even from the funds donated pro bono by third-party funders, law firms, and after-the-event insurers.[46] Finally, crowdfunding by multiple individual donors—which already exists—may provide a potential solution in this context.[47]

The third category of potential solutions involves changes in the law or litigation rules. For example, courts and arbitral institutions could adjust their fee scales to give indigent parties a discount on the fees. Alternatively, courts and arbitral institutions could adopt a rule that a party against whom an injunction or declaratory relief is granted must pay the litigation costs of the winning party. This latter solution would allow law firms to take on injunction or declaratory relief cases on a contingent or conditional basis on the theory that their fees will be repaid if the party is granted the requested relief. This solution has the drawback, however, that it would only help parties likely to have their injunctions or declaratory relief granted, i.e., unfunded winners; this solution would not assist unfunded losers.

Finally, a fourth category of solutions involves financiers modifying their criteria when deciding which cases to fund. For example, a third-party funder might modify its algorithms and decision-making processes to include other factors to weigh in determining whether to fund a case in order to increase access to justice in litigation. One of those factors could be ensuring that defendants have access to third-party funding. Notably, defendants can fall into all categories of unfunded parties mentioned in the introduction to this Essay. If third-party funders financed defendants more regularly, then perhaps the participation of third-party funders in litigation would be viewed as more balanced, perhaps even viewed positively. This Author would even go so far as to assert that, if third-party funders in litigation choose to fund only one category from the three categories of parties mentioned above in order to increase access to justice, then civil defendants are a prime category with which to begin.

CONCLUSION

The thought experiment presented in this Essay intends to provoke discussion and deep thought about the legitimacy crisis in our system of dispute resolution as viewed through the lens of financial access to justice and in light of new options for parties to access capital for their cases. The assumptions made herein may seem rudimentary, and the solutions presented may seem

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[46] For a proposal for funding developing states in WTO dispute settlement, see, for example, Mauritius Nagelmueller, *Guest Post: Dispute Finance For Sovereigns In WTO Disputes - Access To Justice For Developing Countries*, INT'L ECON. L. & POL'Y BLOG (Sep. 12, 2017), https://ielp.worldtradelaw.net/2017/09/dispute-finance-for-sovereigns-in-wto-disputes-access-to-justice-for-developing-countries.html (link updated Jun. 11, 2024) (proposing that for-profit dispute financiers should provide financing to developing states in WTO dispute settlement proceedings).

[47] *See, e.g.*, Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F.L. REV. 307 (2015); Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357 (2018).

idealistic, but this is merely a starting point for a global discussion wherein targeted solutions could be developed that may be more viable to implement than the solutions proposed herein.

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III. Non-U.S. Entities Involved in Third-Party Funding in U.S. Courts

Non-US persons and entities can be involved in any type of third-party litigation funding matter as parties, parent corporations, subsidiaries, legal counsel, experts, witnesses, third-party funders, or investors in third-party funders. Specific to the topic of this hearing, here are seven of the most common ways in which non-US entities may be involved in third-party funding of patent litigation.

First, there are many non-US holders of US patents. According to U.S. Patent and Trademark Office data over multiple years, in recent years, more than 50% of US patents have been issued to individuals and entities based outside the US.[48] One nuance of patent litigation is that non-US persons can be legitimate holders of US patents or can own, solely or jointly, an entity that holds a US patent, such as a special purpose vehicle used to facilitate third-party funding through an equity deal structure. In addition, one common deal structure for third-party funding of cases involves the funder and party creating a joint venture corporation or special purpose vehicle (SPV) corporation to hold the claim (and sometimes the patent itself) and be named as a party in the case. Another common deal structure involves the funder taking an equity stake in the funded party's corporate entity itself; in this circumstance, the funder's rate of return is determined by the increase in the value of the equity stake after the funded party receives a favorable outcome in the case. In both circumstances, the funder obtains an ownership interest in the funded party or in the entity that holds the claim or the patent. Through this direct ownership of a party in the case, the funder gains the ability to exercise more control than would be possible in an arms-length, classic third-party funding arrangement. In addition, a non-US entity could be the funder, the funded party, or the SPV corporation. In any of those instances, the non-US entity would legally have some or all the control over the litigation as an owner of the party in the case.

Second, relatedly, there are non-US named parties in litigation about US patents that are held by US patent holders. For example, a US-based patent holder may have an infringement case against a non-US entity that it alleges is infringing upon its US patent. Similarly, many patent infringement cases are multidistrict within the United States and may also involve cross-border

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[48] See e.g., Kirk M. Hartung, *2022 U.S. Patent Filings Statistics*, (Jan. 18, 2023) https://www.filewrapper.com/2022-u-s-patent-filings-statistics/ ("Approximately 56% of issued U.S. patents are granted to foreign companies. Leading the way is Samsung, which received 6248 U.S. patents in 2022. IBM was second in issued U.S. patents, at 4398 (down almost 50% from 2021 patents). Other top 10 U.S. patentees include: Taiwan Semiconductor, Huawei Technologies, Canon, LG Electronics, Qualcomm, Intel, Apple and Toyota. Globally, the top 10 patent companies for 2022 are: Panasonic Holdings Corp; Samsung Electronics Co. Ltd., Hitachi Ltd.; Chinese Academy of Sciences CAS, Canon Inc., Toshiba Corp., Midea Group Co. Ltd., Toyota Motor Corp., Mitsubishi Electric Corp, and China State Construction Engineering Corp.") (parentheses in original).

allegations of patent infringement. Cross-border patent infringement cases invariably involve at least one non-US-based party or allege that at least one non-US-based patent infringer exists.

Third, non-US non-parties can also be affected directly or indirectly by US patent litigation. These include partners in the supply chain involved in bringing a patented invention to market who are affected by patent infringement cases and may potentially file amicus submissions or otherwise become involved in a tangential way in the case but not as a party.

Fourth, a non-US parent corporation may own the US or non-US subsidiary that owns the patent at issue in the patent litigation. Parent corporations may use the subsidiary structure to shield the parent corporation from liability regarding issues involving the patent, to keep separate the parent corporation's disparate lines of business, or to comply with certain applicable laws that may require a non-local parent corporation to create a local subsidiary to do business in a particular jurisdiction or to bring certain legal claims.[49]

Fifth, there are non-us law firms, expert witnesses, and other litigation support personnel that can be involved in patent litigation on behalf of a party or in conjunction with its law firm. Since bringing a patented invention to market often involves engaging with parties across borders and suppliers in the supply chain across borders, it is important that all stakeholders in the supply chain are at least informed of the patent litigation, if not directly involved.

Sixth, many non-US third-party funders fund commercial cases in U.S. courts, including intellectual property and patent disputes. In fact, the funding industry is relatively new to the United States compared to older, nationally regulated third-party funding markets in Australia and the United Kingdom, for example. Funders in Australia and the United Kingdom regularly fund large commercial cases in the United States, including patent and intellectual property cases.

Seventh, there are often non-US investors and board members of both US and non-US third-party funding entities.

Again, non-US person or entity involvement in third-party-funded patent cases is structured similarly to fund cases that are based on other causes of action, with the exception of the special circumstances surrounding the nationality of patent holders. That said, patent ownership supports a valid cause of action for the patent holder, which is true regardless of whether the patent holder

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[49] For example, some local jurisdictions require foreign corporations to create a local entity to do business in the country. The local entity's nationality may intersect with the nationality requirements of the investor-state dispute settlement system under investment treaties and free-trade agreements. A complete exploration of the impact of third-party funding in the investor-state dispute settlement system is beyond the scope of this brief testimony. Still, it is worth noting that third-party funding is very prevalent in investor-state dispute settlement, that extensive jurisprudence about third-party funding through a long line of investor-state arbitration awards that are publicly available, and that provisions addressing third-party funding are under discussion through UNCITRAL Working Group III on reforming investor-state dispute settlement. *See* United Nations Commission on International Trade Law (UNCITRAL), *Working Group III: Investor-State Dispute Settlement Reform*, available at https://uncitral.un.org/en/working_groups/3/investor-state (website describing the ongoing processes of Working Group III); UNCITRAL Working Group III, *Third-party funding*, available at https://uncitral.un.org/en/thirdpartyfunding (website presenting notes by the UNCITRAL secretariat, initial drafts, and reports on the discussions of third-party funding during the UNICTRAL Working Group III meetings).

is a US-based or non-US entity. The involvement of a non-US third-party funder may make patent ownership more complex, such as if the patent is transferred to a special purpose vehicle partially owned by the non-US funder, but this does not inherently mean that the funder's participation is nefarious. One would need more facts beyond just the fact of funding and the non-US nationality of an involved person or entity to properly assess the issues and risks of the involvement of the non-US person or entity.

Finally, some have raised national security concerns about non-US persons and non-US entities involved in third-party funding of US patent litigation. National security concerns are beyond the scope of my expertise. I understand that, in essence, concerns about national security stem from the fear that adversaries may use third-party litigation funding for nefarious purposes and not from the existence of third-party litigation funding itself. This is similar to other industries, such as banking, securities, energy, healthcare, and insurance, where the industry itself is productive, but adversaries may take advantage of it. Adversaries likely exploited vulnerabilities in our economic and justice systems long before third-party litigation funding arose in the US in the early 2000s. We should be cautious not to shut down this new industry or reduce opportunities for this industry to improve the administration of justice out of fear. Third-party litigation funding is a global industry with legitimate ordinary business relationships between third-party funders, funded clients, investors, patent holders, and case filings that routinely cross multiple national boundaries without cause for concern. Thus, we should carefully separate our concerns about people and entities with ill intentions from concerns about the system of third-party funding itself. Regulation of third-party funding in the national security context should be tailored to achieve clear goals and should not be overly broad in ways that may inadvertently curtail the entire third-party litigation funding industry.

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Biography

Victoria Shannon Sahani is the Associate Provost for Community and Inclusion at Boston University and a Professor of Law at Boston University School of Law. She previously served as an Associate Dean and Professor of Law at Arizona State University's Sandra Day O'Connor College of Law. She started her teaching career and was promoted to Associate Professor of Law at Washington & Lee University School of Law in Lexington, Virginia.

Professor Sahani is an award-winning teacher and serves as an independent arbitrator, consultant, and expert witness on domestic and international arbitration law and third-party litigation funding law. Professor Sahani is an internationally recognized legal scholar in arbitration law and third-party litigation funding law and an award-winning teacher. She has 15 years of experience in international arbitration and more than 12 years of expertise in third-party funding. She also serves as an independent arbitrator, consultant, and expert witness. She is a co-author of the book *Third-Party Funding in International Arbitration* (Wolters Kluwer, 2d ed. 2017) (with Lisa Bench Nieuwveld) – the first book in the world on this topic. She has also written chapters in books published by Cambridge University Press, Brill Nijhoff, LexisNexis / Matthew Bender, Springer, JURIS, Edward Elgar Publishing, and Wolters Kluwer; and law review articles and essays published in the *UCLA Law Review*, *Boston University Law Review*, *Tulane Law Review*, *Cardozo Law Review*, *DePaul Law Review*, *Fordham International Law Journal*, the *American Journal of International Law (AJIL) Unbound*, and other domestic and international journals.

Professor Sahani serves as Chair of the Academic Council for the Institute for Transnational Arbitration (ITA), Chair-Elect of the Association of American Law Schools (AALS) Section on International Law, a Counsellor of the American Society of International Law (ASIL), an Elected Member of the American Law Institute (ALI), and an American Bar Foundation (ABF) Fellow.

Before teaching law, Professor Sahani served as Deputy Director of Arbitration and Alternative Dispute Resolution (ADR) in North America for the International Chamber of Commerce's (ICC) International Court of Arbitration and Deputy Director of the Arbitration and ADR Committee of the US Council for International Business (USCIB). Before joining the ICC and USCIB, she practiced law at Pillsbury and worked on transactions relating to affordable housing and community-based real estate development, matters involving American Indian law, and housing discrimination claims in New Orleans immediately after Hurricane Katrina.

Professor Sahani received her law degree from Harvard Law School and her undergraduate degree in psychology from Harvard College. She remains an active member of the bar in New York and the District of Columbia.

Professor Sahani's publications are available at https://www.bu.edu/law/profile/victoria-sahani/.