# REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING

**Submitted by the Ethics Committee of the**
**Commercial and Federal Litigation Section**
**Of the New York State Bar Association**
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Third-party litigation financing ("TPLF") describes the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement.[1] TPLF is not entirely new to the United States. In fact, certain forms have been in practice since the 1980s.[2] On the consumer side, the cash advance industry has offered pre-settlement funding agreements that loan relatively small amounts of money to personal injury victims while their lawsuits are pending.[3] In another form of TPLF, the syndicated lawsuit, plaintiffs directly solicit individual lenders to invest in claims and share proportionately in the recovery.[4] In both of these forms of TPLF, the plaintiff need only pay back the loan[5] if the lawsuit succeeds.[6]

However, recently, the United States has witnessed the growth of a new breed of TPLF. Large scale litigation finance entities have developed to provide financing in exchange for a share of a corporate plaintiff's potential recovery.[7] Whereas the previously mentioned cash advance industry makes loans of a few thousand dollars in exchange for a share of recoveries that tend to reach only in the thousands of dollars, the large litigation finance lenders that have recently developed regularly loan several millions of dollars in exchange for shares of recoveries that can be in the million to billion dollar range.[8]

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[1] Beisner, John et al., *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States*, U.S. Chamber of Commerce Institute for Legal Reform, Oct. 2009, http:// legaltimes.typepad.com/files/thirdpartylitigationfinancing.pdf (last visited Feb. 26, 2013) at 1.

[2] Shepherd, Joanna M., *Ideal versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593 (Spring 2012).

[3] *Id.*

[4] *Id.*

[5] We note that some courts and commentators have questioned whether TPLF is a form of "loan" or "lending" or even a form of debt. *See O'Farrell v. Martin*, 161 Misc. 353, 354 (N.Y. City Ct. 1936); *Matter of Lynx Strategies, LLC v. Ferreira*, 28 Misc. 3d 1205(A) (N.Y. Sup. Ct. 2010); *Grossman & Flanagan, LLP v. Quick Cash, Inc.*, 35 Misc. 3d 1205(A) (N.Y. Sup Ct. 2012).

[6] Shepherd, *supra* note 2 at *594*.

[7] *Id.*

[8] *Id.*

This latter type of TPLF is in its infancy in the United States.[9] On the one hand, economic markets are driving its expansion, while, on the other, prohibitive, and in many cases, seemingly outdated authority bars its usage in some states.[10] As of 2012, six corporations invested in commercial lawsuits in the United States.[11] Of these six corporations, only two publicly traded corporations existed primarily to invest in American commercial litigation.[12] Of the remaining four corporations, ARCA Capital, Calunius Capital, Juris Capital and IMF Ltd., three are private companies that provide little information about their investments.[13] Several other large institutions have recently formed litigation funding divisions to invest in commercial lawsuits as well.[14]

While the goal of smaller scale TPLF is often thought to be the improvement of access to justice for financially constrained or risk-averse plaintiffs, the sole goal of large corporate TPLF companies is to maximize the returns on their investments in a given litigation.[15] As a result, many of the cases financed by corporate TPLF investors are not the types of cases where financing could improve access to justice for vulnerable plaintiffs.[16]

Recently, the American Bar Association ("ABA") and several state bar associations have reconsidered the ethical ramifications of TPLF as a result of this novel corporate TPLF scheme.[17] Of particular note in New York is the New York City Bar Association's ("NYCBA") 2011-2 formal opinion which highlighted the key concerns that New York City attorneys should have

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[9] Maya Steinitz, *Whose Claim is This Anyway, Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1270 (2011)
[10] *Id.* at 1271
[11] Shepherd, *supra* note 2 at 594.
[12] *Id.* These corporations were Juridica Investments and Burford Capital. *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 595.
[16] *Id.*
[17] *See American Bar Association Commission on Ethics 20/20*, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf (last visited Feb. 27, 2013); *See*, *e.g*., Ky. Bar Ass'n Ethics Comm., Formal Op. E-432 (2011); Michigan Opinion 321 (2000); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 769 (2003);

when it comes to TPLF.[18] The NYCBA opinion takes the view that although "[i]t is not unethical per se for a lawyer to advise on or be involved with such arrangements," the NYCBA cautions against five potential pitfalls.[19] These pitfalls include (i) the potential illegality of the TPLF arrangement; (ii) issues with the attorney failing as an advisor; (iii) possible conflicts of interest; (iv) failure to obtain a waiver of privilege; and (v) losing control over the proceeding.[20]

Similar to the sentiment expressed in the NYCBA opinion, many state court decisions and state bar advisory opinions have condoned litigation financing, so long as the attorney representing the client fulfills certain disclosure requirements. For example, a Florida State Bar opinion concludes that a lawyer may provide a client with information about litigation finance companies if the lawyer believes it to be in the client's best interest.[21] State bar ethics opinions from at least five states, including Connecticut, New Jersey, Pennsylvania, Missouri and Maryland, provide that if the lawyer does advise a client to seek litigation financing, the lawyer should also warn the client about the potential loss of attorney-client privilege when making disclosures to financing companies.[22]

Furthermore, some states have enacted legislation that specifically regulates TPLF and corporate TPLF companies. For example, Maine requires that litigation finance companies register with the state and include specific funding provisions in their agreements with clients.[23] Similarly, Ohio recently enacted a law that expressly requires all TPLF contracts to state that the

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[18] *Formal Opinion 2011-2: Third Party Litigation Financing*, http://www.nycbar.org/index.php/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02 (last visited Feb. 27, 2013).
[19] *Id.*
[20] *Id.*
[21] *See* Benfield, Brianna, et. al, *Third-Party Financing of Commercial Litigation*, http://www.weil.com/files/Publication/17c770d9-514d-426d-aa1f bbc4c7547c0c/Presentation/PublicationAttachment/cacabd85-1ea5-46ac-8657-40ffd9eac8be/IHL_2010_ThirdPartyFinance.pdf (last visited Feb. 24, 2013) (citing Florida State Bar Opinion 00-3 (2000)).
[22] *Id.* (citing New Jersey Opinion 691 (2001), Connecticut Opinion 99-2 (1999) and Pennsylvania Opinion 99-8 (2000)).
[23] *Id.*(citing Maine 9-A M.R.S.A. § 12-106).

investor "shall have no right to and will not make any decision with respect to the conduct of the underlying civil action or claim or any settlement or resolution thereof."[24] Texas state Rep. Senfronia Thompson, D-Houston, also recently proposed setting up a regulatory scheme in Texas to allow companies or individuals with no stake in litigation to take a share of potential proceeds in exchange for an upfront payment.[25]

As previously stated however, not all states and other authorities have embraced TPLF. For example, a Michigan state bar opinion found a proposed TPLF agreement unethical where the agreement placed several restrictions on the lawyer's ability to manage the litigation and the litigation's financing.[26] Additionally, the U.S. Chamber of Commerce's Institute for Legal Reform ("ILR") recently expressed discontent with the possibility of TPLF, particularly large scale corporate TPLF, becoming an unregulated mainstay in the U.S. litigation landscape. Specifically, it recommended that commercial litigation finance be subjected to federal regulation under the Federal Trade Commission, similar to the regulation of the securities markets by the Securities and Exchange Commission.[27] It even stated that "lawmakers and regulators should consider prohibiting third party funding in the United States. At the very least, third-party funding should be banned in the context of aggregate litigation."[28]

As this opening discussion highlights, the views and laws are varied as to whether TPLF, particularly corporate TPLF, is something that all U.S. jurisdictions should adopt. While in New York there has been discussion as to what course of action to take, there has not been a significant amount of guidance as to how New York litigators should proceed when faced with

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[24] *Id.*(citing Ohio R.C. § 1349.55).
[25] Jess Davis, *3rd-Party Litigation Funding Regs Proposed In Texas*, Law360.com, (Feb. 14, 2013).
[26] *Id.*(citing Michigan Opinion 321 (2000)).
[27] *Buying Trouble Third-Party Litigation Funding in the United States*, *supra* note 1 at 12.
[28] *Id.*

TPLF.[29] Accordingly, we highlight the key issues that TPLF presents, and survey what other jurisdictions and ethics bodies have done in order to inform the TPLF dialogue in New York legal circles. This report highlights the principal legal and ethical issues that attorneys face when dealing with TPLF, and discusses the ways in which other jurisdictions have responded to these issues.

The ethical issues implicated by TPLF appear to fall into one of five categories, each of which we report on below: Section I addresses the relationship between TPLF and conflicts of interest. Section II discusses TPLF and issues of privilege and confidentiality. Section III discusses a party's and/or an attorney's potential to lose control over the legal proceeding. Section IV considers TPLF issues arising from the doctrines of Champerty and Maintenance. Finally, Section V analyzes the potential TPLF problem of fee-sharing with non-attorneys.

## ***I. CONFLICTS OF INTEREST***

According to the Chamber of Commerce's ILR, obtaining funds from a third party to finance a case may create conflicts of interest for the attorney, particularly the attorney's duty of loyalty owed to the client.[30] This, it is argued, is especially true where in the commercial litigation context TPLF agreements are often entered into directly with the attorney or law firm rather than with plaintiff and thus, the attorney or law firm has contractual duties to the corporate TPLF supplier that are independent of the attorney's professional duties to the plaintiff.[31]

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[29] Two cases which explicitly discuss the ethical duties of attorneys whose clients engage in TPLF are *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994) and *Francis v. Mirman, Markowitz & Landau, P.C., et. al.*, No. 29993/2010 (Sup. Ct., Kings, 2012). In *Leon*, the Court of Appeals held that a lawyer may have a duty to their client's third-party lienholders who are assigned portions of the client's proceeds in exchange for something of value. In *Francis*, a supreme court held that a law firm owed no duty to their client to advise them on a third-party investment transaction.

[30] *Buying Trouble Third-Party Litigation Funding in the United States*, *supra* note 1 at 8.

[31] *Id.* at 8.

As the ABA points out, however, ethics rules adopted by most, if not all, U.S. jurisdictions restricting a lawyer's professional conduct, help allay the foregoing concerns.[32]

As noted above, various state ethics opinions have also considered the conflicts issue of whether a lawyer may provide information to clients about the availability of TPLF, or refer clients to TPLF suppliers.[33] Ultimately, many of the state bar ethics opinions permitting referrals to TPLF suppliers include qualifications, reflecting other ethical obligations owed by lawyers to their clients. The ABA notes that typical limitations in these state advisory opinions include (i) lawyers may not disclose confidential information to a TPLF supplier without the client's informed consent; (ii) lawyers should warn clients about the risk of waiver of the attorney-client privilege (often as part of obtaining informed consent to disclose confidential information); (iii) lawyers may not have an ownership interest in the TPLF supplier to which the client is referred; and (iv) lawyers may not receive referral fees or otherwise benefit financially as a result of referring the client to the TPLF supplier.[34] The ABA also points out that some opinions include the provision that the lawyer must be satisfied that the funding arrangement is in the client's best

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[32] *See Third-Party Financing of Commercial Litigation, supra* note 21 at 6 (citing Model Rules of Professional Conduct 5.4(c), 2.1, 1.8(f), and 16).

[33] *See e.g.*, Florida State Bar Opinion 00-3 (2000); New Jersey Opinion 691 (2001); Connecticut Opinion 99-2 (1999); Pennsylvania Opinion 99-8 (2000).

[34] *See American Bar Association Commission on Ethics 20/20*, *supra* note 17 at 27 (citing Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 2003-15 (2003); Md. State Bar Ethics Comm., Advisory Op. 00-45 (2000); Conn. State Bar Comm. on Prof'l Ethics, Informal Op. 99-42 (1999); Md. State Bar Ethics Comm., Advisory Op. 92-25 (1991); N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Advisory Op. 691 (2001); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2011-02 (2011); Phila. Bar Ass'n Prof'l Guidance Comm., Advisory Op. 99-8 (2000); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 769 (2003); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 666 (1994); Md. State Bar Ethics Comm., Advisory Op. 94-45 (1994); N.J. Supreme Court Advisory Comm. on Prof'l Ethics, Advisory Op. 691 (2001); N.Y.C. Bar Ass'n Comm. on Prof'l and Judicial Ethics, Formal Op. 2011-02 (2011); Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Advisory Op. 2002-2 (2002)).

interests.[35] There are also ethics opinions that warn lawyers to avoid interference with their own professional judgment as a result of involvement in a TPLF transaction.[36]

## ***II. PRIVILEGE AND CONFIDENTIALITY***

Another important issue that often arises when dealing with TPLF is the potential loss of attorney-client privilege and work product protection. As part of their underwriting process, TPLF investors often require the lawyer to release client information.[37] Such information is clearly relevant to the decision of the TPLF supplier of whether to finance a litigation, especially when the TPLF supplier is a large corporation whose sole reason for investing in the litigation is to obtain a return on the litigation investment. Such disclosures, however, also clearly involve potential waivers of confidentiality and privilege that require the client's consent.[38]

Courts generally have taken a strict approach to privilege waivers, finding that any voluntary disclosure of private communications with a non-privileged party will waive the privilege.[39] Thus, in most jurisdictions, sharing of otherwise privileged communications with a TPLF company may very well be deemed a voluntary disclosure that may affect a waiver of the attorney-client privilege.[40]

The consequences of sharing privileged documents with potential TPLF investors were demonstrated in the recent case of *Leader Technologies, Inc. v. Facebook, Inc.*[41] In this case, Leader filed a lawsuit against Facebook for patent infringement.[42] Prior to filing the lawsuit,

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[35] *See American Bar Association Commission on Ethics 20/20*, *supra* note 17 at 27 (citing Fla. State Bar Prof'l Ethics Comm., Formal Op. 00-3 (2002)).
[36] *Id.* (citing Md. State Bar Ethics Comm., Advisory Op. 00-45 (2000)).
[37] *Fausone v. U.S. Claims, Inc.*, 915 So. 2d 626, 628 (Fla. Dist. Ct. App. 2005), aff'd, 931 So. 2d 899 (Fla. 2006) (Plaintiff's attorneys provided the TPLF supplier with information material to the Plaintiff's claim to assist the TPLF supplier in deciding whether to advance Plaintiff funds).
[38] *See American Bar Association Commission on Ethics 20/20*, *supra* note 17 at 32.
[39] *Id.* at 35.
[40] *Id.* at 36.
[41] 2010 WL 2545960 (D. Del. June 24, 2010).
[42] *Id.*

Leader had engaged in discussions with multiple large TPLF companies regarding potentially investing in Leader's lawsuit for patent infringement.[43] Before showing any documents to the TPLF companies, Leader entered into non-disclosure agreements with the TPLF companies and shared documents with the TPLF companies that were otherwise protected by the attorney-client privilege and/or the work-product protection.[44]

After the lawsuit was commenced against Facebook, Leader withheld documents from Facebook on the basis that they were subject to either the attorney-client privilege or work product protection.[45] Upon learning that these documents had been shared with the TPLF companies, Facebook filed a motion to compel the documents' production, arguing that any privilege had been waived by their release to the potential investors.[46]

The Magistrate Judge concluded, and the District Judge affirmed, that privilege did not extend to documents shared between Leader and the TPLF companies.[47] Thus, Leader had waived attorney-client privilege and work-product protection with regard to the documents it gave to the potential TPLF investors.[48] The court noted that this is an unsettled area of the law, but it ultimately decided to follow prior ethics opinions which noted that where a party's interest in litigation is commercial, such as that of a potential investor, the common interest privilege

[43] *Third-Party Financing of Commercial Litigation, supra* note 21 at 6 (citing *Leader Technologies, Inc. v. Facebook, Inc.*).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*

does not attach.[49] The court also pointed to state court ethics opinions cautioning against the sharing of information with TPLF investors.[50]

Included in the court's discussion was a summary of the New Jersey Advisory Commission on Professional Ethics Opinion Number 691 which states that an attorney must ensure that its client fully understands the risks of information disclosure, including the possible loss of the attorney-client privilege. [51] This opinion notes that the attorney should provide the potential TPLF investor with only that information that would be discoverable by the attorney's adversary.[52]

## ***III. CONTROL OVER THE PROCEEDING***

Where a TPLF transaction is otherwise lawful, the ABA cautions that an attorney must exercise care to ensure that the arrangement does not run afoul of Model Rule 5.4(c)'s prohibition against compromising the lawyer's independent professional judgment and a client's right to control the proceeding.[53] The existence of a TPLF financing arrangement may cause confusion as to who actually owns the claim, who controls the lawsuit and how to resolve conflicts between the client's directions, the TPLF company's financial expectations, and the lawyer's analysis of the client's best interests.[54]

TPLF investors, particularly large corporate TPLF investors, will virtually always be interested in the direction of the lawsuit to ensure it is being managed in a way that protects their

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[49] *Id.* For a recent case that discusses the common interest privilege in the context of TPLF, *see Devon IT, Inc. v. IBM Corp.*, 2012 U.S. Dist. Lexis 166749 at n.1 (E.D. Penn. Sept. 27, 2012). For a slightly older case that discusses the common interest privilege in the context of TPLF and work product protection, *see Mondis Tech., Ltd. v. LG Elecs., Inc.*, 2011 U.S. Dist. Lexis 47807 (E.D. Tex. May 4, 2011).
[50] *Third-Party Financing of Commercial Litigation, supra* note 21 at 6 (citing *Leader Technologies, Inc. v. Facebook, Inc.*).
[51] *Id. See also* Philadelphia Bar Ass'n, Prof'l Guidance Comm., Op. No. 2003-15, at 674-75 (Oct. 2003).
[52] *Id.*
[53] *See American Bar Association Commission on Ethics 20/20*, supra note 17 at 26.
[54] *Id.*

investment.[55] This arguably creates a tension between the TPLF investor's interest in instructing, or even mandating, that the party make certain strategic decisions that best serve the investor's goals, and the party's or lawyer for the party's exercise of independent judgment.[56] This risk is exacerbated where the investor expects to participate in case management decisions or selects or recommends counsel with which it has an ongoing or past relationship.[57] In one Florida case involving Fresh Del Monte Produce, Inc., for example, the TPLF company had the right "to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements."[58]

Moreover, TPLF companies often expressly disclaim any effort to regulate the decision-making of lawyers in the TPLF agreement, even if they ultimately plan on involving themselves in the decision-making process.[59]

To deal with possible investor TPLF company interjection in litigation management, some states have issued ethics opinions on appropriate attorney conduct in these situations. For example, a South Carolina opinion requires the lawyer to inform the TPLF supplier in writing that the client, not the funding company, retains the right to control all aspects of the litigation.[60] Similarly, a Florida advisory opinion expressly requires attorneys to maintain independence from TPLF companies in case management decisions.[61] Indeed, New York Rules of Professional

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[55] *Buying Trouble Third-Party Litigation Funding in the United States*, *supra* note 1 at 7. This appears to be consistent with litigation involving insurance companies in that insurance companies often have an interest in controlling the direction of the litigation to prevent high coverage costs.
[56] *Third-Party Financing of Commercial Litigation, supra* note 21 at 5.
[57] *Id.*
[58] *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693 (Fla. Dist. Ct. App. 2009).
[59] *See American Bar Association Commission on Ethics 20/20*, supra note 17 at 28.
[60] S.C. Bar Ethics Advisory Comm., Advisory Op. 94-04 (1994).
[61] *See* McLaughlin, Julia H., *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 651 (2007) (citing Fla. State Bar Ass'n, Advisory Op. 00-3 (2002), 2002 WL 463991); *see also* N.C. State Bar, Formal Op. 4, 2001 WL 473974 (2001).

Conduct 1.8(f)(2), 2.1 and 5.4(c), which follow the Model Rules, also mandate lawyers to effectively insist that TPLF companies not attempt to control the professional judgment of lawyers.[62]

## *IV. <u>CHAMPERTY AND MAINTENANCE</u>*

As the ILR explains, TPLF was forbidden at common law under the doctrines of maintenance and champerty.[63] As the United States Supreme Court has explained,"[p]ut simply, maintenance is helping another prosecute a suit; champerty is maintaining suit in return for a financial interest in the outcome."[64] By definition, maintenance and champerty prohibit TPLF.

Today, a large minority of states have abandoned champerty restrictions.[65] However the majority of states have retained the prohibition.[66] The rationales frequently cited in support of the imposition of champerty restrictions include a desire to discourage excessive, unnecessary, or speculative litigation often associated with third parties seeking profit, rather than redress, through suits – concerns that are especially applicable to corporation backed TPLF.[67]

Among the states still recognizing champerty prohibitions, and thus possibly TPLF prohibitions, is Minnesota. In *Johnson v. Wright*, for instance, the Minnesota Court of Appeals reviewed the common-law history of champerty in that state and ruled that "an agreement in which [a party] had no interest otherwise, and when he is in no way related to the party he aids, is champertous and void as against public policy."[68]

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[62] *See American Bar Association Commission on Ethics 20/20*, supra note 17 at 32. Notwithstanding the foregoing, it is worth noting that courts do permit profit-seeking third parties to take control of litigation in similar contexts, e.g. insurance cases.
[63] *Buying Trouble Third-Party Litigation Funding in the United States*, *supra* note 1 at 2.
[64] *In re Primus*, 436 U.S. 412, 424 n.15 (1978)).
[65] *Third-Party Financing of Commercial Litigation, supra* note 21 at 2.
[66] *Id.*
[67] *Whose Claim is This Anyway, Third Party Litigation Funding*, *supra* note 9 at 1288.
[68] *Id.* at 1289 (citing Johnson v. Wright, 682 N.W.2d 671, 678 (Minn. Ct. App. 2004)).

Other states also continue to rigidly apply champerty prohibitions with little apparent desire to modernize their laws. Delaware maintains that, under common law, an agreement is champertous whenever an assignee has no interest, either legal or equitable, in an assigned cause of action prior to the assignment.[69] Further, Delaware law instructs that "[i]t is the duty of the court to dismiss a case in which the evidence discloses that the assignment of the cause of action sued upon was tainted with champerty."[70]

On the other hand, New York is representative of the more progressive view that some states have taken with regard to champerty.[71] While not abandoning the doctrine entirely, New York has taken a more lenient stance toward its application.[72] Approaching champerty as a doctrine of more limited scope, New York courts have typically been reluctant to find that an action is champertous as a matter of law.[73]

Moreover, in some states, such as Arizona, California, Connecticut, New Jersey, New Hampshire, New Mexico and Texas, the courts have held that the early common-law prohibitions on champerty were never adopted from England, and thus, do not apply.[74]

Finally, a minority of states such as Massachusetts and South Carolina have abandoned champerty altogether. In *Saladini v. Righellis*, the Massachusetts Supreme Court declined to void an agreement despite explicitly stating that it was champertous.[75] Addressing the application of champerty restrictions, the court stated that, "[w]e also are no longer persuaded

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[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 1290. New York's law of champerty is discussed widely by the New York courts in the context of Jud. Law § 489. For a discussion of this law, *see* http://litigationfinancecontract.com/incorporating-the-claim/ and http://litigationfinancecontract.com/champerty-in-new-york-and-the-model-contract/.
[74] *See American Bar Association Commission on Ethics 20/20*, supra note 17 at 12 (citing *e.g.*, *In re Cohen's Estate*, 152 P.2d 485 (Cal. Dist. Ct. App. 1944); *Polo by Shipley v. Gotchel*, 542 A.2d 947 (N.J. Super. Ct. Law Div. 1987); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 103–04 (Tex. App. 2006)).
[75] *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997).

that the champerty doctrine is needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position. There are now other devices that more effectively accomplish these ends."[76]

Similarly, in *Osprey, Inc. v. Cabana Ltd. Partnership*, the South Carolina Supreme Court abandoned champerty, stating that "[w]e abolish champerty as a defense because we believe it no longer is required to prevent the evils traditionally associated with the doctrine as it developed in medieval times."[77]

In sum, there appears to be a growing discontent with champerty restrictions in some states, but in the majority of states champerty remains a barrier to TPLF.[78]

## *V. FEE SHARING WITH NON-ATTORNEYS*

With certain exceptions which do not apply here, a lawyer may not share legal fees with a non-lawyer.[79] This prohibition is intended to protect the lawyer's independence of professional judgment.

A few state ethics opinions have addressed the fee-splitting rule in connection with TPLF transactions. These opinions state that a lawyer may not agree to give a TPLF supplier a share of or a security interest in the fee the lawyer expects to receive under a contingency fee agreement with the client.[80]

Some cases, however, have reached the opposite conclusion. For example, in *Core Funding Group v. McDonald*, No. L-05-1291, 2006 WL 832833 (Ohio Ct. App. Mar. 31, 2006),

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[76] *Id.*
[77] *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 273 (S.C. 2000).
[78] For a discussion on the current status of the laws of maintenance and champerty in the United States, *see* Sebok, Anthony, *The Inauthentic Claim*, 64 VAND L. REV. 61 (2011); Sebok, Anthony, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453 (2011).
[79] *See American Bar Association Commission on Ethics 20/20*, supra note 17 at 31 (Model Rule 5.4(a)); *see also* NY Rule of Prof. Conduct 5.4(a).
[80] *Id.* (citing Ohio Supreme Court Bd. of Comm'rs on Grievances and Discipline, Advisory Op. 2004-2 (2004); Utah State Bar Ethics Advisory Opinion Comm., Advisory Op. 97-11 (1997); Va, State Bar Standing Comm. on Legal Ethics, Advisory Op. 1764 (2002)).

the Ohio Court of Appeals stated that it is not inappropriate for a lender to take a security interest in an attorney's accounts receivable, to the extent permitted by commercial law.[81] Similarly, at least one author has entirely rejected the argument that litigation financing involves fee splitting with non-lawyers.[82]

Nevertheless, the Model Rules of Professional Conduct have sought to limit the influence of third-party payers of attorneys' fees. Model Rule 1.8(f) prohibits lawyers from accepting compensation from a third party for the representation of a client unless the client gives informed consent, there is no interference with the lawyer's exercise of independent professional judgment, and confidential information is protected as required by Model Rule 1.6.[83]

Interestingly, a trend has developed whereby the prohibition on fee sharing is being avoided by new institutional TPLF companies by contracting directly with the clients, not with their attorneys.[84] The legality of these arrangements, particularly those that allow a TPLF company to oversee the progress of a litigation and to discontinue funding mid-litigation (i.e., effectively control the litigation), have for the most part not yet been tested by the courts.[85]

## ***CONCLUSION***

While there are clearly those that are opposed to corporate and institutional TPLF,[86] this form of litigation financing is becoming an increasingly popular way to finance a lawsuit in the U.S. and appears that it is here to stay in some form. Indeed, as the foregoing illustrates, most states have already had to affirmatively address the issues that TPLF presents as it is becoming a

[81] *Id.*
[82] *See* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 676-81 (2005).
[83] *See American Bar Association Commission on Ethics 20/20*, supra note 17 at 31-32.
[84] *Whose Claim is This Anyway, Third Party Litigation Funding*, *supra* note 9 at 1292.
[85] *Id.*
[86] *See e.g.*, *Buying Trouble Third-Party Litigation Funding in the United States*, *supra* note 1 at 12; *see also Third-Party Litigation Funding: Tipping the Scales of Justice for Profit*, http://www.namic.org/pdf/publicpolicy/1106_thirdPartyLitigation.pdf (last visited Feb.14, 2013).

common way to pay for commercial lawsuits. As a result, it is important for New York litigators to appreciate the ethical and legal obligations that they have when engaging in TPLF arrangements. The above discussion highlights these main issues and obligations and aims to inform the New York State TPLF dialogue going forward.

Respectfully submitted,
Ethics and Professionalism Committee
of the Commercial and Federal Litigation Section[87]

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