STATE OF MINNESOTA

IN SUPREME COURT

A21-1338

Court of Appeals McKeig, J.
Concurring, Moore, III, Hudson, Chutich, JJ.

Pamela Maslowski,

Respondent,

vs. Filed: August 23, 2023
Office of Appellate Courts

Prospect Funding Partners LLC, et al.,

Appellants,

vs.

James Schwebel, Esq., et al.,

Respondents.

James R. Schwebel, James S. Ballentine, Matthew J. Barber, Schwebel, Goetz & Sieben, Minneapolis, Minnesota, for respondent Pamela Maslowski.

Daniel A. Beckman, Erickson, Bell, Beckman & Quinn, P.A., Roseville, Minnesota, for appellants.

Chad J. Hammerlind, Pillsbury Winthrop Shaw Pittman LLP, Austin, Texas, for amicus curiae American Legal Finance Association.

Jennifer E. Olson, TSR Injury Law, Bloomington, Minnesota, and

Stephen M. Warner, Jeffrey M. Markowitz, Harrison E. Berg, Arthur, Chapman, Kettering, Smetak & Pikala, P.A., Minneapolis, Minnesota, for amici curiae Minnesota Association for Justice and Minnesota Defense Lawyers Association.

S Y L L A B U S

1. A repurchase rate in a litigation financing agreement is not subject to Minnesota's usury law, Minn. Stat. § 334.01 (2022), when repayment of the purchase price is contingent upon a recovery in the underlying litigation.

2. Remand to the district court is appropriate to address plaintiff's challenge to the repurchase rate under the common-law doctrine of unconscionability.

3. The repurchase rate specified in the litigation financing agreement began to accrue after the agreement was signed, not after our abolition of the former common-law prohibition on champerty.

Reversed and remanded.

O P I N I O N

MCKEIG, Justice.

This case involves the enforceability of a litigation financing agreement. Appellants Prospect Funding Partners LLC, et al., seek enforcement of a litigation financing agreement they entered into with respondent Pamela Maslowski. The agreement was originally deemed unenforceable by the district court and court of appeals due to the common-law prohibition on champerty. We abolished the prohibition on champerty in a prior appeal. *Maslowski v. Prospect Funding Partners LLC (Maslowski I)*, 944 N.W.2d 235, 241 (Minn. 2020). Following our reversal and remand to the district court, Maslowski continued to

challenge the enforceability of the agreement on several different grounds, including the agreement's 60 percent repurchase rate. The courts below found that the repurchase rate violated Minnesota's usury statute, Minn. Stat. § 334.01 (2022), and concluded that the rate, reduced to 8 percent under the usury statute, began to accrue only after the date of our 2020 decision in *Maslowski I*. We reverse and remand.

FACTS

Respondent Pamela Maslowski was injured in an automobile accident in 2012. She hired Schwebel, Goetz & Sieben, P.A., to represent her in a personal injury lawsuit against the other driver. Maslowski subsequently faced economic hardship and entered into a "Sale and Repurchase Agreement" with appellants Prospect Funding Partners LLC, et al. ("Prospect") to cover her living expenses while she continued to pursue her personal injury lawsuit. Maslowski's attorney reviewed the contract with her and signed the last page of the Agreement, certifying that he had reviewed the terms with her and acknowledged the payment directions in the event of a settlement.

Pursuant to the Agreement, Prospect paid Maslowski $6,000 for the right to receive a portion of the proceeds from any recovery in the personal injury lawsuit. In return, Maslowski agreed that if she was successful in her personal injury suit, she would repay Prospect the $6,000 along with a processing fee of $1,425. Under the repayment schedule, a 30 percent repurchase rate would accrue on the total ($7,425) she owed every 6 months, for a total annual rate of 60 percent. But if Maslowski was not successful in her suit, she would owe Prospect nothing.

Following the settlement of the underlying personal injury case, Maslowski refused to pay according to the terms of her Agreement with Prospect. In response, Prospect filed suit in New York against Maslowski, her attorney, and her attorney's law firm for breach of contract, among other claims. This lawsuit began a multi-year litigation process, which included a battle over a choice-of-law clause in the contract that declared that New York law would govern. After the dispute was moved to Minnesota and Minnesota law was applied to the contract, the district court found the Agreement unenforceable because it violated Minnesota's common-law prohibition against champerty.[1] The court of appeals affirmed. *Maslowski v. Prospect Funding Partners LLC*, No. A18-1906, 2019 WL 3000747, at *1 (Minn. App. July 8, 2019).

We reversed. We agreed that "[t]he lower courts . . . did not err in determining that, under our prior decisions, the contract was unenforceable." *Maslowski I*, 944 N.W.2d at 238. We explained, however, that while the agreement was plainly champertous, it was not "void as against public policy as we understand it today." *Id.* Explaining that the common law reflects the needs of the community it governs and therefore develops alongside it, we eliminated the common-law prohibition against champerty. *Id.* at 238–41. We specifically stated that litigation financing agreements "allow plaintiffs who would otherwise be priced out of the justice system to assert their rights." *Id.* at 241. But we also acknowledged that courts "may still scrutinize litigation financing agreements to determine

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[1] Champerty is "an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim." *Maslowski I*, 944 N.W.2d at 237 (quoting *Champerty*, Black's Law Dictionary (11th ed. 2019)).

whether equity allows their enforcement," pointing to the common-law defense of unconscionability in particular. *Id.* We then remanded the case back to district court.

On remand, the parties continued to dispute the enforceability of the Agreement. Prospect filed a motion for summary judgment. As part of the motion for summary judgment, Prospect included an affidavit from A. Mark Berlin, a manager of Prospect, who explained that the terms of the company's purchase agreements vary depending on the underwriting process. Maslowski filed a cross-motion for judgment on the pleadings, in which she continued to challenge the enforceability of the Agreement. In particular, Maslowski challenged the 60 percent repurchase rate set by the Agreement. She claimed that Prospect's repurchase rate was unconscionable, or, alternatively, that it fell under Minnesota's usury statute, Minn. Stat. § 334.01, and that the repurchase rate should therefore be reduced to 8 percent in conformity with the statute.

The district court denied in part and granted in part both Prospect's motion for summary judgment and Maslowski's motion for judgment on the pleadings. The court found that "the contract . . . is not unconscionable as a whole, but it is unconscionable as to its penalty clauses, interest rate, and restrictions on the relationship between Maslowski and her counsel." As relevant here, the district court concluded that, despite the Agreement not appearing as "a classic loan," the 60 percent annual repurchase rate in the Agreement is unconscionable on the sole basis that it violates Minnesota's usury statute, Minn. Stat. § 334.01.[2] Addressing Prospect's claim that the Agreement did not fall under the usury

[2] The district court's determination that the penalty clauses and restrictions on the relationship between Maslowski and her counsel are unconscionable is not before us.

law because Maslowski's repayment obligation was not absolute, the district court pointed out that the underwriting process provided assurance that Prospect would receive payment despite its purported contingency. The district court ordered Maslowski to pay Prospect the amount advanced, $6,000; the processing fee of $1,425; and simple interest on the amount advanced at an annual rate of 8 percent. The district court further found that the interest only began to accrue following our abolition of the prohibition on champerty, because the Agreement was not legally enforceable until that date.

The court of appeals affirmed. *Maslowski v. Prospect Funding Partners LLC*, 978 N.W.2d 447 (Minn. App. 2022). The court of appeals agreed with the district court that, despite being labeled as a sale of an interest, the Agreement was actually subject to the usury statute. *Id.* at 457–58. The court of appeals wrote that, because Prospect would not fund frivolous suits, "[t]he obligation to repay is therefore absolute unless Maslowski chooses to forego pursuing a recovery in the underlying legal claim." *Id.* at 458. But the Agreement also required Maslowski to use her "best efforts to prosecute the Legal Claim." *Id.*

The court of appeals also affirmed the district court's decision to begin the accumulation of interest following our decision abolishing the prohibition on champerty. *Id.* at 459–60. The court suggested that parties "who have entered into agreements are entitled to their rights under those agreements even if the law under which they were made is later changed." *Id.* at 460. Furthermore, the court concluded that our decision abolishing the prohibition on champerty did not apply retroactively because the earlier decisions declaring the contract champertous and therefore void were not "erroneous." *Id.*

Prospect appealed, and we granted review.

ANALYSIS

This case is before us on a partial grant of Prospect's summary judgment motion and a partial grant of Maslowski's motion for judgment on the pleadings. The parties do not appear to disagree on any of the facts considered by the district court, meaning that we review both determinations de novo.[3] *See SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011) (reviewing cross-motions for summary judgment de novo when the motions were based on undisputed facts).

Prospect raises two issues: (1) whether the Agreement is subject to Minnesota's usury statute, and (2) whether the repurchase rate only began to accrue after we abolished the common-law prohibition on champerty. We, in turn, address Minnesota's usury statute, the broader unconscionability argument against the repurchase rate that was never addressed by either of the courts, and when the repurchase rate began to accrue.

I.

The district court's decision that the repurchase rate charged by Prospect was unconscionable rests on a determination that the Agreement falls under the usury restrictions set by Minnesota law. Questions involving usury are typically factual because they involve scrutinizing a transaction to determine whether it fits within the class of transactions subject to usury restrictions. *Midland Loan Fin. Co. v. Lorentz*, 296 N.W. 911, 914 (Minn. 1941). But the question of whether usury applies in this case is based on

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[3] Though the exact details of Prospect's underwriting process are unclear, the amount of Prospect's risk is immaterial; both parties agree there is *some* risk.

the prior courts' determination that a litigation financing agreement subject to a contingency of recovering in the underlying lawsuit can constitute an "absolute obligation of repayment." The determination of what constitutes an "absolute obligation of repayment" is a question of law, which we therefore review de novo. *SCI*, 795 N.W.2d at 861.

"Usury is the taking or receiving of more interest or profit on a loan or forbearance than the law allows." *Barton v. Moore*, 558 N.W.2d 746, 750 (Minn. 1997). Minnesota sets its permissible rate of interest by statute, capping it at 8 percent annually. Minn. Stat. § 334.01. The statute states that, "[n]o person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than $8 on $100 for one year."

We have further articulated four elements that "must be proven to establish a violation of the usury law":

> (1) a loan of money or forbearance of debt,
> (2) an agreement between the parties that the principal shall be repayable absolutely,
> (3) the exaction of a greater amount of interest or profit than is allowed by law, and
> (4) the presence of an intention to evade the law at the inception of the transaction.

Miller v. Colortyme, Inc., 518 N.W.2d 544, 549 (Minn. 1994) (quotation omitted); *see also Rathbun*, 219 N.W.2d at 646. We look to the "substance and effect of transactions" to determine whether an agreement is usurious. *Adjustment Serv. Bureau v. Buelow*, 265 N.W. 659, 661 (Minn. 1936) ("There is no shift or device on the part of the lender to evade

the law under or behind which the law [court] will not look to ascertain the real nature and object of the transaction.”). This determination is not made by merely adopting “what the parties represent the transaction to be, but by considering the whole evidence to ascertain whether or not it is in substance a contracting to receive usurious interest for a loan or forbearance of money.” *Dunn v. Midland Loan Fin. Corp.*, 289 N.W. 411, 413 (Minn. 1939). To violate the usury law, “a lender need only intend to charge a rate that is in fact usurious.” *Miller*, 518 N.W.2d at 550.

Prospect’s main contention is that the Agreement cannot fall within the purview of Minnesota’s usury laws because it is based upon a contingency: whether Maslowski recovers in the underlying lawsuit.[4] According to the Agreement, if Maslowski “RECOVERS NOTHING FROM THE LEGAL CLAIM,” then Prospect “SHALL RECEIVE NOTHING.” But Maslowski was “NOT ENTITLED TO RECEIVE ANY PROCEEDS” from the personal injury lawsuit “UNTIL PURCHASER HAS RECEIVED” payment.

Under Minnesota law, the element of absolute payment means that the payment of the principal cannot be contingent on any event that must occur before payment is required. *Ordway v. Price*, 194 N.W. 321, 322 (Minn. 1923). Usury cannot be predicated on “something occurring which may never occur.” *Id.*

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[4] Prospect also claims that the agreement to purchase an interest in Maslowski’s legal recovery is not a loan. We need not resolve that issue because we conclude that there is no absolute payment obligation.

In prior cases, we have analyzed whether the absolute payment obligation was met so that the usury limits should apply to the transaction at issue. *See Rathbun*, 219 N.W.2d at 650; *Miller*, 518 N.W.2d at 549. *Rathbun* involved a group of consumers who purchased coupon books under an installment payment plan that accumulated interest at a rate higher than that allowed by the usury statute. 219 N.W.2d at 645. The coupon plan provided for an absolute obligation of repayment on the face of the agreement. *Id.* at 650. We also rejected the defendant's argument that the obligation of repayment was not absolute because the customer could return the unused coupon book for full credit, holding that doing so required an affirmative act on the part of the customer. *Id.*

In *Miller*, we analyzed a rent-to-own contract with advance payments for each rental period and no obligation for renewal. 518 N.W.2d at 549. Even though we found that the appellants in *Miller* "technically ha[ve] no absolute obligation to repay a principal amount," we held that failing to meet the first two common-law elements of usury—that the agreement involve a loan of money or forbearance of debt and that the principal shall be repayable absolutely—did not defeat the appellants' usury claim. *Id.* Instead, we held that the usury statute applied because the Legislature specifically "defined rent-to-own transactions as 'consumer credit sales' for all purposes," including applicability of the usury statute. *Id.*

In the current case, the district court and court of appeals rejected Prospect's argument that the obligation of repayment was not absolute, reasoning that Prospect's underwriting process seeks to ensure that the parties they contract with will win their underlying case. But something being extremely *likely* to happen necessarily accepts the

possibility, however small, that it may not happen. It simply cannot be said that Prospect's ability to recover the money given to Maslowski is absolute. As Prospect points out, she could have faced a procedural bar to recovery or could have lost at trial. This situation is not the same as *Rathbun*, because there is no affirmative obligation on Maslowski to return anything if she fails to recover in the underlying lawsuit. Furthermore, unlike *Miller*, the Legislature has not determined that the usury laws apply to litigation financing agreements. Therefore, the common-law definition of usury applies to this case, and the agreement here does not meet the "absolute" threshold set for the usury law to apply. *See Miller*, 518 N.W.2d at 549.

Other jurisdictions to consider this question have reached the same conclusion. *See*, *e.g.*, *Anglo-Dutch Petro. Int'l v. Haskell*, 193 S.W.3d 87, 96–97 (Tex. App. 2006); *Dopp v. Yari*, 927 F. Supp. 814, 823 (D.N.J. 1996) ("[T]he collection of interest in excess of the lawful rate is not usurious if collection of the entire interest is at risk and depends upon a contingent event and provided . . . the contract was entered into in good faith and without the intent to evade the usury laws."); *Ruth v. Cherokee Funding, LLC*, 820 S.E.2d 704, 710 (Ga. 2018) (holding a litigation financing agreement is not a loan "when the obligation to repay is only contingent"); *Cash4Cases, Inc. v. Brunetti*, 167 A.D.3d 448, 449 (N.Y. App. Div. 2018) (holding usury law did not apply to litigation financing agreement based on the contingent nature of repayment).

But some courts have decided to apply their jurisdiction's usury laws to litigation financing agreements based on the particular circumstances of the agreement at issue. In *Echeverria v. Estate of Lindner*, No. 018666/2002, 2005 WL 1083704, at *8 (N.Y. Sup.

Ct. Mar. 2, 2005), the court decided that it would apply the usury limit to a litigation financing agreement. The court particularly noted that the case involved strict liability, making it virtually certain that the plaintiff would recover. *Id.* Similarly, in *Lawsuit Financial, L.L.C. v. Curry*, 683 N.W.2d 233, 237, 240 (Mich. Ct. App. 2004), the court found the absolute obligation of repayment satisfied where the plaintiff had already won a substantial verdict in the case and was merely facing challenges to the amount awarded. These two circumstances—a strict liability case and a case with liability already settled before the agreement was made—do not exist here.

In the prior appeal, we suggested the possibility of using legislative regulation to address concerns surrounding the allegedly predatory nature of some litigation financing agreements. *See Maslowski I*, 944 N.W.2d at 241. We reiterate here that the question of whether usury limits should apply to litigation financing agreements is likely a question best left to the Legislature. *Shefa v. Ellison*, 968 N.W.2d 818, 822 n.4 (Minn. 2022) (stating that important policy issues "are best directed to the Legislature"). As we noted in *Maslowski I*, some states have explicitly changed their laws to address these agreements.[5] The Legislature would be best poised to decide what an acceptable interest rate may be—possibly higher than the limit on conventional loans due to the uncertainty of recovery, but low enough to prevent vulnerable individuals from falling prey to predatory lenders. The

[5] *See, e.g.*, Ark. Code Ann. § 4-57-109; Ind. Code §§ 24-12-1-0.5 to -12-10-1; Me. Stat. tit. 9-a, §§ 12-101 to -107; Neb. Rev. Stat. §§ 25-3301 to -3309; Ohio Rev. Code Ann. § 1349.55; Okla. Stat. tit. 14a, §§ 3-801 to -817; Tenn. Code Ann. §§ 47-16-101 to -110; Vt. Stat. Ann. tit. 8, §§ 2251–2260.

question before us, though, is a narrow one—does the litigation financing agreement between Prospect and Maslowski fall under Minnesota's usury law? And under the law as it currently stands, it does not. *See Miller*, 518 N.W.2d at 549.

II.

But Maslowski's original claim that the repurchase rate is unconscionable was not limited to a challenge under the usury statute. In fact, in the district court, Maslowski's *primary* argument was that the "60% interest provision is unconscionable on its face." The district court's sole conclusion regarding the repurchase rate, however, was that the rate was usurious under Minnesota law. The court of appeals affirmed the district court's conclusion related to the usury statute, and therefore the broader unconscionability argument was never addressed by either of the courts below.

It is not appropriate for us to address this argument here. The issue was not raised in the petition for review submitted to this court, and neither of the briefs submitted to this court by Prospect nor Maslowski contain *any* discussion of common-law unconscionability whatsoever. "A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (citations omitted) (internal quotation marks omitted). Because the district court resolved the unconscionability argument regarding the repurchase rate on the usury statute without considering Maslowski's primary argument claiming the "repurchase rate" was "unconscionable on its face," we remand that issue for the district court's determination. *See Thayer v. Am. Fin. Advisers, Inc.*, 322

N.W.2d 599, 604 (Minn. 1982), *abrogated on other grounds by Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 351 (Minn. 2003).

III.

We next consider at what point the "repurchase rate" on the Agreement began to accrue. We conclude that because we have already held that the Agreement is valid and enforceable with regard to the issues before us, the repurchase rate obligation accrues in accordance with the schedule the parties agreed to when they signed the valid and enforceable Agreement.

In *Maslowski I*, we decided that the common-law prohibition on champerty no longer applied in Minnesota and held that Prospect was not prohibited from enforcing the Agreement between Maslowski and Prospect on the grounds that the Agreement was champertous. 944 N.W.2d at 238. We stated:

> We decline . . . to hold that the contract between Maslowski and Prospect is void as against public policy as we understand [the public policy] today. Champerty is a common law doctrine, and the development of the common law is "determined by the social needs of the community which it governs." We have previously explained that, as society changes "the common law must also evolve" with it. Our review of changes in the legal profession and in society convinces us that the ancient prohibition against champerty is no longer necessary.

Id. (citations omitted). By holding that the Agreement was not void, we decided that, as long as the Agreement was not unconscionable or unenforceable for some other reason, this particular contract was valid when Maslowski and Prospect entered into it. *See id.*

In *Maslowski I,* we did not reach the issue of whether the repurchase rate provision in the Agreement was usurious because that issue was not before us on appeal. Today, we

determine that the Agreement is not usurious. Accordingly, we have thus far upheld the validity of the Agreement.[6]

Therefore, the only remaining question before us is whether we can modify and rewrite a valid, enforceable agreement and dictate that the repurchase schedule[7] starts not in accordance with the plain terms of the Agreement in May 2014, but instead on June 3, 2020, when we issued our decision in *Maslowski I*. Maslowski argues that we can. She reasons that our decision to abrogate the common-law prohibition on champertous contracts effectively undermined her vested right to avoid the contractual obligations she

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[6] We are remanding the case to assess whether, under the circumstances of the case, the repurchase rate provision in the Agreement is unconscionable and therefore unenforceable. That analysis does not change our retroactivity analysis. If that particular provision in the Agreement is unconscionable, then according to the black-letter rule, a court "may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." *Restatement (Second) of Contracts* § 208 (Am. L. Inst. 1981); *see generally Isles Wellness, Inc. v. Progressive N. Ins. Co.*, 725 N.W.2d 90, 94 (Minn. 2006) (stating that courts have power to void contracts that violate public policy). As a bit of foreshadowing, the key distinction between that rule and this case as it currently stands is that in *Maslowski I*, we did not find the Agreement—or any provision in the Agreement—unenforceable as champertous; rather, we found the Agreement *enforceable*. As discussed more fully below, there is no authority to allow us to modify this enforceable contract.

[7] The Agreement provides that the cost of repurchasing Prospect's interest in the proceeds of the litigation increases by 30 percent every 6 months for approximately 3½ years following the date the Agreement was signed in 2014. The repurchase amount is capped and does not increase after 3½ years. The Agreement sets out a specific schedule showing the repurchase amount (calculated in accordance with the 30 percent repurchase rate) for a repurchase that occurs during each 6-month period over that approximately 3½-year period.

otherwise agreed to by signing the Agreement. She rests this argument on our decision in *Hoven v. McCarthy Bros. Co.*, 204 N.W. 29, 30 (Minn. 1925), where we stated in dicta:

> It is the law that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation—the overruled decision is regarded in law as never having been the law, but the law as given in the later case is regarded as having been the law, even at the date of the erroneous decision, except that, where a Constitution or statute has received a given construction by the court of last resort, and contracts have been made and rights acquired in accordance therewith, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision.

But *Hoven* does not support Maslowski's position. The parties in *Hoven* were not asking for certain terms in an otherwise enforceable contract to be rewritten, which is the remedy Maslowski is seeking here.

Most fundamentally, the common-law prohibition on champerty did not give Maslowski a *vested* (that is, permanent and unchangeable) contractual right to avoid contractual obligations that she otherwise agreed to undertake. That position fundamentally misunderstands our previous common-law prohibition on champertous contracts and similar prohibitions on enforcing contracts that are illegal or against public policy.

A review of how we have addressed this issue in the context of usury is illuminating. In that context, we have held that "[a] person has no vested rights in the defense of usury." *United Realty Tr. v. Prop. Dev. & Rsch. Co*., 269 N.W.2d 737, 743 (Minn. 1978) (quoting *Jenkins v. Union Sav. Ass'n*, 155 N.W. 765, 766 (Minn. 1916)). Consequently, we have held that even if a contract would have been usurious when the parties entered the contract, that same contract cannot be avoided as usurious if the law later changed such that the

repurchase rates in the contract were no longer usurious. Rather, the contract is fully enforceable and all interest due is payable as if the prior usury law has never existed. *United Realty Tr.*, 269 N.W.2d at 743; *see Ewell v. Daggs*, 108 U.S. 143, 149–51 (1883) (articulating the principle upon which we relied in *United Realty Trust*).

In so holding, we reasoned that usury laws are designed to serve broader societal interests in discouraging certain usurious contracts. If the societal interests change such that there is no longer a broad interest in discouraging those contracts, then there is no reason not to hold the contracting party to the terms to which the party otherwise voluntarily agreed. *See United Realty Tr.*, 269 N.W.2d at 743–44. As we stated in *United Realty Trust*:

> [T]he [usury] statute creates a privilege in the borrower, that privilege being the ability to avoid paying the interest he has previously agreed to pay. The modification of the [law] removes the previously existing privilege to the extent of the modification. The privilege ends when that which creates it ends. It can hardly be contended that a borrower has a vested right in this privilege to avoid obligations he has previously voluntarily assumed. As the United States Supreme Court stated in *McNair v. Knott*, 302 U.S. 369[, 373] (1937):
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> 'Placing the stamp of legality [after the fact] on a contract voluntarily and fairly entered into by parties for their mutual advantage takes nothing away from either of them. *No party who has made an illegal contract has a right to insist that it remain permanently illegal. Public policy cannot be made static by those who, for reasons of their own, make contracts beyond their legal powers. No person has a vested right to be permitted to evade contracts which he has illegally made.*'

United Realty Tr., 269 N.W.2d at 743 (emphasis added) (quoting *Am. Sav. Life Ins. Co. v. Fin. Affs. Mgmt. Co., Inc.*, 513 P.2d 1362, 1367 (Ariz. 1973)).

The same logic applies to Maslowski's argument that the abrogated common-law prohibition on champertous contracts vested in her a permanent contractual right to avoid paying the repurchase amount according to the schedule set forth in the Agreement. The prohibition on champertous contracts was meant to discourage " 'officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law.' " *Maslowski I*, 944 N.W.2d at 238 (quoting *Huber v. Johnson*, 70 N.W. 806, 807 (Minn. 1897)). Our decision in *Maslowski I* explained why this common-law prohibition on champertous contracts was no longer needed to serve those societal interests. *Id.* at 238–40 (identifying several reasons the prohibition on champertous contracts is no longer needed, including increased regulation of the legal profession, the recognized legitimacy of certain champerty-adjacent arrangements like contingency fee agreements and assignment of choses of action, and changes in the societal understanding of litigation as an economic asset rather than an evil to be avoided).

The purpose of the prohibition on champertous contracts was *not* to protect the individual who otherwise voluntarily entered into an illegal, champertous agreement. In *Maslowski I*, we recognized that the mechanism for protecting individual parties from unfair or inequitable contracts (including litigation financing agreements) is the distinct common-law doctrine of unconscionability. *Id.* at 241; *see also id.* at 240 (stating that "[a]lthough it is important that the victims of torts receive compensation for their injuries, they nonetheless have the freedom to contract, and we must not lightly disregard that basic principle"). That is what the district court will decide on remand.

In short, Maslowski took $6,000 from Prospect to help her with living expenses during the pendency of her personal injury litigation. She does not have a vested, permanent right to avoid the terms of a champertous contract which she (according to her own argument) illegally but voluntarily made. Accordingly, Maslowski's argument under *Hoven* fails.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

CONCURRENCE

MOORE, III, Justice, concurring.

I agree with the court's conclusion that the litigation financing agreement is not subject to Minnesota's usury statute. And, notwithstanding my grave concerns about whether the litigation to date in this case and the costs related to it are proportionate to the amount in controversy,[1] I also concur that the case should be remanded for the district court to determine whether the agreement's 60 percent repurchase rate is unenforceable under the common-law doctrine of unconscionability. I write separately to aid the district court in making this determination expeditiously in a years-long case that, in *Bleak House* fashion, "still drags its dreary length before the Court, perennially hopeless." Charles

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[1] *See* Minn. R. Civ. P. 1 ("It is the responsibility of the court and the parties to examine each civil action to assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issues. The factors to be considered by the court in making a proportionality assessment include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation.").

In March 2012, respondent Pamela Maslowski was injured in a motor vehicle accident and started a lawsuit to recover damages for the personal injuries she sustained in the accident. Two years later, in May 2014, Maslowski entered into the litigation financing agreement which is the subject of this litigation. The agreement provided Maslowski a net amount of $6,000, in return for Prospect's purchase of a maximum of $25,245 in any proceeds recovered from the lawsuit, based on an annual "repurchase rate" of 60 percent. In 2015, Maslowski brought a declaratory relief action seeking to void the litigation financing agreement. Six years and four appeals and related appeals later, in April 2021, the district court determined that the parties' financing agreement was enforceable in part and ordered Maslowski to pay Prospect the $6,000 advanced to her under the agreement, along with processing fees of $1,425 and simple interest at an annual rate of 8 percent, instead of 60 percent—the issue before us today. And in May 2021, Prospect moved for attorney fees and costs in the amount of $292,140.94 based on the agreement. That was 2 years and two more appeals ago.

Dickens, *Bleak House* 4 (Chapman & Hall 1914) (1853). Understanding that Maslowski may not be the last individual to challenge the enforceability of an interest rate in a litigation financing agreement,[2] I also write to invite the Legislature to consider regulation of the litigation financing industry in Minnesota.

A.

We have acknowledged that "a court of equity may decline to enforce an unconscionable contract." *Abernethy v. Halk*, 166 N.W. 218, 220 (Minn. 1918). The United States Supreme Court has described an unconscionable contract as a contract "such as no [person] in [their] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other." *Hume v. United States*, 132 U.S. 406, 411 (1889). The doctrine of unconscionability is not concerned with "a simple old-fashioned bad bargain." *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013) (citation omitted) (internal quotation marks omitted). Instead, this equitable doctrine, rooted in public policy considerations, allows courts to render unenforceable contract provisions that are so unfair and one-sided that they "shock the conscience." *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 202 (Cal. 2013) (citation omitted) (internal quotation marks omitted). While the threshold separating a bad bargain and an unconscionable one cannot be delineated with any bright line clarity, it is

[2] In using the term "interest rate," I do not suggest that litigation financing companies like Prospect are earning interest on a loan. I use the term more broadly to describe the profit that a litigation financing company would recover from the principal originally given to a party to a lawsuit.

nevertheless the responsibility of courts to "guard against [contract] provisions with unduly oppressive terms." *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1007 (Cal. 2018).

Our court has never explicitly formulated an approach for determining whether a contract is unconscionable. Most courts considering the question require a showing of both procedural unconscionability and substantive unconscionability. 8 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 18:10 (4th ed. 2010); *see, e.g.*, *Summers v. Crestview Apartments*, 236 P.3d 586, 590 (Mont. 2010); *Quicken Loans, Inc. v. Brown*, 737 S.E.2d 640, 657 (W. Va. 2012); *Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 924 (N.D. 2005). Procedural unconscionability concerns the fairness of the bargaining process, including whether the party disadvantaged by the unfair terms "lacked a meaningful choice in entering into the contract." *Kindred Healthcare Operating, Inc. v. Boyd*, 403 P.3d 1014, 1022 (Wyo. 2017). Substantive unconscionability concerns the actual terms of the agreement, requiring courts to determine whether the challenged provisions "*unreasonably* favor one party over the other." *Id.* (emphasis added); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197, 1199 (Wash. 2013) ("A term is substantively unconscionable where it is one-sided or overly harsh, [s]hocking to the conscience, monstrously harsh, or exceedingly calloused." (alteration in original) (citations omitted) (internal quotation marks omitted)).

Both procedural and substantive unconscionability appear particularly relevant to the determination of whether an interest rate in a litigation financing agreement is enforceable. I begin with procedural unconscionability and its focus on the bargaining process. The potential disparity in bargaining power between a litigation financing

company and an individual plaintiff seeking money to cover her living expenses while pursuing a personal injury claim—as Maslowski alleges was the case here—is deeply concerning. Being represented by counsel may certainly help alleviate any disparity in bargaining power. But access to legal advice does not necessarily protect a vulnerable individual from an unreasonably high interest rate in a litigation financing agreement when she is facing a dilemma. On the one hand, such a person can accept the money (and the accompanying high interest rate) from the litigation financing company so that she can continue to pursue her claim. On the other, the vulnerable individual can reject the financing terms, with a possible consequence that she may be forced to settle for far less than what is due—simply because the person needs money now.

The unfortunate reality is that far too many people are priced out of participation in our civil legal system. It is possible that litigation financing can help address this problem, increasing access to justice and leveling the playing field between parties with disparate resources. *See* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1299–1301 (2011). But we cannot ignore the disparity in bargaining power between the litigation financing companies and the individuals who may feel financially compelled to turn to them in order to have their day in court. *See* Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should be Tamed Not Outlawed*, 10 Fordham J. Corp. & Fin. L. 55, 63 (2004) (hereinafter *Wild West of Finance*) (recognizing that "[t]here is something unseemly about investors making money by betting on the outcome of litigation; investors making a lot of money for risk

that sometimes may be limited; and investors making money in circumstances involving people who do not have any”).

With respect to substantive unconscionability, a key question is whether a 60 percent interest rate in a litigation financing agreement “shocks the conscience” and “unreasonably favors” the litigation financing company. This determination involves consideration of the fact that litigation financing agreements are different than traditional loans. As scholars have noted, litigation financing may carry more risk than other types of loans or investments, and thus it may be reasonable as a matter of policy for such transactions to include a higher interest rate than more conventional loans. *See, e.g.*, Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 Vill. L. Rev 83, 116 (2008) (hereinafter *Another Subprime Industry*). But the fact that litigation financing carries more risk than other industries cannot be a carte blanche for litigation financing companies to charge any interest they see fit. It is notable that of states that have undertaken regulation of litigation financing agreement by placing caps on interest rates, all have settled on caps significantly lower than 60 percent. *See* Nev. Rev. Stat. § 604C.310 (40 percent annually); Ind. Code § 24-12-4.5-2(a)(1)(A) (36 percent annually); Ark. Code Ann. § 4-57-109(b)(1) (17 percent annually, per Ark. Code Ann. § 4-57-104 and Ark. Const., amend. LXXXIX, § 3); Tenn. Code Ann. § 47-16-110(a) (10 percent annually).

These issues represent just some of the considerations the district court may weigh to determine whether the repurchase rate in the litigation financing agreement in this case is unenforceable under the common-law doctrine of unconscionability. There are certainly

other considerations and facts relevant to this case that the parties may identify before the district court.

If the district court determines that the repurchase rate term is unconscionable, a court "may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." *Restatement (Second) of Contracts* § 208 (Am. L. Inst. 1981). In this case, the district court concluded that it was equitable for Prospect to recover the $6,000 it advanced to Maslowski, the stated fees of $1,425, and a fair rate of interest.[3] While the district court's conclusion that the usury statute should supply a fair repurchase rate for Prospect was based on an erroneous determination that the agreement was subject to the usury statute, the district court's balanced and judicious approach to weighing the equities in this case confirms that it is best suited to fashion any remedy that may be necessary to avoid an unconscionable result in this case.

B.

While our district courts are more than capable of scrutinizing litigation financing agreements to determine whether equity allows their enforcement, this burden should not be theirs alone to bear. For better or for worse, the litigation financing industry is here in

[3] The district court determined that interest should accrue on June 3, 2020—when *Maslowski I* announced that litigation financing agreements were legally enforceable under Minnesota law. On this issue, the court disagrees, holding that "because we have already held that the Agreement is valid and enforceable, the repurchase rate obligation accrues in accordance with the schedule the parties agreed to when they signed the valid and enforceable Agreement." I concur with this part of the court's opinion.

Minnesota. This case is just one example of the equitable issues district courts will face when disputes arise regarding the enforceability of a litigation financing agreement—concerns that include not just excessive interest rates but also punitive liquidated damages clauses and restrictions on the attorney-client relationship.[4] Additionally, amici participating in this case raise legitimate practical concerns about the effect of unchecked litigation financing agreements on plaintiffs and defendants alike, noting that such agreements may interfere with plaintiffs' ability to control litigation and settle, leading to prolonged litigation in cases that would have settled but for the financing terms.

For these reasons, it would be beneficial for the Legislature to address these concerns through regulation of the litigation financing industry in Minnesota. As the court notes, such regulation could include making litigation financing agreements subject to the usury statute or otherwise placing a cap on acceptable interest rates. The Legislature could also look to approaches taken by other states to regulate litigation financing industries. These approaches include drafting and disclosure requirements,[5] licensing or registration

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[4] In addition to concluding that the 60 percent repurchase rate was unenforceable, the district court concluded that the litigation financing agreement was unconscionable as to its penalty clauses and restrictions on Maslowski's relationship with her counsel. The court of appeals affirmed these conclusions. Prospect did not seek further review on the issue of whether these provisions were enforceable.

[5] *See* Ark. Code Ann. § 4-57-109(c); Me. Stat. tit. 9-a, § 12-104; Neb. Rev. Stat. § 25-3303(1); Ohio Rev. Code Ann. § 1349.55(B); Okla. Stat. tit. 14a, §§ 3-805, 3-807; Tenn. Code Ann. §§ 47-16-104, -106; Vt. Stat. Ann. tit 8, § 2253.

regimes for litigation financing companies that do business within their states,[6] restrictions on advertising and referral fees,[7] extending attorney-client privilege and confidentiality protections to communications between an individual's attorney and the litigation financing provider,[8] barring an attorney retained by an individual entering into a litigation financing agreement from having a financial interest in the litigation financing company,[9] requiring a right of rescission for people who enter into litigation financing agreements,[10] and enforcement measures for companies that violate state regulations.[11]

Scholars have also proposed regulations for litigation financing companies. *See, e.g.*, Steintz, *supra*, at 1326–36; *Wild West of Finance*, *supra*, at 67–76; *Another Subprime Industry*, *supra*, at 114–16. As the court notes, the Legislature is better poised to make these policy determinations. But until the Legislature steps in to regulate, the onus to ensure that individuals are not taken advantage of by unconscionable financing agreements will rest on our district courts.

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[6] Ind. Code § 24-12-9-1; Me. Stat. tit. 9-a, §§ 12-106 to -107; Neb. Rev. Stat. §§ 25-3307 to -3309; Okla. Stat. tit. 14a, §§ 3-809 to -813; Tenn. Code Ann. § 47-16-103; Vt. Stat. Ann. tit 8, §§ 2252, 2260.

[7] *See* Neb. Rev. Stat. § 25-3304; Okla. Stat. tit. 14a, § 3-814; Tenn. Code Ann. § 47-16-105(1)–(3); Vt. Stat. Ann. tit 8, § 2254(a)(1)–(3).

[8] *See* Ind. Code § 24-12-8-1; Neb. Rev. Stat. § 25-3306; Vt. Stat. Ann. tit 8, § 2255.

[9] *See* Ind. Code § 24-12-7-1.

[10] *See* Okla. Stat. tit. 14a, § 3-806; Tenn. Code Ann. § 47-16-104(2).

[11] *See* Ark. Code Ann. § 4-57-109(d); Ind. Code §§ 24-12-5-1 to -12-5-2; Okla. Stat. tit. 14a, § 3-815; Tenn. Code Ann. §§ 47-16-107 to -108; Vt. Stat. Ann. tit 8, § 2259.

When we abolished the common-law prohibition on champerty 3 years ago, we opened the door to litigation financing in Minnesota—or, as others might put it, we opened Pandora's box. Equitable remedies like unconscionability are an important backstop for individuals who are able to challenge the enforceability of unfair litigation financing agreements in courts. Nevertheless, Minnesotans may likely be better protected from predatory financing arrangements through prospective and comprehensive regulations—an issue I would encourage the Legislature to address.

HUDSON, Justice (concurring).

I join in the concurrence of Justice Moore.

CHUTICH, Justice (concurring).

I join in the concurrence of Justice Moore.