# "KEEP TO THE CODE": A GLOBAL CODE OF CONDUCT FOR THIRD-PARTY FUNDERS

**VICTORIA SHANNON SAHANI***

ABSTRACT

*Global commercial third-party funding has given rise to wide-ranging regulatory approaches worldwide. Consequently, funders can engage in cross-border regulatory arbitrage by exploiting regulatory gaps within and among nations. This Article argues that the global community of nations should articulate a universal approach to the behavioral expectations of third-party funders operating transnationally, independent of local laws regarding the technical business of funding. It asserts that the key to fostering the ethical development of the third-party funding industry is to develop a globally applicable but locally enforced code of conduct or professional responsibility for the industry. Moreover, a successful regime for funder professional responsibilities should be genuinely transnational, transsubstantive, and forum neutral. The ideal framework should also be clear but not rigid, and comprehensive but customizable. Individual governments, transnational regulatory efforts, and funders creating internal governance codes can then adopt the principles in this framework to achieve global harmonization.*

*This Article takes three crucial steps toward harmonizing the professional responsibility tenets for the third-party funding industry through a transnational, transsubstantive, and forum-neutral Model Code of Conduct for Third-Party Funders. First, this Article provides a brief overview of several existing approaches to regulating and enforcing third-party funding ethics and professional responsibility globally. Second, this Article distills from these existing approaches universal principles as the starting point for drafting a global Model Code of Conduct for Third-Party Funders in the future. Third, this Article discusses several implementation and enforcement options for such a*

* Associate Provost for Community and Inclusion and Professor of Law, Boston University. I express heartfelt thanks to Maya Steinitz, Tony Sebok, and Mohamed Sweify; the faculties of Pepperdine University Caruso School of Law, Temple University Beasley Law School, and Penn State Law; and the participants of the Lutie A. Lytle Black Women Law Faculty Writing Workshop and the New York University School of Law Center on Civil Justice Recent Developments in Arbitration conference, for their helpful feedback on earlier drafts of this Article. I also express my sincerest gratitude to *Boston University Law Review* editors Julian Burlando-Salazar, Maria Cosma, Noah Gillen, Tobi Henzer, Maggie Houtz, Keenan Hunt-Stone, Philip Ibarra, Victoria Jin, Joseph Odegaard, Minas Rasoulis, Lisa Richmond, Leia Seereeram, Sydney Straub, Mason Trinkle, Abby Vogt, and Allie Works, for their superb editing work.

*code, including drawing an analogy to the successful and celebrated New York Convention, which is globally applicable but locally enforced. Finally, this Article concludes by proposing avenues for further inquiry to bring this idea to fruition.*

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*Me? I'm dishonest, and a dishonest man you can always trust to be dishonest. Honestly. It's the honest ones you want to watch out for, because you can never predict when they're going to do something incredibly stupid.*

—Captain Jack Sparrow[1]

## INTRODUCTION

There are real pirates in dispute settlement, and they are not always who you think. Unscrupulous investors are running amok in our litigation and arbitration systems globally, and there are enough egregious examples from the United States alone to raise the alarm. For example, federal judges have bought and sold the stock of litigants in the cases they were hearing in violation of the Federal Judicial Code of Conduct.[2] In addition, a winning corporation paid a losing individual claimant to pursue and intentionally lose an appeal to create a precedent against thousands of potential similar litigants.[3] In New York City, several attorneys, surgeons, and a third-party funder[4] participated in a $31 million fraud scheme involving fake slip-and-fall cases.[5] The scheme exploited

[1] PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures & Jerry Bruckheimer Films 2003). A video clip of this quotation is available on the internet. *See* RAVAN maharaj, *Jack Sparrow Says"" Iam Dishonest,""* YOUTUBE (June 27, 2019), https://youtu.be/pNksCAN9IcA.

[2] *See* Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Federal Judges or Their Brokers Traded Stocks of Litigants During Cases*, WALL ST. J. (Oct. 15, 2021, 9:59 AM), https://www.wsj.com/articles/federal-judges-brokers-traded-stocks-of-litigants-during-cases-walmart-pfizer-11634306192 (reporting that 131 federal judges heard cases between 2010 and 2018 that involved companies in which they or their family members owned stock); CODE OF CONDUCT FOR U.S. JUDGES Canon 3(C)(1) (JUD. CONF. OF THE U.S. 2019) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which . . . the judge knows that the judge, . . . or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding . . . ."); *id.* at Canon 3(C)(2) ("A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.").

[3] Dave Simpson, *Bayer Paid Roundup Plaintiff To Appeal Its Own Win, Attys Say*, LAW360 (Apr. 22, 2021, 11:30 PM), https://www.law360.com/articles/1378149/bayer-paid-roundup-plaintiff-to-appeal-its-own-win-attys-say.

[4] Some scholars use the term "third-party litigation funding" or "litigation funding" to refer to this same phenomenon. This Article intentionally uses the term "third-party funding"—without the word "litigation"—because this Article addresses funding of both litigation and arbitration, domestically and internationally.

[5] *See* Press Release, U.S. Att'y's Off., S. Dist. of New York, New York Litigation Funder and Fifth Member of $31 Million Dollar Trip-and-Fall Fraud Scheme Arrested and Charged in Manhattan Federal Court (Oct. 20, 2021), https://www.justice.gov/usao-sdny/pr/new-york-litigation-funder-and-fifth-member-31-million-dollar-trip-and-fall-fraud [https://perma.cc/Y3JM-ZTRU]; Alison Frankel, *N.Y. Feds Allege Litigation Funder Horror Story*, REUTERS

poor, homeless, and destitute individuals by giving them meager financial incentives to undergo unnecessary surgeries to "prove" their fraudulent slip-and-fall accidents, then serve as plaintiffs in the cases.[6] In another fraudulent scheme, a surgeon teamed up with a third-party funder of medical claims who misled women into having unnecessary surgeries to remove transvaginal mesh so that the funder could obtain a higher return on investments in those patients' medical device litigation settlements.[7] These incidents came to light in 2021, but there are older examples of problematic third-party funding schemes as well.[8]

Third-party funders have (some say unfairly) been called gamblers, loan sharks, and mercantile adventurers, among other things, so a reference to a pirate movie seems apt.[9] But the plot of the film quoted above emphasizes (in classic Disney fashion) that even pirates, who are famously lawless by definition, have a set of core principles by which they manage themselves: they "keep to the code."[10] As investors in the disputes and businesses of others, third-party funders should also have a set of core principles to govern themselves within and across borders: a code of conduct.

Reputable and conscientious third-party funders with integrity are certainly not pirates. Still, the threat of that disparaging moniker should incentivize funders to obey some guiding principles or code, even if "the code is more what you'd call guidelines than actual rules."[11] In addition, a code of conduct aimed at behavior that looks like third-party funding, broadly defined, could deter "pirates" like those in the horrendous examples mentioned above from engaging

(Oct. 21, 2021, 5:48 PM), https://www.reuters.com/legal/transactional/ny-feds-allege-litigation-funder-horror-story-2021-10-21/.

[6] *See* Frankel, *supra* note 5.

[7] Diana Novak Jones, *Doctor, Surgical Funder Admit to Roles in Transvaginal Mesh Fraud*, REUTERS (Sept. 17, 2021, 6:47 PM), https://www.reuters.com/legal/government/doctor-surgical-funder-admit-roles-transvaginal-mesh-fraud-2021-09-17/.

[8] *See, e.g.*, Weaver, Bennett & Bland, P.A. v. Speedy Bucks, Inc., 162 F. Supp. 2d 448, 450-52 (W.D.N.C. 2001) (indicating that third-party funder problematically designed agreement so plaintiff would only benefit if settlement exceeded $1.2 million, causing her to reject offers that did not reach that amount).

[9] *See* RSM Prod. Corp. v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Claimant's Proposal to Disqualify Arbitrator, ¶ 42 (Oct. 23, 2014) (Nottingham, Arb.) ("The description of third-party funders as 'mercantile adventurers' and the association with 'gambling' and the 'gambler's Nirvana: Heads I win and Tails I do not lose' are, in Claimant's view, radical in tone and negative and prejudge the question whether a funded claimant will comply with a costs award." (emphasis removed)); CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 178 (2014).

[10] *See* PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL, *supra* note 1 (quoting Captain Jack Sparrow). Relevant video clips of this quotation from the movie are interspersed in a derivative work found on the internet. *See* Pirate's Life, *Keep to the Code!*, YOUTUBE (Aug. 31, 2016), https://youtu.be/_fF0owIfNik?t=35.

[11] PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL, *supra* note 1 (quoting Captain Barbossa). For a video clip of this quotation, see Epic Parts of Epic Movies, *The Code Is More Like Guidelines*, YOUTUBE (July 9, 2018), https://www.youtube.com/watch?v=k9ojK9Q_ARE.

in cunning corruption. The code could accomplish this by targeting suspicious, funding-like behavior rather than only official members of the third-party funding industry. Assuming that a code of conduct for third-party funding is desirable, the next question is how to make it viable.

Exploring existing regulatory approaches to third-party funding in other countries is instructive. The past decade of global commercial[12] third-party funding regulation has spurred a "laboratory of nations."[13] The broad spectrum of approaches to regulating third-party funding has demonstrated that it would be undesirable for most nations around the globe to adopt the same legal regime for the procedural and transactional aspects of third-party funding because the approaches are so disparate, ranging from absolute prohibition to judicial and legislative silence to regulatory permission.[14]

Meanwhile, the funding industry continues to morph and expand without regard to national borders. For example, funders are becoming multinational corporations by merging with other funders,[15] raising billions of dollars from

[12] Although the examples above reflect consumer-focused third-party funding arrangements, there is also significant danger in the commercial third-party funding space, which is a separate industry. This Article focuses on commercial, not consumer, third-party funding, although some regulatory efforts referenced in Part II of this Article are aimed at both types. *Cf.* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 394 n.22 (2016) [hereinafter Sahani, *Judging*] (distinguishing between consumer and commercial third-party funding but noting that same procedure and evidence rules apply to both types).

[13] This phrase borrows from the classic "laboratory of states" description of how federalism works in the United States. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[14] *See* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 267-68 (2d ed. 2017) (summarizing nations' approaches to third-party funding).

[15] *See, e.g.*, Dan Packel, *After Merger, IMF Bentham Rebrands as Omni Bridgeway*, LAW.COM (Feb. 14, 2020, 1:09 PM), https://www.law.com/americanlawyer/2020/02/14/after-merger-imf-bentham-rebrands-as-omni-bridgeway/ (describing merger of Australian and Dutch funders into rebranded entity with $1.5 billion in capital).

investors,[16] and simultaneously operating in multiple nations and states.[17] Given the cross-border flow of investor capital, funders may take advantage of the wide-ranging regulatory environments by engaging in regulatory arbitrage—perhaps a form of "piracy"—by exploiting the regulatory gaps within and among nations.[18] This behavior could threaten the integrity of both domestic and international dispute settlement systems. Therefore, as the third-party funding industry is growing exponentially and becoming more widely accepted, the global community of nations should articulate a universal approach to defining the behavioral expectations of third-party funders.[19] A Model Code of Conduct for Third-Party Funders ("Code") would meet this need.

This Article proposes harmonizing the professional responsibility tenets for the third-party funding industry through a transnational, transsubstantive, and forum-neutral Code. Part I provides a brief background on the modern third-party funding industry and explains why the current regulatory framework is insufficient to ensure that funders behave in a professionally responsible manner. Part II briefly describes several existing approaches to regulating and enforcing third-party funding ethics and professional responsibility that the "laboratory of nations" is presently testing. It concludes that this regulatory "trial

[16] *See, e.g.*, *Burford Capital Raises More than $1 Billion in Three Months with New $350 Million Post-Settlement Investment Fund*, ACCESSWIRE (June 13, 2022, 6:30 AM), https://www.accesswire.com/704810/Burford-Capital-Raises-More-than-1-Billion-in-Three-Months-with-New-350-Million-Post-Settlement-Investment-Fund [https://perma.cc/3383-BGKD]; Roy Strom, *Big Law Warms Up to Litigation Finance as Deals Pot Hits $2.8B*, BLOOMBERG L. (Mar. 23, 2022, 5:59 AM), https://news.bloomberglaw.com/business-and-practice/big-law-warms-up-to-litigation-finance-as-deals-pot-hits-2-8b; Roy Strom, *LexShares Raises $100 Million for Litigation Funding 'Certainty*,*'* BLOOMBERG L. (Jan. 25, 2022, 8:30 AM), https://news.bloomberglaw.com/business-and-practice/lexshares-raises-100-million-for-litigation-funding-certainty.

[17] *See, e.g.*, Sara Merken, *Litigation Funders Are Setting Up Shop in the Nation's Capital*, REUTERS (Apr. 21, 2022, 5:18 PM), https://www.reuters.com/legal/legalindustry/litigation-funders-are-setting-up-shop-nations-capital-2022-04-21/ (reporting that several third-party funders are opening satellite offices in Washington, D.C., to service local law firms); INT'L LEGAL FIN. ASS'N, https://www.ilfa.com [https://perma.cc/2FTB-PMDT] (last visited Dec. 7, 2022) (calling itself "Global Voice of Commercial Legal Finance," declaring purpose to "represent the global commercial legal finance community," and noting it "is incorporated in Washington, DC, and will have chapter representation around the world").

[18] For an explanation of regulatory arbitrage, see Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT'L L.J. 63, 70 (2014) ("[T]he arbitrageur seeks to profit from a discrepancy in the price of the investment in two different markets by buying or producing the product in the market of lowest regulatory cost.").

[19] This argument is bolstered by the fact that G-20 nations have pledged to adopt a global minimum corporate tax rate with enforcement "teeth" to curb cross-border tax evasion. *See* Clint Rainey, *G20 Leaders Have Agreed on a Global Minimum Corporate Tax: Here's How It Would Work*, FAST CO. (Nov. 1, 2021), https://www.fastcompany.com/90692067/g20-global-minimum-tax-rate-explained [https://perma.cc/MA76-DFRY]. If the global powers can agree in principle on a minimum standard for something as complex as corporate taxation, then agreeing on minimum standards for third-party funding regulation should be comparatively easy.

and error" advances the global legal system. Thus, instead of replacing the existing patchwork, Part II proposes an overarching, unifying layer of behavioral standards to smooth out the bumps as funding sails across "the Seven Seas."[20] Crucially, in this proposal, nations and states that have outlawed funding would be able to maintain their prohibitions.

Part II explores several existing codes of conduct for funders and concludes there is broad agreement worldwide on the basic principles of funder ethics, despite the disparate regulatory choices around the world. Part III distills from these existing approaches universal principles of professional responsibility for third-party funders as the starting point for drafting a global Model Code of Conduct. Part III also discusses several implementation and enforcement options for the Code, including drawing an analogy to the successful and celebrated New York Convention, which is globally applicable but locally enforced. Finally, Part III concludes by proposing avenues for further inquiry to bring this idea to fruition.

## I. BACKGROUND

### A. *An Overview of Modern Third-Party Funding*

What is third-party funding? In a sentence, third-party funding exists because financial investors have discovered that a monetizable legal claim is an asset with independent value, regardless of external economic, political, regulatory, or public health forces.[21] Classic third-party funding involves an outside entity—called a "third-party funder"—providing dispute-related financing to a party or a law firm.[22] This traditional funding relationship involves the funder contracting to receive a percentage of the proceeds from the case if the plaintiff or claimant wins in exchange for providing nonrecourse funds to pursue the case.[23] The nonrecourse nature of the investment means that, unlike a loan, a funded plaintiff does not have to repay the funder if it loses the case or does not

[20] The pirate analogy is a gift that keeps on giving! For a precise definition of "the Seven Seas," see *What Are the Seven Seas?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN.: NAT'L OCEAN SERV., https://oceanservice.noaa.gov/facts/sevenseas.html [https://perma.cc/7WBF-7AZT] (last updated Mar. 10, 2022).

[21] *See infra* notes 48, 50-51 and accompanying text (discussing third-party funding's detachment from external economic conditions); *cf.* Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DEPAUL L. REV. 611, 628 (2020) [hereinafter Sahani, *Rethinking*] ("Damages claims are understandably attractive to dispute financiers, because there will be a pot of money to share if the party wins. Non-financial claims and 'no liability claims' (defenses) are less attractive, or may be completely unattractive, because such claims do not automatically create a pot of money to share, even though such claims may be worthy on the merits.").

[22] NIEUWVELD & SAHANI, *supra* note 14, at 1-8 (describing players in third-party funding, types of funding relationships, and effect of funder type on attorney-client relationship).

[23] *Id.*

recover any money.[24] However, if the funded party is the defendant or respondent, the funder contracts to receive a predetermined payment from the client, similar to an insurance premium.[25] The agreement may also include an extra payment to the funder if the defendant wins the case.[26] Third-party funding is a controversial and evolving phenomenon that has attracted the attention of the news media and state and federal legislators.[27]

The financier—called a "third-party funder"—finances the party's legal representation in return for a profit.[28] Third-party funders are banks, hedge funds, insurance companies, parent corporations, high-net-worth individuals, nonprofit entities, and crowdfunded sources.[29] Most third-party funders are privately held entities, but a few are publicly traded companies.[30] Third-party funders provide a wide array of products, including consumer dispute funding,[31]

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See* Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sept. 1, 2016), http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about (detailing support and criticism for third-party funding model); Mathew Ingram, *The Gawker vs. Hulk Hogan Case Just Got a Lot More Important*, FORTUNE (May 25, 2016, 2:19 PM), https://fortune.com/2016/05/25/gawker-hogan-thiel/ (reporting that billionaire Peter Thiel financed professional wrestler's lawsuit against media company); Roger Parloff, *Key Funder of Ecuadorians' Suit Against Chevron Quits*, FORTUNE (Feb. 16, 2015, 1:05 PM), https://fortune.com/2015/02/16/key-funder-ecuadorians-suit-vs-chevron-quits/ (reporting that third-party funder of Ecuadorian plaintiffs pledged to give no more money and turned over entire stake in judgment to defendant, Chevron, to settle another lawsuit that Chevron brought against him).

[28] *See* NIEUWVELD & SAHANI, *supra* note 14, at 1-7.

[29] *Id.*

[30] *See* Sarah O'Brien, *Litigation Financing May Tempt Investors with High Returns. What To Know Before Buying in*, CNBC (June 25, 2020, 11:35 AM), https://www.cnbc.com/2020/06/25/litigation-financing-tempts-with-high-returns-tips-before-buying-in.html [https://perma.cc/29NG-L79J]. Publicly traded funders include Omni Bridgeway, an Australian company, and Burford, a company based in the United States but traded on the London Stock Exchange. *See About Us*, OMNI BRIDGEWAY [hereinafter OMNI BRIDGEWAY], https://omnibridgeway.com/about/overview [https://perma.cc/6HGH-NYQF] (last visited Dec. 7, 2022); *About Burford*, BURFORD, https://www.burfordcapital.com/about-burford/ [https://perma.cc/HLG2-X9HE] (last visited Dec. 7, 2022); *see also* News Release, Chuck Grassley, U.S. Sen., Grassley, Cornyn Seek Details on Obscure Third Party Litigation Financing Agreements (Aug. 27, 2015) [hereinafter News Release], https://www.grassley.senate.gov/news/news-releases/grassley-cornyn-seek-details-obscure-third-party-litigation-financing-agreements [https://perma.cc/CW6S-JQEB].

[31] Examples of consumer dispute funders include all the members of the American Legal Finance Association ("ALFA"). *See ALFA Member Companies*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/alfa-membership/alfa-member-companies/ [https://perma.cc/Z5PH-7MUW] (last visited Dec. 7, 2022).

commercial dispute funding,[32] class action funding,[33] lending to law firms,[34] defense-side funding,[35] litigation crowdfunding,[36] brokerage services between

[32] Examples of commercial dispute funders include all the "Funder Members" of the Association of Litigation Funders ("ALF") in the United Kingdom. *See Membership Directory*, ASS'N OF LITIG. FUNDERS, http://associationoflitigationfunders.com /membership /membership-directory/ [https://perma.cc/8EDF-K2RQ] (last visited Dec. 7, 2022). The listed "Associate Members" are brokers and law firms that regularly refer cases to funders, as well as one "Academic Member" who is Head of the School of Law at the University of West London. *See id.*

[33] The key example is from Australia, which has opt-in class actions. IMF Bentham (now known as Omni Bridgeway) is the oldest funder in Australia and regularly funds class actions there. *See* OMNI BRIDGEWAY, *supra* note 30. Class action funding is practically nonexistent in the United States, except in the form of lawyer-lending to plaintiff-side law firms. *See* NIEUWVELD & SAHANI, *supra* note 14, at 132-33. Class action funding is more prevalent in a few countries in Europe—such as the Netherlands—and Australia. *See id.* at 79-82, 85-86, 193-94.

[34] Law firm lenders that may take a security interest in the potential proceeds of the firm's portfolio include Amicus Capital Services, Momentum Funding, LawCash, and Advanced Legal Capital. *See* AMICUS CAP. GRP., LLC, https://amicuscapitalgroup.com [https://perma.cc /2KWM-NZW2] (last visited Dec. 7, 2022); MOMENTUM FUNDING, https://www.momentum funding.com [https://perma.cc/2HZS-9ATY] (last visited Dec. 7, 2022); LAWCASH, https://lawcash.com [https://perma.cc/5PJ6-BZQR] (last visited Dec. 7, 2022); ADVANCED LEGAL CAP., https://www.advancedlegalcapital.com [https://perma.cc/27HV-XT8F] (last visited Dec. 7, 2022). Traditional banks also may offer loans to law firms secured by accounts receivable or tangible property owned by the firm.

[35] An example of a defense-focused funder in the United States was Gerchen Keller Capital LLC (now Burford), which announced a defense-side and risk management focus when it launched. *See* Andrew Strickler, *Litigation Finance Co. Launches with Defense-Side Focus*, LAW360 (Apr. 8, 2013, 12:05 AM), http://www.law360.com/articles/429993/litigation-finance-co-launches-with-defense-side-focus. Burford acquired Gerchen Keller Capital in 2016. *See* Press Release, Burford, Burford Capital Adds Scale and Significant Private Capital Management Business Through Acquisition of Gerchen Keller Capital (Dec. 14, 2016), https://www.burfordcapital.com/media-room/media-room-container/burford-capital-adds-scale-and-significant-private-capital-management-business-through-acquisition-of-gerchen-keller-capital/ [https://perma.cc/3CQT-MV7E]. Defense-side funding is rarer in the United States and is more prevalent in the United Kingdom and European Union in the form of after-the-event or before-the-event insurance. *See* NIEUWVELD & SAHANI, *supra* note 14, *passim* (discussing use of such insurance in various jurisdictions around world, including United Kingdom and Germany).

[36] Examples of litigation crowd-funders include Invest4Justice and LexShares. *See Invest4Justice*, CRUNCHBASE, https://www.crunchbase.com/organization/invest4justice (last visited Dec. 7, 2022); LEXSHARES, https://www.lexshares.com [https://perma.cc/EMR9-WB63] (last visited Dec. 7, 2022).

funders and potential clients,[37] and, in the case of "funders of funders," investment in litigation funders.[38]

Third-party funding is widespread globally in litigation, arbitration, and sometimes mediation if there is a multistage dispute settlement clause.[39] This phenomenon is a multibillion-dollar industry both domestically and internationally.[40] In addition, depending on the structure of the funding arrangement, the funder may lawfully control or influence aspects of the legal representation or may completely take over the case and step into the shoes of the original party.[41] The United States alone is home to dozens of funders of

[37] Examples of funding brokers include Fulbrook Capital Management, Mighty, and ClaimTrading Ltd. *See Fulbrook Capital Management*, CRUNCHBASE, https://www.crunchbase.com/organization/fulbrook-capital-management (last visited Dec. 7, 2022); MIGHTY, https://www.mighty.com [https://perma.cc/GX5Z-NK9J] (last visited Dec. 7, 2022); CLAIMTRADING, https://www.claimtrading.com/index/page?id=home [https://perma.cc/4J8A-MRL3] (last visited Dec. 7, 2022).

[38] Fortress Investment Group LLC invests in litigation funding companies but does not directly finance litigation disputes itself. *See* FORTRESS, https://www.fortress.com [https://perma.cc/E3U5-94N5] (last visited Dec. 7, 2022). To describe entities like Fortress, the author coined the term "funder of funders," which is a play on the common financial term "fund of funds." *Cf.* Zoe Van Schyndel, *A Fund of Funds: High Society for the Little Guy*, INVESTOPEDIA (Aug. 25, 2021), http://www.investopedia.com/articles/mutualfund/08/fund-of-funds.asp [https://perma.cc/YBL3-B3NP] ("A fund of funds (FOF) is an investment product made up of various mutual funds . . . .").

[39] *See* Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RSRV. J. INT'L L. 159, 162, 180-81 (2011); Elayne E. Greenberg, *Hey, Big Spender*: *Ethical Guidelines for Dispute Resolution Professionals when Parties Are Backed by Third-Party Funders*, 51 ARIZ. ST. L.J. 131, 133 (2019) (describing general ethical issues in third-party mediation funding).

[40] *See, e.g.*, Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, WALL ST. J. (Jan. 12, 2014, 7:48 PM), http://online.wsj.com/news/articles/SB10001424052702303819704579316621131535960 (noting several funders have hundreds of millions of dollars in assets under management); Jennifer Smith, *Investors Put Up Millions of Dollars To Fund Lawsuits*, WALL ST. J. (Apr. 7, 2013, 7:46 PM), http://online.wsj.com/news/articles/SB10001424127887323820345784087941558169340 ("Gerchen Keller Capital LLC, a Chicago-based team that includes former lawyers . . . . has raised more than $100 million and says there is plenty of room for newcomers given the size of the U.S. litigation market, which they put at more than $200 billion, measuring the money spent by plaintiffs and defendants on litigation."); Vanessa O'Connell, *Funds Spring Up To Invest in High-Stakes Litigation*, WALL ST. J. (Oct. 3, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052970204226204576598842318233996 ("The new breed of profit-seeker sees a huge, untapped market for betting on high-stakes commercial claims. After all, companies will spend about $15.5 billion this year on U.S. commercial litigation and an additional $2.6 billion on intellectual-property litigation . . . .").

[41] *See* NIEUWVELD & SAHANI, *supra* note 14, at 6 (explaining that some third-party funding arrangements are structured as assignment in which third-party funder becomes claimant in case and original party is no longer involved). For an in-depth treatment of assignment and insurance policies in the third-party funding context, see generally Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453 (2011); Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297

consumer disputes, such as personal injury and other tort claims, and complex commercial disputes.[42] In light of its increasing prevalence, third-party funding has sparked a fascinating debate regarding its place both in the American legal system and in the context of international dispute resolution.[43]

Moreover, third-party funding has many applications. First, funders can help resource-challenged individuals bring claims that they would not otherwise be

(2002); Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11 (2014); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329 (1987).

[42] Regarding consumer disputes, there are over thirty members of the ALFA and several other non-ALFA third-party funding companies that fund consumer disputes. *See ALFA Member Companies*, *supra* note 31. Regarding commercial third-party funders, most of the members of the International Legal Finance Association ("ILFA") are U.S.-based funders. *See Membership Directory*, INT'L LEGAL FIN. ASS'N, https://www.ilfa.com/membership-directory [https://perma.cc/78H9-UX6K] (last visited Dec. 7, 2022). For a list of global commercial funders affiliated with ALF in the United Kingdom, see *supra* note 32.

[43] *See, e.g.*, Keith N. Hylton, *Toward a Regulatory Framework for Third-Party Funding of Litigation*, 63 DEPAUL L. REV. 527, 527 (2014) [hereinafter Hylton, *Regulatory Framework*] (analyzing "economics of third-party funding relationships"); Keith N. Hylton, *The Economics of Third-Party Financed Litigation*, 8 J.L. ECON. & POL'Y 701, 704 (2012) [hereinafter Hylton, *Economics*] (identifying "likely sources of welfare gains and losses in a third-party litigation funding system"); Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 504, 508, 513-23, 526-27 (2006) (arguing "best method of [litigation finance] regulation" is shortening time for disposition of claims); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 56-57, 68, 74-75 (2004) [hereinafter Martin, *Wild West of Finance*] (defending regulated litigation financing industry with disclosure rules as protective of plaintiffs who lack resources to bring meritorious claims); Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 83-95 (2008) [hereinafter Martin, *Subprime Industry*] (proposing that regulation of litigation financing industry should focus on data collection, transparency, and competition); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 72 n.36, 139 (2011) (arguing need for "careful policy-based research to draw boundaries and rules for a market in lawsuits"); Courtney R. Barksdale, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 735 (2007) (advocating for greater access to information about litigation finance industry, more competition, and regulation of interest rates and lending practices); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1325-36 (2011) (proposing conceptual framework for litigation funding regulation); Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 608-09 (2010) ("Third-party litigation lending is consistent with our values as a society."); Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 74-75 (1935) (arguing for regulation of contingency fees in a way similar to today's arguments for regulating third-party funding); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 377-439 (2009) (proposing defense-side funding in United States modeled on after-the-event insurance in Europe); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework To Legitimize Third Party Litigation Finance*, 58 CONSUMER FIN. L.Q. REP. 347, 349-61 (2004) (proposing statute to regulate third-party funding for individual consumers).

able to, increasing access to justice for indigent or disadvantaged persons.[44] Second, third-party funding enables many insolvent or small companies to pursue valid claims that they could not otherwise afford to pursue and are too risky for contingency fee attorneys to accept.[45] Third, large companies that are constantly sued, like insurance companies and manufacturers of dangerous products, are looking to smooth out the litigation line item on their balance sheets.[46] Funders can offer these repeat-player[47] defendants a fixed payment system for managing their litigation costs. Fourth, the worldwide market turmoil during the global financial crisis began in 2008 and never quite seemed to reach its denouement due to the current economic side effects of the global pandemic and Russia's invasion of Ukraine in early 2022. This prolonged economic uncertainty has prompted many investors to seek investments not dependent

[44] For example, the author served as an expert witness in a case in which a third-party funder financed an individual claimant in an investor-state arbitration against a government. Investor-state arbitrations are very expensive, and partly due to the expense, individuals are rarely claimants in investor-state arbitration. Similarly, Keith Hylton extensively analyzed the economic and social welfare benefits and costs of third-party funding, including the economics of waiver, subrogation, and sales and settlement agreements. *See* Hylton, *Regulatory Framework*, *supra* note 43, at 528; Hylton, *Economics*, *supra* note 43, at 702. Furthermore, David Abrams and Daniel Chen conducted an empirical study on third party funding's effect on claimants' ability to proceed in Australian courts. David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1076 n.3, 1077 nn.6-7 (2013) (reporting results of their study on public third-party funding data available in Australia).

[45] *See* Steinitz, *supra* note 43, at 1275-76, 1283-84; Martin, *Wild West of Finance*, *supra* note 43, at 67 n.93; Martin, *Subprime Industry*, *supra* note 43, at 85; James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349, 365-66 (1993); RALPH LINDEMAN, THIRD-PARTY INVESTORS OFFER NEW FUNDING SOURCE FOR MAJOR COMMERCIAL LAWSUITS 1-8 (2010), [https://perma.cc/JT3G-5QFW].

[46] *See, e.g.*, Kevin LaCroix, *What's Happening Now? Litigation Funding, Apparently*, D&O DIARY (Apr. 9, 2013), http://www.dandodiary.com/2013/04/articles/securities-litigation/whats-happening-now-litigation-funding-apparently/ [https://perma.cc/4U37-M9F6] ("Litigation funding proponents contend that the funding arrangements helps [sic] to level the playing field by allowing litigants to pursue lawsuits against better financed opponents, or simply allowing litigants to keep litigation costs off their balance sheet."); David Lat, *Litigation Finance: The Next Hot Trend?*, ABOVE THE L. (Apr. 8, 2013, 1:59 PM), http://abovethelaw.com/2013/04/litigation-finance-the-next-hot-trend/ [https://perma.cc/A7UQ-DH56] (explaining third-party funding allows large companies to pursue claims without having lump sum litigation costs reduce earnings per share).

[47] In 1974, Marc Galanter famously modeled the world of dispute resolution by dividing parties into "one-shotters" and "repeat players" and describing the advantages that repeat players have in the legal system over one-shotters. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-103 (1974). Third-party funding clearly increases the advantages of repeat-players even further.

upon the financial markets, supply chains, stock prices, or company valuations.[48] Fifth, funders have begun taking equity stakes in law firms and clients in recent years and providing transaction structures that look more like ownership or partnership than an arms-length, passive investment.[49] Finally, each litigation or arbitration matter is independent of other disputes and detached from market conditions regarding the value of the underlying harm or liability.[50] This independence shields the third-party funder's investment and potential profit from the general uncertainty in the global financial markets.[51]

The proliferation of third-party funders and funding arrangements strikes a sharp contrast to the comparatively minimal and noncomprehensive regulation of the industry at present.[52] The existing regulations governing the third-party funding industry worldwide are complex, disjointed, and divergent.[53] Creating a model code of conduct for funders would, at the very least, help inform consumers of the appropriate behavior for a reputable third-party funder. It

[48] *See* Steinitz, *supra* note 43, at 1283-84 (discussing effects of global recession on rising demand for litigation funding).

[49] *Cf.* Maya Steinitz & Victoria Sahani, *You No Longer Have To Be a Lawyer To Practice Law in Arizona. That's Good and Bad*, AZCENTRAL. (Feb. 6, 2021, 1:44 PM), https://www.azcentral.com/story/opinion/op-ed/2021/02/06/arizona-no-longer-restricts-law-lawyers-here-pro-con/4339871001/ (discussing jurisdictions that allow investors to own, invest in, and control law firms by creating alternative business structures ("ABS") that are allowed to practice law in those jurisdictions); Maya Steinitz & Victoria Sahani, *New Ariz. Law Practice Rules May Jump-Start National Reform*, LAW360 (Jan. 28, 2021, 4:19 PM) [hereinafter Steinitz & Sahani, *New Ariz. Law Practice Rules*], https://www.law360.com/articles/1349687/new-ariz-law-practice-rules-may-jump-start-national-reform (discussing jurisdictions that allow nonlawyers to own, invest in, and control law firms by creating "alternative business structures" that are allowed to practice law in those jurisdictions); Victoria Shannon Sahani & Maya Steinitz, *Navigating the Sea Change in Law Firm Finance and Ownership in the U.S.*, WOLTERS KLUWER: KLUWER ARB. BLOG (Nov. 18, 2021) [hereinafter Sahani & Steinitz, *Navigating*], http://arbitrationblog.kluwerarbitration.com/2021/11/18/navigating-the-sea-change-in-law-firm-finance-and-ownership-in-the-u-s/ [https://perma.cc/U4YY-6ABS] (addressing discussions among regulators regarding nonlawyer ownership of law firms in Arizona, California, Utah, Illinois, Florida, and New York).

[50] *See* NIEUWVELD & SAHANI, *supra* note 14, at 10-12.

[51] *Id.*

[52] This Article does not address the often debated question of whether third-party funding should exist at all. Instead, the author takes the view that, because the industry is growing rather than shrinking, the focus should be on creating sensible regulations for the industry rather than trying to dismantle it. *See id.* at 157-74 (presenting fifty-two-jurisdiction survey of existing state laws as of early 2017); Richard A. Blunk, *Have the States Properly Addressed the Evils of Consumer Litigation Finance?*, MODEL LITIG. FIN. CONT. (Jan. 20, 2014), http://litigationfinancecontract.com/have-the-states-properly-addressed-the-evils-of-consumer-litigation-finance/ [https://perma.cc/P6XP-WYBY] (describing third-party funding statutes in Maine, Ohio, Nebraska, and Oklahoma).

[53] *See* NIEUWVELD & SAHANI, *supra* note 14, *passim* (discussing law of third-party funding in countries spanning six continents).

would also educate noncompliant funders regarding how to bring their business practices into compliance, retain well-informed clients, and avoid sanctions.

A four-part series of articles studying this growing industry laid the groundwork for this Article. The first article in the series explained the origins of third-party funding to educate academics, practitioners, and legislators, giving context to this then-emergent industry.[54] The second article analyzed the rules of the main methods of adjudication in which funders invest—litigation and arbitration—and suggested appropriate modifications to and reinterpretations of those rules.[55] The third article correctly predicted that new transaction structures and financial products would radically transform the relationships among the third-party funder, the party to the lawsuit, and the party's law firm.[56] Finally, the fourth article described what real, impactful access to justice looks like in an era of third-party funding, arguing that prioritizing nonfinancial characteristics of a case may be the proper foundation of "access to justice" involving third-party funding.[57]

This Article presents the next evolution of designing an appropriate regulatory framework for third-party funding. It revisits the thesis of the first article in the series, which proposed regulating third-party funding procedurally, transactionally, and ethically.[58] Part II of this Article examines the current regulatory efforts in those three areas. It concludes that harmonizing the regulations regarding the procedural and transactional aspects of funding across the entire world is neither achievable nor even desirable; however, ethical rules are ripe for harmonization.[59]

To that end, this Article proposes a model code of conduct. The Code should contain an expansive definition of third-party funding to dissuade corrupt potential financiers from misusing the dispute settlement system. This expansive definition would encompass financiers regardless of whether they are explicitly members of the third-party funding industry or not. With the Code and proper

[54] *See generally* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861 (2015) [hereinafter Shannon, *Harmonizing*] (proposing harmonizing regulatory framework for third-party funding, including key procedural, transactional, and ethical regulations).

[55] *See* Sahani, *Judging*, *supra* note 12, at 390, 410-41 (proposing revision and reinterpretation Federal Rules of Civil Procedure, rules of international arbitration procedure, and rules regarding evidentiary privileges to address third-party funding).

[56] *See generally* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405 (2017) [hereinafter Sahani, *Reshaping*] (predicting that third-party funders might become internal partners of United States law firms or corporate parties, rather than remaining external investors, and analyzing benefits and drawbacks of these new structures).

[57] *See* Sahani, *Rethinking*, *supra* note 21, at 626-28 (proposing that third-party funders should finance "unfunded winners," including nonfinancial claims, and pro bono cases).

[58] *See* Shannon, *Harmonizing*, *supra* note 54, at 883-907.

[59] *See infra* Section II.H.

enforcement, regulators can be more prepared to combat appalling situations like those described in the Introduction of this Article.[60]

### B. *The Problem: A Lack of Funder Ethics or Professional Responsibility Rules*

Third-party funding has evolved into an industry that impacts how parties handle disputes, changing the dynamic between wealthy and nonwealthy litigants and reshaping the legal services industry through partnerships and joint ventures with law firms and corporate parties.[61] In response, laws in many jurisdictions now constrain or shape the third-party funding industry in technical ways, such as through interest rate caps, disclosure rules, licensure requirements, capitalization requirements, and fee schedules.[62] However, these laws do not address how funders should behave when interacting with dispute settlement systems. Instead, third-party funders are essentially left to their own devices worldwide concerning professional responsibility or ethics rules. This lacuna is astonishing because third-party funders operate in a client services industry primarily dominated by heavily regulated professional services firms, such as law firms, accounting firms, consulting firms, and traditional financing entities in the financial services sector. These professional services firms are subject to either licensing or ethics rules or both. Yet, there are no broadly enforceable ethics rules for third-party funders in any jurisdiction, and most jurisdictions do not require licenses for funders.[63] As the funding industry continues to grow without some external source of professional responsibility or ethics regulation, a form of regulatory arbitrage will likely emerge in which funders will try to see how well they can evade indirect regulations by moving their operations from jurisdiction to jurisdiction.[64]

Instead of direct ethics or professional responsibility regulations, passive regulations exist for funders, whereby funders are governed indirectly by multiple constituencies. For example, all the global dispute settlement system

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[60] *See supra* notes 2-3, 5-8 and accompanying text (discussing third-party funders' involvement in judicial misconduct, collusive litigation, fraud, and exploitation of vulnerable populations).

[61] *See supra* note 49 and accompanying text; *see also* Sahani, *Reshaping*, *supra* note 56, at 408-10.

[62] For examples of technical regulations for third-party funders, see *infra* Part II . *See also* NIEUWVELD & SAHANI, *supra* note 14, *passim* (discussing law of third-party funding in over fifty countries on six continents).

[63] *See* NIEUWVELD & SAHANI, *supra* note 14, at 72 (noting ethical issues in third-party funding "remain unsettled"). Section II.E discusses Hong Kong's statutory funder code of conduct, but that code of conduct can only serve as evidence in litigation against a funder or in an international arbitration cost proceeding in a case involving a third-party funder. *See* Arbitration Ordinance, (2022) BLIS Cap. 609, div.4 § 98S (H.K.), https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1498192254668_002 [https://perma.cc/V4LP-348V]. It contains no direct means of enforcement to correct a funder's undesirable behavior. Therefore, it does not solve the problem highlighted in this Article.

[64] *See supra* note 18 and accompanying text.

stakeholders partially govern third-party funders, including legislatures, courts, arbitral institutions, judges, arbitrators, attorneys, funded clients, investors, and funders themselves through self-governance. At the same time, no one is explicitly responsible for holding funders accountable for their ethical misconduct.

For example, national governments regulate third-party funding through statutes, existing regulations,[65] financial or securities enforcement proceedings,[66] and direct governmental inquiries into the industry.[67] Individual provinces or states govern funders through statutes addressing litigation funding directly or categorizing it as a loan;[68] corporate registration requirements (e.g., licensure, capitalization, and disclosures);[69] case law;[70] and bar ethics opinions.[71] Courts and arbitral institutions implement disclosure rules to discover funder participation with few, if any, rules regarding what judges and arbitrators should do about it.[72] Judges and arbitrators govern funders indirectly through their inherent power to issue reasoned opinions construing applicable laws, impose monetary sanctions on funded parties, allocate costs, and join

[65] *See* Victoria Shannon, *Third-Party Litigation Funding and the Dodd-Frank Act*, 16 TENN. J. BUS. L. 15, 16-18 (2014) [hereinafter Shannon, *Dodd-Frank Act*] (discussing national legislative and regulatory oversight of third-party litigation funding in United States, United Kingdom, and Australia).

[66] *See* Seth Sandronsky, *Litigation Funding Is 'Shadow' Industry that Needs Oversight, Expert Says; Prometheus in SEC Crosshairs*, N. CAL. REC. (June 2, 2016), https://norcalrecord.com/stories/510743381-litigation-funding-is-shadow-industry-that-needs-oversight-expert-says-prometheus-in-sec-crosshairs [https://perma.cc/4MK3-UN2X] (reporting Securities and Exchange Commission's charges against third-party litigation funder Prometheus Law).

[67] *See, e.g.*, News Release, *supra* note 30 (discussing information requests that U.S. Senators Grassley and Cornyn sent to three of largest litigation funding companies operating in United States that are publicly traded on non-U.S. exchanges); *Consultation Paper: Third Party Funding for Arbitration*, LAW REFORM COMM'N OF H.K., http://www.hkreform.gov.hk/en/publications/tpf.htm [https://perma.cc/3C48-63ZU] (last visited Dec. 7, 2022) (seeking public comment on how to clarify Hong Kong's laws to allow third-party funding in international and domestic arbitration); *Public Consultation To Seek Feedback on the Third-Party Funding Framework*, SING. MINISTRY OF L. (Apr. 3, 2018), https://www.mlaw.gov.sg/news/public-consultation-third-party-funding/ [https://perma.cc/R63V-LPUP] (seeking public comment on draft of then new third-party funding law in Singapore). In addition, the author is aware that the U.S. Government Accountability Office is currently researching third-party funding at the request of the U.S. Senate and is preparing a report on the industry that will likely be publicly released in 2023.

[68] *See infra* Section II.E (discussing third-party funding statutes in Hong Kong, Singapore, and United States).

[69] *See infra* Section II.D.

[70] *See infra* Section II.A.

[71] *See infra* Section II.C.

[72] See *infra* note 96, Sections II.A, II.F for examples of court rules and arbitration institution rules requiring disclosure of third-party funding.

funders as parties if they are too involved in the dispute resolution process.[73] Attorneys govern funders by making funders aware of their constraints under the Rules of Professional Conduct and threatening to withdraw or not comply if funders interfere in the attorney-client relationship or otherwise try to control the attorney's actions.[74] Funded clients partially govern funders through contract negotiations and co-owning special-purpose vehicles with funders.[75] Investors and shareholders in public and private funders provide the capital and incentives for the funder's profit-making motives and behavior. Finally, funder industry associations allow funders to self-govern through internal codes of conduct and sanctions for violations of the code, the harshest of which might be expulsion from the association, which—to the author's knowledge—has never been imposed.[76] This indirect, loose ethics regime results in no one having any accountability for providing guidance, oversight, or enforcement regarding funder professional responsibilities.

The preceding regulatory influences on funders are not cohesive, do not coordinate, and may even conflict. This patchwork also demonstrates that no single entity in most local jurisdictions is tasked explicitly with keeping funders accountable or overseeing the industry. Thus, most jurisdictions have no consistent source of accountability for the third-party funding industry. Essentially, no one bears the ultimate responsibility for enforcing funder ethics. Moreover, if the funder is disciplined or disqualified from operating in one jurisdiction, it can move to a different jurisdiction and continue to operate, which incentivizes regulatory arbitrage and undermines the integrity of the global dispute settlement system. Therefore, this Article argues that the key to fostering ethical development of the third-party funding industry is to develop a globally applicable but locally enforced model code of conduct or professional responsibility for the third-party funding industry.

The next step toward developing the Code is examining existing global approaches to regulating and enforcing third-party funding ethics and professional responsibility. A complete examination of all potential principles and approaches adopted worldwide is beyond the scope of this Article and is more aptly treated in a book.[77] Nevertheless, novel regulatory practices continue to arise worldwide with increasing frequency as new regulators discover the third-party funding industry. Therefore, any attempt to describe all existing approaches would be out-of-date by the time the ink is dry. Instead, Part II

[73] *See* Sahani, *Judging*, *supra* note 12, *passim*.

[74] *See* Sahani, *Reshaping*, *supra* note 56, at 420, 426-28, 449-50. *See generally* AM. BAR ASS'N COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf [https://perma.cc/LYF4-ZDCL].

[75] *See* Sahani, *Reshaping*, *supra* note 56, at 416, 434 n.156, 435-39.

[76] *See infra* note 139 (discussing range of sanctions under ALF Code of Conduct, including expulsion from ALF).

[77] *See* NIEUWVELD & SAHANI, *supra* note 14, *passim*.

provides a snapshot overview of the range of approaches within a few major categories and highlights a few representative examples.

## II. KEY SOURCES OF PROFESSIONAL RESPONSIBILITY PRINCIPLES FOR THIRD-PARTY FUNDERS

Nations, states, funder professional associations, attorney bar associations, and funders themselves have promulgated many possible sources of professional responsibility principles for funders around the world. Most jurisdictions have adopted, formally or informally, at least one of these approaches, and several have adopted multiple approaches. This Article is too brief to analyze them all thoroughly. A robust qualitative and quantitative study of all the existing approaches to a code of conduct for third-party funders would yield a more comprehensive set of principles. Instead, this Part presents examples from different categories of existing direct and indirect approaches to regulating funder ethics and explains why each approach is insufficient to regulate global third-party funders.

### A. *Court Oversight*

Court oversight is the oldest means of regulating the third-party funding industry and the legal profession.[78] Courts have served as the gateway through which third-party funding has entered into public consciousness in most jurisdictions. National courts across the globe, as well as state and federal courts in the United States, have often been the first authorities in a particular jurisdiction to interpret the existing laws and apply them to the emerging third-party funding industry.

For example, the High Court of Australia initially authorized litigation funding in *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd*.[79] In contrast, the Supreme Court of Ireland has expressly outlawed third-party funding, although the legislature may soon override the prohibition.[80] In the middle is the Colorado

[78] *See* Rancman v. Interim Settlement Funding Corp., 99 Ohio St. 3d 121, 2003-Ohio-2721, 789 N.E.2d 217, at ¶¶ 10-14 (representing, arguably, first time any court addressed third-party funding in United States, well before industry exploded in size and scope and before any state statutes addressed third-party funding); MODEL RULES OF PRO. CONDUCT pmbl. ¶ 10 (AM. BAR ASS'N 2020) ("[U]ltimate authority over the legal profession is vested largely in the courts.").

[79] (2006) 229 CLR 386, 425 (Austl.) ("[T]he law now looks favourably on funding arrangements that offer access to justice so long as any tendency to abuse of process is controlled.").

[80] *See* Persona Digit. Telephony Ltd. v. Minister for Pub. Enter. [2017] IESC 27 (Ir.) (ruling that third-party funding is champertous and illegal); *see also Irish Supreme Court Maintains Third-Party Funding Ban*, GLOB. ARB. REV. (May 24, 2017), http://globalarbitrationreview.com/article/1142016/irish-supreme-court-maintains-third-party-funding-ban. *But see* Catherine Sanz, *McEntee To Bring Forward Proposals To Legalise Third-Party Legal Funding*, BUS. POST (Sept. 17, 2022),

Supreme Court, which determined that third-party funding is a loan subject to the usury statute in that state.[81] While not expressly outlawing funding, this ruling made the industry commercially nonviable in Colorado due to the usury statute's interest rate cap of 12%.[82] Moreover, Ohio provides an example of a legislature overruling a court. The Ohio State Supreme Court prohibited the litigation funding industry in *Rancman v. Interim Settlement Funding*;[83] afterward, the Ohio legislature passed a statute allowing and regulating third-party funding.[84]

Courts have also issued rules and guidelines regarding disclosure and privileges. Wisconsin, West Virginia, and the U.S. District Court for the Northern District of California have all adopted rules requiring the disclosure of funding in cases filed there.[85] The U.S. District Court for the Northern District of Illinois concluded in *Miller UK LTD. v. Caterpillar, Inc.*[86] that work product protection extended to documents disclosed to the funder due to a preexisting confidentiality agreement between the client and the funder; however, the court determined that the attorney-client privilege had been waived according to the facts of *Miller* because the court did not view the funder as falling within the "common interest" waiver exception.[87] Federal district court opinions are not

https://www.businesspost.ie/politics/mcentee-to-bring-forward-proposals-to-legalise-third-party-legal-funding/ [https://perma.cc/U7XM-S775] (reporting Ireland Minister for Justice's proposal to legalize third-party funding in international arbitration only, not domestic litigation in Ireland).

[81] *See* Oasis Legal Fin. Grp., LLC v. Coffman, 2015 CO 63, ¶ 4, 361 P.3d 400, 401-02.

[82] *See id.* at ¶ 34, 361 P.3d at 406.

[83] 99 Ohio St. 3d 121, 2003-Ohio-2721, 789 N.E.2d 217, at ¶ 19 (holding third-party funding "void as champerty and maintenance").

[84] OHIO REV. CODE ANN. § 1349.55 (West 2022); *see also* Mark Bello, *Lawsuit Funding—New Legislation in Ohio*, OHIO TRIAL, Summer 2009, at 28, 28-30, http://www.lawsuitfinancial.com/files/ohio.pdf [https://perma.cc/E8VQ-BLM6] (explaining that, in response to the Supreme Court of Ohio striking down litigation funding agreement in *Rancman*, Ohio State Legislature passed House Bill 248 to both permit and regulate litigation funding industry).

[85] *See* WIS. STAT. ANN. § 804.01(2)(bg) (West 2022) (requiring parties, as of July 1, 2018, to disclose funding agreements that provide "right to receive compensation that is contingent on and sourced from any proceeds of the civil action"); W. VA. CODE ANN. § 46A-6N-1 (West 2022) (establishing requirement identical to Wisconsin's); N.D. Cal. Civil L.R. 3-15(a) (requiring parties to disclose any persons or entities who have "financial interest of any kind in the subject matter in controversy or in a party to the proceeding"); James Anderson, *Is Increased Transparency into Litigation Financing on the Horizon?*, NAT'L L. REV. (Jan. 15, 2020), https://www.natlawreview.com/article/increased-transparency-litigation-financing-horizon [https://perma.cc/DD6Q-4BTP] (discussing both Wisconsin's and West Virginia's laws); *Wisconsin Adopts Proportionality and Mandatory Disclosure of Third-Party Litigation Financing*, BOWMAN & BROOKE LLP (Apr. 26, 2018), https://www.bowmanandbrooke.com/insights/wisconsin-proportionality-and-mandatory-disclosure [https://perma.cc/L9SN-CVHN].

[86] 17 F. Supp. 3d 711 (N.D. Ill. 2014).

[87] *Id.* at 732-36.

binding on other jurisdictions, so this decision is merely persuasive authority regarding the effect of a funder's confidentiality agreement on evidentiary privileges.

In contrast, in *Essar Oilfield Services Ltd. v. Norscot Rig Management PVT Ltd.*,[88] the United Kingdom's English Commercial Court allowed a funded party to recover its third-party funding costs from the opposing side by enforcing a partial international arbitration award on costs on the theory that the opposing side had forced the funded party to seek third-party funding to pay for its arbitration costs.[89] This decision appears to be the first of its kind in the United Kingdom. Although this decision does not directly address third-party funders' professional responsibilities, it enhanced the industry's legitimacy in the United Kingdom and in international arbitration.

As the contrasts between the cases discussed above illustrate, court oversight would likely not be effective as the sole means to regulate third-party funders' professional responsibilities worldwide. Most litigation funders have a multijurisdictional practice,[90] and conflicts between court systems' standards, rules, and procedures abound. Conflicting ethics rules can confuse attorneys and would likely create confusion for funders—or additional regulatory arbitrage opportunities.[91] In addition, courts can only issue rulings when cases come before them, so regulations arising from judicial opinions would be reactive rather than proactive. Reactivity is not an ideal posture from which to regulate professional responsibilities.[92]

On the other hand, judges and arbitrators already have both the authority and the procedural tools to handle and decide issues regarding discovery, disclosure, privileges, conflicts of interest, cost allocation, and sanctions that may be

[88] [2016] EWHC (Comm) 2361, [2016] WLR (D) 576 (Eng.).

[89] *See id.*; *English Court Approves Recovery of Third-Party Funding Costs*, GLOB. ARB. REV. (Sept. 20, 2016), https://globalarbitrationreview.com/third-party-funding/english-court-approves-recovery-of-third-party-funding-costs.

[90] *See supra* note 17 and accompanying text.

[91] *Cf.* MODEL RULES OF PRO. CONDUCT r. 8.5 cmt. 2 (AM. BAR ASS'N 2021) ("A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations."); *id.* r. 8.5 cmt. 3 (explaining lawyer's particular conduct is governed by single jurisdiction's rules of professional conduct because "minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession"). Accordingly, [Rule 8.5(b)] takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.").

[92] *See, e.g.*, Jeff Black & Ranier Buergin, *Buck To Stop with Bankers as G-7 Seeks Conduct Code for Lenders*, BLOOMBERG (May 31, 2015, 7:01 PM), http://www.bloomberg.com/news/articles/2015-05-31/buck-to-stop-with-bankers-as-g-7-seeks-conduct-code-for-lenders (noting governments' preference in banking industry for "better conduct from the outset" over reactionary penalties).

affected by funder involvement.[93] Thus, no additional changes to procedural rules are required, although many are likely forthcoming. For example, the Federal Civil Rules Advisory Committee is considering changing the Federal Rules of Civil Procedure to address third-party funding but has not announced any forthcoming revisions.[94] In contrast, the international arbitration community has been abuzz recently with revisions to international arbitration rules to address third-party funding.[95] As a result, at least eight major international arbitral institutions have adopted or are considering adopting disclosure and cost provisions that apply to third-party funding.[96] In addition, as discussed further below, the United Nations Commission on International Trade Law ("UNCITRAL") will address third-party funding in its suggested revisions to investor-state dispute settlement procedures under bilateral and multilateral investment treaties.[97]

[93] *See* Sahani, *Judging*, *supra* note 12, at 407-08 (overviewing Federal Rules of Civil Procedure that allow judges to account for third-party funding).

[94] In November 2018, the author participated in a conference cohosted by the Federal Civil Rules Advisory Committee (the "Committee") and George Washington University Law School to gather information regarding whether to revise the Federal Rules of Civil Procedure to directly address third-party funding. *See Third-Party Litigation Finance Conference*, GEORGE WASH. UNIV. L. SCH., https://www.law.gwu.edu/third-party-litigation-finance-conference [https://perma.cc/5SQR-XEUC] (last visited Dec. 7, 2022). Recently, defense-side lobbying interests have proposed revisions to Federal Rule of Civil Procedure 16 to address third-party funding, but the Committee has not yet addressed those proposals. *See* LAWS. FOR CIV. JUST. & U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, RULES SUGGESTION TO THE ADVISORY COMMITTEE ON CIVIL RULES 2 (2022), https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf [https://perma.cc/U89D-7U5L].

[95] *See infra* notes 236, 242 and accompanying text (noting enactment of third-party funding rules following Global Task Force on Third-Party Funding report).

[96] International arbitral institutions addressing third-party funding directly in their arbitration rules include the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, the China International Economic and Trade Arbitration Commission, the Hong Kong International Arbitration Centre, the International Court of Arbitration of the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes ("ICSID") (proposed), the Singapore International Arbitration Centre, the Australian Centre for International Commercial Arbitration, and the American Arbitration Association's International Centre for Dispute Resolution, among others. *See* Jonathan Barnett, Lucas Macedo & Jacob Henze, *Third-Party Funding Finds Its Place in the New ICC Rules*, WOLTERS KLUWER: KLUWER ARB. BLOG (Jan. 5, 2021), http://arbitrationblog.kluwerarbitration.com/2021/01/05/third-party-funding-finds-its-place-in-the-new-icc-rules/ [https://perma.cc/MV3K-XAQX]; AUSTL. CTR. FOR INT'L COM. ARB., ACICA RULES 44-45 (2021), https://acica.org.au/wp-content/uploads/2021/03/ACICA_Rules_2021-WFF2.pdf; INT'L CTR. FOR DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) 25 (2021), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar [https://perma.cc/9Z59-4S4X].

[97] *See infra* note 270.

B. *Funder Self-Governance*

Three funder self-regulatory organizations have promulgated voluntary codes of conduct or best practices: the United Kingdom's Association of Litigation Funders ("ALF") Code of Conduct,[98] the American Legal Finance Association ("ALFA") Code of Conduct,[99] and the International Legal Finance Association ("ILFA") list of industry best practices.[100] Individual funders have also developed their own internal corporate codes of conduct regarding funding.[101]

1. The Association of Litigation Funders

The national government in the United Kingdom has delegated regulation of the funding industry to a private organization, the ALF.[102] The Ministry of Justice, through its Civil Justice Council ("CJC"), has legitimized ALF and charged it with updating and administering a code of conduct for third-party funders.[103] This code "sets out standards of practice and behaviour to be observed by Funders" who are members of ALF.[104] Lord Justice Jackson provided input on the drafting of the original code.[105] Noncompliance with the

[98] ASS'N OF LITIG. FUNDERS, CODE OF CONDUCT FOR LITIGATION FUNDERS (2018) [hereinafter ALF CODE OF CONDUCT], http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf [https://perma.cc/7GHW-6ENQ]; *see also Code of Conduct*, ASS'N OF LITIG. FUNDERS [hereinafter *ALF Code of Conduct Summary*], http://associationoflitigationfunders.com/code-of-conduct/ [https://perma.cc/ST3L-NNC7] (last visited Dec. 7, 2022) (summarizing code of conduct).

[99] *The ALFA Code of Conduct*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/alfa-code-of-conduct/ [https://perma.cc/4XGD-QUJ4] (last visited Dec. 7, 2022).

[100] *Best Practice*, INT'L LEGAL FIN. ASS'N, https://www.ilfa.com/#best-practice [https://perma.cc/DF33-UE37] (last visited Dec. 7, 2022).

[101] *See infra* note 141 and accompanying text (describing former Bentham IMF's internal code of conduct).

[102] *How We Work*, ASS'N OF LITIG. FUNDERS, https://associationoflitigationfunders.com/about-us/how-we-work/ [https://perma.cc/TC87-LNEZ] (last visited Dec. 7, 2022) (detailing ALF's creation and its approval by Civil Justice Council ("CJC")).

[103] The United Kingdom's Ministry of Justice acts through the CJC, "an Advisory Public Body which was established under the Civil Procedure Act 1997 with responsibility for overseeing and co-ordinating the modernisation of the Civil Justice System." JUD. OFF., TRIENNIAL REVIEW: CIVIL JUSTICE COUNCIL AND FAMILY JUSTICE COUNCIL 1 (2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/444682/triennial-review-cjc-fjc-2015-print.pdf [https://perma.cc/ZN7S-9CVH]. The CJC authorized funders to self-regulate and held "stakeholder events" in 2008 to draft a "Code of Conduct for Third-Party Funding." *See Third Party Funding*, CTS. & TRIBUNALS JUDICIARY, https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/previous-work/costs-funding-and-third-party-funding/third-party-funding-2/ [https://perma.cc/7S3C-LHZQ] (last updated Nov. 2011).

[104] ALF CODE OF CONDUCT, *supra* note 98, para. 1.

[105] *See ALF Code of Conduct Summary*, *supra* note 98 ("The Code sets out the standards by which all full funder members of the ALF must abide, and meets each of the key concerns set out by Lord Justice Jackson in his Civil Litigation Costs Review.").

ALF code leads to sanctions under the authority granted to ALF by the CJC and implemented through the complaints procedure for third-party funders.[106] Given ALF's governmentally sanctioned regulatory function, "[c]laimants and their lawyers are therefore urged to work only with those funders who are approved members of the ALF."[107] ALF only regulates commercial funding, not consumer funding, and only has jurisdiction over its voluntary members, not other funders who may operate in the United Kingdom or elsewhere.[108]

ALF's Code of Conduct includes the U.K. government's input, and ALF's administration of the code remains under light-touch government oversight. ALF's code provides professional conduct guidance in several areas, including producing "clear and not misleading" advertising;[109] preserving the confidentiality of the client's information;[110] ensuring that the funded party has obtained "independent [legal] advice" regarding the funding agreement;[111] avoiding controlling the party's attorney[112] or causing the party's attorney to breach professional duties;[113] maintaining capital adequacy, submitting to financial audits, and disclosing such financial information to ALF;[114] including in the funding agreement provisions for paying adverse costs, security for costs, or insurance;[115] specifying in the funding agreement whether the funder can provide input (if any) in the party's settlement decision;[116] complying with termination and withdrawal requirements if funders wish to end the funding

[106] *Third Party Funding*, *supra* note 103 (defining CJC working party's objective as to "produce final version of [a voluntary code of conduct for third-party funders] for approval by Ministers [of Justice] which Third Party Funders will be expected to abide by"). *See also generally* ASS'N OF LITIG. FUNDERS OF ENG. & WALES, A PROCEDURE TO GOVERN COMPLAINTS MADE AGAINST FUNDER MEMBERS BY FUNDED LITIGANTS (2017) [hereinafter PROCEDURE TO GOVERN COMPLAINTS], https://associationoflitigationfunders.com/wp-content/uploads/2018/03/ALF-Complaints-Procedure-October-2017.pdf [https://perma.cc/P6VC-WQLJ].

[107] *About Us*, ASS'N OF LITIG. FUNDERS, https://associationoflitigationfunders.com/about-us/ [https://perma.cc/923Y-8263] (last visited Dec. 7, 2022).

[108] *See* ASS'N OF LITIG. FUNDERS, INTRODUCING LITIGATION FUNDING 1, http://associationoflitigationfunders.com/wp-content/uploads/2014/03/ALF-info-for-solicitors.pdf [https://perma.cc/P565-GMLX] (last visited Dec. 7, 2022) ("Litigation funding is typically only available to commercial cases of a high value, and it is not yet suitable for consumer cases, personal injury cases, or claims that do not carry a sufficiently high level of damages.").

[109] *See* ALF CODE OF CONDUCT, *supra* note 98, para. 6.

[110] *See id.* para. 7.

[111] *See id.* para. 9.1.

[112] *See id.* para. 9.3.

[113] *See id.* para. 9.2.

[114] *See id.* paras. 9.4-9.5 (requiring litigation funders to maintain £5 million of capital, undergo annual audits, and "accept a continuous disclosure obligation").

[115] *See id.* para. 10.

[116] *See id.* para. 11.1.

arrangement before the case has ended on the merits;[117] specifying the nonrecourse nature of the funding;[118] extending liability to parent corporation funders for violations of the code by their subsidiaries or associated entities;[119] and requiring ALF to maintain dispute resolution or complaints procedures to handle disputes between the funder and the funded party.[120]

2. American Legal Finance Association

Similarly, the ALFA in the United States has a voluntary code and institutional legitimacy from a government. There is no federal regulation of third-party funding in the United States and no federal legitimacy for legal funding guidelines or professional associations.[121] Instead, legitimacy and guidance must come from state governments, if at all. ALFA's members made an agreement with the New York State Attorney General in 2005 that outlined a code of conduct for litigation funding transactions in New York state and legitimized ALFA.[122] The first provision of ALFA's Code of Conduct states that "[e]ach member agrees to comply with the Agreement negotiated by ALFA with the New York Attorney General dated February 17, 2005 for all New York State transactions."[123] According to that agreement, ALFA was "formed, according to its By-Laws or Certificate of Incorporation, for the purpose of, inter alia, promoting high ethical standards of professionalism for the legal finance industry."[124] As with ALF in the United Kingdom, ALFA's public-private partnership with New York gives the weight of governmental authority to the third-party funding industry's self-regulation efforts, thereby enhancing the effectiveness of that self-regulation.

Unlike ALF, ALFA includes only consumer-focused third-party funders, which means that they finance cases brought primarily by individual human

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[117] *See id.* paras. 11.2-13.2.

[118] *See id.* para. 2.6 (prohibiting litigation funders from "seek[ing] any payment from the Funded Party in excess of the . . . proceeds of the dispute" where funded party does not materially breach funding agreement).

[119] *See id.* para. 14.

[120] *See id.* paras. 13.2, 15.

[121] *See* NIEUWVELD & SAHANI, *supra* note 14, at 142 n.52.

[122] *See The ALFA Code of Conduct*, *supra* note 99, para. 1. *See generally* STATE OF N.Y. OFF. OF THE ATT'Y GEN., ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15) (2005) [hereinafter AGREEMENT BETWEEN ALFA AND NEW YORK], http://docplayer.net/713096-State-of-new-york-office-of-the-attorney-general.html [https://perma.cc/2AAG-6NJ2]. As third-party funding is regulated only at the state level in the United States, the influence of ALFA at the national level is merely as persuasive authority, similar to the American Bar Association's ("ABA") persuasive authority over lawyer regulation by state bars or state supreme courts.

[123] *The ALFA Code of Conduct*, *supra* note 99, para. 1.

[124] AGREEMENT BETWEEN ALFA AND NEW YORK, *supra* note 122, para. 3.

claimants.[125] Thus, the ALFA code applies only to consumer litigation funding by its members.[126] Like ALF, ALFA can only regulate its own voluntary members, not other funders who may operate in the United States or elsewhere.

ALFA's Code of Conduct is less specific than ALF's, and it expressly excludes commercial litigation funding.[127] Still, its provisions are instructive for assembling general principles of professional responsibility for all types of third-party funders. For example, the ALFA Code of Conduct promotes industry self-governance and created a first-of-its-kind tracking system for funded cases.[128] It also requires members to obtain a written acknowledgment from the plaintiff's attorney before funding the plaintiff's case, to inform ALFA of any pending or threatened litigation that may impact the industry, and to negotiate balances with any party that receives a substantially lower settlement.[129] The code prohibits acquiring an ownership interest in the client's litigation, interfering or participating in the client's litigation, attempting to influence the client's litigation, advancing money above the client's need, distributing false or misleading information or advertisements, paying any commission or referral fees to an attorney or law firm referring clients to the funder, and funding a case previously funded by another ALFA member without buying out that other member's interest in the case first.[130] In addition, the ALFA Code of Conduct includes a multistep dispute resolution process that includes mediation through a Grievance Committee and binding arbitration under the American Arbitration Association, Commercial Division.[131]

Uniquely, the ALFA Code of Conduct includes a provision that each member shall input newly funded cases within one business day into an Investment Management System ("IMS"),[132] which is a "comprehensive database . . . of consumer legal funding advances made by ALFA members . . . . to avoid potential problem cases and to ensure that cases are not over-funded."[133] To this Author's knowledge, ALFA's IMS is the world's first administrative system dedicated to ensuring that a funded party is not receiving financing from more than one third-party funder simultaneously or that a third-party funder is not funding more than one side of a case.

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[125] *See About ALFA*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/about-alfa [https://perma.cc/88RM-UVFM] (last visited Dec. 7, 2022).

[126] *See The ALFA Code of Conduct*, *supra* note 99, para. 13.

[127] *See id.*

[128] *See id.* para. 10.

[129] *See id.* paras. 2, 11-12.

[130] *See id.* paras. 4-9.

[131] *Id.* para. 14.

[132] *Id.* para. 10.

[133] *About ALFA*, *supra* note 125.

3. International Legal Finance Association

In contrast to ALF and ALFA, global legal funding industry giants cofounded ILFA in 2020 without seeking government acceptance. Based in Washington, D.C., ILFA's members have a global footprint and focus on the international commercial legal funding market, particularly international arbitration.[134] ILFA's recent creation demonstrates the maturation of the industry and funders' preference for self-regulation.

ILFA has posted a list of best practices on its website without specifically enumerated requirements or a publicly disclosed code of conduct.[135] ILFA's best practices are organized around guiding principles such as clarity, transparency, and forthrightness in communicating "terms, expectations and contractual arrangements" to the "users" of funding; "[r]especting duties to the courts" and "the proper administration of justice"; not interfering with "lawyers' duties to the courts and to their clients"; "[a]void[ing] conflicts of interest"; "[p]reserv[ing] confidentiality and legal privilege"; and maintaining "capital adequacy."[136] However, ILFA's best practices do not mention any enforcement mechanisms or sanctions.[137] This may mean either that ILFA does not have sanctions for member misconduct or that its sanctions are not publicly disclosed.

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If funders are allowed to self-govern, then as the examples above indicate, some tenets of professional conduct should be agreed upon to protect the legal system from attacks on its integrity. Otherwise, regulators cannot be sure that the codes of self-governance are effective and enforceable, rather than simply giving the appearance of ethics and trustworthiness. In an extreme, worst-case scenario, one can imagine that funder self-governance could turn self-destructive if funders seek to eliminate their competitors or detractors purportedly in the name of self-governance like the characters in the book *The Lord of the Flies*.[138]

However, the biggest issue with funder self-regulation is that no information is available about the frequency, extent, or circumstances of funder sanctions by self-regulatory organizations. Thus, one assumption could be that funders are rarely or never sanctioned by their self-regulatory associations. ALF provides the best existing example of funder self-governance (with a faint shadow of government oversight). Still, to the author's knowledge, ALF has rarely engaged in any discipline or sanction of funders who are members, so its efficacy is still theoretical. Does this mean that no funder has ever committed a breach of ALF's

[134] *See* INT'L LEGAL FIN. ASS'N, *supra* note 17.

[135] *See Best Practice*, *supra* note 100.

[136] *Id.*

[137] *See id.*

[138] *See generally* WILLIAM GOLDING, THE LORD OF THE FLIES (Lois Lowry ed., Penguin Books 2016) (1954).

Code of Conduct? Perhaps, but there is no way to know for sure; ALF does not publicly disclose the use of its complaints procedure or the results unless a public sanction is imposed.[139] It is more likely that the member funders are reticent to discipline their peers harshly and publicly, given the finality and embarrassment accompanying such punishment.

In comparison, students administering honor codes at universities exhibit similar behavior whenever expulsion from school is the only punishment imposed; students may vote to expel a peer more often than funders do, but such decisions are still rare.[140] ALF's system of funder self-regulation will not prove its efficacy and integrity until an instance of serious funder misconduct has tested it. Under the existing regime for funder self-governance, such a circumstance may never be publicly disclosed. In Part III, this Article proposes global information-sharing of funder sanctions to bridge this information gap and prevent regulatory arbitrage.

4. A Former Funder's Code of Best Practices

In addition to funder associations, third-party funders often publicly post their internal codes of conduct or best practices on their websites. One of the most detailed of those codes was the Code of Best Practices by Bentham IMF, a former U.S.-based funder that recently merged with another funder and adopted the name Omni Bridgeway.[141] Bentham IMF engaged exclusively in commercial

[139] *See* PROCEDURE TO GOVERN COMPLAINTS, *supra* note 106, para. 35 ("Unless otherwise provided for by this procedure or the Board, the fact of and all matters concerning any Complaint shall be kept strictly confidential by the parties."); *id.* para. 25 (listing all possible sanctions, including fines, private and public warnings, publication of the decision against the funder, suspension of membership in ALF, expulsion from ALF, and "payment of all or any of the costs of determining the Complaint [i.e., the funded party plaintiff]"). To the author's knowledge, ALF has never publicly disclosed the applications of any of these sanctions.

[140] *See, e.g.*, Anna G. Bobrow, *Restoring Honor: Ending Racial Disparities in University Honor Systems*, 106 VA. L. REV. ONLINE 47, 51 (2020) ("Since the first recorded trial in 1851, expulsion from UVA has been the only punishment available if the jury finds the student guilty."); Jill Seiler, *K-State Sees Increase in Honor Code Violations*, KAN. ST. COLLEGIAN (Jan. 27, 2017), https://www.kstatecollegian.com/2017/01/27/k-state-sees-increase-in-honor-code-violations/ [https://perma.cc/BV78-MZS4] ("Very rarely did honor code violations result in suspension or expulsion, and only one or two students found themselves in that situation . . . .").

[141] *See generally* BENTHAM IMF, CODE OF BEST PRACTICES (2014) [hereinafter BENTHAM IMF, CODE OF BEST PRACTICES] (on file with author). Bentham IMF's original Code of Best Practices is no longer available on the internet because Bentham IMF (U.S.), IMF Bentham (Australia), and several other subsidiaries and affiliates recently merged into Omni Bridgeway. *See IMF Bentham and Bentham IMF To Become Omni Bridgeway*, OMNI BRIDGEWAY: BLOG (Feb. 26, 2020), https://omnibridgeway.com/insights/blog/blog-posts/global/2020/02/25/imf-bentham-and-bentham-imf-to-become-omni-bridgeway [https://perma.cc/H69J-W5DY]. However, a press release summarizing the Code of Best Practices and a video of Bentham IMF's former leaders discussing the 2017 version of the Code are still available online. *See* Press Release, Omni Bridgeway, Litigation Funder

litigation funding and therefore did not belong to ALFA, whose members are consumer litigation funders only.[142] Even though Bentham IMF no longer exists as an independent entity, its Code of Best Practices is still instructive and contains many of the same provisions described in the other examples above.

Bentham IMF's code is unique, however, in several ways. First, it sets out four guiding principles: fairness, transparency, accountability, and responsibility.[143] Conversely, the ALF, ALFA, and ILFA examples in this Section do not expressly articulate the overarching principles that their codes seek to uphold. Second, Bentham IMF's code includes best practices for each of the funder's relationships: the funder-public relationship, the funder-attorney relationship, the funder-client relationship, and the funder-financial relationship (termed "financial strength").[144] Separating the funder's duties in these various relationships underscores the interconnectedness and interdisciplinary nature of the third-party funding industry and recognizes that the funder's duties in each of those contexts differ in crucial ways.

Third, Bentham IMF's best practices for the funder-public relationship included educating the public about funding and devoting resources to pro bono projects, a provision that the author has not seen in any other code of conduct.[145] Considering that attorney professional responsibility obligations include taking on pro bono work, this provision indicates that Bentham IMF saw itself as a professional organization with obligations to the profession and society. Fourth, the best practices for the funder-attorney relationship include prohibiting investments by attorneys or law firms representing a funded party in the funder itself.[146] This provision complements the restriction on self-dealing in the Model Rules of Professional Conduct for attorneys.[147] This restriction is crucial given

Bentham IMF Adopts Code of Best Practices for US (Jan. 13, 2014), https://omnibridgeway.com/insights/press-releases/all-press-releases/press-release/2014/01/13/litigation-funder-bentham-imf-adopts-code-of-best-practices-for-us [https://perma.cc/GB37-4ZKF]; Bentham IMF, *Bentham IMF's Code of Best Practices*, VIMEO (June 7, 2017, 3:37 PM) [hereinafter Bentham IMF, VIMEO], https://vimeo.com/220694106. This Article cites a funder's code that no longer exists to avoid the appearance of bias toward or against any existing funders regarding whether their codes are included or excluded from this Article. A comprehensive examination of all available internal funders' codes of conduct is beyond the scope of this Article but is ripe for future inquiry.

[142] *See generally* BENTHAM IMF, CODE OF BEST PRACTICES, *supra* note 141; *see also supra* note 125 and accompanying text.

[143] *See* BENTHAM IMF, CODE OF BEST PRACTICES, *supra* note 141, at 2.

[144] *Id.* at 3-4.

[145] *Id.* at 3.

[146] *Id.*

[147] *See* MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR ASS'N 2021) (restricting financial relationships between attorneys and clients).

the growing availability of crowdfunding and other opportunities for individual attorneys to invest in the practices of other attorneys.[148]

Despite the very forward-looking provisions of the Bentham IMF Code of Best Practices, this was still a voluntary code of conduct administered internally by a single funder. Moreover, like ILFA's list of best practices, this code of conduct contained no enforcement mechanisms, and it is unclear how Bentham IMF enforced this code of conduct internally. Thus, this code was aspirational rather than operational, as underscored by a promotional video that Bentham IMF released about its code.[149] Nevertheless, Bentham IMF's Code of Best Practices was a commendable, concerted effort by a third-party funder to espouse professional responsibility norms sua sponte, without government pressure. Moreover, by prominently publishing the code of conduct on its website, Bentham IMF likely influenced, at least indirectly, the behavior of its competitors and the expectations of potential clients. Today, several more funders have codes of conduct that could be explored in greater detail in a robust qualitative and quantitative study of all the approaches worldwide to regulating third-party funder ethics and professional responsibility.

### C. *Attorney Regulation*

Unlike lawyers, funders do not have a "close relationship between the profession and the processes of government and law enforcement."[150] Still, the activity of funders profoundly affects the relationship between lawyers, clients, and the legal system. As a result, many jurisdictions regulate third-party funding indirectly by regulating how attorneys approach the third-party funding relationship. Regulating through attorneys is indirect because the regulation only affects the funder to the extent that the funder interacts with the attorney. Funders who only interact with the funded party and never encounter the attorney often do so to avoid triggering an attorney's professional ethics conundrum.

There are several examples of indirect regulation of the third-party funding industry through lawyers' professional responsibility requirements in a particular jurisdiction. One of the most comprehensive examples comes from the United States. A decade ago, the American Bar Association ("ABA") Commission on Ethics 20/20 submitted an Informational Report to the ABA House of Delegates on "alternative litigation finance."[151] In its report, the

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[148] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-499.pdf [https://perma.cc/T8LQ-4TJR] (stating that lawyer may passively invest, but not actively practice, in licensed ABS even if lawyer is admitted to practice in jurisdiction that does not allow ABS form).

[149] *See* Bentham IMF, VIMEO, *supra* note 141.

[150] MODEL RULES OF PRO. CONDUCT pmbl. Para. 10 (AM. BAR ASS'N 2020).

[151] *See generally* AM. BAR ASS'N COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/

Commission interpreted the existing ABA Model Rules of Professional Conduct to explain how lawyers should conduct themselves when dealing with a case involving a third-party funder. The Commission identified "several core professional obligations" about which attorneys must be "mindful" when litigation funding is used in a case, including "exercis[ing] independent professional judgment," "not be[ing] influenced by financial or other considerations," preventing "conflicts of interest," complying with restrictions on "third-party payments of fees," "prevent[ing] disclosure of information" protected by confidentiality or by an evidentiary privilege, and "becom[ing] fully informed about" litigation funding or "associat[ing] with experienced counsel."[152]

These professional obligations also indirectly regulate the conduct of third-party funders because the report advises lawyers to withdraw if they are unable to carry out their professional obligations in the face of pressure or undue influence by the third-party funder.[153] The lawyer's withdrawal will cause the funder to incur additional costs in the litigation and may delay or otherwise affect the case's merits. In this way, the lawyer's professional responsibility obligations incentivize cost-conscious funders to avoid any interference in the attorney-client relationship that may hinder a lawyer's performance of her professional duties. Therefore, the ABA's interpretation of the lawyer's obligations vis-à-vis third-party funding functions as an indirect "regulation" of the behavior of third-party funders. This indirect "regulation" does not directly apply professional responsibilities to third-party funders. Instead, it creates the potential for funders to incur additional financial and time costs when the attorney withdraws. This incentivizes cost-conscious funders to take a hands-off approach to the client's legal representation and not interfere in the attorney-client relationship. Such incentives are necessary aspects of any code of professional conduct for third-party funders. Nevertheless, as illustrated in the Introduction of this Article, unscrupulous lawyers (and doctors) will contravene their rules of professional conduct for a profit. Thus, this indirect "regulation" of funders through lawyers is inadequate to prevent funders from abusing the dispute settlement system.

Adding to this problem is that funders can make agreements with clients that attorneys cannot. For example, an attorney cannot make a contract with a client providing that the attorney must approve the terms of the client's settlement agreement,[154] but a funder can put such a provision in its contract with a client.[155] Similarly, an attorney cannot make a contract with a client that restricts the

administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf [https://perma.cc/89BD-ZE6D].

[152] *Id.* at 4.

[153] *Id.* at 29.

[154] *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2021) ("A lawyer shall abide by a client's decision whether to settle a matter.").

[155] *See, e.g.*, ABA Comm. on Ethics & Pro. Resp., Formal Op. 96-403 (1996) (describing insurance contract that grants insurer right to settle claim without insured's consent).

client's right to choose its legal counsel or fire the attorney.[156] In contrast, a funder can make a contract with a client that the funder must approve any changes in the client's legal representation and has the right to fire and replace the attorney over the client's objections.[157] These problems are not addressed by regulating funders indirectly through attorney professional responsibility rules.

Furthermore, funders make many expensive and impactful judgment calls regarding their service despite the lack of guidance for funders on challenging ethical quandaries. Lawyers are not even trusted to make such decisions without a framework for professional conduct, such as the ABA's Model Rules of Professional Conduct and an enforcement mechanism. Are funders somehow more moral or responsible than lawyers? Certainly not.

On the contrary, funders are more like attorneys than they may admit because third-party funding entities are direct byproducts of the legal services industry. For example, nonpracticing attorney principals have founded or currently manage the most significant funding industry players.[158] Many funders hire (or poach) lawyers directly from top law firms to benefit from the formal training that those lawyers have received.[159] Funders hire attorneys to analyze and evaluate cases to decide which ones the funder should fund.[160] Funders also facilitate the financial aspects of the attorney-client relationship (which includes communication) and enter into comprehensive confidentiality and nondisclosure agreements as a best practice.[161] Funders also often have prominent litigators or arbitrators on their advisory boards to help them decide which cases to finance

[156] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.16(a)(3) (requiring attorney to withdraw upon discharge by client); *id.* cmt. 4 (clarifying client's "right to discharge a lawyer at any time, with or without cause").

[157] *Cf.* ABA Comm. on Ethics & Pro. Resp., Formal Op. 96-403 (noting insured may forfeit rights under insurance policy by challenging insurer's "right to control the defense and settle the claim").

[158] *See* Sahani, *Judging*, *supra* note 12, at 399 n.47 (listing examples of third-party funders with lawyers as leaders or principals).

[159] *See, e.g.*, Andrew Mizner, *Vannin Capital Launches in New York*, ICLG.COM (Aug. 16, 2017), https://iclg.com/cdr/third-party-funding/7524-vannin-capital-launches-in-new-york [https://perma.cc/4JKY-9PER] ("Third-party funder Vannin Capital made a statement of intent towards the United States at the start of this month, opening a second office in the country with the hire of three New York lawyers as investment directors.").

[160] For example, in a recent *60 Minutes* episode, Christopher Bogart, the Chief Executive Officer of Burford, one of the largest third-party funders in the world, took the *60 Minutes* host on a tour of Burford's offices hosting dozens of cubicles of lawyers working on evaluating potential cases for investment. *See* Lesley Stahl, *Litigation Funding: A Multibillion-Dollar Industry for Investments in Lawsuits with Little Oversight*, CBS NEWS: 60 MINUTES (Dec. 18, 2022, 7:36 PM), https://www.cbsnews.com/news/litigation-funding-60-minutes-2022-12-18/ [https://perma.cc/YVU2-R62D].

[161] With respect to the latter point, the shroud around the inner workings of third-party funders makes it difficult for academics to obtain much needed data and information for research.

or reject.[162] In this way, the formal training of legal practice is part of the DNA of the leadership of most funders. Thus, funders are already operating with the attorney's rules of professional conduct in mind. As long as an attorney holds at least one active bar license, that attorney is subject to rules of professional conduct, even when that attorney is an owner or employee of a funder and does not represent clients.[163]

Moreover, the well-established, leading funders respect lawyer professional responsibility principles. For example, funders often argue that they provide an "access justice" service. Regardless of whether that is true, funders *should* help alleviate the gap between those who need legal help and those who can afford it for the good of society.[164] Similarly, attorney bars strongly encourage their members to engage in pro bono and reduced-fee representation.[165] Second, like contingent fee attorneys, funders specialize in assessing the cost of providing legal services and constructing financing arrangements to pay for those services. In this way, funders bridge the gap between the licensed legal services profession and the licensed financial services profession. Third, funders create professional associations that promulgate codes of conduct or best practices, such as ALF, ALFA, and ILFA.[166] Fourth, as already discussed, the nature of the third-party funder's work may directly affect the professional responsibilities of lawyers. Thus, the interconnectedness among lawyers and funders necessitates applying principles of professionalism to funders.

Finally, funders are offering a type of unbundled legal service—dispute financing, a field mainly occupied by attorneys until now.[167] Part I explained that traditional third-party funding is essentially a nonattorney contingent or conditional fee. However, because funders are not lawyers, their behavior does not fall under the attorney rules of conduct regarding contingent or conditional fees. Therefore, funders often charge significantly higher rates of return and impose more onerous restrictions on funded parties than the rules and statutes would allow for attorneys.[168]

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[162] *See, e.g.*, Leo Szolnoki, *Beechey To Advise Third Party Funder*, GLOB. ARB. REV. (Nov. 5, 2013), https://globalarbitrationreview.com/third-party-funding/beechey-advise-third-party-funder (reporting that former Chairman of International Court of Arbitration, who had previously spent thirty years litigating at international law firm Clifford Chance, joined investment advisory panel of London-based Woodsford Litigation Funding).

[163] *See, e.g.*, MODEL RULES OF PRO. CONDUCT pmbl. para. 3 (AM. BAR ASS'N 2020) (noting applicability of rules beyond practice of law).

[164] *See* Sahani, *Rethinking*, *supra* note 21, at 626-28.

[165] *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 6.1 (AM. BAR ASS'N 2021) (encouraging lawyers to provide at least fifty hours of pro bono services annually).

[166] *See supra* Section II.B.

[167] Another traditional funding alternative available to clients is a traditional recourse loan, but the terms are often much less desirable, and payments are often required long before the client would recover any money from winning its case. *See* NIEUWVELD & SAHANI, *supra* note 14, at 6.

[168] *See* Shannon, *Harmonizing*, *supra* note 54, at 866 (explaining that funders charge higher rates of return to offset higher risk).

This picture will become even more complex as funders start owning law firms.[169] Jurisdictions are loosening the restrictions on nonlawyers—including third-party funders—owning equity in law firms and are applying attorney Rules of Professional Conduct to these investors.[170] For example, the United Kingdom has allowed nonlawyers limited ownership of law firms since 2013 through alternative business structure ("ABS") entities that practice law.[171] Australia has long allowed nonlawyer ownership of law firms and funder-law firm partnerships, and in 2007, Australian firm Slater and Gordon became the first publicly traded law firm in the world.[172]

In January 2021, Arizona became the first state to allow nonlawyer ownership of law firms through ABS entities.[173] Arizona requires ABS entities to obtain a law license, abide by the attorney rules of professional conduct in Arizona as they apply to law firms, and comply with sanctions for violations.[174] Arizona fundamentally changed its version of Rule 5.4 of the Rules of Professional Conduct to allow for nonlawyer ownership of law firms.[175] California,[176]

[169] *See, e.g.*, *Alternative Business Structures*, ARIZ. JUD. BRANCH, https://www.azcourts.gov/Licensing-Regulation/Alternative-Business-Structure [https://perma.cc/PTY3-BVWG] (last visited Dec. 7, 2022).

[170] *See* Sahani, *Reshaping*, *supra* note 56, at 408-09; *see also supra* note 49 and accompanying text (discussing Arizona legalizing nonlawyer ownership of law firms through ABS entities).

[171] *See* Legal Services Act 2007, c. 29, § 5 (Eng.); *'Tesco Law' Allows Legal Services in Supermarkets*, BBC NEWS (Mar. 28, 2012), https://www.bbc.com/news/uk-17538006 [https://perma.cc/DS8L-MAK3] (reporting United Kingdom's adoption of provisions allowing nonlawyer ownership of law firms through ABS entities, potentially including supermarkets like Tesco).

[172] *See* Jason Krause, *Selling Law on an Open Market*, 93 ABA J. 34, 34 (2007); Peter Lattman, *Underwritten Down Under: A Firm's IPO Opens Debate*, WALL ST. J. (May 23, 2007, 12:01 AM), https://www.wsj.com/articles/SB117988897781011777.

[173] *See supra* note 49 and accompanying text. Though not a state, Washington, D.C., has allowed nonlawyer ownership for many years, but the ownership percentage and the activities of the resulting entity are restricted. *See* Sahani, *Reshaping*, *supra* note 56, at 434-36 (noting original owner must not sell 100% of claim to third-party funder and that funder-attorney partnerships must be "very carefully structured" to comply with Rule 5.4 of the D.C. Rules of Professional Conduct). Thus, historically, D.C. has not been an attractive jurisdiction for third-party funders to invest in law firms. *See* Sahani & Steinitz, *Navigating*, *supra* note 49 (highlighting lack of large-scale nonlawyer ownership of D.C. law firms). In 2020, the D.C. Bar's Global Leader Practice Committee sought public comments on whether to relax its rules and thereby further encourage nonlawyer ownership of law firms. *See D.C. Bar Global Legal Practice Committee Seeks Public Comment on Rule of Professional Conduct 5.4*, D.C. BAR (Jan. 23, 2020) [hereinafter D.C. BAR], https://www.dcbar.org/news-events/news/d-c-bar-global-legal-practice-committee-seeks-publ [https://perma.cc/7C3A-Z2TV].

[174] *See* Steinitz & Sahani, *New Ariz. Law Practice Rules*, *supra* note 49.

[175] *See* Sahani, *Reshaping*, *supra* note 56, at 435.

[176] *See* Lauren Berg, *Calif. Bar OKs Exploring 'Sandbox' To Boost Legal Access*, LAW360 (May 14, 2020, 7:36 PM), https://www.law360.com/articles/1273812/calif-bar-oks-exploring-sandbox-to-boost-legal-access (discussing California State Bar's vote to launch

Utah,[177] Florida,[178] Illinois,[179] New York,[180] and the District of Columbia[181] are all in various stages of examining whether to make similar changes to their rules to allow nonlawyer ownership of law firms. In addition, the ABA issued an ethics opinion in September 2021 stating that lawyers licensed to practice in jurisdictions that do not allow ABS entities may nevertheless invest *passively* in them in jurisdictions in which they are allowed.[182]

If funder ownership of law firms becomes widespread in the same vein as the Arizona model, lawyers and funders would be subject to the same professional conduct rules, and the regulatory arbitrage loophole would be closed, at least concerning attorney ethics. Still, it is not clear that most funders and law firms would choose to partner in that way, especially since the current structures for dispute finance transactions arguably better preserve lawyer autonomy from the financiers. In any event, the current framework for regulating funders through attorney regulation is insufficient to enforce funder ethics rules because it relies solely on how ethical the individual attorneys or law firms interacting with

experimental "sandbox" to relax rules prohibiting nonlawyer ownership of firms to provide greater access to legal services).

[177] *See* Bob Ambrogi, *Utah Supreme Court Votes To Approve Pilot Allowing Non-Traditional Legal Services*, LAWSITES (Aug. 29, 2019), https://www.lawsitesblog.com/2019/08/utah-supreme-court-votes-to-approve-pilot-allowing-non-traditional-legal-services.html [https://perma.cc/Q3K8-LQQ9] (reporting Utah Supreme Court's unanimous vote to launch pilot program allowing nonlawyer investment and ownership of legal service entities).

[178] *See* Justin Wise, *CORRECTED: Florida Special Committee Recommends Regulatory 'Sandbox*,*'* LAW360 (June 29, 2021, 4:45 PM), https://www.law360.com/articles/1398652 (summarizing Florida's "law practice innovation laboratory program," which would permit nonlawyers to have noncontrolling equity interest in law firms).

[179] *See* Aebra Coe, *Where 5 States Stand on Nonlawyer Practice of Law Regs*, LAW360 (Feb. 5, 2021, 4:33 PM), https://www.law360.com/articles/1352126/where-5-states-stand-on-nonlawyer-practice-of-law-regs (discussing regulatory deliberations in Arizona, California, Illinois, New Mexico, and Utah).

[180] *See Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees*, N.Y.C. BAR (July 30, 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees [https://perma.cc/XJC6-S3DQ] (reaffirming Rule 5.4 prohibition on fee sharing with nonlawyers); N.Y.C. BAR ASS'N WORKING GRP. ON LITIG. FUNDING, REPORT TO THE PRESIDENT 2 (2020), http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf [https://perma.cc/6N9Q-RA37] (expressing modestly contrary view that "lawyers and the clients they serve would benefit if lawyers have less restricted access to funding").

[181] Until Arizona changed its Rule 5.4 in 2021, D.C. had the least restrictive Rule 5.4 in the nation, allowing limited nonlawyer ownership of law firms. *See* Sahani, *Reshaping*, *supra* note 56, at 457-70 (discussing history of Rule 5.4 and D.C.'s outlier status). Washington, D.C., is considering loosening its restrictions even further on nonlawyer ownership and multidisciplinary practices. *See* D.C. BAR, *supra* note 173.

[182] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-499.pdf [https://perma.cc/T8LQ-4TJR].

funders are. As described in the Introduction of this Article, attorneys can be just as unscrupulous as funders[183] and therefore constitute an unreliable source of regulatory accountability at best.

D. *Financial Services Industry Regulation*

Commercial third-party funding resembles venture capital, a derivative, or a hedging investment strategy.[184] Thus, some jurisdictions already apply financial or securities industry regulations to third-party funders.[185] For example, Australia recently introduced a requirement that funders obtain an Australian Financial Services License ("AFSL").[186] The Australian Securities and Investments Commission ("ASIC") oversees the "light touch" regulation of third-party funding in Australia and issues AFSLs to third-party funders who operate in Australia.[187] In addition to requiring an AFSL, Australia has a "light touch" regime of regulation for litigation funding that includes a combination of statutes, court oversight, court case management protocols, and regulatory guidance from the ASIC.[188] This regime requires litigation funders operating in Australia to maintain practices for "addressing potential, actual or perceived conflicts of interest."[189]

[183] *See supra* notes 2-6 and accompanying text (discussing fraudulent litigation schemes).

[184] *See, e.g.*, Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1160 (2015) (discussing funding as venture capital); Shannon, *Dodd-Frank Act*, *supra* note 65, at 20 (discussing funding as derivative or hedging strategy); *Int'l Litig Partners Pte Ltd v Chameleon Mining NL*, (2011) 50 NSWCA (Austl.) (debating whether litigation funding in case was derivative); Swaab, *Australia: Has the Long-Anticipated Regulation of Litigation Funding Finally Arrived?*, MONDAQ (June 21, 2011), https://www.mondaq.com/australia/corporate-governance/135958/has-the-long-anticipated-regulation-of-litigation-funding-finally-arrived [https://perma.cc/4Q9X-Z6QM] (discussing decision in *Int'l Litig Partners Pte Ltd* regarding whether funding is a derivative).

[185] Examples of funders regulated by the securities regulatory bodies in the United States, the United Kingdom, and Australia are Calunius Capital, Omni Bridgeway, and Burford. *See* Roy Strom, *Litigation Finance Giants Form Trade Group To Counter Regulation*, BLOOMBERG L. (Sept. 8, 2020, 1:01 PM), https://news.bloomberglaw.com/bloomberg-law-analysis/litigation-finance-giants-form-trade-group-to-counter-regulation?context=article-related.

[186] *See Litigation Funding Schemes*, AUSTRALIAN SEC. & INVS. COMM'N, https://asic.gov.au/regulatory-resources/managed-investment-schemes/litigation-funding-schemes/ (last updated Apr. 19, 2022) ("Operators of litigation funding schemes will generally need to hold an AFS licence and each litigation funding scheme will need to be registered as a managed investment scheme.").

[187] *See id. See generally* AUSTRALIAN SEC. AND INVS. COMM'N, REGULATORY GUIDE 248: LITIGATION SCHEMES AND PROOF OF DEBT SCHEMES (2013) [hereinafter REGULATORY GUIDE 248], https://download.asic.gov.au/media/1247153/rg248.pdf [https://perma.cc/L8FY-Z383].

[188] *See* REGULATORY GUIDE 248, *supra* note 187, at 11 tbl.1.

[189] *See id.* para. 248.18, at 9.

The Financial Conduct Authority ("FCA") regulates funders' asset management activities in the United Kingdom.[190] Among the states that allow and regulate third-party funding via statute, Indiana has designated its Department of Financial Institutions to oversee licensing of funders and discipline funders under its litigation funding statute.[191] Moreover, existing national regulations that protect investors already directly or indirectly regulate some third-party funders. For example, publicly traded funders, such as Omni Bridgeway and Burford, are regulated by the stock exchanges in the countries where they are listed and traded.[192] In addition, publicly traded corporations that are clients of litigation funders must disclose funding if it is a material transaction.[193] Such disclosure is a form of indirect regulation because funders cannot "hide" their business dealings with publicly traded corporations. Furthermore, third-party funders organized as hedge funds or financial firms must comply with the securities and exchange regulatory bodies in all the jurisdictions where they operate, such as the Securities and Exchange Commission ("SEC") in the United States, the ASIC in Australia, and the FCA in the United Kingdom.

In the same vein, third-party funders might be investment brokers under the Jumpstart Our Business Startups ("JOBS") Act, which requires that all crowdfunding occurs through platforms registered with a self-regulatory organization and regulated by the SEC.[194] For example, at least one funder, LexShares, operates under the JOBS Act and focuses on crowdfunding litigation by targeting accredited investors—individuals with a certain minimum dollar amount in assets—to contribute a portion of the investment needed to pursue a

[190] *See Public Consultation on the Draft Civil Law (Amendment) Bill 2016 and Civil Law (Third Party Funding) Regulations 2016: Proposal To Lower the Age of Contractual Capacity from 21 Years to 18 Years, and the Civil Law (Amendment) Bill*, MINISTRY OF L. SING. (June 30, 2016), https://www.mlaw.gov.sg/news/public-consultations/public-consultation-on-the-draft-civil-law--amendment--bill-2016/ [https://perma.cc/UY4L-3GKS] ("In England, funders are regulated by the Financial Conduct Authority in connection with their asset management activities.").

[191] *See* IND. CODE ANN. §§ 24-12-1-1 to -1-10 (West 2022) (regulating litigation funding in Indiana under auspices of state's Department of Financial Institutions).

[192] *See supra* note 30 and accompanying text.

[193] *See* NIEUWVELD & SAHANI, *supra* note 14, at 31.

[194] *See* Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.) (amending Securities Exchange Act of 1934, 15 U.S.C. §§ 77-78, 7213, 7262); *Registration of Funding Portals: A Small Entity Compliance Guide*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/divisions/marketreg/tmcompliance/fpregistrationguide.htm [https://perma.cc/CUX4-296R] (last updated Jan. 18, 2017). For more information, see generally Darian M. Ibrahim, *Equity Crowdfunding: A Market for Lemons?*, 100 MINN. L. REV. 561 (2015) (discussing implications of allowing retail investors to invest directly in startups, which could include litigation finance companies); Press Release, White House, President Obama to Sign Jumpstart Our Business Startups (JOBS) Act (Apr. 5, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04/05/president-obama-sign-jumpstart-our-business-startups-jobs-act [https://perma.cc/L8VZ-9SB8].

case.[195] In exchange, an individual investor receives a "share" of the case corresponding to a portion of any eventual return.[196]

Furthermore, in the future, funders might be securities dealers if they gain the ability to "securitize litigation costs and sell derivative interests in lawsuits to spread the risk of a frivolous lawsuit among numerous investors."[197] Thus, funders with specific characteristics may already be part of the financial services industry. For example, the SEC has already brought an enforcement action against one funder for defrauding investors.[198] Thus, the SEC may be the appropriate government agency to act as an enforcement body for commercial third-party funding enterprises operating in the United States.[199] Nevertheless, the U.S. federal government's hands-off approach has enabled it to observe how the "laboratory of the states" regulates the industry.[200]

Still, even if all financial industry regulations apply to third-party funders, no code of professional conduct exists for bankers.[201] Scholars are looking into this question,[202] and the G-7 countries have asked regulators to develop a code of

[195] *See Frequently Asked Questions*, LEXSHARES, https://www.lexshares.com/pages/faqs [https://perma.cc/9QPE-RUEC] (last visited Dec. 7, 2022) (requiring investors to be accredited and offering interests "pursuant to Regulation D Rule 506(c)" under JOBS Act).

[196] *See id.*

[197] Lawrence S. Schaner & Thomas G. Appleman, *The Rise of 3rd-Party Litigation Funding*, LAW360 (Jan. 21, 2011, 2:07 PM), https://www.law360.com/articles/218954/the-rise-of-3rd-party-litigation-funding.

[198] *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Litigation Marketing Company With Bilking Retirees (Apr. 15, 2016), https://www.sec.gov/news/pressrelease/2016-72.html [https://perma.cc/Q26K-UB6S] (alleging Los Angeles-based litigation marketing company defrauded retirees and other investors); Seth Sandronsky, *Litigation Funding Is 'Shadow' Industry That Needs Oversight, Expert Says; Prometheus in SEC Crosshairs*, N. CAL. REC. (June 2, 2016), https://norcalrecord.com/stories/510743381-consumer-fraud-litigation-funding-is-shadow-industry-that-needs-oversight-expert-says-prometheus-in-sec-crosshairs [https://perma.cc/84E5-PKAP].

[199] With respect to consumer third-party funding, the Consumer Financial Protection Bureau ("CFPB") may be the appropriate enforcement body considering its focus on eradicating predatory lending and enforcing the Truth in Lending Act. *See Truth in Lending Act (TILA) Examination Procedures*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/compliance/supervision-examinations/truth-in-lending-act-tila-examination-procedures/ [https://perma.cc/KE5P-X45U] (last updated Oct. 22, 2021).

[200] Federal legislation has been proposed but not passed. For a discussion of previous U.S. federal interest in regulating litigation funding, see NIEUWVELD & SAHANI, *supra* note 14, at 157 n.110. *See also supra* note 13 (articulating "laboratory" of states ethos of federalism in United States).

[201] *See, e.g.*, Gwendolyn Gordon & David Zaring, *Ethical Bankers*, 42 J. CORP. L. 559, 560-62 (2017).

[202] *See, e.g.*, *id.* at 560 (describing how lack of code negatively impacts banking industry's reputation); David Zaring, *International Ethical Banking*, CONGLOMERATE (June 5, 2015), http://www.theconglomerate.org/2015/06/international-ethical-banking.html [https://perma.cc/F5W8-3VW9] (summarizing international leaders' sentiment that universal banker code of ethics is needed).

conduct for the banking industry.[203] Moreover, litigation funders organized as hedge funds that reach a certain threshold of assets under management may contribute to the systemic risk of the domestic and global financial system and, therefore, the SEC should take notice.[204] The Dodd-Frank Act may also provide appropriate avenues for regulation by the SEC or the Consumer Financial Protection Bureau ("CFPB"), depending on a funder's corporate form, operating structure, and targeted segments of the third-party funding market.[205] For now, however, financial industry regulations would not be a solution to the issue of enforcing the professional responsibilities of third-party funders.

### E. *Statutory Regime with Government Enforcement*

The most common way legislators and the public become aware of funding is through lawsuits that receive media attention. With more media coverage of third-party funding recently,[206] statutes specifically regulating third-party funding are becoming more prevalent. For example, Hong Kong and Singapore are two jurisdictions where third-party funding had previously been illegal, but their governments recently legalized and put limits on the industry.[207] In January

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[203] *See, e.g.*, Black & Buergin, *supra* note 92 (reporting that G7 finance ministers charged Financial Stability Board with drafting global code of conduct).

[204] *See generally* Cary Martin Shelby, *Closing the Hedge Fund Loophole: The SEC as the Primary Regulator of Systemic Risk*, 58 B.C. L. REV. 639 (2017) (discussing how systemically important financial institution designation system subjects industry to loopholes and risks).

[205] *See* Shannon, *Dodd-Frank Act*, *supra* note 65, at 21-22 (using High Court of Australia case to illustrate how United States could bring litigation contracts under purview of CFPB by categorizing them as financial products); Richard Painter, *The Model Contract and the Securities Laws, Part 1*, MODEL LITIG. FIN. CONT. (July 15, 2013), http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-1/ [https://perma.cc/WQ8M-QWFM] ("Litigation Proceed Rights, if used to help individual litigants cover litigation costs and other expenses, could be deemed a consumer finance product subject to disclosure and other requirements under federal law, as amended by the Dodd-Frank Act of 2010, and relevant state law.").

[206] *See, e.g.*, *supra* notes 2-7 and accompanying text.

[207] *See* Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, No. 6, (2017) O.H.K., § 2(3), https://www.elegislation.gov.hk/egazettedownload?EGAZETTE_PDF_ID=13048 [https://perma.cc/3TSR-ZNPJ] (legalizing third-party funding of arbitration subject to incorporated list of rules); Civil Law (Amendment) Act 2017, Gov't Gazette Acts Supplement (Sing.), https://sso.agc.gov.sg/Acts-supp/2-2017/ [https://perma.cc/62U9-EYY8] (declaring that third-party funding is not against public policy and is permissible subject to regulation); *see also* Press Release, Dep't of Just., Gov't of H.K. Special Admin. Region, Third Party Funding of Arbitration: Amendments Proposed for Arbitration Ordinance and Mediation Ordinance (Dec. 28, 2016), https://www.doj.gov.hk/en/community_engagement/press/20161228_pr2.html [https://perma.cc/7U92-V7UH]; *Key Bills Passed in Singapore, as Hong Kong Moves Towards Funding*, GLOB. ARB. REV. (Jan. 11, 2017), https://globalarbitrationreview.com/article/1079959/key-bills-passed-in-singapore-as-hong-kong-moves-towards-funding; *The Singapore Bills: A Detailed Look*, GLOB. ARB. REV. (Jan. 11, 2017), http://globalarbitrationreview.com/article/1079960/the-singapore-bills-a-detailed-look.

2018, as prescribed in their recent legislation legalizing the industry, Hong Kong adopted a "Code of Practice for Third Party Funding of Arbitration."[208] Hong Kong's Code of Practice does not contain a self-enforcing mechanism; instead, the code is admissible evidence of an ethics violation affecting the underlying merits case.[209] Still, Hong Kong's Code of Practice is the first code in the world issued and administered by a government directly.[210]

Hong Kong's Code of Practice is comprehensive and articulates important norms regarding the expectations of the third-party funding industry, such as a third-party funder taking responsibility for violations by its "subsidiaries and associated entities";[211] producing "clear and not misleading" promotional materials;[212] ensuring that the funded party is aware of their "right to seek independent legal advice on the funding agreement";[213] "explain[ing] clearly in the funding agreement all the key features and terms";[214] maintaining capital adequacy;[215] "maintain[ing] . . . effective procedures for managing any conflict of interest that may arise";[216] "observ[ing] the confidentiality and privilege" of the funded client's information;[217] not seeking to influence or control a party, its legal counsel or any arbitral body or institution;[218] assisting the funded party in complying with disclosure requirements;[219] specifying the funder's liability for

[208] *See* TERESA Y.W. CHENG, H.K. SEC'Y OF JUST., GAZETTE NOTICE NO. 9048, ARBITRATION ORDINANCE (CHAPTER 609): (NOTICE UNDER SECTION 98P) (Dec. 7, 2018), https://www.gld.gov.hk/egazette/pdf/20182249/egn201822499048.pdf [https://perma.cc/M6MK-BBT2]; Press Release, Gov't of the H.K. Special Admin. Region, Code of Practice for Third Party Funding of Arbitration Issued (Dec. 7, 2018), https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm [https://perma.cc/B4BB-C29B]; *see also* Arbitration Ordinance, (2022) BLIS Cap. 609, div. 4 § 98P (H.K.), https://www.elegislation.gov.hk/hk/cap609?xpid=ID_1498192254668_002 [https://perma.cc/V4LP-348V].

[209] *See* Arbitration Ordinance, div. 4 § 98S(1) ("A failure to comply with a provision of the code of practice does not, of itself, render any person liable to any judicial or other proceedings."); div. 4 § 98S(2)(a) ("[T]he code of practice is admissible in evidence in proceedings before any court of arbitral tribunal . . . .").

[210] In contrast, the U.K. government had input on ALF's code but did not issue it directly and does not administer it. *See supra* Section II.B.3.

[211] *See* CHENG, *supra* note 208, para. 2.1.

[212] *Id.* para. 2.2.

[213] *Id.* para. 2.3(1).

[214] *Id.* para. 2.3(3).

[215] *Id.* para. 2.5 (requiring that funder be able to pay all debts for minimum of thirty-six months).

[216] *Id.* para. 2.6(1).

[217] *Id.* para. 2.8.

[218] *Id.* para. 2.9.

[219] *Id.* para. 2.10 (requiring funder to remind funded party of its disclosure obligations).

costs;[220] stating clearly the termination provisions in the funding agreement;[221] not terminating the funding agreement arbitrarily;[222] remaining liable for obligations incurred prior to termination;[223] providing for the funded party to terminate the funding agreement if the funder "commit[s] a material breach of the Code or the funding agreement;"[224] "provid[ing] a neutral, independent and effective dispute resolution mechanism" for handling disputes between the funded party and the funder;[225] maintaining an effective complaints procedure;[226] and reporting complaints by funded parties, violations of the code, or violations of Hong Kong's third-party funding law to the "advisory body," a governmental entity charged with overseeing the code's administration.[227]

In the United States, several states have passed statutes to regulate consumer third-party funding. Most of these do not apply to commercial third-party funding due to the parameters of the statutes.[228] For example, some statutes apply to claims only up to a dollar amount that is lower than the claim size for a typical commercial claim.[229] Still, some of the parameters included in these statutes can be instructive in regulating the ethics of global commercial third-party funding ethics.

For example, several statutes require that the third-party funders obtain a license from the state.[230] With wide variations, at least a few states include notable provisions relating to the proper execution of the agreement, such as requiring disclosures in writing to the potential client, providing information about alternative funding sources besides litigation funding, preventing collusion between the client's attorney and the funder, restricting the funder's rate of return, prohibiting false or misleading advertising, and requiring registration or licensing of the funder with an agency of the state.[231] In addition,

[220] *Id.* para. 2.12 (requiring agreement to outline responsibilities for adverse cost payment, premium payment, security costs, and other financial liabilities).

[221] *Id.* para. 2.13.

[222] *Id.* para. 2.14.

[223] *Id.* para. 2.15.

[224] *Id.* para. 2.16.

[225] *Id.* para. 2.17.

[226] *Id.* para. 2.18 (prescribing steps to receive, investigate, review, and remedy any complaints).

[227] *Id.* para. 2.19.

[228] *See* NIEUWVELD & SAHANI, *supra* note 14, at 157-74 (presenting fifty-two-jurisdiction survey of existing laws in United States as of 2017).

[229] *See, e.g.*, NEV. REV. STAT. ANN. § 604C.100 (West 2022) (limiting regulations to funding transactions that do not exceed $500,000).

[230] Those states include Indiana, Maine, Nebraska, Nevada, Oklahoma, Tennessee, Vermont, and West Virginia. *See* PRO. STAFF OF THE COMM. ON BANKING AND INS., FLA. SENATE, BILL ANALYSIS AND FISCAL IMPACT STATEMENT ON SB 1750, at 5 n.20 (2021), https://www.flsenate.gov/Session/Bill/2021/1750/Analyses/2021s01750.pre.bi.PDF [https://perma.cc/F234-VC8J].

[231] *See generally* Blunk, *supra* note 52.

recognizing the critical importance of maintaining evidentiary privileges, some jurisdictions, such as Indiana, Vermont, Nebraska, and Nevada, have explicitly provided an exception to waiver of the attorney-client privilege and work product doctrine for documents and information disclosed to the third-party funder.[232] Privilege protection is essential because client confidentiality is a hallmark of third-party funding, just as it is a hallmark of other licensed professions, such as attorneys, doctors, and accountants.[233] Wisconsin and West Virginia are the first two states to require third-party funding to be disclosed in all cases heard in the courts of those states.[234] Finally, Indiana has set up a robust governance and enforcement regime by statute under the umbrella of trade and financial institution regulation.[235] These examples underscore that licensure, provisions in funding agreements, evidentiary privileges, disclosure, and enforcement are aspects of third-party funding that a model code of conduct should address.

### F. *Nongovernmental and Multinational Approaches*

The *Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration* provides a transnational, nongovernmental, multistakeholder example of best practice guidelines for third-party funders.[236] The International Council for Commercial Arbitration and Queen Mary University of London School of Law collaborated on the task force that issued this 2018 report containing policy suggestions for international arbitration institutions and nations to address third-party funding.[237] The task force members included "arbitrators, attorneys from both in-house and law firms, representatives from arbitral institutions, states, academics, and a range of third-

[232] *See* IND. CODE ANN. § 24-12-8-1 (West 2022) (providing exception to waiver of attorney-client privilege and work product doctrine for communications between parties and funders in Indiana); NEB. REV. STAT. ANN. § 25-3306 (West 2022) (same); NEV. REV. STAT. ANN. § 604C.240 (West 2022) (same); VT. STAT. ANN. tit. 8, § 2255 (West 2022) (same).

[233] *See, e.g.*, FED. R. EVID. 502 (addressing attorney-client privilege and work product protection in U.S. federal court).

[234] *See supra* note 85 and accompanying text.

[235] *See* IND. CODE ANN. §§ 24-12-1-0.5 to -10-1 (providing comprehensive regulation of third-party funding in civil proceedings, including mandatory licensing for funders, prohibitions on attorney referral fees, explicit rights of consumer litigants, and commission fee limits).

[236] William "Rusty" Park, Stavros Brekoulakis, and Catherine Rogers cochaired the ICCA-Queen Mary Task Force on Third-Party Funding, which was organized as a collaboration between the International Council for Commercial Arbitration and Queen Mary University of London School of Law between 2013 and 2018. The author served as a member of the Task Force. *See generally* INT'L COUNCIL FOR COM. ARB., NO. 4, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018) [hereinafter ICCA REPORT], https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf [https://perma.cc/9YRD-V2YD].

[237] *See generally id.*

party funders and brokers."[238] The report addressed the regulation of third-party funders in international arbitration in the areas of fundamentals of the funding transaction structure, definitions, disclosure and conflicts of interest, privilege and "professional secrecy," costs, security for costs, best practices, and special considerations for investment arbitration.[239] It also emphasizes that the primary reason to require disclosure of the identity of a third-party funder in an arbitration matter is to allow an arbitrator to check for potential conflicts of interest.[240] The report contains a sample list of best practices and, uniquely, a due diligence checklist for funders to employ when considering whether to fund a case.[241]

Following the task force report, many international arbitration institutions adopted rules addressing third-party funding.[242] Those rules focus mainly on disclosure to check for arbitrator conflicts of interest, allocation of costs, and orders for security for costs in investor-state arbitration.[243] In addition, nongovernmental investor-state arbitration tribunals have articulated fundamental principles for third-party regulation funding.[244] Investor-state arbitration awards are nonprecedential decisions, but their persuasive authority is powerful enough to influence conversations on international policy more broadly.[245] As a result, rules to regulate third-party funding in investor-state dispute settlements are beginning to emerge.

For example, the China International Economic and Trade Arbitration Commission's *Investment Arbitration Rules* and the Singapore International Arbitration Center's *Investment Arbitration Rules* include provisions for disclosure of third-party funding and consideration of third-party funding in the award of costs by the arbitrator.[246] Moreover, the world's leading arbitral

[238] *See id.* at ix.

[239] *See generally id.*

[240] *See id.* at 81-115 (addressing disclosures to check for arbitrator conflicts of interest). The author cochaired the subcommittee that drafted Chapter 4 of the report.

[241] *See id.* at 185-97 (providing suggested list of best practices and sample due diligence checklist).

[242] *See supra* note 96.

[243] *See supra* note 96.

[244] *See generally* Victoria Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in Investment Arbitration*, *in* CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION (Christina L. Beharry ed., 2018) (discussing reasoning of several international investment arbitration tribunals in their awards addressing third-party funding); Victoria Sahani, *Third-Party Funders*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Stefan Kröll, Andrea Bjorklund & Franco Ferrari eds., forthcoming Feb. 2023) [hereinafter Sahani, *Third-Party Funders*] (same).

[245] *See supra* note 244.

[246] *See International Investment Arbitration Rules (For Trial Implementation)*, CHINA INT'L ECON. & TRADE ARB. COMM'N (Oct. 1, 2017), http://www.cietac.org.cn /index.php?m=Page&a=index&id=390&l=en [https://perma.cc/9AK9-785D] (providing

institution for investor-state disputes, the International Centre for Settlement of Investment Disputes ("ICSID") at the World Bank, recently adopted a rule regarding third-party funding disclosure and consideration of the funding's effect on cost allocation in investment treaty arbitration.[247] Finally, at least two adopted bilateral investment treaties and one proposed multilateral treaty providing for ICSID arbitration contain provisions addressing third-party funding.[248]

Notably, the United Nations Commission on International Trade Law Working Group III on Investor-State Dispute Settlement is drafting guidance for world governments to address third-party funding in bilateral and multilateral treaties.[249] In addition, ICSID has issued the *Draft Code of Conduct for Adjudicators in International Investment Disputes* for discussion and public comments, including provisions addressing arbitrators' disclosures to detect and resolve conflicts of interest related to third-party funding.[250] In addition, the Singapore International Arbitration Center and the International Court of Arbitration of the International Chamber of Commerce have issued guidance to arbitrators encountering third-party funding in a case.[251]

Article 27, which explicitly addresses third-party funding); SING. INT'L ARB. CTR., SIAC INVESTMENT RULES 24-26 (2017), https://siac.org.sg/wp-content/uploads/2022/06/SIAC-Investment-Rules-2017.pdf [https://perma.cc/G7BR-6FHF].

[247] INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ICSID CONVENTION, REGULATIONS AND RULES 75 (2022), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf [https://perma.cc/3RPR-9ZD2] (requiring disclosure of third-party funding).

[248] *See* Investment Protection Agreement ch. 3, § B, subsec. 1, art. 3.28(i); subsec. 3, art. 3.37, June 30, 2019, 2019 O.J. (L 175), https://data.consilium.europa.eu/doc/document/ST-5932-2019-INIT/en/pdf [https://perma.cc/H4UQ-MJ6X] (stipulating that dispute settlement between parties in European Union and Vietnam must involve disclosures of third-party funders); Comprehensive Economic and Trade Agreement arts. 8.1, 8.26, Oct. 30, 2016, 2017 O.J. (L 11), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)&qid=1663528942186&from=EN [https://perma.cc/NPT8-9HX8] (stipulating same in disputes between parties in European Union and Canada); EUR. COMM'N, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP: INVESTMENT arts. 1, 8 (2015), http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf [https://perma.cc/A47C-AS66] (proposing same in disputes between parties in European Union and United States).

[249] *See Third Party Funding*, U.N.: COMM'N ON INT'L TRADE L., WORKING GRP. III: ISDS REFORM, https://uncitral.un.org/en/thirdpartyfunding (last visited Dec. 7, 2022) (containing Working Group's drafts and Secretariat's notes).

[250] *See* INT'L CTR. FOR SETTLEMENT OF INV. DISPS., DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INTERNATIONAL INVESTMENT DISPUTES: VERSION FOUR 16 (2022), https://icsid.worldbank.org/sites/default/files/CoC_V4_ENG.pdf [https://perma.cc/LWZ9-GP4Z] (proposing obligation of potential ICSID arbitrator to disclose any relationships in past five years with "any entity identified by a disputing party as having a direct or indirect interest in the outcome of the IID proceeding, including a third-party funder").

[251] *See* SING. INT'L ARB. CTR., PRACTICE NOTE ON ARBITRATOR CONDUCT IN CASES INVOLVING EXTERNAL FUNDING 1-2 (2017), https://www.international-arbitration-

### G. *No Regulation*

Finally, it is crucial to note that there is no regulation of third-party funding in much of the world. Most legislatures and courts are not yet aware of funding taking place within their borders, and, even if they are aware of it, they have not yet indicated whether funding is legal or whether they plan to regulate it. For example, legislatures, judges, and attorney regulators in the Middle East and most nations in Africa, Asia, and South America have been silent on third-party funding.[252] This silence does not mean that funding is not happening there; it simply means that the governmental authorities have not yet sought to regulate or outlaw it. An illustrative example is Brazil, where neither the legislature nor the courts have opined on third-party funding. However, Brazil's Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada ("CAM-CCBC") issued guidance—but not an arbitral rule—requiring participants in arbitrations conducted under its Arbitration Rules to disclose the identity of any third-party funder involved.[253] This guidance indicates that international arbitration practitioners in Brazil are aware of and open to third-party funding, at least in international arbitration.

### H. *Global Regulatory Uniformity Is Unrealistic*

In the years since the author proposed regulating the procedure, transaction, and ethics of third-party funding,[254] jurisdictions worldwide have implemented and experimented with such regulation in various admirable and exciting ways. This Part has illustrated the diverse approaches worldwide to regulating third-party funding. This Part has also demonstrated that harmonizing global transactional and procedural third-party funding regulations is impossible. For example, some jurisdictions require specific licenses or corporate forms, while others do not.[255] Moreover, third-party funders own law firms through ABS

attorney.com/wp-content/uploads/2018/11/Practice-Note-on-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf [https://perma.cc/5RR7-7WYP] (stressing impartiality, independence, and disclosures); INT'L CHAMBER OF COM., NOTE TO PARTIES AND ARBITRAL TRIBUNALS ON THE CONDUCT OF THE ARBITRATION UNDER THE ICC RULES OF ARBITRATION §§ II.D, III.A & XV (2021), https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration/ [https://perma.cc/6FDC-PMTW] (discussing mandatory disclosure of third-party funders).

[252] Presenting all of the information about which countries address funding and which are silent is beyond the scope of this Article. For a detailed discussion of third-party funding regulations in more than sixty countries, see NIEUWVELD & SAHANI, *supra* note 14, *passim*.

[253] *See AR 18/2016: Recommendations Regarding the Existence of Third-Party Funding in Arbitrations Administered by CAM-CCBC*, CTR. FOR ARB. & MEDIATION OF THE CHAMBER OF COM. BRAZ.-CAN. (July 20, 2016), https://ccbc.org.br/cam-ccbc-centro-arbitragem-mediacao/en/administrative-resolutions/ar-18-2016-recommendations-regarding-the-existence-of-third-party-funding-in-arbitrations-administered-by-cam-ccbc/ [https://perma.cc/R9MD-KBKP] (recommending parties disclose any third-party funders at earliest opportunity and arbitrators check for subsequent conflicts of interest).

[254] *See* Shannon, *Harmonizing*, *supra* note 54, at 883-89.

[255] *See supra* note 230 and accompanying text.

entities in some jurisdictions, but most jurisdictions prohibit nonlawyer ownership of law firms.[256] Finally, some jurisdictions completely prohibit third-party funding.[257] These wide-ranging approaches to third-party funding will lead to diversification and, optimistically, price competition in the global market for commercial clients and law firms shopping for dispute financing services.

On the other hand, third-party funders are also becoming more sophisticated and creative in generating profits across borders and have merged into massive multinational corporations.[258] These huge funders know how to operate in multiple jurisdictions and engage in regulatory arbitrage. For example, a funder prohibited from active involvement in funded matters in one jurisdiction can join an ABS in another jurisdiction (such as Arizona, the United Kingdom, or Australia) to gain more control and diversify its risk, thereby enjoying the best of both worlds.[259]

According to the ABA, lawyers can also invest in ABSs even if their law license does not allow them to practice in an ABS.[260] This investment is also a form of third-party funding for law firms and a way to engage in diversification of income streams from practicing law. For example, if a lawyer's practice is not very lucrative, the lawyer can presumably supplement her income by investing passively in the practices of other lawyers. While these activities do not seem sinister, the potential for abuse is immense in the absence of a clear code of conduct for investors, regardless of whether they are officially termed third-party funders. And even with clear rules, the potential for abuse by investors still exists, as described in the Introduction to this Article.[261]

Another fundamental problem is definitional. The regulatory definitions will always overinclude or underinclude new or changed financial offerings. Therefore, any procedural or transactional regulations will be unavoidably incomplete in their coverage or scope.[262] In addition, the terminology and understanding of the industry will change as the industry changes. For example, this Article has described a variety of third-party funders, including classic

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[256] *See* Sahani, *Reshaping*, *supra* note 56, at 410.

[257] *See, e.g.*, *supra* note 80 and accompanying text (discussing Ireland's ban on third-party funding).

[258] *See supra* notes 35, 141 (detailing recent acquisitions and mergers among funders).

[259] *See supra* notes 169-72 (describing ABS entities in Arizona, United Kingdom, and Australia); *supra* note 18 and accompanying text (discussing regulatory arbitrage).

[260] *See* ABA Comm. on Ethics & Pro. Resp., Formal Op. 499 (2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-499.pdf [https://perma.cc/T8LQ-4TJR] ("A lawyer may passively invest in a law firm that includes nonlawyer owners . . . operating in a jurisdiction that permits ABS entities, even if the lawyer is admitted to practice law in a jurisdiction that does not authorize nonlawyer ownership of law firms.").

[261] *See supra* notes 2-3, 5-8 and accompanying text.

[262] *See* ICCA REPORT, *supra* note 236, at 47, 50-52 (describing range of entities that term "third-party funder" might encompass); Sahani, *Judging*, *supra* note 12, at 412 (discussing how single regulatory definition of third-party funding would be inherently overinclusive, underinclusive, or both).

nonrecourse funders, lenders receiving interest, equity funders owning shares in clients, equity owners in ABS entities engaged in the practice of law, and funders in joint venture vehicles with clients. This Article has also mentioned judges, individuals, and corporations engaged in financing the disputes of others in surprising and often questionable ways.[263] Other forms of funding include assigning claims or monetizing judgments or awards. These involve the funder stepping into the role of the client and the original client giving up any interest in the case after selling it to the funder for less than the face value of the claim or award.[264] For the preceding reasons, a code of conduct aimed at funding activity, broadly defined, could constrain would-be funders engaging in corrupt behavior according to their conduct and not whether third-party funding is their official business.

Therefore, the solution presented in the next Part of this Article is a model code of conduct rather than a model law. Most of the world has not yet wrapped its mind around what third-party funding is or whether it is appropriate.[265] Thus, any proposed global regulatory effort must be policy neutral and customizable to allow every nation the freedom to make its own decisions regarding third-party funding, at its own pace, without external pressure from other nations.

## III. THE SOLUTION: A MODEL CODE OF CONDUCT FOR THIRD-PARTY FUNDERS

### A. *Universal Principles of Professional Responsibility for Third-Party Funders*

Given the regulatory smorgasbord described in Part II, it would be unwise to attempt to convince all jurisdictions to adopt the same legal regime for licensing funders, funding transactions, or court procedures, or to ask all international arbitration institutions to adopt the same funding provisions.[266] Nevertheless, funder ethics and professional responsibilities can and should be harmonized globally, including in jurisdictions currently silent regarding third-party funding. One approach is to develop a document that includes a framework of general principles for the ethical aspects of third-party funding on which there is essentially agreement around the world—principles that states can feel free to adopt and implement. The ideal framework would be clear but not rigid, and comprehensive but customizable.

This Part begins the discussion of developing that framework by defining third-party funders' professional responsibilities in Section A and exploring potential implementation strategies and challenges in Section B. The overarching challenge is that third-party funding is a global industry, so a

[263] *See supra* notes 2-3, 5-8 and accompanying text.

[264] *See* NIEUWVELD & SAHANI, *supra* note 14, at 6.

[265] *See supra* Section II.G. *See generally* NIEUWVELD & SAHANI, *supra* note 14.

[266] Section III.A is a distillation of the universal principles of funder codes of conduct gleaned from the sources explored in detail in Part II.

successful regime for funder professional responsibilities would need to be genuinely transnational, transsubstantive,[267] and forum neutral.[268] This Part begins that discussion by distilling some general funder professional responsibility principles from the examples presented in Part II. Individual governments can adopt these principles domestically[269] and in transnational regulatory efforts,[270] and funders can incorporate them into internal governance codes.[271]

Part II demonstrated that third-party funders already have professional responsibilities in many jurisdictions. Those professional responsibilities, though varied, can be divided into categories based on the funders' duties to multiple constituencies, including the funded party or the funded law firm's client, the funded party's attorney or the funded law firm, the legal system, the financial system, and the public. The funder's duties vary from relationship to

[267] *See* Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244 (1989) ("The second principal criticism of the Federal Rules is that they indiscriminately govern all kinds and types of litigation, whereas civil procedure rules properly constructed would be shaped to the needs of specific categories of litigation. This critique contemplates separate sets of rules for civil rights cases, antitrust cases, routine automobile cases, and so on. Yet . . . the 'trans-substantive' critique seems misguided to me. It overstates the reach of the Federal Rules and underestimates the technical and political difficulties of trying to tailor procedures to specific types of controversies.").

[268] *See generally* Sahani, *Judging*, *supra* note 12 (proposing litigation and arbitration rules regarding third-party funding). When that article was published, no court rules or arbitration rules on third-party funding had yet been adopted. Now there is a proliferation of court rules and international arbitration rules addressing, at a minimum, disclosure of third-party funding and the consideration of third-party funding by the decision-maker when allocating costs at the end of the case.

[269] Most jurisdictions that regulate third-party funding do so at the national level. Federalism, however, raises domestic regulation to the purview of international law in many jurisdictions. The United States is the only jurisdiction where funding is directly regulated only at the state level, so state third-party funding regulations directly affect international third-party funders. *See supra* notes 229-32. Hong Kong has also engaged in state-level regulation of third-party funding in international arbitration explicitly (and prohibited it in domestic litigation), while mainland China does not directly regulate third-party funders. Other nations that have a federalist system, such as Australia, regulate funding at both the state/territory level and the national level. For ease of phrasing, this Article refers to governments generally at the national level, except where specific reference to state-level law is relevant. For more information about how the federalism issue involving third-party funding is addressed in the United States, see NIEUWVELD & SAHANI, *supra* note 14, at 129-74.

[270] *See, e.g.*, *Working Group III: Investor-State Dispute Settlement Reform*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/working_groups/3/investor-state [https://perma.cc/S9GD-G4PX] (last visited Dec. 7, 2022) (promoting broad reforms to investor-state dispute settlement, including encouraging states to revise their hundreds of investment treaties to address third-party funding).

[271] *See supra* Section II.B.

relationship and jurisdiction to jurisdiction.[272] Therefore, this Part presents a general outline of universal principles concerning each relationship.

The primary challenges of the funder-party relationship are information asymmetry and unequal bargaining power between the party and the funder.[273] Thus, the professional responsibilities of the funder concerning the funder-party relationship should attempt to remedy that inequity. Funders should provide clear information that is not misleading in language that a party can understand, and advertising should not be false or misleading.[274] Funders should also advise parties to seek independent legal counsel regarding the negotiation of the funding arrangement.[275] If an individual funded party does not have the means to obtain independent legal counsel, funders should have a duty to inform and educate the funded party adequately about the benefits and risks of litigation funding before signing the funding agreement. This requirement does not supplant the attorney's duty to the funded party in the case (for example, as articulated by the ABA in the United States) to educate herself about litigation funding or associate with an attorney experienced in this area to advise the funded party appropriately.[276] Both the attorney and the funder have a duty to educate the funded party. Funders have a duty to specify clearly in the funding agreement whether and, if at all, how they may be involved in the settlement process and not to exceed that authority during the case. Funders also have a duty to preserve the confidentiality of the funded party's information[277] and any evidentiary privileges that may apply to such information to the extent possible, including executing a confidentiality agreement with the funded party providing for such protection, if applicable.[278] In addition, the funder should have an appropriate procedure in place to handle disputes between it and the funded party through mediation, arbitration, or some other mechanism.[279]

The overarching concern for the funder-attorney relationship is that funders must not interfere in the attorney-client relationship or cause the attorney to

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[272] *See, e.g.*, *supra* note 144 and accompanying text (describing Bentham IMF's relationship-specific best practices).

[273] *See supra* Section II.B.3 (discussing lack of transparency in third-party funding industry).

[274] *See, e.g.*, *supra* notes 109, 130, 212, 231 and accompanying text (discussing code provisions and laws prohibiting misleading advertising from ALF, ALFA, Hong Kong, and several U.S. states).

[275] *See supra* notes 111, 213 (describing Hong Kong's and ALF's provisions concerning independent legal counsel).

[276] *See* AM. BAR. ASS'N COMM'N ON ETHICS 20/20, *supra* note 151 (explaining lawyers' duty of competence requires them to "become fully informed about the legal risks and benefits" of third-party funding through "study or associat[ion] with experienced counsel").

[277] *See supra* notes 110, 137, 152, 217 (describing ALF's, ILFA's, ABA's, and Hong Kong's confidentiality requirements).

[278] *See supra* notes 87, 232 (citing caselaw and state statutes concerning third-party funding's impact on evidentiary privileges).

[279] *See supra* notes 106, 131, 225 (discussing ALF's, ALFA's, and Hong Kong's dispute resolution mechanisms).

breach her own professional duties under any applicable code of conduct or ethics associated with her law license(s).[280] The funder should also not exert indirect influence over the attorney by pressuring the client, withholding payment of attorney fees, or other means. Funders should neither pay commissions or referral fees to attorneys nor allow attorneys, judges, or sitting arbitrators to invest in their funding operations if such investments would lead to conflicts of interest. Funders should not engage in the unauthorized practice of law or give legal advice to their clients.

The main concerns for the funder-legal system relationship are the potential for conflicts of interest involving judges and arbitrators and the potential disruption to the legal system if a funder unexpectedly withdraws or terminates its financing of a pending case. A funder should encourage the funded party or law firm to disclose the funder's identity to the court or arbitral tribunal in compliance with the local laws in the jurisdiction in which the case is pending or the arbitration is seated.[281] If required by local law, a funder should also disclose its identity to the opposing side. The funder should not include unfair termination or withdrawal provisions in its contract with a funded litigant.[282] If the funder does withdraw, the client may need to notify the court or arbitral tribunal of the funder's withdrawal so that the court may stay the case to allow time for the client to make alternate funding arrangements. Funders should also develop a systematic way to track which cases have received funding to prevent funded parties from receiving a windfall of excess funding and to mitigate the potential for abuse by both funders and funded parties.[283] Funders should promptly pay security for costs or adverse cost orders when contractually agreed or ordered by a court or arbitral tribunal. Funders must not fund opposing sides of the same case under any circumstances. Funders should avoid funding opposing parties in different cases where such involvement by the funder could create conflicts of interest for involved attorneys, arbitrators, or judges.

The funder's primary duty in the funder-financial system relationship is to ensure that its funding corporation has adequate capital to handle any eventualities that may occur in cases across its portfolio.[284] A funder must not be so highly leveraged that it lacks enough cash on hand to adequately finance its portfolio of cases adequately. In addition, the funder must have sufficient capital to continue operations during the long waiting time when trying to collect on a judgment or arbitral award. The funder should obtain and maintain any licenses or registrations required to operate as a litigation funder or to solicit

[280] *See supra* Section II.C (explaining indirect third-party funding regulation through attorney ethics rules).

[281] *See supra* notes 85, 219, 250-51, 253 (describing disclosure requirements in United States, Hong Kong, and international arbitral institutions).

[282] *See supra* notes 117, 221-23 (discussing ALF's and Hong Kong's termination provisions).

[283] *See supra* note 132 (describing ALFA's IMS database).

[284] *See supra* notes 114, 136, 215 (citing ALF's, ILFA's, and Hong Kong's capital adequacy requirements).

investors in all the jurisdictions in which it operates.[285] Finally, the funder should provide appropriate, accurate, and understandable disclosures—such as those in a prospectus—to investors and potential investors in funding while also maintaining the confidential and privileged nature of its clients' information.[286]

Concerning the funder-public relationship, funders should educate the judiciary, attorneys, litigants, and the general public about their industry.[287] Funders should also engage in funding cases on a pro bono basis, particularly civil rights cases or other cases of public importance that attorneys traditionally have accepted on a pro bono, reduced fee, or wholly contingent fee basis.[288] Finally, funders should work to improve their image and standing in the eyes of the public.

In sum, the overarching goal of the Model Code of Conduct for Third-Party Funders would be to articulate universal norms and standards for the industry against which to measure compliance. Finally, any effective code of professional responsibility for funders should include an enforcement mechanism and designate an entity to carry out such enforcement. The enforcement entity should have the power to execute appropriate sanctions against a noncompliant funder to ensure that unprofessional or irresponsible funders either correct their behavior or are driven out of the market.[289] Given the diverse regulatory approaches across jurisdictions, local enforcement is more feasible than multilateral enforcement.

In Part II, this Article analyzed several different existing models of direct and indirect regulation of funders. Adopters of the Code would be free to choose from those models or devise new systems to promulgate, oversee, and enforce the Code in their particular jurisdiction. The Code should encourage nations to designate a public or private entity, governmental agency, or court to enforce the Code and should develop sanctions to put funders on notice of the consequences of noncompliance. Sanctions could include, for example, fines or barring the funder from funding matters with specific characteristics, such as a particular industry, type of client, or method of dispute resolution (e.g., banned in litigation

[285] *See supra* notes 186-87, 191, 231-32 (describing licensing requirements in Australia and United States).

[286] *See supra* note 193 and accompanying text (noting public company disclosure rules); *supra* notes 277-78 and accompanying text (discussing confidentiality and evidentiary privileges).

[287] *See supra* note 145 (describing Bentham IMF's funder-public relationship best practices).

[288] *See* Sahani, *Rethinking*, *supra* note 21, at 631 (concluding third-party funders should finance pro bono cases by analogizing to attorney pro bono requirements); *see also supra* note 145.

[289] *See supra* text accompanying notes 138-39 (explaining limitations of self-regulatory enforcement).

but allowed in arbitration).[290] The most severe sanction would be equivalent to expulsion in the ALF Code of Conduct: banning the funder from financing all types of matters in that jurisdiction.[291]

States may also wish to declare that a funder sanctioned under this Code in one jurisdiction is not allowed to engage in new funding in another Code jurisdiction until the funder cures the offending conduct. Conversely, the funder may be required to delay withdrawal from funding clients in pending cases if withdrawal would harm those clients or their legal representation.[292] Moreover, states should publish information about the imposition of sanctions on a particular funder with the global community of enforcement bodies across Code-adopting nations to help reduce the problem of funders moving to a new jurisdiction after one jurisdiction sanctions them. An apt analogy is the problem of a suspended or disbarred attorney attempting to practice law in a different jurisdiction. Many jurisdictions publish the names of sanctioned attorneys in bar publications and on the bar's website to combat this problem. In addition, the ABA Model Rules of Professional Conduct address this problem by admonishing attorneys that practicing law in one jurisdiction while suspended or disbarred in another jurisdiction is sanctionable conduct.[293] Indeed, the Code should treat such funder sanctions similarly.

In sum, funders can be responsible for abiding by a unified, global code of professional conduct even with vastly different laws governing third-party funding transactions or procedures in the nations or states in which they operate. For example, the ABA promulgates rules of professional conduct for attorneys, but the rules governing the actual practice of law in each respective state are vastly different.[294] Regardless, the ABA Model Rules of Professional Conduct are influential in shaping the direction of the legal profession and codifying the professional responsibilities of lawyers. Similarly, suppose a nongovernmental body like the ABA could develop a code generalized to address various

[290] As an example, the law in Hong Kong allows third-party funding only in arbitration, not in domestic litigation. *See* Hong Kong Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance, (2017) BLIS, § 2(3) (H.K.), https://www.elegislation.gov.hk/egazettedownload?EGAZETTE_PDF_ID=13048 [https://perma.cc/3TSR-ZNPJ] (stating that, although provisions 98K and 98L removed prohibitions on maintenance, champerty, and barratry for arbitration funding, "[s]ections 98K and 98L do not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal").

[291] *See supra* note 139 (discussing range of sanctions under ALF Code of Conduct, including expulsion from ALF).

[292] *See* MODEL RULES OF PRO. CONDUCT r. 1.16 (AM. BAR ASS'N 2021) (requiring court approval before attorney's withdrawal from representation).

[293] *See id.* r. 5.5 (applying to regular attorneys in section (c) and to in-house counsel in section (d)).

[294] *See Jurisdictional Rules Comparison Charts*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/6UDW-H948] (last visited Dec. 7, 2022) (detailing variations in rules of professional conduct across U.S. jurisdictions).

situations and regulatory environments in which funders might find themselves in various States or national jurisdictions. Then, like the ABA Model Rules of Professional Conduct for lawyers, nations could take that model code and adapt it to how that state prefers to regulate the third-party funding industry.

In addition, global funders operate in multiple countries worldwide and multiple states in the United States with disparate regulations. A global code would give funders operating in multiple jurisdictions an overarching, global mandate regarding their professional responsibilities—regardless of the nuances of each jurisdiction's substantive law. Having universal professional responsibility principles and guidelines would help standardize funder behavior from jurisdiction to jurisdiction while still allowing them to offer various financing products that differ widely across jurisdictions.

### B. *Potential Models for Implementation*

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention," is a tremendously successful example of international norms with global application and local enforcement in international arbitration. The New York Convention applies in more than 171 signatory nations,[295] and new signatory nations are still joining the sixty-three-year-old Convention in 2022.[296] It is globally applicable but locally enforced through domestic arbitration legislation, such as the Federal Arbitration Act[297] in the United States. Domestic courts in signatory nations apply their local procedural rules and standards to enforce arbitral clauses and awards under the New York Convention. By signing and ratifying the New York Convention, a nation agrees to enforce private arbitral agreements and private arbitral awards, absent limited availability for reservations from the Convention and limited grounds for refusal of enforcement under Article V.[298] But the secret to the New York Convention's success is that it does not micromanage states implementing it. For example, the Convention does not tell states how to give effect to arbitral agreements and awards. Instead, the New York Convention

[295] *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, U.N. COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [https://perma.cc/3PSL-C8MU] (last visited Dec. 7, 2022) (listing 171 parties to Convention). The author uses the term "nation" loosely because there are some nonrecognized quasi-state entities that are parties to the Convention (e.g., Palestine).

[296] For example, Suriname is the most recent nation to join the New York Convention in October 2022. *See id.*

[297] 9 U.S.C. § 1 et. seq. For a discussion of the problems with the Federal Arbitration Act and opportunities for much-needed reform, see generally William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241 (2003); and William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75 (2002).

[298] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 5, June 10, 1958, 330 U.N.T.S. 38, 40-42.

delegates responsibility for the procedural and enforcement mechanisms to the traditional court rules and procedures that apply to domestic court proceedings and the enforcement of domestic court judgments.[299] Thus, the New York Convention provides a bold framework with built-in freedom and may provide an excellent implementation model for a third-party funding code of conduct to emulate.

However, although the New York Convention provides a helpful analogy, a convention is not realistic for regulating third-party funding for several reasons. First, the New York Convention took many decades to become successful, and it would be unwise to wait so long to adopt an ethics framework for third-party funding. Second, the New York Convention carries several assumptions that are not true for third-party funding. For example, the Convention addresses arbitration, which is legal in every nation, as it is one of the oldest forms of human dispute settlement. In addition, every nation has a court system with the capacity to issue decisions and enforce them, and therefore, enforce arbitration agreements and awards under the Convention. In contrast, third-party funding is not legal everywhere, and the industry needs ethical guidance now. Moreover, the definitions of arbitration agreements, arbitral awards, and arbitrators are well-established and universal worldwide. Finally, these assumptions are remarkable in their consistency across legal cultures and societies. The New York Convention would be meaningless without these assumptions, given its brevity, simplicity, and intentional lack of definitions.

In contrast, third-party funding is not legal in every nation, and the definition of funding is constantly changing. In addition, many individuals and entities are engaged in nontraditional forms of funding in which directly profiting financially from third-party funding may not be the primary motive.[300] However, what *is* universal is a visceral reaction in every nation that something is not right about letting the practice of third-party funding run amok in our dispute settlement systems with no oversight or accountability. Moreover, examples of funding "piracy" highlight the industry's need for ethical standards. The community of international dispute settlement practitioners and the community of nations share enough common ground regarding fairness and due process in dispute settlement to reach an overarching consensus regarding what ethics-related behavior by third-party funders would be undesirable.

Moreover, this shared ethos may be enough to support an effort to develop the Code. Nations and states could use the Code as a template. For example, the ABA Model Rules of Professional Conduct are the framework for the

[299] *See id.* art. 3 ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of the procedure of the territory where the award is relied upon . . . .").

[300] *See* Sahani et al., *supra* note 244, at 48-50 (addressing not-for-profit funding, wherein profit is not primary motivation for funding); *see also* Sahani, *Third-Party Funders*, *supra* note 244, at 326-29 (categorizing and overviewing not-for-profit funders).

professional conduct rules in every state and the D.C. Bar.[301] Similarly, the UNCITRAL Model Law on International Commercial Arbitration is the basis for legislation in more than eighty-five nations and eight states.[302] In the same vein, the Code would provide a framework for local regulators to emulate, especially those unfamiliar with or unaware of the funding within their borders. Funders could also mirror the Code in their internal codes of conduct to bolster global confidence in the integrity of funder self-regulation.[303]

Instead of a convention, a model code for the professional conduct of funders is a better format for regulating the ethics of third-party funding. In addition, it would provide a valuable framework for states that have chosen to allow third-party funding without ostracizing states that have chosen to outlaw third-party funding.[304]

For example, in jurisdictions where funding is allowed, the Code could coexist with existing laws and rules regarding procedures and transactions that may already apply to funders regarding licensing, financial services, corporate, civil procedure, and arbitration rules. For example, the U.S. Federal Arbitration Act applies in the eight states that have adopted the UNCITRAL Model Law on International Commercial Arbitration. If there is a conflict, the Federal Arbitration Act controls.[305] Moreover, the Code would enhance the efficacy of the legal regimes for funding around the world. It would provide ethical principles to serve as an interpretive lens through which to view statutes and other forms of regulations and resolve regulatory doubts or gaps in favor of the professionally responsible course of action. Similarly, the Code would invite nations to address the ethical issues surrounding funding, not just the procedural and transactional issues, when regulating the industry.

To support jurisdictions where funding is not allowed, the Code would say nothing about the legality or desirability of third-party funding, leaving states

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[301] California was the last holdout until it finally adopted rule revisions modeled on the ABA Model rules in 2018. *See* Michael E. McCabe, Jr., *Seeking National Uniformity, California (Finally) Adopts New Ethics Rules*, MCCABE & ALI, LLP, https://ipethicslaw.com/seeking-national-uniformity-california-finally-adopts-new-ethics-rules/ [https://perma.cc/A6GW-6EUC] (last visited Dec. 7, 2022).

[302] The eight states are California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, and Texas. *See Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006*, U.N., COMM'N ON INT'L TRADE L., https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status [https://perma.cc/U6TG-37FU] (last visited Dec. 7, 2022) (listing all adopters of UNCITRAL Model Law).

[303] *See supra* Section II.B (discussing funder self-governance).

[304] Ireland is an example of a jurisdiction that has outlawed funding, but it may soon change its position. *See supra* note 80 and accompanying text.

[305] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that Federal Arbitration Act preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))); DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 50-51 (2015) (reaffirming preemption doctrine as expressed in *AT&T Mobility LLC*).

free to determine whether funding is or is not allowed in their jurisdiction. If a state decides to allow funding, it could adopt the Code and choose an oversight, accountability, and enforcement mechanism that suits its legal system. But, like the New York Convention, the Code would not tell states how best to accomplish oversight, compliance, enforcement, or sanctions of the third-party funders operating within their jurisdictions.

As another implementation example, the development of attorney ethics regulation in the United States is instructive. The legal services industry has evolved dramatically over the centuries, and along with innovation, new avenues for potential abuse have arisen. For example, attorney contingency fees, conditional fees, and damages-based agreements were illegal for centuries until they were legalized jurisdiction by jurisdiction during the latter half of the twentieth century through the early 2000s.[306] In addition, the ABA created and revised its Model Rules of Professional Conduct for attorneys during the late twentieth century to provide crucial guideposts and acceptable paths for attorneys to follow when handling new situations and implementing new technologies. As a result, these dispute financing methods are now ubiquitous in the common law world and gaining traction in the civil law world.

Third-party funding is the newest technology for financing legal services, namely nonlawyers serving as dispute financiers.[307] As a result, funders need a similar form of professional responsibility guidance that helped shape the growth of the lawyer funding phenomenon. Notably, the G-7 countries have asked regulators to develop a global code of conduct for the global banking industry.[308] If investment bankers will soon have a global code of conduct, so should third-party funders.

The licensing, transactional, and procedural aspects of third-party funding invoke corporate law, securities law, contract law, usury laws, specific statutes addressing third-party funding capitalization requirements, statutory caps on funder rates of return, and other similar technical regulations. As Part II illustrated, licensing, transactional, and procedural regulations for funding vary widely worldwide and defy unification and harmonization. In contrast, ethics and professional conduct norms for funders are trending in the same direction.[309] Yet, ethics and professional responsibility are the most underdeveloped aspects of the global regulatory expectations of third-party funders.

Promising multilateral efforts at unifying treaty-based regulatory approaches to third-party funding are already underway in investor-state dispute settlement. As mentioned earlier in this Article, UNICTRAL Working Group III is working to capture this ethos regarding third-party funding as part of its

[306] For an overview of the history of contingency fees in the United States, see Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 263-65 (1998).

[307] *See, e.g.*, *Alternative Business Structures*, *supra* note 169.

[308] *See, e.g.*, Black & Buergin, *supra* note 92.

[309] *See supra* Section II.H.

recommendations to states revising or adopting new bilateral or multilateral investment treaties.[310] An extreme but straightforward example of this universal ethos is that every nation in the world would probably consider it unacceptable for a funder to bet on both sides of a single case—funding both the claimant and the respondent against each other—due to the glaring conflict of interest. This principle is universal enough to warrant inclusion in the Code.

Finally, the Code could be accompanied by a funding model law, like the UNCITRAL Model Law, which would provide an example for local legislators to emulate, especially if they are not as familiar with funding or are unaware of the funding occurring within their jurisdiction. Like the Code, a funding model law could exist alongside existing laws that may already apply to funders in a jurisdiction, and those existing laws would take precedence over the model law.

## CONCLUSION

This Article has proposed harmonizing the professional responsibility tenets for the third-party funding industry by devising a transnational, transsubstantive,[311] and forum-neutral Model Code of Conduct for Third-Party Funders. Moving toward that goal, this Article has briefly introduced samples of the various approaches that nations have adopted to regulate third-party funding ethics and professional responsibility and distilled some universal principles that can be codified into the Code. In the future, a robust qualitative and quantitative study of all the approaches worldwide to regulating third-party funder ethics and professional responsibility would yield a more comprehensive set of principles.

Those skeptical of a universal approach to principles of professional responsibility for funders proposed in this Article may argue that established funders would welcome more regulation to increase the barriers to entry and keep out new market entrants. Indeed, excluding new funders might discourage competition for terms and prices in the third-party funding market and reduce party choice. On the other hand, an unimpeachable goal is that unethical funders should be excluded from the market. The insurance industry is heavily regulated, yet no one is complaining that a dubious, start-up insurance company has been regulated out of business. Instead, litigants want to be able to rely on their third-party funders just like they rely on their insurers. A universal, transnational code of conduct with an appropriate, locally tailored enforcement regime in each jurisdiction would begin to bolster public confidence globally in the funding industry. Funders would not be able to change jurisdictions to avoid their professional responsibilities, and jurisdictions that choose to prohibit funding would not be forced to allow it.

In conclusion, the third-party funding industry should be subject to codified principles of professional responsibility that are harmonized and unified across the globe, independent of the local laws regarding the technical business of funding. The contours of the Code still need to be hashed out, and this Article

[310] *See supra* note 249 and accompanying text.

[311] *See supra* note 267 (explaining transsubstantivity).

provides a starting point for principles to include. The hope is that this Article will spark a discussion among funders, regulators, lawyers, clients, and industry observers regarding whether the idea of creating and implementing a worldwide code of conduct is an appropriate next step in the continued evolution of the third-party funding industry.

The same effort could help create a companion funding model law to provide an example for local legislators to emulate, especially if they are not as familiar with funding or are unaware of the funding occurring within their jurisdiction. A model law could exist alongside existing laws that may already apply to funders in a jurisdiction, such as corporate law, financial services law, or usury laws. Drafting a model law is beyond the scope of this Article but is ripe for further exploration in future work.

In a future world, all cases may be funded through claim assignment, and all "parties" may be funders. This would be similar to how a single car insurance company can be a party in thousands of car accident cases to recover amounts paid out on claims, even if the original human policyholder is no longer involved in the case. The question then will be how decision-makers will decide on which version of the truth to adopt when none of the humans or companies involved in the underlying dispute are in the courtroom or arbitration hearing room. Or maybe third-party funding will be as uncontroversial as contingency fees in the future once the decision-makers are all robots.[312]

[312] *See generally* Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135 (2019) (discussing possibility of artificial intelligence judges deciding cases).