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Causes of Action for Sale: The New Trend of Legal Gambling

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NOTES

Causes of Action for Sale: The New Trend of Legal Gambling

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I. INTRODUCTION

The United States judicial system is premised on the notion of "equal justice for all." However, as our country has grown and developed, this notion has become more of an ideal than a reality. In many cases, the almighty dollar has become the gatekeeper of the courthouse door. Philosopher and jurist Jeremy Bentham accurately characterized the situation in *Defence of Usury*, writing, "[w]ealth has indeed the monopoly of justice against poverty . . . ."[1]

* J.D. Candidate 2007, University of Miami School of Law. I dedicate this Note to my parents, Dr. Dennis and Maryann Grous, for their example, support, inspiration, and love. You have given me so much and I am eternally grateful – without the two of you beside me, none of this would be possible. I also thank A.G. for keeping me grounded and laughing. And, finally, a special thank you to Professor Robert Eli Rosen for his invaluable assistance with this piece.

1. Letter from Jeremy Bentham, *Defence of Usury*, Letters I & XII (1787), *available at* http:/

In practice, a plaintiff with a strong cause of action may lack the finances to either pursue the claim or to pay medical bills and other living expenses during the litigation's pendency.[2] She is unable to obtain money from her attorney, as most states prohibit attorneys from loaning their clients money for living expenses.[3] Similarly, traditional lenders generally will not advance the plaintiff funds in exchange for a share of the litigation proceeds, due to the inherent risk associated with litigation.[4] As a result, she faces a dilemma with two unsatisfactory alternatives: (1) abandoning the claim altogether; or (2) accepting a defendant's low settlement offer.[5]

In the past ten years, this problem has given rise to a new financial industry, offering advance funding to plaintiffs in return for a share of the claim's proceeds.[6] As a result of this arrangement, the plaintiff is able to proceed with her claim and the lender stands to recover their initial investment in addition to a generous fee.[7] On the surface, such a general description of the industry and its financing arrangements appears to be advantageous for both parties, in furtherance of the notion of equal justice to all, and a testament to the entrepreneurial spirit upon which America was built. However, a more searching analysis of the industry and its practices reveals a number of unsavory legal and ethical issues that make one question whether the industry furthers its purported ideals. Litigation financing's legal and ethical implications are of significant importance to Florida, a state with a reputation as a hotbed of plaintiffs' litigation. Florida, like other states, however, neither regulates the litigation financing industry's practices, nor has it created a specific law with which its courts could find such agreements unenforceable.[8] In *Fausone v. U.S. Claims, Inc.*, Florida's Second District Court of Appeal confronted these very issues.[9] While recognizing the need for

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/socserv2.mcmaster.ca/~econ/ugcm/3ll3/bentham/usury. *See also* Susan Lorde Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85 (2002) ("the ideas that 'wealth [should not have] the monopoly of justice against poverty' has been embraced as a basic principle in the legal system of the United States") (footnote omitted)).

2. *See* Martin, *supra* note 1, at 85.

3. *See* James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223 (2003) ("Black letter lawyer ethics law prohibits lawyers . . . from providing most forms of financial assistance to litigation clients.") (footnote omitted).

4. Martin, *supra* note 1, at 85.

5. *Id.*

6. Mike France, *The Litigation Machine*, BUS. WK. ONLINE, Jan. 29, 2001, http://www.businessweek.com/2001/01_05/b3717001.htm.

7. *Id.*

8. *See* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 629 (Fla. 2d Dist. Ct. App. 2005) ("There appear to be no laws regulating such [litigation financing] agreements in Florida. They are not treated like consumer loans.").

9. *Id.*

plaintiffs to pursue alternative means of financing – such as utilizing litigation financing companies – the court criticized the agreement's one-sided terms, which were unsurprisingly favorable to the financing company.[10]

Litigation financing companies can tip the scales in what would otherwise be a David versus Goliath-type situation – with the necessary cash, plaintiffs need not become victims of a sophisticated defendant with significant resources. Yet, at the same time, the financing arrangements may simply substitute a new dominant party, the financing company, leaving the plaintiff a victim just the same. Currently, no specific law or regulatory device prevents such victimization.

This Note discusses the need for litigation financing regulation in Florida in the wake of *Fausone*. The Note begins by presenting a general overview of the litigation financing industry's history and structure, focusing on the industry's growth and development in Florida. Part III discusses three relevant legal doctrines – champerty, usury, and unconscionability – that have hindered litigation financing's growth and development. Part IV discusses *Fausone v. U.S. Claims, Inc.*, which demonstrates industry criticism, as well as highlights the need for reform. Industry criticism is further discussed in Part V, focusing on a pertinent 2002 Florida Bar Opinion, as well as arguments presented by plaintiffs' attorneys and state legislators. The Note concludes by detailing existing initiatives and proposed solutions designed to address these criticisms.

II. The Litigation Financing Industry

A. *The Need for Litigation Financing*

During litigation's pendency, plaintiffs often need money to pay medical bills and living expenses.[11] Florida's Rules of Professional Conduct,[12] like those in many other states,[13] and the American Bar

10. *See id.* at 630 ("[A] person who is the victim of an accident should not be further victimized by loan companies charging interest rates that are higher than the risks associated with the transaction. . . . 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.").

11. *See* Martin, *supra* note 1, at 85.

12. *See* FLA. RULES OF PROF'L CONDUCT R. 4-1.8(e) (2004) (Mirroring Model Rule 1.8(e) and stating the general rule that "[a] lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation," and providing two exceptions: (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").

13. *See, e.g.*, ARIZ. RULES OF PROF'L CONDUCT R. ER-1.8(e) (2004) (following MODEL RULE 1.8(e)); CONN. RULES OF PROF'L CONDUCT R. 1.8(e) (2004) (same); *but see* D.C. RULES OF

Association's Model Rules of Professional Conduct,[14] prohibit attorneys from making loans to clients for living or medical expenses. Moreover, traditional lenders have not been willing to make such loans due to litigation's inherent risks.[15] Thus, plaintiffs with meritorious cases may be forced to accept a defendant's low settlement offer, or abandon the suit entirely.[16] One commentator has described the situation as follows:

> As is well-known, should the facts favor a lawyer's side, she argues the facts; if the law favors the lawyer's side, she argues the law. Favored by neither, a defense attorney will stall, procrastinate, and delay. . . . Nearly without exception, time favors a defendant. Just three percent of tort cases filed in state or federal court are tried to a verdict. Some three-quarters of cases are settled. Most plaintiffs settle because they are unable to wait the nearly two years elapsing before the average case comes to trial.[17]

Similarly, Florida's Second District Court of Appeal recently observed that:

> A person who suffers a severe personal injury will often need money to take care of herself and her family during the pendency of the litigation. Lawsuits take time and come with few guarantees. 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.[18]

The litigation financing industry has developed to compensate for this wealth-based disparity and "help relieve the financial pressure of [a] lawsuit" by providing advance funding.[19] Indeed, the practice has been characterized as addressing "a social demand crying to be met."[20] The supplied funding allows a plaintiff to pursue a meritorious claim against a deep-pocket defendant regardless of socio-economic status.

B. *History and Development of the Litigation Financing Industry*

Litigation financing companies trace their inception to the early 1990s.[21] While the identity of the industry's true "creator" is debated, a

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PROF'L CONDUCT R. 1.8(d) (2004) (authorizing an attorney to pay client medical and living expenses if reasonably necessary to permit the client to institute or maintain litigation).

14. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2002).

15. *See* Martin, *supra* note 1, at 85.

16. *Id.*

17. George Steven Swan, *The Economics of Usury and the Litigation Funding Industry:* Rancman v. Interim Settlement Funding Corp., 28 OKLA. CITY U. L. REV. 753, 758 (2003).

18. Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. 2d Dist. Ct. App. 2005).

19. Oasis Legal Finance, http://www.oasislegal.com/plaintiff_funding_process1.php (last visited Feb. 20, 2006) (quoted language appears on main page).

20. *See* Swan, *supra* note 17, at 784.

21. *Id.* at 760.

number of individuals and groups claim the title. One of them, Perry Walton, founder of Future Settlement Funding Company, is said to have discovered the "litigation financing market niche."[22] Indeed Walton, who lacks formal legal education, has since educated over four-hundred entrepreneurs seeking to gain access to the field.[23] Another group claiming the title is the LawFinance Group, Inc., the self-described "creator of the business of litigation financing."[24] Regardless of who created the litigation financing industry, the market has grown considerably since the late twentieth century.[25] This growth is due to a number of factors, among them the ease with which an individual can set up an internet business, the need for such financing, and the success of the industry's pioneers.

C. *How the Industry Functions*

The funding style, including case assessment, amount of funding, interest rates, and delivery of funding, generally varies from litigation financing company to litigation financing company.[26] The industry boasts great variety. For example, some firms are distinct in terms of company management, with attorneys, as opposed to traditional lenders, running the show.[27] Other firms are distinct in the amount of financing they offer.[28] While the majority of financing companies are small, advancing, on average, a maximum amount of $20,000 to individual plaintiffs,[29] other firms provide hundreds of thousands of financing dollars to individual plaintiffs.[30] Despite these differences, however, some fundamental principles and general practices exist.

Litigation financing companies profess to "help relieve the financial pressure of [a] lawsuit," by providing a plaintiff with a cash advance while their claim is pending.[31] The plaintiff is supposed to use the

22. George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 825-26 (2001).

23. *Id.*

24. *See* Martin, *supra* note 1, at 97.

25. *See* Swan, *supra* note 22, at 823.

26. *Id.* at 824. *See also* Tony Doris, *Cash in Advance: Companies that Help Plaintiffs Pay Bills Until Case Goes to Trial Operate Under Cloud in Florida*, MIAMI DAILY BUS. REV., Vol. 78, No. 15 (July 1, 2003), at 2, *available at* http://www.westlaw.com (enter citation "7/1/2003 MIAMIDBR 1" under "Quick Research" and select "Go") (noting that "[d]ifferent companies go about the business in different ways") (page pin citations are to article version available on Westlaw).

27. *See* Swan, *supra* note 22, at 823.

28. *Id.* at 824-25.

29. *Id.*

30. *Id.* at 825.

31. Oasis Legal Finance, http://www.oasislegal.com/plaintiff_funding_process1.php (last visited Feb. 20, 2006) (quoted language appears on main page).

advance to make "mortgage, car, medical and other essential payments while they await a judgment or settlement"[32] An overview of the typical procedure from initial contact to repayment is presented below.[33]

After filing a claim, a plaintiff who needs financial support may contact one of the many litigation financing companies currently operating in the United States. Financing companies are generally easy to locate, with most of the firms operating websites.[34] The plaintiff must then complete a simple application, typically consisting of their name, contact information, their attorney's name and contact information, the amount requested, and the case type.[35]

Once the company receives the application, it will contact the plaintiff's attorney to obtain documentation relevant to assessing the case's strengths and weaknesses.[36] Typically, this documentation will include: (1) the attorney-client retainer agreement; (2) any police, accident, or incident reports; (3) proof of the defendant's insurance coverage; (4) a summary of the medical bills to date; and (5) other materials that are required for the plaintiff's specific case.[37]

Based on this documentation, the company, usually through a panel, makes an assessment of the case's strength.[38] As Oasis Legal Finance's website states,

> [f]unding is based on the strength of a case. Our team of legal, business and financial professionals carefully reviews the documentation of each lawsuit to assess the probability of a win at trial or an out of

32. Doris, *supra* note 26, at 2.

33. *See* Oasis Legal Finance, *supra* note 31. This discussion will focus on Oasis Legal Finance, a litigation financing company headquartered in Northbrook, Illinois. Oasis is a member of the American Legal Finance Association, the group established by the financing industry to regulate its members lending practices. *See id.*

34. *See* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 627 n.1 (Fla. 2d Dist. Ct. App. 2005) (noting that "[a] search for 'litigation loan' on the internet will rapidly produce the websites of various organizations willing to buy a portion of a plaintiff's claim").

35. *See* Oasis Legal Finance, *supra* note 31 (follow the "Application" hyperlink on Oasis Legal Finance's homepage).

36. *Id.* (follow the "Plaintiff Funding" hyperlink; then click "page 2").

37. *Id.*

38. *Id.* These panels generally are comprised of legal, business, and financial professionals. *Id.* For example, LawFinance Group, Inc., a San Francisco-based financing firm, explains that it is "staffed with a team of experienced attorneys, who have a solid understanding of both cases on appeal and the financial issues affecting law practices. As such, they possess far more expertise in assessing the value of a law firm's portfolio and assets than does the typical commercial bank." LawFinance Group, Inc., http://www.lawfinance.com (last visited Sept. 25, 2006) (follow the "Our Company" hyperlink; click "Main;" then scroll to "About Our People"). *See also* American Legal Finance Association ("ALFA") FAQs, http://americanlegalfin.com/alfasite2/faqs.asp (last visited Feb. 20, 2006) ("Each ALFA member employs legal analysts or attorneys who review the pending case of each applicant by examining legal documents and speaking with the client's attorney. Only those plaintiffs with meritorious cases and a good likelihood of success become eligible for advance funding support.").

> court settlement. From that, we determine if your case qualifies for funding.[39]

Financing companies generally rely on a number of factors that make a case suitable for litigation funding. Oasis Legal Finance's factor analysis is representative of the factors other industry participants generally relied on. These factors include:

> **Damages.** In personal cases, these are generally severe injuries that cost time off work and other obligations. If this is not the case, we cannot offer litigation funding.
> **Liability.** It must be clear that the defendant has strong liability for causing the damage. Liability is a key factor in our decision to offer a litigation funding.
> **Ability to Pay.** The defendant must have the ability to pay damages through insurance or other means. If the defendant can't pay a settlement, we can't offer litigation funding.
> **Contingent Attorney Fee.** Your attorney must be compensated from the proceeds of the case rather than a retainer or hourly fee. He or she must be willing to assume the risk of winning the case to be paid for services, just as Oasis is to be repaid for the litigation funding.
> **Sufficient Margin for Investment.** When deciding whether to extend litigation funding to your case, we consider what other expenses will be paid from the proceeds of the settlement. These may include medical bills and liens. We check public records to find liens on cases we are considering for litigation funding. We need to assure ourselves there will be sufficient funds available for all parties.
> **Background.** We check records to make sure any past legal proceedings of the applicant are discharged or explainable and will not affect the outcome of the current lawsuit before we authorize litigation funding.
> **State of Residence.** Oasis is able to extend litigation funding in most states.[40]

This assessment allows the company to decide whether to approve or decline the plaintiff's funding request, as well as determine the cash advance amount, assuming the company approves the plaintiff's request.[41]

If the funding request is approved, the company then prepares a Purchase Agreement and forwards it to the plaintiff's attorney.[42] The agreement typically includes:

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39. Oasis Legal Finance, *supra* note 31. (follow the "Plaintiff Funding" hyperlink; then click "page 2").

40. *Id.* (follow the "Plaintiff Funding" hyperlink; then follow "The Approval Process" hyperlink) (emphasis in original).

41. *Id.* (follow the "Plaintiff Funding" hyperlink; then click "page 2").

42. *Id.* (follow the "Plaintiff Funding" hyperlink; then click "page 3").

1. Amount of cash advance;
2. Repayment schedule;
3. Information regarding method of dispute resolution; and
4. Choice of law provisions.[43]

After the attorney reviews the agreement and explains its terms and duties to the plaintiff, both the attorney and the plaintiff sign the agreement and return it to the company.[44] Once the company receives the executed agreement, it wires the agreed-upon cash advance to the plaintiff's designated account.[45] In short, the process allows the plaintiff to sell an interest in their settlement or verdict to the financing company in return for a cash advance.[46]

The financing companies emphasize that the entire process can take "as little as 48 hours, depending on how quickly the cooperating lawyer's office can submit documentation."[47] Moreover, the executed agreement leaves open the possibility of obtaining additional advances during the litigation's pendency, if and when the need arises.[48]

Of course, the financing's contingent nature is a selling point for plaintiffs. Financing companies emphasize that the plaintiff's repayment obligation plus the fee is contingent upon a favorable settlement or verdict. The financing company is "repaid out of the proceeds of [the plaintiff's] case award. There is no risk! If you lose your case you owe us nothing!"[49]

Perhaps it is this contingency, or the immediate need for such funding, or a combination of both factors that makes the company's imposed fees less threatening or burdensome to the plaintiff. The fee amount varies not only with respect to the funding company, but also with respect to the amount advanced.[50] Some companies, such as Capital Transaction Group, charge plaintiffs a flat financing fee.[51] For example, under such an arrangement, a plaintiff could be advanced $25,000 with a

43. *Id.* Unsurprisingly, the latter two provisions tend to favor the financing company, while proving disadvantageous for the plaintiff-borrower. The agreement at issue in *Fausone v. U.S. Claims, Inc.*, discussed *infra*, for example, included provisions providing for arbitration in either Pennsylvania or Delaware, with Delaware law controlling. *Fausone*, 915 So. 2d at 628. However, Ms. Fausone, the plaintiff borrower, was a Florida resident. *Id.*

44. *See* Oasis Legal Finance, *supra* note 31 (follow the "Plaintiff Funding" hyperlink; then click "page 3").

45. *Id.*

46. *See id.*

47. *Id.*

48. *Id.* Certainly, the possibility of any additional funding depends on the strength of the particular case. *Id.*

49. *Id.* (follow the "Plaintiff Funding" hyperlink; then follow the "How It's Priced" hyperlink).

50. Doris, *supra* note 26, at 3.

51. *Id.*

fee of $7,500.[52] While all companies would require the plaintiff to repay the initial $25,000 advance if and when a settlement is reached, the $7,500 fee may be more, less, or equal depending on the company and the length of time it takes to reach a case resolution. In fact, some companies offer a rebate for early case resolution.[53] On the other hand, other companies increase the fee amount if the case resolution takes longer than initially expected.[54] This fee commonly amounts to fifteen-percent of the original cash advance.[55]

Other companies use a "multiplier."[56] This figure increases by a certain increment depending on the time it takes for the plaintiff to repay the advanced funds.[57] For example, using a $1,000 advance example, a plaintiff would need to repay as follows:

Term to Payment	**Multiplier**	**Client Would Owe**
6 months	1.40	$1,400 ($1,000 x 1.40)
12 months	1.60	$1,600
18 months	2.00	$2,000
24 months	2.50	$2,500
42 months	3.00	$3,000
43 months or more	3.50	$3,500

Depending on the company and the transaction, lenders can triple their investment.[58]

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* Oasis Legal Finance, *supra* note 31 (follow "Plaintiff Funding" to "How It's Priced" under "Plaintiff Resources" Section).

57. *Id.*

58. *See* Martin, *supra* note 1, at 99 ("One writer has noted that funding companies commonly receive gains of a hundred percent or more. Another has said that lenders can triple their investment.") (citing Jean Hellwege, *David v. Goliath Revisited: Funding Companies Help Level the Litigation Playing Field*, TRIAL, May, 1, 2001, at 14; Mike France, *The Litigation Machine*, BUS. WEEK ONLINE, Jan. 29, 2001, http://www.businessweek.com/2001/01_05/b3717001.htm). *See also* Ronald C. Minkoff & Andrew D. Patrick, *Taming the Champerty Beast: A Proposal for Funding Class Action Plaintiffs*, 15 NO. 1 PROF. LAW. 1, at *5 (Spring 2004) ("Investors may receive only a set percentage of total recovery. They may not receive a guaranteed return with interest . . . or a percentage of the attorneys' fees."). *See also* Doris, *supra* note 26, at 2 (According to Thomas H. Ross, President of Palm Beach Capital Advisors, "[t]he average case is only a $2,500 investment and the average return has been $4,000 and [the company] is getting it in about 200 days, which computes to a 120 percent annual return.").

D. *The Litigation Financing Industry in Florida*

In 2002, Florida's Office of Financial Regulation issued an informal regulatory opinion declaring that litigation financing companies' practices violate Florida's anti-usury statute.[59] Despite this declaration, neither the Florida Bar, nor the Florida legislature, took any enforcement action.[60] "Still, litigation industry officials say the continued regulatory uncertainty in Florida has led them to limit their business here."[61] Consistent with this uncertainty and hesitancy, "the litigation funding industry is still a fledging one in Florida,"[62] but many companies have either incorporated under Florida law or have offices in the state.[63]

Among these Florida-based companies are Palm Beach Capital Transactions, of Palm Beach; Fast Funds, Inc., of Miami; Capital Transactions; Advance Settlement; and Legal Advances, Inc., of Aventura. On the role of litigation financing companies, Len Oliker, managing partner of Legal Advances, Inc., notes:

> It's almost an unfair fight when you put an insurance company up against an individual and the insurance company stalls his attorney. [The plaintiff] is going to force his attorney to settle his case as quickly as possible. We hope to level the playing field.[64]

Mr. Oliker's perception of his company's role and the benefits it confers on a plaintiff facing a deep-pocket defendant represents the perception held by most, if not all, litigation financing companies.[65] From the financing company's perspective, the advance funding it provides the plaintiff addresses a sincere need and, at the same time, furthers the idealistic and seemingly unattainable notion of equal justice for all. As the following discussion evidences, however, this characterization oversimplifies and overlooks many of the complex and challenging ethical and legal issues inherent in the industry's practices. While the industry may serve a genuine need and make justice accessible to a wider class of litigants, irrespective of their socioeconomic status, the ultimate costs and burdens imposed on plaintiffs as a result of this advance funding lead an observer to question whether industry regulation is necessary.

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59. Doris, *supra* note 26, at 3.

60. *Id.* at 1, 4.

61. *Id.* at 2.

62. *Id.* No data is available as to how active the industry is in Florida or as to how much money has been advanced under such arrangements. *Id.*

63. *Id.* at 1 ("Despite widespread criticism, litigation funding . . . [is] proliferating in Florida . . . .")

64. *Id.* at 2.

65. *Id.* *See also* ALFA FAQs, *supra* note 38 (last visited Feb. 20, 2006) ("The capital provides support to these victims who face financial constraints – because their injuries may keep them out of work or their medical bills may steadily increase – and seek funds to handle daily expenses while they await full resolution of their cases.").

III. Legal Issues Surrounding the Litigation Financing Industry

A. *Champerty*

"Champerty is an ancient doctrine describing an arrangement in which one person, the champertor, agrees to support another in bringing a legal action in exchange for part of the proceeds of the litigation."[66] This common law doctrine originated in England.[67] "The power of influential persons to whom rights of action were transferred in order to obtain their support and favor in suits brought to assert those rights was the cause of the rigid doctrine. . . ."[68] Historically, champertous agreements have been prohibited based on fears that such agreements encourage plaintiffs to bring frivolous litigation, harass defendants, seek increased damages, and resist settlements.[69] As civilization and the law evolved, however, the need for such strict rules decreased.[70]

Specifically, in the United States, state legislatures recognized the inability of some plaintiffs to bring meritorious claims without third-party funding.[71] Accordingly, several exceptions to the champerty doctrine have developed, the most common being attorneys' contingent fees.[72] Indeed, all states now recognize the validity of these contingent fee agreements.[73] "The open court door policy has had a preeminent place in the United States, and the contingency legal fee has been viewed as the poor and middle income person's ticket to justice."[74]

Currently, states treat champertous agreements differently.[75] In New Jersey, Massachusetts, and Arizona, for example, champerty is not prohibited, and courts regularly enforce such agreements.[76] Complete approval of champerty, however, appears to be an exception to the rule, as most states continue to prohibit champerty in some way, either by

66. Martin, *supra* note 1, at 87.

67. Kraft v. Mason, 668 So. 2d 679, 682 (Fla. 4th Dist. Ct. App. 1996).

68. *Id.* (internal citation and quotations omitted; ellipses in original).

69. *See* 14 C.J.S. *Champerty and Maintenance; Barratry and Related Matters* § 1 (2006) ("The prohibition against champerty is designed to cure malicious 'stirring up' of litigation that would not otherwise have occurred. The activity of champerty is repugnant to public policy against profiteering and speculating in litigation and is grounds for denying the aid of the court.") (footnote omitted).

70. *Kraft*, 668 So. 2d at 682 ("Though Appellants argue to this court that we should follow the strict common-law definitions, the few cases in Florida on this subject support the more modern-day approach that officious intermeddling is a necessary element of champerty.")

71. *See* Martin, *supra* note 1, at 87.

72. *Id.*

73. *Id. See also* Kenneth A. Ewing, Comment, *Quantum Meruit in Ohio: The Search for a Fair Standard in Contingent Fee Contracts*, 18 U. Dayton L. Rev. 109, 110 (1992).

74. *See* Martin, *supra* note 1, at 87 (internal quotations omitted).

75. *Id.* at 87-88.

76. *Id.*

statute or common law.[77]

Florida falls within the latter category.[78] Florida, however, rejects the strict common law champerty formulation,[79] adopting instead a more "modern-day approach," requiring "officious intermeddling" as a necessary element of the practice.[80] Florida's Fourth District Court of Appeal defines officious intermeddling as "offering unnecessary and unwanted advice or services; meddlesome, [especially] in a highhanded or overbearing way."[81] This additional element significantly limits the doctrine's reach and makes applying champerty to litigation financing agreements more difficult.[82]

For example, some commentators have noted that "litigation support firms . . . are clearly engaging in champerty" because they are "providing funds in exchange for a share of a settlement or verdict."[83] This argument presupposes a stricter formulation of champerty. Florida's additional requirement of officious intermeddling to establish champerty requires more intentional conduct on the part of the champertor.[84] Accordingly, despite the commentary, no Florida court has refused to enforce a litigation financing agreement because of champerty.[85]

B. *Usury*

Usury generally is defined as "the act or practice of lending money at a rate of interest that is excessive or unlawfully high."[86] The doctrine's history in the United States dates back to colonial times, when the colonists enacted usury laws to "protect consumers from the overreaching acts of creditors."[87] During the mid to late nineteenth century, at the urging of economists who argued that the laws inhibited economic growth and undermined efficiency, many states repealed their usury laws.[88] But, "[b]y the early twentieth century most states again had usury laws that limited interest rates to between six and twelve percent."[89] Most states have retained their usury statues.[90]

77. *Id.* at 88.
78. *See* Kraft v. Mason, 668 So. 2d 679, 682 (Fla. 4th Dist. Ct. App. 1996).
79. *Id.*
80. *Id.*
81. *Id.* (internal quotations and citation omitted).
82. *See, e.g.*, *id.* at 681-83.
83. *See* Martin, *supra* note 1, at 88.
84. *See* Kraft v. Mason, 668 So. 2d 679, 682 (Fla. 4th Dist. Ct. App. 1996).
85. *Id.* at 88-89.
86. WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2013 (2d ed. 1980).
87. *See* Martin, *supra* note 1, at 89.
88. *Id.* at 89-90.
89. *Id.* at 90.
90. *Id.*

In Florida, as in most other states, the elements necessary to establish usury are: (1) a loan, express or implied; (2) an understanding between the parties that the money loaned must be repaid; (3) in consideration of the loan, the borrower pays or agrees to pay a greater interest rate than is allowed by law; and (4) a corrupt intent to take more than the legal rate for the use of the money loaned.[91] Florida Statute 687.01 defines a "usurious contract" as one setting an interest rate above eighteen-percent.[92]

Elements two and four are particularly relevant when discussing litigation financing. First, Florida courts have held that the contingent nature of settlement or a favorable verdict makes a financing agreement non-usurious.[93] For example, in *Kraft v. Mason*, within the context of an antitrust litigation financing agreement, the court rejected a borrower's usury claim that sought to avoid paying the agreed-upon loan interest.[94] The court explained that the interest could be characterized as a "bonus . . . for participating in an uncertain transaction. A loan agreement is not usurious when payment depends upon a contingency."[95] In *Kraft,* at the time the loan was given, talk of possible recovery was mere speculation.[96] Indeed, "[q]uite possibly, there would be no successful recovery" by the plaintiff, in which case the lender would only receive the initial amount lent.[97] "This contingent nature of any 'interest' . . . makes the agreement non-usurious."[98]

In addition to the repayment's contingent nature, Florida courts have also focused on the lender's intent in deciding whether usury's fourth element has been met.[99] Adopting a definition requiring willfulness and knowledge, Florida courts have explained that "[a] thing is willfully done when it proceeds from a conscious motion of the will intending the result which actually comes to pass. It must be designed or intentional, and may be malicious, though not necessarily so."[100] In explaining the requisite level of intent upon which to base a usury finding, the *Kraft* court juxtaposed the facts before it with those in *Jersey*

91. Kraft v. Mason, 668 So. 2d 679, 683 (Fla. 4th Dist. Ct. App. 1996).

92. *Id.* (Section 687.01, Florida Statutes (2006), refers to the interest rate set pursuant to Section 55.03, Florida Statutes (2006), which is currently approximately eighteen-percent).

93. *Kraft*, 668 So. 2d at 684.

94. *Id.* at 681, 684.

95. *Id.* at 684.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 683 ("The main issue before this court is whether the trial court erred in determining that no corrupt intent existed to collect interest at a usurious rate.")

100. *Id.* at 684 (internal citation omitted).

Palm-Gross, Inc. v. Paper.[101]

The lender in *Jersey* was a developer with 40 years of experience. He was aware of the borrowers' urgent need for the money and the need to dictate the loan's terms. Based on the usury statute's purpose – to "bind the power of creditors over necessitous debtors and prevent them from extorting harsh and undue terms in making loans" – the *Jersey* court concluded that the loan was usurious.[102] In affirming the court's opinion on appeal, the Florida Supreme Court added:

> [U]sury is largely a matter of intent, and is not fully determined by the fact that the lender actually receives more than the law permits, *but is determined by the existence of a corrupt purpose in the lender's mind to get more than legal interest for the money lent.* Moreover, the question of intent is to be gathered from the circumstances surrounding the entire transaction. Consequently, the ultimate arbiter on the issue of intent is the trial court because the question of intent is one of fact.[103]

In contrast to *Jersey,* the lender in *Kraft* was unsophisticated: she neither knew at the outset the total amount she would recover nor did she dictate the loan's terms. Indeed, the loan was to be paid following the litigation. As such, "*no one* could have known at the loan's inception the total amount [the lender] would be receiving in consideration for making the loan. . . . This is not a case of an overreaching lender taking advantage of a desperate borrower to impose undue or harsh terms."[104]

Based on Florida's current usury jurisprudence, Florida courts would not likely invalidate a litigation financing agreement as usurious. Even if a court is disposed to inferring intent based on the lender's level of sophistication, that factor alone appears insufficient to establish usury's intent element. As *Dixon v. Sharp*[105] establishes, the court must not only consider a lender's sophistication, but also the borrower's sophistication and situation. Per *Dixon,* "[f]or the defense of usury to be established, the circumstances surrounding the entire agreement must be proved, and they must be carefully scrutinized by the court,"[106] which, according to Justice Ervin's dissent, might include a sophistication inquiry.[107]

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101. *Id.* at 683-84 (citing Jersey Palm-Gross, Inc. v. Paper, 639 So. 2d 664 (Fla. 4th Dist. Ct. App. 1994)).

102. *Kraft,* 668 So. 2d at 684.

103. *Id.* (emphasis in original; internal quotations omitted).

104. *Id.* (emphasis in original).

105. 276 So. 2d 817 (Fla. 1973).

106. *Id.* at 820-21.

107. *Id.* at 822-23 (Ervin, J., dissenting) ("In determining whether the Dixons knew that they were charging and receiving excessive interest, the trial court should have borne in mind that the lenders here were entirely unlike the unsophisticated woodsman who unwittingly lent money to a

In the typical litigation financing arrangement, one can usually characterize the litigation financing company as a sophisticated lender.[108] While this may be true, the question of how desperate a borrower must be to establish usury's intent element remains. Does desperation require a borrower to exhaust all possible funding sources and be a step away from homelessness? Or does desperation require something less, some genuine need for money in order to live comfortably? Should courts base a desperation finding on a plaintiff's socioeconomic status, finding desperation more readily where a plaintiff's alleged desperation requires them to give up certain luxury items? The courts must offer further elucidation of what sort of borrower desperation suffices regarding a usury analysis.

Yet even if a court is willing to find the requisite intent, a plaintiff will nevertheless encounter difficulty proving usury's second element – an understanding between the parties that the money loaned must be repaid.[109] Litigation financing agreements are premised on a contingency; the initial amount lent plus the accrued interest is only recoverable if a plaintiff receives a settlement or a favorable jury verdict.[110] The possibility remains, however, that a court would be willing to infer or presume that certain agreements may, in fact, not be so contingent and speculative. The Restatement of Contracts supports this argument, providing that:

> Usury laws do not forbid the taking of business chances in the employment of money. . . . If the probability of the occurrence of the contingency on which diminished payment is promised is remote, or if the diminution should the contingency occur is slight as compared with the possible profit to be obtained if the contingency does not occur, the transaction is presumably usurious.[111]

While not explicitly relying on the Restatement's view, an Ohio court reached a similar conclusion in *Rancman v. Interim Settlement*

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banker at an excessive rate of interest, as was the case in *Chandler v. Kendrick*, 108 Fla. 450, 146 So. 551 (Fla.1933), upon which the majority chooses to rely for conflict purposes. We are dealing with two successful business people. The facts reveal that they knowingly put themselves squarely in a position clearly violative of our usury laws.").

108. While not regulated like other lenders, one can infer litigation financing companies' sophistication levels from their practices, such as the amount of money they lend and their application review process.

109. *Dixon*, 276 So. 2d at 819.

110. Litigation financing companies are "quite confident that the contingent nature of their agreements kept them from violating usury laws." *See* Martin, *supra* note 1, at 95. *See also* ALFA FAQs, *supra* note 38 ("[T]hese advances do not require repayment of the investment or any fees if the plaintiff does not receive a financial award or settlement when the case is resolved. If the case is lost or the defendant insolvent, ALFA Members forfeit their entire investment in that case.").

111. RESTATEMENT (FIRST) OF CONTRACTS § 527 cmt. a (1932).

Funding Corp.[112] In *Rancman*, the plaintiff ("Rancman") was injured in an automobile accident involving an uninsured driver.[113] While the litigation was pending, Rancman entered into two litigation financing agreements. Under these agreements, Rancman was to receive $6,000 from Future Settlement Funding Corporation ("FSF") and $1,000 from Interim Settlement Funding Corporation ("ISF).[114] The FSF agreement required that Rancman pay $16,800 out of the litigation proceeds if the case settled in twelve months, $22,200 if the case settled in eighteen months, or $27,600 if it settled in twenty-four months.[115] Under the ISF agreement, Rancman agreed to pay $2,800 contingent upon receiving a settlement or favorable jury verdict.[116] Under both agreements, Rancman was not obligated to pay anything if she did not recover in the litigation.[117] Rancman entered into the agreements against her attorney's advice and testified that she was aware of and understood the agreements' terms.[118]

Rancman filed a claim against State Farm Insurance under the uninsured motorist provision of her husband's insurance policy.[119] While a question existed whether Rancman was covered at the time of the accident due to her separation from her husband, State Farm nevertheless made a $35,000 settlement offer.[120] Rancman rejected the settlement offer and subsequently entered into the agreement with ISF.[121] Rancman ultimately settled the claim with State Farm for $100,000, after which she brought suit against FSF and ISF "seeking, *inter alia,* a declaratory judgment that the loan agreements were void because they were usurious."[122]

At the usury trial, the magistrate stated that the contracts violated the usury interest law and the Small Loan Act, and as such, FSF and ISF either should not receive anything, or alternatively, should receive the principal plus eight-percent annual interest.[123] The trial court, adopting the magistrate's conclusion, elected the latter remedy, and both sides appealed.[124]

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112. No. 20523, 2001 WL 1339487 (Ohio Ct. App. 9th Dist. Oct. 31, 2001).
113. *Id.* at *1.
114. *Id.*
115. Martin, *supra* note 1, at 91.
116. *Id.*
117. *Rancman*, 2001 WL 1339487, at *2.
118. *Id.* at *3.
119. *Id.*
120. *Id.*
121. *Id.* at *1, *3. It is unclear whether State Farm's initial offer was made prior to Rancman's agreement with FSF as the issue was not pursued by the court.
122. *Id.* at *1 (emphasis in original).
123. *Rancman*, 2001 WL 1339487, at *1.
124. *Id.* at *3.

The Ohio Court of Appeals rejected FSF and ISF's argument that the transactions were contingent cash advances; rather, the court held that the transactions were loans.[125] The court defined a loan as

> [a] contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows. . . . The payment of a sum is considered 'repayable absolutely' if non-payment of the amount is 'so improbable as to convince the court or jury that there was no real hazard.'[126]

In classifying the agreements as loans, the court relied heavily on the testimony of the ISF president. Specifically, the president testified that he had been trained on how to evaluate a personal injury case's risks. At trial, he testified to utilizing numerous factors to determine whether the case presented a low risk of non-recovery. He found many of these factors in Rancman's case, including: (1) a skilled attorney; (2) full access to the case file; (3) lack of liability on Rancman's part for the accident; (4) a vehicle that received a serious impact in the accident; (5) "bright blood" injuries; (6) medical bills; and (7) estimable value based on injuries comparable to Rancman's found in a jury verdict database.[127] Based on this evidence, the court determined that the agreements were loans, as "no real probability existed that non-payment would occur."[128] Accordingly, the court reversed the trial court's order that Rancman repay the principal with interest on both of the agreements.[129]

Rancman represents the "first case where a litigation financing company has been found guilty of violating a statute in connection with making a loan."[130] In considering the response to *Rancman,* or lack thereof, it may also represent the *only* case where a litigation financing company has been found to have violated a statute in connection with making a loan.

In Florida, for example, Florida's Office of Financial Regulation issued an informal opinion in 2002 deeming litigation financing a loan,

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125. *Id.*

126. *Id.*

127. *Id.* at *2-3.

128. *Id.* at *3. The court never reached the parties' assignment of error regarding usury. Because the court already classified the transactions as loans, the assignment of error as to usury was rendered moot.

129. The court's reversal was based on its finding that both loans violated Ohio Revised Code Section 1321.02, which provides that "any contract of loan in the making or collection of which an act is done by the lender that violates this section is void and the lender has no right to collect, receive, or retain any principal, interest or charges." Because ISF's president contracted for small loans on behalf of ISF and FSF without a license, Section 1321.02 barred recovery. *See* Rancman v. Interim Settlement Funding Corp., No. 20523, 2001 WL 1339487, at *3 (Ohio Ct. App. 9th Dist. Oct. 31, 2001).

130. *See* Martin, *supra* note 1, at 94 (internal quotations omitted).

and thereby subject to state usury laws.[131] The opinion stated, "[i]t is the substance and not the form that determines whether a transaction is usurious."[132] While state law caps loan interest rates at eighteen-percent, litigation financing company fees may reach one-hundred-and-eighty-percent of the principal on an annualized basis.[133] If the legislature and courts classified litigation financing companies' fund advances as standard loans, such financing charges would undoubtedly violate Florida's anti-usury statute and subject the companies to civil penalties and criminal prosecution.[134] The opinion went on to urge the financing companies who disagreed with the opinion to petition the legislature to change the law.[135]

Despite this invitation, the reaction to the opinion was generally insignificant. The most noteworthy response came from Thomas Crapps of the Douglas Law Firm in Tallahassee, who wrote a response on behalf of Advance Settlement Funding and its president Al J. Cone.[136] In his letter, Crapps maintained that the "litigant's selling of a portion of his or her contingent settlement proceeds is an assignment, not a loan."[137] Crapps premised his position on the fact that the transactions have no monthly payments, promissory notes, collateral, interest rates, maturity dates, or default provision.[138] Because of these differences, Crapps argued, state anti-usury laws should not apply.[139] Crapps concluded that "[c]learly, the litigant's selling of a portion of his or her contingent settlement is an assignment, not a loan."[140]

In retrospect, financing companies operating in Florida had no reason for concern. Since the opinion's release, Florida has done nothing to indicate enforcement efforts are forthcoming.[141] Robert Beitler, General Counsel in the Office of Financial Regulation, believes that Florida will not enforce the informal opinion unless consumers file complaints.[142]

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131. *See* Doris, *supra* note 26, at 3.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* Advance Settlement Funding president Al J. Cone added that the "risk of essentially betting on the outcome of a lawsuit justifies a financing charge that far exceeds standard interest rates on loans, which generally are collateralized." *Id.*

141. *Id.* at 1, 4.

142. *Id.*

C. *Unconscionability*

Unconscionability is defined as the "absence of meaningful choice . . . together with contract terms which are unreasonably favorable to the other party."[143] Unconscionability has two requirements: (1) procedural unconscionability; and (2) substantive unconscionability.[144]

Procedural unconscionability involves an "absence of meaningful choice, [and] is determined by analyzing the respective bargaining powers of the contracting parties, and the ability of the particular contracting party, in light of his education, intelligence, or lack thereof, to understand the terms of the contract."[145] Other relevant considerations include "who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible," and "whether there were alternative sources of supply for the goods in question."[146] Substantive unconscionability, on the other hand, "embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable."[147]

Typically, courts employ a balancing test to decide whether a contract is unconscionable.[148] While "the prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability," both need not be present to the same degree.[149] "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves."[150] Thus, the more evidence of substantive unconscionability that is presented, the less evidence of procedural unconscionability the plaintiff must present for the court to find a contract unenforceable, and vice versa.[151]

Based on this balancing test, it is possible that a Florida court might find a litigation financing agreement unconscionable. While there is no opinion invalidating such an agreement on the grounds of unconscionability, the plaintiff did advance an unconscionability argument in trial

143. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

144. Kohl v. Bay Colony Club Condo., Inc., 398 So. 2d 865, 867 (Fla. 4th Dist. Ct. App. 1981).

145. Bennett v. Behring Corp., 466 F. Supp. 689, 696 (S.D. Fla. 1979) (relying on *Williams*, 350 F.2d 445).

146. *Kohl*, 398 So. 2d at 868.

147. *Id.*

148. Romano v. Manor Care, Inc., 861 So. 2d 59, 62 (Fla. 4th Dist. Ct. App. 2003).

149. *Id.* (quoting Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1533, 60 Cal. Rptr. 2d 138, 145 (Cal. 1st Dist. Ct. App. 1997)) (internal quotations omitted).

150. *Romano*, 861 So. 2d at 62 (internal quotations omitted).

151. *Id.*

court in *Fausone v. U.S. Claims, Inc.*[152] Florida's Second District Court of Appeal, however, did not reach the question of unconscionability because of the plaintiff's procedural decisions.[153]

IV. FAUSONE V. U.S. CLAIMS, INC.

A. *Factual Background*

In *Fausone v. U.S. Claims, Inc.*, the plaintiff, Fausone, was injured in May 2000 when she was struck by a dump truck while riding her bicycle.[154] She retained Florin, Roebig & Walker, P.A., to represent her in the resulting personal injury claim and in a second products liability action unrelated to the bicycle accident.[155]

Five months later, in October 2000, Fausone began selling interests in her lawsuits to various litigation financing companies.[156] Ultimately, she entered into financing agreements with three companies: Advance Settlement Funding, Inc. of Silver Springs, Florida, Advance Legal Funding, LLC of Biloxi, Mississippi, and U.S. Claims.[157] Under the financing agreement with Advance Legal Funding, LLC, Fausone received $3,000 in October 2000.[158] The contract provided that if she were to settle her lawsuit before May 1, 2001, she would owe $6,000 to the company.[159] If settlement occurred subsequent to this date, she would repay $9,000 plus eighteen-percent interest.[160] As the court noted, "the interest rate on this transaction depended on the date of repayment, but was never less than 200%."[161]

Fausone also received $2,000 from Advance Settlement Funding, Inc.[162] In the contract, Fausone agreed to a repayment schedule that would increase $150 each month, with the total not to exceed $4,250.[163] The court estimated that the annual rate of interest under this agreement was approximately ninety-percent for the first year.[164]

152. 915 So. 2d 626 (Fla. 2d Dist. Ct. App. 2005).
153. *Id.* at 629-30.
154. *Id.* at 627.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 627.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* Ms. Fausone apparently entered into additional litigation financing agreements with Advance Settlement Funding, as her account debt was $8,075 in August 2001 and was increasing by $375 per month. These facts reflect a finding in the arbitration decision between Fausone and U.S. Claims.

In 2001, Fausone contacted U.S. Claims for additional financing.[165] The company initially advanced Fausone $18,000, some of which was used to consolidate her previous loans.[166] Between August 2001 and November 2002, Fausone returned to U.S. Claims on numerous occasions to obtain more financing.[167] By November 2002, Ms. Fausone had secured approximately $30,000 from U.S. Claims.[168]

B. *The Financing Agreement*

It is unclear how Fausone learned of U.S. Claims and whether she initially contacted the company.[169] That question aside, the agreements stated that if the claim's proceeds were less than the money owed, U.S. Claims would be entitled to one-hundred-percent of the proceeds.[170] Alternatively, if no money was received, Fausone was not obligated to make any payment unless failure of recovery was due to "fraud, misrepresentation, breach of warranty or failure to perform any covenant" by Fausone or her attorney.[171] Fausone was also prohibited from selling any part of the proceeds of her claim to any other funding source.[172] Fausone's attorneys allegedly reviewed and forwarded the agreements to U.S. Claims.[173] Moreover, the attorneys furnished information concerning Fausone's claim to assist the financing company in determining whether to advance Fausone funds.[174]

The repayment schedule to which Fausone agreed was based on the $30,000 total amount advanced.[175] Under the agreement, Fausone was required to repay $42,890 before November 14, 2002; $46,808 after November 14, 2002, but before February 14, 2003; and, $50,937 after February 14, 2003, but before May 14, 2003.[176] While the terms U.S. Claims offered were more satisfactory than Fausone's other agreements, the interest rate for the loans was "still well above the rates normally allowed for consumer transactions."[177]

Finally, the agreement contained miscellaneous provisions governing choice of law, venue, and the method of resolution of disputes

165. *Id.*
166. *Id.* at 628.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 627.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*

growing out of the agreement.[178] Specifically, U.S. Claims retained the "unilateral right to obtain equitable relief in either Pennsylvania or Delaware" in the event of disagreements between the parties.[179] Fausone waived her right to challenge personal jurisdiction or venue in those states.[180] Furthermore, the agreement was governed and construed pursuant to Delaware law, with the exception of Delaware rules regarding conflicts of law.[181] As such, Fausone could not argue that Delaware should apply Florida law in a dispute occurring under the U.S. Claims contract.[182] Finally, aside from U.S. Claims' unilateral right to obtain equitable relief, the agreement provided for arbitration in either Pennsylvania or Delaware as the exclusive method for dispute resolution.[183]

C. *Arbitration*

In 2003, Fausone settled her personal injury claim for the bicycle accident for an amount in excess of $200,000.[184] However, in a letter to U.S. Claims, Fausone's attorney said that she had instructed him not to remit repayment to U.S. Claims.[185] Under the repayment schedule, Fausone owed U.S. Claims a total of $50,937 at this time.[186] To compel Fausone to repay the debt, U.S. Claims initiated arbitration with the American Arbitration Association in Philadelphia, Pennsylvania.[187] However, soon after this action, Fausone filed a petition for declaratory judgment in Pasco County, Florida, alleging that the U.S. Claims litigation financing agreement was unconscionable, usurious, and unfair in the sense that she should not be forced to arbitrate.[188]

In response, U.S. Claims filed a motion to dismiss or abate the Florida claim pending arbitration.[189] Ultimately, the Pasco County trial court stayed the claim pending arbitration, which occurred in February 2004 in Philadelphia, Pennsylvania. Despite having the opportunity to participate in the arbitration via telephone, Fausone chose not to attend. As a result of the arbitration, U.S. Claims was awarded $72,117.[190]

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 629.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* The court explained that, pursuant to the repayment schedule, $72,117 was the amount Fausone would have to repay if her payment was made after February 14, 2004, and before May 14, 2004. *Id.* Further, while this was the amount awarded as a result of the arbitration, the

Fausone filed a motion in Pasco County, Florida to vacate the arbitration award.[191] Subsequently, U.S. Claims filed a motion to confirm the award.[192] After an April 2004 hearing on the motions, Fausone decided not to proceed with her motion to vacate the award.[193] Thereafter, the Pasco County trial court granted U.S. Claims' motion to confirm the arbitration award.[194]

D. *Appeal Before Florida's Second District Court of Appeal*

Relying on Florida Statute 682.121,[195] the court explained that because Fausone withdrew her motion to vacate the arbitration award, "there are few, if any, preserved issues for appeal."[196] The court stated that, "[Fausone] has not demonstrated that the purchase agreements could be invalidated by a Florida court."[197]

More significantly, however, the court noted that, "there appear to be no laws regulating such agreements in Florida. They are not treated like consumer loans."[198] As a result, the court affirmed the trial court judgment and granted U.S. Claims' motion for attorneys' fees pursuant to the agreement.[199]

E. *A Possible Need for Regulation*

In affirming the judgment and granting U.S. Claims' motion for attorneys' fees, the court commented on a possible need for regulation of financing agreements such as the one at issue in this case.[200] The court, as aforementioned, observed that "[t]here appear to be no laws regulating such agreements in Florida. They are not treated like consumer loans."[201] Citing a 2002 Florida Bar Ethics Opinion, the court acknowledged that the practice of financing litigation was not restricted.[202] While an attorney may not issue a letter of protection to the funding

arbitration order also provided that failure to remit payment by May 14, 2004, would increase the amount owed according to the agreement's payment schedule. *Id.* "It is unclear from the record whether this amount has continued to increase during the term of the arbitration and litigation." *Id.*

191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.* (relying on § 682.12, FLA. STAT. (2004)) ("[A] court shall confirm an arbitration award unless a motion to vacate or modify the award is pending.").
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 630.
201. *Id.*
202. *Id.*

company, she does not violate ethical norms by providing information about litigation companies to her client, furnishing information about her client's case to such companies (assuming the client consents), or honoring the written assignment of the client's claim.[203]

At the outset, the court recognized the need for plaintiffs such as Fausone to obtain a credit source during litigation:

> A person who suffers a severe personal injury will often need money to care for herself and her family during the pendency of litigation. Lawsuits take time and come with few guarantees. 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.[204]

At the same time, however, an accident victim should not be "further victimized by loan companies charging interest rates that are higher than the risks associated with the transaction."[205] While the record on appeal did not indicate the value of Fausone's claim at the time she sought financing with U.S. Claims, the court reasoned that a company that only extended financing to plaintiffs with "high-grade personal injury claims" would seem to be able to offer a lower interest rate on the advance than those at issue in this case.[206]

Additionally, the court characterized the agreement's venue and dispute resolution terms as "one-sided and designed to prevent a Florida citizen from having access to a local court or another local dispute resolution forum."[207] Finally, the agreements created ambiguity as to which party truly owned and controlled the lawsuit, an issue posing a risk that the attorney-client privilege was unintentionally waived.[208]

Despite these criticisms, however, the court concluded that it lacked the authority to regulate litigation financing agreements.[209] Instead, the court called on the Florida Legislature to "examine this industry to determine whether Florida's citizens are in need of any statutory protection."[210]

V. CRITICISM OF THE LITIGATION FINANCING INDUSTRY

The Florida Second District Court of Appeal's criticism of the litigation financing industry mirrors criticisms levied by legislators, com-

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203. *Id.* at 629-30.
204. *Id.* at 630.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*

mentators, and consumer protection groups. In contrast to the previously discussed arguments regarding usury and champerty, these arguments are based not on statute or common law, but rather on policy and ethical considerations. Essentially, the arguments against litigation financing arrangements tend to parallel arguments against attorneys' contingent fees.[211] These criticisms are discussed in turn below.

Primarily, critics argue that litigation financing companies encourage meritless litigation and frivolous lawsuits.[212] By extending funding to plaintiffs, litigation financing companies may resuscitate weak or uncertain suits that otherwise would not have been filed. The industry, organized as the American Legal Finance Association ("ALFA"), has vehemently rejected this allegation, maintaining that it "does not promote frivolous litigation [but] actually discourages it."[213] First, ALFA explains that ALFA members only come into the picture *after* a claim has been filed, typically a few months into litigation.[214] Moreover, the industry maintains that its procedure of reviewing potential cases to determine whether to extend funding ensures that if a company encounters a frivolous suit, they will not fund the case:[215]

> Besides being against public policy, frivolous cases also make very bad investments, since the overwhelming majority of them have low probability of success. By helping victims with compelling claims, ALFA members actually discourage frivolous litigation by denying frivolous cases financial support. By facilitating a more direct, transparent and rational distribution of capital to plaintiffs, we enable a more balanced and efficient legal system, which is consistent with the realities and demands of a modern free market economy.[216]

As one commentator has noted, "funding companies have no incentive to advance money to plaintiffs whose lawsuits might reasonably be described as frivolous because the companies' chance of recovery is low. Litigation funding companies exist to make money, not to throw it

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211. *See* Martin, *supra* note 1, at 95 ("Those critics argue that a contingent fee is justified only when there is a real contingency, that is, where there is an actual risk of no recovery. They complain that lawyers enter into contingency fee arrangements without considering the likelihood of recovery, even in situations where non-recovery is not a possibility." (footnotes omitted)).

212. *See* Doris, *supra* note 26, at 4. In 2002, Associated Industries of Florida, a Tallahassee-based business lobbying group, announced that it would seek legislation to prevent "outside entities from financing litigation." *Id.* (internal quotations omitted). The group's website deemed financing companies "rogue credit operations [that] can only further fuel unnecessary and reckless litigation and magnify plaintiff attorneys' ability to inhibit commerce." *Id.* (internal quotations omitted). In a follow-up interview, however, Associated Industries president John Shebel noted that the group's legislative attack on litigation financing did not materialize. *Id.*

213. *See* ALFA FAQs, *supra* note 38.

214. *Id.*

215. *Id.*

216. *Id.*

away."[217]

Due to the financing company's stake in the case's outcome, however, it has also been argued that the company's presence prolongs litigation and prevents or discourages settlement.[218] A plaintiff understands that she must pay various groups and individuals – including her attorney – once the case settles or is otherwise resolved. If the plaintiff borrowed money under a litigation financing agreement, she must also pay the financing company the principal amount advanced, as well as the financing fee. Both the attorney and the financing company are paid out of the settlement or verdict's proceeds. Depending on the amounts due to the attorney and the financing company, a plaintiff may be hesitant to settle the case, instead holding out for a greater sum.

Financing companies and commentators claim this fear is unfounded.

> The law favors fair and just settlements, not unfair or unjust settlements brought about by a party's economic desperation or financial inability to litigate meritorious claims. Both the public and the justice system benefit when litigants with legitimate disputes face one another on a level playing field. Litigation funding may even promote settlement and discourage prolonged litigation by forcing a recalcitrant defendant to approach a case reasonably and pragmatically in light of the fact that its adversary has the resources to meaningfully prosecute the matter.[219]

A related concern centers on the parties' roles and relationship – namely the plaintiff, her attorney, and the litigation financing company – and the extent to which each exercises control and ownership over the claim and its future. Professor Anthony V. Alfieri, Director of the Center for Ethics and Public Service at the University of Miami, expressed concern that "[t]he presence of third-party financing may palpably or subtly influence litigation strategy in ways that may be inimical to the best interest of a client."[220] Depending on the financing company's degree of involvement, questions may arise as to which party actually owns the lawsuit. Moreover, the financing company's presence – a third-party – may result in an unintentional waiver of attorney-client privilege, as the company is in no way associated with the attorney nor may correctly be classified as the attorney's representative or agent. Neither the financing companies nor commentators have responded

217. Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 660-61 (2005) (footnotes omitted).

218. *Id.*

219. *Id.*

220. Swan, *supra* note 22, at 831 (citing Adam Miller, *Rolling the Dice*, MIAMI DAILY BUS. REV., Vol. 75, No. 24 (July 14, 2000), at A11).

directly to these arguments, only reaffirming that the companies' primary and sole role is advancing the plaintiff litigation funds.

These criticisms and the counterarguments they have elicited, however, are inherently misguided. Specifically, both the pro and con arguments are forward-looking and selectively ends-driven. For example, the arguments on both sides assess the issue from a pre-resolution perspective. Such an assessment, particularly from the financing company, is dangerous – while justifying their validity based on the fact that the plaintiff was able to bring a meritorious suit, the companies overlook the plight of the plaintiff *post-settlement*, when payment is due. Indeed, while the plaintiff may have obtained a favorable outcome regarding the lawsuit, her battle may be far from over, depending on the amount of money she owes her attorney and the financing company, and the total amount awarded as a result of the lawsuit.

Additionally, the validity and ethics of litigation financing agreements are justified primarily in terms of a selected end: the plaintiff's ability to bring the suit. Subscribing to an elementary "ends justify the means" analysis, financing companies and their proponents argue that it is the attainment of this end that justifies the means, regardless of how burdensome, unfair, and one-sided the ends may be. Yet simplifying the arrangement in such a way overlooks just how burdensome, unfair, and one-sided the means may be. As discussed previously, a litigation financing company may easily triple its investment.[221] One commentator noted that:

> [C]ourts just do not like it. There is something unseemly about investors making money by betting on the outcome of litigation; investors making a lot of money for risk that sometimes may be limited; and investors making money in circumstances involving people who do not have any. All these factors make litigation financing seem like just another example of predatory lending.[222]

A March 2002 Florida Bar Opinion reflected these concerns. The opinion made no comment regarding litigation financing agreements' legality, but stated that "[i]f the transactions are illegal, an attorney must not participate in the transaction in any way."[223] Furthermore, it discouraged using these financing companies, as the "terms of the funding agreements offered to clients may not serve the client's best interests in many instances."[224] Consistent with its concern, the Committee placed

221. Mike France, *The Litigation Machine*, BUS. WEEK ONLINE, Jan. 29, 2001, http://www.businessweek.com/2001/01_05/b3717001.htm.

222. Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 63 (2004).

223. Fla. Bar Op. 00-3 (March 15, 2002), 2002 WL 463991, at *1.

224. *Id.* at *4.

restrictions and duties on attorneys in advising their clients regarding a litigation financing transaction and participating in or assisting the client with the transaction.[225] Specifically, the Committee prohibited attorneys from signing letters of protection to the company on behalf of their clients and urged attorneys to fully discuss the risks and benefits of these arrangements with clients prior to entering such an agreement.[226]

VI. Proposed Solutions

Recent commentary in the litigation financing debate frames the matter as an "all-or-nothing" issue: either ban the practice completely, thereby depriving needy plaintiffs of the ability to bring potentially meritorious claims, or allow the practice to continue, free from regulation, in turn allowing the financing companies to continue to benefit at the plaintiff's expense. This classification of the issue as a zero-sum game overlooks the possibility of an effective and mutually-agreeable middle ground: regulation without total prohibition. Three regulatory proposals are presented below.

A. *State Regulation*

Neither the states nor the federal government currently regulates litigation financing companies in any coherent or direct manner. Consequently, the companies are able to charge financing fees, which, if regulated as traditional loans, would undoubtedly violate state anti-usury laws and other borrower-protective laws.[227] However, at present, no state legislature has proposed or enacted laws regulating financing companies.

The current situation in Florida is no different. According to the *Fausone* court, "the court has no authority to regulate these agreements."[228] Though the Florida Bar currently allows attorneys to promote and provide these agreements to clients, the court suggested that because "a person who is the victim of an accident should not be further victimized by loan companies charging interest rates that are higher than the risks associated with the transaction," the Florida Legislature "might wish to examine this industry to determine whether Florida's citizens are in need of any statutory protection."[229] Despite the *Fausone* court's invitation, State Senator Walter Campbell, a plaintiffs' attorney and member of the Senate Judiciary Committee, stated that he was "not

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225. *Id.*
226. *Id.*
227. *See generally* Doris, *supra* note 26, at 3.
228. *See* Fausone v. U.S. Claims, Inc., 915 So. 2d 626, 630 (Fla. 2d Dist. Ct. App. 2005).
229. *Id.*

aware of any lawmaker pushing regulating legislation."[230]

Similarly, there exists no protective or regulatory legislation on the federal level. In response, one commentator has advocated expanding the reach of the federal Truth in Lending Act ("TILA") to include litigation financing companies. She believes this may provide a means of regulation that is both highly protective of borrowers and reasonably non-intrusive for the companies. TILA is intended to "strengthen competition among firms extending credit by the informed use of credit and to enable their customers to compare more easily the credit terms available . . . ."[231] Currently, litigation financing companies do not fall within TILA's regulatory reach due to its relatively narrow "credit" definition. Under TILA, "'[c]redit' must involve the deferred payment of a 'debt.' Generally, for a transfer of money to qualify as a 'debt,' the 'repayment of the purported debt cannot be contingent upon a future event.'"[232] Because litigation financing is premised on a contingency, namely the plaintiff's success in the litigation, it cannot be said that such companies extend "credit" within the meaning of the TILA.

In her proposal to amend TILA to include litigation financing companies, Professor Susan Lorde Martin suggests expanding the meaning of "debt" to comprise "contingent obligations when funds are advanced to support litigation."[233] Professor Martin points to existing precedent for altering the definition of "debt" based on the context in which it is used, specifically to define it as including contingent obligations.[234]

> Protection under TILA provides plaintiffs/borrowers conspicuous disclosure of finance charges and annual percentage rates calculated in a uniform way. Any advertising, including Internet advertising, which is an important method for litigation financing firms appealing to customers, would have to set forth clearly and conspicuously the cost of the funds advanced. Such disclosure would enable plaintiffs/borrowers to understand more easily what their cash advances would actually cost them if they did receive awards from the litigation, and it would enable them to shop around for the most favorable offer and to bargain for fee reductions.[235]

While Professor Martin pinpoints a major concern and focal point in protecting plaintiff-borrowers, her proposed solution, her reliance on

230. Carl Jones, *Lawsuit Financing Industry Survives Appellate-Level Challenge*, MIAMI DAILY BUS. REV., Vol. 80, No. 71 (Sept. 20, 2005), at 3, *available at* http://www.westlaw.com (enter citation "9/20/2005 MIAMIDBR 1" under "Quick Research" and select "Go") (page pin citation is to article version available on Westlaw).

231. *See* Martin, *supra* note 222, at 68.

232. *Id.* at 69 (footnote omitted).

233. *Id.*

234. *Id.*

235. *Id.* at 69-70 (footnotes omitted).

disclosure, without more, does not go far enough. Specifically, the majority of states who do not prohibit such agreements impose an ethical obligation on an attorney to fully discuss the pros and cons of the agreement with the client prior to the client entering into the agreement.[236] It would seem that an attorney who did not feel as if such an agreement was in a client's best interests or who was not convinced that the client fully appreciated what she was entering, would voice those concerns directly to the client. Moreover, according to the ALFA website, the majority of the member organization's financing clients come from attorneys themselves.[237] As a result, the attorney would presumably not refer a client to a litigation financing company in the first place if she had reservations. Due to the attorney's probable presence, any additional disclosure requirement appears to be superfluous.

B. *Laissez-Faire Regulation*

In a nod to Adam Smith and the market's "Invisible Hand," litigation financing companies have responded to calls for regulation by claiming that the market has proven to be, and will continue to be, a sufficient regulatory force. Prefacing this argument, financing companies have reaffirmed that they are not in the business of providing loans.[238] As such, "traditional bank loan interest rates cannot apply to these funds."[239]

> Lawsuits are risky investments and "non-recourse" advances are provided in situations where there is an unknown outcome, an uncertain maturity date, and the recipient has no current means for repaying the funds advanced to them. Furthermore, these advances do not require repayment of the investment or any fees if the plaintiff does not receive a financial award or settlement when the case is resolved. If the case is lost or the defendant insolvent, ALFA members forfeit their entire investment in that case. The higher rates also reflect the high transaction costs associated with processing, origination and servicing small advances.[240]

Moreover, ALFA claims that there is a "great misconception about the rates ALFA Members charge."[241] Because of the cases' indeterminable outcomes, uncertain maturity dates, and current inability to service the

236. *See* Fla. Bar Op. 00-3 (March 15, 2002), 2002 WL 463991, at *4.

237. ALFA FAQs, *supra* note 38 ("It is illegal in most states for attorneys representing personal injury victims in their lawsuits to provide any financial support to their clients. Instead, these attorneys may refer their clients to an ALFA member company when the client is experiencing financial distress during the course of his or her case.").

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

advance, combined with ALFA member's own internal finding costs (typically fifteen-percent per annum or greater), annual loss rates, overhead, wages, benefits, and other general operating costs, litigation financing companies must charge higher interest rates to stay in business.[242]

Accordingly, ALFA maintains that the market has served as an "efficient regulator of rates over the past five years."[243] ALFA explains that in the past, it was not unusual for companies to charge plaintiffs ten to fifteen-percent per month in addition to other fees and minimum charges.[244] "The advent of competition and an organization such as ALFA, establishing and utilizing best practices, has brought these charges down substantially."[245] ALFA's optimism is based on two predictions: (1) the entrance of more institutionally financed companies into the market (i.e. banks and traditional lending organizations); and (2) ALFA members' increased ability to achieve overall lower capital costs, due to the banking industry's greater industry knowledge.[246]

It is unclear whether reality will reflect ALFA's optimism. ALFA's optimism is premised on a contingency that, as of present, has not come to fruition. What are plaintiff-borrowers, consumer protection groups, and legislators supposed to do in the interim? Abandon efforts to regulate and "wait and see," while the financing industry continues to create windfalls for itself at the plaintiff-borrowers' expense? Moreover, the financing industry has not provided a timeframe during which this claimed change will occur. How long must regulation advocacy groups wait? Finally, what if the financing industry is incorrect and the market does produce as anticipated? Conditioning plaintiff-borrower protection on a contingency would be unwise in light of the other available regulatory options.

C. *ALFA Self-Regulation*

As previously intimated, in a novel regulatory approach, or perhaps in an attempt to stave off third-party regulation, the litigation finance industry recently organized itself into ALFA, a national trade organiza-

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242. ALFA FAQs, *supra* note 38 (estimating that, on average, the "true cost of doing business" exceeds thirty-percent per annum).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* ("As the industry continues to mature, ALFA expects rates will continue to fall with more institutionally financed companies entering the marketplace. In addition, it is hoped that the more knowledgeable the banking community becomes about non-recourse funding, the greater the probability that ALFA Members will be able to achieve overall lower costs of capital. Those costs savings will be passed along to the clients in the form of lower rates.").

tion aimed at standardizing industry practices, raising industry standards, and improving its overall image.[247] Based in New York, ALFA was formed in response to New York State Attorney General Eliot Spitzer's investigation into a current ALFA member.[248] While "[n]o charges of wrongdoing were brought, . . . [the investigation] determined that more could be done to protect consumers."[249] Accordingly, eleven national litigation financing companies voluntarily launched ALFA and have agreed to structure their business practices pursuant to terms proposed by Spitzer's office.[250] Harvey Hirschfeld, ALFA Chairman and an executive vice president at New York-based Plaintiff Funding Corp., a group which does business nationally as LawCash, reflected, "[t]here is a concern in the industry that people are charging exorbitant rates and giving the industry a bad name . . . . If done properly, [financing] can serve a solid purpose."[251] Spitzer echoed Hirschfeld's optimism, noting that the establishment of ALFA will "fundamentally change the manner in which these personal injury litigation cash advances are offered and negotiated so that consumers can make more informed decisions."[252]

The fifteen-member organization writes that its members are "collaboratively working together to establish industry standards in the Legal Finance industry, especially regarding transparency in transactions and clear disclosure to consumers."[253] ALFA's stated goal "is to increase membership so that consumers throughout the U.S. can trust that reputable and fair Legal Finance is accessible when they need it."[254] To achieve this goal, ALFA has been working with the New York Attorney General's Office, proposing reforms to protect consumers and the industry's integrity. Proposed reforms include:

- Clear and conspicuous disclosure statements regarding the cash advance, including the total amount of the cash advance; an itemization of one-time fees such as application, processing, broker and attorney review fees; the annualized rate of return on the cash advance; and the total amount to be repaid; broken down in six month intervals, carried forward to 36 months;

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247. Dee McAree, *Legal Cash-Advance Businesses Form Group: Industry Seeks Better Image; Lawyers Skeptical*, THE NAT'L LAW J., Vol. 27, No. 29 (March 28, 2005), at 4.

248. *Id.*

249. *Id.*

250. *Id.*

251. McAree, *supra* note 247.

252. Press Release, Office of New York State Attorney General Eliot Spitzer, Personal Injury Cash Advance Firms Agree to Reforms (Feb. 28, 2005), *available at* www.oag.state.ny.us/press/2005/feb/feb28a_05.html.

253. ALFA About Legal Finance, http://americanlegalfin.com/alfasite2/about_legal_finance.asp (last visited Feb. 20, 2006).

254. *Id.*

- A five-business day right to cancel the contract without obligation or penalty;
- A notarized acknowledgment by the consumer's attorney that the contract has been reviewed and explained to the client;
- For English and Spanish-speaking consumers, contracts written in the same language in which the oral negotiations were conducted. For consumers whose primary language is neither English [n]or Spanish, a translation of the principal terms into their native language.[255]

Despite its relatively recent establishment, ALFA is already drawing critics, particularly consumer and legal groups and plaintiffs' attorneys.[256] These critics have taken issue with the overall concept of litigation financing, especially the high interest fees financing companies charge, with many critics doubting whether entering into such an agreement is in the client's best interest.[257]

Due to ALFA's relative youth, analyzing its effect and potential for success in achieving its stated goals is mere speculation. On the one hand, there is reason to believe that early criticisms are misplaced and that ALFA will achieve its goals. In particular, the member organizations appear to have premised ALFA membership on the maxim "strength is found in numbers." In ALFA's case, strength is found in a partnership and an understanding between the litigation financing company and the plaintiff's attorney, supervised by some form of government presence.

However, ALFA's goals and mission fail to make lowering excessive interest fees a priority, which appears to be the essence of the debate over the legality and ethics of such financing arrangements. Regardless of how frequently disclosure is conducted, who conducts disclosure, and who witnesses disclosure, financing companies continue to charge excessive interest fees at the plaintiff-borrowers' expense. Repairing the industry's image among consumers and making financing more accessible will do little to lower finance fees.

Furthermore, ALFA's limited geographical reach and slight industry representation may result in its downfall. While the member organizations conduct business nationwide, ALFA itself is based in New York and supervised by the New York Attorney General's Office.[258] As a result of this relationship, New York citizens' particular concerns will

255. Spitzer, *supra* note 252.

256. *Id.*

257. *See, e.g.*, Fla. Bar Op. 00-3 (March 15, 2002), 2002 WL 463991, at *4 ("The terms of the funding agreements offered to clients may not serve the client's best interests in many instances.").

258. *See* ALFA About Legal Finance, *supra* note 253; Spitzer, *supra* note 252.

maintain precedence in ALFA's agenda. New Yorkers' concerns may not correspond with consumer concerns in other states. Thus, the risk exists that ALFA's proposals and reforms will cater directly and exclusively to New Yorkers.

Similarly, ALFA's current size suggests that the fifteen member organizations may have bitten off more than they can chew. At present, at least one-hundred litigation financing companies exist in the United States.[259] It does not follow that fifteen of these organizations can easily gain control over and impose standards for a much larger and more diverse industry.

VII. Conclusion

Undoubtedly, litigation financing companies serve a vital need by providing financial assistance to plaintiffs during the pendency of their claims. Litigation is costly and the fight is not always one of equals. Regardless of the strength of her cause of action, a plaintiff may need financial assistance to pay medical bills and other living expenses. Unable to obtain such assistance from her attorney or traditional lenders, the plaintiff may turn to financing companies for the necessary advances.

Despite serving this need, financing companies have been the subject of criticism from consumer protection groups, plaintiffs' attorneys, courts, and legislators, citing concerns of champerty, usury, unconscionability, and potential ethical violations. However, without an existing and effective regulatory mechanism by which to protect plaintiff-borrowers against potential abuses, these groups have been and will continue to be unable to address these concerns via self-regulation. State legislatures, including the Florida Legislature, must address these concerns or risk placing their potentially vulnerable constituents at the mercy of litigation financing companies.

259. Doris, *supra* note 26, at 1.