CHAMPERTY IS STILL NO EXCUSE IN TEXAS: WHY TEXAS COURTS (AND THE LEGISLATURE) SHOULD UPHOLD LITIGATION FUNDING AGREEMENTS

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I. INTRODUCTION

The doctrines of maintenance and champerty trace back to the Middle Ages[1] and probably traveled to the United States on the *Mayflower*.[2] They arose in England in reaction to certain

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1. Ronald L. Cohen & Robert M. Schwartz, *Champerty and Claims Trading*, 11 AM. BANKR. INST. L. REV. 197, 197 (2003). Originating in Greek and Roman law, these principles as they are understood today developed from English common law beginning in the Middle Ages. *Id.*; Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1543-45 (1996).

2. This might or might not be literally true; however, early English colonists naturally brought with them the English common law system, which formed the basis of the American legal system except where otherwise adapted. *See* Bentinck v. Franklin, 38 Tex. 458, 472 (1873). The doctrines of maintenance and champerty are examples of this adaptive process. *Id.*

developments in the legal system: "Wealthy nobles would command their retainers to bring suits against the noble's enemies; the noble would control (and fund) those suits. Defendants (often the newly emerging commercial class), inundated with suits, convinced the courts and crown to adopt laws against these 'fake' lawsuits."[3]

At common law, maintenance was defined as "officious intermeddling" by a completely unrelated third party using monetary or other assistance to enable either party to pursue the lawsuit.[4] Champerty, a form of maintenance, referred under common law to an agreement between a plaintiff or potential plaintiff and a disinterested third party, under which the third party either contributed aid to plaintiff's case or pursued plaintiff's case at his own expense in exchange for some monetary, property, or other benefit upon successful suit.[5]

Although maintenance and champerty are often close companions, they maintain distinct legal identities.[6] For example, all states specifically allow lawyers to choose to work on a contingent fee basis (champerty) but many frown upon "officious intermeddling" (maintenance) through funding or litigation by lawyers and laypersons alike.[7] Furthermore, laws

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3. Anthony J. Sebok, *Venture Capitalism for Lawsuits? (Part Two): Why Champerty Still Matters*, FINDLAW.COM, Feb. 26, 2001, http://writ.news.findlaw.com/sebok/20010226.html [hereinafter *Why Champerty Still Matters*]; *see also* Paula B. Wilson, Note, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291, 295 (1994) ("In the medieval era, maintenance agreements primarily occurred in connection with actions to recover land. Success meant that the investor became a joint owner of the land, which allowed wealthy families to amass 'little principalities' by maintaining the suits of their retainers.") (footnotes omitted).

4. Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 653 (2005); *see* BLACK'S LAW DICTIONARY 973 (8th ed. 2004) (defining "maintenance" as "[a]ssistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation.").

5. *See* Richmond, *supra* note 4, at 652-53 (citing 14 C.J.S. Champerty and Maintenance 2.a (1991)); BLACK'S LAW DICTIONARY, *supra* note 4, at 246 (defining "champerty" as "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif[ically], an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim.").

6. Also closely related is barratry, defined under common law as the criminal act of "stirring up" litigation and disputes between people where presumably there had previously been only a small chance that the litigation would arise in the first place. *See* Richmond, *supra* note 4, at 652-53; BLACK'S LAW DICTIONARY, *supra* note 4, at 160 (defining "barratry" as "[v]exatious incitement to litigation, esp[ecially] by soliciting potential legal clients. Barratry is a crime in most jurisdictions."). Further discussion of barratry is outside the scope of this Comment.

7. In short, "'maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome.'" Richmond, *supra*

relating to champerty and maintenance are designed and enforced at the state level, making jurisdiction a significant issue.[8] This Comment will focus on the evolution of the champerty doctrine in Texas, with occasional mention of maintenance where appropriate.[9]

As some states have slowly relaxed their prohibitions on champerty in the last century and a half, the practice of third-party litigation funding has developed and flourished.[10] Litigation funding involves lending money on a nonrecourse basis to injured plaintiffs, who do not have enough financial resources to pursue their claims themselves, in exchange for a share in the proceeds of a favorable judgment.[11] In addition, badly injured plaintiffs might also lack sufficient funds to cover their living and medical expenses for the duration of a potentially lengthy trial process.[12] Other reasons for such agreements include the temporal costs of litigation,[13] the risk factor of litigation,[14] and the huge potential payoff to nontraditional lenders which can more than compensate for their risk.[15]

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note 4, at 653 (quoting *In re* Primus, 436 U.S. 412, 424 n.15 (1987)); *see also* T. Leigh Anenson, *Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship*, 43 AM. BUS. L.J. 173, 189 n.81 (2006) (citing Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443, 474 (1998)) (describing barratry as "stirring up litigation," maintenance as "financing litigation," and champerty as "splitting the fruits of litigation").

8. *See* Cohen & Schwartz, *supra* note 1, at 197, 197-98; Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1302-03 (2002).

9. As developed under American jurisprudence, champerty is a subspecies of maintenance. *See* Cohen & Schwartz, *supra* note 1, at 197. Further, champerty and maintenance are often discussed in the same breath in judicial opinions, whereas barratry is typically a separate issue. *See, e.g.*, DaimlerChrysler Corp. v. Kirkhart, 561 S.E.2d 276, 282-83 (N.C. Ct. App. 2002).

10. Richmond, *supra* note 4, at 650; *see also* Jean Hellwege, *David v. Goliath Revisited: Funding Companies Help Level the Litigation Playing Field*, TRIAL, May 2001, *available at* http://www.atla.org/Publications/trial/0105/t015ntl.aspx (available online to members only; on file with the Houston Business & Tax Law Journal).

11. Susan L. Martin, *The Wild West of Finance: Should It Be Tamed or Outlawed?*, HOFSTRA HORIZONS, Fall 2005, at 19, *available at* http://www.hofstra.edu/pdf/ORSP_Susan_MartinFall05.pdf [hereinafter *Wild West of Finance*]. If plaintiff loses his case, he is not required to repay the principal. *Id.*

12. *Id.*

13. Susan L. Martin, *Financing Litigation On-Line: Usury and Other Obstacles*, 1 DEPAUL BUS. & COM. L.J. 85, 85 (2002) [hereinafter *Financing Litigation On-Line*]. "[I]n practice, a wealthy litigant can often outlast, and win against, a poor opponent." *Id.*

14. Mike France, *The Litigation Machine*, BUS. WK. ONLINE, Jan. 29, 2001, http://www.businessweek.com/2001/01_05/b3717001.htm. Traditional lenders perceive too great a risk to loan to injured plaintiffs. *Id.* However, others are willing to lend money in the high-risk sphere of litigation. *Id.*

15. Hellwege, *supra* note 10. "[T]he rewards can be as high or even higher than the risk. If the plaintiff wins, the funding company often reaps a gain of 100 percent or more on its investment." *Id.*

Strict common law in England originally dictated that any offer of help to the parties to litigation fell under champerty and maintenance,[16] and many American states have since agreed.[17] However, some state courts, including those in Texas, have been traditionally more lenient,[18] acknowledging either that the old English concerns only rarely existed in the United States[19] or that such concerns ultimately became obsolete.[20] Litigation funding agreements have brought the champerty debate back into the spotlight in recent decades and several states have struggled to redefine their champerty boundaries in light of the new litigation funding industry.[21] Despite their popularity, these agreements are generally "marked by judicial distrust,"[22] forcing some states to determine how flexible the old champerty doctrine is in light of modern pressures and practices.[23]

In 2006, the opportunity arose in Texas to determine the limits and extent of the Texas champerty doctrine with regard to litigation funding agreements, primarily through the efforts of a

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16. *See* McCloskey v. San Antonio Traction Co., 192 S.W. 1116, 1118 (Tex. Civ. App.—San Antonio 1917, writ ref'd).

17. *See* Bond, *supra* note 8, at 1333-41.

18. *E.g.*, Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997) ("We have long abandoned the view that litigation is suspect, and have recognized that agreements to purchase an interest in an action may actually foster resolution of a dispute. In more recent cases we have questioned whether the [champerty] doctrine continues to serve any useful purpose.") (citation omitted).

19. Bentinck v. Franklin, 38 Tex. 458, 473 (1873) ("It is more than probable that the political power of our State has never regarded the principle contained in the English statutes as necessary or applicable to the condition of our people."); *see also* Perry v. Smith, 231 S.W. 340, 342 (Tex. 1921).

> The English basis for the prohibition can be fit into four broad categories: (i) discouraging speculation, which is thought to promote frivolous litigation; (ii) the personal nature relationship view of lawsuits; (iii) protecting the weaker parts of society from being abused through the legal system; and (iv) preventing the rich and powerful from using the legal system to satisfy personal vendettas.

Isaac Marcushamer, Note, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 HOFSTRA L. REV. 1543, 1552 (2005) (footnotes omitted).

20. Dobner, *supra* note 1, at 1546 ("Most of the policies that drove the development of common law champerty are now obsolete. Feudalism died, as did the resistance to capitalism. The administration of justice is no longer so weak and corrupt that the judicial process can be used as an 'engine of oppression.' The view that even meritorious claims should be discouraged and, instead, forgiven, no longer prevails.") (footnotes omitted).

21. *See, e.g.*, Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 220 (Ohio 2003); *Saladini*, 687 N.E.2d at 1225-27; Echeverria v. Estate of Lindner, No. 018666/2002, 2005 N.Y. Misc. LEXIS 894, at *7-8 (N.Y. Sup. Ct. Mar. 2, 2005). "The litigation support firms on the Internet are clearly engaging in champerty. They are providing funds in exchange for a share of a settlement or verdict." *Financing Litigation On-Line*, *supra* note 13, at 88.

22. Richmond, *supra* note 4, at 651.

23. *See, e.g.*, *Rancman*, 789 N.E.2d at 217; *Saladini*, 687 N.E.2d at 1224.

Houston businessman named Scott Van Dyke.[24] Van Dyke's situation was unique compared to those in other states, in that his personal circumstances helped force champerty issues in front of both the Texas judiciary and legislature simultaneously.[25] Once a cash-strapped plaintiff himself, Van Dyke entered into several similar litigation funding agreements with various individuals and entities.[26] Several of those entities sued him in two different Texas courts, urging the courts to declare the agreements void.[27] In the meantime, Van Dyke and others helped fund lobbying efforts for the passage of House Bill 2987, legislation that would have automatically rendered most litigation funding agreements usurious in Texas.[28] Although the state House of Representatives passed H.B. 2987 in 2005,[29] the bill failed in the Texas Senate.[30]

Texas is fortunate that the H.B. 2987 legislation did not pass. In Texas, the body of jurisprudence allowing champerty generally is well-settled, dating back to the state's days as the Republic of Texas when its courts looked to the law of Spain.[31] If passed, the H.B. 2987 legislation would have been at odds with more than 150 years of permissible champerty in Texas.[32] Because all champertous devices are permissible in Texas by default[33] with certain exceptions,[34] there is little general state champerty jurisprudence in existence. This Comment therefore examines assignability of claims, the Texas brand of champerty,

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24. *See infra* notes 205-211 and accompanying text.

25. Many states already have longstanding statutes prohibiting champerty, often dating back to their early years of statehood. *See* Bond, *supra* note 8, at 1333-41. Other states came to shun champerty later through their courts. *Id.* It does not appear that any other state thus far has dealt with champerty in both branches of government simultaneously. *See id.*

26. *See* Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 93-94 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

27. *See id.* at 90; Plaintiff's Trial Brief at 3-4, Smith v. Anglo-Dutch Petroleum Int'l, Inc., No. 2004-48332 (133d Dist. Ct., Harris County, Tex. Aug. 16, 2005) (order signed Mar. 13, 2006) (currently on appeal, Anglo-Dutch Petroleum Int'l, Inc. v. Smith, No. 14-06-00580-CV).

28. Transcript of Record at 136-38, Smith v. Anglo-Dutch Petroleum Int'l, Inc., No. 2004-48332 (133d Dist. Ct., Harris County, Tex. July 2005).

29. H.J. OF TEX., 79th Leg., R.S. 1774 (2005).

30. *See* S.J. OF TEX., 79th Leg., R.S. 624 (2005).

31. *See, e.g.*, White v. Gay's Executors, 1 Tex. 384, 388 (1846).

32. *Bentinck v. Franklin* contains the earliest direct declaration from a Texas court regarding the champerty doctrine in that state. 38 Tex. 458, 472 (1873) ("The law [prohibiting champerty] has not been recognized as in force in this State by any of the former decisions.").

33. *See id.* at 472-73.

34. *See infra* notes 128-34 and accompanying text (listing six exceptions to the traditional law in Texas of free assignability of claims).

to analyze this issue of first impression in Texas. Texas courts have carefully formulated exceptions to the state's general acceptance of champerty[35] and should continue to monitor the bounds of the doctrine with regard to litigation funding agreements. Champerty has its uses and proper place in the Texas legal system and litigation funding agreements fit squarely within those doctrinal bounds.[36]

This Comment will briefly discuss the arguments for and against litigation funding agreements, including their recent status in various states, followed by analysis of the Texas champerty doctrine in the assignment context, including analysis of Scott Van Dyke's recent Texas litigation. Finally, this Comment will examine specific concerns raised by examples of invalid assignments and ultimately recommend six elements or factors for evaluation of current and future Texas champerty issues.

II. LITIGATION FUNDING AGREEMENTS: PERCEPTION AND REALITY

Critics of litigation funding agreements focus primarily on ancient and transplanted fears that champerty will ruin the legal system.[37] Proponents of the agreements point to the inequalities that already exist in the legal system and see such agreements as a tool for overcoming those inequalities.[38] Several state courts have examined litigation funding agreements during the last decade, paying particular attention to the facts and circumstances under which such agreements were made.[39] Although the agreements have received varying treatment, courts have generally looked for some indication of inequality or bad intent on the funder's part.[40]

Lawsuit funding naturally has its pros and cons, which must be balanced as any other policy consideration. To achieve the

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35. *E.g.*, State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 714 (Tex. 1996).

36. *See Why Champerty Still Matters*, *supra* note 3 (suggesting (1) if society wants plaintiffs to have cash, it should not discriminate who may accept or give it; and (2) it is possible, in smaller suits, for the entire matter to be assigned and controlled by third parties, particularly if the injured plaintiff only desires a role as "passive observer"); *see also Gandy*, 925 S.W.2d at 714.

37. Champerty and maintenance originated in feudal England at a time when the English laws and justice system were used to wrongfully obtain land. Dobner, *supra* note 1, at 1544. In feudal England, land was also a precious commodity and in short supply. *Id.*

38. *See id.* at 1590; *Financing Litigation On-Line*, *supra* note 13, at 102.

39. *See* Bond, *supra* note 8, at 1333-42.

40. *See id.*

benefits of champerty without any of its downfalls, it seems litigation funding should only be allowed in situations where it can be accomplished without interference from the investors or disruption of the underlying proceedings.

A. *Brief Arguments for Lawsuit Funding*[41]

Litigation funding evens the playing field on an economic level[42] in a way that traditional banking institutions cannot.[43] Plaintiffs who have expensive, and potentially rising, medical bills or disabling injuries simply do not have the means of support to last them through the trial process,[44] and the possibility of appeal is usually enough to make them fold their tents.[45] On the other hand, wealthy and corporate defendants are willing to fight both financially and temporally to avoid huge payouts.[46] By providing the money plaintiffs need for basic living expenses and other needs during the litigation,[47] lawsuit-funding companies help ensure that justice, although blind, is not also a beggar.[48]

In addition, lawsuit funding provides plaintiffs with a stronger bargaining position in the face of inadequate settlement

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41. This Comment does not pretend to cover every argument for and against lawsuit funding; it merely echoes those most loudly advocated.

42. This Comment assumes the scenario of a low-income plaintiff with medical and other expenses faced with the stark choice between a long, tough court battle against a wealthy defendant(s) or a quick settlement for up-front recompense. Although not considered here, it is possible that financially secure plaintiffs might also obtain lawsuit funding despite not requiring it to proceed with litigation.

43. Litigation funding is too risky for traditional banking and other lending organizations because no lawsuit is ever truly guaranteed. *See* Dobner, *supra* note 1, at 1532 n.20 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 567 (4th ed. 1992)).

44. Hellwege, *supra* note 10. "'Experience supports the conclusion that deep-pocket defendants use the fact of the plaintiff's inability to fund the cost of litigation to wear the plaintiff down and encourage the settlement of claims well below their true value.'" *Id.* (quoting Stephen Gillers, a legal ethics professor).

45. Anthony J. Sebok, *Venture Capitalism for Lawsuits? Why It Doesn't Exist, and What Alternatives for Financing Exist Instead*, FINDLAW.COM, Feb. 12, 2001, http://writ.findlaw.com/sebok/20010212.html [hereinafter *Alternatives for Financing*]; *see also* Dobner, *supra* note 1, at 1531-32 ("Even a plaintiff willing to make the risky investment in his lawsuit may not have the economic means to do so. These plaintiffs may abandon their claims unless there are alternative, less costly or less risky, methods of financing their lawsuits.").

46. *See, e.g.*, Hellwege, *supra* note 10 ("Time is almost always on the side of the defendant. The longer a case churns through the pretrial process, the less likely the parties will face off before a jury or judge and the more likely the plaintiff will settle for merely a fraction of the damages claimed.").

47. Some funding companies provide money to the plaintiff for living and medical expenses during trial, while others supply expert trial witnesses and some only finance appeals. Hellwege, *supra* note 10; *Alternatives for Financing*, *supra* note 45.

48. *See Financing Litigation On-Line*, *supra* note 13, at 85.

offers.[49] Armed with equal monetary bargaining power, plaintiffs can fight a level fight both in and out of court, both financially and psychologically.[50] Because plaintiffs usually stake everything on a single lawsuit, having financial security enables them to spread the risk.[51] Further, allowing champerty and maintenance to run their courses will by no means flood the courts with frivolous lawsuits.[52] Other causes of action, such as abuse of process and malicious prosecution, are still available to defendants and are potentially better-suited to specifically address unmeritorious claims, particularly in light of the current tort reform movement.[53]

Critics complain that lawsuit-funding companies may contribute to an increase in the amount of litigation by forcing lawsuits to proceed that formerly would have settled.[54] However, the reverse view is that litigation is currently at below-normal levels, because inequality of bargaining power between adversaries traditionally results in settlement or other termination of lawsuits.[55] But the number of lawsuits should not matter if plaintiffs have honest claims.[56] In fact, this is the very reason champerty should not be abolished in its entirety: it can actually provide a valuable check on "officious intermeddling" in unmeritorious claims.[57] Lawsuit funders can thus provide a vital social role, especially in products liability and other tort cases.[58] In addition, faced with the threat of a significant increase in

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49. *See id.*

50. Hellwege, *supra* note 10.

51. Dobner, *supra* note 1, at 1533-35 & n.31.

52. "An investor would be unlikely to invest funds in a frivolous lawsuit, when its only chance of recovery is contingent upon the success of the lawsuit." Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 105 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

53. *See* Bond, *supra* note 8, at 1335-37 (citing Macke Laundry Serv. Ltd. P'ship. v. Jetz Serv. Co., 931 S.W.2d 166, 171 n.1 (Mo. Ct. App. 1996)); *see also* 9 FLA. JUR. 2D *Champerty and Maintenance* § 2 (2007). *But see* Bond, *supra* note 8, at 1306 ("Torts of abuse of process do nothing to stem or regulate market champerty.").

54. *See* Anthony J. Sebok, *The Continuing Struggle over Litigation Funding: The Ohio Supreme Court Voids a Sale of an Interest in a Lawsuit*, FINDLAW.COM, June 16, 2003, http://writ.findlaw.com/sebok/20030616.html [hereinafter *Continuing Struggle over Litigation Funding*].

55. *See id.* Furthermore, "it distorts the pricing of accidents if plaintiffs must drop their lawsuits or settle too cheap because they could not afford to press their claims." *Id.*

56. *Id.* ("What is wrong with third parties helping an injured victim bring a lawsuit against a wrongdoer out of a profit motive? Why should society care why good lawsuits are brought, as long as the lawsuit that is brought is good?").

57. *See id.* ("A professional 'tort investor' would only invest in lawsuits that were credible, based on the available evidence and state of the law of the jurisdiction. Thus, the most meritorious lawsuits would be the ones that progressed forward to settlement or verdict.").

58. *Id.*

expensive litigation, corporate defendants will perhaps be motivated to make their products and workplaces safer in the first place.

Theoretically, lawsuits have a deterrent effect on future wrongful or injurious acts—in addition to their traditional punishment and compensatory purposes. However, in practice, individuals and entities will continue to engage in wrongful or injurious acts and behavior and continue to be punished for it.[59] There will still be injured plaintiffs suing for redress and recompense, and many of those with valid claims will never be able to pay the costs of litigation.[60] Utilizing a free market approach to funding their litigation[61] translates their lawsuits into assets and transforms misfortune into the potential for financial security.[62] "[T]he risk of litigation is thrust upon unwilling parties. This is the opposite of a contractual relation, where the risk is assumed willingly. Therefore, the market is a clearinghouse where people who want to get rid of their risk can sell it to those who want to assume it."[63]

B. *Brief Arguments Against Lawsuit Funding*

With the prospect of unlimited funding,[64] a slightly-injured plaintiff's greedy little eyes gleam at the thought of a big jury award. "That's the ugly side of the litigation machine. Plaintiffs'

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59. *See id.* ("[C]onsumer advocates see litigation as a way of forcing corporations to bear the 'true' cost of their economic activity.").

60. "[L]awsuits are, and should be, directly related to the number of tortious events occurring in society. It is unreasonable and elitist to limit access to the courts to some victims, because of the necessity and urgency they may experience." Marcushamer, *supra* note 19, at 1596.

61. *See generally* Peter C. Choharis, *A Comprehensive Market Strategy For Tort Reform*, 12 YALE J. ON REG. 435, 435 ("[A] market approach will benefit tort victims with quicker, higher, and certain damage awards; offer defendants numerous ways to hedge their liability; reduce crowded court dockets and induce faster, fairer settlements; and help society by retaining appropriate safety incentives and allocating the costs of accidents to those most able to bear them. In short, a tort claims market will create a new kind of insurance after accidents occur."). "Under the market system, the victim could sell the claim, get compensated and move on with life, without forgoing the societal function of deterrence that is served by the tort system." Marcushamer, *supra* note 19, at 1596.

62. For a humorous but apt example of the transformation, see the satiric cult movie OFFICE SPACE. Tom Smykowski, despondent over a potential layoff at work, tries to commit suicide but instead is hit by a speeding drunk driver as he backs out of his driveway. OFFICE SPACE (20th Century Fox 1999). Elated over the resulting large settlement, he throws a party and is in high spirits despite being wheelchair-bound, in several casts, and in obvious physical discomfort. *Id.*

63. Marcushamer, *supra* note 19, at 1572.

64. This is obviously exaggerated, but it is not unreasonable to assume *some* plaintiffs will feel this way; indeed, "unlimited" can mean $10 million to one plaintiff and $10,000 to another.

lawyers have become so skilled that they can make good money on clients who have suffered little if any real injury."[65] This money could come from an actual jury award or even from a settlement induced by the mere threat of continued litigation on a thin claim. A plaintiff's lawyer in this situation has greater incentive to try to force a settlement[66] because he is less likely to win at trial on such a flimsy claim.[67] Yet this argument generally fails; "banning champerty throws out the good lawsuits with the bad—and thus the baby with the bath water. Plaintiffs' ability to afford to try their case has little, if anything, to do with the merits of those cases."[68] Frivolous lawsuits will always plague the justice system, and the task of weeding them out falls primarily to the courts. Regardless, injured plaintiffs deserve their day in court and the chance for their claims to be evaluated. Litigation funding is therefore worth the possibility of a few extra "junk" lawsuits, although again, litigation funding companies and individual investors are less likely to risk investing in such dubious ventures.

Another argument against litigation funding is the potential for unscrupulous funding companies to take advantage of desperate and cash-strapped plaintiffs. Some funding companies have claimed in excess of 150 to 200 percent of the original amount invested.[69] Just as frivolous lawsuits will always clutter the American justice system to some extent, there will likely be a few companies whose primary purpose, whether in litigation funding or other arenas, is to take advantage of poorly-informed or ignorant people.[70] But this "predatory lending"[71] should not alone dictate the outcome of the debate about the validity and

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65. France, *supra* note 14 (citation omitted) (describing "assembly-line litigation": massive amounts of information on corporate defendants, compiled by trial lawyers into convenient how-to litigation packets in addition to an underground support network for and of plaintiff's attorneys that cost an estimated $165 billion in 1999 alone).

66. Hellwege, *supra* note 10. The lawyer may be thrust into a conflict of interest between the lender's desire to cash out through the settlement, and his client's desires to hold out for more money. *Id.*

67. Meanwhile, plaintiff's living expenses are covered by the funding company's "investment" seed money. Because plaintiff's lawyer is likely paid on contingency basis, he will not get any money unless defendant agrees to settle. *Id.*

68. *Continuing Struggle over Litigation Funding*, *supra* note 54.

69. *Alternatives for Financing*, *supra* note 45.

70. *E.g.*, Susan L. Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 64 (2004) ("Although there is no legal definition of predatory lending, the term usually refers to situations in which borrowers do not understand the terms of the loan and all material information is not disclosed to them; lenders put undue pressure on borrowers knowing that borrowers have insufficient resources to make loan payments; and lenders target vulnerable borrowers.") (footnote omitted).

71. *Id.*

viability of litigation funding agreements, particularly because certain safeguards already exist which could be employed in the funding agreement context.

In 2001, a Florida Bar Association ethics committee reconsidered an opinion allowing lawyers to use litigation funding companies after Florida attorney Steven Bagen informed members that a funding company had contacted one of his clients to offer a money advance with an excessive payback rate.[72] However, Bagen's proactive response highlights one such existing safeguard: plaintiffs who are considering a litigation funding agreement and already have attorney representation could seek attorney advice regarding the consequences of borrowing under excessive (or reasonable) terms.[73] In this example, Bagen already had an ethical duty to advise his client honestly about the entire legal matter if he perceived his client might have chosen an unwise course of action related to the lawsuit.[74] This is true whether or not Bagen was consulted about the legal matter (arguably encompassing the issue of litigation funding).[75] An analogous example is contingency fee arrangements between attorney and client in which the attorney agrees to accept all payment for her services out of any ultimately resulting monetary award and accept zero payment for her services if the case is lost. Like the attorney in that arrangement, a litigation funding company would be held to a reasonable rate of return.[76]

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72. Hellwege, *supra* note 10. Bagen explained, "It's a promise of easy money. They say we can fund you however many thousand you need, and clients are suckered in by this. But a year or two down the road, they're having to pay triple or quadruple what they got." *Id.*

73. *Financing Litigation On-Line*, *supra* note 13, at 101; *see* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2002). In theory, if Lawyer A allowed plaintiff to enter an unscrupulous funding agreement, plaintiff could later hire Lawyer B to sue Lawyer A (Lawyer B also would probably find a better litigation funding agreement for the second litigation).

74. FL. BAR REG. R. 4-2.1 (2006) ("[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client . . . may require that the lawyer offer advice if the client's course of action is related to the representation."); *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, 251 (2003) ("For the same reasons that lawyers are less likely to bring frivolous claims on contingent fee bases, lawyers are less likely to buy frivolous claims or support clients during litigation of frivolous claims.").

75. *See* Moliterno, *supra* note 74, at 251.

76. The difficulty of course arises in determining what that "reasonable rate of return" should be, but the answer to that question is outside the scope of this Comment.

C. *Current Treatment of Champerty Under State Laws*

Champerty is a state law doctrine.[77] Approximately twenty-nine states currently prohibit a range of champertous agreements, including Texas.[78] Examples of prohibited agreements include general speculation in litigation,[79] assignment of legal malpractice claims,[80] and assignment of personal injury tort claims.[81] Many of the states that absolutely prohibit champertous agreements have followed the English common law prohibition for over a century,[82] while other states have allowed the doctrine to erode slowly and now permit certain agreements to survive the ancient doctrine.[83] Maine goes so far as to criminalize the practice,[84] while Mississippi also makes champerty and maintenance unlawful and punishable by up to one year in state prison.[85]

In the opposite camp, several states have flatly denied the existence of champerty and maintenance within their borders for just as long.[86] Others initially prohibited the doctrines but gradually concluded that certain aspects are no longer applicable in today's society.[87] A few states, such as Connecticut and Texas, gradually accomplished the reverse by initially embracing champerty but excluding certain previously-acceptable champertous transactions on public policy grounds.[88] In addition, several states that do not recognize tort claims in

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77. *See* Bond, *supra* note 8, at 1333.

78. *See id.* at 1333-41; *see also* CAPITAL TRANSACTION GROUP, INC., CHAMPERTY STATE LAW SUMMARY (2005) [hereinafter CAPTRAN, INC.] (on file with the Houston Business & Tax Law Journal).

79. Bond, *supra* note 8, at 1333 (citing Wilson v. Harris, 688 So. 2d 265, 270 (Ala. Civ. App. 1996)).

80. *See id.* (citing Roberts v. Holland & Hart, 857 P.2d 492, 495-96 (Colo. Ct. App. 1993)).

81. *See id.* at 1338 (citing Grossman v. Schlosser, 244 N.Y.S.2d 749, 750-51 (App. Div. 1963)).

82. *See id.* at 1339 (citing Brown v. Bigne, 28 P. 11, 13 (Or. 1891); Martin v. Clarke, 8 R.I. 389, 403 (1866)); Cohen & Schwartz, *supra* note 1, at 198.

83. *See* Bond, *supra* note 8, at 1335-36 (citing Balboa Insurance Co. v. Algernon Blair, Inc., 795 F.2d 404, 405 (5th Cir. 1986); Saladini v. Righellis, 687 N.E.2d 1224, 1228 n.7 (Mass. 1997)); Cohen & Schwartz, *supra* note 1, at 198.

84. Bond, *supra* note 8, at 1335-36 (citing ME. REV. STATE. ANN. tit. 17-A, § 516(l) (1983)). The crime of champerty in Maine can earn up to a $1,000 fine or up to six months in prison. *Id.*

85. *Id.* at 1336 (citing MISS. CODE ANN. § 97-9-13 (1999)).

86. *See id.* at 1333 (citing Landi v. Arkules, 835 P.2d 458, 464 n.1 (Ariz. Ct. App. 1992); Abbott Ford, Inc. v. Super. Ct., 741 P.2d 124, 141-42 n.26 (Cal. 1987)).

87. *See id.* at 1334 (citing Van Gieson v. Magoon, 20 Haw. 146, 148-49 (1910)).

88. *Id.* (citing Robertson v. Town of Stonington, 750 A.2d 460 (Conn. 2000); Baker v. Mallios, 971 S.W.2d 581, 587 (Tex. App.—Dallas 1998), *aff'd*, 11 S.W.3d 157 (Tex. 2000)).

champerty and maintenance *do* generally permit invocation of the doctrines as contract defenses.[89] Only Massachusetts, South Carolina, and New Jersey affirmatively uphold champertous devices.[90]

It should be noted here that most states have dealt primarily with various assignments of claims, but few state courts or legislatures have tackled the recent trend to fund litigation and bypass assignment altogether.[91] Most notably, the Ohio Supreme Court has expressly held litigation funding contracts to be champertous and therefore unenforceable,[92] while New York courts agree with Ohio's policy reasoning, they have differing state statutes that make it more difficult to void agreements as champerty,[93] and Florida has upheld such agreements despite the asserted champerty defense.[94] On the legislative side, Texas appears to be the only state whose legislature has tried specifically to address lawsuit funding in recent years,[95] since most state *legislative* prohibitions are already well-established.[96] Because state laws and jurisprudence relating to champerty and maintenance vary, funding companies must and do closely monitor such laws, both to ensure they are law-abiding and to keep abreast of differing state trends affecting their livelihood.[97]

As mentioned above, three cases from Ohio, Florida, and New York have reinvigorated the champerty and maintenance debate in recent years, specifically in the context of lawsuit funding agreements. In the first of these, *Rancman v. Interim Settlement Funding Corp.*, the Ohio Supreme Court held that Ohio's historical prohibition against champerty and maintenance

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89. *See* Hardick v. Homol, 795 So. 2d 1107, 1110-11 (Fla. Dist. Ct. App. 2001) (noting that Florida, New York, Kansas, and Kentucky only allow champerty and maintenance as affirmative contract defenses).

90. *Why Champerty Still Matters*, *supra* note 3.

91. A few existing state statutes disallow champerty and maintenance that likely extend to lawsuit funding. *See* Bond, *supra* note 8, at 1334 (citing GA. CODE ANN. § 13-8-2(a)(5) (1982 & Supp. 2001)).

92. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003).

93. Echeverria v. Estate of Lindner, No. 018666/2002, 2005 N.Y. Misc. LEXIS 894, at *5, 8 (N.Y. Sup. Ct. Mar. 2, 2005). "In order to constitute Champerty in New York law, the primary purpose of the purchase must be to bring suit or proceed with action upon the claim received." *Id.* at *5.

94. *See* Kraft v. Mason, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996).

95. Texas addressed lawsuit funding in the context of usurious loans in 2005. Tex. H.B. 2987, 79th Leg., R.S. (2005).

96. *See generally* Bond, *supra* note 8, at 1333-41 (surveying the champerty laws of the fifty states).

97. *See* CAPTRAN, INC., *supra* note 78.

applied to such agreements.[98] Because the funding agreements had a substantial impact on any settlement calculation, they were void and unenforceable.[99]

By contrast, New York permits champerty in narrow circumstances, even expressly permitting a third party to fund an existing lawsuit.[100] However, in *Echeverria v. Estate of Lindner*, a personal injury case in which the employee sued his employer for failure to maintain workplace safety, the court addressed the legality of the litigation funding agreement between Echeverria and a third-party lending company, LawCash.[101] Their agreement became an issue after Echeverria claimed his employer essentially forced him to seek outside funding to proceed with his claim by failing to provide worker's compensation insurance.[102] Recognizing that Echeverria's damages calculation stopped just short of assigning part of the recovery to LawCash (and thereby discarding the champerty argument), the court determined instead that their funding contract was a usurious loan and not an investment.[103] Anthony J. Sebok, a Brooklyn Law School professor, suggested the court viewed Echeverria's claim as a "sure thing" because the claim was brought under a strict liability statute; therefore, the transaction failed to qualify as a contingency and thus became a loan.[104]

Finally, the third "pioneer" case in the area of lawsuit funding agreements is *Kraft v. Mason*.[105] Although Florida

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98. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003). Rancman received $7,000 total in advance money from two companies. *Id.* at 220-21. The court said the funding agreements encouraged litigation; after expenses, fees, and superior liens, Rancman had no incentive to settle for less than $28,000, and in fact seemed somewhat "locked in" to at least that amount. *Id.*

99. *Id.* at 221. The court viewed this as intermeddling and potentially manipulative. *Id.*

100. Anthony J. Sebok, *A New York Decision That May Imperil Plaintiffs' Ability to Finance Their Lawsuits: Why It Should Be Repudiated, or Limited to Its Facts*, FINDLAW.COM, Apr. 18, 2005, http://writ.findlaw.com/sebok/20050418.html [hereinafter *New York Decision*]. If the lawsuit has already been filed, any subsequent funding cannot by definition be champertous or contribute to the stirring up of litigation. *Id.*

101. Echeverria v. Estate of Lindner, No. 018666/2002, 2005 N.Y. Misc. LEXIS 894, at *5-9 (N.Y. Sup. Ct. Mar. 2, 2005).

102. *Id.* at *4.

103. *Id.* at *9.

104. *New York Decision*, *supra* note 100. Similarly, in *Lawsuit Financial, L.L.C. v. Curry*, the Michigan Court of Appeals held a litigation funding agreement invalid: "at the time the advances were made, plaintiff had an absolute right to repayment. . . . [B]ecause the parties entered into th[e] agreement[] long after the defendants in the underlying personal injury suit admitted liability and after the jury returned a verdict of $27 million in damages." 683 N.W.2d 233, 239 (Mich. Ct. App. 2004).

105. 668 So. 2d 679 (Fla. Dist. Ct. App. 1996).

generally prohibits champerty and maintenance,[106] the *Kraft* court upheld an agreement under which Kraft's sister, Mason, agreed to take out a bank loan to fund a strong antitrust claim Kraft was pursuing.[107] The court decided their agreement and Mason's subsequent actions simply did not satisfy Florida's definition of champerty:

> Mason clearly did not act in an officious manner. She was not intermeddling in a lawsuit. She did not instigate the litigation. Her assistance was sought out by Kraft when he needed money to continue his lawsuit. She did not bargain for the terms under which she made the loan—they too were prepared by Kraft. Nor did she concern herself with the antitrust litigation or impose her views upon the attorneys or the litigants once she provided the loan.[108]

Florida has since determined that maintenance and champerty have fallen into disuse, displaced by other causes of action aimed at attorney behavior, such as malicious prosecution and abuse of process, which serve the same essential functions formerly served by maintenance and champerty under common law.[109]

Interestingly, these three cases taken together seem to present lenders with a distinct middle ground on which to operate. At one extreme, lawsuit funds will likely be labeled a loan (and subject to usury prohibitions) if the underlying litigation has a guaranteed outcome. At the other end, the lender will be accused of champerty if he is funding what is perceived to be a baseless and frivolous claim. The contours of the middle ground seem to be limited only to how "guaranteed" a certain outcome is; as underscored by *Echeverria*, the difficulty lies in how to draw the line between a claim that is a "sure thing" and a claim that has a likely but less-than-guaranteed outcome.[110]

The *Echeverria* outcome somehow feels legally correct—because Echeverria's claim fell under a statute of absolute liability,[111] he *was* guaranteed a recovery from his employer. Yet

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106. *Why Champerty Still Matters*, *supra* note 3.

107. *Kraft*, 668 So. 2d at 683.

108. *Id.*

109. Hardick v. Homol, 795 So. 2d 1107, 1111-12 (Fla. Dist. Ct. App. 2001).

110. In the abstract, it seems logical that no lawsuit would ever be one hundred percent guaranteed, but in practice, there are probably a few claims that appear legally guaranteed to win, such as the absolute liability statute at issue in *Echeverria*.

111. *See* Echeverria v. Estate of Lindner, No. 018666/2002, 2005 N.Y. Misc. LEXIS 894, at *1 (N.Y. Sup. Ct. Mar. 2, 2005).

this outcome-determinative approach prevents an injured plaintiff with a "slam-dunk" case and no money from taking advantage of litigation funding to pay the costs (living or legal) of actually obtaining his guaranteed award. Even if Echeverria had obtained an attorney on a contingency fee basis and only needed money to sustain his medical costs through trial, it is unlikely that any bank or other financial institution would have felt secure loaning him the money no matter how "guaranteed" the outcome.[112] Instead of concentrating on a cumbersome (and potentially subjective) sliding scale to measure the odds of a given plaintiff's success, the focus should stay on the purpose of champerty prohibition and whether it was violated. If Echeverria's employer breached an absolute statutory duty to Echeverria which thereby injured him, it seems ridiculous to accuse Echeverria's lender of stirring up a lawsuit that Echeverria was one hundred percent entitled, and arguably mandated, to win.

It is less clear whether litigation funding companies engage in "officious intermeddling" if they aggressively advertise their services or otherwise solicit lawsuits to fund. These actions might constitute "intermeddling" if it could be proven that the knowledge of ready capital encouraged more people to sue.[113] On the other hand, the age-old distaste for intermeddling seems misapplied where a plaintiff approaches a funding company on his own initiative.[114] Again, this can be analogous to contingent fee agreements, with all the freedoms and restrictions that accompany them. Further, it is probable that many people are prevented from suing on valid claims simply due to lack of adequate funds to pursue a lawsuit. It would be difficult to prove, and might only be apparent on a case-by-case basis, which lawsuits would render funding companies liable for champerty on such a general theory. Given the unpredictable nature and scope of a given injury, it is inherently unfair to forbid monetary aid to

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112. *Cf.* Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) ("Anglo-Dutch has not presented a compelling argument of how [litigation funding] agreements prey on financially desperate plaintiffs. Instead . . . it was Anglo-Dutch who solicited appellees' investments after being unable to obtain a conventional loan because it had inadequate collateral.").

113. This would be a long and expensive study to conduct of the legal system. In addition, this raises the concern about increased frivolous lawsuits, but again, litigation funding companies do not want to throw their money away on baseless claims that are unlikely to succeed.

114. *E.g.*, Kraft v. Mason, 668 So. 2d 679, 683 (Fla. Dist. Ct. App. 1996) (analyzing Mason's actions under the age-old term "officious intermeddling" and finding that her contribution to the lawsuit was purely financial and only upon her brother's request for help).

those with valid claims—in effect punishing them as if they alone were responsible for their unfortunate situation. As issues of champerty and maintenance crop up in other states, those states (including Texas) will be evaluating their own issues regarding litigation funding with an eye on these bellwether cases.

III. CHAMPERTY IN TEXAS

Relatively few Texas cases speak directly on the issue of champerty. This Part shall examine the development of champerty in Texas, which evolved primarily in the assignment context, and ultimately suggest that the Texas Supreme Court affirmatively uphold litigation funding agreements like those recently at issue in Texas courts. Currently, one lone court of appeals case in Texas has validated litigation funding agreements,[115] with at least one other case pending in another appeals court.[116]

A. *Early History*

Even before the dawn of statehood, Texas diverged from the English common law regarding champerty and maintenance. On January 20, 1840, the Congress of the Republic of Texas adopted the common law;[117] five days later it enacted a statute allowing assignment of negotiable and non-negotiable written instruments.[118] By 1889, the Texas Legislature had provided for assignment of causes of action under the Property Code.[119] The placement of this statute is significant because it designated choses in action as a form of property that held inherent value

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115. *See Haskell*, 193 S.W.3d at 105.

116. *See* Plaintiff's Trial Brief, *supra* note 27.

117. State Farm Fire & Casualty Co. v. Gandy, 925 S.W. 2d 696, 706 (Tex. 1996) (citing Act approved Jan. 20, 1840, 4th Leg., R.S., § 1, 1840 Repub. Tex. Laws 3, 3-4, *reprinted in* 2 *H.P.N. Gammel, The Laws Of Texas 1822-1897*, at 177, 177-78 (1898) (current version at TEX. CIV. PRAC. & REM. CODE § 5.001)).

118. *Id.* at 706-07 (citing Act approved Jan. 25, 1840, 4th Cong., R.S., §§ 1-4, 1840 Repub. Tex. Laws 144, 144-146, *reprinted in* 2 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 318, 318-20 (1898) (formerly at TEX. REV. CIV. STAT. ANN. arts. 568-571 (Vernon 1935))).

119. Act approved March 26, 1889, 21st Leg., R.S., ch 89, 1889 Tex. Gen. Laws 103, 103, *reprinted in* 9 *H.P.N. Gammel, The Laws of Texas 1822-1897*, at 1131, 1131 (Austin, Gammel Book Co. 1898) (current version at TEX. PROP. CODE § 12.014 (Vernon 1989). The Property Code currently states that:

> [A] judgment or part of a judgment of a court of record or an interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing.

TEX. PROP. CODE § 12.014(a).

and could be sold and traded freely without regard for the original plaintiff.[120] Heirs and legal representatives of injured parties could even inherit personal injury claims under an 1895 Texas statute.[121] In 1979, the Legislature added the so-called "turnover statute," which enabled courts to assign to creditors certain present and future property rights, including any assignable causes of action a debtor might own.[122]

Early Texas courts also affirmatively endorsed champerty.[123] The 1873 case of *Bentinck v. Franklin*[124] is usually cited for the proposition that no Texas law exists to prohibit champerty.[125] The court refused to acknowledge a champerty defense to a contract and noted the difference between feudal England and Texas:

> It is more than probable that the political power of [Texas] has never regarded the principle contained in the English statutes as necessary or applicable to the condition of our people. . . .
>
> . . . .
>
> The reasons which led to the enactment of 32 Henry VIII do not exist in this country. . . . Yet it would certainly be very wrong for attorneys to become mere jobbers and speculators, to hunt up

120. *See* Associated Ready Mix, Inc. v. Douglas, 843 S.W.2d 758, 762 (Tex. App.—Waco 1992, no writ); Renger Mem'l Hosp. v. State, 674 S.W.2d 828, 830 (Tex. App.—Austin 1984, no writ) ("A cause of action is a property right.").

121. *Gandy*, 925 S.W.2d at 707 (citing Act of May 4, 1895, 24th Leg., R.S., ch. 89, § 1, 1895 Tex. Gen. Laws 143 (current version at TEX. CIV. PRAC. & REM. CODE § 71.021)).

122. Act of April 11, 1979, 66th Leg., R.S., ch. 671, 1979 Tex. Gen. Laws 1555 (current version at TEX. CIV. PRAC. & REM. CODE § 31.002 (Vernon Supp. 2006)). After judgment for a creditor, a court may sign a turnover order against the debtor "to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property that (1) cannot be readily attached or levied on by ordinary legal process; and (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities." *Id.*

123. *See* White v. Gay's Executors, 1 Tex. 384, 389 (1846) (noting that "if the plaintiff had before he cited his adversary, alienated, abandoned, and truly conveyed all his right to the thing to anyone else, not more powerful than himself, such alienation having been made without fraud, would be valid."); Bentinck v. Franklin, 38 Tex. 458, 473 (1873) ("A law which would prevent the officious intermeddling in the suits of others, in no way concerning parties so interfering, might be a salutary law in any State or community; but it cannot be denied that cases often present themselves to the profession in which a good man may do a service to humanity by espousing the cause of the weak against the strong.").

124. 38 Tex. at 458.

125. *See, e.g.*, Glenney v. Crane, 352 S.W.2d 773, 780 (Tex. Civ. App.—Houston 1961, no writ); *see also* Jones v. Matthews, 75 Tex. 1, 3, 12 S.W. 823, 823 (1889) (noting that "the law of champerty does not obtain in [Texas].").

rotten titles and ferment litigation.[126]

Because the English doctrines of champerty and maintenance likely migrated to America in the minds of English settlers, American jurisprudence inherited and assimilated the predicate fears and rationales associated with them. By contrast, the modern champerty doctrine sidesteps those fears, withdrawing from "officious intermeddling," as it was formerly known, and creates a less distorted version of participation.

B. *Current State of the Law*

In the last hundred years or so, Texas jurisprudence regarding champerty and maintenance has primarily revolved around assignability of claims. "The general rule in Texas has been that causes of action are assignable absent a statutory bar."[127] "Everything which can be called a debt can be assigned, and the assignee may recover either in his own name or in that of his assignor. In other words, any chose in action may be assigned and suit brought thereon by the equitable holder."[128] Were it otherwise, this assignability would have qualified as classic champerty, with the unrelated third party helping to pursue the injured party's claim in exchange for part of the proceeds of the lawsuit.[129] But with the blessing of *Bentinck* and the Texas Property Code, nearly all champertous agreements were presumed valid by law.

However, this has not deterred litigants from challenging such agreements on public policy grounds since then.[130] Texas

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126. *Bentinck*, 38 Tex. at 473; *see also* Stewart v. H. & T. C. Ry., 62 Tex. 246, 248 (1884). "The policy that dictated the English statutes had for its object the protection of the poor against the wealthy and influential, when their rights formed the subject of litigation before the courts. Here the conditions of society in a great measure are very different." *Id.*

127. Vinson & Elkins v. Moran, 946 S.W.2d 381, 390 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). In addition, the turnover statute does not apply where there is a statutory bar to the assignability of a claim. *Id.* at 390 n.3. "Though assignment and turnover are different, the public policy concerns that would bar voluntary assignment also oppose forced transfer through turnover." *Id.* (citing Charles v. Tamez, 878 S.W.2d 201, 205 (Tex. App.—Corpus Christi 1994, writ denied)).

128. *Id.* at 390 (citing Citizens State Bank v. O'Leary, 167 S.W.2d 719, 721 (Tex. 1942)). This includes personal injury claims. State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 707-08 (Tex. 1996) (citing Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987)).

129. BLACK'S LAW DICTIONARY, *supra* note 4, at 246 (defining "champerty"). The mere form of the assignment probably would not have affected the substance of the transaction as champertous.

130. "[W]hile the 'practicalities of the modern world have made free alienation . . . the general rule, . . . they have not entirely dispelled the common law's reservations to alienability, or displaced the role of equity or policy in shaping the rule.'" Coronado Paint

courts have invalidated six types of claims based on public policy:[131] legal malpractice claims,[132] certain assignment of interests in an estate,[133] collusive assignments of insurance claims,[134] Mary Carter agreements,[135] settlement agreements enabling one joint tortfeasor to sue another on the injured plaintiff's claim,[136] and assignments of claims under the Deceptive Trade Practices Act (DTPA).[137] These prohibitions now constrain what was initially a liberal acceptance of champerty in Texas. This trend to curtail absolute champerty has occurred contrary to the direct language in § 12.014 of the Property Code[138] and has slowly redefined the old doctrines and attitudes in the process. All of these prohibitions were added to Texas jurisprudence in the last thirty years as the courts began looking with increasing disfavor on parties pushing the extreme limits of the old pro-champerty sentiment. The trend was best expressed by the court in *Vinson & Elkins v. Moran*, which decided that "public policy considerations should guide our analysis, rather than straining to fit the particular fact pattern into a category. Assignments should be permitted or prohibited based on the likely effect on society, and in particular, on the legal system."[139]

In *Zuniga v. Groce, Locke & Hebdon*, the San Antonio Court

Co. v. Global Drywall Sys., Inc., 47 S.W.3d 28, 31 (Tex. App.—Corpus Christi 2001, pet. denied) (quoting *Gandy*, 925 S.W.2d at 707).

131. *See id.*; PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79 (Tex. 2004). *Coronado Paint Co.* lists the five public policy exceptions in existence in 2001. *Coronado Paint Co.*, 47 S.W.3d at 31. *PPG Industries* represents the sixth exception, added three years after *Coronado Paint Co. PPG Indus.*, 146 S.W.3d at 91-92 ("The DTPA is primarily concerned with people—both the deceivers and the deceived. This gives the entire act a personal aspect that cannot be squared with a rule that allows assignment of DTPA claims as if they were merely another piece of property.") (footnote omitted). Each of the six exceptions and corresponding court decisions shall be examined below in turn.

132. Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd).

133. Trevino v. Turcotte, 564 S.W.2d 682, 690 (Tex. 1978).

134. *Gandy*, 925 S.W.2d at 714.

135. Elbaor v. Smith, 845 S.W.2d 240, 250 (Tex. 1992).

136. Int'l Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932, 934 (Tex. 1988).

137. PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 92 (Tex. 2004).

138. Vinson & Elkins v. Moran, 946 S.W.2d 381, 391 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.). The court noted that the Texas Supreme Court had rejected four of the above-mentioned assignments based on public policy despite the broad language in the property statute. *Id.* "That the supreme court did not specifically address section 12.014 in these cases is unpersuasive. We decline to accept that the supreme court was unaware of the provision, nor do we presume the court chose to ignore it." *Id.*

139. *Id.* at 392.

of Appeals held that legal malpractice actions were not assignable.[140] The Zuniga family obtained a judgment against Bauer Manufacturing Company in a personal injury suit, but Bauer's insurer became insolvent.[141] Bauer settled with the Zunigas, assigning to them its claims against its law firm in exchange for their promise not to collect on the judgment.[142] The court worried that "to allow assignability would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession."[143] The court perceived that upholding the assignment would allow the original defendant to escape liability while simultaneously funding the Zunigas' judgment.[144] It also was afraid of promoting champerty, especially in consideration of the unique and personal nature of the attorney-client relationship.[145]

The Texas Supreme Court in *Trevino v. Turcotte* invalidated an assignment of estate interests that had distorted the parties' true positions.[146] In a complex case involving two different wills executed on behalf of the same decedent, defendants were estopped from contesting the second will because their father elected to take under it during his lifetime.[147] Instead, one of the defendants approached two beneficiaries of the earlier will and persuaded them each to assign ten percent of their interests to the defendants.[148] This act placed defendants in the untenable position of being on both sides of the litigation—contesting the second will while retaining the benefits already received under that will.[149] The court held that the policy grounds, on which the original estoppel was based, applied by analogy to attempts to obtain title by unrelated and circuitous means, and declared the

140. Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 318 (Tex. App.—San Antonio 1994, writ ref'd). *But see* Mallios v. Baker, 11 S.W.3d 157, 163 (Tex. 2000) (noting that while "legal malpractice claims should not be freely marketable, our disapproval of the assignment in [*Zuniga*] did not bar all transfers of legal malpractice claims," referencing Douglas v. Delp, 987 S.W.2d 879, 882 (Tex. 1999)).

141. *Zuniga*, 878 S.W.2d at 314.

142. *Id.*

143. *Id.* at 316.

144. *Id.* at 317.

145. *See id.* at 316 (citing Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83 (Cal. Ct. App. 1976)).

146. Trevino v. Turcotte, 564 S.W.2d 682, 690 (Tex. 1978).

147. *Id.* at 684, 690.

148. *Id.* at 684-85.

149. *Id.* at 685-86 ("It is a fundamental rule of law that a person cannot take any beneficial interest under a will and at the same time retain or claim any interest . . . which would defeat or in any way prevent the full effect and operation of any part of the will.").

assignment invalid.[150]

Collusive assignments of insurance claims are also against Texas public policy and therefore invalid as held under *State Farm Fire and Casualty Company v. Gandy.*[151] Gandy's stepfather pleaded nolo contendere to Gandy's claim against him of childhood sexual abuse.[152] State Farm had agreed to pay an attorney to represent the stepfather in that suit; while the case was pending, the stepfather and Gandy agreed to a $6 million judgment against him in exchange for Gandy's promise not to collect it from him.[153] Instead, Gandy sued State Farm to collect the judgment against the stepfather's homeowners policy.[154] Invalidating the settlement agreement on considerations of public policy, the Texas Supreme Court said, "[t]he settlement arrangement . . . not resolve the parties' disputes but prolonged and confused them," and that Gandy's recovery derived from fraud on the court.[155] "Such a result should be against public policy, because . . . [a]llowing recovery in such a case encourages fraud and collusion and corrupts the judicial process by basing recovery on a fiction . . . the courts are being used to perpetrate and fund an untruth." [156]

Mary Carter agreements initially enjoyed somewhat shaky support after their introduction in Texas, but the state currently deems them invalid under *Elbaor v. Smith.*[157] A Mary Carter agreement exists in Texas "when the plaintiff enters into a settlement agreement with one defendant and goes to trial against the remaining defendant(s). The settling defendant, who remains a party, guarantees the plaintiff a minimum payment, which may be offset in whole or in part by an excess judgment recovered at trial."[158] The settling defendant(s) is therefore highly motivated to help the plaintiff recover as much money as

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150. *Id.* at 689 (noting that, on public policy grounds, rules regarding election and estoppel of wills are "designed to prevent one from embracing a beneficial interest devised to him under a will, and then later asserting a challenge of the will inconsistent with the acceptance of benefits.").

151. 925 S.W.2d 696, 698 (Tex. 1996).

152. *Id.* at 697.

153. *Id.* at 697-98.

154. *Id.* at 698.

155. *Id.* at 714.

156. *Id.* at 705 (citing State Farm Fire & Cas. Co. v. Gandy, 880 S.W.2d 129, 138 (Tex. App.—Texarkana 1994), *rev'd*, 925 S.W.2d 696 (Tex. 1996)).

157. 845 S.W.2d 240, 248-50 (Tex. 1992). The phrase "Mary Carter agreement" derives from *Booth v. Mary Carter Paint Co.*, 202 So. 2d 8, 10-11 (Fla. Dist. Ct. App. 1967). *Elbaor*, 845 S.W.2d. at 242 n.3. The Texas Supreme Court did not rule on the validity of Mary Carter agreements until *Elbaor*, and in fact, some Texas courts upheld such contracts prior to that case. *Id.* at 248-49.

158. *Id.* at 247.

possible from the remaining defendants. Further, although it can be said that at least one defendant has settled with the plaintiff and exited the litigation, it must also be admitted that Mary Carter agreements "frequently make litigation inevitable" due to the settling defendant's share of control in the decision-making process.[159] The agreements are problematic in several ways: altering the essential nature of the trial by allowing an original wrongdoer to escape liability, exaggerating the wrongs committed by his fellow tortfeasors, and undermining the function of the jury.[160] A Mary Carter agreement "is simply an unwise and champertous device that has failed to achieve its intended purpose."[161]

Functionally similar to Mary Carter agreements (but not nearly as poisonous to the judicial process) are arrangements under which a plaintiff assigns to a settling defendant all or part of his claims against any remaining defendants.[162] The Texas Supreme Court invalidated such agreements in *International Proteins Corporation v. Ralston-Purina Company*, noting that the assignment preserved the settling defendant's contribution rights against the remaining defendants.[163] The odd result was to place the burden of proof on the new plaintiff to demonstrate both the original plaintiff's injuries and its own contribution claim.[164] Purina argued it had merely settled its proportionate share of liability with the original plaintiff, then purchased plaintiff's whole claim as a right to reimbursement, which appeared to technically fit within existing law.[165] However, the Court held that "it is contrary to public policy to permit a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed."[166]

Lastly, the Texas Supreme Court most recently invalidated assignment of Deceptive Trade Practices Act (DTPA) claims.[167]

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159. *Id.* at 248.

160. *See id.* at 249; Coronado Paint Co. v. Global Drywall Sys., Inc., 47 S.W.3d 28, 33 (Tex. App.—Corpus Christi 2001, pet. denied) ("One of the evils fostered by assignment of causes of action between parties is the skewing of the dynamics of the trial, whereby a defendant argues for high damages or a plaintiff seeks exoneration of a defendant he has sued.").

161. *Elbaor*, 845 S.W.2d at 249.

162. *See, e.g.*, Int'l Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932 (Tex. 1988).

163. *Id.* at 933.

164. *Id.* at 933-34. In addition, the original plaintiff did not even take part in the trial despite the fact that he was presumed to be doing so. *Id.* at 934.

165. *Id.*

166. *Id.*

167. PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 92 (Tex. 2004).

In *PPG Industries v. JMB/Houston Centers Partners Limited Partnership*, the court held that assignment of DTPA claims "would defeat the primary purpose of the statute—to encourage individual consumers to bring such claims themselves."[168] It also noted a judicial trend to distinguish "between [assigned] claims that are property-based and remedial and claims that are personal and punitive," and that courts generally allow assignment of the first type but not the second.[169] Since DTPA claims fall under the second type and are intended to be brought by "consumers," the court reasoned that DTPA claims could not be freely assigned as can other similar forms of property.[170]

C. *Dissecting the Texas Champerty Doctrine*

Since the enactment of the assignment statute in the Texas Property Code, the Texas champerty doctrine has revolved around assignment of claims. Although the Texas Supreme Court still acknowledges that "as a general rule a cause of action may be assigned,"[171] it has proactively limited complete alienability by keeping this rule within the bounds of public policy, preventing distortion of the judicial process, and protecting the legal profession.[172]

1. Champerty Lessons from Assignment of Claims

The judicial curtailment of unlimited assignability of causes of action in Texas was slowly developed and sensibly considered. The six invalid assignments mentioned above present valid concerns in their proper context, but those same concerns should not be imputed wholesale into the context of litigation funding agreements. This is because litigation funding agreements leave the underlying litigation intact, undisturbed, and undivided. Their only function is to supply cash to plaintiffs in need. Texas champerty jurisprudence seems to indicate that litigation funding agreements would be perfectly valid.

All six instances of invalid assignments in Texas operated to distort the underlying litigation.[173] "In all these cases, the evil sought to be avoided is a distortion of the parties' positions so that they have incentives not generally associated with their

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168. *Id.* at 82.
169. *Id.* at 87 (citations omitted).
170. *Id.* at 82, 87.
171. *Int'l Proteins Corp.*, 744 S.W.2d at 934.
172. *See* State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 711 (Tex. 1996).
173. *See supra* notes 131-137 and accompanying text.

positions in the litigation."[174] "Distortion" has been interpreted as forcing parties "to take inconsistent positions if [they are] to have any hope of actually recovering anything," and is used to describe situations in which "the parties [take] positions that appear[] contrary to their natural interests for no other reason than to obtain a judgment against [another party]."[175]

This "distortion factor" looks promising as a way to analyze champertous devices in Texas (and perhaps elsewhere), including litigation funding agreements. It should be noted that this factor requires an initial assumption that distortion can only occur during litigation itself and in relation to the manner in which the litigation is conducted. In other words, the distortion factor cannot be stretched to include mere contributions of capital to lawsuits where all other aspects of litigation remain undisturbed by the contributing parties. Prolonging litigation because the litigants are on equal financial footing does not equate to distortion. Where a significant bar to litigation is financial, how can it be against public policy to remove that impediment and allow injured plaintiffs to access the courts? "Wealth [should not have] the monopoly of justice against poverty."[176]

As discussed above, in examining the legality of assignments, Texas courts have extracted policy issues relating to the personal nature of the attorney-client relationship, the dangers of falsely or artificially realigning the parties, and the concerns over disrupting the judicial process.[177] Several points of law in the assignment context emerge as helpful guideposts in the uncharted territory of litigation funding agreements. First, so long as the champertous agreement is not making a "mockery" of a rule of law or attempting to circumvent it,[178] Texas courts should have no reason to invalidate litigation funding agreements to any of the six prohibited types of assignments by analogy.

Second, the agreement should not by nature make litigation "more protracted and complex."[179] In the assignment context, this referred to the distortions, disruptions, and realignment that eventually doomed the six prohibited assignments in Texas. However, lawsuit funding is premised on the idea that the

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174. Coronado Paint Co. v. Global Drywall Sys., Inc., 47 S.W.3d 28, 31 (Tex. App.—Corpus Christi 2001, pet. denied).

175. *Gandy*, 925 S.W.2d at 712.

176. *Financing Litigation On-Line*, *supra* note 13, at 85 (citing Jeremy Bentham, Letters I & XII, *in* DEFENCE OF USURY 1-5, 117-28 (1787)).

177. *See supra* Part III.B.

178. *See* Trevino v. Turcotte, 564 S.W.2d 682, 689 (Tex. 1978).

179. *Gandy*, 925 S.W.2d at 715.

investors remain outside the litigation, where they do not have standing or authority in the underlying litigation and cannot complicate it in that respect.

For example, the underlying litigation against the oil companies in the *Anglo-Dutch* litigation was in no way violated by Van Dyke's funding agreements. The funding agreements simply helped Van Dyke pay the bills during the Halliburton litigation;[180] they did not result in additional litigation in that matter. The only additional litigation was the lawsuits against Van Dyke for breach of the funding contracts he collected.[181] Likewise, the only actions against public policy in the *Anglo-Dutch* cases were those taken by Van Dyke to try to get out of valid contract agreements drafted with his approval.[182] Litigation funding agreements do not have a detrimental effect on the litigation; they merely add another layer of paperwork to the plaintiff's table in exchange for the financial security to pursue his lawsuit. Of course the agreements may be litigated as any other contract, should one party try to take advantage of another, but unlike the six examples of invalid assignments, such agreements do not by their mere existence necessitate additional litigation.

Third, litigation funding agreements must achieve their purpose without being a detriment to the legal system. For example, Mary Carter agreements were supposedly intended to promote settlement and discourage litigation but are now invalid in Texas because they warped the litigation instead.[183] The overarching purpose of litigation funding agreements is simply to remove significant financial obstacles that might otherwise compel an injured plaintiff to settle unwisely or not even pursue his rightful claim, while rewarding third-party benefactors for the use of their capital. This is not to say there will never be *bad* lawsuit funding agreements that might thwart these purposes by requiring the successful plaintiff to repay exorbitant sums of money.[184] The Texas Supreme Court has stated, "our public policy favoring fair trials outweighs our public policy favoring

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180. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 90-91 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

181. *See* discussion *infra* Part III.D.1.

182. *See* Plaintiff's Motion for Partial Summary Judgment at 6, Haskell v. Van Dyke, Nos. 2004-21054, 2004-22861 (157th Dist. Ct., Harris County, Tex. Oct. 7, 2004); Plaintiff's Trial Brief, *supra* note 27, at 1.

183. *See* Elbaor v. Smith, 845 S.W.2d 240, 249 (Tex. 1992).

184. HOUSE RESEARCH ORG., BILL ANALYSIS, H.B. 2987, 79th Leg., R.S. (2005), http://www.hro.house.state.tx.us/PDF/ba79R/HB2987.PDF [hereinafter BILL ANALYSIS].

partial settlements."[185] This sentiment easily applies in favor of lawsuit funding agreements, which promote fair trials over inadequate or nonexistent settlements by eliminating or reducing plaintiff's financial burden to arrive at a more just outcome.

Fourth, all six assignment prohibitions in Texas sprung into existence out of public policy concerns. But as every law student learns, public policy is the argument of last resort and should only be used when there is little or no relevant law on the issue (or when trying to get bonus points on an exam). Of little legal weight, public policy can nonetheless be important in new areas of law, such as the legality of litigation funding agreements, or where there is need for an equitable solution. In consistently turning to public policy, Texas courts have implicitly acknowledged that there are no solid legal grounds for invalidating champertous agreements in the state. Instead, the courts have focused on the side effects of assignments, "prohibit[ing] assignments that may skew the trial process, confuse or mislead the jury, promote collusion among nominal adversaries, or misdirect damages from more culpable to less culpable defendants."[186] While these are certainly valid concerns and ones to keep in mind to prevent champertous devices from running amok, litigation funding agreements as they exist today do not yield such results.

Two general fears seem prevalent in the assignment context: that claims assignments will become the next entrepreneurial fad,[187] and the corollary fear that the amount of litigation in Texas will increase exponentially like a mutating science experiment.[188] On their face, these sentiments seem to apply to litigation funding agreements as champertous devices, but a closer look reveals they are unfounded in that context. Funding agreements do not endanger the attorney-client relationship or demean the legal profession by allowing entrepreneurs to profit by making access to justice affordable to those who are otherwise financially barred. They do not deprive the original parties of

185. *Elbaor*, 845 S.W.2d at 250.

186. PPG Indus., Inc. v. JMB/Houston Ctrs. Partners Ltd. P'ship, 146 S.W.3d 79, 90 (Tex. 2004) (citing *Elbaor*, 845 S.W.2d at 250).

187. *See* Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 316 (Tex. App.—San Antonio 1994, writ ref'd) ("We do not relish the thought of entrepreneurs purchasing the legal rights of clients against their attorneys as an ordinary business transaction in pursuit of profit.").

188. State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696, 711 (Tex. 1996) (quoting Trevino v. Turcotte, 564 S.W.2d 682, 690 (Tex. 1978)) ("'[It] is against public policy . . . [to] breed litigation and deprive the real parties at interest of their right to compromise and settle their controversies.'").

their legal rights or misalign the parties.[189] They may indeed greatly appeal to potential investors, but general market conditions will likely impose their own limits on the money contributed and at what rate.[190] This is not to pretend litigation funding agreements will be absolutely free of frivolous claims. However, many litigation funding companies and investors investigate potential claims before investing in order to reduce that risk.[191]

Lastly, Texas public policy should not be construed as standing for the view that litigation must be stifled or avoided, or that settlement is the primary goal in all cases. To be sure, settlements are optimal for courts and litigants alike in many instances, but that does not automatically make lawsuits anathema. Increased litigation, a factor considered in each of the six instances of invalid assignments, is not a concern associated with litigation funding agreements because they do not alter or change the underlying litigation. Furthermore, any new or undeveloped area of law naturally spawns a certain amount of litigation until the relevant jurisprudence becomes more settled. Although litigation funding agreements have the potential to increase the total number of lawsuits in Texas, this fact has little to do with general policy against increased litigation. In fact, increased litigation is only relevant to the distortion factor mentioned above.

2. *Mallios v. Baker*[192]

Pre-*Anglo-Dutch* litigation, *Mallios v. Baker* presented the most functionally similar contractual relationship in Texas to true litigation funding agreements. Injured in a motorcycle accident while intoxicated, Baker sued the owner of a pub for continuing to sell him alcohol after Baker clearly became intoxicated.[193] Baker's attorney, Mallios, mistakenly obtained a

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189. It is possible, although unlikely, that a *defendant* would invest in plaintiff's case in a funding agreement. Such an arrangement would be similar enough in substance to a Mary Carter agreement that it would likely be declared invalid by Texas courts with little debate.

190. Marcushamer, *supra* note 19, at 1544 (arguing "that allowing free assignability [of claims] and creating primary and secondary markets consisting of current and future-contingent tort claims will be more beneficial to nearly all parties involved in the current tort system.") (punctuation omitted).

191. In fact, litigation funding companies might provide a valuable gatekeeping function to a certain extent in the detection and prevention of frivolous suits. *See Continuing Struggle over Litigation Funding*, *supra* note 54.

192. 11 S.W.3d 157 (Tex. 2000).

193. *Id.* at 158.

$1 million default judgment against the wrong company.[194] Baker did not learn of the mistake until he contacted Herron to sell his judgment.[195] Herron's independent research revealed the mistake,[196] and Baker agreed to assign a partial interest in his newfound malpractice action in exchange for Herron's help in pursuing it.[197]

The assignment agreement gave Herron partial control over the lawsuit, including the power to recommend legal counsel and the power to pay related costs.[198] The agreement also required the consent of both Baker and Herron in order to settle, thus giving Herron the right to reject a settlement offer regardless of Baker's wishes.[199] Their agreement thus included both assignment and litigation funding elements. However, Herron's insistence on acquiring co-ownership and control of the claim differentiated it from traditional litigation funding agreements.

Holding only that summary judgment was not proper against Baker, the Texas Supreme Court remained silent on the validity of Baker and Herron's agreement to partially assign interest.[200] By not addressing the issue of the assignment's validity, the court avoided having to consider the odd question of how to invalidate half of a cause of action. Perhaps this could have been ignored until the damages stage, but the court simply noted that "even if we were to . . . determine that . . . it is an invalid assignment, that would not vitiate Baker's right to sue Mallios" based on Baker's reservation of half of the right to the claim.[201]

Justice Hecht's concurrence in *Mallios v. Baker* provided valuable insight as to how litigation funding agreements might be gauged by the highest court in Texas. He emphatically stated, "if the interest purchased gives [an investment buyer] not merely

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194. *Id.* By then, Baker's personal injury claim against the pub owner had expired. *Id.*

195. *Id.* Herron had advertised that he would purchase judgments of amounts over $25,000. *Id.*

196. *Id.* This is some measure of proof that litigation funding agreements and litigation investors must "do their homework" in order to stay in business, and that it is not worth their time to help plaintiffs pursue frivolous claims.

197. *Id.*

198. *Id.* Herron was also entitled to reimbursement of any expenses plus half of any net recovery. *Id.*

199. *Id.* Herron also had the right to terminate the lawsuit in the event he decided that pursuit of Baker's claims was no longer cost-effective. *Id.*

200. *Id.* at 159. The court noted that Mallios could only win on summary judgment if Baker was precluded from pursuing the malpractice claim either because he assigned it to Herron or because the invalid assignment extinguished the claim. *Id.*

201. *Id.*

a share in any recovery but substantial control over the claim, the transfer contravenes public policy and is therefore void."[202] More concerned about the financial arrangement between the parties than the alliance itself, Justice Hecht said the vice in *Mallios* was "not in a mere assignment of part of plaintiff's recovery, but in an assignment coupled with such control that the third party assignee ha[d] a commercial investment in the outcome and the power to protect it."[203] His concern was that this might enable the assignee to force the assignor to take actions he would not ordinarily take.[204]

Justice Hecht's comments are clearly limited to the context of assignment of a legal malpractice action. His disdain for the commercial aspect of Baker and Herron's agreement should be considered as a warning only to greedy or manipulative investors. Litigation funding agreements successfully sever the connection between financial alignment and control entitlement that has made assignment of claims so problematic in Texas. Through these agreements, plaintiffs have economic and decisional freedom to pursue their claims themselves, and their investors are permitted to profit in the course of aiding others.

D. *The* Anglo-Dutch *Litigation and House Bill 2987*

The chain of events sparking the Texas champerty debate began when Van Dyke, an oil investor and president/owner of Anglo-Dutch Petroleum International, Inc.,[205] sued several other oil companies, including Halliburton Energy Services, Inc., Ramco Oil & Gas, Ltd., Golden Eagle Partners, and others on claims that they improperly appropriated a potential oilfield in Kazakhstan owned by Anglo-Dutch.[206] To both fund his litigation against the bigger companies and avoid bankruptcy while awaiting judgment, Van Dyke solicited financing from lawsuit funding companies and individual investors.[207] Although he had claimed damages of $650 million in lost profits, Van Dyke

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202. *Id.* (Hecht, J., concurring).

203. *Id.* at 160.

204. *Id.* at 169.

205. Scott Van Dyke and Anglo-Dutch are at times referred to collectively as "Van Dyke."

206. Defendants' Trial Brief at 1, Smith v. Anglo-Dutch Petroleum Int'l, Inc., No. 2004-48332 (133d Dist. Ct., Harris County, Tex. July 22, 2005).

207. Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 90-91 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). "He not only sought them out, he offered finders fees to firms who found others who would give him more money." Rick Casey, *Aid for Poor or Bailout for Millionaire?*, HOUSTON CHRON., May 3, 2005, at B1 [hereinafter *Bailout for Millionaire?*].

only received a judgment for approximately $81 million.[208] Van Dyke eventually settled with Halliburton for a confidential amount, presumably less than the jury award.[209] Van Dyke then issued checks to his litigation funding investors after receiving this settlement, whereupon some investors, including individuals and two lawsuit funding companies, sued him for breach of their funding agreements.[210] In the midst of fighting court battles over the funding agreements, Van Dyke and others also lobbied for H.B. 2987, a legislative mandate declaring lawsuit funding agreements to be both usurious and against Texas public policy.[211]

1. The *Anglo-Dutch* Litigation

In the last few years, Van Dyke and Anglo-Dutch collectively have been defendants in two separate Texas lawsuits in Harris County—*Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*[212] and *Smith v. Anglo-Dutch Petroleum Int'l, Inc.*[213]—both of which involved the exact same underlying events and issues mentioned above. The *Haskell* court granted partial summary judgment in favor of plaintiffs on their breach of contract claims.[214] The *Smith* court held for Smith after a bench trial during which Smith asserted claims for breach of contract, breach of fiduciary duty, and conversion.[215]

In the course of defending himself against plaintiffs' claims in both suits, Van Dyke and his lawyers presented several possible ways that Texas might treat litigation funding agreements. He contended that such agreements were either invalid, unregistered securities, usurious loans, or champertous agreements that violated Texas public policy.[216] Although the *Haskell* court did not decide whether the funding agreements

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208. *Haskell*, 193 S.W.3d at 90-91. The jury awarded $70.4 million to Van Dyke but the final judgment was increased to $80.4 million. Plaintiff's Motion for Partial Summary Judgment, *supra* note 182, at 4.

209. *Haskell*, 193 S.W.3d at 91. Plaintiffs estimated that Halliburton settled for over $30 million, although the exact amount was protected from disclosure by a confidentiality agreement. Plaintiff's Motion for Partial Summary Judgment, *supra* note 182, at 5.

210. *Haskell*, 193 S.W.3d at 91, 93.

211. *See* Transcript of Record at 136-38, Smith v. Anglo-Dutch Petroleum Int'l, Inc., No. 2004-48332 (133d Dist. Ct., Harris County, Tex. July 2005); *see also Bailout for Millionaire?*, *supra* note 207.

212. 193 S.W.3d 87 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

213. No. 2004-48332 (133d Dist. Ct., Harris County, Tex. July 22, 2005).

214. *Haskell*, 193 S.W.3d at 94-95.

215. *See* Plaintiff's Trial Brief, *supra* note 27, at 3, 11, 13.

216. *Haskell*, 193 S.W.3d at 93; Defendants' Trial Brief, *supra* note 206, at 4.

constituted securities,[217] it overruled Van Dyke's argument primarily on the grounds that if the agreements were securities, the relevant Texas Securities Act provision at issue protected the plaintiffs as purchasers, and not the seller.[218]

Ignoring the finer points of usury law, the loan issue was simply whether the litigation funding agreements constituted loans subject to usurious interest rates or investments outside the realm of usury.[219] The court decided the agreements were not loans and therefore did not involve usurious interest rates because the plaintiffs' invested money was not subject to an absolute obligation to repay.[220] The Texas Supreme Court has held that a usurious transaction consists of: "(1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower."[221] Because lawsuits nearly always carry with them a degree of uncertainty and no outcome is guaranteed (with the possible exception of *Escheverria*-type cases discussed above),[222] litigation funding agreements should not be legally classified as "loans." "If there is no 'loan,' then any disputed amount charged cannot be characterized as interest, and without interest, there cannot be usury."[223] In fact, despite careful intake procedures, lawsuit funding companies often provide financial support for unsuccessful plaintiffs who are not required to repay a dime.[224] Van Dyke owed nothing until he

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217. *Haskell*, 193 S.W.3d at 102 n.12.

218. *Id.* at 102-03. Examining TEX. REV. CIV. STAT. ANN. art. 581-33(K) (Vernon Supp. 2005), the court determined that the plaintiffs did not "acquire[] their rights under the agreements 'with knowledge of the facts by reason of which its making or performance was in violation' of the [Securities] Act." *Haskell*, 193 S.W.3d. at 102. The court noted that as purchasers, *plaintiffs* would have the option to void the transaction based on Van Dyke's failure to act in accordance with the Securities Act, but Van Dyke would have no such option. *See id.* at 102-03.

219. *Haskell*, 193 S.W.3d. at 95-101. Van Dyke's loan defense relates directly to H.B. 2987. *See* discussion *infra* Part III.D.2.

220. *Id.* at 98-99; Plaintiff's Trial Brief, *supra* note 27, at 6 (citing Seem Fin. Sec. Servs., Inc. v. Phase I Elecs. of W. Tex., Inc., 998 S.W.2d 674, 677 (Tex. App.—Amarillo 1999, no pet.); Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994)).

221. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982) (citing Pansy Oil Co. v. Fed. Oil Co., 91 S.W.2d 453, 455 (Tex. Civ. App.—Texarkana 1936, writ ref'd)).

222. *See supra* text accompanying notes 101-104.

223. *Haskell*, 193 S.W.3d at 96 (citing First USA Mgmt., Inc. v. Esmond, 960 S.W.2d 625, 628 (Tex. 1997)); *see* Plaintiff's Motion for Partial Summary Judgment, *supra* note 182, at 13 (arguing that a loan is not usurious when the promise to pay a sum depends upon a contingency, nor is "a contract . . . usurious when the lender is to receive uncertain value, even though the probable value is greater than lawful interest.").

224. Diane E. Lewis, *With Interest: Accident Victims Get Money from 'Advance Funders,'* BOSTON GLOBE, Oct. 2, 2003, *available at* http://www.boston.com/business/globe/articles/2003/10/02/with_interest.

received a cash settlement from Halliburton, which triggered his obligation to repay.[225]

Van Dyke's situation is markedly different than the poor injured plaintiffs discussed above.[226] He is a wealthy businessman trying to keep a company afloat during litigation over theoretical lost profits rather than someone with life-altering physical injuries swamped with medical bills and other necessary living expenses.[227] He helped prove the viability of litigation funding agreements in Texas when it was most convenient to him: he received various sums of money on his own terms from outside investors who had no say in the litigation, enabling him to stay in business, win in court, and ultimately settle for millions of dollars.[228] Only when dissatisfied with the outcome did he decide that such agreements were against public policy.[229] These maneuvers, while not distorting any litigation, have certainly increased it. Other, less-fortunate cash-strapped plaintiffs faced with more pressing concerns about day-to-day living and expenses deserve the same funding opportunities.

2. House Bill 2987[230]

Although H.B. 2987 ultimately failed to pass in the Texas Legislature,[231] it is nevertheless instructive to examine it in detail. The bill specified that "[a]ll funding advanced to a person whose repayment is contingent upon the person's recovery in a lawsuit is a loan subject to the usurious interest prohibition" in the Texas Finance Code.[232] It further provided that "[a] contract to provide such funding that allows a rate of return in excess of the usurious interest prohibition . . . is against the public policy of this state."[233] Of course, it did not apply to contingent attorney's fees, but it was supposed to apply to cases on appeal

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225. *See* Plaintiff's Motion for Partial Summary Judgment, *supra* note 182, at 4-5; Plaintiff's Trial Brief, *supra* note 27, at 3.

226. *See* discussion *supra* Part II.A.

227. *Haskell*, 193 S.W.3d at 90-91.

228. Plaintiff's Motion for Partial Summary Judgment, *supra* note 182, at 2-4.

229. *See id.* at 6. Ironically, these maneuvers technically resulted in added litigation, albeit of a different nature than the feared exponential increase in litigation that supposedly accompanies acceptance of litigation funding agreements.

230. Tex. H.B. 2987, 79th Leg., R.S. (2005).

231. The legislative history for H.B. 2987 indicates that the bill died in the senate. Texas Legislature Online History, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=HB2987 [hereinafter H.B. 2987 legislative history] (last visited Mar. 14, 2007).

232. Tex. H.B. 2987.

233. *Id.*

after its effective date of September 1, 2005.[234]

There were two controversial issues in H.B. 2987, and both related to Van Dyke's *Anglo-Dutch* litigation. The first was the attempt to define litigation funding agreements as loans, which would have enabled Van Dyke to void all of his Claims Investment Agreements as usurious.[235] The second was the retroactivity clause at the end of the bill.[236] This would have automatically eliminated all past claims by Van Dyke's investor-creditors who had relied on the terms his people had drafted into those Agreements.[237] Interestingly, counsel for Smith noted an inconsistency in Van Dyke's position in court: if litigation funding agreements were already void and unenforceable in Texas as Van Dyke claimed, it would be unnecessary and redundant for him to raise the issue in the legislature.[238]

As mentioned above, H.B. 2987 ultimately failed.[239] Although the Texas House of Representatives voted unanimously for the bill,[240] it was considered but never voted on by the Senate.[241] It is unclear why the bill passed overwhelmingly in only one chamber but not the other.[242] The bill's legislative history is slim, but its supporters likened lawsuit investors to "modern-day loan sharks" who "prey on the misfortune of people who have been injured", and "are much more likely to agree to outrageous interest rates than an average person would be."[243] Opponents of the bill supported litigation funding agreements as a means for injured plaintiffs to cover living expenses, etc.[244] The bill's supporters also claimed litigation funding agreements

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234. *Id.* *Houston Chronicle* columnist Rick Casey described this last clause as "a sneaky little clause that would let a Houston businessman off the hook for more than $4 million in debts." Rick Casey, *2, 4, 6, 8! Is This a Way to Legislate?*, HOUSTON CHRON., May 6, 2005, at B1.

235. *See* Tex. H.B. 2987.

236. *Id.*

237. *Bailout for Millionaire?*, *supra* note 207. In addition, at least one of Van Dyke's lawyers testified in support of H.B. 2987. *Id.*

238. Transcript of Record at 136-37, Smith v. Anglo-Dutch Petroleum Int'l, Inc., No. 2004-48332 (133d Dist. Ct., Harris County, Tex. July 22, 2005).

239. *See* H.B. 2987 legislative history, *supra* note 231.

240. H.J. OF Tex., 79th Leg., R.S. 1774 (2005).

241. Tex. S.B. 1405, 79th Leg., R.S. (2005), *available at* http://www.legis.state.tx.us/tlodocs/79R/billtext/pdf/SB01405I.pdf; Texas Legislature Online History, http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=79R&Bill=HB2987 (last visited Mar. 14, 2007).

242. Legislative history also included promiscuous use of the word "loan" (rather than "investment") to describe the funding agreements, circuitously using the term "loan" to describe the financial device being defined. BILL ANALYSIS, *supra* note 177.

243. *Id.*

244. *Id.*

would still be permitted under the bill while borrowers would be protected from unconscionable interest rates.[245] This sounds reasonable, but it would have defeated an important purpose of lawsuit funding investments—to absorb the risk of litigation where traditional lenders refuse to do so. Interest rates must be higher under litigation funding agreements to compensate for the lenders' risk,[246] especially since each plaintiff has on average a fifty percent chance of obtaining a favorable judgment. H.B. 2987 would have ensured that very little, if any, litigation funding occurred in Texas courts. H.B. 2987 was a hasty bill, intended to benefit only certain groups of people, and lacked serious thought and consideration.

E. *Impact of the* Anglo-Dutch *Litigation*

As mentioned above, free assignability of claims has generally been permitted but gradually curtailed by the Texas judiciary in light of champerty principles. Because the *Anglo-Dutch* litigation is the first in Texas to question litigation funding agreements specifically, Texas courts must choose whether to narrow the doctrine relating to assignment of claims and whether to embrace or exclude the current trend of accepting litigation funding. If the courts exclude funding agreements, their reasoning must necessarily rest on public policy grounds and will most likely relate to usury prohibitions.[247] Naturally, the courts must also take into account the specific facts of the *Anglo-Dutch* litigation as the first litigation in Texas over lawsuit funding agreements.

Throughout the years, Texas litigants have attempted to invoke the doctrine of champerty with regard to both causes of action and affirmative defenses. Their only success has been in the name of public policy, since early Texas courts definitively held that Texas never adopted the English common law with respect to the prohibition of champerty.[248] Indeed, the *Anglo-Dutch* defendants' arguments rest primarily either on out-of-state cases regarding litigation funding agreements or Texas cases invalidating champertous assignments on public policy grounds.[249]

There is technically no need for a champerty statute, unless

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245. *Id.*

246. *See id.*

247. This was the argument urged by the *Anglo-Dutch* defendants. *See* Defendants' Trial Brief, *supra* note 206, at 4-7.

248. *See* Bentinck v. Franklin, 38 Tex. 458, 471-74 (1873).

249. *See* Defendants' Trial Brief, *supra* note 206, at 11-15.

it merely codifies existing law or seeks to create a seventh exception, as the Legislature attempted to do with H.B. 2987. Disinterested participation in litigation has such tremendous potential, both to greatly benefit or greatly harm the litigation process. These outcomes can only be balanced in each individual case. Champerty was originally a common law doctrine and should stay that way. Therefore, the Texas Legislature should do nothing regarding litigation funding agreements, because they are already permissible under general champerty. Texas courts can formulate the proper tests and boundaries as appropriate under any given set of facts that lead to injustice or detriment to the legal community, as they have already demonstrated by carving out six exceptions to the blanket acceptance of champerty in the state.

IV. CONCLUSION

As champertous devices in a state that has never prohibited general champerty, litigation funding agreements are already permissible in Texas by default. The question is not whether litigation funding agreements are perfect; rather, the question is whether these agreements offend any public policy related to the six enumerated exceptions discussed above or raise any additional concerns. Like contingent attorney's fees, litigation funding agreements do not breed litigation, attempt to circumvent existing law, interfere with the attorney-client relationship, or demean the legal profession. They are simply permissible champertous devices that enable an injured plaintiff to take a seat at the bargaining or courtroom table on equal financial footing with a defendant.[250]

The Texas Legislature should not revive H.B. 2987 or consider any similar legislation regarding litigation funding agreements. Instead, the courts should continue to monitor champertous devices in Texas, only invalidating those that distort the underlying litigation. The *Anglo-Dutch* litigation does not present such a scenario, and the funding agreements at issue there should be upheld.[251] Likewise, other funding agreements

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250. Ideally, the financing party merely writes checks to the litigating party, sits back, and watches the show from the front row without giving any directorial cues or pulling any puppet-strings.

251. The Texas Rules of Appellate Procedure contain explanations of the precedential meaning of the methods by which the Texas Supreme Court accepts or denies appeal. *See* Tex. R. App. P. 56.1. Van Dyke filed a petition for review of the *Haskell* decision, which the Texas Supreme Court subsequently denied. Texas Courts Online—Supreme Court, http://www.supreme.courts.state.tx.us/opinions/EventInfo.asp?EventID=469811 (showing denial of Van Dyke's petition on August 18, 2006).

generally should be upheld in Texas where parties have validly contracted for them and the fundamental elements of litigation remain undisturbed. If litigation funding agreements remain just that—funding agreements only—Texas's history of allowing beneficial champertous devices will embrace them under the watchful eyes of the courts.

Christy B. Bushnell

> If the Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects, but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the state as to require correction, the Court will deny the petition with the notation "Denied."

Tex. R. App. P. 56.1(b)(1). Therefore, the Texas Supreme Court implicitly expressed some degree of approval of the Court of Appeals' champerty disposition.