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Pay to Play or Get Rich Quick: A Look at Litigation Finance in the United States.

Austin Rucker[*]

ABSTRACT

Litigation Finance is a practice in which financial investors purport to help individuals gain access to the court system. While nearly all litigation investors claim to be funding a noble cause, there is no denying that these investors are profiting from lawsuits. This article addresses the practice of litigation financing in the United States by analyzing state and federal laws regarding the practice and by using empirical data to determine whether litigation financing has in fact increased access to the courts. It concludes that regulations in the practice of litigation financing are absolutely required and that perhaps access to the courts has not increased despite the litigation finance industry's exponential growth in the recent years.

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I. INTRODUCTION

Litigation finance is not a new concept. In the mid 1990's, litigation finance hit the international scene.[1] However, litigation finance was not introduced to the United States until 2006.[2] Since the introduction of litigation finance to the United States, the industry has evolved rapidly.[3] In 2021, the United States had the largest third-party litigation finance market globally, making up 52% of the world market with a price tag of $17 billion.[4] This rapid expansion is likely due to the accessibility and affordability of civil justice, in which the United States ranked 99 out of 126 countries in 2019.[5] Litigation finance is an innovation allegedly aimed at resolving the issues of cost and fairness in the United States civil justice system.

This article will examine the evolution of litigation finance in the United States, the ethics of litigation finance, and review whether litigation finance is used to truly provide access to civil justice or if it is a way for investors to get rich on the backs of those who have suffered a legal injury. Section II of this article seeks to provide a general overview and history of litigation finance, and highlight how the practice started with a finance company and evolved into a company selling NFT tokens as investments in litigation. Section III examines various state laws enacted to regulate the practice of litigation finance. Section IV will examine potential ethical issues with litigation funding. Finally, Section V will discuss whether the issues of cost and access to civil litigation have truly been cured by the widespread use of litigation finance.

II. A BACKGROUND AND HISTORY OF LITIGATION FINANCE

Litigation financing is the practice of using legal claims as collateral to secure financing from third parties to carry on the litigation of those legal claims.[6] The litigation funder provides capital and in return the funder receives an interest in the civil case.[7] In the usual course, the funder receives a return on the invested capital only if the case is successfully settled or the case results in a judgment for the financed.[8] The financed in the usual course has no obligation to repay the funds should their claim be unsuccessful.[9] Litigation can be funded by individuals or corporate entities.

A litigation finance company is a company that uses capital from investors to invest in litigation.[10] A litigation finance company uses their capital to invest either

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1. David J. Kerstein & Wendie Childress, *Litigation Finance Industry*, BLOOMBERG LAW (last visited Mar. 17, 2023), https://www.bloomberglaw.com/product/blaw/document/X486TJHC000000.
2. *Id.*
3. *Id.*
4. Autumn Demberger, *Swiss Re Charts $17 Billion in Litigation Funding in 2021; Is it Any Wonder We're Experiencing Social Inflation?,* RISK AND INSURANCE (Jan. 11, 2022), https://riskandinsurance.com/swiss-re-charts-17-billion-in-litigation-funding-in-2021-is-it-any-wonder-were-experiencing-social-inflation.
5. Kerstein & Childress, *supra* note 1.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

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solely or primarily in litigation.[11] A few notable litigation finance firms in the United States are Tribeca Capital Group, Lex Shares, Omni Bridgeway, Burford Capital, and Nera Capital.[12] Other litigation funders are hedge funds or private investors.[13] When a hedge fund or private investor provides financing for litigation it is typically on a one-off basis, where a broker may identify a case for investment, after which the broker will source capital for the law firm or a litigation finance company.[14] Another source of litigation finance that does not provide a return based on the outcome of the case is crowd-funding.[15]

Litigation funding can be broken down into two types, commercial funders and consumer funders.[16] Those in the commercial funding category are funding complex, high-value commercial litigation cases.[17] Those types of cases usually consist of "antitrust, asset enforcement, bankruptcy, breach of contract, breach of fiduciary duty, copyright or trademark, patent, and trade secret misappropriation,"[18] and typically involve parties that are businesses that are represented by highly sophisticated legal counsel.[19] Funders in the commercial funding category often invest greater than $1 million in a single case and the case usually involves estimated damages of $10 million or greater.[20]

In contrast to commercial funding, consumer funding involves suits such as "personal injury, medical malpractice, class action and mass tort litigation claims."[21] In other words, suits involving individuals.[22] The funding gathered by consumer funders is used to cover legal costs and any medical or living expenses while the lawsuit is pending.[23] Investments amount for individual consumers are typically smaller in amount when compared to commercial funding.

The goal of both commercial and consumer funding is to provide those with legitimate or meritorious claims access to the courts by supplying non-recourse funding.[24] When litigation finance emerged in the United States, the goal was initially to help under-resourced plaintiffs.[25] Litigation financing permits smaller plaintiffs to bring claims against larger adversaries that typically have more resources available than the smaller plaintiff.[26] The idea is that through litigation financing, litigation can be determined based on the merits of the case, and not which party has the funds and resources to outlast the other.[27]

However, even if the goal when litigation financing was introduced was to help the smaller plaintiff, the practice has become a corporate financing tool.[28]

11. Kerstein & Childress, *supra* note 1.
12. *The 5 Best Litigation Finance Companies*, TRIBECA (Sept. 26, 2023), https://tribecalawsuitloans.com/litigation-finance-companies.
13. Kerstein & Childress, *supra* note 1.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Kerstein & Childress, *supra* note 1.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Kerstein & Childress, *supra* note 1.
26. *Id.*
27. *Id.*
28. *Id.*

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Companies that are involved in suits typically have funds tied up in those suits, but litigation financing allows companies to continue to grow while carrying on litigation.[29] Not only has litigation funding evolved from being used by smaller plaintiffs or used to balance the capital sheets of corporations, but law firms have begun taking advantage of litigation financing.

Law firms use litigation financing to manage risk and profitability by leveraging funding.[30] A study by the American Bar Association found that in 2009, just three years after the introduction of litigation financing to the United States, more than 80% of law firms had turned a case away due to not being cost-effective to take.[31] Law firms are now able to take cases that, prior to litigation financing, they may not have been able to take on for cost reasons.[32] Not only can law firms take on more cases, but since firms aren't having to put capital up themselves, discounts can be passed on to clients.[33] Funding supplied to law firms can boost their operation as a whole by removing the uncertainty of when funds will be available under contingent agreements.[34] This enables firms to not only spread the risk among larger pools of cases, but use the funds to maintain staff, provide bonuses, cover expenses that would typically be out of pocket, or simply cover operating cost.[35] The practice of law firms using litigation financing began as a tool for boutique firms attempting to grow but has increasingly become a tool used by leading global firms.[36]

Litigation financing continues to evolve thorough modern times. In 2021, tech startup company Ryval, looked to make litigation not only available to more plaintiffs, but to make the practice available to everyday Americans who wished to invest. Ryval plans to become the "stock market" of litigation.[37] One of Ryval's founders, Kyle Roche, claimed that a goal of the company was to make justice in the federal court system more affordable and accessible to all.[38] Roche believes that Ryval will make "lawsuits happen that maybe might not have happened."[39] Ryval is attempting to revolutionize litigation funding by vetting legal claims, then allowing the public to invest in those claims.[40] In exchange for interest in the claim, the plaintiff would receive funds to litigate their case.[41] Even though Ryval claims to be a warrior for access to the civil legal system, the focus on the company is on the potential return for investors.[42] Ryval advertises a 50% plus return on annual returns and $10 billion plus asset class.[43]

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29. *Id.*
30. *Id.*
31. Kerstein & Childress, *supra* note 1.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Maxwell Strachan , *Tech Startup Wants to Gamify Suing People Using Crypto Tokens*, MOTHERBOARD TECH BY VICE, (Jan. 7, 2022), https://www.vice.com/en/article/v7d7x3/tech-startup-wants-to-gamify-the-us-court-system-using-crypto-tokens.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. Strachan, *supra* note 37.

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Ryval's platform attempts to take advantage of a rule created by the JOBS Act.[44] The rule allows private companies to crowdfund up to $5 million from Americans regardless of wealth.[45] What this means is all investors regardless of accreditation will be allowed to purchase tokens, which represent a stake in the lawsuit, with a specific case and hold or trade those tokens on the open market.[46] Accredited investors will be able to trade the lawsuit tokens immediately and non-accredited investors will be legally required to "agree to a year-long lockup period."[47] This method makes Ryval a crypto-infused, lawsuit-focused crowdfunding platform like GoFundMe; but, instead of donating, users are investing and have a potential to see a profit from their investments.[48] The return on investment is dependent on the timeline of a settlement or judgment.[49]

Roche explained that if a court dismisses the lawsuit that investors have contributed to, investors will get 80% of their investment back.[50] Otherwise, they either lose their investment if the plaintiff loses the case, or they receive anywhere between 2 and 3.5 times return on their investment.[51] The tokens themselves are not governance tokens, meaning they do not grant any decision-making rights to the investors.[52] "Whoever owns a token at the time of a settlement or verdict cashes in on that token."[53]

The first case using this type of token funding was out of California, *Apothio, LLC v. Kern County, California*.[54] Apothio brought suit against the county because of the destruction of 17 million hemp plants the company had "cultivated on more than 450 acres."[55] The crop had been valued between $500 million and $1 billion at the time of destruction.[56] In April 2020, Apothio sued the county and others for the value of the legal hemp crop lost by the destruction.[57] The minimum goal to be raised was set at $250,000 with a maximum of $5 million.[58] 170 investors contributed $347,887 with a minimum investment of $100. The Initial Litigation Offering was closed on March 1, 2022. This case is still ongoing nearly three years later.[59]

This pilot case highlights the aspects of civil litigation that Ryval seeks to assist with by mainly helping plaintiffs raise capital they may not otherwise have; as in the *Apothio* case, the plaintiff's ability to raise capital—selling hemp—was destroyed. While this is the first tokenized litigation, it was not available as tokens to

44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. Strachan, *supra* note 37.
50. Kollen Post, *First Tokenized Lawsuit Fund goes Live on Republic, will Distribute on Avalanche*, THE BLOCK (Oct. 26, 2021), https://www.theblock.co/post/122044/first-tokenized-lawsuit-fund-goes-live-on-republic-will-distribute-on-avalanche.
51. *Id.*
52. *Id.*
53. Strachan, *supra* note 37.
54. Post, *supra* note 50.
55. *Apothio Initial Litigation Offering*, REPUBLIC, https://republic.com/apothio (last viewed Mar. 19, 2023).
56. *Id.*
57. *Id.*
58. *Id.*
59. Court Dockets, *Apothio, LLC v. Kern County, et al., Docket No. 1:20-cv-00522 (E.D. Cal. Apr 10, 2020), Court Docket*, BLOOMBERG LAW, (Accessed Mar. 19, 2023), https://www.bloomberglaw.com/document/2048122477502210.

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be purchased on Ryval's website but rather through a platform named Republic.[60] In *Apothio*, Kyle Roche, one of the founders of Ryval, is listed as an attorney for the plaintiff.[61]

Along with the innovation in litigation funding, the practice has provided some relief to the legal industry during the Covid-19 pandemic during which parties to litigation faced financial uncertainty.[62] The uncertainty was only increased by the congested dockets occurring from lockdowns.[63] Even with most jurisdictions in the United States moving to video or teleconference for certain hearings, trials were postponed indefinitely. In some cases, courts have yet to catch up with the backlog of postponed trials.[64] The effects of the pandemic on the court system have resulted in cases being filed today which requires a trial to be delayed possibly years as the court system catches up from the pandemic.[65]

Most issues regarding litigation funding involve matters of state law, or local procedural matters, resulting in little federal law regarding funding.[66] However, this trend may change. In 2021, the United States Congress introduced an act initially introduced in 2019 as the Litigation Funding Transparency Act.[67] If it were enacted, the Act would require not only disclosure of funding but a copy of the funding agreement in any federal class action or multi-district federal litigation.[68] It is currently uncertain whether the Act will pass.

III. STATE LAWS REGARDING LITIGATION FINANCING

As mentioned above, there are no federal laws or regulations addressing consumer third-party litigation financing. As of November 2022, ten states have enacted laws addressing litigation financing.[69] The following is a brief examination of those laws:

Arkansas

Arkansas Code section 4-57-109 places a limit on interest that litigation funders can charge consumers at a rate no greater than 17%.[70] The statute also requires funding contracts to disclose the annual percentage applicable to the agreement and any amount that is paid to a litigation funder that exceeds what was provided to the consumer for the lawsuit, must be included as interest.[71] This results in a cap that the litigation funder can receive from the consumer's lawsuit.

60. *Apothio Initial Litigation Offering*, *supra* note 55.
61. *Id.*
62. Robin M. Davis et al., *Litigation Funding, Editorial: United States: - Other Key Jurisdictions*, LAW BUSINESS RESEARCH, at 131, https://woodsford.com/us/wp-content/uploads/sites/3/2022/01/2022-Litigation-Funding-United-States-%E2%80%93-other-key-jurisdictions.pdf (last visited Feb. 18, 2023).
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. Davis et. al, *supra* note 62.
69. U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 49 (2002).
70. *Id.* at 45.
71. *Id.*

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Maine

Maine has a statute that covers requirements for litigation funding enacted in 2008.[72] The statute requires contracts for litigation funding to be written with common words and everyday meanings so that consumers can understand the contracts without having to rely on professional assistance.[73] The statute also requires a form disclosure statement, a requirement that the consumer must initial each page of the contract and a legend above the consumer's signature in 12-point font.[74] The legends appear to be required to inform consumers of rights they have and requirements that Maine puts on legal funding providers.[75] In addition, Maine requires the registration of litigation funding providers with a state administrator and requires application fees for registration.[76]

Nebraska

Nebraska's statutes regarding litigation finance can be found in sections 25-3301 through 25-3309.[77] Litigation funders are required to register with the state.[78] The litigation contracts must have the total amount the consumer must repay.[79] The repayment schedule must be provided in 6-month intervals over 36-months, and must include all fees, the annual percentage rate of return calculated for each 6-month interval, and include the frequency with which interest will be compounded.[80]

Nevada

Nevada's statute was passed in 2021 and requires litigation funders be licensed in the state.[81] The provisions of the statute apply to transactions that do not exceed $500,000.[82] The funder must also predetermine the amount to be paid back to the funder and the timing in which it must be paid back.[83] The amount paid back to the funder must not exceed the funded amount plus 40% interest annually.[84] The funding contract must also include the maximum amount the consumer will pay the litigation funder and a payment schedule with 180-day payment due dates.[85] These statutes seem to protect the consumer if the damage award is larger than predicted. Nevada's consumer litigation funding statutes can be found in Nevada Revised Statutes chapter 604C.[86]

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72. ME. REV. STAT. tit. 9-A, § 12-104 (2007).
73. tit. 9-A, § 12-104.
74. tit. 9-A, § 12-104.
75. tit. 9-A, § 12-104.
76. tit. 9-A, § 12-104.
77. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 69.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 69.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*

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Ohio

Ohio requires funding contracts to include the total amount to be paid back to the funder by the consumer.[87] The statute requires the consumer to make payments in six-month intervals for 36-months, which includes all fees and the annual percentage rate of interest, calculated for each six-month interval.[88] The Ohio statute regarding litigation funding can be found in Ohio Revised Code section 1349.55.[89]

Oklahoma

Litigation funders must obtain a license from the state. Funding contracts must contain a payment schedule that includes the funded amount and payments must be due in 180-day intervals.[90] Oklahoma's litigation funding statute can be found in Oklahoma Statutes Title 14a.[91]

Tennessee

Litigation funders must register with the state and cannot not charge consumers an annual fee of more than 10-percent of the original amount given to the consumer.[92] Terms of funding agreements are limited to three years, and maximum yearly fees, which are classified differently as the annual fee, are capped.[93] The statute can be found under Tennessee's Code Annotated section 47-16-101.[94]

Vermont

The statute requires litigation funders to register with the state and file annual reports.[95] Funding contracts must provide the total amount funded to the consumer, itemized charges, and the annual percentage rate of return.[96] The consumer litigation financing statute can be found under Vermont Statute Annotated Title 8 Chapter 74.[97]

West Virginia

Litigation funders are required to be registered with the state.[98] The funding contracts are required to disclose the total amount funded to the consumer, and the total amount the consumer must pay back to the funder.[99] The terms of repayment

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87. *Id.*
88. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 69.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 46.
93. *Id.*
94. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 69, at 46.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*

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are restricted to six-month intervals for 48-months.[100] West Virginia's litigation finance law can be found under West Virginia Code chapter 46a.[101]

Wisconsin

If there is a litigation funder for one of the parties in a civil action, the funding agreement must be disclosed to the other party.[102] The statute does not distinguish between commercial and consumer funding, making Wisconsin the only state requiring disclosure of commercial litigation funding agreements.[103] The Wisconsin litigation finance law can be found under Wisconsin Statutes section 804.01.[104]

Missouri

Missouri currently does not have a law governing litigation finance, but there are two separate Missouri Senate Bills pending in the legislature which would create provisions to consumer legal funding and litigation financing. Senate Bill 342 "creates provisions related to consumer legal funding and litigation financing."[105] The bill would require, among other things, standard contracts and funders licensing. [106] The bill is currently in the "perfection" stage which is required prior to a final reading for the legislature to vote on the bill.[107]

It is clear from this bill that Missouri law makers have a concern that litigation financers may take advantage of consumers and, therefore, are attempting to enact laws to cap the amount financers can recover from the consumer's lawsuits.

It appears the state laws, with the exception of Wisconsin, look to protect consumers in two ways: (1) by making it clear what the terms of repayment are and the exact amount to be repaid, and (2) capping the amount a funder can receive in return. If more states embraced this same model, it would be hard for one to imagine how a company like Ryval could succeed because the ceiling on the returns could potentially deter investors.

IV. ETHICAL CONSIDERATIONS

Bloomberg Law presents seven questions regarding ethical considerations in litigation financing. Of course, every state has their own ethical obligations that attorneys must abide by, so these questions are questions formulated using the ABA Model Rules of Professional Conduct. The following is an examination of the questions presented by Bloomberg.

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100. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 68, at 46.
101. *Id.*
102. *Id.*
103. *Id.* at. 45–46.
104. *Id.* at 46.
105. S.B. 342, 102nd Gen. Assemb., Reg. Sess. (Mo. 2023).
106. *Id.*
107. Missouri House of Representatives, *The Legislative Process in Missouri*, (Accessed Apr. 22, 2023), https://house.mo.gov/billtracking/info/howbill.htm.

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a. "Does the litigation financing agreement preserve the lawyer's independence?"[108]

> All financing arrangements should comply with applicable ethics rules.[109] The writers of the checklist suggest adding a clause to the financing agreement that states the fees or funds provided "do not permit the funder to 'direct or regulate' the lawyer's professional responsibility."[110]

b. Is the client informed of the funding agreement with a third party?[111]

> This question appears to be tailored to conflicts between the client and the funder.[112] Of course, the attorney's duty is to the client not the funder, but a financing agreement should address what happens in the event there is no longer a shared interest between the funder and the client.[113] This is potentially a huge ethical concern on the face of the litigation financing practice because what the funder wants, assumedly, is the greatest return on investment of their contribution and the client, of course, wants their issue to be resolved in the way best for them. This could mean the client is willing to take less in damages in a settlement to have the issue resolved, whereas the funders may want to continue to push the action forward with the potential for the return to be higher. At the very least, the attorney needs to advise the client regarding the fee arrangement and explain their scope of representation to the client.[114]

c. "Does the Agreement require the lawyer to provide direct financial assistance to the client?"[115]

> ABA model rule 1.8(e) states a "lawyer may not provide financial assistance to a client in connection with pending or contemplated litigation" with very limited exceptions.[116] One of the exceptions is to advance the court costs and expenses of litigation with a contingent repayment of the funds supplied.[117]

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108. Alanna Clair, *Litigation, Checklist – Ethical Considerations in Litigation Finance*, BLOOMBERG LAW, https://www.bloomberglaw.com/product/blpg/document/X80B7HUS000000 (last visited Feb 18, 2023).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. Clair, *supra* note 108.
115. *Id.*
116. *Rule 1.8: Current Clients: Specific Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_8_current_clients_specific_rules (last visited Feb. 18, 2023).
117. *Id.*

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d. Is the state where the suit is brought proscribe to "champerty" or "maintenance?" [118]

> Of course, research should be done to ensure parties do not reside in a jurisdiction that recognizes common law limitations on litigation funding arrangements.[119] Research should also be completed to ensure that the funding agreement will be likely enforceable.[120]

e. "Is the litigant and the litigant's lawyer taking steps to maintain any work product protection?"[121]

> Bloomberg suggests not to disclose any work product materials until a non-disclosure agreement is in place with potential funders.[122] Bloomberg also suggests considering limiting work product materials, providing a clause that parties intend to keep communications and materials confidential, and to consider using a common interest agreement.[123]

f. "Is there an obligation to disclose the arrangement to a court?"[124]

> There are some local rules or other rules that require a party to disclose the identity of a litigation funder to the court or opposing parties. While some jurisdictions permit a litigant to resist disclosure of funding agreements or related materials, it necessary to know the jurisdictional rules where the agreement is being made.[125]

g. "Does the Agreement violate the ethical rules against 'fee-sharing' with non-lawyers?"

> ABA Model Rule 5.4(a) restricts lawyers or firms from sharing legal fees with a nonlawyer with exceptions.[126] Most states have a similar rule, however, a few states, have recently modified their rules allowing fee-sharing with non-lawyers under certain circumstances.[127] This may not be an issue in the case of Ryval because the founders appear to be attorneys.[128]

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118. Clair, *supra* note 108.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Clair, *supra* note 108.
125. *Id.*
126. *Rule 5.4 Professional Independence of a Lawyer*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer (last visited Feb. 18, 2023).
127. Clair, *supra* note 108.
128. Strachan, *supra* note 37.

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State courts have also weighed in with concerns about the practice of litigation financing. In a case that abolished the common law prohibition against champerty, The Minnesota state supreme court had words of warning for lower courts.[129] The court cautioned district courts to scrutinize litigation financing agreements to determine if they are enforceable in equity.[130] Lower courts should also review uncounseled agreements, between parties of unequal bargaining power involving an unsophisticated party. [131] The court cautions other courts and attorneys to ensure "litigation financers do not attempt to control the course of the underlying litigation . . . ."[132] Lastly, the court mentions regulation by the Legislature which the court admitted was an issue beyond the scope if its review.[133] However, the court did believe that litigation financing allows plaintiffs "who would otherwise be priced out of the justice system to assert their rights."[134]

The northern district court in Illinois heard a case regarding the discoverability of financing materials.[135] The defendants in the case were attempting to subpoena litigation financing companies to produce documents related to the parties in the lawsuit.[136] The court held that financing materials were relevant to the lawsuit and, therefore, discoverable; however, the materials were protected from disclosure by the attorney work product doctrine.[137] The same district court held in a separate case after an *in camera* review of the litigation documents that some were relevant and did not breach privilege and, therefore, allowed the documents to be discoverable to the defendant.[138]

These cases provide little clarity as to where Illinois stands on whether litigation financing materials, such as contracts, are discoverable or protected by a privilege. It appears that some of the documents may not be protected by privilege and are discoverable. It is worth noting these cases did not delve into the ethics of litigation financing.

The Western District of New York evaluated a litigation finance agreement between a funder and a consumer as a loan when the consumer attempted to file for bankruptcy and in so doing attempted to not pay the funder.[139] The funder initially structured the funding agreement with the consumer to avoid the legal issues in New York with financing.[140] The funder in this case structured the funding agreements as investments and not loans providing a contingent right of repayment if the consumer recovered on account of the personal injury.[141] The court held the funder's attempt to overcome the legal issues of litigation funding in New York were successful and the agreement was held to be valid, but the funder could not change the

129. Maslowski v. Prospect Funding Partners LLC 944 N.W.2d 235 (Minn. 2020) ("Champerty is an agreement to divide litigation proceeds between the owner of the litigated claim and the party unrelated to the lawsuit who supports or helps enforce the claim.").
130. *Id.* at 241.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. Doe v. Society of Missionaries of Scared Heart, WL 1715376, at *1 (N.D. Ill. 2014).
136. *Id.*
137. *Id.* at *2.
138. Miller UK Ltd. v. Caterpillar, Inc., 17 F.Supp. 3d 711, 742 (N.D. Ill. 2014).
139. In re Minor, 482 B.R. 80, 82 (Bankr. W.D.N.Y. 2012).
140. *Id.* at 83 (New York has codified the common law rule against champerty and prohibits the transfer of claims for recovery of damages in a personal injury case).
141. *Id.* at 85.

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classification of the agreement as a loan in light of bankruptcy.[142] The New York court held that the litigation funder enjoys a right to recover litigation proceeds but cannot share in any proceeds that have become non-exempt assets of a bankruptcy estate.[143] This case highlights how New York treats litigation funding and how a funder must structure their funding agreements as to not violate New York statutes at the risk of funders being limited in what they can recover in bankruptcy proceedings.

The above case is not the only time a New York court has weighed in on litigation finance. In a case from 2005, prior to the introduction of litigation funding as a practice in the United States, the Supreme Court of New York found that a litigation funder was charging too high of an interest rate on the funds supplied to a consumer.[144] The court determined that the funder issued a loan to the consumer and that loan was in violation of the state's usury laws.[145] In holding that "a lawsuit is not an investment vehicle,"[146] the court made an important distinction for the litigation funding industry. This language from the court could prove troublesome for a company such as Ryval who advertises its company as an investment opportunity in litigation. From these two cases out of New York, it is clear that litigation funders need to be scrupulous in their contract drafting with a consumer.

The Supreme Court of Colorado has held similar to the New York Supreme Court in that "litigation finance companies that agree to advance money to tort plaintiffs in exchange for future litigation proceeds are making 'loans' . . . even if the plaintiffs do not have an obligation to repay any deficiency if the litigation proceeds are . . . less than the amount due."[147] The main reason the court ruled that the funds were a loan was because the agreements did not transfer ownership rights or assign any rights or duties.[148] Further, the litigation finance companies also required consumers to repay more than the amount funded based on the length of time of the lawsuit as the fees acted as interest, the court found the interest or fees to be finance charges and a "hallmark of a consumer loan."[149] Lastly, the court determined the funds to be a loan because the consumer controls the pending litigation despite purportedly selling rights to some portion of the proceeds.[150] These distinctions are what the court relies on to determine the funds were a loan. Because the funders do not assume or step into the plaintiffs' shoes, the agreements only supply the rights any creditor would have on a loan to receive payment of amounts due.[151]

This brief look into various state court cases shows that there is a difference of opinion on litigation funding from state to state and for litigation funders and consumers to use litigation funders. The landscape is not clear what a state court may hold regarding the contracted agreement. The following section looks at federal courts from 2000 to 2020, and the number of civil cases each circuit had filed within it.

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142. *Id.* at 85–86.
143. *Id.*
144. Echeverria v. Estate of Linder, WL 1083704, at *8 (N.Y. Sup. 2005).
145. *Id.*
146. *Id.*
147. Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400, 401 (Colo. 2015).
148. *Id.* at 410.
149. *Id.*
150. *Id.*
151. *Id.*

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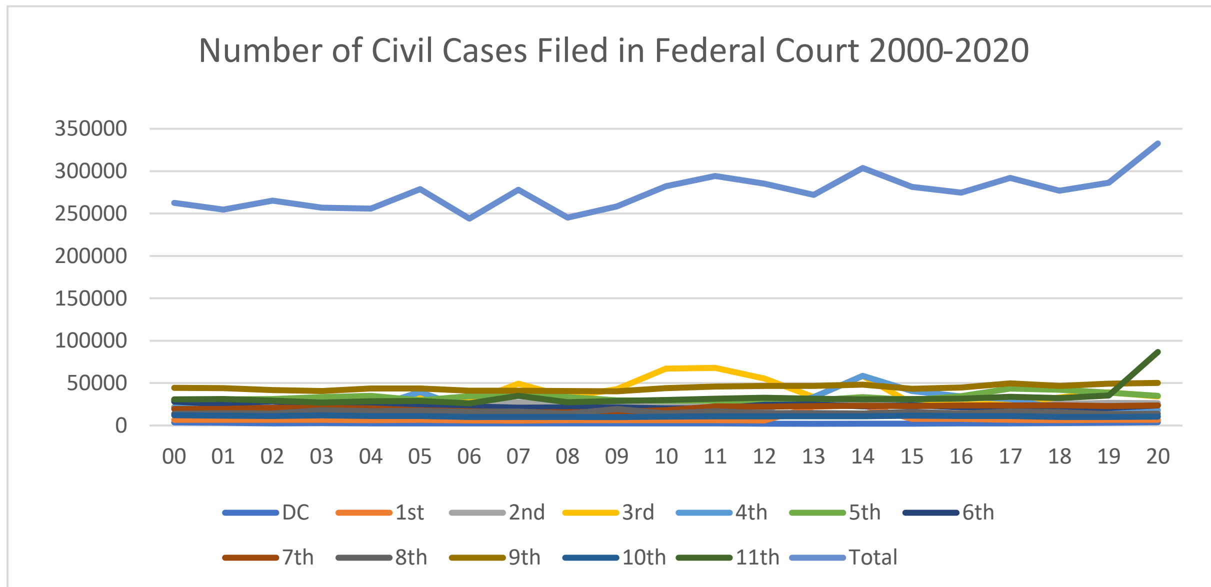
V. ACCESS TO THE FEDERAL COURTS FOR CIVIL LITIGATION FROM 2000 – 2020.

The main goal litigation funders claim to have is to provide individuals with access to the civil court system that the individual may not have had otherwise due to the cost of litigation. The federal courts provide statistical data on the business of the courts, and specifically for the purposes here, how many civil suits are brought yearly in the federal district circuit courts.[152] Figure 1 depicts a line graph showing the number of each federal circuit civil case filings between 2000 and 2020. The x-axis depicts the year, and the y-axis depicts the number of civil cases filed in federal courts. Each circuit is depicted by a different color seen in the legend at the bottom of the figure.

Figure 1



It can be seen that after the practice of litigation funding was introduced to the United States in 2006, there has been a rise in civil litigation, in 2006 there were 244,068 total civil cases filed in federal court and in 2020 there were 332,732 civil cases filed in federal court. However, the fact that there are variances in the yearly numbers, not just steady growth, suggests there are likely confounding variables that have an effect on civil litigation on the federal level.

There are likely many variables that affect the filing of civil lawsuits. The purpose of this evaluation is not to narrow down what variables have the most effect on federal civil litigation, but rather to evaluate since the introduction of litigation funding whether the number of suits increased and, for the most part, whether federal civil lawsuits filed increased from prior to 2006 through 2020.

While exact amounts of funding are not readily available, like the statistics of the cases the federal court system has had filed, there are other statistics that can

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152. *Caseload Statistics Data Tables*, UNITED STATES COURTS, https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (last visited Mar. 17, 2023).

help visualize whether litigation funding is providing greater access to the federal court system. In a 2017 report created by Burford Capital, claimed litigation funding has grown in the United States by 414% from 2013 to 2017.[153] In looking at Figure 1, between the years of the 414% growth, there was actually a decline in civil cases brought in the federal courts between 2014 and 2015. While the number of cases filed increased after 2015, there was not an increase that mirrors the growth of litigation funding. This finding leads to two conclusions. First, there are variables outside of litigation costs that have an effect on individuals bringing suits in federal court. Second, perhaps the cost of litigation, while usually a barrier to the courts, is not such a great barrier after all.

VI. CONCLUSION

Litigation funding on its face seems to be a socially good practice which allows individuals who otherwise could not access the courts have access. However, the data from 2013 – 2017 does not reflect that litigation funding is increasing access to the federal courts per se.

The disparity of the practice from state to state is likely an issue. Without standard regulation the door is open to predatory funders who may take advantage of vulnerable consumers to cash in on their lawsuit. The practice of litigation financing needs to be regulated at both the state and federal level. The states that do have laws protect consumers from harsh repayment schedules and provide ceilings in which consumers must repay. Each state should implement a statute that regulates how much interest a litigant will pay, and a standard payment schedule for all consumers in order to protect consumers. Maine's statute protects consumers most effectively and should be used as a guide for regulating litigation finance. Specifically, requiring litigation contracts to be in plain everyday common words, so that consumers can understand the terms of the contract without professional assistance is a must for regulating this industry.

The federal government should also implement regulations for litigation financing in federal courts. These regulations should include caps on the interest a funder may charge as well as disclosure of third-party funders. These regulations would ensure that consumers are protected and with disclosure requirements courts can oversee the litigation financing practice to ensure the funding passes muster.

As the New York court stated, a lawsuit is not an investment vehicle. If the United States justice system wishes to provide access to courts through litigation funding, then it must be regulated so individuals cannot make investment level profits from lawsuits. This likely means that companies such as Ryval, should not be allowed to sell interest in litigation as "investment" opportunities. This opens the door to have the practice shift from helping individuals gain access to courts, to individuals or companies getting rich on individuals' lawsuits. However, Ryval's social goal is a noble one, and perhaps their platform could help both consumers and investors, but not at the level they advertise. The focus needs to be more on helping consumers access the court system and not the return investors may see from their contribution.

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153. Diane Injic, *The Growth of Litigation Funding and Its Potential Effects on Commercial Auto Insurance*, VERISK, https://www.verisk.com/insurance/insights/social-inflation/growth-of-litigation-funding (last visited Apr. 19, 2023).