Brooklyn Law Review

Volume 86 | Issue 2 Article 9

9-22-2021

The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency

Alec J. Manfre

Follow this and additional works at: https://brooklynworks.brooklaw.edu/blr

Part of the Civil Procedure Commons, Courts Commons, Judges Commons, Law and Economics Commons, Legal Ethics and Professional Responsibility Commons, Legal Profession Commons, and the Litigation Commons

Recommended Citation
Alec J. Manfre, *The Debate Over Disclosure in Third-Party Litigation Finance: Balancing the Need for Transparency with Efficiency*, 86 Brook. L. Rev. 561 (2021).
Available at: https://brooklynworks.brooklaw.edu/blr/vol86/iss2/9

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

The Debate over Disclosure in Third-Party Litigation Finance

BALANCING THE NEED FOR TRANSPARENCY WITH EFFICIENCY

INTRODUCTION

Third-party litigation finance (TPLF) is an old concept.[1] Often conflated with third-party litigation funding, it is generally defined as the practice by which an unrelated third party provides financial support to a plaintiff or defendant involved in a lawsuit in exchange for a share of the recovery from the suit.[2] Conceptually, the idea of "personal property" is often associated with ownership of *physical* things, and the rights that accompany them.[3] For example, a homeowner may sell his property at his leisure—the law protects alienability as a core right.[4] However, lawsuits have not traditionally been afforded the same protection.[5] In the context of litigation, we seldom associate one's lawsuit as their "property," let alone recognize a litigant's power to transfer a portion of that property to another person.[6] In fact, history reveals that litigation in general was considered a "social

---

[1] Michael K. Velchik & Jeffrey Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J. L. BUS. & FIN. 1, 6 (2019) (discussing the use of litigation finance in ancient Greece and classical Rome).

[2] *See Litigation Finance 101*, LEXSHARES, https://www.lexshares.com/litigation-finance-101 [https://perma.cc/8L4G-2JZH]; *see also* Daniel E. Cummings, *Third-Party Litigation Financing: Legal and Ethical Issues & Proposals for Mandatory Disclosure*, 20 NEB. LAW. 7, 7 (Sept./Oct. 2017).

[3] Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 249–50 (2007). For a discussion on the growth of property rights in contemporary society, see Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 63–67 (2011).

[4] Alienability refers to the ability to buy, sell, or transfer property rights from one individual to another. *See Alienable*, BLACKS LAW DICTIONARY (Bryan A. Garner, ed., 11th ed. 2019); *see also* Johnson, *supra* note 3, at 250–51 (discussing William Blackstone's idea that "a property owner [has] complete and absolute freedom in the use and control of his property").

[5] *See* Sebok, *supra* note 3, at 66 (discussing the "resistance to allowing property rights in lawsuits").

[6] *See* Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48, 48 (1935) (describing the historical conception of litigation as involving strictly three parties—the judge and two litigations—and no one else).

evil" that was "inimical to public policy."[7] Part of this conception stems from the use of TPLF in medieval England, where powerful barons would provide financial support to a litigant or "maintain" actions against feudal enemies for either personal gain or payback.[8] As a result of these abusive practices, regulators enacted prohibitions against maintenance and champerty[9] that carried over into the American legal system and persist in some jurisdictions to this day.[10]

Despite the historical stigmas associated with litigation finance, the increasing complexity, cost, and risks associated with legal disputes in modern society have turned TPLF into a "multi-billion dollar industry."[11] Today, dozens of companies offer diverse financing options for different types of lawsuits that primarily fall into two distinct sectors: commercial litigation finance and consumer litigation funding.[12] Although both consumer and commercial TPLF generally involve the provision of capital to a litigant, the two sectors are distinct practices that involve vastly different methodologies and carry separate risks.[13]

Differences aside, however, both practices serve the same general purpose: to provide underfunded litigants with the capital they need to fight their legal battles to the fullest extent possible.[14] TPLF is commonly used to pay for attorneys' fees, which allows litigants and their attorneys to pursue robust legal

---

[7] *See* Velchik & Zhang, *supra* note 1, at 13.

[8] *Id.* Velchik and Zhang note that "feudal lords would initiate and underwrite suits against their personal enemies as a form of 'private war.'" Furthermore, by purchasing and "prosecut[ing]" debt claims, powerful barons would "secure unjust and unmerited judgments, which financially weaken[ed]" their adversaries. *Id.*

[9] *See* STEVEN GARBER, RAND INST. FOR CIVIL JUSTICE, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS, 17–18 (2010) (defining "maintenance" as "the provision of support for a lawsuit to which one is not a party," and "champerty" as "a form of maintenance" which "involves acquiring an interest in the recovery from the lawsuit").

[10] *See* Sebok, *supra* note 3, at 98–99 (noting that "[t]wenty-eight of fifty-one United States jurisdictions (including the District of Columbia) explicitly permit champerty, albeit with varying limitations").

[11] *See* Cummings, *supra* note 2, at 7; *see also* Brian Baker, *In Low-Yield Environment, Litigation Finance Booms*, MARKETWATCH (Aug. 21, 2018, 10:59 AM), https://www.marketwatch.com/story/in-low-yield-environment-litigation-finance-booms-2018-08-17 [https://perma.cc/L9NZ-3PMT].

[12] Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1135 (2019); *see also* GARBER, *supra* note 9, at 8–9.

[13] Danielle Cutrona, Corporate Finance for Law—Essential and Ethical, Federalist Soc'y Blog (July 22, 2019), https://fedsoc.org/commentary/blog-posts/corporate-finance-for-law-essential-and-ethical#3 [https://perma.cc/FNJ5-H823] ("[T]here should [be] no confusion about the distinction between commercial legal finance and the entirely separate consumer litigation funding industry . . . The two are as distinct as investment banking and payday lending.").

[14] *See Litigation Finance 101*, *supra* note 2 (noting that "[a]ll too often litigants who seek justice are unable to pursue their claims due to the high costs associated with lawsuits").

strategies without fear of delayed payment or default.[15] A party may also be inclined to accept TPLF as a means to strengthen its bargaining power when negotiating a settlement.[16] Even if a party can afford the cost of litigation, it may favor financing arrangements to mitigate risk, or even to provide working capital to keep business running smoothly.[17]

Despite the tangible benefits TPLF provides, critics continue to raise various concerns about the practice.[18] Opponents to litigation funding commonly argue that it leads to the filing of "speculative, potentially high-yield cases"[19] and that TPLF allows for "influence [in] litigation decisions and settlement incentives."[20] Proponents of increased transparency also claim that the practice enables third-party funders to "create a conflict of interest between litigants and their attorneys by influencing the legal strategy employed" and that it presents the opportunity for what has become known as "malice maintenance," whereby third-party funders provide financial support to a litigant in order to retaliate against enemies in court.[21] To address these concerns, critics are calling for increased transparency in the industry.[22]

There are many different rules and regulations already in place that govern TPLF, but a uniform regulatory solution has not yet been reached.[23] Despite the existing landscape, critics

---

[15] *See id.*

[16] *See* GARBER, *supra* note 9, at 15 ("[S]ince provision of [TPLF] for a particular claim might send a signal to the defendant that the claim is of high quality, some companies might accept [TPLF] (and reveal this to the other side) in hopes of strengthening their bargaining positions in settlement negotiations.").

[17] *See* Cummings, *supra* note 2, at 7 ("A defendant can pay a certain amount to a funder in exchange for the funder's agreement to pay a portion of any verdict. By doing so, the defendant is able to mitigate its risk, similar to an insurance policy."); *Litigation Finance 101*, *supra* note 2.

[18] *See* Cutrona, *supra* note 13; Cummings, *supra* note 2, at 8.

[19] Lisa A. Rickard & Mark Behrens, *Transparency Needed as Third-Party Litigation Funding Enters the Mainstream*, CIV. JUST. RESPONSE COMMITTEE NEWSL., (Int'l Ass'n of Def. Counsel), Sept. 2016, at 3.

[20] Austin T. Popp, Note, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 743 (2019).

[21] Anusheh Khoshsima, *Malice Maintenance Is "Runnin' Wild": A Demand for Disclosure of Third-Party Litigation Funding*, 83 BROOK. L. REV. 1029, 1031 (2018) (discussing Bollea v. Gawker Media, 913 F. Supp. 2d 1325, 1330 (M.D. Fla. 2012), whereby a litigation funder used a third-party's lawsuit to retaliate against the defendant, an enemy).

[22] *See* Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. Courts 1–2 (June 1, 2017) [hereinafter 2017 U.S. Chamber Letter] ("Absent robust disclosure requirements, TPLF will continue to operate in the shadows, concealing from the court and other parties in each case the identity of what is effectively a real party in interest that may be steering a plaintiff's litigation strategy and settlement decisions.").

[23] *See* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 884 (2015) ("The United States faces the challenge of having a patchwork of sub-national states that have varying degrees of regulation of third-party funding."). Importantly, almost all states regulate consumer TPLF through consumer protection laws, but only two states have implemented mandatory disclosure

argue that a more "robust" disclosure regime is warranted.[24] Notably, the U.S. Chamber Institute for Legal Reform (U.S. Chamber Institute) has offered a novel solution to address the lack of uniform disclosure rules, and its proposal has gained the support of many interest groups and major corporations in the United States.[25] The solution proposes an amendment to the list of preexisting "initial disclosures" mandated by Federal Rule of Civil Procedure 26(a)(1)(A) that would require complete disclosure of TPLF agreements to opposing parties at the outset of civil litigation:

> [A] party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, 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.[26]

Under this proposed disclosure requirement, funded parties in both the commercial and consumer contexts would be required to reveal the various terms and financial intricacies of the agreement to adverse parties without request. The degree of disclosure suggested by the U.S. Chamber Institute would certainly provide adverse parties and courts with any and all information necessary to mitigate potential concerns, especially in the consumer context. However, not everyone agrees that complete

---

requirements for TPLF agreements in all civil litigation. *See* SARAH FOSS & CATHERINE COREY, DEBTWIRE, REGIONAL SPOTLIGHT: LITIGATION FINANCE IN THE UNITED STATES (2019) (surveying TPLF statutes, laws, ethics opinions, and case law pertaining to TPLF across the United States); Katelyn Ashton & Luther Munford, Butler Snow LLP, *Discoverability of Third-Party Litigation Financing*, JDSUPRA.COM (June 18, 2020), https://www.jdsupra.com/legalnews/discoverability-of-third-party-10343/ [https://perma.cc/BHE7-PTBH] (noting that Wisconsin and West Virginia are the only states with mandatory disclosure requirements for TPLF agreements). At the federal level, disclosure requirements for TPLF vary across jurisdictions, with "roughly half of all federal circuit courts and a quarter of all federal district courts requir[ing] disclosure of the identity of (some) litigation funders." Memorandum from Patrick A. Tighe, Rules Law Clerk, to Ed Cooper et al. 1 (Feb. 7, 2018) [hereinafter Tighe Memo].

[24] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 1–2.

[25] *See id.* at 23–24 (notably, various interest groups have voiced support for the U.S. Chamber Institute's efforts, including, but not limited to, the Advanced Medical Technology Association, the American Insurance Association, the American Tort Reform Association, the Association of Defense Trial Attorneys, DRI –*The Voice of the Defense Bar*, and the Federation of Defense & Corporate Counsel); *see also* Letter from Brackett B. Denniston, III et. al, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. Courts 1–3 (Jan. 31, 2019) (major U.S. corporations that have publicly supported the proposal include, but are not limited to, General Electric, AT&T, BP America, Chevron Corp., CVS Health, Ford Motor Company, and Google).

[26] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 2 (alteration in original).

disclosure of funding agreements is the proper solution.[27] Members of the commercial litigation finance community stand firmly in opposition to the proposal's broad requirements, arguing that it constitutes an unwarranted burden with potentially harmful consequences for both funded litigants and courts.[28] In addition, members of the judiciary have expressed similar views on disclosure, representing a trend amongst federal judges of denying discovery requests aimed at TPLF agreements.[29]

For example, in January 2019, the District Court for the Northern District of California struck down a motion to compel discovery of information regarding "persons and entities that [had] a financial interest in th[e] litigation, including [the] identification of any third party that [was] funding th[e] litigation."[30] The defendant contended that such discovery was necessary to "understand the existence of conflicts of interest [and] to identify and exclude jury members who may have a bias."[31] However, the Court found otherwise. In recognition of the fact that the plaintiff had already identified third parties with a financial interest in the case, the Court concluded that the requested discovery was irrelevant, and that the defendant's concerns over potential conflicts of interest and bias were speculative.[32] This case illuminates the contemporary issue that this note seeks to address: as the use of TPLF grows in the

---

[27] *See* Letter from Christopher P. Bogart, Chief Exec. Officer, Burford Capital, to Rebecca A. Womeldorf, Sec'y, Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. 15-16 (Sept. 1, 2017) [hereinafter Burford Response Letter].

[28] *See* Christopher P. Bogart, *Litigation Finance Disclosure Done Right*, BURFORD CAP. (May 7, 2018), https://www.burfordcapital.com/insights/insights-container/litigation-finance-disclosure-done-right/ [https://perma.cc/RYL4-N4PF] (noting Judge Dan Polster's stance on the need for limited TPLF disclosure as support for the theory that disclosure would be "misused to create expensive and time-wasting frolics and detours in litigation as a tactical device by defendants").

[29] Many courts have denied motions to compel discovery of litigation funding documents for a number of different reasons, most commonly lack of relevance. *See* Andrew Strickler, *Want Your Rival's Funder Info? Be Specific, Or Don't Bother*, LAW360 (Sept. 24, 2019, 7:50 PM EDT) https://www.law360.com/articles/1201654/want-your-rival-s-funder-info-be-specific-or-don-t-bother [https://perma.cc/6972-B4HL]. *See, e.g.*, Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019) (denying a motion to compel discovery of litigation funding documents because defendants failed to make the requisite showing that the discovery was "relevant to any party's claims or defense." (quoting Fed. R. Civ. P. 26(b)(1)); *In re* Valsartan N-Nitrosodimethylamine (NDMA) Contam. Prod. Liab. Litig., 405 F. Supp. 3d 612, 615 (D.N.J. Sept. 18, 2019) (finding the use of TPLF to be "irrelevant" to the dispute and therefore "not discoverable"); Space Data Corp. v. Google, No. 16-cv-03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (denying litigation funding discovery for lack of relevance); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 742 (N.D. Ill. 2014) ("Caterpillar is not entitled to discover the amount of money sought or received by Miller, the details of the agreement it has with its funder, or how much the funder will receive if Miller wins the case.").

[30] MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595, at *1 (N.D. Cal. Jan. 7, 2019) (internal quotation marks omitted).

[31] *Id.*

[32] *Id.* at *2.

United States, courts and lawmakers are facing immense pressure to require extensive disclosure of TPLF agreements, but the arguments against mandatory disclosure present compelling reasons to keep disclosure limited.

First, the various concerns raised by TPLF critics, though seemingly valid, are not supported by substantial evidence of abuse or ethical violations, but are the result of a fundamental misunderstanding of the distinction between consumer litigation lending and commercial litigation investment, which each involve unique practices and carry distinct concerns.[33] In particular, the complexity of and extensive due diligence process involved in commercial TPLF transactions serve as structural safeguards that mitigate many of the issues inherent in the consumer segment.[34] Second, mandatory disclosure of TPLF agreements at the outset of litigation would force funded parties with meritorious claims to endure extensive discovery beyond what is relevant or necessary for effective adjudication of the dispute.[35] Such discovery would delay resolution of the case, adding unnecessary expense to courts, attorneys, and litigants.[36] Finally, required disclosure of information contained within funding agreements could provide opposing parties with access to confidential information about the funded party's claim, giving them a strategic advantage in the litigation.[37] Simply put, automatic disclosure of commercial TPLF agreements at the outset of litigation is an unnecessary

---

[33] *See* Cutrona, *supra* note 13 (discussing how a misunderstanding of the distinction between consumer and commercial litigation finance has led to a push for "overbroad regulation").

[34] Telephone Interview with Jay Greenberg, CEO of LexShares, Inc. (Sept. 27, 2019).

[35] *See* Burford Response Letter, *supra* note 27, at 2 ("[T]he [U.S. Chamber Institute's] policy arguments ignore overwhelming evidence of the benefits provided by litigation finance, repeatedly make factual assertions with no support, and mischaracterize aberrant cases as reflecting prevailing trends without disclosing the multitude of countervailing authorities.").

[36] *See* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 721(N.D. Ill. 2014) (noting that discovery was "never intended to be an excursion ticket to an unlimited exploration of every conceivable matter that captures an attorney's interest"); *see also* Stephanie Spangler & Dai Wai Chin Feman, *An Overview of the Debate Over Litigation Finance Disclosure*, LAW360 (May 6, 2019, 2:12 PM), https://www.law360.com/articles/1155496/an-overview-of-the-debate-over-litigation-finance-disclosure [https://perma.cc/B6GH-KQ66] (arguing that "[d]isclosure could open the door to unnecessary, lengthy and costly motion practice, [and] fishing expeditions").

[37] *See* Emma Cueto, *Sens. Reintroduce Litigation Funding Transparency Bill*, LAW360 (Feb. 14, 2019, 5:52 PM), https://www.law360.com/articles/1129037/sens-reintroduce-litigation-funding-transparency-bill/ [https://perma.cc/HG8F-AG5M] (quoting Vannin Capital Managing Director Michael German, "[mandatory disclosures] would unfairly permit defendants facing legitimate lawsuits to gain an improper advantage and force the parties and the courts into an irrelevant side show regarding funding terms").

preventative solution for a problem that lacks sufficient evidence necessary to support the broad requirement.[38]

For the above stated reasons, the U.S. Chamber Institute's proposal is unnecessarily burdensome. However, the need for a well-balanced uniform rule of disclosure remains. This note offers a solution that may help strike that balance. Instead of amending Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure to require automatic and complete disclosure of funding agreements at the outset of litigation, the amendment should limit the initial disclosure requirement to the existence and identity of the funder.[39] This would provide sufficient notice to the court and to an opposing party of the existence of an interested third-party without creating time-consuming and unnecessary discovery expenses.[40] A party that seeks any additional TPLF discovery should be required to plead with specificity *why* additional discovery is necessary based on a reasonable, good-faith inference of abuse, conflict of interest, or other reason.[41] In the event the court is persuaded that disclosure may be warranted, it should use discretion to independently review the requested information prior to discovery

[38] *See* Burford Response Letter, *supra* note 27, at 15–16 (dismissing the U.S. Chamber's arguments in favor of increased transparency as being "misplaced" and "contrary to voluminous scholarly literature" which acknowledges, for example, that "[f]unders generally do not control the course of litigation or unduly interfere with the attorney-client relationship" (quoting Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO L.J. 65, 92 (2010))).

[39] This requirement would be consistent with the growing body of case law in which courts have denied requests for disclosure of specific terms of litigation funding agreements. *See, e.g.*, Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019) (denying a motion to compel discovery of litigation funding documents because defendants failed to make the requisite showing that the discovery was "relevant to any party's claims or defense" (quoting Fed. R. Civ. P. 26(b)(1)); Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 (VM)(KNF), 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (denying defendants' discovery request for failing to show "that the requested documents are relevant to any party's claim or defense"); Space Data Corp. v. Google, No. 16-cv-03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (denying litigation funding discovery for lack of relevancy).

[40] *See* Fed. R. Civ. P. 26(b)(1) (establishing the factors to be considered when determining the scope of discovery, including "whether the burden or expense of the proposed discovery outweighs its likely benefit").

[41] This requirement of a heightened pleading standard is inspired by the clarifications provided by the Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009), and would serve the purpose of preventing parties from using TPLF discovery as a procedural weapon to protract litigation, and to ensure that parties do not raise mere speculation as grounds for extensive discovery. *See* VHT, Inc. v. Zillow Group, Inc., No. C15-1096 JLR, 2016 WL 7077235, at *1 (W.D. Wash. Sept. 8, 2016) (denying litigation funding discovery "[w]ithout some objective evidence that any of [defendant's] theories of relevance apply [to the] case"); *Miller*, 17 F. Supp. 3d at 721 (noting that discovery was never "intended to be an excursion ticket to an unlimited exploration of every conceivable matter that captures an attorney's interest").

in order to prevent privileged or irrelevant material from being exposed and to prevent unnecessary cost to the disclosing party.[42]

Under this uniform disclosure regime, parties adverse to funded litigants will be made aware of the presence of third party funding and will be provided an opportunity to persuade the court that additional discovery is necessary. Conversely, funded parties would be able to preserve their confidential funding arrangements and avoid the expense and time of unnecessary discovery.[43] Part I of this note outlines the differences between consumer litigation funding and commercial litigation finance and highlights the structural safeguards inherent in commercial transactions that make mandatory disclosure unnecessary. Part II discusses the current debate over disclosure, and reveals how the concerns driving mandatory disclosure are fundamentally misguided. Part III provides a brief overview of the current regulatory requirements in federal courts and discusses how judges have ruled on TPLF disclosure in the past. Finally, Part IV suggests a uniform regulatory framework that appreciates the need for transparency as well as the need for efficiency.

I. THE DISTINCTION BETWEEN CONSUMER LITIGATION FUNDING AND COMMERCIAL LITIGATION INVESTMENT

The distinction between consumer and commercial TPLF is a critical consideration that helps inform the debate over disclosure. As explained below, the two sub-sectors of the industry differ greatly in terms of who receives funding, how the

---

[42] This recommendation is consistent with U.S. District Judge Dan Polster's order for *in camera* review of litigation finance documents and information rendered in *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018), as well as subsequent case law. *See* MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (reserving the right to conduct *in camera* review prior to trial in order to prevent costly and unnecessary discovery). By reserving the right to conduct an *in camera* review prior to granting a discovery request, courts are able to balance the need for discovery of relevant information without creating expensive and time-consuming sideshows. *See* Matthew Harrison & Sarah Jacobson, *Courts Are Getting It Right on Litigation Funding Discovery*, LAW360 (Jan. 22, 2019, 6:03 PM) https://www.law360.com/articles/1120873/courts-are-getting-it-right-on-litigation-funding-discovery [https://perma.cc/B4UY-PJKU].

[43] Notably, the U.S. Chamber Institute contemplates an exception to its proposal that would allow a litigant to "move for a protective order seeking to immunize [confidential] information from disclosure" in the scenario where "a TPLF agreement contains confidential information." *See* 2017 U.S. Chamber Letter, *supra* note 22, at 23. The exception falls under the assumption that TPLF agreements are relevant to any particular dispute, and therefore should be subject to disclosure unless the court finds otherwise. This assumption fails to consider the abundance of case law suggesting the contrary. *See* sources cited *supra* note 29. This note suggests that the burden should not rest with the funded party to protect confidential information, but rather with the party seeking additional discovery.

litigant receives it, and how the funder/investor is repaid.[44] Whereas consumer TPLF transactions are frequently described as a form of high interest "payday" lending, commercial TPLF is more akin to "investment banking" whereby experienced financiers spend thousands of dollars and many months conducting due diligence before investing, much in the same way that private equity firms and hedge funds treat traditional financial investments.[45] Because of the general lack of sophistication of consumer-funded litigants, the risk that they will become controlled by their funder or privy to unfair financing agreements is higher than in the commercial context, where funded parties typically have ample experience in contract dealings and courtroom affairs.[46] As a result of these distinctions, each sector has unique ethical considerations and risks, and therefore should be subject to unique rules.[47]

A. Consumer Litigation Finance

In the consumer sector, funds are provided to litigants in the form of a loan, which is repaid to the funder over a specified time schedule.[48] A majority of consumer funding is directed to personal injury cases and other small claims, and most of these litigants lack business backgrounds or experience in court.[49] The funding received by the party is often used to pay medical bills and cover living expenses during the course of the lawsuit, while their claim to a future award, pending a successful lawsuit, is used as security in the transaction with the legal funder.[50] These loans are usually non-recourse[51] and almost all individuals who

---

[44] *See* Anthony J. Sebok, *White Paper on Mandatory Disclosure in Third-Party Litigation Finance*, *in* MANDATORY DISCLOSURE RULES FOR DISPUTE FINANCING, N.Y.U. CTR. ON CIV. JUST. 5, 7–8 (2019).

[45] *Id.*; *see also* David R. Glickman, Note, *Embracing Third-Party Litigation Finance*, 43 FLA. ST. U. L. REV. 1043, 1047 (2016).

[46] *See* Laina Miller, *The Difference Between Commercial and Consumer Litigation Funding and Why it Matters*, VALIDITY FIN. (July 3, 2018), https://validity-finance.com/insights/commercial-consumer-litigation-funding-explained/ [https://perma.cc/GRJ5-UHFP].

[47] *See* GARBER, *supra* note 9, at 9 ("It is crucial to distinguish [consumer and commercial] segments, because activities in the different segments raise different ethical and economic issues, despite some prominent recent suggestions to the contrary.").

[48] *See id.*

[49] *See id.*; *see also* Popp, *supra* note 20, at 737 (noting the general "unsophisticat[ion]" of consumer TPLF plaintiffs who lack "the same level of negotiating power as do larger commercial entities or law firms").

[50] *See* Glickman, *supra* note 45, at 1045–46.

[51] *See* GARBER, *supra* note 9, at 9–10. "[N]on-recourse" means that the consumer is "obligated to pay their [funder] the minimum of (1) the amount specified in the contract . . . and (2) the consumers' proceeds from the underlying lawsuit." *Id.* (emphasis omitted). In other words, the consumer is not liable for repayment to the funder beyond what is contractually agreed upon, which protects the consumer from a lawsuit to recover the advance.

accept TPLF are represented on a contingency fee basis.[52] Unlike funding agreements within the commercial context, consumer TPLF is given directly to the litigant with no intermediary.[53] At the outset of litigation, the consumer signs a contract with the funder obligating the consumer to repay the principal amount plus interest and fees upon receipt of damages resulting from their injuries.[54] Some scholars have noted that these contracts tend to create confusion for consumer litigants because of the complex terms and "opaque" pricing.[55] As a result, the risk that an unsophisticated litigant will fall victim to unethical practices is higher than in the commercial segment.[56]

In order to account for the high risks assumed by taking on unpredictable consumer claims, funders charge astronomical interest rates.[57] Data suggests that out of 38,318 sampled cases, the median average interest rate collected is 43 percent.[58] However, a recent study of the consumer TPLF industry suggested that, while the median amount of funding was $2,250 per case, lenders expected to be repaid a median amount of $4,849, which would indicate a gross return of 115 percent over the median period of a little more than one year.[59] These rates have driven concerns that use of consumer TPLF "often leaves [litigants] with almost nothing from the award or settlement."[60]

Another way that some consumer funders mitigate risk is through the practice of "risk pooling" which involves providing

---

[52] *See id.* at 9.

[53] *See* Avraham & Sebok, *supra* note 12, at 1135.

[54] *See* Glickman, *supra* note 45, at 1046.

[55] *See* Avraham & Sebok, *supra* note 12, at 1167.

[56] *See* Popp, *supra* note 20, at 737.

[57] Brandon Lowrey, *How Litigation Finding Can Save, and Doom, Poor Plaintiffs*, LAW360 (May 13, 2019), https://www.law360.com/articles/1157455/how-litigation-funding-can-save-and-doom-poor-plaintiffs [https://perma.cc/9VWM-RUWQ] ("Litigation finance firms say their high interest rates are justified by the risks they take on plaintiffs in the unpredictable civil justice system."); *id.* (noting that litigation finance firms are forced to absorb losses when a plaintiff loses or settles a case for less than the borrowed amount). *See* GARBER, *supra* note 9, at 24 (discussing the risk of "adverse selection" whereby a litigant in need of funding is more likely to upsell the value of her claim in hopes of securing financial backing).

[58] *See* Avraham & Sebok, *supra* note 12, at 1142. This figure represents the "embedded interest rate," which takes into account various factors that impact the actual amount paid, and is the total interest amount paid over the average length of a case to resolution. *Id.* at 1142–43. The interest rate actually paid varies depending on the compounding structure of the loan, minimum interest period, and interest bucket. *Id.* at 1154; *see also* Daniel Fisher, *Study on Consumer Lawsuit Loans Finds High Rates, Confusing Terms*, LEGAL NEWSL. (Mar. 19, 2018), https://legalnewsline.com/stories/511365351-study-on-consumer-lawsuit-loans-finds-high-rates-confusing-terms [https://perma.cc/CE9W-M9BE].

[59] *See* Avraham & Sebok, *supra* note 12, at 1148–49. It is noted that median values were used because the data was "skewed to the right" which shifts the mean higher in most of the reported statistics. *Id.* at 1142 n.36.

[60] *Id.* at 1137.

many loans to different litigants at a single time.[61] Because the average size of consumer transactions is relatively small, consumer funders are less likely to devote resources to due diligence, but may be in a better position to take on more investments.[62] In doing so, the risk of an adverse judgment or a lower-than-expected settlement in one case is less detrimental to the portfolio as a whole.[63] While this practice can significantly reduce the amount of risk a funder incurs through litigation lending,[64] it also is a contributing factor to the concern that TPLF encourages the filing of frivolous lawsuits.[65]

There is question as to how fair the consumer TPLF market truly is. On the one hand, supporters of consumer TPLF argue that litigation funding provides access to justice for people with legitimate claims and financial trouble, and prevents "deep-pocketed defendants" from taking advantage of the unsophisticated plaintiff.[66] However, the complex terms and exorbitant rates imposed on an unsophisticated party may leave them in worse financial standing than before they received funding.[67] For these reasons, many of the concerns surrounding the TPLF industry in general are the result of abuse in the consumer segment.[68]

B. Commercial Litigation Finance

Whereas consumer TPLF is more attuned to "cash-advance" loans, commercial litigation funding is typically perceived as an "investment," where the "asset value of a litigation claim is used to secure capital from a finance provider in exchange for a return tied to the outcome of a case."[69] Commercial investors have been known to invest anywhere between $2 million and $10 million in a given case, and typically focus investments on disputes involving antitrust, intellectual property claims, and contract claims.[70] Before an investment is made, financiers dedicate extensive resources and spend months analyzing a particular case in order to ascertain the many

---

[61] *See* Popp, *supra* note 20, at 737–38.

[62] *See id.* (discussing how the weaker due diligence increases risk of lower valued cases in the consumer funder's portfolio, which can be offset by spreading the risk across different cases).

[63] *See* GARBER, *supra* note 9, at 25.

[64] *See id.* at 25 ("Applying 'laws of large numbers' . . . risk pooling can reduce portfolio risk to almost zero if a portfolio includes a sufficient number of deals whose risks are sufficiently unrelated.").

[65] *See* Popp, *supra* note 20, at 741.

[66] *See* Lowrey, *supra* note 57.

[67] *See id.*

[68] *See* Glickman, *supra* note 45, at 1045.

[69] *See* Cutrona, *supra* note 13; *see also* GARBER, *supra* note 9, at 10, 13.

[70] *See* Popp, *supra* note 20, at 738–39.

different factors and risks that impact the potential value complex commercial litigation.[71] This due diligence process is a defining feature of commercial TPLF, in comparison to its consumer counterpart, because it ensures that only the most meritorious claims are funded.[72]

The commercial TPLF industry has experienced tremendous growth in the past twenty years; recent estimates value the market in excess of $100 billion.[73] Burford Capital, a global leader in litigation finance, reported a $3.2 billion investment portfolio in 2018, and there are dozens of other funders specifically dedicated to commercial litigation finance.[74] It is almost unanimously agreed upon within the legal community that there are several key factors driving the growth of the commercial litigation finance industry.[75] One factor is the abundance of companies pursuing or defending a legal action, while simultaneously requiring a cash inflow to keep their companies running.[76]

Another force that drives the demand for commercial TPLF is the need for investment diversification in the midst of increasingly volatile global markets.[77] In the aftermath of the global sub-prime housing crisis, investors have sought to diversify their portfolios with assets untied to the ever-shifting and unpredictable financial markets.[78] In fact, the financial crisis of 2008, by its very nature, gave rise to an increase in litigation surrounding the legality of practices which caused the recession; as

---

[71] *See* Shannon, *supra* note 23, at 899 (explaining the process by which funders conduct due diligence in deciding whether to fund a case or not, including "ask[ing] the potential client for immense amounts of information about the case . . . includ[ing] financial statements and background information about the client itself"); Popp, *supra* note 20, at 739–40 (noting that Juridica, a commercial litigation funding company, typically dedicates approximately 60 to 90 days to conducting due diligence, which is a "very detailed and expensive process").

[72] *See* Burford Response Letter, *supra* note 27, at 5.

[73] Andrew R. Goldberg, *Recent Trends in Litigation Finance Discovery Disputes*, LAW.COM (Feb. 5, 2021, 11:30 AM), https://www.law.com/newyorklawjournal/2021/02/05/recent-trends-in-litigation-finance-discovery-disputes/ [https://perma.cc/TQW5-2EPP].

[74] Mark A. Behrens & Christopher E. Appel, *Federal Civil Rule Reform: An Update*, 86 DEF. COUNS. J. 1, 15–16 (2019).

[75] *See* Shannon, *supra* note 23, at 869 ("There are three overarching global forces driving the sharp increase in the demand for dispute financing."); *see also* BURFORD CAPITAL, 2018 LITIGATION FINANCE SURVEY 10 (2018) ("97% of all interviewees perceive litigation finance as growing.").

[76] *See* Shannon, *supra* note 23, at 869; *see also* Glickman, *supra* note 45, at 1048. ("The opportunity costs involved in diverting capital to cover the cost of litigation can be overwhelming to the largest . . . entities and fatal to the rest.").

[77] *See* Shannon, *supra* note 23, at 869 ("A third force is the worldwide market turmoil and uncertainty in recent years, which has inspired hedge funds, banks, and other financial investors to seek investments that are not directly tied to or affected by the volatile and unpredictable financial markets.").

[78] *Id.*

a result, investment in litigation became recognized as a profitable investment in the midst of economic downturn.[79]

TPLF on the commercial front is not only used as a tool for plaintiffs and investors, but also for defendants who may be able to afford the costs of litigation but wish to mitigate costs and potential risks.[80] For example, corporate defendants often use TPLF to offset the appearance of financial instability in the midst of an ongoing business deal or potential merger.[81] In a survey conducted by Burford Capital, 21% of lawyers and in-house legal departments around the globe identified "rebalancing risk as a key factor in the growth of litigation finance."[82]

Commercial litigation finance has helped real businesses achieve legal victories.[83] In *Miller UK Ltd. v. Caterpillar, Inc.*, an England-based family business filed suit against the American machinery manufacturer Caterpillar, Inc. for breach of contract and trade secret misappropriation.[84] Miller was forced to lay off 75 percent of its 400 employees and faced serious financial hardship as a result of Caterpillar's actions.[85] Clearly outmatched by their deep-pocketed opponents aggressive litigation strategy, Miller acquired litigation funding to even the playing field.[86] Using the new source of funds to cover the costs of discovery, pay attorney fees, and even keep business afloat over the course of the lawsuit, Miller hired a renowned law firm to take on the American industry giant in court.[87] Despite Caterpillar's allegations of impermissible use of litigation finance and attempt to obtain disclosure of Miller's financing information, the court struck down the request and the case proceeded to trial.[88] After eight weeks, a jury returned a verdict for Miller in the amount of $74.6 million—a victory that company founder Keith Miller said gave his company a "fresh start."[89]

---

[79] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1283 (2011) ("[R]ecessions . . . produce more claimants who possess less funding for, or at least less appetite to bear, litigation costs.").

[80] *Id.* at 1276.

[81] *See* Glickman, *supra* note 45, at 1049–50 ("An entire deal may be scuttled because the target is subject to an unacceptable and uncertain amount of pending or ongoing litigation risk.")

[82] *See* BURFORD CAPITAL, *supra* note 75, at 6, 12.

[83] *See* Marla Decker & Lake Whillans, *Litigation Finance Success Story: Miller v. Caterpillar*, ABOVE THE LAW (Jan. 27, 2016, 1:01 PM), https://abovethelaw.com/2016/01/litigation-finance-success-story-miller-v-caterpillar/ [https://perma.cc/TT6F-R5Q9].

[84] Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 717–19 (N.D. Ill. 2014); *see also* Decker & Whillans, *supra* note 83.

[85] *See* Decker & Whillans, *supra* note 83.

[86] *Id.*

[87] *Id.*

[88] *See id.*; *see also Miller*, 17 F. Supp. 3d at 742.

[89] *See* Decker & Whillans, *supra* note 83; James R. Hagerty, *Supplier Wins $74 Million Verdict Against Caterpillar*, WALL STREET J. (Dec. 21, 2015, 7:35 AM EDT),

The *Miller* case exemplifies what commercial TPLF is designed to do: provide undercapitalized parties with financial support in furtherance of a meritorious claim, and give investors the chance to diversify traditional assets while helping someone in need at the same time.[90] However, critics of the industry seek mandatory disclosure of funding agreements "to prevent courts from becoming trading floors where people buy and sell lawsuits based on their perceived merit,"[91] and to prevent the justice system from being reduced "to a litigation system effectively controlled by third parties interested solely in profit."[92] Although TPLF has commoditized the legal system in an abstract sense, there are sufficient structural safeguards in place within the commercial litigation finance sector that mitigate the need for robust disclosure.

C. *Structural Differences Between Commercial Litigation Investment and Consumer Litigation Lending*

In furtherance of the argument against increased disclosure, TPLF advocates believe the differences between consumer TPLF and commercial TPLF are often conflated, causing a push for burdensome regulation of two distinct fields.[93] Although the consumer TPLF market presents many issues that likely warrant disclosure of financing agreements, such a requirement is unnecessary in the commercial sector.[94] Compared to transactions in the consumer TPLF segment, where unsophisticated litigants "enter into boilerplate contracts that are to their detriment," transactions in the commercial

---

https://www.wsj.com/articles/supplier-wins-74-million-verdict-against-caterpillar-1450700414 [https://perma.cc/88DS-82ZU].

[90] *See Litigation Finance 101*, *supra* note 2; Glickman, *supra* note 45, at 1049–50 ("TPLF providers offer a crucial solution to a complex problem.").

[91] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 11.

[92] *See id.* at 18. The letter calls for a renewed commitment to the doctrine of champerty, which prevents the legal system from becoming a tool used for financial gain and seeks to ensure that litigants retain control over their own cases without influence from third parties. *Id.* at 9.

[93] *See* Cutrona, *supra* note 13 ("[A] narrow but vocal interest group deliberately conflates [consumer and commercial TPLF] in their effort to obtain overbroad regulation."); *see also* MP McQueen, *As the Litigation Funding Industry Grows, So Do Efforts to Control It*, LAW.COM (Oct. 11, 2019), https://www.law.com/2019/07/11/as-the-litigation-funding-industry-grows-so-do-efforts-to-control-it/ [https://perma.cc/LQX8-W3DD] ("[O]pponents of third-party litigation finance 'absolutely conflate the two [consumer and commercial litigation funding] and I believe it is intentional, because consumer creates a more emotional reaction and confusion is helpful to them.'" (second alteration in original) (quoting David Perla, Managing Director of Burford Capital)).

[94] *See* Miller, *supra* note 46 (noting that "certain ethical and practical issues" inherent in consumer litigation finance "are not present in the commercial context," and as a result, "proposed laws" aimed at alleviating these concerns "have no place in commercial litigation finance deals").

sector are occur between contract-savvy parties and are structured in a way that is designed to prevent abuse.[95]

To provide an example, LexShares, an up-and-coming litigation finance investment company, offers built-in safeguards in its investment structures. In its most common funding structure, a commercial party in need of financing will contact the litigation funding company, which will begin an extensive underwriting process, evaluating the myriad of extrinsic factors that contribute to the likelihood of success.[96] Through this process, the company ensures that meritless claims are avoided.[97] Upon approval, a "special purpose vehicle" in the form of a Limited Liability Company (LLC) created by the funding company will enter into a Purchase and Sale Agreement with the claimant, purchasing a portion of any potential future recovery from their claim(s). The case investment opportunity is then posted to funding company's online platform for investors to subscribe to.[98]

When the investor decides which case investment to fund, they execute a subscription agreement for equity ownership in the special purpose vehicle LLC as a limited member.[99] Per the special purpose vehicle's operating agreement, the investor has no ability or authority to influence the course of litigation or communicate directly with the plaintiff or their counsel.[100] This type of provision is common amongst commercial financiers, and is often overlooked by disclosure advocates.[101]

---

[95] *See* Glickman, *supra* note 45, at 1045 (discussing how the relative sophistication of commercial litigants enables them to enter into "negotiated, arms-length agreements" while consumer litigants tend to "enter into boilerpate contracts"); David Perla, *Control: A Common Question About Litigation Finance*, N.Y. L.J. (Aug. 14, 2018, 2:30 PM), https://www.law.com/newyorklawjournal/2018/08/14/control-a-common-question-about-litigation-finance/. [https://perma.cc/R523-CN8W].

[96] Defined as "the method of critically analyzing investments to select desirable opportunities," the underwriting process consists of a comprehensive assessment of the investment considering "extrinsic factors affecting the prospects for a favorable recovery, while also mitigating significant counterparty risks that can arise from both clients and their attorneys." Max Volsky, *A Brief Introduction to Litigation Finance*, LEXSHARES 5 (July 30, 2019), https://www.wealthforge.com/hubfs/LexShares-Litigation-Finance-White paper.pdf [https://perma.cc/988K-335Y].

[97] *See* Popp, *supra* note 20, at 741.

[98] In addition, the company will post information relevant to the dispute, such as the parties, the background of the case, the jurisdiction and judge, and other relevant information. *See* Telephone Interview with Jay Greenberg, *supra* note 34.

[99] *Id.*; *see also* Matthew Ingber et al., Portfolio Media. Inc., *Practical Considerations for Litigating Against SPVs*, LAW360 (OCT. 3, 2017, 12:42 PM) https://www.mayerbrown.com/-/media/files/news/2017/10/practical-considerations-for-litigating-against-sp/files/practicalco nsiderationsforlitigatingagainstspvs/fileattachment/practicalconsiderationsforlitigatinga gainstspvs.pdf [https://perma.cc/C3AW-F3QU] (defining a "special purpose vehicle" ("SPV") as a "legal entity created to fulfill a narrow and temporary objective, and they typically are used to protect other parties—including their founders, managers, creditors and owners—from unintended risk").

[100] *See* Telephone Interview with Jay Greenberg, *supra* note 34.

[101] *See* Burford Response Letter, *supra* note 27, at 16.

The second investment method offered by LexShares is through the LexShares Marketplace Fund I (LMFI).[102] This financing model allows funders to invest in a "discretionary fund vehicle," which is a broad portfolio created by the funding company comprised of multiple legal claims instead of just one particular case.[103] LexShares uses its discretion to create a portfolio of litigation-related assets by investing in cases on the LexShares platform, making it easier for a new investor to participate in litigation finance without having to conduct extensive due diligence on their own.[104] Because the discretionary fund vehicle prevents a funder from deciding for himself which case or cases to invest in, conflicts of interest between a funder and a party are impossible, while the ability to exercise control over the lawsuit is effectively eliminated.[105]

Considering the intricate investment structure and built-in protections of commercial TPLF in contrast with the vastly different consumer TPLF sector, mandatory disclosure of commercial TPLF agreements is simply unnecessary.[106] Nonetheless, advocates of increased regulation group the distinct practices together, raising instances of abuse in the consumer segment as a reason to implement broad, industry-wide regulations.[107] But opponents to increased regulation, particularly those who work in the commercial sector, seek to expose their counterparts' fears as misguided.[108]

II. THE DEBATE OVER DISCLOSURE

On one side of the debate, there are a variety of interest groups and regulators pushing for mandatory disclosure of TPLF arrangements in civil actions filed in federal court.[109] Although certain objections pertain only to one segment of litigation finance,[110] the most common arguments against the use of TPLF are that it leads to "the filing of frivolous claims"

---

[102] *See* Telephone Interview with Jay Greenberg, *supra* note 34.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* Miller, *supra* note 46.

[107] *See* Glickman, *supra* note 45, at 1045 ("Most of the legitimate issues raised regarding the TPLF industry stem from the consequences in connection with consumer legal funding but are absent from commercial investment."); Khoshsima, *supra* note 21, at 1029–32, 1051 (exposing the problem of "malice maintenance" through the example of *Gawker Media*, and posing a solution to the problem in the form of a "general disclosure rule").

[108] *See generally* Burford Response Letter, *supra* note 27.

[109] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 1.

[110] *See* Spangler & Feman, *supra* note 36 (detailing the general arguments in favor and against TPLF, and acknowledging that some pertain specifically to "consumer, class action, multidistrict litigation and international arbitration").

and that it enables a funder to exert "influence on litigation decisions and settlement incentives."[111] From a broad perspective, arguments made in favor of disclosure are principally aimed at increasing transparency as a measure of preventing conflicts of interest[112] and limiting "malice maintenance," the practice by which "a third party intermeddles in a lawsuit by assisting one party 'out of pure spite or malevolence towards the target of the [lawsuit].'"[113] However, many of these concerns can easily be resolved without the disclosure of the irrelevant details of TPLF agreements.

A. Conflicts of Interest

Noting that corporate entities are already required by the Federal Rules of Civil Procedure to disclose "any parent corporation and any publicly held corporation owning 10 [percent] or more of its stock,"[114] a typical argument made by defendants and defense lobbies is that "[j]udges, jurors and witnesses may have investment or other relationships with litigation funders, and would therefore be inclined to side with the party receiving litigation funding."[115]

The reasons for which TPLF may cause conflicts of interest are twofold. First, the added financial interest in the case interferes with the funded party's ability to consult with counsel and make independent litigation decisions.[116] Whereas an attorney representing a party without TPLF is free to work with their client to decide the course of litigation that would serve the party's best interest, the presence of third-party funding may encourage a party and its counsel to forego the best course of action in exchange for a potentially more lucrative one.[117] Second, there is concern that funders are in a "unique position to create a conflict of interest between litigants and their attorneys" by manipulating the course of legal action and exercising "control over both the development and outcome of the lawsuit."[118]

---

[111] *See* Popp, *supra* note 20, at 741, 743.

[112] *See, e.g.*, 2017 U.S. Chamber Letter, *supra* note 22, at 2; Jonathan T. Molot, *A Market in Litigation Risk*, 76 CHI. L. REV. 367, 434 (identifying conflicts of interest as a "good example of an ethical problem"); Popp, *supra* note 20, at 755 (identifying the elimination of conflicts of interest as a regulatory safeguard that must be implemented and that "mandating disclosure in all suits will promote transparency").

[113] *See* Khoshsima, *supra* note 21, at 1031 (alteration in original).

[114] FED R. CIV. P. 7.1(a)(1); *see also* 2017 U.S. Chamber Letter, *supra* note 22, at 15.

[115] *See* Spangler & Feman, *supra* note 36.

[116] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 15.

[117] *Id.*

[118] *See* Khoshsima, *supra* note 21, at 1031.

This concern is not purely speculative—there have been instances where TPLF was used as a conduit to legal retaliation.[119] In 2012, Terry Gene Bollea, also known as Hulk Hogan, brought suit against Gawker Media (Gawker), alleging invasion of privacy for posting a video of Hogan having sex with a friend's wife.[120] After Gawker faced a $140 million judgment and filed for bankruptcy, Gawker discovered that Hogan's suit was funded by Peter Thiel, a "billionaire Silicon Valley Entrepreneur," whom Gawker had exposed as homosexual over one decade earlier, without first receiving his consent.[121] As Gawker soon learned, Thiel, without ever disclosing his identity, had funded several suits against them for the sole purpose of retaliating against the media outlet.[122] This case serves as a prime example of why disclosure is necessary.[123] However, instances of abuse like this could be mitigated through disclosure of the funder's identity alone, while the more specific provisions included in TPLF agreements would be extraneous.[124]

Critics argue that TPLF not only exacerbates the potential for intraparty conflicts of interest, but also for judicial conflicts of interest as well.[125] In 2010, a group of Ecuadorian citizens filed suit against Chevron Corporation as a result of their disruptive drilling practices, and the Court levied a $18.2 billion judgment against the defendant.[126] The plaintiffs, represented by American attorney Steven Donziger, had received third-party funding from Burford Capital.[127] After being ordered to reveal the identity of the funder, Donziger informed the Special Master presiding over the case of Burford's financial interest.[128] Coincidentally, the Special

---

[119] *Id.* at 1029–31 (discussing Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325 (M.D. Fla. 2012), whereby a third party provided litigation funding to a plaintiff for the purpose of retaliating against the defendant).

[120] Sydney Ember, *Gawker and Hulk Hogan Reach $31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html [https://perma.cc/7BLM-WGA9].

[121] *Id.*

[122] Ryan Mac, *Behind Peter Thiel's Plan to Destroy Gawker*, FORBES (June 29, 2016), https://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#47abcb630f40 [https://perma.cc/W5DT-QEW7]. Thiel sees the retaliatory lawsuits against Gawker as challenging a "singularly terrible bully." *Id.*

[123] *See* Khoshsima, *supra* note 21, at 1054.

[124] *See* Michael German, *Perspectives From a Litigation Funder: The Case for Sensible Disclsoure*, N.Y. L.J. (Jan. 31, 2019), https://www.law.com/newyorklawjournal/2019/01/31/perspectives-from-a-litigation-funder-the-case-for-sensible-disclosure/ [https://perma.cc/JNV6-RZQJ].

[125] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 15.

[126] Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1650 (2013); *see also* Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE (June 28, 2011, 6:06 PM), https://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/ [https://perma.cc/4549-JHZC].

[127] *See* Trusz, *supra* note 126, at 1650.

[128] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 16.

Master disclosed that he "was friends with Burford's former general counsel" and was sent "a brochure about funding one of Burford's cases."[129] Despite this conflict, the Special Master did not recuse himself, although he noted that Donziger's deposition "prove[d] . . . that it is imperative for lawyers to insist that clients disclose who the investors are."[130]

The *Chevron* case[131] lends compelling support for mandatory disclosure of TPLF agreements as a means to prevent conflict of interest and bias issues.[132] But opponents raise an equally compelling argument: bias and conflicts of interest could be avoided altogether if TPLF information is protected by the work product doctrine and is shielded from disclosure through privilege.[133] For example, if the existence and identity of TPLF in the *Chevron* case was protected from disclosure as privileged information, the Special Master would have been unaware of the conflict and therefore free from bias. Confidentiality aside, federal judges in the United States are bound by ethical rules that mandate recusal in the presence of a conflict of interest.[134] For this reason, opponents to disclosure criticize the U.S. Chamber Institute for its broad assertion that TPLF creates the risk of judicial conflicts without offering any additional evidence of cases or examples of similar issues.[135]

B. *Funder Control of Litigation*

The concern that a funder has the power to terminate the inflow of capital if the litigant does not follow the funder's litigation strategy also fuels the push for mandatory disclosure.[136]

---

[129] 2017 U.S. Chamber Letter, *supra* note 22, at 16. According to Burford, however, the U.S. Chamber Institute incorrectly mischaracterized the interaction between Chris Bogart and the Special Master. *See* Burford Response Letter, *supra* note 27, at 12 n.83.

[130] *See* Trusz, *supra* note 126, at 1650 (alteration in original). Since the Ecuadorian judgment was rendered, Steven Donziger has been charged with an abundance of offenses in connection to the case, including bribery and extortion. *See* Nate Raymond, *Chevron Seeks $32 Million in Legal Fees in Ecuador Case*, REUTERS (Mar. 19, 2014, 2:15 PM), https://www.reuters.com/article/us-chevron-ecuador/chevron-seeks-32-million-in-legal-fees-in-ecuador-case-idUSBREA2I1PS20140319 [https://perma.cc/6HKS-M3RQ].

[131] *In re* Chevron Corp., 749 F. Supp. 2d 141 (S.D.N.Y. 2010).

[132] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 16.

[133] *See* Spangler & Feman, *supra* note 36 ("Absent disclosure, no party would have a basis to know that a litigation funder is even involved in the case, precluding knowledge of a relationship that would give rise to a conflict of interest.").

[134] *See* 28 U.S.C. § 455(a) (mandating that a judge "disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *see also* Burford Response Letter, *supra* note 27, at 12 (stating that "federal judges are well aware of their ethical responsibilities, and would be well advised to avoid investing in litigation finance entities").

[135] *See* Burford Response Letter, *supra* note 27, at 12.

[136] *See* Shannon, *supra* note 23, at 863–64.

Given the obvious financial interest a funder has in the outcome of the case, disclosure advocates fear that TPLF companies will "seek to protect [their] investment[s]" by "exert[ing] control over the plaintiff's strategic decisions,"[137] thus interfering with the attorney's ethical duty to maintain "independent professional judgment."[138]

In support of this concern, the U.S. Chamber Institute refers to TPLF company Bentham IMF's 2017 "best practices" guide,[139] which states that litigation funding agreements should clearly establish the extent to which the entity is permitted to "[m]anage [the claimant's] litigation expenses"; "[r]ecieve notice of and provide input on any settlement demand and/or offer, and any response"; and "participate in settlement decisions."[140] Given Bentham's clear confirmation of its reserved right to control aspects of a funded litigation, it would seem obvious that TPLF companies reserve at least some right to control a plaintiff's litigation.

Despite the seemingly crystal-clear provision in Bentham's best practices guide, industry representatives confirm that they maintain no "control nor will [they] seek to control strategy, settlement or other litigation-related decision-making," and "will not withhold contractually required funding for strategic reasons."[141] As noted by Burford Capital, the U.S. Chamber Institute failed to acknowledge other provisions in Bentham's best practice guide that directly address the concerns raised by the Institute.[142] Namely, the best practice guide states: "'[t]he funder shall not induce a litigant's counsel to breach their professional duties,' including counsel's duty of loyalty to the litigant."[143]

Whereas the U.S. Chamber Institute characterized the language contained in Bentham's document as a declaration of Bentham's intention to exercise control over funded litigation, the best practices guide simply establishes circumstances, if at all, under which the funder is permitted to provide input on settlement

---

[137] *See* Popp, *supra* note 20, at 743; *See also* Glickman, *supra* note 45, at 1062 (discussing ways in which TPLF providers exercise control over their investments).

[138] *See* MODEL RULES OF PROF. CONDUCT, R. 2.1 (A.B.A.).

[139] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 16–17.

[140] *Id.* at 17.

[141] *See* Cutrona, *supra* note 13 ("Burford [Capital] does not 'get any rights to manage the litigation in which [they] invest . . . . Just as a leasing company does not tell you how to drive your car, [they] don't drive the litigation. Nor do [they] get any rights to control the settlement of the litigation, which remains wholly in the litigant's control." (quoting a statement from Burford Capital)).

[142] *See* Burford Response Letter, *supra* note 27, at 16 (acknowledging the Institute's omission of relevant information contained in Bentham's best practice guide that addresses the concern over funder-control).

[143] *Id.*

discussions.[144] In fact, the funder's expertise in litigation is often welcomed by litigants, considering that litigation funders typically have extensive litigation experience and are "repeat players in the litigation space."[145] Because a funder's interest in the successful resolution of a case is directly aligned with the party's interest in the same (both the funder and the litigant seek a favorable judgment), the fact that a funder may provide input on the case should not be a point of concern but should be viewed as reassurance that litigants have advocates supporting their best interests.[146] Extensive literature also supports the contentions that funders do not exercise control over litigation strategies and decisions made about the course of the lawsuit are made by the party and his lawyer.[147] As an added layer of protection, existing rules governing attorney conduct require that lawyers exercise professional judgment in the best interest of the client, regardless of financial or other considerations.[148]

III. THE REGULATORY RESPONSE

In response to the issues raised above, many different laws and regulations focused on TPLF have emerged at the state and federal level.[149] However, the dichotomy between consumer and commercial segments, each subject to distinct yet overlapping regulations at both the state and federal level, has made it difficult to implement a uniform set of rules that adequately governs the industry as a whole.[150] With respect to laws specifically aimed at disclosure of TPLF agreements, only two states have addressed the issue.[151] At the federal level,

---

144 *See* BENTHAM IMF, CODE OF BEST PRACTICES 3 (2013) ("[The litigation funding arrangement] shall state plainly whether and in what circumstances the [f]under may . . . receive notice of and provide input on any settlement demand . . . .").

145 *See* Burford Response Letter, *supra* note 27, at 16.

146 *See id.* at 16–18.

147 *Id.* at 15–16; *see also* Molot, *supra* note 112, at 403–06.

148 *See* MODEL RULES OF PROF. CONDUCT, R. 5.4(c) (2009) (prohibiting interference with an attorney's professional judgment by one who "recommends, employs, or pays the lawyer to render legal services for another"); *see also* Burford Response Letter, *supra* note 27, at 15 ("[T]he Chamber's disapproval of litigation finance as a policy matter does not justify amending Rule 26 to require disclosure of [TPLF] arrangements.").

149 David Lat, *The Evolving Regulatory Landscape for Litigation Finance*, ABOVE THE LAW (June 8, 2018, 5:33 PM), https://abovethelaw.com/2018/06/the-evolving-regulatory-landscape-for-litigation-finance/ [https://perma.cc/HX7M-8T4F] (outlining the current regulatory framework for litigation finance in the United States).

150 For example, most consumer TPLF arrangments are subject to interest rate caps and other restrictions imposed by state consumer protection laws. *See* Tighe Memo, *supra* note 23, at 8–9. However, only some states acknowledge exceptions to these provisions for commercial TPLF agreements. *See* Shannon, *supra* note 23, at 884–85.

151 *See* Ashton & Munford, *supra* note 23 (noting that as of June 2020, Wisconsin and West Virginia are the only states to have passed laws explicitly requiring disclosure of litigation funding agreements).

lawmakers attempted to enact a uniform disclosure requirement for TPLF arrangements in class action lawsuits, but the bill stalled in committee in both 2018 and 2019.[152] Notably, federal courts have implemented myriad disclosure requirements for TPLF information that vary greatly in terms of form and substance.[153] Although some commentators believe that the existing disclosure rules adequately addresses concerns over TPLF,[154] the various ambiguities create confusion that could be resolved through a uniform disclosure requirement for commercial TPLF in federal court. The following discussion provides an overview of the current disclosure requirements across jurisdictions and sheds light on the trend amongst judges faced with discovery requests aimed at TPLF agreements of keeping disclosure limited.[155]

A. *Existing Disclosure Requirements in Federal Courts*

Although there is currently no federal law which directly requires litigation funding information to be disclosed, Rule 7.1 of the Federal Rules of Civil Procedure contemplates disclosure of third-party interests, while the Federal Rule of Appellate Procedure 26.1 does the same as well.[156] However, these rules do not necessarily require parties to disclose the identity of a funder who does not exactly fit the description described in the rules.[157] To address the need for transparency, some circuit and district

---

[152] *See* Cueto, *supra* note 37; James Anderson, *Is Increased Transparency into Litigation Financing on the Horizon?*, NATLAWREVIEW.COM (Jan. 15, 2020), https://www.natlawreview.com/article/increased-transparency-litigation-financing-horizon [https://perma.cc/LFN8-AFQ4]; *see also* ADVISORY COMM. ON CIV. RULES, 116TH CONG., REP. TO THE STANDING COMMITTEE OF THE ADVISORY COMM. ON CIV. RULES, 314 (Jan. 6, 2020) (sent from Hon. John D. Bates, Chair) (although the bills failed, there was acknowledgement that "TPLF is a phenomenon of growing importance" and should therefore "remain on the Advisory Committee's agenda").

[153] *See* Tighe Memo, *supra* note 23, at 6.

[154] *See* Cueto, *supra* note 37 (referencing Burford Capital's statement that "[t]he U.S. legal system already has clear and robust rules for disclosure that have worked well for many decades").

[155] *See* Strickler, *supra* note 29.

[156] *See* FED. R. CIV. P. 7.1(a) (requiring that "[a] nongovernmental corporate party must file [two] copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10 % or more of its stock; or (2) states that there is no such corporation"); FED. R. APP. P. 26.1(a) (requiring that "[a]ny nongovernmental [corporate party] to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation").

[157] *See* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 399 (2016).

courts have adopted rules of their own to address in excess of what is required by Rules 7.1 and 26.1.[158]

Circuit courts with expanded disclosure requirements typically mandate that a party disclose "all persons" or "other legal entities" that "are financially interested in the outcome of the litigation" though individual approaches vary.[159] For example, the Fifth Circuit requires the identity of all "legal entit[ies]" to be disclosed, while the Third Circuit only requires disclosure of the identity of every "publicly owned corporation" with a financial interest in the case. The local rules of each circuit court also vary in terms of what information must be included in disclosure statements.[160] In addition, disclosure requirements from circuit to circuit differ depending on the degree to which a third party is financially interested in the case.[161] For example, the Third Circuit requires disclosure of any entity with "a financial interest," while the other Circuits require that the financial interest be "substantial" or "direct."[162] Regardless of the minor linguistic variations from circuit to circuit, the additional rules serve the same general purpose: to "assist judges with evaluating possible issues of recusal and disqualification."[163]

At the district court level, disclosure requirements vary in both form and substance.[164] There are three main considerations that district courts incorporate in their disclosure rules: which types of parties must submit a disclosure statement, what types of interests warrant disclosure, and whose interest should be disclosed.[165] Aside from differences in substance, district courts also have implemented these additional disclosure requirements in

---

[158] *See* Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1079–80 (2019).

[159] *See* FOSS & COREY, *supra* note 23, at 29, 32–38.

[160] *Compare* 5TH CIR. R. 28.2.1 (requiring the disclosure 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"), *with* 3D CIR. R. 26.1.1(a)(2)(b) (requiring the identity of "every *publicly owned corporation* not a party to the appeal" to be disclosed (emphasis added)).

[161] *See* FOSS &COREY, *supra* note 23, at 29–31.

[162] *Compare* 3D CIR. R. 26.1.1(b) (requiring the disclosure of publicly owned corporations that have "a *financial interest* in the outcome of the litigation" (emphasis added)), *with* 4TH CIR. R. 26.1(a)(2)(B) (requiring disclosure of any publicly held corporation that has a "*direct* financial interest" (emphasis added)), *and* 6th CIR. R. 26.1(b)(2) (requiring the financial interest in the outcome of the litigation to be "*substantial*" (emphasis added)).

[163] *See* Steinitz, *supra* note 158, at 1080.

[164] *See* Tighe Memo, *supra* note 23, at 6.

[165] With respect to the first factor, some courts require all parties to submit a disclosure statement, while others only require corporate parties. As for the second factor, courts differentiate between required disclosure of "financial interest[s]," "substantial interest[s]," or "direct financial interest[s]." Notably, twenty-four out of the ninety-four federal districts require parties to disclose the identity of a litigation funder. *Id.* at 2, 6.

different ways—fourteen have local rules, ten use local forms, and two have standing orders.[166]

To provide an example, the U.S. District Court for the Northern District of California has both a local rule and a standing order regarding disclosure requirements for all judges in the district.[167] Local Rule 3-15, adopted in May 2018, requires that:

> [U]pon making a first appearance in any [civil] proceeding in this Court, each party must file with the Clerk a 'Certification of Interested Entities or Persons' pursuant to this Rule . . . .The Certification must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves [(including litigation funders)] known by the party to have either: (i) a financial interest of any kind 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 . . . . [Parties have] a continuing duty to supplement [their] certification[s].[168]

Supporters of increased transparency in funding agreements applauded the efforts taken by the Northern District of California, but call for even more robust disclosure requirements.[169] On the other side of the aisle, members of the TPLF community raise no objection to disclosure of the existence and identity of third-party funders, but want to keep TPLF agreements out of the hands of opposing parties.[170]

On the whole, federal courts have taken different approaches to achieving the same goal.[171] With that said, the implementation of a national rule governing commercial TPLF disclosure would not only make it easier for funded litigants to identify disclosure obligations regardless of the forum, but would also provide a concrete regulatory distinction between commercial litigation finance and consumer litigation funding

---

[166] *See* FOSS & COREY, *supra* note 23, at 32. The Northern District of California has both a local order and standing rule. *See* Tighe Memo, *supra* note 23, at 3 n.4.

[167] *See* N.D. CAL. L. R. 3-15(a)-(b) (2018).

[168] *Id.* In addition, the standing order for all judges in the district requires litigation funders to be identified in class action lawsuits. *See* STANDING ORDER FOR ALL JUDGES OF THE NORTHERN DISTRICT OF CALIFORNIA: CONTENTS OF JOINT CASE MANAGEMENT STATEMENT § 19 (2018) ("In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.").

[169] *See generally* 2017 U.S. Chamber Letter, *supra* note 22 (advocating for an amendment to Fed. R. Civ. P. 26(a)(1)(A) that would require not only the identity of a litigation funder to be disclosed, but also disclosure of the agreement itself).

[170] *See* Michael German, *Perspectives From a Litigation Funder: The Case for Sensible Disclsoure*, N.Y. L.J. (Jan. 31, 2019), https://www.law.com/newyorklawjournal/2019/01/31/perspectives-from-a-litigation-funder-the-case-for-sensible-disclosure/ [https://perma.cc/486Z-WZXV].

[171] *See* Steinitz, *supra* note 158, at 1080 ("The stated purpose of these regulations is to assist judges with evaluating possible issues of recusal and disqualification and none require automatic disclosure in every civil case.").

once and for all. In order to achieve this, a balance must be struck between the two competing interests driving the debate over disclosure.[172] Despite the compelling concerns raised by pro-disclosure advocates, judges faced with discovery requests aimed at TPLF agreements have made it clear that disclosure should remain limited unless circumstances demand otherwise.[173]

B. The Judge's Perspective on Litigation Funding Disclosure

Despite the unique disclosure requirements set forth in the Northern District of California, a Northern District judge recently denied a motion to compel additional discovery of information pertaining to funding agreements.[174] Before going to trial, defendant Micron Technologies, Inc. ("Micron") submitted four discovery requests, one of which sought disclosure of "persons and entities that have a financial interest in [the] litigation," and specifically "an identification of any third party that is funding [the] litigation."[175] The purpose of such request was to uncover "the existence of conflicts of interest to identify and exclude jury members who may have a bias."[176] Acknowledging that MLC had fully complied with the local rules and already disclosed the existence of any third-party financial interests, the Court concluded that Micron was not entitled to discovery because it lacked relevancy to the dispute, and that defendant's concerns were "speculative."[177] Judge Illiston found that "litigation funding agreements could be discoverable when there [is] a specific, articulated reason to suspect bias or conflicts of interest."[178]

---

[172] For an overview of the current debate over disclosure, see generally Spangler & Feman, *supra* note 36.

[173] *See* Harrison & Jacobson, *supra* note 42 ("[C]ourts have routinely rejected discovery into funding arrangements unless the requesting party demonstrates that it somehow relates to the claims and defenses of the litigation.").

[174] *See* MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595, at *1–2 (N.D. Cal. Jan. 7, 2019).

[175] *Id.* In addition to the discovery request for financial interests in the litigation, Micron also sought discovery into any ownership interests in the '571 patent, the subject of the dispute. *Id.* at *1. The Court denied the discovery request, subject to the requirement that MLC submit a statement confirming that it is the sole owner of the patent. *Id.* In addition, Micron requested that the court compel production of communications between MLC's CEO and counsel, along with transcripts describing an investigation conducted by MLC's predecessor. *Id.* at *2–3. With respect to the request for production of communications between MLC's CEO and counsel, the Court reserved ruling, but granted the request for the investigation transcript. *Id.*

[176] *Id.* at *2.

[177] *Id.*

[178] *Id.* ("Whether plaintiff is funding this litigation through savings [or] insurance proceeds . . . is not relevant to any claim or defense at issue. If, however, Local 46 has not merely donated funds or expertise to pursue these claims but has an expectation of payment if and only if plaintiff prevails, evidence of that financial interest

Judge Illston's ruling is not unique; many judges "have routinely rejected discovery into funding arrangements" absent some showing that such discovery would be relevant to the dispute.[179] In *Benitez v. Lopez*, for example, the United States District Court for the Eastern District of New York denied a motion to compel documents concerning plaintiff's litigation finance agreement, holding "the financial backing of a litigation funder is as irrelevant to credibility as the Plaintiff's personal financial wealth, credit history, or indebtedness."[180] In evaluating the defendants' rationale for the request, the court asserted that the claim was meritless and failed to indicate anything that would "impugn [the plaintiff's] credibility."[181] Finally, the court rejected the defendants' argument that the funder could have an "ability to intervene" and "dictate the legal strategies or settlement decisions."[182] The court stated:

> A defendant is not entitled to learn any of these things in any case, absent some special need or showing. One party to litigation is not entitled—absent some contractual or other relationship like an indemnification agreement—to know why the adverse party chooses to make certain strategic decisions in a case or avoid settlement. Many such considerations are privileged; and if they are not, they are irrelevant and outside the scope of what a party needs to defend or prosecute its case. If a court were to accept Defendants' premise, all defendants would be permitted to conduct discovery of all individuals who have spoken to the plaintiff . . . . [T]he discovery rules . . . were never intended to be an excursion ticket to an unlimited exploration of every conceivable matter that captures an attorney's interest.[183]

This excerpt captures the common attitudes amongst judges who have faced discovery requests aimed at TPLF information in the past.[184] In a nearly unanimous fashion, courts

---

may be relevant to determining the credibility and potential bias of Local 46 witnesses." (quoting Yousefi v. Delta Elec. Motors, No. C13-1632 RSL, 2015 WL 11217257, at *2 (W.D. Wash. May 11, 2015)).

[179] *See* Harrison & Jacobson, *supra* note 42.

[180] Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019). The court further opined that defendants failed to show that plaintiff had lied about its communications with a litigation funder, and that "any such contention is just speculation, which does not justify discovery." *Id.*

[181] *Id.*

[182] *Id.* at *2.

[183] *Id.* (second and third alteration in original) (internal citations and quotations omitted).

[184] *See* Harrison & Jacobson, *supra* note 42 (noting that courts have "routinely rejected discovery into funding arrangements" based on a lack of relevance). *See, e.g.*, *In re* Valsartan N-Nitrosodimethylamine (NDMA) Contam. Prod. Liab. Litig., 405 F. Supp. 3d 612, 615 (D.N.J. 2019) (finding the use of TPLF to be "irrelevant" to the dispute and therefore "not discoverable"); Space Data Corp. v. Google, No. 16-cv-03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (denying litigation funding discovery for lack of relevance); Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 (VM)(KNF), 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (denying request for discovery of TPLF

have ruled in favor of limited disclosure.[185] In light of this trend, a uniform disclosure rule should take into consideration the extent to which the courts have found requests for TPLF discovery to be irrelevant or lacking evidence sufficient to justify disclosure.[186]

IV. AN ALTERNATIVE SOLUTION: STRIKING A BALANCE BETWEEN THE NEED FOR TRANSPARENCY AND EFFICIENCY

It is important to note that transparency and disclosure are fundamental principles of the American justice system, and there is no reason for courts and opposing parties to be completely blind to the presence of TPLF.[187] With that said, amending Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure to require disclosure of "all documents, electronically stored information, and tangible things" pertaining to TPLF in all civil proceedings is an unnecessary and overly burdensome requirement, especially in the context of commercial TPLF.[188] Not only is it unwarranted, but it also has to potential to cause real harm for both litigants and courts.[189] Experienced litigators have been known to use the discovery process as an opportunity to raise distracting requests for information as a means to drain opposing parties of their time, money, and energy.[190] A mandatory disclosure requirement for TPLF agreements would only serve to exacerbate this practice, especially in the context of high stakes commercial disputes.[191] In addition, there is also fear that disclosure of TPLF agreements would provide adverse

information, noting that "the defendants did not show that the requested documents are relevant to any party's claim or defense"); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 742 (N.D. Ill. 2014); ("Caterpillar is not entitled to discover the amount of money sought or received by Miller, the details of the agreement it has with its funder, or how much the funder will receive if Miller wins the case.").

[185] *See* sources cited *supra* note 184.

[186] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 10 ("[f]ederal courts have long allowed defendants to utilize discovery tools to uncover unethical conduct by plaintiffs that could affect the case at hand."); *see also* Khoshsima, *supra* note 21, at 1057 (emphasizing the need for disclosure to aid courts in identifying and preventing TPLF related misconduct).

[187] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 11 (noting that disclosure is "critical to the integrity of the adversary process" because TPLF "arrangements threaten core ethical and legal principles that undergrid our civil justice system" (internal quotations omitted)).

[188] *See id.*, at Appendix B (detailing the specific requirements of the proposed amendment). For further discussion on why the proposal is unwarranted, see *supra* Parts I–II.

[189] *See* Bogart, *supra* note 28 (noting Judge Dan Polster's stance on the need for limited TPLF disclosure as support for the theory that disclosure would be "misused to create expensive and time-wasting frolics and detours in litigation as a tactical device by defendants").

[190] *See* Perla, *supra* note 95.

[191] *Id.*

parties with access to pertinent information that would give them a strategic advantage in the litigation.[192]

For these reasons, required disclosure of information including the amount invested in the parties' claim, the specific financing terms, or any other sensitive information beyond the presence and identity of the funder should be excluded from disclosure requirements. In order to avoid the potential harm resulting from such disclosure, and in the interest of promoting a uniform disclosure requirement that balances the respective interests of both the U.S. Chamber Institute and the litigation finance community, this note suggests an alternative solution that codifies the judges perspective on TPLF disclosure.

A. The Solution: Codifying Judges' Perspectives on TPLF Disclosure Through Limited Disclosure and Judicial Discretion

As the debate over disclosure continues, regulators must strike a balance that appreciates the role of transparency in eliminating practices that "distort the traditional adversarial system of civil justice"[193] while at the same time preventing unwarranted TPLF disclosure from causing costly delay to courts and funded parties.[194] In order to achieve this goal, the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts should seek to amend the list of initial disclosures prescribed by Rule 26(a)(1)(A) to a limited disclosure requirement for parties to commercial litigation in federal court.[195] The initial disclosure should be strictly limited to (1) the existence of third-party funding and (2) the identity of the funder. This information alone will provide the court, as well as the opposing party, with sufficient notice of funding and would give all parties, including the court, sufficient opportunity to identify any conflicts of interest that may exist. For purposes of judicial economy, and in the interest of

---

[192] *See* German, *supra* note 170 (suggesting that information including "the amount of money funders have invested in the claim, the commercial terms of the investment, the representations and warranties made during the course of such agreements . . . would give the party seeking the discovery a strategic advantage").

[193] *See* 2017 U.S. Chamber Letter, *supra* note 22, at 9.

[194] *See* Bogart, *supra* note 28.

[195] *See* FED. R. CIV. P. 26(a)(1)(A). This solution is modeled off of the Northern District of California's decision in MLC Intell. Prop. v. Micron Tech., Inc., No. 14-cv-03657-SI, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019). In granting partial discovery subject to in-camera review, Judge Illston struck a three-way balance between respect for the funded-party's interest in privacy, appreciation for the moving party's interest in transparency, and the Court's interest in judicial economy. *Id.* Codification of this approach to TPLF disclosure in the Federal Rules of Civil Procedure would provide a uniform solution which alleviates both the concerns presented by proponents of disclosure, as well as the counterarguments offered by members from within the TPLF community.

eliminating unnecessary expense to the parties, additional information pertaining to the specific terms and conditions included in TPLF arrangements should remain confidential.

However, in the event that a party has reason to believe that TPLF is being used unethically, in violation of any state or federal rule, or in such a way that creates a substantial risk of bias or conflict, the party should be required to submit to the court a motion to compel additional discovery stating with particularity: (1) the party's reasonable good faith belief, based on independent due diligence, that TPLF abuse exists; (2) the party's reason for believing TPLF is being used fraudulently or impermissibly; and (3) the specific information that should be disclosed. This submission should not only establish how the suspected abuse is relevant to the proceedings and is of probative value to the funded party's credibility,[196] but should also be able to provide more than mere "naked assertion[s]" and "conclusory allegation[s]" that misconduct is afoot.[197]

Once the party has made such submission, the court has the discretion to determine whether the discovery request has plausible merit and whether disclosure is necessary. If the judge is inclined to grant the request, the funded party should independently disclose to the court the requested information, and the court should evaluate in camera the materials before allowing inter-party disclosure to ensure, most importantly, that the disclosed information is in fact relevant to the dispute, and if so, to prevent any privileged information from being disclosed accidentally. If the judge determines that the opposing party is entitled to discovery of the information, then the information should be made available.

CONCLUSION

This solution represents a uniform codification of how federal judges have generally disposed of TPLF discovery disputes.[198] A limited preliminary disclosure requirement would

---

[196] *See* Fed. R. Civ. P. 26(b)(1).

[197] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007). The purpose of this additional requirement, as inspired by the Supreme Court's clarification of the pleading standard of Fed. R. Civ. P. 8(a)(2), is to ensure that parties seeking discovery are not simply speculating as to the existence of misconduct in an attempt to delay proceedings or raise imaginary issues to interfere with an opposing party's source of funding. *See* VHT, 2016 WL 7077235 at *1 (denying litigation funding discovery because of defendant's failure to provide "some objective evidence that any of [defendant's] theories of relevance apply [to the] case").

[198] *See* Strickler, *supra* note 29. In response to Judge Joel Schneider's stance in favor of limited disclosure of TPLF agreements, articulated in his opinion in *In re* Valsartan N-Nitrosodimethylamine (NDMA) Contam. Prod. Liab. Litig., 405 F. Supp. 3d 612 (D.N.J. 2019), Professor Anthony Sebok noted that the New Jersey District Court decision was "part of a pattern" in federal courts, while Alan Guy, former managing

serve the dual purpose of promoting transparency and the promotion of the fair administration of justice, while at the same time protecting funded parties and courts from unnecessary expense or delay.[199] Whereas mandatory disclosure of TPLF agreements would ultimately achieve the same goal, such a requirement would prove to be overly burdensome absent a specific inference of abuse or conflict, and courts are well equipped to determine whether further inquiry into TPLF agreements is necessary.[200] By requiring that parties plead with particularity why disclosure is necessary, courts may be able to establish that additional discovery is irrelevant without wasting resources, time, or client money.

The third-party litigation finance industry in the United States has experienced substantial growth over the course of the past decade.[201] As a result of this growth, and in response to the overwhelming concern over the perceived risks and potential for abuse of TPLF, interest groups, NGOs, and major U.S. corporations have advocated for increased regulation in the form of an Amendment to Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure that would require disclosure of TPLF agreements in all civil litigation.[202] Although a handful of cases exist where litigation financing was used unethically or created a conflict of interest between participants in the litigation,[203] many of these issues are unique to the consumer segment, but are routinely used to inspire broad disclosure requirements applicable to commercial TPLF transactions as well.[204]

However, members from within the litigation finance community have made clear that commercial TPLF transactions are specifically structured to keep litigants and their attorneys in charge of all litigation-related decisions, while the various ethical rules governing attorney and judicial conduct already address many of the concerns that new regulations are intended to

---

director at Vannin Capital, stated that it was "consistent with a trend of courts finding that, absent special circumstances, funding deals are not relevant to the merits of a case and thus an inappropriate subject for discovery." *Id.*

[199] *See* Spangler & Feman, *supra* note 36.

[200] *Id.*

[201] *See* GARBER, *supra* note 9, at 1.

[202] *See generally* 2017 U.S. Chamber Letter, *supra* note 22.

[203] *See, e.g.*, Khoshsima, *supra* note 21, at 1029–30 (discussing Bollea v. Gawker Media, 913 F. Supp. 2d 1325, 1330 (M.D. Fla. 2012)); Trusz, *supra* note 126, at 1650 (discussing *In re* Application of Chevron, 749 F. Supp. 2d 141, 157–58 (S.D.N.Y. 2010), whereby a conflict of interest arose between a litigation funder, plaintiff's attorney, and the Equadorian court system).

[204] *See* Cutrona, *supra* note 13.

resolve.[205] With this in mind, mandatory disclosure of TPLF agreements is simply unnecessary, and could even be harmful to litigants and courts alike.[206] Considering the varying levels and degrees of required disclosure across state and federal jurisdictions, however, it becomes difficult to ascertain to what extent, if at all, a uniform disclosure regime could be achieved.[207] At a bare minimum, there is no compelling reason why courts should be kept in the dark about the existence of a funded party in civil litigation, and some commercial litigation funders agree.[208]

By codifying the limited-disclosure approach taken in the *Micron* case in the Northern District of California, litigants seeking disclosure of their opponent's TPLF arrangements would be provided with the necessary information they need to identify conflicts of interest, while funded parties would be spared the expense and delay of unnecessary disclosure. Furthermore, parties seeking additional disclosure would have the opportunity to persuade the court that additional disclosure is warranted. Ultimately, adoption of this proposal would not only relieve concerns both in favor of and against disclosure, but would also allow the courts to serve their intended role of gatekeepers by preventing undue burden for all. The goal of this solution is to bring about a more transparent justice system, while at the same time securing the benefits provided by third party litigation finance for years to come.

Alec J. Manfre[†]

[205] *See* Perla, *supra* note 95 ("Once the decision is made to invest in matters, a typical financing deal is structured to keep control with the client."); Burford Response Letter, *supra* note 27, at 11–12.

[206] *See* Perla, *supra* note 95.

[207] *See* Shannon, *supra* note 23, at 864–65.

[208] *See* German, *supra* note 170 (advocating for a limited disclosure requirement which compels a litigant to reveal the existence and identity of third party litigation funders).

[†] J.D., Brooklyn Law School, 2021; B.A., Providence College, 2018. Thank you to my family, friends, and colleagues for all of your continued support and encouragement throughout this process. Special thanks to the entire *Brooklyn Law Review* editors and staff for your dedication to this publication, even amidst trying times.