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LITIGATION FINANCE IN THE PUBLIC INTEREST

JASON M. WILSON*

In the United States, public interest organizations play a vital role in promoting access to justice and private enforcement of the law. Nevertheless, these organizations face considerable financial constraints in litigating for their causes. While the non-profit sector and private bar provide commendable support through grants and pro bono assistance, this Comment suggests that this financing model does not adequately meet the needs of organizations that undertake expensive litigation efforts on behalf of their clients. In an effort to alleviate this burden, this Comment puts forth an alternative model of funding public interest litigation by merging social entrepreneurship with the newly revitalized practice of litigation finance. Specifically, it proposes that a litigation financing firm organize as a benefit corporation to provide funding for public interest litigation in exchange for a share of any monetary relief generated. This arrangement has the potential to pair a growing community of investors interested in making a social impact with plaintiffs of worthwhile causes, and in the process, ensure greater access to justice and private enforcement of the law. Additionally, it may invigorate a growing litigation finance sector to fund cases that it has thus far chosen not to support.

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TABLE OF CONTENTS

Introduction 386
I. The Status Quo: Underfunded Public Interest Litigation in a Private Enforcement Legal Regime 391
A. The Emergence of Public Interest Litigation and Private Enforcement of the Law 392
B. Impact Litigation and the Backlash Against Public Interest Organizations 395
C. Making Matters Worse: The Supreme Court's Limiting of Attorneys' Fees in Buckhannon 399
II. Two Possible Models for Funding Public Interest Litigation ... 400
A. The Non-Profit Donor Model 401
B. The For-Profit Litigation Finance Model 407
1. The exclusion of public interest organizations: An incentives problem 411
2. An uncertain regulatory scheme: Broader legal concerns for the industry 417
III. Social Entrepreneurship: The Middle Ground Between For-Profit and Non-Profit Solutions to Social Problems 423
A. The Benefit Corporation Model Legislation 426
B. The Delaware Public Benefit Corporation Statute 429
IV. The Legal Feasibility and Policy Benefits of a Social Enterprise Model of Financing Public Interest Litigation 432
A. Public Interest Litigation Financing as a Social Enterprise Model 433
B. The Advantages of the Delaware Public Benefit Corporation 440
1. The specific benefit as an enforcement mechanism .. 440
2. Signaling 442
3. Optional third-party assessment 442
4. The benefit report is not public 443
5. Delaware law treatment of general corporate partners ... 445
C. The Public Policy Benefits 447
1. Realigning incentives between funder and plaintiff .. 448
2. Promoting a better regulatory regime for litigation finance 451
Conclusion 453
Appendix 455
Diagram A 455
Diagram B 455

INTRODUCTION

So much of what lawyers do depends on the resources of their clients—a reality that seems obvious to practitioners today. Yet, the United States has largely failed to address, or even make inroads in, "the problem of access to justice."[1] One estimate offers a particularly bleak portrayal of the issue: out of the 45 million low-income individuals eligible for legal aid, there are only five to six thousand lawyers available to serve their legal needs.[2] Meanwhile, commentators continue to call upon the profession to make a greater pro bono commitment,[3] and current proposals aimed at expanding access often fail to provide an adequate level of reform.[4]

Nevertheless, public interest organizations play a considerable role in promoting access to justice in our legal system.[5] Whether it is through direct legal aid services or impact litigation cases, public interest organizations, by definition, "advance the interests and causes of constituencies that are disadvantaged in the private market or the political process relative to more powerful social actors."[6] The United States often recognizes such interests by embracing private enforcement of the law—that is, Congress frequently authorizes its citizens to enforce statutory rights and regulatory objectives through

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1. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 213 (2003).

2. *Id.* at 211.

3. *See* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 152 (2010) (noting that access to justice issues in the United States are often framed as an ethical failure on the part of lawyers to provide legal services to the poor but contending that a stronger pro bono commitment from practicing attorneys would do little to meet the actual demand for legal services).

4. *See* Tom Lininger, *Deregulating Public Interest Law*, 88 TUL. L. REV. 727, 729 (2014) (reviewing a number of proposals aimed at increasing access to justice but ultimately calling for reform in legal education through accredited "new 'public interest academies' [that] could offer a low-cost path for students intending to practice public interest law").

5. The term "public interest organization" raises a definitional issue. For purposes here, a "public interest organization" is a "nonprofit tax-exempt group[] that attempt[s] to use law to achieve social objectives." Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2029 (2008). This narrows the type of legal practice discussed in this article to exclude other lawyers who may try to influence policy or create social change through litigation. *See* Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 LAW & SOC. INQUIRY 62, 71–72 (2014) [hereinafter Albiston & Nielsen, *Funding the Cause*] (distinguishing public interest organizations from a broader category of "cause lawyering," which may include pro bono work in private practice and other kinds of for-profit lawyering).

6. Scott L. Cummings, *The Pursuit of Legal Rights—and Beyond*, 59 UCLA L. REV. 506, 523 (2012).

private rights of action.[7] Much of the time, public interest organizations provide the necessary legal representation for these citizens to vindicate their claims.[8]

However, public interest organizations face financial challenges that make it difficult to fully improve access to justice and promote private enforcement of the law. A number of scholars surveying the field have found that direct legal service providers lack resources,[9] and even the most well-funded groups operate with budgets that fail to allow for lasting and meaningful reform.[10] These constraints are often due to inadequate sources of funding for the organizations' activities,[11] with a large part of their budgets consumed by expensive litigation efforts.[12] This resource-constrained public interest sector,

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7. *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*] (noting that in contrast to other countries, a private enforcement regime in the United States occupies various areas of the law, including antitrust, securities, environmental, mass tort, and employment discrimination).

8. *See* Megan M. La Belle, *Patent Law as Public Law*, 20 GEO. MASON L. REV. 41, 43–44 (2012) (asserting that public interest organizations, like the NAACP and ACLU, are "the driving force behind large-scale public law adjudication," as they frequently finance and represent litigants in "litigation challenging racial segregation, restrictions on free speech, and invasions of privacy" (internal footnotes omitted)); *see also* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 66 (discussing how public interest organizations emerged with the explicit purpose to enforce private rights of action throughout the 1960s and 1970s, especially in environmental law).

9. *See* Rhode, *supra* note 5, at 2042 (identifying how "direct service providers and human rights organizations face the most obvious and painful reminders of the overwhelming demand [for legal services] and [have] limited capacity to meet it").

10. *See id.* (emphasizing survey results indicating that the "richest" public interest organizations, such as environmental groups with multimillion dollar budgets, reported financial constraints while facing large-scale global issues and well-funded opponents). For example, the President of the Natural Resources Defense Council "acknowledged that her organization was better off than others in terms of 'public and financial support, but the scale of the [environmental] problem is so much greater and the lack of a national strategy on issues like global warming is [more] appalling.'" *Id.*

11. *See* Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 649 (2009) (asserting that nearly all public interest organizations reported challenges in raising funds for their activities); *see also infra* notes 50–56 and accompanying text (attributing the sizeable reduction in public interest organizations' funding to a number of trends, with the end-result being a selective use of expensive impact litigation to enforce substantive rights).

12. *See infra* notes 69–70 and accompanying text (discussing survey findings that indicate 90% of public interest organizations bring impact litigation cases that constitute a considerable portion of their expenses).

when paired with a legal system already lacking adequate access to justice, raises the prospect that the law is enforced with much less vigor than would otherwise be expected. In turn, the financial mechanisms available to fund public interest organizations become all the more important.

Recently, the United States has seen a renewed interest in finance that is both for-profit and socially motivated. While these "social entrepreneurs" are not a unanimous or uniform group,[13] many of them agree that funding social causes is too often a purely non-profit endeavor, but also recognize that traditional business entities often focus exclusively on profit and shareholder value.[14] Instead, social entrepreneurs advocate a middle ground: socially- and profit-motivated financing for worthwhile causes through mechanisms such as crowdfunding, microfinance, social enterprise, impact investing, and the social impact bond.[15] Certainly, each solution has its own proponent in what is sometimes a competitive debate,[16] and critics often dispute the effectiveness of enforcement mechanisms.[17] Nevertheless, social entrepreneurs bring a new perspective on a range of important issues.

Thus far, however, little effort has been put towards alleviating the financial constraints faced by public interest organizations. This is

13. *See, e.g.*, Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351, 1353 (2011) (discussing how the social entrepreneurship movement is distinct, yet closely related to the corporate social responsibility movement that emphasizes transparency and corporate reporting to third parties).

14. *See, e.g.*, Dan Pallotta, *The Laws of Money and Meaning*, HBR BLOG NETWORK (Nov. 13, 2012, 3:00 PM), http://blogs.hbr.org/2012/11/the-laws-of-money-and-meaning (decrying the "false tenets" that define how the United States addresses social issues and the "either/or proposition[] [that] [e]ither you go into charity and give up money, or you go into business and give up meaning").

15. *See generally* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012) (providing an overview of the recent move towards social enterprise and the availability of financing for such entities).

16. *See, e.g.*, Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 708 (2013) (responding to Muhammad Yunus, the founder of microcredit, and his critique on social enterprise that argues the organization's social mission will inevitably become secondary to profit).

17. *See, e.g.*, Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495, 1522 (2013) (contending that social enterprises, such as benefit corporations, may abandon their social purpose because "[u]nlike charities and for-profit entities, social enterprises cannot rely on external actors to enforce their respective social missions").

somewhat surprising because the current financing model for these organizations remains dominated by the very same assumptions that social entrepreneurs call into question in other areas. For decades, the non-profit sector has been the home to the public interest practice—philanthropic foundations provide grants to various organizations, and private law firms offer a helping hand in the form of pro bono time.[18] This model, however, often comes up short in addressing the needs of public interest organizations in pursuing strategic litigation.[19] Meanwhile, for-profit litigation finance—the practice of funding the costs of litigation in return for a share in the proceeds from any settlement or judgment[20]—offers little promise to expand into public interest law as it becomes more prevalent in commercial litigation.[21] In an effort to establish a legally feasible alternative, this Comment proposes that a litigation financing firm organize as a social enterprise to provide funding for public interest litigation in return for a share of any monetary relief awarded. Such an entity has the potential to pair a growing group of impact investors interested in making a social and monetary return with claimholders of compelling cases, and in doing so, provide much-needed financing to public interest organizations. This arrangement may also go a long way towards better regulation of a growing litigation finance industry.

Part I of this Comment describes how, public interest organizations have historically provided the necessary legal representation for disadvantaged litigants to enforce private rights of action in the United States legal system. This part also describes how, despite serving this important function, these same organizations came to experience considerable financial constraints. Part II then explains that public interest organizations currently rely on a non-profit donor

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18. *See generally* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 74 (discussing how public interest organizations fund their activities through a mix of foundational grants, pro bono assistance from the private bar, and state and federal support). Often, these donors will not fund certain causes—for instance, Albiston & Nielsen explain that private law firms often sponsor fellowships that flow to anti-poverty and civil rights organizations, but not those that focus on controversial environmental issues. *Id.* at 79.

19. *See infra* notes 115–21 and accompanying text (discussing the limits of the non-profit donor model of funding public interest litigation).

20. *See The Basics*, BURFORD CAP., http://www.burfordcapital.com/litigation-finance/the-basics (last visited Dec. 21, 2014) (providing a definition of litigation financing and various different financial arrangements aimed at funding lawsuits in exchange for a monetary return).

21. *See infra* Part II.B.1–2 (contending that litigation financing firms do not pursue public interest litigation because of a lack of incentives and an uncertain regulatory regime).

model of financing public interest litigation, while an alternative for-profit model of litigation financing provides little assistance to their efforts. Part III then steps back to describe how social entrepreneurs challenge the non-profit and for-profit binary that defines how we address a variety of social issues, paying particular attention to the benefit corporation as the most likely social enterprise to provide concrete results in this endeavor. Part IV concludes by proposing a social enterprise model whereby a litigation financing firm organizes as a public benefit corporation under Delaware law with the purpose of funding public interest cases. The public policy advantages of this enterprise are explored as well.

I. THE STATUS QUO: UNDERFUNDED PUBLIC INTEREST LITIGATION IN A PRIVATE ENFORCEMENT LEGAL REGIME

Three developments are particularly pertinent to understanding the importance of public interest organizations and their financial constraints. First, at the same time as the public interest movement took hold and major civil rights legislation was enacted, the United States embraced a legal regime that relied on litigants to bring suit to enforce their rights through a private right of action.[22] Crucially, this model, as it was implemented in other statutory and regulatory frameworks, incentivized such litigation by providing attorneys' fees for those who brought successful suits.[23] Second, public interest organizations initially provided the legal representation for these litigants, but due to budgetary concerns, the organizations shifted towards bringing impact litigation as their prime means of alleviating the social ills that the private rights of action sought to alleviate.[24] Third, despite the potential for attorneys' fees to incentivize public interest organizations to bring suit, the Supreme Court limited the availability of attorneys' fees in litigation.[25] Ultimately, each of these developments contributed to today's inapposite status quo: the United States relies on private enforcement of the law, but there is a lack of available capital to incentivize the attorneys who bring such litigation.

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22. *See infra* Part I.A (detailing the history of public interest law and tracing it to the Civil Rights Movement's embrace of a private right of action).

23. *Infra* Part I.A.

24. *See infra* Part I.B (discussing the backlash against public interest organizations and their funding problems).

25. *See infra* Part I.C (detailing the Supreme Court's decision to disallow an award for attorneys' fees in cases that did not result in a court order).

A. The Emergence of Public Interest Litigation and Private Enforcement of the Law

The public interest movement in the United States began with the work of the NAACP's test case strategy employed during the 1950s.[26] By assembling financing from various donors,[27] the NAACP brought lawsuits on a number of fronts, including school desegregation and restrictive covenants.[28] By 1954, the NAACP achieved a major victory in *Brown v. Board of Education*[29] when the Supreme Court declared that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.[30] While the ruling's immediate impact was limited,[31] *Brown* served to show others that litigation "protect[ed] the rights and enlarg[ed] the power of subordinated groups, particularly when other channels of influence [were] unavailable."[32] After the early success of *Brown*, other activists formed public interest organizations that achieved a number of successes of their own.[33] Conservative advocates eventually followed this strategy, balancing what was initially seen as a liberal-dominated

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26. *See* Cummings & Rhode, *supra* note 11, at 606 (attributing the broader public interest law movement of the 1960s to the work of the NAACP Legal Defense and Educational Fund).

27. Mark Tushnet, *Some Legacies of* Brown v. Board of Education, 90 VA. L. REV. 1693, 1701 (2004) (noting that the litigation prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), was funded "by the NAACP's members, by the plaintiffs and their communities, and to a minor extent by foundation grants"). Certainly, some activist litigation efforts came earlier in the century. *See generally* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 97–100 (2002) (examining the role that the NAACP's lawyers played in formulating litigation strategies to promote social change from 1910–1920); *see also* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 63–64 (describing the "Emergent Era" of public interest organizations before 1965, which included the founding of the ACLU and the NAACP's Legal Defense Fund).

28. *See* Tushnet, *supra* note 27, at 1698 (detailing how the organization brought suits on a number of issues across different geographic regions that often caused internal friction among its lawyers).

29. 347 U.S. 483 (1954).

30. *Id.* at 495.

31. *See* Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 14 (2004) (describing how the "all deliberate speed" language of *Brown*'s follow-up litigation allowed for southern states to resist implementation and ensure *Brown*'s requirements were never fully realized).

32. Cummings & Rhode, *supra* note 11, at 606.

33. *See* Tushnet, *supra* note 27, at 1695 (chronicling the "proliferation of planned litigation campaigns" after the *Brown* decision and its successes, including the NAACP's effort to limit the death penalty, the ACLU's work on prison conditions, and welfare rights groups' campaigns to increase government assistance).

field.[34] By the 1960s and into the 1970s, a broader public interest movement existed that continues to this day.[35]

Civil rights advocates also played a role in the more defining trend of the 1960s: major federal legislation bringing about a number of protections in civil rights.[36] However, with the prospect of major federal action, such as Title VII of the Civil Rights Act[37] and its prohibition on employment discrimination, activists were also forced to grapple with how such statutory rights should be enforced.[38] In particular, policy debates over Title VII focused on whether the United States should create a government agency to bring forth lawsuits for violations of these newly conferred rights, or in the alternative, whether it should opt for a private right of action to be brought by individual litigants against those who violate the statutory proscriptions.[39] Conceptually, a private right of action can, *inter alia*, incentivize attorneys and their clients to take legal action, thereby ensuring greater enforcement of the law than a centralized agency

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34. *See* Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1224 (2005) (drawing attention to the conservative advocates who organized public interest law firms to offer an intellectual counterweight to liberal organizations that were dominating the courts).

35. Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 64.

36. *See* Tushnet, *supra* note 27, at 1714 (arguing that *Brown*'s troubled legacy may lie not in its immediate effect on desegregation in public schools but how the case served as an "early—and limited—statement" of "the Great Society's substantive liberalism," that was eventually enacted in "[t]he Civil Rights Act of 1964, the Voting Rights Act of 1965, and innumerable other statutes and administrative policies"). *But see* Susan D. Carle, *How Myth-Busting About the Historical Goals of Civil Rights Activism Can Illuminate Future Paths*, 7 STAN. J. C.R. & C.L. 167, 178–79 (2011) (arguing that the NAACP's test case strategy in *Brown* and other litigation efforts was important to the civil rights movement but not the exclusive means by which major federal legislation was eventually achieved).

37. Civil Rights Act of 1964, Pub. L. No. 88–352, §§ 701–16, 78 Stat. 241, 253–66.

38. *See* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 692 (2013) (describing how, in opposition to democrats and civil rights activists, congressional "[r]epublicans stripped the [Equal Employment Opportunity Commission] of the strong administrative powers initially proposed by advocates of the job discrimination title, and provided instead for private lawsuits with economic incentives for enforcement, including attorney fee awards for prevailing plaintiffs").

39. *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1148 (2012) (characterizing the private enforcement regime as a "conscious congressional choice," to "put into place a number of . . . statutes creating private rights of action—to help effectuate [the law's] substantive aims," all the while "explicitly reject[ing] bureaucratic enforcement regimes for the implementation of those directives" (footnote omitted)).

with limited resources.[40] Yet, at the same time, if those individual litigants or their representation lack proper resources, reliance on a private right of action can result in *less*, not more enforcement.[41] To the civil rights activists and legal advocates of the 1960s, private enforcement of Title VII could have easily meant the latter, less onerous regime.[42] Instead, Title VII embodied a hybrid solution, whereby a litigant first files at the Equal Employment Opportunity Commission, allowing the agency an opportunity to facilitate a settlement or pursue a civil action, while still preserving an employee's right to eventually bring his case to federal court.[43]

Over the next coming decades, the United States enacted a number of statutes that effectively embraced private enforcement of the law. In particular, the once skeptical civil rights activists quickly realized that a private right of action, when paired with an attorney's fee provision, can in fact go a long ways towards properly incentivizing lawyers to bring enforcement efforts on behalf of their clients.[44] Based partly on this success, Congress implemented this basic model of regulatory enforcement in various other areas of the law in the post-Civil Rights Era,[45] while also further incentivizing enforcement action through provisions that allowed for higher

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40. *See* Burbank et al., *supra* note 38, at 662–63 (reviewing literature on the public policy advantages of private enforcement of the law, which include, *inter alia*, expansion in resources, increased detection, less bureaucratic involvement, and reinforced notions of "participatory and democratic governance").

41. *See id.* at 661–62 (noting that an agency with "strong formal powers, ample resources, and leadership dedicated to vigorous enforcement" can provide distinct advantages over a private enforcement regime that is not properly incentivized).

42. *See id.* at 692 (describing how, in the employment discrimination provisions of the Civil Rights Act, activists and proponents were "initially . . . sanguine about agency implementation and dubious about the effectiveness of private enforcement of Title VII, even with attorney fee awards for prevailing plaintiffs"); *see also* Glover, *supra* note 39, at 1149 (noting that civil rights advocates wanted the Equal Employment Opportunity Commission to have cease-and-desist powers rather than rely on private litigants for enforcement).

43. *See* Burbank et al., *supra* note 38, at 688–91 (providing an overview of the Civil Right Act's Title VII statutory framework).

44. *See id.* at 693 (noting that civil rights advocates "observed levels of private enforcement that far exceeded their expectations" because, in part, the Civil Right Act's attorney's fee provision provided a necessary source of financial support that enabled public interest organizations to litigate cases and laid the groundwork for a "private, for-profit bar" that also brought enforcement actions).

45. *See id.* (asserting that public interest organizations throughout the 1970s organized to expand Title VII's enforcement model "beyond civil rights to embrace environmental, consumer protection, and 'public interest' regulation in general").

damage awards.[46] Today, the United States' use of the private right of action continues unabated, with a number of federal statutes incentivizing individual litigants to sue with the promise of attorneys' fees or high damage awards if successful. In fact, over 150 statutes provide for fees to be shifted to encourage litigants to file suit, with over 90% of actions under these statutes brought by private parties.[47]

B. *Impact Litigation and the Backlash Against Public Interest Organizations*

Integral to (and perhaps overlooked by) this private enforcement scheme were public interest organizations that offered the resources and representation necessary for individual litigants to bring suit. For a short while, the private enforcement regime embraced in the 1960s played out as it was expected to: public interest organizations represented those clients who could not afford to pay for a lawyer, and were an "institutionalized" part of the legal system.[48] By 1975, in what may have been a watershed moment for the public interest field, Justice Marshall stated that public interest lawyers "built on the [earlier] success[] of civil rights[,] . . . civil liberties," to represent not only "a broad range of relatively powerless minorities," but also the "neglected . . . interests that most of us share as consumers and as individuals in need of privacy and a healthy environment."[49] In short, public interest organizations became a crucial part of the private enforcement regime.

Yet, despite his approval of the growing public interest movement, Justice Marshall also had the forbearance to point out that the field faced an uncertain future so long as one obstacle remained readily apparent: funding.[50] This prediction was accurate; as public interest

46. *See* Glover, *supra* note 39, at 1151 (noting that a number of current statutes pair a private right of action with other incentivizing devices, such as "damage multipliers, statutory damages, [or] punitive damages").

47. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1089–90 (2007) [hereinafter Albiston & Nielsen, *Procedural Attack*]. One particularly important example is the Trafficking Victims Protection Reauthorization Act, in which Congress provided a private right of action for victims to bring a civil action in federal district court against the perpetrators of human trafficking to recover damages and reasonable attorneys' fees. *See* 18 U.S.C. § 1595(a) (2012).

48. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 66 (observing that many new public interest organizations emerged during an "expansion" era in public interest law from 1965 to 1980 as Congress increasingly embraced private enforcement of the law).

49. Thurgood Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A. J. 1487, 1487–88 (1975).

50. *Id.* at 1489.

law became increasingly more political, its funding sources became a target.[51] Federal courts across the country cut back on doctrines once utilized by these organizations to bring suit.[52] Congress enacted more restrictions on what type of litigants could be represented by Legal Service Corporations.[53] Law school clinics were also criticized for bringing what some saw as overly controversial cases.[54] Other legal doctrines made it more difficult for organizations to challenge agency action.[55] Each trend ultimately strained the budgets of public interest organizations, and by 2009, a survey of public interest organizations found that "[v]irtually all organizations report[ed] major difficulties in meeting their financial needs."[56]

These funding problems only further influenced the type of work pursued by public interest organizations. For example, Title VII employment discrimination claims—once a model for private enforcement of the law[57]—are now dramatically under-enforced because of the prohibitive expense of bringing such cases to trial.[58]

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51. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 66 (discussing the "embattled" era of public interest law throughout the 1980s and 1990s, whereby business organizations became hostile to the environmental and consumer rights lawsuits brought by public interest organizations and the Reagan Administration demonstrated "open hostility" to public interest organizations).

52. *See* Cummings & Rhode, *supra* note 11, at 607 (contending that throughout the 1980s and 1990s, "[a]n increasingly conservative federal judiciary became less hospitable to the claims of liberal public interest groups").

53. *See* Luban, *supra* note 1, at 220–22 (detailing Congress's enactments that restricted legal-services lawyers and Legal Service Corporation recipients from litigating certain cases and foreclosed representation of various types of clients). The Legal Service Corporation is "an independent 501(c)(3) nonprofit corporation that promotes equal access to justice and provides grants for high-quality civil legal assistance to low-income Americans." *About LSC*, LEGAL SERVICES CORP., http://www.lsc.gov/about/what-is-lsc#sthash.zXI39MGk.dpuf (last visited Dec. 21, 2014).

54. *See* Luban, *supra* note 1, at 236–40 (opining on the "notorious effort" by business organizations to prevent student-lawyers from bringing high-profile lawsuits after the Tulane Law School's environmental law clinic prevented a factory from being built in a predominantly African American, low-income neighborhood).

55. *See* Christopher Warshaw & Gregory E. Wannier, *Business As Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 HARV. L. & POL'Y REV. 289, 296 (2011) (analyzing the effect of the Supreme Court's standing decisions on cases brought by environmentalists and organized businesses).

56. Cummings & Rhode, *supra* note 11, at 649.

57. *See* Burbank et al., *supra* note 38, at 693 (describing how civil rights activists embraced the early private enforcement of Title VII in the 1970s).

58. *See* Stephen Churchill, *Making Employment Civil Rights Real*, HARV. C.R.-C.L. L. REV. AMICUS, Oct. 2009, at 1, 5–6, *available at* http://harvardcrcl.org/wp-content/uploads/2010/02/Churchill-FINAL.pdf (finding that the lack of

Individual plaintiffs simply cannot afford to pay an attorney with their own resources, so they often turn to public interest organizations.[59] However, these organizations cannot afford to take on every case and instead focus their efforts on bringing impact litigation,[60] class action or individual lawsuits aiming to achieve "systemic relief."[61] Importantly, impact litigation itself can be an extremely expensive undertaking and involves arranging funding from a number of different donors.[62] Thus, while public interest organizations often pursue impact litigation to enforce private rights of action and other substantive legal rights, the costs involved in these cases only further limit their ability to properly enforce the law and ensure broader reform.

Public interest organizations' greater use of impact litigation is also increasingly criticized in academia and the press. Commentators doubt litigation's ability to reform societal and systemic problems.[63] Former Chief Judge Patricia Wald, for instance, noted that public interest organizations inevitably face tough choices because of their financing troubles, not all of which have to do with the underlying

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enforcement of employment discrimination laws is due to the cost of hiring a private attorney for litigation and the unavailability of contingency fee arrangement).

59. *See* Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 145–46 (Richard B. Freeman et al. eds., 2005) (explaining that the ordinary approach of hiring a private lawyer is an incomplete strategy for enforcing employment laws in the United States).

60. *See* Churchill, *supra* note 58, at 6 (explaining public interest organizations' "widely-held view" that financial constraints require that "impact litigation" be pursued over individual cases); *see also* Jolls, *supra* note 59, at 163 (discussing that public interest organizations "typically focus their energies on a small number of impact-type cases, often at the appellate level of the judicial system").

61. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1130 n.268 (2001) (defining impact litigation). It is important to note that the term "impact litigation" is often viewed as distinct from "service work" which "refers to the individual and perhaps more routine case" brought by direct legal service providers. *Id.* While this Comment focuses on impact litigation, opening up funding for litigation would also conceivably allow for more routine service work by these organizations.

62. *See, e.g.*, *infra* notes 97–104 and accompanying text (discussing the funding arrangements and cost involved in bringing *Wal-Mart Stores, Inc. v. Dukes*, an impact litigation case, to trial).

63. *See generally* Cummings & Rhode, *supra* note 11, at 607–08 (reviewing the criticisms of public interest litigation that contend courts lack the power to enforce wide scale reform and litigation detracts from the political process that can bring broader reform).

merits of the case.[64] Others raise concerns—many present since the *Brown* litigation[65]—that the interests of the public interest lawyer may not always align with the complicated objectives of the client.[66] Not all academics agree with that premise, however, arguing that lawyers have a defensible role in serving broader interests at stake in the legal process.[67] In response to this debate, public interest organizations broadened the scope of their efforts to include grassroots organizing and legislative lobbying.[68] Nevertheless, litigation remains vital to the goals of public interest organizations today[69]—in fact, one recent survey found that "[n]inety percent of surveyed organizations bring impact cases, and nearly half of organizations . . . devote at least 50% of their efforts to such work."[70]

In short, public interest organizations and their litigation efforts cannot be divorced from the larger private enforcement regime in the United States. Yet, it should be equally clear from their recent

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64. *See* Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3, 10 (1995) (arguing a public interest practice involves "[j]udgment-calls on litigation made under financial constraints often involve the least elevated of concerns: what one's staff can do best, which judge will rule on the case, or how much publicity the case will generate for the project").

65. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976) (discussing the accountability issues in the context of the NAACP's desegregation campaign and how the organization's goals differed from the plaintiff-clients); *see also* Tushnet, *supra* note 27, at 1697–98 (criticizing the NAACP's planned litigation campaign as "flawed from the outset" because "plaintiffs lose control of their cases as soon as they are filed").

66. *See* Michael Grinthal, *Power with: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25, 31 (2011) (arguing that the public interest lawyers' strategies in class action and impact litigation "have been criticized both for failing to hold . . . lawyers accountable to the[ir] concerned constituencies, and for leaving those constituencies as marginalized as they were prior to the litigation, though perhaps materially better off").

67. *See* Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 7, at 678–79 (noting that "our legal system has long accepted . . . the concept of the plaintiff's attorney as an entrepreneur who performs the socially useful function of deterring undesirable conduct . . . . [A]lthough our law publicly expresses homage to individual clients, it privately recognizes their limited relevance in this context").

68. *See* Cummings & Rhode, *supra* note 11, at 611, 616 (contending that public interest organizations now realize that litigation must be used "in tandem" with other strategies to encourage support for their cause, as demonstrated by the gay rights movement's recent "legal and non-legal advocacy").

69. *See* Rhode, *supra* note 5, at 2048 (finding that over the last three decades the percentage of legal work pursued by public interest organizations, including direct services to litigants, fell only from 60% to 51%, as legislative work, research, education, and media increased).

70. *Id.*

history that the availability of funding for their operations directly influences their ability to properly serve this important role in our legal system.

C. Making Matters Worse: The Supreme Court's Limiting of Attorneys' Fees in Buckhannon

Despite the crucial role that already underfunded public interest organizations play in providing legal representation to litigants in the United States' regime of private enforcement, the Supreme Court limited the availability of attorneys' fees for these organizations in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services.*[71] In *Buckhannon*, the Supreme Court addressed the "fee shifting" provisions of two statutes—the Fair Housing Act[72] and the Americans With Disabilities Act[73]—that allowed for a "prevailing party" in litigation to collect attorneys' fees.[74] Until the Court's decision, courts often ruled that the "prevailing party" language included not only those litigants who obtained a judgment or consent decree from the court, but also those litigants who were able to "achieve[] the desired result because the lawsuit brought about a *voluntary* change in the defendant's conduct."[75] In *Buckhannon*, the Supreme Court dismissed this "catalyst theory," holding that such a ruling "allows an award where there is no judicially sanctioned change in the legal relationship of the parties."[76] The Supreme Court also ruled out concerns that rejecting the "catalyst theory" would push defendants to "unilaterally moot[] an action before judgment in an effort to avoid an award of attorneys' fees," or "deter plaintiffs with meritorious but expensive cases from bringing suit."[77] The Court determined such arguments to be "speculative and unsupported by any empirical evidence."[78]

The *Buckhannon* case directly impacted public interest organizations that were already financially constrained. Fee-shifting provisions incentivize litigants to take advantage of the private rights

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71. 532 U.S. 598 (2001).
72. Pub. L. 90-284, 82 Stat. 81 (1968).
73. Pub. L. 101-336, 104 Stat. 327 (1990).
74. *Buckhannon Bd. & Care Home*, 532 U.S. at 601. These "fee shifting statutes" are exceptions to the "American Rule," which asserts that litigants should pay their own legal expenses absent explicit language in the statute. *Id.* at 602.
75. *Id.* at 601–02 (emphasis added).
76. *Id.* at 605.
77. *Id.* at 608.
78. *Id.*

of action found so prominently throughout the United States' statutory law.[79] Indeed, the provision of attorneys' fees was one of the prime reasons civil rights activists in the 1960s went along with a private enforcement regime in the first place.[80] But after *Buckhannon* limited the ability to collect attorneys' fees under these statutes, public interest lawyers could not earn back the considerable expenses they accrued in litigating many of these cases.[81] This, in turn, deterred parties from reaching settlements[82] and had an overall "chilling effect" on public interest litigation.[83]

II. TWO POSSIBLE MODELS FOR FUNDING PUBLIC INTEREST LITIGATION

Faced with such internal resource constraints, a public interest organization may choose to pursue impact litigation or otherwise support a litigant exercising a private right of action by securing some form of funding from a third party. Currently, public interest organizations rely on donations or foundational grants for most of

79. *See* Albiston & Nielsen, *Procedural Attack*, *supra* note 47, at 1089–90 (arguing that fee-shifting statutes encourage litigants to bring cases that vindicate "the broader public interest").

80. *See* Burbank et al., *supra* note 38, at 693 (explaining that activists eventually embraced private enforcement of the law because it was properly incentivized and encouraged the private bar and public interest organizations to bring suit).

81. *See* Luban, *supra* note 1, at 244–45. Professor Luban provides a particularly interesting correspondence with a public interest lawyer to illustrate the effect of *Buckhannon* on public interest litigation:

> Buckhannon's significance can't be overstated. True example: We've been litigating fiercely a longstanding dispute with an agency. We have just received a letter—after years of litigation mind you—saying, in essence, "you're right, we're wrong, we will change our policy to address your concerns." No judicial order will or now can be entered because the case will be moot. . . . I have no hope of getting fees here post-Buckhannon, though we have, even using [the statute's] low rates, probably $40,000 in fees in the case. That is a big chunk of my budget. We see this kind of pattern: lengthy litigation, and at some point, capitulation, time and again. Up until now, using a catalyst theory, we could often get fees in these cases . . . . Now we have no chance. I can't tell you how dispiriting this is for us.

Id. (quoting David Vladeck, Public Citizen Litigation Group).

82. Albiston & Nielsen, *Procedural Attack*, *supra* note 47, at 1121.

83. *See id.* at 1120–21 (describing the results of their empirical study indicating that the most impacted by *Buckhannon* were those organizations that "engage in impact litigation, litigate against government actors, bring class actions, [or] work in the environmental, civil rights, or poverty areas").

their financial support ("the Non-Profit Donor Model").[84] Much less frequent is the scenario where a public interest organization turns to a specialized, *for-profit* litigation financing firm ("the For-Profit Model"). These two models of funding public interest litigation, and the respective limits of each as a financing solution, are explored below.

A. *The Non-Profit Donor Model*

The non-profit donor model of funding public interest litigation is the norm for most organizations today.[85] Under this arrangement, public interest organizations form as non-profit organizations with tax-exempt status.[86] By no means does this status prevent the organization from charging attorneys' fees for their work[87]—in fact, a number of legal aid services are now experimenting with charging below-market rates for their services.[88] The problem, however, is that most of the public interest organization's clients simply cannot pay

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84. *See infra* notes 93–95 and accompanying text (providing an overview of the non-profit donor model, whereby foundations provide grants to public interest organizations that then rely predominantly on those funds to carry out their legal activities).

85. While not the focus of this Comment, some public interest organizations also organize as for-profit "public interest law firms," but these organizations also experience budgetary issues as well. *See* Cummings & Rhode, *supra* note 11, at 624–25 (noting that public interest law firms often have limited staff, operate under financial constraints, and face well-funded opposition that force them to pursue only cases that award high fees). Nevertheless, public interest law firms do litigate in the public interest by taking on cases that generate larger damage awards that can then be put towards less profitable but more cause-oriented cases. *See* Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 6 (2012) (providing a case study of a public interest law firm that funds "higher yield 'bread and butter cases,'" such as employment discrimination cases, in order to subsidize a higher risk, but more cause-orientated case in the human rights field).

86. *See generally* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 74 (discussing the "institutionalized model" of public interest law whereby most organize as nonprofit 501(c)(3) tax-exempt organizations).

87. *See* Rev. Proc. 92-59, 1992-2 C.B. 411, §§ 4.02, 5.01–5.02 (stating that a public interest organization "may accept attorneys' fees in public interest cases if such fees are paid directly by its clients," provided that such fees do "not exceed the actual cost incurred in each case" and the organization does not "withdraw from the case because the litigant is unable to pay the contemplated fee"). These IRS revenue procedures are "guidelines" issued by the agency to ensure that public interest organizations maintain a "charitable character" and therefore properly receive tax-exempt status. *See id.* § 1.

88. *See, e.g.*, Michael Zuckerman, *The Utah Lawyers Who Are Making Legal Services Affordable*, ATLANTIC (Aug. 7, 2014, 12:02 PM), http://www.theatlantic.com/business/archive/2014/08/the-utah-lawyers-who-are-making-legal-services-affordable/375717 (discussing a public interest organization that does not provide its services for free but instead chooses to charge clients on a "sliding scale" based on their incomes).

for legal services,[89] let alone afford the costs associated with a protracted and resource-intensive impact litigation effort. Furthermore, even if the public interest organization does receive attorneys' fees from a client, it must not jeopardize its tax-exempt status by running afoul of IRS rules governing such compensation.[90]

Instead, public interest organizations often pursue funding from philanthropic or government sources. Some organizations collect membership dues, receive government funding, or raise donations from private individuals.[91] Others may turn to a fellow non-profit to provide additional funds to the public interest organization.[92] More often than not, the public interest organization will rely heavily on the financial support of foundations.[93] In most instances, this foundational support will come in the form of a grant that helps cover the costs of litigation, attorneys' fees, and the organization's broader advocacy efforts.[94] In this arrangement, the foundation makes payments directly to the public interest organization, which agrees to abide by the terms of the grant in exchange for the funds.[95]

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89. *See supra* note 2 and accompanying text (noting that 45 million low-income Americans are eligible for legal aid).

90. *See generally* Rev. Proc. 92-59, 1992-2 C.B. 411, § 4.01–.05 (establishing guidelines for public interest organizations that engage in litigation and accept attorneys' fees from either a client or defendant, including requirements that the organization report all recovered fees, limit the amount of fees accepted, and decline such fees if the "organization believes the litigants have a sufficient commercial or financial interest in the outcome of the litigation to justify retention of a private law firm").

91. *See generally* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 76 (providing survey results indicating that private contributions account for about fifteen percent of public interest organizations' budgets, with membership dues, fundraising, and attorneys' fees each roughly constituting only a surprising five percent share of their overall funding).

92. *See, e.g.*, *About Us*, IMPACT FUND, http://impactfund.org/?page_id=534 (last visited Dec. 21, 2014) (noting the non-profit's "Grant Making Program awards funding to public interest lawyers to advance costs in systemic impact litigation").

93. *See* Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 75–76 (finding that foundations provide the greatest amount of support to public interest organizations while federal and state funding is becoming increasingly important).

94. *See* Cummings & Rhode, *supra* note 11, at 628 (providing the results of a recent survey indicating that a growing portion of a public interest organization's legal work is funded through grants from foundations).

95. *See, e.g.*, *Types of Grants*, FORD FOUND., http://www.fordfoundation.org/grants/types-of-grants (last visited Dec. 21, 2014) (defining a grant as a "commitment by the foundation to make payments to an organization," that ensures "grantee autonomy over management of the funds" but also requires the grantee to agree to terms and conditions that further the foundation's purpose). For example, in 2014, the Ford Foundation provided $1.3 million in a grant to the NAACP Legal Defense

Interestingly, a public interest organization may also pursue a foundation's support by obtaining a program-related *investment*[96] ("PRI") in its litigation effort. A recent impact litigation effort illustrates how this may work. In *Wal-Mart Stores, Inc. v. Dukes*,[97] three workers, representing a class of 1.5 million Wal-Mart employees, brought a discrimination lawsuit against the retailer under Title VII of the Civil Rights Act, seeking injunctive and declaratory relief, as well as damages for back pay.[98] The plaintiffs were represented by two public interest organizations—the Impact Fund and Equal Rights Advocates ("ERA")—as well as several private law firms.[99] Despite this coordinated effort, the Impact Fund and ERA faced considerable costs in litigating the case.[100] The Rosenberg Foundation, a non-profit that provides grants to public interest organizations, stepped in and provided $500,000 in "ongoing support to ERA to continue its role as lawyer and public interest voice in the case."[101] Notably, the foundation did not merely donate the money in the form of a grant; it also provided a PRI by agreeing to guarantee a loan that the Sisters of Mercy of the Americas, a "socially responsible invest[or]," made to the Impact Fund.[102] Under this arrangement, if the plaintiffs were successful, the loan would be repaid.[103] On the other hand, if the plaintiffs lost the case, the Rosenberg Foundation would cover the cost of the loan.[104] In this fashion, the Rosenberg Foundation and Sister of Mercy of the Americas orchestrated an investment—rather

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and Education Fund for "[a]dvocacy, [l]itigation and [r]eform" *See NAACP Legal Defense and Educational Fund, Inc.*, FORD FOUND., http://www.fordfoundation.org/grants/grantdetails?grantid=121111 (last visited Dec. 21, 2014).

96. Program-related investments ("PRI") are defined as "investments made by foundations to support charitable activities that involve the potential return of capital within an established time frame. PRIs include financing methods commonly associated with banks or other private investors, such as loans, loan guarantees, linked deposits, and even equity investments in charitable organizations or in commercial ventures for charitable purposes." *Knowledge Base*, GRANTSPACE, http://www.grantspace.org/Tools/Knowledge-Base/Funding-Research/Definitions-and-Clarification/PRIs (last visited Dec. 21, 2014).

97. 131 S. Ct. 2541 (2011).

98. *Id.* at 2547.

99. *See id.* at 2546 (providing list of counsel).

100. *See The Rosenberg Foundation: Supporting a Class Action Against Wal-Mart*, ALLIANCE MAG., Dec. 2008, at 48, 48 (promoting the public interest organization's role in the *Dukes* litigation and detailing the Rosenberg Foundation's investment in the case).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

than merely a grant—that hinged on the success of an impact litigation effort.

Ultimately, the Supreme Court ruled against the plaintiffs in *Dukes* by decertifying the class.[105] Nevertheless, as detailed in an *Alliance Magazine* article, this novel funding arrangement enabled the Impact Fund to cover the "significant costs of bringing [the] landmark case to trial."[106] Moreover, Wal-Mart felt pressured enough by the litigation to make changes to their corporate policy by raising pay for female workers and providing healthcare benefits.[107] Thus, while the ruling itself is controversial, the financial arrangement behind the litigation reveals the potential for a socially-motivated entity to finance an ongoing impact litigation effort to achieve social goals.

PRIs, however, are anything but common in the traditional non-profit donor model of funding public interest litigation. This, in many ways, is due to an uncertain regulatory apparatus. Under current tax law, a foundation like the Rosenberg Foundation must spend 5% of its funds to maintain its tax-exempt status and avoid scrutiny from the Internal Revenue Service.[108] To fulfill this obligation, a foundation is left with two options—either it can provide a traditional grant in furtherance of its charitable endeavor, essentially giving the money away with no *monetary* return, or it can make an investment in "for-profit ventures with the potential for a return on [its] money and recirculating it for [its own] charitable purposes."[109] However, in an effort to keep foundations from taking on too much risk, the foundation faces a 10% excise tax if it makes any investment that "jeopardize[s] the carrying out of any of its exempt [purposes]."[110] PRIs, however, work as an exception to that

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105. Wal-Mart Store, Inc. v. Dukes, 131 S. Ct. 2541, 2552, 2561 (2011).

106. *See The Rosenberg Found.*, *supra* note 100, at 48.

107. *Id.* (touting the litigation's impact prior to the Supreme Court's ruling by noting that Wal-Mart reworked its pay system, increased health benefits, raised compensation for female employees by $400 million per year, and adopted a new job posting process, all of which encouraged other competitors to alter their policies).

108. *See* 26 U.S.C. § 4942(e)(1) (2012); *see also* Lloyd Hitoshi Mayer & Joseph R. Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387, 396 (2014) (discussing how private foundations fulfill distribution obligations under § 4942 through PRIs in nonprofit and for-profit entities).

109. Tara Fitzgerald Urich, *Business Organizations in the 21st Century: A Look at New Legal Forms for Business that Enhance Social Enterprise*, 23 S. L.J. 329, 332. For a more in depth review of the IRS's recent guidance on program related investments in the context of a social enterprise, see Esposito, *supra* note 16, at 683.

110. 26 U.S.C. § 4944(a)(1); *see* Cassady V. Brewer, *A Novel Approach to Using LLCs for Quasi-Charitable Endeavors (a/k/a "Social Enterprise")*, 38 WM. MITCHELL L. REV. 678, 711 (2012) (noting that these investment provisions were included in the "Tax

rule, allowing a foundation to make an investment so long as it is in line with the foundation's charitable purpose.[111] Such PRIs have unique advantages over grants in that they make a monetary return, but unfortunately it is not clear what actually qualifies as a PRI.[112] Furthermore, if a foundation makes a PRI later found to be outside of the foundation's purpose, then that foundation may face a number of harsh consequences.[113] Given this uncertainty, it is not surprising that what the Rosenberg Foundation did in *Dukes* was the first PRI in the Foundation's history.[114]

Broadly speaking, the non-profit donor model is further limited in its ability to provide adequate funding for public interest organizations in a number of other ways. First, because a public interest organization often organizes as a non-profit organization, it cannot make distributions to its shareholders.[115] This, in turn, limits the capital available to public interest organizations to those that want to donate funds and excludes any investors in the equity of the

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Reform Act of 1969 to curb abusive or extremely risky investment-related activities undertaken by private foundations").

111. *See* 26 U.S.C. § 4944(c) (stating that "investments, the primary purpose of which is to accomplish one or more of the purposes described in § 170(c)(2)(B), and no significant purpose of which is the production of income or the appreciation of property, shall not be considered as investments which jeopardize the carrying out of exempt purposes"). Specifically, § 170(c)(2)(B) of the Internal Revenue Code sets out that a foundation must be "organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals." *Id.* § 170(c)(2)(B).

112. *See* Esposito, *supra* note 16, at 683–84 (discussing the vagueness in the Internal Revenue Service's guidance on program-related investments).

113. *See* Cassady V. Brewer & Michael J. Rhim, *Using the 'L3C' for Program-Related Investments*, TAX'N EXEMPTS, Nov./Dec. 2009, at 11, 12–13 (noting that if a foundation makes a PRI that does not satisfy the IRS requirements, then a possible excise tax may be imposed or the foundation's tax-exempt status may be revoked).

114. Rosenberg Found., *supra* note 100, at 48.

115. *See* Brewer, *supra* note 110, at 695. Importantly, Professor Brewer points out just how limited the distribution requirements are on non-profits:

> [N]onprofit status does not permit any type of equity participation in the growth and enterprise value of the organization. Reasonable compensation and bonuses may be paid to employees, but nonprofits have no owners and hence all net earnings remain inside the nonprofit for use in fulfilling the mission of the organization. Upon liquidation of a nonprofit, the net proceeds must be distributed to another nonprofit or to the government.

Id. (footnote omitted).

organization.[116] Second, while the public interest organization may turn to the private bar to fill any gap in funding, reliance on pro bono commitments raises issues of its own.[117] Third, when a public interest organization exhausts its own resources and turns to a foundation in hopes of securing a grant or PRI, it will likely not find a participant as willing as the Rosenberg Foundation was in *Dukes*.[118] Rather, foundations typically prefer alternative ventures to make their impact and may lack the enthusiasm for protracted and lengthy impact litigation.[119] When foundations *do* support a public interest organization in an impact litigation case, they often lack the legal expertise to properly target their efforts.[120] Furthermore, foundations may be hesitant to make use of PRIs because of the considerable tax-planning costs and uncertainty surrounding such investments.[121] In short, the non-profit donor model of funding public interest litigation offers a limited pool of capital, lacks the expertise and focus of a dedicated financing operation, and works under an extensive yet uncertain regulatory regime.

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116. *See id.*; *see also supra* note 94 and accompanying text (explaining that public interest organizations rely in large part on philanthropic support from foundations to supplement a large portion of their budgets).

117. *See* Cummings & Rhode, *supra* note 11, at 622–23 (describing how public interest organizations increasingly rely on the pro bono work of large law firms, but that these same firms often lack the will to bring cases against corporations, as well as the resources and expertise to pursue a litigation effort as a piece of a larger campaign effort for social change).

118. *See, e.g.*, Aaron Glantz, *Foundations Weighing Their Options After Wal-Mart Suit*, BAY CITIZEN (June 20, 2011, 8:19 PM), https://www.baycitizen.org/news/law/foundations-pull-plug-wal-mart-suit (reporting that many of the foundations and donors supporting the case pulled funding after the plaintiffs lost the certification battle at the Supreme Court, leaving the litigants with the money already donated by Rosenberg).

119. *See* Rhode, *supra* note 5, at 2056 (conveying survey responses that indicate public interest organizations have "particular problems with foundations," many of which do not fund litigation efforts, lack expertise in public interest litigation, or otherwise appear more interested in supporting those issues with "measurable outcomes").

120. *See* Cummings & Rhode, *supra* note 11, at 628 (characterizing foundations and philanthropic donors as "strikingly unstrategic" in their donations, as "[m]any operate with a 'spray and pray' approach, which spreads assistance on multiple projects with the hope that something good will come of it").

121. *See* Esposito, *supra* note 16, at 684 (noting that the confusion on how PRIs are taxed have led to a reluctance on the part of foundations to utilize the arrangement).

B. The For-Profit Litigation Finance Model

While certainly not the norm, a public interest organization could resort to funding from a for-profit litigation financing firm. Litigation financing[122] is the practice by which "a third party (other than the lawyer in the case) [gains] a financial stake in the outcome of [a] case in exchange for money paid to a party in the case."[123] This form of financing has become increasingly popular in litigation today.[124] While small funders have provided modest financing in personal injury cases for a number of years,[125] the practice is broadly defined to encompass a more recent (and controversial) trend, by which well-capitalized institutional players provide a variety of different financing arrangements to litigants and businesses.[126] It is this part of the litigation finance industry that has garnered particular attention as of late,[127] as specialized litigation financing firms enter into the market to provide financing in major commercial lawsuits, including, among others, antitrust and intellectual property disputes.[128] This new industry promises to grow in the foreseeable

122. Alternative names for litigation finance include: "third-party litigation financing," "alternative litigation financing," or "litigation funding" with various acronyms for each. This article will refer to "litigation finance" and "litigation financing firms" to describe the recent move towards institutions that are exclusively devoted to funding litigation.

123. COMM'N ON ETHICS 20/20, AM. BAR ASS'N, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 5 (2012) [hereinafter COMM'N ON ETHICS, INFORMATIONAL REPORT].

124. *Id.* at 1.

125. *See* STEVEN GARBER, RAND. CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS, 8–9 (2010) (reviewing the different segments of the litigation finance industry and separating funders who provide small amounts of funds to plaintiffs in personal tort injury lawsuits from larger funders that finance commercial litigation cases).

126. *See* COMM'N ON ETHICS, INFORMATIONAL REPORT, *supra* note 123, at 8 (describing a "very different segment of the [litigation-financing] market involv[ing] public and private funds that seek to invest in large, complex commercial lawsuits, including contract, intellectual property, and antitrust litigation"); *see also How We Help*, BURFORD CAP., http://www.burfordcapital.com/how-we-help/#sthash.ZcfoaD8U.dpuf (last visited Dec. 21, 2014) (stating that Burford provides "straightforward funding of the legal fees and expenses for a case (or a portfolio of cases) to a wide and varied suite of corporate finance solutions for businesses and law firms").

127. *See, e.g.*, *Investing in Someone Else's Lawsuit*, N.Y. TIMES (Nov. 15, 2010), http://www.nytimes.com/roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit (exploring the various issues involved in specialized litigation financing and providing a number of differing viewpoints on the practice).

128. *See, e.g.*, *How It Works*, JUR. ASSET MGMT., http://juridicamanagement.com/litigation-finance/how-it-works.html (last visited Dec. 21, 2014) (stating that Juridica provides funding to "corporate claimants" but does not fund personal injury, product liability, mass tort, or class actions); *see also* COMM'N ON ETHICS,

future—one of these specialized firms, Gerchen Keller Capital, amassed $260 million for the sole purpose of investing in complex litigation in early 2014,[129] while another firm, Burford Capital ("Burford"), achieved a 46% return on its litigation investments across its entire portfolio.[130]

A litigation financing firm operates by raising capital and then selecting cases that will likely be profitable. The firm incorporates as a for-profit company that specializes strictly in funding litigation efforts.[131] Unlike a traditional law firm, this entity is not governed by the Model Rules of Professional Conduct,[132] which allows it to have a board of directors and raise capital from a number of non-lawyer shareholders and outside investors.[133] Many of these investors are high net worth individuals or traditional investors such as investment funds.[134] Some firms are even publicly traded.[135] Once capitalized,

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INFORMATIONAL REPORT, *supra* note 123, at 8 (noting that firms finance antitrust lawsuits and intellectual property cases).

129. William Alden, *Litigation Finance Firm Raises $260 Million for New Fund*, N.Y. TIMES (Jan. 12, 2014, 10:33 PM), http://dealbook.nytimes.com/2014/01/12/litigation-finance-firm-raises-260-million-for-new-fund/?_php=true&_type=blogs&_r=0.

130. *See* Jonathan T. Molot, *The Feasibility of Litigation Markets*, 89 IND. L.J. 171, 180 (2014) (noting, however, that this high return rate is "net of losses, but . . . took time to generate and do[es] not reflect uncommitted capital still in reserve").

131. *See, e.g.*, *Who We Are*, BURFORD CAP., http://www.burfordcapital.com/who-we-are (last visited Dec. 21, 2014) (describing the company as "the world's largest provider of investment capital and risk solutions for litigation").

132. *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1294 (2011) [hereinafter Steinitz, *Whose Claim*] (stating that "finance firms are not subject to the constraints imposed by the canons of professional responsibility"). Nevertheless, practicing attorneys who represent clients funded by litigation financing firms are governed by ethical rules. *See* COMM'N ON ETHICS, INFORMATIONAL REPORT, *supra* note 123, at 39 (concluding that "[l]awyers must adhere to principles of professional independence, candor, competence, undivided loyalty, and confidentiality when representing clients in connection with [litigation finance] transactions").

133. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1294 (contrasting litigation financing firms from law firms because litigation financing firms "can take on matters that conflict, can solicit clients, and have nonlawyers in management positions," as well as access financing from outside investors, join in the "ventures of their clients," and receive "alternative forms of compensation such as equity in intellectual property or exploration and drilling rights").

134. GARBER, *supra* note 125, at 8.

135. *See* Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 130 (2013) (explaining that Juridica Investments and Burford Capital, two firms publically traded on the London Stock Exchange, often invest in U.S. commercial litigation with approximately $200 million in managed assets); *see also* Molot, *supra* note 130, at 178 (explaining that Burford raised capital in London (but also invested

the litigation financing firm, often under the management of finance professionals and individuals with litigation experience,[136] analyzes cases to determine whether the underlying claims of the prospect case have merit.[137] If the plaintiff passes this initial due diligence process, "the financing company will advance amounts to cover attorneys' fees and the other costs of litigation," which "typically are made to the claimant or its outside litigation counsel, in return for a percentage of any eventual recovery."[138] In many respects then, a specialized litigation financing firm acts as a "middle man" that pools capital from a variety of investors and shareholders and then advances funds to plaintiffs in exchange for a share in the litigation proceeds.[139]

Nevertheless, the details on the contracts between these various players are relatively scarce.[140] To combat this uncertainty, Professor Steinitz launched an online project in an effort to create a model litigation finance arrangement.[141] In particular, Professor Steinitz suggests that litigation financing firms organize like venture capital firms by, among other things, establishing limited partnership agreements with their investors.[142] Under this arrangement, investors would be limited partners who earn a return once the case has

in United States litigation) because investors there "understood the [litigation finance] model and thought that it would work just as well in the United States as in the United Kingdom—indeed, potentially better given the sheer size of the U.S. market").

136. *See* Molot, *supra* note 130, at 178 (detailing Burford Capital's due diligence process whereby its legal team evaluates the underlying facts and merits of a case, applicable laws, possible forums, the lawyers hired (or "propose[d] to[be] hire[d]") by the client, and the parties' monetary resources).

137. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, Formal Op. 2011-2 (2011) [hereinafter Formal Op. 2011-2].

138. *Id.*

139. Alden, *supra* note 129 (discussing a litigation financing firm that originally invested in other companies who fund cases on behalf of investors but eventually "decided to 'cut out the middleman' and set up a firm to invest in the claims themselves").

140. *See* GARBER, *supra* note 125, at 8 n.3 (explaining that a lack of public information on litigation financing firms and their contracts is due to an absence of any obligation to make their activities or contracts public).

141. *See generally* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, http://litigationfinancecontract.com (last visited Dec. 21, 2014) (providing various posts and discussions on the litigation finance contract and how the industry should organize itself). The project is now complete, culminating in the release of Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711 (2014) [hereinafter Steinitz & Field, *A Model Litigation Finance Contract*].

142. Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 500–01 (2012) [hereinafter Steinitz, *Litigation Finance Contract*].

generated an award.[143] The litigation financing firm would then acts as the general partner, entering into contracts with claimholders on behalf of the limited partnership's funds as "a money management company that employs professionals with specialized expertise."[144] The litigation financing firm then makes money by earning a "small management fee" on the assembled pool of capital, and earns a larger share of any proceeds if the plaintiff's litigation is successful.[145] This structure and method of compensation separates passive investors from the management of the litigation financing firm, allows for a fund to be established for a portfolio of cases, and ultimately "aligns the [litigation financing firm's] interests with those of the investors."[146] As between the litigation financing firm and the plaintiff, another contractual relationship is established that consists of transferring a share of the proceeds of the case to the financing firm in exchange for the advance of funds.[147]

As can be imagined, litigation finance garners considerable media attention and academic research. Pointedly, a number of commentators have questioned whether litigation funding is really a "boon for access to justice," or just disguising the "commodification of litigation."[148] The financing firms are particularly adamant about the former argument, asserting that if the practice is allowed to fully flourish in the United States, non-recourse lending will flow from investors to disadvantaged claimholders with meritorious cases and provide greater access to the judicial system.[149] Some also argue that litigation financing has the potential to support the private enforcement legal regime, while leveling out the bargaining dynamics between individual plaintiffs and "repeat players" such as corporations.[150] While all seemingly possible in the abstract, critics

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143. *Id.*
144. *Id.* at 496.
145. *Id.* at 500.
146. *Id.*
147. *Id.* at 503.
148. Kalajdzic et al., *supra* note 135, at 95.
149. *See, e.g.*, *The Basics*, BURFORD CAP., http://www.burfordcapital.com/litigation-finance/the-basics (last visited Dec. 21, 2014) ("Open access to civil justice is a fundamental characteristic of any meaningful legal system, but the onerous costs of pursuing cases can put the courts out of reach to many. By making it economically feasible to bring worthy claims, litigation finance allows parties to pursue cases that might otherwise have proved too costly.").
150. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1336 (describing how, in theory, litigation financing firms can provide the resources for litigants to bring suit, and "[i]n the process . . . promote not only private enforcement of environmental and

respond that the litigation-financing industry has simply not lived up to its promise: instead of fostering access to the legal system, litigation financing has been criticized as favoring already favored commercial parties,[151] and providing little assistance to disenfranchised groups for which access to justice is a very real problem.[152] This reality is driven, in part, by two trends in the industry: the exclusion of public interest litigation and an uncertain regulatory regime.

1. The exclusion of public interest organizations: An incentives problem

Much of the litigation finance industry's deficiencies in providing access to justice can be attributed to its *exclusion* of public interest organizations and their clients. This is in many ways a problem of incentives. First, litigation financing firms, as they currently operate, are concerned with profit.[153] This is not surprising, because these specialized firms have investors and shareholders to whom they owe a duty to maximize profits[154]—the so-called "[s]hareholder

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human rights standards, but also engage in rule change in areas where the funder may have a similar, or even greater, incentive than the plaintiffs to play for rules").

151. *See* Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 610 (2012) (arguing that litigation financing firms "have little incentive to finance cases where plaintiffs face significant barriers to justice" because "investors face the highest potential returns in the types of cases where the underlying substantive law creates risk and cost imbalances that already give plaintiffs the advantage").

152. *See* Nicholas Dietsch, Note, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 710 (2011) (finding that the growth of litigation finance has not resulted in increased access to justice for low-income plaintiffs as firms fund primarily commercial litigation or otherwise wait for courts to further clarify their position on the practice).

153. *See* GARBER, *supra* note 125, at 23–24. In particular, Garber describes how the litigation financing firms, which he calls alternative litigation finance firms ("ALFs"), are primarily focused on earning a return for their own investors:

> ALF suppliers offer capital to ALF demanders in hopes of making money—business profits in the cases of ALF companies and investment income in the cases of other ALF suppliers. And, it seems, ALF suppliers such as investment funds are willing to accept substantial risks associated with particular investments in exchange for opportunities to achieve unusually high rates of return on their capital. ALF companies seek to profit in an environment in which they wish to please their investors.

Id.

154. Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 739 (explaining that litigation financing firms have a duty to maximize profit for their investors but lack any fiduciary duty to the plaintiffs).

maximization norm" that pervades in other contexts.[155] For this very reason, firms tend to go where the money lies—by funding *commercial* lawsuits with the largest potential for an award or large settlement.[156] Public interest organizations, on the other hand, are not predominantly concerned with profit;[157] they often bring impact litigation with the precise goal of obtaining injunctive and equitable relief.[158] They may also pursue cases against the government with the goal of obtaining a change in policy,[159] or may even find value in a case that is eventually lost.[160] Thus, litigation financing firms have little incentive to fund the cases public interest organizations bring, many of which lie in the controversial environmental, employment discrimination, and civil rights areas of law.[161] It does, however, beg

155. *See* Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215, 216 (2013) (explaining the so-called "shareholder wealth maximization" norm that serves as "the positive foundation and normative goals of corporate law" which prioritizes "the interests of shareholders and discount[s] the interests of nonshareholder constituents of corporations including employees, creditors, suppliers, and customers").

156. *See supra* notes 125, 152 and accompanying text (explaining that litigation financing firms fund cases in the *commercial* realm to the exclusion of poor and disadvantaged parties while small funders provide financing to individual litigants in tort law suits).

157. Albiston & Nielsen, *Funding the Cause*, *supra* note 5, at 62–63 (distinguishing public interest organizations from the "business-like model of modern private law offices" because their practice often includes clients who do not pay for their representation, involves cases that may often be inherently risky, and involves non-traditional activities such as "community outreach and education, talking with the media, organizing coalitions, [and] participating in demonstrations").

158. *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 303–04 (2010) [hereinafter Coffee, *Litigation Governance*] (explaining that public interest organizations, such as the ACLU, Legal Defense Fund, and Sierra Club, often pursue injunctive or equitable relief but may also seek monetary damages when representing litigants in class action lawsuits).

159. *See* La Belle, *supra* note 8, at 43–44 (explaining that public interest organizations often represent litigants in public law adjudication).

160. *See* Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817, 821 (2013) (arguing that losing a case can have more concrete benefits in drawing attention to social problems, the inadequacy of current solutions, and serve as a mobilizer for broader efforts); *supra* note 107 and accompanying text (touting the impact made by the public interest organization and foundation that funded the *Dukes* litigation despite losing the case at the Supreme Court).

161. Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 739–40 (explaining that the duty to maximize profit will push funders to pursue cases that emphasize "monetary remedies over non-monetary ones such as injunctive relief, declaratory relief, a public apology, a change of an internal policy, or a change in the law"); *see also* Coffee, *Litigation Governance*, *supra* note 158, at 342 (explaining that litigants in environmental law, employment discrimination, and civil rights class

the question whether the litigation finance industry can ever make good on its promise to provide access to justice and private enforcement of the law while it systematically excludes public interest organizations from its client base.

Additionally, public interest organizations may avoid for-profit litigation financing because of concerns that the industry may compromise the public interest organization's attorney-client relationships. Quite often, litigation financing firms want to be able to select the plaintiff's attorney in the cases in which they invest.[162] They also may want some say in whether to settle a case.[163] By doing this, funders gain *control* over a lawsuit in order to "monetize" their investment for shareholders and investors.[164] For a public interest organization that owes a duty to provide independent and objective counsel to its clients,[165] however, this is particularly worrisome. First, ceding representation of the case to another lawyer of the financing firm's choosing may complicate the public interest organization's strategy in what is usually a smaller piece in a larger coordinated effort of grassroots organizing and advocacy.[166] Second, as discussed *supra*, the public interest organization's clients will quite often make claims in areas of the law that "involve *bundled* interests, both monetary and nonmonetary, underlying large and complex legal

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actions often seek injunctive and equitable relief but the litigation financing firm is only concerned with obtaining a monetary award).

162. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1323 n.195 (recognizing that funders and plaintiffs commonly debate who will select counsel).

163. *See* Steinitz, *Litigation Finance Contract*, *supra* note 142, at 484 (acknowledging concerns that litigation financing may limit a client's control over a case, especially regarding decisions on whether to settle a case).

164. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1323 ("[F]inanced clients . . . will pay a price in the form of diminished control over their case—from choice of attorney to settlement. The argument against litigation funding based on the client's diminished control is, in essence, one of separation of ownership and control between the client and the funder." (footnote omitted)). Some funders have explicitly claimed that their companies do not apply pressure to the plaintiff's control of the case. *See* Molot, *supra* note 130, at 178 (describing how Burford acts a "passive provider" in funding cases by not attempting to influence litigation strategy, settlement negotiation, or the attorney-client relationship). *But see* Kalajdzic et al., *supra* note 135, at 137 (arguing that the potential still exists for firms to control litigation despite firms publically disclaiming any interest in doing so).

165. *See* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2014) (stating that a lawyer must exercise independent professional judgment when representing a client).

166. *See supra* note 68 and accompanying text (explaining that as a result of criticism on public interest litigation organizations have resituated their legal efforts in a broader campaign of advocacy and organizing).

claims."[167] Litigation financing firms, in comparison, only seek an eventual share in the *monetary* proceeds of a settlement and may therefore pressure public interest organizations to settle early for a monetary amount, while a public interest organization may want to pursue the case further to obtain the benefits of *non-monetary* relief for its client.[168] In fact, the financing firm may be under pressure from its own investors and shareholders to settle the case and distribute a return.[169] Conversely, a public interest organization or client that is more concerned with a large damage award is now freed from "the risk of a loss, [and] may now have an incentive to resist a reasonable and rational early settlement in favor of a late settlement or even a risky and expensive trial."[170] Either way, the litigation financing firm, motivated by maximizing profits, may pull on the loyalty owed by the public interest lawyer to his client, and push him or her to pursue strategies that are not in line with the best interests or objectives of the client.[171] Indeed, litigation financing firms have hesitated to take an interest in funding class actions, where public interest organizations stand to earn larger damage awards, until these ethical concerns facing the industry are resolved.[172] In short, so long as the interests between the litigation financing firm remain at odds with the public interest organization and their client, the firm is incentivized to seek control of the litigation to mitigate the risks of a poor monetary return.[173] For a public interest organization that

167. Steinitz, *Whose Claim*, *supra* note 132, at 1322.

168. *Id.* at 1321 (maintaining that "[n]onmonetary remedies, such as injunctions, declaratory relief, and specific performance, become unattractive either because a plaintiff has lost interest or because the funder pressures for a simple monetary award instead of a socially desirable remedy such as injunction or clean-up").

169. Kalajdzic et al., *supra* note 135, at 137 (asserting that litigation financing firms have investors and shareholders who may hope to achieve a higher return by pushing for an early settlement of a case); *see also supra* note 153 and accompanying text (explaining the various players in the industry and how the firms seek profit for their own investors).

170. Steinitz, *Litigation Finance Contract*, *supra* note 142, at 489–90.

171. *See* Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms when the Deal Breaks Down*, 66 VAND. L. REV. 1831, 1851 n.44 (2013) (analogizing these conflict-of-interest problems in the funder-client relationship to the insurance context).

172. *See* Kalajdzic et al., *supra* note 135, at 134 (explaining that litigation financing firms have not embraced class actions and have stuck to funding commercial litigation cases because of fears of being portrayed as either stirring up litigation or causing ethical problems in the attorney-client relationship).

173. *See* Sebok & Wendel, *supra* note 171, at 1853 (asserting that a litigation financing firm's lack of control is "not a risk per se," so long as the investor remains

brings litigation to make an *impact*, this is an untenable solution to its financial challenges.

Nevertheless, there is at least one rare, albeit telling, example of a litigation financing firm advancing funds to a public interest organization in the environmental context. In 1993, an indigenous population brought suit in Ecuador, as well as New York, claiming that Texaco—which was later bought by Chevron—polluted the Amazon rainforest during its oil extraction from 1964 to 1992.[174] After their case was dismissed in New York, the plaintiffs, aided by an American attorney named Steven Donzinger, secured a judgment against Chevron in Ecuador for $17.2 billion.[175] In an effort to enforce this sizable judgment, the Ecuadorean plaintiffs, acting through the efforts of Donzinger, sought funding from Burford Capital, a specialized, New York-based litigation-financing firm.[176] In turn, Burford brought in outside litigation counsel from a Washington, D.C.-based law firm.[177] The agreement and relationship between these parties was described in an extensive Washington Post article, indicating that Burford originally invested $15 million in the litigation in exchange for 5.545% of any recovery and a minimum return of $55.5 million.[178] Eventually, however, revelations came to light about the underlying scientific report on the Ecuadorean environmental damage, leading to a Chevron-brought lawsuit against Steven Donzinger for racketeering.[179] This litigation led to disclosure of Donzinger's case files, which revealed a litigation financing contract set up between Burford, a non-profit—"Friends of the Defense of the Amazon"—and the individual plaintiffs.[180]

"confident that the claim owner's interests aligned with his own," allowing the investor to forgo control of the litigation and "free ride off of the litigant's efforts").

174. Chevron Corp. v. Naranjo, 667 F.3d 232, 235 (2d Cir. 2012).

175. *Id.* at 234–36.

176. *See* Steve Mufson, *Why Chevron Is Suing One of D.C.'s Most Powerful Lobbying Firms Over . . . the Amazon Jungle?*, WASH. POST (July 2, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/why-chevron-is-suing-one-of-d-c-s-most-powerful-lobbying-firms-over-the-amazon-jungle (providing a description of the lawsuit).

177. *Id.*

178. *Id.*

179. *Id.*

180. *See* Daniel Fisher, *Litigation-Finance Contract Reveals How Investors Back Lawsuits*, FORBES (June 7, 2011, 7:12 AM), http://www.forbes.com/sites/danielfisher/2011/06/07/litigation-finance-contract-reveals-how-investors-back-lawsuits (explaining the background of the *Chevron* litigation and the federal court ruling that eventually resulted in the public disclosure of the contract between Burford and the plaintiffs).

The contract between Burford and the Ecuadorean plaintiffs raises a number of interesting questions on how to best structure a litigation finance agreement. A full provision-by-provision analysis of this arrangement is available,[181] but two provisions of the contract are particularly striking and relevant to this Comment. First, the contract rejected any fiduciary duty[182] between the litigation financing firm and the plaintiff.[183] This is notable, because a fiduciary duty would have the potential to curtail a litigation financing firm's excessive influence over attorneys or exercise of control over litigation.[184] Second, the contract's definition of "award," from which Burford would eventually have taken a share, includes any monetary, as well as *nonmonetary* relief, such as a cleanup or prevention measure.[185] The

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181. *See generally* Steinitz, *Litigation Finance Contract*, *supra* note 142, at 465–79 (providing a case study of the Burford's contract with the plaintiffs in the Chevron–Ecuador case and comparing its provisions to a venture capital's firm investment).

182. A fiduciary duty is the highest contractual relationship that can be embraced by parties. It is defined as "[a] duty of utmost good faith, trust, confidence, and candor owed by a fiduciary . . . to the beneficiary" and "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person . . . ." BLACK'S LAW DICTIONARY 581 (9th ed. 2009).

183. Steinitz, *Litigation Finance Contract*, *supra* note 142, at 469 n.40 (explaining the contract's provisions that explicitly reject any joint partnership between the funder and the plaintiff, including a fiduciary duty); *see also* TRECA FIN. SOLUTIONS (AS THE FUNDER) & CLAIMANTS, FUNDING AGREEMENT § 16.4 (2010) [hereinafter TRECA AGREEMENT], *available at* http://amlawdaily.typepad.com/chevron_fundingagreement.pdf ("The Parties agree that nothing in this Agreement shall give rise to or be construed to create a fiduciary, lawyer-client, agency or other relationship between the Parties or between their counsel, notwithstanding the information or observations or opinions that may be shared between them.").

184. Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 740 (explaining that "[t]he best tool to minimize the conflicts created by profit concerns . . . in favor of the plaintiff is a fiduciary duty[,]" but that "[c]reating such a duty would not be a panacea *as it would be offset by the funders' duty to its shareholders*" (emphasis added)).

185. *See* Steinitz, *Litigation Finance Contract*, *supra* note 142, at 468–69 (summarizing and quoting the contract's definition of award); *see also* TRECA AGREEMENT, *supra* note 183, sched. 3.

> For the avoidance of doubt, "Award" shall include (without limitation) any cash or non-cash value or benefit conveyed to, or any cash or non-cash obligation imposed on or accepted by, any person or entity in connection with the Claim or the resolution or termination thereof, *including (without limitation) the value of, or any obligation to perform or conduct, any investigation or other assessment (including (without limitation) to assess risk to any human or the environment), clean-up, remediation, or mitigation or prevention or measures arising from or relating to the Claim* (including (without limitation) any adverse impacts underlying the Claim).

TRECA AGREEMENT, *supra* note 183, sched. 3. (emphasis added).

effect of this provision was clear—"if a court awards remedial measures for the benefit of the harmed community, the [non-profit and individual plaintiffs as claimholder] must pay the monetary value of the Funder's portion of such remedial measures."[186] This reveals another possible issue with the for-profit litigation financing firm's involvement in public interest litigation. Even if the prospect of an award is large enough for the financing firm to get involved in a given case, it might fund only the litigant's pursuit of monetary relief, leaving any non-monetary relief to come out of the plaintiffs' share of the proceeds.[187] In many ways then, a litigation financing firm's interest in the case begins and ends with its potential for profit.

2. An uncertain regulatory scheme: Broader legal concerns for the industry

The for-profit litigation finance industry has also failed to fund public interest organizations (and provide access to justice) because it operates under an uncertain regulatory regime. This uncertainty is due to two primary issues: (1) champerty, a common law doctrine that purports to *prohibit* third-parties from financing and profiting from litigation; and (2) concerns that disclosures to the financing firm by the plaintiff's attorney may waive protection of the attorney-client privilege and the attorney-work product doctrine.

Champerty is a common law doctrine that places the enforceability of litigation contracts in considerable doubt. "A champertous agreement is one in which an owner of a legal claim and a third, unrelated party agree to divide amongst themselves the proceeds of a litigation, if successful."[188] In many ways, champerty is a holdover of the past—it originated in English feudal society as a way of preventing wealthy individuals from burdening courts with a less wealthy person's claims to land in return for a slice of that land if successful.[189] Nevertheless, the doctrine came to the United States through the common law as various states sought to prevent

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186. Steinitz, *Litigation Finance Contract*, *supra* note 142, at 470.

187. *See* Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 740 n.120 (explaining that "Burford's investment in the Chevron–Ecuador dispute . . . penalized plaintiffs for receiving clean-ups rather than funds by requiring them to pay the funder for its pro-rated share of such a remedy").

188. Steinitz, *Litigation Finance Contract*, *supra* note 142, at 486.

189. *See* COMM'N ON ETHICS, INFORMATIONAL REPORT, *supra* note 123, at 10; *see also* Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 503 (2013) (explaining that the feudal-era champerty doctrine was established to deal with the practice whereby a litigant, backed by a wealthy third party, would sue for property rights that he did not own but nevertheless extract a favorable verdict by overwhelming the court system).

"speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of [a] superior bargaining position."[190] The doctrine laid dormant for a number of years until civil rights opponents, partly in response to the success of the *Brown* litigation, attempted to use the doctrine to prohibit the NAACP from soliciting clients and financing lawsuits for its test case strategy.[191] Ultimately, the Supreme Court stepped in to protect the NAACP's right to solicit plaintiffs for potential litigation under the First Amendment.[192] However, the Court later held that the prohibition on champerty, as applied to a lawyer's broader "procurement of remunerative employment [was] only marginally affected with First Amendment concerns" and "falls within the State's proper sphere of economic and professional regulation."[193]

As it applies today in a number of states, champerty completely bars a litigation financing firm's agreement with the plaintiff. For example, the Minnesota Court of Appeals refused to enforce a litigation financing agreement and refused to abandon the champerty doctrine even if other devices protected litigants.[194] Similarly, the Supreme Court of Ohio specifically found a contract champertous and unenforceable because it "prolong[ed] litigation and reduce[ed] settlement incentives."[195] The Ohio court also found it particularly disturbing that the disputed agreement explicitly stated that the financing company should earn "substantial profit" on the contract.[196]

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190. Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997).

191. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1287 (contending that the champerty doctrine in the United States was used by opponents of civil rights to "stifle social progress"); *see also* Comment, *The South's Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 YALE L.J. 1613, 1613 (1963) (detailing a number of southern states that in the 1950s "suddenly discovered a need to reinvigorate and extend existing champerty" with a "flurry of legislation"). Interestingly, the comment asserts that this was done in part to respond to civil rights groups' successful litigation. *Id.* at 1613.

192. *See* NAACP v. Button, 371 U.S. 415, 419, 437 (1963) (holding that a Virginia statute banning "the improper solicitation of any legal or professional business," as applied to the NAACP's legal efforts, constituted a violation of "the Fourteenth Amendment by unduly inhibiting protected freedoms of expression and association").

193. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 459 (1978).

194. Johnson v. Wright, 682 N.W.2d 671, 680 (Minn. Ct. App. 2004) ("Although there are safeguards in place to alleviate the potential evils associated with champertous agreements, respondent fails to provide a compelling reason to completely abandon the doctrine.").

195. Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 221 (Ohio 2003).

196. *Id.*

Nevertheless, a number of jurisdictions have limited the doctrine to allow the litigation financing industry to establish itself in the United States. This trend, however, is not uniform.[197] In Massachusetts, for instance, the state's highest court explicitly questioned whether champerty "continues to serve any useful purpose" and struck down the doctrine in light of an agreement where an individual fronted the costs of litigation.[198] The court reasoned that other mechanisms exist to address concerns with litigation financing agreements, such as the prohibition on excessive fees, misconduct sanctions, regulations against frivolous lawsuits, and contract "doctrines of unconscionability, duress, and good faith, [which] establish standards of fair dealing between opposing parties."[199] A number of states have since followed suit, and in 2011, the ABA signaled its agreement with this reasoning.[200]

In other states, champerty still reigns but applies narrowly. In a White Paper on the subject, the ABA summarized how champerty currently impact litigation finance, and found that a number of states allow funders to take a share of litigation proceeds so long as the arrangement is not:

> (1) clearly promoting "frivolous" litigation (e.g. a lawsuit . . . that does vindicate a genuine legal interest of the party bringing the suit);
>
> (2) engaging in "malice champerty," which is the support of meritorious litigation motivated by an improper motive (e.g. prima facie tort in NY); [or]
>
> (3) "intermeddling" with the conduct of the litigation (e.g. determining trial strategy or controlling settlement).[201]

New York is particularly illustrative of this approach to the champerty doctrine.[202] There, the champerty doctrine is part of the

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197. *See* Kalajdzic et al., *supra* note 135, at 134–35 (noting that while Australia has largely done away with champerty, the United States has not conclusively answered whether champerty is implicated by litigation finance and only eliminated the "antiquated" doctrine in some states).

198. Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997) (finding that the overall "decline of champerty . . . is symptomatic of a fundamental change in society's view of litigation[,] [turning] from a social ill . . . [that] should be minimized to a socially useful way to resolve disputes" (internal quotation marks omitted)).

199. *Id.* at 1226–27.

200. *See* COMM'N ON ETHICS, INFORMATIONAL REPORT, *supra* note 123, at 9 (concluding that because "existing ethical and legal obligations of lawyers and their clients . . . insure that litigation be conducted in good faith and non-frivolously, it is unclear why the historical concerns of the common law would justify today placing special burdens on litigation funded by third parties").

201. COMM'N ON ETHICS 20/20, AM. BAR. ASS'N, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE 12 (2012) [hereinafter COMM'N ON ETHICS, WHITE PAPER].

state's statutory law.[203] Under interpretation of this statute, New York courts find an agreement champertous if a claim is "acqui[red]" with the "primary purpose" to bring a lawsuit.[204] "Willingness to resort to litigation, however, will not render a transaction champertous if the primary purpose of the transaction is to enforce a legitimate claim . . . ."[205] For this reason, New York does not prohibit litigation financing firms from funding a case in exchange for a share of any monetary recovery *so long as* the case is "already in existence" and the litigant does not lose control of the case.[206] Tellingly, no court in the state has yet held that a litigation finance contract amounts to champerty,[207] but the doctrine's applicability remains anything but clear.[208]

Lastly, a litigation financing firm's involvement in a case may implicate waiver of attorney-client privilege and the protection of the attorney-work product doctrine. Attorney-client privilege protects

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202. *See generally* Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 725–28 (reviewing champerty case law in New York).

203. N.Y. JUD. LAW § 489 (McKinney 2004) ("No person . . . shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, *with the intent and for the purpose of bringing an action or proceeding thereon* . . . ." (emphasis added)).

204. SB Schwartz & Co. v. Levine, 918 N.Y.S.2d 171, 172 (App. Div. 2011).

205. *Id.* at 173. New York courts also maintain that a transaction will not constitute champerty "if the party obtaining the claim . . . does so as part of a larger transaction and the intent to commence litigation is incidental to that larger transaction." *Id.*

206. Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 727; *see also* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 117–18 (2011) (detailing the New York approach to champerty and reviewing cases). In particular, Professor Sebok explains that the New York doctrine "is concerned almost exclusively with contracts made *before* the lawsuit is filed." *Id.* at 118. This rule serves as a "rough proxy" for indicating that the litigant "truly desired to have his or her right vindicated, and was not influenced by the encouragement of a stranger (whose encouragement may have taken the form of a bribe)." *Id.* at 118–19. Professor Sebok goes on to question why this matters so long as the underlying claims have merit. *Id.* at 119.

207. Formal Op. 2011-2, *supra* note 137.

208. For example, one court implied that a plaintiff's adding of new claims to an amended complaint after a financing agreement could constitute champerty. *See* Richbell Info. Servs., Inc. v. Jupiter Partners, 723 N.Y.S.2d 134, 138 (App. Div. 2001) (noting that after a claim was assigned to another party an "amended complaint [was] filed . . . [that] was more than three times as long as the original complaint and alleged 21 new causes of action and that the assertion of new claims against defendants based on the assignment was exactly what [section] 489 was intended to avoid"); *see also* Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 727 n.65 (characterizing the case as "potentially problematic for litigation financiers regardless of deal structure").

information shared by the plaintiffs with their attorneys, but it is possibly waived if later disclosed to third parties.[209] Attorney-work product doctrine protects the lawyer's case materials and impressions of the case from discovery,[210] but that protection can fail if materials are disclosed in a way that risks the information getting into the hands of a litigant's opponents.[211] Litigation financing firms, however, need information about the litigation to initially invest and monitor their investment in the case.[212] For this reason, there are concerns that a lawyer's communications with litigation financing firms could risk waiver of the attorney-client privilege if there is not a "common-interest" between the firm and the plaintiff.[213] Like the champerty doctrine, the application of this "common-interest exception" to the relationship between funders and the plaintiff is inconsistent across many jurisdictions.[214] However, the doctrine of

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209. *See* COMM'N ON ETHICS, WHITE PAPER, *supra* note 201, at 35 (stating that information shared with a person other than a "privileged person" waives the protection of the attorney client privilege and opens such information up to discovery). This discovery rule is closely related but separate from the duty of confidentiality owed by lawyers to their clients. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2014) (prohibiting a lawyer from disclosing information relating to representation unless informed consent is obtained, it is implied in order to represent the client, or an exception applies, such as the potential for risk of harm or death).

210. *See, e.g.*, FED. R. CIV. P. 26(b)(3)(A)–(B) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative . . . [if] the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.").

211. *See* Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083, 1107 (2012) (explaining that disclosure of attorney-work product can waive protection "if the client or lawyer or a representative of either discloses the materials voluntarily to the adversary or discloses the materials in a way that substantially increase[s] the opportunities for potential adversaries to obtain the information" (internal citations and quotation marks omitted)).

212. *See* Formal Op. 2011-2, *supra* note 137 (explaining that the risk of waiver of the attorney-work product doctrine and attorney-client privilege occurs when a litigation financing firm requests information in its due diligence process or includes contract provisions that require information or documents to be shared by the lawyer with the firm). *But see* Molot, *supra* note 130, at 186 (recognizing that a "good funder" will use his own judgment to analyze a case because attorneys "have strong incentives to paint as rosy a picture of the merits as possible").

213. *See* COMM'N ON ETHICS, WHITE PAPER, *supra* note 201, at 36 (suggesting that a court may reason that the information is privileged because the funder itself is a "privileged party" in addition to the attorney and client, or that there is a "common interest" between the funder and the plaintiff in the litigation's outcome).

214. *See, e.g.*, Devon It, Inc. v. IBM Corp., No. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (holding that attorney-client privilege is not waived when

attorney work product has generally been thought of as providing greater protection to attorneys sharing their thoughts and materials regarding an ongoing case with a third-party.[215] As such, an attorney who shares work product with a litigation funder likely does not waive protection so long as the he enters into a nondisclosure agreement with the funder and any other parties who receive such information.[216]

In sum, the current for-profit litigation finance industry provides little recourse to the public interest organization in its litigation efforts. As detailed above, this can be seen as an issue of misaligned incentives: litigation financing firms, motivated by profit and the shareholder maximization norm, are simply not interested in public interest litigation that emphasize non-monetary relief and symbolic victory over large damage awards.[217] Additionally, public interest organizations may shy away from for-profit litigation financing because the funder's monetary interests may lead to associated pressures that do not always align with the organization's social impact goals and the plaintiff's often mixed interests.[218] Even when a case offers a large enough prospect of an award, a litigation financing firm may still disclaim any interest in non-monetary relief or a

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plaintiff's lawyer provided documents to litigation financing firm because of a "common interest" between the plaintiff and funder). *But see* Miller UK Ltd. v. Caterpillar, Inc., No. 10 C 3770, 2014 WL 67340, at *13 (N.D. Ill. Jan. 6, 2014) (finding litigation financing firm, who, "for their part, were interested in profit[s]," were not in a "common legal interest" with the plaintiffs and that "materials shared with any actual or prospective funders lost whatever attorney-client privilege they might otherwise have enjoyed").

215. *See Miller*, 2014 WL 67340, at *16 (finding that the application of the attorney-client privilege and work-product doctrine varies in the case law because the objective of the attorney-client privilege is to protect communication between the lawyer and his client while the work product doctrine protects the lawyer's internal thoughts and strategy from opposing litigants).

216. *See* Giesel, *supra* note 211, at 1087 (concluding that "materials that evaluate litigation, even if created in the [litigation-finance] setting, are likely protected by the work-product doctrine" so long as the litigation financing firm "enters into a binding nondisclosure agreement with regard to any shared materials" and does not take actions that risk disclosing the information to the opponent in the case). The *Miller* court also recently embraced this reasoning. *See Miller*, 2014 WL 67340, at *18 (suggesting that a "confidentiality agreement may be a sufficient but not a necessary element of a finding of nonwaiver" of the attorney work-product protection in the litigation finance context).

217. *See supra* notes 153–60 and accompanying text (discussing the litigation financing firms' incentives are not properly aligned with public interest organizations due to its strictly for-profit motivations).

218. *See supra* notes 162–72 and accompanying text (providing an overview of the type of control that a litigation financing firm may seek over a piece of litigation to ensure a monetary return).

fiduciary duty to the plaintiff.[219] Lastly, the for-profit industry operates under some considerable uncertainty because of the uneven application of the champerty doctrine and lingering questions regarding attorney-client privilege or the doctrine of attorney work product.[220] The question, then, becomes whether there is a middle ground between the for-profit and non-profit donor models of funding public interest litigation, and whether any such solution may mitigate some of the issues that inhibit the for-profit litigation finance industry from facilitating access to justice and private enforcement of the law.

III. SOCIAL ENTREPRENEURSHIP: THE MIDDLE GROUND BETWEEN FOR-PROFIT AND NON-PROFIT SOLUTIONS TO SOCIAL PROBLEMS

Social entrepreneurship is a recent trend developing in the United States that "tak[es] root in a fertile space between the for-profit and nonprofit worlds."[221] While the term itself is meant to include any effort that creates a social benefit,[222] it is widely associated with the critique on for-profit firms that elevate shareholder value over wider concerns for stakeholders (i.e. customers and employees) and the environment.[223] Finding that corporate responsibility efforts have largely failed,[224] social entrepreneurs employ, *inter alia*, two strategies in their effort to widen the concerns of corporate governance and alleviate social ills—impact investing and social enterprise.[225] Impact investing, as its name implies, is an investment practice whereby individuals set up "institutional funds [that] take into account nonfinancial and social benefit considerations when screening potential investment opportunities by either avoiding companies

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219. *See supra* notes 174–87 and accompanying text (detailing two provisions of a litigation finance contract between a funder and public interest organization).

220. *See supra* notes 209–16 and accompanying text (providing a short description of state of the law of champerty, attorney work-product, and attorney-client privilege in the context of litigation finance).

221. Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 342 (2009) (internal quotation marks omitted).

222. Esposito, *supra* note 16, at 647.

223. *See supra* note 155 and accompanying text (discussing the shareholder maximization norm).

224. *See* Esposito, *supra* note 16, at 656 (asserting that corporate responsibility reporting, which involves third-party certification that the firm is providing social benefits, "is increasingly recognized for what it is—a public relations tool that pays lip service to increased corporate transparency but does little, if anything, to alter the corporate decision-making process").

225. *Id.* at 647.

engaged in socially or environmentally harmful activities or actively seeking companies engaged in positive pursuits."[226] It may also include more traditional investors who take greater notice of the social consequences of the businesses in which they invest,[227] or see investment opportunity in areas once occupied exclusively by non-profits.[228] Regardless, impact investing promises to be a growing industry in the United States.[229]

If impact investing refers to the source of socially conscious financing, social enterprise may well refer to the recipient of such funding. Specifically, social enterprises are newly formed business entities that aim to achieve not solely shareholder maximization but instead "'double-bottom-line' (financial and social) or 'triple bottom-line' (financial, social, and environmental) results."[230] Interestingly, this move has resulted in large part from the frustrations associated with the "for-profit/non-profit dichotomy" of today's business entities, namely, that for-profit firms are generally expected to pursue shareholder maximization, and non-profits can have broader social goals but may not distribute profits to investors.[231] Consequently, state legislatures recently passed a number of laws that allow for incorporation of social enterprises, including the flexible benefit corporation, low-profit limited liability company, and the benefit corporation.[232]

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226. *Id.* at 647–48.

227. *See* Briana Cummings, Note, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 583, 602–13 (2012) (noting that traditional investors fearing ramifications of "poor social or environmental performance, or wanting to promote social change as an end in itself, are increasingly screening corporations' nonfinancial performance" (footnotes omitted)).

228. *See* Antony Bugg-Levine et al., *A New Approach to Funding Social Enterprises: Unbundling Societal Benefits and Financial Returns Can Dramatically Increase Investment*, HARV. BUS. REV., Jan.–Feb. 2012, at 3, 4 ("An increasing number of social entrepreneurs and investors are coming to realize that social enterprises of all sorts can also generate financial returns that will make them attractive to the right investors.").

229. *See* Esposito, *supra* note 16, at 643–44 (noting a 13% increase in assets backed by "sustainable" and "socially responsible investing," as well as an estimated 10 year profit potential of $183 to $667 billion on these investments); *see also* Murray, *supra* note 15, at 48 (indicating traditional investment firms and high net worth individuals believe impact investing will grow in the coming years).

230. Kelley, *supra* note 221, at 339.

231. Esposito, *supra* note 16, at 644; *see also* J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, The Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 90 (2012) (explaining the roots of social enterprise lie in the limits of the non-profit solution to social problems).

232. *See generally* MORRISON FOERSTER & TRUSTLAW CONNECT, WHICH LEGAL STRUCTURE IS RIGHT FOR MY SOCIAL ENTERPRISE? A GUIDE TO ESTABLISHING A SOCIAL

The benefit corporation, in particular, illustrates how statutory law attempts to find a balance between the for-profit and social goals of social enterprise. State law mandates that a benefit corporation embrace a public benefit broader than profit-maximization[233] but also permits the entity to earn a monetary return and raise capital like a traditional corporation.[234] The investors may be either traditional investors or impact investors.[235] To ensure that the benefit corporation does not abrogate its responsibility to pursue a public benefit, the benefit corporation has two principal features: it "expands [a director's] fiduciary duty to require consideration of nonfinancial interests,"[236] and imposes requirements on the corporation to report on its performance in achieving its public benefit.[237]

Much of the literature elevates the benefit corporation as offering the most potential for businesses pursuing a social benefit.[238] Not only is the entity already embraced in a number of states,[239] but the

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ENTERPRISE IN THE UNITED STATES 76 (2013) (providing an overview of traditional corporate forms as well as possible social enterprises and hybrid ventures).

233. *See generally* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 839 (2012) (asserting that one of the defining characteristics of a benefit corporation is the obligation to create a "general public benefit," which contrasts with traditional corporations that may "form for any lawful purpose, but have no explicit purpose requirement").

234. *See Benefit Corp and Nonprofits*, BENEFIT CORP INFO. CENTER, http://benefitcorp.net/what-makes-benefit-corp-different/benefit-corp-and-nonprofits (last visited Dec. 21, 2014) (recognizing that while non-profits receive donations, a benefit corporation allows for equity or debt investment that earns a return for investors).

235. *See* William H. Clark, Jr. et al., The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public 28 (Jan. 18, 2013) (unpublished manuscript), *available at* http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf (noting that benefit corporations can attract capital in the same manner as for-profit corporations, but may also appeal to the growing community of impact investors looking for a social return on their investments).

236. Clark & Babson, *supra* note 233, at 838.

237. *See id.* at 842 (indicating that benefit corporations require reports on social performance in order to ensure proper monitoring of directors).

238. *See, e.g.*, Esposito, *supra* note 16, at 707 (denoting the benefit corporation as "the most promising entity" because it allows for a "mixture of specifically defined social or environment corporate purposes, transparency, accountability, flexibility, and limited liability for social entrepreneurs"). *But see* Callison, *supra* note 231, at 92 (arguing that the benefit corporation is inadequate for many corporations and must be more flexible to accommodate different business strategies).

239. *See State by State Legislative Status*, BENEFIT CORP INFO. CENTER, http://www.benefitcorp.net/state-by-state-legislative-status (last visited Dec. 21, 2014)

benefit corporation has also followed a relatively uniform approach due to the organizational efforts of B Lab.[240] This non-profit organization has pushed for states to adopt model legislation as demand for social enterprises has increased.[241] While some have criticized the limitations of the benefit corporation as laid out in the Model Benefit Corporation Legislation (the "Model Legislation" or "Model"),[242] this Comment does not delve deeply into this debate. Instead, it considers how such an entity may help alleviate funding issues in a specific legal practice. As this Comment charts a path forward for social entrepreneurs looking to invest in public interest litigation, a review of the main provisions of the Model Legislation and the Delaware Public Benefit Corporation is useful.

A. *The Benefit Corporation Model Legislation*

The Model Legislation makes clear that the benefit corporation is a status that overlays the traditional for-profit corporation, subject to the traditional corporate laws of the state adopting its provision.[243] To become a benefit corporation, a newly formed corporation must state in its articles of incorporation that it is a benefit corporation;[244] existing corporations may become a benefit corporation through an amendment process or by merging with an existing benefit corporation.[245]

Central to the Model is the requirement that a benefit corporation, *in addition* to fulfilling its purpose under the state's traditional incorporation statute, must have the "purpose of creating a general benefit."[246] This general benefit is broadly defined as a "material

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(providing a frequently updated list of the recent states that have embraced the benefit corporation and those with pending legislation). As of this article, the benefit corporation has been embraced by twenty-seven states with pending legislation in thirteen other states. *Id.*

240. *See The Non-Profit Behind B Corps*, B LAB, http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Dec. 21, 2014). B Lab describes itself as a "501(c)3 nonprofit that serves a global movement of entrepreneurs using the power of business to solve social and environmental problems." *Id.* B Lab also has a certification called the B Corporation, which is distinct from the Model Legislation and the corporate entity embraced by state statues. *Id.*

241. MODEL BENEFIT CORP. LEGISLATION (2012); Callison, *supra* note 231, at 98 (remarking that state statutes derive from B-Lab's Model Legislation).

242. *See* Callison, *supra* note 231, at 98, 104–05 (discussing the weaknesses of the B-Lab Model).

243. MODEL BENEFIT CORP. LEGISLATION § 101(c).

244. *Id.* § 103.

245. *Id.* § 104.

246. *Id.* § 201(a).

positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation."[247] The Model further provides an extensive definition as to what constitutes a "third-party standard."[248] Importantly, in addition to pursuing the required general benefit, a benefit corporation *may* elect to include in its articles of incorporation the identification of "one or more specific public benefits that it is the purpose of the benefit corporation to create."[249] These "optional" specific benefits are further defined under the Model, providing a non-exhaustive list that the benefit corporation may adopt.[250]

In an effort to ensure the benefit corporation carries out its general and specific benefit, the Model mandates that the board of directors, committees, and individual officers "shall *consider* the effects of any action or inaction" on not only the interests of shareholders of the benefit corporation, but also various stakeholders—including the customers as "beneficiaries of the general public benefit or specific public benefit," the environment, the community in which the business is located, and the employees of the company.[251] Directors who fail to create the general benefit

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247. *Id.* § 102.

248. *Id.*

249. *Id.* § 201(b).

250. *Id.* § 102. The Model's possible specific benefits include:

> (1) providing low-income or underserved individuals or communities with beneficial products or services; (2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business; (3) protecting or restoring the environment; (4) improving human health; (5) promoting the arts, sciences, or advancement of knowledge; (6) increasing the flow of capital to entities with a purpose to benefit society or the environment; and (7) conferring any other particular benefit on society or the environment.

Id.

251. *Id.* § 301(a)(1) (emphasis added). The specific language of the statute states that the director must consider:

> (i) the shareholders of the benefit corporation; (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers; (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation; (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located; (v) the local and global environment; (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term

cannot incur any *monetary* liability,[252] and there is an explicit provision stating that directors have no duty to any person that may be a beneficiary of the general or opted-in specific benefits.[253] Moreover, the duty to consider various stakeholders and their interests is subject to the protection of the business judgment rule.[254]

Nevertheless, the Act also sets out to *modify* the fiduciary duties owed by a director, explicitly stating that consideration of the general or specific benefits does *not* constitute a violation of those duties owed to the corporation and shareholders.[255] These provisions are essential, as they ensure "directors who consider the enumerated factors are insulated from shareholder claims that they breached their fiduciary duties by not acting to maximize shareholder benefit."[256] Additionally, the Model also allows for a "benefit enforcement proceeding,"[257] providing that a shareholder may "bring a legal action on the basis that the director failed to *pursue* the stated general or specific public benefits, failed to *consider* the interests of the various stakeholders set forth in the statute, or failed to *meet* the

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> plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose.

Id.

252. *Id.* § 301(c). This allows for injunctive relief to still be brought against the individual director. *See* Clark & Babson, *supra* note 233, at 848–49 (discussing how monetary liability was restricted due to the difficulty in monetizing general and specific benefits and "to focus courts on the exclusive remedy of awarding injunctive relief wherein the benefit corporation would be required to simply live up to the commitments it voluntarily undertook").

253. MODEL BENEFIT CORP. LEGISLATION § 301(d) ("A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.").

254. *Id.* § 301(e) ("A director who makes a business judgment in good faith fulfills the duty under this section if the director: (1) is not interested in the subject of the business judgment; (2) is informed with respect to the subject of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances; and (3) rationally believes that the business judgment is in the best interests of the benefit corporation.").

255. *Id.* § 301(b)(1).

256. Callison, *supra* note 231, at 96.

257. MODEL BENEFIT CORP. LEGISLATION § 305(a) ("Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to: (1) failure to pursue or create general public benefit or a specific public benefit set forth in its articles of incorporation; or (2) violation of an obligation, duty, or standard of conduct under this [*chapter*].").

transparency requirements in the statute."[258] While a *stakeholder*, such as a customer or client of the benefit corporation, has no ability to bring a benefit enforcement proceeding against a director for failing to effectuate the corporation's stated purpose,[259] shareholders nevertheless have the right to bring an enforcement proceeding on the basis that a stakeholder's interests are not being considered.[260]

Lastly, a director is also required to assemble an annual public benefit report that details how the benefit corporation's general or specific benefits were created, how the third-party standard was met, and the ways in which the corporation fell short of its goal.[261] This report must be made available to the public.[262]

B. The Delaware Public Benefit Corporation Statute

On July 17, 2013, Governor Jack Markell signed a law authorizing creation of the "public benefit corporations" ("PBCs") in Delaware.[263] At its core, the Delaware PBC has many of the same features as the benefit corporation under the Model put forth by B Lab.[264] Just as the Model requires the benefit corporation to pursue a "general

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258. Clark & Babson, *supra* note 233, at 849–50.

259. MODEL BENEFIT CORP. LEGISLATION § 305(c) (limiting standing in a benefit enforcement proceeding to shareholders, directors, officers and those stated in the corporation's bylaws).

260. *See* Clark & Babson, *supra* note 233, at 850 (stating that the Model provides that shareholder can "bring an action for failure to consider other stakeholder interests (e.g., for failure of the directors to adequately consider the impact of a particular action on the workforce of the company)"); Esposito, *supra* note 16, at 700 (discussing how a benefit corporation's stakeholders have no right to sue but that "shareholders of benefit corporations are given an expanded right of action to enforce [the] additional duty to consider stakeholder interests"). For a particularly interesting viewpoint of these provisions, see Ian Kanig, Note, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L.J. 863, 898–99 (2013) (arguing that the benefit enforcement proceeding is a substantive guarantee because a director's business decisions can be challenged, but also a procedural guarantee, "in the sense that the board of directors must make some affirmative, evidentiary showing of non-shareholder consideration for all material decisions when challenged in a benefit enforcement proceeding").

261. MODEL BENEFIT CORP. LEGISLATION § 401(a)(1)–(2).

262. *Id.* § 402(b).

263. Daniel Fisher, *Delaware "Public Benefit Corporation" Lets Directors Serve Three Masters Instead of One*, FORBES (July 16, 2013, 2:06 PM), http://www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one.

264. For a more detailed comparison, see *Specifics on Delaware Benefit Corporation Legislation*, BENEFIT CORP INFO. CENTER, http://benefitcorp.net/storage/documents/Delaware_Public_Benefit_Legislation_Specifics.pdf (last visited Dec. 21, 2014).

benefit," a Delaware PBC is "intended to produce a public benefit" and "to operate in a responsible and sustainable manner."[265]

The Delaware PBC, however, differs in a number of respects. First, it *requires* the benefit corporation to identify in its certificate of incorporation one or more *specific* benefits that it seeks to promote.[266] This potentially provides greater specificity for shareholders who invest in the company and want to enforce the social purpose of the enterprise.[267] Second, the Delaware PBC strips the benefit corporation of the heavily criticized mandatory third-party standard requirements,[268] allowing the PBC to simply opt for third-party assessment in the certificate of incorporation or by-laws if it so chooses.[269] Likewise, the biennial benefit report is not required to be public or evaluated by any third party standard; it is provided only to shareholders of the corporation.[270] Lastly, the PBC, unlike the

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265. DEL. CODE ANN. tit. 8, § 362(a) (2013).

266. *Id.* § 362(a)(1) (stating that the corporation must "[i]dentify within its statement of business or purpose . . . 1 or more *specific* public benefits to be promoted by the corporation" (emphasis added)). Additionally, the statute defines a public benefit as a "positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." *Id.* § 362(b).

267. *See* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. (forthcoming 2014) (manuscript at 256), *available at* http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2351&context=facpub (noting that the requirement of the public benefit corporation to declare a specific benefit "give[s] shareholders control over the mission of the public benefit corporation and focus directors on a contractually agreed upon public benefit").

268. *See* Callison, *supra* note 231, at 94 (explaining that while "[t]he Model spills much ink attempting to define each of these characteristics [of the third-party standard], . . . it does not prescribe any content for the standards, . . . [t]hus, it is conceivable that some third-party standard-setters will establish very low, but transparent, standards for benefit corporations and the whole concept of public good will go down the greenwash drain").

269. *See* DEL. CODE ANN. tit. 8, § 366(c)(2)–(3).

270. *Id.* § 366(b)–(c). Specifically, the statement should include:

> (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;
>
> (2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;
>
> (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and

Model, is required to feature the acronym in its name[271] and clearly indicate it is a PBC in any notices or stock certificates to shareholders.[272]

The Delaware PBC preserves the flexibility of directors to pursue a social purpose, but has a somewhat different approach to holding directors accountable for a failure to pursue a public benefit. Like the Model, the Delaware PBC limits the director's liability for failing to create specific benefits, imposes no duties on the director to the broader stakeholders in any such benefits, and allows for the business judgment rule to protect the director's decisions.[273] Importantly, section 365(a) of the Delaware PBC statute also modifies the duties of directors by requiring the corporation to be managed "in a manner that *balances* the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[274] This resembles the Model Legislation's provisions regarding a director's duties,[275] allowing the director a degree of freedom to obviate any duty to maximize

> (4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

Id. § 366(b).

271. *Id.* § 362(c) ("The name of the public benefit corporation shall, without exception, contain the words 'public benefit corporation,' or the abbreviation 'P.B.C.,' or the designation 'PBC,' which shall be deemed to satisfy the requirements of § 102(a)(1)(i) of this title.").

272. *Id.* § 364 ("Any stock certificate issued by a public benefit corporation shall note conspicuously that the corporation is a public benefit corporation formed pursuant to this subchapter.").

273. *Id.* § 365(b) (stating that a director's decision "implicating the balance requirement" satisfies the "director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve"). Additionally, the PBC's certificate of incorporation *may* opt into a provision that "any disinterested failure to satisfy . . . section [365] shall not . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty." *Id.* § 365(c).

274. *Id.* § 365(a) (emphasis added). This language may be stronger than the language used in the Model and may require more of directors. *See* Cass Brewer, *Preliminary Observations Concerning Delaware's New Benefit Corporation Act*, SOCENTLAW (July 19, 2013), http://socentlaw.com/2013/07/preliminary-observations-concerning-delawares-new-benefit-corporation-act ("Delaware require[s] the directors of a benefit corporation to 'balance' the pecuniary interests of the shareholders with the other interests of nonshareholders, whereas the B-Lab mockup only requires 'consideration' of nonshareholder interests. Only time will tell, but the practical difference between 'balancing' versus merely 'considering' nonshareholder interests could be tremendous.").

275. *See supra* note 251 and accompanying text (providing the statutory text obligating a director to consider stakeholder interests).

shareholder value.[276] However, the Delaware law does not embrace the Model's "benefit enforcement proceeding," but instead allows shareholders to maintain a derivative suit to enforce section 365(a) of the Act.[277] Thus, when a corporation opts to become a PBC, a shareholder looking to enforce the specific benefit in the public benefit corporation's certificate of incorporation may bring a derivative proceeding to force the corporation to follow its stated social purpose.[278]

IV. THE LEGAL FEASIBILITY AND POLICY BENEFITS OF A SOCIAL ENTERPRISE MODEL OF FINANCING PUBLIC INTEREST LITIGATION

This Comment presents an alternative, social enterprise model of funding public interest litigation whereby a litigation financing firm organizes as a benefit corporation to provide funding to public interest organizations' litigation efforts in exchange for a share in any monetary award or settlement. The adoption of this social enterprise model is legally feasible and addresses a number of the seemingly distinct trends outlined above. Specifically, the model expands financing for public interest organizations that are currently underfunded in their efforts to provide access to justice and enforce private rights of action; mitigates many of the ethical and legal issues facing the litigation financing industry, while also bringing its benefits to public interest organizations; and allows social entrepreneurs to pursue their goals in the judicial arena while making a modest return on their investment.

This section will proceed in three parts. First, a hypothetical model is provided to illustrate how a litigation financing firm organized as a social enterprise is a legally feasible alternative to the non-profit and

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276. *See* Plerhoples, *supra* note 267, at 256 (asserting that a director, in an effort to shield himself from a derivative suit by shareholders, may argue "that such a broad balancing requirement [in 365(a)] encompasses many interests (even those that conflict with shareholders' monetary interests) and any public benefit" regardless of the one specified in the company's charter).

277. *See* DEL. CODE ANN. tit. 8, § 367 (providing that the "[s]tockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivative suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least $2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title").

278. *See* Plerhoples, *supra* note 267, at 257 (noting that "the Delaware statute does not reference any separate procedure. This might imply that a derivative lawsuit is the appropriate action against the directors of a public benefit corporation for failure to pursue a public benefit").

for-profit models of financing public interest litigation. Particular attention is focused on how a litigation financing firm can incorporate as a benefit corporation to carry out (and enforce) its purpose to finance public interest litigation. Second, it will examine the Delaware PBC statute and its advantages for parties devoted to financing public interest litigation. Third, it will explore the public policy benefits by illustrating how the social enterprise model ameliorates some of the legal issues that currently prevent the broader for-profit litigation financing industry from facilitating greater access to justice and private enforcement of the law.

A. *Public Interest Litigation Financing as a Social Enterprise Model*

Given the limits of the non-profit and for-profit models to provide litigation financing to public interest organizations, a social entrepreneur should instead turn to a social enterprise that broadens the current sources of funding for public interest organizations, yet minimizes the problems associated with a purely profit-oriented approach to litigation financing. This arrangement could be set up as follows. A social entrepreneur organizes and incorporates a closely held,[279] litigation financing firm *as a benefit corporation* with the specific purpose of investing in litigation brought by public interest organizations.[280] In turn, this funder attracts capital from the

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279. A closely held corporation is "[a] corporation whose stock is not freely traded and is held by only a few shareholders." BLACK'S LAW DICTIONARY 391 (9th ed. 2009). For our purposes here, the envisioned entity will be thought of as a *closely held* because such corporations are often more suitable for achieving the goals of social enterprises. *See* Callison, *supra* note 231, at 102 (asserting that most benefit corporations will be closely held because "[i]t seems relatively unlikely that larger corporations, in which shareholders do not share familial or personal connection, will comprise a large proportion of the corporations seeking to enable values other than shareholder profit-maximization").

280. The Delaware PBC statute requires identification of the *specific* public benefit promoted by the corporation in the certificate of incorporation. *See supra* note 266 and accompanying text (providing the statutory language). Therefore, the litigation financing firm's certificate of incorporation should state that it is a public benefit corporation and identify the specific purpose of providing funding to non-profit, public interest organizations' litigation efforts. Under the statutory language, this public benefit would be a "positive effect" on "entities" of an "economic . . . nature." DEL. CODE ANN. tit. 8, § 362(b). More specifically, the language in the certificate of incorporation could be written as the following:

> In an effort to support legal efforts that promote access to justice, the directors of [name of benefit corporation] PBC, after a due diligence process, shall establish, as a specific benefit, litigation financing contracts with plaintiffs represented by non-profit, public-interest organizations

growing community of impact investors, high net worth individuals, and other traditional investment firms looking to make both monetary and social returns on their investments.[281] The benefit corporation, as required by its stated specific benefit, then generates this social return by entering into litigation financing contracts with public interest organizations and their clients who bring impact litigation cases, many of which involve the civil rights, environmental, human rights, and employment discrimination areas of the law; importantly, these cases will often feature a private right of action that seeks non-monetary and monetary relief for not only litigants, but also society as a whole.[282] In return for financing, the benefit corporation receives a share in any monetary relief awarded in the litigation effort.[283] This return is then distributed to the shareholders of the benefit corporation or any other investors in the litigation,[284] along with the added "reputational capital" that comes with supporting a public interest organization's pursuit of non-monetary

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> who have filed class or individual actions on behalf of litigants in the civil rights, environmental, or employment discrimination areas of the law.

This language could be narrowed or broadened depending on the expertise of the litigation financing firm and the type of litigation funded. While outside the scope of this paper, the language could also be modified to include public interest law firms and other organizations involved in impact litigation. *See supra* note 5 (distinguishing public interest organizations from a broader "cause lawyering" movement).

281. *See supra* notes 225–29 and accompanying text (noting the growing "impact investment" community looking for a social return on their monetary investments, as well as traditional investors that are becoming more interested in such opportunities).

282. *See supra* notes 45–47 and accompanying text (describing the various areas of the law in which a private action is often authorized).

283. *See supra* note 126 (detailing the process by which litigation financing firms establish contracts with plaintiffs in return for a share of any eventual award).

284. Certainly, some public interest cases may not generate the same size damage awards seen in commercial litigation currently funded by litigation financing firms, which could result in less of a return for traditional investors in the firm. However, social enterprise models attempt to ensure more competitive returns for traditional investors by carving out a role for foundational grants to subsidize the investment. *See infra* note 294 (proposing litigation financing firms adopt a new model of financing social enterprise). Additionally, the litigation financing firm could contribute its own capital to finance a profitable case, earn a return on its investment, and then put those funds towards cases that may make more of a visible impact but offer less of a monetary return—a strategy currently utilized by for-profit public interest law firms. *See supra* note 85 (discussing how public interest law firms afford to take on cause-oriented, less profitable cases). These public interest law firms, however, cannot tap into outside investment if the state in which it resides adopts the ABA Model Rules of Professional Conduct's prohibition against forming legal partnerships with nonlawyers. MODEL RULES OF PROF'L CONDUCT R. 5.4(b) (2013).

relief and broader social impact.[285] This basic model is illustrated in Diagram A in the Appendix.

Importantly, the public interest organization will likely maintain its non-profit status under this arrangement while also experiencing an increased capacity in its clients to pay for services. Public interest organizations often incorporate as non-profits to obtain tax-exempt status.[286] Per IRS rules, non-profits engaging in litigation may accept attorneys' fees only if "paid directly by its clients."[287] Indeed, if a litigation financing firm were to contract with a public interest organization to cover its fees in a case, this provision would likely pose an obstacle. However, litigation financing firms already contract "directly" with *clients*, who in turn put the advanced funds toward obtaining legal representation.[288] In the social enterprise model, much of the same arrangement plays out—the benefit corporation provides the funds to the client in exchange for a share in any monetary recovery; the client then uses these funds to hire a public interest organization on retainer, with any balance being refunded once the litigation is complete.[289] In this fashion, the public interest organization is paid directly by the client and the client gains greater access to justice.

Perhaps more importantly, the IRS requires public interest organizations to decline cases in which the client has a "sufficient

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285. *See* Coffee, *Litigation Governance*, *supra* note 158, at 346–48 (proposing "nonentrepreneurial model" of "litigation governance" for class action cases in Europe whereby instead of relying on a contingent fee arrangement, a public interest organization serves as lead plaintiff staking its "reputational capital" on the outcome of the case while negotiating with litigation financing firms).

286. *See supra* note 86 and accompanying text (explaining that public interest organizations often organize as 501(c)(3) organizations to achieve tax-exempt status).

287. Rev. Proc. 92-59, 1992-2 C.B. 411, § 4.02. This section also allows fees to be paid "by opposing parties [if the fees] are awarded by a court or administrative agency." *Id.* § 4.01.

288. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1291–92 (noting that litigation financing firms often contract directly with the client, as opposed to the client's lawyer, in order to avoid implicating the ethical prohibition on splitting fees with non-lawyers). In much the same way, this caution carries over and protects the non-profit's tax exempt status.

289. The IRS rules governing public interest organizations already allow for such an arrangement. *See* Rev. Proc. 92-59, 1992-2 C.B. 411, § 5.01 (stating that attorneys' fees "may be charged against a retainer, with any balance remaining after the conclusion of litigation refunded to the litigant"). Nevertheless, any fees charged must not "exceed the actual cost incurred in each case, viz., the salaries, overhead, and other costs fairly allocable to the litigation in question." *Id.* Additionally, the IRS requires that all attorneys' fees collected over a five-year period "must not exceed 50 percent of the total cost of operation of the organization's legal functions." *Id.* § 4.05.

commercial or financial interest in the outcome of the litigation to justify retention of a private law firm."[290] Arguably, the presence of a strictly for-profit litigation financing firm would indeed indicate that the client has a "sufficient commercial or financial interest" in the outcome to justify private legal representation. However, if a benefit corporation—an entity required to balance pecuniary *and* social interests[291]—provides the funding, the public interest organization is all the more justified in believing the client lacks the purely financial or commercial interests that would otherwise justify private legal representation. In fact, the IRS has considerable leeway to take account of such factors.[292]

Likewise, the social enterprise model does not involve a dramatic reworking of the funding mechanisms already financing public interest litigation. Rather, it broadens the pool of capital to include impact investors and traditional investors while preserving an important role for foundations' philanthropy. Under this framework, the foundations continue to provide grants to the public interest organizations, just as the Rosenberg Foundation did in *Dukes*.[293] However, these grants will now act as subsidies to the impact investors, high net-worth individuals, and traditional investors who provide capital to the litigation financing firm and expect both a social and monetary return on their investment.[294] In other words,

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290. *Id.* § 4.04. However, in situations where a client does have a "sufficient financial interest" to justify private representation, the public interest organization may "in cases of sufficient broad public interest, represent the public interest as amicus curiae or intervenor." *Id.*

291. *See, e.g.*, DEL. CODE ANN. tit. 8, § 362(a) (2014) (requiring "a public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation").

292. *See* Rev. Proc. 92-59, 1992-2 C.B. 411, § 1 (stating that "[t]hese guidelines are not inflexible and an organization will be given the opportunity to demonstrate that under the facts and circumstances of its particular program, adherence to the guidelines is not required in certain respects in order to ensure that the operations are totally charitable").

293. *See supra* notes 97–104 and accompanying text (explaining that Rosenberg's support of the impact litigation effort included grants and a program-related investment to the public interest organization bringing the case); *see also supra* notes 93–94 and accompanying text (noting that most of public interest organizations' current support comes from foundations' grants and other philanthropic efforts).

294. *See* Bugg-Levine et al., *supra* note 228, at 4 (providing a social enterprise model that seeks to attract investment from investors to organizations with a social purpose). Importantly, Bugg-Levine et al. advocate a model of financing social enterprise that specifically carves out a continued role for foundations:

the foundations' grants make it "worth it" for conventional investors. Likewise, a litigation financing firm could follow a similar contractual arrangement as the one advocated for by Professor Steinitz in the for-profit industry: the litigation financing firm serves as a general corporate partner that manages funds in a limited partnership with passive investors, earning a small fee for assembling the capital and entering into litigation finance contracts on behalf of the fund.[295] However, in the social enterprise model, the general partner is a litigation financing firm *organized as a benefit corporation* with an expertise in financing public interest litigation, and the limited partners would not only be traditional investors looking to make a monetary return but also impact investors seeking a social return on a specific case or portfolio of cases.[296] This arrangement is illustrated in Diagram B in the Appendix.

> The donor [such as a foundation] does not expect to get its money back; it expects its money to generate a social benefit. It considers the investment a failure only if that social benefit is not created. . . . [W]ith a donor-investor willing to subsidize half the cost, the social enterprise becomes valuable and less risky to conventional investors. The traditional model of social enterprise leaves this value on the table. Donors lose out because they fully subsidize a project that could have attracted investment capital, and investors do not participate at all. . . . In the emerging model of social enterprise capital markets, donors play the role of equity holders, providing capital that supports an enterprise and that makes the debt taken on by financial investors safer, with better expected returns.

Id. at 5. This model of social enterprise can be adopted to litigation finance to similarly ensure higher returns for traditional investors, many of whom are becoming increasingly interested in litigation finance due to the potential for extraordinarily high returns. *See* Alden, *supra* note 129 (explaining that a new litigation financing firm has raised capital "from investors like public pension funds, university endowments and family offices"). Public interest litigation may not offer as high a return to these investors as commercial cases. However, if the foundations continue to provide donations to fund public interest litigation (as they currently do), then they effectively subsidize the investment for traditional investors and ensure a higher return than would otherwise be the case; this, in turn, broadens the pool of capital available to the public interest organization in much the same way as discussed by Bugg-Levine et al.

295. *See supra* notes 142–47 and accompanying text (summarizing Professor Steinitz's litigation finance arrangement modeled after venture capital firms).

296. This sets up two levels of capital derived from potential investors in the firm, which strongly contrasts with the non-profit form's inability to make distributions to investors. *See supra* note 115 (explaining restrictions on non-profits). Essentially, those who are interested in the litigation financing firm for its potential to finance public interest litigation could be the shareholders in the firm (and most likely the directors and officers). The "second level" of investment would then be in the form of the limited partnership arrangements advocated for by Professor Steinitz. *See*

Employing this social enterprise model resolves a number of the disadvantages present in the non-profit and for-profit models of financing public interest organizations and their litigation efforts. As laid out in Part II.B, the for-profit model has provided little financing assistance to public interest organizations as it is strictly motivated by profit-maximization; it has little to gain from generating social returns for its investors.[297] Meanwhile, the non-profit donor model of funding public interest litigation is strictly regulated, limited in available capital, and without the expertise and devoted interest in funding public interest cases.[298] The social enterprise model attempts to resolve these issues by providing a middle ground that moderates the for-profit model's shareholder maximization norm while preserving the non-profit model's goal of achieving a social benefit.

More particularly, a director of a benefit corporation, under both the Model Legislation and the Delaware PBC, is mandated (and empowered) to consider the effect of his decisions on not only shareholders, but also on customers and beneficiaries of the benefit corporation's stated general and specific benefits.[299] For this reason, a director of a litigation financing firm organized as a benefit corporation would not be required to strictly adhere to the profit-maximization norm that pervades the for-profit litigation finance industry.[300] Instead, the director would be free to consider the ramifications of the corporation's actions on the beneficiaries of its financing—the public interest organizations and the individual claimholders—as well as the broader potential for social impact.[301] This also ensures that the litigation financing firm's incentives better

supra notes 142–47 and accompanying text (discussing a limited-partnership arrangement to be used by for-profit firms).

297. *See supra* notes 150–52 and accompanying text (explaining the access-to-justice and private enforcement rationale for litigation finance but how the industry has come up short by providing financing only to sophisticated parties).

298. *See supra* notes 115–21 and accompanying text (discussing the limits of the non-profit model of financing public interest litigation).

299. *See supra* notes 251, 274 and accompanying text (providing the statutory text that lessens the obligation on directors to solely consider shareholder value).

300. *See supra* notes 153–55 and accompanying text (discussing how for-profit litigation financing firms are incentivized to maximize profits for investors).

301. *See supra* note 276 and accompanying text (explaining how the benefit corporation provisions may be used by a director to defend himself in a derivative suit challenging his decisions).

align with the plaintiffs and the public interest organization than in the for-profit context.[302]

The social enterprise model also offers unique advantages over the non-profit donor model of financing cases. First, the benefit corporation is not organized as a non-profit, so shareholders would be free to receive distributions and partake in the equity growth of the organization.[303] As a result, the enterprise is open to funding from the impact investment community and further serves to expand the potential pool of capital for financing a public interest organization's litigation efforts.[304] Second, the benefit corporation would be free to make an investment in the litigation in much the same fashion as the Rosenberg Foundation did in *Dukes*, but without the burden of satisfying the onerous program-related investment rules.[305] Lastly, the benefit corporation, due to its specific benefit, will be uniquely focused on providing funding for public interest litigation, allowing it to build up a reputation as a specialized firm in this area.[306] Consequently, the benefit corporation would have a tremendous advantage over foundations that often do not have the

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302. *See infra* Part IV.C.1 (contending that a benefit corporation's dual mandate to consider profits and social benefit is more compatible with balancing the interests of investors and its funded plaintiffs).

303. *See supra* note 115 and accompanying text (providing an overview of the distribution restrictions placed on non-profits that prohibit equity investment and require all earnings remain in the non-profit).

304. *See supra* notes 225–28 and accompanying text (noting the growing community of impact investors who primarily seek a social return on their investment, as well as the traditional investors who, as a secondary consideration, are increasingly looking for socially beneficial investments).

305. *See supra* notes 108–14 and accompanying text (reviewing the laws governing program-related investments by foundations and the difficulty in ensuring such investments do not run afoul of the IRS's guidance).

306. *See* Steinitz, *Litigation Finance Contract*, *supra* note 142, at 498–99 (arguing that the law should facilitate a litigation financing firm's "noncash contributions" that lessen the risk inherent in litigation finance). Further, Professor Steinitz argues that the firm's principals, many of which will be lawyers, may exercise their expertise in making investment decisions into certain cases for traditional investors who are unfamiliar with the nuances of litigation. *Id.* In the public interest context, we can imagine a litigation financing firm providing ample "noncash contributions" to the public interest organization, especially when considering that impact litigation efforts often have to be coordinated with broader legislative efforts and public relation campaigns. *See supra* note 68 and accompanying text (noting that public interest law is no longer focused strictly on litigation). Additionally, the firm may be able to channel connections to foundations, thereby lessening the burden and expense that foundations currently accrue in maintaining these valuable relationships. This would offer a competitive advantage over current for-profit financing firms.

expertise, focus, or desire for the nuances of investing in an impact litigation effort.[307]

Finally, this model also addresses an issue that was laid out in the very beginning of this Comment: public interest organizations often represent plaintiffs exercising a private right of action, but if they fail to become a "prevailing party" because of a voluntary change in conduct by the defendant, they do not earn an award of attorneys' fees.[308] Here, however, the litigation financing firm would advance the costs of attorneys' fees to the plaintiff who then uses those funds to engage the public interest organization's representation,[309] lessening the "chilling effect" that *Buckhannon* had on public interest litigation as a whole.[310] In other words, establishing a litigation financing firm in the public interest field may have the potential to support not only access to justice but also private enforcement of the law.

B. The Advantages of the Delaware Public Benefit Corporation

As detailed in Part III, Delaware authorizes the incorporation of public benefit corporations that closely follow the business form established in B Lab's Model Legislation.[311] However, the Delaware PBC statute and Delaware corporate law provides a number of crucial advantages over the Model Legislation for a litigation financing firm funding public interest litigation.[312]

1. The specific benefit as an enforcement mechanism

As a Delaware PBC, the litigation financing firm would be *required* to provide a specific public benefit in its certificate of incorporation,[313] as opposed to merely the tenuous and broadly

307. *See supra* notes 119–20 and accompanying text (discussing survey findings indicating that foundations prefer other philanthropic efforts over litigation and lack the expertise and patience necessary to fund controversial cases).

308. *See supra* Part I.C (explaining the ramifications of the *Buckhannon* ruling).

309. *See supra* note 81 (providing an example of the impact that *Buckhannon* had on a public interest organization's ability to recoup fees after expending considerable time and effort in a case).

310. *See supra* notes 81–83 and accompanying text (noting that public interest organizations reported negative impacts after the Supreme Court's *Buckhannon* decision).

311. *See supra* notes 240–41 and accompanying text (stating that the various state laws are based on the benefit corporation model promulgated by B Lab, a non-profit devoted to encouraging adoption of the benefit corporation form).

312. *See supra* Part III.B (outlining the benefits of the Delaware public benefit corporation statute over the Model Legislation).

313. *See supra* note 266 and accompanying text (providing the statutory text that mandates use of a specific benefit within the contours of certain parameters).

defined general benefit found in the Model Legislation.[314] Given that the envisioned entity must attract investment from the impact investor and the traditional investment community, delineating a specific benefit establishes agreement between the firm and its shareholders or investors that the firm will finance public interest litigation.[315] Alternatively, if the litigation financing firm organized as a benefit corporation under the Model Legislation, it would be required only to set out a "general benefit" that provides little reassurance to investors and shareholders that the corporation will pursue its social purpose of financing public interest litigation.[316]

The requirement that the corporation follow a specific benefit also provides greater enforceability of the benefit corporation's purpose to invest in public interest litigation. Importantly, the Delaware Law allows for a derivative suit against directors who fail to balance "the best interests of those materially affected by the corporation's conduct [with] the *specific public benefit* or public benefits identified in its certificate of incorporation."[317] In this context, a shareholder of the litigation financing firm would have grounds to argue that directors who pursue cases wholly outside of the public interest area have not balanced the shareholders' interests with the specific public benefit identified in the certificate of incorporation.[318] Injunctive relief could then follow.[319] A more likely scenario may arise when the benefit corporation funds a case that offers a lesser return to its shareholders and investors but a greater benefit to the public interest organization and the plaintiff; for example, a case may settle for non-monetary relief instead of a large monetary award. Likewise, the directors may decide not to issue a dividend on earnings but instead fund cases that are less profitable but more impactful. In those type of situations, the directors may defend their decision-making by arguing that under the Delaware PBC statute they are not required

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314. *See supra* note 247 and accompanying text (stating the broad statutory text of the Model Code defining a "public benefit").

315. *See supra* note 267 and accompanying text (explaining that the required specific benefit provides greater specificity for shareholders looking to enforce the social purpose).

316. *See supra* notes 246, 249 and accompanying text (noting while a benefit corporation is obligated to embrace the general benefit that it will act in a responsible manner, any specific benefits are optional).

317. DEL. CODE ANN. tit. 8, § 365(a) (2014) (emphasis added).

318. *See supra* note 267 and accompanying text (finding that the provisions of the Delaware PBC provide greater specificity for shareholders to enforce the social mission).

319. *Cf. supra* note 252 (noting that the language of the Model Legislation limits the liability of directors to injunctive relief).

to solely consider the shareholder's monetary interests but may also take into account the interests of the plaintiffs funded by the benefit corporation.[320]

Likewise, if the directors fail to issue the required benefit report indicating how the corporation is fulfilling its purpose to invest in public interest litigation,[321] the shareholders could file a derivative suit to force the directors to produce such a report.[322] In sum, the statutory requirement that a Delaware PBC embrace specific benefit provides greater accountability, as well as a degree of freedom for directors in financing public interest litigation.

2. *Signaling*

The Delaware PBC, unlike the Model Legislation, requires the corporation to affix the acronym "PBC" in its name and to state that it is incorporated as a PBC in any stock certificates or notices.[323] By attaching the PBC acronym to its title, the litigation financing firm would signal to public interest organizations that the entity has a social purpose. Furthermore, by affixing a notice to stock certificates, traditional investors are on notice that the corporation is not strictly following the shareholder maximization norm. Likewise, impact investors are drawn to the investment because it indicates that the litigation financing firm seeks social, as well as monetary benefits.

3. *Optional third-party assessment*

Another advantage in organizing the litigation financing firm as a Delaware PBC would be avoidance of any third-party assessment. As discussed above, the Model Legislation requires benefit corporations to embrace a third-party standard that verifies whether a public benefit is being pursued.[324] Such a requirement would be particularly

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320. *See supra* note 276 and accompanying text (explaining that, like the Model Legislation, the Delaware PBC allows a director to exercise duties more freely by considering factors outside of shareholder value).

321. *See supra* note 270 (providing the statutory text of the Delaware PBC requiring the board of directors provide a detailed statement on how the corporation promotes the public benefit identified in its certificate of incorporation).

322. *See supra* note 260 (discussing how, in the context of the Model Legislation, a benefit report places informal constraints on directors to follow the social mission of the benefit corporation). Much of the same would apply to the Delaware PBC, with the added benefit of greater specificity.

323. *See supra* notes 271–72 (providing the statutory text).

324. *See supra* notes 247–48 and accompanying text (providing statutory text that obligates a benefit corporation under the Model Legislation to assess any public benefit against a third-party standard).

onerous for a litigation financing firm because it may obtain vital information about ongoing litigation in its due diligence process as it oversees additional funding for the case.[325] Current case law suggests that a plaintiff's disclosure of such information to a litigation financing firm could constitute a waiver of the attorney-client privilege if there is no "common interest" between the third-party financing firm and the plaintiff.[326] Undoubtedly, a litigation financing firm may receive a number of sensitive documents, ranging from the attorney's thoughts on a case's prospect for success to discussion with the plaintiff on a strategy for settlement talks.[327] If an industry watchdog disclosed such information through third-party assessment in an effort to verify that the benefit corporation is fulfilling its social purpose, the disclosure could constitute a waiver of attorney-client privilege and surely jeopardize a later finding that the funder and the plaintiff are within a "common interest."[328] The Delaware statute, however, avoids this problem entirely by not requiring third-party assessment of the benefit corporation unless the certificate of incorporation opts into such a requirement.[329] As such, public interest organizations could rest assured that any information in the due diligence process would not be provided to any third parties.

4. The benefit report is not public

Under the Model Legislation and Delaware PBC statute, a benefit corporation must prepare a benefit report for shareholders

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325. *See supra* notes 136, 212 (elaborating on the due diligence process and information shared between the litigation financing firm, attorney, and client before financing).

326. *See supra* notes 213–14 and accompanying text (explaining that preserving attorney-client privilege when attorneys share confidential information with financing firms may lie in the "common-interest exception").

327. *See, e.g.*, *supra* note 136 (explaining the due diligence process Burford Capital undertakes before investing in a case and what types of documents may be disclosed to the firm).

328. *See supra* note 214 and accompanying text (explaining the inconsistent application of the "common-interest exception" to the litigation financing arrangement for purposes of the attorney-client privilege). Plausibly, if the firm is a benefit corporation with the stated purpose to fund the plaintiff's case for its non-monetary and monetary benefits, there is a decent argument that the litigation financing firm is in more of a "common interest" with the plaintiff than would otherwise be the case in the for-profit litigation finance industry.

329. *See supra* notes 268–69 (discussing how the Delaware PBC statute eliminates the obligation under the Model Legislation to adopt a third-party standard in assessing the benefit corporation's public benefit after considerable criticism).

indicating how it fulfills its social mission.[330] In the litigation finance context, such a benefit report may include attorney work product—the attorney's analysis of a given case, the prospect for success, a draft of an important brief, or even the strategy for settling with the defendant.[331] In fact, given the extensive requirements of the benefit report, some attorney work product by the public interest organization may *have* to be included in this report to adequately ensure shareholders that the public benefits are being promoted and an adequate resolution to the controversy is being sought.[332] Yet, if this information were ever provided to the general public, waiver of the attorney work product doctrine would be clear.[333] Under the Delaware PBC statute, however, directors of the corporation are obligated to provide the benefit report only to shareholders of the corporation and *not* the general public.[334] This is an important advantage. A public interest organization's attorneys would be free to provide attorney work product to the financing firm's directors, who could then include some of that information in their benefit report to the shareholders.[335] As discussed previously, the protection of the

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330. *See supra* notes 261–62 and accompanying text (stating that the benefit corporation must provide a benefit report).

331. *See supra* note 210 (indicating what types of materials may constitute attorney work product). For example, in the *Chevron* litigation, an attorney brought in by the litigation financing firm prepared a memo detailing the best strategy for enforcing the judgment against the company or otherwise acquiring an adequate settlement. *See* Mufson, *supra* note 176 (noting that attorneys prepared a confidential, so-called "Invictus" memo outlining strategy for enforcing the judgment against Chevron).

332. *See supra* note 270 (providing the statutory requirements for the benefit report under the Delaware PBC statute). Notably, the Delaware PBC statutory text requires directors to include "objective factual information" on how the firm is pursuing its goal of social impact and financing public interest organizations. This would, at the very least, include the names of current cases in which the firm is invested (which is currently kept confidential by for-profit firms). Likewise, it also requires an "assessment" of the corporation's success in meeting its social objectives, which would plausibly include the type of relief obtained in a litigation effort. If the officers failed to provide this, then the shareholders and investors could bring a suit to obtain such information.

333. *See supra* note 211 (explaining that to ensure non-waiver of the attorney work product doctrine, precautions must be taken that prevent the litigant's adversaries from obtaining the sensitive information).

334. *See supra* note 270 and accompanying text (stating that under the Delaware PBC statute the public benefit report only has to be provided to shareholders).

335. A public interest organization may not want to share any attorney-work product with a litigation financing firm given the risk, but due to the obligation of the financing firm to identify and consider the non-monetary benefits of its operations, it is likely that some information from a public interest organization's lawyers on their cases will have to be shared. Nevertheless, lawyers for the litigant

attorney work product doctrine would extend to this information so long as the director obtains a nondisclosure agreement from the shareholders[336]—a seemingly simple task because the Delaware PBC does not require that the information be made publicly available. In turn, this facilitates information flow between shareholders, directors, and the public interest organization regarding the social impact of the litigation.

5. *Delaware law treatment of general corporate partners*

Delaware's corporate law also has the advantage of providing flexibility in modifying the duties owed in a typical limited partnership agreement. As discussed above, the envisioned entity could follow much of the same path advocated for in the for-profit industry by Professor Steinitz: the litigation financing firm acts as the corporate general partner that manages the pooled assets of investors in a limited partnership agreement,[337] with the investors serving as limited partners in the fund.[338] But this arrangement raises its own issues about what duties are owed to the limited partners by the general partner. In Delaware, the default rule is that a general partner owes fiduciary duties to the limited partners.[339] Moreover, if the general partner is a corporation, then that corporation's *directors* also owe fiduciary duties to the limited partners.[340] For this reason, it is likely that under Professor Steinitz's framework, the directors of a litigation financing firm acting as a corporate general partner owe fiduciary duties to the investors serving as limited partners in the fund.

The social enterprise model, however, differs in one fundamental respect: the litigation financing firm serving as a corporate general partner in the limited partnership would be organized as a benefit

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and directors of the firm should be selective in the amount of detail they include in such reports, with the overall goal being to apprise investors of the social impact of their investment while also not disclosing important strategy and factual information relevant to ongoing litigation.

336. *See supra* notes 202, 216 and accompanying text (discussing case law that indicates protection of the attorney work product doctrine *will not* be waived when the lawyer obtains a nondisclosure agreement from the recipient).

337. *See supra* notes 142–47 and accompanying text (providing a short overview of the limited partnership arrangement advocated for in the for-profit context).

338. *Supra* notes 142–47 and accompanying text.

339. *See generally* Winnifred A. Lewis, *Waiving Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 82 FORDHAM L. REV. 1017, 1029 (2013) (providing an overview of Delaware corporate law regarding fiduciary duties in limited partnerships).

340. *See In re* USACafes, L.P. Litig., 600 A.2d 43, 48 (Del. 1991) (imposing fiduciary duties on directors of a corporate general partner to its limited partners).

corporation. As discussed in Part III, the benefit corporation's directors have a modified fiduciary duty to the shareholders of the corporation that allows the directors to consider factors outside of the shareholder maximization norm.[341] What duty, then, does the benefit corporation owe to the limited partners if it follows Professor Steinitz's framework? Arguably, if the broad language of the benefit corporation statute modifies the duties owed by its directors to *shareholders*, then it also modifies the duties owed by those directors to its *limited partners*.[342] This conclusion finds additional textual support in the Delaware PBC statute.[343]

This default rule[344] has an advantage over the current for-profit litigation financing arrangement as it provides more flexibility depending on the type of investor. Notably, the limited partner investors who want to realize a social impact on their investments (for example, impact investors) would have some recourse against the litigation financing firm's directors if they were to wholly fail to balance the specific benefit and profit goals of the fund or shirk any

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341. *See supra* note 274 and accompanying text (discussing how the benefit corporation statute modifies the director's duties to shareholders by requiring that the directors balance the financial interests of the stockholders and the public benefit as described in its certificate of incorporation).

342. This modification, however, is an entirely new legal question. What fiduciary duties does a benefit corporation acting as a corporate general partner in a limited partnership owe to its limited partners? No case law exists on this question, as the benefit corporation is a very recent invention. The Delaware Code, however, is phrased broadly enough to impose a positive duty on directors to balance the shareholder's interests with the interests of those benefiting from the public benefit in this situation. *See* DEL. CODE ANN. tit. 8, § 365(a) (2013) (requiring that directors "*shall* manage or *direct the business* and *affairs* of the public benefit corporation in a manner that *balances* the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation" (emphasis added)).

343. *See id.* § 361 (providing that "[i]f a corporation elects to become a public benefit corporation . . . , it shall be subject in all respects to the provisions of [Delaware's general corporation law] chapter, except to the extent this subchapter imposes additional *or different* requirements, in which case such requirements shall apply" (emphasis added)). Given this provision, the statute's language in section 365(a) modifies the duties owed by directors in a benefit corporation.

344. Delaware allows the fiduciary duties owed by general partners to be modified or eliminated entirely. *See* Lewis, *supra* note 339, at 1029 (explaining the modifications and elimination of fiduciary duties under Delaware Law). If the default rule, however, is that the fiduciary duties of the benefit corporation's directors include an obligation to balance the competing interests of shareholders and other stakeholders, then impact investors should feel comfortable that they have some recourse if the firm decides to not follow its social mission to finance public interest litigation.

obligation to public interest organizations or the plaintiffs. Conversely, if the limited partner investors were more profit oriented with a social benefit only as a secondary consideration (for example, traditional investors), the litigation finance firm could assert that the director is free to balance the interests of the limited partners with the public interest organization that it funds. Either way, the directors gain some freedom to make a decision on behalf of the limited partnership fund that balances the public interest organization's interests, while also ensuring that traditional investors, high net-worth individuals, and impact investors remain passive in the management of the fund.[345]

C. The Public Policy Benefits

Organizing a litigation financing firm as a benefit corporation generates a number of public policy benefits for the litigation finance industry and the plaintiffs who receive financing. As explored in Part II.B, the growth of the litigation finance industry in recent years is justified by its potential to provide greater access to justice and promote the private enforcement of the law, but it currently falls short of achieving these goals.[346] In particular, this Comment argues that the industry's failings in this regard are in large part due to: (1) the exclusion of public interest organizations from the litigation financing firm's portfolio and (2) the regulatory uncertainty inherent in the champerty doctrine.[347] By establishing a litigation financing firm as a social enterprise, both of these issues are addressed. First, the social enterprise model more effectively aligns incentives between the investors in the litigation and the plaintiffs than the for-profit model. Second, it leads to stronger regulation of the relationship

345. *See* Steinitz, *Litigation Finance Contract*, *supra* note 142, at 500 (stating that the limited partnership structure "isolate[s] investors from their cases, avoiding potential conflicts with defendants"). It may also create a "wall" between investors and the litigation financing firm that protects any confidential information shared with the firm by the plaintiff and the plaintiff's lawyer. *See id.* at 503. In our context, this may be particularly important given that the parties may enter with good intentions to pursue a social cause, but then grow wary of their investment as the time and resources required in a litigation becomes more apparent.

346. *See generally supra* notes 151–52 (discussing the proponents' arguments for allowing less restricted forms of litigation financing and limiting application of the champerty doctrine).

347. *See supra* Part II.B.1–2 (detailing how public interest organizations cannot tap into for-profit litigation financing to fund their cases, and the uneven application of the champerty, attorney-work product doctrine, and attorney-client privilege to the litigation finance contract).

between the funder, investors, and the plaintiff than the champerty doctrine, while also protecting against possible abuse. These arguments are detailed below.

1. *Realigning incentives between funder and plaintiff*

The exclusion of public interest organizations is primarily a product of misaligned incentives facing the litigation financing firm, as manager of an investment, and the public interest organization, as attorney for the plaintiff.[348] However, in the social enterprise model outlined above, the incentives are much better aligned between the funder (the benefit corporation), its own investors and shareholders (the impact investors, high net worth individuals, and traditional investors), the legal representation (the public interest organization) and the eventual plaintiff who receives the funds to pursue the case (the claimholder). Broadly speaking, all parties involved understand that the goal of the litigation financing firm, as explicitly stated in its certificate of incorporation, is enforcing a legal right for its potential non-monetary *and* monetary relief.[349] In other words, the model moderates the for-profit drive so characteristic of the current litigation finance industry by adopting a business form and investment strategy that emphasizes goals much more aligned with public interest organizations and their clients.

More particularly, organizing the litigation financing firm as a benefit corporation aligns the incentives of the firm with the public interest organization's pursuit of *non-monetary* relief. Typically, for-profit litigation financing firms attempt to maximize profits and "commodify" legal claims.[350] However, when the litigation financing firm is organized as a benefit corporation, the firm would become uniquely interested in the non-monetary relief to be gained from public interest litigation. For instance, the benefit corporation, in pursuit of generating a "social benefit," may now support a public interest organization that seeks remedial relief resulting in an injunction against the defendant. A change in the law or agency

348. *See supra* Part II.B.1 (describing how public interest organizations bring impact cases that emphasize injunctive relief, while for-profit litigation financing firms pursue commercial cases that emphasize high monetary returns).

349. *See supra* note 280 (providing a hypothetical specific benefit to be included in the litigation finance firm's articles of incorporation as required under the Delaware PBC statute).

350. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1321 (discussing that some may oppose litigation finance because of the possibility for "reduction of legal claims, particularly of nonbusiness legal claims, into a mere commodity").

policy may also be valuable to the organization.[351] For the benefit corporation, these remedies could constitute a "public benefit," which it could then promote in its benefit report to shareholders and in advertising to other public interest organizations.[352] From this, the litigation financing firm gains a reputation among public interest organizations, while also apprising other potential impact investors of how litigation finance can bring about meaningful social change.[353]

Additionally, these realigned incentives could result in altering the contractual arrangements between the parties; for instance, the definition of "award" in the contracts between the litigation financing firm and the plaintiff may change.[354] As discussed above, even when for-profit litigation financing firms fund public interest litigation because of a large possible monetary return, the contract may require that the value of any non-monetary relief be taken out of the *plaintiff's* share of the overall award.[355] In fact, the contract in the *Chevron* litigation explicitly included the non-monetary relief in the definition of "award," and stated that any "[d]isputes regarding noncash award value are to be resolved by a single arbitrator, who is an accounting or valuation expert, in an expedited process."[356] This, in effect, increased the total amount of litigation proceeds earned by the plaintiff from which the funder took a 20 to 30% share.[357] Yet, if the litigation-financing firm is a benefit corporation looking to generate a social benefit in addition to a monetary return, it has a direct

351. *See supra* notes 158–60 (describing how public interest organizations often do not pursue profit but injunctive and symbolic relief).

352. *See supra* note 261 and accompanying text (explaining that the Delaware PBC, in an effort to create transparency, requires a director to distribute a public benefit report to shareholders).

353. *See* Steinitz, *Litigation Finance Contract*, *supra* note 142, at 518 (arguing, in the for-profit context, that "regulators and lawmakers, including judges, should consider the critical role of reputation markets which, in turn, rely on the transparency of the industry"). In this context, the litigation financing firm would have a direct incentive to be transparent in its investments because it garners "reputational capital" from the work it is doing.

354. The financing firm could provide for a fiduciary duty in its contract with the plaintiff because such an obligation is much less of a direct conflict for directors under the benefit corporation form. *See infra* notes 370–75 and accompanying text (discussing the fiduciary duty as a better form of self-regulation).

355. *See supra* notes 185–87 and accompanying text (discussing the contract in the *Chevron* litigation).

356. Steinitz, *Litigation Finance Contract*, *supra* note 142, at 478.

357. *See* Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 154, at 740 n.120 (explaining that "Burford's investment in the Chevron–Ecuador dispute . . . penalized plaintiffs for receiving clean-ups rather than funds by requiring them to pay the funder for its pro-rated share of such a remedy").

incentive to exclude the value of any non-monetary relief from the contract's definition of "award." In this fashion, when the litigation financing firm provides funding, it would support not only a monetary recovery but also the social benefit obtained through non-monetary relief.

The public interest organization's incentives are also better aligned with those of its funders because the financing firm would be less likely to try to compromise the organization's attorney-client relationships with its clients. As previously discussed, current litigation financing firms may seek to control litigation to earn a better return for its shareholders; mainly, they may pressure the attorney to settle early for a monetary sum or try to bring in an attorney that is more hospitable to the firm's objectives.[358] Yet, when the litigation financing firm's explicit purpose is to support public interest organizations' legal efforts and broadly pursue a social benefit, the benefit corporation has a strong incentive to partner with attorneys who are more interested in the broad, social impact the litigation hopes to achieve than the monetary relief that may occur.[359] Furthermore, as discussed above, the benefit corporation's interests in non-monetary *and* monetary relief better align with a plaintiff's often mixed and "bundled interests" in claims that offer various levels of relief.[360] This incentive, in turn, goes a long way towards ensuring that the firm does not also pressure the public interest organization to settle early and earn a quick return.[361] Alternatively, the benefit corporation may be more willing to support the litigant who forgoes an early settlement offer in favor of going to court for an injunction or symbolic victory.[362] Either way, the benefit corporation is less obligated to the shareholder maximization norm than its for-profit alternative, resulting in less pressure on the attorney's ability to provide candid and objective advice to his client.

358. *See supra* notes 162–64 (explaining that a litigation financing firm may try to control litigation by choosing an attorney or obtaining power over whether to settle a case).

359. *See supra* note 68 (describing how public interest organizations now situate litigation efforts in their broader social campaigns).

360. Steinitz, *Whose Claim*, *supra* note 132, at 1322.

361. *See supra* note 168 and accompanying text (stating that litigation financing firms have an incentive to pressure attorneys to settle a case early for monetary value while a public interest organization will often want to pursue a case for its monetary and non-monetary relief).

362. *See supra* note 170–171 and accompanying text (noting that litigation financing may embolden litigants to pursue trial remedies and resist monetary settlement).

2. *Promoting a better regulatory regime for litigation finance*

Organizing a litigation financing firm as a benefit corporation may also mean that the entity fares better than a strictly for-profit litigation financing firm under the uncertain champerty doctrine. In Massachusetts and other states, the champerty doctrine has been abandoned and other doctrines govern litigation-finance agreements.[363] In these states, the for-profit and benefit corporation's contracts with plaintiffs would likely be enforceable, though it is possible that a benefit corporation's contract would, on its face, appear less unconscionable. In other states, however, the doctrine is not abandoned but rather moderated to prohibit litigation financing when it promotes unmeritorious claims or results in a funder exercising control over or "intermeddling" with litigation.[364] The social enterprise model, as discussed above, realigns incentives so that litigation financing firms have less incentive to control litigation for its purely monetary benefits;[365] as such, any exerted pressure or control on the plaintiff's attorney becomes much less likely. Most importantly, the benefit corporation's effort to fund public interest litigation would fit squarely within the exception to New York's champerty doctrine, which refuses to enforce an agreement that has "the sole purpose of initiating litigation where no prior right to the underlying claim exists."[366] The benefit corporation's specific benefit requires the corporation to enter into cases already filed by public interest organizations, ensuring that a prior right to the underlying claim exits.[367]

As commentators advocate rolling back champerty to promote growth in litigation finance, some have proposed that the doctrine continue to prohibit funding in some types of cases but otherwise allow litigation finance to flourish in the commercial context.[368]

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363. *See supra* notes 198–99 and accompanying text (stating that Massachusetts has completely abandoned the champerty doctrine and opted for using other doctrines to control the issues that may be raised by litigation finance, such as unconscionability and frivolous litigation).

364. *See supra* note 201 and accompanying text (summarizing how champerty is applied in states that retain the doctrine).

365. *See supra* Part IV.C.1 (detailing how a litigation financing firm opting for the benefit corporation form would have different incentives than a for-profit litigation finance firm).

366. Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 154, at 727.

367. *See supra* note 280 and accompanying text (providing the specific benefit language that a litigation financing firm organized as a benefit corporation may adopt).

368. *See* Sebok, *supra* note 206, at 108 (contending that "[l]imiting profit maintenance on the basis of *what* kind of suit the maintenance supports would seem

However, if litigation financing is strictly prohibited in certain cases, such as class actions or public interest litigation, that would seem to cut against the original reason the practice was allowed in the first place: access to justice.[369] Thus, it may be advisable that instead policymakers mandate that certain cases (for instance, those based on a private right of action or class action) be restricted in accepting financing from a litigation financing firm organized as a benefit corporation. This would ensure that the litigants who need litigation financing the most receive the benefit of a litigation financing industry, while also avoiding the more negative consequences discussed above.

Ultimately, opting for the social enterprise model may also indirectly lead to better self-regulation by litigation financing firms in their contracts with plaintiffs. As it now stands, a for-profit litigation financing firm that owes a fiduciary duty to a plaintiff would be in direct conflict with the firm's obligations to shareholders and investors to earn a profitable return.[370] It is not surprising, then, that for-profit litigation financing firms do not impose such a duty on themselves in their contracts with plaintiffs.[371] The benefit corporation statute, however, modifies a director's duties to allow consideration of factors outside of shareholder value;[372] in fact, a director in a benefit corporation has an *obligation* to balance the

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to be an obvious means of regulation for a state that wanted to support champerty as a matter of general principle while recognizing that, as a matter of public policy, there might be some types of litigation which are ill-suited to third-party investment"); *see also* Steinitz, *Whose Claim*, *supra* note 132, at 1321–22 (arguing that "[l]egislatures and courts should decide which litigation subject matters should, as a matter of public policy, be subject to commodification and which should not").

369. *See supra* notes 149–50 and accompanying text (asserting that proponents of litigation finance point to increased access to justice for disadvantaged parties and greater private enforcement of the law as potential benefits of a less restricting regulatory regime).

370. *See supra* note 184 (stating that in the litigation financing context, a fiduciary duty would moderate a number of the issues impacting the relationship between the litigation financing firm and the plaintiffs but its effectiveness would conflict with the firm's obligations to maximize value for shareholders).

371. *See* Steinitz & Field, *A Model Litigation Finance Contract*, *supra* note 141, at 740 (discussing how "[t]o date, no such regulation has been imposed [by courts or legislatures], leaving it up to the private ordering of the parties. Because of the fiduciary duty's potency, a funder may simply refuse its imposition through contract"); *see also supra* note 183 (providing the statutory text of the contract in Burford's investment in the Chevron litigation that explicitly disclaimed any fiduciary duties).

372. *See supra* notes 268–76 and accompanying text (discussing the legal argument that a director could make when faced with challenges to his business decision).

interests of those who stand to gain from the stated benefit.[373] In this way, the benefit corporation statute serves to moderate the litigation finance firm's duty to maximize profits for its investors, which in turn makes establishing a fiduciary duty to plaintiffs much less of a direct conflict.[374] Provided with this flexibility, the directors may well establish fiduciary duties with their funded plaintiffs that would otherwise not be provided in the for-profit context, thereby curtailing many of the same practices that the overly restrictive champerty doctrine prohibits.[375]

CONCLUSION

This Comment began with an alarming statistic on the scarcity of public interest lawyers and the overwhelming demand for their services. Moreover, it posited that public interest organizations and their litigation efforts play a crucial role in the United States' private enforcement regime. Yet despite all of this, a seemingly inapposite trend is apparent: these organizations are dramatically underfunded. Further, when the same organizations turn to third parties to help fund their litigation efforts, be it a non-profit donor or a for-profit litigation financing firm, the funding is either too limited or comes with strings attached: the foundations and non-profits can only offer a limited amount of resources and expertise in financing public interest litigation, while the for-profit litigation financing firms either exert associated pressures on plaintiffs and their counsel, or abstain from financing public interest litigation altogether. Somewhat ironically, the litigation finance sector continues to claim it champions the very two things that public interest law seeks to

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373. *See supra* note 274 and accompanying text (providing the statutory text of the Delaware PBC statute and discussing the possibility that its language may require more of directors than under the Model Legislation).

374. Likewise, the benefit corporation statute states that the certificate of incorporation may state that any failure to satisfy the balance requirements of the statute will not constitute a breach of the duty of loyalty or good faith. *See supra* note 273 (providing statutory text). Opting into this provision would similarly make any fiduciary duty to a plaintiff much less of a conflict.

375. *See* Steinitz, *Whose Claim*, *supra* note 132, at 1328–29 (arguing that a fiduciary duty is the best way to ensure the litigation financing firm does not attempt to control the litigation because it obligates the firm to consider conflicts of interest, encourages reaching settlement offers that are in the *plaintiff's* interests, and forces the firm to ask "whether nonmonetary remedies better serve the client than do mere monetary damages" (emphasis added)). This is particularly important when the funded parties are a public interest organization's clients who often pursue non-monetary relief. *See supra* note 167 and accompanying text (explaining that organizations bring cases in areas of the law may involve interests that are not strictly monetary).

promote: access to justice and private enforcement of the law. Realizing this unsatisfactory status quo, this Comment proposes a potential new solution whereby a litigation financing firm organizes as a benefit corporation with the goal of funding public interest litigation. Additionally, it described how this model alleviates many of the regulatory issues and promotes a number of public policy benefits in the litigation-finance industry. In this manner, the Comment sought to chart a legal path forward that allows public interest organizations and litigation financing firms to join in a venture that promotes access to justice and private enforcement of law.

APPENDIX

Diagram A

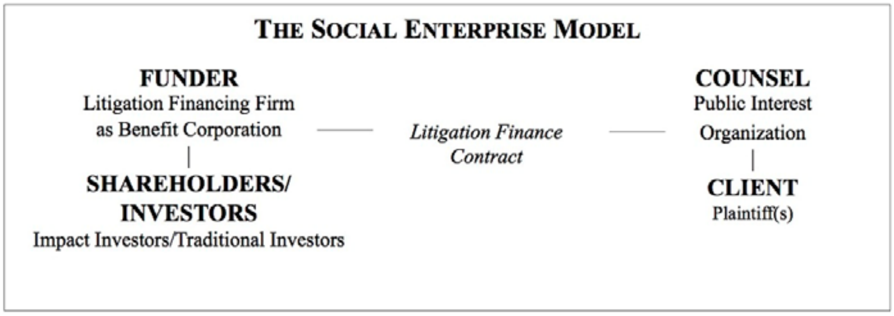

Diagram B