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Follow the New Money Trail: The Rise of Third-Party Litigation Funding

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Who is funding the litigation? That is an increasingly relevant question in insurance cases because third-party litigation funding (TPLF or third-party funding) is on the rise. This new trend is challenging insurers, the legal profession, and policy makers.[1]

TPLF involves the non-recourse funding of a claim by a non-party for a share in the proceeds if the claim is successful.[2] This growing multi-billion-dollar industry, which remains largely unregulated, is changing the claims and litigation landscapes. As one widely published commentator on the subject has observed: "Both critics and proponents of the newly emergent phenomenon of litigation finance agree that the practice is likely the most important development in civil justice of our time. Litigation financing is transforming civil litigation at the case level as well as, incrementally, at the level of the civil justice system as a whole."[3] From a more global view, TPLF is also included in the larger concept of "social inflation," which is increasingly cited as a contributing factor behind the trend of larger settlement and verdict amounts.[4]

With TPLF practices on the rise, insurers should have this issue on their radar. This report provides an overview of TPLF's origins and components, emerging trends/issues, current challenges confronting insurers, and claims impact.

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Part I

BACKGROUND AND ISSUES

A. What is third-party litigation funding (TPLF)?

There is not necessarily a single definition of TPLF based on the materials reviewed by the author.[5] While definitions differ from source to source, they tend to share the common idea that TPLF involves a third party unrelated to the claim funding a plaintiff's case in return for a share of the proceeds from a settlement or award if the claim is successful.[6] The American Bar Association references this practice as "the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer."[7] Another source describes the practice this way: "In short, litigation finance companies are investors in the outcome of the plaintiff's case."[8]

In general, third-party funding is typically provided through a non-recourse loan to the plaintiff or lawyer,[9] in exchange for the right to a specified percentage of any settlement or judgment, or at a specified rate of interest.[10] While loan types differ, it is common for these agreements to use a sliding interest rate scale -- the longer it takes to resolve the claim, the higher the interest rate.[11] Just as loan types vary, TPLF is provided by a variety of different sources and financiers, including, but not limited to, small investors, larger financing and capital companies, and hedge funds.[12] TPLF funders have traditionally invested in individual cases, however, there are reports of an increase in TPLF "portfolio funding"[13] which has been described to involve law firms receiving investor funding for multiple cases in different practice areas.[14]

TPLF is commonly divided into two different camps: "consumer-litigation financing" which generally involves funding for personal injury claims, divorce actions, and other non-commercial cases; and "commercial litigation financing" which encompasses such matters as antitrust litigation, securities, intellectual property actions, and business disputes.[15] Examples of some recent high-profile cases which had third-party funding involvement include Hulk Hogan's suit against Gawker,[16] Stormy Daniels' crowdfunding litigation,[17] the NFL concussion cases,[18] and the #MeToo claims.[19]

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B. TPLF origins and current trends

The origins of modern day TPLF practices are commonly traced to Australia where this practice started to emerge in the mid-1990s, and where it continues to be used regularly today.[20] In fact, a recent study found that almost half of the federal class action suits filed in Australia over the past six years were funded by third parties.[21] Outside of Australia, TPLF has also become an established practice in several other countries, including Canada, New Zealand, South Africa, and the United Kingdom.[22]

In the United States, third-party funding in its current form is newer and is noted to have really taken hold over the past decade.[23] During this short time, TPLF has quickly become a multi-billion-dollar business.[24] While the exact dollar amount invested yearly by third parties in U.S. law suits is unknown, according to a recent *National Law Review* article, conservative estimates place the figure around $2.3 billion.[25] Another source estimates that the TPLF industry is a $5 billion market in the U.S.[26] Some factors cited for the growth in TPLF practices in the U.S. include the high cost and often protracted duration of litigation, coupled with the risk of netting a zero return, particularly if working on a contingency fee basis.[27] This practice is also noted to be profitable-- with one source reporting that a leading TPLF company reported $328 million in after-tax profits in 2018, up from 24% the previous year.[28]

C. Arguments for TPLF—access, fairness, justice

Understanding the arguments for and against TPLF practices is an important first step in appreciating the current debates, issues, and challenges currently facing insurers, attorneys, and policy makers.

Third-party funding proponents argue that this practice promotes greater access to the judicial system for individuals who, absent such funding, may not otherwise have an opportunity to bring a claim. One commentator asserts the current legal system does not meet 80% of the legal service needs for low-income individuals and that 40-60% of the legal service needs for middle income people.[29] He feels TPLF "allows disenfranchised peoples as well as companies to pursue their meritorious cases, as opposed to being priced out of a system that they have a legal right to access."[30]

Others assert that TPLF practices help level the litigation playing field in terms of resources. On this point, one commentator argues TPLF will help minimize the current "disparity in experience and resources" which, from his view, weigh in favor of better financed and resourced litigants and corporations.[31] As such, this source sees TPLF as offering "a chance to rebalance the scales in favor of the little guy. If defendants know that the plaintiff is backed by a financier, they will be more likely to offer a fair settlement rather than intimidate the plaintiff into taking an inequitable one. Further, the plaintiff may be able to see the claim through a trial and recover a more equitable amount."[32] In the consumer litigation context, which includes injury claims, third-party funding is typically used by plaintiffs for financial support and living expenses during the pendency of litigation.[33]

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D. Arguments against TPLF—legality, frivolous claims, consumer protection questions

1. Legal challenges

Others oppose TPLF in principle or raise concerns about consumer protection issues. One question raised, which strikes at the legality of TPLF practices, involves whether these arrangements violate the legal doctrines of "champerty" and "maintenance." By definition, "maintenance" can be described as "the action of wrongfully aiding and abetting litigation; sustentation of a suit or suitor at law by a party who has no interest in the proceedings…."[34] "Champerty" is defined as "an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim."[35] A related concept, called "barratry," has been defined as the practice of filing vexatious litigation.[36] The U.S. Supreme Court bottom-lined these concepts as follows: "Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty."[37] Very generally, these doctrines originated from medieval Europe and were intended at that time to protect smaller and less wealthy landowners from having to convey their property to wealthier landowners in order to defend against attempts from outsiders to take their land.[38]

Throughout the history of the U.S. legal system, prohibitions against practices constituting champerty and maintenance have been recognized in some, but not all, states as part of common law or via statute. For some, modern day TPLF practices raise questions about the potential application of these doctrines. One industry group noted, "[t]he champerty doctrine, in particular, seems to have been intended to prevent precisely the sort of scheme embodied in third-party litigation finance agreements: a speculative investment in litigation in which a stranger to the suit provides financial backing in the hope of realizing a lucrative suit."[39] However, over time legal and judicial perspectives have liberalized regarding these doctrines, with one source reporting that "at least twenty-nine states now permit some form of champerty or maintenance as third-party funding."[40] As one court commented, "the champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position."[41] So, while TPLF may arguably meet the technical definitional components of champerty or maintenance,[42] the practice has become more accepted as legal and judicial viewpoints have evolved. When the dust settles, the question of whether TPLF practices violate these doctrines will boil down to state law in most instances.[43]

2. Frivolous lawsuits

Another issue often raised is the concern that TPLF may lead to an increase in frivolous lawsuits. TPLF supporters generally reject this view arguing that investors have no incentive to fund potentially frivolous claims given the likely risk that such cases would not yield a return on investment.[44] However, in challenging this "rational investor" view, one industry group argues that different investors have different risk tolerances and appetites for risk which could lead to the funding of questionable claims.[45] Accordingly, this group raises the concern that "[s]ome investors, especially if they are well-capitalized funding companies, will invest in lawsuits with low probability of success if the suit seeks a large enough damages figure."[46] Echoing this concern, another commentator noted that "[i]f the potential damages award is high enough, the expected value of the case will be high enough to warrant filing, even if the probability of winning is low. Indeed, the fact that lawyers currently file meritless lawsuits is evidence that a case need not be considered a 'winner' for a lawyer to agree to prosecute."[47]

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D. Arguments against TPLF—legality, frivolous claims, consumer protection questions (cont'd)

3. Consumer protection

From another angle, TPLF practices have raised questions from a consumer protection viewpoint, most specifically, whether the interest rates charged as part of TPLF arrangements could potentially violate state usury laws or other consumer protection measures.[48] Regarding these concerns, in a recent study three law professors had a rare opportunity to examine actual data from an unnamed third-party funding company, noted to be "one of the largest financing firms in the U.S.," consisting of 225,293 requests for third-party funding related to mass tort and motor vehicle accident cases from 2001 to 2016.[49]

With respect to pre-settlement funding, the researchers found, in part, that the actual (weighted) annual interest rate charged by the funder was 38% for mass tort clients and 43% for motor vehicle clients.[50] In addition, this study found that the funder made an annual median gross profit of 55% from mass tort claims compared with 60% from motor vehicle claims (the study's control group).[51] This latter finding was criticized by one group as revealing "how lenders take advantage of exemptions from usury laws in most states to charge rates that are much higher than other forms of credit such as home-equity loans or credit cards."[52]

Overall, based on these, and other findings, these researchers did not recommend any restrictions on the availability of pre-settlement third-party funding.[53] However, they did recommend the "adoption of laws that would ensure greater simplicity, transparency, and consistency across funders with regard to pre-funding disclosures."[54] They also stated that they would prohibit certain practices including, in part, compound interest, minimum interest periods, and "any other hidden or unclear terms" in the funding contract.[55] In addition, they recommended removing the prohibitions that most states' Rules of Professional Responsibility currently impose on lawyers' ability to provide financial assistance to their clients.[56]

Regarding post-settlement funding, this study found, in part, that the effective annual interest rates charged, and the funder's profit, were even greater – 68% regarding mass torts claims compared to 60% for motor vehicle claims.[57] The researchers were more troubled by these findings. Specifically, they found these findings "striking" since, from their view, "post-settlement fundings present virtually no risk to the [f]under. Indeed, we find that the rate of default in post-settlement cases is close to zero, which means that this category of advance is 'non-recourse' on paper but not on the ground." From this, the researchers concluded that "[w]e therefore recommend that funding in post-settlement cases should be subject to consumer protections similar to those usury laws provided for ordinary loans."[58]

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E. Discoverability of TPLF agreements

A current question of much interest to insurers (and other defendants) is whether the identity of third-party funders, the terms of a TPLF arrangement, or an actual copy of the TPLF agreement should be required to be disclosed as part of discovery.

Many argue that TPLF agreements, like insurance information, should be discoverable in the spirit of transparency. The crux of this argument is summed up nicely by one commentator as follows: "In assessing the proportionality of information requests and settlement possibilities, both the court and the defendant ought to know who is sitting on the other side of the table. Just as transparency over defendants' insurance agreements can shine light on their motives and incentives, the details of a third-party funder can help uncover any potential conflicts of interest and/or ethical concerns about contracts interfering with the normal fiduciary lawyer-client relationship."[59] However, in general, insurers can face challenges obtaining TPLF information, although there has been some modest movement recently toward discoverability.

1. Efforts to establish federal TPLF disclosure rules

Currently, the Federal Rules of Civil Procedure do not explicitly require plaintiffs to disclose TPLF information or a copy of the agreement. One vocal industry group trying to change this is the U.S. Chamber Institute for Legal Reform (the Chamber). This group has been urging the Federal Advisory Committee on Civil Rules (Advisory Committee) to adopt third party funder disclosure rules as far back as 2009 and submitted formal proposed rule changes in 2014 and 2017.[60]

As part of these efforts, the Chamber's president in June 2017 sent a detailed letter analysis to the Advisory Committee on behalf of itself, and 29 other industry groups, outlining various arguments supporting TPLF disclosure rules.[61] Specifically, this group is seeking to amend current Fed. R. Civ. P. 26(a)(1)(A) which, in part, requires the production of various documents and information, including a defendant's insurance agreement, without a specific discovery request, unless otherwise exempted under the rules, or stipulated or ordered by the court.[62] The Chamber has proposed that Rule 26 be expanded to also require the production of "any agreement under which any person, other than 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."[63]

In support of its argument, the Chamber outlined a myriad of factors, reasons, and considerations to the Advisory Committee. In general, the Chamber argued that the proliferation and expansion of TPLF funding raised a number of concerns calling for transparency, including potential legal and ethical conflict of interest issues for counsel and judges; questions regarding funder control and influence over a plaintiff's litigation and settlement decisions; promoting consistency with the federal court's interest in safeguarding legitimate, ethical civil litigation practices; identifying potential violations of state champerty laws; and creating "parity of financial disclosure" under Rule 26.[64] The Chamber argued that until third-party disclosure rules are enacted "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. This lack of transparency may also conceal serious conflicts of interest, as TPLF entities may be either publicly traded companies or companies supported by investment funds whose individual stakeholders may include judges, attorneys or jurors."[65]

Despite these efforts, the Advisory Committee ultimately declined to consider the Chamber's proposal, indicating instead that it would continue to monitor the issue.[66] TPLF discovery matters were also raised as part of the Advisory Committee's meetings in 2018, 2019, and 2020, with the committee again deciding to simply monitor TPLF issues and their potential impact on federal litigation.[67] The Advisory Committee's next meeting which is scheduled for October 5, 2021 in Washington, D.C. and it will be interesting to see if TPLF disclosure is raised at this meeting.[68]

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E. Discoverability of TPLF agreements (cont'd)

1. Efforts to establish federal TPLF disclosure rules (cont'd)

On this topic, it should be noted that TPLF discovery issues and Rule 26 were also discussed in a recent article published by the Defense Research Institute (DRI). In this article, the authors argued, in part, that insurers should be permitted to obtain a copy of the TPLF agreement based on the same rationale advanced by the Advisory Committee when it enacted Rule 26(a)(1)(A)(iv) which requires production of insurance agreements.[69] Specifically, it was noted that the Advisory Committee, in support of enacting this subsection, decided that disclosing insurance coverage would "enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation… [i]t will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect."[70] Using this rationale, the DRI authors argued, in part, that these same concerns should apply to TPLF agreements – even in situations where the TPLF agreement gives the funder no rights of control and where the agreement may not otherwise be admissible – on grounds that disclosure of these arrangements would permit "counsel for both sides to make the same realistic appraisals of settlement and litigation strategy" and that "[f]or the same reasons that the insurance agreement itself, not just disclosure of its existence, is to be provided, TPLF agreements themselves should be provided to the defendants."[71]

2. Federal courts and TPLF discovery

While the current Federal Rules of Civil Procedure do not explicitly require TPLF disclosure, some federal courts have promulgated local rules and other approaches addressing TPLF disclosure. However, according to a well-researched memorandum prepared in conjunction with the 2018 Advisory Committee meeting, these efforts have been more focused on disclosure for the purposes of helping courts assess any potential judicial recusal or disqualification issues.[72] On this point, this memorandum reported that, as of late 2017, six U.S. Courts of Appeals had formulated local rules requiring identification of litigation funders, with these rules differing in terms of the type of cases to which the rules apply, the scope of information to be provided, the reasons for disclosure, and under which circumstances it must be provided.[73] Notably, however, none of these rules reportedly required the production of the litigation funding agreement itself.[74] Regarding the U.S. District Courts, it was reported that, as of late 2017, 24 out of the 94 federal district courts required some form of disclosure, either by local rule or through disclosure forms, regarding the identity of litigation funders in a civil case, with the types of case, circumstances, and scope of disclosure varying by district.[75]

The United States District Courts for the Northern District of California and New Jersey are two examples of courts which have issued local rules focused more at providing defendants with third-party funding information as part of general litigation.

In 2017 the United States District Court for the Northern District of California was reportedly the first U.S. court to institute a standing order requiring disclosure of TPLF information in class actions.[76] This rule requires plaintiffs to file a "Certification of Interested Entities or Persons" disclosing certain information regarding third-party funding and imparts a continuing duty to supplement this certification during the pendency of the case.[77]

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E. Discoverability of TPLF agreements (cont'd)

2. Federal courts and TPLF discovery (cont'd)

More recently, the United States District Court for New Jersey issued an order establishing local civil rule, N.J. Civ. Rule 7.1.1 (June 21, 2021) which requires disclosure of TPLF information in certain circumstances.[78] Specifically, N.J. Civ. Rule 7.1.1 requires, in part, that "all parties, including intervening parties" must file a "statement" disclosing information "(a) regarding any person or entity that is not a party and is providing funding for some or all of the attorneys' fees and expenses for the litigation on a non-recourse basis in exchange for (1) a contingent financial interest based upon the results of the litigation, or (2) a non-monetary result that is not on the nature of a personal or bank loan, or insurance."[79]

In these situations, the following information is required to be disclosed: "(1) The identity of the funder (s), including the name, address, and if a legal entity, its place of formation; (2) Whether the funder's approval is necessary for litigation decisions or settlement decisions in the action [and if so], the nature of the terms and conditions relating to that approval; and (3) A brief description of the nature of the financial interest."[80] This information must be filed "[w]ithin 30 days of filing an initial pleading or transfer of the matter to this district, including the removal of a state action, or promptly after learning of the information to be disclosed."[81]

In addition, N.J. Civ. Rule 7.1.1 permits parties to "seek additional discovery of the terms of any such agreement upon a showing of good cause that the non-party has authority to make material litigation decisions or settlement decisions, the interests of the parties or the class (if applicable) are not being promoted or protected, or conflicts of interest exist, or such other disclosure is necessary to any issue in the case."[82] Further, the rule does not preclude the court "from ordering such other relief as may be appropriate."[83] N.J. Civ. Rule 7.1.1 is effective immediately and applies to all pending cases upon its effective date with the filing of the required information "to be made within 45 days of the effective date of this Rule."[84]

Given the unsettled state of TPLF discovery, disputes regarding TPLF disclosure and production have come before the courts. While a complete survey of these decisions is beyond the scope of this article, federal court rulings on this issue have been noted to differ from jurisdiction to jurisdiction.[85]

3. Congress and TPLF discovery

Over the past few years, there have also been several (unsuccessful) Congressional efforts aimed at TPLF discovery in certain cases. For example, H.R. 985, entitled the "Fairness in Class Action Litigation Act of 2017,"[86] proposed required disclosure of the identity of a litigation funder in class action suits.[87] Similarly, the Litigation Funding Transparency Act, first introduced in the Senate in 2018[88] and then re-introduced in 2019,[89] proposed, in general, required disclosure of both the identity of the funder and a copy of the TPLF agreement in MDL and class action litigation.[90] In 2021, two new TPLF disclosure bills, entitled the "Litigation Funding Transparency Act of 2021," were introduced in the House and Senate.[91] Similar to previous efforts, these bills propose, in part, that the identity of the funder and a copy of the funding agreement be disclosed in class actions and MDL cases.[92]

4. States and TPLF discovery

A complete 50 state survey of each state's current TPLF discovery rules is beyond the scope of this article and interested parties will need to review the current rules in their state. However, it is noted that two states, Wisconsin and West Virginia, recently enacted statutes requiring disclosure of TPLF agreements. Wisconsin's statute, codified at Wis. Stat. Ann. § 804.01(2)(bg) and West Virginia's statute, codified at W. Va. Code Ann. § 46A-6N-6, both require production of third-party agreements to the defendant without a specific discovery request, unless otherwise stipulated or ordered by the court.[93]

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Part II

REGULATORY TRENDS AND CLAIMS IMPACT

A. State regulatory trends

As TPLF practices become more prevalent, some states have started to regulate third-party funding. One source reports that certain states like Indiana, Maine, Nebraska, Nevada, Oklahoma, Tennessee, Vermont, and West Virginia require some form of TPLF registration or licensure,[94] while Ohio mandates that funders disclose certain contractual terms and information to the consumer.[95] In addition, some states like Arkansas, Indiana, Nevada, Tennessee, and West Virginia have enacted laws regulating TPLF interest rates or fees.[96] Colorado's Supreme Court held, in part, that a TPLF company agreeing to advance money to tort plaintiffs in exchange for future litigation proceeds is making a loan, thereby subject to regulation under Colorado's Uniform Consumer Credit Code.[97] Similarly, the South Carolina Department of Consumer affairs issued a ruling that entities funding litigation in exchange for a portion of the recovery proceeds are providing loans subject to compliance under South Carolina's laws governing lending.[98]

Florida is an example of another state where regulation of third-party funding was recently proposed. In March, 2021, Senate Bill 1750 (Florida S.B. 1750), entitled Litigation Financing Consumer Protection Act, was introduced in the Florida Senate.[99] S.B. 1750 proposed to add several new statutory sections regulating TPLF practices to existing Chapter 559, Florida Statutes (Regulation of Trade, Commerce, and Investments, Generally).[100]

While Florida S.B. 1750 was not ultimately enacted into law,[101] this bill proposed regulating various aspects of third-party funding. As examples, this bill proposed, in part, the following items: a registration provision requiring financiers to register with the Florida Department of State, including posting of a $250,000 surety bond;[102] an interest rate cap of 10% of the funded amount per year;[103] a listing of certain prohibited activities that could subject a financier to unfair and deceptive trade practices violations under Chapter 501, Florida Statutes;[104] and a provision requiring disclosure of contract terms (and other information) by the financier to the consumer.[105] In addition, Florida S.B. 1750 included provisions requiring plaintiffs to produce the TPLF agreement to the defendant[106] and prohibiting the financier from "directing or making any decision with respect to the course of the subject civil action, claim or any settlement."[107] Further, this bill proposed that communications between a consumer's attorney and litigation financier pertaining to the financing contract would be protected under "any statutory or common-law privilege, including the work product doctrine and the attorney-client privilege."[108]

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B. Professional Ethics and Best Practices Considerations

Third-party funding has raised legal ethics issues and best practices considerations. Questions have been raised regarding whether TPLF agreements between third party funders and lawyers could violate Rule 5.4(a) of the Model Rules of Professional Conduct which prohibits, in part, an attorney or law firm from sharing legal fees with a non-lawyer except in limited situations.[109] Some question whether a non-lawyer's entitlement to a fee share could create conflicts regarding the attorney's control of the case and duty of independence to his/her client.[110] Another ethical concern involves whether TPLF arrangements can possibly violate a lawyer's duty of allegiance to his/her client in situations where the lawyer has a separate contract with the TPLF company which could lead to separate, and potentially inconsistent, duties from his/her professional obligations to his/her client.[111] An example of where this potential conflict could arise is where one party wants to settle the claim while the other prefers to proceed to trial.[112]

In addition, concerns have surfaced regarding whether TPLF arrangements could potentially create situations resulting in the waiver of the attorney-client privilege or work product doctrines. In general, the attorney-client privilege prohibits disclosure of communications made in confidence by a client to obtain legal advice.[113] However, this protection can be vitiated when there is voluntary disclosure to a third party of privileged communications.[114] Some believe that the funder is a third party who, in order to properly assess potential funding opportunities, must use confidential and privileged information, and that this, in turn, could result in waiver of the attorney-client privilege thereby negatively impacting the client's claim.[115] While, a full examination into the issues regarding TPLF and the potential waiver of the attorney-client privilege or work-product doctrines is beyond the scope of this article, one source reports that "[o]f the courts that have reached the question of waiver of the attorney-client privilege, a majority have held that the disclosure of privileged information to a litigation funder waives the attorney-client privilege."[116]

Regarding the work-product doctrine, this has been described as sheltering the mental processes of the attorney "to provid[e] a privileged area where he can analyze

and prepare his client's case" with this protection applying only to documents created primarily "to aid in possible future litigation."[117] This protection can be waived when lawyers "treat their work-product in a manner that increases the likelihood that an adversary would come into possession of the material."[118] In the context of TPLF, one commentator noted that "[c]ourts have found that non-disclosure agreements show that dissemination to third parties will not increase the likelihood that an adversary could come to possess work- product protected materials."[119] Along these lines, another source reports that "the trend is toward finding materials shared with a funder protected from discovery."[120]

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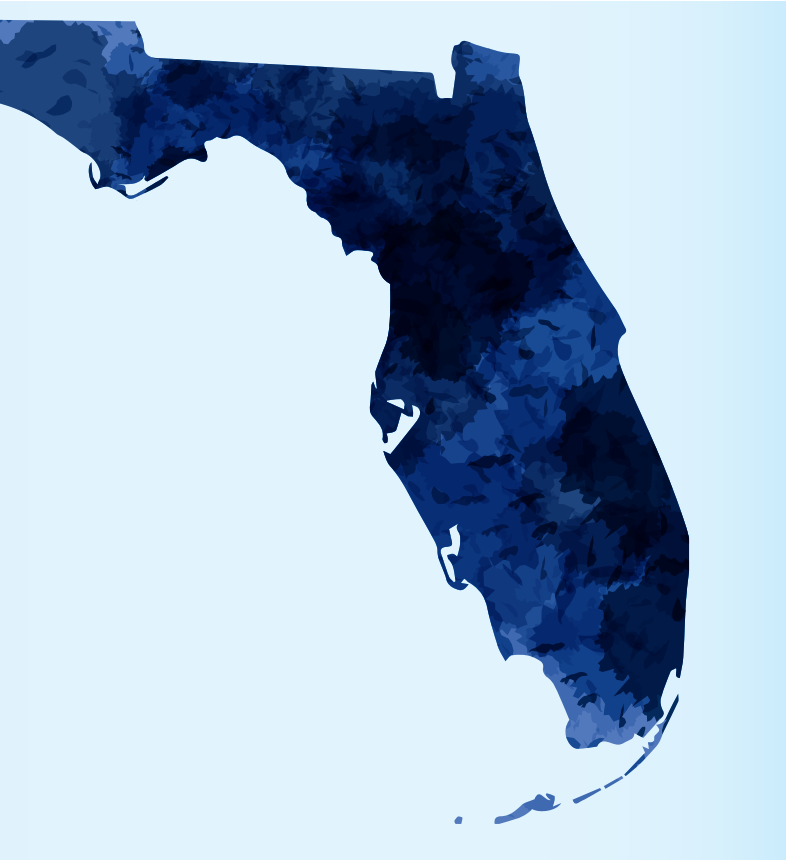
B. Professional Ethics and Best Practices Considerations (cont'd)

Not surprisingly, several state bar associations have been called upon to provide opinions on different TPLF questions. The following is a non-exhaustive sampling of ethics opinions addressing TPLF issues:



1. Florida

In 2002, the Florida State Bar Association Committee on Professional Ethics (the "Florida Committee") issued an ethics opinion (FL Eth. Op. 00-3, March 15, 2002)[121] stating, in part, that it "discourages the use of non-recourse advance funding companies" expressing concerns that the terms of these agreements "may not serve the client's best interests in many instances."[122] Further, the Florida Committee opined that an attorney should not recommend a client's matter to a funding company, or initiate contact with a funding company on a client's behalf, and "[should] not allow the funding company to direct the litigation, interfere with the attorney-client relationship, or otherwise influence the attorney's independent professional judgment."[123] However, the Florida Committee opined that an attorney may provide a client with information about TPLF companies "if it is in the client's best interests" and may provide factual information about the case to the funder with the client's informed consent."[124] The opinion further stated that while an attorney may honor the client's valid written assignment of a portion of his/her recovery to the funding company, the attorney may not issue a letter of protection to the funding company.[125] At the time of this 2002 opinion, the Florida Committee referenced similar opinions from other state bar associations.[126]

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B. Professional Ethics and Best Practices Considerations (cont'd)

2. New York

More recently, the New York State Bar Association Committee on Professional Ethics ("New York State Bar Ethics Committee" or "Committee") has issued several opinions on certain TPLF questions. For example, in Opinion Number 2011-2,[127] the New York State Bar Ethics Committee opined, in part, that "[i]t is not unethical per se for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third-party lender. Nevertheless, when clients contemplate or enter into such arrangements, lawyers must be cognizant of the various ethical issues that may arise and should advise clients accordingly. The issues may include the compromise of confidentiality and waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment."[128]

In Opinion Number 2018-5 (NY Eth. Op. 2018-5, 2018), the New York State Bar Ethics Committee opined, in part, that a lawyer may not enter into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters.[129] However, as part of its analysis, the Committee noted that lawyer-funder arrangements may not involve impermissible fee sharing per se. On this point, the Committee stated that "Lawyer-funder arrangements do not necessarily involve impermissible fee sharing under Rule 5.4(a)" and that this rule "is not implicated simply because the lawyer's payments to a funder come from income derived from legal fees. But Rule 5.4(a) forbids a funding arrangement in which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters. That is true whether the arrangement is a non-recourse loan secured by legal fees or it involves financing in which the amount of the lawyer's payments varies with the amount of legal fees in one or more matters"[130] The Committee further stated that "Rule 5.4(a) has long been understood to apply to business arrangements in which lawyers' payments to nonlawyers are tied to legal fees in these types of ways."[131]

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ("New York City Bar Ethics Committee") issued a similar opinion in 2018 as part of NYC Eth. Op. 2018-5.[132] Specifically, in this opinion the New York City Bar Ethics Committee opined, in part, that a lawyer may not enter into a financing agreement with a litigation funder, a non-lawyer, under which the lawyer's future payments to the funder are contingent on the lawyer's receipt of legal fees or on the amount of legal fees received in one or more specific matters based on Rule 5.4, Professional Independence of a Lawyer.[133] As part of its analysis, the New York City Bar Ethics Committee opined that "[w]e see no meaningful difference between payments for financing, on the one hand, and payments for goods and services, on the other, that would

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B. Professional Ethics and Best Practices Considerations (cont'd)

2. New York (cont'd)

call for a different interpretation of "fee sharing" when a lawyer's payments to a provider of funding, rather than a provider of goods or services, are contingent on the lawyer's receipt of fees in a particular matter. Rule 5.4(a) must therefore be read to foreclose a financing arrangement whereby payments to the funder are contingent on the lawyer's receipt of legal fees."[134] In addition, the committee stated that "[a] non-recourse financing agreement secured by legal fees in a matter - i.e., an arrangement in which it is contemplated that the lawyer will make future payments only if the lawyer recovers fees - constitutes an impermissible fee-sharing arrangement regardless of how the lawyer's payments are calculated" and that "[l]ikewise, a financing arrangement constitutes impermissible fee sharing if the amount of the lawyer's payment is contingent on the amount of legal fees earned or recovered. Further, Rule 5.4 is equally applicable when the lawyer's payment to the funder is based on the recovery of legal fees in multiple matters (e.g., a portfolio of lawsuits against the same defendant or involving the same subject matter) as opposed to a single matter.[135] While the committee noted that there "is room to argue whether the prohibition on fee sharing is overbroad," it viewed this as an issue to be addressed by the judiciary or state legislature.[136]

It is noted that NYC Eth. Op. 2018-5 generated "a significant amount of attention and commentary" which led to the New York City Bar forming a Litigation Funding Working Group to focus on third-party funding issues, including NYC Eth. Op. 2018-5.[137] This working group ultimately issued a report in February 2020 which, in apparent contrast to the opinion and commentary expressed in NYC Eth. Op. 2018-5, recommended, in part, that the New York Rules of Professional Conduct should be modified to accommodate the reality of litigation funding"[138] In this regard, the working group outlined, in part, proposed amendments to Rule 5.4[139] and concluded that "lawyers and [their clients] would benefit if lawyers have less restricted access to funding."[140] This working group also proposed guidelines "so that lawyers will be more informed and better prepared when utilizing third-party litigation funding, protecting their clients' interests and ensuring compliance with their professional obligations" and recommended against a disclosure requirement with respect to commercial litigation funding."[141] In addition, the working group's report discussed a number of other items related to third-party litigation funding such as disclosure issues related to commercial litigation funding, review of recent legislative proposals, and recommendations related to proposed legislation.[142]

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B. Professional Ethics and Best Practices Considerations (cont'd)

3. California

The State Bar of California Standing Committee on Professional Responsibility and Conduct ("California Standing Committee") also recently addressed TPLF issues in Formal Opinion No. 2020-204 (CA Eth. Op. 2020-204).[143] In this opinion, the California Standing Committee addressed a

lawyer's ethical obligations involving a client whose case is financed by a third-party funder in the context of several different factual scenarios. Following an exacting analysis of various TPLF issues and ethics rules raised in each presented scenario, the California Standing Committee concluded, generally, that lawyers whose clients use TPLF arrangements must be cognizant of the ethical considerations implicated, and are obliged to use professional judgment "not shaded by a third party with an interest in the outcome of the litigation," competently advise the client on litigation funding, stay current on relevant law, and obtain the client's informed consent before providing any client confidential information.[144]

4. ABA – Best Practices Considerations

From another angle, in August 2020 the American Bar Association's (ABA) House of Delegates issued a report entitled "Best Practices for Third-Party Litigation Funding." In terms of its objectives, the ABA noted that this report should be viewed "as a shorthand for issues that should be considered before entering into a litigation funding arrangement" and not "recommended standards of professional conduct."[145] Some examples of the ABA's best practice considerations included: ensuring that the terms of TPLF agreements are clearly spelled out, retaining client control of the litigation, and obtaining written affirmation from the funder that no advice, opinions or representations as to the underlying claims have been made by the client or the lawyer.[146] In addition, the ABA's report cautioned attorneys on sharing privileged documents with third party funders.[147]

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C. Assessing TPLF's claims impact

It is difficult to pin an exact price tag on TPLF's impact on claims costs and settlement amounts. This is due, in large part, to the continuing challenges insurers (and others) face in obtaining TPLF data and statistics, which harkens us back to the issues of transparency and discoverability discussed above.

Despite a lack of hard figures, there are some factors which may help us sketch a rough idea of TPLF's general impact. In this regard, on the one hand typical funded amounts are reportedly on the modest side, with one source noting average consumer transactions are in the $2,500 to $7,500 range with monthly financing fees that can be considerably higher than the monthly interest rates on credit card balances or consumer loans.[148] On the other hand, however, there is evidence that TPLF practice continues to grow. For example, the number of law firms using TPLF is reportedly increasing[149] with one source noting that a recent survey found that in 2019 close to 70% of lawyers were "very familiar" with TPLF, representing an increase from around 50% a year earlier, and that use of third-party funding had increased by 105% since 2017.[150] Another source reports that consumers with mass tort claims pending in MDL actions "constitute the fastest growing sector of those seeking assistance" from third-party funding.[151] Further, as discussed above, third-party funding has exploded into a multi-billion dollar industry over the past decade. A cursory Google search on this topic will quickly reveal numerous companies offering funding services for all types of personal injury (and other) claims and the availability of funding amounts at all levels for both individuals and lawyers.

Thus, assessing TPLF's impact may be more about the exploding availability, prevalence, and use of this practice as opposed to "average" funding amount provided to any individual plaintiff. As one commentator remarked: "[t]he primary import of the industry is its propensity to increase the number of cases brought. This is either a positive or a negative depending on whether one focuses on the potential to increase access to justice for deserving but under-resourced plaintiffs, or on the potential to increase non-meritorious litigation."[152]

Accordingly, in evaluating TPLF's impact, key consideration points would appear to center around the extent to which TPLF will: (a) lead to the filing of claims that may have not been filed at all; (b) fuel claims that would have settled more quickly and for less; (c) provide a lifeline to keep claims (and litigation) alive; or (d) lead to an increase in the filing of questionable (or even frivolous) claims. In addition, the degree of funder control over settlement decisions and litigation strategy are other key factors to consider.[153] Any of these factors could result in higher pay-out amounts, litigation

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D. TPLF and "social inflation"

Looking at TPLF's impact more globally, this practice is often included by commentators in the larger concept of "social inflation."[154] While a complete analysis into social inflation is outside the scope of this article, it is important to at least touch on this topic as part of our TPLF conversation. Very generally, social inflation, has been defined by one commentator as referring "to all ways in which insurers' claims costs rise over and above general economic inflation, including shifts in societal preferences over who is best placed to absorb risk."[155] More narrowly, this source defines the concept as involving "legislative and litigation developments which impact insurers' legal liabilities and claims costs." TPLF is just one of the factors included under the social inflation umbrella. Other factors commonly included are legislative and judicial developments, aggressive plaintiff claims and trial strategies, and shifts in judicial and jury attitudes.[156]

Overall, social inflation is often cited as a significant contributing factor behind the trend of larger settlement and verdict amounts. Verisk's Tim McCarthy explained in **this article** that social inflation's impact must be usually inferred given the multi-factorial nature of this concept.[157] As part of **this article**, Mr. McCarthy undertakes a detailed review of recent insurer statistical data, as well as verdict award statistics, and concludes, in general, that there are several indicators suggesting that social inflation is significantly impacting insurers, including evidence of higher jury verdicts, which has occurred without a correlating rise in claims frequency or economic inflation.[158] As examples, he cites a Wall Street Journal article reporting "a more than 300% rise in the frequency of verdicts $20 million or over in 2019 from the annual average from 2001 to 2010,"[159] and another source reporting that jury verdicts against the trucking industry had increased more than 550%, with an average award increasing from $2.6 million in 2012 to more than $17 million in 2019."[160] In addition to Mr. McCarthy's analysis, another article discussing social inflation noted that a major re-insurer in 2019 reported that a study conducted by a law firm found that the top 50 single-plaintiff bodily injury verdicts in the United States climbed from an average of $27.7 million in 2014 to $54.3 million in 2018.[161]

E. Future issues for consideration

As insurers grapple with TPLF going forward, it is important to note that third-party funding continues to grow in acceptance, popularity, and use. We will likely continue to see efforts toward regulating TPLF practices and creating more defined professional and ethical standards to help establish better rules regarding third-party funding, as opposed to eliminating or outlawing this practice. Several states, as noted above, have already enacted statutes aimed at regulating various aspects of this practice.

In many respects it appears the major challenge facing insurers at this time involves identifying whether TPLF is at play in a given case, and the extent to which the funder may influence (or perhaps even control) the course of the claim, litigation, and settlement. To a large degree these questions, once again, bring us back to issues of discoverability raised above, regarding whether insurers should be able to obtain TPLF information to help assess and evaluate the claim. From a more macro level, consideration should be given to the impact third-party funding, and the larger issue of social inflation, is having on claims with respect to rising costs, settlement amounts, and jury verdicts. Finally, as this area continues to evolve on many fronts, monitoring future changes and developments will be important.

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Part III

CONCLUSION – MEETING FUTURE CHALLENGES

The trend towards expanded use of third party funding in claims litigation speaks to the larger issue of the importance for insurers to contain legal costs. Verisk is ready to equip the industry with solutions that drive down litigation spend, help guide legal strategy, and provide settlement guidance. Our legal case management solution is centralized and collaborative, enabling claim handlers and defense counsel to share information, and structures case data into actionable insights to contain costs and improve outcomes. The system captures and structures critical data – including unstructured data such as notes – and helps teams formulate an insight-driven litigation plan. This new solution for claims litigation also has additional Verisk solutions integrated within the platform including ISO ClaimSearch®, Decision Net®, and more.

About the Author

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Endnotes

1. It is noted that TPLF is referred to by other names, such as litigation financing or funding, settlement funding, or alternative litigation finance. See e.g. Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding,* World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 305 (2017). By way of example, Ms. Pigna notes that the preferred name for this practice in the United Kingdom is "Third Party Funding," while the American Bar Association prefers the term "Alternative Litigation Finance;" while still others have referenced the practice as "Contingency Fee by Non-Lawyers." Id. at 310, citing, Bernardo Cremades, *Third Party Funding in International Arbitration*, 1 BA Arb. Rev. 4, 4 (2013)

2. Ana E. Tovar Pigna, Florida: *An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 310 (2017); citing, Maya Steinitz and Abigail Field, *A Model Litigation Finance Contract*, 99 Iowa L. Rev. 711, 713 (2014). In the context of TPLF, non-recourse funding has been described to mean that "the plaintiff must repay the money (plus fees and interest) ***only if, and to the extent that,*** the plaintiff ultimately receives compensation for underlying legal claim." Ronen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 149 (Spring 2021) (authors' emphasis). By way of an additional example, another source describes non-recourse funding this way: "if the plaintiff loses, he does not need to repay the loan or any interest…. [a]dditionally if the plaintiff does win, but his proceeds do not exceed [the] loan plus interest, the plaintiff does not owe the deficit; in other words, a debt cannot be created that is larger than [the] judgment received by the plaintiff." Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss.C.L.Rev. 102, 106 (2021); citing, John L. Ropiequet, *Current Issues in Consumer Litigation Funding*, 33 No. 9 Banking & Fin. Services Policy Rep 17 (2014).

3. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1075 (December 2019).

4. Darren Pain, The Geneva Association, *Social Inflation: Navigating the evolving claims environment*" (December 2020), at 25-26.

5. See, e.g., Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 310 (2017); citing, Bernardo Cremades, Third Party Funding in International Arbitration, 1 BA Arb. Rev. 4, 4 (2013). On this point, Ms. Pigna comments that "[i]t has been difficult to agree on a definition of third-party funding because of the many forms the funding can take." Pigna, at 310.

6. See, e.g., Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 311 (2018); citing, Maya Steinitz, *Whose Claim is This Anyway?*, 95 Minn. L. Rev. 1268, 1276 (2010-2011).

7 See, David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 2.

8. Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss. C. L. Rev. 102, 104 (2021). From a wider view, this commentator defines TPLF, in part, as "the process by which a litigant secures finding from an outside party, with no other interest in the litigation … a plaintiff will secure funds from a lawsuit funding company. The capital is advanced to the plaintiff on a non-recourse basis meaning that if the plaintiff does not have a favorable outcome, he does not need to repay the loan. If the plaintiff does prevail, in exchange for the advance of capital, the funding company will take a cut of the plaintiff's recovery to repay the loan with interest … In short, litigation finance companies are investors in the outcome of the plaintiff's case." Id. at 104 (citations omitted).

9. See n. 2 above.

10. Malcolm E. Wheeler and Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, 13 J. Tort L. 281, 282 (October 2020).

11. Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss.C.L.Rev. 102, 106 (2021). See also, Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding,* World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 314 (2017).

12. See, Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, at 360-361, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf

13. See, Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts (June 1, 2017), at 363, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf

14. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 691 (Summer 2020), citing, Sean Thompson, Dai Wai Chin Feman, and Aaron Katz, United States, *in* The Laws. Rev., Third Party Litigation Funding Review, 55 Leslie Perrin ed., 2019.

15. Malcolm E. Wheeler and Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, 13 J. Tort L. 281, 282-283 (October 2020). See also, Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 690-691 (Summer 2020).

16. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1088 (December 2019), referencing *Bollea v. Gawker Media, LLC.*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624 (M.D. Fla, Nov. 14, 2012).

17. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davisi L. Rev. 1073, 1089 (December 2019), citing, Stephanie Clifford, *Clifford (aka Daniels) v. Trump et al.,* CrowdJustice (Apr. 24, 2018), https://www.crowdjustice.com/case/stormy.

18. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1089 (December 2019), citing, Steven M. Sellers, *Troubled NFL Concussion Deal May Roil NHL Cases,* Bloomberg Law (May 25, 2018, 4:06 AM), https://news.bloomberglaw.com/product-liability-and-toxics-law/troubled-nfl-concussion-deal-may-roil-nhl-cases.

19. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1089 (December 2019), citing, Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo,* N.Y. Times (Jan. 28, 2018), https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harassment.html;

    Philippe A. Lebel, *Could a Litigation Finance Initiative Capitalize on #MeToo?*, Nat'l L. Rev. (Nov. 14, 2017), https://www.natlawreview.com/article/could-litigation-finance-initiative-capitalize-metoo.

20. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 689 (Summer 2020), citing, Michael Legg, Edmond Park, Nicholas Turner and Louisa Travers, *The Rise and Regulation of Litigation Funding in Australia*, 38 N. Ky. L. Rev. 625, 628 (2011).

21. Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020; citing, Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 95 (2013). According to this source, important factors driving TPLF practices in Australia include the country's general fee-shifting approach, whereby the losing party is typically responsible for paying some or all of the winning party's legal costs and other expenses, along with Australia's prohibition on contingency fee arrangements. Id. https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/

22. Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020; citing, Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, (2013).

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23. See e.g., Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 690 (Summer 2020). The author notes that while many commentators reference modern TPLF practices in the U.S. as approximately a decade old, the author found references indicating that this practice has roots dating back to the late 1980's. See e.g., Ronen Avraham and Anthony Sebok, *An Empirical Investigation of Third Party Consumer Litigant Funding*, 104 Cornell L. Rev. 1133, 1136 (July 2019), citing, Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (and Legal) Business*, 33 U. Mich. J.L. Reform 57, 57 (1999). This reference to some form of third-party funding existing before the often noted "decade old" reference to "current" practices would seem to be accurate in that, as discussed in the "Professional Ethics and Best Practice Considerations" section of this article, there is a Florida ethics opinion issued in 2002 which makes reference to several other ethics opinions from other jurisdictions addressing third-party funding issues dating back into the 1990's. Thus, based on this evidence, from the author's view, it may be more accurate to view TPLF as having established roots in the U.S. earlier than a decade ago, and that this practice has significantly grown and expanded over the past decade.

24. Diane Injijic, *The Growth of Litigation Funding and its Potential effects on Commercial Auto Insurance: Part One*, Verisk Visualize, June 10, 2019. https://www.verisk.com/insurance/visualize/the-growth-of-litigation-funding-and-its-potential-effects-on-commercial-auto-insurance-part-one/

25. *Considerations from the ABA's Best Practices for Litigation Funding*, The National Law Review, Volume XI, Number 151 (February 16, 2021). https://www.natlawreview.com/article/considerations-aba-s-best-practices-litigation-funding

26. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 1.

27. Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020. https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/

28. Malcolm E. Wheeler and Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, 13 J. Tort L. 281, 283 (October 2020) (citation omitted).

29. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 699 (Summer 2020), citing, Jayne R. Reardon, *Alternative Business Structures: Good for the Public, Good for Lawyers*, 7 St. Mary's J. Legal Malpractice & Ethics 304, 322 (2017).

30. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 700 (Summer 2020).

31. Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss. C. L. Rev. 102, 109 (2021).

32. Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss. C. L. Rev. 102, 109 (2021), citing, Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1304 (2011).

33. Ronen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 151(Spring 2021).

34. National Association of Mutual Insurance Companies (NAMIC), *Third Party Litigation Funding: Tipping the Scales of Justice for Profit*, prepared by the NAMIC State & Policy Affairs Department (May 2021), citing, Oxford English Dictionary.

35. Id., citing, Black's Law Dictionary.

36. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 12.

37. National Association of Mutual Insurance Companies (NAMIC), *Third Party Litigation Funding: Tipping the Scales of Justice for Profit*, prepared by the NAMIC State & Policy Affairs Department (May 2021), citing, *In re Primus*, 436 U.S. 412, 424-25, n. 15 (1978).

38. See e.g., Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss. C. L. Rev. 102, 105 (2021).

39. National Association of Mutual Insurance Companies (NAMIC), *Third Party Litigation Funding: Tipping the Scales of Justice for Profit*, prepared by the NAMIC State & Policy Affairs Department (May 2021).

40. Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 326 (2017).

41. Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 326-327 (2017), citing, *Saladini v. Righellis*, 426 Mass. 231, 235 (Mass. 1997).

42. See e.g., David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 12.

43. On this point, one commentator notes that "[c]hamperty laws are quite inconsistent among the states" and that "[s]ome states like Arizona, California, Louisiana, New Jersey, and Texas permit champerty or do not see third-party litigation financing as champerty" while the doctrine still holds some force in other states "including Alabama. Delaware, Georgia, Minnesota, Mississippi, New York and Pennsylvania." Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss. C. L. Rev. 102, 105 (2021). See also, David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 12-17.

44. Christopher Mendez, *Welcome to the Party: Creating a Responsible Third-Party Litigation Finance Industry to Increase Access and Options to Plaintiffs*, 39 Miss. C. L. Rev. 102, 110 (2021). As part of this article, the commentator argues that TPLF will *not* lead to an increase in frivolous cases stating, in part, that "[b]y injecting into the litigation process, the likelihood of a meritless claim being forwarded is likely not increased. This is because third-party financing creates a shifting of risk, not an elimination of risk … Accordingly, [third party funders] are unlikely to invest in a claim that is frivolous as they will be the party incurring the loss if the plaintiff loses." Id. citing, Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1314(2011).

45. National Association of Mutual Insurance Companies (NAMIC), *Third Party Litigation Funding: Tipping the Scales of Justice for Profit*, prepared by the NAMIC State & Policy Affairs Department (May 2021).

46. Id.

47. Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 Loy. U. Chi. L.J. 1239, 1250 (Summer 2016).

48. See, e.g., Malcolm E. Wheeler and Theresa Wardon Benz, *Litigation Financing: Balancing Access with Fairness*, 13 J. Tort L. 281, 301 (October 2020) and David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 17-18. While outside the scope of this article, the "non-recourse" nature of third-party funding raises questions as to whether such funding would be subject to state usury laws. See, Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 149-150 (Spring 2021). See also, *Davis v. Oasis Legal Finance Operating Company, LLC.,* 848 Fed.Appx. 408 (11th Cir. 2021) (finding, in part, that based on Georgia state law precedent, the non-recourse TPLF agreement in this case in which the repayment obligation was limited and contingent was not a loan subject to Georgia's Payday Lending Act). But see, *Odell v. Legal Bucks, LLC.*, 665 S.E. 2d 767 (N.C. App. 2008) in which the court found a TPLF agreement unenforceable as usurious under North Carolina law based on the facts of that particular case. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding, Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at. 17. Ultimately, as this source noted, "the question of whether a given TPLF agreement is usurious depends greatly on the particular terms of the deal documents and the wide variations in state law." Id.

49. The three law professors who conducted this study are: Romen Avraham – Professor of Law, Tel Aviv University Buchmann Law Faculty, and Senior Lecturer, University of Texas School of Law; Lynn A. Baker – Frederick M. Baron Chair in Law, University of Texas School of Law; and Anthony J. Sebok – Professor of Law, Benjamin N. Cardozo School of Law. This group released two articles regarding their study as follows: *The Anatomy of Consumer Legal Funding*, Cardozo Legal Studies Research Paper No. 618 and University of Texas Law, Public Law Research Paper No. 723 (September 2020) and *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143 (Spring 2021).

    With respect to these article releases, the researchers claim, in part, that their articles are "the first to present systematic, large scale data on MDL mass tort consumer-litigant funding" and that this "data, which are robust and representative, enable us to make transparent for the first time the terms and true cost to MDL mass tort consumer-litigants of this increasingly popular source of cash advances"… and that this data "also enable us to better understand mass tort claimants and their unique financial vulnerabilities compared to one-off tort claimants, such as those involved in motor vehicle accidents." Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 147-148 (Spring 2021).

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Regarding this rare opportunity to examine a third-party funder's data, the researchers commented as follows: "In light of how jealously funders guard their data, one might reasonably wonder why this one was willing to share its comprehensive raw data with us. The Funder felt that accurate data would be more beneficial to the industry as a whole than the anecdotes and speculation that appear in media reports. In addition, the Funder had known and worked with one of us for many years and trusted us to be fair and to not misuse the data. The Funder did not request, and did not have, any influence or control over our data analyses, our statistical results, or the content of this Article. The only restrictions were that we maintain the anonymity of the Funder and not make the raw data public." Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 147-148 (Spring 2021).

50. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 181 (Spring 2021). On this topic, the researchers commented that the "debate to date regarding [TPLF] has been based solely on anecdote and speculation, and the reported interest rates have been eyepopping." On this point, as examples, they noted that two scholars had reported TPLF costs between 180% and 435% per year, while another source stated that it was not atypical for a third-party funder to charge 80% interest in the first year of the loan and up to 280% of the total loan amount. Id. at 181 (citations omitted). In comparison to these reports which they viewed to be anecdotal and speculative, the researchers noted that their "data should be somewhat heartening" by comparison. Id. at 181.

    Overall, the researchers did not appear particularly troubled or concerned by their findings that the actual (weighted) annual interest rate borne by the funder's clients were 38% for mass tort clients and 43% for motor vehicle clients, noting as follows:

    > Are even these interest rates "too high"? We think it is important to ask, "as compared to what alternative?" The interest rates may be high compared to those on a home-equity loan or a credit card held by someone with an excellent credit score. But we think it is reasonable to assume that the individuals seeking [TPLF] do not have those options available. Indeed, our data suggest that [TPLF] is likely "funding of last resort" for the clients who seek it. One of our most striking findings is the small median amount of the fundings $2000 for MVA and $5000 for MT. We would add that [TPLF] for consumers is a robust and growing industry; and one might reasonably expect funders to compete on the contractual terms they offer consumers. Id. at 182 (Spring 2021).

51. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The Anatomy of Consumer Legal Funding*, Cardozo Legal Studies Research Paper No. 618 and University of Texas Law, Public Law Research Paper No. 723 (September 2020) at 1.

52. U.S. Chamber Institute for Legal Reform, *Study: Mass tort plaintiffs paying dearly for loans* (September 1, 2020). https://instituteforlegalreform.com/study-mass-tort-plaintiffs-paying-dearly-for-loans-regulation-needed/ See also, Daniel Fisher, *Study: Mass tort plaintiffs paying dearly for loans, regulations needed*, Legal Newsline (August 31, 2020). https://legalnewsline.com/stories/551873336-study-mass-tort-plaintiffs-paying-dearly-for-loans-regulation-needed

53. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 183 (Spring 2021) and Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The Anatomy of Consumer Legal Funding*, Cardozo Legal Studies Research Paper No. 618 and University of Texas Law, Public Law Research Paper No. 723 (September 2020) at 47.

54. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 183 (Spring 2021) and Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The Anatomy of Consumer Legal Funding*, Cardozo Legal Studies Research Paper No. 618 and University of Texas Law, Public Law Research Paper No. 723 (September 2020) at 47.

55. Id.

56. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143 (Spring 2021).

57. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The Anatomy of Consumer Legal Funding*, Cardozo Legal Studies Research Paper No. 618 and University of Texas Law, Public Law Research Paper No. 723 (September 2020) at 1. Of note, from the author's review of both articles released by the researchers, it does not appear that the researchers addressed post-settlement funding in their Spring 2021 article.

58. Romen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The Anatomy of Consumer Legal Funding*, Cardozo Legal Studies Research Paper No. 618 and University of Texas Law, Public Law Research Paper No. 723 (September 2020) at 1-2.

59. Darren Pain, The Geneva Association, *"Social Inflation: Navigating the evolving claims environment,"* (December 2020), at 31.

60. Regarding the Advisory Committee, according to U.S. Courts.gov, the U.S. Supreme Court first established this committee in June 1935 to help draft the Federal Rules of Civil Procedure, which took effect in 1938. Presently, this source reflects that Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, Criminal Procedure, and the Rules of Evidence carry on a continuous study of the rules and recommend changes to the Judicial Conference through a Standing Committee on Rules of Practice and Procedure. https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection From the author's research, the issue of TPLF disclosure and discovery was raised as part of the Advisory Committee's recent annual meetings in 2018, 2019, and 2020. The issue was raised at the 2018 and 2019 meetings as part of discussions related to multidistrict litigation (MDL). However, in 2020, the Advisory Committee decided to remove TPLF from the subcommittee's agenda, stating that this issue "is not unique to or especially prevalent in MDL cases," and returned it to the Advisory Committee for monitoring. Of note, the Advisory Committee's next meeting is scheduled for October 5, 2021 in Washington, D.C. See, Federal Register, Volume 86, No. 121, June 28, 2021, at 34044. It is unknown whether TPLF issues will be discussed at this upcoming meeting.

61. See, Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts (June 1, 2017) at 357, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf The full list of the 29 industry groups supporting the Chamber's letter is contained at the end of the president's letter which included, by way of examples, notable industry organizations such as: the American Insurance Association, American Tort Reform Association, Association of Defense Trial Attorneys, the Defense Research Institute, National Association of Mutual Insurance Companies, Property Casualty Insurer Association of America, and the U.S. Chamber of Commerce.

62. Federal Rules of Civil Procedure Rule 26 is entitled: Duty to Disclose; General Provisions Governing Discovery. Section (a)(1)(A) of this rule states as follows:

    (a) Required Disclosures.

    (1) *Initial Disclosure*.

    (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

    (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

    (ii) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

    (iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

    (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

63. Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts (June 1, 2017), at 358, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf

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64. Id. at 358, 365, 366, 368, 371, 372, 374 and 378.

65. Id. at 358.

66. Id.

67. The issue was raised at the 2018 and 2019 meetings as part of discussions related to multidistrict litigation (MDL). However, in 2020, the Advisory Committee decided to remove TPLF from the MDL's subcommittee's agenda, stating that this issue "is not unique to or especially prevalent in MDL cases," and returned it to the general Advisory Committee for monitoring. See, Advisory Committee on Civil Rules Booklet, April 1, 2020, at 47, https://www.uscourts.gov/sites/default/files/04-2020_civil_rules_agenda_book.pdf

68. Information on the Advisory Committee's next scheduled meeting planned for October 2021 was obtained from the Federal Register, Volume 86, No. 121, June 28, 2021, at 34044.

69. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding, Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 7. On this point, the authors state "[f]or the same reasons that the insurance agreement itself, not just disclosure of its existence is to be provided, TPLF agreements themselves should be provided to the defendants." Id.

70. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding, Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 7.

71. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding, Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 7. In addition, these authors raised several other issues regarding the potential impact of TPLF on litigation as part of its argument for TPLF transparency. For example, the authors outline, in part, concerns that TPLF can raise regarding such issues as who should pay for discovery costs and potential cost-shifting under the federal rules; questions concerning the amount of the plaintiff's medical bills and other claimed damages; and potential collateral resource issues. Id. at 9-18.

72. Patrick A. Tighe, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, February 7, 2018, at 209, as contained in the Advisory Committee on Civil Rules Booklet, April 10, 2018, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf

    Two references cited include Fifth Circuit's local rule, 5th Cir. L.R. 28.2.1 at 213, citing, C.D. Cal. L. R. 7.1-1. Id. at 209.

73. Patrick A. Tighe, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, February 7, 2018, at 210, as contained in the Advisory Committee on Civil Rules Booklet, April 10, 2018, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf. In Appendix A, Mr. Tighe provides the following listing of local circuit court rules regarding disclosure of TPLF finance arrangements, with the scope and type of disclosure varying by circuit: "Third Circuit (3rd Cir. L.R. 26.1.1(b); Fourth Circuit (4th Cir. L.R. 26.1(2)(B); Fifth Circuit (5th Cir. L.R. 28.2.1); Sixth Circuit (6th Cir. L.R. 26.1(b)(2)); Tenth Circuit (10th Cir. L.R. 46.1(D)); and Eleventh Circuit (11th Cir. L.R. 26.1-1(a)(1); 11th Cir. L.R. 26.1-2(a)." Id. at 220.

74. Patrick A. Tighe, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, February 7, 2018, at 209, as contained in the Advisory Committee on Civil Rules Booklet, April 10, 2018, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

75. Patrick A. Tighe, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, February 7, 2018, at 210, as contained in the Advisory Committee on Civil Rules Booklet, April 10, 2018, https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf In Appendix B, Mr. Tighe provides the following listing of local district court rules regarding disclosure of TPLF finance arrangements, with the scope and type of disclosure varying by district: "Arizona (no local rule, but corporate disclosure statement); C.D. California (C.D. L.R. 7.1-1); N.D. of California (N.D. Cal. L.R. 3-15; Standing Order for All Judges of the N.D. Cal (1/17/2017); M.D. Florida (Interested Persons Order for Civil Cases 6/14/2013, only applies to some judges; no local rule or order applicable to all district court judges); N.D. Georgia (N.D. Ga. L.3.3); S.D. Georgia (S.D. Ga. L.R. 7.1); N.D. Iowa (N.D. Iowa L.R. 7.1); S.D. Iowa (S.D. Iowa L.R. 7.1); Maryland (M.D. L.R. 103.3(b)); E.D. Michigan (E.D. Mich. L.R. 83.4); W.D. Michigan (Form-Corporate Disclosure Statement; No local rule order); Nevada (Nev. L.R. 7.1-1);E.D. North Carolina (E.D. N.C. L.R. 7.3); M.D. North Carolina (Form-Disclosure of Corporate Affiliations; No local rule order); W.D. North Carolina (Form-Entities with a Direct Financial Interest in Litigation Form, No local rule or order); N.D. Ohio (N.D. Ohio L. Civ. R. 3.13(b); Form – Corporate Disclosure Statement); S.D. Ohio (S.D. Ohio L.R. 7.1); E.D. Oklahoma (Form-Corporate Disclosure Statement, No local rule order); N.D. Oklahoma (Form-Corporate Disclosure Statement; No local rule or order); N.D. Texas (N.D. Tex. L.R. 3.1(c), 3.2(c), 7.4, 81.1); W.D. Texas (W.D. Tex. L.R. CV-33); W.D. Virginia (Form-Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation; No local rule order); and W.D. Wisconsin (Form-Disclosure of Corporate Affiliations and Financial Interest; No local rule or order)." Id. at 223-229.

76. Joseph J. Stroble and Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, IADC Defense Counsel Journal, April 30, 2020. https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/

    Paragraph 19 of this standing order, referenced as U.S.Dist.Ct.Rules N.D.Cal., Attachment C. Standing Order for All Judges of the Northern District of California-- Contents of Joint Case Management Statement, states as follows:

    > Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the "Certification of Interested Entities or Persons" required by Civil Local Rule 3-15. In addition, each party must restate in the case management statement the contents of its certification by identifying any persons, firms, partnerships, corporations (including parent corporations) or other entities known by the party to have either: (i) a financial interest in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.

Local Rule 3-15, cited as U.S.Dist.Ct.Rules N.D. Cal., Civil L.R. 3-15, provides, in part, that "upon making a first appearance in any proceeding in this Court, each party must file with the Clerk a 'Certification of Interested Entities or Persons'" which "must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves 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." Further, this rule provides that "[i]f a party has no disclosure to make pursuant to subparagraph (a)(1), that party must make a certification stating that no such interest is known other than that of the named parties to the action. A party has a continuing duty to supplement its certification if an entity becomes interested within the meaning of section (1) during the pendency of the proceeding." This rule does not apply to governmental entities or its agencies.

77. Id.

78. This recently released New Jersey civil rule is referenced by the court as "Civ. RULE 7.1.1 DISCLOSURE OF THIRD-PARTY LITIGATION FUNDING" and, per the court, was promulgated pursuant to its authority under 28 U.S.C. 2071 and Rule 83 of the Federal Rules of Civil Procedure. This new rule became effective via a court order dated June 21, 2021.

79. N.J. Civ. Rule 7.1.1 (a).

80. Id.

81. Id.

82. Id. at (b).

83. Id. at (c).

84. Id. (d).

85. Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020. https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/

    On this point, these authors note *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-CV-9350 VM KNF, 2015 WL 5730101 (S.D.N.Y. Sept. 10, 2015) where the court refused to allow the defendants in a putative securities fraud class action any discovery regarding the plaintiffs' litigation funder finding, in part, that the defendants had not shown that the litigation funding documents were "relevant to any party's claim or defense." Id., citing, *Kaplan*, at 2015 WL 5730101, *5. In addition, this source notes that some courts have held that certain documents related to a plaintiff's financing, such as the funding agreement itself, are simply not relevant to any claim or defense of the parties -- outside of the limited context when the defenses of champerty or maintenance are asserted, and therefore are not discoverable. On this point, as examples, the authors cited *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); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 721 (N.D. Ill. 2014) ("The terms of Miller's actual funding agreement would seem to have no apparent relevance to the claims or defenses in this case, as required by Rule 26 as a

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precondition to discovery."); *Benitez v. Lopez*, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019) ("[T]he financial backing of a litigation funder is as irrelevant to credibility as the Plaintiff's personal financial wealth, credit history, or indebtedness. That a person has received litigation funding does not assist the factfinder in determining whether or not the witness is telling the truth. Furthermore, '[w]hether plaintiff is funding this litigation through savings, insurance proceeds, a kickstarter campaign, or contributions from the union is not relevant to any claim or defense at issue.'"). Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020.

In contrast to these decisions, this source notes that the court in *Gbarabe v. Chevron Corp.*, No. 14-CV-00173-SI, 2016 WL 4154849 at *2 (N.D. Cal. Aug. 5, 2016) granted the defendant's motion to compel the disclosure of the plaintiff's funding agreement in this proposed class action suit finding, in part, that the funding agreement was relevant to the Federal Rule of Civil Procedure 23 adequacy determination, and that Chevron was entitled to view the agreement itself "to make its own assessment and arguments regarding the funding agreement and its impact, if any, on plaintiff's ability to adequately represent the class." Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020, citing, Gbarabe, 2016 WL 4154849 at *2.

86. H.R. 985, 115th Cong. (2017).

87. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding, Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at. 31.

88. Litigation Funding Transparency Act of 2018, S. 2815th Cong. (2018).

89. Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019).

90. David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding, Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at. 31.

91. Litigation Funding Transparency Act of 2021, H.R. 2025 and S. 840, 117th Cong. (2021). Both bills were introduced on March 18, 2021 and propose to amend Chapter 114 of title 28, United States Code.

92. Litigation Funding Transparency Act of 2021, H.R. 2025 and S. 840, 117th Cong. (2021). The provisions regarding discovery are basically the same in both bills.

Regarding class action suits, these bills, in pertinent part, propose:

> In any class action, class counsel shall—
>
> (1) disclose in writing to the court and all other named parties to the class action the identity of any commercial enterprise, other than a class member or class counsel of record, that has a right to receive payment that is contingent on the receipt of monetary relief in the class action by settlement, judgment, or otherwise; and (2) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

In terms of timing, the bills propose that the required information regarding class actions suits must be disclosed "10 days after execution of any agreement [as described above] … or the time of service of the action."

As for MDL actions, these bills, essentially propose the same disclosure requirements as class action stating, in pertinent part, as follows:

> In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall (A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and (B) produce for inspection and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

Regarding timing, the bills propose that the required disclosures in MDL litigation must be made "10 days after execution of any agreement [as described above] or the time the civil action becomes subject to this section."

93. These statutes read as follows:

> Wis. Stat. Ann. § 804.01(2)(bg) – "*Third party agreements*. Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."
>
> W. Va. Code Ann. § 46A-6N-6: "Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, 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."

94. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021), at 5, citing, Indiana (IC § 24-12), Maine (ME Rev. Stat. Ann. 9-A, § 12), Nebraska (Neb. Rev. St. § 25-3301, et. seq.), Nevada (NRS § 604C.320), Oklahoma (Okla. Stat. § 14A-3-801(6)), Tennessee (Tenn. Code Ann. § 47-16-101, et. seq.), Vermont (8 V.S.A. § 2252), and West Virginia (W. Va. Code § 46A-6N-2).

95. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021), at 5, citing, Ohio Rev. Code §. 1349.55(A)(1).

96. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021), at 5, citing, Arkansas (A.C.A. § 4-57-109), Indiana (Ind. Code § 24-4.5-3-110), Nevada (NRS § 604C.310), Tennessee (Tenn. Code Ann. § 47-16-101), and West Virginia W. Va. Code § 46A-6N-9. More specifically, this source reports that Nevada licenses and regulates consumer litigation financing and requires that the funded amount plus charges and fees of each transaction cannot exceed a rate of 40% of the funded amount annually. By contrast, in Tennessee a financier may impose a fee of up to 10% of the original amount provided to the consumer and may impose a maximum annual fee of $360 per year for each $1,000 of the unpaid principal of the funds advanced to the consumer for up to a maximum of 3 years. In addition, it is noted that West Virginia caps interest on such transactions at 18% while Indiana authorizes a litigation financier to impose an annual fee of 36% of the funded amount and an annual servicing charge of up to 7% of the funded amount, as well as a onetime document charge. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021), at 5 (citations omitted).

97. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021), at 5, citing, *Oasis Legal Finance Group v. Coffman*, [361 P. 3d 400 2015 (Nov. 16, 2015)]. In this case, two national TPLF companies brought an action against Colorado's Attorney General and Uniform Consumer Credit Code (UCCC) Administrator for declaratory judgment that funding agreements for personal injury litigation were not loans. The Attorney General and UCCC Administrator counterclaimed, in part, to enjoin these companies from making or collecting loans without being properly licensed. The Colorado Supreme Court held, in pertinent part, that the TPLF companies in this case who had agreed to advance money to tort plaintiffs in exchange for future litigation proceeds were making "loans" making them subject to Colorado's UCCC provisions, even if the plaintiffs did not have to repay any deficiency if the litigation proceeds were ultimately less than the amount due. *Oasis Legal Finance Group, LLC v. Coffman*, 361 P.3d 400, 401 (2015).

98. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021), at 5-6, citing, South Carolina, Department of Consumer Affairs, Administrative Interpretation: Legal/ Litigation Funding Transactions, (Nov. 14, 2014), Administrative Interpretation 3.104, 106-1403, https://consumer.sc.gov/sites/default/files/Documents/Business%20 Resources%20Laws/Administrative%20Interpretations/C hapter%203/3.104%2C106-1403%20Litigation%20FundingTransactions.pdf.

99. 2021 Florida Senate Bill No. 1750, Florida One Hundred Twenty-Third Regular Session (March 10, 2021). This bill was introduced in the Florida Senate on March 10, 2021 by Florida State Senator Douglas Broxon (Fla. 1st District).

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100. It is also noted that a similar bill regarding third-party funding was introduced in the Florida House of Representatives, cited as 2021 Florida House Bill No. 1293, Florida One Hundred Twenty-Third Regular Session (February 24, 2021). This bill, entitled "Litigation Financing Consumer Protection Act," proposed to create part VIII to Chapter 501, Florida Statutes (Consumer Protection). Id. Florida House Bill 1293 was referred to the Civil Justice and Property Rights Subcommittee, the Insurance and Banking Subcommittee, and the Judiciary Committee. The bill is noted to have died in the Civil Justice and Property Rights Subcommittee and not enacted into law. Westlaw Bill Tracking, Florida House Bill 1293.

101. Florida S.B.1750 was referred to the Committee on Senate Banking and Insurance where it ultimately died without being enacted into law. See, Information retrieved via Westlaw in a document entitled 2021 Florida Senate Bill No. 1750 Florida One Hundred Twenty-Third Regular Session, Bill Tracking. This source contains a legislative history outline, prepared by Sen. Broxon who introduced S.B. 1750, which, in part, contains the following notation: "04/30/2021 (S) DIED IN BANKING AND INSURANCE."

102. 2021 Florida Senate Bill No. 1750, Florida One Hundred Twenty-Third Regular Session, Sec. 3 (March 10, 2021).

103. Id., Sec.8.

104. Id., Sec. 11.

105. Id., Sec. 6.

106. Id. Sec. 9. This proposal provided, in part, that "[e]xcept as otherwise ordered by the court, a party to any civil action or claim must, without awaiting a discovery request, provide to the other parties any contract under which a litigation financier has contingent right to receive compensation sourced from potential proceeds of the civil action or claim."

107. Id., Sec. 5

108. Id., Sec. 10.

109. See e.g., Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts (June 1, 2017), at 369-370, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf

Rule 5.4(a) of the Model Rules of Professional Conduct states as follows:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

110. See e.g., Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts (June 1, 2017), at 369, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf citing, Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1291-1292 (2011) (quoting Model Rules of Professional Conduct R. 5.4 cmt)(2003). See also, Joseph J. Stroble and Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, *IADC Defense Counsel Journal*, April 30, 2020.

111. Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform letter (June 1, 2017) to Ms. Rebecca A. Wolmeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts (June 1, 2017), at 370, as contained in the Advisory Committee on Civil Rules Booklet, November 7, 2017, https://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf citing, Rule 1.7(a) of the Model Rules of Professional Conduct which Ms. Rickard notes provides that a "concurrent conflict of interest exists where there is a significant risk that the representation… will be materially limited by the lawyer's responsibilities to… a third person." See also, Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 320-328 (2018).

112. See, Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305, 323(2017).

113. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 696 (Summer 2020), citing, as an example, *Catler v. Arent Fox, LLP*, 71 A.3d 155,165 (Md,Ct. Spec. App. 2013).

114. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 696 (Summer 2020), citing, *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 280 P.3d 240, 306-07 (Mont. 2012).

115. See e.g., this issue as discussed in Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 696 (Summer 2020).

116. Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020. https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/ This source further noted that some parties have sought to shield TPLF documents from disclosure asserting the "common interest" exception to waiver, but that for this exception to apply, most jurisdictions require that the common interest be legal, not solely commercial, and that the communication be made to further that specific legal interest. Id. (citations omitted). See also, David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy (2018), at 26. In this article, the DRI authors noted that "[a]lmost all the cases that have considered the question have concluded that communications with the TPLF company constitute communications to a third-party, and waive attorney-client privilege" citing, as an example, the court's opinion *Miller v UK Ltd. V. Caterpillar, Inc.*, 17 F.Supp. 3d 711, 733 (N.D. Ill. 2014).

117. Jarrett Lewis, *Third Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 Geo.J.Legal Ethics 687, 697 (Summer 2020).

118. Id.

119. Id. at 697, citing, *Mondis Tech. Ltd. v. LG Elec. Inc.*, 2011 WL 1714304, at *3 (E.D. Tex. 2011).

120. Joseph J. Stroble and Laura Welikson, *Third-Party Litigation Funding: A Review of Recent Industry Developments*, IADC Defense Counsel Journal, April 30, 2020. https://www.iadclaw.org/defensecounseljournal/third-party-litigation-funding-a-review-of-recent-industry-developments/

This source noted that "[w]ith few exceptions, courts have largely held that the funded party does not waive work-product protection of those materials by sharing information with the third-party litigation funder…" Id., citing, J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 923 (2016). Cases cited on this point included *Mondis Technology, Ltd. v. LG Electronics., Inc.* No. 2:07-CV-565-TJW-CE, 2011 WL 1714304 (E.D. Tex. May 4, 2011), *Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A.*, No. CV 7841-VCP, 2015 WL 778846, at *10 (Del. Ch. Feb. 24, 2015); *Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd*, No. 315CV01735HRBB, 2016 WL 7665898, at *6 (S.D. Cal. Sept. 20, 2016).

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121. FL Eth. Op. 00-3 (Fla.St.Bar Assn.), 2002 WL 463991 (March 1, 2002).

122. FL Eth. Op. 00-3 (Fla.St.Bar Assn.), 2002 WL 463991 at *4. On this point, the Florida Bar stated in more detail as follows:

> The Florida Bar discourages the use of non-recourse advance funding companies. The terms of the funding agreements offered to clients may not serve the client's best interests in many instances. The Committee continues to have concerns, as discussed in Opinion 92-6, of the problems that can arise when a client obtains financial assistance from a third party, such as the client's lack of incentive to cooperate. This Committee can conceive of only limited circumstances under which it would be in a client's best interests for an attorney to provide clients with information about funding companies that offer non-recourse advance funding or other financial assistance to clients in exchange for an assignment of an interest in the case. Under these limited circumstances an attorney may advise a client that such companies exist only if the attorney also discusses with the client whether the costs of the transaction outweigh the benefits of receiving the funds immediately and the other potential problems that can arise. Only after this discussion may a lawyer provide the names of advance funding companies to clients. Id.

123. FL Eth. Op. 00-3 (Fla.St.Bar Assn.), 2002 WL 463991 at *4.

124. FL Eth. Op. 00-3 (Fla.St.Bar Assn.), 2002 WL 463991 at *4.

125. FL Eth. Op. 00-3 (Fla.St.Bar Assn.), 2002 WL 463991 at *4.

126. On this point, the Florida Bar stated:

> The majority of states who have examined these issues have determined that it is permissible for an attorney to provide a client with information about funding companies. See, e.g., Arizona Ethics Opinion 91-22 (attorney may refer personal injury client to funding company, but may not reveal information to the company without the client's consent, may not co-sign or guarantee the transaction, and may not tell the company that the lien is valid and enforceable if in the attorney's opinion it is not); New York State Bar Association Opinion 666 (attorney may refer client to funding company which then takes a lien on the recovery, may provide information to the company only with informed consent of the client, but may not have an ownership interest in the company or receive any compensation from the company for the referral); Philadelphia Bar Association Opinion 91-9 (attorney may refer personal injury client to funding company which takes a lien on the recovery, but may not have an ownership interest in the company or receive any compensation from the company, must maintain independent professional judgment, and must have informed client consent to disclose information to the company); South Carolina Ethics Opinion 94-04 (if the transaction is not illegal, an attorney may tell a personal injury client about funding companies at the client's request or if it is in the client's interest, but should advise the client of the benefits and detriments of the transaction, should inform the client and company in writing that the client controls the litigation; the attorney may also pay the settlement proceeds to the company under a valid assignment); South Carolina Ethics Opinion 92-06 (an attorney may refer personal injury clients to a funding company and may honor the assignment of a portion of the claim to the company); South Carolina Ethics Opinion 91-15 (attorney may refer personal injury clients to a funding company in which the attorney has no interest, and may honor the assignment to the company as long as the client consents); Ohio Ethics Opinion 94-11 (attorney may not refer a client to a funding company which requires the attorney to give a percentage of the legal fee to the company, but may refer a client to a funding company if such an arrangement is not required, it is in the client's best interest, and the arrangement does not cause the attorney to violate the rules of professional conduct; the attorney should advise the client on alternative methods of obtaining assistance such as low interest credit cards, bank loans or personal loans from the client's family or friends); Virginia Ethics Opinion 115 (an attorney may request that a funding company provide a personal injury client with funding when other lending sources have declined to assist the client and may honor the company's lien on the recovery, but the attorney may not guarantee or co-sign the loan). The majority of states have concluded that providing information to a funding company at the client's request is permissible, with the informed consent of the client. They also conclude that an attorney may honor a client's assignment of a portion of the recovery to the funding company. FL Eth. Op. 00-3 (Fla.St.Bar Assn.), 2002 WL 463991 at *3.

127. NY Eth. Op. 2011-2 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2011 WL 13176618 (2011).

128. Id. See also, NYC Eth. Op. 2011-2 (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), 2011 WL 6958790 (2011).

129. NY Eth. Op. 2018-5 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2018 WL 4608937 (2018). On this point, the New York State Bar Ethics Committee also opined that litigation funding arrangements also involve impermissible fee sharing where the arrangement in effect makes the lawyer's payments contingent on the receipt or amount of fees, regardless of how the arrangement is worded. For example, Rule 5.4(a) applies equally regardless of whether the lawyers' future payments are explicitly contingent on the receipt of fees or are contingent on the client's success which in turn will result in legal fees. Id. at n. 7.

130. Id at *4.

131. Id.

132. NYC Eth. Op. 2018-5, 2020 WL 3962062 (2020).

133. See n. 109 above.

134. NYC Eth. Op. 2018-5, 2020 WL 3962062, at *3. It is noted, however, that the New York City Bar Ethics Committee also stated that "[t]his opinion does not read Rule 5.4(a) to forbid funding arrangements in which the lawyer's debt obligation is secured by current or future accounts receivable but repayment is not contingent on the receipt or amount of fees. For example, a recourse debt that is not contingent on the amount of legal fees - e.g., a promise to repay a loan with interest over a particular period of time - does not constitute impermissible fee sharing simply because the debt is secured by accounts receivable in one or more matters. In the case of a recourse loan, there is no implicit or explicit understanding that the debt will be repaid only if legal fees are obtained in particular matters, and the creditor may seek repayment out of all of the law firm's assets. Nor do we believe the fee-sharing rule forbids funding arrangements in which the timing of the lawyer's payments is determined by the resolution of a matter - e.g., where the lawyer's payment obligation does not begin until a matter is resolved - but the amount of lawyer's payment obligation does not itself depend on whether, or in what amount, legal fees are obtained." NYC Eth. Op. 2018-5, 2020 WL 3962062, n. 9.

135. NYC Eth. Op. 2018-5, 2020 WL 3962062, at *3. It is noted that as part of its analysis the New City Bar Ethics Committee took the view that its opinion fell in line with opinions from ethics divisions of other state bar associations stating:

> Several other states have also reached a similar conclusion. *See* Prof'l Ethics Comm'n Me. Bd. of Overseers of the Bar, Op. 193 (2007) ("[P]ayment on a non-recourse loan to finance litigation in a contingency fee case, where the lawyer is obligated to repay the loan only if a fee results in the case, constitutes sharing legal fees with a non-lawyer in violation of the rule."); State Bar of Nevada Op. 36 (2007) ("Any loan obtained for purposes of litigation funding must be a 'recourse' loan that counsel is obligated to pay."); Utah Bar Ass'n Adv. Op. 97-11 (1997) ("[A]n attorney may not finance the costs of a contingent-fee case in which a non-recourse promissory note is secured by the attorney's interest in the contingent fee."); *see also* Va. State Bar Standing Comm. on Legal Ethics, Advisory Op. 1764 (2002) ("not[ing] a basic ethical problem" in a proposed financing agreement that called for a "finance company to receive a portion of the attorney's legal fee"). NYC Eth. Op. 2018-5, 2020 WL 3962062, n. 8.

136. Id. at*4. It is noted that as part of its opinion, the New York City Bar Ethics committee acknowledged recent New York court decisions upholding TPLF practices noting as follows:

> We recognize that several New York courts have upheld litigation funding agreements in the face of public-policy challenges. *See Hamilton Capital VII, LLC, I v. Khorrami, LLP*, 2015 N.Y. Slip Op. 51199(U) (Sup. Ct. N.Y. County Aug. 17, 2015) (distinguishing between fee-sharing agreements and a credit facility giving lender a security interest in law firm's accounts receivable); *Lawsuit Funding, LLC v. Lessoff*, 2013 WL 6409971 (Sup. Ct. N.Y. County Dec. 4, 2013) (refusing to use Rule 5.4(a) to invalidate a settlement agreement on public policy grounds where lawyer agreed to repay lender a set amount from lawyer's fees in eight other lawsuits); *see also Heer v. North Moore St. Developers, L.L.C.*, 140 A.D.3d 675, 676 (1st Dep't 2016) (rejecting law firm-defendant's argument that N.Y. Judiciary Law barred collection agency's motion to intervene, as § 474 permits "litigation loans obtained by law firms and secured by their accounts receivable"). However, insofar as the lawyers' payments to funders in these cases depended on the receipt of legal fees in particular matters, the judicial decisions enforcing the lawyers' contracts do not necessarily establish that Rule 5.4 applies differently to litigation funding arrangements than to other business arrangements. Regardless of whether the funding arrangements were forbidden by Rule 5.4, New York courts could be expected to enforce the arrangements, because lawyers who violate the Rules cannot ordinarily invoke their own transgressions to avoid contractual obligations. *See Marin v. Constitution Realty, LLC*, 28 N.Y.3d 666, 672 (2017) (rejecting lawyers attempts to "use the ethics rules as a sword" to render an agreement unenforceable). NYC Eth. Op. 2018-5, 2020 WL 3962062, n. 12.

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137. New York City Bar, *Report to the President by the New York City Bar Association Working Group on Litigation Funding*, (February 28, 2020), at 1. This report notes that this working group was "comprised of a range of interested professionals, including private practitioners, ethics professors and specialist, litigation funding executives, a former federal judge, in-house counsel, ADR specialists, and representatives from several of the City Bar's standing committees." Id.

138. New York City Bar, *Report to the President by the New York City Bar Association Working Group on Litigation Funding*, (February 28, 2020), at 90.

139. Id. at 24-30. See n. 109 to review Rule 5.4(a).

140. Id. at 2.

141. Id. at 90.

142. Id. at 74-89.

143. CA Eth. Op. 2020-204 (Cal.St.Bar.Comm.Prof.Resp.), 2020 WL 6122633 (2020).

144. CA Eth. Op. 2020-204 (Cal.St.Bar.Comm.Prof.Resp.), 2020 WL 6122633 at *8.

145. Latif Zaman, *ABA Outlines Best Practices for Third-Party Litigation Funding*, December 10, 2020. https://www.americanbar.org/groups/business_law/publications/committee_newsletters/consumer/2020/202011/third-party/

146. *Considerations from the ABA's Best Practices for Litigation Funding*, The National Law Review, Volume XI, Number 151 (February 16, 2021). https://www.natlawreview.com/article/considerations-aba-s-best-practices-litigation-funding

147. *Considerations from the ABA's Best Practices for Litigation Funding*, The National Law Review, Volume XI, Number 151 (February 16, 2021). https://www.natlawreview.com/article/considerations-aba-s-best-practices-litigation-funding

148. See, The Florida Senate, Bill Analysis and Fiscal Impact Statement, Senate Bill 1750, prepared by the Committee on Banking and Insurance (March 23, 2021) at 3, citing, Zakara, Laura, Overview of Alternative Litigation Financing in the United States, Research Brief, RAND Institute of Civil Justice (2010) available at https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf (last visited Jan. 2, 2021).

149. Insurance Information Institute, Press Release, Triple-I: Rising Litigation Expenses Are Driving Up Cost of Insurance (February 2021).

150. Darren Pain, The Geneva Association, "*Social Inflation: Navigating the evolving claims environment,*" (December 2020), at 26, citing, Buford Capital, 2019 Legal Finance Report and 2020 Legal Finance Report.

151. Ronen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. Litig. 143, 143 (Spring 2021).

152. Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1084 (December 2019).

153. On the issue of funder control, in an interesting Florida case, *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693 (Fla. 3d DCA 2009), a third-party funder had the right "to approve the filing of the lawsuit; controlled the selection of plaintiff's attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements." See, Joseph J. Stroble and Laura Welikson, Third-Party Litigation Funding: A Review of Recent Industry Developments, *IADC Defense Counsel Journal*, April 30, 2020. Based on these facts, the Florida Third District Court of Appeal found, in part, that the funder's control was so significant that the funder became a "party" under Florida law thereby subjecting the funder in this case to statutory costs and attorney's fees under Florida's civil theft statute which, in part, allows for such damages for claims filed without "substantial legal support." *Abu-Ghazaleh*, 36 So. 3d at 694-695. See also, Ana E. Tovar Pigna, *Florida: An Approach to Third Party Funding*, World Arbitration and Mediation Review, Vol. 11, No. 3, 305 (2017) in which the author breaks down the *Abu-Ghazaleh* decision in detail and discusses its relation to larger TPLF issues and considerations.

154. Darren Pain, The Geneva Association, *Social Inflation: Navigating the evolving claims environment,*" (December 2020), at 25-26.

155. Darren Pain, The Geneva Association, *Social Inflation: Navigating the evolving claims environment,*" (December 2020), at 6.

156. Darren Pain, The Geneva Association, *Social Inflation: Navigating the evolving claims environment,*" (December 2020), at 13-26.

157. Timothy McCarthy, *Is a wave of social inflation upon us?*, https://www.verisk.com/insurance/insights/social-inflation/faq/

158. Id.

159. Id. citing, Telis Demos, *The Specter of Social Inflation Haunts Insurers*, The Wall Street Journal, December 27, 2019, accessed on April 23, 2021.

160. Id. citing, Kim Palmer, *A few industries drive commercial insurance rates higher for everyone*, Crain's Cleveland Business, January 26, 2020, accessed on April 23, 2021.

161. Jim Sams, *Litigation Funding Bills Crop Up in State Houses Across the Country, Claims Journal*, Claims Journal (February 18, 2020) https://www.claimsjournal.com/news/national/2020/02/18/295539.htm (retrieved, August 4, 2021).

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