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RETHINKING THE IMPACT OF THIRD-PARTY FUNDING ON ACCESS TO CIVIL JUSTICE

Victoria Shannon Sahani*

CONTENTS

INTRODUCTION	612
I. ASSUMPTIONS MADE	615
A. <i>Defining “Third-Party Funding”</i>	615
B. <i>Defining “Access to Justice”</i>	618
C. <i>Cost as a Component of “Access to Justice”</i>	622
D. <i>Other Assumptions</i>	624
II. THE THOUGHT EXPERIMENT AND OUTCOMES	625
III. SUGGESTIONS FOR INCREASING ACCESS TO JUSTICE	629
CONCLUSION	632

Third-party funding indisputably puts a gold-weighted thumb on the scales of justice in favor of funded parties for two main reasons: (1) funded cases already tend to be calculable winners on the merits, and (2) third-party funders seeking a profit generally do not fund cases that are demonstrably likely to lose on the merits. Thus, we are left with both the promising potential for winners to be more likely to win with third-party funding and the alarming realization that not all winners are offered this same chance. This provokes a larger, fundamental question: If funders are picking winners among the winners, then what does real access to justice look like in an era of third-party funding? Would real access to justice need to involve third-party funders funding indigent or innocent defendants, expensive long-shot claimants, righteous injunctions with no monetary recovery, or unprofitable cases that espouse some worthy yet controversial position?

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This Essay uses a thought experiment to identify areas of law and categories of parties where the promise of third-party funding may be falling short with respect to expanding access to civil justice. After outlining the thorny needles of this problem, this Essay presents a potential solution for funding longshot winners, expensive winners, defendant winners, non-financial winners, and political winners—depending on the facts and circumstances of the disputes.

This Essay argues that if funders decide to fund only one additional category of parties in the name of increasing “access to justice”— even if such funding cuts against the funder’s own profit-seeking interests— then civil defendants are as good a place as any to begin. Civil defendants, by definition, do not commence the litigation and, therefore, in theory, there can be no corporate influence from the third-party funder with respect to stirring up the litigation itself (i.e., maintenance, champerty, and barratry). In addition, this Essay argues that other worthy aspects of the case itself—besides financial worth— may be the true foundation of “access to justice” that funders should espouse and support financially. This Essay concludes with a few ideas regarding how a funder might modify its algorithms and decision-making processes to include some of these aspects as factors to weigh in determining whether to fund the myriad categories of “unfunded winners” to help rebalance the scales of justice.

INTRODUCTION

One reason for the public outcry against third-party funding¹ is the widespread perception that it is unbalancing our notions of party-

1. An in-depth working definition of “third-party funding” is provided later in this Essay. See *infra* Part I.A and accompanying text. For now, third-party funding can be simply defined as a financial arrangement between a party involved in a dispute and an outside entity through which the party seeks funding for its legal representation instead of self-financing. For a more thorough and nuanced description of third-party funding, see generally LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, *THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION* (2d ed. 2017). See also Maya Steinitz, *Whose Claim Is This Anyway - Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1270, 1275–77 (2011); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT’L L. 159, 161, 167 (2011); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 453 (2011); Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1298 (2002); Terrence Cain, *Third Party Funding of Personal Injury Tort Claims: Keep the Baby and Change the Bathwater*, 89 CHI.-KENT L. REV. 11, 12 (2014); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 329 (1987); Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 379 (2014); Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation: How Lawyer Lending Might Remake the American Litigation Landscape, Again*, 61 UCLA L. REV. DISCOURSE 110, 112 (2013); W. Bradley Wendel, *Paying the Piper But Not Calling the Tune: Litigation Fi-*

driven dispute resolution processes and even-handed tribunals.² In the aspirational vision of idyllic dispute resolution, an arbitrator or judge oversees the proper administration of the proverbial “scales of justice” in an orderly manner and “balances” out party-power differentials calmly through procedural evenhandedness. Yet, third-party funding indisputably puts a gold-weighted thumb on the scale in favor of funded parties, particularly since funded cases already tend to be calculable winners on the merits, and since third-party funders seeking a profit generally do not fund cases that are demonstrably likely to lose on the merits.³

Thus, we are left with the promising potential for winners to be more likely to win with third-party funding, and the alarming realization that not all parties are offered this same chance to win for several reasons. First, traditional for-profit third-party funders only fund cases from which they can make a profit.⁴ Thus, many merit-based winners whose claims are too expensive to pursue relative to their claim value

nancing and Professional Independence, 52 AKRON L. REV. 1, 2–3 (2018); W. Bradley Wendel, *Litigation Trolls*, 12 N.Y.U. J.L. & BUS. 725 (2016); W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*, 63 DEPAUL L. REV. 655, 656 (2014); J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 918, 922–23 (2016); Elizabeth Chamblee Burch, *On Regulatory Discard and Procedure*, 11 N.Y.U. J.L. & BUS. 819, 823 (2015); Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 320–22 (2011); Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will The Sky Fall*, 63 DEPAUL L. REV. 499, 500, 509–10 (2014); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 863 n.1, 869 (2015); Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 390 (2016); Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 407 (2017).

2. Cf. Eugene Kontorovich, *Peter Thiel's funding of Hulk Hogan-Gawker litigation should not raise concerns*, WASH. POST (May 26, 2016) (“Anyone who donates to the ACLU or a Legal Aid fund is basically underwriting third-party litigation. Most recently, private profit-motivated litigation finance has emerged as an industry in its own right, unburdened by any concern over the old common law rules By current standards, [such] funding should raise no eyebrows — unless one also wants to revisit public interest litigation, class actions and contingent fees But if the lawsuit is not frivolous, it is hard to see how the motivations of funders are relevant (or discernible). One would not say a civil rights organization could not accept donations from philanthropists angered by a personal experience with discrimination. All [this] has done is cut out the middleman.”).

3. Cf. NIEUWVELD & SAHANI, *supra* note 1, at 25 (“[I]t helps to look at a third-party funder’s motivations. At any point in time, the third-party funder will be determining on which one of three paths the litigation sits: (1) is the third-party funder still likely to make a significant profit; (2) if not, does the third-party funder have a decent chance of emerging with some or all of its original investment intact (and possibly a modest profit) if it continues to fund; or (3) is it likely that any new money invested will be wasted, alongside the old money? Only in the latter case (path 3) is it likely that the third-party funder will want to terminate.”).

4. Cf. NIEUWVELD & SAHANI, *supra* note 1, at 33–34 (describing traditional commercial third-party funding investments as seeking “three times” or “3X” return on investment, at a minimum).

are turned down. Second, it is likely that long-shot winners—cases too risky even for a third-party funder—are less likely to be funded as well. These cases include those that rightfully argue for a change in the law or rely on creative theories that require mental and verbal jujitsu to convince the decision-maker of their merit (i.e., the stuff of Hollywood films about courageous lawyers and citizens fighting against insurmountable odds). Third, defendant winners may be less likely to be funded unless those defendants already have hefty funds at their disposal through which to either pay the funder a periodic premium or pay the funder from their own pockets (rather than from the proceeds of an award) upon winning the case. Fourth, non-financial winners—parties seeking non-financial remedies—are not likely to be funded unless they are willing to pay the funder from their own pockets, since there will be no monetary judgment upon winning the case. Fifth, political winners are not likely to be funded, as many funders choose not to engage in funding of controversial positions, parties, or of cases involving governments—which may be viewed as courageous or cowardly, depending on the type of party or issue at stake in the case.

The foregoing examples collectively engender a larger, fundamental question: If funders are picking primarily winners—and more specifically winners that suit their profit-making business model—then what does real access to justice look like in an era of third-party funding? Would real access to justice need to involve third-party funders funding indigent or innocent defendants, or expensive long-shot claimants, or righteous injunctions with no monetary recovery, or unprofitable cases that espouse some worthy yet controversial position?

Much has been written about access to justice in civil litigation.⁵ This Essay contributes to the conversation by presenting a theoretical framework to assess the level of access to justice that currently exists and determine pathways to increasing access to justice. This Essay

5. See generally Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Marc Galanter, *Access to Justice in A World of Expanding Social Capability*, 37 FORDHAM URB. L.J. 115 (2010); Marc Galanter, “Old and in the Way”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, 1999 WIS. L. REV. 1081 (1999); Michele Goodwin & Mariah Lindsay, *American Courts and the Sex Blind Spot: Legitimacy and Representation*, 87 FORDHAM L. REV. 2337 (2019); Sande L. Buhai, *Access to Justice for Unrepresented Litigants: A Comparative Perspective*, 42 LOY. L. A. L. REV. 979 (2009); Laura K. Abel, *Evidence-Based Access to Justice*, 13 U. PA. J.L. & SOC. CHANGE 295 (2009); Ian Weinstein, *Coordinating Access to Justice for Low- and Moderate-Income People*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 501 (2017); Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741 (2015); Chase T. Rogers, *Access to Justice: New Approaches to Ensure Meaningful Participation*, 90 N.Y.U. L. REV. 1447 (2015).

proposes working definitions of “third-party funding” and “access to justice,” and then presents a thought experiment to assess which parties currently have access to justice and which parties may lack such access. This Essay concludes by suggesting some next steps regarding how to increase access to justice in civil proceedings.

I. ASSUMPTIONS MADE

A. Defining “Third-Party Funding”

What is third-party funding? Put simply, third-party funding is an arrangement in which a party involved in a dispute seeks funding from an outside entity for its legal representation instead of financing its own legal representation.⁶ The outside entity—called a “third-party funder”—finances the party’s legal representation in return for a profit.⁷ The third-party funder could be a bank, hedge fund, insurance company, or some other entity or individual.⁸ If the funded party is the plaintiff, then the funder typically contracts to receive a percentage or fraction of the monetary award from the case if the plaintiff wins.⁹ Unlike a loan, the funded plaintiff does not have to repay the funder if it loses the case or does not recover any money.¹⁰ If the funded party is the defendant, then the funder contracts to receive a predetermined payment from the defendant—similar to an insurance premium—and the agreement may include an extra payment to the funder if the defendant wins the case.¹¹ In addition to these traditional third-party funding structures, there are many other innovative third-party funding transaction structures that may be used, the analysis of which are not the focus of this Essay.¹²

To cast the widest net, this Essay adopts the ICCA-Queen Mary Task Force on Third-Party Funding¹³ definition of “third-party funding,” which reads as follows:

6. A party may also engage both a contingency fee attorney and a third-party litigation funder to work together simultaneously on its case.

7. NIEUWVELD & SAHANI, *supra* note 1, at 1.

8. *Id.* at 3.

9. *Id.* at 4–5.

10. *Id.* at 4–6.

11. *Id.* at 3–5.

12. See generally Sahani, *Reshaping Third-Party Funding*, *supra* note 1 (discussing innovative third-party funding transaction structures including funder-client and funder-law firm partnerships).

13. This Task Force on Third-Party Funding was organized as a collaboration between the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London School of Law between 2013 and 2018. See ICCA, THIRD-PARTY FUNDING, https://www.arbitration-icca.org/projects/Third_Party_Funding.html.

The term “third-party funding” refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

(a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and

(b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant [i.e., *pro bono*] or in return for a premium payment.¹⁴

This definition encompasses traditional for-profit third-party funding investments as well as not-for-profit third-party funding, in which profit-making is not the primary motive.¹⁵

Third-party funding is widespread around the world in both litigation and arbitration. A large and growing number of banks, hedge funds, and other financial institutions are funding the legal representation of parties to litigation as a type of investment. This phenomenon is growing exponentially and is already estimated to be a multibillion-dollar industry both domestically and internationally.¹⁶ In addition, depending on the structure of the funding arrangement, the funder may legally control or influence aspects of the legal representation or may completely take over the case and step into the shoes of the original party.¹⁷ The United States is home to dozens of funders of consumer disputes, like personal injury and other tort claims, and funders

14. ICCA, ICCA QUEEN MARY TASK FORCE REPORT ON THIRD-PARTY FUNDING IN LITIGATION, ICCA REP. NO. 4 (Apr. 2018), www.litigation-icca.org/publications/Third-Party-FundingReport.html.

15. See Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, OXFORD UNIV. PRESS: INV. CLAIMS (Mar. 1, 2017), <http://oxia.oup.com/page/third-party-funders>.

16. See, e.g., Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, WALL ST. J. (Jan. 12, 2014), <http://online.wsj.com/news/Essays/SB10001424052702303819704579316621131535960> [hereinafter Smith, *Litigation Investors Gain Ground in U.S.*] (several funders have several hundreds of millions of dollars in assets under management); Jennifer Smith, *Investors Put Up Millions of Dollars to Fund Lawsuits*, WALL ST. J. (Apr. 7, 2013), <http://online.wsj.com/news/Essays/SB10001424127887323820304578408794155816934> [hereinafter Smith, *Investors Put Up Millions of Dollars to Fund Lawsuits*] (“Gerchen Keller Capital LLC, a Chicago-based team that includes former lawyers . . . has raised more than \$100 million and says there is plenty of room for newcomers given the size of the U.S. litigation market, which they put at more than \$200 billion, measuring the money spent by plaintiffs and defendants on litigation.”); Vanessa O’Connell, *Funds Spring Up to Invest in High-Stakes Litigation*, WALL ST. J. (Oct. 3, 2011) (“The new breed of profit-seeker sees a huge, untapped market for betting on high-stakes commercial claims. After all, companies will spend about \$15.5 billion this year on U.S. commercial litigation and an additional \$2.6 billion on intellectual-property litigation, according to estimates by BTI Consulting Group Inc.”).

17. See NIEUWVELD & SAHANI, *supra* note 1, at 6–7 (explaining that some third-party funding arrangements are structured as an assignment in which the third-party funder becomes the claimant in the case and the original party is no longer involved). For an in-depth treatment of

of large, complex corporate disputes.¹⁸ In light of its increasing prevalence, there is a fascinating debate regarding the place of third-party funding both in the American legal system and in the context of international dispute resolution.¹⁹

There are four main drivers of the third-party funding industry worldwide. First, funders help some—but not all—individual plaintiffs bring claims that they would not otherwise be able to bring, which supports the public policy ideal of increasing access to justice for indigent or disadvantaged persons.²⁰ It is important to note that third-party funding's contribution to increasing access to justice for plaintiffs does not reinforce the rights of civil defendants to present an adequate defense, which will be addressed later in this Essay. Second, many insolvent companies and small companies are seeking means to pursue valid claims that they could not otherwise afford to pursue and that are too risky for a contingency fee attorney to accept.²¹ Third,

assignment and insurance policies in the third-party funding context, see generally Sebok, *supra* note 1; Bond, *supra* note 1; Cain, *supra* note 1; Shukaitis, *supra* note 1.

18. Regarding consumer disputes, there are over thirty third-party funding companies funding consumer claims as members of the American Legal Finance Association (ALFA), as well as several other third-party funding companies that are not members of ALFA funding consumer disputes. ALFA, <http://www.americanlegalfin.com/> (last visited Nov. 4, 2019). Regarding commercial disputes, see Smith, *Litigation Investors Gain Ground in U.S.*, *supra* note 16; Smith, *Investors Put Up Millions of Dollars to Fund Lawsuits*, *supra* note 16; O'Connell, *supra* note 16.

19. See, e.g., Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 504, 508, 513–23, 523 n.113, 526–27 (2006); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 56–57, 68–69, 72, 74, 77 (2004) [hereinafter Martin, *The Litigation Financing Industry*]; Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83, 83–84 (2008) [hereinafter Martin, *Litigation Financing*]; Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 72 n.36, 139 (2011); Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 735 (2007); Steinitz, *supra* note 1, at 1325–36; Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 608–09 (2010); Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 74–75 (1935) (arguing for the regulation of contingency fees in a way similar to today's arguments for regulating third-party funding); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 377–439 (2009) (proposing defense-side funding in the United States that would be similar to after-the-event insurance in Europe); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimize Third Party Litigation Finance*, 58 CONSUMER FIN. L. Q. REP. 347, 350–61 (2004) (proposing a statute to regulate third-party funding for individual consumers).

20. See David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1076 n.3, 1077 n.6, 1077 n.7 (2013) (reporting the results of their study on public data on third-party funding available in Australia).

21. See Raconteur Media, *Raconteur on Legal Efficiency*, THE TIMES (Supp. Mar. 25, 2010), at 7–9; Steinitz, *supra* note 1, at 1275–76, 1283–84; Martin, *The Litigation Financing Industry*, *supra* note 19, at 67 n.93; Martin, *Litigation Financing*, *supra* note 19, at 685; James D. Dana, Jr. & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J. L. ECON. & ORG. 349, 365–66 (1993); Ralph Lindeman, *Third-Party*

many large companies that are constantly sued (such as insurance companies or manufacturers of dangerous products) are seeking means to smooth out the litigation line item on their balance sheets, and funders can offer them a fixed-payment system for managing their litigation costs as defendants.²² Fourth, the worldwide market turmoil over the past decade since the 2008 global financial crisis has led many investors to seek investments not dependent upon the financial markets, stock prices, or company valuations.²³ Each litigation or litigation matter is its own separate entity and is independent from market conditions in terms of the value of the underlying harm or liability.²⁴ This independence shields the third-party funder's investment and potential profit from the general uncertainty present in the global financial markets.²⁵

B. Defining "Access to Justice"

What is access to justice in civil litigation?²⁶ Access to justice could be defined in many ways depending on the context. For this Essay,

Investors Offer New Funding Source for Major Commercial Lawsuits, FULBROOK CAP. MGMT., LLC (Mar. 10, 2010), <http://fulbrookmanagement.com/third-party-investors-offer-new-funding-source-for-major-commercial-lawsuits/> [<https://perma.cc/39WX-8PQX>].

22. See, e.g., Fulbrook Capital Management, LLC, *Third-Party Litigation Funding*, FINANCIER WORLDWIDE (May 1, 2012), <http://www.fulbrookmanagement.com/third-party-litigation-funding/> ("Third-party funding offers corporate clients the opportunity to move the financial risk and cost of litigation off their balance sheets."); Kevin LaCroix, *What's Happening Now? Litigation Funding, Apparently*, THE D&O DIARY (Apr. 9, 2013), <http://www.dandodiary.com/2013/04/Esays/securities-litigation/whats-happening-now-litigation-funding-apparently/> ("Litigation funding proponents contend that the funding arrangements helps to level the playing field by allowing litigants to pursue lawsuits against better financed opponents, or simply allowing litigants to keep litigation costs off their balance sheet. It seems clear that as the litigation funding field grows, the funding companies are offering new approaches – for example, the defense side option that the Gerchen Keller firm will be offering, or the 'defense costs cover' that provided protection for prospective RBS claimants sufficient for them to be able to take on litigation in the U.K. notwithstanding the 'loser pays' litigation model that prevails there."); David Lat, *Litigation Finance: The Next Hot Trend?*, ABOVETHELAW (Apr. 8, 2013), <http://abovethelaw.com/2013/04/litigation-finance-the-next-hot-trend/> ("Ashley Keller [of Gerchen Keller Capital]: You're certainly right that a lot of these clients have balance sheet capacity and could fund out of pocket. Notwithstanding their balance sheet capacities, there might be institutional constraints. If a company has a \$5 billion claim, it will pursue it. But what if it has a \$50 million or \$100 million claim? If you're a general counsel, a lot of C-suite executives are viewing your office as a cost center. It's not that easy to walk to the CFO's office and ask for \$5 million or \$10 million to finance offensive litigation. That will immediately hit the P&L of the company and affect earnings per share, but the outcome is uncertain and contingent. We think a fair number of meritorious claims are being left on the table notwithstanding balance sheet capacity.").

23. See Steinitz, *supra* note 1, at 1283–84.

24. See NIEUWVELD & SAHANI, *supra* note 1, at 11.

25. *Id.*

26. This Essay does not address third-party funding as a way to increase access to justice for criminal defendants, because third-party funding is illegal in criminal cases in over sixty jurisdic-

simple working definitions are appropriate. This Essay defines “justice” as the assumption that the system of civil dispute resolution, viewed as a whole, reliably and regularly decides cases in a fair and enforceable manner that upholds due process of the law for all parties involved (leaving aside the idiosyncratic errors or biases of individual judges or arbitrators). Of course, this is a naively rosy assumption that could easily be challenged by those critical of the civil litigation system. Nevertheless, for the purposes of this thought experiment, such an assumption is necessary—like a mathematical constant, if you will—to examine access from a purely financial perspective.

Moreover, it is important to note that the definition of “justice” used in this Essay does not address the merits of a particular claim or defense. In other words, this Essay assumes that losers have just as much right as winners to bring their claims or marshal their defenses and, therefore, losers deserve as much *procedural* justice as winners do—even though losers’ substantive arguments on the merits may be less convincing to a judge or arbitrator. Again, such an assumption could be challenged, but this Essay adopts this assumption as necessary to the conclusions of this thought experiment, discussed further below.

This Essay also assumes that “access” relates to the *financial* ability to proceed forward in court proceedings. Thus, “access” in this context does not address non-financial barriers to adequate representation, such as jurisdictional requirements, unfavorable precedents, inadequate remedies, non-participating parties, the certifiability of a class, or any similar non-financial barrier. In sum, for the sake of the argument presented herein, this Essay limits the phrase “access to justice” to simply mean having or acquiring the *financial* resources needed to bring your claim or muster your defense in court.

In applying this definition, there are an endless number of ways in which a party could have or acquire financial resources for pursuing a

tions worldwide in which this Author has conducted research. See NIEUWVELD & SAHANI, *supra* note 1 (presenting research on third-party funding laws in over sixty jurisdictions). Nevertheless, it is undisputed that severe access to justice problems exist for criminal defendants as well. See e.g., Michele Goodwin, *The Pregnancy Penalty*, 26 HEALTH MATRIX 17 (2016); Michele Goodwin, *Race As Proxy: An Introduction*, 53 DEPAUL L. REV. 931 (2004); Erik Bergmanis, *Justice Underfunded Is Justice Denied*, 72 J. MO. B. 4 (2016); Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005). As a farfetched hypothetical, if third-party funding of criminal defense were allowed—and, to be clear, it is expressly *illegal* in all jurisdictions globally—criminal defendants might be able to subsidize the cost of their criminal defense using their related civil damages claims, with the financier funding both the criminal and civil proceedings. This would likely be prohibitively expensive and unprofitable, however, and therefore would not be an attractive target for investment by for-profit dispute financiers.

claim or defending against it. For example, many parties self-finance their claims or defenses. Parties may also acquire liability insurance or political risk insurance,²⁷ which may include paying the costs of litigation or arbitration. Subsidiaries may be able to tap into the resources of their parent corporations. States or national governments may use their internal legal teams or tap into their treasuries to pay external law firms. A client may hire an attorney or law firm on a contingent or conditional fee basis. And then there's third-party funding.

Given the plethora of financing options, this Essay must draw an arbitrary dividing line in the sand for the purpose of assessing access to justice. On one side of that line, the party definitely has access to justice; and, on the other side, the party could potentially lack access to justice for the purpose of this thought experiment. It is important to note that this is not simply a line between the "haves" and the "have nots." Instead, this is a line between those who most certainly have access to justice and those whose access to justice is predicated on the outcome of the decision-making process of a financier not present at the time the dispute arises. Thus, for the purpose of this thought experiment, the line will be defined as whether the party's dispute financing is based on a *pre-existing* financial relationship with the financier *prior* to the event that led to the claim in the dispute. Of course, this line could be defined by other characteristics of a party or its case, but since this Essay focuses on *financial* access to justice, the choice to draw the line according to the status of the source of a party's funding seems most appropriate.

To illustrate how this line functions, the simplest example is that a party with the financial resources to self-finance litigation has a pre-existing relationship with itself (the financier) before the claim arose; thus, that party has access to justice, according to this Essay's definition. Similarly, a subsidiary has a pre-existing relationship with a parent corporation prior to the existence of the litigation. If the parent corporation has the ability and willingness to provide financial support for a viable claim or defense, then the subsidiary has access to justice. Furthermore, if a party acquires liability insurance, political risk insurance, or legal expenses insurance at the outset of a contract or prior to entering into a commercial relationship, and if such insurance covers the costs of dispute resolution, then the party has access to justice.

27. Political risk insurance insures an investor against a (usually foreign) government taking an action that harms or devalues the investor's investment. *See e.g.*, OVERSEAS PRIVATE INVESTMENT CORPORATION, POLITICAL RISK INSURANCE, <https://www.opic.gov/what-we-offer/political-risk-insurance> (last visited Nov. 5, 2019).

On the other side of the line, an attorney or law firm will not enter into a contingent or conditional fee arrangement with a client until after the event that gives rise to the claim has taken place. Thus, if the party needs such contingent or conditional fee arrangement in order to pursue litigation, then the party is in danger of not having access to justice if it is unable to obtain such an arrangement. Similarly, third-party funding—as traditionally envisioned—is tied to the existence of events that give rise to a claim.

It is important to note that, since the definition of access to justice articulated above involves engaging the machinery of court procedures, this Essay assumes that types of outside funding not tied to the existence of a dispute are more in the realm of corporate finance transactions and are not contemplated within this Essay's definition of access to justice. The assumption here is that if a party has the wherewithal to enter into a corporate finance transaction independent of any pending disputes, then it also likely has access to adequate resources to pursue a claim or defend itself in litigation; therefore, according to this Essay's narrow definition, it has access to justice. Furthermore, any insurance agreement entered into *after* the event that gives rise to the claim has taken place, which is often termed “after-the-event insurance,”²⁸ is categorized on the same side of the line as third-party funding and contingent or conditional fee arrangements.

This line in the sand is crucial because the “access” in “access to justice” is an indicator of possibility, not certainty. In other words, having access to justice means that a party *could* financially pursue litigation even if it chooses not to do so or is unable to do so for other non-financial reasons. For example, if a subsidiary could bring a viable claim with the help of the parent corporation, but *chooses* not to do so for business reasons, then the subsidiary has access to justice, according to the definition in this Essay. In addition, if the subsidiary could bring the claim with the help of the parent corporation, but the parent corporation believes that the claim is not viable enough to bring, then the subsidiary has access to justice, according to the definition in this Essay. Furthermore, if a party is the defendant with sufficient financial resources to self-finance and nevertheless *refuses* to participate in the litigation (thinking that the claim is bogus, for example), then the party has access to justice, according to the definition in this Essay.

28. After-the-event insurance often overlaps with third-party funding and is also offered by third-party funders. See e.g., Allianz, *What is after the event insurance (ATE)?*, <https://www.allianzlegalprotection.co.uk/home/for-individuals/what-is-after-the-event-insurance.html> (last visited Nov. 5, 2019).

On the other hand, if a party is the *defendant* and does *not* have sufficient financial resources to self-finance while wanting to participate meaningfully in the litigation, then whether such a defendant has access to justice depends on the type of financier that could finance defendant's defense. If the defendant can obtain a financier through a preexisting financial relationship, such as a family member, a parent corporation, or a pre-existing insurance agreement, then the defendant has access to justice. If the defendant's financial relationship with the financier arises after the event that led to the claim in the litigation—such as a contingent or conditional fee arrangement with a law firm, after-the-event insurance, or traditional third-party funding—then the defendant may have no access to justice if it is unable to create such a financial relationship.

This highlights a crucial point about access to justice, however it may be defined. Any proper assessment of access to justice must examine the situation of parties that have no choice in the matter: defendants. Defendants in all types of litigation have no choice regarding whether the litigation will bind them to the judgment, regardless of whether they are financially able to participate in the litigation or not. Thus, defendants *must* have access to justice—obtaining the financial resources needed to muster their defenses in litigation—in order for the system to be considered “just” at all.

C. *Cost as a Component of “Access to Justice”*

There is also a cost component to access to justice, namely, whether the financier's willingness to pay the costs of litigation is predicated on some relationship between the amount of the costs of litigation and the value of the claim. Some types of financiers—such as self-financiers, parent corporations, and liability insurers—will pay the costs of litigation regardless of the amount of the claim or the type of defense because of their pre-existing relationship. Other types of financiers—such as third-party funders or after-the-event insurers—might only agree to pay the costs of litigation if the costs are some order of magnitude less than the amount of the claim, or if the party provides the financier with some other alternative form of remuneration. Attorneys on contingent or conditional fees likely fall somewhere in the middle of those two extremes. An attorney on a contingency fee may turn down a case that might be too expensive to pursue relative to the amount the attorney could expect to be paid if the party wins the case, especially since most jurisdictions have a legislative cap on attorney

contingent or conditional fees.²⁹ In light of this, the cost of litigation is a crucial component to consider in determining whether a party has adequate access to justice.

To further complicate the matter of costs, it is nearly impossible to calculate in advance precisely how much a case will cost. The only exception may be that certain types of financiers, such as third-party funders or law firms working on a contingent or conditional fee, may include provisions in their contracts capping the amount that they will spend on litigation costs. In addition, there are different fee provisions under the various arbitration rules—whether calculated on an hourly or daily rate or based on the amount in dispute—and for ad hoc arbitration³⁰ the basis for the fees is even more variable. Moreover, there are certain types of claims or remedies that may require more extensive resources, such as class litigation, or that may require the services of an emergency judge or arbitrator (besides the one deciding the merits of the case), such as an injunction. The costs of such types of proceedings may be highly variable and not at all connected to the economic value of the result. Furthermore, some types of remedies may have no damage award attached to them, such as injunctive or declarative relief, in which case the costs will always mathematically outweigh the dollars recoverable from the claim, even if the claim is otherwise worthy and winnable. Finally, there is the question of timing and settlement. If all other parameters are equal, a case that settles early usually results in cheaper costs than a case that goes all the way to an award, which in turn results in cheaper costs than a case that leads to enforcement or appeal proceedings after the judgment or award.

In sum, a case may be wildly expensive or may settle cheaply. Usually, one cannot predict in advance exactly which of these scenarios will happen in a particular case. Considering the high variability in cost structures and amounts, the thought experiment in this Essay makes a simple assumption about costs. It assumes that the costs for a hypothetical party to a case are reasonable and proportional for the

29. See generally NIEUWVELD & SAHANI, *supra* note 1 (citing contingent or conditional fee caps in Canada, China, New Zealand, South Africa, the United Kingdom and United States). There are also likely many other countries that cap contingent or conditional fees, but which were not included in the aforementioned book due to the lack of information available from those countries regarding the availability of third-party funding.

30. Ad hoc arbitration is arbitration administered solely by the arbitrator or arbitrators and is not overseen by the auspices of an arbitration institution or other administrative body. See e.g., *UNCITRAL Arbitration Rules (as revised in 2010)*, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited Nov. 4, 2019) (exemplifying arbitral rules commonly used for ad hoc international arbitration).

type of case and type of claim or defense at issue, even though many cases may be extraordinarily expensive or surprisingly inexpensive. This assumption regarding costs is necessary for there to be any generalizable conclusions to be drawn from this thought experiment regarding access to justice.

D. Other Assumptions

There are a few less controversial assumptions in this thought experiment as well. This Essay addresses only three types of parties: a corporation, a state, or an individual. Multi-party actions—such as class, mass, or representative actions—are not contemplated. Furthermore, this Essay categorizes the relief requested by a claimant as either damages or non-financial relief, such as an injunction, specific performance, or declarative relief. For defendants, the relief requested (that is, the defendant’s “claim”) is characterized as “no liability” (namely, asking the tribunal to decide that the defendant is not liable for the injury the claimant alleges) in order to consider defendants and claimants together in this study. There may be other hybrid, unusual, or less common types of relief that parties may request, but the aforementioned categories encompass the vast majority of types of claims or defenses brought in litigation.

Finally, since it is virtually impossible to predict with certainty the outcome of a case, this study addresses only two possibilities with respect to outcome—likely winner or likely loser. However, it is important to keep in mind that, for some cases, a party may be just as likely to win or lose. The reason that this study addresses only those two possibilities is that we know that all parties, including those who are self-financing, engage in some sort of analysis regarding the likelihood of winning the case when deciding whether or how to proceed. Most parties or their legal counsel have at least some expectation regarding whether the party is more likely to win or more likely to lose the case, and funders analyze this question and draw their conclusions often before the litigation has even commenced. Moreover, some financiers enter the case at some point in the middle of the proceedings or finance enforcement proceedings at the end of the case, and those financiers will have a different viewpoint regarding the likelihood of winning than the financier who considers the case at the outset. Thus, the categories “likely winner” and “likely loser” are rough and inexact but help draw another necessary line in the sand, similar to this Essay’s aforementioned arbitrary dividing line in the sand for the purpose of defining access to justice.³¹

31. See *supra* Part I.B.

II. THE THOUGHT EXPERIMENT AND OUTCOMES

This Essay now presents a thought experiment based on the aforementioned assumptions in order to assess what types of litigation parties are in danger of not having access to justice. This thought experiment begins by excluding parties whose preexisting relationships provide access to justice. From the foregoing assumptions, any party that has a preexisting financial relationship with the financier *before* the event that led to the claim in the litigation has access to justice. This means that any party that has the guaranteed ability to self-finance or to obtain funding from a parent corporation or preexisting insurance contract (liability insurance or before-the-event insurance) has access to justice. This is true regardless of whether the party is more likely to win or lose, regardless of the type of claim, and regardless of whether the party is a claimant or defendant. This is also true if the party chooses not to pursue the claim or defense, despite having the financial resources to do so. In contrast, a party in danger of lacking access to justice must enter into a new financial relationship *after* the event that gives rise to the claim. This means that the thought experiment will focus on avenues for financial support for litigation that are available only after the event that gives rise to the claim has happened. These avenues include contingent or conditional fee agreements with attorneys, after-the-event insurance agreements, bank loans, and traditional third-party funding arrangements.

The second phase of the thought experiment narrows the categories of litigation parties that need dispute financing by separating those likely to win from those likely to lose. Most avenues for dispute financing that are available after the event are tied to the likelihood of winning. Attorneys and law firms will generally only enter into a contingent or conditional fee agreement if they believe the case is a likely winner. Similarly, after-the-event insurers and third-party funders will generally only enter into an arrangement in which they expect to make money, which is usually tied to the party winning the case. There are some structures for third-party funding or after-the-event insurance (often, but not exclusively, on the defense side) in which the financier receives some remuneration even if the party loses the case.³² In most situations, however, financiers that enter into an agreement with a party after the dispute has arisen want to fund likely winners on the merits rather than likely losers, if such a characteristic can

32. These structures normally involve either the defendant making periodic fixed payments to the funder while the funder pays for the fluctuating legal costs, or the defendant making a “success payment” to the funder if the defendant wins the case and avoids liability, or both. *See, e.g.*, Sahani, *Reshaping Third-Party Funding*, *supra* note 1.

be gleaned at the outset. Thus, in contrast to the situation described in the prior paragraph in which the party is virtually guaranteed access to justice, a party with no preexisting financial relationship to the financier, and who is also likely to *lose* its claim or defense, has almost no access to justice. The word “almost” is used because there may be rare instances of financiers willing to back a case with a small chance of winning (a “long shot”) but doing so on a regular basis would likely not be lucrative for such financiers. Thus, parties likely to lose are likely to remain largely unfunded unless a preexisting financier is available. Therefore, such parties are likely to lack access to justice, according to the framework presented in this thought experiment.

This lack of access to justice for these “likely losers” can be viewed in two different ways. On the one hand, one could argue that claimants who have a high likelihood of losing should not be able to bring their claims, perhaps (for example) because those claims might be frivolous. Similarly, one could argue that defendants who have a high likelihood of losing should not need the wherewithal to muster a zealous defense, perhaps because they truly did injure the claimant and the magnitude of that injury is equal to the relief that the claimant alleges. On the other hand, one could argue that both claimants and defendants may have a high likelihood of losing, not because the claim or defense is invalid or frivolous, but rather due to a defect in the law applied to the case, or the party’s lack of access to evidence to submit to the tribunal (for example, if the opposing party is in possession of the majority of the key evidence), or the party’s (perhaps less expensive) legal counsel being inexperienced in litigation or arbitration. In addition, even losers deserve the opportunity to zealously advocate for reducing the magnitude of their losses by arguing in favor of a set-off claim, a partial award, a lower cost award to the winner, or a lower interest rate on the damages (if applicable).

Nevertheless, the lived experience of “winning” and “losing” feels more like a spectrum than a bucket, because all parties involved lose time in resolving the matter and most lose some money on costs. Thus, this study focuses purely on winners or losers on the *merits only*, rather than degrees of winning or losing measured by cost allocation or award setoffs. The result is that likely losers on the merits that need dispute financing typically do not obtain such financing and, therefore, lack access to justice. This is our first access to justice problem that this thought experiment has uncovered: “How can we provide access to justice for ‘unfunded losers’”?

If we remove the foregoing parties with preexisting access to funding and remove the unfunded losers, we are left with what this Essay

terms “unfunded winners,” namely claims or defenses that are likely to win on the merits if the party is able to obtain dispute financing. In civil litigation, the parties are all fungible, meaning that any party can be on any side and bring any claim or counterclaim. In civil litigation, corporations, individuals, and states can all serve as claimants or defendants. In addition, defendants in civil litigation can bring counterclaims or set-off claims, which gives them the ability to simultaneously serve as claimants while also serving as defendants. Therefore, the type of party is irrelevant in determining whether access to justice is available to unfunded winners in civil litigation. This is also true in domestic arbitration and international commercial arbitration, although it is not true in international investment treaty arbitration, for reasons beyond the scope of this brief intervention.³³

33. Under traditional international investment treaty arbitration, corporations or individuals are always claimants, and states are always defendants in investment arbitration. For arguments in favor of granting states jurisdiction to bring claims in investment litigation, see, for example, Victoria Shannon, *The Structural Challenge of Investment Litigation Viewed through the Lens of Third-Party Funding*, OXFORD UNIV. PRESS: INV. CLAIMS (June 9, 2015), <http://oxia.ouplaw.com/page/491/the-structural-challenge-of-investment-litigation-viewed-through-the-lens-of-third-party-funding>; Gustavo Laborde, *The Case for Host State Claims in Investment Litigation*, 1 J. INT'L DISP. SETTLEMENT 97 (2010), <https://doi.org/10.1093/jnlids/idp008>. This is because traditional investment treaties do not provide for rights of the defendant state. For a basic explanation of jurisdiction in investment treaty litigation, see, for example, Christoph H. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RESOL. 1 (2014), *republished in*, TDM J. 6 (2015), www.transnational-disputemanagement.com/article.asp?-key=2293. However, some investment treaties negotiated in modern times do contain rights of defendant states and corresponding obligations of the individual or corporate investor. See, e.g., Tarcisio Gazzini, *The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties*, INV. TREATY NEWS (Sept. 26, 2017), www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/ (describing the innovations in this treaty, including putting obligations on investors to comply with the laws of the host state and providing a state the opportunity to sue an investor in the courts of its home country for violations of the treaty obligations). While this treaty does not allow for a state to bring an investment litigation claim against an investor, the treaty does provide a judicial route through which the state may be compensated for any wrongs the investor commits under the treaty. In addition, the treaty is silent regarding whether states may bring counterclaims against investors in investment treaty litigation, which may open the door to jurisdiction over such claims. The effects of these provisions will be tested if a case is eventually commenced under the treaty. Furthermore, jurisdictional constraints restrict the types of claims that can be brought. The treaty must specifically name the substantive rights that claimants may vindicate in investment litigation. In vindicating those rights, the claimant may request damages or non-financial relief, such as restitution in kind or specific performance, but only if such remedies are allowed by the treaty. See, e.g., Michael E. Schneider, *Non-Monetary Relief in Litigation: Principles and Litigation Practice*, in PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION: ASA SPECIAL SERIES NO. 30 (Juris 2011); Brooks E. Allen, *The Use of Non-Pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, in PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION: ASA SPECIAL SERIES NO. 30 (Juris 2011); Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Litigation*, 20 ARB. INT'L 325, 325–32 (2004). Under more modern investment treaties, defendant states may have the jurisdictional ability to bring substantive counterclaims

Instead, one must examine the type of claim in order to assess access to justice for “unfunded winners” in civil litigation. Damages claims are understandably attractive to dispute financiers, because there will be a pot of money to share if the party wins. Non-financial claims and “no liability claims” (defenses) are less attractive, or may be completely unattractive, because such claims do not automatically create a pot of money to share, even though such claims may be worthy on the merits. Dispute financiers that arrive on the scene after the dispute has arisen are typically looking for a cash profit. This is where the access to justice problem arises in civil litigation. The one exception is what one may call “not-for-profit” funders, which are funders that take an interest in the specific merits outcome of the case for non-financial reasons and do not expect to make a profit.³⁴ However, “not-for-profit” funders are not general market players in this space; they typically fund cases on a one-off, case-by-case basis and cannot be counted on to fund large categories of cases. Thus, “not-for-profit”

and the corresponding rights within the treaty that may be vindicated in investment litigation. For some examples of how tribunals have responded in cases in which host states have tried to bring counterclaims under traditional investment treaties, see Jean Kalicki, *Can States Assert Counterclaims Against Investors in BIT Proceedings?*, KLUWER ARB. BLOG (Jan. 16, 2012), <http://arbitrationblog.kluwerarbitration.com/2012/01/16/can-states-assert-counterclaims-against-investors-in-bit-proceedings/>. Nevertheless, the right to bring a counterclaim is necessarily predicted on the claimant bringing the original claim first. Thus, it is exceedingly rare to see a host state bring an initial claim (rather than a counterclaim) against an investor under a treaty. As mentioned in the main text above, such a scenario would most certainly be possible in a contractually agreed domestic arbitration or international commercial arbitration.

34. Cf. generally Victoria Shannon Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in Investment Arbitration*, in CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 49 (Christina Beharry ed., 2018) (“In addition, not-for-profit funding may be a viable option for respondents in international arbitration—particularly respondent States in investment arbitration—since a financial return on investment would not normally be required.”); Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, *supra* note 15; *Third-Party Funders as Stakeholders in International Arbitration*, in CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION (Andrea Bjorklund, Franco Ferrari & Stefan Kröll eds., Cambridge Univ. Press) (forthcoming 2020). For example, in *Philip Morris v. Uruguay*, Uruguay’s defense was funded by a not-for-profit funder called the Campaign for Tobacco-Free Kids, and the Anti-Tobacco Litigation Fund (a Bloomberg Foundation and Gates Foundation collaboration) is funding defendant states facing similar challenges. See Bloomberg Philanthropies, *Bloomberg Philanthropies & The Bill & Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund*, PRESS & MEDIA (Mar. 18, 2015), www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund/ (last visited Nov. 4, 2019). These are both not-for-profit funders, however, which invites the question, should only not-for-profit funders fund defendant governments? This Essay argues for answering this question in the negative, but cogent arguments could be made on the other side. For example, in the political campaign finance arena, arguments have been raised about the impropriety of corporate influence over elections and governmental functions through lobbying and financial contributions; one could argue that for-profit third-party funders funding governments, generally, could yield similar negative effects.

funders cannot provide a solution that is generalizable to litigation as a whole and, therefore, cannot solve the problem of access to justice in civil litigation. This brings us to our second access to justice problem that this thought experiment has uncovered: *How can we provide access to justice for “unfunded winners” with non-damages claims or defenses?*

III. SUGGESTIONS FOR INCREASING ACCESS TO JUSTICE

The thought experiment above has raised the following question: *How can we provide access to justice for two types of parties in civil dispute resolution: unfunded losers and unfunded winners with non-damages claims or defenses?* This Essay concludes with a few ideas regarding how to address this question and thereby improve access to justice in civil dispute resolution.

The first step is for our society to decide whether the concept of procedural due process requires that unfunded losers and unfunded winners have adequate access to dispute financing. This is more of a philosophical question and, thus, is largely beyond the scope of this brief Essay. The short answer, from this Author’s point of view, is that the right to adequate resources for loss mitigation—i.e., a party’s right to argue for a judge or arbitrator to reduce the amount of the party’s loss—is a right that society should recognize as part of the concept of procedural due process. Arguing in favor of loss mitigation may take the form of pursuing a claim that is likely to lose, requesting an injunction or other non-monetary relief, arguing for paying less costs despite losing on the merits, or presenting a viable defense including mitigating factors. Note that likely losers as mentioned in this paragraph may include plaintiffs as well as defendants—a long shot could be on either side of a case. Yet, long shots can change the world, as we have seen in cases in which the right of minority groups facing long-shot odds and unfavorable laws have led to judicial victories that have changed the course of history. In addition, even in the criminal context, the loser has the opportunity to mitigate his or her loss of liberty by taking a plea agreement to reduce the length of his or her prison sentence. Shouldn’t losers in the civil context have similar access to loss mitigation resources? Losers have the right to “lose well,” that is, to present the strongest case they can for their side, even if those arguments do not end up swaying the decisionmaker regarding the final decision on the merits. This Author believes that the concept of loss mitigation is as fundamental to assessing access to justice as the idea of meritorious claims. Thus, for the sake of argument, this Essay will assume that society would agree that the concept of procedural due process re-

quires that unfunded parties in the three categories outlined in this Essay have adequate access to dispute financing in order to proceed to the next step in this analysis, although this Author recognizes that compelling arguments could certainly be made on the opposing side.³⁵ Assuming that unfunded losers and unfunded winners have a right to adequate financing for their claims or defenses, the next step in this analysis is figuring out how to pay for this. This Essay presents four categories of possible solutions.

The first potential solution is for the unfunded party to bring more than one claim in the litigation or arbitration. A party in civil litigation has the ability to subsidize the cost of bringing a non-financial claim or a lower damage claim via a higher damage claim, meaning that the marginal cost of bringing two (or three) claims instead of one is significantly reduced. In fact, most plaintiffs bring at least one damages claim even if they intend to raise non-financial claims as well. Thus, the potential recovery on the damages claim could be enough to cover the costs of the additional non-financial claims or low damages claims such that a dispute financier might agree to finance the representation. A drawback of this solution is that it would be limited to unfunded parties that have more than one viable claim, one of which is a damage claim that would be attractive enough to a dispute financier. This would therefore not include unfunded parties who may only have a nonfinancial claim that the court would entertain, even if the nonfinancial claim is strong on the merits.

The second category of potential solutions involves donations of time or money. For example, perhaps third-party funders and after-the-event insurers should engage in pro bono funding for a subset of worthy claims or defenses that may be long-shot winners, which are seemingly worthy but likely to lose, or non-damages claims. One could include in this category worthy claims against judgment-proof defendants, meaning that the plaintiff would likely win the case but may be unlikely to be able to collect the award from the defendant. The reason for this is that an unpaid judgment or award could perhaps

35. For example, in *Essar Oilfields Serv. v. Norscot Rig Mgmt.*, the High Court upheld an ICC tribunal's ruling requiring the defendant to pay the claimant's cost of third-party funding in addition to paying the underlying damage award, because the court found that the defendant so damaged the claimant's financial position as to require the claimant to seek third-party funding in the first place. [2016] EWHC 2361 (Comm). For a description of the *Essar* case, see, for example, Maximilian Szymanski, *Recovery of Third Party Funding Ordered by ICC Tribunal and Confirmed by the English High Court – An Under-Theorised Area of the Law*, KLUWER ARB. BLOG (Oct. 8, 2016), <http://arbitrationblog.kluwerarbitration.com/2016/10/08/recovery-of-third-party-funding-ordered-by-icc-tribunal-and-confirmed-by-the-english-high-court-an-under-theorised-area-of-the-law/>.

have symbolic, political, or public value that would make the endeavor worthwhile for non-monetary reasons. Plus, it could result in positive reputational effects for the funder or insurer that supports the plaintiff pro bono in the case. A drawback of this solution is that it would require a paradigm shift in the for-profit dispute financing industry to embrace its role in promoting widespread access to justice beyond its primary profit-making motive. Whether such a transition is possible remains to be seen.

Another way to frame this solution is by analogizing dispute financing pro bono efforts to attorney pro bono obligations. The attorney bar in many countries asks attorneys to donate a small percentage of their annual hours (e.g., fifty hours per year on average in the United States)³⁶ to pro bono efforts or for attorneys to donate money to the pro bono efforts of other attorneys in lieu of performing the work directly. Similarly, law firms regularly take on some litigation cases pro bono, without any expectation of reimbursement. By analogy, third-party funders or after-the-event insurers should donate some small percentage of their portfolio funds toward pro bono efforts without an expectation of a return on investment. In addition, a defense fund for needy defendants could be established, perhaps even from the funds donated pro bono by third-party funders, law firms, and after-the-event insurers.³⁷ Finally, crowdfunding by multiple individual donors—which already exists—may provide a potential solution in this context.³⁸

The third category of potential solutions involves changes in the law or litigation rules. For example, courts and arbitral institutions could adjust their fee scales to give indigent parties a discount on the fees. Alternatively, courts and arbitral institutions could adopt a rule that a party against whom an injunction or declaratory relief is granted must pay the litigation costs of the winning party. This latter solution would

36. See A.B.A., MODEL RULES OF PROF'L CONDUCT r. 6.1 ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.").

37. For a proposal for funding developing states in WTO dispute settlement, see, for example, Mauritius Nagelmueller, *Guest Post: Dispute Finance For Sovereigns In WTO Disputes - Access To Justice For Developing Countries*, INT'L ECON. L. & POL'Y BLOG (Sept. 12, 2017), <http://worldtradelaw.typepad.com/ielpblog/2017/09/dispute-finance-for-sovereigns-in-wto-disputes-access-to-justice-for-developing-countries.html> (proposing that for-profit dispute financiers should provide financing to developing states in WTO dispute settlement proceedings).

38. See, e.g., Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F.L. REV. 307 (2015); Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357 (2018).

allow law firms to take on injunction or declaratory relief cases on a contingent or conditional basis on the theory that their fees will be repaid if the party is granted the requested relief. This solution has the drawback, however, that it would only help parties likely to have their injunctions or declaratory relief granted, i.e., unfunded winners; this solution would not assist unfunded losers.

Finally, a fourth category of solutions involves financiers modifying their criteria when deciding which cases to fund. For example, a third-party funder might modify its algorithms and decision-making processes to include other factors to weigh in determining whether to fund a case in order to increase access to justice in litigation. One of those factors could be ensuring that defendants have access to third-party funding. Notably, defendants can fall into all categories of unfunded parties mentioned in the introduction to this Essay. If third-party funders financed defendants more regularly, then perhaps the participation of third-party funders in litigation would be viewed as more balanced, perhaps even viewed positively. This Author would even go so far as to assert that, if third-party funders in litigation choose to fund only one category from the three categories of parties mentioned above in order to increase access to justice, then civil defendants are a prime category with which to begin.

CONCLUSION

The thought experiment presented in this Essay intends to provoke discussion and deep thought about the legitimacy crisis in our system of dispute resolution as viewed through the lens of financial access to justice and in light of new options for parties to access capital for their cases. The assumptions made herein may seem rudimentary, and the solutions presented may seem idealistic, but this is merely a starting point for a global discussion wherein targeted solutions could be developed that may be more viable to implement than the solutions proposed herein.