U.S. CHAMBER
Institute for Legal Reform

# Selling More Lawsuits, Buying More Trouble

*Third Party Litigation Funding A Decade Later*

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U.S. CHAMBER
Institute for Legal Reform

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# Executive Summary

In 2009, the U.S. Chamber Institute for Legal Reform (ILR) published *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States*, which described the introduction of third party litigation funding (TPLF) in the United States and warned of the possible ill effects of an unregulated and undisclosed financing regime on the American civil justice system at large.[1]

The 2009 paper began by explaining what TPLF is and how it works.[2] As the paper explained, TPLF "is a term that describes the practice of providing money to a party to pursue a potential or filed lawsuit in return for a share of any damages award or settlement."[3] TPLF generally falls into two broad categories: (1) consumer lawsuit lending, which typically involves individual personal injury cases; and (2) investment financing, which includes investments in large-scale tort and commercial cases and alternative dispute resolution proceedings. In either scenario, the TPLF provider essentially invests money in the outcome of lawsuits, betting that they will be successful.

At that point, TPLF was "not widespread" in the United States and was largely concentrated in Australia.[4] As the paper presaged, however, that is no longer the case. Over a decade later, the TPLF landscape has changed dramatically, with the practice becoming an increasingly ubiquitous feature of civil litigation in the United States. "Lawsuit finance is no longer in its infancy in the United States. What began as a financial tool for 'David vs. Goliath' cases—small plaintiffs who used funding to sue large defendants in bet-the-company cases—has gone mainstream."[5] An annual survey of in-house counsel and law firm lawyers taken by Burford Capital Limited (Burford)—the largest TPLF company in the world—reported that, "[i]n 2018, it's hard to find any lawyers who say they've never heard of litigation finance."[6] According to the survey, "[r]eported use [of litigation finance] has risen dramatically."[7]

In addition to introducing the phenomenon of TPLF, the 2009 paper drew from the Australian experience to warn about potential dangers associated with the practice, including the prospect of frivolous and abusive litigation and various ethical consequences, particularly those at play when TPLF is involved in aggregate

litigation or class actions. Unfortunately, a decade later, those warnings have proved well-grounded. Although TPLF arrangements generally are not required to be disclosed—and therefore largely operate under a veil of secrecy—those that have been made public tell an ominous story of TPLF spawning frivolous and abusive litigation, particularly in the mass tort arena; TPLF spurring myriad ethical violations, ranging from improper fee-splitting between lawyers and funders to conflicts of interest and violations of decades-old champerty and maintenance prohibitions; and TPLF seeping into the class action arena, subordinating the interests of class members to those of outside funders.

This paper seeks to update the earlier 2009 research regarding TPLF.

- Part I recounts the dramatic expansion of TPLF in the United States, as well as its diversification.
- Part II chronicles some of the most egregious examples of frivolous and abusive litigation that have been facilitated by TPLF.
- Part III addresses the various ethical implications of TPLF.
- And Part IV proposes potential solutions for reining in TPLF, including—at a minimum—a disclosure requirement such as the one currently under consideration by the federal Advisory Committee on Civil Rules.

# The TPLF Industry Has Expanded by Leaps and Bounds

The most logical starting point for any assessment of TPLF in the United States is a review of the economic health of the industry supporting the practice, which has become both richer and more diversified over the past decade.

One recent article described investment in the TPLF industry as capital "rush[ing] into [the] space like a flash flood into a canyon gully."[8] The TPLF industry is now massive, with some analysts estimating "that litigation finance is at least a $10 billion industry."[9] Although the industry has already become an economic behemoth, it still has plenty of room to grow, considering "U.S. tort system costs totaled $429 billion in 2016, or 2.3 percent of the nation's [GDP]."[10] TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, fueling the expansion of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits. The rapid financial expansion and funding diversification of the industry are described in more detail below.

## Financial Expansion

The last 10 years have witnessed unprecedented financial expansion on the part of those engaged in TPLF. As one recent article put it, "[t]he figures just get bigger and bigger,"[11] or as Allison Chock, chief investment officer of a prominent funding company, summed it up: "[f]ive or 10 years ago this industry barely existed in the USA. Now it's thriving … ."[12] According

*"TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, fueling the expansion of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits."*

to one recent survey, "private funders in the U.S. have a whopping $9.52 billion under management for commercial case investments."[13] The following examples illustrate this trend:

- Burford recently revealed that it held "new investment commitments of $1.3 billion in 2018."[14] That staggering figure "represent[s] 30x growth from 2013."[15] Burford also recently secured $667 million in new capital from an undisclosed sovereign wealth fund.[16] Burford, which can be seen as emblematic of the TPLF industry, has gone from receiving "131 inquiries for funding … in its first twelve months of doing business, [to receiving] 1,470 inquiries for funding in 2018."[17] "In other words, demand grew 1022%."[18]

- In late 2018, Bentham IMF, an Australia-based litigation funder, announced the launch of a new litigation fund.[19] The new fund—the fourth fund of its kind launched by Bentham that is focused on U.S. litigation—will initially be valued at $500 million, with the potential for investors to increase the fund to $1 billion.[20] Charlie Gollow, Bentham's U.S. Chief Executive, emphasized the increasing demand for litigation funding in the U.S. by saying in a press release that "[i]n the last three years, we've seen a 110% increase in qualified applications for funding in the U.S. and greater interest in larger deals."[21]

- Therium Group Holdings Limited (Therium) recently surpassed the $1 billion institutional investment milestone, largely thanks to its recent announcement of a new $430 million fund.[22] The new fund is the largest to date for Therium and follows a $265 million fund raised in February 2018.[23]

- Longford Capital Management LP, which was founded in 2014 and invests in contract, antitrust, and other claims, raised $56.5 million for its first fund.[24] The litigation funder experienced significant economic growth in its initial venture, obtaining returns in the "70-90 percent range."[25] The funder has announced a whopping $500 million for a second fund, dwarfing the initial $56.5 million.[26]

The dramatic increases in investments illustrated above point to one unmistakable conclusion: litigation funders are reaping enormous financial benefits from investing in litigation. Although many funders are not publicly traded and therefore need not report their earnings and various other economic figures, the numbers reported by two of the largest publicly traded funders (Burford and Bentham) support this conclusion and portend even greater expansion of TPLF going forward. Specifically, in its 2018 annual financial report, Burford touted after-tax profit of $328 million, up 24 percent from 2017, and

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> *Another indicator is the growth of practice groups providing legal advice regarding TPLF.*

cash generation at a "robust" $513 million, up 41 percent from 2017.[27] Burford also reported income of $420 million, which is up 23 percent from 2017.[28] Similarly, according to Bentham's most recent financial report (June 2018), Bentham's net assets have almost doubled from $206.3 million in June 2017 to $367.8 million in June 2018.[29] The news for total investments was similar, with Bentham reporting $190.9 million in 2017 and $321.3 million in 2018.[30]

As the numbers above amply demonstrate, investments in the TPLF industry are extremely lucrative, and the finance world has noticed.[31] *The New York Times* recently reported that, "according to lawyers and lending executives … [h]edge funds such as Fortress Investment Group, Pravati Capital and Virage Capital Management have lent money to mass-tort law firms in recent years."[32] The TPLF industry is an attractive market for hedge funds, largely because the industry is not subject to the same limitations as the stock market or, as one article described it, "is uncorrelated with anything else."[33] Indeed, the TPLF industry is considered to have "investments that won't perform in lock step with stock markets or the overall economy."[34] Accordingly, many hedge funds are jumping to invest in litigation. For example, EJF Capital (based in Arlington, Virginia), a $6 billion hedge fund, began raising money in early 2018 for a new $300 million fund dedicated to investing in mass tort cases.[35] The new fund is on top of the $450 million that the hedge fund already invested in personal injury law firms.[36]

The financial success of TPLF has come with other indicators of a maturing industry that are further solidifying the influence of litigation funding on the American civil justice system. For example, due to the significant growth of the TPLF industry, Chambers & Partners—one of the world's most renowned legal directories—started ranking funders in the U.S. and U.K. in 2018.[37] Another indicator is the growth of practice groups providing legal advice regarding TPLF. One law firm, McDonald Hopkins LLC, has even opened up a new practice group focused exclusively on the TPLF industry.[38] The new practice group "will represent plaintiffs who are seeking litigation funding for individual cases and portfolios of cases and law firms who are seeking litigation funding for portfolio cases … . The firm will also represent litigation funders who are seeking assistance with due diligence as they evaluate potential investments."[39] These are attributes of a robust TPLF industry—one that is becoming enmeshed in the U.S. civil justice system.

## Expanding Funding Models

The TPLF industry is not only growing financially but is also diversifying and becoming more sophisticated, expanding into portfolio investing, defense-side litigation funding, claim monetization, crowdfunding and other models—all of which have enabled the industry to reach more cases and more sectors of the civil justice system.

### PORTFOLIO INVESTING

As funders seek to get their hands on more profit, they have transitioned from funding individual cases to investing in an entire portfolio of cases at a given firm. Under this approach, the funder essentially bankrolls all or part of a firm's operations, including the firm's day-to-day operating expenses, and then takes a cut of any litigation proceeds.[40] By spreading an investment across a portfolio of cases, funders hope to make their investments less risky: "In a sector already adverse to risk, a portfolio of cases could work much the same as mutual funds, helping to improve the chances of strong returns from multiple sources, rather than relying on just one piece of litigation."[41] Funders have enthusiastically embraced this model, largely eschewing their previously touted vetting processes for evaluating the merits of the cases that they are financing.

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For instance, Burford's portfolio investments have "grown to become a significant portion of Burford's investment[s] … . In 2018 alone, Burford committed over $450 million to portfolio finance investments,"[42] and 62 percent of Burford's investments are described as portfolio investments, compared to only 15 percent of single case finance.[43] Portfolio investing is becoming a bigger and bigger part of the industry, with one article reporting that "[o]f the litigators who obtained third-party funding in 2017, nearly 40% used the capital received to finance portfolios containing several cases."[44] And according to a more recent survey of private funders, 47 percent of total investments made in cases in the 12-month period ending in June 2019 went to portfolio arrangements.[45]

### DEFENSE-SIDE FUNDING

The TPLF industry has long funded plaintiffs, but it is now making a concerted effort to fund defendants as well. Because the nature of litigation financing is traditionally dependent on the funded party "winning" the case and getting a payout, defense-side financing takes on some unique packaging of claims, such as a hybrid model in which both defense and plaintiff-side claims, or counterclaims, are packaged together.[46] Essentially, the theory is that under the hybrid model of defense-side litigation funding, the client would have certain claims of its own "with enough upside to offset the risks associated with

financing the defense" of other claims in the same or other litigations.[47] As this description illustrates, however, even so-called defense-side funding encompasses significant elements of traditional plaintiff-side funding.

On the other side of the spectrum is "'pure defense' financing."[48] A typical agreement would provide that the case is "successful" if it is settled below a certain threshold.[49] The funder would agree to finance the legal fees and to cover any settlement that exceeds the agreed-upon threshold. Conversely, the client would agree to pay the funder a multiple of the funder's investment if the case is ultimately "successful."[50] However, in many respects, such arrangements may look more like law firm bonus compensation arrangements than actual litigation funding.

Although there has been much recent talk about funding defendants' litigation efforts, the extent to which such activity is occurring is far from clear.[51]

### CLAIM MONETIZATION

Another new and sophisticated funding model is "claim monetization." In claim monetization, "parties use the capital for a purpose other than covering the costs of litigation."[52] For example, the funder might provide the plaintiff with "working capital," which serves as an "advance" on an ultimate judgment.[53] As with other forms of litigation funding, claim monetization is non-recourse in nature, which means that the funder is only repaid in the event that the client prevails in the underlying litigation.

Although this paradigm resembles the model employed by consumer lawsuit lending—i.e., the practice of funders advancing money to individuals to pay for their living expenses during the pendency of litigation—monetization is increasingly being used by commercial entities. "Parties large and small are interested in pure claim monetization at various stages of litigation, even if they are willing to pay their counsel on an hourly basis."[54] And monetization can be provided as a lump-sum payment or on a schedule of key developments, such as surviving a motion to dismiss or withstanding a later dispositive motion. "Claim monetization is merely a different way to unlock a litigation asset's value. In contrast to typical litigation funding, monetization's main benefit is time: it is no secret that litigation often takes years to resolve, and monetization enables parties to realize the value of their litigation assets without waiting to prevail in litigation."[55]

### CROWDFUNDING AND OTHER MODELS

Yet another funding model employed by litigation funders is crowdfunding. In particular, one company, LexShares Inc., is attracting investors, commercial plaintiffs, and plaintiffs' firms to its online marketplace by applying a crowdfunding strategy to TPLF.[56] Accredited investors are able to shop among individual cases and

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contribute as little as $2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment.[57] Unlike traditional TPLF firms, LexShares solicits investments using a crowdfunding model, which allows ordinary accredited investors to choose among cases vetted though LexShares' due diligence.

Notably, the examples of funding models described above are by no means exhaustive. Indeed, Burford recently announced a new $300 million fund for post-settlement deals, which marks yet another different type of fund to emerge in the industry.[58] It stands to reason that the continued expansion of TPLF will foster even more kinds of funding models in the near future.

At bottom, there is no question that, in contrast to 10 years ago, TPLF has become a prominent facet of civil litigation in the United States. And it has been accompanied by sophisticated changes in funding methods that will likely accelerate its growth.

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# TPLF Gone Awry

When ILR released its *Selling Lawsuits* paper roughly a decade ago, the authors—looking to the experience of TPLF in Australia—predicted that TPLF would not only increase the volume of litigation, but also encourage the filing of frivolous and abusive litigation.[59] After all, TPLF companies are mere investors, and they base their funding decisions on the present value of their expected return. As such, even if a lawsuit has little or no merit, it may be a worthwhile investment if there is a possibility (however small) of recovering a very large sum of money.

In addition, TPLF providers can mitigate their downside risk by spreading the risk of any particular case over their entire portfolio of cases and by spreading the risk among their investors—which is presumably why portfolio-based funding has become so pervasive. For these reasons, TPLF providers have higher risk appetites than most contingency-fee attorneys and will be more willing to back claims of questionable merit. Sure enough, this is the very dynamic that has played out in the TPLF arena over the last 10 years, perhaps best exemplified by the abusive and fraudulent *Chevron Corp. v. Donziger* litigation and the foray of litigation funders into the mass tort arena—both of which are explored in greater detail below.

## *Chevron Corp. v. Donziger*

Two years after publication of the original *Selling Lawsuits* paper, one of the most notorious examples of TPLF playing a role in fueling abusive and frivolous litigation occurred in the case of *Chevron Corp. v. Donziger*.[60] In *Donziger*, an investment by a fund associated with Burford helped sustain a lawsuit against Chevron filed in an Ecuadorian court, alleging environmental contamination in Lago Agrio, Ecuador. Burford invested $4 million with the plaintiffs' lawyers in the Lago Agrio suit in October/November 2010 in exchange for a percentage of any award to the plaintiffs. In February 2011, the Ecuadorian trial court awarded the plaintiffs an $18 billion judgment against Chevron.[61] In March 2011, Judge Lewis Kaplan of the U.S. District Court for the Southern District of

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New York issued an injunction barring the plaintiffs from trying to collect on their judgment because of what he called "ample" evidence of fraud on the part of the plaintiffs' lawyers.[62] Long before Burford had made its investment in the case, Chevron had conducted discovery into the conduct of the plaintiffs' lawyers under a federal statute that authorizes district courts to compel U.S.-based discovery in connection with foreign proceedings, and at least four U.S. courts throughout the country had found that the Ecuadorian proceedings were tainted by fraud.[63]

Sometime in 2011, Burford decided not to provide any additional funding in the Lago Agrio case.[64] Nevertheless, its year-long involvement—and its initial decision to invest $4 million despite allegations of fraud in the proceedings—vividly shows that TPLF investors have high risk appetites and are willing to back claims of questionable merit. Chevron ultimately sued the lead plaintiffs' attorney for civil racketeering for procuring the judgment fraudulently. In 2014, Judge Kaplan found that the "decision in the Lago Agrio case was obtained by corrupt means."[65] Judge Kaplan also lamented the plaintiffs' lawyers' "romancing of Burford," which the court found led the plaintiffs' counsel to adopt a litigation strategy designed to maximize the plaintiffs' ability to collect on any judgment—rather than focus on securing a judgment ethically and honestly.[66]

## Mass Torts Warehouse

Because the increasingly common portfolio strategy by definition involves funding a larger and broader array of cases, it can be expected to increase the filing of ill-considered cases. Indeed, a case filed in 2015 revealed that TPLF is being used in major mass tort proceedings where lawyers amass as many "faceless clients as possible" without adequately investigating the merit of the claims.[67] A lawsuit brought by a former employee of plaintiffs' law firm AkinMears in connection with the use of TPLF in litigation involving allegedly defective mesh products summarized the business model employed by the law firm as follows:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or

> buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[68]

This lawsuit, which had been reported on in the press, ultimately settled. However, the allegations in the petition underscore the tendency of TPLF to engender dubious claims in the mass tort arena. As one article explains, the funding company's "investment in a claims-bundling firm, known not for trial work but for multi-million-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder's usual customers: companies with big business disputes for their Am Law 200 firms."[69] In short, the AkinMears case illustrates that the buying and selling of questionable mass tort lawsuits on a massive scale is not only supported by third party funding, but is capable of reaching new heights precisely because of the availability of such funding.

## Unnecessary Surgeries for the Sake of Dividends

In April 2018, *The New York Times* chronicled an even more troubling (albeit related) consequence of TPLF: litigation funders were pushing plaintiff law firms to encourage women to undergo unnecessary surgeries in order to drive up the value of their claims.[70] The article describes the story of a woman receiving a phone call from a stranger who tells the woman that she has a defective mesh implant and that she needed surgery to remove it. "Just like that, she had stumbled into a growing industry that makes money by coaxing women into having surgery—sometimes unnecessarily—so that they are more lucrative plaintiffs in lawsuits against medical device manufacturers."[71] "While studies have shown that up to 15 percent of women with mesh implants will encounter problems" and that "removing the mesh is not always recommended," some TPLF companies in control of litigation will apparently do anything necessary to increase the potential recovery, including pushing women to undergo unnecessary and dangerous surgeries.[72]

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## TPLF Being Used to Buy and Sell False Claims Act Lawsuits

Funders have also signaled that they are interested in entering the False Claims Act (FCA) fray.[73] Although funders have promoted the view that litigation funding "has the potential to increase the number of legitimate claims reaching the Department of Justice,"[74] it ignores serious constitutional and statutory problems with introducing TPLF into the FCA arena. In addition, the funders' view is precisely backwards, as TPLF-based FCA claims would engender more vexatious and frivolous lawsuits under that statute.

As a threshold matter, the use of TPLF is not authorized by the FCA. As the Supreme Court has explained, the FCA vests standing in a private *qui tam* relator by "effecting a partial assignment of the Government's damages claim."[75] To have standing to bring suit under this statute, the relator must comply with several important statutory requirements, including, for example, disclosing her case to the United States and affording it the opportunity to investigate and intervene in the proceeding.[76] However, the FCA does not authorize the relator to re-assign the government's claim to outside funders, which would effectively constitute a sale of all or part of the relator's share of the government's claim with consideration payable only to the relator.

Importantly, there are good reasons for this lack of statutory authorization. TPLF arrangements are generally kept secret, including from the government, whose interest the relator is pursuing. If the government is not even aware that a relator has further assigned its interest (let alone the terms of that assignment) to an outside third party, then it obviously cannot properly supervise those cases in which it does not intervene. Nor can it properly evaluate the fundamental question of whether the relator's assignment of its interest to a third party warrants the government intervening in the first place—such as if the funding

*[S]uch delegation of executive power to outside entities with a pecuniary interest in the underlying litigation would be especially problematic in light of the punitive nature of FCA proceedings.*

agreement places constraints on the relator's actions that are incompatible with the interests of the United States—or dismissing the case altogether.

Moreover, permitting TPLF in the FCA context would raise serious constitutional questions by delegating control of FCA lawsuits—an executive function—to individuals who (unlike the *qui tam* relator) are complete strangers to the alleged misconduct at issue in the litigation. Indeed, such delegation of executive power to outside entities with a pecuniary interest in the underlying litigation would be especially problematic in light of the punitive nature of FCA proceedings.[77] The use of TPLF in FCA cases threatens the fundamental due process rights of defendants by undermining the impartiality and neutrality of these quasi-criminal proceedings. "'If you got pulled over by a cop and the cop made more money if he gave you a ticket and less if he didn't, no one would think that was fair.'"[78]

When a relator sells the government's claim to a financially interested TPLF entity, it is essentially creating that same kind of scenario. After all, and as elaborated throughout this paper, TPLF entities naturally and inevitably seek to influence the lawsuits they finance by, for example, deterring reasonable settlements so that they can maximize the return on their investment. And such pressure is extremely difficult to resist, raising the specter that a relator will subordinate the public interest in favor of the TPLF entity's personal, pecuniary interest. To be sure, private relators are also motivated at least in part by a desire to obtain a financial reward for their prosecution of the government's claims.

However, in stark contrast to relators (whose identity is known and over whom the government can exercise proper oversight), TPLF entities operate unbeknownst to the government and can therefore seek to exert control and influence over the prosecution of an FCA case with impunity. Needless to say, such a troubling dynamic does not exist when the government itself, or a properly supervised relator, is bringing claims against a defendant alleged to have violated the FCA.

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Allowing TPLF to fester in FCA litigation would also pose serious risks to the nation's civil justice system by incentivizing vexatious and frivolous litigation. As just discussed, because the goal of TPLF funders is to maximize the return on their litigation investments, they will naturally seek to exercise control over those investments by influencing key litigation decisions, such as those pertaining to settlement. And because most funder compensation turns on the plaintiff obtaining a monetary settlement, TPLF could jeopardize the chances of a non-monetary settlement that would satisfy the government but not the funder, needlessly protracting litigation. In addition, companies that might not already be involved in TPLF could seek to exploit the FCA's treble damages provision by bankrolling claims of questionable merit against their competitors for financial advantage. The result would be frivolous and vexatious litigation, which is expressly discouraged by the FCA.[79]

## TPLF Potentially Being Used to Burden New York City with Abusive Litigation

There have also been troubling reports about litigation funders fleecing indigent people by encouraging them to file lawsuits against the City of New York and then charging them interest rates as high as 124 percent.[80] These schemes target vulnerable individuals, including convicted criminals, with promises of money for suing the city (often alleging mistreatment in the criminal justice system), but in the end the firms take home the bulk of the money.[81]

In short, TPLF is being used to gamble on questionable—and sometimes fraudulent—litigation. And because TPLF arrangements generally need not be disclosed, there are undoubtedly many other instances of abusive or frivolous litigation that have evaded public scrutiny. Inevitably, as TPLF companies continue to expand their coffers and multiply their returns on litigation finance, more and more examples of TPLF gone awry will come to light.

# TPLF Is a Recipe for Ethical Impropriety

The many ethical concerns surrounding TPLF—initially touched upon in the original *Selling Lawsuits* paper—have not gone away. On the contrary, the handful of TPLF arrangements that have seen the light of day confirm that the practice is threatening core ethical principles.

These principles include that:

- the plaintiff and his or her lawyer (as opposed to an outsider) should control the prosecution of the underlying litigation[82];
- lawyers may not share fees with nonlawyers[83];
- lawyers have a fiduciary obligation to adequately represent class members in putative class litigation[84]; and
- lawyers and judges must avoid conflicts of interest.[85]

## TPLF Undermines A Party's Control Over His Or Her Lawsuit

One of the most glaring ethical problems resulting from TPLF is the tendency of funders to exercise control over the underlying litigation. Such efforts are inevitable. If a third party has a financial stake in a lawsuit, that third party will naturally seek to control the lawsuit and, as a result, the lawyers being funded by that third party will be controlled by that third party, sometimes to the detriment of the actual party in interest. The ensuing interference in the fundamental attorney-client relationship contravenes Model Rule

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of Professional Conduct 2.1, which specifically requires attorneys to exercise independent professional judgment and to provide honest legal advice to their clients.[86] As a 2012 ABA Working Group on litigation funding explained, "[t]he attorney's advice should be based solely on what is best for the client, without regard to extraneous considerations such as the lawyer's interests or the interests of third parties."[87]

The exercise of control by outside funders also implicates the centuries-old prohibition against champerty, which bars "someone from funding litigation in which he or she is not a party."[88] The prohibition against champerty "is intended to prevent courts from becoming trading floors where people buy and sell lawsuits based on their perceived merit."[89] Although the TPLF industry has promoted the view that this doctrine (as well as the parallel doctrine outlawing maintenance, the funding of existing litigation) are a dead letter,[90] recent state and federal court decisions in the TPLF arena belie the notion that champerty and maintenance principles are moribund. Over the past few years alone, certain litigation funding agreements have been declared unenforceable under the laws of Minnesota, New York, North Carolina, Pennsylvania, and Kentucky, based on provisions purporting to vest the funder with control over key litigation decisions.[91]

Consistent with their unfounded claims regarding the vitality of champerty and maintenance, TPLF entities continue to deny that they can exercise control over litigation in which they invest. But such protestations are not credible. Would a hedge fund or other funder really invest in a venture it has no ability to influence?

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Notably, the "best practices" guide of Bentham IMF, one of the largest litigation funding companies in the world, contemplates robust control by funders. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the funding entity is permitted to: "[m]anage a litigant's litigation expenses"; "[r]eceive notice of and provide input on any settlement demand and/or offer, and any response"; and participate in settlement decisions.[92] Indeed, one need only look at the few funding agreements that have been disclosed to see that third party funders are adhering to Bentham's "best practices" and exercising a large degree of control over the litigations in which they choose to invest.

For example, in *Boling v. Prospect Funding Holdings, LLC*, the plaintiff entered into a series of funding agreements to finance his lawsuit, which eventually—after the resolution of his lawsuit—led to the plaintiff seeking a declaratory judgment that the agreements violated Kentucky's prohibition against champerty and also violated the

state's usury laws.[93] The U.S. Court of Appeals for the Sixth Circuit recently affirmed the district court's conclusion that the agreements were unenforceable, recognizing that the agreements "effectively g[a]ve Prospect substantial control over the litigation."[94] As the Court of Appeals made clear, the funding agreements were rife with clauses that ceded control over the underlying litigation from the claimant to the funder. Specifically:

- "All four Agreements limited Boling's right to change attorneys without Prospect's consent, otherwise Boling would be required to repay Prospect immediately."[95]
- The funder "had the right to examine the 'case files and to inspect the correspondence, books and records relating to [the plaintiff's] case or claim.'"[96]
- Two of the agreements at issue "authorized [the funder] to request 'pleadings, notices, orders, motions, briefs or other documents … correspondence,' [the plaintiff's] medical records, and 'documents relating to any other material developments with respect to' [the plaintiff's] claim or recovery in the suit."[97]
- Another provision "actually provided that if [the plaintiff] replaced his attorney, or hired an additional attorney, without notifying [the funder] and ensuring that the new attorney executed an acknowledgment of the litigation-funding agreement, [the plaintiff] was immediately required to pay [the funder] the amount due at 40 months of funding (over $34,000 for the $5,000 loan in the 2012 Agreement and over $68,000 for the $10,000 loan in the 2013 Agreement) regardless of when [the plaintiff] changed attorneys."[98]

In holding that these provisions rendered the TPLF agreements champertous under Kentucky law, the Sixth Circuit reasoned that the "conditions raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."[99] As part of its analysis, the Court of Appeals expressed concern that "agreements like this may interfere with or discourage settlement, which is inconsistent with Kentucky's public policy, 'because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan'" and that "such conduct encourages and multiplies litigation."[100] The Sixth Circuit's decision and explication of these agreements, and how they undeniably work to exert control over a litigation, is not an isolated incident.

Similarly, the elaborate funding agreement utilized by Burford in the *Donziger* litigation previously discussed "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'"—lawyers "selected by the Claimants with the Funder's approval."[101] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[102] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[103]

> *These fee-sharing agreements are particularly problematic because they may exist without the attorney's client being fully aware of their existence—much less their ramifications—and are per se violative of Rule 5.4(a).*

As the Sixth Circuit aptly recognized in *Boling*, provisions like those described above vest the funder with significant control over key litigation decisions, threatening the autonomy of both the claimant and his or her lawyer. And even when a funder's efforts to control a plaintiff's case are not overt, the existence of third party litigation funding naturally subordinates the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor.

## TPLF Encourages Unethical Fee-Sharing Between Lawyers and Nonlawyers

Although all TPLF funding agreements have the potential to disrupt the attorney-client relationship, this concern is perhaps most apparent in contingency-based funding agreements entered into directly between a funder and an attorney as compared to contracts entered into between the funder and the litigant itself. These fee-sharing agreements are particularly problematic because they may exist without the attorney's client being fully aware of their existence—much less their ramifications—and are per se violative of Rule 5.4(a).

Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances.[104] "As stated in the comments to Rule 5.4, this prohibition is intended to 'protect the lawyer's professional independence of judgment.'"[105] "Fee splitting is [also] viewed as running the risk of granting nonlawyers control over the practice of law or potentially enabling lay persons to practice law without authorization."[106] Such a risk is essentially another variant of the control problem previously discussed, and demonstrates why it is especially egregious when a funding agreement is entered into between a funder and the claimant's lawyer, who owes a fiduciary duty to his or her client. While "[f]unders may … insist upon contracting directly with the client in order to circumvent the prohibition,"[107] some are ignoring this bedrock principle, as the *Gbarabe v. Chevron Corp.* case (described below) illustrates.

## TPLF Can Engender Conflicts of Interest

Another potential ethical concern is the possibility of conflicts of interest. According to Canon 2 of the Code of Conduct for United States Judges, judges must avoid even the appearance of impropriety in all activities.[108] In particular, "[a] judge should not allow … financial … or other relationships to influence judicial conduct or judgment."[109] Similarly, judges shall perform their duties "impartially," disqualifying themselves from any matters in which they have a "financial interest."[110]

Disclosure of TPLF arrangements can ensure that judges faithfully abide by these important canons. "As some TPLF entities are multi-billion- and multi-million-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held TPLF entities, the web of interpersonal relationships judges [or other judicial officers] have could be impacted as well, leading to unintentional appearances of impropriety."[111]

This problem was once again on display in the *Donziger* case mentioned above.[112] During a deposition in that proceeding, lead plaintiffs' lawyer Steven Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.[113] Only after being ordered to answer the question by the special master presiding over the case did Donziger disclose that the funder was Burford.[114] The special master then disclosed that he was former co-counsel with the founder of Burford, and that he had received marketing materials from that same individual aimed at litigation funding.[115] The special master also disclosed that he was friends with Burford's former general counsel.[116] The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.[117] Nonetheless, as the special master recognized, the deposition "prove[d] … that it is imperative for lawyers to insist that clients disclose who the investors are."[118]

## These Problems Are Magnified in Class Actions

It is no secret that in our civil justice system, the stakes are much higher in class (as opposed to individual) litigation. Class actions can be especially profitable for third party funders given the number of class members who may be involved and the aggregation of double- and triple-damages claims. But they are also uniquely prone to abuse. Defendants faced with improvidently certified, meritless lawsuits already feel intense pressure to settle before trial, culminating in "judicial blackmail."[119] "Critics of class action litigation have … pointed out that the propensity for plaintiffs' lawyers to file allegedly frivolous lawsuits and the potential for massive jury verdicts have generally been sufficient to force corporations into settling unfounded claims or deter otherwise honest corporations from expanding their operations."[120]

Moreover, few class actions provide meaningful benefits to class members in the first place. Indeed, "every study that has" looked at consumer and employee

> *"Allowing TPLF to fester in the class action setting will not only reduce the downside risk to mounting frivolous class actions, but also guarantee that such proceedings deliver even less money for the actual class members."*

class action settlements "reached the same conclusion: The overwhelming majority of [such] class actions deliver nothing to class members."[121] Those studies establish that lawyers are reaping most of the benefits of class action settlements. Allowing TPLF to fester in the class action setting will not only reduce the downside risk to mounting frivolous class actions, but also guarantee that such proceedings deliver even less money for the actual class members.

Ten years ago, few, if any, class actions used third party funding. However, TPLF has now undeniably seeped into the class action context. For example, the Virginia-based hedge fund EJF Capital specifically targets "class-action injury lawsuits" at "hefty interest rates," with the loans to be repaid by law firms "as they earn fees from settlements and judgments."[122] "[C]lass actions [also] make up a significant portion of the cases that [Bay Area-based Law Finance Group] invests in."[123] "Other firms, like New York-based Counsel Financial, also market themselves as offering various kinds of financing to class-action plaintiffs['] attorneys."[124]

Consistent with the veil of secrecy that has shrouded TPLF arrangements outside the class action context, the agreements that have been entered into in the class action realm have likewise gone undisclosed to class members or courts, even though some agreements require that portions of any recovery by the class be paid to the funder. This fact, and the increasing prevalence of TPLF arrangements in class actions, not only raise serious ethical questions, such as unethical fee-sharing under Rule 5.4(a), but also implicate the adequacy of representation that Rule 23(a)(4) requires must be established prior to certifying a putative class action.

> *"[T]he agreements that have been entered into in the class action realm have likewise gone undisclosed to class members or courts, even though some agreements require that portions of any recovery by the class be paid to the funder."*

These ethics and adequacy issues were illustrated in *Gbarabe v. Chevron Corp.*[125] In that putative class action, the two attorneys representing the plaintiffs acknowledged to the court that they had to seek third party funding to advance their case and obtained a number of time extensions as a result.[126] When funding was apparently obtained but the plaintiffs refused to disclose its terms, Chevron moved to compel production.[127] Chevron argued, among other things, that the information about funding was relevant to the adequacy of the class representatives under Rule 23(a)(4) due to the possibility that the funding agreement created a conflict of interest with absent class members.[128] Chevron also argued that the agreement could be relevant to the suitability of the attorneys as representatives of the class under Rule 23(g), which requires a court appointing

class counsel to consider "the resources that counsel will commit to representing the class" and further permits the court to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[129]

The court agreed and ordered production of the funding agreement, which contained several significant provisions. Specifically, the agreement referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[130] The agreement expressly prohibited the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[131] Further, the agreement required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[132]

The funding agreement also provided that the lawyers shall endeavor to "recover the maximum possible Contingency Fee,"[133] a requirement that may conflict with class member interests. Further, under the agreement, counsel agreed that the funder would be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million), to be paid from attorneys' fees—plus two percent of the total amount recovered by the putative class members.[134] In other words, the agreement required attorneys to share their fees with nonlawyers, raising Rule 5.4(a) issues.

Provisions like these—which vest control in a funder as opposed to the actual plaintiffs and appear to subordinate the interests of the class members to those of the funder—raise serious ethical concerns for all of the reasons already discussed in this paper. Indeed, these concerns apply in spades in class proceedings given that class representatives tend to be among the least sophisticated and zealous, generally leaving the plaintiffs' attorneys in the driver's seat in such cases. In *Gbarabe*, for example, the representative knew nothing about the details of the funding agreement. Under these circumstances, it is difficult to see how the plaintiff could be expected to protect the putative class' interests regarding an agreement between the attorneys and a third party funder. And of course, such ethics- or adequacy-based problems are not only detrimental to the interests of the class members that the class device was supposedly designed to protect, but also threaten the interests of defendants. After all, these problems pose a substantial risk that any final resolution of classwide litigation could be invalidated by a court that ultimately learns that money belonging to the class must be siphoned off to pay a funder that has remained hidden during the course of the litigation.

Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation. Although the court did not expressly tie the TPLF agreement to its ruling on adequacy, it did find that plaintiffs' counsel "failed to diligently prosecute this case"—a failure the court suggested may have been linked to their struggle in securing funding early on in the litigation.[135] But it did not address any of the important issues presented by the TPLF agreement in the case, leaving them for further development by future cases. Nonetheless, class counsel and the named plaintiffs already have significant difficulty satisfying their fiduciary obligations to the class they are seeking to represent, and adding a funder to the class action mix only exacerbates that challenge and makes carrying out those fiduciary responsibilities all the more difficult.

> *"[A]dding a funder to the class action mix only exacerbates that challenge and makes carrying out those fiduciary responsibilities all the more difficult."*

# Proposals for Reform

As the prior sections of this paper demonstrate, TPLF has gained a foothold in—and poses a number of nettlesome problems for—the American civil justice system. But there are means available to at least temper the adverse effects of TPLF.

Indeed, there are a handful of sensible measures that would go a long way toward that end, some of which have already been adopted in various forms by certain jurisdictions. At a minimum, lawmakers and rule makers should seriously consider requiring the disclosure of TPLF arrangements. Other potential reforms include outright prohibitions of TPLF fee-sharing arrangements between funders and lawyers on the ground that they violate Rule 5.4, as well as a prophylactic ban on TPLF in class actions.

> *"At a minimum, lawmakers and rule makers should seriously consider requiring the disclosure of TPLF arrangements."*

## Disclosure

At a bare minimum, TPLF arrangements should be disclosed at the outset of civil litigation. After all, unless some light is shined on these agreements, plaintiffs will continue to utilize TPLF—in some situations, potentially illegally—without fair notice to the court or the opposing party. Disclosure would minimize the prospect for these abuses and promote other salutary effects on our civil justice system. Specifically:

- **Disclosure will reduce the likelihood of unethical fee-sharing between lawyers and nonlawyer funders consistent with Rule 5.4**. As the *Gbarabe* case illustrates, funders sometimes enter into arrangements directly with lawyers rather than the actual party litigant. Such agreements blur the line between lawyers and nonlawyers and threaten the professional independent judgment of attorneys, which is a cornerstone of the ethics rules. If TPLF agreements are disclosed as a matter of course early on in the life of a civil case, the parties and the court can

determine whether any provisions purport to commingle lawyer and nonlawyer funds in contravention of Rule 5.4.

- **Disclosure will minimize conflicts of interest**. As the *Donziger* case previously discussed illustrates, TPLF raises serious conflict-of-interest questions. Such conflicts can arise based on a pecuniary, familial, or other personal interest in the funder on the part of opposing counsel or perhaps even the court itself. As a result, the court needs to know the identity of funders to assess whether it or anyone else involved in the litigation unwittingly has a conflict of interest that warrants recusal or some other remedy. Disclosure would furnish that information.

- **Disclosure will help ensure that plaintiffs have control over the litigation**. As the examples summarized in this paper make clear, funders routinely seek to exercise control over key strategic decisions in litigation they finance. Mandatory disclosure requirements could temper this problem by discouraging funders from insisting on inappropriate control provisions in the first instance. And if funders persist in inserting such problematic provisions in their funding arrangements, disclosure will provide the courts with the necessary information to nullify them.

- **Disclosure of funding arrangements will further the enforcement of rules against champerty and maintenance**. As discussed above, the funding industry's mantra that states no longer recognize champerty and maintenance sweeps too broadly and ignores the recent judicial rulings from multiple states reaffirming the vitality of these important doctrines. Courts and parties cannot ensure that funding agreements are faithful to these principles unless they are disclosed.

- **Disclosure will facilitate efficient proportionality and cost-shifting determinations**. Under the Federal Rules of Civil Procedure, the parties' resources are highly relevant to a number of questions, including whether discovery is being conducted in a proportional manner.[136] Since a funder is effectively a real party in interest, its resources should be considered in resolving the question of proportionality. In addition, it should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs.[137]

- **Disclosure will facilitate more realistic settlement negotiations**. Courts sometimes want to hear from all parties with authority over the fundamental question of settlement. As some of the examples previously discussed in this paper illustrate, funders routinely seek to weigh in on that key strategic decision. But absent disclosure, a funder's role is completely hidden from the court and the opposing party, undermining accurate and realistic settlement negotiations between the parties.

- **Disclosure in FCA cases will ensure that claims being asserted on behalf of the government are actually being prosecuted for the public interest**. As previously discussed, the legal and ethical concerns implicated by TPLF are

*As previously discussed, the legal and ethical concerns implicated by TPLF are accentuated in FCA litigation because the claims being prosecuted are those of the United States.*

accentuated in FCA litigation because the claims being prosecuted are those of the United States. Disclosure of TPLF in this context would apprise the government of its existence and afford the United States the opportunity to dismiss the case or intervene in order to avoid the nettlesome ethical, statutory, and constitutional problems previously discussed.

- **Disclosure would shine much needed light on abusive litigation funding practices**. For example, as already discussed, *The New York Times* recently published an exposé on litigation funders financing unnecessary surgery so women could file stronger claims in the vaginal mesh litigation.[138] Another publication reported on funders using their investments to encourage the filing of frivolous claims against New York City.[139] And in another troubling report, funders financed substantial advertising to buy control of mass tort claims.[140] These unseemly episodes would have come to light much sooner had funding disclosure been required.

Some legislatures and judicial bodies have begun to take heed of these important rationales. In 2018, Wisconsin enacted a comprehensive litigation funding disclosure requirement.[141] The Wisconsin law provides that "a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person … has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise."[142]

In late 2018, the U.S. District Court for the Northern District of California adopted a TPLF disclosure requirement for class actions. The court added to its "Standing Order for All Judges" a provision requiring that "in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."[143] As one attorney who studies the litigation funding industry explained, the Northern District of California rule is "really a harbinger and a signal that

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courts … need to consider the presence of third-party financiers in a lawsuit and consider their role."[144]

U.S. District Court Judge Paul Grimm of the District of Maryland, for example, recently required lawyers seeking to lead a sprawling MDL concerning a huge data breach of Marriott hotels to disclose whether they plan to receive outside finance.[145] In a recent article, Judge Grimm remarked that "it's important judges know everyone with a stake in a case" because "[w]hat you don't know, if you have third-party funding, is if someone from the outside has made a decision, an investment decision, that this case has merit, and they have advanced the money to take the case forward … [t]hen, when it comes time to resolve the case, those people are not in the room, and if they have minimal expectations of what they must recover in order to maximize their investment, that is an influence, a potential influence, in how the litigation is conducted and how the litigation might be resolved."[146] Another judge overseeing a large swath of federal opioid cases, Judge Dan A. Polster of the U.S. District Court for the Northern District of Ohio, also required that lawyers connected with the cases disclose to the court (but not to opposing parties) the fact of any third party funding.[147]

Notably, disclosure of TPLF arrangements is already required in several foreign countries that allow TPLF.[148] For example, Hong Kong recently enacted a law requiring the disclosure of TPLF arrangements in arbitration.[149] Similarly, Australia requires the disclosure of a TPLF funder's identity and portions of the underlying agreement in class action cases.[150] And in Canada, where TPLF has also been countenanced, TPLF

*"Notably, disclosure of TPLF arrangements is already required in several foreign countries that allow TPLF."*

arrangements are increasingly being subjected to various disclosure requirements in the class action arena.[151]

Importantly, "[r]equiring disclosure of a litigant's financial relationships in a case is not an original concept."[152] After all, Rule 26 also already requires that defendants automatically disclose (without need for a request) at the outset of litigation "any insurance agreement" that may apply to the litigation.[153] Thus, defendants already must disclose arrangements they may have for financing the prosecution or settlement of a litigation matter. Requiring that TPLF arrangements be disclosed would simply bring plaintiffs' Rule 26 disclosure obligations in line with those of defendants.

Against this backdrop, the federal judiciary's Advisory Committee on Civil Rules is actively considering a proposal to amend Federal Rule of Civil Procedure 26 and place TPLF agreements on the list of items that must be automatically disclosed.[154] And a bill pending in the U.S. Senate, the Litigation Funding Transparency Act of 2019, would require the disclosure of TPLF arrangements in both class actions and mass tort multidistrict litigation

*"A uniform rule is needed to make disclosure a standard practice routinely followed in all federal courts."*

proceedings.[155] Notably, a recent study conducted at the direction of the federal Advisory Committee on Civil Rules concluded that around half of U.S. federal appellate courts and one quarter of federal district courts already have rules that appear to require identification of litigation funders in civil litigation matters.[156] However, those disclosure requirements vary widely and are often ignored or misunderstood. A uniform rule is needed to make disclosure a standard practice routinely followed in all federal courts.

In short, there are a number of vehicles for instituting a mandatory disclosure requirement. Needless to say, a robust disclosure regime is a necessary first step to ensuring that TPLF in a given case is not running afoul of core legal and ethical precepts.

## Fee-Sharing

Agreements to share fees between lawyers and nonlawyer funders are now a recurring feature of TPLF, as the *Gbarabe* case makes clear. Such arrangements threaten the independent professional judgment of attorneys, who have a fiduciary obligation to act in their clients' best interests rather than curry favor with an outside entity funding a lawsuit. They also threaten to take control away from the lawyer's client and place it in the hands of the funder, which has a financial incentive to influence key strategic decisions of the litigation it has rolled the dice on.

The New York City Bar Association recently recognized as much when it issued an August 2018 interpretation of New York's version of Rule 5.4(a). That interpretation concluded that fee-sharing with a litigation funder is unethical where "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."[157] As the opinion explains, Rule 5.4(a) "presupposes that when nonlawyers have a stake in legal fees from particular matters, they have an incentive or ability to improperly influence the lawyer."[158] In short, the opinion concluded that one of the most common litigation funding arrangements—i.e., a deal under which a funder provides money to litigate a matter in

*"Such arrangements threaten the independent professional judgment of attorneys, who have a fiduciary obligation to act in their clients' best interests rather than curry favor with an outside entity funding a lawsuit."*

> *[T]he opinion concluded that one of the most common litigation funding arrangements—i.e., a deal under which a funder provides money to litigate a matter in exchange for a percentage of the fee ultimately collected by plaintiffs' counsel—violates Rule 5.4(a).*

exchange for a percentage of the fee ultimately collected by plaintiffs' counsel—violates Rule 5.4(a). Hardly the first professional association to reach this decision, the New York City Bar Association joined earlier decisions by the state bar associations of Maine, Nevada, Utah, and Virginia.[159]

The ethics rules are designed to protect the attorney-client relationship and safeguard the fair administration of justice. Instead of creating exceptions to these time-tested canons, state bar associations and courts should reaffirm their vitality and make clear that TPLF arrangements are not outside their scope. Because lawyer-funder agreements under which attorneys share their fees with outside funders facially run afoul of Rule 5.4, they should be explicitly prohibited.

## Class Actions

TPLF in the class action context can also be a recipe for abuse, as the *Gbarabe* case illustrates. Because such aggregate litigation already raises significant concerns regarding control of the litigation, injecting TPLF into class actions increases the danger that a class action will be prosecuted primarily for the benefit of attorneys and funders, and not for the benefit of the class of claimants. As a result, policymakers should consider prohibiting TPLF in class actions.

> *[I]njecting TPLF into class actions increases the danger that a class action will be prosecuted primarily for the benefit of attorneys and funders, and not for the benefit of the class of claimants.*

# Conclusion

It can no longer be denied that TPLF is becoming increasingly prevalent in the United States. As this paper demonstrates, the marketplace for selling lawsuits and buying trouble has only multiplied and diversified, with TPLF companies investing billions of dollars, creating increasingly sophisticated investment models and reaching parts of the legal industry previously thought incompatible with litigation funding.

As expected, the problems have multiplied and diversified as well, with TPLF leading to dubious mass torts warehouses, unnecessary surgeries being foisted on unsuspecting plaintiffs, and funding agreements that plainly vest undue influence and control in the hands of the outside funder in both individual and class litigation. These problems illustrate the need for placing reasonable limits on TPLF, including—most fundamentally—a requirement that TPLF arrangements be disclosed at the outset of civil litigation both to the court and to the opposing party. The time for studying and observation has passed, and policymakers must now take concrete action to mitigate the abuses posed by this increasingly pervasive feature of our civil justice system.

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48 *Id.*

49 *Id.*

50 *Id.*

51 TPLF businesses certainly are urging defense-side law firms to use TPLF, all in the hopes of generating an image of widespread acceptance. For example, Burford asserted in its 2018 annual financial report that it has discussed potential TPLF arrangements with "90% of the AmLaw 100," which is largely populated by firms that primarily handle defense work. Burford Report, *supra* note 14, at 24. And Bentham has similarly stated that it has "active relationships with 114 of the 'AmLaw 1-200' firms (70 of which are in the AmLaw 100) and 113 of those 1-200 firms have approached us or met with us for funding opportunities." Bentham IMF Report, *supra* note 12, at 14. Of course, to the extent those firms are using such funding, it is likely to support plaintiff-side work—not the firms' traditional defense activity. And these vaguely-stated, unverified data should not be construed as demonstrating broad, unqualified support for TPLF usage among defense-side law firms.

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59 *See* Beisner et al., *supra* note 1, at 5-7.

60 768 F. Supp. 2d 581 (S.D.N.Y. 2011).

61 The Ecuadorian trial court awarded $9 billion in damages to the plaintiffs, which would be doubled if Chevron did not publicly apologize to them. Chevron did not apologize, and the damages were doubled to $18 billion.

62 *Donziger*, 768 F. Supp. 2d at 636. The Second Circuit later vacated Judge Kaplan's injunction on jurisdictional and procedural grounds, but his factual findings stand. *See Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012).

63 *See, e.g.*, Mem. Op. & Order Rejecting Claims of Att'y-Client Privilege & Ordering Produc. of Docs. at 11, *In re Chevron Corp.*, No. 1:10-mc-00021-JCH-LFG, ECF No. 173 (D.N.M. Sept. 13, 2010) (finding "that … discussions trigger the crime-fraud exception, because they relate to corruption of the judicial process, the preparation of fraudulent reports, the fabrication of evidence, and the preparation of the purported expert reports by the attorneys and their consultants"); *In re Appl. of Chevron Corp.* at 9, No. 3:10-cv-01146-IEG-WMC, ECF No. 81 (S.D. Cal. Sept. 10, 2010) (crime-fraud exception applies because "[t]here is ample evidence in the record that the Ecuadorian Plaintiffs secretly provided information to Mr. Cabrera, who was supposedly a neutral court-appointed expert, and colluded with Mr. Cabrera to make it look like the opinions were his own"); Order at 12, *Chevron Corp. v. Champ*, No. 1:10-mc-00027-GCM-DLH, ECF No. 26 (W.D.N.C. Aug. 30, 2010) ("While this court is unfamiliar with the practices of the Ecuadorian judicial system, the court must believe that the concept of fraud is universal, and that what has blatantly occurred in this matter would in fact be considered fraud by any court. If such conduct does not amount to fraud in a particular country, then that country has larger problems than an oil spill."); Hr'g Tr. 23:14-20, *In re Appl. of Chevron Corp.*, No. 2:10-cv-02675-KM-MCA, ECF No. 34 (D.N.J. June 17, 2010) (plaintiffs' lawyers' actions could not constitute "anything but a fraud on the judicial proceeding"). On the Lago Agrio suit, *see generally* Roger Parloff, *Have you got a piece of this lawsuit? The bitter environmental suit against Chevron in Ecuador opens a window on a troubling new business: speculating in court cases*, Fortune (June 28,

2011), https://fortune.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

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65 *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 644 (S.D.N.Y. 2014).

66 *Id.* at 479.

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75 *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 773 (2000).

76 *See* 31 U.S.C. §3730(b)(2)-(4).

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83 *See* ABA Model R. Prof'l Conduct 5.4(a).

84 *See* Fed. R. Civ. P. 23(a)(4).

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86 ABA Model R. of Prof'l Conduct 2.1.

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131 *Id.* § 10.1.

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135 *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *7 n.7, *35 (N.D. Cal. Mar. 13, 2017) ("After discovery, Chevron now asserts that plaintiff's September 17, 2015 request for an extension [to file a class certification motion] was not actually based on difficulties presented by the rainy season, but rather due to the fact that plaintiff did not obtain funding until November 2015.").

136 *See* Fed. R. Civ. P. 26(b)(1) (scope of discovery shall be "proportional to the needs of the case, considering … the parties' resources … [and] whether the burden or expense of the proposed discovery outweighs its likely benefit").

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judgment; does not give the funder control over litigation strategy or settlement decisions; and does not affect party control of settlement. *See* Order Regarding Third-Party Contingent Litigation Financing at 1-2, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-02804-DAP, ECF No. 383 (N.D. Ohio May 7, 2018).

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150 *See* Federal Court of Australia, Class Action Practice Note GPN-CA, paragraph 6.

151 *See Defendant access to third-party funding agreements in Canadian class actions*, Canadian Class Action Defence (Nov. 21, 2018), https://www.lexology.com/library/detail.aspx?g=912d3a6c-b609-458b-bdb1-f55d9b28df7d&utm_source=lexology+daily+newsfeed&utm_medium=html+email+-+body+-+general+section&utm_campaign=toronto+lawyers+association+subscriber+daily+feed&utm_content=lexology+daily+newsfeed+2018-11-23&utm_term=. Courts in Ontario have taken the lead in requiring the disclosure of funding agreements in class proceedings subject to certain redactions. *Id.*; *see also* Ranjan K. Agarwal & Doug Fenton, *Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context*, 59 CBLJ 65 (2017).

152 Haston, *supra* note 111.

153 Fed. R. Civ. P. 26(a)(1)(A)(iv).

154 *See Report of the Advisory Committee on Civil Rules* at 176-179, Committee on Rules of Practice & Procedure (Dec. 4, 2018), https://www.uscourts.gov/sites/default/files/cv12-2018_0.pdf; *see also* Caroline Spiezio, *General Counsel Push for Full Disclosure of Third-Party Litigation Funding in New Letter*, The Recorder (Jan. 31, 2019), https://www.law.com/therecorder/2019/01/31/general-counsel-push-for-full-disclosure-of-third-party-litigation-funding-in-new-letter/. The organizations that have endorsed this proposal include: the Advanced Medical Technology Association, the American Tort Reform Association, DRI – The Voice of the Defense Bar, the Federation of Defense & Corporate Counsel, the Financial Services Roundtable, the Florida Justice Reform Institute, the Insurance Information Institute, the International Association of Defense Counsel, the Las Vegas Metro Chamber of Commerce, Lawyers for Civil Justice, the Louisiana Lawsuit Abuse Watch, the Michigan Chamber of Commerce, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the National Retail Federation, the Pennsylvania Chamber of Business and Industry, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Small Business & Entrepreneurship Council, the South Carolina Chamber of Commerce, the South Carolina Civil Justice Coalition, the State Chamber of Oklahoma, the Texas Civil Justice League, the U.S. Chamber Institute for Legal Reform, the U.S. Chamber of Commerce, the Virginia Chamber of Commerce and Wisconsin Manufacturers & Commerce.

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159 *Id.* at n.8 (citing Prof'l Ethics Comm'n Me. Bd. of Overseers of the Bar, Op. 193 (2007); State Bar of Nev. Op. 36 (2007); Utah Bar Ass'n Adv. Op. 97-11 (1997); Va. State Bar Standing Comm. on Legal Ethics, Advisory Op. 1764 (2002).)

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