

Litigation Trafficking

A study on the legality of Litigation Funding that results into Maintenance, Champerty or Assignment of Bare Right to Litigate to third-party litigation funders taking into consideration the Right to Access to Justice as a means of protecting Liberty and nurturing Prosperity under the Rule of Law.

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Abstract¹

Litigation Funding occurs when an assignor-plaintiff assigns his or her bare right to litigate to a third-party litigation funder because of inability to pursue and maintain a legal action due to lack of funds. With this, the third-party litigation funder then shoulders all judicial costs and other out-of-court expenses (e.g., procurement of evidence, representation fees of preferred counsel) arising from the legal action. In return, the third-party litigation funder will receive its share from the amount to be awarded in favor of the assignor-plaintiff should the latter be given a favorable judgment.

Litigation Funding is a tool to promote the Right to Access to Justice of all persons. However, it may result into commercialization of court proceedings lowering such to a mere commodity being passed from one investor to another. As a response, several foreign jurisprudences developed tests to assess the validity of Litigation Funding agreements and ensure that said agreements were entered solely to promote the Right to Access to Justice of a potential plaintiff.

This paper seeks to explore the regulation of Litigation Funding in foreign jurisdictions and incorporate foreign legal doctrines in the Philippine context. This paper assesses the applicability of the tests established by common law courts in determining the validity of Litigation Funding. Additionally, this paper tackles the Right to Access to Justice in relation to the Right to Liberty and Prosperity of the Filipino people. Finally, this paper analyzes relevant Philippine laws in addressing Litigation Funding, particularly the rule on “real party-in-interest” and other pertinent laws on assignment of claims.

¹ An outline of this paper can be found on page 8, particularly in Chapter 1, VII. Methodology.

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Chapter 1

Introduction

“Those that have less in life should have more in law to give them a better chance at competing with those that have more in life; ... if the people are not happy with the access to justice and the economy, they will rebel.”²

-Former Chief Justice Artemio V. Panganiban

I. Background of the study

Every Filipino is equally afforded with the Right to Liberty and Right to Prosperity under the Rule of Law. One way of ensuring that these rights are fully enjoyed by the people is through the promotion of the Right to Access to Justice.

The Right to Access to Justice entails that every person, as represented by a competent counsel, is free to go before an impartial tribunal whenever his or her rights are violated regardless of financial status and capacity.

² Eric Van Zant, Asian Development Bank Law and Policy Resources (2005), <http://www.asianlii.org/asia/other/ADBLPRes/2005/12.html> (last visited Apr 3, 2021).

The Philippine legal system provides for means to promote the Right to Access to Justice. To state, the Rules of Court contains a provision where indigent parties may be exempted from paying legal fees. There is also a statute governing the free services of the Public Attorney's Office ("PAO") for the public. However, the aforesaid rule and statute impose definite qualifications that limit its application. Particularly, there is a certain threshold amount that qualifies an individual to be considered as an "indigent". Moreover, the party pertained to is limited only to a natural person. With this, the objective of promoting the Right to Access to justice to ensure the equal enjoyment and accessibility the Right to Liberty and Right to Prosperity of the public, is defeated.

Fortunately, there is an innovative, yet archaic, tool to make the Right to Access to Justice equally accessible to all - Litigation Funding. Litigation Funding is innovative in such a way that the State's burden of securing the Right to Access to Justice is shared with Commerce.

Basically, Litigation Funding, for purposes of this paper, is where a plaintiff assigns his or her right to litigate in favor of a third-party litigation funder ("TPLF"). The TPLF then receives a portion of the amount ruled in favor of the assignee-plaintiff should the latter win the case. The rationale for said assignment of right is for the TPLF to secure its receipt of its stipulated share.

Several decades ago, Litigation Funding was viewed as a scheme to commercialize court proceedings which lowered the standard of the administration of justice to a mere commodity.

To illustrate, *P* wanted to file an action for damages against *D* but the former has no financial means to maintain one. *P* assigned his right to litigate in favor of *T*, a TPLF. *T* will shoulder all costs and expenses in prosecuting *P*'s action until final judgment and will receive a portion of the proceeds in case of a favorable judgment. Although *T* may be considered as a tool in promoting the Right to Access to Justice of *P*, the agreement of *P* and *T* may circumvent the proper administration of justice if the following factors are present:³ (1) *T* will influence *P* to claim a larger amount of damages to increase former's profits, (2) preliminary dispute settlements (e.g., barangay settlement, mediation) will be inutile as *P* and *T* will be motivated to pursue the litigation, (3) court proceedings will be treated as commodities like stocks traded in commerce being passed around from one investor to another, and (4) commercially motivated unmeritorious cases will further clog court dockets.

Interestingly, as the world of Litigation Funding continuously evolves, several foreign jurisprudence have already established ground-breaking doctrines that restore its very purpose - to promote the Right to Access to Justice of individuals in need of funding to maintain an action before the courts. These doctrines are currently used by the international community, among others are Hong Kong and Singapore.

³ Re Trepeca Mines Limited, 14 ACLC 1610, 1615, 1996 [Hereinafter, "Trepeca"]

As provided in several foreign jurisprudence, Litigation Funding should be allowed if: (1) the TPLF has “genuine commercial interest,” (2) its purpose is not solely for profit, (3) the Right to Access to Justice of the assignor-plaintiff is promoted and (4) the integrity of court proceedings is preserved.

II. Thesis statement

Litigation Funding should be used as a tool to promote the Right to Access to Justice as a means of protecting the Liberty Rights and nurturing the Prosperity Rights of every Filipino under the Rule of Law, yet be regulated, in order to prevent commercialization of court proceedings.

III. Statement of the problem

The following is the list of this paper’s Statement of the Problem that guided the author to delve into Litigation Funding regulations in light of the Right to Access to Justice.

A. What is Litigation Funding?

(1) What is assignment of bare right to litigate?

(2) When is assignment considered “bare”?

B. What is the fundamental human rights affected by Litigation Funding?

(1) What is the Right to Liberty and Right to Prosperity?

(2) What is the Rule of Law?

(3) What is the Right to Access to Justice?

(4) How can the Right to Access to Justice promote Liberty and Prosperity Rights under the Rule of Law?

C. What are the commercial motives behind Litigation Funding?

D. What are the legal framework surrounding Litigation Funding?

E. What can be the legal framework of Litigation Funding following the Philippine laws and jurisprudence?

(1) What are the laws, regulations or rules in the Philippines that should be expanded or modified to give way to the nature of Litigation Funding?

(2) How to regulate stakeholders affected by Litigation Funding?

IV. Objectives of the study

Guided by this paper's Statement of the Problem, the following are the objectives the author sought to accomplish:

A. General objectives

(1) To determine the definition and the nature of Litigation Funding

(2) To determine the fundamental human rights affected by Litigation Funding and assess their interconnectedness with each other.

(3) To determine the rationale of international jurisdictions in regulating or prohibiting Litigation Funding when it results into assignment of bare right to litigate.

(4) To determine the legal framework to properly regulate Litigation

B. Specific objectives

(1) To establish the legal framework which will govern the operation of Litigation Funding and to ensure that it is properly used to promote Right to Access to Justice.

(2) To serve as foundational guide for scholars conducting a study in the field of litigation finance (e.g., probate funding)

V. Significance of the study

The State has the duty to uphold every Filipino's Right to Access to Justice. Conforming to this, the Philippine legal system provides for assistance to qualified indigent parties (e.g., waiver of fees for pauper litigants, free representation from PAO), which covers the financing court-related costs. However, the same is insufficient to completely cater the needs of all parties since out of court expenses (e.g., expenses procuring evidence, legal fees of preferred counsels) are not covered. In addition, these remedies are only limited to natural persons and not to juridical ones. This now calls for a recourse that completely relieves a party from all possible expenses it

may incur in pursuing a legal action; and that which is fairly extended to everyone, regardless of financial capacity or status.

In today's time, Litigation Funding is continuously evolving in Asia. In fact, Singapore and Hongkong have already pronounced case laws that laid down the legal framework of Litigation Funding.⁴ Verily, the hit of COVID-19 pandemic fortified the need of Litigation Funding on the part of potential plaintiffs who are in the brink of bankruptcy should they single-handedly pursue their legal actions in court. Thus, they are more inclined of tapping a qualified TPLF to assist them financially in the pursuit of their legal actions.

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Given the above circumstances, it is strongly believed that it is timely for the Philippine legal system to establish a regulatory framework governing Litigation Funding. This paper aims to reach those who are in authority to promulgate rules and enact laws. In addition, this paper also aims to serve as a guide to legal practitioners should they handle a case funded by TPLF.

VI. Scope and limitations

The following shall be the scope and limitations of this paper:

⁴ Joe McGrath, Litigation Finance in Asia is catching up: LCM Finance: Litigation Capital Management LCM Finance | Litigation Capital Management | Litigation Finance (2019), <https://www.lcmfinance.com/litigation-finance-in-asia-is-catching-up/> (last visited Apr 7, 2021).

⁵ Paige Long, Litigation Funding Demand Rises As Pandemic Suits Percolate Law360 (2020), <https://www.law360.com/articles/1326533/litigation-funding-demand-rises-as-pandemic-suits-percolate> (last visited Apr 7, 2021).

- (1) Litigation Funding, for purposes of this paper, is limited to cases resulting to assignment of bare right to litigate.
- (2) This study does not dwell on assignment of post-execution rights or rights acquired after litigation was concluded.
- (3) This study is only limited to civil actions arising from contractual rights and actions for damages involving torts. This paper does not include disputes involving Constitutional provisions or criminal actions.
- (4) This study is only limited to cases funded and filed before judicial courts and not before arbitral tribunals under arbitration proceedings and other alternative dispute resolutions.
- (5) Lastly, Litigation Funding is limited to that of the plaintiff side.

VII. Methodology

This paper discusses the background of the prevailing doctrines and related legal literatures on the Right to Access to Justice, Liberty and Prosperity Rights, Litigation Funding, Champerty and Maintenance, and Assignment of Bare Right to Litigate. Additionally, this paper resolves the legal issues surrounding each of the said topic as divided into five chapters:

Chapter 2 discusses the fundamental human rights according to their nature. This chapter lays down the concept that every individual is entitled to enjoy the Liberty and Prosperity Rights under the Rule of Law. However, to fully enjoy these fundamental human rights, said individual must be afforded with Access to Justice, which includes the right to be represented by a

competent counsel before an impartial tribunal, and the right to go to courts regardless of its financial capacity. Finally, it concludes that Litigation Funding is one of the modes of promoting Access to Justice. In developing this chapter, texts of international human rights conventions and related legal literatures were consulted. Literatures in ways to promote Access to Justice were also considered.

Chapter 3 discusses the economics behind Litigation Funding. It includes a discussion on the nature of Litigation Funding in the perspective of the TPLF. The factors affecting the decisions of the TPLF and their application to a mathematical model formula were also tackled. In developing the model formula, several literatures in economics were consulted.

Chapter 4 discusses the evolution of Litigation Funding's legal framework from the time it was frowned upon because of its abuse. Thus, this chapter elucidates the history of Litigation Funding. It begins with the rationale on Litigation's prohibition and went on to discuss several groundbreaking foreign jurisprudences that made an exception to the said prohibition. Various literatures regarding champertous agreements were referred to in developing this chapter. Ultimately, it recommends tests for the courts to use in assessing the legitimacy of Litigation Funding.

Chapter 5 proposes the legal framework of Litigation Funding in the Philippines. A thorough analysis of the Philippine laws affecting Litigation Funding was done to devise a comprehensive legal framework. Each recommended modification to a certain law or rule is supported by persuasive

legal reasonings, taken into consideration the hierarchy of the affected laws in the Philippine legal system and the opinions of well-known legal authors.

Chapter 6 tackles the affected stakeholders of Litigation Funding showing the need to establish a harmonized regulatory approach. It is divided into three categories: the transactional category, the procedural category, and the ethical category. This Chapter was developed by consulting with legislative deliberations of other jurisdictions on how they ensured that Litigation Funding promotes Access to Justice and not commercialization of court proceedings.

Chapter 2

Access to Justice as a gateway in protecting Liberty and nurturing Prosperity under the Rule of Law.

The Right to Access to Justice emanates from the State's duty to ensure that all its constituents are given equal access to an impartial tribunal which upholds their rights and enforces their obligations to another and to the State,⁶ regardless of their financial capacity.

Every State must ensure that the liberty of its constituents is protected, and that sufficient means are implemented to nurture their prosperity. Thus, under the Rule of Law, every successful State has an impartial tribunal which ensures that liberty is not abused, and prosperity is equally accorded to all people.⁷

Accordingly, former Chief Justice Artemio V. Panganiban (“Justice Panganiban”) theorized a concept which states that “Liberty and Prosperity are the two beacons of Justice.” According to him, “in its most abbreviated sense, ‘Liberty and Prosperity under the Rule of Law’ means that our judiciary should not only safeguard the political and civil liberty of our people, like the freedom of expression, freedom of suffrage, the right to due process and the right to be presumed innocent till proven guilty”.

⁶ Deborah L. Rhode, Access to Justice, 69 *FORDHAM L. REV.* 1785 (2001).

⁷ Carlos Thiebaut, The Role of Negativity in Inclusion and Exclusion, 27 *IND. J. GLOBAL LEGAL Stud.* 97 (2020).

The said concept was further elaborated in one of his speeches, to wit: “To me, justice and jobs; freedom and food; ethics and economics; democracy and development; liberty and prosperity must always go together; one is useless without the other.”⁸ He added that “the judiciary must nurture the prosperity of our people, and secure them from illness, poverty and disease.”⁹ To attain this, the State must ensure that people have equal access to courts and fair representation of an independent and competent counsels. Hence, the concept of the Right to Access to Justice.

Merging the concept altogether, the protection of [I] Liberty and the nurturing of [II] Prosperity under the [III] Rule of Law are the elements that fulfill the basic human rights; verily, an efficient [IV] Access to Justice ensures that all these elements are satisfied.

I. The right to liberty

The Right to Liberty is considered as the greatest treasure, more valuable than oil found beneath the sea.

Liberty Rights embrace Civil and Political Rights. Civil Rights include rights to property, marriage, equal protection of the laws, freedom of contract,

⁸ Artemio V Panganiban, Safeguard Liberty, Conquer Poverty, Share Prosperity (Part One – For the Alumni of Mapa High) The Personal Website of Retired Chief Justice Panganiban (2019), <https://cjpanganiban.com/2014/02/23/safeguard-liberty-conquer-poverty-share-prosperity/> (last visited Apr 3, 2021).

⁹ Stephanie Mae B. Domingo, An Interlink between Liberty, Prosperity, and Rule of Law with the Criminal Justice System Foundation for Liberty & Prosperity (2021), <https://libpros.com/2021/03/11/an-interlink-between-liberty-prosperity-and-rule-of-law-with-the-criminal-justice-system/> (last visited Apr 3, 2021).

and other similar rights.¹⁰ On the other hand, Political Rights refer to “the right to participate, directly or indirectly, in the establishment or administration of government which includes the right of suffrage, the right to hold public office, the right of petition and, in general, the rights appurtenant to citizenship and the management of government.”¹¹

The United Nation International Convention on Civil and Political Rights¹² (“ICCPR”) mainly governs said kinds of rights. These include “the right to life, the right to be free from inhumane or degrading treatment or punishment, freedom from slavery and servitude and freedom from discrimination on the one hand, and rights to individual liberties, inclusive of the right of privacy freedom of thought, conscience, and religion, freedom of opinion and expression and the right of marriage, on the other hand.”¹³

II. The right to prosperity

If Liberty Rights are considered as the greatest treasures, Prosperity Rights are the tools pertinent in discovering and obtaining the said treasures.

Prosperity Rights embody Economic, Social, and Cultural Rights. The United Nations International Convention on the Economic, Social and

¹⁰ Simon vs. Commission on Human Rights, G.R. 100150, January 5, 1994.

¹¹ *Id.*

¹² International Covenant on Civil and Political Rights, Dec. 16, 1966, available at <https://www.refworld.org/docid/3ae6b3aa0.html>. This Covenant was adopted by the U.N. General Assembly Resolution 2200A (XXI) of December 16, 1966. It entered into force on March 23, 1976, in accordance with article 49. [Hereinafter, “ICCPR”]

¹³ Jixi Zhang, Fair Trial Rights in ICCPR, 2 J. POL. & L. 39 (2009).

Cultural Rights¹⁴ (“ICESCR”) primarily governs these rights by seeking to promote a better quality of living and ensuring an individual's well-being and economic security.¹⁵

In one of Justice Panganiban’s excerpts, he elaborated that “prosperity can have a deeper meaning than just wealth.” Corollary, Prosperity Rights can be further divided into three: time, talent and treasure. “Time so that we may share our knowledge to our fellow human beings. Talent that we can use to improve not only our lives but also the lives of others. And treasure that we may acquire from our experiences in life. Also, in the societal context, we look at prosperity as the ability to live a decent and dignified life. Prosperity involves the ability to have a job that will feed one’s family, buy groceries, pay the bills and satisfy other necessities of life. Prosperity can even be defined as the freedom not only from poverty but also from ignorance.”¹⁶

III. Tying all together under the Rule of Law

Simply knowing the Liberty and Prosperity Rights without associating them with the Rule of Law is insufficient to effectively exercise them. As Justice Panganiban asseverated, another element must be applied to complete the equation, that is, to exercise both Liberty and Prosperity Rights under the

¹⁴ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <https://www.refworld.org/docid/3ae6b36c0.html> [Hereinafter, “ICESPR”]

¹⁵ Noel Villaroman, Compendium Of Terms And Phrases On Human Rights 115 (2002).

¹⁶ Stephanie Mae B. Domigo, An Interlink between Liberty, Prosperity, and Rule of Law with the Criminal Justice System Foundation for Liberty & Prosperity (2021), <https://libpros.com/2021/03/11/an-interlink-between-liberty-prosperity-and-rule-of-law-with-the-criminal-justice-system/> (last visited Apr 3, 2021); Artemio V. Panganiban, Visionary Leadership By Example The Personal Website of Retired Chief Justice Panganiban (2019), <https://cjpanganiban.com/2007/02/07/visionary-leadership-by-example-2/> (last visited Apr 3, 2021).

Rule of Law. This element is present when a country is governed in accordance with its Constitution and laws as enacted by its representatives who were chosen democratically by its people, not by virtue of its rulers' schemes and impulses.¹⁷

The Rule of Law guarantees just and equitable fundamental human rights for all. Hence, the enactment of laws to enforce and preserve said rights vested on the people. The enforcement of laws also aims to promote the welfare of the people and maintain the harmony amongst them.

IV. Access to Justice

Access to Justice is the main ingredient to fully utilize Justice Panganiban's philosophy. Access to Justice [A] is considered a mechanism to promote the rule of law. The same has also been [B] recognized by international conventions and the 1987 Constitution. Although the Philippine legal system provides for several regulations in promoting Access to Justice, [C] the means provided fell short in addressing every person's Right to Access to Justice.

A. The Right to Access to Justice is the mechanism to promote the Rule of Law.

¹⁷ Artemio V. Panganiban, Towards a Just World Society The Personal Website of Retired Chief Justice Panganiban (2019), <https://cjpanganiban.com/2008/05/08/towards-a-just-world-society/> (last visited Apr 3, 2021).

The rights of an individual vested by law must be protected and his or her obligations arising therefrom must be rightly regulated. In theory, it is the judicial courts that maintain said protection and regulation. They also punish those who disrupt the harmony of their operations.¹⁸ This theory, however, failed to consider certain frictions that hinder a person from resorting to judicial courts and utilizing its services. These include the cost of finding a lawyer and his or her corresponding representation fees, judicial costs, expenses in retrieving pieces of evidence, and other related expenses in maintaining a suit.

Therefore, the Right to Liberty cannot be fully protected and Right to Prosperity cannot be successfully nurtured under the Rule of Law without an efficient and effective system in promoting the Right to Access to Justice.

B. The Right to Access to Justice is recognized by the International Conventions and the Philippine Constitution.

No less than the ICCPR recognizes the Right to Access to Justice. Article 14(3)(d) of the said convention provides:

“and to have legal assistance assigned ... in any case where the interests of justice so require and without payment ... in any such case if he does not have sufficient means to pay for it.”

¹⁸ Ivor Richardson, *The Courts and Access to Justice*, 31 VICTORIA U. WELLINGTON L. REV. 163 (2000).

The European Court of Human Rights (“ECHR”),¹⁹ one of the most significant regional human rights treaties, also adopted and expanded the ICCPR provision on “fair trial rights”, which states:

“in the determination of ... civil rights and obligations ... To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.”

The 1987 Philippine Constitution also recognizes that poverty shall not be considered as hindrance to Access to Justice and that the poor must be provided with legal aid for proper representation, to wit:

“Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty.”²⁰

C. The Philippine Legal system provides for different means but are insufficient to truly promote the Right to Access to Justice.

The successful enforcement of the Right to Access to Justice is achieved with three aspects: first, the members of the bench, who are required to be impartial at all times and mandated to give a clear and concrete decision

¹⁹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html>.

²⁰ CONST, Art. III, Sec. 11.

supported by law and jurisprudence;²¹ second, the bar, consisting of counsels who are competent in representing their clients and fair in treating them irrespective of their capacity to pay legal fees;²² and third, the ability of the litigants to go to court regardless of their financial standing and status in life.²³

The Philippine Legal system provides for sufficient rules and regulations when it comes to the first and second aspect. However, [1] it failed to fully address the issues existing on the third aspect, that is, the provision of adequate funding to maintain an action. Nonetheless, [2] Litigation Funding is a mode to mitigate this inadequacy.

1. The different modes of Accessing Justice are insufficient due to factors outside judicial proceedings.

The jurisdiction of courts is determined by a cause of action and the amount sought to be recovered therefrom. Thus, the prayed amount fixes the legal fees to be paid by the complainant at the time of filing a complaint.²⁴

Correspondingly, Rule 3 of the Rules of Court exempts an “indigent party” from payment of legal fees. As defined, an indigent party is one who has insufficient money or property to sustain food, shelter and necessities for himself and his family.²⁵ The law has established a test to determine whether

²¹ A. I. Abdoullin, R. Sh. Davletgildeev & M. V. Keshner, Right to Access to Justice in International Law: Current Problems, 2013 Russ. JURID. J. ELEC. Supp. 33 (2013).

²² Benjamin P. Cooper, Access to Justice without Lawyers, 47 AKRON L. REV. 205 (2014).

²³ Dina E. Fein, Access to Justice: A Call for Progress, 39 W. NEW ENG. L. REV. 211 (2017).

²⁴ RULES OF COURT, Rule 141, Sec. 4.

²⁵ Rules of Court, Rule 3, Section 2.

a party is considered as indigent. The test provides that to be considered as indigent, a person's own gross income together with his or her immediate family's, must not exceed an amount double the minimum wage of an employee and do not own real property with an assessed value of more than P300,000.²⁶

Moreover, a statute is enacted to govern the Public Attorney's Office ("PAO") legal mandate to extend free legal assistance to qualified persons in judicial cases.²⁷

Unfortunately, both failed to address the other necessary expenses incurred by a party in maintaining litigation.

Consequently, counsels representing indigent parties have struggled with having their clients qualified as "indigent" under the rules due to the stringent threshold amount and vague procedures imposed therein.²⁸ Nevertheless, despite the declaration of indigency, indigent parties are still not completely discharged with the burden of shouldering other necessary expenses arising from litigation because the rules do not cover such. Thus, without stable and equitable assistance for all, counsels are perplexed with which to prioritize first between applying for a declaration of indigency or the actual filing of an action; as well as whether to further pursue a case when there is lack of funds to support it.

²⁶ A.M. No. 00-2-01, March 1, 2000.

²⁷ Executive Order No.292, Chapter 5, Title III, Book IV, Sec.14-A.

²⁸ International Commission on Jurists, Access to Justice: Human Rights Abuses involving Corporations, A Project of the International Commission on Jurists 14.

Adversely, aside from the aforesaid flaw in the existing rule and statute on indigent parties, they also deprive other entities from enjoying similar privileges because these are limited only to natural persons. Hence, a different story occurs for juridical entities who are at the brink of insolvency and could not afford to pursue legal actions because doing so would lead to inevitable bankruptcy.

2. There is a new yet archaic way to expand the Right to Access to Justice.

Litigation Funding emerged from the need of the State to effectively promote Access to Justice. This is an innovative yet archaic mode where a plaintiff assigns its bare right to litigate to a TPLF who will then shoulder all the necessary expenses in maintaining an action. In return, the TPLF would earn a share from the amount ruled in favor of the plaintiff. Oftentimes, it is the unpaid creditor of the plaintiff who stands as the latter's TPLF since it also wants to settle its credit from the plaintiff. Thus, the business sector also benefits from Litigation Funding because creditors are relieved from unpaid debts owed to them.

Litigation funding has already been considered as an additional mode in furthering Access of Justice by various jurisdictions.²⁹ Inevitably, it is still tainted with few issues, one of which is the potential commercialization of

²⁹ Ranjan K. Agarwal & Doug Fenton, Beyond Access to Justice: Litigation Funding Agreements outside the Class Actions Context, 59 CAN. Bus. L.J. 65 (2017).

court proceedings that will diminish the effective and efficient administration of justice.

V. Chapter synthesis

The inherent fundamental human rights are conceptualized into two (2): the Right to Liberty and the Right to Prosperity.

Liberty Rights allow an individual to decide without any hindrance and fear from the State. Meanwhile, Prosperity Rights include the right to pursue a calling that would maintain an individual's livelihood and support his or her goals. The said fundamental human rights are bound by a knot denominated as the Rule of Law. Former US President Theodore Roosevelt professed the importance of Rule of Law when he said, "No man is above the law and no man is below it: nor do we ask any man's permission when we ask him to obey it."³⁰

However, to effectively uphold and nurture Liberty and Prosperity Rights, the Right to Access to Justice should first be strengthened. The Access to Justice serves as a gateway in ensuring the protection of these fundamental rights. However, the present rule and statute aimed to promoting the Right to Access to Justice are insufficient to fully allow all persons to benefit from it.

³⁰ Alec Waid, *Nicolas Maduro's Impunity Is a Foregone Conclusion: A Case for Replacing the Treaty-Based Rule of Law Model with Universal Jurisdiction*, 51 U. MIAMI INTER-AM. L. REV. 107 (2020).

Litigation funding is an additional mode to further promote the Access of Justice in various jurisdictions.³¹ Justice and business pursuit are two concepts that generally contradict with each other. Justice focuses on equity while business pursuits focus on profits. Will commercialization of court proceedings really promote the Right to Access to Justice or is it just lowering the level of the well-recognized human rights to the level of profit-oriented enterprise?

³¹ Ranjan K. Agarwal & Doug Fenton, Beyond Access to Justice: Litigation Funding Agreements outside the Class Actions Context, 59 CAN. Bus. L.J. 65 (2017).

Chapter 3

The economics of Litigation Funding

I. What is Litigation Funding

Third-party Litigation Funding is practiced internationally in litigation.³²

Fundamentally, this involves a TPLF who finances a plaintiff's legal action as an alternate to the latter's self-funding practice and conditional or contingent fee arrangement with a counsel.³³ The TPLF then receives a portion of the amount ruled in favor of the plaintiff in case the latter obtains a favorable judgment.³⁴ Depending on the structure of the litigation funding arrangement, a TPLF may legally control or influence the aspects of the legal representation. It may completely take over the case and step into the original party's shoes.³⁵

II. Economics behind Litigation Funding

Subject to contrary terms agreed upon, a TPLF shoulders all legal expenses including the cost of maintaining the action (e.g., court fees,

³² Cassandra Burke Robertson, The Impact of Third-Party Financing on Transnational Litigation, 44 CASE W. RES. J. INT'L L. 159, 162, 180-81 (2011).

³³ Marc J. Shukaitis, A Market in Personal Injury Tort Claims, 16 J. LEGAL STUD. 329 (1987); Attorneys waiving legal representation fees in exchange of a contingent or conditional fees is not allowed in Philippine Jurisdiction.

³⁴ Lisa Bench Nieuwveld & Victoria Shannon, Third-Party Funding In International Arbitration (2012)

³⁵ Paul Bond, Comment, Making Champerty Work: An Invitation to State Action, 150 U. PA. L. REV. 1297 (2002).

lawyer's acceptance and appearance fees, expenses in procuring pieces of evidence) and other business or operational expenses directly related in funding the proceedings (e.g., research expenses in assessing the probability of winning or losing, paper works). The agreement is nonrecourse,³⁶ hence, the TPLF only receives its stipulated share if there is a positive monetary outcome for the owner of the dispute.³⁷

As a norm, a TPLF will only fund an action if there is a positive expected return represented by a positive numerical value. Some foreign authorities would argue that a TPLF would only fund plaintiffs who have high probability of winning.³⁸ This premise gives a partial indication that whenever actions are funded, the case is winnable and will also create a bias on the mind of judges.

Contrastingly, the author respectfully begs to disagree. Using the suggested [A] mathematical model formula below, a TPLF may fund a potential plaintiff's claim even if the probability of winning is only less than 10% and the probability of losing is more than 90% provided that the expected return of the litigation funding yields a positive numerical value.

A. Mathematical approach in assessing whether to fund a certain action.

³⁶ Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & Mary L. Rev. 455, 459 (2012).

³⁷ Jeremy Kidd, *Probate Funding and the Litigation Funding Debate*, 76 Wash. & LEE L. REV. 261 (2019).

³⁸ John Beisner, Jessica Miller & Gary Rubin, *Selling Lawsuits, Buying Trouble: Third-Party Litigation Financing In The United States* 5–6 (2009)

From a TPLF's perspective, the given formula below is used to assess the extent of fund to be shouldered; and determine whether to enter into a litigation funding agreement with the potential plaintiff. The model formula assumes that a TPLF will only be interested in the monetary value of the proceedings and will not take into consideration factors personal to the assignor-plaintiff.

This model formula was developed by prominent third-party litigation firms³⁹ taking into consideration the net expected return in funding the proceedings, as shown below:

$$Net R = R_f - R_U$$

Where:

Net R is the Net Expected Return

R_f is the expected return in case of favorable judgment

R_u is the expected return in case of unfavorable judgment

The discussions below further expand the model formula, specifically [1] the expanded formula for favorable judgment, *R_f*, and [2] the expanded formula for unfavorable judgment, *R_u*. It is also important to note that [3] probabilities of winning and losing will highly depend on the estimate of the

³⁹ Steven Shavell, Sharing of Information Prior to Settlement or Litigation, 20 RAND J. ECON. 183, 184-85 (1989); A. Mitchell Polinsky & Steven Shavell, Legal Error, Litigation, and the Incentive to Obey the Law, 5 J. L. ECON. & ORG. 99, 100 (1989); Robert D. Cooter & Daniel L. Rubinfeld, An Economic Model of Legal Discovery, 23 J. LEGAL STUD. 435, 439-40 (1994); Oren Bar-Gill, The Evolution and Persistence of Optimism in Litigation, 22 J. L. ECON. & ORG. 490, 490 (2006); Ulrike Malmendier & Geoffrey Tate, Behavioral CEOs: The Role of Managerial Overconfidence, 29 J. ECON. PERSP. 37, 39 (2015); Edward Elgar, The Elgar Companion to Law And Economics 394 (Jirgen G. Backhouse ed., 2d ed. 2005); Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55, 63 (1982).

TPLF. Finally, illustrations were provided to show the application of the model formula.

1. Computing for the expected return from a favorable judgment using the model formula

Expected return from a favorable judgement, R_f , is determined by adding all monetary values prayed for by an assignor-plaintiff taking into consideration its reasonableness, to be represented by K_c . K_c is deducted by the costs and expenses in the action including filing fees, lawyer's representation expenses, to be represented by J . K_c is further deducted by the amount the assignor-plaintiff will receive should favorable judgment be rendered. The assignor-plaintiff's share is determined by multiplying its percentage share, S , to the total amount claimed, all of which to be represented by $(S)(K_c)$. After deducting the costs and expenses, and the assignor-plaintiff's share from the amount prayed, it is multiplied with the probability percentage of winning the case to be determined by the TPLF, to be represented by P_f . Combining all the elements above, the formula for R_f is as follows:

$$R_f = P_f(K_c - J - [(S)(K_c)])$$

Where:

R_f is the expected return in case of favorable judgment

P_f is the probability of winning the case

K is the value of things prayed for by the plaintiff

J is the costs and expenses in maintaining the proceedings.

S is the plaintiff's percentage share in the amount claimed

2. Computing for the expected loss from an unfavorable judgment

On the other hand, expected loss from an unfavorable judgment, R_u , is computed by adding the value of the counterclaims being prayed for, if any, by the opposing party taking into consideration its reasonableness, to be represented by K_{cc} , and the expected costs and expenses of the proceedings, to be represented by J . The sum of the two will be multiplied with the probability of losing the case to be determined by the TPLF, as represented by P_u . Combining all the aforesaid elements, the formula for R_u is as follows:

$$R_u = P_u(K_{cc} + J)$$

Where:

R_u is the expected loss in case of an unfavorable judgment

P_u is the probability of losing the case

K_{cc} is the value of things included in the counterclaims and damages prayed for by the opposing party

J is the costs and expenses in maintaining the proceedings.

Note that the costs and expenses in maintaining the case, as represented by J , are the same whether the judgment be favorable or unfavorable because it is assumed that that similar pieces of evidence are presented and set of counsels are hired. It is also assumed that costs incurred during the process of

appealing unfavorable decisions will not be that material compared to the proceedings at the trial court level.

More importantly, there will be no plaintiff's share in case of an unfavorable judgment because the latter will not receive anything from the proceedings should an unfavorable judgment be rendered.

3. The probability of winning and losing the case

As discussed above, the probability of winning the case is represented by P_f and the probability of losing the case is represented by P_u .

The probability of winning and losing the case is affected by various factors such as the quality of the evidence of the parties, the expertise of counsels, the possible partiality of the judge, the likelihood that the parties will enter into compromise agreement, and political climate.⁴⁰

Since there are always two (2) possible outcomes, the sum of the probabilities of winning and losing the case is always equal to 100%. A TPLF will often require legal expert opinion in determining said probabilities that vary as the proceedings go by.⁴¹

Continuous monitoring of the net expected returns is important to help the TPLF in deciding whether to pursue the case or just advise the plaintiff to

⁴⁰ Bruce L. Hay, Effort, Information, Settlement, Trial, 24 J. LEGAL STUD. 29, 34-36 (1995).

⁴¹ Matthew Bodgan, Note, The Decisionmaking Process of Funders, Attorneys, and Claimholders, 103 GEO. C. J. 197, 212-13 (2014).

compromise with the adverse party since probabilities of winning or losing the case is very much uncertain.⁴²

4. Putting the model formula into use

The following is the expanded form of the model formula:

$$Net R = R_f(K_c - J - [(S)(K_c)]) - R(K_{cc} + J)$$

If the net expected return from the case, which is represented by *Net R*, yields a positive numerical value, then the TPLF will most likely fund the assignor-plaintiff.

The illustrations below are divided into four: **[i]** scenario where *Net R* is positive, **[ii]** scenario where *Net R* is negative, **[iii]** scenario where *Net R* became positive because the assignor-plaintiff lowered its share, and **[iv]** scenario where *Net R* remains positive despite the probability of winning being only 10%.

i. Net Expected Return (Net R) having a positive numerical value.

Illustration 1.

⁴² John Hull & Alan White, Credit Derivatives, in Handbook Of The Economics Of Finance Set 1363, 1364-65

P wants to file an action for damages against D for P10,000,000. If P files a case against D, D will file a counterclaim against P amounting to P10,000,000. The expected litigation cost and expenses is P500,000. P assigned his claim to T, a TPLF, to shoulder the litigation costs and expenses. Upon evaluation of T, there is an 80% chance of winning and 20% chance of losing the case. It was agreed that P will be given 60% of the amount prayed for. The Net Expected Return, *Net R*, for T is computed as follows:

$$Net R = R_f(K_c - J - [(S)(K_c)]) - R_u(K_{cc} + J)$$

$$Net R = 80\%(10,000,000 - 500,000 - 6,000,000) - 20\%(10,000,000 + 500,000)$$

$$Net R = 700,000$$

Since the Net Expected Return, *Net R*, results in a positive numerical value of P700,000, T will highly agree to fund P's case.

ii. Net Expected Return (Net R) having a negative numerical value because the probability of winning was decreased.

Illustration 2.

Using the same facts in illustration 1 but changing the probability of winning to 60% and the probability of losing to 40%, the Net Expected Return, *Net R*, is computed as follows:

$$Net R = R_f(K_c - J - [(S)(K_c)]) - R_u(K_{cc} + J)$$

$$Net R = 60\%(10,000,000 - 500,000 - 6,000,000) - 40\%(10,000,000 + 500,000)$$

$$Net R = - 2,100,000$$

Upon computing for the Net Expected Return, it results into a negative numerical value of P2,100,000. Because of this, T will not finance the P's claim.

iii. Net Expected Return (Net R) having a positive numerical value because the plaintiff's share was decreased.

Illustration 3.

Using the same facts in illustration 2, but substantially lowering P's share to 20%, the Net Expected Return, *Net R*, for T is computed as follows:

$$Net R = R_f(K_c - J - [(S)(K_c)]) - R_u(K_{cc} + J)$$

$$Net R = 60\%(10,000,000 - 500,000 - 2,000,000) - 40\%(10,000,000 + 500,000)$$

$$Net R = 300,000$$

The Net Expected Return, *Net R*, is a *positive* P300,000. Since the Net Expected Return, *Net R*, has a positive figure, then T will highly fund P's case.

Above illustration shows that it is inadvisable for regulatory bodies to place a minimum or maximum threshold on the plaintiff's share. As a solution, Chapter 6 of this paper recommends the creation of an independent institutional which will check the reasonableness of the terms of the litigation funding agreement and the soundness of the formula used.

iv. Net Expected Return (Net R) still having a positive numerical value even if the probability of winning was decreased to 10%.

Illustration 4:

Using the same facts in illustration 3 but lowering the probability of winning to 10%, and also lowering the expected counterclaim to P5,000. The Net Expected Return, *Net R*, for T is computed as follows:

$$Net R = P_f(K_c - J - [(S)(K_c)]) - P_u(K_{cc} + J)$$

$$Net R = 10\%(10,000,000 - 500,000 - 2,000,000) - 90\%(5,000 + 500,000)$$

$$Net R = 295,500$$

Above illustration shows the possibility of a TPLF still funding an action despite the chance of winning being only 10%. The Net Expected Return, *Net R*, is a positive P295,500. Since the Net Expected Return, *Net R*, has a positive figure, then T will highly fund P's case even if there is only a miniscule chance of winning.

This illustration completely proves the author's view that it is possible for a TPLF to fund a case even if the same seems to be unwinnable. So long as the Net Expected Return (*Net R*) yields a positive numerical value, a TPLF is better off funding the claim.

III. Chapter synthesis

Litigation Funding is likened as an investment that allows a TPLF to infuse capitalization on assignor-plaintiffs who have no resources to maintain a legal action. In return, the TPLF gets a portion of the proceeds should the court renders a favorable judgment.

There are several factors that may affect the decision of the TPLF to fund the potential plaintiff. The most controlling factor is the Net Expected Return.⁴³ Nevertheless, it is still up to the discretion of a TPLF whether to fund an action despite the probability of winning is low, so long as the Net Expected Return yields a positive numerical value. The Net Expected Return

⁴³ See Chapter 3, II, A..

greatly depends on the variables used in the model formula, especially the expected probabilities of winning or losing the case which changes as the case progresses.

Litigation Funding continuously proliferates in Asia,⁴⁴ and this was affirmed when the COVID-19 pandemic adversely affected various industries causing several persons to suffer liquidity and insolvency risks.⁴⁵ In fact, foreign jurisdictions outside Asia are also starting to regulate Litigation Funding subject to limitations.⁴⁶ With this, Litigation Funding is certainly a revolutionary mode of improving the Right to Access to Justice. This now brings about a question on why Litigation Funding is not practiced in our jurisdiction despite the advantages it provides in ensuring the promotion of the Right to Access to Justice?

⁴⁴ Development of third-party litigation funding in Asia, Financier Worldwide, <https://www.financierworldwide.com/development-of-third-party-litigation-funding-in-asia#.YGQf5i0RpQI> (last visited Mar 31, 2021).

⁴⁵ Shari L. Klevens & Alanna Clair, Litigation Funding During The Pandemic The Recorder (2020), <https://www.law.com/therecorder/2020/12/28/litigation-funding-during-the-pandemic/> (last visited Apr 4, 2021).

⁴⁶ Re Patrick Cowley and Lui Yee Man, Joint and Several Liquidators of the Company [2020] HKCFI 922

Chapter 4

The evolution of the legal framework governing Litigation Funding.

I. Origins of Litigation Funding

Litigation Funding has a rich history. [A] It was first developed by the feudal lords during the medieval England. Soon after, the legislature coined the terms [B] “maintenance and champerty” which are prohibited because they encourage unmeritorious intermeddling with court proceedings. Throughout the years, granting of financial resources evolved into a situation where the right to go to court were the subject of an agreement; hence, an [C] assignment of bare right to litigate.

A. Litigation Funding originated from the feudal lords of medieval England.

Litigation was one of the few means in augmenting one’s landholding during the medieval time in England.⁴⁷ Feudal lords would lend money to pauper landlords to enable the latter to defend their landholdings before the courts. In return, feudal lords would receive a portion of the pauper landlords’ land.⁴⁸ Unfortunately, several feudal lords used this scheme as an opportunity to acquire lands in the cheapest way.

⁴⁷ N.F. Cantor, *Imagining the Law*, Harper Collins (1997) 53

⁴⁸ P.H. Winfield, *History of Conspiracy and Abuse of Legal Process*, Cambridge University Press (1921) 151.

This resulted to excessive court dockets, and worsened the desire to fabricate evidence and circumvent the law to win a case. Thus, courts failed to make equitable decisions based on meritorious grounds due to unfounded claims arising from spurious actions.⁴⁹

As a response, the English legislature enacted series of statutes to address the aforesaid abuses in litigation and futile administration of justice.⁵⁰ Primarily, these statutes treated the scheme done by feudal lords as “Maintenance and Champerty” and made them punishable as tortious acts.

B. Maintenance and champerty.

Maintenance is “the support, typically of financial means, of litigation by non-party who does not have legitimate interest in that litigation.”⁵¹ Champerty, on the other hand, is “an aggravated form of maintenance, in which litigation is funded in exchange for a share of the proceeds of that litigation.”⁵²

Today, maintenance and champerty have already been successfully regulated. In fact, public policy concerns arising therefrom are considered as already “virtually dead”.⁵³ As such, the preservation of the solemnity of the administration of justice and public order is upheld once again.

⁴⁹ *Giles v Thompson* (1994) 1 AC 142, 153.

⁵⁰ P.H. Winfield, *History of Conspiracy and Abuse of Legal Process*, Cambridge University Press (1921) 151.

⁵¹ Glen Rogers, *Litigation Funding, Assignment of Actions and Access to Justice: SPV Osus v HSBC* [2018] IESC 44, 18 HIBERNIAN L.J. 93 (2019).

⁵² *Id.*

⁵³ Mark James, *The End of Champerty?*, 161 *New Law Journal* 547 (2011).

C. Assignment of Bare Right to Litigate in relation to Maintenance and Champerty.

Currently, the doctrines on maintenance and champerty apply on agreements that resemble the scheme illegalized by the English legislature in relation to Litigation Funding.

Above fact is affirmed when Litigation Funding expanded its coverage and included the assignment of bare right to litigate where assignor-plaintiffs assign their right to go to court to a TPLF. Under such assignment, the relevance of maintenance and champerty is seeming – the “assignee” is, in essence, “bankrolling the assignor’s suit in exchange for the spoils,” making the arrangement champertous.⁵⁴ In consequence, assignment of bare right to litigate has been prohibited in common law jurisdictions.⁵⁵

The assignment of bare right to litigate was even considered as “Litigation Trafficking.”⁵⁶ Trafficking occurs when a thing impermissible to be traded is used to trade. Trading of bare right to action is considered impermissible because of “the abuses to which it may give rise (e.g., inflame damages, suppress evidence, suborn witnesses).⁵⁷

⁵⁴ Andrew Cheng, *Assignment of Bare Rights to Litigate: Assessing the Modern Doctrinal Position*, (2014).

⁵⁵ Andrew Tettenborn, ‘Assignment of Rights to Compensation, *Lloyd's Maritime and Commercial Law Quarterly* (2007) 392, 402.

⁵⁶ *Ultra Tune Australia Pty Ltd v UTSA Pty Ltd* (1996) 14 ACLC 1610, 1615.

⁵⁷ *Trepeca*, 219-220.

However, as commercial transactions evolve throughout the years, exceptions to the concept of “Litigation Trafficking” was developed. These were clearly illustrated in [1] *Trendtex v. Credit Suisse*,⁵⁸ [2] *SPV Osus v. HSBC*⁵⁹ and [3] *Giles v. Thompson*.⁶⁰ These cases are widely accepted by the international arena in relation to Litigation Funding regulation.

1. Trendtex v. Credit Suisse introduced the ‘Genuine Commercial Interest’ test.

Trendtex v. Credit Suisse (“Trendtex”) is a case decided by the United Kingdom House of Lords. It [i] prospered when a debtor assigned its action for damages to its creditor because the former was already suffering from liquidity problems. The [ii] Supreme Court allowed such assignment because the creditor was declared to have a “genuine commercial interest.”

i. The genesis of Trendtex

Trendtex is a Swiss corporation which obtained a loan from Credit Suisse. Upon receiving the needed fund to operate, Trendtex contracted with an English Company in Nigeria to sell a large amount of cement for shipment. The latter promised to pay using a letter of credit guaranteed by the Central Bank of Nigeria (“CBN”). However, CBN later dishonored the letter of credit.

⁵⁸ *Trendtex Trading Corporation v Credit Suisse* (1982) AC 679. [Hereinafter, “Trendtex”]

⁵⁹ *SPV Osus v. HSBC Institutional Trust Services (Ireland) Limited* (2018) IESC 44. [Hereinafter, “SPV Osus”]

⁶⁰ *Giles v Thompson* (1994) 1 AC 142. [Hereinafter “Giles”]

Trendtex failed to collect from the English company, and it was left heavily indebted to Credit Suisse.

Because of CBN's cancellation, Trendtex filed an action for damages against it. Unfortunately, Trendtex experienced severe liquidity problems that furthering its case would lead to its bankruptcy. This prompted Trendtex to assign its bare right to litigate in favor of Credit Suisse. Surprisingly, without waiting for judgment, Credit Suisse compromised with CBN and was paid a substantially higher amount as compared to what it paid to Trendtex.

Upon knowing this, Trendtex filed a complaint against Credit Suisse arguing that it was prejudiced by the series of transactions orchestrated by Credit Suisse. Trendtex alleged that under the English law, assignment of a cause of action is illegal and unenforceable because it is considered as maintenance and champerty. Moreover, that Credit Suisse lacked the legal capacity to sue CBN as it was not a party to the contract between Trendtex and CBN.

ii. The Supreme Court held that there was a valid assignment using the “genuine commercial interest” test.

The Supreme Court held that Credit Suisse is considered a real party-in-interest because it had genuine and legitimate interest in maintaining Trendtex’s action against CBN.⁶¹

⁶¹ *Trendtex*, 694.

The Supreme Court noted that there can be no issue if what was assigned is the right to litigate annexed to a property right because it merely resembles an assignment of property; hence, enforcing it before the courts is merely ancillary.⁶² On the other hand, an assignment of the bare right to litigate can only be allowed if the assignee has a "genuine commercial interest".⁶³

Recall that Trendtex initially filed an action for damages against CBN. Therefore, when Trendtex assigned its right to litigate to Credit Suisse, what was assigned is a bare right to litigate and not a right to litigate annexed to a property right. This now calls for an answer whether said assignment amounts to champerty. The Court answered in the negative stating that a creditor has genuine commercial interest to maintain the suit of its debtor regardless of whether the case is an action for damages. The Court further elucidated that a customer may possess a genuine commercial interest in a case pursued by its sole supplier.⁶⁴

2. SPV Osus v. HSBC recognized the “profit” test in the main decision and the “Possibility of denial of Access to Justice” test in its concurring decision.

⁶² *Id.* at 679.

⁶³ *Id.* at 703.

⁶⁴ Damian Reichel, The Law of Maintenance and Champerty and the Assignment of Choses in Action, Sydney Law Review 166–179.

Another ground-breaking decision when it comes to assignment of bare right to litigate is *SPV Osus Limited v. HSBC Institutional Trust Services*⁶⁵ (“SPV Osus”), decided by the Irish Supreme Court.

The [i] issue arose when a corporation created a special purpose vehicle (“SPV”) and assigned its cause of action to the said SPV. The sole purpose of the creation of the SPV is to allow investors to speculate on the outcome of the assigned cause of action. The [ii] Supreme Court held that there can be no valid assignment of bare right to litigate if such is primarily motivated for profit. However, [iii] the concurring decision discussed the possibility of denial of Access to Justice when the supposed assignment is prohibited since it was the only available remedy of the assignor-plaintiff.

i. The inception of the SPV Osus.

Optimal Strategic US Equity Limited (“Optimal”) is an investment vehicle that invests its fund in various assets. Optimal invested most of its funds through the Bernard L. Madoff Investment Securities LLC (“Madoff Investment Securities”). Soon after the infusion of investment to the Madoff Investment Securities, the said company went into bankruptcy because of its illegal scheme. By operation of the United States bankruptcy law, Optimal became entitled to a preferential share in Madoff Investment Securities' assets on an unsecured basis. Although this is beneficial for the investors of Optimal, its receivables are not immediately realizable; thus, Optimal's investors

⁶⁵ SPV Osus, 44

created a secondary market where investors sell their shares to another investor for an immediate cash return.⁶⁶

Optimal discovered this strategy and devised a sophisticated plan to be involved in the secondary market. Optimal created SPV, with the name of SPV Optimal Osus Limited ("Osus").⁶⁷

Osus eventually became a distressed company. It then filed an action against HSBC Securities Services Ltd. ("HSBC Ireland") alleging breach of contract, misrepresentation, and negligence of HSBC Ireland's fiduciary duty as a custodian and administrator of Optimal's investment in Madoff Investment Securities. Although the real party-in-interest is Optimal being the injured party, its cause of action was assigned to Osus. The assignment includes "other rights, action or claim arising out of Optimal's investment in Madoff Investment Securities." HSBC Ireland then argued that Osus is not the proper party to initiate the case, and that the assignment was invalid.⁶⁸

ii. The Supreme Court held that Osus has no genuine commercial interest because the assignment was motivated by profit.

The Supreme Court held that the assignment should be disallowed.⁶⁹ First, the character of litigation will be distorted if the claim is motivated by

⁶⁶ *Id.* at ¶1-15.

⁶⁷ *Id.* at ¶19.

⁶⁸ *Id.* at ¶¶25-90.

⁶⁹ *Id.* at ¶61.

profit on the assignee's part leaving the assignor-plaintiff with less than what is rightly due to it.⁷⁰ Second, the commodification of litigation by assigning it to another who has no interest has generally been regarded as “intrinsically offense.”⁷¹

The Supreme Court concluded that the assignment made in favor of Osus was clearly motivated for profit.⁷² In fact, Osus was intentionally created so that third parties can indirectly participate in the proceeds of the claim. Said participation is done by purchasing a participating share of stock from Osus.

iii. The Supreme Court's concurring judgment emphasized on the possibility of denial of Access to Justice

In avoidance to undermine the Right to Access to Justice, the concurring decision was pronounced considering the inevitable fact that assignor-plaintiffs may subsequently become unable to pursue their legal claims because they may not afford litigation fees anymore. Hence, they are left with the remedy of Litigation Funding as subsidized by the TPLF who has no genuine commercial interest.⁷³

3. Giles v. Thompson concocted the “integrity of courts” test.

⁷⁰ *Id.* at ¶89.

⁷¹ *Id.* at ¶90.

⁷² *Id.* at ¶97.

⁷³ *Id.* at ¶116.

*Giles v. Thompson*⁷⁴ (“Giles”), a case decided by the United Kingdom House of Lords, reintroduced the very purpose of the prohibition of maintenance and champerty in relation to assignment of bare right to litigate.

It makes more sense to consider the effects of the assignment of bare right to litigate on the integrity of court processes to assist the courts to strike an appropriate balance. Such an approach is desirable as it avoids the artificiality of examining the assignee’s pre-existing interest and aligns judicial inquiry with the policy rationales underlying maintenance and champerty.

The case [i] commenced when one party assigned its cause of action to another as payment for the services of the latter. The [ii] High Court held that the assignment is valid provided the integrity of court processes are maintained.

i. The commencement of Giles

Plaintiff is a motorist who suffered injuries and sustained damages on his motor vehicles due to the fault of the defendants.⁷⁵ A hire company then made cars available to the plaintiff while the latter’s cars were being repaired. As payment to the hire company, the plaintiff assigned its cause of action to the hire company. They agreed that if the action is successful, the hire

⁷⁴ Giles, 142.

⁷⁵ *Id.*

company will receive the damages to be recovered. Because of this, the defendants argued that said arrangement is champertous and therefore invalid.

ii. The Court held that assignment of bare right to litigate is allowed provided it will not adversely affect court processes.

The High Court examined the validity of the subject arrangement by making reference to the “origins of maintenance and champerty” as principles of public policy designed to protect the purity of justice and interests of vulnerable litigants.⁷⁶ Defendants’ contention that the hire company’s support in the litigation might encourage witnesses to exaggerate their evidence and encourage hiring of cars at inflated rates which the defendants would have to pay, was rejected.⁷⁷ It was also held that the hire company did not engage in “wanton and officious intermeddling” with another’s dispute as there was no realistic possibility that the administration of justice would be undermined by the hiring arrangements.⁷⁸

II. When is assignment of right to litigate considered “bare”

To understand what constitutes a “bare right to litigate,” a distinction needs to be drawn between [A] “right to litigate annexed to rights of property,” and [B] “bare right to litigate.” This distinction is critical to the question of

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

whether an assignment is potentially champertous that would warrant the application of the tests provided by *Trendtex*, *SPV Osus* and *Giles*.

A. Right to litigate annexed to rights of property

The right to litigate an action annexed to, or “incidental and subsidiary” to a right of property is beyond the category of “bare right to litigate.” It is valid by reason of the assignee’s interest in the underlying property, which is readily assignable.⁷⁹ For example, an assignment of chattels with a right to sue a bailee in negligence in respect of damage caused to the chattels, is valid.⁸⁰

Debts, properties, and the right to sue for liquidated claims under a contract have always been regarded as rights of property which are susceptible of being assigned;⁸¹ notwithstanding said debt being overdue for payment,⁸² being disputed by the debtor,⁸³ or failing to be quantified.⁸⁴ The necessity of an action to reduce debts and reduce liquidated claims into possession is merely incidental with the assignment of the property.⁸⁵ However, said property is only obtained when the suit involving it succeed, otherwise, it has no practical existence or value for the assignee.⁸⁶

⁷⁹ *Dawson v Great Northern and City Railway Co* (1905) 1 KB 260, 271; *Ellis v Torrington* (1920) 1 KB 399 [Hereinafter, “Ellis”], 407- 408; *Trendtex*, 703.

⁸⁰ *W J Vine Pty Ltd v Hall* (1973) VR 161, 161-165.

⁸¹ *Commonwealth v Ling* (1993) 118 ALR 309, 432.

⁸² *County Hotel and Wine Co v London & North-Western Railway Co* (1918) 2 KB 251 [Hereinafter, “County”]

⁸³ *Camdex International Ltd v Bank of Zambia* (1998) QB 22, 33.

⁸⁴ *Zabihi v Janzemini* [2009] EWHC 3471, 23.

⁸⁵ *Ellis*, 411.

⁸⁶ *Trendtex*, 665.

Under the Philippine laws, this is best illustrated by the assignment of credit where the assignee will, aside from receiving the right to collect the credit, receive the right to enforce such credit before the courts.⁸⁷ The main object of the assignment here is a property right where right to enforce such property right is only incidental to the assignment.

B. Bare right to litigate

Assignment of bare right to litigate are those which does not involve rights arising from any contractual relationships.⁸⁸ Assignment of rights to sue for tort⁸⁹ and unliquidated damages for breach of contract⁹⁰, and rights to sue in equity such as a right to set aside a deed for fraud,⁹¹ are considered assignment of bare rights to litigate.

The claims in abovesaid actions only arise from the determination of a favorable judgment by the courts; and are not annexed to any contracts. The fact that the claim originated solely from litigation and not from other sources of obligation,⁹² makes it “bare.”

III. Chapter synthesis

⁸⁷ Rep Act. no. 386, Book IV Chapter 8, Arts. 1624 to 1635.

⁸⁸ Anthony Sebok, Going Bare in the Law of Assignments: When Is an Assignment Champertous?, 14 FIU L. REV. 85 (2020).

⁸⁹ Poulton v The Commonwealth (1953) 89 CLR 540, 602.

⁹⁰ May v Lane (1894) 64 LJ (QB) 236; County, 258.

⁹¹ Prosser v Edmonds (1835) 160 ER 196, 202.

⁹² Rep Act no. 386, Art. 1156.

Litigation Funding has a rich history. During the medieval England, provision of financial aid to maintain a suit before the courts was held unlawful because it was used to intermeddle with the solemn court proceedings, coining the terms maintenance and champerty. Eventually, an indirect circumvention was created when parties started assigning their bare right to litigate to TPLF; scholars refer to this as “Litigation Trafficking.”

However, several ground-breaking high court decisions in the international arena were promulgated which allowed the assignment of bare right to litigate.

To recapitulate these revolutionary decisions: *Trendtex* provides that a TPLF can be an assignee if it has “genuine commercial interest” in the outcome of the case; *SPV Osus* enunciated that there is no valid assignment when a TPLF is motivated solely by profit, however, caution should be made for a possible complete denial of Access to Justice on the part of the assignor-plaintiff when its only remedy of assigning its bare right to litigate is prohibited; *Giles* articulated that the assignment is invalid when indications such as excessive damages are prayed for, settlement procedures are deliberately neglected, and pieces of evidence are patently fabricated, are present.

Chapter 5

Establishing a legal framework for Litigation Funding in the Philippines

Chapter 2 signifies that Access to Justice is a fundamental right that serves as a gateway to Liberty and Prosperity Right and that Litigation Funding is a mode of promoting the same. Still, the possibility of championing Litigation Funding in the Philippines is but a theory if there is no legal framework that will support it. To rectify this, the laws that will govern Litigation Funding should be determined, and regulations in conflict with the nature of Litigation Funding resulting to assignment of bare right to litigate should be calibrated.

Specifically, it is recommended that **[I]** the definition of real parties-in-interest under the Rules of Court be expanded, **[II]** the assignability of tort claims under the New Civil Code be allowed, and **[III]** the laws on assignment of incorporeal right to primarily govern the assignment of bare right to litigate.

I. The definition of “real party-in-interest” under the Rules of Court should be expanded to include the TPLF.

The concept of “real party-in-interest” is material to assignment of bare right to litigate because the funded litigation will be under the name of the TPLF. Thus, an assignor-plaintiff’s participation in the proceedings will be lowered to a mere witness.

Note that [A] the present Rules of Court limits the definition of real parties-in-interest to those who will be directly affected by the outcome of the case. With this, it is recommended for [B] said definition to include a TPLF who will step into the shoes of an assignor-plaintiff thereby allowing it to actively prosecute the case.

A. Rediscovering real parties-in-interest under the Rules of Court.

According to Rule 3 of the 1997 Rules of Court, to be a real party-in-interest, one must be “either a natural or a juridical person or an entity authorized by law, and must have the legal capacity to sue.”⁹³

The same rule provides that “every action must be prosecuted and defended in the name of the real party-in-interest. A real party-in-interest is one who would be benefited or injured by the judgment, or who is entitled to the avails of the suit.”⁹⁴ Logically, any decision that will be promulgated in favor of a person who is not a real party-in-interest “cannot be executed; hence, a complaint that is filed by or against such person should be dismissed.”⁹⁵

The concept of “interest” in relation to a “real party-in-interest” means “material interest”, that is, “an interest in issue to be affected by the decree, as distinguished from a mere interest in the question involved, or a mere

⁹³ RULES OF COURT, Rule 3 Section 1.

⁹⁴ *Columbia Pictures v. Court of Appeals*, G.R. no. 110318.

⁹⁵ *Aguila v. Court of Appeals*, 319 SCRA 246.

incidental interest.”⁹⁶ The interest of the party must be “personal and not one based on a desire to vindicate the constitutional rights of some third and unrelated party.”⁹⁷

B. Expanding the definition of “real parties-in-interest” to cater the nature of assignment of bare right to litigate.

When an assignor-plaintiff assigns its right bare right to litigate to a TPLF, the latter becomes the new plaintiff, and the case will be prosecuted in the name of the TPLF. The rationale for this is for the TPLF to secure the receipt of any award the court may grant to the assignor-plaintiff and the TPLF will just later provide the assignor-plaintiff its share.

Given the nature of assignment of bare right to litigate, it is recommended that the TPLF should be allowed to sue in its own name irrespective of existence “material interest” in the proceedings.

Corollary, to avoid commercialization of court proceedings, following requirements must be satisfied: First, the TPLF must have a “genuine commercial interest” in the proceeding, as ruled in *Trendtex*; Second, the assignment is not motivated solely for profit and the assignor-plaintiff’s Access to Justice is promoted, as enunciated in *SPV Osus*; Lastly, the integrity of court proceedings is maintained, as articulated by *Giles*.

⁹⁶ *Rebollido v. Court of Appeals*, 170 SCRA 800.

⁹⁷ *Tankiko v. Court of Appeals*, 302 SCRA 559.

Not less than the 1987 Philippine Constitution provides that rules promulgated by the Supreme Court cannot interfere with the substantive rights vested by the law.⁹⁸ Hence, rules on real parties-in-interest, which are remedial in nature, must pave way to the concept of assignment of bare right to litigate, a mode to achieve the Right to Access to Justice which is a fundamental substantive right.⁹⁹

The very purpose of requiring that parties in the proceedings to be “real parties-in-interest” is “to protect actions to whom the proceeds of the action shall belong, and to prevent actions by person who have no interest in the results of the same.”¹⁰⁰

The recommended expansion of the “real party-in-interest” does not deviate from the very purpose of the said requirement. In assignment of bare right to litigate, the proceeds of an action are protected because the TPLF will be able to actively prosecute the case in favor of the assignor-plaintiff. There will be no proceeds in the first place should the assignor-plaintiff cannot go to court to prosecute its claim because of lack of financial resources.

II. Assignability of tort claims should be allowed for TPLF to validly initiate an action in its own name.

⁹⁸ CONST. Art. VIII, Section 13.

⁹⁹ Winluck Wahiu, The Fundamental Right of Access to Justice, 3 E. AFRICAN J. HUM. Rts. & DEMOCRACY 43 (2005).

¹⁰⁰ Oscar M. Herrera, 1 CIVIL PROCEDURE PART I (RULE 1-22) 520.

Recall that the very object of assignment of bare right to litigate is the right to sue a claim arising from tort and unliquidated damages.¹⁰¹ If we revisit the New Civil Code, [A] it lacks rules governing the assignability of claims arising from tort. With the current Philippine legal system, a TPLF may not be an assignee of bare right to litigate. Therefore, [B] it is recommended that the assignor-plaintiff be legally allowed to assign its tort claims to the TPLF.

A. Revisiting the laws governing torts.

Tort is an unlawful violation of private right, not created by contract, and which gives rise to an action for damages.¹⁰² It is considered an act or omission producing an injury to another, without any previous existing lawful relation of which the said act or omission may be said to be a natural outgrowth or incident.¹⁰³

A tort case may only be prosecuted by one who has been injured by reason of a tortious conduct and is entitled to damages.¹⁰⁴ This injury inflicted is caused by tortfeasors who are then liable for the damage done.

Article 2176 of the New Civil Code provides that tortfeasors are liable for damages incurred by a person due to their act or omission. The same provision is the main legal basis for the right of the injured party to demand

¹⁰¹ See Chapter 4, II, B.

¹⁰² Timoteo B. Aquino, *Torts and Damages* (2nd ed. 2005) 1. [Hereinafter, “Aquino”]

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 18.

damages from the tortfeasor for any liabilities arising from tort. Moreover, liability of tort arises “where tort is that which breaches the contract.”¹⁰⁵

Damages, as mentioned in the preceding paragraph, can be categorized as liquidated or unliquidated damages.¹⁰⁶ Unliquidated damages comprise moral damages, nominal damages, temperate damages, and exemplary damages.¹⁰⁷ Unliquidated damages may be awarded by courts when a breach of contract was done with manifest bad faith.

Concludingly, nothing in the New Civil Code nor in any other laws allow the assignment of a cause of action arising from torts and the corresponding unliquidated damages resulting therefrom.

B. Easing the assignability of actions arising from torts with the corresponding damages prayed for.

The prohibition of assignability of tort claims denies Access to Justice.

In the Philippine legal system, an assignment of rights arising from contracts is legally permitted because it is governed and regulated by Contract law, particularly the provisions on assignment of receivables and subrogation. The New Civil Code provides that a disinterested third person who pays a debt to a creditor may recover from the debtor the sum paid.¹⁰⁸ If the debtor has

¹⁰⁵ *Id.* at 19.

¹⁰⁶ Rep. Act no. 386, Art. 2197.

¹⁰⁷ *Id.*, Art. 2197.

¹⁰⁸ *Id.*, Art. 1236.

knowledge or has given consent with the payment, the disinterested third-party can “step into the shoes of the original creditor acquiring all the rights of the latter, against the original debtor, guarantors, or possessors of mortgages.”¹⁰⁹ However, if the debtor has no knowledge of the payment or the payment is made against his will, the disinterested third-party can only recover the amount that has been beneficial to the debtor.¹¹⁰

Accordingly, if what is to be claimed by the assignor-plaintiff is a sum of money arising from a contract, but he has no resources to pursue the same before the court, he can simply assign his contractual right to a disinterested third person. If the assignment was made with the knowledge and consent of the debtor, then the disinterested third party acquires all the rights of the original creditor. If the assignment was without the knowledge or consent of the debtor, the disinterested third person can merely collect from the debtor the amount beneficial to the latter.

Evidently, in either case, whether with the knowledge or consent of the debtor, the disinterested third person may legally pursue a claim against the debtor under its own name when the claim arises from a contractual relation. This assignment is considered as an Assignment of Right to Litigate Annexed to the Rights of Property.¹¹¹ The right to enforce the assigned receivables is annexed to the contract between the debtor and the creditor which is considered a property right.

¹⁰⁹ *Id.*, Art. 1303

¹¹⁰ *Id.*, Art. 1236.

¹¹¹ *See* Chapter 3, II, A.

Unfortunately, when what is involved are rights to damages arising from torts, a disinterested third party may not legally do this. This is because the current laws only cover plaintiffs who had been injured by reason of a tortious conduct.¹¹² Therefore, an injured party may not legally assign its bare right to litigate; hence, it no recourse when it lacks fund to pursue a legal action against tortfeasors. As such, a disinterested third party is then deprived to be an assignee for an action for damages arising from torts. This is a clear denial of the injured party's Right to Access to Justice.

With this, it is recommended that an injured party in an action for damages arising from torts be legally allowed to assign its bare right to litigate to a TPLF. This would make the injured party in tort cases in equal footing with an injured party in cases involving breach of contract.

To note, the doctrines imparted by *Trendtex*, *SPV Osus* and *Giles*, must still be followed. Thus, the assignment should only be allowed if the TPLF has "genuine commercial interest," not motivated solely for profits, there is no denial of Access to Justice on the assignor-plaintiff, and the integrity of court proceedings are maintained.

III. The rules on assignment of incorporeal rights should govern the operation of assignment of bare right to litigate.

Rules on assignment of incorporeal rights are governed primarily by Book IV Title VI Chapter 8 of the New Civil code, "Assignment of Credits

¹¹² Aquino, 18.

and Other Incorporeal Rights.” It is recommended that the Rules on Incorporeal Right govern the operation of assignment of bare right to litigate particularly its [A] elements, [B] perfection, [C] warranties and [D] binding effect.

Incorporeal rights are those that cannot be seen or touched but are still enforceable by law.¹¹³ A bare right to litigate is an incorporeal right because the acts of going to court and being represented by a counsel are not manifested by a tangible object.

A. Elements

Like a contract of sale,¹¹⁴ an assignment of incorporeal rights has three elements, to wit: (1) the consent, (2) the object which is the incorporeal right, (3) and the consideration which is the price certain in money for the assignment.¹¹⁵

Assignment of bare right to litigate is also composed of three essential elements, to wit: (1) the consent of the assignor-plaintiff and the TPLF, to assign the former’s bare right to litigate, (2) the object which is the right of the assignor-plaintiff to litigate his claims and its proceeds in case of favorable judgment, and (3) the consideration which consists of the payment of the TPLF of to all litigation expenses and costs.

¹¹³ Thomas McIntyre Cooley. Elements of Torts (1995).

¹¹⁴ Rep. Act no. 386, Art. 1624.

¹¹⁵ Ernesto L. Pineda, Sales and Other Special Contracts (2010 ed.) 426. [Hereinafter, “Pineda”]

Truly, an object of a contract should be within the commerce of man.¹¹⁶ While, it is conceded that the Right to Litigate is outside the commerce of man, this should be treated as an exception to the general rule because the purpose of this assignment is always for the promotion of the Right to Access to Justice.

B. Perfection of assignment

Assignment of incorporeal right is perfected from the moment the parties agree upon the incorporeal right to be assigned and the price to be paid. However, the transfer of ownership is only perfected upon its delivery. To show, when sale is made through a public instrument, the execution thereof is equivalent to a symbolic delivery of the incorporeal right.¹¹⁷ Thus, placing the titles of ownership in the possession of assignee is considered as a delivery.¹¹⁸

Assignment of bare right to litigate is perfected upon the meeting of the minds of the parties. A TPLF acquires the ownership over a right to prosecute a case upon delivery of a public instrument by the assignor-plaintiff.

C. Warranties for the assignment of incorporeal right.

Art. 1628 of the New Civil Code provides for the things an assignor warrants in assigning incorporeal rights; these include (1) the existence of the incorporeal right at the time of the assignment, (2) the legality of the credit

¹¹⁶ Cesar L. Villanueva, *Law on Sales* (2009 ed.) 80.

¹¹⁷ Pineda, 428.

¹¹⁸ *Lo v. KJS Eco-Formwork System Phil, Inc.*, 413 SCRA 182.

unless he sold the thing as “doubtful,” (3) the solvency of the debtor or the capacity of the person to whom the right is exercised against to perform his obligation.¹¹⁹

In case of breach of warranty, the liability of the assignor will depend on whether he acted in good faith or bad faith. If the assignor acted in good faith, it is only liable for the consideration or price received from the assignee, the expenses arising from the contract and other legitimate expenses occasioned by the assignment.¹²⁰ However, if the assignor acted in bad faith, which means that he or she has knowledge of the non-existence, illegality or invalidity of the incorporeal right, or the insolvency of the debtor or the incapacity of the person to whom the right will be exercised, then the assignor must pay, in addition to the enumerated liabilities of the assignor in good faith, other liabilities for the damages suffered by the assignee.¹²¹

Sometimes what is being assigned is a doubtful credit. A doubtful credit is one which is subject to certain contingencies such as when it is an old claim susceptible of being barred by laches or prescription or a claim subject to a defense of vitiated consent.¹²² If the assignor has disclosed the facts surrounding the assailability and precarious condition of the credit, the assignor shall incur no liability, for in effect, he made no warranty on the efficaciousness, validity and legality of the credit.¹²³

¹¹⁹ Pineda, 433.

¹²⁰ Rep. Act no. 386, Art. 1628.

¹²¹ *Id.*

¹²² Pineda, 434.

¹²³ *Id.*

In assignment of bare right to litigate, the object is always a “doubtful claim.” Despite this, an assignor-plaintiff will not be liable for any damages provided he or she discloses to the TPLF all pertinent facts that would allow the latter to properly determine the *Net Expected Return* in funding the case.¹²⁴

D. Binding effect of assignment as to the contracting parties and third parties.

Between the parties, the assignment of incorporeal right is effective even if it appears only in a private document unless the nature of the object of the assignment requires a specific form as required by law to be valid.¹²⁵ However, “to affect third persons, the assignment must be in a public instrument.”¹²⁶ This document also constitutes as evidence against third persons as to the facts stated therein and the date which gave rise to its execution.¹²⁷

Verily, the transfer of an incorporeal right is valid and effective from the moment it is made to appear in a document. Hence, third persons must recognize it as such, in view of preventing all suspicions of fraud regarding the transfer and date of the assignment of credit.¹²⁸

In assignment of bare right to litigate, the agreement always affects third parties including judicial courts, defendants in the proceedings, counsels

¹²⁴ See Chapter 3, II, A.

¹²⁵ Pineda, 429.

¹²⁶ 10 Manresa 381.

¹²⁷ Lopez v. Olivarez, 9 Phil 28.

¹²⁸ 10 Manresa 381; 5 Tolentino 192.

representing the parties and other affected stakeholders in the case. Therefore, the assignment of bare right to litigate should always be placed in the public instrument.

IV. Chapter synthesis

Litigation Funding that results into assignment of bare right to litigate will remain a concept if there is no legal framework that supports it.

As such, it is recommended that: first, the scope of “real parties-in-interest” under the Rules of Court be expanded to include a TPLF. Second, that the assignor-plaintiff be legally allowed to transfer its tort claims to a TPLF for the latter to effectively pursue the case. Lastly, that laws on Assignment of Incorporeal Right govern the operation of assignment of bare right to litigate.

As a final point, the TPLF should only be allowed to step into the shoes of the assignor-plaintiff provided it has a “genuine commercial interest” in the outcome of the proceeding, it is not motivated solely for profit, the Access to Justice of the assignor-plaintiff is promoted, and the integrity of court proceedings is maintained.

Chapter 6

Enhancing the proposed legal framework with the Harmonized Regulatory Approach

Mere implementation of Litigation Funding is insufficient without regulation and supervision of its stakeholders. TPLF does not act in isolation and there are other stakeholders involved for Litigation Funding to take place. They include the assignor-plaintiff, court, lawyers, opposing parties.

With this, the establishment of the harmonized regulatory approach is recommended. This approach is divided into three categories, namely: **[I]** transactional, **[II]** procedural, and **[III]** ethical category.

I. Transactional category

The transactional category focuses on the network of agreements surrounding the Litigation Funding.

Unfortunately, it is inevitable that a TPLF would fund the opposing party as well. The TPLF would then be essentially stirring disputes.¹²⁹ It could also be foreseen that a TPLF may take advantage of an assignor-plaintiff's situation and place the latter on unfavorable contractual terms.¹³⁰

¹²⁹ James D. Dana, Jr. & Kathryn E. Spier, Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation, 9 J.L.ECON. & ORG. 349, 365-66 (1993).

¹³⁰ David S. Abrams & Daniel L. Chen, A Market for Justice: A First Empirical Look at Third Party Litigation Funding, 15 U. PA. J. BUS. L. 1075 (2013).

To prevent this, it is recommended that a TPLF be mandated to disclose all its network of agreements with the assignor-plaintiff, otherwise, liability for damages will arise. In addition, an independent institution should be established by the judiciary to check the reasonableness of the funding agreement and the soundness of the formula used in computing for the TPLF's share.

II. Procedural category

The procedural category focuses on the proceedings before the court. It includes the enhancement of the rules on procedure and evidence.

Correspondingly, to determine the validity of Litigation Funding, it is recommended for courts to require all parties, including their respective counsels, to sign a statement under oath stating whether they have availed of Litigation Funding or not, and require disclosure of other pertinent facts that would allow courts to assess the legitimacy of the assignment as guided by the doctrines enunciated in *Trendtex*, *SPV Osus* and *Giles*.

In relation to this, to mitigate the possibility of tampering evidence, it is recommended that the TPLF be prohibited to procure evidence. Hence, all pieces of evidence to be presented during trial proceedings should come solely from the original parties. The TPLF's role then is limited to financing the expenses incurred in procuring such evidence.

Correspondingly, assignor-plaintiffs should be required to make appearance before the courts if their presence is required under the present Rules of Court (e.g., Rule 18 on pre-trial hearings), even if the bare right to litigate was already assigned to TPLF. This would enable the judge to observe the demeanor of the assignor-plaintiff and enable the former to further assess the latter's willingness to pursue the suit.

III. Ethical category

The ethical category focuses mainly on the ethical requirements imposed by the Code of Professional Responsibility ("CPR") to lawyers who are counselling actions funded by TPLF.

Rule 1.04 of the CPR provides that "a lawyer shall encourage his clients to avoid, end or settle a controversy if it will admit of a fair settlement." Thus, lawyers should not be instigators of controversy but mediators for concord and conciliators for compromise.¹³¹

Accordingly, a TPLF may focus only on its possible share in the proceeds of the case should the assignor-plaintiff receive a favorable judgment and neglect any possibility to amicably settle. It is recommended then that lawyers still communicate the possibility of amicably settling the case to the original plaintiff.

¹³¹ Theresa S. Dizon, Basic Legal Ethics (2017 ed.) 73.

Moreover, Canon 15 of the CPR provides that “a lawyer shall observe candor, fairness and loyalty in all his dealings and transactions with his clients.” Meanwhile, Canon 17 of the CPR provides that “a lawyer owes fidelity to the cause of his client and he shall be mindful of the trust and confidence reposed in him.

With this, it is recommended for lawyers to maintain the original plaintiff as his or her client and not the TPLF. In the first place, the primary purpose of Litigation Funding is the promotion of the original plaintiff’s Right to Access to Justice. Therefore, a lawyer’s loyalty should always remain with the original plaintiff as well as his or her dedication to sustain the best interest of the latter.

V. Chapter synthesis

The complete administration and effective implementation of Litigation Funding requires not just the creation of its legal framework but also the protection and regulation of its stakeholders as they act dependently with one another.

With this, a harmonized regulatory approach should be observed to ensure that all the stakeholders of Litigation Funding are acting towards the promotion of Right to Access to Justice of the assignor-plaintiff.

Although the harmonized regulatory approach only provides for a conceptual structure, it serves as a guide on how to regulate all the

stakeholders in a holistic basis. Verily, it serves as the foundation of future legislation for the parties having interest in Litigation Funding.

Epilogue

Litigation funding resulting to assignment of bare right to litigate can work as a double-edged sword. It can be considered as a tool to promote the Right to Access to Justice. But without limitations, it can be the very instrument that would destroy the well-functioning judicial system of our country. The paper resolved this issue by providing limitations, standards and the proper legal framework.

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