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FINANCING PLAINTIFFS' LAWSUITS: AN INCREASINGLY POPULAR (AND LEGAL) BUSINESS

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In the late eighties and early nineties there were a few publicized cases in which the plaintiffs invited investors to finance their litigation in exchange for a share of the awards if the plaintiffs won. This kind of arrangement provides access to the justice system which might otherwise be denied impecunious plaintiffs with meritorious claims. The problem with this kind of arrangement is that it is champerty, which is prohibited in most states. This Article discusses Massachusetts' recent rejection of the champerty prohibition, the expansion of exceptions to the prohibition in this country and others, and the emergence of firms whose business is investing in litigation. The Article concludes that any potential evils associated with champerty are addressed in a variety of other laws and, therefore, champertous agreements should be enforceable.

INTRODUCTION

In the late eighties and early nineties, articles about investing in other people's lawsuits started appearing in journals, magazines, and newspapers with some regularity.[1] The sudden interest was sparked by a few cases in which the plaintiffs invited investors to finance their litigation in exchange for a share of the awards if the plaintiffs won.[2] The case that particularly attracted the public's attention was *Intex Plastic Sales Co. v. Hall*.[3] It was attention-getting not only because it involved an unusual method of financing the litigation, but also because it involved waterbeds. When the

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1. *See, e.g.*, Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485 (1992); Donald L. Abraham, Note, *Investor-Financed Lawsuits: A Proposal to Remove Two Barriers to an Alternative Form of Litigation Financing*, 43 SYRACUSE L. REV. 1297 (1992); *Financing Inventors' Lawsuits*, N.Y. TIMES, Mar. 11, 1989, at 36; Linda Himelstein, *Legal Affairs: Investors Wanted—for Lawsuits*, BUS. WK., Nov. 15, 1993, at 78; Richard B. Schmitt, *Selling Interests in Syndicated Lawsuits Raises Cash—and Questions over Ethics*, WALL ST. J., Oct. 20, 1998, at B1; Catherine Yang, *Psst! Wanna Buy a Lawsuit?*, FORBES, May 19, 1986, at 67.

2. *See* Killian v. Millard, 279 Cal. Rptr. 877, 878 (Ct. App. 1991); Intex Plastics Sales Co. v. Hall, 20 U.S.P.Q.2d (BNA) 1367 (N.D. Cal. 1991).

3. 20 U.S.P.Q.2d (BNA) at 1367.

inventor of the waterbed did not have the funds to pursue a patent infringement claim against a $20 million company selling waterbeds, he exchanged a share of any proceeds recovered from the alleged infringer for an investment group's financial and administrative support for litigation of the claim.[4] The defendant waterbed company had the suit dismissed on the grounds of champerty.[5]

Champerty is a practice in which one person, the champertor, agrees to support another in bringing a legal action, in exchange for part of the proceeds of the litigation.[6] It is a form of maintenance, which is a general category that includes any agreement by which one person finances another's legal action.[7] These arrangements have been prohibited either by common law, statutory law, or public policy throughout the United States and the United Kingdom.[8] The champerty doctrine, which prohibits the purchase of litigation rights, is based on longstanding fears that champertors will encourage frivolous litigation, harass defendants, increase damages, and resist settlement.[9]

In spite of the fears, however, exceptions to the prohibition on champerty have been commonplace because of a recognition that without third party support some meritorious plaintiffs who lacked the financial wherewithal would not be able to litigate their claims.[10] As far back as 1787, for example, Jeremy Bentham railed against "the antique laws" prohibiting "the hard-named and little-heard-of practice of Champerty."[11] He asserted that

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4. *See* Edward S. Wright, Investment in Litigation from the Plaintiff's Perspective 2 (on file with author). Wright was the attorney for the inventor.

5. *See* Intex Plastics Sales Co. v. Hall, No. C-85-2987-JPV (N.D. Cal. Sept. 14, 1989). Subsequently, Hall, the inventor, assigned an interest in his patent and the court granted his motions to reinstate his claim and to join the assignee in the action. *See* Intex Plastics Sales Co. v. Hall, No. C-85-2987-JPV (N.D. Cal. Apr. 13, 1990). After a jury trial and a hearing on post-judgment motions, the district court affirmed the jury's finding that Hall held a valid patent that was infringed and awarded Hall damages and interest of almost $6,500,000. *See id.*

6. *See generally* Martin, *supra* note 1; Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 48–78 (1935); Y.L. Tan, *Champertous Contracts and Assignments*, 106 L.Q. REV. 656, 656–79 (1990).

7. *See* Tan, *supra* note 6, at 657. Barratry is another form of maintenance that specifically refers to promoting and exciting groundless lawsuits. *See, e.g.*, CAL. PENAL CODE § 158 (West 1999); IDAHO CODE § 18-1001 (1997); 720 ILL. COMP. STAT. 5/32-11 (West 1998) (defining common barratry in each jurisdiction).

8. *See generally infra* notes 14, 31, 73–79, 83–86, 93–94, 101 and accompanying text.

9. *See* Note, *The Effect of Champerty on Contractual Liability*, 79 L.Q. REV. 493, 494 (1963).

10. *See generally infra* notes 127, 137–38, 155–60 and accompanying text.

11. JEREMY BENTHAM, *Letters I & XII*, *in* IN DEFENCE OF USURY 1–5, 117–28 (1787).

> [w]ealth has indeed the monopoly of justice against poverty: and such monopoly it is the direct tendency and necessary effect of regulations like [those prohibiting champerty] to strengthen and confirm. But with this monopoly no judge that lives now is at all chargeable. The law created this monopoly: the law, whenever it pleases, may dissolve it.[12]

More than two hundred years later, as this century comes to a close, the law is starting to dissolve some of the prohibitions against third party support for meritorious litigation.

One important development is the Massachusetts Supreme Judicial Court's rejection of champerty as a cause of action, overturning hundreds of years of legal precedent.[13] Part I of this Article discusses that court's groundbreaking decision and compares it with existing law in other states. Part II addresses the expansion of the exceptions to the champerty prohibition, including the issue of lawyers' contingency fees, in this country and others. Part III describes the emergence of firms whose business is champerty, that is, investing in litigation. Before concluding that the champerty prohibition should be abolished and investment in litigation accepted, the Article reviews the various mechanisms available to specifically address the evils champerty was assumed to create.

I. CHAMPERTY IN THE UNITED STATES

A. Massachusetts

Massachusetts had enforced through common law a prohibition against maintenance and champerty,[14] but with significant exceptions. For example, Massachusetts courts have not prohibited agreements where the alleged champertor had some intent and interest other than bringing suit.[15] As long ago as 1894, the Massachusetts Supreme Judicial Court recognized that agreements to support a lawsuit in exchange for a share of its proceeds may actually have the beneficial effect of encouraging dispute resolution.[16] Finally, after a series of cases in which the court questioned the

12. *Id.* at 123.
13. *See infra* text accompanying notes 14–19.
14. *See, e.g.*, Thurston v. Percival, 18 Mass. (1 Pick.) 415, 416–17 (1823).
15. *See, e.g.*, Williams v. Fowle, 132 Mass. 385, 388–89 (1882).
16. *See* Joy v. Metcalf, 37 N.E. 671 (Mass. 1894).

usefulness of maintenance and champerty doctrines,[17] at the end of 1997 the court held in *Saladini v. Righellis*[18] that "the common law doctrines of champerty, barratry, and maintenance no longer shall be recognized in Massachusetts."[19] In that case, Saladini agreed in writing to provide the funds for Righellis to pursue a legal claim arising out of his interest in Putnam Manor, real property in Cambridge, Massachusetts.[20] In exchange, any recovery would first be used to reimburse Saladini and then, after the attorney was paid, she would receive fifty percent of any remaining funds.[21] Righellis was not satisfied with his attorney, hired a new one, and orally agreed with Saladini, who paid half the new lawyer's retainer and disbursements, that their original agreement would remain in effect.[22] Saladini paid Righellis a total of $19,229.[23]

Righellis settled the Putnam Manor lawsuit for $130,000 and received some of that money but did not tell Saladini.[24] When Saladini found out, she filed suit, but her complaint was dismissed because the judge ruled her agreement with Righellis was "champertous and unenforceable as against public policy."[25] She appealed, and the Supreme Judicial Court found in her favor.[26] The court noted that the champerty doctrine is no longer necessary because there are other ways to limit frivolous lawsuits and other such mischief.[27] The court provided some guidance on how it would proceed without the champerty doctrine. When faced with a litigation-financing agreement, the court will look to see that the fees are reasonable and that there has not been "impermissible overreaching by the financier."[28] In the instant case the court concluded that it would be unfair for Righellis to receive a windfall at Saladini's expense.[29]

While eliminating the champerty doctrine in Massachusetts, the court specifically stated in a footnote that it was not authorizing

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17. *See, e.g.*, Berman v. Linnane, 679 N.E.2d 174 (Mass. 1997); Christian v. Mooney, 511 N.E.2d 587 (Mass. 1987), *cert. denied sub nom.* Christian v. Bewkes, 484 U.S. 1053 (1988); McInerney v. Massasoit Greyhound Ass'n, 269 N.E.2d 211 (Mass. 1971).
18. 687 N.E.2d 1224 (Mass. 1997).
19. *Id.* at 1224; *see also* sources cited *supra* note 7 (explaining barratry).
20. 687 N.E.2d at 1224–25.
21. *See id.* at 1225.
22. *See id.*
23. *See id.*
24. *See id.*
25. *Id.*
26. *See id.* at 1226.
27. *See id.* at 1226–27.
28. *Id.* at 1227.
29. *See id.* at 1228.

"the syndication of lawsuits."[30] The court gave no explanation of this dicta. It seems to mean that it is permissible for one person, like Saladini, or one business entity to support someone else's lawsuit, but it may not be permissible for a group, i.e., a syndicate, to do the same thing. If, however, there is no champerty prohibition in Massachusetts, it is not clear on what grounds a syndicate's support of another's lawsuit that is not frivolous or harassing or mischievous would void the lawsuit. Perhaps the court, not faced in this case with the syndication issue, wanted to make it clear that it was not encouraging a new industry in litigation without having had the need to investigate any unforeseen implications of such a development. In spite of these reservations, Massachusetts has now gone far beyond most other states in permitting litigants to seek outside support for their legal expenses.

B. New York

In New York, by statute, no corporation or association, nor any person or partnership in the collection or adjustment of claims business, may acquire an interest in any thing in action or any claim "with the intent and for the purpose of bringing an action or proceeding thereon."[31] Violation is a misdemeanor resulting in a

30. *Id.* at 1227 n.7.

31. The statute reads:

> § 489. Purchase of claims by corporations or collection agencies.
> No person or co-partnership, engaged directly or indirectly in the business of collection and adjustment of claims, and no corporation or association, directly or indirectly, itself or by or through its officers, agents or employees, shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon; provided however, that bills receivable, notes receivable, bills of exchange, judgments or other things in action may be solicited, bought, or assignment thereof taken, from any executor, administrator, assignee for the benefit of creditors, trustee or receiver in bankruptcy, or any other person or persons in charge of the administration, settlement or compromise of any estate, through court actions, proceedings or otherwise. Nothing herein contained shall affect any assignment heretofore or hereafter taken by any moneyed corporation authorized to do business in the state of New York or its nominee pursuant to a subrogation agreement or a salvage operation, or by any corporation organized for religious, benevolent or charitable purposes.

N.Y. JUD. LAW § 489 (McKinney 1999).

penalty of not more than $5000,[32] but a violation can also result in the dismissal of an otherwise legitimate legal claim.[33]

The last time the New York Court of Appeals ruled on this issue, in 1971, it described the legislative reasons for making champerty and maintenance illegal as being to "prevent the resulting strife, discord and harassment which could result from permitting attorneys and corporations to purchase claims for the purpose of bringing actions thereon."[34] The court, in holding that the champerty and maintenance statute, Judiciary Law Section 489, had not been violated, noted that "in order to fall within the statutory prohibition, the assignment [of a legal claim] must be made for the very purpose of bringing suit and this implies an exclusion of any other purpose."[35] Thus, the court construed the statute narrowly (just as the Massachusetts court had interpreted its common law prohibition before eliminating it entirely), as generally required for a penal statute. Nevertheless, the court accepted the age-old wisdom that champerty would bring strife without explaining how that would happen.

In more recent cases, lower New York courts have frequently found that the prohibition in Judiciary Law Section 489 did not apply to the alleged champertor because, in fact, no mischief or strife had been caused. For example, New York courts have routinely held that when an assignee of a note and mortgage brings a foreclosure action against the defaulting borrower, the assignee is not in violation of Section 489 when foreclosure has "a legitimate business purpose."[36] In one such case, *Limpar Realty Corp. v. Uswiss Realty Holding, Inc.*,[37] Uswiss gave General Electric Credit Corporation (GECC) a mortgage to secure a $1,750,000 note payable to GECC.[38] Uswiss missed its monthly payments, defaulting on the note.[39] GECC accelerated the loan balance and then assigned the note and mortgage to Limpar for $1,801,397.[40] Less than a month after acquiring the mortgage, Limpar commenced this foreclosure

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32. *See id.*

33. *See, e.g.*, Bluebird Partners v. First Fidelity Bank, 686 N.Y.S.2d 5, 6 (App. Div. 1999).

34. Fairchild Hiller Corp. v. McDonnell Douglas Corp., 270 N.E.2d 691, 693 (N.Y. 1971).

35. *Id.*

36. Limpar Realty Corp. v. Uswiss Realty Holding, Inc., 492 N.Y.S.2d 754, 756 (App. Div. 1985); *see also* G.G.F. Dev. Corp. v. Andreadis, 676 N.Y.S.2d 488 (App. Div. 1998); Small Bus. Admin. v. Mills, 610 N.Y.S.2d 371 (App. Div. 1994); Wainco Funding v. Logiudice, 606 N.Y.S.2d 86 (App. Div. 1993).

37. 492 N.Y.S.2d at 754.

38. *Id.*

39. *See id.*

40. *See id.* at 754–55.

action against Uswiss.[41] Uswiss contended that Limpar had violated Section 489, but the First Department of the Appellate Division dismissed the contention because Limpar's "intent to sue was merely incidental and contingent" to their "legitimate business purpose" of assembling properties on one block.[42]

The reasoning in the mortgage cases is not very persuasive. The United States Bankruptcy Court for the Southern District of New York has correctly concluded that New York case law is clear: even if a mortgage is purchased for the sole purpose of foreclosing, Section 489 is not violated.[43] The assignees in these cases have violated the letter of the statute, but they have not stirred up litigation. They have merely substituted themselves for the original parties in interest because they each perceive the exchange to serve their business interests.

A comparison of two New York cases illustrates how courts apply the letter of the statute if the alleged champertor is engaged in some kind of undesirable behavior other than merely buying an interest in another's litigation but will get around the statute if the alleged champertor's behavior seems benign. In *Ehrlich v. Rebco Insurance Exchange, Ltd.*,[44] Ehrlich, the plaintiff and an attorney, sued for breach of a contract in which he was retained by Rebco as a legal consultant for four and a half years at an annual fee of $80,000.[45] Dr. Carl Neuman was president of Rebco and its only insured.[46] Rebco assigned Ehrlich to represent Neuman in approximately one hundred medical malpractice actions.[47] When Rebco did not pay money owed over a two-year period, Ehrlich terminated the agreement and brought suit.[48] Before the litigation, Ehrlich had referred Neuman to another law firm for bringing a tax certiorari proceeding concerning a piece of property owned by the Sarah H. Neuman Foundation and leased to Neuman, who was president of the Foundation.[49] Ehrlich received a referral fee from that law firm.[50] When Ehrlich instituted the instant case, Neuman counterclaimed for breach of fiduciary duty and unjust enrichment

41. *See id.*
42. *Id.* at 756.
43. *See* Downtown Athletic Club v. Caspi Dev. Corp., No. 98 B41419 JLG, 1998 WL 898226, at *13 (Bankr. S.D.N.Y. Dec. 21, 1998).
44. 649 N.Y.S.2d 672 (App. Div. 1996).
45. *See id.* at 673.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.*

based on Ehrlich's acceptance of the referral fee.[51] The counterclaim was based on a written agreement in which the Foundation assigned its claim against Ehrlich to Rebco, and Rebco agreed to pursue legal remedies against Ehrlich to recover the amount of the referral fee.[52] Ehrlich moved to have the counterclaims dismissed because they violated Section 489.[53]

Rebco cited *Sygma Photo News, Inc. v. Globe International, Inc.*[54] in arguing that its actions did not violate Section 489 because Ehrlich had already instituted his lawsuit when Rebco entered into the agreement with the Foundation, and, therefore, the Foundation's assignment could not have been for the purpose of bringing an action.[55] In *Sygma* a photographer who had taken pictures of the British royal family assigned the copyrights in the photographs to his agent for the sole purpose of prosecuting infringement claims against a publisher who published photographs before an agreed upon date.[56] The agent agreed to assign the copyrights back to the photographer after the litigation was concluded and to donate the proceeds of the action to charity.[57] Evidence indicated this arrangement was made because the photographer did not live in the United States and was not going to be available to appear in court.[58] The United States District Court for the Southern District of New York held that the infringement action was not barred by Section 489 because the assigned claims were asserted in an action that had already " 'been commenced and the mischief the statute [sought] to avoid [was] non-existent.' "[59]

The New York Appellate Division First Department, deciding *Ehrlich* in favor of the plaintiff and holding that Rebco violated Section 489, rejected the *Sygma* decision because "while the assignment occurred after the plaintiff had filed suit asserting other claims, the assertion of additional claims based on the assignment was indeed the very 'mischief the statute seeks to avoid.' "[60] The facts of each of these cases suggest that the outcomes had more to do with "mischief" of some kind than to the statute's language. The photographer's agent in *Sygma*, although accepting the assignment for the purpose of pursuing litigation in violation

51. *See id.*
52. *See id.* at 673–74.
53. *See id.* at 674.
54. 616 F. Supp. 1153 (S.D.N.Y. 1985).
55. *See Ehrlich*, 649 N.Y.S.2d at 674.
56. 616 F. Supp. at 1155.
57. *See id.*
58. *See id.* at 1157 n.5.
59. *Id.* at 1157 (citations omitted).
60. *Ehrlich*, 649 N.Y.S.2d at 674 (citations omitted).

of the words of the statute, was not bringing a frivolous suit, was not stirring up litigation, but was merely helping the photographer pursue his legitimate interests. Neuman, on the other hand, was a man frequently in legal difficulties who attempted to exploit the system to extricate himself from those difficulties. It was, therefore, convenient to be able to bar Neuman's counterclaim because it violated Section 489, but that violation was not the crux of Neuman's "mischief." That violation served as no more than an excuse to inconvenience him for other wrongs he had probably committed. If a primary purpose of Section 489 is to avoid the strife of bringing legal actions, then perhaps Neuman should have been allowed to continue with his counterclaim, and the photographer's agent should have been prohibited from continuing his suit. If that had happened, the latter suit might have been discontinued because the photographer could not have pursued it himself, whereas Neuman could reinstitute his claims by starting a lawsuit against Ehrlich in the name of the Foundation, the actual party allegedly wronged. Such outcomes would, of course, be very unsatisfying and would seem not to serve the cause of justice.

Judges in New York have long recognized that Section 489 is unnecessary to control groundless suits and that third party support does not necessarily encourage groundless suits.[61] The United States District Court for the Southern District of New York recently suggested that the policy underlying Section 489 is "a relic of Medieval English legal concerns" and fits "uncomfortably with current sensibilities."[62] Nevertheless, until the New York legislature decides to act, the state is stuck with this anachronism.

C. Alabama and Ohio

In Alabama an appellate court gave credence to the common law champerty doctrine on grounds different from those generally referred to in Massachusetts or New York opinions.[63] In *Wilson v. Harris*[64] Wilson agreed to give Harris, a friend of many years who

61. *See, e.g.*, Thallhimer v. Brinckerhoff, 3 Cow. 623, 643 (N.Y. 1824) ("[W]here the laws give adequate redress for groundless suits, it is not easy to conceive, that mischief can arise . . . from contracts by which the fruits of a suit may be divided between him who has the right of action, and him who has contributed . . . expense . . . to institute the suit.").

62. Elliott Assocs., L.P. v. Republic of Peru, 12 F. Supp. 2d 328, 345 (S.D.N.Y. 1998), *rev'd sub nom.* Elliott Assocs., L.P. v. Banco de la Nación, 194 F.3d 363 (2d Cir. 1999).

63. *See* Wilson v. Harris, 688 So. 2d 265 (Ala. Civ. App.), *cert. denied*, No. 1952101 (Ala. Dec. 20, 1996).

64. *Id.*

was in financial difficulty, $400 a month in exchange for Harris' assigning to him part of any recovery she might realize from a wrongful death case she had pending on appeal.[65] When her appeal was concluded, she refused to give Wilson the agreed-upon share of the proceeds.[66] Wilson alleged breach of contract.[67] He described entering into similar agreements with other people who were short of cash but had lawsuits pending.[68] In each instance the borrower would have no means to repay Wilson but for a successful outcome of the pending suit.

The court determined that Harris' agreement with Wilson was not exactly champertous because Harris already had a judgment on appeal when she entered into the agreement with Wilson.[69] Nevertheless, the court refused to enforce the agreement because, even though it did not satisfy all the requirements for champerty, it was "closely akin to champerty" and "violate[d] the public policy against gambling and speculating in litigation."[70] The opinion suggests the court's belief that the primary purpose of the champerty doctrine is to eliminate "gambling in litigation."[71] Thus, it seems quite clear that in Alabama investing in litigation would be considered a particularly undesirable form of gambling which the law would not sanction.

The situation in Ohio may be similar to the one in Alabama. While Ohio courts do not recognize a common law cause of action for maintenance or champerty, an appellate court noted that the doctrines can be used as a contract defense.[72] Although the reported cases it cites for that proposition were decided in 1823,[73] 1885,[74] 1892,[75] 1953,[76] and 1954,[77] in the 1954 decision the court found an attorney guilty of maintenance.[78] It explained its decision as an effort not to encourage "a gambling spirit."[79] One might speculate whether investors in internet stocks are any less gamblers than investors in litigation.

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65. *See id.* at 266.
66. *See id.* at 268.
67. *See id.*
68. *See id.*
69. *See id.* at 269.
70. *See id.* at 270.
71. *Id.* (citing Lott v. Kees, 165 So. 2d 106, 110 (Ala. 1964)).
72. *See* Tosi v. Jones, 685 N.E.2d 580, 583 (Ohio Ct. App. 1996).
73. *See* Key v. Vattier, 1 Ohio 132 (1823).
74. *See* Stewart v. Welch, 41 Ohio 483 (1885).
75. *See* Reece v. Kyle, 31 N.E. 747 (Ohio 1892).
76. *See* Rice v. Pigman, 114 N.E.2d 738 (Ohio 1953).
77. *See* Lo Guidice v. Harris, 128 N.E.2d 842 (Ohio 1954).
78. *See id.* at 845.
79. *Id.*

D. Alaska, Colorado, Kentucky, Georgia, Maryland, Nevada, Oklahoma, and Montana

This group of states prohibits champerty to some extent, but has not, in fact, invalidated an agreement on that basis in recent years, if at all. Whether that pattern would continue if the issue were the champertous nature of an agreement between a group of investors and a litigant whose lawsuit they were financing is highly speculative.

The Alaska Supreme Court, while still suggesting that its common law prohibition against champerty is in effect, has not enforced it in any recent case.[80] Similarly, the Supreme Court of Colorado has mentioned common law champerty and maintenance[81] but has not in recent years invalidated an agreement on those grounds. Kentucky has a statute that declares void as champertous a contract for the purpose of aiding in the prosecution or defense of a lawsuit in exchange for any part of the requested recovery.[82] Nevertheless, Kentucky too has not voided a contract on that ground in recent years. In dicta in 1992[83] and 1997[84] the Supreme Court of Kentucky suggested that champerty could be used as a defense, but the cases it cited for that proposition were decided in 1895[85] and 1909.[86]

Georgia has a statute providing that contracts contrary to public policy cannot be enforced, including, "contracts of maintenance or champerty."[87] The Georgia Supreme Court has noted, however, that "the delicate and undefined power of courts to declare a contract void as contravening public policy should be exercised with great caution, and only in cases free from substantial doubt."[88] Apparently taking this statement very seriously, Georgia courts have not invalidated any contracts as violative of the statutory prohibition against champerty.

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80. *See, e.g.*, Wichman v. Benner, 948 P.2d 484 (Alaska 1997) (holding that hospital's assignment of its claims in malpractice action did not violate public policy against champerty and maintenance); Deal v. Kearney, 851 P.2d 1353 (Alaska 1993) (holding that hospital's assignment of its claims in malpractice action did not violate public policy against champerty and maintenance).

81. *See* People v. Mason, 938 P.2d 133 (Colo. 1997).

82. *See* KY. REV. STAT. ANN. § 372.060 (Michie 1998).

83. *See* McCullar v. Credit Bureau Sys., 832 S.W.2d 886 (Ky. 1992).

84. *See* Great W. Land Mgmt. v. Slusher, 939 S.W.2d 865 (Ky. 1997).

85. *See* Wemhoff v. Rutherford, 98 Ky. 91 (1895).

86. *See* Cumberland Tel. & Tel. Co. v. Maxberry, 121 S.W. 447 (Ky. 1909).

87. GA. CODE ANN. § 13-8-2(a)(5) (1998).

88. Foster v. Allen, 40 S.E.2d 57, 59 (Ga. 1946).

Maryland has a criminal statute, with a penalty of incarceration for one year and a fine of $1000, that prohibits a person from soliciting, for personal gain, another person to sue or retain a lawyer to represent the other person in a lawsuit.[89] There has not, however, been any reported case in which a violation of the statute was upheld. In the one case where it was alleged, an appellate court held that the plaintiff was the one who had sought the help of the defendant, a person who for a fee assisted Korean people in finding a lawyer, and therefore there was no proscribed meddling.[90]

In the only recently decided case dealing with champerty in Nevada, the court held that an investment relationship was not champertous.[91] The Nevada Supreme Court held that as long as investors in litigation have some interest in the litigation, or merely reasonably believe they have some interest, their agreement to finance the litigation is not champertous.[92] The Oklahoma Supreme Court within the last few years has noted that the reasons for a public policy prohibiting champerty have disappeared.[93] Notwithstanding that assertion, the court referred to still-existing champerty statutes in Oklahoma.[94] Although the statutes refer only to agreements involving real property,[95] their mere existence and the court's refusal to hold specifically that champerty is not recognized in Oklahoma allows for a possible revitalization of the doctrine.

The Supreme Court of Montana has asserted, inexplicably, that the purpose of the common law champerty prohibition was to prevent *attorneys* from stirring up litigation,[96] although clearly champerty applied to everyone including, but not limited to, attorneys. That interpretation has been codified in Montana to prohibit attorneys from having an interest in any thing in action for the purpose of instituting litigation.[97] By the letter of the statute, non-attorneys could invest in another's litigation with the hope of making a profit.[98]

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89. *See* MD. CODE ANN. BUS. OCC. & PROF. § 10-604(a) (1998).
90. *See* Son v. Margolius, Mallios, Davis, Rider & Tomar, 709 A.2d 112, 121 (Md. 1998).
91. *See* Schwartz v. Eliades, 939 P.2d 1034, 1037 (Nev. 1997).
92. *See id.*
93. *See* Voiles v. Sante Fe Minerals, Inc., 911 P.2d 1205, 1212 (Okla. 1996).
94. *See id.*
95. *See* OKLA. STAT. tit. 21, §§ 547, 548 (1991).
96. *See* Green v. Gremaux, 945 P.2d 903 (Mont. 1997).
97. *See* MONT. CODE ANN. § 37-61-408 (1999).
98. The statute reads:

> 37-61-408. Attorney prohibited from buying claim or demand for purpose of bringing action.

E. Florida and South Carolina

An appellate court in Florida has not eliminated the maintenance and champerty doctrines from Florida common law but has redefined them according to the "modern view," noting that no state adheres to the original strict formulations.[99] In that view, "officious intermeddling is a necessary element" of the doctrines.[100] Thus, giving unnecessary and unwanted services and being meddlesome in an overbearing way is not permitted.[101] In *Kraft v. Mason*,[102] the facts were very similar to those in the Massachusetts case, *Saladini v. Righellis*.[103] Kraft was a plaintiff in a federal antitrust suit.[104] He did not have the financial resources to continue pursuing the case, so he borrowed $100,000 from his sister, guaranteeing repayment of the loan and interest plus a percentage of any recovery.[105] The suit settled for over $5 million, but Kraft refused to pay his sister the agreed-upon amount.[106] She sued him, and he used the champertous nature of their agreement as a defense.[107] The court rejected the champerty argument, noting that the sister did not act in an officious manner, intermeddle, instigate the litigation, bargain for the terms of the loan (they were prepared by Kraft), or impose her views on the litigants or their attorneys.[108] Thus, the Florida court came to the same conclusion as the Massachusetts court, but without invalidating the entire champerty

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(1) An attorney and counselor must not directly or indirectly buy or be in any manner interested in buying a bond, promissory note, bill of exchange, book debt, or other thing in action with the intent and for the purpose of bringing an action thereon.

(2) An attorney and counselor must not, by himself or by or in the name of another person, either before or after action brought, promise or give or procure to be promised or given a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands or in the hands of another person a demand of any kind for the purpose of bringing an action thereon. This subsection does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

Id.

99. Kraft v. Mason, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996).
100. *Id.*
101. *See id.*
102. 668 So. 2d 679 (Fla. Dist. Ct. App. 1996).
103. 687 N.E.2d 1224 (Mass. 1997).
104. *See id.* at 681.
105. *See id.*
106. *See id.* at 681–82.
107. *See id.* at 682.
108. *See id.* at 683.

doctrine. The Massachusetts holding is, however, a more straightforward way of achieving the result. The financial support of another's litigation in exchange for part of the litigation's proceeds is not necessarily troublesome, so that behavior alone should not trigger a legal inquiry. Massachusetts has adopted the truly modern view by eliminating champerty as a cause of action altogether. Nevertheless, it remains a question whether the courts in either state would be as sanguine about upholding the rights of professional investors as they were about upholding the rights of a single litigation supporter who was a friend or family member of the litigant.

A South Carolina appellate court last year took the same approach as the Florida appellate court but, while the Florida court called its interpretation "modern," the South Carolina court rejected appeals to "modern jurisprudence" and emphasized its reliance on old law.[109] In *Osprey, Inc. v. Cabana Limited Partnership*[110] the Cabana defendants had been plaintiffs in a federal lender liability action.[111] Their lawyers in the federal action arranged for Osprey to pay them $50,000 in exchange for an interest in the litigation.[112] Cabana settled the suit for $650,000 but refused to pay Osprey the amount owed under the agreement.[113] Osprey sued Cabana for, inter alia, breach of contract.[114] Cabana succeeded before the trial court in arguing that the suit should be dismissed because the contract was champertous and therefore unenforceable.[115]

The appellate court, although acknowledging that there were no appellate decisions in South Carolina voiding an agreement as champertous, confirmed that champerty is prohibited in the state.[116] The court relied on a South Carolina Supreme Court opinion from 1830 that mentioned champerty unfavorably,[117] and a state statute that provides that the "common law of England . . . [shall] continue[] in full force and effect."[118] The court noted that

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109. *See* Osprey, Inc. v. Cabana Ltd. Partnership, 509 S.E.2d 275, 277-78 (S.C. Ct. App. 1998), *cert. granted* (S.C. Ct. App. Aug. 19, 1999).

110. *See id.*

111. *See id.* at 275.

112. *See id.* at 276.

113. *See id.*

114. *See id.* at 277.

115. *See id.*

116. *See id.*

117. *See* State v. Chitty, 17 S.C.L. (1 Bail.) 379, 401 (1830) (defining as a champertor a person who sues on behalf of an impoverished individual with the stipulation that they divide the recovery).

118. S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1976).

champerty is clearly part of the common law of England.[119] The court also rejected Osprey's argument that modern jurisprudence and commercial practices oppose the prohibition against champerty.[120] The court did hold, however, that the prohibited behavior occurs only when the champertor acts officiously and for the purpose of "'stirring up strife and continuing litigation.'"[121] The court, after reviewing the facts of the case, held that there were certainly issues of fact regarding whether Osprey engaged in such officious intermeddling with wrongful intentions and suggested that there was evidence that Osprey had not.[122]

F. Other States

Other states similarly slip and slide around the champerty issue, relying on statutes, common law, and public policy to prohibit it but often not enforcing the prohibition to the letter of the law.[123] Until the Supreme Judicial Court of Massachusetts declared champerty no longer illegal in that state, New Jersey was the only state to permit and enforce champertous agreements.[124] With only two states refusing to invalidate contracts because they are champertous, it might seem that the doctrine is generally maintaining its viability. When developments in other countries are considered, however, that viability becomes less assured.

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119. *See Osprey*, 509 S.E.2d at 277.

120. *See id.* at 278.

121. *Id.* at 279.

122. *See id.*

123. *See generally* Martin, *supra* note 1; Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1547–55 (1996).

124. *See, e.g.*, Bron v. Weintraub, 199 A.2d 625, 629 n.1 (N.J. 1964); Schomp v. Schenck, 40 N.J.L. 195, 204 (1878) (noting that doctrines of maintenance and champerty were determined to be "'*inapplicable*'" in New Jersey as early as 1792); Polo v. Gotchel, 542 A.2d 947, 949 (N.J. Super. Ct. Law Div. 1987); Hughes v. Eisner, 72 A.2d 901, 902 (N.J. Super. Ct. Ch. Div. 1950); Weller v. Jersey City H & P St. Ry. Co., 57 A. 730, 732 (N.J. Ch. 1904) (stating that the prohibition of maintenance and champerty never prevailed in New Jersey as indicated in a "learned and exhaustive opinion" of Chief Justice Beasley in *Schomp v. Schenck*). One commentator has advised investment litigation companies to negotiate and execute their agreements in New Jersey where they will be enforceable. *See* Dobner, *supra* note 123, at 1588–89.

II. EXPANDING EXCEPTIONS TO THE CHAMPERTY PROHIBITION

In the United States, as well as in England, Australia, and Canada, courts have increasingly relaxed the champerty prohibition. In the United States, for example, the most notable exception is the contingency fee system. A lawyer's agreement to handle a case in exchange for a percentage of the damages recovered, if any, is clearly champertous. Nevertheless, all states recognize such agreements.[125] By the mid-nineteenth century most states had rejected the English rule prohibiting contingency fee arrangements between lawyers and their clients.[126] In the United States the open court door policy has had a preeminent place, and the contingency legal fee has been viewed as the poor and middle income person's ticket to justice.[127] Most other countries, on the other hand, outlaw contingency legal fees.[128]

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125. *See* Kenneth A. Ewing, Comment, *Quantum Meruit in Ohio: The Search for a Fair Standard in Contingent Fee Contracts*, 18 U. DAYTON L. REV. 109, 110 & n.4 (1992) (listing statutory, common law, and court rule approval of lawyers' contingency fees).

126. *See* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 231–32 (1998).

127. *See* Radin, *supra* note 6, at 69–72.

128. *See, e.g.*, Magnin v. Teledyne Continental Motors, 91 F.3d 1424, 1430 (11th Cir. 1996) (noting that contingency fee arrangements are prohibited in France); Macedo v. Boeing Co., 693 F.2d 683, 688 (7th Cir. 1982) (noting that lawyers are not permitted to make contingent fee agreements in Portugal); Fiorenza v. United States Steel Int'l, 311 F. Supp. 117, 120 (S.D.N.Y. 1969) (noting that contingency fee arrangements are not permitted in Bahamas); W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 33.32 (1996) (noting that contingency fee agreements are void in France and Germany); Stefano Agostini, *Advertising and Solicitation: A Comparative Analysis of Why Italian and American Lawyers Approach Their Profession Differently*, 10 TEMP. INT'L & COMP. L.J. 329, 341 (1996) (noting that contingency fees are strictly prohibited in Italy); Betty M. Ho, *Rethinking the System of Sanctions in the Corporate and Securities Law of Hong Kong*, 42 MCGILL L.J. 603, 641 (1997) (noting that Hong Kong does not have a contingency fee system); Richard I. Miller & Michael R. Young, *Financial Reporting and Risk Management in the 21st Century*, 65 FORDHAM L. REV. 1987, 2063 n.351 (1997) ("'[C]ontingency fee arrangements . . . are largely forbidden abroad.'") (citations omitted); Carole J. Petersen, *Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong*, 34 COLUM. J. TRANSNAT'L L. 335, 358 (1996) (noting that lawyers are prohibited from operating on contingency fee basis because of ethical rules in Hong Kong); Frederick J. Tansill, *Offshore Asset Protection Trusts: Emphasizing Non-Tax Issues*, SB45 ALI-ABA 389, 448 (1998) (noting that Nevis law prohibits contingency fees); Richard Vaznaugh, Note, *Extraterritorial Jurisdiction–Environmental Muscle for the North American Free Trade Agreement*, 17 HASTINGS INT'L & COMP. L. REV. 207, 215 (1993) (noting that Mexican law does not permit contingency fee arrangements).

A. Champerty in England

England has traditionally barred all champertous agreements. Contingency fees, for example, were viewed as degrading to the legal profession because they might lead to oppressive bargains between the client and lawyer, encourage the solicitation of legal business, or increase improper litigation.[129] In recent years, however, England adopted a kind of contingency fee system, called a "conditional fee."[130] The "conditional fee" has two parts: an agreed upon hourly rate for the lawyer's services, and an "uplift" which is an additional percentage, up to 100%,[131] of the original hourly fee if the case succeeds.[132] Usually the "uplift" is limited to twenty-five percent of the damages recovered for the client.[133] Since 1998, contingency fees have been permitted in all kinds of civil actions other than family law matters.[134] Moreover, this past winter the English Parliament debated amending the Courts and Legal Services Act of 1990 to add a subsection that permits a conditionally funded agreement which is defined as "an agreement made between a lawyer, his client, and some third person who agrees to act as funder to the action being pursued by the client."[135]

The Courts and Legal Services Act has also been interpreted very broadly to increase the situations in which contingency fee arrangements are permissible. In *Ashford v. Yeandle (Contractors) Ltd.*,[136] the chancery division held that a contingency fee arrangement between

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129. *See* Radin, *supra* note 6, at 69–72.

130. *See* Courts & Legal Services Act, 1990, § 58 (Eng.); Conditional Fee Agreements Order, S.I. 1995, No. 1674; Conditional Fee Agreements Regulations, S.I. 1995, No. 1675; Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 268 (1998).

Under the new system, lawyers who participate in a conditional fee agreement (CFA) must treat all disbursements (for example, court fees, expert witness fees) as overhead. In exchange, if they win, they are entitled to an "uplift" of their fees to a maximum of 100%. *See* J S Publications, *Factsheet 22: Conditional Fees and Their Likely Impact* (last modified Nov. 2, 1998) <http://www.jspubs.com/factmain.22.htm> (on file with the *University of Michigan Journal of Law Reform*).

131. *See* Clare Dyer, *Brave New Deal*, GUARDIAN, May 16, 1995, at T13.

132. *See* Audra A. Albright, Comment, *Could This Be the Last Gasp? England's First Case Against the British Tobacco Industry*, 11 TEMP. INT'L & COMP. L.J. 363, 373 (1997).

133. *See id.*; *see also* Alison Clarke, *Law: Justice for the Not-So-Rich; 'No-Win, No-Fee' Deals Mean We Can All Afford Lawyers. So Look Forward to Lots of Litigation*, INDEPENDENT (LONDON), Feb. 4, 1999, at 14 (noting that the Law Society recommends a cap of 25% and research shows that lawyers are following that voluntary limit).

134. *See* Conditional Fee Agreements Order, S.I. 1998, No. 1860.

135. Comments of The Lord Chancellor in response to the Access to Justice Bill [H.L.], UK PARL. PUB. DATABASE, Feb. 11, 1999, at col. 449.

136. 3 W.L.R. 172 (Ch. 1998).

the client and his solicitor for an arbitration case was not void for champerty even though the Courts and Legal Services Act permits conditional fees only for "'proceedings in court.'"[137] The Vice-Chancellor's opinion emphasized that the law of champerty and the rejection of contingency fees for lawyers rested on the "bedrock" of public policy, but public policy changes with time, and what was champertous and unlawful before is not necessarily so today.[138]

The high cost to the taxpayer of the nation's legal aid system for poorer litigants has caused this turnabout in English policy.[139] In 1997, the Lord Chancellor proposed eliminating legal aid for personal injury cases, about a quarter of all legal aid cases, which cost the taxpayer about £160 million a year.[140] Using third parties, either lawyers or others, to fund litigation gives less affluent people access to the justice system without burdening taxpayers. Of course, under the English system poor litigants would still have less access to the courts than those in the United States because even though they would not have to pay their own lawyer's fees under a contingency fee arrangement, if they lost they would have to pay the winner's costs. This possibility raises the need for some kind of insurance to protect against this kind of expense, but the insurance is not available to all plaintiffs.[141] The English legal aid system also does not provide any assistance to small businesses that may have very limited resources for litigation.[142] They too will be assisted in proceeding with claims or defending themselves against claims by a contingency fee system.

One commentator has noted that the new contingency fee system has significantly increased "access to justice."[143] In the first year of its implementation, when the kinds of cases to which it applied were more limited than they are now, approximately 1000 people a month brought legal claims that they otherwise would not have brought because they could not afford to pay for a lawyer, and they could not qualify for legal aid.[144]

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137. *Conditional Fee Deal in Arbitration Valid*, TIMES (LONDON), Apr. 23, 1998, at 42 (citations omitted).

138. *See id.*

139. *See* J S Publications, *supra* note 130.

140. *See id.*

141. *See* John C. Evans, *England's New Conditional Fee Agreements: How Will They Change Litigation?*, 63 DEF. COUNS. J. 376, 378 (1996).

142. *See* Legal Aid and Advice Act, 1949, § 17(1) (Eng.); Legal Aid Act, 1988, Ch. 49, Sched. 10 § 2 (Eng.).

143. Albright, *supra* note 132, at 374–75.

144. *See* Grania Langdon, *Law: Pay to Win—The Introduction of the No-Win, No-Fee Deals Proved Popular with Clients*, GUARDIAN, Nov. 5, 1996, at T17.

This change in England, the very model of a champerty-free, non-American system, is quite remarkable. It reflects the recognition that, because litigation is so expensive, potential litigants without financial resources will be denied their day in court. Lord Hoffmann, who in upholding assignments of causes of actions from companies to individuals so that the latter would get legal aid to pursue the cases (because under English law only a "person," not a company, is entitled to legal aid),[145] has noted:

> The cost of obtaining justice in England, only too often prohibitive, is a current social problem which goes to the roots of civil society. The provision of a system of justice to resolve disputes between citizens is one of the most ancient and important duties of the state. But the cost of litigation is today so high that the majority of people are in practice unable to seek redress for the wrongs they have suffered. This applies not only to individuals but also to companies with modest resources.[146]

Allowing a third party, whether it is the lawyer or some other investor, to fund meritorious litigation helps to assure that potential litigants will not be denied access to the justice system merely because they do not have the money to gain admittance.

B. Champerty in Australia

Of the six Australian states and two territories, three states (New South Wales, South Australia and Victoria) have by statute abolished criminal and civil liability for maintenance and champerty.[147] In West Australia there have been legislative debates about the high costs of litigation being beyond the budget of any legal aid system, the unfairness of people needing legal help not being able to afford it or to receive legal aid, and the importance of the availability of contingency fee arrangements as in the United States and

145. *See* Legal Aid Act, 1988, § 2(10) (Eng.).

146. Circuit Sys. Ltd. v. Zuken-Redac (U.K.) Ltd., 1997 App. Cas. (appeal taken from England).

147. *See* Maintenance and Champerty Abolition Act, 1993, no. 88, 2 N.S.W. Stat. (1993); Criminal Law Consolidation Act, 1935, sched. 11 § 1(3) (S. Austl.); Crimes Act, 1958, pt. IA § 322A (Vict.).

some Australian states.[148] Nevertheless, everywhere in Australia champertous agreements may still be treated as contrary to public policy or otherwise illegal.[149] As in the United States, however, courts do not seem eager to invalidate agreements merely because they are champertous.[150]

For example, the High Court of Australia, in a case involving a bankrupt party, asserted that a "bare right of litigation" is not assignable, but property is assignable even though it may not be recovered without litigation.[151] The court then held that under the Australian Bankruptcy Act[152] the right to an appeal is property, and therefore an agreement between a bankrupt (who by definition has no money to pursue a legal appeal) and a third party willing to finance the appeal in exchange for a share of the proceeds is not illegal as champertous.[153]

Australian courts, like some courts in the United States, have held that for maintenance and champerty to be unlawful, the third party must be acting as an officious intermeddler.[154] In addition, they have recognized several exceptions to the prohibitions against maintenance and champerty. One is for a "'genuine commercial interest,'" and another is the "'statutory power of sale'" exception.[155] In the former the third party must have a "genuine and substantial interest in the success of the litigation . . . [that] exists independently of the allegedly infringing contract."[156] The second exception exists strictly in a bankruptcy context to allow trustees in

148. *See Acts Amendment (Legal Costs) Bill—Second Reading*, Leg. Assembly 6481 (Sept. 18, 1997) (remarks of Mr. Prince); *Professional Standards Bill—Second Reading*, Leg. Assembly 4398 (June 19, 1997) (remarks of Mr. Prince).

149. *See In re* Tosich Constr. Ltd. (1997) 115 A. Crim. R.

150. *See, e.g.*, Clyne v. New South Wales Bar Ass'n (1960) 104 C.L.R. 186, 192, 203 (doubting that crimes of maintenance and champerty were still viable and noting that reasons for importance of the crimes disappeared long ago); AUSTL. LAW REFORM COMM'N, REPORT NO. 27, STANDING IN PUBLIC INTEREST LITIGATION ¶ 340 (1985) (noting only one prosecution for maintenance between 1935 and 1985, an unsuccessful one in 1959); NEW SOUTH WALES LAW REFORM COMM'N, DISCUSSION PAPER 36—BARRATRY, MAINTENANCE AND CHAMPERTY § 2.15 (1994) (noting paucity of civil actions for maintenance resulted in calls for abolition of tort of maintenance on grounds of obsolescence).

151. Cummings v. Claremont Petroleum NL (1996) 185 C.L.R. 124, 150.

152. Bankruptcy Act, 1966 (Austl.).

153. *See id. But see* Magic Menu Sys. Ltd. v. A.F.A. Facilitation Pty. Ltd., No. QG 125 of Fed. No. 358/96 (Austl. Fed. Ct. May 8, 1996) (holding that "arm" of franchisees' association, which seemed to act only for its own private pecuniary interest not for the good of association's members, entered into illegal champertous agreement with franchisees who were suing their franchisor when it funded their litigation in exchange for fee contingent on outcome of the case).

154. *See Magic Menu*, No. QG 125 of 1995 Fed. No. 358/96 at 8.

155. *Tosich* (1997) 115 A. Crim R. at 126 (citations omitted).

156. *Id.*

bankruptcy and liquidators to sell company property.[157] A third exception exists for those with a family connection to the litigant or those providing financial support for reasons of charity.[158] A fourth exception exists for a third party who shares with the litigant " 'a bona fide community of pecuniary interest or religion or principles or problems.' "[159]

The common interest exception was used by the Tasmanian Supreme Court in refusing to enjoin the Housing Industry Association from supporting the appeal of a small contractor who had had a judgment of almost $35,000 assessed against him by the owner of a house he had built.[160] The association argued that the members of the organization had an interest in the outcome of the contractor's case because they could be subject to similar lawsuits—that it was an industry issue not just a personal one.[161] The court also recognized that the contractor had no assets with which to pursue the appeal on his own and that the plaintiff's purpose in pursuing the action for an injunction was to force the withdrawal of the association's financial support, so the appeal would be discontinued.[162] The court noted the "change in public opinion on the question of supporting litigation," and agreed that "a collection of out of date rules which no longer fit the conditions of modern life" should not be upheld.[163]

Contingency legal fees are also allowed in all Australian federal cases except for family and criminal matters.[164] The states and territories are considering allowing contingency fees to combat the continuing increase in the number of people priced out of the justice system.[165]

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157. *See id.*

158. *See Magic Menu*, No. QG 125 of 1995 Fed. No. 358/96 at 9.

159. *Id.* at 9 (citations omitted).

160. Moloney v. Housing Indus. Ass'n Ltd., No. 371/1992 (Tasmanian Sup. Ct. Dec. 4, 1992).

161. *See id.* at *9–10.

162. *See id.* at *10.

163. *Id.* at *16–17 (quoting Baker v. Jones (1954) 1 W.L.R. 1005 and Alabaster v. Harness (1895) 1 QB 339, respectively).

164. *See Australia Reforms Its Legal System*, LAW. INT'L, July 1, 1995, at 2.

165. *See, e.g.*,); Peter Elliott, *Letters: No Win-No Fee a Win-Win Idea*, AUSTL. FIN. REV., Feb. 26, 1999, at 42 (considering whether New South Wales would adopt U.S.-style contingency fee system); Grace Malatesta, *Win or Fee Cut Plan for Court*, WEST AUSTRALIAN, Jan. 29, 1999, at 27 (noting that West Australian Law Reform Commission says American contingency fee system could resolve problem of potential litigants without financial resources).

C. Champerty in Canada

Canada's courts generally have taken a very rational approach to the doctrines of maintenance and champerty. While recognizing that champerty is prohibited for public policy reasons and because of a reliance on the ancient common law of England,[166] Canadian courts have been willing to recognize exceptions for any kind of pre-existing financial interest[167] and whenever the third party support is for "a legitimate purpose that does not jeopardize the integrity of the judicial process."[168] As far back as 1907, the Supreme Court of Canada noted that champerty should be prohibited only if it promotes unnecessary litigation, is immoral, or arises from a bad motive.[169]

Contingency fees are permitted in every Canadian province except Ontario.[170] There is an exception in Ontario, however, which permits lawyers for class action plaintiffs to enter agreements with their clients promising payment of fees only in the event of success.[171] If successful, the lawyer can ask the court's approval to increase the base fee by an "uplift," that is, applying a multiple to the fee.[172]

In 1996 the Ontario government established the Ontario Legal Aid Review to study and report on legal aid and the needs of low-income residents.[173] The resulting document reported on an empirical study comparing litigation in Ontario and British Columbia, where a contingency fee system similar to the one in the United States is permitted.[174] The study concluded that contingency fee arrangements probably increase access to justice.[175] The Review panel also concluded that such arrangements would not encourage

166. *See e.g.*, Union Gas Co. of Can. v. Brown [1968] D.L.R. 44, 49.

167. *See* Collar v. Edmonton [1992] A.R. 39; Fredrickson v. Insurance Corp. of B.C. [1986] B.C.L.R. 145, 156.

168. Margetts v. Timmer Estates, [1999] 1999 D.L.R. Lexis *12.

169. *See* Newswander v. Giegerich, [1907] 39 S.C.R. 354.

170. *See* An Act Respecting Champerty, R.S.O., ch. 327 (1897) (Can.); *Contingency Fees in Ontario?*, LAW. INT'L, Mar. 1, 1996, at 2; REPORT OF THE ONTARIO LEGAL AID REVIEW: A BLUEPRINT FOR PUBLICLY FUNDED LEGAL SERVICES ch. 13 (1998) (available from Ontario Government Bookstore, 880 Bay St., Toronto, Canada) [hereinafter ONTARIO REPORT].

171. *See* Class Proceedings Act, S.O., § 33(1) (1992) (Can.).

172. *See* Gagne v. Silcorp Ltd., No. C28348 (O.A.C. Oct. 21, 1998) (discussing the appropriate considerations on a motion for contingency fee, created by applying a multiple to base fee).

173. *See* ONTARIO REPORT, *supra* note 170.

174. *See id.*

175. *See id.*

frivolous litigation because lawyers are not likely to take on unmeritorious cases when their fees are contingent upon their winning.[176]

One of the other methods of increasing access to justice for poorer litigants that the Review panel considered is a Contingency Legal Aid Fund.[177] Under this arrangement, which has been implemented in Hong Kong, litigants whose cases are accepted after merit and means tests would be supported in their litigation by the Fund, in return for agreeing to pay the Fund a percentage of any recovery.[178] This certainly sounds like a government-as-champertor plan. Presumably the Fund would refuse to support cases that did not have a reasonable chance of being successful, but then, so would private investors. The Fund would not support cases merely to harass defendants, but neither would private investors. Moreover, in this age of privatization, it is the general wisdom that private industry can deliver services better and more efficiently than government. There is no reason to expect that supporting legal services would be an exception.

III. LITIGATION SUPPORT FIRMS

If potential litigants have good cases but no money in the United States, and now in England and much of Canada and Australia, they may be able to find lawyers willing to be their advocates on a contingency fee or conditional fee basis. In addition, they now may have another alternative, the litigation support firm. If a litigant has won a judgment that is being appealed, the chances of finding a lawyer willing to undertake the appeal on a contingency fee basis are much less, making the emergence of litigation support firms particularly important.

One such firm receiving a great deal of publicity is the Judgment Purchase Corporation (JPC).[179] On its web site,[180] the

176. *See id.*

177. *See id.*

178. *See id.*

179. *See, e.g.*, Simon Barker-Benfield, *First Business: Lenders Have a New and Very Specialized Competitor*, FLA. TIMES-UNION, May 26, 1997, at 5; Eric Freedman, *They Scan Docket Sheets Instead of the Stock Tables*, NAT'L L.J., Apr. 15, 1996, at B1; Reynolds Holding, *Investing in Other People's Lawsuits*, S.F. CHRON., Feb. 12, 1996, at B1; Jennifer Huie, *Sell Futures in Your Verdict*, BUS. WK., Sept. 8, 1997, at 8; Leigh Jones, *Legal Beat: Judgment Purchase Enters Oklahoma*, U. REC., Oct. 15, 1998; Louis Lavelle, *Firm Gambles on Litigants' Wins, Buys Stake in Awards*, REC., N.N.J., May 9, 1997, at B1; Molly McDonough, *Venture Capitalists See Profits in Judgments on Appeal*, CHI. DAILY L. BULL., July 6, 1998, at 1; Lara Wozniak, *Company Buys into the Appeals Process*, ST. PETERSBURG TIMES, Apr. 4, 1996, at 1E.

180. *See LawFinance/group inc.* (last modified Jan. 18, 2000) <http://www.lawfinance.com> (on file with the *University of Michigan Journal of Law Reform*).

company explains that it provides cash for litigation and personal expenses in exchange for a share of a money judgment on appeal.[181] The company is only an investor; control of the case remains with the client and attorney.[182] If the case is lost, the client owes nothing.[183]

On its web site, JPC describes one of its cases in which the owners of an upscale restaurant sued the developer of the shopping center where they were located for fraud and breach of contract.[184] The plaintiffs had limited financial resources and were forced to liquidate their assets and sell their home to continue financing the lawsuit, which the wealthy developer kept going for six years.[185] Plaintiffs won, and the developer appealed.[186] Instead of settling the case for a fraction of the judgment because of their lack of financial resources to continue, they sold a share of the judgment to JPC and were able to hire a prominent appellate counsel who received a fair settlement offer within six months.[187]

JPC will consider investing only if the judgment on appeal is over $200,000, and the defendant has the financial resources or has posted a bond.[188] The maximum stake in a case JPC will buy is twenty-five percent.[189] For example, in a case with a $1 million verdict, JPC might buy a twenty-five percent share, giving the client $100,000. If the award is upheld, JPC makes $150,000, and the client keeps the $100,000 and whatever else the court awards. JPC says it does not give legal advice and is not privy to confidential information.[190] It is not stirring up litigation because it supports only appeals. One professor of legal ethics is discomfited, however, by JPC's retention of control over the selection of counsel and its ability to blackball an attorney who pursues a strategy JPC does not

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181. *See LawFinance/group inc., Features and Benefits Civil Appeal Investment Program* (last modified Aug. 12, 1999) <http://www.lawfinance.com/FEATBENE/FEATBENE.HTM> (on file with the *University of Michigan Journal of Law Reform*).

182. *See id.* JPC does not require specific appellate counsel, but must approve the client's choice—" 'quality control.' " *See* Freedman, *supra* note 178, at B3 (citations omitted).

183. *See Law/Finance group inc., supra* note 180.

184. *See Law/Finance group inc., Case Histories* (last modified Aug. 12, 1999) <http://www.lawfinance.com/CASESUMS/CASESUMS.HTM> (on file with the *University of Michigan Journal of Law Reform*).

185. *See id.*

186. *See id.*

187. *See id.*

188. *See* Leigh Jones, *Judgment Purchase Enters Oklahoma*, J. REC., Oct. 15, 1998. Other reports say the minimum amount of the judgment must be $300,000. *See* Jan Ackerman, *Firm Takes Gamble Aiding Plaintiffs on Appeal of Damages*, PITTSBURGH POST-GAZETTE, Feb. 1, 1999, at A1.

189. *See* Holding, *supra* note 179, at B1. Other reports say the maximum amount of the stake is 50%. *See* Ackerman, *supra* note 188, at A1.

190. *See* Holding, *supra* note 180, at B1.

like.[191] Another legal ethics expert described JPC's business as "'perfectly lawful under universally recognized legal principles.'"[192]

Although it may be the best known, JPC is not the only firm in the United States investing in litigation. Recently, General Electric Capital Corporation (GECC) has agreed to pay $5.8 million for a $10 million contingency share in a $151 million judgment against Chase Manhattan Bank.[193] The agreement provides that the one-third contingent fee must be paid first out of any award that survives the appeal.[194] It is reasonable to expect that GECC's involvement will have an effect on settlement negotiations. Both the plaintiff, Lot$off, and Chase know GECC has analyzed the chances of the judgment being sustained on appeal and that could give Lot$off, which had filed for bankruptcy, a more even playing field than it otherwise would have had.[195]

In Australia, a well known Sydney stockbroker, René Rivkin, created a litigation business, the Justice Corporation, last year.[196] Within its first month of operation it had processed 200 requests for financing, including six requests from consumer groups seeking support for class actions.[197] Moreover, the New South Wales Legal Aid Commission considered referring commercial cases to the new company.[198] Surprisingly, from the American perspective, Australians seem more willing to permit businesspeople to invest in litigation than to accept a contingency fee system for lawyers.[199] Consequently, the creation of the Justice Corporation caused negative comment from lawyers, who complained that it was "introducing contingency fees without an upper limit, which was worse than the American system."[200] Lawyers complained that, unlike the Justice Corporation, they could not charge fees based on a percentage of their clients' winnings; they could receive only an "uplift" for financing their clients' cases, capped in New South

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191. *See* Freedman, *supra* note 180, at B1 (quoting George Schatzki, professor of legal ethics at the University of Connecticut).

192. Ackerman, *supra* note 188, at A1 (quoting Geoffrey C. Hazard, Jr.).

193. *See* 50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A., No. SA-95-CA-159, 1997 WL 790739 (W.D. Tex. May 20, 1997); Margaret Cronin Fisk, *Large Verdicts for Sale: Plaintiffs Sell Portions of Million-Dollar Judgments to Weather Long Appeals*, NAT'L L.J., Jan. 11, 1999, at A1.

194. *See* Bruce Rubenstein, *Company Sells Shares in Jury Award as Appeal Hedge*, CORP. LEGAL TIMES, Dec. 1998, at 32.

195. *See id.*

196. *See* Bill Pheasant, *Ruling to Help Recovery Suits by Liquidators*, AUSTL. FIN. REV., June 12, 1998, at 26.

197. *See* Chris Merritt, *Rivkin's Idea Wins Consumer Backing*, AUSTL. FIN. REV., May 15, 1998, at 24.

198. *See id.*

199. *See id.*

200. *Id.*

Wales at twenty-five percent.[201] The emergence of Rivkin's company has encouraged politicians to support a removal of the ban on contingency fees.[202] One commentator noted that the ban "'enables private financiers to step into an area where trained lawyers should be making the judgment on the issues.'"[203]

In Canada, a new public company was created this year whose sole purpose is financing large patent infringement lawsuits in the United States.[204] The company is trading on the Alberta Stock Exchange and asserts that "[f]or the first time ever, the public can own a risk-adjusted portfolio of multi-million dollar lawsuits."[205] The president of the company notes that even if a patent owner whose patent is being infringed can retain counsel on a contingency fee basis, the cost of discovery, experts, and travel can be so expensive as to preclude litigation as a viable option.[206]

This Article began with a reference to "the waterbed case," a patent infringement case. Although Charlie Hall, the inventor, had his patent infringement case against Intex dismissed because he syndicated his potential rights in order to support the litigation in violation of California's public policy against champerty, the case did not end there. Instead of assigning part of his interest in the litigation, Hall assigned an undivided sixty-five percent interest in his patent to WBX Partners,[207] as is authorized by federal law.[208] He then moved for reinstatement of his claim against Intex, joining WBX in the action.[209] The court held that because the patent had already expired, and the only source of income remaining to be exploited was the claim for damages for infringement, the case should be tried on its merits.[210] A jury awarded Hall more than $6 million.[211]

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201. *See id.*

202. *See* Chris Merritt, *McClelland Urges Callinan Inquiry*, AUSTL. FIN. REV., Oct. 23, 1998, at 29.

203. *Id.* (quoting the Federal Opposition's shadow Attorney-General Robert McClelland).

204. *See* Letter from Kerry Knoll, Vice-President, Corporate Affairs, Patent Enforcement and Royalties, Ltd. (PEARL) to Susan L. Martin (May 4, 1999) (on file with author).

205. *Id.*

206. *See* Letter from John A. Cocomile, President, Patent Enforcement and Royalties, Ltd. (PEARL) to Susan L. Martin (Mar. 1, 1999) (on file with author).

207. *See* Hall v. Aqua Queen, Inc., 93 F.3d 1548, 1551 n.1 (Fed. Cir. 1996); WRIGHT, supra note 4, at 2.

208. *See* 35 U.S.C. § 261 (1998).

209. *See* Intex Plastics Sales Co. v. Hall, No. C-85-2987-JPV, 1991 WL 270167 (N.D. Cal. July 10, 1991).

210. *See id.* at 2.

211. *See* Intex Plastic Sales Co. v. Hall, 20 U.S.P.Q.2d (BNA) 1367 (N.D. Cal. 1991), *aff'd*, 960 F.2d 155 (Fed. Cir. 1992) (unpublished disposition).

Hall was successful, and the new Canadian company saw a niche for itself because United States law permits the assignment of patents or an interest in them. Thus, financial backers can support litigation in such cases in exchange for an interest in the patent instead of an interest in the litigation which, in many cases such as Hall's, amounts to the same thing. The litigation supporters thus will not run afoul of any common law, statutory, or public policy prohibitions against champerty.

IV. ELIMINATING THE EVILS OF CHAMPERTY WHILE PRESERVING ITS ADVANTAGES

It is interesting to speculate why an investment company should be able to support litigation for patent infringement, clearly a legal undertaking, but not litigation for injury caused by a product defect, or for breach of contract, or any other cause of action. In medieval England, interference in litigation was feared because powerful nobles and officials could use it to harass less fortunate people.[212] Their financial interests might encourage them to suborn judges and witnesses and to pursue frivolous suits to oppress hapless defendants.[213]

Today a variety of mechanisms are available to discourage those evils, making a ban on champerty completely unnecessary. Such mechanisms include causes of action for malicious prosecution and abuse of process.[214] There are prohibitions against instituting or maintaining frivolous actions, and sanctions for doing so.[215] Lawyers are bound by rules of professional conduct as well as by public policy disallowing excessive fees.[216] There are also doctrines of unconscionability, duress, and good faith that establish standards of behavior for those entering into agreements for the support of

212. *See* NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 150, § 2.9.

213. *See id.*

214. *See, e.g.*, 42 PA. CONS. STAT. §§ 8351–8354 (1998) (codifying common law tort of malicious prosecution); Farm Serv. Coop. v. Goshen Farms, Inc., 590 S.W.2d 861, 868 (Ark. 1979); Adams v. Super. Ct., 3 Cal. Rptr. 2d 49, 51–54 (Ct. App. 1992); Klesh v. Coddington, 684 A.2d 530, 536 (N.J. Super. Ct. App. Div. 1996); Greenberg v. Wolfberg, 890 P.2d 895, 901–02, 905 (Okla. 1994); Ely v. Whitlock, 385 S.E.2d 893, 895–97 (Va. 1989).

215. *See, e.g.*, FED. R. CIV. P. 11 (1999); CAL. CODE CIV. PROC. § 128.5 (1998); MASS. GEN. LAWS ch. 231, § 6F (1998); N.Y. C.P.L.R. 8303 (McKinney 1998); N.Y. R. OF CT. § 130-1.1 (McKinney 1998); TEX. R. OF CT. 13 (1999); WASH. REV. CODE § 4.84.185 (1998).

216. *See, e.g.*, IND. RULES OF PROF'L CONDUCT R 1.5(a), (d) (1987); LA. RULES OF PROF'L CONDUCT R 1.5(a), (d) (1999); MINN. RULES OF PROF'L CONDUCT R 1.5(a), (d) (1992); N.H. RULES OF PROF'L CONDUCT R 1.5(a), (d) (1999); S.D. RULES OF PROF'L CONDUCT R 1.5(a), (d) (1994).

litigation.[217] The Massachusetts court in *Saladini v. Righellis* announced that it would "scrutinize an agreement to finance a lawsuit with care."[218] That is an appropriate undertaking for courts. These safeguards can prevent any potential mischief caused by financial backers of litigants.

As the Massachusetts court recognized, allowing third parties to support litigation, rather than creating evils in our justice system, may actually improve it. Today we know that great injustice arises when lack of wealth keeps people with meritorious cases from pursuing them or when lack of wealth forces people to abandon cases or agree to unfair settlements because their opponents have greater financial resources. Furthermore, if someone like Righellis does find a person willing to support his litigation in exchange for a share of the award, it is patently unfair for him to receive a windfall were a court to invalidate his agreement with the financial backer. Even abroad, where eliminating litigation used to be a prime value, increasing access to the courts is now viewed as a basic necessity in a justice system.[219]

A well-known legal ethics expert has offered another important reason for facilitating the bringing of legal claims. Geoffrey Hazard has said:

> Claimant litigation fills a gap between individual decision-making—for example, a decision not to smoke cigarettes—and mobilization of legislative authority to change the legal ground rules. . . . [E]stablished interests can long postpone legislative efforts to change the rules. . . . [C]laimant litigation often performs the political function of the little boy who said that the emperor had no clothes. Those of us generally sympathetic to emperors—that is, to maintenance of established authority—have to keep that in mind.[220]

Because individuals rarely have the wherewithal to litigate the kinds of cases that have the most dramatic impact (for example, those involving tobacco, asbestos, drugs, or chemicals), plaintiffs generally bring such claims as class actions. Class actions are financed by lawyers who often end up getting far more of the

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217. *See* Saladini v. Righellis, 687 N.E.2d 1224, 1227 (Mass. 1997).

218. *Id.*

219. *See, e.g.*, NEW SOUTH WALES LAW REFORM COMMISSION, *supra* note 150, § 2.16; *Conditional Fee Deal in Arbitration Valid*, TIMES (LONDON), Apr. 23, 1998, at 42.

220. Geoffrey C. Hazard Jr., *Brits Adopt U.S.-Style Tort Litigation Methods*, NAT'L L.J., Jan. 13, 1997, at A15.

proceeds of the action than any of the claimants.[221] Allowing others to finance these suits as an investment might actually reduce the cost of the litigation by creating competition with class action law firms. A partner in such a firm has estimated that there are fewer than twenty firms nationwide that are primarily class actions firms.[222] She asserts that these experts would not want to work for investors at an hourly rate;[223] however, perhaps a new way of financing such cases would create more experts in the field and a fairer, more efficient way of conducting such litigation. The financial resources of the law firm supporting the litigation will influence a class action defendant in deciding whether or not to settle early at a high figure. If the law firm is not one of the premier twenty but a less financially endowed firm, the defendant might attempt to exhaust the plaintiffs' resources by dragging out discovery for years.[224] Knowing that the suit is supported by outside investors might encourage quicker settlements.[225]

CONCLUSION

Some commentators have argued for the elimination of the prohibition on maintenance and champerty because the "free trade" of legal claims is efficient.[226] This Article recognizes that there may be a market for legal claims if the champerty barrier were lifted. It argues for eliminating rules against champerty, however, not because it makes economic sense, but because it would

221. *See* Martin, *supra* note 1, at 508–09.

222. *See* Elizabeth Joan Cabreser, Syndicating Litigation: Advocacy, Ethics and the Limits of Entreneurship 7 n.12 (Aug. 8, 1993) (presented at ABA Annual Meeting) (on file with author).

223. *See id.* at 8.

224. *See* Judge Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation 26 (Mar. 18, 1993) (Second Annual Pope and John Lecture on Professionalism, Northwestern University School of Law, Chicago, Ill.) (on file with author).

225. One commentator has noted another barrier to third party support for litigation—federal security laws. *See* Abraham, *supra* note 1, at 1308. If a litigant wanted to put together a syndicate to finance a lawsuit, it might require compliance with stringent securities law requirements. *See id.* This Article is concerned with eliminating bans on champerty to keep court doors open to those with limited financial resources. It is not concerned with balancing the interests of a litigant in obtaining court access and the interests of potential investors in access to information about the investment. There is no reason to assume that such investors would be any less entitled to investment safeguards such as disclosure and government registration than investors in any other kind of investment opportunity.

226. *See, e.g.*, Dobner, *supra* note 123, at 1532; *see also*, Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435 (1995) (arguing for a tort claims market).

help to make the legal system more of a justice system. One cannot expect justice if the outcome of a lawsuit depends on which party has greater financial staying power. The United States legal system recognized long ago that lack of financial resources would in effect close court doors to many people with meritorious claims. Thus, contingency fees were permitted in this country long before they were available elsewhere. For the same reasons that lawyers are permitted to finance their clients' lawsuits, others (friends, relatives, businesspeople) should be able to enter into agreements with litigants to finance the litigation in exchange for a share of any proceeds of the litigation. The investors should be able to know that those agreements are enforceable, and the litigants should know that their claims will not be dismissed because of their third party support.