LITIGATION FUNDING: CHARTING A LEGAL AND ETHICAL COURSE

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Some work of noble note, may yet be done . . . .[1]

INTRODUCTION

Consider the following facts. A young single mother, call her Ann, was hit by a dump truck while riding her bike. Witnesses agreed that the truck driver ran a red light and hit her while she crossed the intersection. She was rushed to the hospital and treated for multiple broken ribs, a concussion, and severe internal bleeding. She incurred medical bills and was unable to return to work indefinitely. Her employer fired her, and she was denied unemployment compensation. She had no medical insurance. With no income, no unemployment compensation, no insurance, and no savings to rely upon, Ann faced financial crisis. She consulted a personal injury attorney. Ann's attorney advised her to sue for negligence. Her attorney proposed representation on a contingent fee basis in order to ease the financial burden of litigation and to permit Ann to pursue her claim. Ann retained the attorney.

As the bills mounted over the following weeks, Ann asked her attorney for financial assistance. Ann's attorney explained that the ethical rules prohibited lawyers from providing to clients any financial assistance to meet day-to-day living expenses. Ann unsuccessfully applied for conventional loans and credit. All of her applications were denied. While continuing to seek financial assistance, she identified a lender who promised cash "upfront and fast" with no obligation to repay the loan. Ann was intrigued. She recognized that the longer it took her to resolve her case, the more money she would owe to the lender. She was not troubled by this because it seemed to be the same business model used by banks and credit card companies. She filled out the application and submitted it online. The application and loan process required her attorney to release confidential client information, notify the lender of all settlement offers, and execute an acknowledgement obligating the attorney to pay the lender

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1. Alfred Lord Tennyson, *Ulysses*, *in* THE NORTON ANTHOLOGY OF POETRY 402, 403 (Shorter 3d ed., 1983).

directly from any proceeds recovered from the suit.

Ann's attorney faced a dilemma. If the attorney refused to disclose and sign, Ann's request would be denied. However, if she cooperated by disclosing and executing the acknowledgement, she risked disciplinary action on two levels. First, she faced possible sanctions for violating the attorney–client privilege in relationship to any confidential information disclosed to the lender. Second, she risked compromising the duty of client loyalty by entering into an agreement with a third party whose financial interests were adverse to Ann's interests. Ann's attorney discussed all of these concerns with Ann. Thereafter, Ann authorized her attorney to disclose the requested information and to execute the acknowledgment. The attorney disclosed and signed, thus paving the way for Ann to receive the advance.

Released from the daily stress associated with financial crisis, Ann was temporarily relieved. Although the immediate financial crisis eased, as the days and weeks passed, the financial pressures again mounted. Not only did Ann have her monthly living expenses to cover, as each day passed without resolving her case, the amount of interest she owed to her lender continued to increase. Ultimately her case settled. From her recovery designed to compensate her injuries, including her lost past and future wages, Ann was obligated to pay her medical costs, attorney's fees, the principle loan amount, plus interest at a rate far outstripping the legal lending rate.

On September 14, 2005, in *Fausone v. U.S. Claims, Inc.*, the Florida Second District Court of Appeals addressed a similar fact pattern and decided the matter on procedural grounds by upholding the trial court's decision to enforce a mandatory arbitration provision and the resulting arbitration award.[2]

Should litigation loans be prohibited entirely with respect to personal injury claims? This prohibition would result in expedited and deflated financial settlements, at the cost of the injured party's future financial instability. On the other hand, should litigation loans remain unregulated? Providers of these loans would profit from compensable claims by reaping usurious interest, thus resulting in more equitable settlement agreements, at the cost of the injured party's future financial instability. In either scenario, the injured party faces long-term financial hardship. The injured litigant, like Odysseus, is faced with a dilemma: in order to avoid the swirling whirlpool of Charybdis, in the form of certain financial ruin, the litigant

2. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005), *aff'd*, 931 So. 2d 899 (Fla. 2006).

must brave the six-headed monster Scylla, in the form of a litigation loan, accepting the attendant legal and ethical risks.[3] The choice appears futile. Either course of action leads to future financial instability. The absence of an acceptable resolution demands legislation. This dilemma can best be resolved by compromise. The usurious profit can be eliminated by prohibiting litigation loans entirely. At the same time, the pressing financial need of injured tort litigants can be eased by creating a public trust fund, established by members of the personal injury bar and operated on a non-profit basis. Short of prohibition and non-profit funding, substantial rule reform is needed to eliminate the legal and ethical concerns posed by litigation loans.

This Article explores the legal and ethical challenges associated with litigation loan agreements (LLAs) and provides guidance to courts and practitioners regarding their validity and enforceability. Part I of this Article examines the recent rise of litigation-funding companies (LFCs) and LLAs.[4] Part I also surveys the scholarship surrounding this industry. Part II examines the *Fausone* ruling in more detail to highlight the legal and ethical concerns associated with LLAs.[5] Part III examines the law of usury, champerty, and unconscionability as existing legal impediments to LLAs, justifying prohibition. Part IV explores ethical concerns raised by LLAs. Part V examines the New York structured settlement statute and the New York Attorney General's attempt to regulate LFCs absent legislation. Part VI of this Article proposes the prohibition of LFCs, or at least substantial rule reform, to protect plaintiff litigants from unscrupulous practices and to prevent further erosion of the public's trust in lawyers and the legal system.

I. THE RISING TIDE: LITIGATION LOAN AGREEMENTS OVERTAKE THE INJURED

Part I of this Article is divided into two subparts. The first subpart defines LLAs and surveys how LFCs advertise, obtain confidential client information, and vet potential clients to reduce, if not eliminate, the risk of non-recovery. The second subpart surveys the literature discussing the benefits and burdens of LLAs.

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3. *See id.* at 630 (noting potential financial difficulties as well as inadvertent ethical transgressions); HOMER, THE ODYSSEY 274, 278 (Robert Fagles trans., Penguin Books 1996) (describing the dangers of Charybdis and Scylla).

4. Some LFCs use terms other than litigation loan to refer to their products, including but not limited to: litigation funding, litigation advances, settlement funding, non-recourse lawsuit loans, pre-settlement funding, and pre-settlement cash advances. *Fausone*, 915 So. 2d at 627 n.1.

5. *Id.* at 630.

A. Litigation Lending: The Dilemma Defined

LFCs constitute a relatively new and unregulated money-making business.[6] LFCs advance money to injured claimants in exchange for a share of the proceeds related to the claim. The advance is accomplished according to the terms of an LLA.[7] The service provided—a cross between a usurious loan and a futures market in damages awards—is sometimes referred to as a "litigation loan." The word *loan* is a misnomer because the advance is conditional in nature and is repayable only upon receipt of a cash recovery by the plaintiff.[8] Although subject to many different names, six criteria typify a litigation loan: (1) a cash advance; (2) made by a non-party; (3) to a plaintiff in a personal injury civil action; (4) in exchange for an assigned share of the litigation proceeds, if any; (5) arising out of settlement or judgment; and (6) payable at the time of recovery.[9] The absence of a legal obligation to repay the funds advanced if financial recovery is denied arguably shields the industry from the existing usury legislation designed to protect consumers from predatory lenders.

It is no surprise that Las Vegas, the glitzy city of high rollers where the odds overwhelmingly favor the house, is described as a hub of the litigation-funding industry.[10] One of the most noted litigation lenders is

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6. *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, 55 (2004) ("[L]ending money to plaintiffs to finance their lawsuits has become an industry within the last ten years . . . [and] it is not clear how the law does control or should control these transactions.").

7. This Article focuses on money advanced to injured claimants, rather than on the ethical and legal concerns raised by litigation-support companies advancing funds to plaintiffs in other types of civil actions or to attorneys directly.

8. *See Fausone*, 915 So. 2d at 627 ("These transactions are often referred to as 'litigation loans,' but the law does not regard them as loans because the corporation that gives money to the plaintiff has no right to recover from the plaintiff in the event that the lawsuit is unsuccessful.").

9. *See* David L. Hudson, Jr., *Helping Clients Get Living-Cost Loan OK: But Pennsylvania Committee Warns of 'Serious Ethical Issues'*, A.B.A. J. E-REPORT, Dec. 12, 2005, at 2. "[T]he attorney can assist the client in obtaining a cash advance from a litigation-funding organization. Under these arrangements, the funding group advances the plaintiff money in exchange for an interest in the plaintiff's lawsuit. The funding group is repaid from the resolution of the plaintiff's lawsuit." *Id.*; *see also* 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, 506–07 (2006) ("Described as promoting a 'new twist on legalized gambling,' litigation financiers offer nonrecourse funding—if the plaintiff ultimately loses her case at trial she has no obligation to repay the amount advanced, and the company thus forfeits its entire investment.") (footnote omitted).

10. *See* Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 100 (2002) ("Locating in Nevada is probably a good idea for litigation financing firms because Nevada does not have usury laws (Idaho, New Hampshire, Oregon and Wyoming also do not[]).""). This advantage may be offset, however, because at least one Nevada court recognized champerty as a defense to the enforceability of agreements in Nevada. *See* Prosky v. Clark, 109 P. 793, 793 (1910) ("If the contract between Prosky and Hafer was unexecuted and was in fact

Perry Walton,[11] the owner of Future Settlement Funding, a litigation-funding company located in Nevada. Walton established his litigation-funding company after he was convicted for extortionate collection of debt under Nevada law.[12] Like Perry Walton, Darryl Levine is no stranger to litigation. He owns USClaims, Ms. Fausone's LFC.[13] In addition to suing Ms. Fausone to recover $102,000 in exchange for advances totaling $30,000,[14] he sued another customer to collect under the terms of an LLA.[15] Study of these claims reveals how LFCs game the legal system by

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champertous, in a suit by Prosky against Hafer to enforce the contract, the latter might set up the defense that the contract was void for champerty.").

11. Mr. Walton has been described by one litigant suing him for tortious interference with contract as follows:

> Walton developed a wide ranging business of loaning money in pending lawsuits around the country for huge returns. To facilitate this scheme he began offering "courses" which he taught applicants to his school of how to loan money to plaintiffs in lawsuits.
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> He taught classes for FSF [Future Settlement Funding] for which he netted . . . [$200,000] to . . . [$300,000] per year (Walton Depo. p. 109). Indeed, Walton has taught a sufficient number of persons that FSF has probably four hundred (400) affiliates. One of the affiliates, Providence Funding Group, mailed . . . [$50] to the families of the airplane victims of the September 11, 2001 terrorist attacks. (Walton Depo. p. 96, 97).
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> The base of operations for the lawsuit funding business developed by Walton is Las Vegas, Nevada. The probable four hundred (400) affiliates he taught funnel money making opportunities to the Defendants [referring to Walton and others] in Las Vegas from all over the country.
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> The affiliates of FSF likewise refer cases to RSC. (Walton Depo. p. 100).
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> Walton put up the money which FSF was loaning to persons in the judicial system. Walton incorporated FSF. He was its initial officer, and director. (Walton Depo. pp. 41–44).

Plaintiff's Response to Defendants' Motions for Summary Judgment Dated March 22, 2002 Pursuant to FRCP 56(e), Plaintiff's Motion for Partial Summary Judgment Pursuant to FRCP 56(a) at 8, Weaver, Bennett & Bland, PA v. Speedy Bucks, Inc., 162 F. Supp. 2d 448 (W.D.N.C. 2001). The foregoing summary of Mr. Walton's deposition testimony traces his initial conception of the litigation funding industry, his creation of a course to teach and export LFCs throughout the country, and his creation of a loose referral network of approximately 400 affiliates. *Id.* The creation of a referral network raises the attendant question of whether referral fees are paid by one LFC to another and whether such payments should be disclosed to consumers.

12. *Id.* at 7–8.

13. *Fausone*, 915 So. 2d at 628. Although captioned as "U.S. Claims" in the *Fausone* case, and other litigation, the website collapses the name as follows: "USClaims." This spelling must be used to access the web page. *See* Am. Legal Fin. Ass'n, USClaims, http://www.usclaims.com (describing USClaims' purpose).

14. *Fausone*, 915 So. 2d at 627.

15. Darryl Levine sued his former lawyer for breach of their LLA. *See generally* U.S. Claims, Inc. v. Ostroff, Villari, & Kusturiss, P.C., No. 2025, 2001 WL 1807893 (Pa. Com. Pl. July 25, 2001). Attorney Villari represented Darryl Levine, the principal shareholder of the LFC, USClaims. Mr. Villari allegedly assigned to USClaims his future legal fees of $152,837.50 (payable on December 31, 1999) from a separate action in exchange for an immediate payment of $144,000 (paid on July 5, 1999). *Id*. at *1. When the relationship later soured and Levine terminated Villari's representation, Attorney Villari

diverting to venture capitalists money awarded to injured victims.

LFCs structure LLAs in a variety of ways. The funds advanced often come from a group of investors who provide cash to LFCs according to the terms of their underlying investment agreement.[16] After securing funding, the LFC solicits applicants with pending litigation claims and advances money to injured parties in cases that are deemed meritorious; that is, cases likely to result in a damages award large enough to repay the amount advanced and reap a profit for the LFC.

Claim alienation is typically partial[17] but can also be full.[18] The LLA sets forth the terms of the parties' agreement and secures the LFC's interest in the proceeds of the lawsuit through assignment. While there are no constraints placed on the use of the money advanced to the injured party, most injured parties use the advance to pay living expenses, pending the resolution of the litigation and receipt of any damages awarded.[19] Under the terms of the LLA, the LFC is repaid only if the injured party recovers. Thus, the potential recovery, if any, secures the LFC's interest. If there is no recovery, then the advance is a windfall to the injured litigant and a loss to the LFC.[20] However, if the injured party recovers, the money owed to

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sued USClaims, asserting a 25% interest in USClaims. *Id*. The ownership interest asserted by Attorney Villari raised ethical issues related to attorney ownership in LFCs and client loyalty; however, these questions were never addressed by any court because Attorney Villari settled his action against USClaims in 1999. *Id.* However, USClaims initiated action in 2001 against Attorney Villari, asserting breach of the settlement agreement. *Id.* Thus, Mr. Levine has been sued at least twice in the past decade and called upon to defend the legality of USClaims' LLAs. Additional claims may also have been settled or arbitrated; however, these matters are not of public record.

16. *See* George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 805 (2001) ("Each litigation funding company can reap the benefits of the portfolio means of investing. That is to say, investor funds can simultaneously be directed to multiple lawsuits."); *see also* Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1542 (1996) ("Champerco also offers investors several avenues for investing in litigation. Investors seeking the greatest possible returns can invest directly in specific lawsuits. These direct investments offer the greatest returns because the investment is undiluted, but also involves the highest risks because it is undiversified.").

17. *See* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 650 (2005). Richmond describes partial claim alienation in this way: "For example, a litigation funding company may agree to loan a plaintiff $10,000 in exchange for the first $25,000 of any settlement or judgment received within a specified time." *Id.*

18. Isaac Marcushamer, Note, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543 (2005). Marcushamer describes complete claim alienation in this way: "From an economic perspective, the sale of a tort is possible because of the difference between the risk factors of the individuals involved. . . . A certainty equivalent is the 'minimum amount of money' a person 'would rather have for certain instead of taking some risk.'" *Id.* at 1572.

19. *See, e.g.*, *Fausone*, 915 So. 2d at 630 ("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.").

20. *See* Martin, *supra* note 10, at 86 ("If the plaintiff loses, the money need not be returned.").

the LFC can exceed by more than 200% the amount of the funds advanced, thus creating significant legal and ethical questions.[21]

Although varied and evolving, LFCs occupy a unique niche in the American consumer financing market. By structuring its business using buy–sell agreements, the litigation-funding industry attempts to evade usury and other financial market regulations.[22] The absence of regulation may also be attributed to the industry's repetitive and drum-like focus on the attendant risks associated with the business of advancing funds: there is no promise of repayment, no collateral to secure the debt, and no guaranteed return on investment associated with the traditional lending industry.

At first blush, LLAs seem risky indeed. However, an LFC staffed by a litigation savvy businessperson and a skilled litigation claims adjuster could reduce, even eliminate, the risk of loss by adroitly valuing the range of recovery in personal injury actions and by advancing only a fraction of the carefully calculated range of recovery dollars. Absent regulations, LFCs stand to regularly reap a hefty profit.

Free market advocates might celebrate LFCs as a triumph of innovation.[23] Upon closer inspection, however, the litigation-funding industry carries heavy costs born by the injured litigants and society. Plaintiffs trade future financial security for immediate cash, and thereby provide to LFCs a rate of return that far outstrips the average profit available in traditional investment markets such as bonds, CDs, and even the stock market, when profit is adjusted over time.[24]

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21. *See Fausone*, 915 So. 2d at 627 ("[T]he interest rate on [Fausone's agreement with Advance Legal Funding] depended on the date of repayment, but was never less than 200%."); *see also* Martin, *supra* note 10, at 98 ("[I]t is hard to know whether the percentages cited in *Rancman*, 280% and 180%, exemplify those in the industry in general.").

22. For example, the LFC industry trades in futures accounts and is analogous to the types of transactions governed by the Commodity Futures Trading Commission (CFTC). *See* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 22.7 (5th ed. 2005) (identifying the regulatory authority of the CFTC). The CFTC enjoys exclusive jurisdiction over "transactions involving contracts of sale of a commodity for future delivery." 79A C.J.S. *Securities Regulation* § 470 (2005) (citing 7 U.S.C.A. § 2 (West 2006)). The CFTC analogy is appropriate given the following similarities to the LFC industry: both deal in the sale of future commodities, and both raise concerns surrounding disclosure of investment costs to the consumer and risk to the financier. Unlike the commodities futures trading industry, however, LFCs are not regulated.

23. *See* Swan, *supra* note 16, at 816-17 ("Competitive exchange affords a promising remedy for inefficient tort laws. Regardless of the initial allocation by law of liability rights, exchange in (at least) a complete set of perfectly competitive markets allocates liability rights efficiently.").

24. *Compare Fausone*, 915 So. 2d at 627 ("[T]he interest rate on [Fausone's agreement with Advance Legal Funding] depended on the date of repayment, but was never less than 200%."), *with* Bankrate.com, http://bankrate.com/brm/rate/high_home.asp (select "5-year CD" under "Choose Your Option") (listing annual percentage rates for these CDs as anywhere from 4.55% to 5.40%), *and* CNNMoney.com, http://money.cnn.com/markets/bondcenter (charting the yield for 2- to 30-year bonds at under 5%).

It is difficult to present a complete picture of the LFC industry. Numerous "dotcom" companies are marketing a profusion of financial advance services, under a wide variety of names. When the query "litigation funding advance" is submitted to the Google search engine, over 1,300,000 "hits" are identified. Among them is a link to "American Legal Finance Association" (ALFA). Under the umbrella ALFA, the following twelve funding entities are listed: Plaintiff Support Services, Lawmax Legal Finance, Global, Money for Lawsuits, LawCash, CMG Cash, Whitehaven, Pre-settlement Finance, Bridge Funds, Law Cash Advance, Magnolia Legal Funding, and Oasis Legal Finance.[25] ALFA is an association organized by a group of litigation-funding companies to create guidelines for lending within the industry.[26] Absent mandatory disclosure rules, the ALFA website offers no information about the owners, the investors, the employees, the profit margins, or the jurisdictions of incorporation for any of the ALFAN LFCs.[27] There is, likewise, no explanation as to the membership criteria of ALFA. The recognition of the need for guidelines by the LFCs suggests that independent oversight of the industry is needed.

Examination of the manner in which business is generated confirms the need for oversight. For example, USClaims' home page on the web is decidedly upbeat.[28] It features a patriotic red, white, and blue color scheme and showcases personal testimonials of satisfied customers. The page claims to "specialize[] in satisfying the immediate financial needs of clients with . . . assistance . . . provided at 75% less than other services."[29] The page is geared to attorneys and their clients.

USClaims' website bears a flashing seal guaranteeing fifteen-minute application results.[30] The initial USClaims application can be completed

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25. Am. Legal Fin. Ass'n, http:www.americanlegalfin.com/alfasite2/index.asp. Six of these twelve LFCs signed a stipulation, dated February 17, 2005, which was partially entitled "Assurance of Discontinuance." The stipulation was also executed by Eliot Spitzer, who was then Attorney General for the State of New York. The stipulation set forth the conditions under which these LFCs could continue to do business in New York. *In re* Plaintiff Support Services, Inc., Assurance of Discontinuance Pursuant to Executive Law § 63(15), Op. Att'y Gen. *4–7 (Feb. 17, 2005). *See infra* notes 223–28 and accompanying text.

26. Daniel Brook, *Litigation by Loan Shark*, LEGAL AFFAIRS, Sept.–Oct. 2004, at 42, 47. According to Brook, ALFA's goal is to "create a code of conduct" within the industry, setting "standards on issues like disclosure of rates and contract terms." *Id.* The hope is that self-regulation will lend an air of legitimacy to the industry. *Id.*

27. Am. Legal Fin. Ass'n, http://americanlegalfin.com/alfasite2/index.asp.

28. *See* Am. Legal Fin. Ass'n, USClaims, http://www.usclaims.com (showing a smiling family in front of a waving American flag).

29. *Id.*

30. *Id.* This promise of quick approval may warrant investigation by consumer protection agencies. For example, Florida state law prohibits deceptive trade practices. Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. §§ 501.201–501.23 (West 2006). "Unfair methods of

and submitted online. The form requests background information about the customer and very specific information relating to: (1) the nature of the litigation claim; (2) the name of the attorney handling the case; (3) the legal theories of recovery advanced; (4) past and future wages lost and past and future medical expenses; and (5) copies of any settlement offers.[31] Applicants are also asked to provide copies of all papers filed in connection with the case, medical records, any demand letters, and correspondence between the insurance company and the client.[32] It seems unlikely that all of the information could be gathered and transferred, much less reviewed in fifteen minutes.

The section entitled "How We Work" summarizes the main points of the Purchase Agreement and encourages the attorney to review it fully with the client before execution, thus attempting to transfer the burden of intelligent and knowing execution from the LFC to the personal injury attorney.[33] One troubling portion of the summary provides, "[t]he amount paid to USClaims comes directly out of the proceeds of your client's case. In the Purchase Agreement, your client authorizes you to do this, and you acknowledge this authorization and agree to pay USClaims when the case is concluded."[34] Thus, the USClaims Purchase Agreement creates a contractual relationship with both the client and the client's attorney.[35]

Although USClaims does not even allude to the potential conflicts of interest between the attorney's duty of client loyalty and the attorney's duty to the third-party LFC,[36] there is, however, a page with links to cases and ethics opinions purporting to survey the validity of LLAs across the United States.[37] USClaims "believe[s] in high ethical standards, clear terms, and

competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." *Id.* § 501.204(1). A cause of action exists when the alleged conduct is "likely to deceive a consumer acting reasonably in the same circumstances." Fla. Office of Att'y Gen. v. Wyndham Int'l, Inc., 869 So. 2d 592, 598 (Fla. Dist. Ct. App. 2004).

31. Am. Legal Fin. Ass'n, USClaims, http://www.usclaims.com (follow "Download Application Now" hyperlink).

32. *Id.*

33. Am. Legal Fin. Ass'n, USClaims, How We Work, http://www.usclaims.com/how_we_work.html.

34. *Id.*

35. This raises a potential conflict of interests among the attorney, the client, and the LFC. *See infra* notes 244–46 and accompanying text.

36. *See* Am. Legal Fin. Ass'n, USClaims, http://www.usclaims.com (failing to mention any conflicts of interest).

37. Another webpage owned by Oasis Legal Finance contains a law and ethics link. This link relies in part on *Baltimore Scrap Corp. v. David J. Joseph Co.*, 237 F.3d 394, 401 (4th Cir. 2001), for the proposition that a person enjoys a "constitutionally protected First Amendment right" to enter into LLAs. This case upholds the trial court's grant of standing to a citizen's group opposing a permit granted to a business to install a metal shredder, despite evidence that the lawsuit was funded by a

fair repayment for personal injury victims[]" and has a direct link to ALFA,[38] the LFC promotional and self-proclaimed ethical watchdog organization, even though USClaims is not a listed member of the ALFA.

The application process highlights two of the most disturbing aspects of LLAs: (1) LLAs require injured customers to mortgage their future economic security by selling, at a sharply discounted rate, some or all of a potential recovery based, in part, upon their future lost wages and medical costs; and (2) LLAs require attorneys to create potential ethical violations by disclosing confidential client information and creating a third-party claim to litigation proceeds.

B. Litigation Loans: The Dilemma Explored

Initially, scholars evaluated the economic desirability of litigation investment vehicles to prohibit claim trading in light of the common-law doctrines of champerty and maintenance that prohibited a third party from acquiring an interest in a lawsuit owned by another.[39] The elements of maintenance require proof that a party without a bona fide interest in the litigation provides financial assistance to a litigant.[40] *Champerty* is a specific type of maintenance in which a party undertakes to further another's interest in a suit and in exchange for a part of any favorable litigation result.[41] The bar to champertous agreements arguably: (1) discourages speculation and frivolous actions; (2) preserves the personal interest in the proceeds of the injured party; (3) protects the weaker party from abuse through the legal system; and (4) eliminates the potential for individuals with superior economic power to purchase claims to harass

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competitor seeking to maintain its monopoly status. *Id.* at 396–97. The case is factually unrelated to LFCs or LLAs. *See* Lawsuit Settlement Funding (Settlement Advances), Law and Ethics Commentary, http://www.oasislegal.com/attorney_lawandethics.php (listing comments on lawsuit settlement funding).

38. Am. Legal Fin. Ass'n, USClaims, http://www.usclaims.com (follow "Non-Recourse Funding" hyperlink).

39. *See* Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 498 (1992) ("The main issue in these cases [of lawsuit investment] is whether their champertous nature should categorically invalidate the agreements between the plaintiffs and those investing in the lawsuits . . . .").

40. *See, e.g.*, Hardick v. Homol, 795 So. 2d 1107, 1109–10 (Fla. Dist. Ct. App. 2001) (setting forth Florida's definition of "maintenance").

41. *See* Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. MICH. J.L. REFORM 57, 58 (1999) [hereinafter *Financing Plaintiffs' Lawsuit*]. "Champerty is a practice in which one person . . . agrees to support another in bringing a legal action, in exchange for part of the proceeds of the litigation. It is a form of maintenance, which . . . includes any agreement by which one person finances another's legal action." *Id. See also Hardwick*, 795 So. 2d at 1109–10 (setting forth Florida's definition of champerty).

defendants.[42]

Historically, the lawyer's ability to accept cases on a contingent fee basis was barred under the champerty doctrine.[43] However, given the economic needs of many injured individuals, legal and ethical rules were relaxed throughout the United States to permit attorneys to undertake legal work pursuant to a contingent fee agreement,[44] thus enshrining the contingent fee as an acceptable payment arrangement and legitimizing the plaintiff's attorney's claim to a portion of the settlement, verdict, or judgment proceeds, if any.

If the ethical constraints placed on the attorney–client relationship permit clients to assign an interest in the recovered proceeds to the attorney and third parties who intervene, another question arises in this discussion: Why not extend the client's right to assign interests in future recoveries? The rise of the LFC industry followed contingent fee reform and has its earliest roots in litigation in the public interest.[45]

Third-party financing of litigation expenses was first permitted in relationship to civil rights class-action litigation supported by the NAACP, as long as the organization provided funding but did not control the litigation.[46] Permission was next granted to syndication of copyright and patent infringement actions under federal law.[47] In both instances, syndication was permitted to allow those with meritorious claims and insufficient assets to pursue them.[48] Nevertheless, personal injury claims

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42. Marcushamer, *supra* note 18, at 1552.

43. *See* James Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 229–30 (2003) (tracing the history of the contingent fee in the United States and its subsequent prohibition).

44. "The [ABA], reflecting the history of the development of the contingent fee as one of grudging acceptance, gave its reluctant approval in 1908[,]" subject to ethical constraints and judicial scrutiny. Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 37–38 (1989).

45. *See* Martin, *supra* note 39, at 507 ("The primary policy reason for permitting investors to support the litigation of others in exchange for a share of the proceeds of the litigation, if there are any, is to allow those with meritorious claims, but insufficient funds to pursue them, access to courts."); *see also* Martin, *supra* note 41, at 83 (asserting that champertous agreements should be enforceable not only in patent infringement cases, but also in tort and contract matters to afford justice to impoverished petitioners with meritorious claims).

46. *See* Martin, *supra* note 39, at 492 ("When the NAACP challenged the newly extended statutes [on maintenance, champerty, and barratry], the Virginia court held all but one of them unconstitutional, affirming the right of the NAACP to finance litigation . . . .").

47. *See id.* at 505 (noting federal law allowing patent assignment and a court decision upholding copyright assignment).

48. *See id.* at 507–08 ("The United States Supreme Court has asserted that 'the civil courts of the United States and each of the States belong to the people of this country and . . . no person can be denied access to those courts . . . because he cannot pay a fee . . . .'") (citing Meltzer v. C. Buck LeCraw & Co., 402 U.S. 936, 955–56 (1971)).

remained off limits to syndication. This distinction turned on the legal doctrine of assignment. So long as the legal claims were assignable at law, the litigation-funding agreements were approved. Because tort claims were traditionally unassignable, the recoveries could not be encumbered by LLAs.[49] The distinction between copyright and patent infringement actions and tort claims faded as statutory reform allowed survivability of all causes of action.[50] This left little to deter the public trade in the pain and suffering of others.

Having overcome the bar to assignability with respect to tort claims,[51] the LFC industry extended its reach to purchase personal injury claims.[52] The laissez-faire climate encouraged, perhaps, expansion of LFCs into the arena of providing funding in exchange for an interest in future tort recoveries. Expansion into the area of personal injury claims thrived absent regulations.[53] In turn, scholars began to focus on the legal and ethical implications of assigning future tort recovery interests.[54] Rather than critically examining the legal and policy implications of claims-trading in relationship to pain and suffering claims, scholars advocated ways to permit financing.[55]

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49. *See id.* at 506–07. "In general, a cause of action for personal injuries or the proceeds of a personal injury action is not assignable. Courts have asserted the dangers of maintenance and champerty as the public policy reasons for not allowing such assignments." *Id.*

50. Marcushamer, *supra* note 18, at 1563.

51. Patrick T. Morgan, Note, *Unbundling Our Tort Rights: Assignability for Personal Injury and Wrongful Death Claims*, 66 MO. L. REV. 683, 690 (2001) ("On the other hand, statutes sometimes override the common law and allow for the survivability of tort claims.").

52. *See* Martin, *supra* note 10, at 85 (noting the rise of LFCs and their willingness to provide loans to plaintiffs regardless of the potential proceeds that may come from the lawsuit). *See also* Andrew Hananel & David Staubitz, Note, *The Ethics of Law Loans in the Post-*Rancman *Era*, 17 GEO. J. LEGAL ETHICS 795, 800 (2003) (demonstrating that a law loan company provides an option to plaintiffs when "a claim is a little riskier").

53. *See* Oasis Legal Fin., www.oasislegal.com/sitemap.php. Oasis Legal Finance is ready for just such a market in light of its site map index listing the following specific types of claims: employment discrimination suits, animal bite, asbestos litigation, car accident lawsuit, fen-phen litigation, mass torts, medical malpractice, mesothelioma, nursing home litigation, pedestrian lawsuits, pharmaceutical drug litigation, plane crash, product liability, primary pulmonary hypertension, truck accident, and worker's compensation. *Id.*

54. *See* Richmond, *supra* note 17, at 664 (emphasizing the attorney's obligations in entering an LLA). *See generally* Hananel & Staubitz, *supra* note 52, at 804–10 (discussing the Model Rules implicated in law loans).

55. Moliterno, *supra* note 43, at 256–57 (suggesting an amendment of the "financial assistance and acquisition of interest rules" to permit lawyers to support clients and acquire financial interests in immature claims, including pending tort claims). *See* 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 (2006) (arguing that the best remedy to reduce reliance upon litigation loans would be to reduce the time between claim filing and claim resolution); Lauren J. Grous, Note, *Causes of Action for Sale: The New Trend of Legal Gambling*, 61 U. MIAMI L. REV. 203, 205 (2006) (advocating litigation finance reform in Florida).

The scholarship explores two separate avenues of claim alienation: partial and complete. The LLC industry profits through partial claim alienation, which requires the contingent repayment from future tort recovery proceeds, if any.[56] A complete claim alienation model contemplates a complete release of all ownership in the pending tort claim by the claimant and the creation of primary and secondary markets in tort claims.[57] Recently, one author examined the economic and non-economic consequences of *mandatory* claim alienation.[58]

Curiously, no scholars have called for the absolute prohibition of third-party LLAs. This is despite the unequal bargaining position of the customer and the LFC, the financial duress prompting the customer to sign an LLA, the usurious profit reaped by the LFCs, and the ethical pressures placed on the attorney–client relationship. This may be due to the compelling need to make living expense loans available to the injured. However, there are ways to meet this compelling need short of exposing injured litigants to unregulated, usurious lenders willing to profit from the pain and suffering of others.

Currently, there is no federal or state legislation providing oversight of the litigation-funding industry with respect to personal injury claims.[59] LFCs should be required to face the light of legislative fact-finding and to debate the relative public utility of the industry. If deemed socially useful, there should be additional public discussion to frame regulations to attain

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56. *See* Richmond, *supra* note 17, at 650 ("For example, a litigation funding company may agree to loan a plaintiff $10,000 in exchange for the first $25,000 of any settlement or judgment received within a specific time.").

57. *See* Marcushamer, *supra* note 18, at 1572. "From an economic perspective, the sale of a tort is possible because of the differences between the risk factors of the individuals involved . . . . A certainty equivalent is the 'minimum amount of money' a person 'would rather have for certain instead of taking some risk.'" *Id.*

58. Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 758 (2005).

> In a mandatory-alienation regime, parties would be required to alienate their legal claims. That is, a plaintiff would be forbidden from initiating a lawsuit on her own behalf and instead would be required to sell the legal claim to a third party. Similarly, a defendant would be required to pay off a third party to assume the burden of any judgment. Settlement could occur in a mandatory-alienation regime both before and after alienation.

Id. Important tax questions are raised by the assignment of future interests in litigation proceeds, which can be analogized to other fraudulent income schemes. *See* Robert Grafton & Clyde Posey, *Tax Implications of Fraudulent Income Earning Schemes: Ponzi and Others*, 27 AM. BUS. L. J. 599, 608–09 (1990) (discussing the confusion in determining whether victims of income earning schemes can characterize money received as capital gains or ordinary income for tax purposes and questioning whether money received by defrauders is actually income or loans).

59. New York has a statute dealing with structured settlements. N.Y. GEN. OBLIG. LAW § 5-1706(b) (McKinney 2004). Additionally, the territory of Puerto Rico has a statute designed to eliminate profiteering from the sale of litigation credits. P.R. LAWS ANN. tit. 31, § 3950 (2002).

the agreed-upon goals. In addition, the difficult ethical choices attorneys face should be examined. The propriety of LLAs is not even mentioned in the Model Rules of Professional Conduct.[60]

As individuals seek ways to profit peripherally from the practice of law, lawyers face the ethical dilemma presented by facilitating and profiting from the LFC industry through advising clients to enter such agreements, acknowledging the client's legal obligation to pay over litigation proceeds to the lender, or even profiting directly through business investments in LFCs.[61] Litigation-funding companies operate on a nationwide basis, conduct interstate commerce,[62] and present legal and ethical questions that transcend state lines.[63] State legislators and ethics organizations have failed to respond with laws to protect injured litigants, and legal ethics experts have yet to issue precise ethical rules to guide attorneys.[64] The LFC industry is ripe for legislative and ethical oversight.

II. LITIGATION LENDING RUN AMUCK: THE *FAUSONE* CASE

As previously noted, the *Fausone* case inspired the opening hypothetical. The case is significant, not so much because of the legal issues it addresses, but because of the legal issues the court fails to reach in considering the legality and ethics of LLAs. This Part is subdivided into two subparts. The first explores the factual background of the *Fausone* case. The second explores judicial willingness to enforce a mandatory arbitration clause, thereby shielding the LLA from substantive review according to state public policy concerns.

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60. *See generally* MODEL RULES OF PROF'L CONDUCT (2006) (failing to consider the propriety of LLAs).

61. *See* U.S. Claims, Inc. v. Ostroff, Villari & Kusturiss, P.C., No. 2025, 2001 WL 1807893, at *1 (Pa. Com. Pl. July 25, 2001) (explaining that Attorney Villari asserts a 25% ownership interest in U.S. Claims).

62. The interstate business aspect of LLAs invites federal legislation under the commerce clause of the United States Constitution. *See* U.S. CONST. art. 1, § 8 (allocating regulation of interstate commerce to Congress).

63. One writer examined the repercussions of treating future interests in tort claims as a security interest within the scope of U.C.C. Article IX and bankruptcy proceedings. *See generally* Harold R. Weinberg, *They Came from "Beyond the Pale": Security Interests in Tort Claims*, 83 KY. L.J. 443 (1994–95) (advocating for the expansion of the scope of U.C.C. Article IX to include security interests in tort actions); *see also* Ronald L. Cohen & Robert M. Schwartz, *Champerty and Claims Trading*, 11 AM. BANKR. INST. L. REV. 197, 210–11 (2003) (noting that the champerty defense should be inapplicable to secondary markets for non-investment grade bonds, notes, and negotiable instruments).

64. *See* Sarah Northway, Note, *Non-Traditional Class Action Financing and Traditional Rules of Ethics: Time for a Compromise*, 14 GEO. J. LEGAL ETHICS 241, 258 (2000) (suggesting that litigation investment by attorneys or third parties to promote justice should not be precluded by antiquated rules but should be sensibly regulated).

A. The Circumstances Surrounding Ms. Fausone's LLAs

The *Fausone* facts illustrate the debate regarding the legality and propriety of LLAs. A dump-truck driver hit and seriously injured Ms. Fausone while she was riding a bicycle in May 2000.[65] She suffered injuries and retained a lawyer to represent her in this action.[66] She soon faced a dilemma: Should she settle quickly for less than she would otherwise be entitled to receive, or should she seek a loan to pay her living expenses? The second option would permit meaningful negotiation backed by the credible threat of trial.

In October 2000, less than six months after initiating suit, Ms. Fausone sought funding by selling interests in her future personal injury recovery. She sold interests first to Advance Legal Funding in exchange for $3,000 and then to Advance Settlement Funding in exchange for $2,000.[67] In August of 2001, she turned to a third LFC, USClaims, seeking yet another advance of funds.[68] In total, Ms. Fausone received advances totaling $30,000 from USClaims, all non-recourse loans secured by her future personal injury recovery.[69] Each USClaims advance was predicated upon an agreement executed by Ms. Fausone and USClaims. The payment terms of the agreement were secured by a separate authorization contract, signed by Ms. Fausone, USClaims, and Ms. Fausone's personal injury lawyer.[70] The agreement required her attorney to pay USClaims from any proceeds of her claim.[71] Additionally, Ms. Fausone's attorney was required to sign authorization agreements, in connection with each purchase agreement, creating a series of contractual relationships between Ms. Fausone's lawyer and USClaims.[72] The repayment terms provided for a rate of return well in excess of the rates legally permitted in consumer transactions under Florida

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65. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005), *aff'd*, 931 So. 2d 899 (Fla. 2006).

66. *Id.*

67. *Id.* The maximum legal lending interest rate in Florida when the agreements with USClaims were executed, between 2001 and 2002, was 18%. *See* FLA. STAT. ANN. §687.02 (West 2006).

68. *Fausone*, 915 So. 2d at 627.

69. *Id.* at 628. Ms. Fausone received the initial advance of $18,000 in mid-August 2001. Subsequent advances were made between August 2001 and November 2002.

70. *Id.*

71. *Id.*

72. *Id.* According to a Florida State Bar Advisory Opinion dealing specifically with relationship to LLAs: "The attorney shall not co-sign or otherwise guarantee the financial transaction." Fla. State Bar Ass'n, Comm. On Prof'l Ethics, Formal Op. 00-3, at *4, 2002 WL 463991 (2002). Thus, Florida attorneys are prohibited from signing such assignments on or after March 15, 2002, the date of the advisory opinion.

law.[73] In exchange for the August 2001 payment of $30,000, the LLA required Ms. Fausone to pay to USClaims $42,890 if she received her proceeds before November 14, 2002.[74] If she recovered after November 14, 2002, but before February 14, 2003, the amount owed increased to $46,808.[75] If she recovered between February 14, 2003, and May 14, 2003, the amount increased to $50,937.[76] Additional interest accrued on a monthly basis thereafter.[77]

In addition to making a profit well in excess of Florida's legal lending rate, the USClaims LLA also included a variety of contract terms that proved debilitating to Ms. Fausone. Under the LLA, Ms. Fausone agreed to arbitrate disputes in the jurisdictions of Pennsylvania or Delaware.[78] She waived her right to challenge personal jurisdiction or venue.[79] Delaware law controlled the agreement and, at the same time, the agreement expressly prohibited Ms. Fausone from arguing that Delaware choice-of-law rules required the application of Florida law to determine the enforceability of the LLA.[80] This condition also blocked review of the enforceability of the agreement under the Florida public policy exception to an otherwise valid choice-of-law provision.[81] The agreement further mandated arbitration as the sole remedy for breach.[82] Finally, the

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73. *Fausone*, 915 So. 2d at 628.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.* at n.5 and accompanying text (noting the amount owed would continue to increase in line with the initial agreement).

78. *Id.* at 628.

79. *Id.*

80. *Id.*

81. The choice-of-law provision was expertly crafted. It identified Delaware law as controlling with the exception of the Delaware choice-of-law precepts. *Id.* In this way, USClaims guarded against Ms. Fausone's ability to argue that, under Delaware choice-of-law precepts, Florida law applies to determine the validity of the agreement. The court never reached the merits of Ms. Fausone's claim because the arbitrator ruled first. *See id.* at 629 (tracing Ms. Fausone's claim from trial court, to arbitration, to appeal). Thus, Ms. Fausone's potential argument that parties may not, by agreement, prevent a court from applying its own conflicts rules to determine the validity of choice-of-law provisions in contracts was never addressed by any court or arbitrator. Arguably, when a Florida court is called upon to enforce an agreement designating foreign law as applicable, the court retains the authority to determine whether enforcement of the agreement, valid under the laws of another jurisdiction, violates a fundamental Florida public policy, rendering the agreement unenforceable in Florida. *See* Mazzoni Farms, Inc. v. E.I. DuPont de Nemours & Co., 761 So. 2d 306, 312 (Fla. 2000) ("Although courts have adopted varied formulations, the underlying principle remains the same: the countervailing public policy must be sufficiently important that it outweighs the policy protecting freedom of contract.").

82. *Fausone*, 915 So. 2d at 628. Under Florida law in place at the time of execution and enforcement, Ms. Fausone was entitled to have a trial court determine the overall validity of the agreement under usury laws before she could be compelled to arbitrate. *See* FastFunding the Company,

agreement provided that if the proceeds on the claim were less than the money owed, then USClaims was entitled to 100% of the proceeds.[83] If Ms. Fausone did not recover, she had no obligation to make any payments unless her failure to recover was due to her "fraud, misrepresentation, breach of warranty or failure to perform any covenant" under the LLA.[84]

In 2002, Ms. Fausone recovered $200,000 in compensation for her injuries and instructed her attorney, a party to the USClaims acknowledgement contract, not to release the funds owed to USClaims.[85] Despite his signature on the LLAs expressly obligating him to release the funds, Ms. Fausone's attorney retained them, as she instructed.[86]

USClaims initiated arbitration proceedings in Philadelphia, an appropriate forum according to the LLA, to enforce the agreement according to Delaware law.[87] Ms. Fausone, a Florida resident injured in Florida and a party to an LLA executed in Florida, initiated a declaratory

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Inc. v. Betts, 758 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 2000). However, in 2006, the United States Supreme Court ruled that arbitrators have jurisdiction to determine illegality arguments regarding payday loan agreements. This settled a split amongst jurisdictions regarding a state court's right to preempt an arbitrator's jurisdiction to decide questions of contractual validity and enforceability when the agreement contains a mandatory arbitration clause. Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1209 (2006). This case could arguably be distinguished on the basis that the LLAs at issue were poorly disguised loans, usurious in nature, thus tainting the enforceability of the entire contract and rendering the mandatory arbitration clause invalid. In *Durst v. Abrash*, 253 N.Y.S.2d 351, 352 (N.Y. App. Div. 1964), the plaintiff sought "a declaratory judgment to determine that a certain purported stock sale transaction was in fact a disguise for a usurious loan agreement . . . ." The court, after determining that the agreement was a loan, held that if the agreement were usurious, a subsidiary agreement to arbitrate disputes arising under the transaction would also be unenforceable. *See id.* at 354 ("[I]t is undisputed law that a usurious agreement is invalid regardless of the form it takes . . . . It is always possible to show that any transaction and the documents which are part of it are illegal and unenforceable as a usurious transaction.").

83. *Fausone*, 915 So. 2d at 628.

84. *Id.* While there may not be a representational conflict between the attorney and the LFC, there is a clear conflict of interest between the attorney's contractual obligations to the client, as well as to the lender through the LLA. This may result in the attorney and the lender claiming the same dollars from the client's recovery, ultimately leaving the client with nothing. At a minimum, the conflict and the potential results must be explained to the client and a waiver obtained. This need to disclose may be inferred from the Florida Rules of Professional Conduct. FLA. STAT. ANN., RULES OF PROF'L CONDUCT R. 4-1.7(b)(4), (c) (West 2006).

85. *Fausone*, 915 So. 2d at 628–29.

86. *Id*. *See* FLA. STAT. ANN., RULES OF PROF'L CONDUCT R. 4-4.1 (West 2006). This rule states that the attorney owes an obligation of truthfulness to third parties. This may be violated if the attorney signs an agreement to turn over litigation proceeds and later refuses to do so. *Id.*

87. *Fausone*, 915 So. 2d at 629. The Delaware usury law permits an annual interest rate of no more than 5% over the federal discount rate. *See* DEL. CODE ANN. tit. 6, § 2301(a) (2005). In addition to the cap on interest, Delaware courts invalidate agreements tainted by champerty. Hall v. State, 655 A.2d 827, 830 (Del. Super. Ct. 1994). Delaware law defines champerty to include any transaction in which the assignee had no interest in a cause of action prior to the assignment. *Id.* at 829. Thus, even applying the chosen law of Delaware, Ms. Fausone could have attacked the validity of the agreement as champertous had she been adequately represented in her challenge to the LLA.

judgment action in Florida to invalidate the LLA because it was unconscionable.[88] Ms. Fausone remained unrepresented throughout her Florida challenge to the LLA.[89] Additionally, the arbitration went forward without Ms. Fausone, who declined to participate by telephone.[90] The Philadelphia arbitrator awarded $72,117 to USClaims in February 2004.[91] This amount increased to $102,007 after February 14, 2005.[92] Ms. Fausone then filed a motion to vacate the award in the Circuit Court of Pasco County, Florida; USClaims then filed a motion to confirm.[93] Unrepresented, Ms. Fausone ultimately withdrew her motion to vacate, and the trial court confirmed the arbitration award entered in February 2004.[94] The award required Ms. Fausone to pay USClaims the full amount of $30,000, plus interest and fees of $72,007.[95] This was an investment return in excess of 240%, or $1,714 per month in profit, over the 42-month life of the LLAs (August 2001–February 2005).[96]

B. The Fausone *District Court Upholds LLAs*

Absent evidence that the original LLAs between Fausone and USClaims were invalid under Florida law, the Florida Second District Court of Appeals reluctantly enforced the arbitration award.[97] In reaching its decision, the court noted the absence of statutory law in Florida regarding LLAs.[98] The court encouraged the Florida legislature to "examine the industry to determine whether Florida's citizens are in need of any statutory protection."[99] Absent such legislation, the *Fausone* court affirmed.[100]

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88. *Fausone*, 915 So. 2d at 629. In the trial court declaratory judgment action, Ms. Fausone claimed that the agreement was invalid because it identified arbitration as the only dispute resolution remedy. The trial court granted USClaims' request to stay the action pending the arbitration results. Ms. Fausone appealed the ensuing arbitration award after choosing not to participate in the action. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at n.5.

93. *Id.* at 629.

94. *Id.* In upholding the arbitration agreement and enforcing the arbitration award on appeal, the district court commented on the absence of counsel on behalf of Ms. Fausone. *Id.* Although the trial court stayed Ms. Fausone's declaratory action pending the arbitration result, there is no further mention of the absence in the opinion.

95. *Id.* at n.5.

96. *Id.*

97. *Id.* at 630.

98. *Id.* at 629.

99. *Id.* at 630.

100. *Id.* at 629.

On January 12, 2006, Ms. Fausone, proceeding pro se, filed with the Florida Supreme Court a petition for discretionary review of the decision of the Second District Court of Appeals and an amended brief on jurisdiction.[101] In her brief, she asserted that the trial court erred by granting USClaims' request to abate the action pending arbitration without addressing Ms. Fausone's claim of illegality.[102] Likewise, Ms. Fausone asserted that the Florida Second District Court of Appeals erred by refusing to reverse on appeal.[103] Ms. Fausone petitioned the Florida Supreme Court to grant jurisdiction, reverse, and remand.[104] She argued, as a matter of law, that she was entitled to have the legality of the underlying arbitration agreement determined by a Florida court prior to arbitration.[105] The Florida Attorney General's Office filed an amicus brief in support of Ms. Fausone, only to have the brief quashed as premature and, subsequently, the Florida Supreme Court denied review.[106]

In summary, neither the Philadelphia arbitrator nor any trial court has determined the validity and enforceability of the underlying LLA. Unchallenged, the LLA entitles USClaims to collect the full amount of the funds advanced, plus an additional $72,007, a profit in excess of twice the amount of cash originally advanced to Ms. Fausone over a period of 42 months.[107] The sheer number and weight of the legal issues left unresolved by the Florida court is dizzying: (1) Are LLAs subject to applicable usury lending interest rates? (2) Do LLAs constitute impermissible champerty? (3) Do LLAs violate applicable common-law unconscionability standards?[108] and (4) By advising a client to sign an LLA and, by

101. Petitioner's Amended Brief on Jurisdiction at *5, Fausone v. U.S. Claims, Inc., No. SC06-82 (Fla. Feb. 2006), 2006 WL 460052.

102. *Id.*

103. *See id.* at *8 (suggesting that the Second District Court erred by enforcing an arbitration clause in conflict with precedent).

104. *See id.* (requesting that the Florida Supreme Court accept jurisdiction and implying that it should reverse and remand).

105. *See id.* (arguing that precedent required the trial court to rule on the legality of the loan contract before compelling arbitration).

106. *See* Brief on Jurisdiction for Attorney General as Amicus Curiae Supporting Petitioner, Fausone v. U.S. Claims, 931 So. 2d. 899 (Fla. 2006) (No. SC06-82).

107. *Fausone*, 915 So. 2d at 629 n.5.

108. Hypothetically, USClaims could sell its interest in Ms. Fausone's future recovery to another litigation funding company for a profit in excess of the net money advanced, but less than the payment due the assignee upon recovery. Thus, absent any risk of non-recovery, a series of LFCs could continue to leverage Ms. Fausone's future injury recovery in a chain of lesser assignments. Each assignee would receive an interest in a future financial recovery for lost wages and/or pain and suffering. The further down the chain, the more removed the assignee is from the injured cyclist and the careless truck driver. Each assignee can use the proceeds to invest in additional claims, with the goal of divesting themselves of the risk through a secondary resale market. A dishonest plaintiff could sell multiple interests in his or her future recovery, abscond with the cash, and leave the LFCs without

acknowledging the LLA, does an attorney violate the applicable rules of professional conduct? Given the finality of the *Fausone* decision, none of the substantive legal issues or the ethical concerns are ripe for review by the Florida Supreme Court. Thus, unhindered and emboldened, the LFCs operate freely.

III. NAVIGATING SCYLLA'S PERILS: USURY, CHAMPERTY, AND UNCONSCIONABILITY

Ideally, when faced with financial crisis, Ms. Fausone and our hypothetical Ann should have applied for and received a consumer loan at prevailing interest rates to assist them in meeting their financial needs during this pending personal injury litigation. Conventional loans, however, would have been unavailable to our unemployed and injured applicants, both of whom lack sufficient collateral to secure loans. As a matter of necessity, each woman turned to the predatory litigation-funding industry and signed LLAs. The contracts, although providing immediate economic benefits, resulted in grave economic harm to the accident victims and presented ethical dilemmas to their attorneys. Although barred from arguing the invalidity of the LLAs at trial because of mandatory arbitration clauses, the LLAs were subject to numerous legal challenges.

When courts strictly construe mandatory arbitration clauses, plaintiffs are deprived of the opportunity to litigate the validity and enforceability of LLAs according to precepts of usury, champerty, and unconscionability. Interpreting clauses in this way does not take into account the public policy of the jurisdiction in which enforcement is sought. The inclusion of mandatory arbitration clauses, designating foreign forums and foreign law as controlling, pit the interests of sophisticated businesses against the interests of injured-plaintiff consumers in financial crisis. Courts asked to enforce LLAs should consider the defenses of usury, champerty, and unconscionability.

A. The First Concern: Usury Law

The traditional elements of usury include: (1) a loan or forbearance of

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recourse. Either Ponzi scheme is worthy of the master himself. *See generally* Cunningham v. Brown, 265 U.S. 1, 7–10 (1924) (describing Charles Ponzi's pyramid scheme); *see also* Robert Grafton, *Tax Implications of Fraudulent Investment and Earning Scams: Ponzi and Others*, 27 AM. BUS. L.J. 599, 601 (1990) (describing Charles Ponzi's 1920 pyramid scheme in which he borrowed from Peter to pay Paul). In the first instance, the reassignment of an LLA eliminates entirely the risk of non-payment. In the second example, the injured party sells a future interest he no longer owns. Both schemes leave the last investor holding a valueless claim.

money (either express or implied); (2) made with the understanding that the principal will be returned, along with an exaction from the borrower of greater compensation than the amount allowed by law; (3) with the intent to violate or evade the law.[109] Historically, usury was a matter of common law; however, the legal lending interest rate is typically a matter of state statutory law.[110] Prior to the enactment of usury statutes across the United States, drafters of the *Restatement (First) of Contracts* realized that deals could be creatively structured to evade usury laws. Section 529, entitled "Usurious Bargain In Fact Though Not In Form," recognizes the need for flexibility and provides:

> Where the intent of a party to a bargain is to make a loan of money or an extension of the maturity of a pecuniary debt for a greater profit than is allowed by law, the agreement is illegal though the transaction is put in whole or in part in the form of a sale, a contract to sell or other contract.[111]

Thus, section 529 reflects the need for flexible legal standards to cope with usurious deals.

Few state courts have expressly addressed whether LLAs are invalid due to state usury statutes. However, both New York and Michigan courts adopted a flexible definition of usury to invalidate LLAs. This flexible definition permits courts to examine the true nature of the LLA to determine whether the transaction is a loan for purposes of the usury statute, rather than accepting the LFC's attempt to distinguish the transaction because the repayment obligation is contingent. A New York trial court in *Echeverria v. Estate of Lindner*[112] raised, sua sponte, the issue of the validity of an LLA between the plaintiff and LawCash, an LFC and party to the February 17, 2005 Stipulation with the New York Attorney General's Office.[113] The LLA under scrutiny was executed on November 25, 2003.[114] While litigation was pending, LawCash advanced $25,000 to cover plaintiff's surgery expenses.[115] In an action reviewing the validity of

109. *See generally* Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 397–98 (3d Cir. 2000) (ruling that NTF did not fulfill all the requirements necessary to apply usury law); Janis K. Cheezem, *Equity Financing Under Florida Law*, 38 U. MIAMI L. REV. 711, 719 (1984) (discussing the elements of usury under Florida law).

110. 47 C.J.S. *Interest & Usury* § 145 (2005).

111. RESTATEMENT (FIRST) OF CONTRACTS § 529 (1932).

112. Echeverria v. Estate of Lindner, No. 018666/2002, 2005 WL 1083704, at *1 (N.Y. Super. Ct. Mar. 2, 2005).

113. *See infra* notes 167–72 and accompanying text.

114. *Echeverria*, 2005 WL 1083704, at *12.

115. *Id.* at *2.

the LLA—which provided that interest accrued at the rate of 3.85% per month compounded monthly, until the balance was repaid—the court held that the LLA presented serious public policy concerns: (1) LLAs undermine public policy favoring settlement; (2) there was no risk assumed by LawCash because the injury was subject to New York's strict liability labor law; and (3) the interest rate was clearly usurious.[116] The court held that LawCash was lending money at usurious rates and that it was

> ludicrous to consider this transaction anything else but a loan unless the court was to consider it legalized gambling. Is it a gamble to loan/invest money to a plaintiff in a Labor Law action where there is strict liability? I think not. In fact, it might be considered a "sure thing." . . . Thus, it is not a gamble, but a "sure thing," therefore, it is a loan, not an investment with great risk. If it is a loan, then the interest rate charged is usurious and the court could vitiate the agreement.[117]

Inherent in the court's analysis is its application of a four-prong usury test requiring: (1) a loan; (2) that is repayable; (3) at a usurious rate; and (4) evidence of the lender's intent to "gorge upon the fruits of litigation."[118]

Given the numerous legal and policy concerns associated with the LLA, the court invalidated it.[119] The court rewrote the parties' agreement and ruled that the LFC, LawCash, was entitled to prejudgment interest at the rate of 16% annually from the date of execution of the agreement.[120] Finally, the New York court questioned the overall utility of such businesses, and called for further examination of the LLA industry to determine "whether this type of business practice is more of a benefit or detriment to society as a whole."[121]

Likewise, the Michigan Court of Appeals, in *Lawsuit Financial, LLC v. Curry*, characterized an LLA as a loan and invalidated it as usurious,

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116. *Id.* at *2,*7–*8. The negative impact of LLAs on settlement parameters is pervasive. In a recent Tennessee court decision, the plaintiff's attorney sued to recover additional attorney's fees and argued that the court-approved settlement was too little to permit him to repay $186,452 under an LLA in consideration for an advance of $97,726 to pay litigation costs and still be paid adequately for his legal services. Shoughrue v. St. Mary's Med. Ctr., Inc., 152 S.W.3d 577, 587 (Tenn. Ct. App. 2004).

117. *Echeverria*, 2005 WL 1083704, at *8.

118. *Id*. (quoting Rancman v. Interim Settlement Funding Corp., 99 Ohio St. 3d 121, 125 (Ohio 2003)). The court relies upon the Ohio court's characterization of the LFCs as predators to justify its decision.

119. *Id.*

120. *Id.* at *12. The court substituted this provision, rather than enforcing the agreed-upon interest rate of 3.85% compounded monthly, amounting to an annual interest rate approaching 50% on the $25,000 cash advance. *Id.* at *1.

121. *Id.* at *8.

despite the contingency language within the agreement.[122] In *Curry*, the lender advanced $177,500 on the condition that, when she recovered, the borrower would owe the loan company $887,500 or 10% of the proceeds from the lawsuit, whichever was greater.[123] At the time the LLA was signed, the plaintiff/borrower had won a verdict of $27 million, which the defendant appealed.[124] When the attorney settled the case for $4,570,000, the lender demanded payment of $887,500.[125] The law firm refused to disburse, and the lender sued for breach of contract and conversion.[126] Because the money was advanced pursuant to agreements that were reached after the defendants had admitted liability, the court held that the advances were usurious loans and were therefore unenforceable.[127] The *Curry* LLA was signed after the borrower had received a favorable jury verdict of $27 million, but before determination of the motion to reduce the exemplary damages.[128] Thus, the court characterized Curry's recovery as a certainty, despite its executory nature.[129]

Both the New York and Michigan courts characterized LLAs as usurious, applied the traditional criteria, and invalidated the LLAs. The first element of usury requires evidence of an express or implied loan.[130] While, admittedly, the definition of loan requires that the loan be "repayable absolutely,"[131] litigation advances granted by LFCs assume minimal risk when LFCs employ stringent lending parameters,[132] such as extending credit only in cases of strict liability or admitted wrongdoing. All lenders who provide unsecured loans accept some risk of non-payment. Although creating the illusion of heightened risk taking, LFCs arguably enjoy greater security of repayment from personal injury proceeds than do

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122. Lawsuit Fin. v. Curry, 683 N.W.2d 233, 240 (Mich. Ct. App. 2004).

123. *Id.* at 236.

124. *Id.* at 237.

125. *Id.* at 236.

126. *Id.*

127. *Id.* at 239–40.

128. *Id.* at 237.

129. *Id.* at 239.

130. Cheezem, *supra* note 109, at 719.

131. *See generally* 45 AM. JUR. 2D *Interest and Usury* § 132 (1999) ("To constitute usury it is essential that the sum loaned be repayable absolutely . . . . [I]t is also held that the mere contracting for usurious interest is in violation of the usury statutes, even though no interest is actually collected, implying that it is the obligation and not *the payment which satisfies the requirement*.") (emphasis added).

132. *See* Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 348 (2004) (explaining that lenders consider multiple risk factors depending on the type of case, allowing "investors . . . to guarantee the litigant who borrows that if he or she does not prevail at trial, his or her obligations to repay the advance will cease and the obligation to repay will be nullified.").

traditional lenders providing unsecured loans based only on credit history and income information. Thus, all lenders factor in the risk of non-payment in setting interest rates governed by maximum interest rates determined by state law. Both the New York and Michigan courts expressly rejected the argument that LLAs escape usury laws because of the contingent nature of repayment, and the courts applied state usury law to the LLAs at issue. Both the *Echeverria* and *Curry* courts deemed the risk of non-payment negligible, thus ruling that the first two elements of usury, a loan repayable as a matter of law, were satisfied.

Likewise, the third element of usury, an excessive interest rate, was also present according to both courts.[133] Although a matter of state law, annual interest rates in excess of 3.85% per month compounded monthly in the *Echeverria* case and annual interest rates of 200%–370% in the *Curry* case were clearly excessive under applicable law.[134] With respect to the final element, corrupt intent, the very structure of the agreement—charging interest at rates far exceeding the legal rate coupled with a negligible risk of non-payment—demonstrated a corrupt intent.[135] Given the realities surrounding some LLAs, there is no legal justification for exempting them all from state usury law.[136]

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133. Cheezem, *supra* note 109, at 719; *Lawsuit Fin.*, 683 N.W.2d at 240; *Echeverria*, 2005 WL 1083704, at *1.

134. *See also* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005) *aff'd*, 931 So. 2d 899 (Fla. 2006). In the *Fausone* case, the interest was in excess of 200% of the principal advanced to the client. *Id.* This amount clearly exceeds the legal annual lending interest rate of 18% under Florida law, which would have permitted a profit of approximately $13,500. FLA. STAT. ANN. § 687.02 (2003). The $13,500 figure is calculated as follows: 18% of $30,000 equals $5,400, multiplied by 2.5 years (or 30 months).

135. Cheezem, *supra* note 109, at 719–20 (asserting that corrupt intent is based upon the surrounding circumstances, including consideration of unequal bargaining position). By characterizing the repayment terms as conditional, yet exacting repayment in an amount double the value of the funds advanced, USClaims revealed its corrupt intent through its conduct, thus satisfying the third prong of the usury test.

136. Strict interpretation of state usury law creates inequity. For example, the Florida pawn shop industry evades usury regulation by structuring the deal as a buy-sell agreement. The shop charges a buy-back fee that is calculated by adding 25% to the money paid for the pawn. This interest rate exceeds the legal usury rate of 18%; however, the industry escapes the net cast by Florida usury law because the transaction is not defined as a loan. *See* Jarret C. Oeltjen, *Florida Pawnbroking: An Industry in Transition*, 23 FLA. ST. U. L. REV. 995, 1023–24 (1996). Likewise, payday lenders also craft transactions to avoid state usury laws by structuring them as sale-leasebacks, cash-back-advertising sales, or as catalogue-sales arrangements. Marjorie Wengert, *Cause of Action Against Payday Loan Creditors for Violating Disclosure Requirements of the Federal Truth in Lending Act*, *in* 26 CAUSES OF ACTION 2ND 409, 417 (Clark Kimball ed., 2004). *See also* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 4, 18–21 (2002). The payday loan industry creates legal and ethical questions that are similar to those raised by LLAs. *See* GA. CODE ANN. § 16-17-1 (2007) (regulating payday lending). This statute designates Georgia law as controlling and designates the forum as "the court of competent jurisdiction in the county in which the borrower resides

B. The Second Concern: Champerty Law

Another challenge to the validity of LLAs is embodied in the common-law doctrine of champerty[137] and in the *Restatement (First) of Contracts* section 547.[138] This subpart of the Article is divided into three separate sub-subparts. The first analyzes the cases in which courts have invalidated LLAs based on champerty. The second examines the application of precepts of fairness and reasonableness when jurisdictions reject the doctrine of champerty as antiquated. The final sub-subpart examines the general contract prohibition against assignment of personal injury claims as a bar to LLAs.

1. The Policies Underlying Champerty Protect Litigants and the Legal System

Champerty and maintenance are doctrines of medieval English origin arising out of the feudal system, designed to protect litigants from "officious intermeddling" and profiteering from the sale of legal claims to third parties.[139] As previously noted, the elements of champerty are: (1) a party undertakes; (2) to further another's interest in a suit; (3) in exchange for a part of any favorable litigation result.[140]

In many states, the common-law actions of maintenance and champerty have been superseded by the statutory claims of malicious prosecution and abuse of process.[141] The rules deter speculation in litigation and protect defendants from frivolous law suits.[142] While the common-law cause of action of champerty may be unavailable to those harmed by LLAs, both the borrower and his or her attorney may proceed according to the malicious prosecution statutes or on the theory of tortious interference with contract.

In *Rancman v. Interim Funding Settlement Corp.*, the Ohio Supreme Court allowed the use of champerty as a defense to invalidate an LLA. The

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or the loan office is located." *Id.* Additionally, the statute states that such loans are "having an unreasonable impact upon the elderly, the economically disadvantaged," and that "certain payday lenders have attempted to use forum selection clauses contained in payday loan documents to avoid the courts of the State of Georgia, and . . . such practices are unconscionable and should be prohibited." *Id.*

137. *See* Hananel & Staubitz, *supra* note 52, at 797–98 (discussing the doctrines of champerty and maintenance).

138. *See* RESTATEMENT (FIRST) OF CONTRACTS § 547 (1932) (discussing assignment of personal injury claims).

139. Moliterno, *supra* note 43, at 232; Hananel & Staubitz, *supra* note 52, at 797.

140. Martin, *supra* note 41, at 58.

141. *See* Moliterno, *supra* note 43, at 232–33 (discussing the development of "litigation controls").

142. *Id.*

court held that the transaction was an illegal loan in violation of Ohio maintenance and champerty law.[143] Ms. Rancman was hit by a car.[144] During the pendency of her personal injury case, she entered into an agreement with Interim Settlement Funding Corp. (Interim) to borrow a total of $6,000, repayable in increasing amounts of $16,800 if repaid within one year, $22,200 if repaid within 18 months, and $27,600 if repaid within 24 months.[145] If the suit was not resolved in Rancman's favor, she owed nothing.[146] Rancman borrowed an additional $1,000 secured by the next $2,800 she expected to collect from her suit.[147] She settled for $100,000 within 12 months and refused to pay the amounts owed.[148] Instead she offered to repay the $7,000 she had borrowed at 8% interest per annum.[149] Interim rejected the offer, and Rancman filed an action "seeking rescission of the contracts and a declaratory judgment that the defendant's practices were unfair, deceptive, and unconscionable."[150]

The *Rancman* trial court invalidated the agreements, not on the basis pled, but on the basis of champerty law.[151] The court identified two policy objections to the litigation-funding agreement. First, it could "prolong litigation and reduce settlement incentives" when the claimant must pay a premium to the funding company.[152] Second, the speculation in lawsuits by the funding company is expressly prohibited under Ohio law because "[a]n intermeddler is not permitted to gorge upon the fruits of litigation."[153] Thus, the agreements were void and unenforceable. In *Rancman*, the appellate courts affirmed the trial court's decision to invalidate the LLAs.[154]

Seven years earlier, in 2001, a North Carolina appeals court ruled that an assignment of a litigant's interest in a personal tort claim was void against public policy because it promoted champerty.[155] If such assignments take place, notwithstanding the state prohibition, attorneys representing the injured plaintiff face serious ethical challenges. The severity of such conflicts faced by an attorney seeking to zealously represent a client within the bounds of ethical practice is starkly illustrated

143. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003).
144. *Id.* at 218.
145. *Id.* at 218–19.
146. *Id.* at 219.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* (internal quotation omitted).
151. *Id.* at 221.
152. *Id.*
153. *Id.*
154. *Id.*
155. Horton v. New South Ins. Co., 468 S.E.2d 856, 858 (N.C. Ct. App. 1996).

in *Weaver, Bennett & Bland v. Speedy Bucks, Inc.*, where a plaintiff law firm survived summary judgment to continue its suit against the LFCs, Speedy Bucks and Future Settlement Funding.[156] The law firm's suit claimed tortious interference with contract, asserting that the litigation-funding companies secretly and wrongfully advanced $200,000 to the firm's client, thus making it impossible for the firm to settle the lawsuit for less than $1,200,000 in order to repay the minimum litigation-funding debt of $600,000 after the collection of the 50% contingency fee.[157] The Federal District Court denied the defendant's motion to dismiss because the plaintiff law firm satisfied its initial evidentiary pleading burden under North Carolina law. The plaintiff law firm alleged that the defendant, Speedy Bucks, intentionally induced the plaintiff law firm's client not to perform the obligations arising out of her attorney–client contractual relationship, as evidenced by her refusal to accept the settlement offer, in contravention of her attorney's advice.[158] Thus, through no fault of its own, the law firm absorbed the financial costs of trying and losing a case that should have settled but did not because of the officious intermeddling of the LFC. The firm's attempt to recover some or all of its losses remained alive in federal court. Ultimately, the judge and jury awarded damages totaling $521,225 to the law firm.[159]

This victory demonstrates how LLAs interfere with pending litigation and poison the attorney–client relationship. In *Weaver*, the LLA interfered with the attorney's ability to settle the case, thus forcing a trial. Conversely, an LLA might also encourage the client to accept an early settlement offer, against attorney advice, in order to staunch the daily interest costs due to the LFC upon settlement. Either result interferes with the attorney's ability to zealously represent the client.

2. Antiquated Champerty Rules Transformed into Principles of Reasonableness and Fairness

Even when courts reject as antiquated the defense of champerty to invalidate assignments related to litigation proceeds, they have substituted fairness considerations to review the deals. For example, the South Carolina Supreme Court abolished the champerty defense and adopted a

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156. Weaver, Bennett & Bland v. Speedy Bucks, Inc., 162 F. Supp. 2d 448, 450 (W.D.N.C. 2001).

157. *Id.* at 451–52.

158. *Id.* at 452.

159. Gary Young, *No Advance to the Rear: Litigation Financiers Have Been Hurt by Ohio, North Carolina Rulings, But the Industry Shows No Sign of Disappearing*, 78 MIAMI DAILY BUS. REV. 8, 10 (2003).

fairness test directing courts to consider the bargaining power of the parties to the contract, the degree of understanding of the parties, the degree of financial need of the borrowing party, whether the return on the funds advanced was disproportionate, and "whether the financier engaged in officious intermeddling."[160]

Three years earlier, the Massachusetts Supreme Court also abrogated the common-law doctrines of champerty, barratry, and maintenance.[161] The court replaced them by adopting a fairness and reasonableness test to analyze lawsuit financing agreements.[162] According to the court, the relevant considerations include the reasonableness of the agreement under the circumstances and the relative bargaining positions of the parties.[163] The matter was remanded to the trial court to determine whether Saladini's claim for repayment of the $19,229 advanced plus half of the net remaining recovery, leaving the plaintiff with only $35,000 of the $130,000 recovery, was reasonable.[164] The *Saladini* loan differed from the LLAs examined in this Article because the funds were advanced by an individual, not a business entity.[165] Additionally, the advance permitted the plaintiff to pursue a potential property interest in real estate, rather than a personal injury claim.[166] Despite the absence of the hallmarks of an LLA—unequal bargaining power, a usurious interest rate, and looming personal financial collapse—the *Saladini* court embraced a reasonableness test in place of the outdated concepts of champerty, barratry, and maintenance.

3. Section 547 of the *Restatement (First) of Contracts* Reflects Champerty Policies

The common-law doctrine of champerty, which underlies the common-law contract principle prohibiting assignment of personal injury claims, renders LLAs unenforceable. The *Restatement (First) of Contracts* section 547 is entitled, "When An Assignment Of A Claim Or Bargain To Assign It Is Illegal" and provides: "An assignment of a claim against a third person or a bargain to assign such a claim is illegal and ineffective if the claim is for . . . damages for an injury the gist of which is to the person rather than to

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160. Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 277–78 (S.C. 2000) (citing Saladini v. Righellis, 687 N.E.2d 1224, 1227 (Mass. 1997)).

161. Saladini v. Righellis, 687 N.E.2d 1224, 1224 (Mass. 1997).

162. *Id.* at 1227.

163. *Id.*

164. *Id.* at 1225, 1227–28.

165. *Id.* at 1224.

166. *Id.*

property, unless the claim has been reduced to judgment."[167]

Careful examination of the policy underlying the non-assignability of personal injury claims is warranted. Recovery in dollars is measured by the proven degree of harm. To the extent that the injured party's share of the proceeds from settlement or judgment is reduced, so arguably is the litigant's incentive to participate fully in the fact-finding process. Our tort system is based upon individual rights of personhood. If this relationship is strained to the breaking point, the entire system will collapse. Thus, freedom-of-contract arguments do not account for the elimination of the personhood policies supporting our tort system. This would be less of a concern if our government provided a strong social services net to provide income, housing, and medical care to the needy; however, this is not the current model. Therefore, the *Restatement (First)* section 547 reflects policy condemning the trafficking in human pain and suffering.

C. The Third Concern: Unconscionability

The contract defense of unconscionability provides another basis upon which to challenge the validity of LLA agreements. Unconscionable agreements shock the conscience and are so one-sided as to render them unenforceable.[168] Precepts of unconscionability are matters of state law reflecting general fairness concerns. This subpart explores precepts of fairness in relation to LLAs, using Florida law as a lens.

Under Florida law, an agreement may be set aside only if the petitioner can demonstrate both procedural and substantive unconscionability.[169] Florida courts have historically exercised their equitable power to invalidate a contract when

> one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce[.] . . . [A] court of equity will not hesitate to interfere, even though the victimized parties owe their

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167. RESTATEMENT (FIRST) OF CONTRACTS § 547 (1932).

168. *See* Robert Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1063 (2005) (explaining the components of procedural and substantive unconscionability).

169. Powertel, Inc. v. Bexley, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999). Evidence of unequal bargaining power and disparate familiarity with the law establishes procedural unconscionability. *Id.* Substantive unconscionability can be demonstrated by terms requiring a party to waive legal rights, remedies, and protections such as participating in a class action, seeking injunctive relief, seeking declaratory relief, and seeking punitive damages. *Id.* at 576. Such circumstances and provisions are arguably illegal attempts to evade consumer protection law.

predicament largely to their own stupidity and carelessness."[170]

LLAs are often the product of overreaching LFCs and careless customers. The court recognized the potential presence of unconscionability factors in the *Fausone* case and observed: "The purchase agreement in this case is one-sided and designed to prevent a Florida citizen from having access to a local court or another local dispute resolution forum."[171] Without expressly ruling LLAs to be unconscionable, the *Fausone* court focused in detail on the circumstances creating unequal bargaining positions,[172] the one-sided nature of the LLAs, and the high profit reaped by USClaims.[173] Seemingly, the court identified and dismissed yet another legal basis upon which to remand the case to the trial court for further review.[174]

One Florida court set aside an arbitration clause unilaterally inserted into the contracts of an LFC's existing customers.[175] The contract was procedurally unconscionable because it was a contract of adhesion characterized as a "standardized contract form offered to consumers of goods and services on essentially [a] take it or leave it basis."[176] The arbitration clause was deemed substantively unconscionable because the clause deprived the petitioner of relief equivalent to that available in court.[177] Thus, the mandatory arbitration clause was deemed unenforceable

170. Peacock Hotel, Inc. v. Shipman, 138 So. 44, 46 (Fla. 1931).

171. Although often undefined at common law and highly fact specific, the general factors demonstrating unconscionability are present: disparate bargaining power, financial duress, and draconian substantive contract provisions. *See* Oakley, *supra* note 168, at 1063 (describing the elements of procedural and substantive unconscionability).

172. In contrast, when a sophisticated business entity contracts with an LFC to stave off bankruptcy and to continue litigation, the concerns of unequal bargaining power and overreaching are alleviated. *See* Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 91, 94, 105 (Tex. App. 2006) (affirming the trial court's decision to enforce Anglo-Dutch's duty to adhere to the LLA and pay Law Funds $2,556,105.51, pursuant to the terms of the LLA, where LFC advanced $560,000, and Anglo-Dutch recovered $81,000,000).

173. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. Dist. Ct. App. 2005), *aff'd*, 931 So. 2d 899 (Fla. 2006).

174. Florida courts enforce choice-of-law provisions in contracts so long as doing so does not violate its fundamental public policy. Mazzoni Farms, Inc. v. E.I. DuPont de Memours and Co., 761 So. 2d 306, 311 (Fla. 2000). Jurisdictions disagree about the validity of choice-of-law provisions contained in LLAs. In one federal case, the court invalidated a choice-of-law provision that would have permitted the enforceability of an LLA in violation of Maryland barratry law. Accrued Fin. Serv., Inc. v. Prime Retail, Inc., 298 F.3d 291, 297, 300 (4th Cir. 2002). *But see* Martin, *supra* note 10, at 100 ("Courts have held that 'usury laws are not so distinctive a part of a forum's public policy that a court, for public policy reasons, will not look to another jurisdiction's law which is sufficiently connected with a contract and will uphold the contract.'") (citation omitted).

175. Powertel, Inc. v. Bexley, 743 So. 2d 570, 574, 577 (Fla. Dist. Ct. App. 1999).

176. *Id.* at 574 (citation and internal quotation marks omitted).

177. *Id.* at 576.

because it was both procedurally and substantively unconscionable.[178]

Not only can mandatory arbitration clauses violate Florida law in matters related to lending, but because the unconscionability challenge was coupled with a usury claim, the trial court was required to determine the usury question *before* enforcing the mandatory arbitration clause.[179] The Florida law, controlling at the time Ms. Fausone executed the assignment and litigated its enforceability, provided that the usury question cannot be determined by an arbitrator, and an arbitrator cannot require an individual to comply with an illegal agreement.[180]

Nevertheless, on February 21, 2006, the United States Supreme Court ruled, in *Buckeye Check Cashing, Inc. v. Cardegna*, that when parties challenge the legality of an agreement containing a mandatory arbitration provision under the Federal Arbitration Act, the arbitrator determines issues of validity and enforceability because the Act preempts state law.[181] Under the new rule, state courts may exercise limited jurisdiction to hear challenges related directly to the validity of the arbitration provision itself, but do not have jurisdiction to determine the overall legality of the agreement in general.[182] Assuming that the Federal Arbitration Act applies to the *Fausone* LLA, Ms. Fausone is, nevertheless, entitled to have all questions related to the LLAs determined by the law controlling at the time she executed them.[183]

Arguably, under Florida law existing at the time of execution, Ms. Fausone was entitled to have her challenge to the validity of the LLAs, including the mandatory arbitration clauses, determined by a Florida court, applying Florida law, before the LLAs became procedurally ripe for arbitration.[184] Thus, the Florida Second District Court of Appeals could

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178. *Id.* at 577. *But see* Tropical Ford, Inc. v. Major, 882 So. 2d 476, 479 (Fla. Dist. Ct. App. 2004) (enforcing an arbitration clause absent evidence of procedural unconscionability).

179. FastFunding the Company, Inc. v. Betts, 758 So. 2d 1143, 1144 (Fla. Dist. Ct. App. 2000) (invalidating a mandatory arbitration clause with no mention of the Federal Arbitration Act).

180. *Id.*

181. Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1208–10 (2006). The Court enforced the mandatory arbitration clause and required parties to submit questions of legality of the underlying contract to the arbitrator for resolution. While the resolution of this issue, if applied to all pending cases, arguably forecloses the argument that Ms. Fausone is entitled to have a Florida court determine the validity of the contract, she is entitled, at a minimum, to have all of her legal defenses determined by the arbitrator.

182. *Id.* at 1209.

183. *See, e.g.*, State v. City of Coral Gables, 72 So. 2d 48, 49 (Fla. 1954) ("[T]he law in force at the time the contract is made forms part of the contract . . . ."); Southern Crane Rentals, Inc. v. City of Gainesville, 429 So. 2d 771, 773 (Fla. Dist. Ct. App. 1983) ("The laws which exist at the time and place of the making of a contract enter into and become a part of the contract made, as if they were expressly referred to and incorporated in its terms . . . .").

184. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 629 (Fla. Dist. Ct. App. 2005), *aff'd*, 931 So.

have remanded and directed the trial court to decide the validity of the mandatory arbitration clause and her usury claim. It failed to do so.[185] Even *Cardegna* permits courts to decide a limited and express challenge to the validity of a mandatory arbitration clause.[186] At a very minimum, under *Cardegna*, Ms. Fausone is entitled to participate fully in the arbitration.[187] Thus, the *Fausone* facts support claims of illegality, disparate bargaining power, overreaching, and absence of full financial disclosure: all substantive claims shielded from judicial review by the mandatory arbitration provision, a non-negotiable term of the deal.

In summary, LLAs present weighty legal concerns related to usury, champerty, and unconscionability. Typified by illegal and usurious interest rates, the insertion of a disinterested third party into the attorney–client relationship arising out of personal injury litigation and the overreaching provisions typically included in LLAs, such as foreign choice-of-law and forum provisions, demand regulation. Because judicial review and application of traditional contract precepts are evaded by mandatory arbitration provisions, legislators need to pass laws prohibiting, or at least regulating, LLAs in relationship to personal injury claims to combat the ills of usury, champerty, and unconscionability.

IV. OUTRUNNING THE CHOCK-A-BLOCK CONFLICTS OF CHARYBDIS: CLIENT CONFIDENTIALITY, LOYALTY, AND ECONOMIC INDEPENDENCE

The advance of living expenses by attorneys to needy clients is prohibited under the Model Rules of Professional Conduct.[188] Some state courts attempted to create limited judicial exceptions, which were not embodied in later revisions of ethics codes.[189] Ethics experts remain hostile to the concept of attorneys advancing living expenses.[190] This ethical prohibition, without viable commercial loan options, has created a demand for third-party funding. The demand has been satisfied by the unregulated LFC industry, creating another set of ethical challenges for lawyers and their impecunious clients.

2d 899 (Fla. 2006).

185. *Id*. at 630.

186. *Cardegna*, 126 S. Ct. at 1209.

187. *See id*. (holding that any challenges should be considered by the arbitrator).

188. *See* Moliterno, *supra* note 43, at 223 (citing Model Rule 1.8(i) in support of the proposition that "[b]lack letter lawyer ethics law prohibits lawyers from acquiring an interest in the subject of litigation").

189. *See id.* at 233–34 (discussing cases where courts condoned the practice of lawyers advancing money to clients to pay living and medical expenses).

190. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (e) (2006) (stating that, with some exceptions, attorneys are not permitted to provide financial assistance to clients).

In fact, while lawyers are bound by strict rules of ethics designed to protect their clients' legal and financial interests, LFCs are bound by no legal standards, much less ethical rules. Thus, LFCs engage in conduct that would result in disbarment of an attorney. In fact, it seems the LFC industry is a result of Darwinian evolution, fashioning itself to provide the specific financial aid attorneys are prohibited from providing: day-to-day living expenses. Consider the niche created by the rules of ethics and the striking fit of the LFC industry into this precise niche.

First, compare the similarities between LFCs and attorneys working on a contingent fee: both depend upon a percentage share of personal injury proceeds to remain in business; both are third parties with an interest in the outcome of personal injury litigation. Now, contrast the differences: attorneys must fully explain the contingent fee arrangement to the client, and the arrangement must be knowingly approved. Additionally, it must be objectively fair and reasonable in relation to the services provided. LFCs face no similar constraints. Profit need not be itemized and knowingly approved by the client. Moreover, there is no independent objective overview of the profit garnered. There is no additional service rendered in exchange for an interest rate prohibited by usury law. Finally, attorneys are bound by strict rules related to advertising and client-getting. The attorney may not personally solicit clients by promising financial assistance during litigation, whereas LFCs target impoverished plaintiffs awaiting personal injury awards with the lure of quick cash.[191] For example, one LFC went so far as to send $50 bills, along with LFC information, to the families who lost loved ones in the plane crashes associated with 9/11.[192]

LFCs seemingly studied the rules of ethics governing lawyers and engaged in the precise conduct identified as unprofessional and improper by state bar authorities. In addition to targeting tort victims to make a profit, the LFCs create ethical conflicts between attorneys and clients by requiring attorneys to release confidential information to third parties, acknowledging a duty to pay over settlement proceeds and asking attorneys to choose between a duty of loyalty owed to clients and a duty of fair dealing owed to third parties, notwithstanding the legal and ethical challenges embodied in LLAs.

Although the ABA Ethics Committee has not issued any opinion to guide attorneys with respect to the ethics of LLAs, the state bar associations of numerous jurisdictions have issued opinions to guide attorneys through

191. *Id.*

192. Plaintiff's Response to Defendants' Motions for Summary Judgment, Plaintiff's Motion for Partial Summary Judgment at *8, Weaver, Bennett & Bland v. Speedy Bucks, Inc., 162 F. Supp. 2d 448, No. 1:00CV249-C (W.D.N.C. 2001), 2002 WL 32730050.

the vexing ethical issues raised by LLAs. For example, Michigan Ethics Opinion RI-321 involved the review of a litigation advance agreement from a venture capital company. The agreement required the plaintiff's counsel to cooperate and sign an assignment which created "a conflict of interest by significantly interfering with the lawyer's relationship with the clients, with the lawyer's ability to advise the clients, with the clients' control of the litigation, with the clients' power and right to terminate the lawyer and/or to settle or abandon the claims."[193] The Michigan Standing Committee on Professional and Judicial Ethics further observed that these conflicts were so severe that they could not be cured by client waiver or consent.[194] The Michigan ethics opinion arguably prepared the way for the Michigan courts to invalidate LLAs.[195]

Even if ethically permissible, a study of the existing advisory opinion underscores the inherent threats LLAs pose to the attorney–client relationship and the malpractice traps these agreements present. For example, some state bar ethics committees, including those of Connecticut, New York, and Pennsylvania, have approved LLAs under express and limited conditions.[196] In an attempt to clarify that the attorney's primary duty of loyalty is owed to the client, the Utah State Bar Advisory Opinion Committee issued an opinion indicating that attorneys must determine whether a third party asserting an interest in proceeds from a personal interest award has a mature legal or equitable claim.[197] Such a claim would be sufficient to trigger the notice, release, and accounting duties.[198] The court recognized that if the client asserts a good faith basis to dispute the third-party claim, the attorney must protect the funds until the dispute is resolved.[199] Likewise, other jurisdictions have provided similar ethical

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193. Mich. Comm. on Prof'l and Judicial Ethics, Op. RI-321, 2000 WL 33716933 (2000).

194. *Id.*

195. *See id.* (discussing the difficulty of resolving conflicts).

196. *See* Hudson, *supra* note 9, at 2 (citing Pa. Bar Ass'n, Formal Op. Regarding Litigation-Related Financing, No. 2005-100 (2005) and describing the opinion as stating that while no prohibition exists, attorney must explain the transaction, the risk of disclosure of protected information, avoid conflicts, disclose those that are unavoidable, and obtain waiver); N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 769, at *2–*3, 2003 WL 23099781 (2003) (permitting the attorney to negotiate an agreement on behalf of the client with a litigation funding company so long as such agreements are determined to be legal under New York law and so long as the attorney discloses potential conflicts of interest, discloses threats to the attorney–client privilege, and establishes the terms of the attorney–client relationship in negotiating the LLA); Conn. Bar Ass'n, Informal Op. 99–42, 1999 WL 33115192 (1999) (finding no ethical bar to advising the client regarding litigation advance agreement but highlighting the fiduciary responsibility owed by the attorney to the client and the obligation to determine the legality of the transaction under state and federal law).

197. Utah State Bar Ethics Advisory Op. Comm., Op 00-04, at *1, 2000 WL 815564 (2000).

198. *Id.*

199. *Id.* This opinion was perhaps a response to attorney confusion like that exhibited by one

advice to attorneys caught between client and third-party disputes over the disposition of tort recovery proceeds. In Alaska, when a client instructs an attorney to disregard the terms of an assignment, the attorney is obligated to deposit the funds with the court for disposition by a judge.[200] Conflicts associated with LLAs fall into three general categories: (1) client confidentiality; (2) client loyalty; and (3) financial independence. Each will be addressed below.

A. Duty of Client Confidentiality

LLAs raise serious questions relating to the duty of client confidentiality. Model Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to representation of a client unless the client gives informed consent."[201] Under this rule, disclosure of confidential information is permitted only if the client gives informed consent. In order to obtain informed consent, the lawyer must advise the client concerning the wisdom of executing the LLA. The lawyer must explain the consequences of disclosure to a third party, including the potential waiver of attorney–client privilege regarding information disclosed to an LFC, a waiver that would render formerly-privileged information discoverable and potentially admissible at trial.[202] If the client chooses to execute the agreement in contravention of the lawyer's advice, disclosure of otherwise confidential information is mandated, and the lawyer–client relationship is strained by the introduction of a third party with an economic interest in prolonging litigation to increase the third party's profit. A final concern is raised if the LFC expects to participate in case management decisions.[203] When an attorney makes any representations regarding the likelihood of recovery to an LFC, the attorney arguably creates a reliance interest

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attorney who released personal injury proceeds to a client despite a third party claim to the proceeds based upon an assignment. *See* Achrem v. Expressway Plaza Ltd., 917 P.2d 447, 448 (Nev. 1996) (holding that the attorney violated contract law by releasing all settlement funds to the client over the express objection of the assignee).

200. Alaska Bar Ass'n Ethics Comm., Op. 92-3, 1992 WL 809155 (1992).

201. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

202. N.C. State Bar, Formal Op. 4, 2001 WL 473974 (2001).

> A lawyer may disclose confidential client information, such as an opinion as to the value of a claim, with a client's consent. Rule 1.6(d)(2). However, given the potential risk that disclosure to a third party, such as Finance Company, may waive the client-lawyer privilege with regard to the information, Attorney should counsel Plaintiff about the potential risk in order that the client's consent to disclosure will be informed.

Id. at *3.

203. *See id.* at *1 (stating that an attorney may cooperate with a finance company provided that the financing agreement does not give the finance company control over the litigation).

between the attorney and the LFC, further complicating the relationship between LFC, client, and attorney.

B. Duty of Client Loyalty

LLAs threaten to undermine the duty of loyalty owed to a client by creating a contractual relationship with a third party, potentially creating a conflict of interest between the duty of loyalty the attorney owes to the client and the duty of fair dealing the attorney owes to third parties. Model Rule 1.7(a) states:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[204]

When LFCs require attorneys to sign LLAs, a contractual duty to a third party is created, thus potentially creating a conflict between the duty owed to the client and the duty owed to the third party.[205] This conflict undermines the attorney's duty to maintain independent professional judgment in cases in which attorneys sign acknowledgments, successfully conclude the case, and are instructed by the client not to release the assigned funds to the LFC. Additionally, the client may infer that signing the agreement is in his or her best interest because the lawyer referred the client to the LLA provider.

Some advisory opinions attempt to eliminate pressure on the attorney's duty of confidentiality without prohibiting LLAs.[206] For example, the Florida advisory opinion expressly prohibits attorneys from signing acknowledgements. This may be the strongest deterrent to LFCs who can

204. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2006).

205. *See* Fla. State Bar Ass'n, Advisory Op. 00-3, at *2, 2002 WL 463991 (2002) (citing a Florida Supreme Court decision that held that allowing attorney involvement in litigation funding "will result in inevitable conflicts of interest among lawyer, client, and lending institution").

206. *See id.* at *6 ("The attorney may not . . . provide a letter of protection to the funding company signed by the attorney.").

choose to do business with plaintiffs represented by counsel in states where executing acknowledgments is not unethical. Other state advisory boards require attorneys to expressly reserve the right to reevaluate the legality and propriety of an acknowledgment under the circumstances existing when payment is requested by the LFC.[207]

C. Duty to Maintain Financial Independence

LLAs create confusion concerning the party who actually owns the claim, who controls the lawsuit, and how to resolve a conflict between a client's directive, an LFC's economic expectations, and an attorney's assessment of a client's best interests. For example, it is possible that the amount owed to the LFC, comprised of the amount advanced plus the accrued interest, may make it practically impossible for the attorney to settle the case, thus forcing the uncertainties associated with trial.[208] One advisory opinion expressly required attorneys to maintain independence from LFCs in case management decisions[209] but did little to protect the attorney–client privilege related to confidential information disclosed to the LFC during the application process. Nor did it provide guidance to attorneys who believe the LLA is not in the best interests of the client.

Not only does the acknowledgement potentially create a conflict of interest between the duty of loyalty owed to a client and the duty of fair dealing owed to third parties, but financial conflicts of interest can arise if attorneys own a financial interest in or receive a referral fee from the LFCs they deal with. Under Model Rule of Professional Conduct 1.8(e), only two exceptions exist to the prohibition that attorneys shall not provide financial assistance to clients:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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207. N.C. State Bar, Formal Op. 4, at *2, 2001 WL 473974 (2002).

> A lawyer must exercise independent professional judgment on behalf of the client. See Rule 1.7 and comment. If Attorney's ability to represent Plaintiff will be compromised by the extent of Finance Company's interest in the outcome of the case, Attorney should not participate in the arrangement and he should counsel the client on the risks to the representation. Attorney must also preserve the right to re-examine the legality and enforceability of the assignment.

Id.

208. *See, e.g.*, Weaver, Bennett & Bland v. Speedy Bucks, Inc., 162 F. Supp. 2d. 448, 451 (W.D. N.C. 2001) (noting that the client's unwillingness to settle was due to the undisclosed agreement concerning litigation funding).

209. Fla. State Bar Ass'n, Advisory Op. 00-3 (2002), 2002 WL 463991.

> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client . . . .
>
> (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client . . . .[210]

One scholar traces the rule that attorneys may not provide financial assistance to a client in connection with pending litigation to the power exercised by the civil defense bar.[211] Lawyers representing defendants in civil litigation advanced an agenda favoring corporations and opposing economic aid that might postpone settlement and increase litigation costs.[212] Additionally, while the rules expressly permit attorneys to enter contingent fee agreements, attorneys may not acquire any additional financial interest in a client's claim.[213] One advisory opinion expressly prohibits the attorney from acquiring a financial interest in the finance company.[214] Presumably this refers to the LFC doing business with the attorney's client. It leaves open the attorney's right to invest in LFCs or make compensated referrals of non-clients, so long as the attorney's clients are not among those doing business with the LFC.[215] Thus, whether

210. MODEL RULES OF PROF'L CONDUCT R. 1.8(e), (i) (2006).

211. *See* Moliterno, *supra* note 43, at 226.

212. *See id.* at 230 (stating that the bar's early opposition to contingency fees came from members who represented wealthy clients likely to be sued).

213. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2006).

214. *See* N.C. State Bar, Formal Op. 4, at *3, 2001 WL 473974 (2001) (stating that an attorney may refer a client to a finance company only where the "arrangement is legal, [and] Attorney receives no consideration from Finance Company for making the referral").

215. When referrals to litigation support firms are made, irrespective of referral fees, an aura of impropriety follows. A recent article in the Wall Street Journal bearing the headline "Boies Office Sent Clients to 3rd Firm With Family Ties" reported that the firm referred two large companies, Tyco and Adelphi, to LSAG, an expert witness and research company, and to Amici, a document management firm. Between 2001 and 2002, LSAG's revenues grew from $800,000 to $17 million. In making the referral, the firm failed to disclose that Mr. Boies's children owned shares in a holding company that benefited from LSAG's increased profits. Adelphia, now in bankruptcy, is seeking the return of more than $20 million in fees paid to Boies, along with the $7 million it paid to Amici, hired based upon the Boies firm's recommendation. Adelphia seeks the return of funds because the Boies firm failed to disclose that Amici was partly owned by the Boies children. Though perhaps legal, the financial gain to Boies family members through legal referrals of substantial value and the failure to disclose the family ties has angered clients and caused litigation. Robert Frank & Nathan Koppel, *Boies Office Sent Clients to 3rd Firm With Family Ties*, WALL ST. J., Oct. 11, 2005, at C1. Similar profits through referral relationships are inherent in LLAs.

attorneys may invest in LFCs or make compensated referrals of non-clients to LFCs without violating the advisory opinion remain open questions. Clearly, direct pecuniary profit from the LLA executed by a client is impermissible under the North Carolina advisory opinion.[216]

The separation of the LFC industry from the legal community is particularly important because the attorney representing the client in a personal injury case, in all probability, has accepted representation on a contingent fee basis. Thus, any additional profit through an LLA would arguably conflict with the fee agreement and the fiduciary relationship between the client and the attorney. In fact, contingent fee agreements have been characterized as partial assignments.[217] Thus, attorneys should be particularly careful to avoid financial investment in LFCs. This is because LFCs pose a serious threat to the attorney–client relationship and present a serious threat to the public's perception of the independence of the legal profession from profiteering from the client's injury.

V. UNCHARTED TERRITORY: LEGISLATION AND STIPULATIONS PROVIDE BREECHES BUOYS

Thus far, only six states, Ohio, Michigan, New York, Massachusetts, North Carolina, and South Carolina, have relied upon common law or state usury law to invalidate LLAs.[218] New York is poised to debate the appropriate role of LFCs. This Part examines the New York structured settlement statute[219] and the New York Attorney General's attempt to regulate LFCs absent legislation.[220]

The New York legislature responded to the threat posed to plaintiffs by the unregulated speculation in litigation proceeds following settlement.[221] It passed a Structured Settlement Protection Act (SSPA) to oversee an industry of "factoring" in which lenders advanced sharply discounted cash advances to an injury victim in exchange for the victim's future stream of

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216. N.C. State Bar, Formal Op. 4, at *3, 2001 WL 473974 (2001).

217. Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 640–41 (1995) ("Assignment of part of an action is a risk-sharing device where part of the potential award from a lawsuit is exchanged for money or services. Such a partial assignment of course occurs when a lawyer charges a contingent fee, and this assignment is permitted despite the prohibition on many other assignments of tort claims and despite the fact that a lawyer is prohibited from otherwise acquiring an interest in the subject matter of her litigation.").

218. *See supra* notes 80–133 and accompanying text.

219. N.Y. GEN. OBLIG. LAW § 5-1706(b) (McKinney 2007).

220. *See supra* notes 166–71 and accompanying text.

221. This legislation does not apply to LLAs prior to initial judgment or settlement, but only to jury verdicts subject to appeal or final settlements, situations in which the risk assumed by the lender is even further reduced. N.Y. GEN. OBLIG. LAW § 5-1706 (McKinney 2007).

payments arising out of a litigation structured settlement.[222] Like LLAs, factoring resulted in inequity because the injured parties could receive far less than the present value of the future stream of payments, in some cases as little as one-third of the amount owed to them.[223] To curb the abuse, in 2002, the New York Legislature passed a statute requiring independent court approval of a "buy-out" based upon a judicial determination that the transfer is in the best interests of the payee and that "the discount rate used to determine the gross advance amount" is "fair and reasonable."[224] In *In re Settlement Funding of New York*, the court denied a petition to approve a transfer of the payee's right to receive future payments in the aggregate amount of $60,000 in exchange for a net advance of $14,000 because it was not in the payee's best interests, nor were the terms of the transfer fair and reasonable.[225]

On February 17, 2005, nine LFCs doing business in New York executed an Assurance of Discontinuance Pursuant to Executive Law §63(15) ("Stipulation") to address a variety of concerns raised by the New York Attorney General.[226] The Stipulation describes the companies as "in the business of providing cash advance[s]" to consumers in exchange for a subsequent payment "significantly in excess" of the amount advanced, paid from the proceeds recovered from the consumer's personal injury claim.[227] As of the date of the Stipulation, the attorney general stated the LFCs had "entered into thousands of [LLAs] with New York consumers."[228] The Stipulation further identified and addressed a variety of concerns about LLAs. The signatories to the Stipulation agreed: (1) to provide a large print disclosure page stating "the total amount to be advanced to the consumer;" (2) to itemize "one-time fees"; (3) to provide an annualized percentage statement of return and the frequency of compounding; (4) to provide a 36-month forecast of the total repayment schedule; (5) to inform the consumer

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222. *See In re* Petition of Settlement Funding of N.Y., LLC, 2003 N.Y. Misc. LEXIS 1693, at *1 (N.Y. Sup. Ct. Dec. 30, 2003) ("New York . . . enact[ed the] . . . SSPA in response to abuses of a practice known as 'factoring,' in which finance companies . . . purchase an injury victim's future payments with sharply-discounted cash advances.").

223. *See id.* at *1–2 (noting cases that describe factoring abuse).

224. *Id.* at *2 (*citing* N.Y. GEN. OBLIG. LAW § 5-1706(b) (McKinney 2007)).

225. *Id.* at *4–*5.

226. Am. Legal Fin. Ass'n, ALFA Agreement, http://www.americanlegalfin.com/alfasite2/documents/ALFAAgreementWithAttorneyGeneral.pdf. In addition to the New York State Attorney General, signatories to the Stipulation included Plaintiff Support Services, Pre-Settlement Finance, QuickCash, Magnolia Funding, BridgeFunds Limited, Plaintiff Funding Corp. d/b/a/ LawCash, Oasis Legal Finance, The Whitehaven Group, and New Amsterdam Capital Partners. *Id.*

227. *Id.* at 2.

228. *Id.* at 2–3.

of the right to have an independent attorney review the agreement on the consumer's behalf; and (6) to warn the consumer, in writing, not to sign the agreement if it has any blank terms in it.[229] Additionally, the agreement must have an attorney certification verifying that the consumer's lawyer explained the LLA to the consumer, "including the annual[] rate of return."[230] Finally, the Stipulation expressly provided that LLAs may not "require mandatory arbitration" to resolve any dispute.[231]

The Stipulation addresses issues related to voluntariness by insuring adequate disclosure; however, the Stipulation does not address concerns relating to usury or ethical conflicts. The voluntary execution of the Stipulation by the ALFA member LFCs may forestall, but should not replace, legislation to protect the consumer. One New York court has questioned the utility of the Stipulation because it provides implicit state approval of LLAs, a decision that should be made by the legislature, not the attorney general.[232] Thus, New York is poised to debate and legislate the role of LLAs in relationship to personal injury claims.

VI. CHARTING A SAFE COURSE: FOLLOW THE POLESTAR OF FAIRNESS

Legislative action is necessary, given the public interest in maintaining the legitimacy of the legal justice system, implementing cost savings, promoting settlement, and affording to individuals fair hearings. According to the U.S. Department of Justice, expenditures to operate the justice system in the United States "increased from almost $36 billion in 1982 to over $185 billion in 2003, an increase of 418%."[233] The per capita expenditure ranged from a low of $147 per person in Nevada, to a high of $621 in Alaska, with a national average of $228.[234] Given the cost of operating the civil justice system, promoting settlement makes sense. LLAs have a potentially dilatory impact upon settlement by forcing litigation, they also impact the public risk by forcing plaintiffs to rely prematurely upon social welfare because damages designed to replace lost wages are diverted to

229. *Id.* at 4–5.

230. *Id.* at 5.

231. *Id.* at 6. The provision in the Stipulation prohibiting mandatory arbitration highlights the New York Attorney General's concerns regarding the fairness of such provisions. Ms. Fausone has asked the Florida Supreme Court to consider the validity of the mandatory arbitration provision contained in the LLAs she signed. *See* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627 (Fla. Dist. Ct. App. 2005), *aff'd*, 931 So. 2d 899 (Fla. 2006).

232. Echeverria v. Estate of Marvin L. Lindner, No. 018666, 2005 WL 1083704, at *8 (N.Y. Sup. Mar. 2, 2005).

233. KRISTEN A. HUGHES, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 (2006), *available at* http:www.ojp.usdoj.gov/bjs/pub/pdf/jeeus03.pdf.

234. *Id.* at 5.

LFCs. Ultimately, the plaintiffs could be forced into bankruptcy when they run out of cash. The costs of administering our civil justice system are steep, thus creating a public interest favoring settlement of civil claims. Given the legal and ethical quagmires associated with LLAs and LFCs, regulation is needed to protect consumer litigants. Additionally, lawyers need guidance from rules of ethics, similar to those accompanying contingent fee agreements.[235] This Part outlines possible legislative and ethical rules to address the inequities related to LLAs.

A. Legislatures Should Regulate the LLA Industry in Order to Bar Profiteering

Legislation is needed to prohibit LLAs associated with personal injury claims to protect litigants from further victimization "by loan companies charging interest rates that are higher than the risks associated with the transaction" when the loans are secured "by high-grade personal injury claims."[236] Nothing short of prohibition of LLAs in tort cases can cure the ills associated with these deals. The passage of time without legislative response has created an epidemic of major proportions with LFCs engaging in unregulated lending to vulnerable plaintiffs with personal injury claims. This crisis requires legislation prohibiting third-party loans secured by potential personal injury proceeds.

Absolute prohibition is justified, given the recent United States Supreme Court decision broadly interpreting the arbitrator's authority to determine the validity of contracts without regard to the public policy concerns of the jurisdiction in which the agreements were executed and where the plaintiffs lived.[237] Thus, consumer litigants are deprived of the protections afforded by state courts. The *Buckeye* decision undermines the Tenth Amendment, which expressly protects the states' retention of all powers not expressly delegated to the federal government. In addition to the federal and state court systems, *Buckeye* creates a third legal system comprised of claims subject to mandatory arbitration. In so doing, the United States Supreme Court effectively eliminated the role of state courts in applying principles of usury and unconscionability to govern business conducted within state borders. The *Buckeye* decision, relying on principles of preemption, arguably invades state sovereignty and demands specific

235. *See generally* FLA. STAT. ANN. BAR RULE 4-1.5 (2006).

236. *Fausone*, 915 So. 2d at 630.

237. *See* Buckeye Check Cashing, Inc. v. Cardegna, 26 S. Ct. 1204, 1204, 1209 (2006) (holding that a challenge to the validity of a contract containing an arbitration clause should "be considered by an arbitrator, not a court").

LLA legislation.

B. Short of Prohibition

Another legislative response is to render all assignments related to speculation in litigation proceeds subject to one rule: the assignee may recover the amount paid to purchase the interest in the litigation, along with interest subject to the statutory usury rate.[238] For example, Delaware's usury rate is tied to the federal discount rate.[239]

If these straightforward approaches lack sufficient finesse, a model act has already been proposed by Yifat Shaltiel and John Cofresi in the form of the "Litigation Lending and Personal Needs Act" (LLPNA).[240] The LLPNA is not comprehensive; however, it "creates some contours and boundaries" for courts to flexibly develop law.[241]

Arguably, LLAs create economic threats to the plaintiff's recovery of proceeds that are even more severe than those created by contingent fee agreements, which are subject to strict legal and ethical oversight due to the fiduciary relationship between the client and the attorney.[242] Any statutory reform permitting LLAs should address the legal concerns of usury, champerty, and procedural and substantive unconscionability, informed by existing law and scholarship. Usury concerns could be addressed by expressly providing that LLAs be subject to the same usury interest rates applicable to consumer loans within the jurisdiction and prohibiting the application of any other law to control the legality of the profit from LLAs.

There is a need to further the public policy interests of champerty and to prevent officious intermeddling and frivolous law suits. In order to accomplish both of these interests, legislation should require that a valid LLA exist following execution of the agreement, when communication

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238. *See* P.R. LAWS ANN. tit. 31, § 3950 (1991) ("When litigated credit is sold, the debtor shall have the right to extinguish the same by reimbursing the assignee for the price the latter paid for it, the judicial costs incurred by him, and the interest on the price from the day on which the same was paid."); *see also* Consejo de Titulares del Condominio Orquídeas A, B, and C v. Urban Renewal and Housing Corporation, 132 P.R. Dec. 707 (P.R. 1993) (enforcing § 3950 to avoid speculation in pain and suffering claims). Such a statute could set the maximum profit based on a percentage of the funds advanced not to exceed the legal usury rate of the state in which the agreement is executed.

239. Delaware usury law permits an annual interest rate of no more than 5% over the federal discount rate. DEL. CODE ANN. tit. 6, § 2301(a) (2005).

240. Shaltiel & Cofresi, *supra* note 132, at 349. Shaltiel and Cofresi favor requiring the litigation loan industry to "level the playing field between the vulnerable consumer and the usually well-heeled defendant." *Id.*

241. *Id.* at 356.

242. *See* Brickman, *supra* note 44, at 44–54 (discussing the legal and ethical limits on contingent fee arrangements).

between the LFC, the claimant, and the claimant's attorney ceases. This enables the attorney and client to make all decisions relating to the litigation after consultation, thus insulating the attorney–client relationship from third-party intrusion.

In order to guard against procedural unconscionability, the consumer's ability to prosecute and defend actions arising out of the LLA in a convenient forum should be protected. Thus, the forum should be defined as the domicile of the consumer at the time the litigation is commenced. Additionally, given the disparate bargaining power of the economically secure lender and the needy borrower, there should be a cooling-off period during which the consumer can abrogate the agreement without consequence. Only after this waiting period should the money be advanced. Finally, mandatory arbitration clauses shield LLAs from review by state courts, subject to public policy concerns unique to each state. Thus they should be prohibited.

In order to guard against substantive unconscionability, the terms specifying the degree of risk and the degree of profit to the LFC must be clearly articulated. One way to do this is to require the LFC to reveal the risk analysis it employed in agreeing to advance funds and in determining the amount of profit upon settlement, judgment, or verdict. One formula would require the LFC to identify the percentage likelihood of prevailing at trial and a range of anticipated recovery, and the impact of delay upon the repayment terms. This risk analysis should accompany a clear explanation of how passage of time affects the amount owed. For example, the amount owed could increase with the degree of risk assumed up to the maximum rate of return allowed under the applicable usury rates. Additionally, the LFC could be required to itemize the amount of money advanced to the consumer, the one-time fees (including any referral fees charged for the service), the rate of return on an annualized basis, and the total amount owed to the LFC by the consumer in six-month intervals should the consumer prevail.[243]

The impact of LLAs on the settlement process is uncertain. Arguably, defendants pay inflated settlement amounts because plaintiffs no longer experience the financial pressure to settle early in the litigation process. Alternatively, the settlement amount could be characterized as a fair result based on a more level economic playing field. Society ultimately bears the social-welfare costs associated with successful, yet cash-poor, litigants whose settlement proceeds line the pockets of venture capitalists. The

243. This formula is based upon that devised by the New York Attorney General's Office, as set forth in the Stipulation. *See supra* Part IV.

concern is heightened when the LLA relates to personal injury claims, suggesting a market in the pain and suffering of others. When damages include compensation for lost future wages, a concern arises that the remaining proceeds will not sufficiently compensate an individual who can never regain economic independence. This creates a financial burden on the public and undermines one of the policy pillars upholding the tort recovery system—the need for individuals and entities to compensate the injured when liability exists.

After paying attorney's fees and the amount required under an LLA, a real threat arises that the remaining proceeds will be insufficient to meet the day-to-day living expenses of the injured plaintiff, the evidence upon which the tort action and damages award was purportedly based. The added financial constraints created by LLAs also interfere with the settlement process by increasing the minimum dollar amount for which the plaintiff can approve a settlement, given the competing claims to the same damages pie.

Finally, the amount of the funds to be repaid should be capped at no more than 25% of the overall recovery.[244] This would protect the injured party who may have to pay a portion of court costs, has to pay all of the litigation costs, has to pay the attorney, and must satisfy the LLA. This would also preserve a portion of the recovery for its intended purpose, which is to compensate the injured party.

In summary, it is time for legislators to draft, debate, and pass legislation prohibiting LLAs or at least regulating them to redress issues related to usury, champerty, and unconscionability to protect the client-consumer and maintain the legitimacy of the justice system.

C. Ethics Organizations Should Revise the Rules of Professional Conduct to Expressly Limit the Lawyer's Role in LLAs

In addition to legislative reform, the *Fausone* case highlights the need for express ethical rules to guide lawyers and judges as they navigate the channel between the client's right to contract and the numerous ethical concerns created by LLAs. Given the ethics opinions of Michigan, North Carolina, and Florida, there is a clear need for attorneys to study and propose appropriate ethical rules that would provide clear guidance regarding the best way to insulate the attorney–client relationship from the

244. *See* Marcushamer, *supra* note 18, at 1545–46. This may in fact be impossible to achieve given the current research indication that the plaintiff in a tort system receives only 20% of the "total system cost." The remaining 80% covers transactional costs in a tort system that costs approximately $180 billion to operate on an annual basis. *Id.*

potential taint associated with LLAs.

1. Prohibition

The attorney's duty to protect client confidentiality is threatened by both the degree of disclosure required and the degree of control over settlement that is lost. Client confidentiality can best be preserved by controlling the circumstances surrounding the LFC's review of confidential client communications and work product and by conditioning release of the privileged information on the attorney–client shield.[245]

LLAs also threaten the duty of client loyalty when attorneys are required to execute assignments, thus creating a potential conflict of interest between the duty owed to the client and the duty owed to the third party. Any dispute between an LFC and a customer related to litigation proceeds should be resolved by a court. The proceeds in dispute should be escrowed pending resolution of the conflict. Under no circumstances should a lawyer be required to release funds to an LFC over the client's objection. Thus, no contractual relationship between an LFC and the consumer's attorney should be permitted. Additionally, decisions related to strategy, parameters of settlement, and when to abandon litigation should remain entirely within the control of the lawyer and client.[246] Thus, there should be no continued contact between a client and an LFC or the attorney and an LFC.[247]

Finally, LLAs can create ethical concerns related to an attorney's duty to maintain financial independence from a client. It is vital to protect from erosion the express and detailed rules developed by the ethics organizations of each state. Thus, lawyers should be prohibited from investing in LFCs, referring clients to family-owned LFCs, or receiving referral fees from LFCs. In this way, the LFC industry is segregated as a consumer-lending business, and the law of loans remains separate from the ethics of lawyering.

2. Bar Association Funding

Given the numerous conflicts created between the lawyer and client by

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245. *See* Shaltiel & Cofresi, *supra* note 132, at 352–55 (describing how the LLPNA protects sensitive information by extending the attorney–client privilege to the lender).

246. *See id.* at 354 (explaining that section 4 of the LLPNA limits communication between lenders and consumers, while also prohibiting consumers' attorneys from referring clients to specific lenders in order to limit lenders' influence in the litigation).

247. *Id.*; *see also* Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1331–32 (2002) (the "purchaser of a judgment" should not interfere with the case in which it holds a stake).

LFCs, one alternative may be to permit day-to-day living expense advances within the parameters of the ethical rules for attorneys. Thus, such advances would be permissible so long as they do not: (1) create a conflict of interest; (2) stir up litigation; or (3) violate client-getting rules.[248] This regime permits LLAs within the ethical guidelines of the practice of law. This is arguably preferable to the current regime of unregulated third-parties.

These goals can be achieved through state bar association action. Ethics boards should explore the possibility of establishing a litigation-funding account for plaintiffs asserting personal injury claims to advance day-to-day living expenses.[249] The fund could be created and maintained via mandatory contributions from personal injury awards resulting from litigation or settlement. A percentage of every award could be contributed to the fund, thus creating a lending pool that is free from the taint of profiteering. For any claimant unable to meet living expenses during the pendency of a claim, a loan at a competitive interest rate could be made available based upon need on a non-profit basis, which is administered through the state bar associations.[250] Like LLAs, the advances would be repayable only if the plaintiff recovers.

Bar associations should act expeditiously to address the proposed revisions and consider any additional rules needed to protect clients and attorneys in relation to LLAs.

CONCLUSION

In closing, issues related to one LLA present perils as numerous as those Odysseus encountered on his return journey to his home and his wife Penelope. It is only prudent for lawyers to pause, research, reflect, and seek guidance regarding LLAs. One alternative is to outlaw LLAs. However, if we do so, have we prevented an economically vulnerable class from pursuing and collecting personal injury compensation? The question remains: Scylla or Charybdis? When Odysseus charted his course, he followed Circe's advice and avoided the sure doom of the monster Charybdis, who swallowed great gulps of the sea and all its contents,

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248. Moliterno, *supra* note 43, at 243–55.

249. For example, the New Jersey Bar Association assessed a fee from all practicing attorneys in the state to assist doctors in paying for medical malpractice insurance. *See* N.J. Bar Ass'n v. State, 902 A.2d 944, 954 (N.J. Super. Ct. App. Div. 2006) (holding that a New Jersey law assessing the state's practicing attorneys a $75 annual fee for a medical malpractice insurance fund to ease the burden of rising insurance premiums on the state's doctors is constitutional).

250. *See* Martin, *supra* note 41, at 79 (describing a Hong Kong legal aid fund that supports litigants with meritorious claims through a contingency system).

creating a whirlpool and spouting great waves that touched the sky.[251] Odysseus chose instead to brave Scylla, a six-headed monster.[252] Sailing through the Strait of Messina, between Italy and Sicily, six men fewer, Odysseus continued his homeward journey.[253]

State legislatures and bar associations face a similar Odyssean task: how to avoid the sure doom of prohibiting monetary living expense advances to injured plaintiffs, without falling victim to the legal threats of usury, champerty, and unconscionability, and the ethical threat posed to client confidentiality, loyalty, and economic independence. This challenge can be successfully met by making litigation funding available to needy litigants, at a fair interest rate, through honest lenders, while protecting the trust, confidence, and financial professionalism embodied in the attorney–client relationship. This result may best be achieved through a compromise, adopting legislation to eliminate profiteering by LFCs, thus eliminating usury, champerty, and unconscionability concerns. Additionally, ethics organizations should amend the applicable rules of ethics to prohibit direct or indirect attorney profit from litigation loan providers, protect attorney–client confidences, eliminate threats to the duty of client loyalty, and create a bar-sponsored lending program, available to personal injury claimants and administered on the basis of economic need.

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251. HOMER, *supra* note 3, at 274–75 ("One terrible trial they had while passing between the smooth, sheer rock of Scylla and the whirlpool of Charybdis, where the sea forever spouted and roared and the furious waves mounting up touched the very sky.").

252. *Id.* at 278.

253. *Id.* at 278–79, 285.