LITIGATION FINANCE IN THE MARKET SQUARE

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Litigation finance is the subject of a contentious scholarly and policy debate. Litigation funders provide capital to litigants or law firms in exchange for a share of case proceeds. The current debate centers on how litigation finance impacts the civil justice system. Proponents of funding argue it helps litigants get their day in court, while opponents argue funders pervert the judicial process. Policymakers are torn between these two competing viewpoints, without a clear path forward.

This Article reframes the debate about litigation finance. Scholars and policymakers have focused too narrowly on the "litigation" part of litigation finance, i.e., on how funding impacts the legal system. We shift the focus to the "finance" implications of litigation finance. We explore for the first time how litigation finance affects competition not only in the *courtroom* but also in the *marketplace*—how companies use funding to access not just the courts but the capital markets. To do this, we offer a novel interdisciplinary approach drawing on the classic business concept of "non-market strategies." This scholarship, which has been all but ignored by legal scholars, studies how companies leverage "non-market" institutions like courts to increase their competitive advantage in the market. While we introduce this scholarship with reference to litigation finance, it holds promise to reframe the debate around legal issues far beyond the realm of litigation funding.

Our central claim is that any regulation of litigation finance is a regulation not only of the courts but of the capital markets, with significant but unexplored implications for contemporary debates about funding. We show that the regulation of funding affects competition in the marketplace and is especially likely to harm small and medium-sized enterprises, which are more likely to rely upon litigation funding to pursue non-market strategies. Our approach also offers new insights into the ongoing debate about funding's impact on the civil justice system. We conclude by inviting scholars and policymakers to further study these new questions about litigation finance's impact outside the courthouse gates and in the market square.

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INTRODUCTION 1
I. TODAY'S DEBATE ABOUT LITIGATION FINANCE 5
A. What is Litigation Finance? 5
B. The Scholarly Debate 11
C. The Policy Debate 15
II. NON-MARKET STRATEGIES: A PRIMER 22
A. What Are Non-Market Strategies? 22
B. The Types of Non-Market Strategies 25
C. The Choice Among Non-Market Strategies 31
III. LITIGATION FINANCE AS A NON-MARKET STRATEGY 33
A. Litigation Finance as Corporate Finance: An Adaptive Strategy 35
B. Litigation Finance to Pursue Litigation: Adaptive and Transformative Strategies 43
C. Lobbying and Trade Associations: Transformative and Additive Strategies 47
IV. POLICY IMPLICATIONS OF LITIGATION FINANCE AS NON-MARKET STRATEGY 49
A. A New Dimension to the Policy Debate 50
B. Implications for the Civil Justice System 56
V. SCHOLARLY BENEFITS OF THE NON-MARKET STRATEGY FRAMEWORK 60
A. Legal Scholars 61
B. Business Scholars and Businesses 62
CONCLUSION 63

INTRODUCTION

This Article reframes the contentious scholarly and policy debate about litigation finance. Third-party litigation funders provide capital to litigants or law firms in exchange for an interest in the potential recovery from a legal claim.[1] The standard approach to litigation funding focuses exclusively on how litigation finance affects *litigation*: that is, how it impacts the civil justice system and access to the courts.[2] Scholars have explored whether funding improves or impairs the legal system, benefits or harms litigants, prolongs or expedites cases, impairs or supports the attorney-client relationship, and so on.[3] In the political arena, a fight over how funding should be regulated pits those who argue funding levels the litigation playing field against those who contend it spurs frivolous suits and encourages speculation on lawsuits.[4]

These are important themes but not the full story. Litigation finance is not just "likely the most important development in civil justice

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[1] Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 570 (2021); U.S. GOV'T ACCOUNTABILITY OFF., GAO 23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 1 (2022).

[2] *See infra* Part I.B.

[3] For a non-exhaustive list of scholarly articles exploring the legal implications of litigation finance, see, e.g., Tom Baker, *What Litigation Funders Can Learn About Settlement Rights From the Law of Liability Insurance*, __ THEORETICAL INQUIRIES L. __ (2025) (forthcoming) (drawing parallels between litigation insurers and litigation funders, and demonstrating implications for the debate over funder control of litigation); Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL INQUIRIES L. 109, 122 (2018) (arguing that litigation finance will create outcomes more in line with merits rather than financial strength); Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J. LAW & BUS. 911 (2015-2016) (discussing whether litigation funding communications are discoverable in court); Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 627–29 (2012) (discussing the increase of frivolous claims and lawyers' rent-seeking behavior); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 101–02 (2010) (discussing how litigation finance affects pre-trial settlements); Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831 (2013) (discussing the nature of litigation finance investment agreements); Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919 (2015) (discussing how third-party funding assists claimants and law firms).

[4] *See infra* Part I.C. and accompanying notes.

of our time."[5] It is also a highly important development for the capital markets and business arena. To fully appreciate the welfare effects of third-party funding, scholars and policymakers must study not only how litigation finance impacts *litigation* but also how it impacts *finance*; how it affects not only access to the *courts* but also access to the *capital markets*. This Article starts that process.

This Article is the first to shift the debate about litigation finance to a host of vital questions that are not currently being considered: How does litigation finance affect business competition? What impact does the rise of this new corner of the capital markets have on corporate strategy, including the use of litigation to gain a strategic advantage in the marketplace? Why do some companies finance litigations and other business activities with third-party litigation funding, rather than with more traditional third-party debt and equity financing? Who wins—and who loses—in the business arena when we impose regulations designed to restrict access to litigation finance? How do the answers to these questions bear upon the existing debate about funding?

One reason these questions about litigation finance have not yet been explored is that legal scholars do not have an accepted framework for analyzing how companies engage with litigation for strategic business purposes. We provide that framework by drawing on foundational business scholarship about "non-market strategies," which provides an account for how companies leverage the courts, legislatures, and other "non-market" institutions to jockey for position in the market.[6] The non-market strategy literature speaks directly to how companies interact with the judicial process to gain an advantage in the market, yet it has been almost entirely ignored by legal scholars.[7] Although we introduce a

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[5] Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1075 (2019).

[6] *See infra* Part II. Nonmarket strategy research has a long history in management and business journals. For some leading articles, see, e.g., David P. Baron, *The Nonmarket Strategy System*, MIT SLOAN MGMT. REV. (1995); David P Baron, *Integrated strategy: Market and nonmarket components*, 37 CAL. MMGT. REV. 47 (1995); David Baron & Daniel Diermeier, *Strategic Activism and Nonmarket Strategy*, 16 J. ECON. & MGMT. STRAT. 599 (2007); Sinziana Dorobantu, Aseem Kaul, & Bennet Zelner, *Nonmarket Strategy Research Through the Lens of New Institutional Economics: An Integrative Review and Future Directions*, 38 STRAT. MGMT. J. 114 (2017); Kamel Mellahi et al., *A Review of the Nonmarket Strategy Literature: Toward a Multi-theoretical Integration*, 42 J. MGMT. 143 (2016).

[7] For the rare discussions of nonmarket strategies in legal scholarship, see, e.g., John C. Coates IV, *Corporate Speech & the First Amendment: History, Data, and Implications*, 30 CONST. COMMENT. 223, 270 (2015) (briefly referring to litigation challenging agency action as a non-market strategy); Jill E. Fisch, *How Do Corporations Play Politics?: The*

non-market strategy approach in the context of how companies engage with litigation finance, this framework holds the promise of influencing legal scholarship across the waterfront of issues pertaining to business litigation.[8]

Analyzing litigation finance through the lens of non-market strategies, we highlight three ways the use of litigation finance affects competition in the market square. First, companies use litigation finance not only to finance litigation but also to raise working capital to support business growth, leveraging the courts (a non-market institution) to strengthen their capital position in the market. In this way, litigation finance is simply a new dimension of the financial markets, and one that is especially likely to provide a lifeline to small and medium-sized businesses that have relatively thin access to traditional equity and debt capital markets.[9] Second, companies use litigation finance to *pursue litigation as a non-market strategy*—that is, they use litigation to obtain a strategic advantage relative to other marketplace actors, the same way well-resourced companies have done since long before the advent of the modern litigation finance industry.[10] Third, we recast lobbying efforts to regulate litigation finance, and the actions of related trade associations to support or attack litigation finance, as themselves non-market strategies used by companies that stand to lose or gain from the growth of litigation finance.[11]

These insights provide a fresh perspective on debates about litigation funding. First, we identify an entire set of funding's policy

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Fedex Story, 58 VAND. L. REV. 1495, 1558 (2005) (discussing FedEx's use of nonmarket strategies); Sean Leibowitz, *State Insurance Rate Regulation: A Coasian Perspective*, 17 J.L. BUS. & ETH. 107, 117 (2011) (briefly addressing nonmarket strategies in the context of rate regulation); Christopher J.S. Termini, *Return on Political Investment: The Puzzle of Ex Ante Investment in Articles 3 and 4 of the U.C.C.*, 92 VA. L. REV. 1023, 1039 (2006) (briefly addressing nonmarket strategies in the context of lobbying).

[8] Legal scholars have offered approaches to certain non-market strategies. For example, public choice theory provides an account for how interest groups including businesses influence legislation and regulation. *See*, *e.g.*, Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). But public choice theory focuses on political decision-making and does not emphasize other subjects of the non-market strategy framework, such as how companies leverage legal claims as assets, use litigation as a strategic business tool, or engage in self-regulation. *See infra* Part II.

[9] *See infra* Part III.A.

[10] *See infra* Part III.B.

[11] *See infra* Part III.C.

implications that scholars and policymakers have overlooked. Existing discussions of litigation finance present only one view of the cathedral.[12] Litigation finance's impact on litigation is explored at length but its impact on finance and business strategy is ignored. Scholars and policymakers cannot fully understand or effectively address litigation finance unless they explore its implications for both litigation *and* finance. Indeed, one could set aside entirely the debate about whether litigation finance is good for the legal system and still be left with a host of questions about whether litigation finance is good for business and finance.

Our study of the business and finance implications of litigation finance reveals that almost all companies use some form of third-party financing—"other peoples' money"—to pay for litigation and other legitimate business pursuits.[13] Some companies use traditional debt and equity financing. But for many companies—primarily small and medium-sized enterprises (SMEs)—structuring a capital raise as a litigation finance investment is the most efficient, or even the only, way to raise new third-party capital. Litigation finance is thus used disproportionately by SMEs to pursue non-market strategies that might allow those firms to better compete against larger incumbent players. Regulation of modern commercial litigation finance may undermine SMEs' ability to compete in the marketplace, likely diminishing welfare.

Second, our study of the finance implications of litigation finance also brings fresh insights to the existing debate about how litigation finance impacts the civil justice system.[14] The traditional debate first defines third-party litigation funding and then zooms in on its impact on the legal system. We instead zoom out and place the modern litigation finance industry in the broader context of the many ways companies use third-party capital to finance litigation and other legitimate business pursuits. When we do this, we show that many arguments that third-party litigation finance adversely affects the civil justice system—that it might promote frivolous litigation, invite foreign control of litigation, and impair the principle of party control—apply equally or indeed even more forcefully to the many other ways claimholders raise third-party capital to support litigation (e.g., via traditional debt and equity capital). These insights both expose existing efforts to regulate litigation funding as vastly under-inclusive relative to their stated goals and help us see the

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[12] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 & n.2 (1972).

[13] *See infra* Part IV.A.

[14] *See infra* Part IV.B.

(mostly negative) welfare effects of targeting only one specific form of third-party funding, i.e., the kind of third-party funding supplied by the modern litigation finance industry and especially demanded by small and medium-sized businesses.

This Article proceeds in five parts. Part I describes litigation finance and how it has been framed in the scholarly and policy debate, demonstrating that the narrow focus on litigation finance as a purely "litigation" phenomenon has led to ad hoc regulations and confusion by legislatures on how to manage litigation finance. Part II introduces the concept of non-market strategies and describes the various "non-market" strategic behaviors that companies pursue. Part III identifies three ways companies use litigation finance (and the regulation of funding) as a non-market strategy to jockey for position in the financial and commercial markets. Part IV offers policy implications of this new framework. Part V draws out implications of our framework for legal and business scholars.

I. TODAY'S DEBATE ABOUT LITIGATION FINANCE

We first provide a background on litigation finance, defining what it is and reviewing its scholarly and public policy debate.

A. What is Litigation Finance?

Imagine you are the CEO of a small, family-owned technology company. You invented high-flying weather balloons that operate as airborne communication systems. A much larger company suggests a joint venture, signs a nondisclosure agreement, and learns your trade secrets. In the end, no deal happens—but the larger company soon copies your tech anyway and recreates its own version of your weather balloons.[15]

Assume that to rebuild you need $15 million, including $5 million to bring a $150 million trade secret misappropriation case against your one-time JV partner, and another $10 million to research and develop a next-generation weather balloon transceiver. You have a strong, and therefore valuable, legal claim.[16] But you do not have $15 million. You approach the traditional debt or equity markets, but you experience the

[15] *See Space Data Corporation v. X*, No. 16-cv-3260, 2017 WL 5013363 (N.D. Cal. Feb. 16, 2017).

[16] *See* Geoffrey P. Miller, Commentary, *On the Costs of Civil Justice*, 80 TEX. L. REV. 2115, 2115 (2002); Sebok & Wendel, *supra* note 3, at 1842. *Cf. Cannon-Stokes v. Potter*, 453 F.3d 446, 447 (7th Cir. 2006) (Easterbrook, J.) (recognizing that "valuable legal claims" are "assets" of a bankruptcy estate).

same problems many small and medium-sized enterprises face: a thin capital market, high lending rates, and reluctant equity investors.[17] What can you do?

An emerging solution is litigation finance, the practice where a third party provides capital to a litigant or law firm in exchange for an interest in the potential recovery of a legal claim.[18] "Litigation funding agreement[s]," one court recently acknowledged, "are a fact of contemporary complex litigation."[19] Instead of trading away equity in the company or pledging assets to a traditional lender, you can pledge expected proceeds from your legal claim as collateral for the $15 million you need.

Litigation finance investments are typically "non-recourse," which means the litigation funder receives its return only if the case succeeds.[20] If the case loses, the funder receives nothing.[21] The non-recourse nature of litigation finance can make it attractive even to companies that can access the traditional equity and debt capital markets because (unlike new equity investment) litigation finance does not dilute existing shareholders,[22] and (unlike debt finance) funders do not have the right to regular payments of interest and principal, or the power to put the

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[17] *See infra* Part III.A.1. and accompanying text.

[18] Bedi & Marra, *supra* note 1, at 570; GAO Litigation Finance Report, *supra* note 1, at 1.

[19] *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2024 WL 1214568, at *1 (N.D. Ill. Mar. 21, 2024).

[20] Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 244 (2014). It is technically more precise to say that litigation finance agreements are *limited recourse*: the funder has recourse to any proceeds from the legal claim, and funding agreements typically become full recourse if the funded breach commits a material breach. *See*, *e.g.*, Litigation Funding Agreement Between Legalist Fund II, L.P. & DiaMedica Therapeutics Inc. § 9.1 (Exhibit to Form 8-K, DiaMedica Therapeutics, Inc.) (Dec. 27, 2019) (limitation of liability provision recognizing that the funder has recourse in the event of a breach), https://bit.ly/2ZwmPAc [https://perma.cc/Y4EW-7BEZ].

[21] Mariel Rodak, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 506-07 (2006).

[22] *See*, *e.g.*, STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 392 (3d ed. 2012) (explaining that "bringing in more equity owners dilutes the potential upside return" for pre-existing shareholders); Arjya B. Majumdar, *The (Un?)enforceability of Investor Rights in Indian Private Equity*, 41 U. PA. J. INT'L L. 981, 1010–11 (2020) ("Future rounds of investment which involve fresh issues of equity will inevitably dilute the existing shareholding of the investor. Dilution is the reduction of a shareholder's ownership percentage in a company due to an increase in the paid up share capital.").

company into bankruptcy or sue for recovery if those payments are not made.[23]

The key insight, then, of the modern litigation finance industry is an insight not so much about the civil justice system but about *corporate finance*: legal claims are assets against which companies can secure financing, no different than inventory, real estate, and accounts receivables. In short, litigation funders are asset-based investors where the asset is law.[24]

Asset-based investing typically requires specialized expertise,[25] and litigation finance is no different. Instead of valuing a company's real property or inventory, litigation finance companies expend great time and effort studying the merits of legal claims before advancing capital against those claims.[26] The need for subject-matter expertise has led to specialization among litigation funders.[27] Some litigation finance companies invest primarily in business-to-business disputes; these "commercial litigation funders" include publicly-traded companies like Burford Capital and Omni Bridgeway; multi-strategy hedge funds like the D.E. Shaw Group; and privately-held groups like Parabellum Capital and Certum Group.[28] Other financers focus instead on financing mass tort claims, where they typically help law firms advertise for clients who have been injured in a particular mass tort.[29] Still other entities are

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[23] *See*, *e.g.*, Ronald J. Mann, *Explaining the Pattern of Secured Credit*, 110 HARV. L. REV. 625, 639 (1997) (discussing certain remedies of secured lenders).

[24] Bedi & Marra, *supra* note 1, at 571 ("Litigation finance allows claimholders, or law firms with contingent fee interests in claims, to secure financing against those assets, just as the owner of a home, factory, or account receivable may use those assets as collateral for financing.").

[25] *See* Paul M. Shupack, *Preferred Capital Structures and the Question of Filing*, 79 MINN. L. REV. 787, 808 (1995).

[26] Note, Mathew Andrews, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 YALE L.J. 2422, 2437 (2014) (reviewing the "extensive due diligence process" of four different litigation funders).

[27] Sebok & Wendel, *supra* note 3, at 1842 (distinguishing between the commercial and consumer funding markets).

[28] Bedi & Marra, *supra* note 1, at 576.

[29] For contrasting review of the effect litigation finance has on mass torts, *compare* Samir D. Parikh, *Opaque Capital and Mass-Tort Financing*, 133 YALE L.J. FORUM 32 (2023) (arguing that litigation funders exert undue influence in the resolution of mass torts disputes) *with* Elizabeth Chamblee Burch, *Financiers As Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1276-77 (2012) (arguing that third-party funders can play a beneficial role as monitors who mitigate principal-agent problems between lawyers and clients).

consumer litigation funders, primarily providing small-dollar advances to individuals with personal injury and medical malpractice claims.[30]

Commercial litigation finance companies typically undertake months-long diligence processes before they invest in a case.[31] Funders are staffed with highly experienced lawyers who develop specialized expertise in evaluating whether a case is a winner or loser.[32] Funders frequently consult subject-matter experts to assist with their evaluation, including outside diligence counsel and third-party damages experts.[33] The net effect is that commercial funders invest in only a tiny fraction of cases they see—typically less than 10% of opportunities.[34] In the end, it is likely that a funder's evaluation process is even more rigorous than the evaluation provided by contingent fee law firms or by companies deciding whether to pursue a case with their own retained earnings.[35]

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[30] For scholarship studying litigation finance in the consumer funding sector, see, e.g., Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11 (2014) (reviewing the consumer funding industry and proposing certain regulations); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LIT. 143, 151 (2021) (analyzing the archive of 225,293 requests for funding from one of the largest consumer litigation finance companies).

[31] Andrews, *supra* note 26, at 2438 (explaining that "any claims that come before [the studied litigation funders] are likely rigorously vetted," and stating that at least one funder spends an average of $75,000 to $100,000 in diligence on cases before funding); Erick Robinson, *More Litigation Funding Rules Would Threaten Access to Justice*, BLOOMBERG (Apr. 30, 2024), https://bit.ly/46gx8ua (describing the "arduous months-long process of obtaining approval for funding").

[32] Michael Perich, *Profile of Litigation Funders*, BLOOMBERG LAW (Jan. 3, 2024), https://bit.ly/3Lv3esx (explaining that "[e]ach traditional litigation funder is staffed by former attorneys who perform thorough diligence on the cases they consider financing").

[33] Andrews, *supra* note 26, at 2437 (discussing funders' use of outside diligence experts).

[34] Bedi & Marra, *supra* note 1, at 607 ("Commercial litigation financiers reject the vast majority (even ninety percent or more) of financing requests that they receive."); BURFORD CAPITAL, ANNUAL REPORT 2019, at 17 (2020) https://bit.ly/4d3MhkH (reporting that in 2018 and 2019, Burford invested in 5.9% and 7%, respectively, of inbound requests for funding).

[35] *Cf.* Bob Craig et al., *Litigation Finance 101: What You Need to Know*, Berkeley Research Group (Fall 2018), https://bit.ly/3xX3zBh ("Litigation funders bring a significant level of discipline and professionalism to damage assessment, because their business depends on it. In this regard, litigation funding is analogous to the broader movement to outsource non-core corporate functions—web hosting, IT, property management, etc.—to specialized vendors as part of a quest for efficiency and agility.").

In this Article we focus on the commercial litigation finance space, which is by all accounts the largest and most prominent segment of the litigation finance industry, and is also the emerging target of regulation by policymakers.[36] In 2023, there were an estimated 39 active commercial litigation finance companies with a total of $15.2 billion in assets under management.[37] These companies made $2.7 billion in new litigation finance commitments that year, with funding distributed across 353 new deals.[38] Commercial litigation finance companies invest based on the range of business-to-business disputes, including contract, business tort, antitrust, patent infringement, trademark, copyright, trade secret misappropriation cases.[39] Commercial litigation funders can finance either claimants or law firms,[40] and they can invest at any stage of the case, from pre-suit through appeal and post-judgment proceedings.[41]

Litigants and law firms can use litigation finance in two different ways: to pursue their legal claims and to raise general-purpose working capital. To begin with the first point, litigation is very expensive.[42] Many litigants are liquidity-constrained: they lack access to the thousands or

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[36] *See infra* note 37 and accompanying text (providing a market size of the litigation finance industry); *infra* Part I.C (discussing regulators' shifting attention towards the commercial litigation finance space). The two largest publicly-traded litigation funders in the United States, Burford Capital and Omni Bridgeway, are both commercial litigation funders.

[37] WESTFLEET ADVISORS, THE WESTFLEET INSIDER: 2023 LITIGATION FINANCE MARKET REPORT 3 (2024), https://bit.ly/3WGVlXz.

[38] *Id.*

[39] *See*, *e.g.*, Burford Capital, *Disputes We Finance*, https://bit.ly/3Y9CxkF; Jim Batson, *Consumer vs. Commercial Litigation Funding: How They Are Different and Why It Matters from a Regulatory Perspective*, Omni Bridgeway (Jan. 31, 2018), https://bit.ly/4f3bgXf.

[40] Bedi & Marra, *supra* note 1, at 571 (explaining that litigation funders can provide capital directly to a litigant or to a law firm); *see also* Westfleet 2023 Report, *supra* note 37, at 3 (finding that in 2023, 64% of litigation finance agreements were between funders and law firms, with the balance between funders and claimholders). For a particularly insightful discussion of law firm-directed financing, see Anthony J. Sebok, *Selling Attorneys' Fees*, 2018 U. ILL. L. REV. 1207 (2018) (arguing that a law firm's sale of future, unmatured, fees, does not violate the legal ethics rule prohibition against lawyers sharing fees with non-lawyers).

[41] Bedi & Marra, *supra* note 1, at 573 ("Claimholders can seek funding at all stages of a case, from before a complaint is filed to after final judgment is entered.").

[42] *See* Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIA. L. REV. 499, 503 (2015) (detailing how the rising cost of legal services impedes access to justice).

even millions of dollars it takes to pursue litigation.[43] Even if prospective litigants have the money to pursue the case, they may be risk-constrained: that is, they may not want to risk their capital in an uncertain litigation.[44] Law firms can litigate cases in exchange for a contingent fee—effectively operating as a third-party funder—but law firms are usually uniquely ill-suited to invest in litigation, for reasons that scholars have explored at length.[45] Litigation finance provides an alternative path for litigants and law firms to finance their cases.

The second way litigants can use litigation finance is by using the funding as working capital to finance general corporate endeavors, including to hire new workers, build new products, or invest in research and development.[46] In this sense, litigation funders operate similarly to traditional equity and debt providers, advancing capital in return for an interest in potentially valuable assets.[47] Although the focus of this Article is the use of litigation funding directly by claimholders, law firms may also use litigation finance as working capital, drawing down funding against existing contingent fee matters to hire new employees and expand client services.[48]

While commentators typically distinguish between funders' supply of fees and costs funding on the one hand, and working capital on the

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[43] For discussions of risk and liquidity constraints for litigants, see Bedi & Marra, *supra* note 1, at 578; Cary Martin, *Private Investment Companies in the Wake of the Financial Crisis: Rethinking the Effectiveness of the Sophisticated Investor Exemption*, 37 DEL. J. CORP. L. 49, 59 (2012); Avraham & Wickelgren, *supra* note 20, at 235; J.B. Heaton, *Litigation Funding: An Economic Analysis*, 42 AM. J. TRIAL ADVOC. 307, 309 (2019); Shepherd & Stone, *supra* note 3, at 923–30.

[44] *See* Bedi & Marra *supra* note 1, at 578.

[45] Edward S. Adams & John H. Matheson, *Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1 (1998) (discussing the challenges lawyers have in raising third-party capital); Shepherd & Stone, *supra* note 3, at 929–30. *See also* Brian Fitzpatrick & William C. Marra, *Agency Costs in Third-Party Litigation Finance Reconsidered* __ THEORETICAL INQUIRIES L. __ (2025) (forthcoming) (discussing the agency problems inherent in both contingent fee and hourly fee arrangements, and contending that the hybrid fee arrangement typically requested by litigation funders, where the law firm is compensated with a portion of its hourly rate and a modest contingent upside, better aligns the interests of lawyer and client than either the contingent fee or hourly fee models).

[46] Bedi & Marra, *supra* note 1, at 573.

[47] *See infra* Part III.A.

[48] Bedi & Marra, *supra* note 1, at 571.

other hand, it is important to remember that money is fungible.[49] A dollar of third-party financing for one purpose frees capital for other purposes.[50] Thus even if a claimholder obtains third-party litigation funding that may be used only to pay its lawyers in a case, this financing frees up the company's remaining capital to pursue other legitimate corporate purposes like paying employee wages, delivering goods and services, and so on.[51] Similarly, when funders support law firms, this funding typically enables lawyers to enter into a "full contingency" relationship with their clients (with the firm's fees partially funded by the litigation funder), enabling the claimholder to pursue a case without having to devote its finite resources to paying lawyers.[52] Thus even funding directed to law firms helps corporate claimholders free up capital for general corporate purposes.

B. The Scholarly Debate

Legal scholars are paying attention to what Maya Steinitz calls "likely the most important development in civil justice of our time."[53] The scholarship about litigation finance is vibrant and growing. Yet virtually the entire collection treats litigation finance as fundamentally a *litigation* phenomenon. That is, scholars study litigation finance almost

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[49] *See* Tanner Dowdy, *Speech Markets & Web3: Refreshing the First Amendment for Non-Fungible Tokens (NFTs)*, 91 U. CIN. L. REV. 206, 213 (2022) (explaining that "money is a classic fungible asset—it is interchangeable and is capable of being fractionalized, i.e., (dollars can break down into cents)" and that "[t]he fungible nature of money allows one to substitute a five-dollar bill with five one-dollar bills" (internal quotation marks omitted)).

[50] *Cf.* David Adam Friedman, *Bringing Candor to Charitable Solicitations*, 78 MD. L. REV. 709, 728 (2019) (explaining problems related to the fungible nature of money that arise when charities make representations to use money in a certain way).

[51] *See* W. Bradley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 14 (2018) ("During the time the lawsuit was pending, the small company would not be using its capital to innovate and compete more effectively against the large manufacturer. Litigation financing thus offers litigants the opportunity to make more productive use of their working capital, rather than dissipating it on the expenses of litigation.").

[52] Bedi & Marra, *supra* note 1, at 574 (describing law firm "portfolio funding"); Note, Zeqing Zheng, *The Paper Chase: Fee-Splitting vs. Independent Judgment in Portfolio Litigation Financing of Commercial Litigation*, 34 GEO. J. LEGAL ETHICS 1383, 1384 (2021) ("Portfolio financing involves funding arrangements between third-party litigation funders and lawyers where funders invest in a portfolio of cases managed by one law firm. Under portfolio financing, there is a separation between the funder and the client.").

[53] Steinitz, *Follow the Money?*, *supra* note 5, at 1075.

solely as a development in "civil justice," examining how funding impacts the legal system.[54] The unit of analysis is the legal system, with proponents of litigation finance arguing that funding creates a better legal system, and opponents arguing it hurts civil justice.[55] Indeed, even articles that apply an economic lens to litigation finance apply that lens to study how funding impacts *litigation*, not how it impacts the *financial markets* or the broader business world.[56]

Existing scholarship studies the litigation effects of litigation finance from many different and important angles. Scholars have debated whether litigation funding increases the amount of litigation and

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[54] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1299–30 (2011) (explaining that "[v]irtually all of the literature arguing in favor of permitting litigation funding does so on the basis that it will reverse the exclusion of have-nots from the courthouse," and expanding the analysis to focus on another litigation issue, i.e., the potential for litigation finance "to significantly reduce the Great Men's grip on the courts").

[55] *See*, *e.g.*, Samuel Antill & Steven R. Grenadier, *Financing the Litigation Arms Race*, J. FIN. ECON. 218, 219 (2023) (arguing that litigation funding likely deters wasteful defense-side bullying and necessarily cause an increase in the filing of frivolous litigation); Terrence Cain**,** *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 12-13 (2014) (summarizing the arguments for and against funding, all of which concern funding's impact on the legal system); Steinitz, *Whose Claim Is This Anyway?*, *supra* note 54, at 1327-32 (listing the regulatory questions as all concerning litigation funding's impact on the civil justice system, including champerty, attorney-client-funder relationship and agency issues, court supervision, and the funding contract); Note, Austin L. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 740-44 (2019) (listing the objections to litigation finance as all concerning funding's impact on litigation, including whether funders promote frivolous claims, improperly influence litigation strategy, and impair privilege and work product protections).

[56] Jeremy Kidd has written about competition among litigation funders in the litigation finance market. Jeremy Kidd, *Probate Funding and the Litigation Funding Debate*, 76 WASH. & LEE L. REV. 259, 292 –93 (2019); Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOYOLA U. CHI. LAW J. 1239, 1257 (2016). For other works taking an economic lens to litigation finance, *see*, *e.g.*, Keith Sharfman, *The Economic Case Against Forced Disclosure of Third Party Litigation Funding*, 94 N.Y. ST. B.J. 36, 38-39 (2022) (studying the debate about disclosure through an economic lens to determine how it impacts parties during litigation); Maya Steinitz, *How Much is that Lawsuit in the Window? Pricing Legal Claims*, 66 VAND. L. REV. 1889, 1904-05 (2013) (studying how litigation finance impacts the price at which claims settle); Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98, 138 (2015) (arguing that litigation funders view modern civil litigation as not just "a forum for redress of private grievances" but "also a clearinghouse for complex financial interests attached to legal claims presented, assessed, and settled through the legal infrastructure"); Molot, *supra* note 3 (describing litigation finance as a mechanism to allow cases to resolve at the optimal price).

whether it results in the filing of frivolous lawsuits.[57] They have studied how litigation funding affects litigants' access to the courts[58] and the price at which claims settle.[59] Scholars have studied how funding impact the price of legal services and injects competition into the market for legal services.[60] They have explored whether litigation funding violates background legal rules about champerty and maintenance.[61] They have studied whether litigation funding runs afoul of the legal ethics rules[62] and whether funders interfere with (or strengthen) the attorney-client relationship.[63]

An especially large body of scholarship studies whether litigation funding agreements and communications should be disclosed to the

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[57] *Compare* Antill & Grenadier, *supra* note 55, at 219 (presenting financial modeling that shows "litigation financing does not necessarily encourage frivolous lawsuits") *with* Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 627–29 (2012) (arguing that litigation financing will increase the number of high-value frivolous claims and lawyers' rent-seeking behavior to manipulate the common law toward favorable rules).

[58] *See, e.g.*, Steinitz, *Whose Claim Is This Anyway?*, *supra* note 54, at 1338 ("Third-party financing of litigation will increase access to justice and encourage private enforcement of the law.").

[59] *See*, *e.g.*, Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL INQUIRIES L. 109, 122 (2018) (explaining that litigation financing's potential effects—increasing the number and length of litigated cases—increase the likelihood that cases will be resolved based on the merits, not based on the parties' resources or risk tolerances); Molot, *supra* note 3, at 101–02 (noting that the lack of market alternatives causes risk-averse plaintiffs to settle prematurely relative to the lawsuit's merits).

[60] Bedi & Marra, *supra* note 1, at 610-11 (arguing that litigation funders introduce price competition, including because funders compete directly with law firms for the right to finance a case).

[61] *See*, *e.g.*, Susan Lorde Martin, *Syndicated Lawsuits: Illegal Champerty or New Business Opportunity?*, 30 AM. BUS. L.J. 485, 511 (1992); Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 110 (2011).

[62] *See*, *e.g.* Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833 (2015); Wendel, *supra* note 51.

[63] James M. Fischer, *Litigation Financing: A Real or Phantom Menace to Lawyer Professional Responsibility?*, 27 GEO. J. LEGAL ETHICS 191, 194 (2014) (arguing that "[w]hile litigation financing may present difficulties and challenges for lawyers, particularly plaintiff's counsel, under current professional codes, those difficulties and challenges may be avoided and overcome by careful planning by the affected lawyer"); Fitzpatrick & Marra, *supra* note 45 (arguing that the hybrid fee arrangements typically presented in litigation funding arrangements better align the interests of lawyer and client than either the pure hourly or pure contingent fee arrangement).

court and defendants during litigation, both as a policy matter and under the attorney work product doctrine and attorney-client privilege.[64] Control is another hot topic, with scholars debating whether funders should be allowed to control litigation strategy decisions.[65]

This scholarship is important, but it studies litigation finance through a narrow lens: the *effect* that litigation finance has on the *legal system*. A few scholars have discussed the *causes* of litigation finance, that is, why companies use third-party litigation funding to finance their cases. But that scholarship (which includes our own) is mostly limited to explaining that companies typically use litigation funding because they are either liquidity-constrained, i.e., they do not have the capital to pursue the case, or they are risk-constrained, i.e., they do not want to risk their capital on litigation.[66] This explanation is true as far as it goes, but it goes only far enough to explain why companies would use *third party capital* rather than retained earnings to finance litigation or working capital needs. While commentators have recognized the valuable non-recourse nature of litigation finance, no one has studied at depth why companies might use third-party *litigation finance* rather than the host of other ways they can raise third-party capital like traditional debt or equity finance to support their litigation and business endeavors.[67]

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[64] *See, e.g.*, Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or A Common Problem?*, 63 DEPAUL L. REV. 305, 311 (2014) (arguing that courts should adopt a broad understanding of the common interest doctrine to protect communications between funders and funded parties); Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J. LAW & BUS. 911, 942 (2015-2016) (identifying a "mismatch" between the work product doctrine and litigation funding, and arguing that "discovery requests for funding materials will remain a tempting means of indirectly disabling or hindering the ability of impecunious parties to pursue their claims"

[65] Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 517-18 (2012) (arguing litigation funders should be treated as real parties in interest and should be allowed to control litigation decisions); Baker, *supra* note 3 (arguing that it is routine and uncontroversial for insurers to control litigation, and contending that insurers are effectively defense-side litigation funders).

[66] Heaton, *supra* note 43, at 309; Bedi & Marra, *supra* note 1, at 578; Shepherd & Stone, *supra* note 3, at 927.

[67] Indeed, most discussions of litigation funding overlook that litigation can be financed by general-recourse third-party debt and equity capital where the investors' return is not tied solely to a litigation outcome. *See, e.g.*, Jean Xiao, *Heuristics, Biases, and Consumer Litigation Funding at the Bargaining Table*, 68 VAND. L. REV. 261, 262 (2015) (listing only "plaintiffs, defendants, the parties' attorneys, and defendants' insurers" as the "variety of sources" that have traditionally financed litigation); Steinitz, *Follow the Money*, *supra* note 5, at 1088-91 (focusing on situations where the third-party

Moreover, the emphasis on the *litigation effects* of litigation finance has also led to near-exclusive study of litigation finance as a tool to finance the fees and costs of litigation. But as explained above, that is only half the story: companies also use litigation finance to raise working capital that can be used to support non-litigation business needs like hiring employees.[68] And because money is fungible, "fees and costs" funding also frees up *other capital* for managers to reinvest into a company's core market pursuits.[69] Scholars sometimes mention in passing that funding can be used to raise working capital, but the market impact of funding's role as a source of general business capital has not been analyzed.[70]

The existing scholarship about litigation finance is insightful and important—but it tells only half the story. To fully understand litigation finance, we must study its implications not just for *litigation* but also *finance*—its implications for competition not only in the courtroom but also in the market square.

C. The Policy Debate

Alongside this scholarship stands a four-front policy debate about litigation finance. This policy debate tracks the scholarship by focusing on funding's impact on the civil justice system while ignoring its impact on the marketplace.

First, opponents of litigation finance are asking federal and state legislative bodies to enact regulations of litigation finance.[71] While there are not yet any federal regulations that specifically target litigation funding, several states have acted. The first round of state statutes were essentially consumer protection statutes that targeted *consumer* litigation finance agreements, i.e., agreements that typically concerned smaller-dollar advances to personal injury tort plaintiffs. State regulations in this mold were enacted in Arkansas, Indiana, Nebraska, and Vermont,

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financier is primarily concerned about the strength of the legal claim and not debt or equity finance).

[68] *See supra* notes 42–48 and accompanying text.

[69] *See supra* notes 49–52 and accompanying text.

[70] Bedi & Marra, *supra* note 1, at 588 (emphasizing that distressed companies can obtain working capital but not exploring the theme in detail); Steinitz, *Follow the Money?*, *supra* note 5, at 1102 (same); Wendel, *supra* note 51, at 14 (same).

[71] For a recent compendium of state laws regulating litigation finance, see Appendix III: State Laws Addressing Third-Party Litigation Financing, GAO Litigation Finance Report, *supra* note 1, at 45.

among other states.[72] These consumer-rights statutes require consumer litigation funders to register with the state,[73] provide funded parties with certain disclosures in the litigation finance contract,[74] and sometimes limit the interest rates funders can charge customers.[75] With respect to disclosure during litigation, those older regulations state that litigation funding documents are protected by the attorney-client privilege, thus making it harder for defendants to obtain information on a plaintiff's funding agreements.[76]

More recent "second wave" regulations focus on the commercial rather than consumer sector, and they demand more rather than less disclosure of litigation funding agreements. Emblematic second wave regulations include newly-enacted laws in Indiana[77] and Louisiana,[78] and a failed bill in Florida.[79] The United States Chamber of Commerce, a business advocacy group, was a chief proponent of these bills.[80] While

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[72] Each state law regulates funding transactions only with real persons. *See* ARK. CODE § 4-57-109(a)(1) (2017); NEB. REV. STAT. § 25-3302(2) (2010); IND. CODE § 24-12-1-1(7) (2019); VT. STAT. tit. 8, § 2251(2) (2019).

[73] NEB. REV. STAT. § 25-3307; IND. CODE. § 24-12-9-1; VT. STAT. tit. 8, § 2252.

[74] ARK. CODE § 4-57-109(c); NEB. REV. STAT. § 25-3303 (same); IND. CODE § 24-12-4-1; VT. STAT. tit. 8, § 2253.

[75] ARK. CODE § 4-57-109(b)(1); NEB. REV. STAT. § 25-3305; IND. CODE § 24-12-4.5-2.

[76] *See*, *e.g.*, NEB. REV. STAT. § 25-3306; VT. STAT. tit. 8, § 2255. Indiana's statute initially contained only this same language providing that communications with funders do not waive the protections of the work product doctrine or the attorney-client privilege. IND. CODE ANN. § 24-12-8-1. However, the statute was amended in 2023 to provide for mandatory disclosure of litigation funding agreements to defendants and their insurers. *Id.* § 24-12-4-2.

[77] IND. CODE § 24-12-11-1 *et seq.*

[78] Senate Bill No. 355, Louisiana 2024 Regular Session (2024), https://bit.ly/3y1rtLS [hereinafter Louisiana Statute]. For news coverage of the Louisiana statute, see Sara Merken, *Louisiana Law Places New Rules on Litigation Funders*, REUTERS (June 24, 2024), https://bit.ly/4f6Hdhl./

[79] See CS/ SB 1276: Litigation Financing, Florida 2024 Regular Session (2024), https://bit.ly/4f9wrH2 [hereinafter Florida Bill]. For news coverage of the Florida bill, see Emily R. Siegel, *Florida Lawmakers Move to Restrict Litigation Finance Industry*, BLOOMBERG (Feb. 7, 2024), https://bit.ly/46cRF2L.

[80] Daniel Connolly, *U.S. Chamber's Litigation Funding Concerns Spur 2 State Laws*, LAW360 (March 20, 2024), https://bit.ly/4d8hF1j (attributing recent Indiana and West Virginia statutes to the Chamber's efforts); Siegel, *Florida Lawmakers Move to Restrict*, *supra* note 79 (reporting that the Chamber of Commerce has supported the Florida bill and similar recent bills); Emily R. Siegel, *Louisiana Gov. Gets Bill Regulating Lawsuit*

earlier consumer litigation funding statutes confirmed enhanced protection for litigation funding documents, the Indiana and Louisiana statutes, and the failed Florida bill, all provide that commercial litigation funding agreements are subject to discovery and disclosure to opposing parties.[81] The statutes also contain other regulations designed to restrict litigation finance. For example, Indiana's statute prohibits funders from exercising any control or even "influence" over litigation decisions,[82] while the Louisiana statute requires litigation funders to be responsible for costs imposed on funded litigants[83] and provides that any violation of the statute renders a litigation finance contract unenforceable by the funder.[84]

Advocacy groups like the Chamber of Commerce have also lately argued that litigation funding might present a national security risk because foreign adversaries may use funding to hurt American companies and obtain access to U.S. corporate trade secrets.[85] While the supporters of litigation funding have pushed back against this narrative, claiming it is a scare tactic without basis in fact,[86] Indiana's new law bans funding from foreign adversaries of the United States, including China, Russia, and North Korea,[87] while the Louisiana statute requires disclosure of anyone entitled to receive, pursuant to a funding

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Funding Business, BLOOMBERG (May 31, 2024), https://bit.ly/3zT4UJV (reporting that the Chamber of Commerce has "led the charge" on the Louisiana statute and similar bills).

[81] *See* IND. CODE ANN. § 24-12-11-5 (providing that commercial litigation funding agreements are subject to discovery and disclosure); Louisiana Statute, *supra* note 78, at § 3580.3 (requiring disclosure of funding agreements and further stating that "[t]he existence of litigation financing, litigation financing transactions, and all participants in such financing arrangements are permissible subjects of discovery in all civil cases"); Florida Bill, *supra* note 79, at § 69.107(2) (generally requiring automatic disclosure within 30 days).

[82] IND. CODE ANN. § 24-12-11-4.

[83] Louisiana Statute, *supra* note 78, at § 3580.5.

[84] *Id.* § 3580.6.

[85] Matt Webb, *Pulling the Curtain Back on Foreign Influence in Third Party Litigation Funding*, U.S. CHAMBER OF COMMERCE (Apr. 2, 2024), https://bit.ly/3WqOlhd.

[86] *See*, *e.g.*, Adam Mortara, *Litigation Finance Doesn't Pose a Security Threat. That's a Myth*, BLOOMBERG LAW (May 3, 2023), https://bit.ly/3zYUxUH.

[87] IND. CODE Ann. § 24-12-11-2 ("A commercial litigation financier may not provide funding to a commercial litigation financing agreement that is directly or indirectly financed by a foreign entity of concern"); *see id.* § 24-12-11-2(3) (defining a "country of concern" as countries designated as "foreign adversaries" under 15 C.F.R. § 791.4).

agreement, any information affecting national defense or security that is released during a litigation.[88]

Second, in addition to the policy fight among legislators, there is also a push to have judges themselves enact disclosure rules that target litigation funding.[89] In 2021, the United States District Court for the District of New Jersey became the first federal district court in the nation to enact a disclosure rule targeting litigation finance companies' involvement across all cases.[90] Chief Judge Colm Connolly of the United States District Court for the District of Delaware has also adopted the rule.[91] That rule requires parties to disclose to the court whether there is any non-party that funding the matter on a non-recourse basis.[92] If such a funder exists, the litigant must disclose the identity of the funder, "[w]hether the funder's approval is necessary for litigation decisions or settlement decisions in the action and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval," and "[a] brief description of the nature of the financial interest."[93] The rule also states that "[t]he parties may seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other

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[88] Louisiana Statute, *supra* note 78, at § 3580.3(B) (disclosure requirement regarding information that affects national defense and security).

[89] We do not address here the local rules of many federal courts that require disclosure generally of parties with a financial interest in the case, without specifically referencing litigation funders. *See* Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper, Dan Coquillette, Rick Marcus, and Cathie Struve, Survey of Federal and State Disclosure Rules Regarding Litigation Funding (Feb. 7, 2018), in Advisory Committee on Civil Rules, Agenda Book, at 209 (Apr. 10, 2018).

[90] D.N.J. Civ. Rule 7.1.1 (2021). *See* Allison Frankel, *New Jersey Now Has a Sweeping Lit Funding Disclosure Rule. Does It Matter?*, Reuters (June 23, 2021), https://reut.rs/3YgJjVE. The U.S. District Court for the Northern District of California had previously enacted a mandatory disclosure rule specifically limited to disclosing litigation finance in class action litigations only. *See* Standing Order For All Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19.

[91] *See* Colm Connolly, *Standing Order Regarding Third-Party Litigation Funding Arrangements* (D. Del.), https://bit.ly/4bRdXrS [hereinafter Judge Connolly Standing Order]; *see generally* Dorothy Atkins, *Del. Judge Requires 3rd Party Litigation Funding Disclosures*, LAW360 (Apr. 19, 2022) https://bit.ly/4bJVb5O.

[92] D.N.J. Civ. R. 7.1.1(a).

[93] *Id.*

disclosure is necessary to any issue in the case."[94] Lawmakers opposed to funding have also asked for the Judicial Conference, the judicial branch's national policymaking body for the federal courts, to investigate whether mandatory disclosure of litigation finance agreements should be required,[95] and the Judicial Conference has recently formed a working group to study whether the Federal Rules should address litigation funding.[96]

Third, alongside efforts to persuade lawmakers and judges to enact certain regulations, the practice of litigation funding continues to be tested during litigation. Defendants routinely seek disclosure of litigation funding agreements and communications from plaintiffs.[97] Most courts reject these attempts, concluding that the communications are not relevant to the case or are protected by the work-product doctrine or attorney-client privilege.[98] But other courts have allowed some disclosure of information related to litigation funding, concluding that funding agreements may be relevant to issues including the adequacy of class counsel or the value of the plaintiff's claim.[99] Other topics debated in the cases include whether litigation finance violates prohibitions

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[94] *Id.* R. 7.1.1(b).

[95] *See* Letter from Rep. James Comer, Chair of the House of Representatives Committee on Oversight and Accountability, to the Honorable John Roberts, Chief Justice of the United States (July 12, 2024), https://bit.ly/46bkRqK.

[96] *See* Nate Raymond, *U.S. judicial panel to examine litigation finance disclosure*, REUTERS (Oct. 10, 2024), https://bit.ly/40JF4Dj.

[97] For a comprehensive review of the current case law, see Charles M. Agee, III, Lucian Pera, & Chase Haegley, *Litigation Funding & Confidentiality: A Comprehensive Analysis of Current Case Law*, WESTFLEET ADVISORS (Aug. 2023), https://bit.ly/4d8ey9S.

[98] For cases denying discovery requests, see, e.g., *Mondis Tech., Ltd. v. LG Elecs., Inc.*, 2011 WL 1714304 (E.D. Tex. May 4, 2011); *Devon It, Inc. v. IBM Corp.*, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012); *Cabrera v 1279 Morris LLC*, 2012 WL 5418611 (N.Y. Sup. Ct. 2013); *Doe v. Soc'y of Missionaries of Sacred Heart*, 2014 WL 1715376 (N.D. Ill. May 1, 2014); *Ashghari-Kamrani v. United Services Automobile Assn.*, 2016 WL 11642670 (E.D. Va. May 31, 2016).

[99] For cases granting discovery requests, see, e.g., *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010); *Caryle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, 2015 WL 778846 (Del. Ch. Feb. 24, 2015); *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, 2015 WL 1540520 (Del. Super. Ct. Mar. 31, 2015) *Odyssey Wireless, Inc. v. Samsung Elecs. Co.*, 2016 WL 7665898 (S.D. Cal. Sept. 20, 2016)*SecurityPoint Holdings, Inc. v. United States*, 2019 WL 1751194, at *5-6 (Fed. Cl. Apr. 16, 2019).

against champerty[100] and whether funders can exercise control over settlement decisions.[101]

Fourth, bar associations and legal ethics committees are increasingly asked to decide whether litigation funding agreements violate applicable ethics rules. In 2020, the American Bar Association released a set of "Best Practices" for third-party litigation funding addressing topics including the handling of confidential information, the rule against fee sharing, and funding contracts.[102] Bar association ethics committees have also weighed in on topics including whether agreements between funders and law firms violate the rule against lawyers sharing fees with non-lawyers,[103] whether litigation counsel should advise clients in the negotiation of litigation funding agreements,[104] how lawyers should approach the sharing of confidential information with litigation funders,[105] and whether lawyers may refer their clients to litigation funders.[106]

On all four fronts, the policy debate has tracked the scholarly debate and suffers its same limitations. That is, the policy debate studies litigation finance solely as a litigation phenomenon, with one side arguing that funding promotes a more level litigation playing field, and the other side arguing that funding perverts the civil justice system. A simple illustration: litigation finance is discussed by congressional *judiciary*

[100] *Compare, e.g.*, *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235, 241 (Minn. 2020) (abolishing Minnesota's champerty doctrine), *with Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 582 (6th Cir. 2019) (holding that a litigation finance transaction violated Kentucky's champerty law).

[101] *Compare In re Pork Antitrust Litig.*, No. 18-cv-1776, 2024 WL 2819438, at *4 (D. Minn. June 3, 2024) (refusing to allow Burford to replace Sysco Corporation as a plaintiff in Sysco's antitrust case against food suppliers because Burford's underlying agreement with Sysco improperly allowed Burford to exercise settlement control) *with In re Broiler Chicken Antitrust Litig.*, No. 16-cv8637, 2024 WL 1214568, at *1 (N.D. Ill. Mar. 21, 2024) (allowing substitution under the same facts).

[102] Am. Bar Ass'n, *Best Practices for Third-Party Litigation Funding* (Aug. 2020).

[103] *See*, *e.g.*, Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2018-5 (2018) (arguing that non-recourse agreements between funders and lawyers violate the rule against fees sharing).

[104] *See*, *e.g.*, Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2024-2 (2024) (offering guidance to lawyers asked to negotiate funding deals for their clients).

[105] *See*, *e.g.*, Illinois State Bar Ass'n, Op. No. 19-02 (April 2019).

[106] *See*, *e.g.*, Am. Bar Ass'n Formal Op. 484 (Nov. 27, 2018).

committees but wholly ignored by *financial services* committees.[107] One congressional committee debate in June 2024 exemplifies the narrow scope of the debate about funding, with the supporters of funding emphasizing its positive impact on the legal system and the detractors of funding alleging detrimental effects on civil litigation.[108]

The lobbying groups on either side of the debate similarly focus on litigation effects. As noted, the Chamber of Commerce is probably the most vocal critic of litigation funding and a driving force behind much of the recent state regulation of funding.[109] The Chamber has issued a number of attacks against litigation funding, and they all focus on funding's impact on the courtroom, not the marketplace or the capital markets.[110] Indeed, although the Chamber usually supports deregulating the capital markets and expanding small businesses' access to capital,[111] the Chamber has not addressed how litigation finance might impact those goals. Meanwhile, the International Legal Finance Association, the trade association for the litigation finance industry, has likewise articulated the case for litigation funding as a case fundamentally about

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[107] Litigation finance has been examined by the House Judiciary Committee and the Committee on Oversight & Accountability, but there have been no hearings on litigation finance on the House Financial Services Committee. *See* Hearing, House Judiciary Committee, *The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities* (June 12, 2024), https://bit.ly/3SfoNRI [hereinafter June 2024 House Hearing]; Hearing, House Committee on Oversight & Accountability, *Unsuitable Litigation: Oversight of Third-Party Litigation Funding* (Sept. 13, 2023), https://bit.ly/3SggHrT.

[108] *See* June 2024 House Hearing (witnesses all discussing litigation finance in terms of its effect on the litigation system, and largely ignoring questions about funding's impact on the capital markets and business competition).

[109] *See supra* note 80 and accompanying text.

[110] For the Chamber's criticisms litigation finance, see, e.g., John H. Beisner & Gary A. Rubin, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation*, U.S. CHAMBER INST. FOR LEGAL REFORM (Oct. 2012), https://bit.ly/3LJaFfN; Lawyers for Civil Justice & U.S. Chamber of Commerce, *Rules Suggestion to the Advisory Committee on Civil Rules* at 1 (Sept. 8, 2022), https://bit.ly/3y6L658; Webb, *supra* note 85.

[111] *See Finance*, U.S. CHAMBER COMM., https://bit.ly/3Wu8wLd ("Free and efficient financial markets are essential to a diverse and growing economy….To support that system, we need smart regulation that ensures access to capital and credit, enables companies to go public, incentivizes innovation, and provides choice and access for investors while protecting consumers."); *Small Businesses*, U.S. CHAMBER COMM., https://bit.ly/3SgMdWQ ("We work every day to fight for policies and regulations that benefit small business, elevate the voice of America's small business owners, highlight the role they play in the nation's economy, and support Main Street businesses' growth and success with tailored resources and expert insights.").

access to the courtroom, not access to the capital markets or the business marketplace.[112]

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Existing scholarship and policy debates discuss funding's impact on litigation but largely ignore its effect on finance and business strategy is ignored. When we reframe the debate about litigation finance around business strategy, we pave new paths to study litigation finance, its use cases, and its impact on society. These are questions that have not simply gone unanswered. They have gone unasked.

II. NON-MARKET STRATEGIES: A PRIMER

We explained in Part I that scholars and policymakers have largely overlooked litigation finance's implications for corporate finance and business strategy. We believe this has happened in part because legal scholars do not have a widely-adopted framework for analyzing how companies engage with litigation for strategic purposes. In Part II, we provide that framework by drawing on a robust existing literature in business academia concerning "non-market strategies." While business scholars pay great attention to nonmarket strategies, legal scholarship has almost entirely ignored the topic, despite its intimate connection not only with litigation finance specifically but with litigation more generally.[113] In this section, we define and describe non-market strategies, identify different forms of non-market strategies, and discuss why companies use these non-market strategies.

A. What Are Non-Market Strategies?

Companies seek to maximize value for their shareholders and other stakeholders. This theme resonates in legal, ethics, and business

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[112] *See*, *e.g.*, Statement for the Record International Legal Finance Association House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet (June 12, 2024), https://bit.ly/4cQfy2H (focusing on litigation effects, not capital market impact); Statement for the Record International Legal Finance Association United States House of Representatives Committee on Oversight and Accountability (Sept. 13, 2023), https://bit.ly/4cQfy2H ((making the case for litigation finance by emphasizing funding's salutary impact on the civil justice system).

[113] For some of the few instances of legal scholarship briefly invoking the concept of nonmarket strategies, see *supra* note 7.

scholarship.[114] The actions that a company takes to maximize value are called strategies.[115]

Business research has long focused on how companies use the marketplace where they operate to extract and maximize value. These behaviors are considered market strategies.[116] Market strategies are "a concerted pattern of actions taken in the market environment to create value by improving economic performance."[117] The key here is the use of the private market environment, which "includes those interactions between the firm and other parties that are intermediated by markets or private agreements. These interactions typically are voluntary and involve economic transactions and the exchange of property."[118] When companies operate with market strategies, they are performing business activities like producing goods, hiring workers, contracting with counterparties, engaging in mergers and acquisitions, and so on.

Recall the weather balloon company we discussed earlier. That company will surely have engaged in a host of market strategies to grow.

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[114] Most legal and financial scholarship adopts the view that companies seek to maximize shareholder value. *See*, *e.g.*, D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 176-77 (2020); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, (2005); Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 75, 89 (2001). Other scholars also argue companies should (and are) maximizing *stakeholder* value, with shareholders as one of several potential stakeholders. *See*, *e.g.*, R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (2010); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012); William Savitt & Aneil Kovvali, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORNELL. L. REV. 1881 (2021).

[115] Strategy scholarship is vast and covers many decisions a company makes. For a selection of business strategy scholarship, see Michael Porter, *Competitive Strategy*, 1 MEASURING BUSINESS EXCELLENCE 12 (1997); Michael Porter, *Towards a Dynamic Theory of Strategy*, 12 STRAT. MGMT. JOURNAL 95 (1991); Jay Barney, *Types of Competition and the Theory of Strategy: Toward an Integrative Framework*, 11 ACAD. OF MGMT. REV. 791 (1986). Russell Crook et al., *Strategic Resources and Performance: A Meta-Analysis*, 29 STRAT. MGMT. J., 1141 (2008); Colin Campbell-Hunt, *What Have We Learned About Generic Competitive Strategy? A Meta-Analysis*, 21 STRAT. MGMT. J. 127 (2000).

[116] David Baron, *Integrated Strategy: Market and Nonmarket Components*, 37 CAL. MGMT. REV. 47 (1995). *See also* Michael E. Porter, COMPETITIVE STRATEGY (New York, NY: The Free Press, 1980); Michael E. Porter, COMPETITIVE ADVANTAGE (New York, NY: The Free Press, 1985); Sharon M. Oster, MODERN COMPETITIVE ANALYSIS (Oxford: Oxford University Press, 1990).

[117] Baron, *Integrated Strategy*, *supra* note 116, at 47.

[118] *Id.*

These market strategies would include offering competitive wages to hire talented employees, conducting research and development into new technologies, entering into joint ventures and other strategic partnerships with other companies, contracting with suppliers, and marketing products. Each of these behaviors relies on private commercial markets, including the markets for labor, supplies, customers, and so on.

The rise of institutional economics has drawn attention to strategic behavior beyond the market environment.[119] Business scholars have more recently recognized that in addition to engaging in traditional "market strategies," companies also engage in strategies that use the "non-market."[120] The non-market environment "includes those interactions that are intermediated by the public, stakeholders, government, the media, and public institutions. These institutions differ from those of the market environment because of characteristics such as majority rule, due process, broad enfranchisement, collective action, and publicness."[121] The non-market environment include the courts, the lawmaking process, interest group activities, and social and cultural institutions.[122]

A non-market strategy then is a set of actions that utilizes the non-market environment to drive economic value.[123] These institutions create the "rules of the game" for competition in the marketplace.[124] Companies engage in non-market strategies when they leverage non-

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[119] *See* Dorobantu et al., *supra* note 6, at 115 (arguing that "the diverse activities under the umbrella of nonmarket strategy reflect different ways of addressing institutional contexts that make transactions costly (or impossible) to undertake through the market").

[120] Non-market strategies is a growing area of business scholarship. For a selection of articles discussing non-market strategies, see David P. Baron, *The Nonmarket Strategy System*, MIT SLOAN MGMT. REV. (1995); David Bach, and David Bruce Allen., *What Every CEO Needs to Know About Nonmarket Strategy*, MIT SLOAN MGMT. REV (2010); David Baron & Daniel Diermeier, *Strategic Activism and Nonmarket Strategy*, 16 J. ECON. & MGMT. STRAT., 599 (2007); Jonathan P. Doh et al., *Advancing Nonmarket Strategy Research: Institutional Perspectives in a Changing World*, 26 ACAD. OF MGMT. PERSP. 22, (2012); Jean-Philippe Bonardi et al., *Nonmarket Strategy Performance: Evidence From U.S. Electric Utilities*, 49 ACAD. OF MGMT. J. 1209 (2006).

[121] Baron, *Integrated Strategy*, *supra* note 116, at 48.

[122] *Id.*

[123] *Id.*

[124] North describes them as "the rules of the game in a society or, more formally … the humanly devised constraints that shape human interactions." D.C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3(Cambridge University Press 1990).

market institutions (e.g. courts) to compete more effectively in the marketplace.[125]

Our weather balloon company is likely to pursue a host of non-market strategies alongside more traditional market strategies. It might lobby lawmakers for subsidies, sue companies engaging in anticompetitive behavior, or seek to invalidate government regulations adverse to its business interests, among other potential non-market strategies.

B. The Types of Non-Market Strategies

Business scholars have identified three types of non-market strategies that firms might pursue: adaptive strategies, transformative strategies, and additive strategies.[126] We discuss each in turn.

1. *Adaptive Strategies*

Adaptive strategies are non-market strategies that take the state of existing institutional non-markets as a given, and then attempt to either leverage or circumvent those non-market institutions to the actor's advantage.[127] One common example is the use of litigation by one company to attack the market position of a direct or indirect competitor.

The Lanham Act is a common locus of adaptive non-market strategies, as it provides companies with a cause of action to sue a direct or indirect competitor for false advertising.[128] One leading Lanham Act

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[125] Although most scholars would agree with our definition of non-market strategies, we note there are many different ways that the concept is discussed in the literature. Dorobantu et al., *supra* note 6, at 117 (describing non-market strategies as "strategies that firms use to address high institutional costs of using the market, i.e., to create and appropriate value from transactions that are costly to undertake through the market on account of the weakness of the existing institutional environment"). They draw this definition from Chris Marquis & Mia Raynard, *Institutional Strategies in Emerging Markets*, 9 ACAD. OF MGMT. ANNALS 291, 294-296 (2015). Still others define the concept as a "firm's concerted pattern of actions to improve its performance by managing the institutional or societal context of economic competition." Mellahi et al., *supra* note 6, at 144 (2016).

[126] We draw here from Dorobantu et al., *supra* note 6.

[127] Adaptive approaches occur when "firms accept the institutional environment as given, and use governance forms other than the market to create and appropriate value within the confines of existing institutions." Dorobantu et al., *supra* note 6, at 117.

[128] 15 U.S.C. § 1125 (2000). *See* Diane Taing, *Competition for Standing: Defining the Commercial Plaintiff under Section 43(a) of the Lanham Act*, 16 GEO. MASON L. REV. 493,

case involved Johnson & Johnson's false advertising suit against Proctor & Gamble concerning over-the-counter (OTC) heartburn medication.[129] In 2003, Proctor & Gamble launched an OTC heartburn drug Prilosec OTC, which was poised to compete with Johnson & Johnson's incumbent Pepcid offering.[130] Proctor & Gamble's marketing campaign suggested that one pill of Prilosec OTC would provide 24 hours of heartburn relief.[131] Johnson & Johnson challenged these statements as false advertising because the pill took up to five hours to start working.[132] A federal district court agreed with Johnson & Johnson and granted a preliminary injunction against the advertising campaign, ruling that Proctor & Gamble's advertisements were "literally false and certainly convey[ed] a false message."[133]

Johnson & Johnson's litigation may be described as an adaptive non-market strategy because, rather than competing through the market system (e.g., by using comparative advertising, a well-studied and researched marketing strategy[134]), the company used existing legal institutions (the court system and liability rules) to gain market share from Proctor & Gamble. Lawsuits like these help the plaintiff firm extract economic value from the marketplace, regardless of whether the competitor suit is welfare-enhancing for consumers.[135]

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494 (2009) ("Section 43(a) of the Lanham Act, 15 U.S.C.A. § 1125, allows a plaintiff to bring a false advertising claim against a defendant who has undertaken deceptive activity.").

[129] *See J & J-Merck Consumers Pharms. v. The Proctor & Gamble Co.*, 285 F. Supp. 2d 389 (S.D.N.Y. 2003), *aff'd*, 90 Fed. App'x 8 (2d Cir. 2003).

[130] *See* Sarah Ellison, *P&G to Appeal Prilosec Ad Ruling*, WALL ST. J. (Sept. 23, 2003), https://bit.ly/46m6pfF.

[131] *See J & J-Merck*, 285 F. Supp. 2d at 391.

[132] *Id.*

[133] *Id.*

[134] For detailed discussions of comparative advertising, see, e.g., Jerry B Gotlieb and Dan Sarel, *Comparative Advertising Effectiveness: The Role of Involvement and Source Credibility*, 20 J. OF ADVERTISING 38 (1991); Gorn J. Gerald and Charles B. Weinberg, *The Impact of Comparative Advertising on Perception and Attitude: Some Positive Findings*, 11 J. OF CON. RESEARCH 719 (1984); Cornelia Pechmann and David W. Stewart, *The Effects of Comparative Advertising on Attention, Memory, and Purchase Intentions*, 17 J. OF CON. RESEARCH, 180 (1990).

[135] For the view that competitor false advertising cases detract from consumer welfare, see Lillian R. BeVier, *Competitor Suits for False Advertising under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 2 (1992).

2. *Transformative Strategies*

Companies may also engage in transformative non-market strategies, which are strategies that seek to change or alter a non-market institution that impacts the company.[136] Here, companies seek to lobby politicians, regulators, and courts to transform the rules of the game.[137]

Lobbying is a classic example of a transformative non-market strategy. Ample work has been written on the nature of the lobbying as it relates to political processes and the law.[138] When companies engage in lobbying, their goal is frequently to have lawmakers (re)write the rules of the game in their favor.[139] For example, when the federal government responds to lobbying efforts by granting tax subsidies that offset the cost of installing electric vehicle chargers, the government effectively reduces the purchase price of electric vehicles, giving electric vehicle

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[136] Dorobantu et al., *supra* note 6, at 123-125.

[137] As noted *supra* note 8, public choice theory provides one perspective on how interest groups like businesses engage with the policy process. While public choice theory speaks to this aspect of transformative non-market strategies, it does not address the waterfront of issues captured by the integrated non-market strategy approach, including how companies might treat legal claims as assets for strategic business purposes (discussed *supra* Part II.B.1) or how companies might engage in self-regulation (discuss *infra* Part II.B.2.).

[138] Some examples of legal scholarship on lobbying include Nicholas W. Allard*, Lobbying is an Honorable Profession: The Right to Petition and the Competition to Be Right,* 19 STAN. L. & POL'Y REV. 23, 24 (2008). ("more remarkable than the persistent image in the public consciousness of corrupt influence peddlers, is that today, while trust of professional lobbyists is particularly low, the number of lobbyists and the level of lobbying activity continues to rise"); Melissa Durkee, *International Lobbying Law*, 127 YALE L. J. 1742 (2018) (arguing that lobbying is captured by private corporate interests); Richard Hasen, *Lobbying, Rent-seeking, and the Constitution*, 64 STAN. L. REV. 191 (2012) (providing an economic welfare rationale for the regulation of lobbying); Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016) (arguing that lobbying violates the Petition Clause);

[139] Some examples of management/business scholarship on lobbying include Rui J.P. De Figueiredo, Emerson Tiller, *The Structure and Conduct of Corporate Lobbying: How Firms Lobby the Federal Communications Commission*, 10 J. OF ECON. & MMGT. STRAT. 91, (2001) (showing that transaction cost theories and collective action predict corporate lobbying strategies); Michael Hadani & Douglas Schuler, *In Search of* El Dorado*: The Elusive Financial Returns on Corporate Political Investments*, 34 STRAT. MGMT. JOURNAL 165, (2013) (showing that most corporate political investments do not enhance firm value but do enhance value when the firm operates in a highly regulated industry); Amy Hillman & Michael Hitt, *Corporate Political Strategy Formulation: A Model of Approach, Participation, & Strategy Decisions*, 24 ACAD. OF MGMT. REV. 825(1999) (designing a model of firm corporate political activity strategy).

manufacturers like Tesla a competitive leg-up relative to manufactures of more traditional gas-powered vehicles.[140]

Transformative non-market strategies may also be directed towards the civil justice system. Sometimes companies lobby lawmakers to change court rules to favor that company. One recent example: after Apple lost two prominent patent cases brought against the company at the U.S. International Trade Commission, the tech company asked Congress to change the rules governing how the ITC adjudicates complaints and enforces penalties.[141] These rules, if adopted, would make it more difficult for parties to prevail in ITC suits against Apple, giving the tech company a competitive advantage in the marketplace.[142]

Litigation can also be a form of transformative non-market strategy. We discussed above how litigation is used as an adaptive non-market strategy when a company uses litigation to enforce existing rules against its competitors. By contrast, litigation is used as a transformative non-market strategy when companies bring court challenges to government regulations that impair their business efforts. From one perspective, these litigations simply ask courts to affirm that an inferior law must give way to a more supreme law.[143] From another perspective, however, these litigations are non-market strategies that ask courts to transform the legal "non-market" environment where firms operate.

For a recent example of litigation as a transformative non-market strategy, consider the Chamber of Commerce's lawsuit challenging the Federal Trade Commission's rule banning non-compete agreements between employers and employees.[144] Although the Chamber does not disclose its individual donors, the Chamber is financed by corporations and then engages in strategic litigation on behalf of those corporations.[145] To satisfy standing requirements, the Chamber invokes

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[140] *See* Madeline Ngo, *Electric Vehicle Charging Tax Credits Will Be Available in Much of Country*, N.Y. TIMES (Jan. 19, 2024), https://bit.ly/4czrSEr.

[141] *See* Tripp Mickle, *Apple Keeps Losing Patent Cases. It's Solution: Rewrite the Rules*, N.Y. TIMES (Mar. 19, 2024), https://bit.ly/3Lkvyh7.

[142] *Id.*

[143] *See* U.S. CONST. art. VI, cl. 2.

[144] *See* Complaint for Declaratory & Injunctive Relief, *Chamber of Commerce of the United States of America v. Federal Trade Commission*, No. 24-cv-148, ECF No. 1 (E.D. Tex. Apr. 24, 2024) [hereinafter Chamber v. FTC Complaint].

[145] Zachary Brown, *The Interests of the Few: How the Chamber's Lopsided Donor Base Mirrors its Advocacy*, PUBLIC CITIZEN (Apr. 26, 2023), https://bit.ly/4bKJ7kX (explaining that the Chamber does not disclose the identifies of donors and "has been one of the leading opponents of proposal to require disclosure of donors to groups that engage

the associational standing doctrine, which allows the Chamber to vindicate the interests of its members.[146] The Chamber's challenge to the rule against non-competes is a transformative non-market strategy because it seeks to use the non-market environment of courts to create a market environment where companies have greater leverage over employees, giving them a potential competitive advantage in the marketplace.

Thus, litigation can be used as part of both *adaptive* and *transformative* non-market strategies. The distinction between the two generally tracks the distinction between enforcement of "private law" and "public law."[147] "Private law" refers to litigation that ordinarily occurs between private individuals or companies.[148] As Abram Chayes has explained, private law litigation is typically *retrospective*, that is, it involves a controversy over an "identified set of completed events," and the *right and remedy are interdependent*, with the typical remedy being "that the plaintiff will get compensation"—money damages—"measured by the harm caused by the defendant's breach of duty."[149] Adaptive non-market strategies typically involve one company litigating a private law claim against another company.

Transformative non-market strategies typically involve litigation over the validity of laws and regulations themselves, usually where a governmental body is a defendant, and almost always where the primary relief sought is declaratory and injunctive, not a retrospective damages award. When companies engage in public law litigation, they usually do so as part of a transformative strategy to require or prohibit enforcement

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in political activities"); Brian Schwartz, *Chamber of Commerce gets nearly half its funding from those who give at least $1 million*, CNBC (Apr. 26, 2023), https://bit.ly/3zDVsdb.

[146] *See* Chamber v. FTC Complaint, *supra* note 144, at ¶ 24 ("The U.S. Chamber has numerous members who use noncompete agreements for entirely legitimate purposes and will be adversely affected by the Noncompete Rule."); *Chamber of Com. of U.S. v. Edmondson*, 594 F.3d 742, 756 (10th Cir. 2010) (holding that the U.S. Chamber of Commerce and affiliated chambers have associational standing to challenge an Oklahoma law governing employee verification based on associational standing).

[147] Rachel Bayefsky, *Public-Law Litigation at A Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. ONLINE 128, 132–33 (2024) (describing the difference between public and private law litigation); Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986) (offering a typology of the public law-private law distinction).

[148] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

[149] *Id.* at 1282.

of laws bearing upon issues of public concern—topics like civil rights, environmental law, administrative law, and so on.[150]

3. *Additive Strategies*

Companies also engage in additive non-market strategies, which seek to add to, or supplement, pre-existing institutional rules and regulations. Additive strategies work "by supplementing [existing institutional] structures with new, decentralized ones to which participants commit voluntarily rather than in response to a mandate from the state, thus creating a polycentric institutional structure."[151] Rather than simply take the institutions as given, companies seek to augment institutional structures to give themselves a competitive advantage.[152]

In one common additive strategy, companies engage in self-regulation, either acting alone or in concert with competitors. For example, companies may band together into an industry trade association and sign on to certain "standards of conduct,"[153] or they may all agree to certain voluntary business practices.[154] When acting alone, companies may act solely to reduce a perceived negative externality, with the hope of setting an industry norm, resulting in benefits to the firm.[155] Traditional corporate social responsibility (CSR) behaviors also fall into

[150] Justin P. Gunter, *Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention*, 66 VAND. L. REV. 645, 648–49 (2013)

[151] *Id* at 121. *See also* Paul Ingram & Karen Clay, *The Choice-Within-Constraints New Institutionalism and Implications for Sociology*, 26 ANNUAL REV. OF SOCIOLOGY 525, (2000); Andrew King et al., *The Strategic Use of Decentralized Institutions: Exploring Certification with the ISO 14001 Management Standard*, 48 ACAD. OF MGMT. J. 1091, (2005).

[152] Dorobantu et al., *supra* note 6, at 121-22.

[153] *Id.* at 121. *See also* Michael Barnett, Andrew King, *Good fences make good neighbors: a longitudinal analysis of an industry self-regulatory institution*, 51 ACAD. OF MGMT. J. 1150 (2008).

[154] *See* Pratima Bansal, *Evolving Sustainably: A Longitudinal Study of Corporate Sustainable Development*, 26 STRAT. MGMT. J. 197, 202 (2005) (describing how mimicry of firms is a motivator for voluntary sustainable actions); *see also generally* Erin Reid & Michael Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 STRAT. MGMT. J. 1157 (2009).

[155] Dorobantu et al., *supra* note 6, at 122 (explaining that firms "adopt proactive strategies and visibly commit to the provision (abatement) of a positive (negative) externality, in the hope that they will be rewarded for establishing a norm of better behavior, either by those who benefit from their actions directly, or from those who value responsible behavior more generally").

this non-market strategy.[156] CSR strategies include, for example, voluntary environmental and socially-sustainable practices.[157] Companies frequently undertake these behaviors with the hope that stakeholders will reward the company and hence further enhance the firm's economic value. But additive strategies also seek to anticipate or influence institutional changes. Companies may voluntarily take costly behaviors with the anticipation that regulators will eventually enact those rules, leaving the firm better positioned to succeed in the market.[158]

C. The Choice Among Non-Market Strategies

Not all strategies are created equal. Companies consider a range of internal and external factors when deciding whether and how to use non-market strategies.

External factors include the nature of both market and non-market institutions.[159] Some jurisdictions, including the United States, have clear laws and regulations that allow for relative predictability in outcome.[160] Other jurisdictions, including many developing countries, may have no laws, or either unclear or incomplete laws, governing business conduct.[161] Whether an institution is relatively "complete" or "captured" (as in the United States) or relatively "incomplete" (as in many developing countries)[162] influences which type of non-market behavior a company may engage in.

Internal factors also affect which strategies a company may use. For example, some companies may develop a comparative advantage at implementing certain non-market strategies over others.[163] These so-

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[156] The literature on CSR is vast and intersects law, ethics, marketing, finance, and management scholarship. For a detailed discussion of CSR and non-market strategies in the management context *see* Mellahi et al., *supra* note 6.

[157] Dorobantu et al., *supra* note 6, at 122.

[158] *See* Adam Fremeth & J. Miles Shaver, *Strategic Rationale for Responding to Extra-jurisdictional Regulation: Evidence From Firm Adoption of Renewable Power in the U.S.*, 35 STRAT. MGMT. J. 629, 630 (2014).

[159] Dorobantu et al., *supra* note 6, at 125-126.

[160] *Id.*

[161] *Id.*

[162] Dorobantu et al. use the terms incomplete or captured, with the term "captured" referring to situations where to "robust rules and structures exist, but have been captured by a narrow set of elite interests." *Id.* at 125.

[163] The seminal work on dynamic capabilities is Jay Barney, *Firm Resources and Sustained Competitive Advantage* 17 J. OF MGMT. 99 (1991).

called firm-specific capabilities drive which non-market strategies firms should pursue.[164] Research on firm-specific capabilities seeks to analyze what unique strengths a company has and then asks what kinds of strategies the company may use to leverage these unique strengths.[165] The goal is to create sustained long-term competitive advantages in the marketplace.

Consider for example a company that can recruit former politicians into its ranks.[166] Relative to its competitors, that company has a comparative advantage in transforming the institutional rules in which it operates. The firm's political connections provide it with superior insight into how certain regulations will be interpreted and implemented. These capabilities may also give the firm a comparative advantage at influencing which regulations are made or unmade. Such a firm is more likely to use transformative strategies, as it has unique capabilities to influence regulations.[167]

A firm's capabilities will also help predict whether a company will use a market or a non-market strategy in the first place.[168] Certain companies, as we describe using examples below, can more cheaply and efficiently engage in non-market strategies in comparison to more traditional market ones. As we argue, small and medium businesses may find it cheaper to engage in capital funding using non-market strategies than market ones.

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[164] Dorobantu et al., *supra* note 6, at 128 ("Firms with strong capabilities may prefer to pursue nonmarket strategies independently so as to enhance their competitive advantage.").

[165] The literature on firm specific capabilities is incredibly vast. Some seminal examples include Shantanu Dutta et al., *Conceptualizing and Measuring Capabilities: Methodological and Empirical Application*, 26 STRAT. MGMT. JOURNAL 277, (2004); Jennifer Dyer & Nile Hatch, *Relation-Specific Capabilities and Barriers to Knowledge Transfers: Creating Advantage Through Network Relationships*, 27 STRAT. MGMT. JOURNAL 701, (2006); Jay Barney, David Ketchen, Mike Wright, *The Future of Resource-Based Theory: Revitalization or Decline?*, 37 J. OF MGMT. 1299, (2011).; Jay Barney and Delwyn Clark, *Resource-based theory: Creating and sustaining competitive advantage.* Oxford University Press, 2007.

[166] Many companies place former politicians on their boards to maximize lobbying success. *See* Amy Hillman, *Politicians On the Board of Directors: Do Connections Affect the Bottom Line?*, 31 J. OF MGMT. 464 (2005) (showing that firms that do have politicians on boards have higher returns in comparison to those that do not).

[167] *See* Dorobantu et al., *supra* note 6, at 128-129.

[168] *Id.*

III. LITIGATION FINANCE AS A NON-MARKET STRATEGY

Litigation finance is an important development not only for the civil justice system but also for the capital markets and marketplace at large. Companies use litigation finance to compete not only in the courthouse but also in the market square. Drawing upon the non-market strategy literature discussed above, we illustrate three ways companies engage with litigation finance to help themselves better compete in the marketplace.

The chart below provides a roadmap for our discussion. This chart indicates the types of strategies, the result each strategy seeks to achieve, an example of the strategy, and the business benefit the strategy creates. We also note that some of these strategies involve the use of litigation finance while others involve the regulation of funding.

Figure 1.

Strategy	Direct use of litigation finance?	Action	Goal	Example	Benefits
Adaptive	Yes	Leverage legal claim to secure corporate finance	Finance transactions	Raise working capital to invest in research and development	More efficient method of corporate finance compared to retained earnings, debt, or equity
	Yes	Enforce private laws against competitors	Enforce existing laws	Johnson & Johnson Lanham Act litigation	Gain market share relative to competitors
Transformative	Yes	Pursue public law litigation	Change laws	Fund Chamber of Commerce's challenge to the FTC ban on noncompete agreements	Attack regulations that impair the business's market position
	No	Lobby Legislators	Change laws	Chamber efforts to regulate litigation finance	Make litigation finance more difficult to use
Additive	No	Create litigation finance trade association	Establish industry norms	International Legal Finance Association	Set industry norms, preempt lawmaker regulation

A. Litigation Finance as Corporate Finance: An Adaptive Strategy

The best things in life may be free but everything else costs money. Corporate finance is the discipline that studies how companies finance their business pursuits.[169] We first provide a brief overview of the traditional ways companies finance their activities. We then demonstrate how litigation finance operates as an alternative "non-market" way to access investment capital and finance business pursuits, including but not limited to the financing of litigation. Using litigation finance in the way we describe below is a type of adaptative non-market strategy.

1. *"Market" Methods of Corporate Finance*

Companies need money to pursue the waterfront of legitimate corporate activities, including hiring employees, manufacturing products, marketing their goods, investing in research and development, and yes, sometimes pursuing litigation. Firms use one of three broad categories of finance: retained earnings, equity, and debt.[170] All three involve the company appealing to traditional market institutions: the marketplace for goods and services to obtain revenue that can then be used to finance future business activities, or the capital markets, where third parties provide debt or equity capital in exchange for an anticipated return on their investment.[171]

Recall the weather balloon company that needs $15 million in financing, including $5 million to pursue litigation and $10 million for research and development. To come up with the cash, first, the company could use its retained earnings, i.e., profits, or revenue in excess of expenses.[172] Second, the company might raise debt from third parties.

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[169] Peter H. Huang & Michael S. Knoll, *Corporate Finance, Corporate Law and Finance Theory*, 74 S. CAL. L. REV. 175, 176 (2000).

[170] William R. White, *The Tobin Tax: A Solution to Today's International Monetary Instability?*, 1999 COLUM. BUS. L. REV. 365, 385 (1999) (identifying "the different methods employed by firms in financing their investment programs" as fitting within "three main types: equity financing, debt financing, and internally-generated funds derived from retained earnings.").

[171] Baron *Integrated Strategy*, *supra* note 116; Channing E. Brackey, *Choices of Capital: Reducing Their Impact on Taxpayers and the Government*, 22 SETON HALL L. REV. 320, 320 (1992).

[172] Nathan R. Long, *Community Characterization of the Increased Value of Separately Owned Businesses*, 32 IDAHO L. REV. 731, 739 (1996).

These loans can be either unsecured or secured.[173] Unsecured loans rely on the borrower's creditworthiness and future cash flows.[174] Secured loans are backed by company assets.[175] Secured loans may be further categorized: some are secured by all company assets, while others are "asset-based" loans secured only by a specific subset of the company's assets.[176] Third, the company might raise equity financing, selling ownership interests in the firm in exchange for capital.[177]

Several points bear emphasis. *First*, both debt and equity financing usually involve companies raising capital from third party investors.[178] Creditors remain third parties after the transaction is consummated; that is, they do not become first-party owners of the company.[179] Equity investors, by contrast, are third parties relative to the company before making their investment, and then come inside the company as first-party owners. Thus if a firm like our weather balloon company needs capital to fund litigation and research, there is a good chance it would

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[173] *See* Mann, *Explaining the Pattern*, *supra* note 23, at 630 (identifying secured and unsecured debt as the two forms of debt financing, and exploring how firms choose between the two); Ronald J. Mann, *The Role of Secured Credit in Small-Business Lending*, 86 GEO. L.J. 1, 4 (1997) (same).

[174] Mann, *Explaining the Pattern*, *supra* note 23, at 660 ("In an unsecured transaction, creditors focus on the creditworthiness of the borrower as a whole.").

[175] *Id.*

[176] Claire A. Hill, *Is Secured Debt Efficient?*, 80 TEX. L. REV. 1117, 1118 (2002). In one common form of secured loan, a firm pledges its receivables to a lender; the lender may even have the right to be directly paid all collections on the receivables until the loan is repaid. *Id.* at 1129. *See also* Jon S. Robins, David E. Wallace, Mark Franke, *Mezzanine Finance and Preferred Equity Investment in Commercial Real Estate: Security, Collateral & Control*, 1 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 93, 143 (2012) (explaining that sometimes "a creditor has recourse limited to a specified security interest in property of the company").

[177] William C. Philbrick, *The Paving of Wall Street in Eastern Europe: Establishing the Legal Infrastructure for Stock Markets in the Formerly Centrally Planned Economies*, 25 LAW & POL'Y INT'L BUS. 565, 566 n.6 (1994).

[178] Creditors hold "fixed claims to the corporation's assets," while shareholders are "residual owners" of the company. Rutheford B. Campbell, Jr. & Christopher W. Frost, *Managers' Fiduciary Duties in Financially Distressed Corporations: Chaos in Delaware (and Elsewhere)*, 32 J. CORP. L. 491, 492 (2007).

[179] J. Brad Bernthal, *The Evolution of Entrepreneurial Finance: A New Typology*, 2018 B.Y.U. L. REV. 773, 858 n.211 (2018) ("Capital providers that do not qualify as corporate shareholders are deemed creditors or another contract-specific holder."). The tension between the interests of third-party creditors and first-party equity-holders is a subject of significant scholarly attention. *See generally* Colin Mayer, *How to Avoid Implementing Today's Wrong Policies to Solve Yesterday's Corporate Governance Problems*, 161 U. PA. L. REV. 1989 (2013).

approach the capital markets and raise capital from third-party investors, with those investors expecting their return to come from some or all of the firm's assets.[180]

Second, a firm's choice between using retained earnings, debt, and equity to finance business endeavors is typically driven by questions of corporate finance and business strategy. Classical corporate finance theory teaches that, in perfect markets without transaction costs, firms should be indifferent between using retained earnings, debt, and equity.[181] In reality, markets are not perfect and firms are not indifferent.[182] There is an entire discipline—corporate finance—devoted to studying firms' decisions about how to finance their business activities.

A corporate finance literature review is beyond the scope of this Article. It is sufficient for present purposes to identify a few tradeoffs that companies face when deciding whether to finance their business activities through retained earnings, debt, or equity.[183]

For example, companies may prefer to use retained earnings because they can act quickly when they see an investment opportunity,

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[180] Virtually all companies rely at some point on third-party debt and equity capital. *See generally* J. Brad Bernthal, *The Evolution of Entrepreneurial Finance: A New Typology*, 2018 B.Y.U. L. REV. 773, 773 (2018).

[181] The Miller-Modigliani Theory states that the choice between debt and equity should have no effect on the value of the firm, assuming no market frictions or inefficiencies. *See*, *e.g.*, Merton Miller & Franco Modigliani, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV., no. 3, 1958. The theory teaches for example that a company's source of financing its earnings, "whether internally from retained earnings or externally from debt or new equity, should not matter." Ezra Wasserman Mitchell, *Finance and Growth: The Legal and Regulatory Implications of the Role of the Public Equity Market in the United States*, 6 MICH. BUS. & ENTREPRENEURIAL L. REV. 155, 170 (2017).

[182] The Modigliani-Miller theorem "applies only to perfectly competitive financial markets without transaction costs. As a result, it comes with the same caveats as the Coase theorem. That is, although theorizing a world of perfect, costless capital markets is informative, corporate finance policy choices must be considered in the context of the real world, where transaction costs are never free.'" Herbert Hovenkamp, *Neoclassicism and the Separation of Ownership and Control*, 4 VA. L. & BUS. REV. 373, 395–96 (2009). Scholars thus often study where the Modigliani-Miller assumptions fail, in what is sometimes called the "reverse" Modigliani-Miller theorem. Michael S. Knoll & Daniel M. G. Raff, *A Comprehensive Theory of Deal Structure: Understanding How Transactional Structure Creates Value*, 89 TEX. L. REV. 35, 37 (2011).

[183] For a particularly insightful overview of the various tradeoffs firms face when deciding how to finance their operations, see Daniel Waxman, *Playing with House Money: Directors' Fiduciary Duties in A Distressed Corporation*, 49 WAKE FOREST L. REV. 1193, 1194–95 (2014).

avoiding the time-consuming and scrutiny-inducing process of raising money in the capital markets.[184] On the other hand, existing shareholders may prefer instead to receive those earnings as dividends today and shift the risk of tomorrow's success onto third-party debt or equity capital.[185] Debt finance frequently has tax advantages,[186] and it usually caps creditors' upside, ensuring shareholders receive any surplus profits generated when the company invests the loan.[187] On the other hand, debt instruments usually saddle the debtor with relatively inflexible payment obligations, requiring the company to regularly generate cash to pay interest on the debt.[188] An advantage of equity financing is that equity investors have fewer downside protections than lenders, which means equity is usually "riskier capital" than debt.[189] Thus early-stage companies and other businesses without a proven track record can raise third-party capital in the equity markets even when the debt markets are closed to them.[190] On the other hand, raising new equity dilutes existing

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[184] Zohar Goshen, *Shareholder Dividend Options*, 104 YALE L.J. 881, 887 (1995). As the Mars Corporation—the candy conglomerate and one of the world's largest privately-held companies—succinctly puts it: "Private ownership allows Mars to remain free … [and] to move quickly in exploring new ground, act boldly in the face of competition, and take risks wherever they are justified." Our Operating Structure: Private Ownership, MARS, https://bit.ly/3WjoLJA.

[185] Douglas K. Moll, *Shareholder Oppression & Dividend Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841, 858 (2003).

[186] Katherine Pratt, *The Debt-Equity Distinction in A Second-Best World*, 53 VAND. L. REV. 1055, 1061 (2000) (explaining that companies can deduct interest on bonds but not profits paid as dividends).

[187] *See* JAMIE D. PRENKERT, A. JAMES BARNES, JOSHUA E. PERRY, TODD HAUGH & ABBEY STEMLER, BUSINESS LAW: THE LEGAL, GLOBAL, & DIGITAL ENVIRONMENT (18th Ed., McGraw Hill 2021) (see the discussion on risks and benefits associated with debt versus equity financing in chapter 42).

[188] *See generally* Michael O'Connor Keefe, and Mona Yaghoubi, *The Influence of Cash Flow Volatility on Capital Structure and the Use of Debt of Different Maturities*, 38 J. OF CORP. FIN. 18, (2016).

[189] Frank H. Easterbrook, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1425 (1989).

[190] J. Brad Bernthal, *The Evolution of Entrepreneurial Finance: A New Typology*, 2018 B.Y.U. L. REV. 773, 776–77 (2018) ("The traditional way an early-stage startup raises outside capital is through an equity financing from an angel investor or venture capitalist—that is, an investor who takes an ownership stake in exchange for a capital contribution to the company.").

shareholders, who may prefer not to have their ownership interest and decision-making power reduced.[191]

The upshot for our purposes is that firms select their method of corporate finance for reasons very specific to that firm and the firm's regulatory environment. Preferences and market access will vary according to a host of factors, including the firm's size and strength, its industry, its geography, and the regulatory landscape.

Third, while all companies in principle can use retained earnings or obtain third-party debt or equity, in practice, small and medium-sized enterprises (SMEs) usually do not have access to substantial retained earnings or to liquid debt and equity markets.[192] There is a robust literature explaining how and why small and medium-sized businesses face challenges accessing traditional capital markets.[193]

Again, a comprehensive literature review is beyond the scope of this Article. It is sufficient to repeat the oft-made insight that information asymmetries, transaction costs, and other market inefficiencies result in SMEs either being totally cut off from the debt and equity markets or facing much higher costs of capital relative to more established incumbent players.[194] Prospective investors in smaller companies face much larger information asymmetries compared to when they invest in larger companies that are publicly traded and have armies of analysts studying their every move.[195] Increased information asymmetry means increased risk, and increased risk means higher borrowing costs.[196] In short, it is generally much harder for small and

[191] Anat R. Admati, Peter Conti-Brown, & Paul Pfleiderer, *Liability Holding Companies*, 59 UCLA L. REV. 852, 911 (2012). *See also* Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. ON REG. 1343, 1345 (2022) (recognizing that shareholders control companies but explaining that companies may vary control rights through dual-class equity structures).

[192] The U.S. Small Business Administration generally defines a small business as a firm with fewer than 500 employees. An estimated 99.9% of all firms qualify as small businesses. *See Frequently Asked Questions*, Office of Advocacy, U.S. Small Business Administration (March 2023), https://bit.ly/4bX5L9y.

[193] *See, e.g.*, Todd H. Baker et. al., *Credit, Crises, and Infrastructure: The Differing Fates of Large and Small Businesses*, 102 B.U. L. REV. 1353 (2022); Amy C. Bushaw, *Small Business Loan Pools: Testing the Waters*, 2 J. SMALL & EMERGING BUS. L. 197 (1998); Kelly Mathews, *Crowdfunding, Everyone's Doing It: Why and How North Carolina Should Too*, 94 N.C. L. REV. 276 (2015).

[194] *See id.*

[195] Pratt, *supra* note 186, at 1089.

[196] *See generally* Franco Modigliani and Merton H. Miller, *The Cost of Capital, Corporation Finance and the Theory of Investment*, 48 AM. ECON. REV. 261 (1958).

medium-sized businesses to find willing investors or lenders, and when they do, they typically face a much higher cost of capital compared to larger companies.[197] Similarly, SMEs almost by definition do not have significant retained earnings to invest in business-critical projects, including research and development, launching new products, or paying lawyers for bet-the-company litigation.

When SMEs can access third-party capital, they tend to gravitate towards bank loans with personal guarantees, or towards higher-cost secured credit, where a third-party investor lends against discrete collateral and has the right to foreclose on that collateral if the debtor fails to repay the loan.[198] With asset-backed transactions, the financier is treating the collateral as the primary or indeed sole source of repayment, and thus need not rely on the counterparty's general creditworthiness, enabling loans to go to companies that cannot qualify for unsecured debt or equity investments.[199]

We thus have a rough hierarchy of firms' ability to access the capital markets. Larger, more established firms generally have the best access to equity and debt markets. SMEs often have thin or no access to the capital markets. But SMEs with high-quality assets can frequently obtain secured loans even where unsecured lending or equity investment is not an option.

2. *Litigation Finance as a "Non-Market" Method of Corporate Finance*

Enter litigation finance. We explained earlier that the central insight of the modern litigation finance industry is an insight about *corporate finance*, namely that a strong legal claim is a valuable asset that can be used to secure third-party financing. Litigation finance may be characterized as asset-based finance where the asset is a legal claim, and the financing can be used either to secure financing to pursue the legal claim itself, or to secure working capital that can be used for general corporate purposes. Put differently, if a company needs money to invest in litigation, invest in research, or invest in any other legitimate business pursuit, it can use retained earnings, it can raise equity investment, it can

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[197] *See generally* Mann, *The Role of Secured Credit*, *supra* note 173, at 10.

[198] *Id.* at 6.

[199] *See* Mann, *Explaining the Pattern*, *supra* note 23, at 683 n.131 ("In some kinds of heavily asset-based transactions, such as purchase-money loans on automobiles, the lender might forgo any serious investigation of the credit of the borrower because of the decision to treat the collateral as the primary source of repayment in the event of default.").

raise traditional types of secured or unsecured debt—or it can raise litigation finance.

But we just explained that (a) companies face tradeoffs when deciding whether to use retained earnings, debt, or equity finance, and (b) not all companies have equal access to all these forms of capital. The same holds true as to litigation funding. The latter point is easier to make: litigation finance is only available to companies with strong legal claims that typically involve plaintiff-side litigations with sizable damages potential.[200] If you do not have a litigation claim, you cannot obtain litigation finance.

As for tradeoffs: there are pros and cons to the use of litigation finance. Many of the drawbacks concern the high transaction costs inherent in litigation funding deals. Because commercial litigation funders perform comprehensive diligence into funded matters, funded deals often take months to close. Companies that need financing quickly—whether because their case has a statute of limitations issue, they urgently need capital to hire new employees, or for some other reason—may prefer to use readily available retained earnings, or existing access to equity or debt investors, rather than wait months for litigation funders to complete their work.[201]

Add rigor to duration: as we explained, litigation funders typically perform more comprehensive diligence on a company's legal claim compared to other forms of financing.[202] Companies that use retained earnings do not have to subject their decision to pursue a legal claim to the discipline of the market.[203] Meanwhile, traditional equity or debt financiers do not usually invest based on the value of legal claims and thus are unlikely to scrutinize the legal claim before providing financing.

The regulatory landscape concerning litigation funding also imposes transaction costs. Litigation funders typically request to see case confidential information before investing against a lawsuit. And defendants typically seek disclosure of litigation finance agreements and communications, in part to gain a strategic advantage in the litigation.[204] The early statutes regulating consumer litigation finance deals recognized

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[200] Bedi & Marra, *supra* note 1, at 570–71.

[201] *See supra* note 184 and accompanying text. Moreover, while companies and their corporate counsel are generally familiar with traditional debt and equity financing, most have not previously entered into a litigation finance transaction, further prolonging and complicating the funding process.

[202] *See supra* notes 31–35 and accompanying text.

[203] *See supra* note 184 and accompanying text.

[204] *See supra* notes 97–101 and accompanying text.

this fact and reacted by ensuring those communications with funders do not impair the protections of the work product doctrine or attorney-client privilege.[205] Ironically, the more recent statutes recognize this fact too, except they *mandate* rather than *prohibit* litigation finance disclosure.[206] Regulations that impede funders' access to full and transparent communication from prospective funded parties, lurking regulatory challenges, and funders' inability to control litigation all effectively increase the funder's risk and thus increase the price funded parties must pay for litigation funding.

Against these drawbacks stand the benefits of using litigation finance. Such funding is typically non-recourse, which means the company can secure financing backed only by a discrete legal asset.[207] Litigation finance is thus frequently preferable to debt, since the funder does not have an absolute right to be repaid and the attendant enforcement rights that creditors have. And funding is frequently preferable to equity, as litigation funding does not dilute existing shareholders.[208] Funders, like other asset-backed lenders, also have specialized expertise, which can help the company maximize the value of their legal assets. And because traditional debt and equity financiers are not trained in valuing legal claims, they are likely to undervalue legal claims relative to litigation funders.

But perhaps the most important reason many companies—especially small and medium-sized businesses—use litigation finance is simply that these businesses have no other choice. Most companies do not have millions of dollars in retained earnings to invest in litigation or research and development. Most companies are not publicly traded and do not have investment bankers who help them access liquid pools of debt and equity capital. Traditional equity and debt financing is either prohibitively expensive or effectively unavailable to the great many enterprises. And most companies do not have substantial assets like inventory, machinery, or real property that can serve as the basis for asset-backed loans.[209]

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[205] *See supra* note 76 and accompanying text.

[206] *See supra* note 81 and accompanying text.

[207] *See supra* note 24 and accompanying text.

[208] *See supra* note 191 and accompanying text.

[209] Litigation funding agreements could be structured as first-party equity investments where the funder owns a class of stock whose return tracks only the value of the legal claim, rather than as third-party funding agreements. *See* Bedi & Marra, *supra* note 1, at 585–86. Such an investment still requires the specialized expertise of litigation

For these reasons, small and medium-sized businesses are leading consumers of litigation finance.[210] And they use litigation finance not only to finance their cases but also to obtain lower-cost capital than they could in the traditional capital markets.[211] Simply put, companies likely to use litigation finance are small and medium-sized businesses that have difficulty accessing capital in the more traditional capital markets.

The implications for the scholarly and political debate about funding are significant. Companies use litigation finance not simply because it gives them better access to the courts. They use litigation finance because it gives them better access *to the capital markets*. Companies use litigation finance as an adaptive non-market strategy, leveraging their legal claims to secure financing that allows them to grow their businesses and better compete in the marketplace. This is especially true when the company secures litigation finance to obtain general working capital, for in that sense, litigation finance companies serve an identical function as do financiers in other corners of the capital markets: they are third parties who provide an investment secured by company assets. And this insight holds true when they secure funding to pay the fees and costs of litigation: money is fungible, and by obtaining financing for their litigation, they free up other cash to invest in their core business.

B. Litigation Finance to Pursue Litigation: Adaptive and Transformative Strategies

We explained earlier that businesses frequently seek a competitive market advantage by engaging in litigation, including by bringing suit against competitors, customers, suppliers, or regulators. Companies use the court system to gain a strategic advantage in the marketplace and

funders to value claims, though it has potential drawbacks from a funder's perspective, including potentially worse bankruptcy rights and tax treatment.

[210] Lake Whillans & Above the Law, *2023 Litigation Finance Survey Report*, https://bit.ly/4fxyvJl [hereinafter Lake Whillans 2023 Survey] (survey results finding that the entities most likely to use litigation finance were individuals and small private companies with fewer than 100 employees); Lake Whillans & Above the Law, *2022 Litigation Finance Survey Report*, https://bit.ly/4ddID7V [hereinafter Lake Whillans 2022 Survey] (reporting that "small and medium-sized companies, as well as portfolio companies of private equity firms, are the entities most likely to seek funding").

[211] Lake Whillans 2023 Survey, *supra* note 210 (reporting that 45% of companies sought litigation finance to fund legal expenses, 26% to hedge the risk of litigation, 13% to fund operating expenses, and 6% to obtain a lower cost of capital); Lake Whillans 2022 Survey, *supra* note 210 (reporting that 31% of companies sought litigation finance to fund operating expenses, 30% to hedge the risk of litigation, 20% to fund legal expenses, and 18% to obtain lower cost of capital).

drive economic value to themselves.[212] Winning the litigation is a secondary consideration, or more precisely, a necessary antecedent to the ultimate goal of winning in the marketplace. Companies use litigation as an additive non-market strategy when they use litigation to enforce existing rules and regulations against other market participants, in the hopes of achieving an advantage in the marketplace.[213] These litigations are typically "private law" disputes seeking money damages. By contrast, companies use litigation as a transformative non-market strategy when they use the court system to transform the rules and regulations that affect their business, typically by challenging the legality of laws and regulations.[214] These litigations are typically "public law" disputes seeking declaratory and injunctive relief.

If a company wants to use litigation as a non-market strategy, it needs money to pursue that claim. Litigation is expensive, and some firms (generally, small or medium-sized enterprises) are at a comparative disadvantage in terms of their ability to use retained earnings to file suit or to prevail on traditional capital markets to raise debt or equity capital that can be used to finance litigation.

A firm's relative inability to use litigation as a non-market strategy puts the firm at a comparative disadvantage in its ability to compete in the marketplace. Compared to larger players, the firm is relatively unable to pursue private law claims against other market participants to bolster its position in the market, and it is comparatively unable to pursue public law claims that attack unfavorable government regulations. Thus litigation finance helps level the playing field *in the marketplace* by enabling small and medium-sized enterprises to have greater ability to use litigation as a non-market strategy. The battle over litigation finance must then be understood at least in part as a battle over which companies have access to litigation as a non-market strategy.

Our argument here does not presume that any and every non-market strategy is necessarily welfare-enhancing. Indeed, scholars have questioned the value of litigation through a host of normative lenses. For example, some have argued that private law litigation between two parties does not maximize welfare for either the parties to the litigation or society as a whole.[215] Likewise, the use of lobbying—a transformative

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[212] *See* David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137 (2016).

[213] *See supra* Part II.B.1.

[214] *See supra* Part II.B.2.

[215] *See*, *e.g.*, Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. Ill. L. Rev. 691, 694 (1992) (referring to litigation costs as "a deadweight loss that only benefits attorneys"); BeVier, *supra* note

strategy—has been challenged as inefficient rent-seeking.[216] While resolution of these underlying questions is beyond the scope of this Article, but we offer three relevant comments.

First, the question for purposes of this Article is not whether litigation (or lobbying for that matter) should be used as a non-market strategy. Litigation has been used for strategic business reasons since long before the rise of the modern litigation finance industry, and well-resourced companies will continue to use litigation as a non-market strategy even if third-party litigation finance is stamped out of existence. The question instead is whether the ability to use litigation for strategic purposes should primarily be the domain of companies more likely to rely on retained earnings or traditional capital markets to pursue litigation, or whether it should also be the domain of smaller firms more likely to use third-party litigation finance.[217] Put differently, even if one believes the "first-best" policy would be for no one to use litigation as a non-market strategy, the second-best solution is not necessarily to allow well-resourced incumbents to use non-market strategies while stripping smaller competitors of the means to do so too.[218]

Second, there are good reasons to believe that cases funded by litigation funders are less likely to exacerbate broader concerns about the use of litigation as a non-market strategy. We previously discussed funders' rigorous diligence process, which tests a case's merits in the courtroom, not its impact on the plaintiff's market position.[219] And because funders *need* their return to come from a court settlement; they generally do not benefit if a funded case results in a small monetary

135, at 2 (arguing that Lanham Act false advertising suits may not improve consumer welfare).

[216] *See* Hasen, *supra* note 138, at 197 (reviewing arguments that "lobbyists facilitate activity which economists term rent-seeking").

[217] We also note that this is a category mistake. The concern that companies may use litigation as a bully tactic is ever-present, regardless of whether that funding arises from third-party funding or not. The legal system is built to mitigate these risks through various safeguards, including the various litigation stages parties must overcome plus the threat of Rule 11 sanctions for companies and lawyers who file frivolous suits. *Cf.* BRIAN FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS (2019) (explaining that many arguments against class actions generally are better understood as arguments against particular liability regimes).

[218] *Cf.* Richard H. Fallon, Jr., *Forward: Implementing the Constitution*, 111 HARV. L. REV. 54, 126 (1997) ("[A]n ideal of what would be first-best should not obscure the practical need for approaches that are second-best; second-best approaches are sometimes necessary, in practice, for the Constitution to be implemented reasonably successfully.").

[219] *See supra* notes 31–35 and accompanying text.

settlement but a significant market advantage for the funded party. Put differently, litigation funders are less likely to back cases that help companies win in the marketplace *unless* the company is also likely to win in the courtroom. Thus, although some critics of litigation finance argue that funders may promote frivolous litigation, the opposite is more likely true: cases funded by litigation funders are probably *less likely* to be weak competitor bullying cases than most other cases because funded cases are subject to more pre-filing scrutiny than other cases.

Third, litigation finance is more likely to be used in contexts where litigation is used as an *adaptive* rather than *transformative* strategy. Because litigation funders invest on a non-recourse basis, receiving their recovery only from case proceeds, they typically only invest in cases where the plaintiff seeks money damages, not injunctive relief.[220] Thus litigation funders frequently finance competitor suits like patent suits, false advertising cases, unfair competition suits, and so on, all of which are the domain of adaptive non-market strategies. But litigation funders are highly unlikely to finance cases that pursue transformative strategies, as those suits are more likely to be cases brought against governmental entities seeking declaratory and injunctive relief, usually in the form of a court order finding a particular regulation unenforceable.

Larger firms that do not need litigation finance (e.g., the Apples and Intels of the world) are more likely to pursue litigation as a *transformative* strategy rather than *adaptive* strategy. In a related context, scholars have studied the different litigation preferences of repeat players compared to "one shotters."[221] Larger corporations tend to be repeat players, whereas smaller firms and individuals tend to be one-shotters.[222] And larger companies are more likely *to be sued* than *to sue* for violations of the patent, antitrust, unfair competition, trademark, and

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[220] Bedi & Marra, *supra* note 1, at 571 n.23 (explaining that "[s]uits seeking purely injunctive relief are not normally candidates for funding," and identifying claims for exclusion orders at the International Trade Commission as an exception because those cases often result in financial settlements).

[221] *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (introducing the concept of different litigation preferences among one-shotters and repeat players); *see also* Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 6 (2000) (explaining that repeat players care more about the precedent set in a particular case, whereas for one-shotters, the result in that particular case matters above all else); Steinitz, *Whose Claim Is This Anyway?*, *supra* note 54, at 1303 (arguing that litigation finance can help one-shotters better "play for rules" because although the individual plaintiffs may be one-shotters, litigation funders are repeat players more interested in the favorable development of precedent).

[222] Steinitz, *Whose Claim Is This Anyway?*, *supra* note 54, at 1303.

copyright laws. For this reason, they are less likely to pursue meritorious plaintiff-side cases involving those underlying legal theories because they do not want to establish precedent that expands liability in those domains. For example, victory in a specific patent case for Apple may be Pyrrhic if it expanded Apple's liability for patent infringement in dozens of other cases.

Litigation used as a transformative strategy—that is, as a strategy to invalidate rules and regulations—present a different story. In general, larger firms will be more comfortable with plaintiff-side litigation that develops precedent in ways that restrict the power of regulatory bodies, such as precedent overruling the *Chevron* doctrine or invalidating agency regulations. This insight helps explain why the Chamber of Commerce strongly opposes modern commercial litigation finance even as it actively pursues public law litigation to benefit its own financiers.[223]

In sum, (a) large and small companies can use litigation as a non-market strategy, (b) litigation finance is primarily used by smaller companies to implement adaptive non-market strategies, and (c) larger companies that have less of a need for litigation finance are more likely to pursue transformative strategies and disfavor litigation involving adaptive strategies. From these points emerges an important implication for the policy debate about litigation finance: regulations of litigation finance, with their focus on a third-party funder's receipt of money damages rather than injunctive relief, target the use of litigation as an adaptive strategy, primarily as employed by small and medium-sized enterprises. If the battle of litigation finance is partly a battle over which companies can use litigation as a strategy to better compete in the marketplace, the regulation of litigation finance will generally tend to give larger companies a comparative advantage over smaller companies.

C. Lobbying and Trade Associations: Transformative and Additive Strategies

Litigation finance has become a contentious policy issue, with regulations being considered by state and federal lawmakers and judges alike. The opponents of litigation finance are lobbying lawmakers and judges, asking them to impose regulations that range from mandatory disclosure rules and registration requirements to rate caps and even bans on funding.[224] These efforts are led by the United States Chamber of Commerce, a business lobby, and by major corporations that have found

[223] *See supra* note 80 and accompanying text.

[224] *See supra* Part I.C.

themselves as defendants in funded cases.[225] The supporters of funding have launched their own counter-offensive, trying to stave off these regulations they believe will hinder the industry's growth.[226] The funding community's efforts are led by the International Legal Finance Association (ILFA), a non-profit organization whose mission is to promote litigation finance and represent funders' interests before lawmaking bodies like the United States Congress.[227]

As we have demonstrated, participants in the policy debate focus on funding's impact on the civil justice system.[228] Our analysis suggests a different interpretation: the policy fight itself must be understood at least in part as a non-market strategy where the stakes are success in the market. Many companies stand to either win or lose *in the marketplace* when litigation finance becomes widely available. Efforts by groups like the Chamber of Commerce and businesses to impose burdensome regulations on the litigation finance industry represent a classic example of that common transformative non-market strategy, lobbying.[229] These enterprises are trying to transform the laws and regulations governing funding to essentially increase the transaction costs associated with third-party litigation finance, with the goal of ultimately giving larger firms a comparative advantage in the market square.

Litigation funders have also responded by forming ILFA, a trade association. ILFA engages in lobbying as its own transformative strategy in response to efforts to regulate litigation funding. ILFA has also promulgated a set of best practices for funders, which includes an emphasis on clarity, avoidance of conflicts of interest, confidentiality, respect for court rules, and capital adequacy.[230] ILFA's members voluntary commit to these standards.[231] Trade associations that set standards for an industry present prime examples of additive non-market strategies.[232] Companies voluntarily sign onto these trade associations, they fund them, and ultimately, they follow the advice of these trade

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[225] *Id.*

[226] Emily Siegel, *Litigation Finance Group Shrugs Off Forced Disclosure Push*, BLOOMBERG (Nov. 15, 2023), https://bit.ly/3WlOEJZ.

[227] About ILFA, Int'l legal Finance Association, https://www.ilfa.com/#about-us.

[228] *See supra* Part I.C.

[229] *See supra* Part II.B.

[230] Best Practices, ILFA, https://www.ilfa.com/#best-practice.

[231] *Id.*

[232] *See* Dorobantu et al., *supra* note 6, at 121.

associations.[233] The goal is frequently to insulate an industry from further *external* regulation through *self-regulation*.[234]

By voluntarily committing to the standards set by ILFA, financiers can accomplish several strategic goals. By self-regulating, they may avoid "being subject to government rules which may be more onerous or less efficient than the rules defined locally by the actors themselves."[235] The legal profession itself is largely self-regulating through the code of legal ethics, allowing lawyers primarily to regulate themselves rather than being subject to external government regulation.[236] Moreover, by organizing behind a group like ILFA, funders can signal to stakeholders that they take seriously obligations to justice and the legal system. The goal here is to create a system where financiers are "rewarded for establishing a norm of better behavior, either by those who benefit from their actions directly, or from those who value responsible behavior more generally."[237]

IV. POLICY IMPLICATIONS OF LITIGATION FINANCE AS NON-MARKET STRATEGY

We have demonstrated that litigation finance has powerful implications not only for the legal system, but also for finance and business competition. The primary contribution of this Article is thus to identify a new dimension of study for scholars and policymakers who

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[233] *See generally* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999).

[234] For discussions of self-regulation via trade association, see, e.g., William A. Birdthistle & M. Todd Henderson, *Becoming A Fifth Branch*, 99 CORNELL L. REV. 1, 7–8 (2013) (explaining that "nongovernmental regulations—what is commonly known as private law—exercise substantial regulation of behavior…. Entities and organizations of all sizes establish and enforce their own disciplinary codes, often through their own legislative, executive, and judicial efforts"); Dennis D. Hirsch, *The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation?*, 34 SEATTLE U. L. REV. 439, 465 (2011) ("The key distinction between co-regulation, government regulation, and self-regulation concerns who sets and enforces regulatory goals and standards. In self-regulation, the regulated industry itself sets the goals, develops the rules, and enforces the standards.").

[235] Dorobantu et al., *supra* note 6, at 121.

[236] *See, e.g.*, Jonathan Macey, *Occupation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1081 (2005); Sandra Caron George, Comment, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 745 (2005). For the contrary view that lawyers are not in fact largely self-regulated, see Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1148 (2009).

[237] Dorobantu et al., *supra* note 6, at 121.

wish to understand the welfare effects of litigation finance. We provide the non-market strategy framework for understanding how litigation funding impacts finance and business.

We now provide some initial observations for how our insights affect debates about funding. First, we identify implications related to funding's impact on the marketplace. Second, we draw implications for the existing debate about funding's impact on the civil justice system.

A. A New Dimension to the Policy Debate

Companies use litigation finance to compete not only in the courtroom but also in the marketplace. Scholars and policymakers cannot fully understand and effectively regulate litigation finance unless they account for these overlooked welfare impacts.

1. *A Regulation of the Capital Markets*

Recent efforts to regulate "third party litigation finance" cannot be understood as efforts to broadly regulate the practice of third parties funding lawsuits in the civil justice system. Rather, the proposed regulations are instead targeted at a particular corner of the capital markets—and a corner more likely to be used by small and medium-sized enterprises.

Consider two enacted regulations: a federal court's local rule requiring disclosure of certain third-party financing agreements, and an exemplary state law regulating certain third-party financing arrangements. These regulations do not target third-party funding writ large. Rather, they target very specific types of corporate transactions.

We begin with the District of New Jersey's Local Rule requiring mandatory disclosure of certain litigation funding arrangements, which has been copied verbatim by Judge Colm Connolly in the District of Delaware. The rule requires disclosure of any:

> person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan, or insurance.[238]

Subtle nuances in the Rule's language work to require disclosure only of certain forms of third-party finance. The rule covers entities that

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[238] D.N.J. Civ. R. 7.1.1(a). *See also* Judge Connolly Standing Order, *supra* note 91.

are "not a party" to the litigation and provide finance "on a non-recourse basis." These limitations carve out traditional equity and debt financing. If a company raises equity financing from third parties with the goal of using that money to pursue litigation, disclosure is not required because the third-party investor essentially becomes a first-party owner. This new equity-holder could very well hold voting rights to control the company's activities, including its litigation. Meanwhile, the reference to "non-recourse" financing carves out traditional forms of unsecured or secured credit, which typically rely on the firm's general creditworthiness (unsecured loans) or discrete assets like receivables or machinery (secured loans).

The Rule also excludes from disclosure instances where a company finances a third-party seeking injunctive relief, as when companies provide financing to entities like the Chamber of Commerce so that the Chamber can seek declaratory and injunctive relief in public law cases. Companies that finance third-parties seeking injunctive relief do not retain "a contingent financial interest" in the litigation, nor do they finance in exchange for "a non-monetary result that is not in the nature of a personal or bank loan, or insurance." They simply finance the pursuit of injunctive relief that will necessarily benefit their business.

A similar analysis may be applied to a recent law enacted in Louisiana, SB355, which requires disclosure of litigation financing agreements and prohibits funders from controlling litigation.[239] The statute has a lengthy definition of "third-party litigation funder" that excludes from its coverage many entities that are in fact third-party litigation funders. The statute's 300-plus word definition of "litigation financing" provides:

> "Third-party litigation funder" means any person or entity that provides funding intended to defray litigation expenses or the financial impact of a negative judgment related to a civil action and has the contractual right to receive or make any payment that is contingent on the outcome of an identified civil action by settlement, judgment, or otherwise or on the outcome of any matter within a portfolio that includes the action and involves the same counsel or affiliated counsel. This term does not apply to:
>
> (a) The named parties, counsel of record, or law firm of record providing funding intended to defray litigation expenses related to the civil action.
>
> (b) A person or entity providing funding solely intended to pay costs of living or other personal or familial expenses during the

[239] Act No. 765, Senate Bill No. 355, Louisiana Stat., https://bit.ly/3A24Ozw.

> pendency of such civil action where such funds are not used to defray litigation expenses.
>
> (c) Counsel of record, or law firm of record, or any referring counsel providing legal services on a contingency fee basis or to advance his or her client's legal costs where the services or costs are provided by counsel of record or law firm of record in accordance with the Rules of Professional Conduct.
>
> (d) A health insurer, medical provider, or assignee that has paid, is obligated to pay, or is owed any sums for health care for an injured person under the terms of a health insurance plan or other agreement.
>
> (e) A financial institution providing loans made directly to a party, counsel of record, or a law firm of record when repayment of the loan is not contingent upon the outcome of such civil action or on the outcome of any matter within a portfolio that includes such civil action and involves the same counsel or affiliated counsel.
>
> (f) A nonprofit legal organization exempt from federal income tax under 28 Section 501(c)(3) of the Internal Revenue Code, or any person providing funding to a nonprofit legal organization that represents clients on a pro bono basis. This Subparagraph does not affect the award of costs or attorney fees to a nonprofit legal organization or related attorney.[240]

Each of the exclusions in subsections (a) through (f) are in fact instances of third-parties to the litigation that provide financing to support the litigation. Subsection (b) exempts third-party funding provided for a particular use of funds. Ignoring that money is fungible, the statute permits funders to provide capital that is specifically used for "costs of living or other personal or familial expenses," so long as that money is not diverted "to defray litigation expenses." Subsection (b) does *not* permit funders to provide capital used for corporate working capital, thus ensuring that the statute regulates discretionary financing to companies but not to individuals.

The remainder of the exclusions carve out various entities that provide third party funding. Subsections (a) and (c) exempts lawyers (third parties to the litigation) who finance the litigation on a contingent fee basis, while subsection (a) also allows one party to the litigation to finance the litigation of their co-plaintiffs. Subsection (d) exempts insurers. Subsection (e) carves out all third-party investments that are *not* recourse only to the legal claim. In other words, subsection (e)

[240] *Id.*

recognizes that many companies use general-recourse third-party debt and equity financing to back their litigation, but it excludes those entities from having to disclose their funding. Meanwhile, subsection (f) excludes non-profit entities organized under section 501(c)(3).

The definition of "third-party litigation funder" also only covers entities with a "contractual right to receive or make any payment" from the funded case. This definition therefore excludes all funders that seek declaratory or injunctive relief in public law matters (as opposed to money damages relief in private law matters). This exclusion applies, for example, to organizations like the Chamber of Commerce's Litigation Center, a 501(c)(6) organization that uses raises money from donors to pursue injunctive relief against government entities (pursuing transformative non-market strategies on behalf of its backers). The Chamber's proposed regulations of third-party funding carve out the form of third-party funding that the Chamber uses.

In sum, the New Jersey disclosure rule and Louisiana statute, which are emblematic of other proposed and enacted regulations,[241] do not broadly regulate the practice of third parties financing the pursuit of legal claims. Rather, they target specific forms of third-party funding, with a definition based on the *corporate form* of the transaction and the parties thereto. The regulations turn primarily on the financier's corporate status (e.g., whether it is a law firm, nonprofit, or profit-seeking funder), the collateral for the financier's investment (e.g., whether it is broad-recourse equity or debt, or recourse only to the litigation), and whether the financier's expected return is tied directly to a monetary result in a case. Certain types of companies are more likely to prefer the narrow category of third-party funding regulated by these rules and statues. Specifically, small and medium-sized businesses are more likely to structure their third-party capital raises with use of modern commercial litigation finance, regardless of whether they use the litigation funder's investment to pursue litigation or as general corporate working capital.

2. *Implications for Business Competition*

Efforts to regulate or deregulate litigation finance must be viewed as a battle for an edge not just in the courthouse but also in the

[241] *See* D.N.J. Civ. Rule 7.1.1 (2021) (mirroring the language of Judge Connolly's District of Delaware disclosure rule); Florida Bill, *supra* note 79 (containing a lengthy list of exclusions from the definition of "litigation funding agreement" that mirrors many of the exclusions in the Louisiana statute).

marketplace. When companies lobby for regulations of litigation funding, they are pursuing transformative non-market strategies to give themselves a market edge by discouraging litigation funding. And when the funding industry forms its own lobbying and standard-setting body, it is pursuing transformative and additive non-market strategies to combat the anti-funding transformative strategy.

This Article has also shown that companies use litigation finance to pursue non-market strategies in both adaptive and transformative ways. Regulations that promote or discourage litigation finance will impact firms' ability to avail themselves of these non-market strategies. This insight raises important but overlooked welfare concerns that scholars and policymakers must consider when evaluating litigation finance.

First, consider the use of litigation finance to pursue litigation as an adaptive strategy (e.g., to pursue an antitrust suit against a competitor) or as a transformative strategy (e.g., to challenge a regulation that targets the company's business model). If policymakers curtail access to funding, then companies that rely on litigation funding to pursue litigations with adaptive or transformative purposes will be less likely to pursue those litigations, or they will have fewer resources to effectively prosecute those litigations.[242]

In the first instance, the normative impact of litigation finance regulations will likely depend on whether one views the pursuit of these non-market strategies as a good or bad thing. For example, if one thinks the patent laws are under-enforced and the antitrust laws promote a healthier market, then diminished access to litigation finance may be a bad thing because it means fewer firms will be able to pursue patent and antitrust suits as an adaptive non-market strategy. If one takes a different view—that litigation involving the existing patent and antitrust laws diminishes welfare—then one might view the regulation of litigation finance as a good thing.

But the analysis is more complicated than this. Many companies do not need modern litigation finance to pursue litigation as an adaptive or transformative litigation strategy. Ban litigation funding, and they still have access to retained earnings and traditional debt or equity capital to pursue litigation designed to give them an edge in the courthouse.

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[242] As we have argued elsewhere, litigation funding does not necessarily result in a net increase in litigation, partly because many cases backed by litigation funders may be brought through other means (e.g., with contingent fee counsel) if modern commercial litigation finance did not exist. But funding does frequently provide litigants with more substantial resources to pursue their claims. *See* Bedi & Marra, *supra* note 1, at 607, 609–10.

Regulating litigation finance thus only prohibits *some* players from deploying these non-market strategies. Put differently, if one prohibits some (mostly smaller) firms from accessing litigation finance, other (mostly larger) firms that do not need litigation finance can still pursue litigation for adaptive and transformative purposes, putting them at a comparative advantage in the marketplace. Policymakers must consider the welfare implications that flow from firms' unequal ability to pursue litigation as a non-market strategy.[243]

Second, in addition to the use of litigation for adaptive and transformative purposes, this Article also demonstrated that companies can also use litigation finance as an adaptive strategy by leveraging their legal claim to raise capital. Many companies use third-party financing writ large not simply to pay their lawyers on legal cases, but also to raise general working capital to fund their business activities.[244] Larger companies often structure these transactions as third-party equity investments, or third-party debt investments that are either unsecured or secured by assets other than litigation claims. Smaller companies have more difficulty accessing these traditional markets, so they often turn to litigation finance instead.[245]

Put differently, large companies are more likely to finance their litigation and other business suits through third-party capital that falls within the safe harbors provided by the nascent regulations of litigation funding such as the New Jersey disclosure rule and Louisiana statute discussed above. They are more likely to raise general recourse debt or equity capital, and they are more likely to have the financial wherewithal to finance transformative litigation through a third party like the Chamber of Commerce.

To see the patchwork results, recall the weather balloon company that needs $15 million to finance litigation and develop new products. If the company has retained earnings, or is able to raise traditional third-party debt or equity financing, it need not disclose its financing in litigation. Yet if the most efficient fundraise for the company is a commercial litigation finance fundraise, then the litigation finance regulatory structure kicks in. Meanwhile, if the company's interests lie not in enforcing a claim against a competitor for money damages, but rather in invalidating a government regulation via declaratory and injunctive relief, then the company is not subject to the litigation finance

[243] *See supra* notes 217–18 and accompanying text.

[244] *See supra* notes 46–52 and accompanying text.

[245] For various reasons including bankruptcy protections and tax policy, litigation funders may prefer to structure their investments as third-party funding agreements rather than debt or equity investments.

disclosure regime either. This is so regardless of whether the company sues in its own name or if it finances a third party like the Chamber of Commerce to pursue the litigation.

One's perspective on these insights may depend on the normative lens applied. As an example, consider the impact of limiting companies' ability to raise capital via litigation funding. Assuming one values marketplace efficiency, current calls for regulation of litigation finance likely move the marketplace away from efficiency.[246] This is because current litigation finance regulations hamper small businesses' ability to access the litigation finance capital markets to fund various strategic business endeavors. These regimes thus favor larger companies, who have ample access to other capital markets and have less need for litigation funding.

And assuming one believes that it is better when most industries have many firms competing against each other, then the use of litigation finance as an adaptive strategy to raise capital likely improves societal outcomes. Litigation finance allows more companies to raise capital to produce, market, and sell their goods. Increased competition usually reduces prices for consumers and moves the market towards a more competitive equilibrium.[247]

B. Implications for the Civil Justice System

In addition to identifying a new dimension in the debate about litigation funding—how funding affects parties' ability to compete in the marketplace—our study also brings a fresh perspective to the existing debate about how funding affects the civil justice system.

First, one significant question in the existing policy debate is whether litigation funders spur frivolous litigation. Opponents of litigation funding argue that funders will seek high-value claims even if they are frivolous, with the hopes of forcing settlements. Proponents of

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[246] Law and economics has as its bedrock a goal of maximizing marketplace efficiency. For a discussion of this *see generally* Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 N.D. L. REV. 817, 817 (1989) (discussing how law and economics advances notions of efficiency); MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (Aspen Publishing, 2018) (analyzing various legal concepts from a perspective of maximizing efficiency).

[247] Our claim is not that litigation finance creates perfect efficiency or competition. And there are certainly inefficiencies associated with litigation. *See supra* note 215. Instead, we offer the more modest argument that when used as an adaptive non-market strategy, litigation finance likely moves the market towards a more efficient outcome. Nor is our claim that litigation finance is only ever welfare-enhancing. It may decrease welfare at times. We leave for future research a discussion of inefficiencies that litigation finance may create.

funding respond that financiers who invest in bad cases will soon be out of business.[248]

Our analysis sheds new light on that question by inviting a comparison of the scrutiny applied to cases that are funded via third-party litigation finance, as compared to funding via retained earnings or traditional third-party debt and equity financing. Before commercial litigation finance companies invest in cases, they apply extensive, months-long diligence that is characteristic of asset-based lenders in general.[249] By contrast, funding litigation with retained earnings does not result in rigorous third-party scrutiny of the value of the litigation. Indeed, corporate finance scholarship has identified the agency problem inherent when managers use retained earnings to pursue new investments. Retained earnings avoids investor accountability because, by not raising external funds, "managers avoid a capital markets inspection of their past performance and the need to persuade the capital markets of the soundness of their proposed projects."[250] By contrast, the use of project finance—and litigation finance is project finance for law—can "discipline management" because it "allows the investors, not the managers, to decide where the free cash flow will be invested. If the managers want to make new investments, they must raise the capital from outside investor."[251] Meanwhile, while raising more traditional equity or debt capital does invite investor scrutiny, it is not usually scrutiny specifically focused on the value of the legal claim. It follows that if companies want to pursue frivolous litigation, third-party litigation funding is probably least likely to result in approval to pursue the case.

Second, another important question in the existing debate about funding is whether third-party funders should be able to control litigation strategy and settlement decisions. Third-party funders state that they generally do not exercise control rights over litigation decisions, and many publicly-disclosed financing agreements bear this out, but there is one notable exception: after Burford Capital provided $140 million in working capital to Sysco secured against several antitrust suits the food company had brought against suppliers, Burford attempted to veto Sysco's decision to settle those cases for an amount below Burford's

[248] *See supra* note 57.

[249] *See supra* notes 31–35 and accompanying text.

[250] Goshen, *supra* note 184, at 887. *See also* Huang & Knoll, *supra* note 169, at 183–84 (2000).

[251] Huang & Knoll, *supra* note 169, at 183–84.

liking.[252] Meanwhile, litigation finance regulations have targeted control, with recent regulatory efforts trying to prohibit funders from controlling litigation, and court rules promulgated by the District of New Jersey and the Chief Judge of the District of Delaware requiring parties to disclose if they have provided a third-party funder with litigation control rights.[253]

If policymakers are concerned about control, there are many ways that financiers can accomplish control, and indeed standing as a third-party funder may be a uniquely inferior way to obtain control. For example, a third-party financier could become a controlling equity investor in the company, and thus take over control of all the company's operations, including the litigation.[254] This approach might be particularly feasible as to smaller claimholders in financial distress whose value is tied primarily or entirely to the value of litigation. Similarly, traditional creditors usually have powerful sticks of control, including the power to force the company into bankruptcy or sue for payment on a loan.[255] Creditors may use these rights to influence litigation. Yet the proposed regulations of litigation funding capture none of these instances of control via equity or traditional debt investment.

Third, a more recent issue in the litigation finance debate is whether litigation finance might present a national security risk. Opponents of litigation finance argue that funding can provide a conduit for foreign adversaries like China and Russia to impair the competitiveness of American companies by forcing them to defend against costly litigation and by gaining access to sensitive trade secrets during discovery.[256] Supporters of litigation finance argue that there is little evidence of such foreign interference, and that China and Russia have much more

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[252] *See* Allison Frankel, *Sysco cedes antitrust claims to litigation funder Burford as two sides drop cases*, REUTERS (June 29, 2023); Alison Frankel, *Sysco Sues Litigation Funder Burford, Blasts Boies Schiller over $140 Million Soured Deal*, REUTERS (Mar. 9, 2023).

[253] See, *e.g.*, D.N.J. Civ. R. 7.1.1(a) (requiring disclosure of "[w]hether the funder's approval is necessary for litigation decisions or settlement decisions in the action").

[254] *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003) (discussing the powers of, and potential for abuses by, controlling shareholders). The control rights of minority shareholders are more complicated and contingent. *See* Dalia Tsuk Mitchell, *Shareholders As Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1504 (2006).

[255] *See*, *e.g.*, Lucian Arye Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 HARV. L. REV. 2386, 2393 (2001) (describing the powers of secured creditors in and out of bankruptcy).

[256] U.S. Chamber of Commerce Institute for Legal Reform, *Pulling the Curtain Back on Foreign Influence in Third Party Litigation Funding* (April 2, 2024), https://bit.ly/3WqOlhd.

effective ways of hurting America than corrupting the judicial system from the position of a third-party funder.[257]

Our analysis offers a different perspective. If foreign adversaries want to gain a competitive edge by accessing secrets through litigation, they can do so much more effectively by simply taking control of the plaintiff company, or by pursuing any of the other third-party financial methods that are *not* captured by the proposed regulations. In those circumstances, none of the onerous proposed regulations of litigation finance would capture their participation. The enacted and proposed regulations are highly underinclusive relative to the stated goal of ferreting out foreign influence.

Fourth, the disclosure of litigation finance agreements has emerged as a leading regulatory proposal in the existing debate. Proposed regulations of funding almost universally include a requirement that plaintiffs disclosure the presence of litigation funding to the court and defendants.[258] Proponents of disclosure argue that it is necessary to unearth whether the funder is violating any applicable ethical or legal rules, and to avoid judicial conflicts of interest.[259] Opponents of disclosure argue that it invites discovery side-shows and gives defendants a strategic advantage by disclosing whether the plaintiff has funding (and potentially disclosing much more too).[260]

But again, there are myriad ways in which third parties finance another company's litigation, and these financing methods are not commonly disclosed to courts or litigation opponents. Indeed, the federal rules provide very thin corporate disclosure, mandating that private companies need only disclose the identity of a parent corporation and of any publicly held corporation that owns 10% or more of its stock.[261] These limited disclosures were no mere oversight but a deliberate choice. The Rules Committee acknowledged that "[f]raming a rule that calls for more detailed disclosure will be difficult" and could create "[u]nnecessary disclosure requirements" that "place a burden on the parties and on courts."[262] The new regulations of litigation finance

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[257] *See*, *e.g.*, Adam Mortara, *Litigation Finance Doesn't Pose a Security Threat. That's a Myth*, BLOOMBERG LAW (May 3, 2023), https://bit.ly/3zYUxUH.

[258] *See supra* Part I.C.

[259] U.S. Chamber of Commerce Institute for Legal Reform, *What You Need to Know About Third Party Litigation Funding* (June 7, 2024), https://bit.ly/4bS6dGn.

[260] Keith Sharfman, *The Economic Case Against Forced Disclosure of Third Party Litigation Funding*, 94 N.Y. ST. B.J. 36, 38-39 (2022).

[261] FED. R. CIV. P. 7.1(a)(1).

[262] *Id.*, Committee Notes on Rules—2002.

thus impose burdensome disclosure requirements on only one form of corporate finance, with the inquiry turning not on the type of litigation or the intent of the financier, but rather simply on the type of corporate form that makes most sense for the regulated party.[263]

In sum, almost all companies raise third-party capital to finance litigation and other business pursuits. Sometimes they raise equity from third-party investors. Sometimes they raise traditional third-party debt on a secured or unsecured basis. And sometimes—if it makes sense for the company give its size, strength, and regulatory environment, among other factors—they raise modern "litigation finance." Efforts to regulate only a subset of the many ways claimholders raise third-party capital to finance litigation suggests that many proposed regulations of funding are underinclusive relative to their stated goal. Our non-market strategy framework suggests strategic business motivations for these proposed regulations.

V. SCHOLARLY BENEFITS OF THE NON-MARKET STRATEGY FRAMEWORK

In addition to reframing how scholars and policymakers should approach litigation finance, our framework also holds value for both the law and business academies. First, our analysis answers recent calls by legal scholars for work that combines the scholarly disciplines of law and strategy. Second, our framework creates new insights for business scholars, especially concerning the types of strategic endeavors that firms engage in.

[263] Insured parties do not need to disclose the availability of insurance, Fed. R. Civ. P. 26(a)(1)(A)(iv), and supporters of financing disclosure usually highlight this fact in pushing for disclosure, *see* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 409 (2016). But insurance is an exception for reasons explained in the comment to Rule 26, *see* notes of Advisory committee on Rules—1970 Amendment, Fed. R. Civ. P. 26, while the norm is that other third-party financing agreements (e.g., third party debt and equity) are not disclosed. Indeed, while a defendant must disclose insurance, they need not disclose third-party sources of funding their defense, such as third-party debt or equity capital raises or retained earnings set aside for defense. *See id.* (explaining that disclosure is limited to insurance coverage, and does not extend for example to the defendant's general litigation reserves or defense funding budget or a party's general financial status).

A. Legal Scholars

Legal scholarship does not usually focus on strategic business decision-making.[264] "The notion that law may be a source of competitive advantage remains largely unexplored."[265] This is so even though law has a tremendous impact on business strategy, and even though many of the most contentious contemporary legal questions have high stakes for business interests.[266]

Scholars have recently called for a change. "If scholars can better understand the characteristics of firms and the attitudes of managers that promote legal strategy," Robert Bird has argued, "both scholars and managers can devise ways to capture value from the legal environment that have never been previously considered."[267] He concludes that "law and strategy research can contribute much to both disciplines and can produce beneficial insights for scholars, practitioners, and managers alike."[268] For example, a full picture of the interaction between corporate counsel and regulators must account for business strategy decisions.[269]

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[264] Historically, even business law scholarship has mostly focused on corporate governance and regulatory issues. The list of corporate governance scholarship is extensive, *see*, *e.g.*, Lawrence E. Mitchell, *Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 (1992); Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749 (2010); Jonathan R. Macey, *Corporate Law and Corporate Governance a Contractual Perspective*, 18 J. CORP. L. 185 (1993); Suneal Bedi, *The Corporate Pro Se Litigant*, 82 OHIO ST. L.J. 77 (2021). The list of business law scholarship focused on regulation is likewise vast, *see*, *e.g.*, James Park, *Rules, principles, and the competition to enforce the Securities Laws*, CAL. L. REV. 115 (2012); some examples on compliance at large are: Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215 (2017); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965 (2018).

[265] Robert C. Bird, *Law, Strategy, and Competitive Advantage*, 44 CONN. L. REV. 61, 64 (2011).

[266] *See*, *e.g.*, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024) (overruling *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984)); *CFPB v. Community Financial Services Ass'n of America*, 601 U.S. 416 (2024) (upholding the constitutionality of the Consumer Finance Protection Bureau); *SEC v. Jarkesy*, 603 U.S. 109 (2024) (holding that the Seventh Amendment requires jury trials in Securities & Exchange Commission enforcement actions).

[267] Bird, *Law, Strategy, and Competitive Advantage*, supra note 266, at 65.

[268] *Id.*

[269] *Id.* at 80–89.

Fortunately, a law-and-strategy line of legal scholarship is emerging.[270] Scholars (including one of us) similarly contend that laws and legal principles are important for marketing and product developers to understand so that they may better drive consumer demand to their products.[271] Still others have argued that litigation can be a type of bullying to capture market power.[272]

This Article responds to the call of various legal scholars to engage with strategic decision-making in addition to legal decision-making.[273] We provide a new lens for legal scholars to study how laws impact business strategy. This framework can help scholars address business litigation writ large, including private law disputes (such as the antitrust, patent, and Lanham Act disputes we have discussed) as well as high-profile public law disputes that grab headlines at the Supreme Court.[274]

B. Business Scholars and Businesses

Just as legal scholars have mostly ignored business scholars' insights about law and strategy, the business and finance academy has mostly overlooked litigation finance.[275] This Article contends that litigation finance is ripe for business scholarship too.

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[270] As one of us has previously argued, general counsel and compliance departments need to better understand how business professionals operate and the incentives that motivate them. Todd Haugh & Suneal Bedi, *Valuing Corporate Compliance*, 109 IOWA L. REV. 541, 601 (2024) ("While most legal and compliance scholarship views the law as distinct from management, marketing, sales, operations, or any other business unit, we have conceptualized compliance as part and parcel of business strategy."). Some prominent examples of law and strategy scholarship include: David Orozco, *Legal Knowledge as an Intellectual Property Management Resource*, 47 AM. BUS. L.J. 687 (2010); Constance E. Bagley, *What's Law Got to Do with It: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587 (2010); Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L.J. 575 (2010); Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285 (2017).

[271] *See* Haugh & Bedi, *supra* note 270 (arguing that legal decisions like compliance have implications for profit-making, in particular marketing and product design).

[272] *See* David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J.L. & BUS. 137 (2016).

[273] "Legal issues may be one of the most important determinants in a firm's external operating environment. Law is likely the last great source of untapped competitive advantage." Bird, *Law, Strategy, and Competitive Advantage*, supra note 265, at 64. *See also generally* Larry Downes, *First, Empower All the Lawyers,* HARV. BUS. REV. (Dec. 2004).

[274] *See supra* note 266.

[275] There are a few notable exceptions, including Antill & Grenadier, *supra* note 54 (providing a theoretical game theory model on how litigation finance effects litigation outcomes) and Andrew Daughety and Jennifer F. Reinganum, *The effect of third-party funding of plaintiffs on settlement*, 104 AM. ECON. REV. 2552 (2014).

A few avenues of research are likely to be fruitful. First, litigation finance is relatively unique in the non-market strategy context as it implicates adaptive, transformative, and additive strategies. Most business scholarship focuses on corporate strategies that are one-dimensional. Litigation finance is also unique because it is the subject of a push-and-pull of non-market strategies: some companies are using litigation finance as a non-market strategy to improve their market position, while others are pushing back against funding to preserve their own position.

Second, there is a dearth of empirical scholarship on litigation finance.[276] The literature that has explored the instrument empirically has, unsurprisingly, focused on dependent variables relevant to the legal system, including the number, type, and outcome of funded cases.[277] The framework presented in this Article suggests business scholars should also explore various business-focused dependent variables, including investments returns, weighted cost of capital, market power, and on so. Our framework can be a foundation on which scholars can evaluate the efficacy of these non-market strategies.

In addition to business scholarship, our framework here should provide businesses themselves with new strategies to create economic value. We have identified for firms the types of non-market strategies they can leverage. While we have identified several ways companies leverage litigation finance to drive economic value, we suspect that there are many unexplored strategies. By retooling litigation finance as a strategic endeavor and not just a legal one, companies may improve their ability to compete not only in the courtroom but in the market too.

CONCLUSION

This Article shifts the vantage point for analyzing litigation finance from the courthouse to the market square. The extensive scholarship on litigation finance has focused only on funding's impact on the civil justice system. We argue that scholars and policymakers must also grapple with funding's impact on capital markets and the business marketplace. To make this point, we use an interdisciplinary approach,

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[276] There are a few notable exceptions. *See* 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 (2013); Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, (2019); Paul Fenn and Neil Rickman, "The empirical analysis of litigation funding" in *New Trends in Financing Civil Litigation in Europe: A Legal, Empirical and Economic Analysis. Cheltenham, UK: Edward Elgar Publishing Ltd* (2010): 131-148.

[277] *See id.*

drawing on business strategy literature about nonmarket strategies that has been largely ignored by legal scholars. Our framework identifies an entire set of funding's policy implications in the market. It also offers new insights for the existing debate about how litigation finance affects the civil justice system. This approach provides a new lens for scholars and regulations struggling with how to study and regulate funding.