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Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool

By MANUEL A. GÓMEZ*

Introduction

IF THE DECADE-OLD crowdfunding industry is still perceived to be in its infancy, crowd litigation funding (CLF) is simply nascent. The possibility of relying on small donations, given—mostly online—by hundreds of individuals who are unrelated to each other, to help defray the potentially high costs of litigation appears to be a welcomed idea. Unlike the vast division existing between proponents and detractors of the alternative litigation finance (ALF) industry,[1] and the potentially pernicious effects of and the apprehension generated by the ability of a financier extraneous to the litigation to intrude in the parties' dealings and assert control over the litigation,[2] CLF has flown under the radar and has not elicited any meaningful controversy to this day.

In the case of crowdfunding, the financial backer of the litigation is potentially hundreds of individuals unrelated to each other; most of these individuals donate small amounts of money instead of "invest-

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1. *See generally infra* Part II.

2. Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 92 MINN. L. REV. 1268, 1299 (2011).

ing" a large sum toward the litigation.[3] As a result, the procurement of financial support through crowdfunding might, in principle, diminish or mitigate some of the major concerns about funder control and conflicts of interest. Crowdfunding benefactors are not necessarily driven by a financial gain, but instead by an altruistic motivation or by the funder's empathy[4] towards a particular cause or project. Even when the party seeking funding offers a reward in exchange for a monetary contribution, such reward is usually negligible and does not give the funder any control administratively, or otherwise, on the fate of the project.[5]

This Article describes the blossoming CLF sector by placing it in the context of the fast-growing crowdfunding industry and the alternative litigation finance industry. Part I first explains the basic structure, variations in the types of crowdfunding financing, and the overall impact of crowdfunding, after which this Article turns to highlight the most important issues that arise in the context of alternative litigation finance in Part II. Subsequently, in Part III, the Article explains the main features of the emerging CLF sub-industry and examines the universe of recently launched crowdfunding campaigns geared towards seeking funding for litigated cases. This Part—and the Article—ends with a brief discussion on the possible challenges that affect the development of CLF, and how the sub-industry's players are addressing them.

I. Leave It to the Crowd: Venture Financing in the Web 2.0 Era

Until a few years ago, if an emerging musician wanted to produce an album or a young inventor wanted to build a prototype or launch a new product, they most likely had to pitch their idea or project to a professional producer, a financial institution, or perhaps a wealthy individual. Depending on many variables and a likely complicated screening process, the project would perhaps obtain the necessary funding to come to fruition. Although it is impossible to know how

3. Crowdfunding Puts Access to Justice in the Hands of the People, BENTHAM IMF (Feb. 26, 2014), http://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2014/02/26/crowdfunding-puts-access-to-justice-in-the-hands-of-the-people.

4. *See* Richard Painter, Litigation Financing and the Securities Laws, A MODEL LITIGATION FINANCE CONTRACT (Feb. 25, 2013), http://www.litigationfinancecontract.com/litigation-financing-and-the-securities-laws/.

5. Chance Barnett, *Donation-Based Crowdfunding Sites: Kickstarter Vs. Indiegogo*, FORBES (Sept. 9, 2013, 9:00 AM), http://www.forbes.com/sites/chancebarnett/2013/09/09/donation-based-crowdfunding-sites-kickstarter-vs-indiegogo/.

many proposals for new ideas or products are successfully supported in a given year, one can assume that in many cases the process is taxing and the yield is low. In the music industry, for example, the decision of which artists were allowed to record an album remained almost always in the hands of a small and select group of people.[6]

Historically, many social causes and philanthropic initiatives also faced similar hurdles in their quest to entice wealthy foundations and other deep-pocketed backers to support their projects and initiatives.[7] New ideas and projects also rely on the support of the general public, but generally only after a well-orchestrated fundraising campaign.[8] Churches and other faith-based organizations are among the most visible and successful fundraisers mostly because of their longstanding reputation and broad base of followers and affiliates that share their objectives and support them permanently.[9]

A. Artistshare and the Modern Roots of Crowdfunding

In 2003, Brian Camelio, a Boston-based musician, launched a web-based fundraising platform called ArtistShare.[10] The main purpose of ArtistShare was to connect artists needing financial support with fans interested in backing the artists' projects. In return for a financial pledge, supporting fans could receive certain benefits, such as participating in the creative process, attending recording sessions or special events with the artists, or appearing in the credit listing on the final product.[11] In other cases, the reward consisted of limited edition or autographed products, VIP tickets to attend concerts, exhibits and other events hosted by the artist, and other items of limited monetary value depending on the amount pledged by the backer.[12] In

6. Andrea Ordanini et al., *Crowd-funding: Transforming Customers into Investors Through Innovative Service Platforms*, 22 J. SERV. MGMT. 433, 456 (2011).

7. *See* Tom Watson, Challenging the Big Funders, FORBES (July 20, 2014, 9:32 AM), http://www.forbes.com/sites/tomwatson/2014/07/20/challenging-the-big-funders-philanthropy-startup-targets-billionaires-and-their-giving/.

8. *See* ANDREA KIHLSTEDT, CAPITAL CAMPAIGNS: STRATEGIES THAT WORK 157 (2d ed. 2005) ("[The campaign kickoff] is often a media event designed to interest the press in a story about the capital campaign and the project it is to fund. This event is designed to obtain media coverage in the broader community just before the solicitors begin to make their calls.").

9. *See* Darryl B. Holloman et al., *Motivations for Philanthropic Giving in the African American Church: Implications for Black College Fundraising*, 12 J. RES. ON CHRISTIAN EDUC. 137, 137–40 (2009).

10. ARTISTSHARE, http://www.artist share .com (last visited Mar. 17, 2015).

11. Featured Projects, ARTISTSHARE, http://www.artistshare.com/v4/Features (last visited Mar. 17, 2015).

12. *Id.*

order to recognize the efforts of the different backers, the artists and/or entrepreneurs seeking funding created different tiers of rewards. Because the artist received public financial support for his or her project, ArtistShare billed itself as a "fan-funding platform."[13] Later on, this model became known as "crowdfunding," an allusion to the fact that the financial backing for the project comes from many individuals (i.e., a crowd) as opposed to a single sponsor or financier.[14] ArtistShare's first project was a jazz album proposed by musician Maria Schneider.[15] After running a very successful campaign, Schneider raised $130,000, which allowed her to "compose the music, pay her musicians, rent a large recording studio, and produce and market the album."[16] In 2005, Schneider's album was recognized with a Grammy Award, an accolade also earned by several other ArtistShare-funded projects.[17]

Essentially, crowdfunding involves two parties, the proponent/entrepreneur who launches an idea or project that requires outside support to materialize, and the "crowd of people that decide to financially support these projects, bearing a risk and expecting a certain payoff."[18] In the majority of cases, however, what makes the connection between the entrepreneur and the backer possible is the presence of an intermediary organization known as a crowdfunding platform (CFP).[19] In addition to serving as matchmaker between the beneficiary and the funders, CFPs help promote and publicize the projects and ventures in order to attract the largest possible number of potential backers.[20] To this end, most CFPs have built and maintained a web presence and operate almost exclusively online, thus taking advantage

13. *Id.*

14. Ordanini et al., *supra* note 6, at 444.

15. ArtistShare Celebrates Its 10-Year Anniversary!, ARTISTSHARE (Oct. 15, 2013), http://www.artistshare.com/v4/Home/News/1310/ArtistShare-Celebrates-its-10-year-Anniversary-.

16. David Freedman & Matthew R. Nutting, A Brief History of Crowdfunding 1 (Oct. 3, 2014) (unpublished manuscript) (on file with author).

17. See About Us, ARTISTSHARE, http://www.artistshare.com/v4/Home/About (last visited Mar. 17, 2015) (listing all of the accolades and awards obtained by ArtistShare funded projects to this day).

18. Justyna Bakker-Rakowska, Crowdfunding for Innovation: A Qualitative Research on Resources, Capabilities and Stakes 8 (2014) (unpublished M.A. thesis, University of Twente), *available at* http://essay.utwente.nl/64668/1/Bakker-Rakowska_MA_Faculty%20of%20Management%20and%20Governance.pdf.

19. Joachim Hemer, *A Snapshot on Crowdfunding* 15 (Fraunhofer Institute for Systems and Innovation Research ISI, Working Paper No. R2, 2011), *available at* https://www.econstor.eu/dspace/bitstream/10419/52302/1/671522264.pdf.

20. *Id.* at 10–11.

of the technological innovations of the Web 2.0, which enables people to "use, create and modify content and interact with other users through social networks."[21]

The possibility of reaching out to potential backers and matching them with entrepreneurs through the Internet has been a panacea to CFPs and to fundraisers, in general. According to recent industry reports, online giving has been growing steadily in the United States during the last few years.[22] In the case of charitable giving, the upsurge has been even more stunning. In 2013, for example, online giving grew almost three times more than all forms of charitable giving together.[23] Some industry experts predict that online giving will continue to be a growth engine for nonprofit organizations in the foreseeable future,[24] and the crowdfunding industry will undoubtedly benefit from that trend.

ArtistShare was not alone in relying on the crowdfunding model successfully; in the late nineties, for example, some other crowdfunding initiatives were launched to support music-related projects.[25] As the crowdfunding industry expanded, CFPs began competing with each other to entice entrepreneurs, creators, and developers into proposing projects, and helping them connect with people willing to finance their ventures.[26] In addition to playing the role of matchmaker, CFPs also perform certain administrative and fiduciary roles by establishing and implementing procedures to handle the reception, administration, and disbursement of any monies received from the backers.[27] Cognizant of the risks associated with online transactions in an increasingly complex virtual marketplace—and the perceived need to build a trustworthy environment for their users—CFPs began devising and implementing comprehensive selection processes for the

21. Ordanini et al., *supra* note 6, at 445.

22. STEVE MACLAUGHLIN, BLACKBAUD IDEA LAB, CHARITABLE GIVING REPORT: HOW NONPROFIT FUNDRAISING PERFORMED IN 2013 1 (Feb. 2014), *available at* https://www.blackbaud.com/files/resources/downloads/2014/2013.CharitableGivingReport.pdf.

23. *Id.* at 2.

24. *Id.* at 12.

25. Although the Schneider campaign is often credited as the first successful crowdfunded campaign in the United States, as early as 1997, the rock band Marillion raised over £35,000 from a group of fans through the Internet to finance its first American tour. *See* Ross S. Weinstein, *Crowdfunding in the U.S. and Abroad*, 46 CORNELL INT'L L.J. 427, 437 (2014).

26. *See* Douglas J. Cumming et al., Crowdfunding Models: Keep-It-All vs. All-or-Nothing 5–7 (Sept. 27, 2014) (unpublished manuscript) (on file with author), *available at* http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2447567.

27. *Id.* at 5.

projects that they agreed to sponsor and also made efforts to ensure transparency throughout the funding campaigns.[28]

In exchange for their involvement, CFPs routinely take a percentage of the proceeds (a success fee), which varies from four to nine percent of the raised capital, depending on the model in which the crowdfunding campaign is based.[29] To this end, entrepreneurs usually set a capital-raising goal to give the crowd a sense of their aspirations, to help others assess the feasibility of the project and the level of risk assumed by the potential investors, and to set the parameters for calculating the rewards offered to them and the compensation to be obtained by the CFP.[30] The funders' level of risk also varies depending on whether the entrepreneur has adopted a "Keep-it-All" (KIA) or an "All-or-Nothing" (AON) model.[31] The difference is that in crowdfunding campaigns that run under the KIA model, the entrepreneur has the right to keep the entire amount pledged regardless of whether the preset capital goal has been reached.[32] Conversely, in the AON model, the entrepreneur will only receive the pledged funds if and when the capital goal is reached, thus significantly reducing the "crowd's risk that undercapitalized projects will be undertaken."[33]

Whereas some CFPs only participate in certain industries or niche areas such as music and arts (ArtistShare, Bandstocks,[34] Sellaband,[35] and Slicethepie[36]), scientific research (*Experiment*[37] and *Petridish.org*[38]), or fashion design (Beforethelabel.com,[39] Betabrand.com,[40] Cameesa.com,[41] Iamlamode.com,[42] and Outofx.com[43]), the most

28. FLORIAN DANMAYR, *Web 2.0 and Crowdfunding Platforms*, *in* ARCHETYPES OF CROWDFUNDING PLATFORMS 7 (2014).

29. Cumming et al., *supra* note 26, at 6.

30. *Id.*

31. *Id.* at 6–8.

32. *Id.* at 6.

33. *Id.* at 3.

34. BANDSTOCKS.COM, http://www.kwamecorp.com/lifestream/2008/09/bandstockscom.html (last visited Jan. 19, 2015).

35. SELLABAND, https://www.sellaband.com (last visited Jan. 19, 2015).

36. SLICETHEPIE, http://www.slicethepie.com/ (last visited Jan. 19, 2015).

37. EXPERIMENT, https://www.experiment.com (last visited Jan. 19, 2015).

38. PETRIDISH.ORG, http://www.petridish.org/ (last visited Jan. 19, 2015).

39. BEFORE THE LABEL, http://beforethelabel.com/ (last visited Jan. 19, 2015).

40. BETABRAND, http://www.betabrand.com/think-tank/crowdfunding.html (last visited Jan. 19, 2015).

41. *Crowdfunding Fashion*, CAMEESA.COM, http://cameesa.weebly.com/cameesa-t-shirts.html (last visited Jan. 19, 2015).

42. I AM LA MODE, http://www.iamlamode.com/en (last visited Jan. 19, 2015).

43. OUT OF X, https://www.outofx.com/ (last visited Jan. 19, 2015).

prominent CFPs include Kickstarter[44] and Indiegogo.[45] Indiegogo specifically "offers entrepreneurs the possibility to launch their online reward-based crowdfunding campaign in three categories (Innovative, Creative, or Social), which are divided in 24 subcategories."[46] The spectrum of projects sponsored by these CFPs range from consumer products to movies to social causes, and even to litigation.[47]

B. The Global Reach and Versatility of Crowdfunding

Crowdfunding is certainly a global phenomenon, and the fact that most crowdfunding campaigns take place online helps the industry remain unaffected by any geographical limitations. CFPs, such as Indiegogo, offer their website in several languages and allow crowdfunding campaigns to be launched in different currencies.[48] Pledges are collected through online payment systems such as PayPal, which is available in more than two hundred countries, and accepts twenty-six different currencies.[49] Despite the centrality of online platforms in the development of the crowdfunding industry, the defining feature of crowdfunding is not the means through which the funds are generally raised (i.e., online), but the fact that the financing originates from a large number of people (i.e., a crowd) who are geographically dispersed,[50] and whose contribution—at least in the case of reward-based crowdfunding campaigns—is usually tied to obtaining something in exchange, ranging from intangible benefits to a material payoff.[51]

Crowdfunding may also serve as a vehicle to raise equity for a business venture (equity crowdfunding), to facilitate lending (lending crowdfunding), or simply to obtain philanthropic or charitable contributions without offering anything in exchange to the funders (dona-

44. KICKSTARTER, https://kickstarter.com (last visited Jan. 19, 2015).

45. INDIEGOGO, https://indiegogo.com (last visited Jan. 19, 2015).

46. *See* Cumming et al., *supra* note 26, at 5.

47. *See, e.g.*, Kelly Cheung, *Considering Crowdfunding as a Litigation Aid? You Should*, FINDLAW (May 29, 2013, 11:59 AM), http://blogs.findlaw.com/in_house/2013/05/considered-crowdfunding-a-business-litigation-strategy-you-should.html. *See infra* Part III.C.

48. Start Your Campaign, INDIEGOGO, https://www.indiegogo.com/campaigns/new (last visited Nov. 25, 2014).

49. PayPal Global, PAYPAL, https://www.paypal.com/webapps/mpp/country-worldwide (last visited Jan. 20, 2015).

50. Ajay Agrawal, Christian Catalini & Avi Goldfarb, *The Geography of Crowdfunding* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 16820, Feb. 2011), *available at* http://www.nber.org/papers/w16820.pdf.

51. Hemer, *supra* note 19, at 13.

tion crowdfunding).[52] Some CFPs operate outside the web by matching entrepreneurs and donors face-to-face and are mainly devoted to sponsor donation-based campaigns,[53] while others follow instead the equity crowdfunding model.[54]

Despite its globalizing features, 94 percent of the crowdfunding industry is concentrated between North America (59 percent) and Europe (35 percent),[55] which is also where most CFPs are based.[56] Unsurprisingly, it is also in these jurisdictions where the policy debate on crowdfunding is more active, and where the industry has been subject to official regulation.[57] Some examples stemming from the United States are the Jump Start Our Business Startups Act (JOBS Act),[58] the Regulation Crowdfunding proposed by the Securities and Exchange Commission (SEC) under the Securities Act of 1933 and the Securities Exchange Act of 1934,[59] as well as the recent statutes governing

52. Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155, 181 (2014).

53. A good example is SOUP, a Detroit-based organization, which organizes a monthly potluck dinner during which a crowd of potential funders contributes with five dollars each and listens to four four-minute proposals of projects that benefit the community. At the end of the night, the crowd votes for the best proposal, which is then awarded all of the money raised in the evening, and the drafters of the proposal are invited back to a later event to give a report. *See* DETROIT SOUP, http://detroitsoup.com/howitworks/ (last visited Feb. 19, 2015).

54. One example of an offline CFP that promotes equity crowdfunding campaigns is the Florida-based platform called One Spark, which connects creators and funders at a weeklong event held at a multi-venue gallery in downtown Jacksonville, during which people pitch their proposals to a crowd of potential funders. *See About*, ONE SPARK, https://www.onespark.com/about (last visited Feb. 19, 2015).

55. *Crowdfunding Statistics and Trends*, GOGETFUNDING, http://blog.gogetfunding.com/crowdfunding-statistics-and-trends-infographic/ (last visited Jan. 19, 2015).

56. *See Directory of Sites*, CROWDSOURCING.ORG, http://www.crowdsourcing.org/directory (last visited Jan. 21, 2015).

57. *See generally* Weinstein, *supra* note 25 (describing the regulation of equity crowdfunding in the United Kingdom, Italy, and France); Daniela Castrataro & Ivana Pais, Analisi delle Piattaforme di Crowdfunding Italiane [Analysis of Italian Crowdfunding Platforms] (Nov. 2012) (unpublished manuscript) (on file with author) (discussing the development of crowdfunding in Italy).

58. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012). It is important to note, however, that the JOBS Act only refers to "investment crowd funding," a modality of micro-lending or benevolent giving to individuals or specific causes through CFPs. *See* Weinstein, *supra* note 25, at 427–28 (discussing investment crowdfunding in the context of the JOBS Act).

59. Crowdfunding, 78 Fed. Reg. 66428-01 (proposed Nov. 5, 2013) (to be codified at 17 C.F.R. pts. 200, 227, 232, 239, 240, 249).

investment crowdfunding in Georgia,[60] Kansas,[61] Michigan,[62] Alabama,[63] and Maine.[64]

As mentioned earlier, crowdfunding campaigns can help materialize a broad range of projects and serve an array of different interests, from commercial to purely philanthropic. A group of people collecting and giving small amounts of money is not a new phenomenon; the practice has a long history in the realm of charity and social cooperation.[65] People have traditionally given money and offered support to causes that promote the welfare of others and the advancement of altruistic goals.[66] Examples include the preservation of endangered species, the advancement of certain individual and collective rights, the pursuit of social causes, and even the preservation of religious traditions. Philanthropic giving is generally driven by altruistic motivations, including "self-esteem, public recognition, satisfaction of expressing gratitude for one's own wellbeing, and relief from feelings of guilt and obligation,"[67] or even the expectation of potentially benefitting from the supported activity.[68] Similar motivations can be found in the support for social and humanitarian causes, and in the pursuit of legal strategies to advance such goals.[69]

This is particularly important in the realm of public interest litigation, where support and funding tend to be limited, and are usually conditioned on the charitable time contribution of lawyers, activists,

60. Bill Meagher, *States Make Own Crowdfunding Rules, Rather Than Wait for SEC*, THE DEAL PIPELINE (May 5, 2014), http://www.thedeal.com/content/regulatory/states-make-own-crowdfunding-rules-rather-than-wait-for-sec.php. See Invest Georgia Exemption, GA. COMP. R. & REGS. 590-4-2-.08 (2013).

61. *Invest Kansas Exemption—"IKE,"* OFF. KAN. SEC. COMM'R, http://www.ksc.ks.gov/DocumentCenter/View/228 (last visited Jan. 22, 2015); KAN. ADMIN. REGS. § 81-5-21 (2011).

62. Alan McGlade, *Michigan Governor Signs Intrastate Crowdfunding Exemption*, FORBES (Dec. 31, 2013), http://www.forbes.com/sites/alanmcglade/2013/12/31/michigan-governor-signs-intrastate-crowdfunding-exemption/.

63. S. 44, Reg. Sess. (Ala. 2014).

64. Meagher, *supra* note 60.

65. Ordanini et al., *supra* note 6, at 445.

66. *See id.*

67. *Id.* at 447.

68. James Andreoni, *Philanthropy*, *in* HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM AND RECIPROCITY 1201, 1204 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

69. VELINA STOIANOVA, GLOBAL HUMANITARIAN ASSISTANCE, PRIVATE FUNDING: AN EMERGING TREND IN HUMANITARIAN GIVING 2–10 (Apr. 2012), *available at* http://www.globalhumanitarianassistance.org/wp-content/uploads/2012/04/Private-funding-an-emerging-trend.pdf.

and other supporters.[70] Part II will discuss how the advent of third-party funding into the litigation world potentially creates new possibilities for litigants, yet also poses important challenges that crowdfunding might be able to address, as subsequently described in Part III.

II. The Not-So-New Thing: The Rising Popularity of Alternative Litigation Financing

Alternative litigation financing (ALF)[71] has garnered significant attention during the last few years.[72] A number of academic publications,[73] industry reports,[74] and specialized conferences[75] on this topic reveal an increased interest in this emerging sector. The policy debate, however, has been circumscribed to a handful of jurisdictions—namely the United States, Australia, and the United Kingdom.[76] In these countries, alternative financing has been addressed by legislation,[77] considered by domestic courts,[78] and increasingly promoted by

70. Erik S. Knutsen & Janet Walker, Canada, in THE COSTS AND FUNDING OF CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE 239, 250 (Christopher Hodges et al. eds., 2010).

71. Other names for ALF include third-party funding, claims transfer, outside investment, and litigation finance. *See* Heather A. Miller, *Don't Just Check "Yes" or "No": The Need for Broader Consideration of Outside Investment in the Law*, 2010 U. ILL. L. REV. 311, 311–12 (2010).

72. *See, e.g.*, STEVEN GARBER, RAND INST. FOR CIV. JUST., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES (2010), *available at* http://www.rand.org/pubs/occasional_papers/OP306.html (2010).

73. *See, e.g.*, Steinitz, *supra* note 2; Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 62 (2011).

74. *See, e.g.*, JOHN BEISNER ET AL., U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES 1–4 (Oct. 2009); FRESHFIELDS BRUCHAUS DERINGER, CLASS ACTIONS AND THIRD PARTY FUNDING OF LITIGATION 1–3 (June 2007); N.Y.C. Bar Ass'n, Formal Op. 2011-2 (2011) (discussing third party litigation financing).

75. *See, e.g.*, Conference on Third Party Funding of International Arbitrations, held by CICIA (Feb. 7, 2014); Global Conference on Third-Party Financing of Litigation, held by SCJI (Nov. 9–10, 2011); Conference on Third Party Litigation Funding and Claim Transfer, held by the UCLA-RAND Center for Law & Public Policy (2010).

76. In those jurisdictions, the issue of alternative financing in litigation is part of a broader debate on outside investment on the provision of legal services and different direct ownership models in law firms. *See* Steven Mark & Tahlia Gordon, *Innovations in Regulation-Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 518–22 (2009); Miller, *supra* note 71, at 313.

77. Miller, *supra* note 71, at 327.

78. Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460 n.6 (2012).

investment funds and financial institutions.[79] In Australia, the litigation-funding industry has been subject to regulatory action, under the Corporations Amendment Regulation,[80] as a way to mitigate the tensions that arise in the realm of control and the realm of conflicts of interest. In Europe, the Recommendation on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted Under Union Law issued by the European Commission in 2013 requires plaintiffs to declare the source of their funding.[81]

The emerging ALF industry is comprised of two different sectors: one devoted to consumer funding that focuses on "small personal claims, predominantly personal injury and divorce cases";[82] and the other one that refers to business dispute funding, which is usually large-scale and complex, and involves sophisticated parties.[83] Substantively, the discussion on ALF centers on its impact on domestic litigation, and whether it should be left to the fate of market forces, regulated, or banned altogether.[84] Experts and commentators refer to the increasing relevance of alternative financing in international litigation[85] and arbitration.[86] After all, several important developments affecting litigation have percolated to the realm of arbitration, to the point that some have begun referring to arbitration as the "new litigation."[87]

Regulation on the assignment of legal claims and restrictions imposed on the involvement of third parties in litigation have traditionally been circumscribed to parties and disputes subject to the territorial boundaries of municipal laws and the jurisdiction of domes-

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

80. *Corporations Amendment Regulation 2012* (No. 6) (Austl.).

81. Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law, 2013 O.J. (C 3539) 1, *available at* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2013_201_R_NS0013.

82. Steinitz, *supra* note 78, at 460.

83. *Id.* at 460–61.

84. *See* BEISNER ET AL., supra note 74, at 1–7.

85. Miller, *supra* note 71, at 358–60.

86. Maxi Scherer, Aren Goldsmith & Camille Flechet, *Third Party Funding in International Arbitration in Europe*, 2012 INT'L BUS. L.J. 207, 207 (2012); Willem H. van Boom, Third Party Financing International Investment Arbitration 9 (Dec. 2011) (unpublished manuscript) (on file with author).

87. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8–9 (2010).

tic courts.[88] In more concrete terms, the discussion centers on whether and to what extent third parties should be allowed to intervene or be barred from intermeddling in extraneous litigation.[89] Another source of concern relates to the implications that alternative financing might have vis-á-vis local ethical rules, and whether alternative financing should be encouraged, regulated, or left to the fate of market forces and the individual decisions of sophisticated litigants.[90] The increased commodification of lawsuits, and their portrayal as either assets or liabilities has also played a role in giving more prominence to issues involving alternative financing.[91]

A critical part of this debate involves a discussion about the legal rules on maintenance[92] and its most common species known as champerty,[93] the two most prominent limitations to alternative litigation financing practices in the common law world.[94] Maintenance and champerty[95] have been addressed in different ways by national laws, courts, and local bar associations,[96] and have been the subject of

88. *See, e.g.*, Sebok, *supra* note 73, at 99–120.

89. *See* Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 100–06 (2013).

90. Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 70–77 (2004).

91. *See* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 72–73 (2010).

92. Maintenance is "'the intermeddling in a suit by a stranger, one having no privity or concern in the subject matter and standing in no relation of duty to the suitor.'" Hall v. State, 655 A.2d 827, 829 (Del. Super. Ct. 1994) (quoting 14 AM. JUR. 2D *Champerty and Maintenance* § 2 (1964)). *See* ABA Comm'n on Ethics 20/20, Informational Report to the House of Delegates, at 9–12 (Feb. 2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.

93. Hamilton v. Gray, 31 A. 315, 315 (Vt. 1895) ("Champerty is an agreement between the owner of a claim and a volunteer that the latter may take the claim and collect it, dividing the proceeds with the owner, if they prevail; the champertor to carry on the suit at his own expense.").

94. Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 594 (2012); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 655 (2005).

95. *See Hamilton*, 31 A. at 315.

96. Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1302–06 (2002); N.Y.C. Bar Ass'n Comm'n on Prof'l Ethics, Formal Op. 2011-2 (2011), *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2011-opinions/1159-formal-opinion-2011-02; ABA Comm'n on Ethics 20/20, Informational Report to the House of Delegates, at 9–12; L.A. Cnty. Bar Ass'n Prof'l Responsibility and Ethics Comm'n, Formal Op. 500 (May 10, 1999), *available at* http://www.lacba.org/showpage.cfm?pageid=433.

scholarly debate for decades,[97] thus revealing that the concern about third-party funding is an old phenomenon. What seems to be new, however, are the commoditization of legal claims, the increasingly complex litigation funding arrangements, and the emergence of a professional industry of litigation financiers.[98] As a signal of this trend, some jurisdictions, such as Australia and the United Kingdom, have progressively moved toward lowering the bar and removing some of the obstacles traditionally imposed on maintenance, and conversely encouraging ALF to occur.[99] In turn, this has enabled the nascent industry of litigation financing to flourish, along with the emergence of some publicly traded companies as its most prominent players.[100]

Proponents of ALF argue that that alternative financing may be a positive force because of its potential for opening the doors to groups of individual litigants or small business parties otherwise lacking the resources and expertise to pursue their claims through litigation.[101] Moreover, the availability of alternative financing may also help level the playing field[102] by altering the bargaining dynamics of the parties,[103] which, in turn, might help promote access to justice.[104] On the other hand, some critics argue that the increased involvement of professional investors in the litigation finance industry could produce some pernicious effects. These effects may include the encouragement of meritless claims and settlement agreements that are detri-

97. *See generally* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 66–69 (1935) (describing the origins of champerty and its historical evolution); Percy Winfield, *The History of Maintenance and Champerty*, 35 LITIG. Q. REV. 50 (1919) (discussing the historical origins of maintenance and champerty).

98. *See* Steinitz, *supra* note 2, at 1318–22; Steinitz, *supra* note 78, at 455–56.

99. Michael Legg et al., *The Rise and Regulation of Litigation Funding in Australia*, 38 N. KY. L. REV. 625, 627 (2011); Miller, *supra* note 71, at 326–33.

100. *Second-hand Suits*, ECONOMIST (Apr. 6, 2013), http://www.economist.com/news/finance-and-economics/21575805-fat-returns-those-who-help-companies-take-legal-action-second-hand-suits.

101. GEOFFREY MCGOVERN ET AL., UCLA-RAND CENTER FOR LAW & PUBLIC POLICY, THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER 1 (2010), *available at* http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2010/RAND_CF272.pdf.

102. *Id.* at 4. *See* Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in The United States Market*, 53 VILL. L. REV. 83, 102 (2008). *See also* BRIEFCASE ANALYTICS & BURFORD CAPITAL LLC, SECOND ANNUAL LITIGATION FINANCING SURVEY 10 (2013), *available at* http://www.burfordcapital.com/wp-content/uploads/2014/01/2013-SURVEY-REPORT-FINAL-2014-01-14.pdf.

103. *See* Steinitz, *supra* note 2, at 1303–18.

104. *See* Gulf Azov Shipping Co. Ltd. v Idisi, [2004] EWCA (Civ) 292, [54]. ("Public policy now recognises that it is desirable, in order to facilitate access to justice, that third parties should provide assistance designed to ensure that those who are involved in litigation have the benefit of legal representation.").

mental to the client—but not necessarily to the funder—or the undue influence and interference of the funder in the relationship between the client and her counsel.[105]

Other issues arising in the ALF discussion regard the disclosure about the existence of the funding transaction, the identity of the funder, and even the content and scope of the litigation funding agreement.[106] There may be several reasons for disclosing the funding transaction and related aspects. One of them is the need to identify possible conflicts of interest, which might exist between the funder and one of the parties to the litigation.[107] Disclosure might also facilitate the monitoring of the funder's conduct with regard to how much control the funder has over the litigation and the funded party.[108] Both conflicts of interest and control have obvious ethical implications for the parties. This prompted some jurisdictions to press for regulation and encouraged the courts to decide whether to order disclosure and to what extent.[109]

Regarding the latter, there are examples of cases from Australia and New Zealand where courts ordered the funded party to produce a litigation financing agreement. In one such case, *Saunders v. Houghton*,[110] a class action case, the New Zealand court required the plaintiff in the class action suit to produce the financing agreement to the court, but not to opposing counsel.[111] The court then scrutinized the quality and conduct of the litigation funders, the independence of the lawyer, and the relationship between the funder and the acting lawyer.[112] Australian courts, in turn, require the litigation funding agreement to be disclosed to the other party, but allow the funded party to redact it in order to avoid giving tactical advantage to the opponent.[113]

105. U.S. CHAMBER INST. FOR LEGAL REFORM, THIRD PARTY LITIGATION FINANCING IN AUSTRALIA 12–14 (Oct. 2013), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TPLF_in_Australia_page_web.pdf.

106. *Waterhouse v Contractors Bonding Ltd.* [2013] 1 NZLR 91, 91 (SC).

107. Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1648, 1657 (2013).

108. *Id.* at 1655.

109. *See, e.g., Waterhouse v Contractors Bonding Ltd.* [2013] 1 NZLR 91, 91 (SC).

110. *Saunders v Houghton* [2012] 2 NZLR 652 (CA).

111. *Id.* at 653.

112. *Id.* at 652.

113. Federal Court of Australia, Practice Note CM 17, at 3.6 (Oct. 9, 2013), *available at* http://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm17.

In a more recent case, *Waterhouse v. Contractors Bonding, Ltd.*,[114] the Supreme Court of New Zealand also ordered disclosure and further discussed the scope of judicial scrutiny.[115] While allowing the non-funded party to examine the funding agreement, the court redacted it and allowed only certain information for examination, such as: (1) the litigation funder's location and identity; (2) the funder's financial standing; (3) the funder's amenability to the New Zealand courts' jurisdiction; and (4) the terms for withdrawal of funding and the consequences of such withdrawal.[116]

Generally speaking, the push for disclosure seeks to prevent the funder—usually a single entity or an individual—from exercising undue influence on the party or controlling litigation.[117] An individual funder is obviously easy to identify and single out, but this might not be possible when the funding comes from multiple sources, as is the case with CLF.[118] Part III will describe the nascent CLF sector and will discuss the potential offered by this novel form of ALF to mitigate some of the drawbacks commonly associated with the traditional forms of third-party funding in the realm of litigation.

III. "A Few Bucks for a Good Cause": Crowd Litigation Funding (CLF) and Its Potential Benefits and Challenges

The apprehension generated by the ability of an external financier to meddle in the litigation and exert control over the funded party is likely to diminish when the funding comes from multiple individuals, as in the context of crowdfunding campaigns. Crowdfunding benefactors are not necessarily driven by a financial gain, but instead are driven by an altruistic motivation or by the funder's empathy with a particular cause or project.[119] Even in situations where the party

114. *See Waterhouse v Contractors Bonding Ltd.* [2013] 1 NZLR 91, 91–92 (SC).

115. *Id.* at 92.

116. *Id.*

117. *See id.*

118. Richard Painter, *Crowd Funding, Private Placements and Other Options for Funding Plaintiffs' Lawsuits Under the JOBS Act of 2012*, LEGAL ETHICS FORUM (Feb. 26, 2013), http://www.legalethicsforum.com/blog/2013/02/crowd-funding-private-placements-and-other-options-for-funding-plaintiffs-lawsuits-under-the-jobs-ac.html ("[A] process by which a large number of investors are solicited—for example over the Internet—to contribute modest amounts of capital that add up to a lot of money . . . .").

119. *See* Elizabeth Gerber & Julie Hui, *Crowdfunding: Motivations and Deterrents for Participation*, 20 ACM TRANSACTIONS ON COMPUTER-HUM. INTERACTION 34:1, 34:8–34:14 (Dec. 2013), *available at* http://dl.acm.org/citation.cfm?id=2530540&CFID=647359794&CFTOKEN=33849306.

seeking funding offers rewards in exchange for a monetary contribution, any such reward usually is minor or inconsequential and does not provide the funder with any administrative or other type of control over the outcome of the project.[120]

Moreover, some CFPs, such as Indiegogo and Kickstarter, prohibit campaign owners from offering "any form of financial incentive or participation in any profit sharing,"[121] equity, repayment, or "security," as perks to the contributors/donors.[122] The perks offered to crowdfunding donors are usually a symbolic token used to entice them to participate or to show appreciation for supporting the campaign.[123] Although crowdfunding perks are generally perceived as producing a positive effect on donors,[124] they are not the main reason why people support a particular campaign. People tend to donate because they feel a connection with those seeking support, to be part of a group, or because they consider the campaign to be aligned with their personal beliefs. Further, individual crowdfunding donations tend to be small, to the point that they do not qualify as investments, and—at least in the United States—are excluded from the regulatory regime applicable to securities.[125] In this sense, crowdfunding contributions are no different from the donations obtained by activists and advocates to benefit many public interest causes. Whereas the individual donations might be small in size, it is the aggregation of numerous contributions that makes a campaign successful.

In the particular case of cause lawyering,[126] different types of entities—ranging from legal aid organizations, to public interest law firms, to human and civil rights defense organizations—have traditionally relied on charitable contributions from the public, grants

120. *See id.* at 14.

121. *Terms of Use*, INDIEGOGO, https://www.indiegogo.com/about/terms (last visited Feb. 7, 2015).

122. *See Our Rules*, KICKSTARTER, https://www.kickstarter.com/rules?ref=footer (last visited Feb. 7, 2015).

123. Hemer, *supra* note 19, at 14.

124. Samantha Hurst, *GreedyGiver Launches Perk Marketplace for Crowdfunding Campaigns*, CROWDFUND INSIDER (July 16, 2014), http://www.crowdfundinsider.com/2014/07/44251-greedygiver-launches-perk-marketplace-crowdfunding-campaigns/.

125. Edan Burkett, *A Crowdfunding Exemption? Online Investment Crowdfunding and U.S. Securities Regulation*, 13 TRANSACTIONS: TENN. J. BUS. L. 63, 64 (2011).

126. See Carrie Menkel-Meadow, The Causes of Cause Lawyering, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 31–33 (Austin Sarat & Stuart Scheingold eds., 1998) (defining cause lawyering as legal work undertaken for a particular cause, goal, or objective).

from foundations, and sponsorships from corporations to carry out their activities, particularly litigation.[127]

Likewise, individual cause lawyers and activists have also relied on the generosity of benefactors and supporters to achieve socially-minded goals, while trying to maintain a reasonable level of independence. Regarding the latter, one of the biggest challenges faced by cause lawyers and legal aid organizations alike has been the need to insulate themselves from external pressures, including preventing their benefactors from imposing conditions on their actions, or exerting influence which might adversely affect the cause lawyers' autonomy.[128] In order to minimize the potential for conflict and other shortcomings arising from the traditional funding mechanisms, some have advocated for other forms of financing, such as court awarded attorney fees,[129] strategic philanthropy,[130] and more recently, crowdfunding.

A. CLF in Practice: The Emergence of a New Sub-Industry

The number of cases involving CLF is still scant, but the interest in this new sub-industry appears to be on the rise. As of March 2015, there have been only a handful of CLF cases involving traditional CFPs, but, at the same time, specialized players such as the litigation-dedicated CFP, Lexshares.com, and the peer-to-peer online network, Invest4justice (I4J), have also entered this nascent market.[131] From the existing CLF campaigns, at least two different variations of litigation crowdfunding can be identified: reward-based and donation-based crowdfunding.[132] All CLF campaigns were launched through online CFPs based in the United States or Canada, such as Indiegogo, GoFundMe, Fundanything, and CSI Catalyst. Only two campaigns sought precisely to promote the creation of another CFP devoted exclusively to collect and disburse monies for litigation;[133] all other cam-

127. Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice*, 36 FORDHAM URB. L.J. 603, 628 (2008).

128. *Id.* at 620.

129. Peter E. Sitkin & J. Anthony Kline, *Financing Public Interest Litigation*, 13 ARIZ. L. REV. 823, 825–27 (1971).

130. Cummings & Rhode, *supra* note 127, at 628–30.

131. LEXSHARES, https://www.lexshares.com/ (last visited Feb. 7, 2015); *Invest4Justice: The Peer-to-Peer Litigation Crowdfunding Network*, INVEST4JUSTICE, http://www.invest4justice.com/ (last visited Feb. 7, 2015).

132. *The Ultimate Crowdfunding Guide*, CROWDFUND INSIDER, http://www.crowdfundinsider.com/the-ultimate-crowdfunding-guide/ (last visited Mar. 17, 2015).

133. *Wildcard Nominee—Crowd Funding Legal Action*, INNOVATING JUSTICE FORUM, http://www.innovatingjustice.com/innovations/crowd-funding-legal-action?view_content=details

paigns were intended to raise contributions to help a private party offset their litigation costs in a current or forthcoming court case. Table 1 below shows the amount of contributions raised, the type of campaign, the goal set in each campaign, and the duration of the different CLF campaigns launched since 2013.

Table 1. Crowdfunding Litigation Campaigns Launched Since 2013

Campaign	CFP	Type of Campaign*	Goal Set	Contributions Raised by 03/18/2015	Launching Date-Closing Date
Save Our Podcasts Legal defense Fund[134]	Fundanything.com	Reward-Based CSC	N/A	$482,607	2/2014-N/A
Seattle Officers' Lawsuit[135]	Gofundme.com	Donation-Based CSC	$100,000	$3,715	8/30/2014-N/A
Support First US-Iraqi Lawsuit Against Bush Administration About the Iraq war[136]	Indiegogo.com	Reward-Based CSC	$6,000	$6,166	4/9/2013-5/24/2013
Save Startup, DITTO.com, from Patent Trolls[137]	Indiegogo.com	Reward-Based CSC	$30,000	$10,243	5/12/2013-7/11/2013
Day in Court	Innovatingjustice .com	Donation-Based GFC	N/A	N/A	2013
Getjustaccess.com	Csicatalyst.com	Donation-Based GFC	N/A	N/A	2013

*(Reward/Donation-Based and Case-Specific Campaign (CSC)/General Funding Campaign (GFC))

In addition to the cases shown above in Table 1, an online press release published on January 17, 2014 announced an Indiegogo-based crowdfunding campaign launched by two Miami-based leather goods

(last visited Feb. 7, 2015). *See* JUSTACCESS, http://www.getjustaccess.com/ (last visited Feb. 7, 2015).

134. *Save Our Podcasts Legal Defense Fund*, FUNDANYTHING, http://www.fundanything.com/en/campaigns/patenttroll (last visited Feb. 7, 2015).

135. *Seattle Officers' Lawsuit*, GOFUNDME, http://www.gofundme.com/bqpdk4 (last visited Feb. 7, 2015).

136. *Support First US-Iraqi Lawsuit Against the Bush Administration About the Iraq War*, INDIEGOGO, https://www.indiegogo.com/projects/support-first-us-iraqi-lawsuit-against-bush-administration-about-the-iraq-war (last visited Feb. 7, 2015). *See* Class Action Complaint for Conspiracy to Commit Aggression; and the Crime of Aggression at 10–14, Saleh v. Bush, No. C-13-1124 (N.D. Cal. Mar. 13, 2013), *available at* http://witnessiraq.com/wp-content/uploads/2013/03/SalehBush.pdf.

137. *Save Startup, DITTO.com, from Patent Trolls*, INDIEGOGO, https://www.indiegogo.com/projects/save-startup-ditto-com-from-patent-trolls (last visited Feb. 7, 2015).

designers to help pay attorneys fees in a patent infringement litigation before the U.S. District Court for the Southern District of Florida.[138] A search on Indiegogo, however, reveals that the campaign was never launched.[139]

The CLF campaigns included in Table 1 could be divided into two categories. The first category, which I term "case-specific campaign" (CSC), involves campaigns that seek to raise funds to support a pre-established litigation.[140] The second category, involves crowdfunding campaigns geared at or toward creating specialized, litigation-related CFPs designed to receive, administer, and provide funding to needy litigants.[141] I refer to these campaigns as "general funding campaigns" (GFCs).[142]

One of the GFCs was donation-based, and the other one reward-based. Conversely, most CSCs were reward-based; that is, backers were offered perks in exchange for their donations. These perks were established on a scale ranging from one dollar to five thousand dollars, as shown in Table 2 below.

138. *Laura Buccellati Seeks Crowd Funding to Defend Her Leather Goods Company in Court*, PRWEB (Jan. 17, 2014), http://www.prweb.com/releases/LauraBuccellati/CrowdFunding/prweb11489935.htm.

139. *See Invalid Page*, INDIEGOGO, https://www.indiegogo.com/p/622604?vsmaid=1 (last visited Feb. 7, 2015) (indicating that the requested page regarding this campaign is in "DRAFT" mode and is unavailable to the public).

140. *See, e.g.*, *Save Our Podcasts Legal Defense Fund*, *supra* note 134; *Save Startup, DITTO.com, from Patent Trolls*, *supra* note 137; *Seattle Officers' Lawsuit*, *supra* note 135; *Support First US-Iraqi Lawsuit Against the Bush Administration About the Iraq War*, *supra* note 136.

141. *See About Us*, INNOVATING JUSTICE FORUM, http://www.innovatingjustice.com/about (last visited Feb. 7, 2015); JUSTACCESS, *supra* note 133.

142. *See, e.g.*, *Wildcard Nominee—Crowd Funding Legal Action*, *supra* note 133; *Crowdfunding for Justice*, *supra* note 141.

Table 2. Perks Offered in Different Reward-Based, Crowd-Litigation Funding (CLF) Campaigns

Donation Level/ Perks Offered	Save Our Podcasts Legal Defense Fund (SOP)	Support First US-Iraqi Lawsuit against Bush Administration about the Iraq War (ILAB)	Save Startup, DITTO.com, from Patent Trolls (SDSU)
$1	N/A	Acknowledgement of support for campaign	N/A
$5	Publicity materials	Thank you email from Comar Law	N/A
$10	N/A	Handwritten thank you card	N/A
$20	All of the above plus four posters)	N/A	N/A
$25	N/A	Thank you card and decal	N/A
$30	All of the above plus a #TrollHunter Campaign T-shirt	N/A	T-shirt in various sizes and colors
$50	All of the above plus a cap with campaign logo	Thank you card, decal, and signed complaint	N/A
$75	All of the above plus a igned imited Edition Certificate of Enlistment in the "Troll Fighters Army" on personalized parchment	N/A	N/A
$95	All of the above plus surprise items, including a personalized letter and digital download	N/A	N/A
$100	Guest star on the podcast, "Story Worthy"	All of the above, plus invitation to telephonic Q&A with attorneys	N/A
$125	Unlimited access to podcasts featuring Marc Maron for life	N/A	N/A
$250	VIP package with comedian Brad Williams (2 tickets to any show and private meet and greet with comedian)	All of the above, plus thank you note from lead Iraqi plaintiffs	N/A
$500	Be in Studio for a taping of the podcast, "About Last Night"	All of the above, plus one hour of legal time with Comar Law in any practice area of Comar Law	N/A
$2,500	Be in studio for taping of the podcast, "Mohr Stories"	All of the above, plus dinner with Iraqi plaintiffs and their lawyers	N/A
$5,000	Private recording studio appearance with Adam Carolla	All of the above, plus recognition on the Witness Iraq website as a "Chief Supporter" of the Witness Iraq Legal Defense Fund	N/A

Among the CSCs indicated in Table 1, only the "Seattle Officer's Lawsuit" CLF campaign was donation-based, in other words, its promoters did not offer anything in exchange for support and no funding scale was established.[143] However, the campaign webpage listed the individual donations, most of which were anonymous and

143. *See Seattle Officers' Lawsuit, supra* note 135.

ranged from twenty dollars to two hundred and fifty dollars.[144] In terms of promoting the CSC campaigns, three were launched by the litigants themselves[145] and only the "US-Iraqi Lawsuit" CLF campaign was launched by the lawyer.[146] In all three CSC cases, the justification for the CLF campaigns was to help defray legal fees and expenses, although only the promoters of "Save Our Podcasts" and "Save Our Startup, Ditto.com," cited the potential high costs of litigation as the main reason for soliciting donations.[147]

B. Getting to Give: General Funding Campaigns (GFCs) and the Advent of New Players in the CLF Sub-Industry

Regarding the GFCs in Table 1, the goal was not to solicit support for a specific litigation, but instead to create a dedicated platform that would raise, administer, and disburse money obtained from crowdfunding donors to needy litigants in order enable them to pursue litigation.[148] With both CSCs and GFCs, the promoters appeared to be individuals or stand-alone entities—although it was not clear whether they were affiliated or related to a traditional advocacy group, legal aid society, or public interest lawyer.

The first initiative was led by a group called JustAccess (JA) and launched through the Canadian CFP, CSI Catalyst.[149] In the promoter's own words, the purpose was to create a CFP that would enable "both defendants and plaintiffs [to] access financial support for the legal cases that matter for everyone."[150] Although the campaigns did not make a distinction between private and public interest cases, one could assume that they would focus on the latter based on their descriptions.[151]

The promoters of the JA campaign set their goal at ten thousand dollars and provided a five-tier scale for donations ranging between

144. *Id.*

145. *See Save Our Podcasts Legal Defense Fund, supra* note 134; *Save Startup, DITTO.com, from Patent Trolls, supra* note 137; *Seattle Officers' Lawsuit, supra* note 135.

146. *See Support First US-Iraqi Lawsuit Against the Bush Administration About the Iraq War, supra* note 136.

147. *See Save Our Podcasts Legal Defense Fund, supra* note 134; *Save Startup, DITTO.com, from Patent Trolls, supra* note 137.

148. *Wildcard Nominee—Crowd Funding Legal Action, supra* note 133; *Crowdfunding for Justice, supra* note 141.

149. *JustAccess (Campaign Cancelled)*, CSI CATALYST, http://www.csicatalyst.org/projects/28-justaccess (last visited Jan. 21 2015); *About Us*, CSI CATALYST, http://www.csicatalyst.org/pages/about-us (last visited Feb. 7, 2015).

150. *JustAccess (Campaign Cancelled), supra* note 149.

151. *See id.*

ten dollars and one hundred and fifty dollars.[152] Although the JA campaign was able to attract at least ten backers and a total of six hundred and fifty dollars, the project was cancelled.[153] The project funders posted a comment on the campaign page indicating that they "just found another, hopefully more effective," way to increase access to justice, but did not offer any specific information about it, nor explain the destiny of the collected funds.[154]

The second GFC is a United Kingdom-based campaign called "Day in Court" (DIC), which, although not formally launched through a CFP, the European online forum, Innovating Justice, recognized it as an innovative idea.[155] DIC's promoters also focused on facilitating access to justice and indicated that their "website will allow potential litigants to explain their 'story' to the public, who would then have the opportunity to make micro-contributions to the cost of raising an action (or reaching a settlement)."[156] The project description does not indicate a specific goal or whether the campaign would be reward-based, suggesting it may be a donation-based only crowdfunding campaign.

Other new players emerging more recently in the CLF sub-industry are a U.S.-based CFP, exclusively dedicated to litigation called Lexshares,[157] and a Switzerland-based peer-to-peer litigation crowdfunding network called Invest4Justice (I4J).[158] Lexshares consists of an online platform where accredited investors registered with the website are given the opportunity to participate—as funders—in any of the pre-screened litigations submitted by plaintiffs.[159] The pool of investors is limited to U.S. citizens with a net worth of more than one million dollars or a gross annual income of at least $200,000, and to foreign nationals whose applicable laws allow it.[160] After a selective process, Lexshares connects these accredited investors with private

152. *Id.*

153. *Id.*

154. *JustAccess (Campaign Cancelled): Changing Directions*, CSI CATALYST http://www.csicatalyst.org/projects/28-justaccess#updates (last visited Feb. 7, 2015).

155. *Wildcard Nominee—Crowd Funding Legal Action*, *supra* note 133.

156. *Id.*

157. *See* LEXSHARES, *supra* note 131.

158. INVEST4JUSTICE, *supra* note 131.

159. *See* LEXSHARES, *supra* note 131.

160. *Investor Bulletin: Accredited Investors*, INVESTOR.GOV (Sept. 23, 2013), http://www.investor.gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors; *Terms of Use*, LEXSHARES, https://www.lexshares.com/pages/terms_of_use (last visited Mar. 18, 2015).

venture capital funds, especially established for investing in each legal claim.[161]

In addition to evaluating the cases for eventual posting on the website and taking the necessary steps to set up venture capital funds dedicated to each litigation, Lexshares establishes the terms of the funding agreement, posts the cases so interested investors are able to make funding commitments, monitors the progress of the case, and ensures that investors are paid from the proceeds of any recovery obtained.[162] The technology utilized by Lexshares also allows plaintiffs to decide which investors have access to information about their case, to monitor the progress of the fundraising campaign, and to retain control over litigation decisions.[163] By screening and selecting who participates both as plaintiff (funded party) and investor (funder), by evaluating and selecting the pool of cases to be funded, by establishing the terms of the funding agreement, and by monitoring the development of the case, Lexshares plays a role that goes well beyond that of mere matchmaker. As of March 2015, Lexshares's portfolio comprised merely a handful of cases, only two of which have received complete funding ($250,000 and $110,000, respectively),[164] so at this point it is not possible to determine how successful Lexshares is or will be.

The other new player is Invest4Justice (I4J), which also operates through an online platform, but with a much broader reach than Lexshares.[165] One differentiating feature between I4J and Lexshares is that, in addition to supporting for-profit investment, I4J allows funders to simply donate to a cause or litigation without any expectation of a financial gain (i.e., non-for-profit).[166] Moreover, I4J does not appear to get involved in screening each case, in certifying the investors, establishing the terms of funding, or regulating the issuers.[167] To the contrary, I4J's main function seems to simply serve as a platform that allows litigants, lawyers, prospective funders, law firms, and third-party funders to interact with each other freely.[168] In this sense, I4J

161. *How It Works*, LEXSHARES, https://www.lexshares.com/pages/how_it_works (last visited Mar. 18, 2015).

162. *See id.*; *Terms of Use*, LEXSHARES, *supra* note 160.

163. *See How It Works*, LEXSHARES, *supra* note 161; Jonathan Shieber, *Crowdfund Your Next Lawsuit with Lexshares*, TECHCRUNCH (Nov. 19, 2014), http://techcrunch.com/2014/11/19/crowdfund-your-next-lawsuit-with-lexshares/.

164. *Cases*, LEXSHARES, https://www.lexshares.com/cases (last visited Mar. 18, 2015).

165. INVEST4JUSTICE, *supra* note 131.

166. *Frequently Asked Questions*, INVEST4JUSTICE, https://www.invest4justice.com/faq/ (last visited Mar. 18, 2015).

167. *See id.*

168. *See id.*

operates more as a virtual marketplace than anything else. According to its website, the only revenue obtained by I4J is a one-time fee equivalent to four percent of the funds obtained if, and when, the goal is reached.[169] As a way to stress its non-for-profit goal, I4J also vows to reinvest any profits in "worthy cases."[170]

C. The Perceived Advantages of CLF over the Traditional ALF Model

These examples show that the CLF sub-industry is expanding rapidly both in terms of the arrival of new players, and also regarding funding strategies and safeguards against potential risks.[171] Up until now, CLF appears to have addressed two of the most common problems generally attributed to ALF. The first problem refers to the encouragement of potentially frivolous or meritless claims by outside funders.[172] The second is the possibility that outside funders attain and exercise undue control over the litigation and the funded party.[173]

Regarding the potential use of outside funding to facilitate the filing of frivolous and meritless lawsuits, such risk seems unlikely in the case of CLF. A frivolous claim "is one that relies on factual allegations or legal theories so outlandish as to be inarguably insufficient."[174] A meritless claim, on the other hand, "is a claim in which a court determines, after adversarial briefing or discovery, that a plaintiff's theory of relief is insufficient or that a reasonable jury could not find facts that would allow a plaintiff to recover."[175]

The general reaction to frivolous litigation is one of scorn and disapproval.[176] Frivolous claims are seen as a waste of judicial resources, a cause of delay and court congestion, and as an abuse of one's right to seek judicial protection.[177] There is a general sense that a lawyer who knowingly files a frivolous or a meritless claim should be subject to sanctions, and that litigants should be discouraged or

169. *Id.*

170. *Id.*

171. *See supra* Part III.B.

172. *See generally* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1202–04 (2014) (discussing frivolous and meritless claims).

173. *See* Richmond, *supra* note 94, at 669–74; Steinitz, *supra* note 2, at 1321–25.

174. Reinert, *supra* note 172, at 1202.

175. *Id.* at 1203.

176. *Id.* at 1194.

177. Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633, 641–42 (2010).

barred from manipulating the court system in such a manner.[178] Critics of ALF have generally accused the industry of lending financial resources to encourage otherwise illegitimate lawsuits. The main explanation offered is that "by increasing the amount of money available to pay attorneys to litigate claims, third-party funding necessarily increases the volume of claims litigated."[179] This critique assumes that the funder is primarily interested in obtaining a financial gain, regardless of whether the claim can be legally substantiated, or, in other words, whether it has merit.

As a result, and despite knowing that a potential claim is without substance, a third-party funder might still be incentivized to lend his financial support. An unfounded lawsuit might be used strategically to force a risk-averse defendant into a settlement; it might also be utilized to shift the power balance between the parties, to give leverage to the plaintiff and/or the funder, or simply to inflict harm.[180] This is only possible when the third-party funder is able to exercise influence or control over the case or the plaintiff, an unlikely scenario in the case of CLF, given that the funding generally comes from multiple sources, thus impeding a single individual's ability to attain the necessary leverage to use the litigation as a strategic tool.

This characteristic of CLF also helps address the control problem. At least in the case of CSC campaigns, the fact that the backing does not come from a single individual, but from a crowd, has the potential to mitigate some of the concerns associated with funder control and other conflicts that commonly arise when the outside funder is a single individual or small pool of individuals. As described previously, crowdfunding campaigns not only tend to elicit contributions or donations from a large number of individuals who are geographically dispersed, but also tend to be composed of donations that are relatively small as compared to other forms of outside financing.[181] As a result, most crowdfunding contributions are treated as donations rather than investments, and are thus excluded from the legal regime applicable to securities.[182] What results from this is that no single donor or funder, or even a group of them is likely to attain control over the litigation or the funded party in the same way that a single funder

178. *See* Reinert, *supra* note 172, at 1195–1200.

179. BEISNER ET AL., *supra* note 74, at 5.

180. *See* Reinert, *supra* note 172, at 1216–17.

181. *See supra* Part I.B.

182. *Crowdfunding*, CUTTING EDGE CAPITAL, http://www.cuttingedgecapital.com/crowdfunding/ (last visited Mar. 18, 2015).

might in the realm of traditional ALF. This is not to say that the risk of outside funder control is nonexistent in CLF, but simply that the odds are slim at best.

Moreover, the backers in a CSC are also able to obtain all the necessary data from the promoter to make an informed decision before investing. The fact that most CSC campaigns are launched through well-known CFPs, and therefore are subject to screening regarding the scope, goals, and other relevant features of the campaign, provides assurances to the potential backers and enhances the campaign's credibility.[183] CFPs also play a role in diminishing the possibility of frivolous litigation. In this sense, CFPs become quality control mechanisms, not just intermediaries. Furthermore, the emergence of CLF-dedicated platforms such as Lexshares, which has its activities subject to securities regulations, has also created a heightened screening process for lawsuits and funders, which, in turn, has meant more safeguards for CLF users.

The fact that CLF has the potential to minimize some of the perceived inefficiencies of ALF does not mean that this nascent sub-industry is without risks. One such problem may be found in the use of GFCs, which instead of seeking funding directly for a specific cause, intend to create yet another intermediary that will, in turn, disburse the funds among cases chosen by the promoters.[184] While the idea of facilitating access to justice is likely appealing to the average citizen, a potential contributor might want to know more about the specific purpose of the funds instead of leaving that decision to the promoters alone. Further, given the nature and various levels of success of the CLF campaigns launched to this date through traditional CFPs,[185] it seems that the backers are content with the role played by Indiegogo and others, and may not be particularly keen on supporting the idea of another layer of brokerage between the promoter and the funder.

We can also see that with the exception of the SOP campaign, which as of March 2015, has raised almost half million dollars, most CLF campaigns have merely raised between three to ten thousand dollars.[186] This might mean that promoters may also have to rely on other contributions, such as pro bono representation by the lawyers involved in the litigation because crowdfunding contributions are in-

183. *See* Natasha Lomas, *Tackling the Crowdfunding Credibility Gap: A Q&A with Dropkicker*, TECHCRUNCH (Oct. 30, 2014), http://techcrunch.com/2014/10/30/dropkicker/.

184. *See supra* Part III.B.

185. *See supra* Table 1.

186. *See supra* Table 1.

sufficient to cover all litigation-related expenses.[187] It is important to note, however, that the relatively low amounts raised in the aforementioned CSCs do not necessarily mean that CLF will only work for low-budget litigation. As seen from the cases recently funded through Lexshares, CLF has been used to raise monies in the order of six figures, a clear signal of the promise of this emerging sector.[188]

The general crowdfunding industry began with relatively low threshold campaigns that quickly evolved into a multi-million dollar sector,[189] where, for example, a single campaign initially set at five hundred thousand dollars in 2012,[190] raised more than fifty million dollars by August 2014.[191] By the same token, it is possible that the CLF sector evolves into an important segment where top dollar disputes also receive support, or where a large number of backers contribute toward an ambitious goal. Even so, it is likely that most disputes that receive support through traditional CFPs will be non-commercial, as the promoters would not able to offer the backers the same incentives that an outside investor could obtain in the traditional context of third-party funding described in Part II.[192]

Conclusion

Crowd-litigation funding is in its infancy, but has incredible potential for growth in a similar manner to the development of the general crowdfunding industry a few years ago. Although the number of cases involving CLF is still small, it is likely that the numbers will increase, thus creating more opportunities for litigants to obtain the support they need to pursue their claims in court or to defend themselves in litigation. In this sense, CLF has the potential to level the

187. *See* MANUEL A. GÓMEZ & JUAN C. GÓMEZ, GENERAL REPORT ON RELIEF IN SMALL AND SIMPLE MATTERS IN THE UNITED STATES OF AMERICA 5–11 (Nov. 2014) (report prepared for the International Association of Procedural Law World Congress). The average cost of litigation varies greatly depending on different factors such as the type of parties, type of case, and length of litigation, among others. Nevertheless, according to a survey conducted by the National Center for State Courts in 2013, the average cost of a fully litigated case in the United States ranges from $54,000 to $122,000. *See id.* at 8–9.

188. *See Cases*, LEXSHARES, *supra* note 164.

189. *See* Freedman & Nutting, *supra* note 16, at 1–3.

190. *Star Citizen*, KICKSTARTER, https://www.kickstarter.com/projects/cig/star-citizen (last visited Feb. 7, 2015).

191. Phil Savage, *Star Citizen's Crowdfunding Total Shoots Past $50 Million*, PC GAMER (Aug. 17, 2014), http://www.pcgamer.com/star-citizens-crowdfunding-total-shoots-past-50-million/.

192. *See supra* Part II.

playing field and benefit otherwise disenfranchised litigants, and in more general terms, facilitate access to justice.

Even though this outlook is promising, CLF also runs the risk of enabling actors with less noble goals to take advantage of well-intentioned donors, and even to manipulate the system to their advantage. The possibilities range from promoters that fail to fulfill their promises offered through a crowdfunding campaign, to the utilization of crowdfunding to promote frivolous litigation, to the use of a "fabricated crowd" to disguise the identity of a real funder who does not want to be identified. Some of these problems have arisen in similar contexts and were resolved through litigation[193] or were averted by the CFPs themselves by imposing certain obligations on those who promote their campaigns through the platforms.[194]

Whereas these resolutions show the crowdfunding industry's ability to regulate itself and tackle novel challenges as they appear, there may be other areas that remain exposed to risk, perhaps in need of other forms of social control through policymaking and regulation. Only time will tell. Meanwhile, the CLF industry appears as a welcomed occurrence that has the potential to empower the crowds to help realize the goals of justice.

193. See, e.g., Taylor Soper, Kickstarter Fraud: Washington Files First Consumer Protection Lawsuit Involving Crowdfunding, GEEKWIRE (May 1, 2014), http://www.geekwire.com/2014/attorney-general-asylum-playing-cards-crowdfunded-project/.

194. *Your Responsibility*, KICKSTARTER, https://ksr-assets.s3.amazonaws.com/creator-responsibility.png (last visited Feb. 7, 2015).