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PANEL 4: LITIGATION FUNDING AND THE FEDERAL RULES OF CIVIL PROCEDURE

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MODERATOR: *Arthur Miller*
PANELISTS: *Stephen Gillers, Michael Fishbein, Elizabeth Chamblee Burch, Maria Glover, Victoria Shannon Sahani*

MR. PETER ZIMROTH: Arthur Miller, to my right, is going to moderate the fourth and final panel. Arthur is a university professor here at NYU, one of the faculty co-directors of the Center. He's also Associate Dean of the NYU School of Professional Studies and Director of the Tisch Sports Institute. He's Chairman of the NYU Sports and Society program, and many, many, many, many, many other things. So, we're very happy to have you, Arthur. I'll turn it over.

MR. ARTHUR MILLER: Thank you, Peter. We want to try to be on schedule. We realize it's Friday afternoon, but when we put this program together—the powers that be, which means Peter—we sort of decided that after doing a lot of presentation about the industry and the alternatives other than litigation funding in the way it was discussed this morning, it might be a good idea to have a panel that would focus on, what does all this mean for the way litigation will proceed in an environment in which a case may be financed by a third party?

And that's what the five people to my right will be addressing. First up, Elizabeth. You want to start us off? You take the mic.

Ms. Elizabeth Chamblee Burch: Thank you. Well, thank you all for sticking around on a Friday afternoon. I appreciate that.

I realize a number of you don't follow class actions religiously. So, for those of you who don't know, plenary class action certification over the past ten, fifteen years has become much more difficult in the wake of a number of legislative and judicial changes. And those changes essentially shift the focus from the defendant's conduct to the plaintiff's eligibility for relief. So, specific causation, damages, reliance, all become barriers to certifying class actions. In a different work, I've suggested that courts make greater use of issue classes, under Rule 23(c)(4), which could allow them to really focus on the defendant's conduct, what a defendant knew, when the defendant knew it—things that are common to all of the different plaintiffs. Then, after successful issue class certification and litigation on the defendant's conduct, class members can then use issue preclusion and follow-on proceedings, to avoid relitigating a number of those common questions.

The problem with all of this is that plaintiffs' attorneys might be reluctant to request issue class certification, particularly in multidistrict litigation, where it might prove most useful, in part because of the uncertain nature of attorney's fees. So, unlike plenary classes or even settlement classes, issue classes are uniquely situated because they don't immediately produce a common fund from which a successful class counsel can recover.

Now, there are some analogies that courts can make to compensate issue class counsel. They can use charging liens, or common benefit doctrines. But those doctrines still require plaintiffs' attorneys to shoulder an enormous amount of risk. That risk is compounded in the multidistrict litigation context, when issue class counsel may have to split fees with the attorneys who take over a case upon remand in its court of origin. Now, these remand scenarios are really quite rare at the moment, but they could require issue class counsel to entrust unfamiliar attorneys with resolving the case, and then have to engage in fee fights in dispersed jurisdictions.

So, there a couple of principal concerns that arise in this context. The first is that meritorious cases that are too expensive to pursue on remand individually might ultimately be abandoned, and the second is that even if these remanded

cases settle or end in a favorable judgment, there may be no common fund from which issue class counsel can recover.

While it's possible to navigate the system under the current system's constraints, the question remains as to whether third party financing can play a beneficial role in funding issue classes. And I'm not going to give you an affirmative answer one way or the other; I'm going to instead suggest that there are some costs and benefits.

I think we've heard a lot thus far about, sort of, two different caricatures of litigation financiers. Either they are knights in shining armor, galloping in to help David in taking on Goliath, or they are trolls, according to Posner, or they are the new wolves of Wall Street who are essentially intent on commodifying the legal system. Regardless of where you fall, I think it's probably time we move past those caricatures and consider some of these costs and benefits. What I'll do, then is just start with some of the potential benefits.

Just as law firms are aggregating clients, finance firms can aggregate attorneys or clients too, depending on the nature of the funding relationship. So, the funder has the ability to work across multiple law firms, which gives them the ability to follow disaggregated litigation to its originating forum, in a way that issue class counsel can't do unless they happen to represent all of the different claimants.

Second, at least in theory, these types of meritorious claims that are too expensive to pursue individually on remand would receive continued funding from a financier who stands to gain not only in that one particular case, but again, from all of the spillover effects that it has on others like it.

This has two particular applications in the multidistrict litigation context. The first is that financiers can help combat defendants divide-and-conquer strategy. So, some of you may be familiar with the asbestos litigation. And reportedly, Berkshire Hathaway, under its various subsidiaries, is purchasing the reinsurance obligations for asbestos claims and is delaying, and refusing to settle particularly with firms that have fewer cases. So, the idea is that the delay gives the company the time to invest the float, which is the money it holds from the policy payments before a claim is made. And when the company settles, it's now doing so cheaply and then using that reduced price point, reportedly, to achieve a lower going rate, even for firms that have a larger claims inventory.

The second concern is that in the transvaginal mesh cases, defendants are rumored to be settling cases in bulk, and on the cheap. And plaintiffs' law firms, with just a few cases, apparently have to pay the lead lawyers to package their cases with many others like them before the defendant will be willing to discuss settlements. But one could propose that if a financier backed all of these different cases, it could cut not only these pay-to-deal tactics, but a defendant's divide, delay, and diminish strategy.

The third potential benefit is that financiers can reduce pretrial costs. So, as you all know who are attorneys in the room, document review can create billable hours. Billable hours are then compensated with the billable rate baked into it, which means that firms are less likely to outsource review overseas, to, say, a legal process vendor that could perform the services at less expense to a plaintiff. Presumably, a financier, on the other hand, might prefer to keep costs down instead of reimbursing on a billable hourly rate.

Finally, even if a third party financier lacks a relationship to the law firms that are handling the remanded cases, it has the means and the incentive, and the specialization to pursue compensation on the back end.

But you'll notice that a lot of these benefits that I'm talking about fall under the umbrella of monitoring, and they largely depend on the incentive structure that underpins the funding relationship itself. And so, if financiers are simply serving as a stand-in for banks, substituting their willingness to view litigation claims as assets, and loaning money directly to the law firms on a recourse basis, with higher interest rates, then they really do nothing to improve the status quo. In fact, the arrangement may ultimately be more harmful because interest rates paid by the law firm might prompt the law firm to try to pass those costs onto their clients, or ultimately, to settle more quickly.

So, I've proposed, at least in the non-class context, that we could change this funding relationship in a way that financiers contract directly with the plaintiffs for a portion of their proceeds, just like attorneys do with contingent fee litigation right now. But instead of fronting money to the plaintiffs for their daily living expenses, as say, consumer legal funding does, the third parties would use that money to finance the lawsuit on a non-recourse basis. Lenders then pay the plaintiff-chosen at-

torneys on a billable hourly rate, plus a small percentage of the gross proceeds as a successful litigation bonus.

Now, as you all might be thinking, this requires a lot of adaptation to adapt it to the current system of class actions. I see I have 30 seconds to talk, now, about the downsides. So I'll just say very quickly, the downsides have been identified pretty well in some of our previous commentary.

One is control over the litigation funding decision. So, there's a question about who gets to control the litigation decisions, who gets to decide when and whether to settle. And the second is the potential for complicity, this idea that you have pay-to-play practices in securities class actions could pretty easily make its way into the funding context. So, I see that I'm out of time. I'm happy to talk more about some of the negatives in the questions and the answers.

MR. MILLER: Alright. Let's move onto Maria.

MS. MARIA GLOVER: Okay. Thank you, also, for having me today.

A common theme, of course, today, has been the high cost of litigation. Indeed, one might say that is the genesis for alternative litigation financing, and of course, part of the costs, if not the bulk of some of the costs that are generated in litigation derive from discovery disputes. So, the idea of litigation funding, to some degree, is to come in and help defray those costs. But on the ground as the big normative debates about whether we should kind of have this go on—on the ground, as funding is being used, the litigation funding materials themselves are becoming the subject of often quite costly discovery disputes.

The purpose of the essay that I put together is rather modest. It's to first give a descriptive account of the state of the law. There are not many opinions out there about whether and to what extent funded parties are able to claim protection of funding materials, specifically under the work product doctrine, but the general trend has been in favor of protection. The trend in favor protection, in fact, has been so broad-sweeping that I go on to examine the normative undercurrents with regard to the desirability of litigation financing that seem to better explain the opinions that do exist than do the narrow contours of the work product doctrine itself.

For those not familiar, the work product doctrine basically protects materials created in anticipation of litigation. It

exists for the purpose of protecting the attorney's zone of privacy in preparing the case in an adversarial system. Courts faced with questions of whether funding materials, be they communications between the attorneys and the funder prior to securing funding—so maybe even funding groups that didn't ultimately decide to fund the case or the attorneys didn't decide to use—the funding documents themselves, and the communication subsequent to the entering into the funding contract, have all been virtually uniformly protected by the courts under the work product doctrine. At some level, though, this blanket protection ought to make us wonder what's going on, because it's not necessarily clear that the work product doctrine is doing all the work.

So, I just want to talk about a couple of the cases that are kind of prominent in the area, and one of them is a case that came out of the Eastern District of Pennsylvania, called *Devon*. And the reason *Devon* is so interesting is because the defendants had requested funding materials that were for the purpose of developing champerty and maintenance defenses. Unlike other states, where maintenance and champerty have basically, you know, fallen by the wayside, in the Eastern District of Pennsylvania there's a recent case that says maintenance and champerty is alive and well.

So, it's hard to imagine a set of documents that's more relevant to the claim of maintenance and champerty than litigating funding materials themselves. Moreover, the work product doctrine carries with it an exception, if the material is protected for substantial need. One of the considerations in substantial need is whether the materials are available elsewhere. It is hard to imagine any other source of materials that would establish the claims for maintenance and champerty than the litigation funding materials.

Nonetheless, the court says that these are protected. And I think what's underlying this opinion, which is only a paragraph, and it's strangely all a footnote, but that's what it is, is this implicit recognition that discovery into the funding arrangement materials, particularly given the frequency of communications and emails, would be extremely costly. It would essentially tax the use of litigation funding, because these are not the sort of discovery costs that exist within the case; they're generated simply by trying to defray the costs of litigation.

Another case that came out of the Northern District of Illinois, Miller against Caterpillar, the judge explicitly expressed his reservation about litigation funding. He said that these were sort of private capital experimenters looking for profit in the exploitation of economic inequality, but nonetheless concluded that all of the funding materials were protected under the work [product] doctrine. On one stroke of the pen he says he shouldn't substitute judgments about litigation funding for that of the legislature, and so maybe that's doing all the work.

But there's sort of a general couple paragraphs at the end of the opinion in Caterpillar where the judge talks about all of the burdens that the defendant would be placing upon the plaintiff that would shift the focus of discovery onto those burdens inappropriately that suggests that what's really going on is at least a concern for the fact that what these requests are by defendants—particularly in Illinois, where maintenance and champerty isn't recognized in any meaningful way—they are attacks on that party itself. They are attacks on the funding itself. It's supposed to equalize resources in the normatively most flattering light, but litigation funding—you know, arguably, defendants don't want to have resources equalized. They liked being able to use the costs of discovery and other litigation costs to sort of have an advantage, and litigation funding takes that away.

In a recent case called *Carlyle*, this sort of normative underpinning is made explicit, where in protecting litigation funding materials, the judge says, "allowing work product protection for documents and communications relating to third party funding places those parties that require outside funding on the same footing as those who do not and maintains a level playing field among adversaries in litigation."

And finally, just recently, defendants in a class action—*SAC Capital* is the name of the case, it's still ongoing—requested litigation funding materials on the grounds that they were relevant to a claim under 23(g) that there might not be adequate representation by counsel, because they were inadequately funded. The court said these weren't even relevant. I think one could make a pretty strong argument, as we've talked about today, that there are legitimate concerns about the combination of class counsel, and litigation funding as it relates to the interest of plaintiffs, and so to hold that they're

not relevant to me suggests a normative underpinning favoring alternative litigation financing.

I also mention in the essay that the mere request of work product can itself be an attack on funding inasmuch as it's extremely costly to produce a privilege law from the thousands and thousands of communications with the funder, among others. And also, that it would reveal in some ways the pieces of information the work product doctrine exists to product.

So, for example, if the privilege log says, execution of funding agreement, April 1, 2015, well, now the defendant knows when the plaintiff ran out of money, among other things. So, you know, whether or not Congress or any number of regulatory agencies are going to tamp down on litigation funding or allow it to flourish, right now the courts seem to be relatively supportive, at least in a discovery context. And questions will remain about how the rules of procedure are going to facilitate or regulate this sort of funding in the future.

MR. MILLER: Is there anything that you would say should be within the ambit of discovery, such as the fact of a funder/ the identity of the funder?

MS. GLOVER: See, you're getting into my moral dilemmas.

MR. MILLER: Oh, that makes it even more interesting. [Laughter]

MS. GLOVER: Right now—so, please, don't put this on the record as what I think for now and forevermore—right now, the current split, for me, is it seems to be less appropriate, given the tax that it exacts on plaintiff, combined with the kind of less arguable benefit to the defendant in individual cases, versus class actions, where I think there are really difficult questions about loyalty to the class, triangulated conflicts of interest. And besides, Rule 23 itself requires us to look for those sorts of problems. So right now, for me, I tend to agree with the categorical protection in individual cases, caveat, still thinking through it. For class actions I am less convinced of that being the right result.

MR. MILLER: Just as an aside—see, I never travel without my copy of the Federal Rules. What would life be without my Federal Rules? Keep in mind that the scope of discovery under Rule 26 is that you have to satisfy relevance to a claim or defense in the action. One could make the simplistic but possibly determinative argument, even the fact of funding, even the

identity of the funding, simply is not relevant to a claim or defense in the action.

Ms. GLOVER: I think you could, but the communications between the attorney and the funder at any time, evaluating the merits of the case, or how much damages should be, that, I think, can be very arguably relevant.

Mr. MILLER: And there you have the dual levels of relevance and work product. And going deeper, the possibility of attorney client privilege, which is tougher.

Ms. GLOVER: Yes. And there's a case *Facebook* that kind of conflated the two in the beginning, and I think the courts have separated that out, largely, because the common legal interest doesn't work well.

Mr. MILLER: I'll argue for a good education in civil procedure. Right?

Ms. GLOVER: I will second that. I will second that.

Mr. MILLER: Victoria? Your turn.

Ms. VICTORIA SHANNON SAHANI: Thank you very much, and thank you so much to the organizers for having us here, and for putting on a conference on this very, very important topic.

I'm going to speak to you today about the Federal Rules. The article that you have in your materials is a forthcoming article in which I go through the federal rules of civil procedure, as well as rules of the rules of domestic and international arbitration procedure, and evidentiary privileges, and talk about ways in which we could modify the existing rules or interpret them to the extent that we can interpret them now, even before revisions would happen. And the question is, why to do this? Well, as one of the members of the audience mentioned earlier in a question, what is the effect? What is the effect of third party funding on procedure? We don't know. That's the answer right now. We actually don't know.

One of the reasons we don't know is that most funding happens in secret, or at least the parties don't necessarily disclose it as a matter of general practice. So, we actually don't know about how normal funding operates. When there's a problem, such as when one of the parties challenges the funding agreement, or when there's a dispute between a funder and its client, then we hear about it. And so, perhaps to some extent, maybe what we're hearing about are anomalies.

So, I argue in the article that we should have some sort of systematic type of disclosure as part of the Federal Rules applicable to the dispute, and in that way, we can do some information gathering. The Advisory Committee on the Rules of Civil Procedure has already mentioned third party funding in its reports. They are quite aware of it. They actually said in a December 2014 report that the judges currently have the power to obtain information about third party funding when it is relevant in a particular case. And that was the full extent of what they had to say at that time about what to do about third party funding under the Federal Rules.

And so I said, well, wait a minute. We need a little bit more guidance here for judges and arbitrators, and that's why I wrote this article. And so I go through the rules, and I propose revisions of some rules and interpretations of other rules to address certain specific areas relating to third party funding.

I don't have time to go into too much detail, but I'll hit the high points in terms of what areas of the Federal Rules I think we should look at. First of all, with respect to discovery and disclosures under Rule 26 and Rule 16, I actually agree with Professor Miller. I do not believe that third party funding agreements are required to be disclosed as part of the initial disclosure. I don't think they meet the burden of relevance or materiality to a claim or defense. Third party funding arrangement are also not insurance, under Rule 26. The reason why they're not insurance can be found in part of the Advisory Committee's Note accompanying Rule 26. Third party funding arrangements don't meet the definition of the types of insurance arrangements targeted under Rule 26, according to the explanation of that definition in the Note accompanying Rule 26. So, third party funding agreements shouldn't be disclosed in the insurance context. That said, we do have a potential for conflicts of interest for judges. We currently have Rule 7.1, which is the corporate party disclosure rule, that says a corporate party must disclose any shareholders or other parent corporations to the judge.

I argue that we should have a new Rule 7.2. The reason why I think we should have a new one is Rule 7.1 only applies to corporate parties, and you could have an individual party or some other non-corporate entity that's a party to a case and that is funded. So, Rule 7.1 is not broad enough in terms of which type of party has to make the disclosure. So, I argue that

we should create Rule 7.2, which would say that all parties, no matter how they are structurally organized, should disclose the identity of their funder to the judge *in camera*. And why do I make the disclosure that specific?

One of the reasons is for the judge to check for conflicts of interest, as required by law in case the judge may need to recuse himself or herself due to a financial conflict. In order to know whether there is a financial conflict, the judge needs to know the identity of the funder. The terms of the funding arrangement are not necessary for the judge to be able to check for a conflict of interest. So, I propose that the identity of the funder should be disclosed to the judge *in camera*, because there have been some calls by the Chamber and others for parties to disclose their entire funding agreement to the opposing side as a matter of initial disclosure, and I just think that's a litigation tactic for the defendant to get ahold of the plaintiff's funding agreement and try to challenge the funding terms through satellite litigation.

The real purpose within the litigation system, I believe, for disclosing the identity of the funder, is to make sure the judge doesn't have a conflict of interest. So, the judge just needs to know the identity and they need to know *in camera*. You don't need the other side to know. And so that's my proposed Rule 7.2. With respect to evidentiary privileges, which Maria just spoke about a moment ago, I actually think that we should modify the privileges. Now, one of the difficulties, of course, is that, although the work product doctrine and the attorney-client privilege are mentioned in the Federal Rules, they actually derive from state or federal statutes or common law. At the state level you would need to modify each and every state's law on privileges, which could be challenging.

In the meantime—because that's kind of a heavy lift in terms of regulation—under Rule 16, the parties actually can make an enforceable agreement about privileges. They can actually agree amongst themselves regarding the effect of third party funding on privileges. That's most likely to happen when both sides are funded. If only one side is funded, then the other side is probably not going to agree. But it's good to know that, under the existing rules, the parties can be empowered to make a decision about how third party funding will affect privileges in their case.

Regarding cost allocation, Rule 54 is the rule that governs attorney fees if a winning party wants to ask for recovery of attorney fees. Rule 54 actually currently says that the party must disclose *if the court so orders*—and that's important—the terms of any agreement about the fees for the services for which the claim is made; meaning, if there is an agreement about payment of attorney's fees, and the winning party is trying to get attorney's fees under Rule 54, the court may order that party to disclose any agreement about fees. I believe that, according to the language of the rule, the winning funded party would have to disclose the terms of their funding agreement to the court if they wanted to recover attorney's fees under Rule 54. I think that's reasonable.

With respect to sanctions, I think that Rule 11 and Rule 37 sanctions don't really apply directly to third party funders, but third party funders may end up having to pay, depending on the terms of their agreement with their client, if the client's attorney or the client directly is sanctioned. However, some funding arrangements actually specifically say that the funder will not pay sanctions costs if the party or the party's attorney is sanctioned. So I think it's a matter of contract.

Moving to class actions, which have been discussed a lot today, it is important to note that the plaintiff class is not typically directly funded as a matter of course in the United States. Of course, as we know, plaintiffs' attorneys and plaintiffs' law firms are funded by funders. So, I don't think at this moment that Rule 23 needs to be revised to deal with third party funding. But if direct funding to the plaintiff class becomes more prevalent, then Rule 23 may need to be modified in the future.

I also wanted to quickly mention domestic and international arbitration. I have a lot in the article on arbitration as well, because I think that litigation and arbitration are inextricably intertwined. And so you can't really address one without addressing the other, and funding happens in both contexts. On the arbitration side, class arbitration is pretty much nonexistent in the United States for reasons discussed earlier. I think that earlier today Tom Coyle proposed a very interesting and potentially innovative way to deal with that issue, in order to potentially have direct funding of the plaintiff class.

With respect to arbitrator disclosure statements, the International Bar Association has guidelines for conflicts of interest for international arbitrators. As of their October 2014 revision,

they require that arbitrators disclose any connections to third party funders. And, in order to facilitate arbitrator disclosures, the October 2014 guidelines require a party to disclose to the arbitrator any third party funder funding the case.

Those are guidelines, however, and they are not mandatory in arbitration, so it remains to be seen whether parties will adopt them. Still, I think that disclosure is where we're headed in the arbitration world. The funders that I've talked to are all open to disclosure. They don't necessarily want to be hiding in the shadows. They're perfectly fine with being disclosed. So, I think that disclosure is at least the first step. The point of disclosure is that we need a mechanism for information gathering. We need to see how positive relationships between funders and clients are working, so that when we create regulations, those regulations will be based on what works rather than on situations that don't work and that just so happen to get into the media.

Thank you very much, and I look forward to your questions.

MR. MILLER: So, you think we're ready for any rule revision right now, Victoria?

MS. SAHANI: Well, we have rule revisions coming down the pipe in just a few days.

MR. MILLER: Right. You know how long they were in the pipe?

MS. SAHANI: Yes, several years. Several years.

MR. MILLER: Now, I can't see Elizabeth's face, because I'm strained, so I don't know whether you're blushing or not. I'll be autobiographical. I was a reporter 30, God, 40 years ago. It's worse than watching grass grow. But maybe we're not ready for it yet.

MS. SAHANI: That's right. That's right.

MR. MILLER: Because you yourself called for information.

MS. SAHANI: That's right. That's right. The article actually talks about both rule revisions and reinterpretations of existing rules. The article presents how the rule could ideally be changed and, in the meantime, how we can interpret the existing rule to help us gain information. So, we actually don't necessarily need major rule revisions in order to get information. The only one I would say is essential is the disclosure rule, because we still don't have anything in the rules where a judge could force a party to reveal the identity of its funder at

the start of the case. The judge could tell the party, "if you want attorney's fees, then you have to tell the court about the funder," because that's already in Rule 54, but that happens at the end of the case. We don't have anything in the rules that mandates an initial disclosure to inform the judge about the funding, so that the judge can observe the case and see how it goes. That's why I propose adding a new Rule 7.2.

MR. MILLER: But you know that with the unlimited power of a federal district judge under Article III, even without your 7.2, the judge can ask forcefully.

MS. SAHANI: Absolutely, and under Rule 83 the court can create local rules. So, the judge can say, "under the local rule of this court, all third party funders must be disclosed." So, I do mention that option in the article as well, and that may be the interim solution in order for us to get more data and have more opportunities for observation.

MR. MILLER: Okay. Now our two commentators, two distinguished commentators. If you guys, or either one of you guys, wants to come here, you can. We haven't gone there yet, in deference to the fact that one of our panelists is not able to make it there.

MR. MICHAEL FISHBEIN: I'll continue the deference.

MR. MILLER: Okay. Michael?

MR. FISHBEIN: Thank you. My name is Michael Fishbein. I've represented plaintiff classes for thirty-eight years, and I'm going to sort of give you a practical laborer-in-the-vineyard kind of response to some of the things we've heard on this panel, and some of the things we've heard today.

The first thing I have to say is that as a young lawyer, I tried my first class action in 1982. I tried it to verdict, and won, and was paid four years later. At the point at which I was finally paid for committing myself to working on that case for six or seven years, I was within a hair's breadth of filing bankruptcy, all my credit cards were maxed out with cash withdrawals, et cetera, et cetera, and boy, I sure could have used some litigation funding back then.

Flash forward, I've fortunately had a successful career and I don't need it anymore to be involved in a class case. But it is an appealing thing, I mean, to take somebody else's money on what I assume would be a non-recourse basis. These cases are extraordinarily expensive, and even though everybody here seems to think you can analyze the risk of these cases in the

beginning, I'm here to tell you that there's no way in God's green earth you can. You have no idea what facts are going to emerge in discovery.

A lot of our cases, the science changes, the law changes, the facts are completely different than what you thought, the juries act weird, and your very best cases that you think are terrific at the beginning turn out to be losers, and vice versa. So, it is a risk-laden business, it is an expensive business. And if someone offered me the opportunity to finance the case in exchange for a multiple of three times whatever the financing is, it's something that I would certainly want to consider.

Here are the questions that as a class counsel with a lot of experience doing this that would immediately pop into my mind. Number one. If I'm agreeing to pay a financer three, or four, or some multiple of whatever they're advancing, am I agreeing to share attorney's fees with a non-lawyer? Because if I am, I am in violation of the code of professional responsibility, or whatever we're calling it these days.

Or, am I simply agreeing to pay a usurious interest amount? I don't know. I don't know what the answer is to those questions, but it's something that obviously, you know, as class counsel, the last thing you can afford to do is get yourself in ethical trouble.

The second thing I worry about is, in modern contemporary class practice, we recover a fee as a percentage of the amount we recover from the class. And the reason that the courts have gone to a percentage method of recovery is because it aligns the interests of class counsel with the interest of the class.

Now, if I enter into a funding arrangement, am I disturbing that alignment? And I disturbing it in such a significant way that's hampering my ability to make judgment about resolving the case, settling the case? And if that's true, then am I an adequate - class counsel? And so, I worry about that.

The last thing that I really, really do worry about is, what is the funder asking in terms of control of the case? Now, in private litigation, that's one thing.

But in class litigation, I have the obligation to provide the class with fair and adequate representation as their counsel. That's required by the rules; it's required by the due process clause. I can't do anything to jeopardize that.

So, what is, from my perspective, the most essential element of fair and adequate representation? My client can't have a conflict, and I have to be qualified, but more importantly than that, I have an obligation to exercise independent professional judgment for the class as a whole. And that obligation is indeed so strong, it overrides my obligation to my named client.

If my named class representative is taking a position that is contrary to the interests of the class, I have to go with what I believe is the best interests of the class as a whole. So, I can't—I think consistent with Rule 23—agree to anything with a funder which would give them any control, in any way, over any decisions that I make as class counsel in the case.

Could I be required to consult with them? Sure. I'm happy to listen to anything an intelligent person has to say about any case I'm involved in. But if it goes further than that, if it penalizes me for not accepting a settlement offer, if it requires that I exercise my judgment in a certain way, I can't do it. And no responsible class counsel could do it. You would destroy the entire underpinning of what gives you representative status if you were to do that.

And to the point of whether or not these relationships are disclosable in litigation, generally, whatever they are in litigation, generally, I can tell you for sure, if I had such an arrangement in a class case, that arrangement would be disclosed to the court in my motion for class certification. Because the last thing that judge needs in considering and perhaps certifying my class, is to be surprised to find that there's somebody around that has some connection to my representation that he or she doesn't know about. And I think that would be a terrible mistake. So, those are kind of my practical take on some of the things we heard today as it relates to class litigation.

MR. MILLER: Michael, let me push a wee bit on that last point, because it really ties in with Victoria. 23(g) gives the court the power to pick class counsel. One of the elements 23(g) tells the court to consider the resources that counsel will commit to representing the class, which I think is a mirror, a two-faced mirror.

Number one, I think it gives the court power to ask the question, and it seems to me that it does indeed oblige you to reveal it, and it can work against you or for you in the mind of the judge selecting class counsel. Let me ratchet it forward.

You come to settlement. How much—not only of the fact of the relationship, which may come at the class certification—but now at settlement, where the court is appraising the quality of the settlement, is it not relevant under 23(e), the settlement provision that that judge knows how much is going to a funder?

MR. FISHBEIN: I think it is relevant, and from my perspective, it should be disclosed when you ask the court for certification in the first place, so that it's already behind you when you get to settlement. It's already out on the table. Everybody knows what financial relationship I have—or we have, if it's a group of class counsel—that could have affected our handling of the case.

So, when it comes out at time of settlement, it's already a known fact, and not only the fact of the relationship, but I think, also, the terms of the relationship. Now, that doesn't mean all of our discussions about strategy or whatever. I think that is work product. But I think the fact and nature of the relationship are something that good practice, if not the rule itself, would require disclosure.

MR. MILLER: Alright. Let me put the nail in the coffin on that point, because 23(e)(3) says, the party seeking approval must—which generally is a mandatory word, though not necessarily.

MR. FISHBEIN: Then I'm glad I said I'd do it. [Laughter]

MR. MILLER: Justice Scalia would say it's a mandatory term. Parties seeking approval must file a statement identifying any agreement made in connection with the proposal. Whether the funding is in connection with the proposal, that's. . .

MR. FISHBEIN: It's close enough.

MR. MILLER: So, some of the issues of protecting the privacy of the work product may be jackknifed out, at least in the class context.

MS. GLOVER: That's why it makes the capital so interesting.

MS. SAHANI: And also under 23(h), if the class was seeking attorney's fees, it would have to disclose the third party funding as well, because it connects with Rule 54.

MR. MILLER: Yeah. I think that's right. So, I think the class action, being the special beast it is—but remember, there are judges out there who are quite willing to declare anything a

quasi-class, and fiddle with all this stuff without benefit of rule. Stephen? You with us?

MR. STEPHEN GILLERS: I am. Thank you. I'm quite aware that I'm the last speaker, so I will be mindful of your time.

There has been a lot of discussion across the day about ethics rules, and I'm going to comment on all of the discussion briefly, because of my eight-minute limit. It is apt that I follow Michael, because he, in his talk, exemplified the issues in practice that I'm going to talk about from a more academic perspective.

I'm going to identify three so-called ethics rules, and make one recommendation. But first, there is an overarching necessity here. If, at the end of the day, the funder makes a lot of money and the lawyer makes a lot of money, and the client is essentially a notional presence who gets, you know, lunch, it won't work. There will be ways in which it will be undermined. Courts or consumer groups will require that the client must be appreciably better off. The client cannot simply be a necessary, if inconvenient, vehicle to profit. It's critical.

Now, the first so-called ethical problem—it's really a legal problem—is independent professional judgment. Independent means to incorporate all of the conflict rules, because if you're conflicted, you're not independent. And you're conflicted if there is another substantial influence on your judgment.

Even if you don't succumb to it, in your view, a jury may conclude otherwise. That's what independent means. And that is, essentially, the only justification remaining for the champerty rules.

Judgement means you thought about it, you investigate it, the matter. You acted competently. So, if it is your assignment to assist the client in a funding agreement, it means you shopped around. It means you negotiated.

Independence means you didn't call the funder you usually deal with only, or the funder you would like hereafter to deal with. Independence means that only your client's interest counts and you're working hard to achieve your client's interest.

Take the $15 million scenario from the first panel. The funder puts up $5 million. It gets the first $15 million. Presumably, that $5 million went toward the cost of litigation, and perhaps some of it in counsel fees.

In the discussion of that scenario, no one talked about the lawyer's fee. The lawyer's fee may exceed $5 million. The lawyer then looks to the client, who has gotten nothing so far, and says, well, four of those $5 million went to me, but my fee is $6 million. You owe me $2 million, even though you won.

Even though there was a settlement. I don't think we can tolerate that resolution. I don't think that would be seen as acceptable. A competent lawyer charged with negotiating the fee in the first place would have to spin out the worst case scenario and protect the client from it.

Privilege and waiver. A confidentiality agreement between the funder and the client cannot serve to prevent discovery of information that is otherwise discoverable. It is just a private contract. You could say this is confidential, but it doesn't mean it's beyond discovery if it would otherwise be subject to discovery.

And the lawyer should not be sharing confidential information with the funder without the client's informed consent. It's the client's information. Now, the client may be happy to consent. The lawyer should not be sharing privileged information for fear of waiving the privilege.

The idea of a joint defense agreement or a common interest agreement, as it's more properly called, as sufficient to shelter the allegedly privileged information is still an open question. At the time of the negotiation of the funding agreement, the party's interests are adverse. I would not have much confidence that it would be recognized.

Furthermore, not all jurisdictions recognize common interest agreements outside the context of litigation or imminent litigation. Until a couple of months ago, no New York court did so. Then the First Department did so. Whether or not that survives is another question.

And finally, and most troubling, is the idea that the funder could attach a penalty to the client's refusal to accept the $15 million offer, which will cash out the funder but leave the client possibly owing his or her lawyer the fee the lawyer is entitled to by contract, but which the lawyer has not received.

The idea that that could happen is simply unacceptable, and I believe that it would be incompetent for a lawyer to allow a client to delegate that level of authority to the funder, who can, essentially, if the penalty is serious enough, preempt the client's desire to continue the litigation.

You know, lawyers in contingency fee cases have attempted to do just that; to say: "If you settle over our objection, or you don't settle over our advice, then our contingency fee shifts to an hourly fee We're going to keep a record of our hours, and you owe us for our hours, because you may choose to settle for what we consider to be too little, when we want you to go on. Or the converse, you may reject a settlement we recommend, and it shifts to an hourly fee."

That interferes with the client's right to decide whether or not to settle. If you're going to take a risk on your client, you take a risk. You cannot preempt settlement discretion by penalizing the client with a shift from contingency to hourly fee.

Final point. One thing you might think about doing, as many industries have done is—consistent with antitrust laws, which I think can be done—develop a code of ethics for funders. A code of best practices. That would be impressive, if carefully done, and done with respect for the client, other than as a notional presence.

That would be impressive to courts, as they begin to grapple, as they will grapple, as they have not yet fully grappled, with the many lawyer regulatory issues, more than I have had time to discuss, in this still relatively new industry. Thank you.

MR. MILLER: I'm going to get up here simply so that you folks have three microphones, which is less than five. I love Steve. He's the paradigm moral man in an immoral society.

As Peter said in giving a brief biography, in these last years of my life I have decided to run a sports institute. What's the hottest issue in sports today?

MS. SAHANI: Concussions?

MR. MILLER: No. Concussions is old.

MS. SAHANI: Paying student athletes wages?

MS. BURCH: DraftKings.

MR. MILLER: It's fantasy football. Now, the usual image used for this industry is "Wild West." To me, the proper image is, this is fantasy litigation.

And you heard it a little bit this morning, and of course you read about it every day in the paper in the context of fantasy football; namely, shut it down, or regulate it. And indeed, there's every reason to believe, I think, that this industry [litigation finance] is going to be regulated.

I don't think it will wait for the rulemaking process, and I don't think the rulemaking process can remotely deal with the range of issues raised by third party funding.

Any adjustment, Victoria, in privileges, will not come through the rulemaking process. The rule-makers have been kicked in the teeth on that one before when they proposed the Federal Rules of Evidence, and Congress took them away, and legislated.

So, I want to ask the five of you, what's the best way, if there's going to be regulation, to regulate this industry? What do you think, Michael? You look pregnant with thought.

MR. FISHBEIN: Well, I think if you're going to regulate the industry, it should be at the federal level so there's uniform regulation.

MR. MILLER: Not like insurance, which is left to the states?

MR. FISHBEIN: God, no.

MR. MILLER: God, no. I take it that's a negative.

MR. FISHBEIN: That's a negative. And it seems to me that, really, there's two concerns—well, there's lots of concerns from a regulatory standpoint.

But one of the fundamental concerns are when you're dealing with consumers and other people that don't have a lot of bargaining power is, are people getting a fair deal, and are the terms of these deals going to be regulated?

The other is disclosure. What is being disclosed to the people who sign these deals so that they can understand what the ramifications are.

MR. MILLER: Truth in lending.

MR. FISHBEIN: Essentially, yes. I think those are the two elements that I think are, I guess, urgently in need of being addressed.

MR. MILLER: Well, what do you mean by fair deal? Are you talking about the rate? Sort of communize the fee structure?

MR. FISHBEIN: Well, you know, we regulate a lot of things, economic exchanges, in this country. And I think that we certainly could regulate—I don't know whether it's a fee structure, or fee guides, or something that would prohibit lenders from taking advantage of those to whom they lend, to extract unfair terms.

Unfair is in the eye of the beholder, but that's why there's legislation because somebody's got to consider those issues, I would think.

MR. MILLER: So, we've got disclosure, and we've got fairness, however you'd like to describe it. Anything else that you five can think of that might go into a regulatory package?

MS. SAHANI: I wrote another article about the sort of regulatory categories that we need for this industry. First, I definitely agree with Michael that we need regulations of the transaction, which would include things like disclosures of terms to the client, but it would also include things like regulation of the funder. For example, capitalization. So, there's this argument: what if the funder runs out of money in the middle of the case? If they're too highly leveraged among their various investments, that's a danger to the client as well. So, perhaps funders should have a required amount of capital on hand, at all times, for example. Or have a certain sort of corporate structure, for example. So we need some regulations for the transaction. Second, we also need regulation for the procedure, which I talked about today. Third, we need ethical regulations. And the three of those need to be connected. So, I sort of see the regulatory challenge as trying to regulate within those three buckets.

MR. MILLER: Now, Steve focused on the last point you made, the relationships, the conflicts. You spoke about developing a code of conduct, or code of best practices.

Presumably, you meant by the industry. Would you go further? What about the Bar Association? What about legislation?

MR. GILLERS: No, I would not go to the Bar Association. And on legislation, you know, after some of the early decisions, including an awful decision in Ohio, someone prevailed on the Ohio legislature to approve funding after the Ohio Supreme Court decided it was champertous.

I imagine that the bar, or the plaintiff's bar, did that, because the availability of funding is very attractive to the plaintiff's bar. But in the legislation, while it calls for transparency to the client, there is nothing that protects the client beyond transparency.

There's no limitation on fees, there's no guarantee that the client will walk away with something, at the very least, because the client population is not represented in the lobbying effort.

So, I'm not really confident that legislation will work. And even if the client population were represented, I'm not quite sure how you would devise that law.

I do think it would be useful, advisable, not to permit the lender to penalize the client's choice to settle or not to settle.

I think that's very important. Because if you take away that choice, if you make it expensive to exercise that independent choice, then you really are making the client a notional presence.

We're just borrowing your face, your name, but you have no power any longer with regard to your matter, which may produce nothing for you. And that's just simply unacceptable, and if that is how this evolves, then someone's going to intrude legislatively, or courts through rulemaking.

So, from purely a defensive point of view, it's incumbent on the industry to make sure we don't come to that point by controlling greed, really, by controlling how much we can expect to earn from funding. Lawyers and funders, don't forget the client. Clients should not be, you know, Where's Waldo? They should know who the client is, and he, she, it, should be front and center all the time.

MR. MILLER: I have a very good friend who likes to say, greed is a growth industry. Any reactions on this regulatory front?

MS. GLOVER: Just to say that I agree with Michael that uniformity is crucial. But I tend to think the emphasis ought to be on the scope of terms. I think disclosure has proven itself to be relatively—I won't say worthless, but maybe I'll say worthless—relatively worthless.

The CFPB recently did a two-book study on arbitration agreements, and found that virtually everyone who reads them, despite them being in big, bold letters, don't understand them, right? The problem with the $7,000 offer in the AT&T clause that issued at *Concepcion* wasn't so much that it didn't incentivize people. So, people didn't really understand what in the world that meant, or even read it. Moreover, we've seen in the settlement mill context that, you know, we've seen calls for disclosure about these law firms that aggregate a number of small-value claims, and then use the volume to leverage money with the insurance companies, and arguably, settle on the cheap.

When you're a small value plaintiff who can't get access to a very high cost litigation system, you have about, you know, zero leverage. You don't have much economic leverage to dic-

tate the terms with the settlement mill, or with the funder. So, I think regulation terms is crucial.

And I guess, one small thing to say is whether we need regulation—for example, of the arbitration context or expansion of small value claims, with all due respect to litigation funding—I mean, part of the problem is, there are so many people who cannot go to court without funding.

So, arguably, we need regulation to make some people just be able to take relatively simple claims through a process that isn't so arduous.

Ms. BURCH: So, this question of regulation reminds me—this will reveal my reading preferences. I have a three-year-old. But it reminds me of this Dr. Seuss story about the bees, right? And the bees work harder when they're watched, but when they're watched, the watcher sometimes falls asleep, and there needs to be a bee watcher's watcher, and then there needs to be a bee watcher's watcher's watcher.

And so, when I'm thinking about this regulation, I'm reminded that maybe we can back to making the bees work hard for their own incentives. And so, depending on how we align the incentives of the funding relationship itself, then there may be less need for bee watcher's watchers, because the funding relationship itself will provide those incentives.

A lot of what we've been presupposing, at least in the class context, is that the funding relationship is going to be made directly to the plaintiff's law firms. And in that case, the triangulated relationship doesn't work very well. But if the funding relationship is with the clients themselves, such that the funders actually perform a public service function of monitoring the lawyers, then maybe there's less need for the bee watcher's watcher, and so maybe there's less need to occupy the regulatory space, at least with regard to class actions.

Mr. MILLER: You make it sound like a full employment policy. Now, what are you going to say to the Chamber of Commerce when it puts on the hard press? Because at some point, if regulation comes front and center, you know they're in the arena, and they're not going to take a moderate position on it. Can you really sell the access concept?

Ms. BURCH: Well, I mean, I think it depends on the type of case, right? Depends on the type of class action in particular. One of the things we've been discussing with regard to disclosure is this assumption that disclosure is automatically a

bad thing, but I think that what we heard on one of the first panels this morning is that these financiers actually perform a screening function, right?

So if they provide a robust screening function, then they are making sure that the claims are actually meritorious on the front end. Disclosing that there is a financier involved in the lawsuit can actually provide a signal to the defendant that this is a meritorious suit. If you're the Chamber of Commerce and you're worried about all of these frivolous suits, as they purportedly are, then they should be welcoming some of this, because it provides the screening function.

MR. MILLER: You're dreaming, aren't you?

MR. FISHBEIN: Don't you think there's constitutional implications to litigation funding? I mean, litigation is ultimately the right to petition, and *Citizens United* seems to say that an inherent part of the right to petition is the right to fund your petitioning, or fund your political activity, or fund your speech.

So, it would seem to me that if the Chamber of Commerce were to say, we can't have litigation funding, period, to me that would generate a pretty good constitutional response.

MR. MILLER: You've finally found a use for *Citizens United*.

MR. FISHBEIN: It was hard. [Laughter] It was hard.

MS. SAHANI: I couldn't agree more with that, particularly in the context of civil rights litigation. I mean, if we think back to the fifties and sixties, there were funders, but we didn't call them funders. We had the NAACP and other organizations essentially bankrolling civil rights litigation. If we didn't have that, we wouldn't have the society that we live in today. So, to some extent, that is constitutional, because it was trying to vindicate the right to equal opportunity and equal protection of the law. So, I completely agree with you.

MR. MILLER: Without saying so, Victoria, you sort of—or have you—abandoned public interest litigation. Who would fund *Brown v. Board of Education* today, or marriage equality today? Is that going to end up as private funding as opposed to industry funding?

MS. SAHANI: Well, there are some law firms that take those cases on contingency or *pro bono*. For example, in Boston there was a school desegregation case in the eighties that was taken on by the firm of Foley Hoag, for example. Built into the civil rights statute, you have the award of attorney's fees to sort of

incentivize law firms to take on these cases. What if the statute awarded not only attorney's fees, but also litigation funder attorney's fees? Then, if the litigation funder paid the attorney fees for the civil rights case, the funder could get the statutory reimbursement. That would incentivize the funding industry to fund civil rights litigation as well. This doesn't completely replace the need for public funding, but I think there are a lot of meritorious class actions, as Elizabeth mentioned, that aren't being brought because the private sector is not funding them, and the public sector has run out of money, as Tony mentioned.

MR. MILLER: Yeah. The Quebec model is not to going to fly in this country. We sort of know that.

MS. SAHANI: That's true.

MR. MILLER: Before we go to the audience, sort of a 30,000-foot question. Is litigation funding by third parties good for the soul of the profession? Or is it just another manifestation of the businessfication of the profession?

Is this going to make us better lawyers, or better businesspeople? More crass, more. . .?

MR. FISHBEIN: The business is already businessified, to the nth degree, and I think it's naïve for anybody to think otherwise. And litigation funding is just an alternative tool to allow lawyers on, I guess, both sides of the case, because it can go on the defense side as well—to do their job. But the notion that we are in a profession that's somehow different from business, I don't see it. I mean, you know, you see the way these big cases get organized, the way they come together, and if that's not capitalism working at full tilt, I don't know what is.

MR. MILLER: Steve, you want to make an anti-capitalism statement?

MR. GILLERS: Well, Arthur, with all due respect—I have a lot of respect—but I think the question about whether law is a profession or a business is a very tired question, and the answers get us nowhere. The critics of the profession use the businessification of law to attack lawyers. And that's silly, right? So my view is that we shouldn't even join that debate, because it will produce no valuable conclusions.

MR. MILLER: You abstain. You know it's going to come up in any regulatory push.

MR. GILLERS: Well, it depends who's asking. You know, if Charles Grassley is asking, I have one answer. If you're asking, I have another answer. [Laughter]

MR. MILLER: I don't know how to take that. Okay. Okay. Chip in. Chip in. Sir. The mics are floating around.

MALE VOICE 1: Thanks very much. I was interested when you asked for different perspectives on the regulatory regime that would be appropriate, nobody said, how about no regulatory regime? And I would be interested to know what would be so horrible about that.

For example, somebody mentioned how essential it is that disclosure—that funding sources be disclosed to the court, *et cetera*, because then it would send an important signal to the other side. Well, if there's a plaintiff with a meritorious case and Fortress Investment Group in the shadows, you can bet Fortress Investment Group will not be in the shadows to send that signal very clearly.

There's no essential need for the funding source to be disclosed in documentation because the plaintiff wants to make it clear that settlement should be reached as soon as possible, because they have all the resources that can possibly be brought to bear. So, that's kind of the natural force behind, in my view, no need for particular disclosure of how wealthy the funding source is.

What I haven't heard today is, what is so horrible about a world in which lawyers are governed by their respective rules of professional conduct and Rule 11? Why is there a need for the five or six different overlapping regimes of regulation? And remember, we're talking about sophisticated commercial parties, well-informed, doing business with one another.

MR. GILLERS: First of all, they're not always well-informed, sophisticated parties, because there's the model of the personal injury plaintiff who needs living expenses. Now, on that model, we have a rule, you know, that doesn't allow the lawyer to provide minimal living and medical expenses to a litigation client.

That rule is not uniform throughout the United States. California allows living expenses; D.C. allows living expenses. There is no justification for that rule. Well, there is. There is justification offered, but it's very thin.

The value of that rule is to the defense bar, and to the insurance companies, because personal injury plaintiffs can

hold out for only so long. And while the lawyer can invest many hours of time and many dollars in experts, and what have you, he or she cannot provide living expenses, because somehow that money will warp the lawyer's judgement, whereas the litigation costs and the hourly investment will not warp the lawyer's judgement.

It just falls apart, but for some reason, it's been impossible, with a few exceptions, to knock out that rule. So, my point simply is that we're talking about two different kinds of plaintiffs, and that has been emphasized here earlier. Second, I'm for no regulation in the first instance, other than transparency and a rule that does not allow the funder to penalize the client's choice whether or not to settle.

Beyond that, I want to see how the industry itself handles its responsibilities, whether the interest in money overtakes all other considerations, which will result in doom, or whether the industry puts together some kind of coherent, plausible, respectable document that identifies, and shows itself to have been able to identify, an appropriate role for the service it provides.

MR. MILLER: Other reactions?

MS. GLOVER: Yes, just a quick one, in that, you know, without getting into the specifics of what term regulation would be, although perhaps just preventing unconscionability, I tend to agree, perhaps outside of the context of the class action, that disclosure of the fact of funding, or anything relating to funding in relation to the court, is a bit of a tax on a funded party, and not something that we would require were there not funding available, and not something that would be discoverable.

You wouldn't be able to ask the plaintiff, you know, how she's financially doing otherwise. So, disclosure to the court, I think I agree with the way the courts have been going.

MR. MILLER: Sir?

MALE VOICE 2: In terms of regulation, we're not just starting from scratch, the U.K. has had voluntary rules proposed by the funders, and that's been under Justice Jackson's edict after studying the industry that, let's do it voluntarily before trying to impose legislation.

That's been working. Now, the U.S. Chamber of Commerce is over there, and perhaps rightly saying no, now they've proven they can't do it. Let's go onto legislation.

There are rules in Australia. There are rules that are coming down the pike in Hong Kong. And there are rules coming down the pike here. That's what Senator Grassley is now looking into. He's having interviews.

There is no question about whether, it's going to be when. That's number one. Number two, the real problem. I think, is not so much with regulating the industry, although that is a problem. We've got some very, very, very fine industry members now, only a few bad apples.

The real problem I think, that regulation doesn't look at are the claimants, are the lawyers, and basically, the defendants. Now, the reason there has been so much opposition to disclosure is because when they disclose it, then the defendants jump all over it and argue champerty and whatever, the satellite litigation.

So, funders have gotten kneejerk responses to that. They don't want disclosure. Now, they're being forced to be disclosure.

In every arbitration, every international arbitration, the first thing the arbitrator will ask is, are you being funded? Because otherwise, it's in your interest to tell me. If there is a conflict that I have, then this is going to blow up the litigation.

Now, that same thing can happen in the litigation world. So, that disclosure is down the pike. I think Steve's point about—and Victoria's point—about settlement and about disclosure are two key issues.

So, you're not going to regulate the industry as a whole in all its aspects. What you really need to do is, number one, pick out some of the most sensitive things, like this settlement, like this disclosure. Regulate that, and regulate the defendants on certain things, and regulate the claimants on certain things.

And most important, the industry has to get involved in preparing the regulations, because otherwise, you're going to have chaos. You're going to have some of the worst regulations around. And the industry hasn't done that. So the first thing is, get the industry involved and regulate it as a web. That's all I have to say.

MR. MILLER: You have a reaction?

MS. SAHANI: Yes, actually. So, there's a new organization called the Alliance for Responsible Consumer Legal Funding. And, as a disclosure, I'm on the advisory group for that organization. It actually does have funders, as well as law professors

and funding clients involved, and the organization is getting involved in the regulatory process and having funders be part of the solution. So, the funders know that regulation is coming, at least in the consumer context. It may be that, in the commercial context, the regulators wait longer or decide not to regulate. But the consumer context is where the first push is going to come to regulate. I think at least some funders are interested in being involved in that process to make sure that the regulations are balanced. That said, we need to make sure that there are more voices than just the funders. Yes?

MALE VOICE 2: They're being dragged into it, number one. Number two, you're not talking about consumers, you're talking about a different role, I'm talking about commercial.

MS. SAHANI: Commercial. Okay.

MALE VOICE 2: And I'm also talking about the plaintiffs . The biggest risk of funding is not the funders. It's not the defendants, it's not the litigation, it's the plaintiffs. Because you have desperate claimants, who are going to shade the facts and you have dishonest claimants. So all that comes back under [inaudible]. So that this whole notion of comprehensive regulation is key in the commercial funding context.

MR. MILLER: Yes?

MALE VOICE 3: So, my question is really about litigation funding in class actions. I just wanted to get some clarification. First of all, my impression is that it's a problem that many of you talked about, but not exclusively all of you talked about, but the problem that we ended up talking about a lot in this panel. My impression is that there has been almost no third party funding of Rule 23 class actions in the United States. I just want to make sure I haven't missed something. Now, my question is, really, if it were to happen, I heard two different ways it could happen.

One is, I heard that a third party funder could directly fund a law firm. A step up from a bank loan. It would be a nonrecourse transaction with a percentage recovery of the fee. The second would be that a third party funder would transact with the class.

And my question is, how do either of those work? The first one strikes me as dangerously risky on the issue of fee-splitting. The second one, I know that class action attorneys have gotten consent to go out and take out large loans on behalf of the class. Does that have to go through the judge, before even that

happens? I don't understand exactly how a lead plaintiff could bind the sale of future recovery for the entire class.

MR. FISHBEIN: I don't either. I don't think that's a practical thing, unless you have a very small class and you're effectively in touch with all the people, and you can talk to them individually. But I don't see how you can fund class members directly. I don't see that.

It seems to me that if it's going to work in the class context, people that drive the litigation for the benefit of the absent class members are the lawyers. And it's the lawyers that are doing the funding. It's the lawyers that are putting the money out. It's almost never the members of the class. So, if you're going to fund anybody, you're going to have to fund the lawyers. Now, how much funding is going on? I don't know.

There are cases that start out as kind of mass tort cases, where some of the lawyers are funded, and that morph into class actions as you get to settlement. I don't know what happens with those cases, but that is happening out there. That I know. So, if any of the lawyers who started out as representing individual claimants in mass torts that get MDL'ed, that end up representing a settlement class, they got funding from a litigation funder. Now, how that relates to the class, I don't know. And I don't know to what extent it goes on.

MR. MILLER: Maria? You're nodding up and down.

MS. GLOVER: Sorry. I was writing a note. So far, it isn't happening much, at least in published ways. You know, you sort of hear about it.

MS. BURCH: But I mean, Radek's paper this morning was talking a little bit about the funding of plaintiffs' law firms, right?

But I mean, I think there is this sort of persistent question about whether a named representative can consent to a funding relationship on behalf of a class, and have a judge bless it. I don't think there's been that much written in that area.

In the MDL context—so, if you were to have an issue class that focused on, principally, present plaintiffs, then you could go about it in some of the same way as consumer legal funders do, which is to contract directly with the client.

MR. MILLER: But you can see, if you pursue a deviled [phonetic] theory that the fact of funding probably has to be in the settlement papers, element relevant to opting in or opting out,

and your professional objectors could have a field day with it. It's a wonderful world. One last question.

MALE VOICE 3: I just wanted to respond to Tony's - there is funding of class actions. They fund the class action lawyers, but they don't take a percentage of the fee; they take a multiplier on the loan. So they will take three times the loan if the class action is successful.

It's actually a big issue because the class action lawyers never, in my experience, tell the court that they had this non-recourse loan. And they go into the court, and they ask for fees, and they say, "We took on a lot of risk," but in fact they had a funder give them this non-recourse loan, and so, I think it's an issue that hasn't been really explored yet. But it does happen.

I think, in theory, the funders could directly fund the class members the same way that the lawyers get paid from class members. Unjust enrichment, the common fund doctrine. I think in theory, the representative plaintiff and the class counsel could go to the court and say, "Would you please approve this funding arrangement, and pay the funder with 10% of the class's recovery on the grounds of unjust enrichment, common fund doctrine?" There's no reason why that couldn't happen, but I don't think it has happened yet.

MR. MILLER: Our time has expired. My thanks to my colleagues. Peter, you've got some words?

MR. ZIMROTH: I'm not going to try, in the two and a half minutes that I have, to summarize everything that happened today. Not even a titter. Alright. So, all I want to do is thank you all for coming. It's been, really, a wonderful day. I've learned a tremendous amount from all the panelists. Earlier this morning, actually the first thing I said this morning, was that I was looking to you folks to help us—that is, the Center—determine how we could continue this conversation, what we as the Center at this law school could do to be useful to further this dialogue.

And so, I would ask you again to do that. You can email us, or speak to us. Other than that, I just want to say thank you very much for coming. Those of you who have signed up for CLE credit, please remember to sign out, otherwise you won't get your credit. Thank you.