ARTICLE

THIRD-PARTY LITIGATION FUNDING: A CALL FOR DISCLOSURE AND OTHER REFORMS TO ADDRESS THE STEALTHY FINANCIAL PRODUCT THAT IS TRANSFORMING THE CIVIL JUSTICE SYSTEM

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Investors are pouring billions of dollars into large-scale (commercial) litigation funding, seeking to turn the courts into investment opportunities. Hedge funds, institutional investors, and others front money to law firms in exchange for a share of any settlement or judgment from an individual lawsuit or portfolio of lawsuits. These arrangements occur across a wide range of cases, including mass torts, commercial disputes, and intellectual property lawsuits. Third-party litigation funding is fundamentally changing the civil justice system in the United States. Proponents claim that such funding improves access to justice. The practice, however, has many negative impacts ranging from compromising lawyers' ethical duties; contributing to mass filings of speculative or unsupported tort claims; prolonging litigation and making settlements more difficult and costly to achieve; undermining U.S. companies; and creating a possible path for theft of trade secrets or other sensitive information. Some federal courts have taken the modest step of requiring disclosure of litigation financing. A growing number of states require mandatory disclosure of third-party litigation funding agreements. This Article advocates that courts and legislatures should require disclosure of third-party litigation funding agreements and adopt additional reforms such as to prevent funders from controlling or influencing litigation decisions.

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INTRODUCTION

Hedge funds, institutional investors, foreign sovereign wealth funds, and wealthy individuals are pouring enormous sums of money into funding lawsuits. These "third-party" funders front money to law firms in exchange for a portion of any recovery the firm may obtain in a settlement or court award on a client's behalf.[1] "Well-heeled investors" view large-scale (commercial) third-party litigation funding ("TPLF") as a lucrative opportunity to obtain hefty returns "that are largely untethered to the wider markets."[2]

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[1] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 5 (2022) [hereinafter GAO 2022 Report]. Large-scale (commercial) TPLF is different from consumer lawsuit lending. Those arrangements are between a funder and the plaintiff in a personal injury case. Consumer lawsuit lenders typically provide "a relatively small amount (typically under $10,000) to the plaintiff, who uses it for living expenses." *Id.* at GAO Highlights.

[2] Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, WALL ST. J. (May 15, 2016), https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262?reflink=desktopwebshare_permalink. For example, the CEO of TPLF heavyweight Burford Capital LLC told *60 Minutes*, "On an average basis, we'll largely double our money," and added, "We're right about 90% of the time . . . ." Lesley Stahl, *Litigation Funding: A Multibillion-dollar Industry for Investments in Lawsuits with Little Oversight*, CBS NEWS:

TPLF arrangements occur across a range of cases, including mass tort litigation, antitrust, asset recovery, commercial disputes, and patent cases. Two-thirds of TPLF is invested in lawsuit "portfolios" rather than individual cases.[3]

TPLF "funding is typically in the millions of dollars," according to the U.S. Government Accountability Office ("GAO").[4] Westfleet Advisors, a leading U.S. litigation finance advisory firm, reports that single-matter deals averaged $4.8 million in 2023 and portfolio deals averaged almost $10 million.[5] In the mass tort context, the "funding provided to individual law firms now regularly exceeds $50 million," and at least one plaintiffs' law firm has received "$250 million in funding."[6]

TPLF is fundamentally changing the civil justice environment in the United States. As Professor Maya Steinitz, an expert on litigation finance, told *60 Minutes*:

> "[L]itigation funders" . . . are reshaping every aspect of the litigation process—which cases get brought, how long they are pursued, when are they settled. But all of this is happening without transparency. So we have one of the three branches of government, the judiciary, that's really being quietly transformed.[7]

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60 MINUTES (Dec. 18, 2022), https://www.cbsnews.com/news/litigation-funding-60-minutes-transcript-2023-07-23/ [https://perma.cc/U8VB-QCBZ] (interview of Christopher Bogart, CEO, Burford Capital LLC); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-25-107214, INTELLECTUAL PROPERTY: INFORMATION ON THIRD-PARTY FUNDING OF PATENT LITIGATION 11 (2024) ("[S]ome funders require a payout amounting to two or three times their investment before the patent owner begins receiving any proceeds from a successful lawsuit, according to our review of funding agreements and our interviews with stakeholders.") [hereinafter GAO 2024 Report].

[3] WESTFLEET ADVISORS, THE WESTFLEET INSIDER: 2023 LITIGATION FINANCE MARKET REPORT 6 (5th ed. 2023) [hereinafter 2023 WESTFLEET INSIDER REPORT]; *see also* Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. 563, 574 (2021) ("Law firm funding is usually provided on a 'portfolio' basis, with the funder's investment secured by a basket of three or more matters. With portfolio funding, the funder frequently provides capital to the firm at fixed intervals, such as on a quarterly or monthly basis."); Emily R. Siegel, *Mass Tort Lawyers Trapped in Cycle of Debt as Cases Drag On*, BLOOMBERG L. (Nov. 18, 2024) ("Loans to law firms often come with double-digit interest rates that can exceed 20%. The deals typically mature after three to four years. If cases aren't resolved by that time, borrowers are forced to restructure the loans—with pricey concessions to lenders—or refinance with a new lender.").

[4] GAO 2022 Report, *supra* note 1, at GAO Highlights.

[5] 2023 WESTFLEET INSIDER REPORT, *supra* note 3, at 3.

[6] Tom Baker, *Where's the Insurance in Mass Tort Litigation*, 101 TEX. L. REV. 1569, 1586 (2023); *see also* Emily R. Siegel, *Fortress' Billions Quietly Power America's Biggest Legal Fights*, BLOOMBERG L. (Oct. 16, 2024), https://news.bloomberglaw.com/business-and-practice/mass-tort-lawyers-trapped-in-cycle-of-debt-as-cases-drag-on [https://perma.cc/7NND-N8UE] ("What started as $5 million to $10 million investments in single commercial cases has grown into loans exceeding $100 million to law firms for their entire caseloads. It's a built-in diversified portfolio that hedges risk.").

[7] *Stahl*, *supra* note 2 (interview of Prof. Maya Steinitz); *see also* Laurel Terry, Editorial, *Regulating the Industry Won't be Easy*, N.Y. TIMES (Nov. 15, 2010), https://www.nytimes.com/

Professor Donald Kochan has noted that "[TPLF] turns the American justice system into a financial playground by transforming lawsuits into investment vehicles."[8]

This Article will briefly describe the rapidly growing TPLF industry in the United States. Next, the Article will discuss the numerous public policy concerns raised by TPLF. The Article will then summarize court cases addressing the discovery of TPLF agreements. In addition, the Article summarizes recent TPLF developments in the federal judiciary's rulemaking body and in Congress. The Article also discusses local court rules and case management orders in certain federal courts that require TPLF disclosure. The Article finishes with a discussion of state legislation providing for disclosure of TPLF agreements and offers suggestions for additional reforms. The Article concludes that mandatory disclosure of TPLF agreements is sound public policy and should be adopted by courts and legislatures along with other reforms.

I. LARGE-SCALE TPLF IS RAPIDLY EXPANDING

Large-scale TPLF began in Australia, made its way to the United Kingdom, and arrived in the United States about a decade ago.[9] The

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roomfordebate/2010/11/15/investing-in-someone-elses-lawsuit/regulating-the-industry-wont-be-easy [https://perma.cc/2J9S-AQCT] ("Third-party litigation funding has been described by the Rand Institute for Civil Justice as one of the 'the biggest and most influential trends in civil justice.'").

[8] Donald J. Kochan, Editorial, *Keep Foreign Cash Out of U.S. Courts*, WALL ST. J. (Nov. 24, 2022), https://www.wsj.com/articles/keep-foreign-cash-out-of-u-s-courts-litigation-courts-foreign-cash-profit-legal-reform-funder-lawsuit-money-11669227764?st=wFCFb4&reflink=desktopwebshare_permalink. Burford Capital LLC once explained in an Annual Report:

> A litigation claim is an asset. It may seem strange to think of litigation in that way, but if one strips away the drama and the collateral dynamics associated with the litigation process, a litigation claim is nothing more than an effort to get money to change hands. In other words, a litigation claim is just like any other receivable.

BURFORD CAPITAL LLC, 2015 ANNUAL REPORT 4 (2015).

[9] MARK POPOLIZIO, FOLLOW THE NEW MONEY TRAIL: THE RISE OF THIRD-PARTY LITIGATION FUNDING 4 (2021) ("The origins of modern day TPLF practices are commonly traced to Australia where this practice started to emerge in the mid-1990s . . . . Outside of Australia, TPLF has also become an established practice in several other countries, including Canada, New Zealand, South Africa, and the United Kingdom. In the United States, third-party funding in its current form is newer and is noted to have really taken hold over the past decade."); *A Brief History of Litigation Finance*, THE PRACTICE (Sept./Oct. 2019), https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation-finance/ [https://perma.cc/4FCH-MKBE] (discussing history of litigation finance industry in Australia and the United Kingdom). Professor Steinitz has explained:

> The developments in the United Kingdom and in Australia must be viewed in light of the fact that both jurisdictions are governed by the so-called British rule which requires the losing party to pay the winner's attorneys' fees. Conversely, the American rule requires that each party bear its own fees. This means access to justice is more limited in British rule jurisdictions as the rule leads to less litigation, including less meritorious litigation.

practice has taken off with the loosening of common law doctrines on maintenance, champerty, and barratry that prohibited the outside financing of litigation.[10]

GAO found that TPLF funding "more than doubled" from 2017 to 2021.[11] According to commentators, "This once-fledgling industry is valued at approximately $15 billion globally and over $3 billion domestically."[12] TPLF investment is "projected to grow to an astounding $25–30 billion by the end of the decade."[13]

The increasing use of TPLF is partly due to the "'vendorization' of mass tort litigation."[14] One funder has explained:

> To understand what the financing is for, who provides it, and why the numbers get so big, go to [the] Mass Torts Made Perfect [conference for plaintiffs' lawyers in Las Vegas] and walk through the exhibition hall at Bellagio. There are tons of booths. For everything that has to be done in the lifecycle of a mass tort case—advertising, calling clients, intaking clients, following up to get medical records, everything through the process all the way through litigating the case—there are multiple vendors that law firms can and do outsource to. If you are an aggregator, meaning you find and sign-up clients, you make deals with firms litigating and settling the cases. They

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Maya Steinitz, *Whose Claim is This Anyway? Third-Party Litigation Funding,* 95 MINN. L. REV. 1268, 1278 n.23 (2011).

[10] Sara Randazzo, *Investors Flock to Back Lawsuits in Exchange for a Cut of Settlements*, WALL ST. J. (Sept. 18, 2017), https://www.wsj.com/articles/litigation-funder-longford-raises-500-million-as-industry-surges-1505707261?st=Kt7aQA&reflink=desktopwebshare_permalink. *But see* KY. REV. STAT. § 372.060 (2024) (champertous contracts and conveyances void); GA. CODE § 13-8-2(a)(5) (2024) (contracts of maintenance or champerty deemed contrary to public policy).

[11] GAO 2022 Report, *supra* note 1, at 11.

[12] Brett Clements & Elyse Shimada, *Dark Money: Why Courts Should Enforce Disclosure of Third-Party Litigation Funding*, LEGAL OPINION LETTER 1 (May 17, 2024), https://www.wlf.org/wp-content/uploads/2024/05/0521724ClementsShimada_LOL.pdf [https://perma.cc/2U85-LJHT]. According to Westfleet Advisors, 39 active funders had $15.2 billion in assets under management and committed $2.7 billion to new litigation financing agreements in 2023. 2023 WESTFLEET INSIDER REPORT, *supra* note 3, at 3.

[13] Clements & Shimada, *supra* note 12; *see also* Irina Fan et al., *U.S. Litigation Funding and Social Inflation: The Rising Costs of Legal Liability*, 2021 SWISS RE INST. 8 (Dec. 2021), https://www.swissre.com/institute/research/topics-and-risk-dialogues/casualty-risk/us-litigation-funding-social-inflation.html [https://perma.cc/V8SP-PUEH] (explaining that TPLF could reach $31 billion by 2028); Annie Pavia, *Analysis: Are Boom Times Ahead for Litigation Finance?,* BLOOMBERG L. (Nov. 13, 2022), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-are-boom-times-ahead-for-litigation-finance [https://perma.cc/68QW-PHF5] ("[TPLF] will continue to grow among law firms and corporations as the legal profession continues to grow accustomed to this financial tool.").

[14] Baker, *supra* note 6, at 1587.

> include your inventory of clients in return for a share of the legal fees. Funding pays for all of the above.[15]

II. LARGE-SCALE TPLF RAISES SERIOUS CONCERNS

Proponents of TPLF claim the practice levels the playing field between large, well-financed litigants who are well accustomed to fighting in court and individuals or small to mid-sized companies who may find themselves outgunned.[16] There are, however, serious downsides to these investments.

A. TPLF Poses Serious Ethical Issues

Lawyers have an ethical obligation to exercise independent judgment and zealously represent their clients' interests. TPLF "weakens the traditional attorney-client relationship and raises serious questions concerning the funder's place in that relationship . . . . Funders have no historical duty to represent their clients zealously and guard their confidences. Rather, funders are only in the business of making money for their investors."[17] As one commentator explained, a TPLF investor is "a purely profit-seeking actor engaged in a form of gambling for profit, untethered to any ethical or professional interest in justice generally, or in the personal circumstances of the plaintiff in particular."[18]

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[15] *Id.* at 1586–87.

[16] Jennifer Smith, *Litigation Investors Gain Ground in U.S.*, WALL ST. J. (Jan. 12, 2014), http://online.wsj.com/article/SB10001424052702303819704579316621131535960.html?reflink=desktopwebshare_permalink. Professor Joanna Shepherd has questioned whether TPLF actually improves access to justice, explaining:

> [T]he goal of third-party financiers is not to improve access to justice. Although improving justice may be a positive side effect of third-party financing, the financiers are ultimately investing in commercial litigation to maximize the expected returns on their investments. As a result, the types of cases that third-party investors finance often diverge from the types of cases where third-party financing can improve access to justice.

Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593, 600 (2012).

[17] U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, THIRD PARTY FINANCING: ETHICAL & LEGAL RAMIFICATIONS IN COLLECTIVE ACTIONS 3 (2009); *see also* Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155, 1168 (2015) ("[T]he introduction of a financier into the attorney-client relationship can produce conflicts or reinforce existing ones."); J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 935 (2016) ("[O]ne could imagine any number of legitimate concerns about the ways in which litigation funding could alter the incentives of plaintiffs' counsel and potentially create conflicts between its loyalty to the class and its contractual obligations to the litigation funder.").

[18] Paul Taylor, *Disclosing High Roller Bankrolling in the Patent Litigation Casino: The Need to Regulate Third Party Litigation Financing*, 103 J. PAT. & TRADEMARK OFF. SOC'Y 21, 25 (2023); *see also* Letter from U.S. Rep. James Comer, Chairman, Comm. on Oversight &

Thus, it may be in a client's interest to settle a case, but a funder whose sole motivation is to pursue the largest possible recovery may push the attorney to reject a reasonable settlement offer in pursuit of a "nuclear verdict."[19] Similarly, a lawyer working with a funder "may feel compelled to unreasonably risk trial to attempt generating a verdict large enough to cover all third-party payment obligations and to provide a satisfying return for counsel and client."[20] Claimants may be harmed "[w]hen reasonable settlement options are rejected on this basis . . . ."[21] Other times, funders may pressure law firms to accept a settlement "because the company wants a guaranteed return on its investment," even though the plaintiff may be able to achieve a larger recovery by working up the case and taking it to trial.[22]

Funders often claim they are passive investors.[23] But, as Chief Judge Colm Connolly of the United States District Court for the District of Delaware told attendees at a Stanford Law School conference: "I've heard funders say that before . . . . If you control the purse strings, you exercise control."[24] Chief Judge Connolly requires third-party litigation funding disclosure in his court.[25] Likewise, Professor Maya Steinitz told *60 Minutes*:

> The funders are not regulated. There's nothing precluding them legally from pressuring a client to settle. The rules

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Accountability, to Hon. John Roberts, C.J. of the U.S., Presiding Officer, Jud. Conf., at 2 (July 12, 2024), https://oversight.house.gov/wp-content/uploads/2024/07/TPLF-Letter-07122499.pdf [https://perma.cc/FS8L-6D8P], ("Without transparency measures in place, there is a strong risk of profit-driven investment funds, both foreign and domestic, directly influencing litigation proceedings with aims that may not be fully aligned with the interests of claimants."); Lisa Miller, *Perils of Third-Party Funding*, 40 L.A. LAW. 19, 20 (2017) ("Counsel's ethical obligations require that he or she act in the best interest of the client and in conformity with the client's directives. Alternatively, third party funders are primarily ethically obligated to bring in the best possible return for investors. None of the third-party funders' fiduciary duties extend to counsel's client, before or after contracts are signed and funds are advanced.").

19 *See, e.g.*, *In re* Pork Antitrust Litig., Nos. 18-cv-1776 (JRT/JFD), 22-md-3031 (JRT/JFD), 21-cv-1374, 22-cv-1750, 2024 WL 511890, at *3 (D. Minn. Feb. 9, 2024), *aff'd*, 2024 WL 2819438 (D. Minn. June 3, 2024).

20 Miller, *supra* note 18, at 20.

21 *Id*.

22 Gareth Purnell, Comment, *The Disclosure of Third-Party Litigation Funding Agreements Is Necessary to Resolve Ethical Dilemmas Created by The Third-Party Lender Industry*, 13 ST. MARY'S J. LEGAL MAL. & ETHICS 361, 371 (2023).

23 Stahl, *supra* note 2 (interview of Christopher Bogart, CEO, Burford Capital LLC).

24 Michael Shapiro, *Courts Not a Casino, Says Judge Seeking Third-Party Transparency*, BLOOMBERG L. (Mar. 28, 2024), https://news.bloomberglaw.com/ip-law/courts-not-a-casino-says-judge-seeking-third-party-transparency [https://perma.cc/LK8D-QU25]; GAO 2024 Report, *supra* note 2, at 25–26 ("[P]laintiffs may be required to consult with their funder before accepting a settlement offer, according to funding agreements we reviewed and funders we interviewed." One mediator told GAO that "it was clear that the funders . . . had influence that sometimes complicated the [settlement] discussions.").

25 Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022).

> of ethics are very clear that the lawyer has to abide by the wishes of the client. But human nature is human nature. There may be an inclination to be pulled towards the person who is paying.[26]

Professor Samir Parikh warns that litigation "financiers will never be passive partners."[27] To the contrary, "[o]paque capital is moving into mass tort financing to dictate outcomes."[28]

A high-profile dispute between food distributor Sysco Corp. and Burford Capital LLC recently exposed a funder actively working to prevent its client from settling claims.[29] The Sysco dispute appears to contradict public statements by Burford Capital's CEO that funded parties are "free to run their litigations as they see fit."[30] Burford Capital "holds itself out as 'the world's largest provider of commercial legal finance.'"[31]

Sysco, a large food distributor, alleged price-fixing conspiracies against suppliers in the beef and pork industries. Sysco financed the

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[26] Stahl, *supra* note 2 (interview of Prof. Maya Steinitz); *see also* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 484 (2010) ("[A] key concern is that third-party funding will diminish clients' control over their claims generally, and in particular in connection with the decision of when and for how much to settle.").

[27] Samir Parikh, *Opaque Capital and Mass Tort Financing*, 133 YALE L.J. FORUM 32, 32 (abstract) (2023).

[28] *Id.*; *see also* JOHN H. BEISNER ET AL., U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, GRIM REALITIES: DEBUNKING MYTHS IN THIRD-PARTY LITIGATION FUNDING 20 (2024) (stating that given the high returns funders seek on their investments, it is "no surprise that TPLF investors are proactive in influencing and controlling their investments—i.e., protecting them"); John E. Hall, Jr. et al., *Modern Litigation: The Effect of Discoverability of Third-Party Litigation Funding (Part 1 of 2)*, FOR THE DEF. (DRI, Chi., Ill.), Mar. 2021, at 20, 24. ("At times, funders may overtly attempt to control litigation by contractually acquiring the right to choose counsel and the right to formal settlement authority. A funder may also threaten to withdraw financing unless the litigation proceeds according to its own strategic preferences. Funders also may engage in less obvious forms of control. For example, long-term working relationships between funders and counsel may enable the funder to exercise significant influence over counsel's decision making.") (citing Steinitz, *supra* note 17, at 1168).

[29] Editorial, *The Litigation Finance Snare*, WALL ST. J. (Mar. 21, 2023), https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb?st=iKxTsa&reflink=desktopwebshare_permalink; Hannah Albarazi, *When a Litigation Funder Is Accused of Taking Over the Case*, LAW360 (Mar. 15, 2023), https://www.law360.com/articles/1584860/when-a-litigation-funder-is-accused-of-taking-over-the-case [https://perma.cc/F29X-ZDHR]; Emily R. Siegel, *Sysco Says $140 Million Litigation Funder Blocking Lawyer Change,* BLOOMBERG L. (Mar. 21, 2023), https://news.bloomberglaw.com/business-and-practice/sysco-says-140-million-litigation-funder-blocking-lawyer-change [https://perma.cc/G85T-U5PE].

[30] Stahl, *supra* note 2 (interview of Christopher Bogart, CEO, Burford Capital LLC); *see also* Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 694 (Fla. 3d Dist. Ct. App. 2009) (discussing a litigation funding agreement that gave the funder: the power to "approve counsel for the plaintiffs"; "veto power over whether the litigation was filed, who would file it and how it would be pursue"; and "the final say over any settlement agreements proposed to the plaintiffs").

[31] *In re* Pork Antitrust Litig., Nos. 18-cv-1776 (JRT/JFD), 22-md-3031 (JRT/JFD), 21-cv-1374, 22-cv-1750, 2024 WL 511890, at *1 (D. Minn. Feb. 9, 2024), *aff'd*, 2024 WL 2819438 (D. Minn. June 3, 2024).

litigation with "over $140 million of litigation financing provided by Burford Capital."[32] The litigation funding agreement "gave Burford the authority to approve or disapprove of settlements."[33] Eventually, "[m]atters came to a head . . . when Sysco negotiated settlements with some defendants, and Burford, thinking the settlement amounts too low, withheld its approval . . . ."[34]

Sysco and Burford Capital entered into arbitration over Burford's veto regarding the proposed settlements. Ultimately, the companies "resolved their differences by engineering an assignment of Sysco's antitrust claims" to a '"special purpose vehicle' established by Burford."[35] A federal magistrate judge in Minnesota prohibited the Burford affiliate from being substituted for Sysco, explaining that the transfer "has caused serious practical problems in this litigation, and will allow a financer with no interest in the litigation beyond maximizing profit on its investment to override decisions made by the party that actually brought suit . . . ."[36] The magistrate added: "The largest harm that condoning Burford's efforts to maximize its return on investment would cause is the harm of forcing litigation to continue that should have settled."[37]

A federal district court judge affirmed the magistrate's decision, explaining that "Sysco and Burford's conduct that resulted in the assignment agreement threatens the public policy favoring the settlement of lawsuits."[38] The court also noted that while Minnesota has "abolished its common-law prohibition against champerty, courts must still 'be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation.'"[39]

Reuters has also reported about a dispute in which a lawyer allegedly separated from his former firm for reasons that included ethical differences caused by a litigation funder conditioning its funding for mass arbitration claims on early settlements.[40] The lawyer said he was told that the funder

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[32] *In re* Pork Antitrust Litig., Nos. 18-cv-1776 (JRT/JFD), 22-md-3031 (JRT/JFD), 21-cv-1374, 22-cv-1750, 2024 WL 2819438, at *1 (D. Minn. June 6, 2024).

[33] *In re Pork Antitrust Litig.*, 2024 WL 511890, at *1; *see also id.* at *3 ("Sysco is required, under Amendment No. 1 to the Second Amended and Restated Capital Provision Agreement between Burford and Sysco, to immediately email to Burford any settlement offers it receives 'and shall not accept a settlement without the Capital Providers' prior written consent, which shall not be unreasonably withheld . . . .'").

[34] *Id.* at *3.

[35] *Id.* at *1.

[36] *Id.*

[37] *Id.* at *7.

[38] *In re Pork Antitrust Litig.*, 2024 WL 2819438, at *4.

[39] *Id.* (quoting Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 241 (Minn. 2020)). In contrast, a federal judge in Illinois agreed to allow a Burford affiliate to be substituted for Sysco in similar price-fixing litigation against broiler chicken producers. *In re* Broiler Chicken Antitrust Litig., No. 16 C 8637, 2024 WL 1214568 (N.D. Ill. Mar. 21, 2024).

[40] Alison Frankel, *Mass Arbitration Target Valve Accuses Law Firm, Litigation Funder of 'Extortion*,' REUTERS (Dec. 8, 2023), https://www.reuters.com/legal/legalindustry/

"had to control the arbitrations because otherwise absent an early settlement the litigation could go on for years and [the funder] was not interested in investing in years of litigation."[41]

Apart from the ethical problems TPLF poses for funded lawyers and law firms, "[j]udges may need to know the identities of funders in order to assess potential conflicts of interest the judges themselves may have, such as financial conflicts."[42] As then-U.S. House Judiciary Committee Chair Bob Goodlatte observed, "judges and parties need to know when and how TPLF is being used, so that appropriate steps can be taken to avoid conflicts of interest, to ensure compliance with ethical rules, and to protect the legitimate interests of all litigants."[43]

B. TPLF Fuels the Filing of Unsupported and Speculative Mass Tort Claims

TPLF fuels speculative lawsuits because it "reduces—even eliminates—the claimant's downside risk of testing questionable claims in court."[44] Professor Tom Baker has described the psychological impact on funded firms as similar to a gambler playing with house money.[45] Funders,

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column-mass-arbitration-target-valve-accuses-law-firm-litigation-funder-2023-12-08/ [https://perma.cc/A79X-V9D9].

41 *Id.* (quoting former Zaiger lawyer William Bucher). Fortress Investment Group, which funds mass tort and IP litigation, is described by insiders as intricately involved in the litigation it funds. Siegel, *supra* note 6. As Fortress' managing partner candidly noted, "We see where funds go. If you do something you're not supposed to do, we're gonna be upset." *Id*. (quoting Fortress managing partner and co-CIO Jack Neumark).

42 Jayme Herschkopf, Fed. Jud. Ctr., Third-Party Litigation Finance 9 (2017); *see also* Kyle Bjornlund & Ryan Hanofee, *How Third-Party Litigation Financing May Be Affecting Your Practice*, For the Def. (DRI, Chi., Ill.), July 2015, at 18 ("As the number of companies that provide litigation funding grows, the interests of an attorney, judge, or mediator or arbitrator are more likely to conflict with the source of a plaintiff's funding.").

43 Letter from Hon. Bob Goodlatte, Chair, U.S. House of Reps., Comm. on the Jud., to Rebecca Womeldorf, Sec. of the Comm. on Rules of Prac. & Proc. of the Admin. Office of the U.S. Courts (Nov. 1, 2017) (No. 17-CV-FFFFFF), https://www.uscourts.gov/sites/default/files/17-cv-ffffff-suggestion_goodlatte_0.pdf [https://perma.cc/N3TP-5AR2]; *see also* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. Rev. 388, 445 (2016) ("The funded party should be required to disclose to the judge or arbitrator the identity of the third-party funder so that the judge or arbitrator can determine whether he or she has a connection to the funder that would require recusal.").

44 U.S. Chamber of Com. Inst. for Legal Reform, *supra* note 17, at 2.

45 Professor Tom Baker explains:

> Non-recourse financing transforms the mental framing of litigation expenses from a loss to a foregone gain. Thanks to the financing, the law firm does not have to pay its own money for the costs of acquiring and managing its mass tort cases until the comparatively distant future. In that comparatively distant future, the law firm will only have to pay those costs and the associated interest out of the proceeds of the mass tort settlements. From the law firm's perspective, those future proceeds are seen as gains. Thus, non-recourse litigation financing allows a law firm to avoid a certain loss today (paying the costs of litigation expenses out of law firm capital) in return for making a promise to pay that money back only

in turn, are able to finance such risk-taking because, "unlike individual claimants, funding companies are able to spread the cost of litigation over a broad portfolio of cases and among numerous investors . . . ."[46]

The practice has attracted critics. For example, Delaware federal district court Chief Judge Colm Connolly said, "I don't believe our courts are casinos where people should just go to profit."[47] He added, "I think that's bad for the system and I think it undermines the importance of our courts."[48]

TPLF is playing an especially key role in the growth of mass tort litigation.[49] Mass tort cases are fueled by legal services advertisements sponsored by lead generating companies.[50] These "campaigns are often made possible by third-party financing . . . . From 2017 to 2021, an astonishing $6.8 billion was spent on legal advertising, underscoring the magnitude of this issue."[51] As the American Tort Reform Association's president explained in a letter to a congressional committee:

> TPLF can create litigation, not just fund it. Investments by outside funders have enabled the growth of mass tort litigation by covering upfront costs for maximizing the number of claims to flood the courts and overwhelm defendants, and by spreading the risk of filing speculative lawsuits.
>
> An entire industry has developed to generate and settle mass tort litigation. Law firms and businesses known as "lead generators" spend extraordinary sums on lawsuit advertising. . . . These ads have also inundated social media. . . . Call centers, sometimes in other countries, gather medical and other information from

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> out of potential foregone future gains (revenue from cases that are successfully resolved). Indeed, non-recourse litigation funding arbitrages the psychological difference between loss and foregone gain so well that it is a wonder that non-recourse lending to contingent fee lawyers is not even more widespread.

Baker, *supra* note 6, at 1589.

46 *Id.*

47 Shapiro, *supra* note 24.

48 *Id.*

49 ADVAMED, DARK MONEY: UNDISCLOSED THIRD PARTY LITIGATION FUNDING AND ITS IMPACT ON MEDICAL TECHNOLOGY 1 (2023) ("Outside financing that generates mass tort litigation is a driving force behind litigation today.").

50 *Id*. at 8 ("Bolstered by outside investment, law firms and businesses known as 'lead generators' spend extraordinary sums to identify potential plaintiffs through television, social media, and print advertisements, and even telephone and email solicitations.").

51 AMERICAN TORT REFORM ASS'N, TRIAL LAWYER PLAYBOOK 3 (2023); *see generally* CARY SILVERMAN, U.S. CHAMBER INST. FOR LEGAL REFORM, GAMING THE SYSTEM: HOW LAWSUIT ADVERTISING DRIVES THE LITIGATION LIFECYCLE (2020).

> those who respond, then package and sell potential claims to interested law firms.[52]

Plaintiff lawyers and funders appreciate that if plaintiff firms can quickly generate thousands of claims tying a widely used product to a common illness, the defendant will face pressure to settle, even when sound science does not support the lawsuits. The settlements produce "a substantial pay-out to both the contingency-fee lawyers and investors."[53]

TPLF's role in mass tort claim generation was also described by a former employee of a plaintiffs' law firm.[54] In a lawsuit, the employee claimed he was terminated because the law firm did not want to pay substantial commissions owed to him for raising over $93 million in TPLF for the law firm in just four months.[55] The ex-employee's complaint described the law firm's business model as follows:

> (i) borrow as much money as possible; (ii) buy as many tv ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vi) lather, rinse and repeat . . . .[56]

Many cases funded by TPLF are housed in federal court multi-district litigations ("MDLs"). In recent years, MDL cases—primarily involving

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[52] Letter from Sherman Joyce, President, Am. Tort Reform Ass'n, to Hon. James Comer, Chairman, and Hon. Jamie Raskin, Ranking Member, Comm. on Oversight & Accountability of the U.S. House of Reps., at 3–4 (Sept. 11, 2023) (Re: Hearing on "Unsuitable Litigation: Oversight of Third-Party Litigation Funding"), https://www.atra.org/wp-content/uploads/2023/09/DOC091123.pdf [https://perma.cc/A3CT-PBLL]; *see also* Emily R. Siegel, *Mass Tort Marketer Hires Ex-LexShares CEO to Lead Funding Program*, BLOOMBERG L. (Aug. 20, 2024), https://news.bloomberglaw.com/business-and-practice/mass-tort-marketer-hires-ex-lexshares-ceo-to-lead-funding-program [https:/perma.cc/SRP5-6K4T] (stating that half of mass tort marketing firm Consumer Attorney Marketing Group's ("CAMG") business comes from litigation funders and that "CAMG is working directly with litigation funders and pairing them with lawyers to generate leads. It's a sign that funders have become increasingly intertwined with marketing as they set their sights on mass torts.").

[53] Letter from Sherman Joyce, *supra* note 52, at 4.

[54] Paul Barrett, *Inside Massive Injury Lawsuits, Clients Get Traded Like Commodities for Big Money*, BLOOMBERG L. (Oct. 22, 2015), https://news.bloomberglaw.com/business-and-practice/inside-massive-injury-lawsuits-clients-get-traded-like-commodities [https://perma.cc/S8DC-UVRC].

[55] Plaintiff's Original Petition and Request for Disclosure, Shenaq v. Akin, No. 2015-57942, at 28 ¶ 71 (Tex. Dist. Ct. Harris Cty. Sept. 29, 2015).

[56] *Id.* at 29 ¶ 76.

product liability mass torts—have made up more than half of the federal civil caseload (excluding most prisoner and Social Security cases).[57] Data from the Judicial Panel on Multidistrict Litigation and the United States Courts, analyzed by the group Lawyers for Civil Justice, shows that "[a]s of the end of fiscal year 2023, MDL cases constituted 71.3% of the pending federal civil caseload, up from just 29 percent 12 years earlier."[58]

Mass tort cases are often filed without proper vetting, leading to large numbers of unsupported claims—i.e., cases where the claimant did not use the product at issue, did not suffer from the injury that is the focus of the litigation, or the claim is time-barred. For example, in an MDL involving a medical device, then-Chief Judge Clay Land of the U.S. District Court for the Middle District of Georgia observed that MDLs invite "cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action."[59] Judge M. Casey Rodgers of the U.S. District Court for the Northern District of Florida has explained that "high volumes of unsupportable claims clog the docket, interfere with a court's ability to establish a fair and informative bellwether process, frustrate efforts to assess the strengths and weaknesses of the MDL as a whole, and hamper settlement discussions."[60]

Empirical evidence from Lawyers for Civil Justice shows that there are tens of thousands of unsupported claims in some of the largest MDLs.[61] Examples include:

- Mentor Corp. Transobturator Sling Products MDL—75% of cases dismissed;
- Ethicon, Inc. Pelvic Repair System Products Liability Litigation MDL—53% of cases dismissed;

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[57] Dave Simpson, *MDLs Surge to Majority of Entire Federal Civil Caseload*, LAW360 (Mar. 14, 2019), https://www.law360.com/articles/1138928/mdls-surge-to-majority-of-entire-federal-civil-caseload [https://perma.cc/NRK4-6J7M] (providing that MDLs accounted for 52% of the pending federal civil cases at the end of the 2018 fiscal year); *see also* Daniel S. Wittenberg, *Multidistrict Litigation Dominating the Federal Docket*, ABA J. (Feb. 19, 2020), https://www.americanbar.org/groups/litigation/resources/litigation-news/2019/fall/multidistrict-litigation-dominating-federal-docket/ [https://perma.cc/H8XX-SDGL].

[58] Press Release, Lawyers for Civil Justice, *Over 70% of Federal Civil Cases Remain in MDLs as of Fiscal year 2023* (Apr. 4, 2024) (reporting that 417,137 civil cases out of 584,986 federal civil cases, excluding most prisoner and Social Security cases, were pending in MDLs as of the end of fiscal year 2023).

[59] *In re* Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig., No. 4:08–MD–2004 (CDL), 2016 WL 4705827, at *2 (M.D. Ga. Sept. 7, 2016).

[60] Judge M. Casey Rodgers, *Vetting the Wether: One Shepherd's View*, 89 UMKC L. REV. 873, 873 (2021).

[61] Lawyers for Civil Justice, Comment to the Advisory Comm. on Civil Rules, "Clarity on the Two 'Rules Problems': Empirical Evidence of the Insufficient Claims Problem in MDLs and Key Testimony on Much-Needed Revisions to the Proposed Rule 16.1 and Privilege Log Amendments," Feb. 16, 2024, https://www.regulations.gov/comment/USC-RULES-CV-2023-0003-0054 [https://perma.cc/UZY9-G977].

- Zofran MDL—approximately 40% of cases dismissed; and
- Cymbalta (California Judicial Council Coordination Proceedings) —31% of cases dismissed.[62]

In addition to fueling unsupported claims, TPLF fuels questionable claims. Portfolio funders appreciate that flimsy litigations that mostly result in defense verdicts may be profitable investments if plaintiffs are sometimes able to score large verdicts.[63] For example, in the Roundup weedkiller litigation, Bayer and Monsanto have prevailed in two-thirds of the trials,[64] but there have been "several massive" plaintiff verdicts.[65] Johnson & Johnson prevailed in 95% of alleged talc-related ovarian cancer cases tried by mid-2024.[66] Nevertheless, one verdict in Missouri resulted in a $2.12 billion award in favor of almost two dozen plaintiffs.[67]

C. TPLF Prolongs Litigation and Raises Costs

A funder's presence may unreasonably prolong litigation and frustrate settlements.[68] The presence of a litigation funder can change what is essentially a two-party negotiation into a multi-party settlement with a "behind the table" constituent. The Sysco litigation is an example. There,

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[62] *Id.* at 3, 6.

[63] Professor Jeremy Kidd explains:

> Proponents of litigation finance argue that litigation financing will not result in an increase in frivolous lawsuits. Their persuasive arguments are based on the rational self-interest of the financier: why would any financier knowingly invest in a lawsuit that is likely to be dismissed? One answer is that a rational, self-interested financier would knowingly invest in a frivolous lawsuit because she knows that the courts' screening procedures are imperfect and that there is always a chance that a claim will slip through and either achieve a damages award from a jury or lead to a settlement offer by the defendant.

Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 627–28 (2012); *see also* Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 197 (2014) (arguing that litigation funding may facilitate the filing of "low-probability lawsuits" that plaintiffs' law firms would otherwise reject).

[64] Press Release, Bayer, Statement on *Womack*, Nov. 15, 2024 ("The jury's verdict in favor of the company marks the 15th favorable outcome in the last 22 trials and validates the company's strategy of taking cases to trial based on strong scientific and regulatory evidence."), https://www.bayer.com/en/litigation-statement/womack [https://perma.cc/BD28-6MM3].

[65] Brendan Pierson, *Bayer Must Pay $78 Million in Latest Roundup Cancer Trial, Jury Finds*, REUTERS (Oct. 10, 2024), https://www.reuters.com/legal/bayer-must-pay-78-mln-latest-roundup-cancer-trial-jury-finds-2024-10-10/ [https://perma.cc/3PR5-44X8].

[66] *Johnson & Johnson Moves Forward With $6.475 Billion Settlement of Talc Cancer Lawsuits*, CNN (May 1, 2024), https://www.cnn.com/2024/05/01/business/j-and-j-talc-cancer-lawsuits-settlement [https://perma.cc/5KJL-EA4Z].

[67] *Id.* (discussing *Ingham v. Johnson & Johnson*, 608 S.W.3d 663 (Mo. Ct. App. 2020)).

[68] GAO 2024 Report, *supra* note 2, at 25 ("Third-party funders may complicate settlement negotiations, contributing to longer settlement times, according to technology companies, mediators, and a judge.").

the judge specifically noted that the "litigation burden caused by Burford's efforts to maximize return on investment ha[d] been enormous."[69] Another leading funder's chief investment officer told the *Wall Street Journal*, "We make it harder and more expensive to settle cases."[70] Parties and courts should know when an outsider may be influencing a case or complicating settlement.

D. TPLF Provides a Way for Foreign Adversaries to "Weaponize the Courts"

A newer concern is the potential for foreign financiers to exploit the lack of transparency with regard to TPLF to "weaponize the courts for strategic goals."[71] Foreign interests may fund lawsuits in the United States to "weaken critical industries" or "obtain confidential materials through the discovery process."[72]

In 2022, GAO found that TPLF investors include "foreign sovereign wealth funds, which are government-controlled funds that seek to invest in other countries . . . ."[73] As an example, Burford Capital LLC has a strategic partnership with an unidentified foreign sovereign wealth fund that one attorney has pointed to as "clear evidence of overseas entities financing cases in U.S. courtrooms."[74] By mid-2023, the partnership had

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[69] *In re* Pork Antitrust Litig., Nos. 18-cv-1776 (JRT/JFD), 22-md-3031 (JRT/JFD), 21-cv-1374, 22-cv-1750, 2024 WL 511890, at *4 (D. Minn. Feb. 9, 2024), *aff'd*, 2024 WL 2819438 (D. Minn. June 3, 2024).

[70] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, WALL ST. J. (Mar. 21, 2018), https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600?st=pR2LoU&reflink=desktopwebshare_permalink (quoting Allison Chock, chief investment officer for IMF Bentham's U.S. division (now Omni Bridgeway)); *see also* Nick Polavin & David Metz, *Go Sue Me: The Broken Promises of Third-Party Litigation Funding*, IN-HOUSE DEF. Q. (DRI, Chi., Ill.), Winter 2024, at 7, 8 ("To encourage larger returns, plaintiff attorneys make larger demands and agree to settlements less often, resulting in a longer process and more cases going to trial.").

[71] Kochan, *supra* note 8; *see also* Letter from Marco Rubio and Rick Scott, U.S. Sens., to Hon. Rick Walker, C.J., U.S. Dist. Ct. for the N. Dist. of Fla., at 2 (Nov. 3, 2023) ("The cost of allowing foreign actors, especially foreign adversaries, to take advantage of the American court system is high."), https://www.rubio.senate.gov/wp-content/uploads/2023/11/a11.03.23-Rubio-Scott-letter-to-the-U.S.-District-Court-for-the-Northern-District-of-Florida-re-foreign-Third-Party-Litigation-Funding.pdf [https://perma.cc/VTE7-DM7F].

[72] *Id.*; *see also* MICHAEL E. LEITER ET AL., U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, A NEW THREAT: THE NATIONAL SECURITY RISK OF THIRD PARTY LITIGATION FUNDING (2022).

[73] GAO 2022 Report, *supra* note 1, at 10.

[74] Sunidhi Sridhar, *Lawmakers Push for Transparency to Combat Foreign Influence in Litigation Funding*, DAILY J. (Apr. 30, 2024), https://www.dailyjournal.com/articles/378267-lawmakers-push-for-transparency-to-combat-foreign-influence-in-litigation-funding [https://perma.cc/UZ3E-9D64] (summarizing statement by Jonathan Stroud, General Counsel of United Patents, LLC).

committed $872 million in funding to capital provision-direct assets.[75] Saudi investment firm Mithaq Capital SPC is one of Burford's largest shareholders.[76] Abu Dhabi sovereign investor Mubadala Capital recently received regulatory approval to obtain a majority equity interest in U.S.-based Fortress Investment Group for $3 billion.[77]

"By targeting U.S. innovators and companies in critical industries, foreign-funded [lawsuits] drain time and resources that could instead be dedicated to producing the cutting-edge technologies that will keep America safe and prosperous," according to former U.S. Attorney General Michael Mukasey.[78] U.S. Senator John Kennedy raised similar concerns in a letter to U.S. Attorney General Merrick Garland and U.S. Supreme Court Chief Justice John Roberts.[79] Senator Kennedy wrote, "Merely by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country."[80] The Center for Strategic and International Studies has observed: "There are several vulnerabilities that TPLF introduces into the U.S. legal system, related to skewed incentives, lack of transparency, and enhanced access for malign foreign actors," including "a potential backdoor for foreign powers to access sensitive information that arises from a lawsuit."[81]

In December 2022, over a dozen state attorneys general wrote the U.S. Department of Justice asking Attorney General Garland and other top officials about steps being taken to protect the United States against

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[75] Emily R. Siegel, *Litigation Finance Trade Group Shrugs Off Disclosure Push*, Bloomberg L. (Nov. 15, 2023), https://news.bloomberglaw.com/business-and-practice/litigation-finance-trade-group-shrugs-off-forced-disclosure-push [https://perma.cc/57A4-6SVM].

[76] Burford Capital Limited Ordinary Shares (BUR) Institutional Holdings, Nasdaq, https://www.nasdaq.com/market-activity/stocks/bur/institutional-holdings [https://perma.cc/4DVW-48LC]; Siegel, *supra* note 75.

[77] *Mubadala Capital's $3 Bln Fortress Bid Clears Key US Regulatory Hurdle, FT Reports,* Reuters (May 10, 2024), https://www.reuters.com/markets/deals/mubadala-capitals-3-bln-fortress-bid-clears-key-us-regulatory-hurdle-ft-reports-2024-05-10/ [https://perma.cc/C4XN-SEXL].

[78] Michael B. Mukasey, Editorial, *Patent Litigation Is a Matter of National Security*, Wall St. J. (Sept. 11, 2022), https://www.wsj.com/articles/patent-litigation-is-a-matter-of-national-security-chips-and-science-act-intellectual-property-theft-lawsuit-technology-scammers-manufacturing-11662912581?st=xTWptX&reflink=desktopwebshare_permalink.

[79] Letter from John Kennedy, U.S. Sen., to Hon. Merrick Garland, Attorney Gen. of the U.S., and Hon. John Roberts, Chairman, Jud. Conf. of the U.S. (Jan. 6, 2023), https://www.kennedy.senate.gov/public/_cache/files/0/7/077acc52-6622-453b-b9a5-bbecd358e136/32C50A661400A5B670DC1D48B8D75E73.letter-to-ag-garland-cheif-justice-roberts.pdf [https://perma.cc/N6SM-EAKM].

[80] *Id.*

[81] Thibault Denamiel et al., *Is Third-Party Litigation Financing a National Security Problem?*, Ctr. for Strategic & Int'l Stud. (Feb. 23, 2024), https://www.csis.org/analysis/third-party-litigation-financing-national-security-problem [https://perma.cc/X2VJ-AKPA].

potential national security threats posed by TPLF. The state attorneys general wrote: "It is impossible to know the extent that foreign adversaries are spending on American litigation through TPLF, which leads to significant concern that TPLF is being used to harm our States and threaten our country's economic and national security."[82] A former chair of the U.S. House Armed Services Committee has cautioned that "[t]he longer we wait to put a spotlight on litigation investment entities, the larger the threat grows . . . ."[83]

In November 2023, *Bloomberg* reported that Purplevine IP of Shenzhen, China is financing a number of intellectual property lawsuits in U.S. federal courts.[84] The disclosure of a litigation funder tied to China "is our worst fears confirmed," said a former acting director of the U.S. Patent and Trademark Office, "because nothing over there is really independent."[85] He added, "With hundreds of patent lawsuits filed every year that receive financing from third parties, it's past time for the U.S. to require disclosure of third-party litigation funding."[86]

Additionally, it has been reported that "a group of Russian oligarchs who have been sanctioned by the United States have funded litigation in New York."[87]

TPLF disclosure would help protect litigants from potential theft of trade secrets and other sensitive information.[88] TPLF disclosure could also

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[82] Letter from Att'ys. Gen. of Ga., Va., Ala., Ark., Ind., Kan., Ky., Mont., Neb., Ohio, S.C., Tenn., Utah & W. Va. to Hon. Merrick Garland, Att'y Gen. of the U.S., Hon. Lisa O. Monaco, Deputy Att'y Gen., & Hon. Mathew G. Olsen, Assistant Att'y Gen. (Dec. 22, 2022) (Re: Threats Posed by Third-Party Litigation Funding), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-55-letter.pdf [https://perma.cc/5MLH-3EJ2].

[83] Howard "Buck" McKeon, Editorial, *Some Third-Party Litigation Funders Pose a Threat to US Security*, BLOOMBERG L. (Apr. 7, 2023), https://news.bloomberglaw.com/us-law-week/some-third-party-litigation-funders-pose-a-threat-to-us-security [https://perma.cc/JT7E-UPJ5].

[84] Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, BLOOMBERG L. (Nov. 6, 2023), https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties [https://perma.cc/SLL9-L6ML]. Purplevine paid for the cost of four lawsuits against Samsung Electronics Co. and a subsidiary. The cases, tied to earbud, tablet and smartphone technology, were filed by Staton Techiya, an affiliate of Florida-based private equity firm Staton Capital. *Id.*

[85] *Id.* (quoting Joe Matal, former acting director of the U.S. Patent and Trademark Office).

[86] Joseph Matal, *Patent Lawsuits Are a National Security Threat*, WALL ST. J. (Mar. 20, 2024), https://www.wsj.com/articles/patent-lawsuits-are-a-national-security-threat-secretly-funded-litigation-f3cd5bd4?st=zcDE6Y&reflink=desktopwebshare_permalink.

[87] Letter from John Cornyn & Thom Tillis, U.S. Sens., to H. Thomas Byron III, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (July 11, 2024), https://www.uscourts.gov/sites/default/files/24-cv-m_suggestion_from_senators_cornyn_tillis_-_rule_26_tplf.pdf [https://perma.cc/KV4U-NVTY]; *see also* Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, BLOOMBERG L. (Mar. 28, 2024), https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits [https://perma.cc/ZRB8-7XME].

[88] Defense counsel should anticipate the presence of a funder in a case and address the possibility that a funder may obtain information from a funded law firm, either by prohibiting

help identify instances where foreign governments secretly fund lawsuits to retaliate against dissidents or for political purposes.[89]

E. TPLF Can Facilitate Fraudulent Litigation

TPLF can facilitate fraudulent litigation—another reason for disclosure. An example of the potential for TPLF to facilitate such litigation is Steven Donziger's securing of an $18 billion foreign judgment against an energy company through alleged corruption, which he then attempted to collect in U.S. courts.[90] In another instance, a Houston-based plaintiffs' law firm received $3 million in litigation funding that it allegedly used to purchase leads and file hundreds of fraudulent hurricane lawsuits in Louisiana.[91]

Lawsuits against the United States for harm caused by exposure to contaminants in the water at Marine Corps Base Camp Lejeune from August 1, 1953 to December 31, 1987 provide another example of TPLF leading to misbehavior by some. According to *Bloomberg*, litigation funders committed nearly $2 billion to Camp Lejeune lawsuits soon after the passage of a federal law authorizing the claims.[92] The staggering amount of money available to pay claimants, as well as to recruit claimants and fund their cases, "unleashed a wave of fraudulent claims that threatens to disrupt or taint what could be one of the largest-ever mass tort cases."[93] As one commentator explains:

> Camp LeJeune cases by the hundreds have been deemed bogus as they have "doctored" medical records and reports or had been recruited by call centers that "coached" participants in answers to questions to qualify the recipient on the call. Many would-be plaintiffs have had bogus addresses, such as a fast-food restaurant, or improper

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opponent law firms from sharing case materials with funders or by requiring funders to be bound by any sealing agreement.

89 For example, questions arose as to whether individuals and entities affiliated with the Chinese Communist Party had funded a defendant's litigation expenses in a dispute with a company closely tied to a prominent Chinese dissident. E. Profit Corp. Ltd. v. Strategic Vision US, LLC, No. 18-cv-2185 (LJL), 2020 WL 7490107 (S.D.N.Y. Dec. 18, 2020).

90 Chevron Corp. v. Donziger, 974 F. Supp. 2d 362, 474–81 (S.D.N.Y. 2014), *aff'd,* 833 F.3d 74 (2d Cir. 2016). Donziger was later disbarred and convicted of criminal contempt. United States v. Donziger, 38 F.4th 290 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 868 (2023); *In re* Steven R. Donziger, 163 A.D.3d 123 (N.Y. App. Div. 2018).

91 *Lawsuit Seeks to Recover $3M Invested in Hurricane-Damage Lawsuits*, CLAIMS J. (Apr. 27, 2023), https://www.claimsjournal.com/news/southcentral/2023/04/27/316655.htm [https://perma.cc/LWT9-C4JB].

92 Emily R. Siegel & Kaustuv Basu, *Bogus Claims Threaten to Taint Lejeune Payouts to Veterans*, INS. J. (Oct. 31, 2023), https://www.insurancejournal.com/news/national/2023/10/31/746288.htm [https://perma.cc/KM4S-ZZ7H].

93 *Id.*

> time frames for allegedly having been exposed. Legal advertising and robocalls are the norm for recruitment and payment.[94]

One litigation funder said these abuses are occurring because "an influx of capital invites greed."[95]

F. TPLF Disclosure Is Important for Cost-Shifting and Sanctions

Courts might be more open to defendant requests for cost-shifting in cases involving burdensome discovery if they are aware that there is not a wide disparity in each side's ability to pay. A multi-million-dollar hedge fund that is making a business decision to invest in a case for profit should not be entitled to the same producer-pays free ride as an impecunious citizen. As one commentator explains:

> In the modern era, large-scale litigations involve a fight between Goliaths on both sides—but with one side forced to subsidize the other's discovery. This is unfair and not justified by the current litigation environment, especially in cases where a third-party litigation funder places a bet on the outcome of a case. Since funders stand to make a lot of money if a case is successful, they should absorb the cost of civil discovery as a business expense.[96]

The issue of sanctions provides another reason for TPLF to be disclosed. Where sanctions are appropriate for misconduct, courts need to know about the presence of a third-party in the litigation to determine how to impose sanctions or other costs.[97] For example, in 2024, a New York trial court issued a $156,000 sanction against a law firm and its litigation funder after a party was forced to file a protective order to address the law firm's unauthorized access into its corporate file directory and subsequent attempt to use the documents to gain a litigation advantage.[98]

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94 Lisa M. Bellino, *The Fifth Dimension: TPLF and Its Effect on the Judiciary*, FOR THE DEF. (DRI, Chi., Ill.), June 2024, at 22, 23.

95 Siegel & Basu, *supra* note 92 (quoting Brian Roth, CEO of Rocade Capital, a litigation funding firm).

96 Andrew Trask, *Third-Party Litigation Funding Justifies Cost-Shifting in Mass Tort/Class Action Discovery*, LEGAL OPINION LETTER (May 17, 2024), https://www.wlf.org/wp-content/uploads/2024/05/0521724Trask_LOL.pdf [https://perma.cc/A5VU-WVW]; *see also* Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 755 (2019) ("Mandating disclosure up front will also promote speedy determinations related to cost shifting—which ultimately leads to more efficient use of judicial resources—and will allow courts to police the ethical obligations of attorneys more readily.").

97 Letter from Hon. Bob Goodlatte, *supra* note 43.

98 Katryna Perera, *Robins Kaplan, Funding Firm Must Pay Sanctions, Court Told*, LAW360 (Mar. 21, 2024), https://www.law360.com/articles/1816028/robins-kaplan-funding-firm-must-pay-sanctions-court-told [https://perma.cc/5KC7-B6JL]; *see also* Abu-Ghazaleh v. Chaul,

G. Plaintiffs May Be Kept in the Dark About Excessive Fees Billed to Them

TPLF is not only hidden from courts and parties—it may be hidden from plaintiffs themselves. This should concern consumer advocates as it is "becoming increasingly common in [TPLF] litigation arrangements for a plaintiff to recover only a small portion of his or her award."[99] In one recent case, a plaintiff sued his lawyer and a litigation funder after he was billed for substantial interest on litigation funding obtained by the lawyer.[100] After the plaintiff settled a workplace injury claim for $475,000, his lawyer sent him an itemization of expenses showing that the firm borrowed more than $81,000 to cover case costs that accrued interest daily, resulting in charges of nearly $137,000. According to a complaint filed in federal court in Philadelphia, the plaintiff "had no idea" that his lawyer had received litigation funding and he "never agreed to pay interest on any of those case costs."[101]

III. TPLF IS TYPICALLY HIDDEN

Presently, in most states, TPLF arrangements are rarely disclosed—and therefore largely remain hidden from scrutiny.[102] Parties may seek disclosure of litigation funding arrangements through discovery, but opponents routinely assert objections on relevance or privilege grounds.[103]

Courts have held that litigation funding materials are "largely irrelevant to the claims and defenses presented, and therefore, not discoverable."[104] There may be "specific instances," however, where courts

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36 So. 3d 691, 694 (Fla. 3d Dist. Ct. App. 2009) (holding litigation funders liable along with plaintiff for attorneys' fees incurred by defendant in civil theft suit that lacked substantial legal support where the funders' involvement had "risen to level of a party").

99 General Thurbert Baker, *Paying to Play: Inside the Ethics and Implications of Third-Party Litigation Funding*, 23 WIDENER L.J. 229, 230 (2013).

100 Emily R. Siegel, *Worker Sues Over Litigation Funding He Claims He Didn't Agree To*, BLOOMBERG L. (Jan. 3, 2024), https://news.bloomberglaw.com/business-and-practice/worker-sues-over-litigation-funding-he-claims-he-didnt-agree-to [https://perma.cc/7UU6-FPP7].

101 *Id.*

102 BLOOMBERG L., LITIGATION FINANCE SURVEY 2022 3 (2022) (finding that TPLF is never or rarely disclosed in court); MARK A. BEHRENS, INT'L ASS'N OF DEF. COUNSEL, THIRD-PARTY LITIGATION FUNDING: STATE AND FEDERAL DISCLOSURE RULES AND CASE LAW (Jan. 2025), https://www.iadclaw.org/assets/1/6/5.1_-_Third-Party_Litigation_Funding_-_State_and_Federal_Disclosure_Rules_and_Case_Law.pdf [https://perma.cc/4SBT-VEZ7] (surveying case law).

103 Joseph J. Stroble & Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, DEF. COUNSEL J., Jan. 2020, at 13–16.

104 John E. Hall, Jr. et al., *The Effect of Discoverability of Third-Party Litigation Funding (Part 2 of 2)*, FOR THE DEF. (DRI, Chi., Ill), Apr. 2021, at 28, 29; *see also* Art Akiane LLC v. Art & Soulworks LLC, No. 19 C 2952, 2020 WL 5593242, at *5–6 (N.D. Ill. Sept. 18, 2020) ("[B]roadly asking in discovery for 'documents relating to third-party funding for this litigation' is insufficient without some detailed, meaningful explanation to satisfy the requirement of relevancy."); Ashghari-Kamrani v. United Servs. Auto. Ass'n, No: 2:15-cv-478, 2016 WL

will find that "TPLF is factually relevant to the underlying dispute."[105] For example, in patent cases, courts generally allow discovery into TPLF documents that discuss the value of the patent in dispute[106] or that establish a plaintiff's ownership of the subject patent and standing to sue.[107] Discovery of TPLF documents has also been allowed where the documents might support a defense asserted by a defendant.[108] Further, discovery of TPLF arrangements has been allowed in putative class

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11642670, at *4 (E.D.V.A. May 31, 2016) ("Information about a party's litigation funding is only relevant (and ultimately discoverable) if the requesting party has an actual basis for the relevancy of the information other than mere speculation or fishing."); HERSCHKOPF, *supra* note 42, at 11 (stating that when requests for discovery of litigation finance materials "are based on sheer speculation, rather than having some foundation, they most likely will not be sufficient to warrant discovery."). Courts may be taking a perspective that is too narrow with regard to relevancy determinations. Even when discovery of TPLF may not relate to the claims or defenses in a particular case, such information is relevant for other reasons, such as judicial conflicts and enforcement of lawyers' ethical obligations.

105 Hall et al., *supra* note 104, at 30.

106 *See*, *e.g.*, Electrolysis Prevention Solutions LLC v. Daimler Truck N. Am. LLC, No. 3:21-cv-00171-RJC-WCM, 3:23-mc-00042-RJC-WCM, 2023 WL 4750822, at *5, 8 (W.D.N.C. July 24, 2023) (holding that litigation funding documents containing statements and analysis of the value of the asserted patent were discoverable in addition to "some limited discovery" to rebut potential David vs. Goliath trial themes); *In re* Bayerische Motoren Werke AG, No. 22 C 2103, 2022 WL 1422758, at *5 (N.D. Ill. May 5, 2022) (authorizing subpoena by defendant to obtain litigation funding information that was relevant to plaintiff's "value-in-dispute claims"); Impact Engine, Inc. v. Google LLC, No. 19-cv-1301-CAB-DEB, 2020 U.S. Dist. LEXIS 145636, at *4–5 n.2 (S.D. Cal. Aug. 12, 2020) ("[C]ourts have generally ruled that litigation funding agreements and related documents are relevant and discoverable in patent litigation [to] (1) establish the value of the patents at issue; (2) obtain statements made by [plaintiff] regarding the patents at issue; and (3) refute potential trial themes."); Acceleration Bay LLC v. Activision Blizzard, Inc., Nos. 16–453–RGA, 16–454–RGA, 16–455–RGA, 2018 WL 798731, at *2 (D. Del. Feb. 9, 2018) (holding that plaintiff's communications with litigation funder were relevant in patent dispute); Odyssey Wireless, Inc. v. Samsung Elec., Co., Ltd., Nos. 3:15-cv-01738-H (RBB), 3:15-cv-01743-H (RBB), 3:15-cv-01735-H (RBB), 2016 WL 7665898, at *6–7 (S.D. Cal. Sept. 20, 2016) (finding that defendants could access documents regarding the valuations of plaintiff's patents). *But see* Taction Tech., Inc. v. Apple, Inc., No.: 21-cv-00812-TWR-JLB, 2022 WL 18781396, at *2 (S.D. Cal. Mar. 16, 2022) (noting that, "in patent litigation cases, 'courts have generally ruled that litigation funding agreements and related documents are relevant and discoverable,'" but finding documents to be protected work-product where they were created in anticipation of litigation and included express confidentiality provisions).

107 *See*, *e.g.*, Cobra Int'l, Inc. v. BCNY Int'l, Inc., No.: 05–61225–CIV–MARRA/MATTHEWMAN, 2013 WL 11311345, at *3 (S.D. Fla. Nov. 4, 2013) (ordering production of litigation funding agreement as relevant to establishing plaintiff's ownership of the subject patent and standing to sue); Gamon Plus, Inc. v. Campbell Soup Co., No. 1:15-cv-08940, 2022 WL 18284320, at *2 (N.D. Ill. May 26, 2022) ("[C]ourts have been more receptive to allowing such discovery in patent infringement cases, given patent cases unique standing requirements and the potential for funding agreements to shed light on patents' value.") (quoting Preservation Techs. LLC v. MindGeek USA, Inc., No. 2:17-cv-08906-DOC-JPR, 2020 WL 10965161, at *6 (C.D. Cal. Dec. 18, 2020)).

108 *See*, *e.g.*, Doe v. Soc'y of Missionaries of Sacred Heart, No. 11–cv–02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014) (ordering personal injury plaintiff alleging childhood sexual abuse to produce redacted "fact work product" litigation financing materials that "could potentially shed light on the statute of limitations defense asserted by [defendant]").

actions with respect to class certification adequacy determinations.[109] And discovery of litigation financing information has been permitted where the plaintiff's motivation to sue is an issue[110] or "when there is a sufficient factual showing of 'something untoward' occurring in the case."[111] As summarized by commentators:

> The moral of these rulings appears to be that there must be actual evidence and a definitive reason that litigation funding is relevant to the underlying facts, claims, and defenses of the case at issue. However, courts appear to be slowly becoming less reluctant to hold that discovery as to a plaintiff's litigation funding is always undiscoverable, and they are becoming more willing to delve into disclosure of information regarding litigation financing

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[109] *See*, *e.g.*, Gbarabe v. Chevron Corp., No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (granting defendant's motion to compel production of plaintiff's litigation funding agreement and related documents as relevant to assessing class counsel's ability to adequately represent the class in putative class action arising out of a Nigerian oil spill); Haghayeghi v. Guess?, Inc., No. 14-CV-20 JAH (NLS), 2016 WL 9526465, at *1 (S.D. Cal. Mar. 21, 2016) (finding litigation funding documents "relevant to whether Plaintiff would adequately protects the interests of the class"); Burkhart v. Genworth Fin., Inc., No. 2018-0691-NAC, 2024 WL 3888109, at *4 (Del. Ch. Aug. 21, 2024) (ordering production of unredacted litigation funding agreement in class action because of "legitimate concerns that counsel could face a conflict of interest"); HERSCHKOPF, *supra* note 42, at 11 ("[I]f the circumstances of the litigation raise concerns about the adequacy of counsel, the court may grant discovery.").

[110] *See*, *e.g.*, Smartmatic USA Corp. v. Fox Corp., No. 151136/2021, 2023 WL 2626882, at *4–5 (N.Y. Sup. Ct. N.Y. Cty. Mar. 24, 2023) (finding that defendants were entitled to TPLF agreement where plaintiff's motivation to sue was an element of defendants' anti-SLAPP counterclaim); Carroll v. Trump, No. 20-cv-7311 (LAK), 2024 WL 97359, at *3 (S.D.N.Y. Jan. 9, 2024) ("In general, litigation funding is not relevant. Here I allowed very limited discovery against what seemed to me a remote but plausible argument that maybe something to do with litigation funding arguably was relevant to the credibility of one or two answers by this witness in her deposition."); Wopsock v. Dalton, No. 2:12–cv–0570–RJS–EJF, 2018 WL 1578086, at *5 (D. Utah Mar. 29, 2018) (finding that defendants, in sexual assault action against police officer who counterclaimed with civil rights claims, could depose certain individuals about the alleged assault and who was funding the litigation given that the information was relevant to defendants' claims and defenses); *see also* NantWorks, LLC v. Niantic, Inc., No. 20-cv-06262-LB, 2022 WL 1500011, at *2 (N.D. Cal. May 12, 2022) (holding that litigation funding agreements are "generally discoverable only where there is 'a specific, articulated reason to suspect bias or conflicts of interest'") (quoting MLC Intellectual Prop. LLC v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019)).

[111] Nunes v. Lizza, No. 20-cv-4003-CJW, 2021 WL 7186264, at *3–6 (N.D. Iowa Oct. 26, 2021) (in defamation case by close family members of prominent U.S. congressman with a history of litigation against media defendants, the court permitted discovery, subject to *in camera* inspection, to determine if the congressman was funding the lawsuit, finding the information relevant to (1) whether plaintiffs remained the real party in interest, (2) illuminate possible bias by the congressman—a witness in the case—and (3) refute a potential David vs. Goliath narrative at trial); *see also* Mize v. Kai, Inc., No. 17–cv–00915–NYW, 2018 WL 1035084, at *9 (D. Colo. Feb. 23, 2018) (finding that, in Americans with Disabilities Act claim, communications between plaintiff and her representatives and firm that funded and controlled her lawsuit were "relevant because they may reveal facts pertaining to Plaintiff's standing to bring this action and to whether Plaintiff has perpetrated an actionable fraud on the court.").

where a definitive reason of the relevance is brought to the court's attention.[112]

IV. THE MARCH TOWARD DISCLOSURE

A. *Proposed Amendments to the Federal Rules and Congressional Action*

Against this backdrop, business, defense bar, and civil justice groups have called for amendments to federal court rules to mandate the disclosure of TPLF agreements.[113] For example, Lawyers for Civil Justice and the U.S. Chamber of Commerce Institute for Legal Reform, among others, have advocated for (1) an amendment to Federal Rule of Civil Procedure ("FRCP") 7.1 "to 'better inform judges of circumstances that might trigger the statutory duty to recuse' by revealing non-party financial investments contingent on the outcomes of cases"[114]; (2) an amendment to FRCP 26

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[112] Hall et al., *supra* note 104, at 30; *see also* Seibel v. PHWLV, LLC, No. A-17-751759-B, 2020 WL 13568373, at *1 (Nev. Dist. Ct. Clark Cty. July 15, 2020) ("[T]he facts and discovery sought in this case are different from the typical discovery seeking information regarding litigation funding. Indeed, whether [plaintiff] has any interest or control over [certain entities] and his suitability issues are at the core of this case."); Fulton v. Foley, No. 17-CV-8696, 2019 WL 6609298, at *4 (N.D. Ill. Dec. 5, 2019) (holding that plaintiff in wrongful arrest case had to produce fact-based information and documents, including statements made by the plaintiff, that was provided to the funder); Morley v. Square, Inc., Nos. 4:14cv172, 4:10cv2243 SNLJ, 2015 WL 7273318, at *3 (E.D. Mo. Nov. 18, 2015) (ordering disclosure of communications between plaintiffs and funders that revealed the underlying facts conveyed to the funders).

[113] JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 14 (2012) ("ILR proposes amending Federal Rules of Civil Procedure 26 (requiring initial disclosures) and 7.1 (requiring corporate disclosure statements) to provide for specific disclosures of TPLF investments in funded cases."); David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Ctr. for L. & Pub. Pol'y, Third Party Litigation Funding Working Group, at 32 (2018) ("DRI . . . proposes that appropriate judicial and legislative authorities ought to be evaluating, and setting rules, requiring uniform disclosure of TPLF agreements to all parties in litigation where such transactions exist."); Lawyers for Civil Justice, *Disclose Third-party Litigation Funding* (2024), https://www.lfcj.com/advocacy#issues [https://perma.cc/Y8BR-VQKE]; *see also* Jeffrey James Grosholz, Note, *In the Shadows: Third-Party Litigation Funding Agreements and the Effect Their Nondisclosure Has On Civil Trials*, 47 FLA. ST. U. L. REV. 481, 500 (2020) ("[J]urisdictions should adopt currently proposed rules requiring disclosure of TPLF agreements."); Lawyers for Civil Justice & U.S. Chamber of Commerce Institute for Legal Reform, Rules Suggestion to the Advisory Committee on Civil Rules, "It is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding Agreements," Oct. 2, 2024 ("Courts and parties need a simple, effective, and predictable rule for TPLF disclosure.").

[114] Lawyers for Civil Justice & U.S. Chamber of Commerce Institute for Legal Reform, Rules Suggestion to the Advisory Committee on Civil Rules and its Rule 7.1 Subcommittee, "A Necessary Disclosure: Why Rule 7.1 Should Provide Judges Information About Non-Party Contingent Financial Interests That Could Require Disclosure," Mar. 14, 2024 (quoting Memorandum from Hon. Robin L. Rosenberg, Chair, Advisory Comm. on Civil Rules, to Hon.

to require initial disclosure of TPLF agreements, similar to FRCP 26(1)(A)(iv) requiring insurance disclosure[115]; (3) an amendment to FRCP 16 to prompt judges to inquire about TPLF during pretrial conferences[116]; and (4) an amendment to Federal Rule of Appellate Procedure 26.1 to require disclosure of all non-party financial stakes directly tied to the proceedings.[117]

In October 2024, "[a]fter a decade of weighing whether it should do anything to regulate the emerging field of litigation finance, the U.S. Judicial Conference's Advisory Committee on Civil Rules . . . agreed to create a subcommittee to examine the issue."[118] The new TPLF Subcommittee is chaired by Chief U.S. District Judge R. David Proctor of the Northern District of Alabama.

TPLF is also attracting attention in Congress. Letters by Members of Congress to the Department of Justice and the federal judiciary were previously discussed in this Article.[119] In addition, in September 2023, the U.S. House of Representatives Committee on Oversight and Accountability held a hearing on "Unsuitable Litigation: Oversight of Third-party Litigation Funding."[120] The same month, Senators John Kennedy and Joe Manchin introduced the Protecting Our Courts from Foreign Manipulation Act of 2023 to increase transparency and limit foreign TPLF.[121] In June 2024, the Courts, Intellectual Property and the

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John D. Bates, Chair, Comm. on Rules of Prac. & Proc., Dec. 8, 2023, in Agenda Book, Comm. on Rules of Prac. & Proc., Jan. 4, 2024, at 307).

115 Beisner & Rubin, *supra* note 113; Letter from Advanced Medical Technology Association et al., to H. Thomas Byron III, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (May 8, 2023), https://www.uscourts.gov/sites/default/files/23-cv-m_suggestion_from_35_organizations_-_rule_26_0.pdf [https://perma.cc/CJ7U-XQZL]. Fed. R. Civ. P. 26(1)(A)(iv) requires a party to a lawsuit to provide all parties with "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Similar rules exist for most state court actions.

116 Lawyers for Civil Justice, Rules Suggestion to the Advisory Committee on Civil Rules, "An Important But Rarely Asked Question: Amending Rule 16(c)(2) to Prompt Judges to Consider Inquiring About Financial Interests Created by Third-Party Litigation Funding," Sept. 8, 2022.

117 Lawyers for Civil Justice, Rules Suggestion to the Advisory Committee on Appellate Rules, "Pervasive, Yet Unknown The Prevalence of Direct, Undisclosed Non-Party Financial Stakes in Appellate Outcomes, and Why The Committee Should Amend Rule 26.1," Sept. 1, 2022.

118 Nate Raymond, *US Judicial Panel to Examine Litigation Finance Disclosure*, Reuters (Oct. 10, 2024), https://www.reuters.com/legal/government/us-judicial-panel-examine-litigation-finance-disclosure-2024-10-10/ [https://perma.cc/A9A7-KFDD].

119 *See supra* notes 18, 43, 71, 79, & 87.

120 *Unsuitable Litigation: Oversight of Third-party Litigation Funding*, U.S. House of Reps., Comm. on Oversight & Accountability, 118th Cong., 1st Sess., Serial No. 118–60 (Sept. 13, 2023).

121 Press Release, John Kennedy, U.S. Sen., *Kennedy, Manchin Introduce Bipartisan Protecting Our Courts from Foreign Manipulation Act to End Overseas Meddling in U.S. Litigation* (Sept. 14, 2023).

Internet Subcommittee of the House Judiciary Committee held a hearing on "The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities."[122] In October 2024, Congressman Darrell Issa, Chairman of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, and Congressman Scott Fitzgerald introduced the Litigation Transparency Act of 2024, which "requires the disclosure of parties receiving payment in civil lawsuits."[123] GAO has issued two reports on third-party litigation funding at the request of Congress.[124]

B. Local Court Rules Requiring TPLF Disclosure

While the federal judiciary's rulemaking body and Congress study TPLF, a number of pioneering federal courts have acted to require TPLF disclosure.[125] For example, Chief Judge Colm Connolly of the United States District Court for the District of Delaware has been a leader in requiring "transparency, disclosure, and adherence to ethical standards in the context of TPLF."[126] In April 2022, Judge Connolly issued "Standing Order Regarding Third-Party Litigation Funding Arrangements," providing:

> (1) Within . . . 30 days of the filing of an initial pleading . . . the party receiving [TPLF] funding shall file a statement . . . containing the following information:
>
> (a) The identity, address, and, if a legal entity, place of formation of the Third-Party Funder(s);
> (b) Whether any Third-Party Funder's approval is necessary for litigation or settlement decisions in the

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122 *The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities*, Courts, Intell. Prop. & the Internet Subcomm. of the House Jud. Comm., 118th Cong., 2d Sess. (June 12, 2024).

123 Press Release, Congressman Darrell Issa, *Issa Introduces Legislation Reforming Third-Party Financed Civil Litigation* (Oct. 7, 2024).

124 *See* GAO 2022 Report, *supra* note 1; GAO 2024 Report, *supra* note 2.

125 Fastship, LLC v. United States, 143 Fed. Cl. 700, 716–17 (Fed. Cl. 2019) ("Several circuits around the country have amended their local rules to require disclosure of litigation financing agreements with third parties that have a financial interest in the outcome case . . . . [L]itigation financing agreements can occasionally be susceptible to abuse . . . . But the possibility of abuse does not mean the entire system should be discarded. Instead, courts have focused on the *disclosure* of such agreements to encourage transparency and ensure a shadow broker is not using litigation as a form of harassment or for multiple bites at the same apple. Disclosure also enables judges to appropriately evaluate potential recusal due to conflicts of interest."), *vacated and remanded on other grounds*, 968 F.3d 1335 (Fed. Cir. 2020).

126 Emily Pyclik, *An Overview of How Third-Party Litigation Funders are Being Addressed by Courts and Policymakers*, BAKER BOTTS (June 3, 2024), https://www.bakerbotts.com/thought-leadership/publications/2024/june/an-overview-of-how-third-party-litigation-funders-are-being-addressed-by-courts-and-policymakers [https://perma.cc/TZ7L-QJMD].

> action, and if the answer is in the affirmative, the nature of the terms and conditions relating to that approval; and
> (c) A brief description of the nature of the financial interest of the Third-Party Funder(s).[127]

The Order further states that "[p]arties may seek additional discovery . . . upon a showing that the Third-Party Funder has authority to make material litigation decisions or settlement decisions, the interests of any funded parties or the class (if applicable) are not being promoted or protected by the arrangement, conflicts of interest exist as a result of the arrangement, or other such good cause exists."[128]

The United States District Court for the District of New Jersey is another leader with respect to TPLF disclosure. Since June 2021, that court has maintained a local rule for civil cases stating:

> [A]ll parties . . . shall file a statement . . . containing the following information regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal or bank loan . . . .[129]

The United States District Court for the Northern District of California was the first court to require TPLF disclosure as part of a standing order governing class actions. The court's order, initially adopted in 2018 and updated in November 2023, provides:

> [E]ach party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. *In any proposed class, collective, or representative action, the required*

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127 Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022).

128 *Id.* Judge Connolly is "confident about the appropriateness of the Third-Party Funding Order." Nimitz Techs. LLC v. CNET Media, Inc., Nos. 21-1247-CFC, 21-1362-CFC, 21-1855-CFC, 22-413-CFC, 2022 WL 17338396, at *3 (D. Del. Nov. 30, 2022), *motion denied*, 2022 WL 17669186 (D. Del. Dec. 14, 2022).

129 Civ. L.R. 7.1.1 (D.N.J. June 21, 2021) (order amending local civil rules).

> *disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.*[130]

In some federal court MDLs, judges have required limited disclosures to the court to address potential conflicts, promote adherence to lawyers' ethical obligations, and protect claimants from unscrupulous practices.[131] For example, U.S. District Court Judge J. Philip Calabrese of the Northern District of Ohio requires counsel to disclose to the court the name of any entity that is "fund[ing] (directly or indirectly) the prosecution of any claim" or that has an "interest that could be substantially affected by the outcome of the proceeding, including but not limited to actual or functional decision-making authority with respect to litigation strategy, settlement, or other decisions normally reserved to parties or counsel."[132]

It has also been reported that local rules addressing disclosure of persons or entities with financial interests in litigation in roughly half the federal appellate courts and approximately one-quarter of all federal district courts are written broadly enough to theoretically require disclosure of the identity of litigation funders,[133] but these rules do not

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[130] Standing Order for All Judges of the North District of California, Contents of Joint Case Management Statement ¶ 17 (N.D. Cal. Nov. 30, 2023) (emphasis added).

[131] *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018) (ordering counsel with TPLF to submit to the court *ex parte*, for *in camera* review, a letter identifying and describing the litigation financing and sworn affidavits from counsel and the funder attesting that the financing "does not: (1) create any conflict of interest for counsel, (2) undermine counsel's obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decisions, or (5) affect party control of settlement."); *In re* Zantac (Ranitidine) Prods. Liab. Litig., No. 20-MD-2924, 2020 WL 1669444, at *6 (S.D. Fla. Apr. 3, 2020) (directing applicants for plaintiffs' leadership counsel to inform the court in writing if they had obtained TPLF and, if so: (1) whether the funder would have "any control (direct or indirect, actual or apparent or implied) over the decision to file or the content of any motions or briefs, or any input into the decision to accept a settlement offer"; (2) whether the financing would create a conflict of interest for counsel, "undermine counsel's obligation of vigorous advocacy," impact "counsel's independent judgment," allow the funder to "control over litigation strategy or settlement decisions (as to either the common benefit work done by counsel or work for individual retained clients)," or "affect party control of settlement."); *In re* 3M Combat Arms Earplug Prods. Liab. Litig., No. 3:19-md-02885 (N.D. Fla. Aug. 29, 2023) (Case Management Order No. 61 (Third-Party Litigation Funding)) (requiring plaintiffs' counsel who obtain TPLF to provide the court with the name of the claimant and funder, the dates of the loans, the amount of funding received, the fees and interest rates on the loans, and all other material terms of the funding arrangement), https://www.uscourts.gov/courts/flnd/3M-Case_Management_Order_No_61_Third-Party_Litigation_Funding.pdf [https://perma.cc/4C3J-UJRA]; *see also* Aaseesh P. Polavarapu, Comment, *Discovering Third-Party Funding in Class Actions: A Proposal for In Camera Review*, 165 U. PA. L. REV. ONLINE 215 (2017) (calling for disclosure of TPLF arrangements to the court for *in camera* review in class actions).

[132] Rule 26(f) Report of the Parties – Form at 13 ¶ 13 (N.D. Ohio updated Jan. 2, 2024) (form for report of the parties in cases before U.S. District Court Judge J. Philip Calabrese), https://www.ohnd.uscourts.gov/sites/ohnd/files/Rule%2026%28f%29%20Report%20of%20the%20Parties%20%281.2.2024%29.pdf [https://perma.cc/QM72-Q2YR].

[133] *Nimitz Techs. LLC*, 2022 WL 17338396, at *3 (citing Meeting of the Advisory Committee on Civil Rules Agenda Book 209, 2010 Philadelphia, P[a]. (Apr. 10, 2018) (reporting survey

appear to be consistently applied in that manner or enforced, nor do they require disclosure of the funding agreement itself.

C. State Legislation Requiring TPLF Disclosure Gains Momentum

States are increasingly enacting laws that require disclosure of TPLF agreements. In 2018, Wisconsin became the first state to require disclosure of all TPLF agreements. Wisconsin's TPLF disclosure law states:

> Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.[134]

Montana enacted TPLF disclosure legislation in 2023. Montana's TPLF disclosure law states:

> Except as otherwise stipulated or ordered by a court of competent jurisdiction, a consumer or the consumer's legal representative shall, without awaiting a discovery request, disclose and deliver to the following persons the litigation financing contract: (a) each party to the civil action . . . (b) the court . . . and (c) any known person, including an

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results showing that "[s]ix U.S. Courts of Appeals have local rules which require identifying litigation funders" and that "of the 94 federal district courts in the United States, 24—or roughly 25% of all U.S. District Courts—require disclosure of the identity of litigation funders in a civil case")). The circuit court local rules expand on Federal Rule of Appellate Procedure 26.1, which requires any nongovernmental corporation that is a party to file a corporate disclosure statement. For example, a Fifth Circuit local rule requires counsel to "certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation." 5th Cir. L.R. 28.2.1; *see also* 3d Cir. L.R. 26.1.1(b); 4th Cir. L.R. 26.1(a)(2)(B); 5th Cir. L.R. 28.2.1; 10th Cir. L.R. 46.1(D)(1) & (2); 11th Cir. L.R. 26.1–2(a). Similarly, many district court local rules expand on Federal Rule of Civil Procedure 7.1 and extend required corporate disclosure statements to all private parties. For example, the United States District Court for the Central District of California requires non-governmental parties to file "a Notice of Interested Parties, which shall list all persons, associations of persons, firms, partnerships, and corporations . . . that may have a pecuniary interest in the outcome of the case . . . ." C.D. Cal. L.R. 7.1–1; *see also* D. Ariz. L.R. 7.1.1; N.D. Cal. L.R. 3–15; M.D. Fla. L.R. 3.03(a); N.D. Ga. L.R. 3.3(A)(2); S.D. Ga. L.R. 7.1.1; N.D. Iowa L.R. 7.1; S.D. Iowa L.R. 7.1; D. Md. L.R. 103.3(b); E.D. Mich. L.R. 3.4(b)(2); Nev. L.R. 7.1–1; E.D.N.C. L. Civ. R. 7.3(b)(2); M.D. Tenn. L.R. 7.02; N.D. Tex. L.R. 3.1(c), 3.2(e), W.D. Tex. L.R. CV-33(b)(3). Judges use these disclosures for disqualification or recusal purposes.

134 WIS. STAT. § 804.01(2)(bg) (2024).

> insurer, with a preexisting contractual obligation to indemnify or defend a party to the civil action . . . .[135]

The Montana law further states that the disclosure obligation "is a continuing obligation" and that the "existence of the litigation financing contract and all participants or parties to a litigation financing contract are permissible subjects of discovery."[136]

In 2024, Indiana, West Virginia, and Louisiana also enacted TPLF disclosure laws.[137]

Indiana's 2024 law provides that TPLF agreements are subject to discovery under the Indiana Rules of Trial Procedure.[138] Further, a party may not disclose or share information with a commercial litigation financier that is subject to a court order to seal or protect.[139] Commercial litigation funders are prohibited from making any decision, having any influence, or directing the plaintiff or the plaintiff's attorneys with respect to the conduct of the underlying civil proceeding or any settlement.[140] Commercial litigation finance agreements that are directly or indirectly funded by a "foreign entity of concern" are also prohibited.[141]

West Virginia's 2024 law states that a party or his or her counsel shall, without awaiting a discovery request, provide any litigation funding agreement to the other parties.[142]

Louisiana's Litigation Financing Disclosure Act provides that a litigation funder shall not decide, influence, or direct a funded party's litigation decisions, including the conduct of the underlying civil proceeding or any settlement or resolution thereof.[143] Litigation financing agreements are subject to discovery in accordance with the Code of Civil

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135 MONT. CODE ANN. § 31-4-108 (2024).

136 *Id.*

137 IND. CODE § 24-12-11-5 (2024); W. VA. CODE § 46A-6N-6 (2024); LA. REV. STAT. § 3580.13 (2024). In November 2024, the National Council of Insurance Legislators ("NCOIL"), a legislative organization comprised principally of legislators serving on state insurance and financial institutions committees around the nation, adopted model legislation stating:

> A party or his or her counsel shall, without awaiting a discovery request, provide to the other parties, and each insurer that has a duty to defend another party in the civil proceeding, any agreement under which any commercial litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent in any respect on the outcome of the legal claim.

TRANSPARENCY IN THIRD PARTY LITIGATION FINANCING MODEL ACT § 16(1) (Nat'l Council of Ins. Legislators 2024).

138 IND. CODE § 24-12-11-5 (2024).

139 IND. CODE § 24-12-11-3 (2024).

140 IND. CODE § 24-12-11-4 (2024).

141 IND. CODE § 24-12-11-2 (2024).

142 W. VA. CODE § 46A-6N-6 (2024).

143 LA. REV. STAT. § 3580.12(A) (2024).

Procedure and Code of Evidence.[144] The Transparency and Limitations on Foreign Third-Party Litigation Funding Act,[145] enacted in the same legislation, provides that in civil cases involving a third-party litigation funder from a "foreign country of concern," the funder must disclose to the state's attorney general the name, address, and citizenship of any foreign entity from a country of concern that has a right to receive or obligation to make a payment that is contingent on the outcome of the civil action.[146] A funder from a foreign country of concern also must disclose to the attorney general whether a foreign entity from a country of concern has received or is entitled to receive proprietary information or information affecting national security interests obtained as a result of the funding agreement.[147] The attorney general shall be given a copy of the funding agreement.[148] Third-party litigation funders from countries of concern are prohibited from directing or making litigation decisions and cannot be assigned rights to or in a civil action other than the right to receive a share of the proceeds pursuant to the litigation financing agreement.[149]

D. Elements That Should Be Included in TPLF Reforms

TPLF reforms should include the following elements to address the various policy concerns discussed in this Article:

> *Disclosure of TPLF Agreements to the Court and Parties*. In any civil action, a party or party's attorney should be required to disclose to the court and the parties any agreement in which a non-party agrees to fund some or all of the party's attorneys' fees, costs, or expenses in exchange for a contingent right to receive payment out of any settlement, judgment, or award the party may receive in a civil action, including as part of a litigation funding portfolio.
>
> *Protect Consumers by Having Firms Disclose TPLF to Clients*. Claimants should be told if a firm has a TPLF arrangement before they commit to counsel if the law firm has a portfolio arrangement with a funder or immediately after funding is secured if the claimant is being represented by the funded firm.
>
> *Prevent Funders from Making Litigation and Settlements Decisions*. To maintain lawyers' ethical obligations to

144 LA. REV. STAT. § 3580.12(B) (2024).
145 LA. REV. STAT. §§ 3580.1 to 3580.7 (2024).
146 LA. REV. STAT. § 3580.3 (2024).
147 *Id.*
148 *Id.*
149 LA. REV. STAT. § 3580.5 (2024).

their clients, funders should be prevented from making litigation or settlement decisions.

Subject TPLF to Discovery. TPLF arrangements should be subject to discovery.

Hold Funders and Funded Firms Jointly Liable for Sanctions. Funders and funded law firms should be jointly liable for sanctions to reduce frivolous or fraudulent litigation.

CONCLUSION

TPLF is fundamentally changing the civil justice system in the United States. Proponents claim that TPLF helps less-wealthy plaintiffs—whether they are individual consumers or small to medium-sized businesses—take on the largest corporations in court. But, the practice has many negative impacts ranging from compromising lawyers' ethical duties; contributing to mass filings of speculative or unsupported tort claims; prolonging litigation and making settlements more difficult and costly to achieve; undermining U.S. companies; and creating a possible path for theft of trade secrets or other sensitive information. The federal judiciary and Congress are studying TPLF. Meanwhile, some individual federal courts have taken the modest step of requiring disclosure of TPLF. A growing number of states require disclosure of TPLF agreements. Courts and legislatures should require disclosure of TPLF agreements and adopt additional reforms such as to prevent funders from controlling or influencing litigation decisions.