Third-Party Funding of Patent Litigation: Problems and Solutions

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Executive Summary

This paper documents the rise of third-party funding in patent litigation with a unique data set. We track the sources of funding for patent lawsuits in the United States from 2002 to 2021. The data show a dramatic increase in both the number of cases and the percentage funded by third parties. While we cannot say with certainty that third-party funding has caused this growth in patent litigation, we can observe its high correlation. Tracing the history of the doctrine of champerty in the United States, although the doctrine was originally decriminalized to allow underresourced plaintiffs access to litigation, use of the doctrine today by patent trolls leads to distortions in the marketplace and an excessive amount of frivolous litigation.

The secondary market for patents, in which non-practicing entities (NPEs) can buy patents from innovators and litigate against defendants, has created a robust market for litigation. Fueled by the capital markets, investment funds place bets on litigation in hopes of a financial return with no interest in the underlying technology or innovation. This growth in litigation drains social welfare and creates a hidden tax on innovation, since operating companies spend costly resources to defend against patent trolls funded by Wall Street. To be certain, these problems arise because patent policy, by construction, is imperfect: It grants a government monopoly to innovators and creates an environment for rent seeking and lobbying.

Abandoning patent policy altogether would eliminate these distortions. Absent such reform, the best solution would be for courts to ask plaintiffs and defendants to disclose third-party funding arrangements as evidence in patent litigation. Courts can mandate such disclosure, but even allowing for voluntary disclosure could bring more transparency to the funding arrangements behind patent litigation. Juries could then factor these funding arrangements into their decisions to assess whether the lawsuits protect the rights of innovators, as originally intended. Disclosure has been effective in improving governance and reducing information asymmetries in the capital markets, and could have a similar positive effect in the market for litigation. Over time, unnecessary litigation could decrease, and third-party funding could resume its rightful place as a funding mechanism for under-resourced innovators.

Introduction

Third-party litigation funding (TPLF) is big business. Hancock (2017) estimates that overall commercial funding commitments to third-party litigation funding total as much as $5 billion. Korchin (2021) estimates that in 2019, nearly $10 billion in assets under management were dedicated to US legal finance, of which $2.3 billion were for commercial litigation finance, which includes IP and patent litigation finance.

A third-party litigation fund operates like any investment fund in the capital markets. Such funds have fund managers; these are general partners who select lawsuits to invest in. The asset in question is a lawsuit, rather than a stock, bond, or commodity, which are the traditional purview of investment managers. The funds are backed by limited partners (LPs) who provide capital to the fund. Such LPs are usually large institutional sources of capital, such as university endowments, sovereign wealth funds, pension funds, and so on. The most common funding structure applies a "Two and Twenty" rule, in which the general partner (GP) charges 2% of assets under management to operate the fund, keeps 20% of the profits, and returns 80% to the LPs. If successful, this can be highly remunerative for both the GPs and the LPs.[1] The American Bar Association (2020) outlines what it considers to be best practices for third-party litigation funding. This extensive policy covers types of agreements, practices such as disclosure or documentation, and considerations for special types of funding.

The most basic cost and benefits of litigation funding are as follows. The chief benefit is that it widens access to litigation, so potential plaintiffs who otherwise could not afford a lawsuit now have the resources to bring a claim against the defendant. The cost is that it increases the amount of litigation, which includes both legitimate and frivolous litigation. In the United States, the legal academy is divided in its opinion of litigation funding, as are the states; currently, more states allow it than not. Bushnell (2007) summarizes the arguments in favor of litigation funding by stating that litigation funding levels the economic playing field, allows plaintiffs more bargaining power, and allows those in need to pursue litigation. Bushnell also summarizes the arguments against, stating that litigation funding increases frivolous litigation and allows funding companies to take advantage of the less fortunate.

Proponents of litigation funding generally propose some sort of adjustment to minimize its damaging effects. For example, Martin (2008) supports litigation funding but recommends a licensing regime to certify financing agreements. Douglas (2005) recommends that lawyers ensure that funders are separate from the litigation and that they refrain from disclosing any confidential information. Steinitz (2011) broadly supports litigation funding, even though she acknowledges that there are concerns. Molot (2010) argues that litigation funders should push for higher settlements, since underresourced plaintiffs are likely to settle at lower prices.

Opponents of TPLF are similarly diverse. McLaughlin (2007) recommends pools of public funds to support plaintiffs. However, this introduces distortionary taxation, which would be necessary to raise the revenue for these funds. Kidd (2012) opposes TPLF because funders will invest in cases that

[1] In practice, investment fund agreements contain a bevy of details, such as high-water marks, sidecars, and other contractual obligations that split profits between the GP and the LP in more complicated ways. However, Two and Twenty is the general structure.

cause courts to generate new areas of claims. These are just some of the stances with respect to TPLF in the legal academy; the issue is far from settled.

The key historical notion is that of champerty, in which a third party funds litigation in return for a share of the proceeds of a judgment, as defined by Stroble (2020). The third party does not have a stake in the litigation outside of financial concerns, so it cannot play any legal role in the lawsuit. The doctrine of champerty traces back to the Middle Ages and, in the United States, dates to pre-colonial common law. Individual states decide whether to allow champerty; some states allow third-party funding, such as Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, New Hampshire, New Jersey, Ohio, and Texas. Others restrict it or even outlaw it altogether, such as Alabama, Colorado, Kentucky, and Pennsylvania. Bond (2002) provides an excellent overview of champerty restrictions by state as of 2002, and highlights the "patchwork" nature of the doctrine and its application across the US. See Appendix B for an updated list of state statutes and their laws and stances on litigation funding.

Bushnell (2007) defines champerty as "an agreement between a plaintiff or potential plaintiff and a disinterested third party, under which the third party either contributed aid to plaintiff's case or pursued the plaintiff's case at his own expense in exchange for some monetary, property or other benefit upon successful suit." This definition itself allows for various forms, but the essence is the following: Champerty is an agreement whereby a third party provides funds for litigation to receive a share of the potential profit. The objective is to allow the plaintiff to bring a lawsuit when he would not otherwise have the resources to do so.

Data

The data came from Unified Patents, and was collected in three phases. The first phase examined data from 2010 forward; specifically, within the Western and Eastern Districts of Texas. Litigation data from Unified Patents' portal identify each plaintiff as an NPE (Patent Assertion Entity), NPE (Small Company), or NPE (Individual); see Appendix A for definitions.

Using these definitions, Unified first identified whether NPEs were aggregators and then whether third-party financing was involved. NPE aggregators were defined as NPEs with more than one affiliated subsidiary that is also bringing patent litigation. An example of this would be IP Edge and the various limited liability companies under its control that have filed numerous cases against operating companies. Third-party financing is defined as evidence of any third party with a financial interest other than the assertors.

With this limited focus on the Western and Eastern Districts of Texas, in the second phase Unified used several public databases, such as Edgar, USPTO Assignment Records, the NPE Stanford Database, press releases, and its own database of NPEs, to identify any aggregator and any third-party financial interest, as well as various secretary of state corporate filings or court-ordered disclosures. After those two districts were identified, Unified then expanded the data to cover the top five most litigious venues for patents: the Western and Eastern Districts of Texas, Delaware, and the North and Central Districts of California. Over the past five years, on average, these districts have accounted for about 70% of all patent litigation. When this process was completed, the dataset was then expanded to include all jurisdictions from 2010 forward.

The third and final step was to expand the data set from 2000 to 2009. Using Lex Machina, the NPE Stanford Database, and Unified's portal, the same process was followed. Unified identified all litigation that was known to be NPE-related. From there, using the top five jurisdictions' aggregation and financing data, aggregator entities—such as Intellectual Ventures—were identified using the same methodology. The final dataset covers 2000-2021 and identifies (1) which plaintiffs are NPEs, (2) which NPEs are aggregators, and (3) which aggregators are known to have third-party financing.

Note: Currently, there are no requirements whereby the financing details of non-public entities must be publicly disclosed at the federal or state level or in the courts. Thus, any data analysis of which litigations are funded or financed is necessarily incomplete, since many of these arrangements are closely held, private, and unknown even to the courts and the parties to the actions. This data set endeavors to describe the minimum *known* amount of third-party funded patent litigation and is necessarily underinclusive of all nonpublic deals for which there is no available evidence or insight. For further generalized industry information on the size and scope of litigation funding for patent litigations, private sources often report on the size and scope of the burgeoning industry in the aggregate. For example, see Westfleet Advisor's 2021 Litigation Finance Report, available at https://www.westfleetadvisors.com/publications/2021-litigation-finance-report/.

The data set contains 79,541 observations, which include 73,989 unique patents filed over a time series of 2000-2021. The data capture the district court in which the patent lawsuit was filed, the case number and date, the year the summons and complaint were filed, the status of the case (open or closed), court in which the litigation occurred, the name of the plaintiff, the name of the defendant, and whether the lawsuit was funded by a third party. The data classify each lawsuit by entity type, such as non-practicing entity (NPE), operating company, other entity, patent assertion entity, small company, or individual, as well as the presiding judge on the case, the date the case was terminated, the date of the Markman hearing, and a description of the product. Some data are only available for the years 2015 to 2021, such as a description of the product, a flag that denotes whether the defendant is a small to medium enterprise (SME), and the industry classification. All figures are collected in Appendix B.

Figure 1a plots the total number of patent cases and total number of third-party funded patent litigation cases in the United States over the full sample from January 2000 to November 2021 by month. Third-party funding largely tracks the growth in patent litigation over this horizon: Both the number of cases and those funded by third parties began to increase starting in 2010 and have remained statistically significant (different from 0) ever since.

Figure 1b shows the ratio of the two lines in Figure 1a—that is, the number of cases funded by third parties divided by the full sample. That percentage started with a minimum value of 0 in January 2000 and reached a maximal value of almost 50% in April 2014. November 2002 was the first month with a third-party funded case. In that month, of the 217 total patent litigation lawsuits in the United States, 28 were funded by third parties, or 12.9%. In the most recent month (November 2021), of the 324 patent litigation lawsuits filed in the US, 36 were funded by third parties, or 11.11%. Over the full sample from 2000 to 2021, roughly 302 lawsuits were filed per month on average; 44 of those, on average, were funded by third parties for an average of 11.25%. However, this understates the role of more recent history: In the last 6 years (2015–2021), 358 lawsuits on average were filed per month, and on average, 90 of those were funded by third parties—slightly more than 24%. Since 2000, the trend has been upward; the simple linear regression that yields the line of best fit between 2000 and 2021 gives a slope of 0.13. This means that from 2010 to 2021, for each additional year in that subsample, third-party funding of patent litigation increased by 1.56%.

Figure 2a shows the distribution of cases by court across the top 20 courts in the sample from 2000 to 2021. The Eastern District of Texas account for 17.2% and Delaware and the Central District of California for 13.23% and 8.25%, respectively. Figure 2b shows the distribution of cases by court in the last 5 years of the sample, from November 2016 to November 2021. The Western District of Texas now accounts for 11.13%, Delaware for 21.36%, and the Eastern District of Texas for 14.27%.

Table 3 lists the top 20 plaintiffs over the full sample from 2000 to 2021, with the number and percentage of total cases for each. Figure 4 shows the total cases of the top 20 defendants over the full sample of 2000 to 2021. Many names are familiar: Samsung, Apple, LG, Microsoft, Amazon, HTC, HP, and Google. The top two defendants are Samsung and Apple, the main suppliers of smartphones—respectively, Android and iPhones—to the global market. This is not surprising, since smartphones combine thousands of technologies—each of which is subject to patent infringement by NPEs.

Figure 5 illustrates the extent of NPEs' role in patent litigation. Whereas a slight majority (51.8%) of plaintiffs were operating companies, 47% of all cases emerged from NPEs of various kinds, either patent assertion entities, individuals, or small company NPEs. This means that NPEs have cornered close to half of the market on patent litigation and brought almost as many lawsuits as operating companies themselves. We have additional data on the last 6 years, from 2015 to 2021, during which more than two-thirds (69.6%) of defendants were large operating companies; and25.6% were small and medium enterprises.. In terms of industries, 62.6% of cases involved technology, 13% medical, and 24.4% industrial or mechanical.

The courts and judges in these patent cases are highly skewed. Figure 6 shows the top 20 judges in the whole sample. Judge Rodney Gilstrap has presided over 1,545 cases; Judge T. John Ward is in second place, with 664 cases—less than half of Judge Gilstrap's caseload.

Figure 7 shows the average case duration for the top 20 courts in the full sample, with the Southern District of Florida the quickest nationwide at 216 days, the Eastern District of Virginia second at 259, and the Western District of Texas third at 268; the latter is Judge Alan Albright's "rocket docket."

Figure 8 shows the percentage of total cases tried in the top 10 courts over the full sample, with the Eastern District of Texas at 17%. For the last 5 years, from November 2016 to November 2021, the top court is Delaware, with 21% of total cases tried. Figure 9 shows the percentage of third-party-funded cases as a proportion of total cases by court in the top 10 courts in the full sample from 2000 to 2021. The Eastern District of Texas has the highest percentage at 45.78%, and Western District of Texas is second highest at 31.21%.

The Rocket Docket

Given their prominence in patent litigation, as shown by the above statistics, Texas courts merit a deeper dive. Figure 10a plots the rise and fall of the Eastern District, which tried a high number of patent litigation lawsuits from 2010 to 2018. Figure 10b shows the percentage of third-party funding of these lawsuits, which exceeded 80% in early 2014 and late 2017.

Figures 11a and 11b shows the recent growth of cases in the Western District, which coincided with the installation of Judge Albright by President Trump; between 2016 and 2021, he presided oversaw 35.56% of third-party funded cases on average.

It should be apparent from these data that the increase in patent litigation caseloads in districts such as Eastern and Western Texas has paralleled the increase in third-party litigation funding; the two cannot be disentangled. Moreover, in the universe of third-party litigation funding, the majority are funding plaintiffs rather than defendants. In other words, in the quintessential patent litigation case in a court such as the Eastern or Western District of Texas, the defendant is an operating company, like Apple or Samsung, and the plaintiff is an NPE. In this example, the defendants are large, established technology companies and plaintiffs are shell entities created explicitly for the purpose of enforcing and litigating patents.

Judge Albright of the Western District of Texas famously created the rocket docket, which allows for fast trials, quick settlements, and increases in the number of patent cases processed per month, as shown in our data. Judge Albright has also changed some rules in his court, such as disallowing discovery after the Markman hearing. This is beneficial for defendants who are operating companies, because discovery is costly, especially for large companies. In this sense, the rule change has helped defendants by reducing the drain on litigation.

The rocket docket has both partial and general equilibrium effects. The partial equilibrium effect is the reduced time for any one case in the Albright courtroom. The general equilibrium is that plaintiffs over time will select his courtroom over others, which can increase the number of cases seen. Whereas the length of each case falls, the total number of cases rises, and the aggregate hours spent in litigation may increase.[2]

The Logic of Third-party Funding

The rationale behind third-party litigation funding is based on the doctrine of champerty, as discussed earlier. The traditional argument has been that this funding provides access to litigation for plaintiffs who would otherwise lack the resources to bring suit. Let’s examine the logic more closely.

By way of comparison, consider the logic of allowing companies to access public capital markets. Managers of private companies wish to make positive NPV, risky investments. When the company

[2] This is similar to the classical puzzle of how to resolve traffic. Consider a congested road: Building more capacity will lower traffic in the short term because cars already on the road will have more space. But because there is more space, new drivers will elect to drive on the road and possibly increase traffic beyond prior levels. This is the difference between partial and general equilibrium.

is privately held, a small number of shareholders bear the risk, both upside and downside, of managerial decisions. As the scale of the company grows, not only will managers need more capital for their business, but they will also need a different *kind* of capital, one that is less averse to risk. The public capital markets provide both a higher quantity of capital and higher quality (less risk-averse) capital. When diversified across a large base of shareholders, the capital is risk neutral compared with a small handful of investors in a private company. This affects managerial decisions, since they can make risky investments, which a smaller private company could not. Capital markets provide this important social benefit, which is often overlooked—that is, changing not just the quantity of capital provided, but its risk profile. Therefore, most companies prefer to access public capital markets once they reach sufficient size, even with their higher financial reporting requirements.

This logic can also apply to patent litigation: A small plaintiff may lack the resources to bring an expensive lawsuit against a well-heeled defendant. Access to capital markets, in which third parties fund the litigation and in exchange capture some of the upside, allows the plaintiff to shift the risk from himself to a less risk-averse entity, which consists of a diversified pool of risk-neutral shareholders. Like the public a company that shifts its risk from risk-averse managers to risk neutral shareholders, so too does the plaintiff shift risk to the capital markets. However, this logic breaks down at a certain point. To see where, let's consider some common scenarios in patent litigation.

To fix ideas, consider two firms: an incumbent and an entrant. The incumbent operates in the market first and the entrant comes in second. In our first scenario, suppose the incumbent is the innovator and files a patent to protect his innovation. The government grants him a monopoly, which prevents new entrants from copying the invention. The entrant infringes on the patent, the incumbent can file a lawsuit as the plaintiff against the entrant as the defendant. If the patent is strong, the law will side with the incumbent and protect his innovation. This case is perhaps the original justification for the entire patent system, and in this example, if the plaintiff lacks the financial resources to bring a suit against the entrant (who is infringing), third-party litigation funding can make sense. It can provide a source of capital to the innovator to protect his invention when he may not have the resources himself. This may describe the mom-and-pop inventor story in patent law lore that motivates much of the justification for patents in the first place. And in this example, third-party litigation funding does not distort the market.

Now suppose the incumbent is a large operating company in an established market. The entrant is the innovator and files a patent to protect his innovation. If the incumbent knowingly produces a product that infringes on the patent, then the entrant can file a lawsuit as the plaintiff against the incumbent as the defendant. Though this example is more nuanced than the prior one—since the incumbent was operating unknowingly—most would agree that the entrant has a claim to the innovation and the patent should enforce that right. If the plaintiff lacks the resources to bring this suit against the defendant, third-party funding could assist the plaintiff and would allow the entrant to protect his innovation against infringement.

This scenario is slightly less clear-cut; some courts and juries might rule in favor of the incumbent, especially if it was not aware of the entrant's later patent. Also, third-party funding might induce new entrants to file an excessive number of patents beyond what is socially optimal because of the capital that is funding the lawsuits. But if the entrant is an operating company in the same business as the incumbent, this strategy may not be socially optimal, since filing patents is costly in terms of both time and dollars. In this scenario, third-party funding may lead to a slight distortion in the market.

Now consider our third scenario. The incumbent operates in an existing industry and the entrant files a patent. But now the entrant sells the patent to an NPE—a patent troll—that makes no product on its own, and only enforces the patent it bought from the entrant. The NPE then serves as the plaintiff in a suit against the incumbent as defendant. In this case, third-party litigation funding provides capital not for the entrant who is operating in the market, but for the NPE whose sole purpose is to sue the incumbent. Over time, this will encourage new entrants to file an excessive number of patents relative to what is socially optimal. This over-patenting occurs because the patent holder it can simply sell the patent to the NPE, whose sole purpose is to litigate the patent through access to capital markets. In this case, third-party funding can dramatically distort the market, because it creates an assembly line of litigation and encourages the increase in patent trolls.

This third scenario differs from the second precisely because of the secondary market for patents. In the second scenario, the entrant is an operating company that is embedded in the industry, so litigating a patent, even with third-party funding, will be costly for the entrant. This cost will dampen the distortions from third-party funding, because the entrant must bear some of that cost in time and dollars. But in the third scenario, the entrant simply sells the patent to the NPE and has no further involvement in the litigation. The entrant can return to its operating business while the NPE pursues its existential purpose. Thus, it is the secondary market for patents—namely, one party's ability to sell a patent to another without any intent to operate in the market—that leads to an excessive amount of litigation. This is also where the outcomes vary greatly from the original intent of patent law, as evidenced by how different the third scenario is from the first, in which the patent was serving its true purpose—i.e., protecting the innovator.

Third-party litigation funding can lead to distortions in the market, depending on the circumstances of the patent case. In cases are close to the original design of the policy, in which the innovator files the patent first to protect against future entrants, it is unlikely that third-party funding would distort market outcomes. However, today's technology sector is more vulnerable to the third scenario, in which, for instance, the incumbent is a large smartphone manufacturer like Apple or Samsung and entrants are small technology companies that are patenting one of the thousands of technologies within the smartphone. In this scenario, the incumbent may or may not know that a patent exists on each of the underlying technologies.

The patent troll market has grown substantially, buying patents from small entrants and litigating them at scale against cash-rich incumbents. Many of these lawsuits settle, but some do not and result in large damages being awarded to plaintiffs. In such cases, the plaintiff earns a large payout, which partly accrues to the investors in the litigation. Third-party investment firms then raise capital from the capital markets to fund future lawsuits brought by patent trolls against incumbent operating companies. For instance, Pfizer vs Teva Pharmaceuticals (TEVA) & Sun Pharma (2013) reached a settlement of $2.15 billion; Intel vs VLSI Technology (2021), $2.18 billion (Intel is appealing); Carnegie Mellon University vs Marvell Technology Group (2012), $1.17 billion (settled for $750 million); Polaroid vs Kodak (1991), $925 million; and Monsanto Company vs E.I. du Pont de Nemours and Company (2012), $1 billion. These are just a few examples of high-dollar patent litigation cases that, while not specifically funded by third parties, show the magnitude of the money behind patent litigation.

Taylor (2022) argues that there is something immoral about betting on patent litigation and that it should be outlawed as a form of gambling. However, such a carte blanche prescription not only introduces a possibly irrelevant moral aspect to the debate, but also neglects the important role capital markets play in society. The chief problem with third-party funding is not the funding mechanism itself, but rather the scenarios in which patent law and patent policy vary greatly from their original intent. In those cases, third-party funding adds fuel to the fire, distorts the outcomes, and further damages an already imperfect patent system.

First-best Solution: Abandon Patents

To address the rapid increase in litigation funding, the most basic question is whether third-party funding is socially suboptimal. This issue is complex, because third-party litigation funding for patent litigation in particular combines two separate issues. The first is the question of third-party funding, which occurs in both consumer and commercial contexts. The second concerns patent law.

In one sense, all litigation is a deadweight loss. The Coase theorem argues that absent transaction costs, parties will bargain to efficient outcomes; this is the most foundational result in law and economics. In the real world, there are nonzero transaction costs (such as litigation) that prevent efficient outcomes. Litigation that results in a trial is perhaps the most inefficient, since both sides must hire typically expensive lawyers and a jury must assess damages and reach a verdict. Even in the most clear-cut case, for which patent law was intended—such as a sole innovator who seeks the monopoly granted by the government to protect an invention in which he invested—litigation may provide him those monopoly rents, but the cost in terms of legal fees and time can be substantial. In sum, litigation funding simply increases the amount of litigation. This is a problem, because litigation is socially wasteful.

I see no problem with a market for third-party funding as a general principle. However, the problems with TPLF in patent litigation do not arise from litigation funding, but rather from patent law itself. Because patent law as a policy instrument is imperfect, increasing the amount of litigation within the world of patent litigation creates more problems. Therefore, we must first consider how to resolve the underlying issues in patent policy.

At its most elemental level, a patent grants, by law, monopoly rights to an inventor; today, this occurs in the first-to-file regime under the America Invents Act. In the United States, an approved patent awards legal protection to the first inventor to file—not necessarily discover—an invention for a period of 20 years if the patent.

The historical argument has been that innovation requires government intervention to ensure the patent's legal protection. Absent that, rents from innovation would dissipate because of entry by competitive firms: Other firms would observe the innovation, steal it, and profit from it at the cost of the original inventor. The problem with this claim is that it takes a narrow measure of innovation—namely, the incentives of the original inventor himself. It does not consider the innovation the patent prohibits, by preventing other firms from undertaking their own exploration. Thus, while the patent may encourage innovation by the original inventor by granting him monopoly rights, it discourages innovation by subsequent inventors by locking them out of the market. How do these costs and benefits compare?

Empirically, there has been very little correlation between productivity and the number of patents awarded. Countries with weak or no patent regimes have showed no decrease in innovation relative to those countries with patent regimes. In fact, weaker patent systems—such as late 19th century Germany, which allowed for process rather than product patents—demonstrate greater innovation than countries with strong patent policies. In the United States, the number of patents increased from 59,715 in 1983 to 244,341 in 2010 with little increase in innovation, R&D, or total factor productivity during that time; R&D expenditure and total factor productivity did not increase by nearly as much as the number of new patents. A wide range of academic research demonstrates the lack of any empirical proof that patents actually increase innovation—for instance, Gallini (2002); Jaffe (2000); Lerner (2000); and Boldrin (2011).

Moser (2013) surveys the historical evidence and concludes that "patent policies which grant strong intellectual property rights to early generations of inventors may discourage innovation." The reason is that many innovations occur outside of the patent system. Many countries with no patent laws innovate just as much as countries with patent laws and create innovations of similar quality. Rather than relying on the legal mechanism, inventors can simply keep their ideas secret or move fast in the market to make profits.

On the theory side, patents reward a government-granted monopoly to an individual inventor. While that generates monopoly rent for the original inventor, it bars other innovators from the marketplace and increases incentives for lobbying, which is socially wasteful. Thus, the general equilibrium effect of reducing innovation in the marketplace must be considered against the partial equilibrium effect of increasing incentives for the original inventor to innovate.

Patents also cause delays, especially in markets in which technologies are complex and have multiple smaller technologies embedded within them. The inventor of a small piece of technology can force a large company to negotiate strict terms. For example, consider the smartphone, which contains thousands of individual technologies. The inventor of any one individual technology can require onerous licensing terms from manufacturers such as Apple and Samsung. Boldrin (2011) and Llanes (2012) have examine the underlying theory of this problem, which arises from government-granted patent monopolies.

Finally, patents motivate operating companies to acquire patents for purely defensive reasons, such as buying companies solely for their patent portfolio rather than for their human, intellectual, or physical capital. Armed with those patents, the acquiring company can now defend against a broader portfolio of IP attacks. Insofar as the acquiring company has no use for the underlying technology and it is not integrated into its core products, such defensive patenting is socially wasteful. Given the substantial theoretical and empirical problems with patents, a possible conclusion is to abolish the patent system altogether. Instead, innovators would rely on competition and their desire to establish a first-mover advantage, which is ultimately the prime engine of innovation. This would also reduce socially wasteful patent litigation and other distortionary activities of the patent system, such as delays and defensive patenting. It would, as a consequence, also completely end third-party litigation funding of patents.

This first-best policy solution may seem extreme, but many of the problems with third-party litigation funding emerge from a broken system. Nonetheless, if there is not sufficient political appetite for a major abolition of the patent system, I now turn to more incremental changes within the existing patent system that can address problems of third-party litigation funding.

Second-best Solution: Regulatory Responses

Given that there is not sufficient political will to abolish the patent system entirely, what are some second-best solutions that could mitigate some of the distortions caused by third-party litigation funding of patents? As argued earlier, the chief problem arises from the secondary market for patents, in which the entity filing the patent sells it to an NPE that exists solely to litigate the patent. This essentially creates a market for litigation—and assuming that all litigation is socially wasteful, the market for litigation will only diminish social welfare and drain economic productivity. The patent troll in this case does not innovate or operate in the underlying business. This is outside the original intent of the patent policy, which was designed to protect innovators and provide incentives for innovation.

One might argue that the secondary market for patents does provide incentives to the first entity that files the patent. For instance, knowing that he could sell the patent to a troll at a high price, the innovator invests in risky technologies and exploration. To fix ideas, recall that the chief problem arises when, in the third scenario, an incumbent operates in an existing industry. A new entrant subsequently enters the industry, files a patent, and sells the patent to a patent troll. The troll then litigates and initiates a lawsuit as the plaintiff against the incumbent as the defendant. In this context, the troll has no operating activity in the underlying business—and likely not even deep technical knowledge of the patent itself, since it bought the patent instead of developing it internally. This creates a market for litigation that, since all litigation is ultimately socially wasteful, will drain economic productivity.

One might argue that the existence of this secondary market for patents, in which the troll buys the patent from the entrant, creates incentives for innovation. After all, absent the secondary market, the troll would not be willing to buy the patent. Were the secondary market to vanish, the entrant might not have sufficient incentive to file the patent in the first place. However, I do not believe the incentive for the entrant is for innovation, but rather for patent litigation.

If the entrant is filing the patent purely for the secondary market, he will optimize the patent for that purpose. He will likely have no reason to do otherwise, and insofar as the secondary market is competitive, the entrant will tailor his patent to maximize resale, rather than maximize invention or innovation. As such, it is unlikely that the secondary market for patents creates incentives for innovation, but rather simply incentives for more patent litigation.

The most heavy-handed solution would be to outlaw the secondary market for patents. In other words, only practicing entities could bring suits against other practicing entities. Unfortunately, Determining whether an entity is truly non-practicing or not is a subjective exercise, and trolls would likely find ways to skirt the regulation. Does the ownership of a plant or factory constitute operating ability? What if the troll has scientists on its staff? Finally, there could be edge cases in which the entrant sells patents to a former innovator who is no longer inventing, and that buyer has a legitimate claim to litigate the patent. Therefore, shutting down the secondary market altogether is unrealistic and would introduce a raft of additional regulations to an already highly regulated industry.

Chao (2019) offers a solution in the form of a "legal showdown" approach: Each side picks their most compelling arguments from the sea of claims, and the decision whether to hear the remaining arguments hinges on the success of those first few. While this is a great oversimplification, the premise of putting the best evidence first remains intact. A large amount of court resources and costly litigation fees for both sides are saved by essentially going to the root of the litigation at the outset.

This solution has been adopted in certain courts to avoid the excessive claims presented by trolls that attempt to draw out litigation. A legal showdown increases the likelihood that the defendant will settle—while costing everyone else, including the court, more time and money. By only hearing the best arguments and claims first, the judge can see whether the claims have legitimacy or are being presented in such large quantities to avoid scrutiny.

While this solution may work to shorten excessively long trials or allow for less overall time spent on huge claims, it does not address the underlying issue. The solution is a band aid for larger systemic issues within patent litigation policy as it currently stands. A true solution needs to address the root cause of the excessive litigation and abuse by third parties. Although this solution will not prevent third parties from abusing the patent system, it might slow them down.

Another heavy-handed solution would be to outlaw third-party funding of litigation altogether. This could be done by reversing the Champerty Law at the federal level. Patent trolls would still have the ability to litigate, but they would lose the line of capital that is required for their existence. Unfortunately, this policy also has problems, since third-party litigation funding itself is not the problem.

Recall our discussion earlier, in which, in the first two scenarios, third-party funding had minimal, if any, problems: It may serve a legitimate purpose if an innovator lacks the resources to engage in costly litigation, and it will likely serve a socially valuable purpose if the true innovator deserves patent protection by law but lacks the resources to defend the patent and protect the innovation, because the litigation is too costly.

Thus, the real problem lies in the combination of third-party funding with the secondary market for patents, which is primarily occupied by patent trolls. In circumstances such as these, in which a single regulation is unlikely to work—given the complexity of the environment and the ability for private actors to change behavior and skirt new regulations—the best policy is to *increase transparency* so that the market itself can adapt. Markets have a remarkable ability to reward success and punish failure, provided they have the information they need to operate. In this example, the market comprises the judges and jury involved in patent litigation. In short, let sunshine be the best disinfectant, and the litigation market may in fact self-correct.

A Better Way: Disclose Funding Arrangements

The disclosure of funding arrangements would mean that either a plaintiff or a defendant who has entered into a contract with a third party to finance the lawsuit must disclose this as evidence in the lawsuit itself. This would be part of the facts of the case, and the judge and jury would then interpret this information as needed. Such a disclosure could include the amount of the funding, the interest rate charged or equity granted to the funder, and names of the individuals and corporations providing the capital.

Disclosure has a long history of positive effects in the capital markets. Thinking broadly, companies today must disclose a bevy of accounting and financial information to public equity markets in order to be listed on stock exchanges. This disclosure requires compliance with generally accepted accounting principles (GAAP) as well as specific rules mandated by individual exchanges, such as the New York Stock Exchange.

The long history of US capital markets shows that disclosure improves corporate governance, reduces information asymmetry between managers and investors, lowers the cost of capital, and ultimately provides the lubricating oil that allows the gears of capital markets to function. Investors must know what they are investing in, and the current capital market regime provides that. A private sector entity, the Financial Accounting Standards Board, sets disclosure standards in concert with a community of market participants to ensure that the disclosure rules are not excessively onerous; a government entity, the Securities and Exchange Commission, enforces those rules. Disclosure in patent litigation could also have positive effects. Lambert et al. (2007) show how accounting information is directly linked to lowering the cost of capital. Similarly, Goldstein (2017) links disclosure with improvements in a slew of market factors, such as general market quality, investor confidence, and investor welfare. The more information the market receives, the more confident investors can be in their decisions.

Disclosure would have several collateral consequences that in the long term are likely to lessen the distortionary effects of third-party funding today. First, and most primarily, this information would inform decision makers (the judge and jury) about the financial interest of third parties. This is not to vilify such financial interest, but simply to identify it. Decision makers must be able to distinguish between the three scenarios discussed earlier—i.e., innovators who are operating in the industry patent protection was designed for and patent trolls who are enforcing and litigating patents in the secondary market. It is not within the government's purview, either state or federal, to decide which of these two scenarios is better for plaintiffs or defendants; it is up to the jury. Ultimately, they must decide in favor of one side or another, and more information will facilitate that assessment.

Implementing Disclosure Policies

The strongest form of disclosure is mandatory, in which the court requires that each side disclose evidence of any arrangements for third-party funding. Failure to do this would have consequences, which are necessary to ensure that the parties disclose the evidence. Just as defendants must engage in discovery (the process of revealing all evidence that bears on the case) so too must plaintiffs (or defendants) disclose the details of third-party funding arrangements. Supplying the full contract between the third-party entity would provide maximal information for the case—but even disclosing the amount of funding, at the bare minimum, would make a difference.

Courts can require this disclosure in varying levels of specificity. Usually, disclosure regimes start out vague, in which it is up to the party with the information to decide how to convey that to the court. Over time, courts can eliminate variation in information received by developing more specific requirements for plaintiffs and defendants. Short of requiring the full contract, they could require disclosure of the amount of funding and the interest rate charged (or equity share promised) to the third party, up to and including the names of individual investors and limited partners in the fund.

If this information is hard for the jury to process, expert testimony can assist in validating the data, like technical or forensic experts in other types of court proceedings. Such experts could provide an independent assessment of the third-party funding arrangement. Over time, they could even develop a market for such third-party funding experts, who could serve both plaintiffs and defendants; this has already occurred with economic damage experts.

The long-term effects of disclosure will ultimately depend on what is disclosed. Consider the baseline case, in which only the existence of funding is disclosed: The jury only knows whether any third-party funding is involved. I suspect that even this bare amount of information would lead juries to be more skeptical of third-party-funded plaintiffs and, over time, rule in favor of incumbent operating companies. In the long term, this would choke off the supply of capital to patent trolls.

A more rapid route to this outcome would be stronger disclosure requirements. If the court required the amount of a contractual arrangement between a third party and the plaintiff or defendant, the jury would know whether a plaintiff who wins a case with a damage assessment of X dollars would give some share αX dollars to a third party in exchange for covering the costs of litigation.

This jury could then decide whether α was high or low. Over time, an equilibrium would develop in the legal market, in which contracts with α above some threshold level α^* would be considered aggressively funded, while contracts with $\alpha < \alpha^*$ would be considered lightly funded. Once this threshold α^* becomes known to the marketplace, investors in future litigation funds would negotiate a lower α in their contracts. Over a long enough horizon, this could decrease the amount of litigation funding for frivolous litigation, since α could even converge to 0.

Other analysts have also proposed disclosing third-party arrangements as evidence in a lawsuit. Avraham (2013) makes a provocative argument whereby allowing third-party funding will lead to better selection of claims. Since the funder receives nothing if the lawsuit fails, third-party funders are only willing to risk their capital on lawsuits with the highest expected return. Therefore, the mere existence of a market for litigation funding will itself reduce noise in the courtroom. Avraham (2013) advocates that third-party funding should be disclosed in the lawsuit itself and presented as evidence. Over time, this would not only signal that the plaintiff and his or her lawsuit have merit, but that this will lead to a reduction in the interest rates the third-party charges.[3] Avraham argues that over time, only better qualified suits will survive (and will have lower risk), and therefore will

[3] In this framework, the investor lends capital to the plaintiff and charges an interest rate on the loan to compensate for risk. The more likely it is that the plaintiff's lawsuit will fail, the greater the risk.

incur lower interest rates.

While Avraham (2013) frames his analysis in terms of the interest rate, this is formally equivalent to my analysis of the previous paragraph on the equity share. An outside investor will charge a high interest rate to compensate for the risk that a given patent lawsuit will fail, which is equivalent to requiring a high equity share (α in my example). My prediction is that over time, the equity shares will converge to 0, while Avraham shows that interest rates over time will converge to 0. These are formally equivalent.

If disclosure requires the full contract, knowledge of individual investors and LPs would be available to the court. Over time, the legal system would develop knowledge about both different funds and different LPs, which would develop their own reputations. Some would have good reputations, if they have funded cases that legitimately assist an underresourced plaintiff in protecting an innovation, as patent policy was designed to me. Others will have bad reputations for exploiting the uncertainty of patent litigation in order to gamble on a risky asset. Knowledge of funds and LPs with bad reputations will spread through the legal system, possibly assisted by the third-party litigation experts discussed above. Over time, bad apples will be excluded, and this should decrease the damaging effects of third-party litigation funding.

Finally, the free-market community may oppose mandated disclosure, since some may believe that it is too heavy-handed. But even voluntary disclosure can have positive benefits for third-party litigation funding. Voluntary disclosure leaves it up to the plaintiff or defendant to disclose, and this may sound like it would have no consequences—but juries are rational, as are plaintiffs and defendants. For example, a plaintiff who is not funded by a third party knows that he may have a better chance of winning the case, since he can convince the jury that his motives are based purely on the merits of the innovation, rather than on the risk-return trade-off third-party funding would require. All such plaintiffs would behave similarly, and any plaintiff without third-party funding would disclose that. The jury would then infer that if a plaintiff does not disclose, they must have something to hide and are likely to be funded by third parties.

Non-disclosing plaintiffs would then face a penalty during the trial, since the jury might assume the worst. Of the remaining plaintiffs funded by third parties, those with the least aggressive financial terms from their investors would seek to distinguish themselves from their peers, and would disclose. This desire to separate from their peers (because the jury could infer that lack of disclosure means you must have aggressive financial backing) would lead each plaintiff to sequentially disclose. This is an example of applying the unraveling hypothesis from economics to patent litigation. The hyphothesis has been verified in the capital markets and likely will apply in the litigation context as well. Therefore, although voluntary disclosure may seem like a weak instrument, the interaction between rational parties may ultimately lead to full disclosure, which essentially amounts to mandatory disclosure.

Conclusion

All litigation has at least two types, legitimate and frivolous. Legitimate litigation refers to trials and settlements that represent the spirit of the law, in which case the law resolves the dispute between private actors who are unable to agree on their own. Since the dawn of time, however, litigation has also introduced loopholes, which the plaintiff or defendant can exploit to evade the original intent of the law. It is impossible to contain such loopholes completely, but more disclosure can enable juries to better assess which litigation is legitimate and which is frivolous and in a way that heavy-handed regulation alone cannot achieve. Third-party litigation funding has allowed patent trolls to take advantage of loopholes in the patent litigation market. I believe greater disclosure of these funding arrangements can, over time, reduce the distortions that exist in this market and lead to greater innovation and economic prosperity for all.

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Appendix A: Definitions

Non-practicing Entity (NPE) = Company that derives the majority of its total revenue from patent licensing activities.

NPE (Patent Assertion Entities) = Entity whose primary activity is licensing patents and acquires most of its patents from another entity.

NPE (Small Company) = Entity whose original activity was providing products and services, but now is primarily focused on monetizing its own patent portfolio.

NPE (Individual) = Entity owned or controlled by an individual inventor who is primarily focused on monetizing inventions patented by that individual inventor.

NPE aggregators = NPEs that have more than one affiliated subsidiary that is also bringing patent litigation

Third-party financing = Evidence of any third party with a financial interest, other than the assertors.

Appendix B

Figure 1A

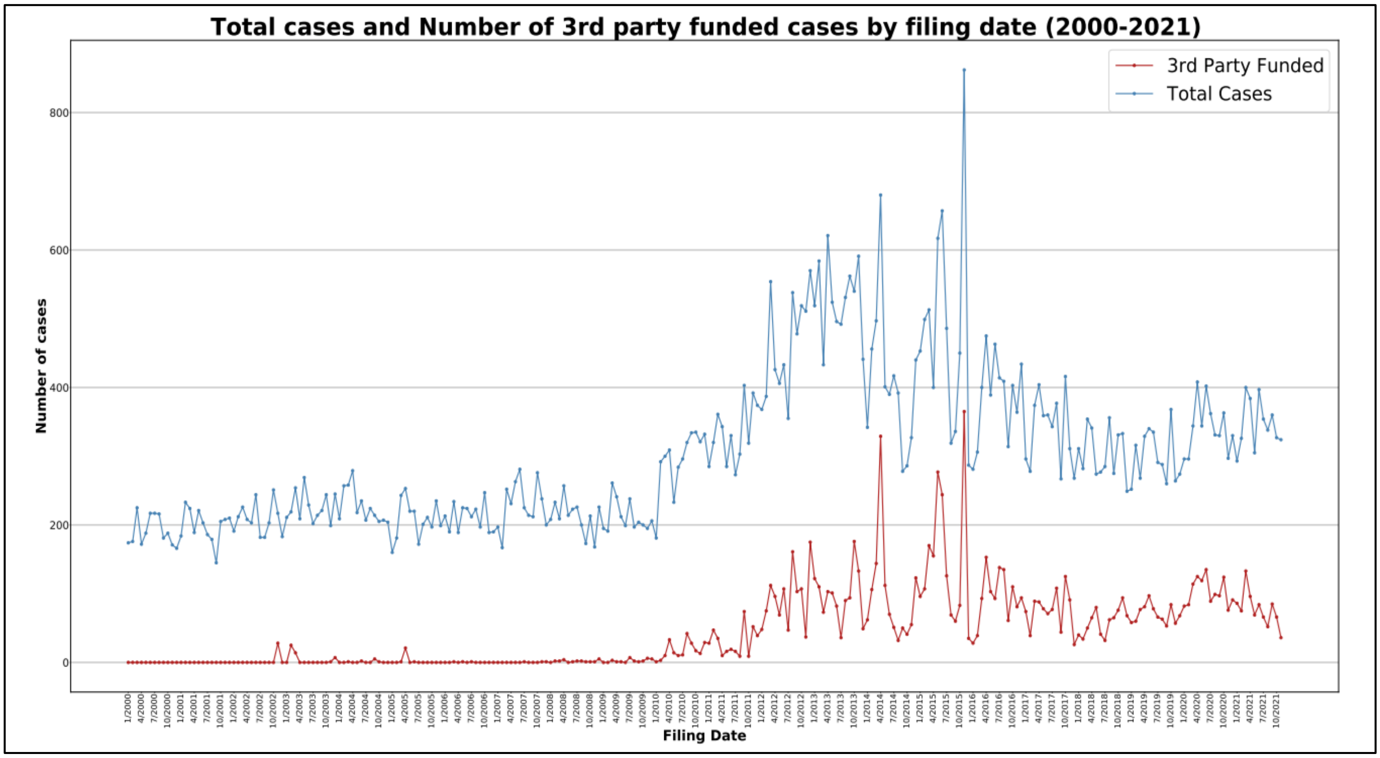


Figure 1B

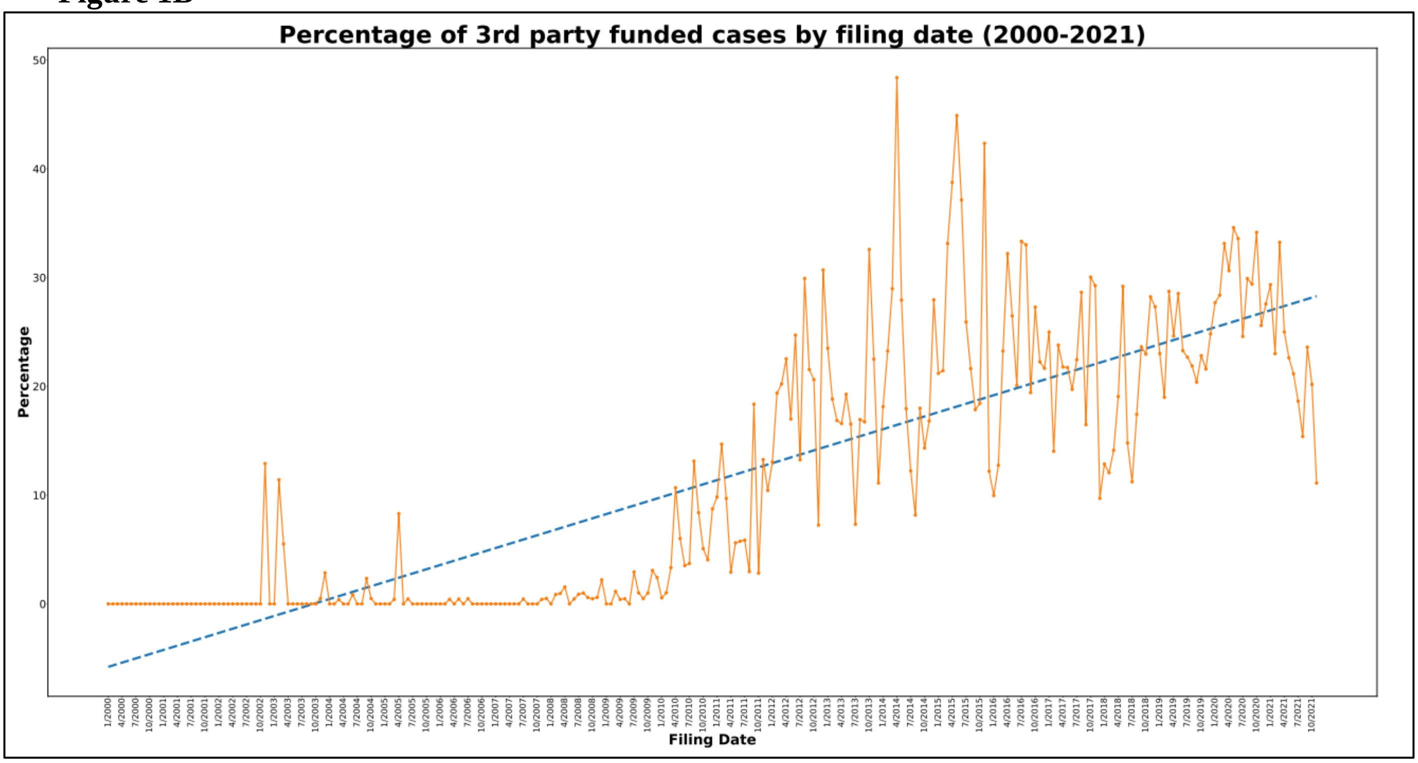


Figure 2A

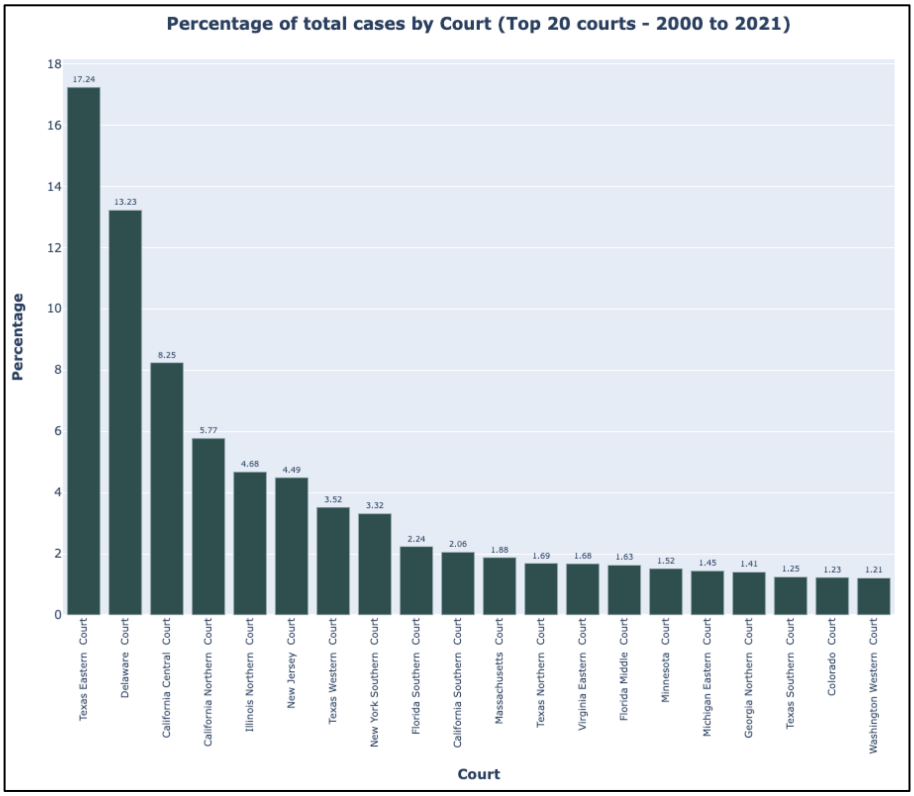


Figure 2B

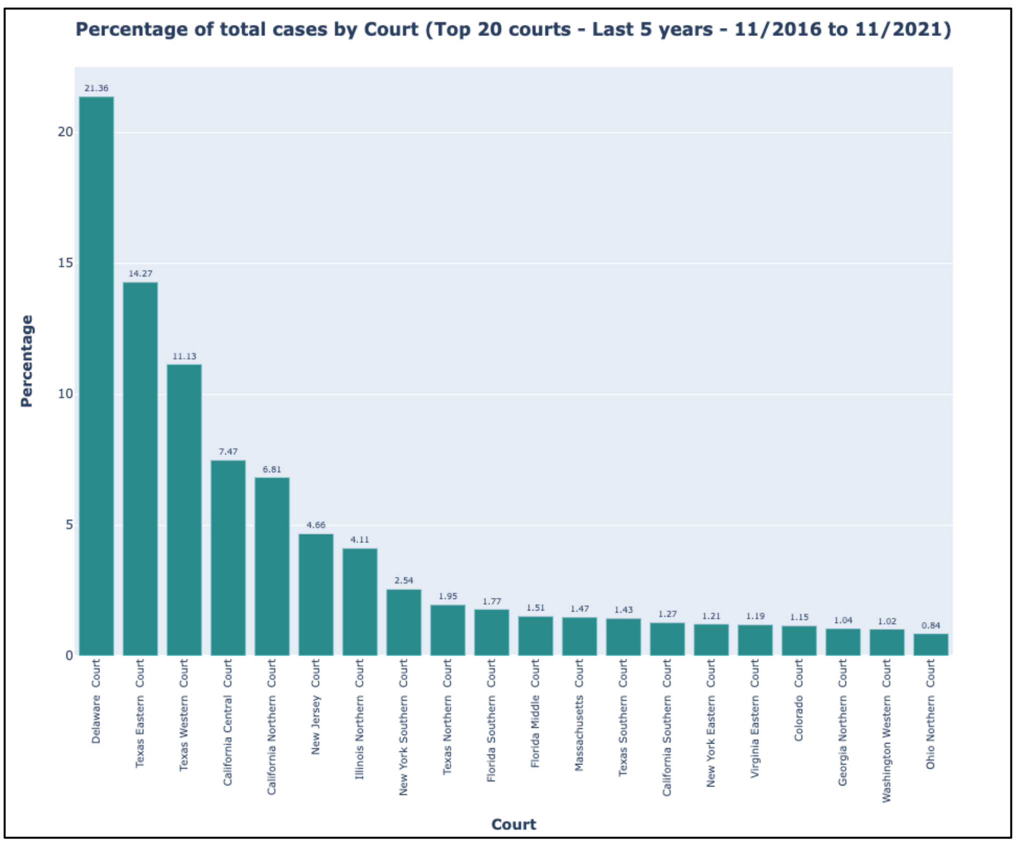


Table 3

Plaintiff	Total Number of Cases	Percentage
Uniloc Usa Inc	473	0.48
Uniloc Luxembourg Sa	389	0.39
Arrival Star Sa	370	0.38
Melvino Technologies Ltd	357	0.36
Edekka Llc	253	0.26
Uniloc 2017 Llc	222	0.23
Pfizer	217	0.22
Hawk Technology Systems Llc	216	0.22
Patent Group Llc	209	0.21
Oakley Inc	208	0.21
Symbology Innovations Llc	201	0.20
Novartis	194	0.20
Data Carriers Llc	194	0.20
Astrazeneca	185	0.19
Shipping Transit Llc	176	0.18
Cedar Lane Technologies Inc	176	0.18
Personalweb Technologies Llc	172	0.17
Laughlin Products Inc	165	0.17
Level 3 Communications Inc	159	0.16
Eclipse Ip Llc	158	0.16

Figure 4

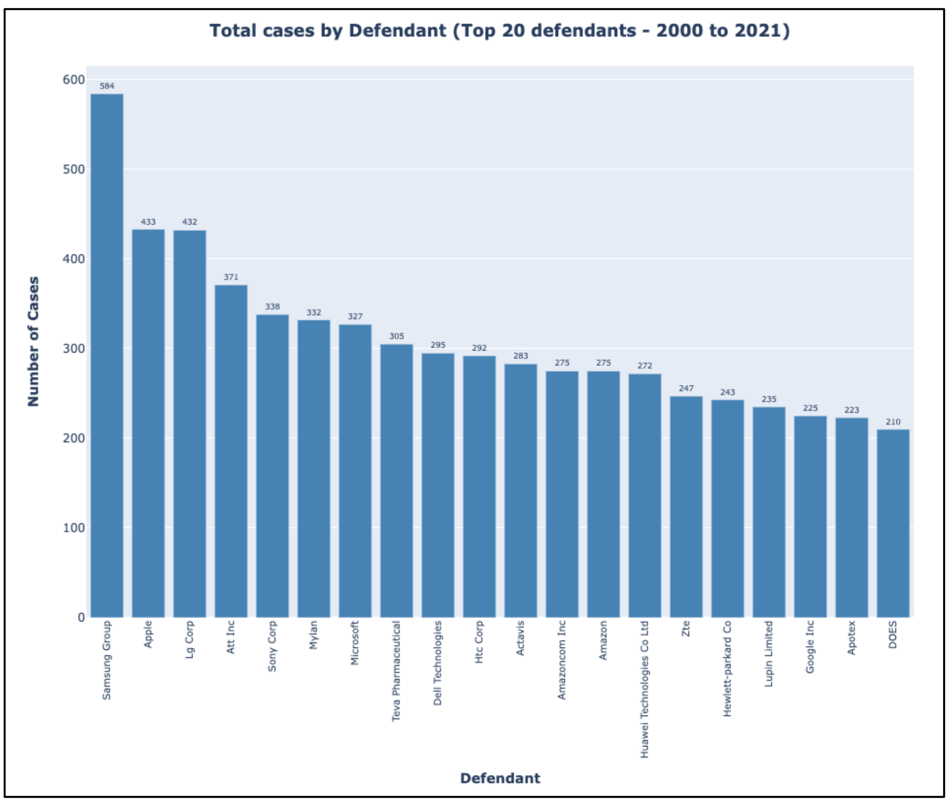


Figure 5

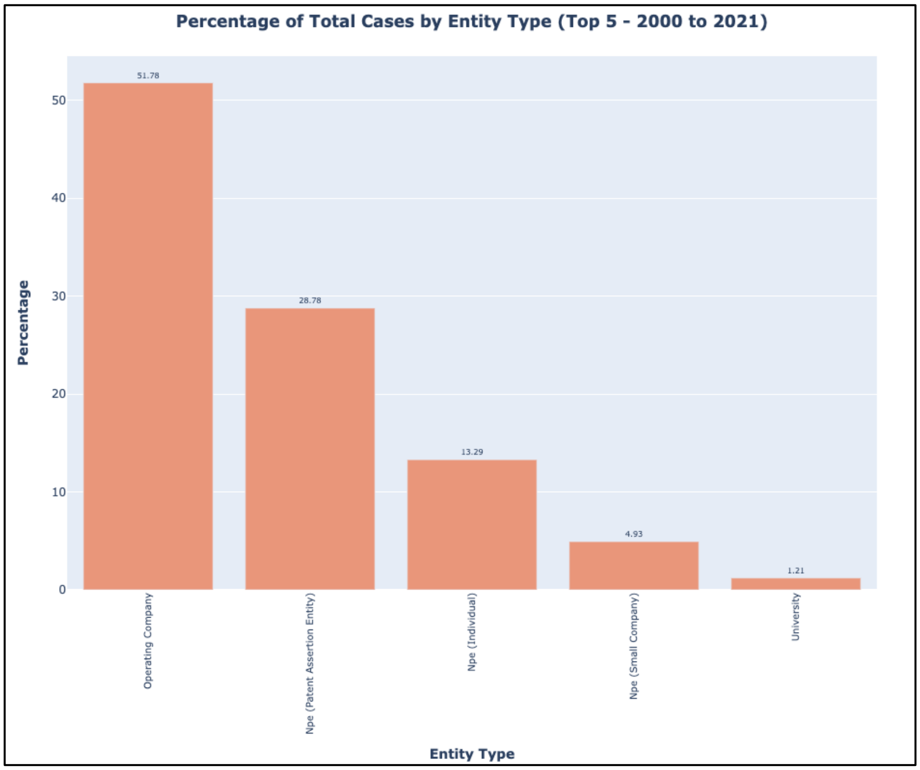


Figure 6

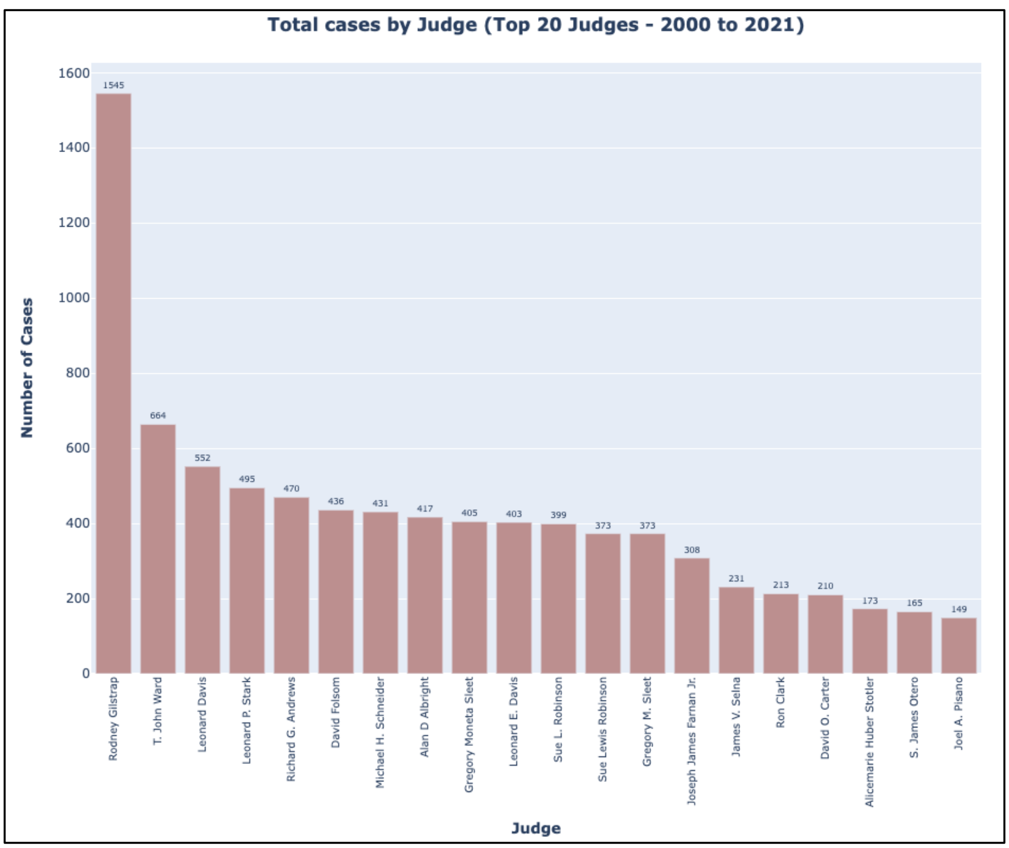


Figure 7

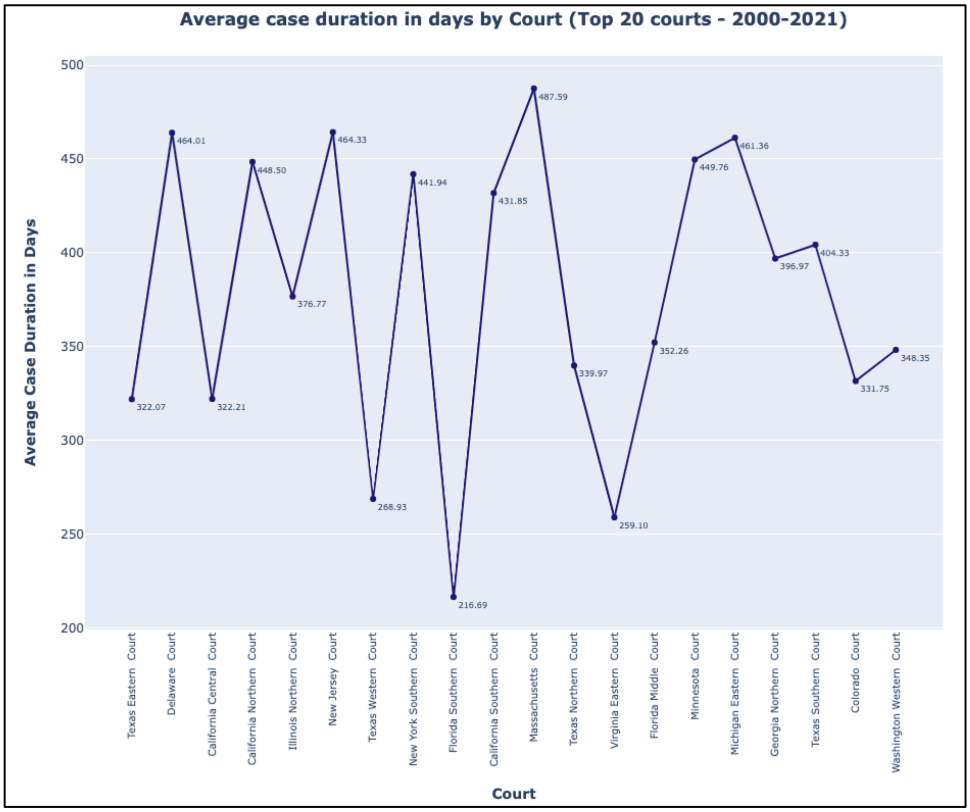


Figure 8

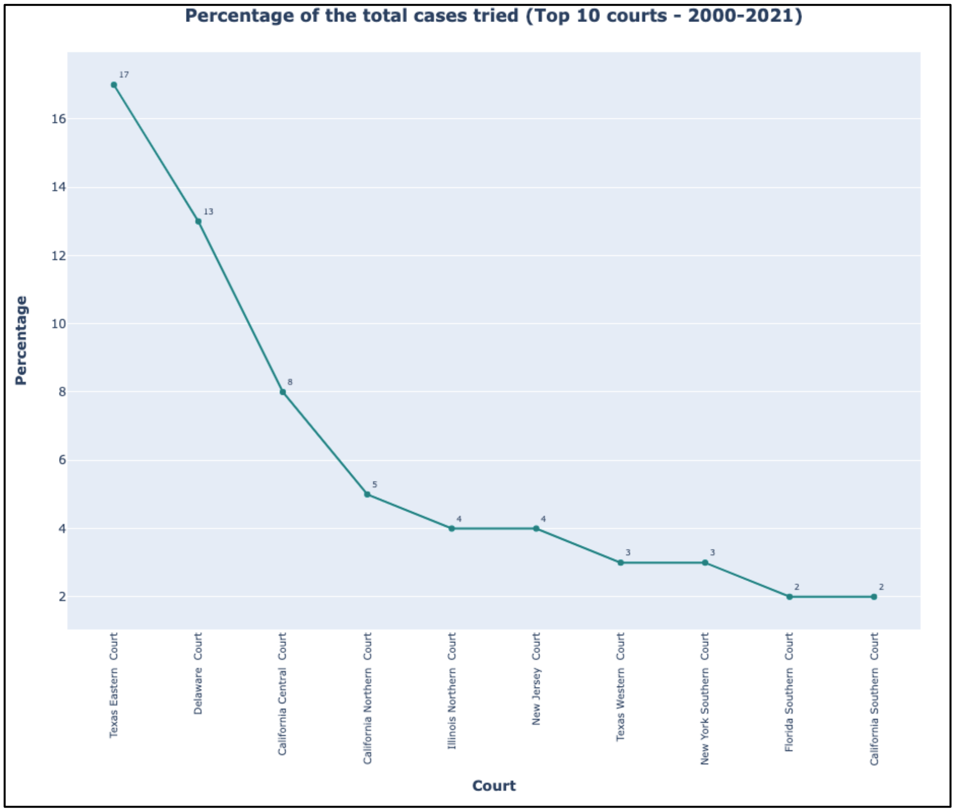


Figure 9

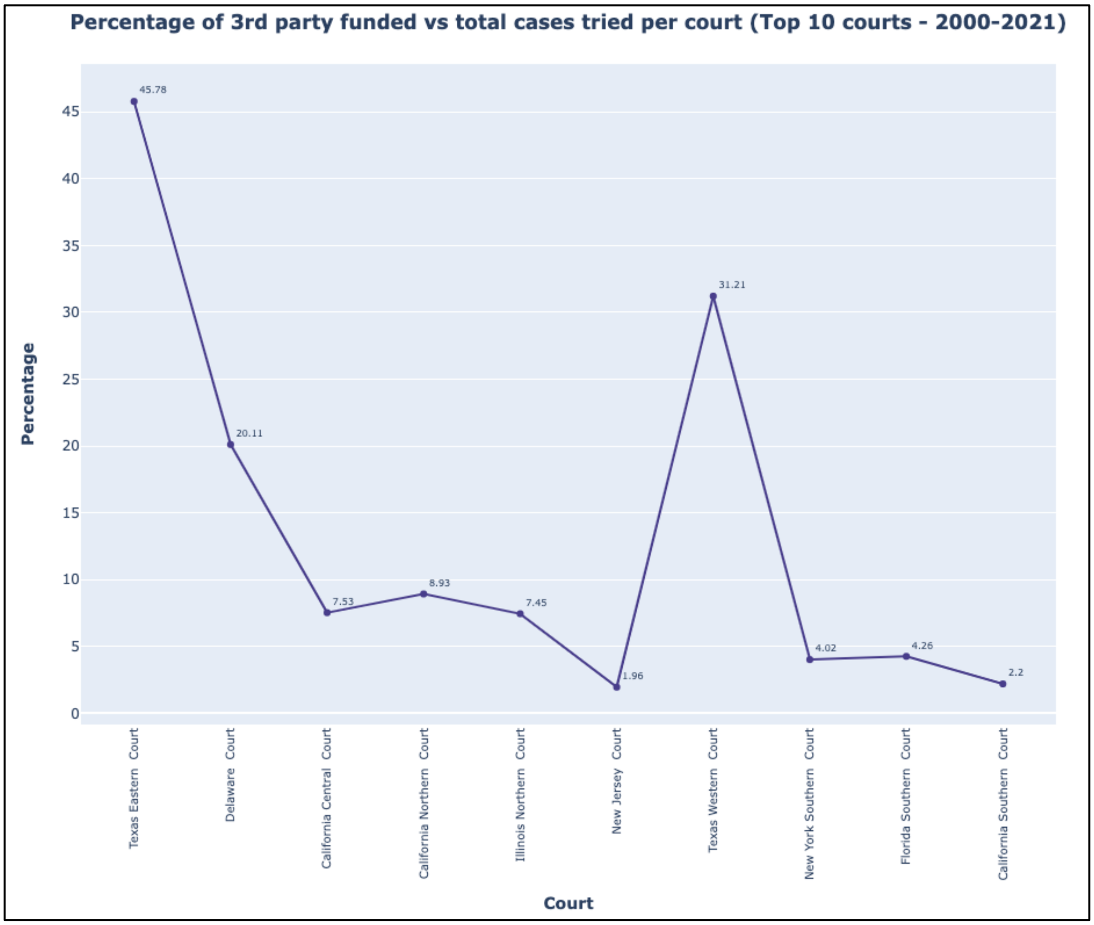


Figure 10a

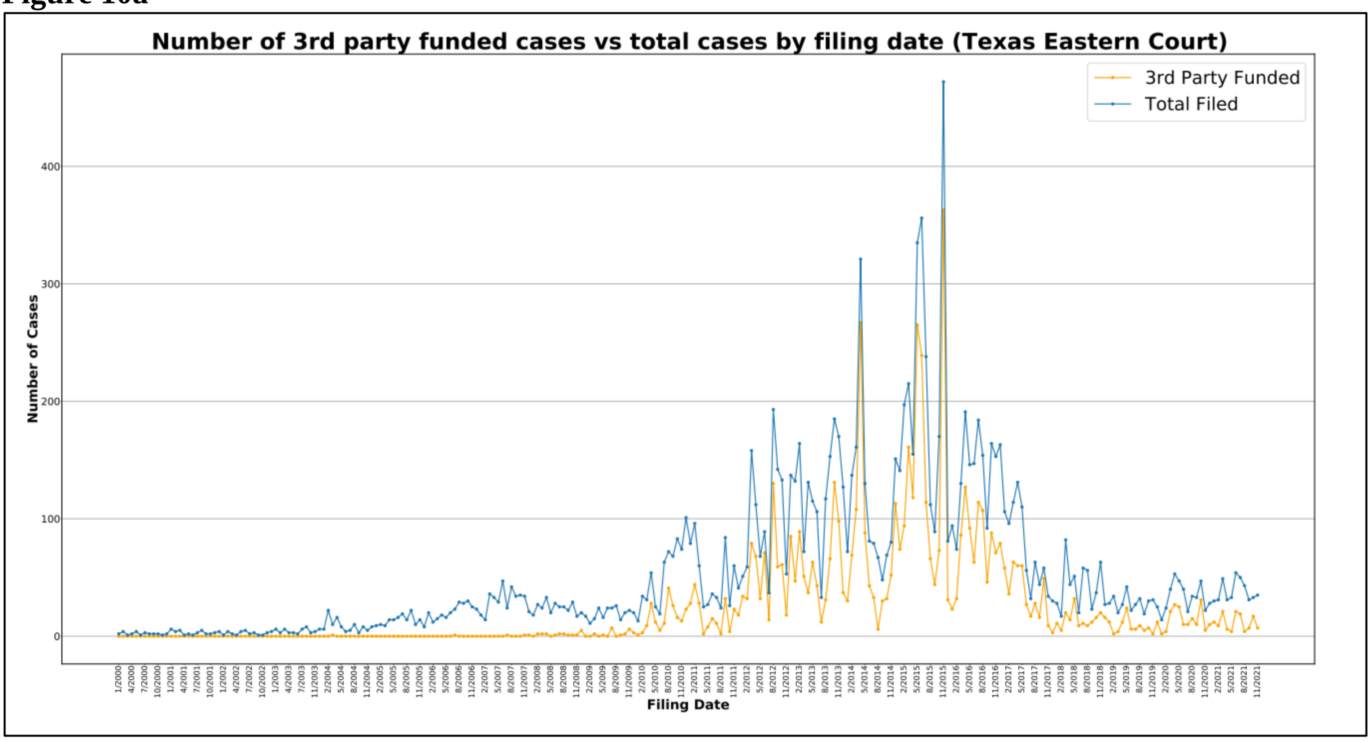


Figure 10b

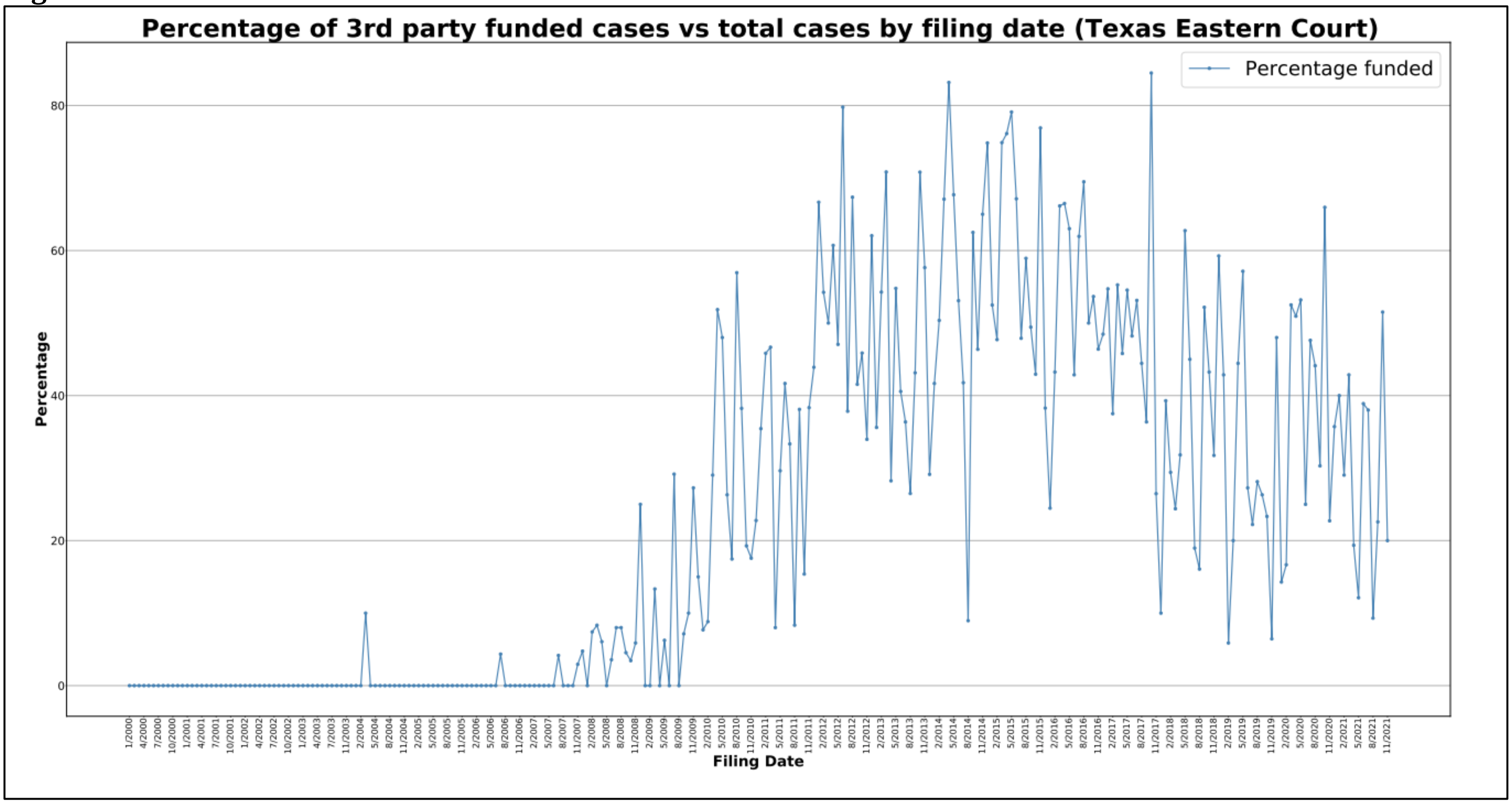


Figure 11a

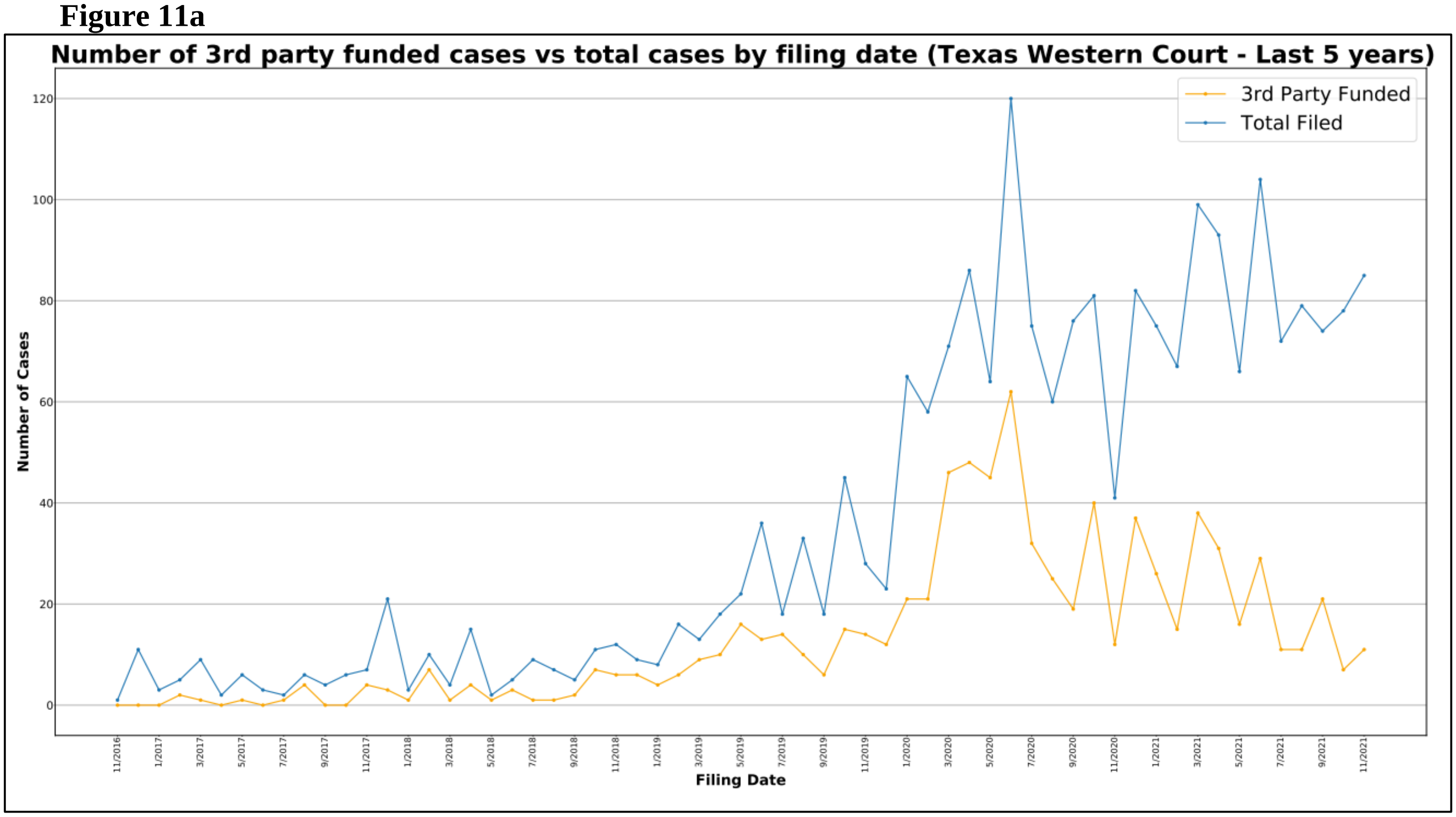
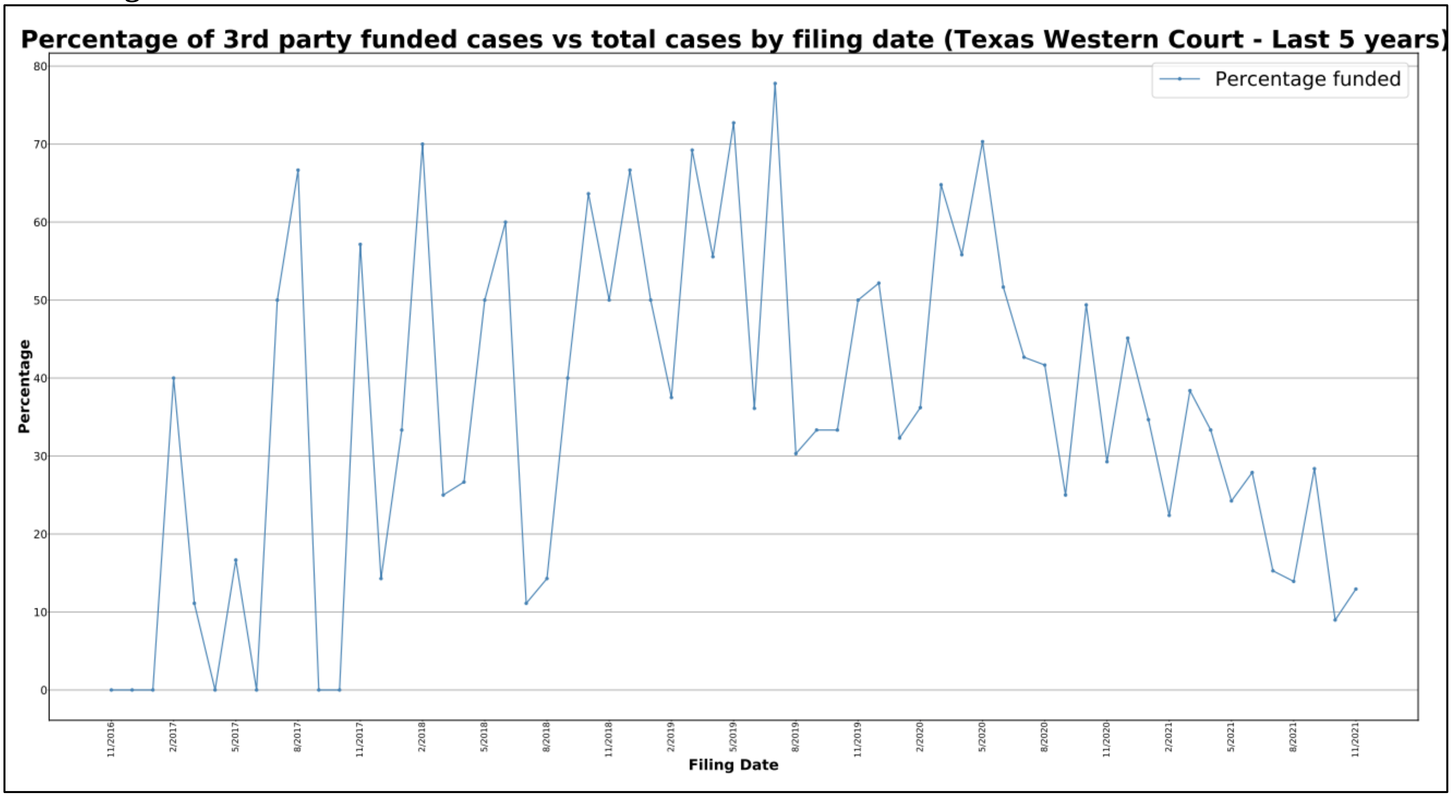


Figure 11b



Percentage of 3rd party funded cases vs total cases by filing date (Texas Western Court - Last 5 years)
Percentage funded
Percentage
Filing Date
0
10
20
30
40
50
60
70
80
11/2016
2/2017
5/2017
8/2017
11/2017
2/2018
5/2018
8/2018
11/2018
2/2019
5/2019
8/2019
11/2019
2/2020
5/2020
8/2020
11/2020
2/2021
5/2021
8/2021
11/2021

Appendix C: Third-Party Funding by State[4]

- Alabama
  - § 8-1-150 Ala. Code; KY Rev Stat. § 372.060
  - Wilson v. Harris: An Alabama court refused to enforce a contract that "does not satisfy all the requirements for champerty," because "it nevertheless violates the public policy against gambling and speculating in litigation." 688 So. 2d 265, 270 (Ala. Civ. App.1996).
    - Not allowed
- Alaska
  - Though Alaska prohibits champerty in common law, the Alaska Supreme Court has not enforced this in any recent case in which the issue of litigation funding has arisen. As a result, no pre-settlement funding agreements in Alaska have been invalidated on account of champerty.
  - https://fundmylawsuitnow.com/states/alaska/#:~:text=Though%20Alaska%20prohibits%20champerty%20in,of%20litigation%20funding%20has%20arisen.&text=Plaintiffs%20are%20able%20to%20spend,%2C%20bills%2C%20and%20other%20costs.
    - No real conclusion, has not been tried
- Arizona
  - Strahan v. Hayes, 33 Ariz. 128 (1928)
  - Landi v. Arkules: The "doctrine of champerty or maintenance does not apply in Arizona." 835 P.2d 458, 464 n.1 (Ariz. Ct.App. 1992).
    - Allowed
- Arkansas
  - Bennett v. NAACP, 370 S.W.2d 79 (Ark. 1963)
  - Bennett v. NAACP: In the latest Arkansas case to mention champerty, according to a LEXIS search, the Arkansas Supreme Court struck down as unconstitutional a state anti-champerty law that would "make the single act of proposing that a fellow man litigate, regardless of intention or the merits of the proposed litigation, or regardless of the good intentions of the proposer, a felonious act in this society punishable by heavy fine and imprisonment." 370 S.W.2d 79,82 (Ark. 1963) (citation omitted).
    - Not allowed
- California
  - Abbott Ford v. Superior Court, 741 P.2d 124 (Cal. 1987)
  - "California ... has never adopted the common law doctrines of champerty and maintenance." 741 P.2d 124, 141-42 n.26 (Cal. 1987).
    - Allowed
- Colorado
  - Fastneau v. Engel, 125 Colo. 119 (1952)
  - Oasis Legal Finance Group, LLC v. Coffman, 361 P.3d 400 (Colo. 2015), the Colorado Supreme Court held that litigation funding agreements were "loans," subject to the terms of the Colorado Uniform Consumer Credit Code (UCCC).

[4] Matthew Deane gathered this information.

Casserleigh v. Wood: However, the Colorado Court of Appeals has suggested that champerty per se is not prohibited under state law. 59P. 1024, 1026-27 (Colo. Ct. App. 1900).

    - Allowed

- Connecticut
  - Rice v. Farrell, 129 Conn. 362 (1942)
  - Robertson v. Town of Stonington: "This common law doctrine of champerty and maintenance, as applied to civil actions, has never been adopted in Connecticut, and the only test is whether a particular transaction is against public policy," and an agreement in which a stranger helps another assert a right for a share of the proceeds is contrary to public policy. No. CV950534631, 1999 Conn. Super. LEXIS 592, at *8, *9 (Conn. Super. Ct. Feb. 17, 1999), affd, 750 A.2d 460 (Conn. 2000).
    - Champerty is not adopted, TPLF is circumstantial
- Delaware
  - Hall v. State: "It is the duty of [this Delaware] court to dismiss a case in which the evidence discloses that the assignment of the cause of action sued upon was tainted with champerty," because "[in [Compaq Computer Corp. v. Horton, 631 A.2d 1 (Del. 1993)], the [Delaware] Supreme Court noted that the activities of the plaintiff constituted neither champerty nor maintenance, implicitly recognizing the continuing vitality of the doctrines under Delaware law." 655 A.2d 827, 830 (Del. Super. Ct. 1994), affd, No. 383 1994, 1995 Del. LEXIS 395 (Del. Oct. 27, 1995).
    - Not allowed
- Florida
  - . Kraft v. Mason: "The few cases in Florida on this subject support the more modern-day approach that officious intermeddling is a necessary element of champerty. We define officious as 'offering unnecessary and unwanted advice or services.'" 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (citation omitted).
    - Restricted somewhat
- Georgia
  - Georgia Code Annotated: "Contracts of maintenance or champerty" are unenforceable as contrary to the public policy of Georgia. GA. CODE ANN. § 13-8-2(a) (5) (1982 & Supp. 2001).
    - Not allowed
- Hawaii
  - TMJ Hawaii, Inc. v. Nippon Trust Bank, 153 P.3d 444 (Haw. 2007)
  - Van Gieson v. Magoon: In 1910, the Hawaii Supreme Court enforced a contract that "appears to be of a champertous nature" because "the conditions of society under which the law of maintenance and champerty originated no longer exist." 20 Haw. 146, 148-49 (1910).
    - Allowed
- Idaho
  - Wolford v. Tankersley: "While Idaho law does not recognize champerty and maintenance…the goals of champerty and maintenance provisions are still around and well, both defensively and offensively, in the form of actions or defenses based on abuse of process or malicious prosecution of civil actions." 695 P.2d 1201, 1222 (Idaho 1984).

        - Allowed
- Illinois
    - Brush v. City of Carbondale, 229 Ill. 144 (1907)
    - Puckett v. Empire Stove Co.: “Champerty and maintenance have been disapproved by the courts as against public policy because a litigious person could harass and annoy others if allowed to purchase claims for pain and suffering and pursue the claims in court as an assignee.” 539 N.E.2d 420, 427 (Ill. App. Ct. 1989).
        - Not allowed
- Indiana
    - Reichhart v. City of New Haven: Indiana defines champerty and maintenance as “the aiding of a litigant by a stranger having no interest, direct or remote, immediate or contingent on agreement with the party in interest, whereby the stranger is to receive a part of the thing in dispute.” 674 N.E.2d 27, 32 n.3 (Ind. Ct. App. 1996) (citation omitted).
        - Not allowed
- Iowa
    - Ontjes v. McNider: The Iowa Supreme Court reiterated the holding of a previous court that “a contract of an attorney that produces champerty and maintenance would be declared void as against public policy.” 12 N.W.2d 284, 292 (Iowa 1943) (citing Boardman & Brown v. Thompson, 25 Iowa 487 (1868)).
        - Not allowed
- Kansas
    - Boettcher v. Criscione: “Common barratry and champerty have been... generally defined as ... frequently exciting and stirring up quarrels either at law or otherwise. Whether champerty and barratry is in violation of public policy... turns largely on the facts and circumstances of each case.” 299 P.2d 806, 811 (Kan. 1956).
        - Circumstantial
- Kentucky
    - Kentucky Revised Statutes Annotated: Kentucky law renders void “any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense... by any person not a party on record in the suit, whereby the thing sued for or in controversy ... is to be taken, paid or received for such services or assistance.” KY. REV. STAT. ANN. § 372.060 (Michie 1996).
        - Not allowed
- Louisiana
    - Balboa Insurance Co. v. Algernon Blair, Inc.: “Out of a rich Louisiana gumbo [of state law], the [federal] District Court detected the bitterness of the ancient doctrine of champerty and dismissed the plaintiff’s case as violative of public policy. We have subjected the identical recipe to our appellate palate and have found the concoction to be both savory and nutritious.” 795 F.2d 404, 405 (5th Cir. 1986).
        - Not allowed

- Maine
    - Maine Revised Statutes Annotated: “A person is guilty of champerty if, with the intent to collect by a civil action a claim, account, note or other demand due, or to become due to another person, he gives or promises anything of value to such person.” ME. REV. STAT. ANN. tit. 17-A, § 516(1) (West 1983). In Maine, champerty is a Class E crime, id. § 516(3), warranting a fine of up to $1000, id.§1301 (1) (E), or imprisonment of up to 6 months, id. § 1252(2) (E).
        - Not allowed
- Maryland
    - Hernandez v. Suburban Hospital Ass’n: Maryland allows for the prejudgment assignment of personal injury awards to health care providers to secure incurred medical expenses. 572 A.2d 144, 148 (Md. 1990).
        - Specifically allowed
- Massachusetts
    - Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997)
    - Saladini v. Righellis: Massachusetts no longer recognizes champerty as an offense. But this “ruling today should not be interpreted to indicate our authorization of the syndication of lawsuits.” 687 N.E.2d 1224, 1228 n.7 (Mass. 1997).
        - Allowed
- Michigan
    - Smith v. Childs: “The [contract] defense of champerty does not exist in Michigan except as specified by statute with regard to attorneys.” 497 N.W.2d 538, 540 (Mich. Ct. App. 1993)
        - Allowed
- Minnesota
    - Maslowski v. Prospect Funding Partners LLC, No. A18-1906 (Minn. 2020)
    - Huber v. Johnson: “We do not think that any court… has ever gone so far as to hold that contracts may not so manifestly tend to stir up strife ... and speculative litigation, and prevent the amicable compromise of claims between citizens, as to be void on grounds of public policy.” 70 N.W. 806, 807-08 (Minn. 1897)
        - Not allowed

- Mississippi
    - Mississippi Code § 97-9-11 (Criminal Statute)
    - Mississippi Code Annotated: Under Mississippi law, it is unlawful for any person “either before or after proceedings commenced: (a) to promise, give, or offer, (b) to receive or accept (c) to solicit, request, or donate, any money.., or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further… any proceeding in any court,”
        - Not allowed

- Missouri
  - Macke Laundry Serv. Ltd. P'ship v. Jetz Serv. Co., Inc., 931 S.W.2d 166 (Mo. App. 1996)
  - Macke Laundry Service Ltd. Partnership v. Jetz Service Co.: Actions of champerty and maintenance of litigation "are rare in modern times, having been replaced by the causes of action of abuse of process, wrongful initiation of litigation and malicious prosecution" but "have been found to be in force in this state by the Missouri Supreme Court." 931 S.W.2d 166, 171 n.1 (Mo. Ct. App. 1996) (citations omitted).
    - Not allowed
- Montana
  - Montana Code Annotated: "An attorney and counselor must not ... promise or give ... a valuable consideration to any person as an inducement to placing or in consideration of having placed in his hands or in the hands of another person a demand of any kind for the purpose of bringing an action thereon." MONT. CODE ANN. § 37-61408(2) (2001). "[Section 37-61408(2) applies] to a person prosecuting an action in person who does an act which an attorney and counselor is therein forbidden to do." Id. § 37-61411 (2001).
  - Green v. Gremaux: "Today, the common law prohibition of champerty is codified at § 37-61408 [of the Montana Code Annotated]." 945 P.2d 903, 907 (Mont. 1997).
  - Lussy v. Bennett: The Montana Supreme Court voided a contract as violative of § 37-61-411, asserting that a suit to enforce its provisions "smacks of champerty, and public policy requires dismissal of [the] action." 692 P.2d 1232, 1235-36 (Mont. 1984).
    - Not allowed
- Nebraska
  - Omaha & Republican Valley Railway Co. v. Brady: "Champerty is not a criminal offense, nor is a champertous contract illegal under our statutes; and if this contract is champertous and voidable, it is because it is contrary to public policy to enforce it." 57 N.W. 767, 772 (Neb. 1894).
    - Allowed
- Nevada
  - Schwartz v. Eliades: "'To maintain the suit of another is now, and always has been, held to be unlawful, unless the person maintaining has some interest in the subject of the suit."' 939 P.2d 1034, 1036 (Nev. 1997) (quoting Lur v. Stinnett, 488 P.2d 347, 350 (Nev. 1971)). Champerty is a species of maintenance hinging on the absence of an interested party.
    - Not allowed
- New Hampshire
  - Markarian v. Bartis, 199 A. 573 (N.H. 1938)
  - Adkin Plumbing & Heating Supply Co. v. Harwell: "[We have] noted the changing attitude toward contracts in champerty and determined that such contracts no longer constituted a violation of public policy." 606 A.2d 802, 803-04 (N.H. 1992).

- Markarian v. Bartis: "It is our conclusion that, except in those cases where it is found as a fact that litigious strife is sought to be promoted, the rule against champerty and maintenance is not now in force in this jurisdiction." 199 A. 573, 577 (N.H. 1938).
  - Allowed

- New Jersey
  - Weller v. Jersey City H&P St. Ry. Co., 57 A.730 (N.J. Ch. 1904)
  - Polo v. Gotchel: "This Court need not address the doctrines of champerty and maintenance, as they do not presently exist in New Jersey." 542 A.2d 947, 949 (N.J. Super. Ct. Law Div. 1987) (citation omitted).
    - Allowed
- New Mexico
  - Reinhardt v. Kelly: The New Mexico Court of Appeals overturned, on the facts, a trial court ruling that "declared an agreement between the Plaintiff and [a third party] to file the suit as champertous and thus void as against public policy." 917 P.2d 963, 963-64 (N.M. Ct. App. 1996).
    - Not allowed
- New York
  - New York Judiciary Law: New York law curtails the purchase of any "bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon." N.Y. JUD. LAW § 489 (McKinney 1983).
  - Bluebird Partners, L.P. v. First Fidelity Bank: "Champerty is a venerable doctrine developed hundreds of years ago to prevent or curtail the commercialization of or trading in litigation. It is currently codified in New York as Judiciary Law § 489." 731 N.E.2d 581, 582 (N.Y. 2000).
  - Coopers & Lybrand v. Levitt: "The doctrine of champerty does not prevail in this State except as provided by statute." 384 N.Y.S.2d 804, 807 (App. Div. 1976) (citations omitted).
  - Grossman v. Schlosser: While personal injury tort claims are not assignable under
  - N.Y. GEN. OBLIG. LAW § 13-101 (McKinney Supp. 2001), "the assignment of the proceeds of such a cause of action, prior to its settlement or adjudication, [is] valid and effectual as an equitable assignment against the assignor and his attaching creditor, and... such an assignment [is] not against public policy." 244 N.Y.S.2d 749, 750-51 (App. Div. 1963).
    - Allowed with some restrictions
- North Carolina
  - Charlotte-Mecklenburg Hospital Authority v. First of Georgia Insurance Co.: "The assignment of a claim gives the assignee control of the claim and promotes champerty. Such a contract is against public policy. The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid." 455 S.E.2d 655, 657 (N.C. 1995) (citation omitted).
    - Allowed
- North Dakota

- Interstate Collection Agency v. Kuntz: “While the authorities differ as to all the ingredients essential to constitute champerty, they seem agreed that the gist of the offense is the malicious or officious intermeddling in a suit in which the intermeddler has no interest.” 181 N.W.2d 234, 242 (N.D. 1970) (quoting Rohan v. Johnson, 156 N.W. 936, 937 (N.D. 1916)).
    - Not allowed
- Ohio
  - Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003)
  - June 11, 2003) The Ohio Supreme Court ruled unanimously today that, except as expressly authorized by legislative enactment or legal ethics rules, financial agreements in which a third party advances money to a civil litigant in exchange for a percentage of the litigant’s prospective damage award are void and unenforceable. In an opinion authored by Justice Maureen O’Connor and joined by four other members, the court held that an outside party’s “investment” in a lawsuit in which it has no direct involvement constitutes the illegal practices of “champerty” and “maintenance.”
  - Tosi v. Jones: “ The doctrines of champerty and maintenance appear in numerous Ohio cases as contract defenses. Ohio has never recognized a common law tort for champerty and maintenance.” 685 N.E.2d 580, 583 (Ohio Ct. App. 1996) (citations omitted).
    - Not allowed
- Oklahoma
  - Mitchell v. Amerada Hess Corp.: “The proof necessary to demonstrate the contract to lease for oil and gas was champertous must establish both officious intermeddling and lack of an interest in the action apart from the alleged champertous document.” 638 P.2d 441, 444 (Okla. 1981).
    - Allowed but limited
- Oregon
  - Brown v. Bigne: “The doctrine of champerty ... ought not to prevail when such aid is furnished by a layman; but when such contracts are made for the purpose of stirring up strife and ... inducing suits to be begun which otherwise would not… they come within. that doctrine, and should not be enforced.” 28 P. 11, 13 (Or. 1891).
    - Allowed
- Pennsylvania
  - Severely restricted or altogether unlawful
  - WFIC, LLC v. LaBarre, 148 A.3d 812 (Pa. Super. Ct. 2016)
  - Clark v. Cambria County Board of Assessment Appeals: “Champerty has long been considered repugnant to public policy against profiteering and speculating in litigation and grounds for denying the aid of the court. The common law doctrine against champerty and maintenance continues to be a viable doctrine in Pennsylvania and can be raised as a defense.” 747 A.2d 1242, 1245-46 (Pa. Commw. Ct. 2000) (citations omitted).
    - Not allowed
- Rhode Island

    - Martin v. Clarke: “Whether we look, therefore, at the ancient common law, to the English statutes upon the subject, or to our own legislation, the conclusion must be the same, that champerty is an offence against the law. Being such, it must avoid every contract into which it enters.” 8 R.I. 389, 403 (1866)
        - Not allowed
- South Carolina
    - Osprey, Inc. v. Cabana Ltd. Partnership: “We abolish champerty as a defense. We are convinced that other well developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits ... than dated notions of champerty.” 532 S.E.2d 269, 277 (S.C. 2000).
        - Allowed
- South Dakota
    - McKellips v. Mackintosh: “There [has been] no statutory or judicial repudiation of the common law remedy of champerty; therefore, this court must hold that the doctrines of champerty and maintenance currently apply in South Dakota.” 475 N.W.2d 926, 929 (S.D. 1991).
        - Not allowed
- Tennessee
    - Tennessee. Record v. Insurance Co. of North America: “In 1899 theChamperty Statutes of this State were repealed to leave in effect only that portion of the laws which relates to the effect of the conveyance of land adversely held.” 438 S.W.2d 743, 747 (Tenn. 1969). Can Do Inc. v. Mainer: The Tennessee Supreme Court voided a contract assigning legal malpractice claims, in part because such assignments promote champerty. 922 S.W.2d 865, 869 (Tenn. 1996).
        - Allowed, but heavily restricted
- Texas
    - Bentinck v. Franklin, 38 Tex. 458 (1873)
    - Baker v. Mallios:
        - Allowed, somewhat restricted
- Utah
    - Croco v. Oregon Short Line Railroad Co.: The Utah Supreme Court held that the common law of champerty and maintenance, as modified by statute in the case of attorneys and clients, is a contract defense that must be plead or lost. 54 P. 985, 987-88 (Utah 1898).
        - Allowed, but heavily restricted
- Vermont
    - D’Amato v. Donatoni: In the most recent champerty case heard by the Vermont Supreme Court, that court found an attorney’s contingency fee contract not to be champertous. The Court cited Hamilton v. Gray, 31 A. 315, 316 (Vt. 1894), for the propositions that “[a] champertous agreement was void at common law, and we think the common law as to champerty is in force in this state.” 168 A. 564, 568 (Vt. 1933).

    - The Vermont Statutes Online Title 8: Banking and Insurance Chapter 74 Consumer Litigation Funding Companies
        - Allowed, but heavily restricted
- Virginia
    - Virginia Code Annotated: "Only those causes of action for damage to real or personal property.... and causes of action ex contract are assignable. This section shall not prohibit any injured party or his estate from making a voluntary assignment of the proceeds or anticipated proceeds of any court award or settlement." VA. CODE ANN. § 8.01-26 (Michie 2000). In re Musser: "T he prohibition against assignments of causes of action for personal injury does not proscribe a hospital from obtaining an equitable assignment of the sums to be recovered by an individual from a tortfeasor to the extent of the value of the services provided by the hospital." 24 B.R. 913, 922 (W.D. Va. 1982).
        - Not entirely clear
- Washington
    - Giambattista v. National Bank of Commerce: "It is questionable whether many remnants of these doctrines [champerty and maintenance] remain in this state." 586 P.2d 1180, 1186 (Wash. Ct. App. 1978).
        - Allowed, somewhat
- West Virginia
    - Currence v. Ralphsnyder: The West Virginia Supreme Court of Appeals recognized that the circumstances that necessitated champerty no longer exist, and the court refused to "nullify the contract merely because it savors of champerty under the common law." 151 S.E. 700, 702 (W. Va. 1929).
        - Allowed
- Wisconsin
    - Wisconsin Statutes Annotated: "No action, special proceeding, cross complaint or counterclaim in any court shall be dismissed on the ground that a party to the action is a party to a contract savoring of champerty or maintenance unless the contract is the basis of the claim pleaded." WIS. STAT. ANN. § 895.375 (West 1997).
        - Allowed
- Wyoming
    - Johnson v. Sellers: The Wyoming Supreme Court heard a claim that the purchase of land with the intent to bring suit should be voided as champerty. 84 P.2d 744, 745 (Wyo. 1938). The court, however, has never directly ruled on the enforceability of a champertous contract formed between a plaintiff and a champertor other than the plaintiff's lawyer.
        - Unclear