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Multi-Party Litigation and Third-Party Funding of Litigation

Michael James Boland

Introduction:

Globalisation has forged two significant developments in litigation: it has given rise to the phenomenon of mass harm claims arising from "defective products, environmental exposure to toxic chemicals [or mass] civil rights and human rights abuses"[1] and it has placed a greater emphasis on multi-party litigation as a remedy for CSR-related claims. However, the typical methods of funding litigation, specifically, legal aid and contingency or conditional fee arrangements do not easily accommodate the growing interest in collective redress.[2] A strict adherence to such funding structures may inadvertently privilege the legal claims of wealthy litigants compared to those of impecunious litigants. It follows that in order to hold corporations liable for damage, injury or abuse, we need to consider the issue of funding litigation and imagine new ways of financing cases.

Against this background, this article will present the burgeoning practice of third-party funding of litigation as an alternative to traditional funding models. While it is largely prohibited in Ireland, this article will show how third-party funding of litigation has received albeit tentative approval by the Irish courts who note its potential as a tool in providing access to justice.

The remainder of this article is structured as follows: Section II will discuss the advantages and disadvantages of multi-party litigation. It will refer to current methods of collective redress in Ireland and the U.K. while focussing on the complexities of the representative action regime in both jurisdictions. Section II will consider the representative action because, firstly, it is arguably the best method available to institute group litigation against a corporation and, secondly, it resembles the U.S. style class action. Section III will briefly describe a selection of funding structures around the world before considering in detail the practice of third-party funding of litigation in the U.K. and in the U.S. and its likely application in Ireland. While the U.K. and the U.S. experience of litigation funding is not without its drawbacks, these

[1] D. Hensler, "The Globalisation of Class Actions" (2009) 622 The Annals of the American Academy of Political and Social Science 7 (hereinafter Hensler).
[2] ibid.

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jurisdictions are examples upon which an Irish system of third-party funding of litigation can be modelled.

Multi-Party Litigation:

Background:

Litigation involving corporations is highly complex. It requires great patience and a keen insight into corporate life. Multi-party litigation, otherwise known as class or collective actions, can help relieve the complexities. Multi-party litigation is the collective name for various legal mechanisms which allow a group of litigants with similar causes of action to bring a consolidated legal claim to court. The rise of collective action regimes in approximately eighteen countries around the world,[3] with others including the European Union in the process of debating the merits and demerits of collective redress mechanisms,[4] reflects a trend in civil litigation which seeks to challenge the immutability of the traditional bilateral model of litigation.[5] Multi-party litigation has thus become a symbol of solidarity where disputes between an individual and a corporation have become "group struggles" against multinational corporations rather than being merely "singular disputes".[6]

Models of collective action may apply a 'multi-statute regime' whereby its use is limited to certain causes of action or it may be a 'trans-substantive' system that is available for every conceivable cause of action including mass harm claims thus serving both to deter unlawful conduct and compensate those injured by it.[7] However, it would be a truism to say that the process of multi-party litigation has disadvantages. For instance, models of group litigation are criticised as being incendiary and likely to provoke "entrepreneurial lawyering"[8] which, as Blennerhassett warns, could "[open the] apocryphal litigation floodgates".[9] Moreover, multi-party actions could give rise to an abusive litigation culture in mass harm claims which would potentially burden the court and "divert [its attention] from matters more worthy of its

[3] ibid., 13.
[4] For discussion on the history of the various E.U. proposals on collective redress see, C. Hodges, "Collective Redress: A Breakthrough or a *Damp Sqibb*?" (2014) 37(1) Journal of Consumer Policy 67 at 68-75 (hereinafter Hodges).
[5] A. R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality and the 'Class Action Problem'" (1979) 92 Harvard Law Review 664 at 668 (hereinafter Miller).
[6] Hensler (n 1) 8.
[7] ibid., 14-15.
[8] ibid., 10.
[9] J. Blennerhassett, "Mass Harm Litigation in Ireland and Multi-Party Actions" (UCD Sutherland School of Law: UCD Working Papers in Law, Criminology and Socio-Legal Studies, 2017) 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3082816> accessed 10 July 2018 (hereinafter Blennerhassett).

energies".[10] This has become a significant risk in some Nordic countries where it is common for multi-party actions to continue for several years with one Swedish case lasting eight years.[11] This issue of delay is particularly relevant in cases of corporate-related harm where the impecunious litigants are faced with the mighty bulwark of their corporate opponent.

Multi-Party Litigation in Ireland and the U.K.

There are primarily two avenues available to pursue multi-party litigation in Ireland[12] and the U.K.[13]: the representative action and the rather nebulous 'test case' option. The latter seems to depend on so-called 'herd instinct', that is, the use of the experimental case to subsequently litigate an analogous set of actions. The former, by contrast, is more closely aligned with the vision of the class action system in the U.S. whereby the combined cases of a number of identifiable litigants are represented by one, or at times, more than one party. A key distinction, however, between the representative action and the U.S. style class action is the latter's 'opt-out' feature[14] whereas the representative action is often the result of a court sanctioned consolidation of legal claims.[15] 'Opt-out' class action regimes automatically join litigants to the proceedings who may subsequently decide to remove themselves from the action and litigate individually thereafter.[16] By contrast, the 'opt-in' procedure invites claimants who meet the requirements of the class to join the litigation.[17] It follows that while the discretion to litigate rests with the individual litigant in the 'opt-in' and 'opt-out' methods, it is ostensibly in the hands of the court in representative actions which may not always accord to litigants' wishes.

The conditions of a representative action are contained in both Irish and U.K. rules of court which, up to 2007, used identical language to govern this form of group litigation.[18] The rules, however, tend to sow dissension among practitioners as they circumscribe the use of the representative action to cases where the members of the action share the 'same or common interest' in the cause of action which raises questions of *locus standi*.[19] Moreover, the courts

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[10] Miller (n 5) 666.
[11] Hodges (n 4) 79.
[12] For discussion of current approaches to multi-party litigation in Ireland see, Law Reform Commission, *Report on Multi-Party Litigation* (LRC 76 – 2005) 9-13 (hereinafter LRC, *Multi-Party Litigation*).
[13] For a description of the existing law and procedure on multi-party litigation in the U.K. see, J. Sorabji (ed), *Improving Access to Justice through Collective Actions* (Civil Justice Council 2008) 25-35 (hereinafter Sorabji).
[14] Hensler (n 1) 15-16.
[15] LRC, *Multi-Party Litigation* (n 12) 9; *cf.* Blennerhassett (n 9) 7.
[16] Hensler (n 1) 15.
[17] ibid.
[18] RSC Ord 15, r 9. In the UK, the modern text of the representative action procedure is contained in the Civil Procedure Rules 19.6 whereupon the pre-conditions to instituting representative proceedings in its statutory predecessor continue to apply.
[19] LRC, *Multi-Party Litigation* (n 12) 10.

have struggled to agree on a definition of 'same or common interest'. For instance, in *Bedford v. Ellis*,[20] Lord Macnaghten considered that parties to a representative action share a 'common interest' where they invoke the same legislation in the action and have the same profession.[21] Significantly, Lord Macnaghten usefully stated the prerequisites of representative actions in more general terms. He said, "[g]iven a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent".[22] It follows that representative actions are contingent on a common interest, a common grievance and a common reward amongst the members of the class thus underscoring the unsuitability of this form of redress in actions for damages because, as Fletcher-Moulton L.J. observed, "[d]amages are personal only" and cannot be calculated collectively.[23]

This issue was also addressed in *Markt & Co. Ltd v. Knight Steamship Co. Ltd* where, despite satisfying Lord Macnaghten's requirement in *Bedford v. Ellis* that the members of the representative action share the same profession, the Court opined that a 'common interest' did not exist as the respective contracts governing the relationship between each member of the representative action and the defendant company were different to each other.[24] Conditions of performance, entitlement to damages and the applicable category of defence were different which, according to Fletcher-Moulton L.J., brought the litigation outside "[t]he proper domain of a representative action ... where there are like rights against a common fund, or where a class of people have a community of interest in some subject-matter".[25]

The diverse and transient set of circumstances in which a 'same or common interest' may be established makes any systematic exposition of its meaning and the wider issue of *locus standi* difficult. It is also likely to create disagreement and delay. Against this background, an interesting point of contrast is with organisation actions – a *de facto* method of multi-party litigation in which public interest groups such as non-governmental organisations institute proceedings on behalf of the public or a specific group of individuals.[26] In contrast to the representative action, the Irish and U.K. courts have loosely interpreted the requirement that entities, as juristic persons, show a 'sufficient interest' in the subject-matter of the litigation in

[20] [1901] AC 1.
[21] ibid., 9.
[22] ibid., 8.
[23] [1910] 2 KB 1021 at 1040.
[24] ibid., 1039-1040.
[25] ibid., 1040.
[26] LRC, *Multi-Party Litigation* (n 12) 5.

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order to overcome issues of standing before instigating organisation actions.[27] Thus, in *Irish Penal Reform Trust v. The Minister for Justice,*[28] Griffin J was satisfied that the plaintiff group had standing to challenge prison conditions as it is a "*bona fide* organisation with an interest common to that [of those it represents]".[29] Similarly, in *R v. Inspectorate of Pollution*,[30] m J was satisfied that Greenpeace had *locus standi* to challenge the UK government's environmental policy due to its "genuine [and *bona fide*] concern for the environment".[31] It follows that while a somewhat strict and prescriptive approach to establishing *locus standi* is taken in respect of representative actions, a more ad hoc approach is taken in respect of organisation actions. However, it is suggested that an organisation action is an unsuitable avenue to seek recourse for harm caused by corporate-related damage or abuse as the remedy sought would ordinarily be of a declaratory or injunctive nature rather than one that provides relief for victims of corporate-related harm.[32] If victims were to receive an award of damages, they would have to bring further litigation.[33]

As stated previously, just as damages are generally unavailable in mass injury class actions in the U.S.,[34] litigants in both Ireland and the U.K. are traditionally prohibited from seeking damages in representative actions.[35] However, there are signs that the U.K. is easing its stance on the prohibition against the recovery of damages in representative actions. In *Prudential Assurance Co Ltd v. Newman Industries Ltd*,[36] Justice Vinelott held that a declaration of an entitlement to damages could be sought in a representative action thus necessitating further litigation by the individual members of the represented class in order to activate their entitlement.[37] He also confirmed that the representative action could be used in claims arising from tort as well as contract.[38] While Justice Vinelott arguably placed a mere gloss on the prohibition against the recovery of damages in representative actions in the U.K., his position has been refined in subsequent cases such that damages are recoverable where the "global quantum to the entire represented class is ascertainable"[39] and where damages benefit all

[27] ibid.
[28] [2005] IEHC 305.
[29] ibid., 317.
[30] [1994] 4 All ER 329.
[31] ibid., 350.
[32] Hensler (n 1) 13.
[33] LRC, *Multi-Party Litigation* (n 12) 6.
[34] Hensler (n 1) 14.
[35] LRC, *Multi-Party Litigation* (n 12) 10; *cf*. Sorabji, (n 13) 34.
[36] [1981] Ch. 229.
[37] ibid., 246.
[38] ibid., 247.
[39] Sorabji (n 13) 34; *cf*. *EMI Records Ltd v. Riley* [1981] 1 WLR 923.

members of the action thus satisfying the final condition of the *Bedford v. Ellis* tripartite that the relief sought must be beneficial to all members of the representative action.[40] In Ireland, this issue is unresolved, however the Law Reform Commission has opined that a multi-party litigation procedure must allow for monetary compensation and also provide for mass tort claims.[41]

Third-Party Funding of Litigation:

Background:

For the impecunious litigant(s) who have suffered injury due to corporate-related damage or abuse in what often appears like a David versus Goliath encounter, obtaining finance to litigate the dispute in the first instance and the ongoing challenge of financing the action through to its completion presents the greatest difficulty. The different approaches to litigation funding around the world compounds this situation. For example, while the Irish Law Reform Commission have recommended that civil legal aid continue to be granted to members of group litigation who would ordinarily be eligible under the legal aid scheme,[42] the exclusion of group litigation and mass harm claims from the scope of the Irish civil legal aid system remains extant.[43] In contrast, both the Netherlands and Sweden offer public legal aid for mass claims with the Netherlands allowing representative organisations such as charities and public interest groups access this funding.[44] Its neighbouring jurisdiction of Belgium also offers legal aid funding for both group and individual litigation arguably because other funding practices such as contingency fee agreements and conditional fee arrangements, commonly known as "no foal, no fee" agreements (discussed below), are prohibited.[45] Elsewhere, in the U.K. and Australia where such "no foal, no fee" arrangements are permitted, the prevailing "loser-pays principle" dictates that the unsuccessful litigant may still be liable for their opponent's costs.[46] The effect of this system may be contrasted with that in the Canadian States of Quebec and

[40] See generally, *Independiente Ltd v. Music Trading On-Line (HK) Ltd* [2003] EWHC Ch. 470.
[41] See generally, LRC, *Multi-Party Litigation* (n 12) 6-10; *cf.* Blennerhassett (n 9) 4.
[42] LRC, *Multi-Party Litigation* (n 12) 60-62. The LRC recommendation reads: "class plaintiffs who are otherwise eligible should be entitled to apply for civil legal aid".
[43] Civil Legal Aid Act 1995, s. 28(9) states that "[…] legal aid shall not be granted by the Board [where] the application for legal aid is made by or on behalf of a person who is a member, and acting on behalf, of a group of persons having the same interest in the proceedings"; *cf. Conway v. Ireland and Ors* [2017] IESC 13 where Clarke J (as he was) suggested, albeit *obiter*, that the State may be required, at least in some circumstances, to provide legal aid in cases of environmental harm where the Aarhus Convention and its E.U. implementing measure, the Public Participation Directives, are invoked.
[44] Janet Walker, "Who's Afraid of U.S. Style Class Actions?" (2012) 18(2) Southwestern Journal of International Law 509 at 542 & 545 (hereinafter Walker).
[45] ibid., 543-544.
[46] ibid., 539-541.

Ontario where the public funding available for group litigation indemnifies the group against adverse costs.[47]

The fragmentation and obfuscation that characterises existing models of litigation funding has occasioned the use of contemporary sources of finance for litigation such as crowdfunding and third-party funding of litigation. Notwithstanding the rise of unique crowdfunding platforms that specialise in funding litigation,[48] the practice as constituted in the U.K. and the U.S. is *prima facie* concerned with entrepreneurship and business start-up financing rather than litigation financing.[49] This Section will, therefore, consider the practice of third-party funding of litigation in the U.K. and the U.S. and the extent to which it is permitted in Ireland where prohibitive laws of maintenance and champerty subsist despite producing no prosecutions in the history of the State (possibly longer)[50] and being "so old that their origins can no longer be traced".[51] The tort and crime of maintenance refers to the "wanton and officious intermeddling"[52] by the funder in litigation in which they have no legitimate interest, whereas "[f]or champerty there must be added the notion of a division of the spoils".[53] Champerty is, according to Hogan J in *Greenclean Waste Management Ltd v. Leahy (No. 2)*,[54] a "secular form of simony within the legal system"[55] which developed as a procedural safeguard against vexatious legal claims.

Ireland:

As stated, the common law rules of maintenance and champerty continue to operate under Irish law.[56] The case could be made that the subsistence of such rules in Irish law is at variance with the constitutional right of access to the courts which was declared an unenumerated personal right protected by Article 40.3 of the Constitution in *Macauley v. Minister for Posts and*

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[47] ibid., 538.
[48] See, M. Holmes, "Two's Company, Fee's a Crowd" (2017) 111(8) Law Society Gazette 30 at 32 for discussion of crowdfunding as a source of litigation finance. The author refers to crowd litigation funding platforms that operate in the U.K. and the U.S. such as CrowdJustice, TrialFunder and LexShares which invite investment in commercial litigation <https://www.lawsociety.ie/globalassets/documents/gazette/gazette-pdfs/gazette-2017/oct-2017-gazette.pdf> accessed 13 November 2017.
[49] See generally, J. Armour and L. Enriques, "The Promise and Perils of Crowdfunding" (2018) 81(1) The Modern Law Review 51.
[50] *Persona Digital Telephony Ltd v. Minister for Public Enterprise* [2017] IESC 27 at 50 (hereinafter *Persona Digital Telephony Ltd v. Minister for Public Enterprise*).
[51] *Giles v. Thompson* [1994] 1 AC 142 at 153 *per* Lord Mustill (hereinafter *Giles v. Thompson*).
[52] *British Cash and Parcel Conveyors Ltd v. Lamson Store Service Co. Ltd* [1908] 1 KB 1006 at 1014.
[53] *Giles v. Thompson* (n 51) 161.
[54] [2014] IEHC 314 (hereinafter *Greenclean Waste Management Ltd v. Leahy (No. 2)*).
[55] ibid., 315.
[56] Statute Law Revision Act 2007, Schedule 1 retains pre-1922 statutes concerning, *inter alia*, maintenance and champerty.

Telegraphs.[57] Lynch J recognised this in *O'Keeffe v. Scales*[58] when he indicated that there are higher laws, specifically the constitutional right of access to the courts, against which the law relating to maintenance and champerty must be measured.[59] The judgment of Clarke J (as he was) in *Persona Digital Telephony Ltd v. The Minister for Enterprise* also concerned the roots that lie at the foundation of this practice, namely, access to justice. He suggested that the pluralism necessary for the preservation of this constitutional right envisaged, *inter alia*, "some form of legitimate third-party funding".[60] In its consultation on the issue, the LRC also looked towards litigation funding by third parties as a means of restoring trust, confidence, and co-operation in the system of justice in Ireland.[61]

While calls for reform to the funding of cases "in light of the internet and crowdfunding" have been mooted within politics,[62] recent Irish case law has led an albeit cautious reappraisal of the tort and crime of maintenance and champerty and have taken an increasingly experimental approach to the issue of third-party funding of litigation. For example, in *Greenclean Waste Management Ltd v. Leahy*, Hogan J recognised the "practical vibrancy"[63] of maintenance and champerty but added that "the scope of application of the law of champerty must […] accommodate itself to modern social realities".[64] Similarly, in *SPV Optimal Sus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd*,[65] a case concerning the assignment of causes of action, Ryan P observed that much litigation is funded today by third parties through insurers, charity and the State who have no direct interest in its outcome and that "public policy [must] move with the times".[66] Elsewhere, Denham C.J. in *Persona* unequivocally raised the possibility of modernising the law on champerty to enable third-party funding of litigation in light of "Ireland being an international trading State [and due to] issues arising on (sic) international arbitrations, and in the Commercial Court".[67]

[57] [1966] IR 345.
[58] *O'Keeffe v. Scales* [1998] 1 IR 290.
[59] ibid., 295.
[60] *Persona Digital Telephony Ltd v. Minister for Public Enterprise* (n 50) 46.
[61] Law Reform Commission, *Issues Paper on Contempt of Court and Other Offences and Torts Involving the Administration of Justice* (LRC IP 10 – 2016) at 75 (hereinafter LRC, *Issues Paper*).
[62] Josepha Madigan T.D., "Contempt of court is not taken seriously enough here – and after Jobstown we need to change that" *Irish Independent* (8 July 2017); *cf.* The issue of third-party funding of litigation was raised in a parliamentary question to the former Minister for Justice, Charlie Flanagan T.D., in June 2017. The former Minister indicated that the issue would be revisited at a later date.
[63] *Greenclean Waste Management Ltd v. Leahy (No. 2)* (n 54) 316.
[64] ibid.
[65] [2017] IECA 56.
[66] ibid., 69.
[67] *Persona Digital Telephony Ltd v. Minister for Public Enterprise* (n 50) 41.

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Notwithstanding the lack of an overall scheme for third-party funding of litigation in Ireland, the practice is currently permissible in certain circumstances. In *Greenclean*, Hogan J considered that so-called 'after the event' (ATE) insurance does not fall into the category of being champertous or amounting to maintenance as it "serves important needs within the community by facilitating access to justice".[68] ATE insurance provides cover for legal costs in return for a significant premium[69] and could therefore be considered a "disguised" form of champerty.[70] However, its association to conditional fee arrangements ostensibly protects it from a charge of "champertous connivance".[71] This is because conditional fee arrangements – more appropriately termed 'deferred fee payments' given their application in Ireland[72] – relieves the litigant of liability for the costs of their own representation in the event that their case is lost but exposure to potential liability for their opponent's costs remain.[73] ATE insurance, therefore, allows the litigant to cover the other party's costs in this situation[74] which Hogan J says establishes its acceptability as a *de facto* form of third-party funding of litigation.[75]

Elsewhere, in *Thema International Fund Plc v. HSBC Institutional Trust Services (Ireland) Ltd*,[76] Clarke J identified further exceptions to the prohibition on third-party funding of litigation. The first arises where funding is provided with "[c]haritable intent",[77] whereas the second is arguably influenced by the *Wallersteiner v. Moir (No. 2)*[78] innovation in which a company may indemnify its minority shareholders against legal expenses incurred on its behalf. Thus, Clarke J's second exception is invoked where shareholders or creditors fund the progression of litigation by a company in which they are invested as "[t]hey are, even if only *indirectly*, already involved in the litigation".[79] As an interesting point of contrast, the New Zealand Law Commission cited the potential of "unruly corporations prepared to employ ruthlessly aggressive litigious processes against business rivals, hiding behind nominal litigants" as justification for retaining the law relating to maintenance and champerty in New

[68] *Greenclean Waste Management Ltd v. Leahy (No. 2)* (n 54) 319.
[69] LRC, *Issues Paper* (n 61) 73.
[70] *Greenclean Waste Management Ltd v. Leahy (No. 2)* (n 54) 319.
[71] Harper Lee, *To Kill a Mockingbird* (Arrow Books 1997) at 182.
[72] For discussion see, LRC, *Multi-Party Litigation* (n 12) 50.
[73] ibid., 51.
[74] LRC, *Issues Paper* (n 61) 74.
[75] *Greenclean Waste Management Ltd v. Leahy (No. 2)* (n 54) 319.
[76] [2011] 3 IR 654 (hereinafter *Thema International Fund Plc v. HSBC*).
[77] ibid., 662.
[78] [1975] QB 373.
[79] ibid., 663 (Emphasis added).

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Zealand.[80] Hence, what is seen in Ireland as a legitimate exercise in self-interest which justifies a loosening of the maintenance and champerty rules is seen in New Zealand as a disconcerting display of self-interest designed to damage business competitors which accordingly gives renewed support to the laws of maintenance and champerty as tools in preventing anti-competitive business practices.[81]

Greenclean and *Thema* provide albeit limited instances where third-party funding of litigation is permissible. *Moorview Developments Ltd v. First Active Plc*,[82] on the other hand, deals with the consequences of funding litigation. Clarke J extracted jurisdiction from both the Rules of the Superior Courts[83] and the *Judicature Act 1877*[84] to join the third-party funder – who was a director and shareholder of the plaintiff company – as a defendant in the proceedings for the purposes of awarding costs against the funder where the litigant is unable to discharge their liability for the costs of their opponent. Accordingly, the aptly named "*Moorview* jurisdiction"[85] will be invoked where the funded party cannot meet an order for costs and where the funder acted with *mala fides* or acquired a significant financial interest in the litigation.[86] The decision of Clarke J has been endorsed by the Supreme Court[87] and applied by the High Court in *W.L. Construction Ltd v. Chawke and Bohan*[88] where Noonan J, in circumstances similar to those in *Moorview*, imposed liability for costs on the majority shareholder of the plaintiff company owing to his impropriety. On appeal, Hogan J overturned the decision of Noonan J and queried the very existence of such a jurisdiction to award an order for costs against a so-called 'non-party'.[89] Hogan J inclined to the accepted dogma that the rules of court only apply to parties to the litigation and without express provision to the contrary the ordinary practice could not be displaced.[90] Viewed thus, the second pillar supporting the "*Moorview* jurisdiction", namely, section 53 of the *Judicature Act* fails as it subjects the exercise of the

[80] New Zealand Law Commission, *Report on Subsidising Litigation* (NZLC 72 – 2001) at 10.
[81] See, for example, the decision of the Queensland Supreme Court in *JC Scott Constructions v. Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 wherein the funder was found to have "stirred up litigation" between the parties who were business competitors in order "to embarrass the plaintiff financially and, if possible, to procure its winding up".
[82] [2011] 3 IR 615 (hereinafter *Moorview Developments Ltd v. First Active Plc*).
[83] RSC Ord 15, r. 3; Clarke J was influenced by *dicta* of Kearns J in *Byrne v. John. S. O'Connor and Co* [2006] IESC 30 who stated, albeit *obiter*, that there inheres in this particular rule of court jurisdiction to join a party to proceedings with the intention of ordering costs against him.
[84] Supreme Court of Judicature (Ireland) Act 1877, s. 53 says that the issue of costs shall be "in the discretion" of the court.
[85] Hogan J ascribed the title of "*Moorview* jurisdiction" to the act of ordering costs against a party that had neither been a plaintiff or a defendant in the proceedings because Clarke J's decision was among the first in this jurisdiction to make such an order. See, *W.L. Construction Ltd v. Chawke and Bohan* [2018] IECA 113.
[86] *Moorview Developments Ltd v. First Active Plc* (n 82) 632.
[87] *Moorview Development Ltd and Ors v. First Active Plc and Ors* [2018] IESC 33.
[88] [2017] IEHC 319.
[89] [2018] IECA 113.
[90] ibid., 119-121.

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court's discretion as regards costs to the requirements of the rules of court which, according to Hogan J, makes no provision for third-party costs orders.[91] Notwithstanding Hogan J's reservations with the *Moorview* decision, they cannot be viewed as representing a concluded view due, on the one hand, to the Supreme Court's approval of the so-called "*Moorview* order" and, on the other, to the fact that Hogan J's comments were *obiter dicta*.

It follows from *Greenclean* and *Thema* that activity akin to third-party funding of litigation in Ireland will not always run afoul of the prohibitions on maintenance and champerty where funders have a 'sufficient connection' to or a 'legitimate interest' in the outcome of the litigation.[92] However, this nomenclature cuts across various legal fields and thus defies neat definition in this context. While guidance as to the possible contours of a 'sufficient connection' may be gleaned from the law on vicarious liability[93] and from English insolvency law[94] where this phrase is in common parlance, the requirement of a 'legitimate interest', on the other hand, "lacks precise definition".[95] In *Thema*, Clarke J accepted that even an "indirect interest" would suffice.[96] This seems to be in line with the approach of the English courts in *Simpson v. Norfolk and Norwich University Hospital*[97] and in *Thai Trading Co. v. Taylor.*[98] In the former case, Moore-Bick L.J. said that "it is [not] possible to state in definitive terms what does and does not constitute a sufficient interest"[99] and, in the latter case, Millett L.J. said that a 'legitimate interest' was "not confined to cases where [the funder] had a financial or commercial interest in the result" adding that "[i]t extended to other cases where social, family or other ties justified the maintenance in supporting the litigation".[100]

In light of the foregoing, any reconsideration of third-party financing of litigation in Ireland might appropriately be addressed by legislative action rather than by judicial means where the precise parameters of a 'sufficient connection' or 'legitimate interest' may be drawn. Clarke

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[91] ibid.

[92] *Thema International Fund Plc v. HSBC* (n 76) 662.

[93] See, for example, *Lister and Others v. Hesley Hall Ltd* [2002] 1 AC 215, in which Millett L.J. stated the test to be "where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment" (at 245).

[94] For example, in order for English courts to sanction the winding-up of a foreign company a 'sufficient connection' with England must exist. Similarly, it is accepted practice that a 'sufficient connection' with England be established before a foreign company may restructure via the revered scheme of arrangement procedure. The meaning of a 'sufficient connection' in these contexts has been interpreted loosely. Having assets within the jurisdiction or having English law govern certain business arrangements are accepted as representing a 'sufficient connection'. See, J. Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press 2014) at 289-291.

[95] E. Quill, *Torts in Ireland* (4th edn, Gill & Macmillan 2014) at 380.

[96] *Thema International Fund Plc v. HSBC* (n 76) 663.

[97] [2012] QB 640 (hereinafter *Simpson v. Norfolk and Norwich University Hospital*).

[98] [1998] QB 781 (hereinafter *Thai Trading Co. v. Taylor*).

[99] ibid., 644.

[100] ibid., 786.

C.J. expressed this view in *SPV Osus Ltd v. HSBC Institutional Trust Services (Ireland) Ltd*[101] in which he considered that a court-led reappraisal of the rules on maintenance and champerty would give rise to an "unregulated commoditisation of litigation" and, in view of increasingly complex commercial litigation, he called for legislation to balance the potential "benefits of liberalisation" with its attendant disadvantages.[102]

The Irish jurisprudence indicates that the courts are at a crossroads on the subject of third-party funding of litigation. Despite dualities in judicial opinion and ambiguities in the detail, it is clear that the force of the laws relating to maintenance and champerty is in decline in Ireland. It is apposite, therefore, to reflect on the operation of litigation funding in jurisdictions where the laws of maintenance and champerty are accorded lesser significance.

The International Experience:

The U.K.:

The rise of third-party funding of litigation in common law jurisdictions such as Jersey, Canada, certain states of Australia and South Africa[103] and, in particular, its foothold in the U.K. is in response to its role in promoting access to justice.[104] Thus, in *Thai Trading Co. v. Taylor*, Lord Justice Millet upheld what was described incorrectly as a contingency fee agreement on the grounds that it satisfied "a countervailing public policy in making justice readily available to persons of modest means".[105] In doing so, Lord Justice Millett effectively created a framework for the modern English understanding of a conditional fee arrangement.[106] He drew a distinction between what is a contingency fee agreement where the lawyer or the funder share in the 'spoils' of litigation and a disposition in which the reward consists only of the lawyer's or the funder's ordinary fees.[107] The Court ventured that the former practice is

[101] [2018] IESC 44.
[102] ibid.
[103] R. Mulheron, "England's Unique Approach to the Self-Regulation of Third-Party Funding: A Critical Analysis of Recent Developments" (2014) 73(3) Cambridge Law Journal 570 at 573 (hereinafter Mulheron).
[104] M. Steinitz, "Whose Claim Is This Anyway? Third-Party Litigation Funding" (2011) 95 Minnesota Law Review 1268 at 1276 (hereinafter Steinitz).
[105] *Thai Trading Co. v. Taylor* (n 98) 790.
[106] It is useful to distinguish between a 'conditional fee arrangement' as understood in England with the understanding applied in Ireland, for example. Under the terms of a 'conditional fee arrangement' in England, a lawyer or funder would surrender their fees in the event that the litigation failed or otherwise recoup their basic fee, plus an 'uplift' measured as a per centage of their basic fee if the case was won. In Ireland, however, the term 'conditional fee arrangement' is a misnomer and, as already stated, should be described as a 'deferred fee payment' because the lawyer retains the right to pursue the litigant for costs even where the action is unsuccessful. Hence, it is at the lawyer's discretion whether the litigation will truly be on a "no foal, no fee" basis as they can either pursue or forego their costs. See, LRC, *Multi-Party Litigation* (n 12) 50-51 and 66-67.
[107] *Thai Trading Co. v. Taylor* (n 98) 788-790.

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"condemned as tending to corrupt the administration of justice",[108] whereas public policy supports the latter on the basis that "the worker is worthy of his hire".[109]

While the crimes and torts of maintenance and champerty were abolished in England in 1967,[110] their relevance endures by virtue of the rule in common law that they are contrary to public policy.[111] Hence the determination of the courts to establish whether a billing or litigation financing arrangement meet with prevailing public policy expectations.[112] For instance, in *Awwad v. Geraghty & Co.*,[113] decided two years after *Thai Trading*, Lord Justice Schiemann took the contrary view that a conditional fee arrangement offends public policy.[114] He reasoned that even an arrangement where a lawyer's 'success fee' equals their 'normal fee' moves the lawyer towards a "temptation to misbehave" and dispense with "their best traditions" as agents of justice.[115] The same concern applies to the terms of a funder's remuneration contract: the greater the share of the spoils that the funder will receive, "the greater the temptation to stray from the path of rectitude", Lord Phillips M.R. opined in *R (Factortame) v. Secretary of State for Transport & Others (No. 8)*.[116]

The differences between *Thai Trading* and the *Awwad* decision showed that within the judiciary there were clear divisions as to the nature and extent of public policy: that is, in the context of conditional fee arrangements, whether public policy would deem acceptable remuneration agreements tied to the outcome of litigation. The debate was settled, however, following the Jackson Report into the cost and funding of civil litigation. This recommended that both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients,[117] thus, turning previous judicial opprobrium about what Lord Denning M.R. once flagellated as a "particularly obnoxious form of champerty" [118] on its head. The recommendation was inserted into the *Courts and Legal Services Act 1990* by the *Damages-Based Agreements Regulations 2013* where the definition of a contingency fee agreement was widened to include *all* subject areas of civil litigation, specifically personal injury and

[108] ibid., 788.
[109] ibid.
[110] Criminal Law Act 1967, s. 13(1).
[111] Criminal Law Act 1967, s. 14(2) provides that removal of criminal or civil liability "shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal".
[112] Mulheron (n 103) 581.
[113] [2001] QB 570 (hereinafter *Awwad v. Geraghty & Co.*).
[114] ibid., 593.
[115] ibid., 589.
[116] [2003] QB 381 at 413 (hereinafter *R (Factortame) v. Secretary of State for Transport*).
[117] Lord Justice R. Jackson, *Review of Civil Litigation Costs: Final Report* (Stationery Office 2009) at 133 (hereinafter Jackson Report).
[118] *Trendtex Trading Corporation v. Credit Suisse* [1980] QB 629 at 654.

commercial matters.[119] The recommendation, however, does not apply to litigation funders, although, the industry's Code of Conduct is unequivocal that the funder "receives a share of the proceeds if the claim is successful" which bespeaks a contingency fee agreement.[120]

The Jackson-inspired reforms appear to place the litigant at a slight disadvantage. It is certainly conceivable that litigation which operates on the basis of a contingency fee agreement and involves a solicitor, a barrister and a funder will give to the litigant the smallest share of the 'spoils'. It is worthy of note, however, that the 2013 Regulations limit the sum of the proceeds lawyers may claim [121] and, in the case of funders, the Code of Conduct measures the funder's reward against the amount of their financial contribution, thus, applying a *de facto* 'Arkin Cap' *(discussed below)* to the calculation of the funder's share.[122] By contrast, the funder's contingency fee in the U.S. represents three to four *times* the funded amount [123] which arguably conduces towards a disproportionate privileging of the funder's interests over those of the litigant.

Another matter of public policy on which the judiciary have struggled to speak with one voice concerns liability for costs. Ever since *Aiden Shipping Ltd v. Interbulk Ltd*,[124] Section 51 of the *Supreme Court Act 1981* confers jurisdiction on the court to make a third-party funder liable for the costs of the opposing party where the action is unsuccessful. However, in *Hamilton v. Al Fayed (No. 2)*,[125] the Court held that the right to recover costs must "yield to the funded party's right of access to the courts to litigate the dispute in the first place".[126] Simon Brown and Lord Justice Chadwick. considered that to do otherwise would weaken the redistributive function of litigation funding which, as Steinitz says, is to "reverse the exclusion of [society's] have-nots from the courthouse".[127]

Although she concurred with the majority decision, Lord Justice Hale's judgment in *Hamilton* was more closely aligned with the subsequent decision of the Court of Appeal in *Arkin v.*

[119] Courts and Legal Services Act 1990, s. 58AA(3) and (9); *cf.* Mulheron (n 103) 590-591.
[120] *Code of Conduct for Litigation Funders* (London: Association of Litigation Funders, 2018) *per* clause 2.5 <http://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf> (accessed 5 July 2018).
[121] The Damages-Based Agreements Regulations 2013, Regs 4(2)(b) – 7 provide that a contingency fee deducted from damages in a personal injury action should not exceed 25per cent of the award; 35per cent in an employment matter; and 50per cent in a commercial-related case.
[122] *Code of Conduct for Litigation Funders* (n 120) Clause 2.6.
[123] Steinitz (n 104) 1276.
[124] [1986] 2 All ER 409 (hereinafter *Aiden Shipping Ltd v. Interbulk Ltd*).
[125] [2003] QB 1175 (hereinafter *Hamilton v. Al Fayed*).
[126] ibid., 1195.
[127] Steinitz (n 104) 1300; *cf.* ibid., 1201.

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Borchard Lines Ltd.[128] The leading judgment of Lord Phillips M.R. surveyed case law and legislation, sources that supported his ringing endorsement of the "rule that costs should normally follow the event".[129] He, therefore, proposed an approach whereby the liability of both professional and 'pure funders' (that is, altruistic and not-for-profit funders who have no collateral interest in the outcome of the action) to pay the successful party's costs would be capped to the extent of the funding provided to the litigant.[130]

The Jackson Report, however, delivered strong criticism of the so-called 'Arkin Cap'. It recommended that, in order to protect the successful party against the prospect of unrecovered costs, and to protect the litigant from potential liability for their opponent's costs, the 'Arkin Cap' should be overturned, whether by "rule change or by legislation" so that questions of costs and liability may be determined by the courts.[131] Despite this, the *Arkin* principle survives, albeit vestigially, in the Code of Conduct for Litigation Funders which requires that the litigation funding agreement "state whether *(and if so to what extent)* the funder [...] is liable to [pay adverse costs]".[132]

Summary of the U.K. Experience

This Section considered the application of the laws of maintenance and champerty in the U.K. Despite the abolition of the relevant laws in 1967, the sample of U.K. jurisprudence offered above reveals the judiciary's incessant suspicion of anything resembling maintenance and champerty. Hence the divergence within case law over whether contingency fee agreements or even conditional fee arrangements offend public policy. However, the Jackson Report and the emergence of a sophisticated litigation funding industry in the U.K. changed attitudes by forced majeure such that a contingency fee agreement may now determine a lawyer's or a funder's remuneration save for particular procedural safeguards.

Even though contingency fee agreements may threaten the litigant's access to justice by seeming to privilege the interests of the lawyer and the funder, the litigant's access to justice underpins the 'Arkin Cap' which, on the one hand, shields the litigant against liability for *all*

[128] [2005] 3 All ER 613 (hereinafter *Arkin v. Borchard Lines Ltd*).
[129] ibid., 624.
[130] *Arkin v. Borchard Lines Ltd* (n 128) 624.
[131] Jackson Report (n 117) 123.
[132] *Code of Conduct for Litigation Funders* (n 120) Clause 10.1 (Emphasis added).

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of their opponent's costs and, on the other hand, allows litigation funders continue to exercise their purported function as agents or, at least, facilitators of justice.

The U.K. experience, thus, provides a way to evaluate the prospects of litigation funding in Ireland where case law reveals an appetite for reform and where the right of access to justice is posited as among the most powerful of the constitutional arsenal.

The U.S.:

The laws relating to maintenance and champerty subsist in approximately thirty-five states of the U.S. with a minority of states either abolishing the prohibitions on maintenance and champerty or enforcing them with "varying degrees of zeal".[133] For instance, while statute precludes the practice in New York,[134] case law has sought to dilute its effect. Thus, in *Bluebird Partners L.P. v. First Fidelity Bank N.A.*,[135] the Court of Appeals of New York ventured that the statutory prohibition on maintenance and champerty *only* applied where "the *primary* purpose for, if not the *sole* motivation" behind a lawyer's or a funder's interest in the cause of action was to pursue litigation on foot of it.[136] The effect of the test was to deem champertous the "wanton and officious intermeddling" [137] in disputes by lawyers or funders where the interference was for "*the* purpose (as contrasted to *a* purpose) of bringing an action or proceeding".[138]

Elsewhere, the Supreme Judicial Court of Massachusetts in *Saladini v. Righellis* [139] were, on the other hand, unequivocal that the "ancient prohibition" against maintenance and champerty no longer applied.[140] The Court questioned the continued relevance of the ostensibly anachronistic doctrines which, it said, were designed to confront abuse of the legal process at a time when, as Lyon recalls, "[litigation] was regarded as a sign of a belligerent [and] vexatious spirit".[141] The Court instead depicted the doctrines as tools to "foster resolution of a

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[133] Steinitz (n 104) 1289; *cf.* B. C. Tobias, "Officious Intermeddling or Protected First Amendment Activity? The Constitutionality of Prohibitory Champerty Law After *Citizens United*" (2014) 22(4) William and Mary Bill of Rights Journal 1293 at 1310 (hereinafter Tobias).

[134] Judiciary Law, s. 489 states, *inter alia*, that "no corporation or association […] shall solicit, buy or take an assignment of, or be in any manner interested in buying or taking an assignment of […] any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon".

[135] *Bluebird Partners L.P. v. First Fidelity Bank N.A. and Others* (2000) 94 N.Y. 2d 726 *per* Bellacosa J (hereinafter *Bluebird*).

[136] ibid., at 736 (Emphasis added).

[137] *British Cash and Parcel Conveyors Ltd v. Lamson Store Service Co. Ltd*, *supra* at 1014 *per* Fletcher-Moulton L.J.

[138] *Bluebird*, *supra* at 736 (Emphasis in original).

[139] *Saladini v. Righellis and Others* (1997) 426 Mass. 231 (hereinafter *Saladini*).

[140] ibid., at 233.

[141] J. Lyon, "Revolution in Progress: Third-Party Funding of American Litigation" (2010) 58 UCLA Law Review 571 at 580-581 (hereinafter Lyon); *cf.* ibid., at 234.

dispute",[142] although, it was careful that maintenance and champerty continue to serve its salutary purpose and thus recommended the retention of vestiges of the rules in the form of proscriptions against the recovery of excessive fees.[143] It follows that activity 'savouring of champerty' may still be precluded in Massachusetts on public policy grounds which is similar to the approach in the U.K.

There is, however, no ambiguity as to the status of maintenance and champerty in the State of Ohio which is among the first of the pioneering states to revoke the doctrines and introduce legislation enabling the funding of litigation.[144] The legislation contains procedural guidelines and disclosure requirements for lending agreements, and carefully states the rights and responsibilities of the litigant including their right to repudiate their contract with the funder and to maintain control over the proceedings.[145] The terms of the legislation, however, are a complete volte-face on previous perceptions of the practice. For example, in providing that a contingency fee will be the basis for the lawyer's and the funder's remuneration, the legislation appears to ignore the vociferous contempt for such arrangements expressed by the Supreme Court of Ohio five years before its enactment in *Rancman v. Interim Settlement Funding Corp*.[146] Having extolled the virtues and criticised the demerits of the "ancient practices of maintenance and champerty" as utilities for protecting "public justice",[147] Justice O'Connor stressed that "a lawsuit is not an investment vehicle", colourfully adding that "[a]n intermeddler is not permitted to gorge upon the fruits of litigation".[148] Ohio law, thus, represents a move from outright prohibition to regulation of third-party funding of litigation.

The U.S. Supreme Court's treatment of this subject has focused largely on the solicitation of clients which is the sourcing and, in particular, the inducement of potential clients to initiate litigation. Thus, against the background of the civil rights movement, the Court in *N.A.A.C.P. v. Button* [149] struck down as unconstitutional several laws in Virginia relating to maintenance and champerty – one of which even declared it a criminal offence to inform an individual that their legal rights were infringed [150] – on the grounds that they curtailed freedoms contained in

[142] *Saladini*, *supra* at 234.
[143] ibid., at 235.
[144] The State of Maine is the first to pass legislation allowing for the funding of litigation. See, Lyon, *supra* at 586-587.
[145] For a summary of the main provisions of the Act see, M. M. Bello, "Lawsuit Funding – New Legislation in Ohio" *Ohio Trial* (August 2009) <https://www.lawsuitfinancial.com/files/ohio.pdf> (date accessed: 10 July 2018).
[146] *Rancman v. Interim Settlement Funding Corporation and Others* (2003) 99 Ohio St.3d 121.
[147] ibid., at 123.
[148] ibid., at 125.
[149] *National Association for the Advancement of Coloured People v. Button and Others* (1963) 371 U.S. Reports 415 (hereinafter *Button*).
[150] ibid., at 434.

the First and Fourteenth Amendments of the U.S. Constitution. The Court accepted, on the one hand, the feeling of hostility towards the "stirring up of private litigation" particularly where it promotes the use of litigation for "pecuniary gain",[151] however, on the other hand, the Court was conscious of the potential of 'organised' litigation to serve as a platform for political speech, expression and association especially within the extremely polarized milieu of the civil rights movement.[152] Accordingly, there inheres in the Court's decision a *distinction* between 'intermeddling' that is motivated by financial reward and thus prohibited and 'intermeddling' that seeks to further political goals and vindicate constitutional rights which is both permitted and encouraged.

This apparent distinction gained potency in the subsequent U.S. Supreme Court decisions of *In Re Primus* [153] and *Ohralik v. Ohio State Bar Association*.[154] While both cases concerned the solicitation of clients with the possibility of financial reward in the event of successful litigation, the Court in the *Primus* decision, in contrast to the latter decision of *Ohralik* where it considered the regulation of such practices to "fall within the State's proper sphere of economic and professional regulation",[155] inclined to the view that "[i]n the context of *political expression and association* […] a State must regulate [all solicitation activities] with significantly greater precision".[156]

The foregoing suggests, therefore, that the doctrines of maintenance and champerty will be invoked where profit dictates a lawyer's or a funder's interest in the litigation but not where so-called "expressive interests" are implicated, that is, for example, where litigation seeks to accentuate 'civil liberties' [157] as was the case in the *Button* and *Primus* decisions. However, it has been suggested by Tobias and others that the more recent decision of the U.S. Supreme Court in *Citizens United v. Federal Elections Commission* [158] has blurred the distinction which emerged from the *Button* decision such that any organisation regardless of motivation can conceivably defend litigation funding as an expression of its free speech.[159] While the case concerned the constitutionality of prohibitions on the use of treasury funds by corporations for

[151] ibid., at 440-441.
[152] ibid., at 429-431.
[153] *In re Primus* (1978) 436 U.S. Reports 412 (hereinafter *Primus*).
[154] *Ohralik v. Ohio State Bar Association* (1978) 436 U.S. Reports 447.
[155] ibid., at 459.
[156] *Primus*, *supra* at 438 (Emphasis added).
[157] Lyon, *supra* at 582.
[158] *Citizens United v. Federal Elections Commission* (2010) 558 U.S. Reports 310.
[159] Tobias, *supra* at 1320.

"electioneering" or political endorsements,[160] Justice Kennedy declared any attempt to suppress the speech of corporations or other associations to be unconstitutional, particularly where "restrictions [distinguish] among different speakers, allowing speech by some and not by others".[161] Also, even where it is apposite to restrict 'speech' in order to protect "governmental functions",[162] Justice Kennedy urged that the Court "must give the benefit of any doubt to protecting rather than stifling speech".[163]

Indeed, prohibitive maintenance and champerty laws functionally operate to suppress the voice of the funder and, by extension, the voice of the impecunious litigant. In a similar way to the impugned legislation in *Citizens United* that sought to suppress the corporate voice from political discourse, the laws of maintenance and champerty are also "classic examples of censorship" [164] as cases concerning corporate-related damage or abuses that require a large team of lawyers and experts in order to defeat the mighty bulwark of the corporate defendant will be too expensive to litigate and thus exiled from the courthouse. However, as stated previously, *Citizens United* has reaffirmed the 'personhood' of the corporation [165] such that "first-wave" and "second-wave" litigation funding *companies* [166] possess a right of access to the courts as legal 'persons' and may assert their free speech, and the ideas to which it gives rise regardless of whether funders are opportunistically interfering in litigation for financial gain or for goodwill.[167] *Citizens United*, thus, places proscriptions against maintenance and champerty that continue to operate in the U.S. on a potentially infirm legal footing.

Summary of the U.S. Experience:

This Section considered the application of the laws of maintenance and champerty in the States of New York and Massachusetts, and the State of Ohio which is one of the first U.S. states to legislate for third-party funding of litigation. Significantly, the attitude of the New York and Massachusetts courts offers an example to Ireland where the force of maintenance and

[160] ibid., at 365. Interestingly, Kennedy J commented that the prohibitions would also preclude endorsements or critiques of election candidates on blog or social media platforms if such websites were created with corporate funds (at 364). Similarly, Roberts C.J. warned that the effect of the prohibitions would be to prevent election commentary in corporate-owned newspapers "as the major ones are", he added (at 373).
[161] ibid., at 340.
[162] ibid., at 341.
[163] ibid., at 327.
[164] ibid., at 337.
[165] See, Chapter II, Section II (a), *supra* for discussion of 'corporate personhood'.
[166] "First-wave" litigation funding companies refer to the first litigation-funders that were largely established by former lawyers who operated on a contingency fee basis. "Second-wave" litigation funding companies refer to modern litigation funding practices dominated by institutional investors such as insurance companies, mutual funds and hedge funds whereby the asset manager invests in litigation on behalf of its investor. See, Steinitz, *supra* at 1277.
[167] Tobias, *supra* at 1320-1323.

champerty is also in decline, thus, enabling the practice of third-party funding of litigation to gain a foothold in these legal systems.

While the doctrines retain some potency in New York and Massachusetts, maintenance and champerty only operate when confronted with vexatious litigation and in the face of financial inequities caused by excessive fees. Ohio, on the other hand, permits contingency fee agreements, although, gives to the litigant complete control over the proceedings and reserves for them the right to repudiate the litigation funding contract. In a similar way to the Irish experience considered above, the sample of case law from New York, Massachusetts and Ohio express a marked appreciation for the value of litigation as a tool that can lead to transformative social change; it places the litigant, often depicted as the reticent and vulnerable party, at the centre of the proceedings.

The U.S. Supreme Court's response to the issue is particularly instructive from the Irish perspective. Just as the flourishing discussion in the Irish courts on the subject focuses on the constitutional imperative of access to justice, so too does the *dicta* of the U.S Supreme Court recognise the utility of litigation in challenging the powerful, and in rearranging the economic and political landscape; and it treats as an anchor for political speech and expression the 'intermeddling' in litigation. More palpable is the decision of *Citizens United* which, it has been argued, locates the practice of third-party funding of litigation within the First Amendment to the U.S. Constitution.[168] Buoyed by the concept of corporate 'personhood' and the right to free speech, the effect of *Citizens United* is to (possibly) strike down any proscriptions against maintenance and champerty which prevent litigation funding and restrict a litigation funding company's access to the courts.[169]

Conclusion:

This chapter has presented multi-party litigation as a method of corporate enforcement and the practice of third-party funding of litigation as a necessary pre-condition to any system of group litigation. It has argued that a fully functioning scheme of multi-party litigation is needed in Ireland in order to address the behaviours identified in the introduction to this chapter and referred to throughout, namely corporate-related damage and abuse, and to allow individuals and groups of litigants hold corporate bodies to account. The fragmented and piecemeal method

[168] ibid.
[169] ibid., at 1324.

of the representative action offers a weak form of redress as damages are unavailable; the representative(s) must share the 'same or common interest' in the cause of action as the other members of the group; and the representative action cannot be used for tort claims. Ultimately, the representative action inadvertently allows cases of mass harm to go unchallenged.

As a pre-condition to a system of multi-party litigation, this chapter also discussed the practice of third-party funding of litigation in the U.K. and the U.S. It was suggested that the experience of litigation funding in these jurisdictions provides a way to evaluate its prospects in Ireland where the laws of maintenance and champerty continue to prohibit its introduction.

It is axiomatic that to combine mechanisms of multi-party litigation with the practice of third-party funding of litigation will not unilaterally resolve corporate governance issues. As O'Sullivan remarks, "various forms of corporate malfeasance continue despite the existence of enforcement mechanisms".[170] However, as the Irish case law recognises, and as the U.K. and the U.S. jurisprudence affirms, there is constitutional value in third-party funding of litigation as a tool in providing access to justice which, in turn, enables litigants pursue CSR-related claims. Hence, as the procedural, economic, and social costs of conducting litigation increase such reforms are imperative.[171]

[170] C. O'Sullivan, "The Gendered Corporation: The Role of Masculinities in Shaping Corporate Culture" in B. Sjafjell and I. Lynch Fannon, *Creating Corporate Sustainability: Gender as an Agent for Change* (Cambridge: Cambridge University Press 2018) at 280.
[171] For a general discussion of the cost of litigation see, for example, M. McDermott, "Civil Legal Aid Needs much more than a Helping Hand" (2013) 107(1) Law Society Gazette 12.

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