Update on Consumer Litigation Funding Issues

By John L. Ropiequet

I. Introduction

An earlier article comprehensively reported on the legal and ethical issues that surround litigation funding agreements with consumers, pursuant to which funding companies advance cash to consumers who have pending lawsuits, repayment is secured by an assignment of an interest in the proceeds of the suit, and the funders take nothing if the plaintiff takes nothing. Apart from the ethical issues which confront the attorneys who represent the plaintiffs, litigation funders face a series of legal issues that present challenges that may make funding contracts difficult, if not impossible, to enforce. As noted in the previous article, these issues confront litigation funding for both businesses and consumers.

Briefly, these issues are:

- Do the contracts violate the common law prohibitions against champerty and maintenance?
- Can the plaintiff’s attorney be bound by an irrevocable letter of direction to pay a portion of the proceeds to the funder?
- Will the courts hold that a litigation funding contract meets the definition of a “loan,” subjecting the funder to licensure requirements and usury limitations?
- If a state has enacted a statute to regulate funding contracts, what is required of the funder?

Since the previous article was published, there have been some additional case law and legislative developments that have bearing on these issues. This article will discuss those developments. As was the situation when the earlier article was published, no clear trends can be seen.

II. Champerty and Maintenance Issues

The first hurdle that must be surmounted by litigation funding contracts is presented by the ancient doctrines of champerty and maintenance. “Champerty” has been defined as:

A bargain by a stranger with a party to a suit, by which such party undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if

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2. See id. at 16 - 18.
3. See id. at 1.
4. See id. at 5 - 8.
5. See id. at 8.
7. See id. at 13.
8. See id. at 13 - 16.
9. See id. at 9 - 12.
successful, a part of the proceeds or subject sought to be recovered.\textsuperscript{10}

“Maintenance” has been defined as:

An unauthorized and officious intermeddling with a suit in which the offender has no interest, to assist one of the parties to it, against the other, with money or advice to prosecute or defend the action.\textsuperscript{11}

Since a litigation funder is a third party that enables a plaintiff to continue to prosecute a lawsuit by advancing funds in exchange for some of the proceeds of the suit, some courts have found that litigation funding agreements are champertous and void.\textsuperscript{12} Similarly, a litigation funder may be found to be an intermeddler that lacks an interest in a suit, and thus violate the doctrine of maintenance.\textsuperscript{13}

The court in \textit{Charge Injection Technologies, Inc. v. E.I. Dupont DeNemours & Co.},\textsuperscript{14} broke with earlier Delaware precedent when it denied a motion to dismiss the case based on champerty and maintenance stemming from the plaintiff company’s commercial litigation funding agreement. In \textit{Charge Injection}, the plaintiff brought suit in 2007 alleging that Dupont had wrongfully used and disclosed its proprietary and confidential technology. As the litigation progressed and the plaintiff’s costs mounted, it entered into agreements with two companies to search for a litigation funder, one of which brought the plaintiff into contact with a United Kingdom litigation funding company, but it declined to fund the litigation in 2010.\textsuperscript{15} Two years later, after further negotiation and due diligence by the funding company, it agreed to provide funding to prosecute the case against Dupont in exchange for a percentage of future proceeds, with a security interest in the underlying claim as collateral.\textsuperscript{16}

When Dupont moved to dismiss the case on the ground that the plaintiff had entered into a champertous contract with the litigation funder, the plaintiff asserted that its agreement was not champertous because it did not assign its claims to the funder, nor had it entered into an agreement with a third party to pursue the litigation without it at the third party’s “own risk and expense in consideration of receiving part of the proceeds.”\textsuperscript{17}

The \textit{Charge Injection} court took note of two earlier Delaware cases where the courts had found agreements to be champertous and unenforceable, but it distinguished them. In one case, \textit{Hall v. State},\textsuperscript{18} a prisoner sued to obtain seized property after another prisoner assigned his claim to him and the suit was dismissed as champertous “because the assignee had no legal or equitable interest in the subject matter of the litigation prior to the assignment.”\textsuperscript{19} In the other, \textit{Street Search Partners, L.P. v. Ricon International, LLC},\textsuperscript{20} the plaintiff company assigned its interest in the litigation to a funder, which then sought to intervene in the case as an “assignee-in-interest” in order to prosecute the claims, which was held to be a champertous assignment of a legal interest in the litigation.\textsuperscript{21} The \textit{Charge Injection} court distinguished both cases because the record showed that, unlike in the earlier cases, the plaintiff company “retained the right to direct, control, or settle the claims, and because the contract expressly provided that the plaintiff ‘‘retains the unfettered right to settle the Litigation Claim at any time for any amount.’’"\textsuperscript{22} The \textit{Charge Injection} court also found that the doctrine of maintenance was no bar to the funding agreement. It noted that maintenance “involves the officious intermeddling in a suit, ‘for the purpose of stirring up litigation and strife, encouraging others to bring actions or make defenses that they have no right to make.’”\textsuperscript{23} The funder was not an officious intermeddler, and the contract therefore did not constitute maintenance, because the funder did not stir up any litigation or force the plaintiff to pursue it.\textsuperscript{24} In addition, the agreement between the parties, which was “freely negotiated,” did not give the funder any right to direct, control, or settle the claims and the plaintiff was not restricted in how it had to use the funding that was provided to it under the funding agreement.\textsuperscript{25}

\section*{III. Other Public Policy Issues}

\subsection*{A. Alabama Litigation}

The unique approach taken by the Alabama Court of Appeals in \textit{Wilson v.}

\begin{itemize}
  \item \textsuperscript{10} See id. at 5 (citing \textit{BLACK'S LAW DICTIONARY} at 292 (4th ed. 1966) [\textit{BLACK'S}]).
  \item \textsuperscript{11} See id. (citing \textit{BLACK'S}, supra note 10 at 1106).
  \item \textsuperscript{12} See, e.g., Johnson v. Wright, 682 N.W.2d 671, 677 - 81 (Minn. App. 2004); Rancman v. Interim Settlement Funding Corp., 99 Ohio St. 2d 121, 123 - 15, 789 N.E.2d 217 (2003). See also \textit{Litigation Funding, supra note 1, at 6 - 7}.
  \item \textsuperscript{13} See, e.g., Toste Farm Corp. v. Hadbury, Inc., 798 A.2d 901, 905 - 06 (R.I. 2002). See also \textit{Litigation Funding, supra note 1, at 7}.
  \item \textsuperscript{14} 2016 WL 937400 (Del. Super. Mar. 9, 2016).
  \item \textsuperscript{15} Id. at *2.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{17} Id. at *3.
  \item \textsuperscript{18} 655 A.2d 827 (Del. Super. 1994). See \textit{Litigation Funding, supra note 1, at 7 n.35}.
  \item \textsuperscript{19} \textit{Charge Injection}, 2016 WL 937400, at *3 (citing \textit{Hall}, 655 A.2d at 829 - 31).
  \item \textsuperscript{20} 2006 WL 1313859 (Del. Super. May 12, 2006).
  \item \textsuperscript{21} \textit{Charge Injection}, 2016 WL 937400, at *4 (citing \textit{Street Search Partners}, 2006 WL 1313859, at *4 - 5).
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id. (citing Gibson v. Gillespie, 152 A. 589, 593 (Del. Super. 1928)).
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id. (citing Bayard v. McLane, 3 Del. 139, 208 (1840)).
  \item \textsuperscript{26} Id. at *5.
  \item \textsuperscript{27} Id.
\end{itemize}
Harris, finding that a litigation funding agreement was invalid as a matter of public policy on the ground that it was a gambling contract, was tangentially addressed the U.S. Court of Appeals for the Eleventh Circuit in Rucker v. Oasis Legal Finance, L.L.C. Oasis, the defendant litigation funder, put a forum selection clause in its standard litigation funding agreement which required that all disputes be litigated in state court in Illinois. The plaintiffs filed a class action in Alabama seeking a declaratory judgment that Oasis’ contracts “were void under Alabama law as illegal gambling contracts.” Oasis moved to dismiss for improper venue because of its forum selection clause, and the district court denied the motion on the ground that it was unreasonable to “require the parties to litigate a pure question of Alabama law in Illinois.”

On an interlocutory appeal, the Eleventh Circuit held that forum selection clauses like the one in the Oasis contract “are presumptively valid and enforceable unless the plaintiff makes a ‘strong showing that enforcement would be unfair or unreasonable’ under the circumstances.” Reviewing the clause under the four factors outlined by the U.S. Supreme Court in M/S Bremen v. Zapata Off-Shore Co., the Rucker court found that none of the factors supported invalidating the clause.

The first Bremen factor was not present because the plaintiff had made no specific allegations amounting to fraud or overreaching with respect to inclusion of the clause in the contract. As to the second factor, being deprived of a day in court by inconvenience or unfairness, while litigating the case in Illinois rather than Alabama may be more difficult or costly,” mere financial difficulties in litigating in a distant forum were not enough to invalidate the clause. Moreover, the inconvenience of litigating in Illinois “was foreseeable at the time of contracting, and there was no showing that ‘litigating ‘in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practical purposes be deprived of his day in court.'”

The third Bremen factor also was not sufficient to invalidate the clause because enforcing it would not “deprive the plaintiff of a remedy.” The Rucker court specifically noted that the Oasis contract provided that all disputes would be governed by Alabama law, so that “the remedy will be determined under the same set of rules no matter where this case is heard.” The fourth factor, contravention of public policy, was also no bar. Citing Wilson v. Harris, the plaintiffs argued that “enforcing the forum selection clause would violate Alabama’s public policy against enforcing contracts based on a gambling consideration.”

The Rucker court found that an Illinois court hearing the case would be applying Alabama law “and must therefore give proper deference to the Alabama precedent plaintiffs provide,” in which the Alabama Court of Civil Appeals had found that a litigation funding contract was “closely akin to champerty…and void as a matter of public policy.”

The plaintiffs’ final argument was that the forum selection clause could not be enforced because it was part of a contract that was void as an illegal gambling contract as a matter of Alabama law. The Rucker court held that “[a] forum selection clause is viewed as a separate contract that is severable from the agreement in which it is contained and therefore could be found enforceable even if a court might ultimately find the entire contract unenforceable.” The court therefore remanded the case to the district court and directed it to dismiss the case “without prejudice based upon improper venue.”

B. Minnesota Litigation

A motion to dismiss was granted under very similar circumstances by a Minnesota district court in Fountain v. Oasis Legal Finance, LLC. Fountain was another class action brought against Oasis asserting that its litigation funding agreements were void as against Minnesota public policy under the doctrines of champerty and maintenance pursuant to the decision in Johnson v. Wright. The complaint sought a declaratory judgment on behalf of a class of Minnesota consumers that Oasis’ agreements “violate Minnesota public policy, are void, and cannot be enforced,” and for other relief. Oasis removed the case to federal court and sought dismissal based on the same forum selection clause as in Rucker, which required that all disputes be brought in state court in Illinois. The complaint was amended to add a Minnesota lawyer as a plaintiff who sought a declaratory judgment that his legal and ethical rights and obligations were being violated because the funding agreement required the tort plaintiff’s attorney to acknowledge receipt of a copy of the agreement to execute an irrevocable letter of direction.

The Fountain court found that the attorney plaintiff lacked constitutional

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29. See Litigation Funding, supra note 1, at 8.
30. 632 F.3d 1231 (11th Cir. 2011).
31. Id. at 1234.
32. Id. at 1234 - 35.
33. Id. at 1236.
34. Id. (citing Krenkel v. Kezner Int'l Hotels Ltd., 579 F.3d 1279, 1281 (11th Cir. 2009)).
36. Rucker, 632 F.3d at 1236.
37. Id. at 1237.
38. Id. (citing P & S Bus. Machs., Inc. v. Cannon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003); and Bremen, 407 U.S. at 17 - 18).
39. Id. (citing Krenkel, 579 F.3d at 1281).
40. Id.
41. Id.
42. Id. (citing Wilson v. Harris, 688 So. 2d 263, 265, 270 ( Ala. Civ. App. 1996)).
43. Id.
standing to bring a claim because he had not suffered any injury in fact sufficient to give him standing to sue. In particular, the attorney “failed to identify any actual harm that he himself has endured due to the purchase agreement, rather only alleging that his client Fountain has been wronged and deserves monetary damages.”

He also failed to allege any “imminent harm that he might endure due to the attorney acknowledgment,” and instead “offers only conjecture.” In addition, the court found that it could not give the attorney advice on his “ethical obligations as a lawyer in a hypothetical circumstance.” For that advice, the court referred the attorney to the Minnesota Lawyers Professional Responsibility Board.

The other plaintiffs’ claims were dismissed under the forum non conveniens doctrine pursuant to the forum selection clause after the Fountain court found that none of the Supreme Court’s Bremen factors made the forum selection clause unenforceable. Citing Rucker, the Fountain court found that it was appropriate to determine the validity of the forum selection clause before determining the validity of the contract as a whole. Thus, the first question was whether the forum selection clause by itself violated public policy, not whether the contract as a whole violated the Minnesota public policy against champerty.

Like the Rucker court, the Fountain court found that the plaintiffs “had simply not pleaded enough facts to plausibly show that they would be deprived of their day in court if they had to file this lawsuit in Illinois.” The plaintiffs also failed to allege fraud in the procurement of the forum selection clause, and their argument that the funding agreement was a contract of adhesion was unavailing because they failed to allege “that the agreements were necessary or that they were not free to turn down the agreements and obtain financial assistance elsewhere.”

With respect to the question of whether applying a valid forum selection clause should lead to dismissal of the case under the forum non conveniens doctrine, the Fountain court relied upon the U.S. Supreme Court’s decision in Atlantic Marine Construction Co. v. U.S. District Court. Under that decision, courts “must place the burden of proof on the plaintiff to show that the forum-selection clause should not be enforced, give ‘no weight’ of the plaintiff’s choice of forum, and not consider the parties’ private interests.” Applying those factors, the Fountain court found that the public interest factor concerning Minnesota’s interest in applying its prohibition of champerty to its residents made no difference because an Illinois court hearing the case would enforce the contract’s choice of law provision and would analyze the plaintiffs’ claims under Minnesota law, so that the Minnesota public policy against champerty would not be thwarted. The court therefore dismissed the complaint.

IV. Is a Litigation Funding Contract a Loan?

As noted in the earlier article, several courts have addressed this question, which is important because construing a litigation funding contract as a loan will require funders to become properly licensed under state law and will subject the contracts to state usury limits. One of the cases was an intermediate appellate decision in Colorado, Oasis Legal Finance Group, LLC v. Suthers.

This decision was affirmed by the Colorado Supreme Court in Oasis Legal Finance Group, LLC v. Coffman, in which the court provided significant additional background information about the circumstances of the case as well as going into the issues in greater detail than the court of appeals did.

In Coffman, the two plaintiff litigation funding companies operated under very similar contracts and started doing business in Colorado in 2001 and 2004. In 2010, counsel for an unrelated litigation funding company sought an opinion from the Administrator of the Colorado Uniform Consumer Credit Code (Colorado U3C) as to whether any licensing requirements or other regulations would apply to it. The Administrator concluded that non-recourse pre-settlement cash advances would be loans subject to the Colorado U3C pursuant to the Colorado Supreme Court’s decision in State ex rel. Salazar v. Cash Now Store, Inc.

The Administrator then became aware of the two plaintiff companies’ litigation funding businesses, began an investigation, issued a letter determining that they were making loans in violation of the Colorado U3C, and offered to settle the matter with them. Rather than settle with the Administrator, the companies sought a declaratory judgment that their funding agreements were not loans, while the state counterclaimed to enjoin the making of loans without being licensed, as well as seeking penalties and sanctions.

The trial court granted partial summary judgment for the state, finding that the funding transactions were loans, and the Colorado Court of Appeals affirmed.
“loans” governed by the Colorado U3C based on “a careful reading of the statute’s text and our precedent.”77 The U3C contained a definition of “loan” that included the creation of debt by various means.78 On the question of whether a litigation funding transaction created a “debt” as that term is used in the statute, the court concluded that although the statute does not define the term “debt,” the transaction did meet the definition of “debt” in Black’s Law Dictionary as “a specific sum of money due by agreement or otherwise.”79 Thus, it found that “a debt is an obligation to repay,” although not all debts were subject to being regulated under the U3C as loans.74

The plaintiffs argued that their transactions were not loans and did not create debt because their customers’ “repayment obligations do not extend beyond their recoveries in the event of a shortfall.”75 In particular, the record showed that the plaintiffs recovered less than the amount due in about fifteen percent of the cases and that “when claims yield nothing, [tort] plaintiffs pay nothing.”80 The Coffman court found that such “intermittent losses” did not control the case because “[l]itigation finance transactions create repayment obligations – debt – at the outset.”81

Under the court’s Cash Now decision, the normal full recovery of the obligation to repay plus “an extra amount based on how long it took the [tort] plaintiff to pay up” supported the conclusion that “these transactions constitute loans.”82

The court further rejected the contention that the non-recourse feature of the transactions distinguished them from loans under Cash Now because it was “a distinction without a difference” under the South Carolina case on which Cash Now relied, and there was no basis “to shoehorn the word ‘recourse’ into the statute’s definition of loan.”79 The Coffman court further found significance in the fact that “the obligation increases with the passage of time, another characteristic of a loan.”80 This feature of litigation funding contracts was similar to the definition of “finance charge” in the Colorado U3C as well as the definition of “interest” in Black’s Law Dictionary.81

Finally, the court rejected the argument that the transactions were sales or assignments for which money was paid rather than loans because the tort plaintiffs did not agree to “give and pass rights of property,” as normally happens in a sale or transfer of rights and duties that puts the “assignee in the assignor’s shoes,” because “the tort plaintiffs continue to control the pending litigation even though they are purportedly selling their rights to a portion of the proceeds from that litigation.”80 Instead, the litigation funding agreements provided the funders “only with the rights that any creditor would have to receive payment of the amount due.”83 The court therefore affirmed the lower courts’ findings that the litigation financing agreements constituted loans subject to the licensing requirements of the Colorado U3C.84

V. Additional Legislation

The earlier article reported on five states that have enacted statutes that regulate litigation funding agreements, with provisions that were substantially similar.85 While legislation that would regulate litigation funding agreements has been proposed in several more states,86 only two states have actually enacted a statute and neither statute follows the previous pattern.

A. The Arkansas Statute

Arkansas enacted a statute labeled “To Regulate Consumer Lawsuit Lending” on April 1, 2015. The statute contains a definition for “consumer lawsuit lending” as:

(A) Providing money to a consumer to use for any purpose other than prosecuting the consumer’s dispute, the repayment of which is conditioned upon and sourced from the consumer’s proceeds from the outcome of the dispute by judgment, settlement, or otherwise; and

(B) Purchasing from a consumer a contingent right to receive a share of the proceeds of the consumer’s dispute, by judgment, settlement or otherwise….87

The statute further requires that any contract or agreement that governs a consumer lawsuit lending transaction must be in writing and must prominently disclose the annual percentage rate.88 Finally, consumer lawsuit lending contracts are made subject to the general interest rate maximum of seventeen percent set by statute and the

71. Id. at 406.
72. Id. at 406 - 07.
73. Id. at 407 (citing Black's Law Dictionary, at 462 (9th ed. 2009) [BLACK'S 9th ed.]).
74. Id. at 407 - 08.
75. Id. at 408.
76. Id.
77. Id.
78. Id.
80. Id. at 409.
81. Id. at 409 - 10 (citing: Colo. Code § 5-1-301(15)(a)(III); and Black’s 9th ed., supra note 73, at 886).
82. Id. at 410.
83. Id.
84. Id.
85. See Litigation Funding, supra note 1, at 9 - 12.
88. Id. (to be codified at Ark. Code § 4-57-109(c)).
Arkansas Constitution. Any violation of the statute is deemed to be a deceptive and unconscionable trade practice.

While the Arkansas statute contains no provisions that would make it complicated to comply with, the interest rate cap of seventeen percent will likely discourage litigation funders from entering into contracts in the state since the return is too low to cover the costs of extending a cash advance and the risks involved. This apparently has happened in the neighboring state of Tennessee, where a ten percent cap on fees was put into effect and one large litigation funder promptly announced that it would no longer do business in the state.

B. The Vermont Statute

Vermont took a wait-and-see approach to litigation funding agreements in a statute that became effective on July 1, 2015. The statute defined “litigation funding” as:

[A] non-recourse transaction in which a person provides personal expense funds to a consumer to cover personal expenses while a consumer is a party to a civil action or legal claim and, in return, the consumer assigns to such person a contingent right to receive an amount of the proceeds of the settlement or judgment obtained from the consumer’s action or claim. If no such proceeds are obtained, the consumer is not required to repay the person the funded amount, any fees or charges, or any other sums.

After finding that this “relatively new business” raises concerns about whether, and if so, to what extent, such transactions should be regulated by the Commissioner of Financial Regulation, the legislature required the Commissioner and the Attorney General to submit a report or to draft legislation that would balance providing consumers access to funds for personal expenses with protecting them from predatory practices. In addition, apparently in order to give the legislature time to take action, the act set a moratorium on issuing new litigation funding contracts between July 1, 2015 and July 1, 2016, unless the legislature authorized such contracts before the latter date.

The Commissioner and the Attorney General issued their recommendations in a report dated December 1, 2015. The report took note of the statutes previously enacted in six states, including Arkansas, and discussed how they might be adapted for Vermont. The report found that there were three options available: (1) licensing litigation funding companies, including reviewing their character and fitness; (2) requiring them to register without a pre-registration review; or (3) imposing no registration or licensing requirement other than the general requirements for registering a corporation to do business in the state.

The report then discussed the benefits and burdens of those alternatives and recommended the “middle approach” of only requiring registration without an administrative review of character, fitness, and financial stability since that “would provide for adequate tracking of this industry within the State without additional bureaucratic burden” due to “the relatively limited risk that arises from the character and soundness of the counterparty (consumer litigation funding company) in such transactions.” Although the report found that there was little reason to require a bond because “consumers get the money first and there is no direct recourse against the consumer for repayment,” the report found that a bonding requirement would be beneficial because an insurance company would perform an investigation before issuing a bond that would in effect substitute for a review of character, fitness and solvency that would otherwise be done by a state agency.

The report’s review of the other states’ statutes found that their frameworks “can be divided into four parts: required disclosures, required contract provisions, prohibited practices and enforcement.” The report recommended that: legislation provide for a series of required disclosures; contracts be clear and coherent and contain a list of required provisions; the statute contain several prohibitions, such as prohibiting payment of commissions, false advertising, and referrals for professional services, and prohibiting attorneys from having a financial interest in a funding company; and there be enforcement provisions.

The report also discussed other provisions in effect or proposed in other states. The Tennessee interest rate cap appeared to have caused litigation funders to withdraw from the state because rates were “capped at a level that does not allow a company to recoup its losses.” The report did not think that requiring any medical liens to be given priority was desirable, because non-related medical costs would take priority over repayment of the litigation funding. Likewise, the $40,000 cap on funding proposed in Illinois appeared unnecessary because of “the nonrecourse nature of the litigation funding agreements.”

89. Id. (to be codified at Ark. Code § 4-57-109(b)).
90. Id. (to be codified at Ark. Code § 4-57-109(d)).
91. See Litigation Funding, supra note 1, at 11.
93. Id. (to be codified at 8 Vt. Stat. Ann. § 2245(10b)).
94. Id. (to be codified at 8 Vt. Stat. Ann. § 2246(c)).
95. Id. (to be codified at 8 Vt. Stat. Ann. § 2246(d)).
97. See id. at 3 - 4.
98. Id. at 4.
99. Id. at 6.
funding contract” and because plaintiffs may face medical bills or expenses like college tuition that are much larger than that amount. Setting a cap on the period of time fees could be imposed appeared appropriate to protect consumers, while capping the amount of net proceeds that could be used to repay a contract might make funders “less likely to contract with plaintiffs whose claims are viewed as being more modest.”

VI. Conclusion

Consumer litigation funding continues to be a growing business, but one that faces an uncertain future in the many states that have not enacted statutes to govern the business or have case decisions that disfavor it. In states without statutes that deal specifically with consumer litigation funding, the cases may allow it under some circumstances, as in Delaware, or find that it violates the laws that govern the making of consumer loans, as in Colorado. In states where the case law has disfavored consumer litigation funding agreements on public policy grounds, like Alabama and Minnesota, creative lawyering like the Oasis forum selection clause may successfully fend off attacks by private litigants. However, it is uncertain what would happen if a class action were brought in Illinois, as the clause requires, and an Illinois court applied another state’s strong public policy against litigation funding. In addition, litigation funders that operate in those states remain vulnerable to governmental enforcement actions. The relatively high rate of return that is needed to make consumer litigation funding an economically viable business continues to trouble some state legislatures. While the Vermont legislature took a relatively benign view, requiring the state’s Commissioner of Financial Regulation and its Attorney General to study the issues on its behalf, resulting in a report that carefully weighed the pros and cons, the Arkansas legislature adopted a meat-cleaver approach that simply cut off the interest that could be charged at a low level that likely makes the business economically unviable there. Also, while legislation to govern consumer litigation funding has been introduced in several more states during the past couple of years, those legislatures’ failure to enact statutes suggests a willingness to allow the business to remain at the mercy of case-by-case rulings in court.

108. Id. at 11 - 12.
109. Id. at 12.