FLORIDA: AN APPROACH TO THIRD PARTY FUNDING

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ABSTRACT

This article will discuss the implications of the Florida Third District Court of Appeal's decision in *Abu-Ghazaleh v. Chaul* on the development of third party funding in Florida. In *Abu-Ghazaleh*, the Third District Court of Appeal—in using a very broad definition of party—held that when a third party funder has significant active control over the claim, the funder rises to the level of party and, consequently, the third party funder could be liable for statutory cost awards and attorney's fees. The proposition is that the Third District's decision in *Abu-Ghazaleh* will have both positive and negative effects on third party funding in Florida. *Abu-Ghazaleh* will likely incentivize the funding of meritorious claims, which arguably can be achieved by means other than holding a third party funder a party to the claim. At the same time it will encourage the much more passive role of the funder, which many funders will not likely agree with. It will also weaken the confidentiality of third party funding agreements by permitting the courts and other parties to know the terms of the agreement.

I. INTRODUCTION

Let's suppose that a Mexican corporation sold its stake in two multinational renowned companies—world leaders in the production, market, and distribution of fresh fruit and vegetables —to the CEO of the two companies, and, now the shareholders of

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the Mexican corporation, disgruntled with the sale, have decided to sue the CEO for civil theft and conspiracy in Florida state courts. The plaintiffs claim that the shares were sold millions below price because the CEO bribed the officials of the Mexican Corporation. However, the plaintiffs do not want to take the risk of bearing with the costs of litigation, including the potentially high legal fees, and then losing the lawsuit. Fortunately, or so it appears, the shareholders have the opportunity to enter into a financing agreement with a group of investors that is offering to pay all the legal fees and costs in exchange for a share in the proceeds if the lawsuit is successful. The agreement, on this occasion, gives the funders complete control over the claim, that is, they would be able to approve filing of the lawsuit, to control selection of attorneys, and to direct the proceeding and legal strategies.

Welcome to third party funding: a booming industry that has grown rapidly in the last decade in the U.S. and other jurisdictions such as United Kingdom and Australia.[1]

The situation described above is almost identical to the one in *Abu-Ghazaleh v. Chaul,* a case decided by Florida's Third District Court of Appeal in 2009.[2] The court held that the third party funders in that case were *real parties* to the claim for adverse costs purposes because they had significant control over the claim.[3]

In the U.S., acceptance of third party funding has been slow because of historical legal barriers such as the prohibition of champerty and maintenance.[4] Champerty and maintenance were considered morally and ethically against public policy.[5] One reason for this has been explained by the "theory of the inauthentic claim," which holds that by involving a third party

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[1] *Third Party Litigation Funding (TPLF),* U.S. INSTITUTE OF LEGAL REFORM, http://www.instituteforlegalreform.com/issues/third party-litigation-funding (last visited March 31, 2017).

[2] Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693 (Fla. 3d DCA 2009).

[3] *Id.*

[4] Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 579 (2010).

[5] *Id.*

funder, the lawsuit becomes "inauthentic" because the legal quality and legal validity of the claim no longer rest on the same person (i.e., plaintiff).[6]

Nevertheless, today these common law doctrines have been set aside in the majority of the states because the problems meant to be prevented by champerty and maintenance are now more efficiently and effectively resolved by modern rules of procedure.[7] Thus, states have allowed third party funding giving rise to the growth of the industry in the U.S. for both litigation and arbitration.[8]

Besides these historical legal barriers, there is also skepticism towards third party funding. Such reluctance is largely based on the ethical concerns underlying the at-least-three different relationships that are created as a result of the involvement of a third party into the otherwise dyadic relationship between plaintiff and defendant: lawyer-client, client-funder, and lawyer-funder. Notwithstanding, third party funding has been viewed to promote access to justice and even out the bargaining power of parties.[9]

The current state of affairs in Florida regarding third party funding is a general acceptance of third party funding.[10] Moreover, in 2002, the Florida Bar released Opinion 00-3, giving guidance to lawyers as to how to advise their clients about third party funding consistent with ethical and professional responsibility rules.[11]

This comment will discuss the implications of *Abu-Ghazaleh* on the development of third party funding in Florida, both as a

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[6] *See* Anthony Sebok, *The Inauthentic Claim* 79 (Benjamin N. Cardozo Sch. of L., Jacob Burns Inst. for Advanced Legal Stud., Working Paper No. 298, 2010).

[7] Lyon, *supra* note 4.

[8] *Id.*

[9] *See* Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1271 (2010-2011).

[10] *See Abu-Ghazaleh,* 36 So. 3d at 693; Kraft v. Mason, 668 So. 2d 679, 682-83 (Fla. 4th DCA 1996).

[11] Prof. Ethics Fla. Bar Op. 00-3 (2002), http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/Ethics,+Opinion+00-3?opendocument

financing tool in litigation and arbitration. *Abu-Ghazaleh* involved third party funders that, because of the significant control they had over the claim, the court considered as *real parties* to the claim for adverse costs purposes. At the time of writing (April 2018), *Abu-Ghazaleh* was the only Florida case addressing the important issue of whether, and under what circumstances, third party funders should be regarded as parties to a claim. Accordingly, *Abu-Ghazaleh* provides some guidance on the direction that third party funding is taking in Florida.[12]

This comment proposes that *Abu-Ghazaleh* will have both positive and negative impact on the development of third party funding agreements in Florida. As a positive effect, the decision will incentivize the funding of non-frivolous claims because third party funders, to the extent they might be treated as a party to the claim, will not assume the risk of being held liable for costs awards and attorney's fees for funding a frivolous claim.

As a negative effect, after *Abu-Ghazaleh* it seems that third party funders will always be considered a party either for adverse costs purposes or any purpose whatsoever unless the funder has no control over the claim. Under a hands-off approach, the funder has little, if any, control or influence over the claim and legal strategies.[13] Whereas, under a hands-on control, the funder has significant control over claim decisions and strategies.[14] As middle ground, there is an enhanced control approach under which the funder has certain control and influence over the claim.[15] Under *Abu-Ghazaleh,* this enhanced control appears to also put the funder under the category of real parties to a claim. This is undesirable to the parties of a third party funding agreement because certain control from the funder is both reasonable and advantageous. Reasonable because, as any

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[12] *Third-party funding update: New York Court narrowly applies champerty law while Florida court holds investors can be liable for costs*, IBA ARB. & ADR NEWS (2010) [hereinafter *Third-party Funding Update*].

[13] Christopher Hodges et al., *Litigation funding: Status and Issues* 86 (Oxford Legal Stud. Res. Paper No. 49, 2012).

[14] Hodges et al., *supra* note 13.

[15] *See* Selvin Seidel, *Control*, COMMERCIAL DISPUTE RESOLUTION MAGAZINE, Oct. 2011, at 60.

investor, the funder wants to protect and ensure his interests.[16] Also, it is advantageous because funders have access to a platform of knowledge and professionals that will benefit the claimant in developing a right assessment of the claim and taking effective legal strategies.[17]

Moreover, another possible negative effect is the weakening of the confidentiality of third party funding agreements. A main element of these agreements is their confidentiality, not only regarding the funding terms, but also the disclosure to the court and to the other party that there is a third party funding agreement in place.[18] Under *Abu-Ghazaleh,* to decide whether a funder is a party to the claim, courts will have to determine how much control the funder has over the claim, and for this courts will have to look into the terms of the agreement. Even acknowledging that disclosure is somehow advisable to prevent conflict of interests and unethical circumstances, the issue of how much disclosure should be allowed must be established in clear guidelines.[19]

Part I of this comment will offer a general description of third party litigation funding. Specifically, this section will address the legal nature, use, and main elements of a third party funding agreement. Moreover, this part will also discuss the ethical concerns underlying these agreements based on the different set of relationships created within: lawyer-client, client-funder, and lawyer-funder. This part will also briefly analyze the reception of third party funding in the United States.

Part II will discuss third party funding in Florida. This part will analyze *Abu-Ghazaleh* and its impact on third party funding agreements in Florida. First, the analysis will focus on the development of the definition of "party to a claim" in the U.S. and in Florida, and to what extent a third party funder could be

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[16] Hodges et al., *supra* note 13, at 133.

[17] Seidel, *supra* note 15.

[18] *See* Maya Steinitz & Abigail Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 713 (2014).

[19] *See* Selvyn Seidel & Sandra Sherman, *"Corporate governance" rules are coming to third party financing of international arbitration (and in general)*, in ICC INST. OF WORLD BUS. LAW 32, 32 (July 8, 2013).

considered a party to the claim. In addition, the comment will consider the effect of this decision on the legal nature of these agreements. Part II will also address *Abu-Ghazaleh's* specific implications on third party funding, and whether regulation is an effective tool to achieve a more certain and uniform scenario for the industry in Florida.

In view of *Abu-Ghazaleh's* impact, this comment concludes that professional and formal regulation of third party funding in Florida is likely the most effective way to establish clear rules and guidelines for all the stakeholders. The extent, applicability, and issues of this regulation, while imperative to determine, are beyond the scope of this comment.

II. BACKGROUND

A. Third Party Funding Agreement

It has been difficult to agree on a definition of third party funding because of the many forms the funding can take.[20] The funding may come from a sophisticated investor fund, or a financing bank, or can sometimes be structured as an assignment of claim, or under a venture capital formula.[21]

Moreover, in the U.K., the preferred name is "Third Party Funding," while the American Bar Association prefers "Alternative Litigation Finance."[22] Others have called it "Contingency Fee by Non-Lawyers."[23] It seems like the term "Alternative Litigation Finance," used in the U.S., is a broad term, which, among other methods of financing, include third party funding. For purposes of this comment it will be referred to as "third party funding."

In general, third party funding is the nonrecourse funding of a claim by a non-party for a share in the proceeds if the claim is successful.[24] Third party funding can be considered an equity

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[20] Bernardo Cremades, *Third Party Funding in International Arbitration*, 1 BA ARB. REV. 4, 4 (2013).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Steinitz & Field, *supra* note 18.

instrument for funding claims because the third party funder pays all the legal expenses and litigation costs of the claim sharing in the proceeds if the claim succeeds but without any recourse if the claim fails.[25] Thus, in third party funding, the funder, usually a specialist company or hedge fund, agrees to finance all legal expenses and costs of the claim and *only if* the claim succeeds will the funder share a percentage in the proceeds.[26] These agreements might also be referred to as profit sharing agreements because the parties share both the risks and proceeds of the claim.[27]

Third party funding agreements are typically executed either to pay the legal fees of financially distressed claimants, or where the claimant, even when able to pay, does not want to assume the risk of paying the legal expenses and then losing the claim, like in the hypothetical discussed at the beginning of this comment.[28] From the standpoint of the funded party, there are two categories of third party funding: (1) defense funding and (2) claim funding.[29] Both plaintiffs and defendants use third party funding to improve their bargaining power.[30] Certainly, each category functions very differently. "Claim funding functions as a form of finance whereas defense funding functions as a form of insurance."[31] Whenever pertinent to the discussion, this comment is analyzing third party funding from a claim funding perspective.

Moreover, third party funding has been used both in litigation and arbitration, but it has been mostly "employed by parties in

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[25] WILLEM H. VAN BOOM, THIRD PARTY FINANCING IN INTERNATIONAL INVESTMENT ARBITRATION 27 (Erasmus Sch. of L., 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114.

[26] Steinitz, *supra* note 9, at 1276.

[27] Van Boom, *supra* note 25, at 32.

[28] Selvyn Seidel & Sandra Sherman, *Lawyer's Competence in the Funding World* (Fall 2014), http://www.fulbrookmanagement.com/wp-content/uploads/sites/2416/2014/09/Seidel-Lawyers-Competence-in-the-Funding-World.pdf [hereinafter Seidel & Sherman]; PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE 56 (Helen Burley, Corp. Eur. Observatory and the Transnat'l Inst., 2012).

[29] Steinitz, *supra* note 9, at 1302.

[30] *Id.*

[31] *Id.*

the international arena and, in particular, by parties in commercial and investment arbitration proceedings."[32] In fact, third party funding "seems to be taking a firm hold of commercial arbitration worldwide."[33]

Third party funding has been compared to other financing methods such as non-recourse loan agreements and contingency fees.[34] While there might be some similarities, there are some important differences.[35] For instance, in non-recourse loan agreements, as in third party funding, the lender does not have any recourse against the party if the claim fails.[36] However, generally, non-recourse lenders do not share a percentage in the proceeds of a successful claim, rather, they have a right to the amount of the loan plus interest.[37]

Moreover, there are several important distinctions with contingency fees agreements.[38] The most important difference is that in third party funding, the funder is not providing any service; in contrast, in contingency fees, the lawyer is providing legal services.[39] Also, third party funding firms and funds function very different than law firms.[40] They have different goals, strategies, and agency problems.[41] More specifically, the business of third party funding is not, at least not yet, subject to canons of professional responsibility.[42] This means that funding firms may take cases or elicit clients that have conflicts of interest, appoint

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[32] BERNARDO M. CREMADES, Jr., *Third Party Litigation Funding: Investing in Arbitration*, 8 TRANSNATIONAL DISPUTE MANAGEMENT 1, 2 (2011).

[33] VAN BOOM, *supra* note 25, at 30.

[34] Steinitz, *supra* note9, at 1276.

[35] *Id.*

[36] Van Boom, *supra* note 25, at 26.

[37] *Id.* at 25-26.

[38] Steinitz, *supra* note 9, at 1293-94.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

non-lawyers to management positions, practice any career, and/or accept alternative forms of compensation.[43]

As mentioned earlier, third party funding has been subject to both criticism and praise.[44] Third party funding faces criticism because it is said to lead to the multiplication of frivolous claims, which in turn overloads the courts.[45] Also, it has been criticized because of the conflicts of interests and ethical concerns between its parties, and because it might include the "bad apple" funders wanting to "rip-off" claimants.[46] Nonetheless, these risks are offset—and "overwhelmed"—by two major benefits: increased access to justice and leveling of the bargaining power of parties by "aligning structurally weak social players who make infrequent use of the courts (one-shooters) with powerful funders who make repeated use of the court system (repeat players)." [47]

Lastly, the negotiation of these agreements develops in the "interplay" between public policy issues and regulatory law issues (i.e., finance law, banking law, securities regulations), which ultimately requires "flexibility among dispute resolution lawyers tasked, by their clients, with finding funding for a substantive commercial or treaty arbitration case."[48]

1. Main Elements of the Third Party Funding Agreement

a) Percentage share in the proceeds

Third party funding is the funding of litigation for profit; this profit capitalizes as a percentage share in the proceeds of a successful claim.[49]

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[43] *Id.*

[44] *See id.* at 1271; Seidel & Sherman, *supra* note 19.

[45] Seidel & Sherman, *supra* note 19.

[46] *Id.*

[47] Steinitz, *supra* note 9, at 1271.

[48] LISA BENCH NIEUWVELD & VICTORIA SHANNON, THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION 21 (Kluwer Law, 2012) (chapter contributed by author Mick Smith) [hereinafter BENCH & SHANNON].

[49] Steinitz, *supra* note 9, at 1276.

The percentage share will vary depending on the transfer of risks and level of risk the claim has.[50] Generally, the percentage share is structured in scale: a percentage in case of settlement and a percentage in case of full claim success in trial. [51] One general rule is that the third party funder's interest does not attach until the proceeds are actually recovered or paid to the claimant.[52] In addition, when the recovery is uncertain the parties must reach an agreement in defining "satisfactory recovery."[53]

One key aspect to take into consideration when determining the legal structure of the funder's interest in the proceeds is the governing law of the agreement and of the claimant's domicile to ensure enforceability against the litigation proceeds.[54] In common-law jurisdictions, the interest may be held in trust, may involve an assignment of proceeds, or may even be consider an assignment of claim.[55]

Moreover, the parties should also establish rules of priority for the distribution of proceeds.[56] Generally, the parties execute a Priorities Agreement, in which they agree on how the proceeds are going to be administered.[57] A "typical" priority structure is:

> (1) Repayment to the third party funder of its investment to date; (2) payment to the third party funder of its return and to the insurer of any contingent or deferred premium; (3) to lawyers in respect of any deferred or contingent or conditional success fees; and (4) the balance to the claimant.[58]

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[50] VAN BOOM, *supra* note 25, at 30.

[51] *Id.*

[52] BENCH & SHANNON, *supra* note 48, at 21.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 24.

[57] *Id.* at 25.

[58] BENCH & SHANNON, *supra* note 48, at 25.

Furthermore, the return on third party funding is often set at "three times," meaning that the third party funder hopes to get a return of at least three times its investment.[59] This serves just as an expectation basis so if the claim outcome is lower than expected, the third party funder will get less than expected, but if the outcome is greater, the third party funder will receive more than it expected.[60] This expectation is often viewed as "too high," however, it is important to keep in mind that third party funding is a non-recourse equity funding, and if the claim does not succeed, the third party funder loses his entire investment.[61]

b) Transfer of risk

One of the main elements of a third party funding agreement is the transfer of the risks of the claim to the third party funder.[62] These risks might include: losing the claim; difficulties in collecting the proceeds if the claim succeeds; and adverse cost orders.[63] When entering into a third party funding agreement, the parties should agree on how and in what proportion the transfer of risk will take place. [64]

Generally, the transfer of risk is reflected in the percentage share of proceeds if the claim is successful.[65] Funders will assess and calculate the risk of the claim and determine a price—their participation in the proceeds of the claim—accordingly.[66] For this, funders assess the merits of the claim, the legal team, the legal strategy proposed to pursue the claim, and the risks inherent to the claim.[67] Thus, funders carry out a quantitative and qualitative assessment of the claim.[68]

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[59] *Id.*

[60] *Id.* at 28.

[61] *Id.*

[62] VAN BOOM, *supra* note 25, at 25.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Hodges et al., *supra* note 13, at 2.

[68] BENCH & SHANNON, *supra* note 48, at 29.

Some key aspects that the third party-funder will assess are: (1) jurisdiction of the claim; (2) merits and factual matrix; (3) quantum, which includes losses corresponding to defendant's conduct, lost profits, and proven valuable assets; (4) recovery, which includes the payment of credit to the respondent; (5) duration of the claim; and (6) costs, including legal expenses.[69]

This assessment controls the negotiation of the agreement's main terms.[70] Attorney-client confidentiality might interfere with this assessment and negotiation process.[71] Attorney-client confidentiality "worsens the information asymmetry" that already exists between the funder and the plaintiff regarding the claim's facts and risks. [72] Accordingly, there is a necessary fragmentation of the attorney-client confidentiality when executing third party funding agreements.[73]

Moreover, third party funding agreements usually contain an Initial Risk Discount Clause, where the third party funder agrees to receive a lower percentage of the proceeds in exchange for bearing less risk at the initial stages of the claim, because claims are riskier at the beginning of trials; as trials progress, more information about the possible outcome is available and, thus less risk exists.[74]

c) Budget and funding terms

Budget and funding terms are fundamental aspects of a third party funding agreement.[75] The parties need to carefully negotiate and plan the budget, as well as how it is going to be spent.[76] The parties should carry out an exhaustive assessment and approximation of all costs and expenses.[77] In this part of the

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[69] *Id.*

[70] *Id.*

[71] Steinitz & Field, *supra* note 18, at 711.

[72] *Id.*

[73] *Id.*

[74] *See id.* at 756.

[75] BENCH & SHANNON, *supra* note 48, at 27.

[76] *Id.*

[77] *Id.*

contract, the parties agree on the funding amount, the terms, and the payment schedule.[78]

A "well-thought-out" budget includes contingencies for the different phases of the claim, it may also include a cap for lawyer's fees and cash advances as security for costs.[79] Therefore, in determining the funding amount and payment schedule, the parties must anticipate deviations and additional unplanned expenses.[80]

Determination of the budget is a "three-way" process that includes: negotiation between the claimant, the lawyer, and the third party funder.[81] They must ensure "that the right amount of money is being spent on the case given the prospects of successful recovery at that time."[82]

d) Confidentiality and non-disclosure terms

The parties should execute a confidentiality non-disclosure agreement before negotiating and entering into a third party funding agreement.[83] This non-disclosure agreement protects all shared information and documents regarding the claim and the third party funding.[84]

In principle, third party funding agreement's terms are meant to be kept from the court and the other party of the claim.[85] In fact, only a few litigation finance agreements have come to be known in litigation.[86]

This key feature of third party funding agreements has been subject to controversy and criticism because the few agreements

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[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] BENCH & SHANNON, *supra* note 48, at 27.

[82] *Id.*

[83] *Id.* at 23.

[84] *Id*.

[85] Steinitz & Field, *supra* note 18, at 713.

[86] *Id.* at 719.

that have come to light have contained some terms that appear unconscionable against the claimant or to give complete control of the claim to the funder.[87] However, as further explained below, these ethical concerns may very well be prevented by either self-regulation of the industry, or formal ethics regulations. Also, ethical concerns may be prevented through the adoption of a model third party funding agreement to encourage "transparency" and "efficiency" in third party funding negotiation and contracting.[88]

e) Funder's control over the claim

Many factors influence the final determination of how much control the funder will have over the claim: the bargaining power of the parties; the asymmetry of claim information in favor of the claimant; and the need for funding of expenses and costs.[89] Control over the claim is subject to conflicting interests between the claimant and the funder: on one hand, the claimant's interests and affairs being disputed, and on the other, the funder's investment interest in the claim.[90]

Moreover, as examined in Part II, the subject of how much control the funder has over the claim is important when determining whether the funder is a party to the claim, or whether there has been an assignment of claim or an assignment of proceeds.[91]

Typically, control over claim decisions may follow a "hands-off" approach or a "hands-on" approach.[92] In addition, recently, there has been a proposal for an "enhancement control approach," somewhere in between a hands-off control approach and a hands-on control approach.[93]

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[87] *Id.*

[88] *Id.* at 720.

[89] *See* Hodges et al., *supra* note 13, at 132.

[90] *Id.* at 132-33.

[91] *See* Steinitz & Field, *supra* note 18, at 711.

[92] Hodges et al., *supra* note 13, at 86.

[93] Seidel, *supra* note 15.

A hands-off approach is "a relatively straightforward funding model."[94] The funder has little control over claim decisions and strategies.[95] There is already a legal team in place and a preliminary strategy on the case.[96] The funder carries out a risk and merits assessment based on this preliminary strategy and legal advice.[97] All tactical and strategical decisions are taken by the claimant and his lawyer.[98]

Conversely, in a hands-on approach, the funder is an "active participant" in all claim decisions and strategies.[99] The funder carries out a formal and broader assessment of the merits and risks, and sometimes it may even have a say on the legal team and legal strategy.[100] Also, under this approach, the funder may look for independent legal advice.[101] This approach may interfere with confidentiality and privilege duties so the claimant may need to waive his legal privilege for the funder to have more access to information and leeway to look for legal strategies.[102]

Under a hands-off control approach, the funder would typically be approached after the initial investigation or even after litigation has commenced.[103] While with a hands-on control approach, the funder participates in the initial investigation and assessment. [104] With a hands-on approach, funder's approval is key in whether or not the case is commenced.[105]

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[94] Hodges et al., *supra* note 13, at 86.

[95] *Id.* at 85-6.

[96] *Id.*

[97] *Id*. at 85.

[98] *Id*.

[99] *Id.* at 86.

[100] Hodges et al., *supra* note 13, at 86.

[101] *Id.*

[102] *Id.* at 87.

[103] *Id.* at 86.

[104] *Id.*

[105] *Id.*

Furthermore, in view of the criticism and ethical concerns with a hands-on control approach, some funding firms have proposed an "enhancement approach."[106] Some control and participation of the funder in the process of assessing the merits and risks of the claim is positive for the success of the claim.[107] The funders have an objective view of the claim, which is beneficial and advantageous for determining strategies.[108] Moreover, funders often have analytical and financial expertise, and usually they have access to a platform of sophisticated professionals, which may help to have an integrated analysis and evaluation of the claim and a better understanding of its value.[109] It seems this approach would be something more like influencing the claim rather than controlling the claim.[110] "Overall, replacing the hands-off approach with an enhancement approach would improve what the industry delivers, what the market receives and what the courts experience."[111] Yet the right to decide the most important claim decisions, such as the legal team and final strategy, remains on the party.[112]

Whether the funder has less or more control depends on many factors.[113] When determining the amount of control that a third party funder will have over the claim, the parties should consider the following practical situations: (1) investigation of the case, facts, and applicable law; (2) assessment of the merits; (3) selection of the lawyers; (4) instruction to the lawyers; (5) control and decision of the strategic conduct of the case; (6) control over settlement of the claim; (7) decisions about making, accepting, or rejecting an offer; and (8) decisions to withdraw from the case.[114]

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[106] Seidel, *supra* note 15.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *See* Steinitz & Field, *supra* note 18, at 728.

[111] Seidel, *supra* note 15.

[112] *Id.*

[113] Hodges et al., *supra* note 13, at 132.

[114] *Id.*

In deciding these questions, the parties must balance two important, yet conflicting, interests: on the one hand is "that there should not be undue interference in the collection or presentation of evidence or of a case or in relation to settlement, since this would undermine the fairness and objectivity of the legal process and decisions, and interfere with the free choice of litigants."[115] On the other hand, that the funding "represents an investment decision by the funder, who should be able to take steps to protect his investment, and cut losses if and when that seems prudent."[116]

2. Ethical Concerns in Third Party Funding Agreements

Third party funding agreements result in, among others things, the creation of three different sets of relationships: lawyer-client, lawyer-funder, and client-funder. As a result, there might be conflicts of interests and ethical concerns underlying these relationships, which the third party funding agreement should address to ensure each party's interests are fulfilled as well as they can be.

The parties, lawyers, courts, arbitrators, and regulators should take into account these agency problems to efficiently manage and profit from third party funding.[117] Stakeholders should understand that while it is desirable to exclude outsiders who are incapable of benefiting the claim or are a threat to the claimant, absolute restriction on third party funding would ultimately exclude outsiders who, as a matter of fact, may benefit the claimant and his claim.[118]

a) Attorney-client relationship

The attorney-client relationship imposes, among others, a duty of competence and a duty of confidentiality on the lawyer, which should remain throughout the entire negotiation and

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[115] *Id.* at 132-33.

[116] *Id.*

[117] Steinitz, *supra* note 9, at 1325.

[118] Michele DeStefano, *Globalization and the Legal Profession: Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2811 (2012).

execution of a third party funding agreement.[119] Notwithstanding, third party funding may lead to the "fragmentation" of the attorney-client relationship as generally conceived.[120]

The lawyer and client might have conflicts of interests regarding third party funding. The lawyer wants to get the case funded for both his and his client's benefit, but the lawyer may prefer a particular funder because, for example, the funder refers cases to litigation.[121] Furthermore, the introduction of a funder to the attorney-client relationship may interfere with how and what the client communicates to the lawyer, as well as the lawyer's professional judgment.[122] Thus, third party funding might affect the overall relationship and, ultimately, the claim's success if the client and the lawyer do not set clear rules and guidance regarding how the third party funding is going to be accomplished.[123] The premise of these rules must be to avoid a "corrupting influence of non-lawyers (other than, of course, their own clients); [because] clients are best served by lawyers who preserve their 'professional independence' by avoiding unholy alliances."[124]

Accordingly, to ensure the lawyer's professional independence and compliance with duties of competence and confidentiality, lawyers should abide by a "Duty-to-Know and Duty-to-Tell" within all the intricacies of third party funding.[125] Before deciding on whether to seek and agree to third party funding, clients should be well informed about all the details and consequences of litigation funding.[126] This duty to know and tell about third party

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[119] *See* Selvyn Seidel, *The Lawyer's "Duty-to-Know & Duty-to-Tell" in Third Party Funding: A Time to Recognize & Respect These Obligations* (July 2012), http://www.fulbrookmanagement.com/the-lawyers-duty-to-know-duty-to-tell-in-third-part y-funding-a-time-to-recognise-respect-these-obligations/.

[120] Steinitz, *supra* note 9, at 1323.

[121] Seidel & Sherman, *supra* note 28.

[122] Steinitz, *supra* note 9, at 1323.

[123] *Id.*

[124] DeStefano, *supra* note 118, at 2794.

[125] Seidel, *supra* note 119.

[126] *Id.*

funding is both an ethical and legal duty towards the client consistent with the lawyer's duty of competence.[127]

Moreover, the law firm should have an "internal structure" within the firm with the adequate knowledge about third party funding to properly equip the law firm to face third party funding's many challenges.[128] Challenges a law firm will face include lack of knowledge about how third party funding works; control of litigation; confidentiality and disclosure of information; conflicts of interests among clients, lawyers, and funders; unfair pricing; threats to attorney-client privilege; and lack of specific rules.[129]

Thus, the ethical issues that might arise within the lawyer-client relationship in third party funding can be thwarted by maintaining an internal structure within the law firm that allows for proper handling of these agreements and abidance to the "duty-to-know and duty-to-tell."

b) Attorney-funder relationship

The funder's control in a third party funding agreement may diminish the attorney's ability to exercise professional judgment because both the funder and the attorney want to maximize their fee gain, thus, creating "divergent" interests.[130] This conflict of interests may lead one party to prefer early settlement but the other party to continue to trial.[131] Also, attorneys and funders, as "savvy repeat players," have reputational and gain interests, which may lead them to take a different stance regarding the claim and may be in conflict with the claimant's interests.[132] To prevent this conflict of interests, the parties should agree on fee structures that align all the parties' best interests.[133]

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[127] *Id.*

[128] Seidel & Sherman, *supra* note 28.

[129] *Id.*

[130] Steinitz, *supra* note 9, at 1323-24.

[131] *Id.* at 1324.

[132] *Id.*

[133] *Id.*

Moreover, lawyers are subject to strict professional responsibility and ethics rules while funders are not.[134] Thus, funders might perform otherwise prohibited conduct for lawyers such as control of important claim decisions and maximization of their gains at the expense of both the claimant and the lawyer.[135]

Furthermore, funders usually insist on regularly obtaining information about the claim as a way of monitoring their investment.[136] These communications might break the attorney-client privilege and duty of confidentiality.[137] Nevertheless, the lack of information creates an "information asymmetry" between the parties, restricting the funder's ability to monitor the case and its interests, which, in many occasions, is also beneficial for the client as an "agents-watching-agents" benefit.[138] However, it is true that in many instances the funders and lawyers are repeat players making the attorney-funder relationship a repeat-play relationship, which may enhance the conflict of interests with the claimant, thus, decreasing the "agents-watching-agents" benefit.[139]

As discussed below, one possible solution to ensure that the lawyer exercises proper professional judgment in accordance with established ethical rules and the funder properly supervises its interests and how the claim is being carried out—both of which will ultimately be beneficial for the client—is to bind the funder to ethical and professional responsibility standards.[140] For example, regulations may establish a funder's duty of loyalty in favor of the claimant, which will require funders to take into account the claimant's interests.[141]

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[134] Julia McLaughlin, *Litigation funding: Charting a legal and ethical course*, 31 VERMONT L. REV. 615, 647 (2006-2007).

[135] *Id.*

[136] Steinitz, *supra* note 9, at 1324-25.

[137] *Id.*

[138] *Id.* at 1324.

[139] *Id*. at 1325.

[140] *Id.* at 1324; *see* Lyon, *supra* note 4, at 602.

[141] Lyon, *supra* note 4, at 602.

c) Client-funder relationship

The most significant issue regarding a client-funder relationship is the funder's control or influence over the claim: it is said that claimants "pay a price in the form of diminished control" over their claim.[142] This relinquishment of control is taken in favor of the claimant when setting the amount of the financing or when setting the share percentage of proceeds to the funder.[143]

It is important to emphasize that control over the claim must originate from a delegation of power from the claimant and not from a transaction between the funder and the lawyer.[144] Thus, any control or direction by a third party funder will be permitted only insofar as it pertains to the representation of the claimant's interests who transferred this authority to influence the claim to the funder.[145]

The two major points of control issues are: (1) the claimant's right to select, or fire, a lawyer, and (2) the authority to dispose of a claim.[146] Moreover, the claimant's diminished control over the claim and pressure from the funder to maximize the proceeds "dramatically affect[s] choice of remedies" for the claimant.[147] Here, the lawyer's duty-to-know and duty-to-tell all particulars about third party funding plays a key role because, even if the ultimate decision rests on the claimant, the same should be a well-informed decision.[148]

B. Third Party Funding in the U.S.

In the beginning, the U.S. objected to third party funding on the grounds of the common law doctrines of champerty and maintenance.[149] The Supreme Court defined maintenance as

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[142] Steinitz, *supra* note 9, at 1323.

[143] *Id.* at 1323-24.

[144] Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 STAN. J.L. BUS. & FIN. 98, 103-04 (2015).

[145] *Id*. at 104.

[146] *Id.* at 103.

[147] Steinitz, *supra* note 9, at 1321.

[148] *See* Seidel, *supra* note 119.

[149] Lyon, *supra* note 4, at 579.

financially helping another person to prosecute a suit, and champerty as maintaining a suit in exchange for a financial interest in the outcome.[150] These common law doctrines were considered morally and ethically against public policy because "a man would buy a weak claim, in hopes that power might convert it into a strong one, and . . . stalking into court . . . might strike terror into the eyes of a judge upon the bench."[151]

Moreover, the theory of "the inauthentic claim" explains the policy behind the prohibition of champerty and maintenance.[152] This theory asserts that what confers authenticity to a claim is that both the legal quality and legal validity of the claim rest on the same person (e.g., the plaintiff). [153] Therefore, when an outsider (e.g., a third party funder) assists or aids the party in bringing the lawsuit, the claim becomes inauthentic or sham.[154] "The defendant's obligation to repair must be invoked by the right person for the right reasons."[155]

Nonetheless, the majority of states have set aside champerty and maintenance statutes. In fact, twenty-nine states, including Florida, now permit some form of champerty or maintenance as third party funding.[156]

> Indeed, our public policy choices regarding litigation for most of the past century have had the effect, if not the goal, of liberalizing access to the courts. Moreover, the problems meant to be addressed by the doctrines are more efficiently and effectively remedied by various modern rules of procedure. Courts should, and

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[150] In re Primus, 436 U.S. 412, 424-25 n. 5 (1978).

[151] Lisa Bench Nieuwveld, *Third Party Funding—Maintenance and Champerty—Where Is It Thriving?*, KLUWER ARBITRATION BLOG (Nov. 7, 2011), http://kluwerarbitrationblog.com/2011/11/07/third party-funding-maintenance-and-champerty-where-is-it-thriving/.

[152] Sebok, *supra* note 6.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding + DOI*, 61 AM. J. COMP. L. 93, 135 (2013); Kraft v. Mason, 668 So. 2d 679 (Fla. 4th DCA 1996).

> likely will, set aside maintenance and champerty as obsolete, at least insofar as they may be applied to third party litigation finance.[157]

Accordingly, as an example of the relaxation of these common law doctrines, Florida's Fourth District Court of Appeal in *Kraft v. Mason* approved a third party loan agreement and stated that it was not prohibited by champerty because the lender did not instigate the litigation and did not intermeddle in the claim.[158] Furthermore, the Massachusetts Supreme Court in *Saladini v Righellis* stated that the "champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position."[159]

Although some states have permitted third party funding, they have done so "contingent on the third party funder having absolutely no control, input, or influence over litigation decisions and case management—a rule that, as a practical matter, is unrealistic."[160] Unrealistic because, as in any investment, a "cardinal rule" is that the one who invests expects a say on how the money will be used and how the investment will be managed.[161]

Moreover, these protectionist measures may be counter-productive and unwise because they do not symbolize the way many lawyers in the U.S. are doing business, because lawyers are benefiting from what the non-lawyer market can offer.[162] Furthermore, these restrictions limit business opportunities for lawyers instead of protecting them because non-lawyers, wanting "a piece of the lawyers' pie," are innovating with legal outsourcing technics.[163] In fact, non-lawyers and ex-lawyers are forming

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[157] Lyon, *supra* note 4, at 587.

[158] *Kraft*, 668 So. 2d at 682-83.

[159] Saladini v. Righellis*,* 426 Mass. 231, 235 (Mass. 1997).

[160] DeStefano, *supra* note 118, at 2796.

[161] *See* Goral, *supra* note 144, at 102.

[162] DeStefano, *supra* note 118, at 2795.

[163] *Id.*

multidisciplinary teams to provide "quasi-legal or extra-legal" services to achieve better and more efficient results.[164]

Third party funding does not go without flaws, but these flaws can be addressed through the parties' own regulation and local ethical rules involved.[165] In addition, there have been suggestions of conceptual frameworks for governmental regulations aimed at maximizing third party funding benefits and minimizing its flaws.[166]

III. THIRD PARTY FUNDING IN FLORIDA

Third party funding in Florida is in its early developmental stages, and decisions like the Florida's Third District Court of Appeal in *Abu-Ghazaleh* set up the scene for what could be included in the debate about recognizing and possibly regulating third party funding in the state.[167] *Abu-Ghazaleh* deals with the definition of "party to a claim" as applied to third party funding.[168]

Although the case is limited to costs awards and attorneys' fees, the consequences of adopting such a broad definition of "party to a claim" will have both positive and negative implications in the development of third party funding in Florida. Moreover, it might also affect the overall analysis of the legal nature of third party funding agreements. If control over the claim, even an "enhanced approach control," gives the funder the status of a real party to the claim, then this might imply that third party funding is in fact an assignment of the claim.[169]

A. Context: Abu-Ghazaleh *and the Definition of "Party to a Claim"*

1. *Abu-Ghazaleh v. Chaul*

The case arose from a purchase and sale of shares agreement in which Grupo Empresarial Agricola Mexicano sold its shares in

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[164] *Id.*

[165] *See* Goral, *supra* note 144, at 102.

[166] *See* Steinitz, *supra* note 9, at 1326.

[167] *See Third-party Funding Update, supra* note 12.

[168] Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 694 (Fla. 3d DCA 2009) (quoting Visoly v. Security Pac. Credit Corp., 768 So. 2d 482, 489 (Fla. 3d DCA 2000)).

[169] Steinitz, *supra* note 9, at 1324.

two subsidiary, multinational, and world-leading companies, Fresh Del Monte Produce N.V. and Global Reefer Carriers, to Abu-Ghazaleh, the CEO of the two companies.[170] The shareholders of the Grupo Empresarial Mexicano sued Abu-Ghazaleh for civil theft and conspiracy of civil theft claiming that Abu-Ghazaleh had bribed some officials of Grupo Empresarial Mexicano.[171]

Prior to the start of litigation, the shareholders entered into a financing agreement with Van Diepen and CSI Financial Investments.[172] Van Diepen and CSI agreed to finance all costs and expenses of the lawsuit for 18.33% of any successful award.[173] Also, the plaintiffs agreed to give significant control of the claim to the funders such as the ability to approve the filing of the lawsuit; to control the selection of attorneys; to recruit fact and expert witnesses; to receive, review, and approve attorney's fees; and to veto any settlement agreements.[174]

Abu-Ghazaleh, after obtaining a verdict its favor, sued the shareholders and the third party funders for attorney's fees and costs under Florida Statute Section 772.11 for filing a frivolous claim.[175] Under Florida Statute Section 772.11, the party must show that: (1) the defendant was a party to the lawsuit, and (2) the lawsuit was frivolous.[176]

Addressing the issue of whether the third party funders were a party to the claim, the court held that a "party" under Florida law was defined as any person "who participates in litigation . . . by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of the proceedings."[177]

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[170] *Abu-Ghazaleh*, 36 So. 3d at 692.

[171] *Id.*

[172] *Id.*

[173] *Id.* at 693.

[174] *Id.*

[175] *Id.*

[176] *Abu-Ghazaleh*, 36 So. 3d at 693.

[177] *Id.* at 694 (quoting Visoly v. Security Pac. Credit Corp., 768 So. 2d 482, 489 (Fla. 3d DCA 2000)).

Accordingly, the court reasoned that because the funders had significant control over important claim decisions (approval of counsel for the plaintiffs, veto power over whether the litigation was filed, who would file it and how it would be pursued, final say over any settlement agreements), the funders rose to the level of parties.[178] As such, and because the court also found that the underlying lawsuit was frivolous, the funders were held liable for attorney's fees and costs under Florida Statute Section 772.11.[179]

Even if one takes *Abu-Ghazaleh* as an outliner case—because on the one hand the control given to the third party funders was significant, and on the other, the claim was frivolous[180]—*Abu-Ghazaleh* is an important case because to date it is the only case in Florida that examines whether and under what circumstances a third party funder may be considered a party to the claim. In addition, the definition of "party" in *Abu-Ghazaleh* is broad enough to include third party funders who may have a lot less control over the claim than the funders in *Abu-Ghazaleh*.

2. Development of the Definition of "Party to a Claim" and Its Application in Florida

Since long ago, courts in the federal and state level have dealt with the definition of "party to a claim," and, in general, they have adopted a broad definition of party (except in specific cases where "party to a claim" has been defined narrower).[181]

The Supreme Court in *Green v. Bogue* held that parties, in a broad sense, were all persons with the right to control the claim and proceedings such as: making a defense, adducing and cross-examining witnesses, and appealing decisions.[182] In *Green*, the defendants argued that they were not parties because they were not involved in the objections to the claim, but the Court found

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[178] *Abu-Ghazaleh*, 36 So. 3d at 694.

[179] *Id.* at 694-95.

[180] *Third-party Funding Update*, *supra* note 12.

[181] *See* Fong Sik Leung v. Dulles, 226 F.2d 74, 81 (9th Cir. 1955).

[182] Green v. Bogue, 158 U.S. 478, 503 (1895).

that they *maintained interest* in the claim and, as such, they were real parties to the claim.[183]

Moreover, the Ninth Circuit in *Fong Sik Leung v. Dulles* defined party as "one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or not."[184] The court further explained that in a variety of situations, a person not named in the cause or not even appearing in any formal capacity could be held to be a party to the claim *in which they are concerned*.[185] *Fong Sik Leung* regarded the definition of party under Rule 35 of the Federal Rules of Civil Procedure concerning physical and medical examinations, which the court held was more limited because of the context and history of the rule.[186]

Furthermore, in *Theller v. Hershey*, a California state court held that "the law is well settled that parties and privies include all who are directly interested in the subject-matter, and who had the right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment."[187] Moreover, the court held that "parties" include all *those that participate* in the litigation of the claim, not only those whose names appear upon the record,[188] including those that have a saying in the employment of counsel, *contribute towards the expenses of the claim*, or who, in any manner, have control as to be entitled to direct the course of the proceedings.[189]

In *Theller* the court gave an example of what is considered a party to the claim:

> Suppose there is a case . . . against a particular individual, but involving a subject-matter concerning . . . a large number of other persons [that] are equally interested with the particular defendant in that case,

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[183] *Id.*

[184] *Fong Sik Leung,* 226 F.2d at 81.

[185] *Id.*

[186] *Id.*

[187] Theller v. Hershey, 89 F. 575, 576 (C.C.N.D. Cal. 1898).

[188] *Id.*

[189] *Id.*

> and suppose all the parties who are interested, or a number of them, come together, enter into a contract that they will raise a fund to carry on that litigation, that they will unite for the purpose of employing counsel, and combine to carry it on in the name of the party to the record; it seems to me that the persons who, under such a contract as that, actually contribute money for the purpose of carrying on a suit, are authorized to go into that court and use the name of the party to the record in making such motions and taking such steps as are necessary for the protection of their particular interest in it.[190]

Florida courts have adopted this broad definition of party.[191] In *Lage v. Blanco*, the Third District Court of Appeal stated that "in its broadest meaning, the word party includes those concerned with, conducting, or taking part in any matter or proceeding, whether his name appears on record or not."[192] Thus, "parties" include all those who participate in the litigation by employing counsel, contribute with the expenses, or who, in any manner, *have such control as to be entitled to direct the course of the proceedings*.[193] In that case, the court held that the attorneys that brought and maintained the frivolous suit in the name of the corporations but without the corporations' authorization and knowledge were in fact real parties to the claim.[194]

Moreover, in *Visoly v. Security Pac. Credit Corp*, the Third District stated that a "party" is defined under Florida law as any person who participates in litigation regardless of whether or not they are actually named in the pleadings: concerned with, conducting, or taking part in any matter or proceeding.[195] In that case, the defendants argued that the trial court lacked jurisdiction

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[190] *Id.* at 576-77.

[191] *See* Lage v. Blanco, 521 So. 2d 299, 300 (Fla. 3d DCA 1988); Visoly v. Security Pac. Credit Corp., 768 So. 2d 482, 489 (Fla. 3d DCA 2000); Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693 (Fla. 3d DCA 2009).

[192] *Lage*, 521 So. 2d at 300.

[193] *Id.*

[194] *Id.*

[195] *Visoly*, 768 So. 2d at 489.

over them individually because they were not named parties in the record, and thus, they could not be found liable for attorney's fees.[196]

Abu-Ghazaleh, reiterating this broad definition of party to the claim, made it applicable to third party funding.[197]

> [T]he word party includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or not. *Fong Sik Leung v. Dulles*, 226 F.2d 74, 81 (9th Cir. 1955). 'Parties include, not only those whose names appear upon the record, but all others who participate in the litigation by employing counsel, or by contributing towards the expenses thereof, or who, in any manner, have such control thereof as to be entitled to direct the course of the proceedings … "*Theller v. Hershey*, 89 F. 575 (C.C.N.D.Cal. 1898)." *Lage v. Blanco*, 521 So.2d 299, 300 (Fla. 3d DCA 1988) (emphasis in original) (also cited by *Visoly*, 768 So. 2d at 489).[198]

Thus, the court held that Van Diepen and CSI had risen to the level of a party because under the agreement they had the power to approve counsel for the plaintiffs, they paid litigation costs, they had veto power over whether the litigation was filed or settled, and who and how the claim would be filed.[199] All of these facts showed that Van Diepen indeed had "such control thereof as to be entitled to direct the course of the proceedings" and was a party to the suit liable for costs and attorneys' fees.[200]

Moreover, the Florida Statute section 772.11 regulating attorney's fees, which states that a non-party could be held liable for attorney's fees, cites and explains *Abu-Ghazaleh*.[201] The statute mentions that, in that case, the Third District Court of

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[196] *Id.*

[197] Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 694 (Fla. 3d DCA 2009).

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] FLA. STAT. § 772.11 (2018).

Appeal affirmed an award for attorney's fees against the funders of a claim even when the funders were not named as parties to the lawsuit.[202] The statute further explains that the plaintiffs had filed numerous legal proceedings and documents and that the funders participated in such legal proceedings and paid the expenses.[203] Further, the funders, even if not a named party in the lawsuit, would recover eighteen percent of the proceeds if the lawsuit was successful.[204] As a result, the statute reiterates that the funders were parties for adverse costs purposes.[205]

It is important to emphasize that in Florida this broad definition of "party" regarding third parties has been limited to liability for costs awards and attorneys' fees.[206] Indeed, in *Miccosukee Tribe of Indians of S. Fla. v. Bermudez*, the Third District Court of Appeals held that the definition in *Lage, Visoly,* and *Abu-Ghazaleh* meant "no more than a person can be deemed a party for the purposes of paying attorney's fees that result from vexatious or wrongful litigation he or she funded and controlled, even if he or she is not a named party."[207]

In a nutshell, these Florida cases establish that a third party that both *funds* and *controls* a frivolous claim will be considered a party to the claim for purposes of adverse costs. Accordingly, from a third party funding perspective, whether the funder is a party for adverse costs purposes will depend on the amount of control the funder has over the claim. A third party funder with hands-on control, as in *Abu-Ghazaleh,* would certainly fall within the definition. Moreover, a funder with hands-off control, where the funder has very little (if any) control, would not likely be considered a party for adverse costs liability.

Nevertheless, the challenge will most likely arise when the third party funder has an enhanced control over the claim. An

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[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] Miccosukee Tribe of Indians of S. Fla. v. Bermudez, 145 So. 3d 157, 160 (Fla. 3d. DCA 2014).

[207] *Id.*

enhanced approach is the middle ground between hands-on and hands-off control.[208] Under an enhanced approach the funder lends valuable strategic expertise but does not participate in important decision-making.[209] Yet the funder expects this expertise to influence the decision-making and to be taken into consideration.[210]

It seems like Florida courts will struggle in determining whether, under an enhance control, the third party has enough control to be considered a party for purposes of adverse costs. However, it is fair to anticipate that courts will likely hold that a funder with an enhanced control falls within the definition of party for purposes of liability of adverse costs because of the broad definition of party the Florida courts have adopted.

a) Consequences over the legal nature of the third party funding agreement

As explained, the issue of how much control the third party funder may have over the claim is a critical issue involving matters such as conflicts of interests between the parties, and whether the funder is in fact a party to the claim for adverse costs purposes. In this part, the comment will briefly focus on whether being considered a party might affect the legal nature of the third party funding agreement.

There are two different views of what a third party funding agreement might *really* constitute: (1) an assignment of interest in the claim (proceeds), or (2) an assignment of ownership of the claim.[211]

On one side, there is the understanding that the law should recognize that, in a third party funding agreement, the claimant relinquishes partial control over the claim and also transfers partial ownership of the claim.[212] Thus, unlike attorney funding where there is a separation of ownership and control, in a third

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[208] Seidel, *supra* note.

[209] *Id.*

[210] *Id.*

[211] *See* Steinitz, *supra* note 9, at 1324.

[212] *Id.*

party funding scenario there is a partial assignment of the claim.[213] This transfer of ownership is taken into account when establishing the price of the finance and the share percentage in the proceeds.[214]

On the other side, there is the position that some courts have taken that distinguishes between the claim and the proceeds from the claim.[215] Therefore, under a third party funding agreement, the claimant assigns part of the proceeds to the funder rather than assigning ownership over the claim.[216] This is the position that New York courts have taken.[217] Furthermore, in the U.K., where maintenance and champerty were decriminalized in 1967, the purchase or transfer of ownership of claims is prohibited.[218] Thus, third party funding agreements are allowed but as an assignment of proceeds where the litigation funder is prohibited from managing and directing the claim as an owner would do.[219]

Now, does holding that a third party funder is a party for purposes of adverse costs implicitly recognize that third party funding is a claim transfer? In Florida, the courts have not considered this specific question yet, probably because third party funding is in its early stages, but it currently does not seem like they are recognizing an assignment of claim.

It is the law in Florida that parties can assign claims derived from a contract, a statute, and insurance contracts.[220] In contrast, purely personal tort claims cannot be assigned.[221] In *Miccosukee Tribe of Indians of S. Fla.*, the cause of action was a personal tort claim, and the court held that a third party will be considered a

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[213] *Id.*

[214] *Id.*

[215] Steinitz & Field, *supra* note 18, at 727.

[216] *Id.*

[217] *Id.*

[218] Cento Veljanovski, *Third party Litigation Funding in Europe*, 8 J.L., ECON. & POL'Y 405, 442 (2012).

[219] *Id.*

[220] Forgione v. Dennis Pirtle Agency, 701 So. 2d 557, 559 (Fla. 1997).

[221] *Id.*

party for adverse costs liability if the third party funded and controlled a vexatious and frivolous claim.[222] The court in that case did not distinguish between contract and tort claims.[223] Thus, after *Miccosukee Tribe of Indians of S. Fla.*, a court in a personal tort claim could hold that the third party funder is a party for adverse costs purposes if the court finds that the funder controlled and funded a frivolous claim, and certainly this would not mean that the court is implicitly recognizing an assignment of claim because assignment of tort claims is prohibited in Florida.

Nonetheless, the courts in Florida have not specifically addressed the subject. We will have to wait for the courts to decide whether third party funding is an assignment of claim or an assignment of proceeds and the repercussions this will have in the subject of the funder's liability for adverse costs.

B. Abu-Ghazaleh v. Chaul*: Implications on Third Party Funding in Florida*

The analysis of the positive and negative implications of *Abu-Ghazaleh* on third party funding in Florida will include an evaluation of the necessity of regulation of third party funding. Having a regulatory scheme in place might prevent the slowdown effect that *Abu-Ghazaleh* will probably have on third party funding. This regulatory scheme may take the form of self-regulation, professional regulation, or formal governmental regulation.

1. Positive Implications of *Abu-Ghazaleh* on Third Party Funding in Florida: Funding of Non-Frivolous Claims

One critique against third party funding is that it encourages the filing of frivolous claims because "if a claimant does not have to bear the financial risk of prosecuting his own suit, there is nothing to stop him from pressing ahead with any claim that shows a miniscule possibility of recovery."[224] To have the terms clear and avoid any confusion, it is important to briefly state the difference between frivolous and meritless claims.

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[222] Miccosukee Tribe of Indians of S. Fla. v. Bermudez, 145 So. 3d 157, 160 (Fla. 3d. DCA 2014).

[223] *Id.*

[224] Lyon, *supra* note 4, at 593.

A frivolous claim is a claim that lacks fact or legal basis, meaning that it "relies on factual allegations or legal theories so outlandish as to be inarguably insufficient."[225] Typically, frivolous claims are resolved before summary judgment and discovery.[226] Conversely, a meritless claim is a claim in which the factual basis is insufficient for legal recovery or a reasonable jury could not find sufficient facts for recovery.[227] Typically, courts determine whether a claim is meritless after adversarial briefing or discovery.[228]

It is true that some "well-capitalized" third party funding companies, such as Juridica and Burford, are more willing to take on riskier claims because this risk can be spread among a large group of investors.[229] However, this critique ignores the third party funder's interest in recovery and how the recovery highly depends on the accurate assessment of the value of claims and its level of risk.[230] In fact, funders, through platforms of sophisticated professionals in the legal and financial areas, exercise a more refined and integrated analysis of the claim.[231] It can be said that the funder's analysis offers the claimant a "second opinion" as to the merits, risks, and value of the claim.[232]

In addition, funders must take internal governance and compliance steps to prevent and/or reduce the risk of illegal conduct by themselves, as well as the need to take steps to assure claimants do not take part in illegal activity such as bringing unmeritorious or frivolous claims.[233] Moreover, for reputational concerns, a funder may not want to fund a frivolous claim because this would likely affect its "bargaining reputation" in the future,

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[225] Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1202 (2014).

[226] *Id.*

[227] *Id.* at 1203.

[228] *Id.*

[229] Lyon, *supra* note 4, at 593.

[230] *Id.*

[231] Seidel, *supra* note 15; Lyon, *supra* note 4, at 593.

[232] Lyon, *supra* note 4, at 593.

[233] Seidel & Sherman, *supra* note 19.

which is necessary to be a repeat player in the game of third party funding.[234]

Notwithstanding, there is still a fear that third party funding might encourage frivolous claims.[235] Legislation and courts have taken on the job to minimize this potential consequence of third party funding.[236] Thereby, the Third District Court of Appeal with *Abu-Ghazaleh* incentivizes third party funders to fund non-frivolous claims because, to the extent the court might consider the funder a real party to the claim for adverse costs purposes, the funder would seek to conduct a better analysis of the merits, facts, and law of a claim. Also, *Abu-Ghazaleh* incentivizes a better assessment of the risks and costs to avoid being held liable for costs awards and attorneys' fees.

Although it is argued that third party funding does not incite the funding of frivolous claims because of the reasons explained above, cases like *Abu-Ghazaleh* reassure that third party funding is well conducted in Florida where third party funding is in an "embryonic" stage.[237]

2. Negative Implications of *Abu-Ghazaleh* on Third Party Funding in Florida

a) Funder control over the claim

In Florida, the amount of control over the claim will determine whether the third party funder will be considered a party to a claim. Under *Abu-Ghazaleh,* the more control a funder has over a claim, the more likely the funder will be found to be a real party to the claim for costs awards and attorneys' fees, assuming the claim is frivolous. As explained, it is likely that courts in Florida will find that an enhance control approach over the claim is sufficient to find the funder liable for the payment of adverse costs as a real party to the claim.

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[234] Lyon, *supra* note 4, at 593.

[235] Seidel & Sherman, *supra* note 19.

[236] *See* Lyon, *supra* note 4, at 593; Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693 (Fla. 3d DCA 2009).

[237] Seidel & Sherman, *supra* note 19.

Therefore, under *Abu-Ghazaleh,* funders are encouraged to take a hands-off control approach over the claim. However, it is unlikely that funders will agree to a hands-off approach where the funder has little to no control over the claim and its legal strategies.[238]

It might well be argued that if, in theory, and seemingly in practice, the funder assesses the claim to ensure the funding of non-frivolous claims, then being considered a party for purposes of adverse costs should not be an issue of concern. In fact, cases such as *Abu-Ghazaleh* are a "powerful common law means of protecting the litigant's right to control his own suit . . . Extending lender liability beyond its initial investment when it exercises control over a suit may be the most powerful means of all to limit the third party's involvement in decision making."[239]

Nonetheless, some control from the funders has a positive effect on the claim.[240] An enhancement approach would improve what the industry of third party funding delivers to claimants and courts what the market and funders receive, and what the courts and attorneys experience because funders have an objective view of the claim, financial and analytical expertise, plus access to a network of sophisticated professionals.[241]

Moreover, a third party funder, as any other investor, should be able to take steps to protect his investment.[242] Some control, or influence, over the claim is necessary to provide financial and legal opinion on decision-making to ensure the best strategies are taken.[243] Although there are conflicts of interests and ethical concerns involved, both the funder and the claimant want the best recovery from the claim.[244] In addition, the funder should also be

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[238] Hodges et al., *supra* note 13, at 133.

[239] Lyon, *supra* note 4, at 604.

[240] Seidel, *supra* note 15.

[241] *Id.*

[242] Hodges et al., *supra* note 13, at 133.

[243] *Id.*

[244] *Id.*

able to cut losses if and when it seems prudent for the outcome of the claim.[245]

Furthermore, those in favor of some control of the funder over the claim have compared a third party funder to other investors such as an investor holding an X per cent stake through shares in a company or investing X amount of capital in a venture, or a bank providing financing through a litigation loan agreement.[246] They argue that third party funders, just as the above examples of investors, are entitled to act in favor of their interests and decide whether to extend funding even if this may affect the claimant's ability to continue litigation.[247]

Hence, Florida courts should strive to apply a higher threshold of control when determining whether a third party funder is a party to the claim. At least to allow an enhancement control over the claim and still not be considered a party to the claim.

b) Confidentiality of the third party funding agreement

As explained above, third party funding terms are meant to be kept from the court and the other party to the claim.[248] Generally, parties execute a non-disclosure agreement that covers the third party funding agreement and all documents and negotiations regarding the same.[249]

After *Abu-Ghazaleh,* courts in Florida will be able to order the disclosure of third party funding agreements in all claims for adverse costs in which the original claim was funded by third party funding. This ability of the courts to order disclosure will certainly disrupt the third party funding market because parties want their agreements to remain confidential.

Moreover, even if some disclosure is needed, and perhaps beneficial to prevent undue interference by the funder, the courts should limit the information that should be communicated to the

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[245] *Id.*

[246] Hodges et al., *supra* note 13, at 133; Steinitz & Field, *supra* note 18, at 721.

[247] Hodges et al., *supra* note 13, at 133.

[248] Steinitz & Field, *supra* note 18, at 713.

[249] *Id.*

other party and the court itself, because the parties to the third party funding agreement do not want to disclose details about the funding terms.[250] Nonetheless, the court will need to know enough information about the funding terms to understand the relationship between the funder, the claimant, and the claim to determine the amount of control the funder has over the claim and how the claim's process and outcome might be affected by this.[251]

In this regard, there have been some well-known exceptional cases where the courts have requested disclosure of the third party funding agreement, for example, the famous environmental case where an Ecuadorian court issued a judgment of $18.2 billion against Chevron.[252] In that case, the plaintiffs, a class of Ecuadorian indigenous, agreed to third party funding.[253] Chevron brought suit in a federal court in New York against the plaintiff's lawyers in the Ecuador case under civil racketeering charges for fabrication of evidence, intimidation of judges, and corruption of Ecuadorian officials.[254] The federal court, in what was seen a "rare opportunity," ordered disclosure of the third party funding agreement.[255] It was a "rare opportunity" because the court was able to order disclosure thanks to the claimant lawyer's actions: by inviting a moviemaker into the strategy sessions, the lawyer inadvertently waived the attorney-client privilege to everything that took place during the session.[256] The terms of the agreement showed a "distribution waterfall" in which the plaintiffs, at the end of the distribution scheme, were entitled to any balance remaining, if any.[257] Moreover, the investors—famous hedge funds—had practically all control over the claim in Ecuador.[258]

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[250] Seidel & Sherman, *supra* note 19.

[251] *See id.*

[252] Roger Parloff, *Have you got a piece of this lawsuit?*, FORTUNE (Jun. 28, 2011), http://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] Roger Parloff, *Have you got a piece of this lawsuit?*, FORTUNE (June 28, 2011), http://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

It might well be maintained that this case deserved a request for disclosure, nonetheless, this was an exceptional and "rare opportunity" because third party funding terms are usually kept confidential.[259]

Florida courts should endeavor to set clear guidelines for the disclosure of third party funding agreements. In doing so, the courts should limit the scope of disclosure as much as possible taking into account the interests of all stakeholders: the claimant, the funder, and the adverse costs' claimant.

3. Regulation of Third Party Funding

In view of these implications and the uncertainty they bring to the stage of third party funding in Florida, and considering that third party funding is new in Florida, the expected effect is a slowdown in the use and understanding of third party funding. To ameliorate the outlook of third party funding in Florida, there are some possible solutions that have been discussed and analyzed in other jurisdictions within and outside the U.S.: courts giving clearer guidelines for the treatment of a third party funding agreement; governmental regulation of third party funding; self-regulation by investors companies and associations; professional regulation (bar associations), or adopting model contracts.[260]

The issue regarding regulation is whether third party funding should be regulated at all, and, if so, what would be the best way to do it for the adequate protection of all the stakeholders' interests.[261]

The main policy concerns are the potential conflicts of interests between the stakeholders; the issues of transparency with regard to whether the claimant understands the funding terms and his duties under a third party funding agreement; the funder's control over the claim; the financial risks; the disclosure

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[259] *Id.*

[260] *See* Steinitz, *supra* note 9, at 1301; Hodges et al., *supra* note 13, at 141; Laurel Terry, *Regulating the Industry Won't be Easy*, N.Y TIMES (Nov. 15, 2010), http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/regulating-the-industry-wont-be-easy.

[261] Hodges et al., *supra* note 13, at 141.

of the agreement; and the lawyer's professional independence.[262] In view of these concerns, regulation has been seen as an adequate means through which unethical third party funding practices may be prevented, but the question remains as to who should regulate.[263]

a) Self-regulation

One example of self-regulation is the Third Party Litigation Funders Association's "voluntary code" adopted in 2011.[264] A "voluntary code" might be an effective method because it covers the basic standards of good conduct for third party funding, and it addresses minimum standards for claim assessment, capital adequacy, disclosure, confidentiality, and dispute resolution.[265]

Nonetheless, self-regulation is not always effective in preventing the ethical concerns of third party funding because these voluntary codes, such as the Third Party Litigation Funders Association's code, cover specific funding models but does not cover all the different funding models constantly developing in the litigation finance market and the potential harm these new models cause.[266] Moreover, these codes do not appropriately deal with rogue funders because of the lack of sufficient penalties for unethical practices and because they only apply to funders that are members of the association that issued them.[267]

b) Professional regulation

Legal services regulatory bodies, such as Law Societies, Solicitors Regulatory Authorities, or Bar Councils, may also efficiently regulate third party funding's ethical concerns as part of their Ethics Code consistent with the importance of the integrity of the client-attorney relationship.[268]

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[262] *Id.* at 142-43.

[263] *Id.*

[264] *Id.* at 148.

[265] *Id.* at 141.

[266] *Id.* at 148.

[267] Hodges et al., *supra* note 13, at 148.

[268] *Id.* at 149.

In this regard, state bar authorities have said that there is no inherent conflict between the lawyer's duties to their client and the execution of a third party funding agreement as long as the funding terms do not interfere with the lawyer's professional judgment and duties towards the client.[269] The general view is that third party funding is an acceptable tool for attorneys to ensure effective litigation for their clients.[270] As explained, the lawyer has a duty to know and tell, which encompass the duty to warn the client of all advantages and disadvantages of third party funding.[271]

Moreover, in the U.S., the majority of state bar authorities have held that it is permissible to provide information to a funding company at the client's request, provided the client has given informed consent.[272] Furthermore, they also conclude that attorneys may honor a client's assignment of a portion of proceeds to the third party funder.[273]

Nevertheless, the Florida Bar in Opinion 00-3 of March 15, 2002, discouraged the use of third party funding because funding terms may not always serve the client's best interests.[274] In fact, the Florida Bar Committee stated that only in limited circumstances would it be in a client's best interests for an attorney to provide information about third party funding companies or other financial assistance services in exchange for an assignment of an interest in the proceeds of the case.[275] The Committee explained that if the attorney is going to advise litigation funding to a client, then the attorney must discuss with the client whether the costs of the third party funding outweighs its benefits and the other potential problems that can arise (conflict of interests, disclosure of privilege information, diminish control over the claim).[276]

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[269] *Id.*

[270] *Id.*

[271] *Id.*

[272] Prof. Ethics Fla. Bar Op. 00-3, *supra* note 11.

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

Moreover, the opinion also stated that attorneys shall not look or initiate contact with a funding company on the client's behalf, rather, it has to be at the client's request, and the attorney shall not have any ownership interest in the funding company.[277]

Regarding the issue of how much control the funder may have over the claim, the Committee said that the attorney shall not allow the funder to direct litigation, interfere with attorney-client relationship, or influence the attorney's professional judgment.[278]

In conclusion, the Florida Bar stated that an attorney may provide—but it is discouraged to do so—a client with information about non-recourse third party funding in exchange for an interest in the proceeds of the client's case, and the attorney may provide information to the funding company given informed consent of the client.[279] The Florida Bar emphasized that the opinion did not discuss the legality of third party funding in Florida, but the appropriate conduct of attorneys regarding third party funding assuming that these transactions are legal in Florida.[280]

Given that the main policy issues about third party funding concern ethical matters and conflicts of interests, professional regulation through Ethical and Professional Responsibility Rules, which purpose is precisely to rule on these matters, is an effective way to regulate third party funding. This method, however, regulates only the lawyer's conduct in third party funding.

Moreover, the Florida Bar Opinion 00-3 on third party funding sheds some light on how Florida legal professionals perceive litigation funding mainly regarding the attorney-client relationship, meaning the lawyer's role and duties towards the client when the client decides to enter a third party funding agreement. *Abu-Ghazaleh*, on the other hand, shows the court's concern over the funder-client relationship mainly regarding the amount of the funder's control over the claim.

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[277] *Id.*

[278] Prof. Ethics Fla. Bar Op. 00-3, *supra* note 11.

[279] *Id.*

[280] *Id.*

c) Formal governmental regulation

Formal governmental regulation has been seen as the most appropriate method to regulate third party funding.[281] As a matter fact, the U.S. Chamber Institute of Legal Reform has stated that "the risks posed by third party litigation funding investments are so serious, and the incentives for misconduct . . . so great, that industry self-regulation is not a viable option to protect the administration of civil justice."[282] The ILR has further stated that government regulation is adequate because third party funders use the courts to "make money" and under these circumstances regulating the funder's conduct is an "entirely proper function of the government."[283]

Moreover, considering the rapid growth of the third party funding industry, governmental regulators should start resolving what regulations are needed and whether a "one size fits all" model is adequate.[284] The aim is for governmental regulation to provide regulatory consistency and effective statutory scrutiny.[285] Some suggest that regulation should focus on the disclosure of relevant information rather than having a broad general regime. [286] "Whether in favor or against TPF, the industry is increasingly requiring a clear, uniform and binding regulatory framework."[287] According to the 2015 Queen Mary School of International Arbitration survey, 71 percent of practitioners advocate for regulating the industry.[288]

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[281] JOHN H. BEISNER & GARY A. RUBIN, STOPPING THE SALE OF LAWSUITS: A PROPOSAL TO REGULATE THIRD PARTY INVESTMENTS IN LITIGATION 7 (U.S. Chamber Inst. For Legal Reform, 2012).

[282] *Id.*

[283] *Id.*

[284] Terry, *supra* note 260.

[285] Hodges et al., *supra* note 13, at 149.

[286] Francisco Blavi, *It's About Time To Regulate Third Party Funding*, KLUWER ARB. BLOG (Dec. 17, 2015), http://kluwerarbitrationblog.com/2015/12/17/its-about-time-to-regulate-third party-funding/.

[287] *Id.*

[288] *Id.*

Nonetheless, governmental regulation has been criticized in that it is not necessary, or even effective, because third party funding may properly and more effectively be regulated either through self-regulation or through professional and ethical authorities.[289] However, unless ethical regulations are made applicable to funders, this kind of regulation will only be effective in preventing unethical conduct from lawyers.[290] Likewise, although self-regulation might be effective both in regard to lawyers and funders' conduct, it only applies to those funders that are part of the specific association.[291]

Formal governmental regulation is probably the best method to regulate third party funding. The main reason is because it is a way by which ethical rules can be made applicable to funders. While professional regulation through a Bar Association is effective in controlling lawyers' conduct, because to practice law all lawyers must be members of the bar and abide by its rules, it is not effective in controlling funders' conduct. Funders do not need to be part of an ethical professional association and abide by its rules to be able to fund a claim. For the same reason, self-regulation is also not an effective method.

Notwithstanding, it is important to highlight that this formal governmental regulation should be limited and specific, mainly regulating ethical and conflicts of interest matters. A formal regulation that intends to regulate all aspects of the funding agreement will end up being too rigid and unable to keep up with the changing market of third party funding.[292]

d) Model contract

The adoption of a model contract, or model contracts, has also been suggested to better confront the ethical and conflict of interest issues arising from third party funding.[293] In general, the

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[289] Vannin Capital PCC, *MoJ Answers Questions About Regulation of Third Party Litigation Funders*, LEXOLOGY (Jan 26, 2017), https://www.lexology.com/library/detail.aspx?g=f3b4f2c4-06e8-4380-91e1-1b9f8fc1f2fe.

[290] *See* McLaughlin, *supra* note 134.

[291] Hodges et al., *supra* note 13, at 148.

[292] Blavi, *supra* note 286.

[293] *See* Steinitz & Field, *supra* note 18, at 727.

proposed model contract aims at reducing information asymmetry between the parties without having to waive any privilege, thus preventing conflict of interests between the parties.[294] This occurs through representations, warranties, and other provisions specifically designed to ensure that claimant shares all material non-privilege information before funding and privilege information after providing informed consent.[295] Furthermore, the contract would impose on the funder the duty to disclaim any conflict with the claim or claimant.[296]

Also, the model contract suggests that a claimant seek independent counsel to ensure that its attorney is complying with all ethical duties.[297] Moreover, the model contract "allows the funder to acquire influence but not control over the plaintiff's settlement decision."[298] The plaintiff would need to give notice of any settlement offer to the funder, and the funder would give a good faith analysis of the settlement.[299] However, the claimant would retain full control over settlement decisions.[300]

Such model contract would grasp what seems like the main concerns regarding-third party funding in Florida: (1) lawyer's duties towards the client, and (2) funder's control over the claim.[301] This model contract would ideally be revised and approved by the Florida Bar. Even if a complete model contract is not adopted, the adoption of common contractual clauses may deliver progress in having more certain and uniform rules, as was the case in the U.K through the Association of Litigation Funders, in Germany, and Australia.[302]

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[294] *Id.*

[295] *Id.* at 741.

[296] *Id.*

[297] *Id.*

[298] *Id.*

[299] Steinitz & Field, *supra* note 18, at 741.

[300] *Id.*

[301] *See* Prof. Ethics Fla. Bar Op. 00-3 *supra* note 11; Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693 (Fla. 3d DCA 2009).

[302] BENCH & SHANNON, *supra* note 48, at 20.

IV. CONCLUSION

This comment has analyzed how *Abu-Ghazaleh* will impact third party funding in Florida. Specifically, as a positive implication, this decision will incentivize the funding of non-frivolous claims because third party funders, to the extent they might be treated as a party to the claim, will not assume the risk of being held liable for costs awards and attorney's fees for funding a frivolous claim.

Moreover, as a negative effect, *Abu-Ghazaleh* will compel the selection of a hands-off control approach. From the funder's perspective, this type of control is not the most desired because the funder, as an investor, is entitled, within the ethical and legal limits, to advocate for its interests. Likewise, from the claimant's perspective, a hands-off control approach is not the most preferred. It has been suggested that certain control from the funder is desirable because the funder may lend a platform of sophisticated professionals to thoroughly assess the claim's risks and choose the best strategies accordingly.[303]

It is uncertain if the Florida courts or arbitrators applying Florida law will find an enhancement control over the claim as sufficient to hold that the third party funder is a party to the claim for adverse costs' purposes. But considering that in Florida the current definition of "party to a claim" is very broad, an enhanced approach, if not properly limited, will likely be considered sufficient control over the claim to make the funder liable for cost awards and attorney's fees. Furthermore, even if the concept of party is applicable to third party funding only to the effects of liability for adverse costs, this definition is so broad that it might in a future include a third party funder as a real party to the claim beyond adverse costs.

Moreover, another undesirable effect is the impact on the confidentiality aspect of third party funding agreements. To determine how much control a funder has over the claim, the court will have to look at the funding terms of the agreement. Even if some disclosure is desirable to prevent unethical conduct, how much and what information should be disclosed is still an unresolved issue.

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[303] Seidel, *supra* note 15.

The expected effect of these implications is a slowdown of third party funding in Florida. A solution to this uncertainty is the regulation of third party funding. As explained, this regulation may be by formal governmental regulation, professional regulation, or self-regulation of the industry. Regulation will serve to set, or at least try to set, clear guidelines and rules for the use of third party funding by all stakeholders: clients, lawyers, funders, and courts.

Arguably, the best methods to set clear rules applicable both to lawyers and funders, and to still maintain certain flexibility to adapt to the evolving market of third party funding, are professional regulations and formal governmental regulations.

In Florida, professional regulation is already in place through the Florida Bar.[304] The Florida Bar not only has its ethical rules applicable to all lawyers in Florida, but also has explained how these rules apply in the context of third party funding through ethical opinions.[305] Formal governmental regulation has not been implemented probably because third party funding is still new to the state, but sooner rather than later this type of regulation should be implemented.

The regulation of third party funding in Florida will help the courts, arbitrators, and parties in better understanding how third party funding works and in taking advantage of its benefits. Third party funding, probably rightly, has been criticized for the conflicts of interests and ethical concerns it creates within its stakeholders. Nonetheless, these conflicts can be limited with proper regulation, while the benefits of the industry do not seem to have been achieved through regulation or other instrument.

Third party funding can "ameliorate the systemic inequalities" in the justice system by allowing access to courts, [or access to arbitration], to all players.[306] In the justice system there are those that are repeat players and those that are one-shooters. The "repeat players both understand the system and

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[304] FL. BAR RULES OF PROF'L CONDUCT, https://www.floridabar.org/divexe/rrtfb.nsf/FV?Openview&Start=1&Expand=4#4

[305] Prof. Ethics Fla. Bar Op. 00-3, *supra* note 11.

[306] Steinitz, *supra* note 9, at 1301.

have the long-term perspective that allows them to game the system."[307] They might also have the capability to sustain a short-term loss in favor of a long-term gain. The "one-shooters," on the other hand, lack the same understanding and experience in the court system, and "may not have the desire of the flexibility to risk a short-term loss."[308] Third party funding through risk transfer between the repeat players and the one-shooters allows the latter to access the justice system.[309] Likewise, third party funding lends to the claimant a platform for understanding the system, thus, allowing the claimant to pursue a more aggressive and more rational legal strategy, and leveling the bargaining power of the parties.[310]

Consequently, in view of *Abu-Ghazaleh,* regulation of third party funding in Florida seems necessary and adequate. Professional regulation and formal governmental regulation are probably the best methods to regulate third party funding. Nevertheless, there are still many questions that remain to be answered such as the scope and the specific issues this regulation should have, but which fall outside the realm of this article.

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[307] *Id.*

[308] *Id.*

[309] *Id.* at 1303.

[310] *Id.*