Litigation Financing Disclosure and Patent Litigation

Sean Keller and Jonathan Stroud

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Sean Keller and Jonathan Stroud*

"Justice must not only be done, but must also be seen to be done."[1]

"Does he who contemns poverty, and he who turns with abhorrence from usury feel the same passion, or are they moved alike?"[2]

"Pay … no attention … to the man behind the curtain!"[3]

I. Introduction

Money draws scrutiny. The *VLSI Technology vs. Intel* saga is the highest-profile patent litigation in recent memory, primarily due to the size of the verdict. In 2021, as pandemic restrictions eased, an Austin, a Texas jury returned a $2.175 billion verdict against U.S. chipmaker Intel as infringing two U.S. patents;[4] at the time, it was the second-highest patent verdict in U.S. history, and one of the highest non-class action verdicts of all time.[5] And while that particular verdict is on appeal and subsequent successful (if controversial) administrative challenges have cancelled both patents,[6] the greater litigation campaign against Intel continues today on others,

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[1] Lord Hewart, the then Lord Chief Justice of England in the case of Rex v. Sussex Justices, [1924] 1 KB 256.

[2] William Blake, Excerpt from Visions of the Daughters of Albion, found in Romanticism: 100 Poems (Michael Ferber, Ed., Cambridge University Press 2021).

[3] THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939).

[4] Blake Brittain, US Patent Tribunal Sides with Intel Again in $2.2 Billion VLSI Case, REUTERS (June 14, 2023, 3:17 PM), https://www.reuters.com/legal/us-patent-tribunal-sides-with-intel-again-22-bln-vlsi-case-2023-06-13/.

[5] Vipin Singh, *Top 10 US Patent Infringement Cases with Largest Patent Damages*, GREYB, https://www.greyb.com/largest-patent-infringement-awards/ [https://perma.cc/J7KY-EN9X]. The patents are U.S. Patent 7,523,373 and 7,725,759.

[6] Brittain, *supra* note 1.

with another $994 million judgement pending appeal, one dismissal, one jury finding of noninfringement, and at least one other trial scheduled to take place in 2024.[7]

At first blush, one might assume *VLSI Technology v. Intel* is a sprawling battle between two competing semiconductor companies. And, indeed, there was once a practicing company called VLSI, founded in 1979 by former employees of Fairchild Semiconductor.[8] But that VLSI, after enjoyed some early commercial success, by the 1990s had begun to plateau, and was eventually wholly acquired by and merged into Philips Electronics in 1999.[9,10] And although VLSI and Intel coexisted in those decades, it was not that VLSI who sued Intel. The VLSI who sued Intel—and the patent portfolio it asserted—bears no relationship to the company once acquired by Philips.[11] This VLSI—VLSI Technologies, **LLC**, *not* the now-shuttered VLSI Technologies, **Inc**.—came into existence in 2019 and does not, by its own admission, produce any products. It is instead a non-practicing entity ("NPE") *i.e.*, a patent-holding company that acquires other's patent portfolios for cash in arm's-length transactions and then enforces them against operating

[7] *Id.*

[8] Tobias Mann, *Intel Settles to Escape $4b Patent Suit with VLSI*, THE REGISTER (Dec. 29, 2022, 3:26 PM), https://www.theregister.com/2022/12/29/intel_vlsi_patent/

[9] *Id.*

[10] A search of the USPTO's trademark registry turns up no living hits for the name VLSI, and no records could be found of a company existing or using the name VLSI Technologies for two decades before VLSI Technologies, LLC was incorporated in Delaware on June 26, 2016. *See* Delaware Department of State: Division of Corporations, File Number 6080833*, available at* *https://icis.corp.delaware.gov/Ecorp/EntitySearch/EntitySearchStatus.aspx?i=6080833&d=y*, (last visited Oct. 5, 2023) (showing date of incorporation in 2016 as the only recorded event).

[11] *Compare id.* with VLSI Technology, Inc. Webpage, *Semiconductor Engineering, Deep Insights for the Tech Industry, available at* *https://semiengineering.com/entities/vlsi-technology-inc/* (last updated May 27, 2014) (describing the Philips acquisition and general corporate history).

companies.[12] What's more, the patents this VLSI asserted here were acquired from yet another long-defunct third party, and bear no connection to the original *nom de guerre*.[13]

It does, however, have well-heeled overseers. VLSI's existence and litigation campaign has been financed and directed by Fortress Investment Group and their investors, a private global investment manager with more than $50 billion in managed investments.[14] Its *raison d'etre* is to earn a return on investment tied to the patents it litigates.[15]

While unusual in its structure, it's not alone. It is part of an ever-growing number of civil litigants funded in some way by third parties—otherwise known as third-party litigation funders (TPLFs).[16] These arrangements, if written and implemented correctly and handled ethically, are legal. As a new investment class generally called third-party litigation financing ("TPLF"), it is one of the least-understood developments in modern litigation. TPLF is generally defined, per government reports, as "an arrangement in which a funder that is not a party to a lawsuit agrees to provide nonrecourse funding to a litigant or law firm in exchange for an interest in the potential

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[12] *See* VLSI Technology LLC Webpage, *available at* https://www.vlsitechnologyllc.com/ (last accessed Oct. 5, 2023) (noting that VLSI "manages a portfolio of semiconductor patents" and listing just two employees, both with long patent licensing and litigation experience).

[13] The patents were originally filed for and assigned to a Sigmatel, Inc., a Texas-based chip company that was acquired by Freescale Semiconductor in 2008, which NXP in turn bought in 2015. Eran Zur, the head of the IP group at Fortress, was the authorized signatory on some of those transfers. *See* Richard Lloyd, *Former NXP Patents asseted against Intel by entity with possible Ties to Fortress*; *See* USPTO Assignment Record Reel 17, 048349/0169, *available at https://assignment.uspto.gov/patent/index.html#/patent/search/resultAbstract?id=7725759&type=patNum* (showing assignment from NXP USA, Inc. to VLSI Technology, LLC in 2019, amidst other releases and secured interests).

[14] Brittain, *supra* note 1.

[15] Fortress IP, for their part, avers that it is not a litigation funder, but instead invests in distressed companies like a private equity fund, turns them around, and generates licensing revenue. *See* FORTRESS, https://www.fortress.com/businesses/credit (listing IP as an "opportunistic credit industry specialty").

[16] *At Least 25% of the Last 3 Years NPE Litigation Caused by Litigation Investment Entities (LIEs)*, UNIFIED PATENTS (Feb. 21, 2023), https://www.unifiedpatents.com/insights/2023/2/21/litigation-investment-entities-the-investors-behind-the-curtain [https://perma.cc/K8S6-SFUP].

recovery in a lawsuit."[17] Much like private equity funds,[18] they seek a higher return on investment than the public markets offer, in exchange for a lack of liquidity and a longer timeline of investment.[19]

Third-party funders can be grouped into three categories: dedicated funders, multi-strategy funders, and *ad hoc* funders.[20] Dedicated funders, which account for most of the TPLF capital available, specialize in litigation financing, fund portfolios of litigations, and exercise complete control over the funding.[21] Multi-strategy funders are typically hedge funds or fund managers that have an established litigation finance subdivision and treat their IP funds as a recurring "sidecar" investment.[22] *Ad hoc* funders are typically hedge funds, private investors, or family offices that only occasionally participate in financing of particular litigations.[23] Litigation funders generally fund plaintiffs, but some fund defendants as well.[24]

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[17] *See* U.S. GOV'T ACCOUNTABILITY OFF., THIRD-PARTY LITIGATION FUNDING (Dec. 2022), *available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.gao.gov/assets/gao-23-105210.pdf* (hereafter "GAO Report").

[18] *See* U.S. Securities and Exchange Commission, Private Equity Funds, Investor.gov, *available at* https://www.investor.gov/introduction-investing/investing-basics/investment-products/private-investment-funds/private-equity (last visited Oct. 5, 2023) (noting that "a private equity fund is a pooled investment vehicle where the adviser pools together the money invested in the fund by all the investors and uses that money to make investments on behalf of the fund," but that, "Unlike mutual funds or hedge funds, however, private equity firms often focus on long-term investment opportunities in assets that take time to sell with an investment time horizon typically of 10 or more years.").

[19] *See Progressive Capital Partners, Ltd., Legal Assets: Litigation Finance and Regulatory Process Investing* at 3 (noting that "[t]raditionally, litigation financing has been an illiquid asset class with an investment horizon similar to private equity."), *available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.progressivecapital.com/fileadmin/user_upload/pcap_legal_assets_investing_final.pdf.*

[20] WESTFLEET ADVISORS, 2022 LITIGATION FINANCE MARKET REPORT 4 (2023), https://www.westfleetadvisors.com/publications/2022-litigation-finance-report/.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] Jason Levine, A Primer on U.S. Defense-Side Litigation Finance, Omni Bridgeway (July 7, 2022), https://omnibridgeway.com/insights/blog/blog-posts/blog-details/global/2022/07/07/a-primer-on-defense-side-litigation-finance. *See also* Emily Samra, *The Business of Defense: Defense-Side Litigation Financing*, 83 U. CHI. L. REV. 2299 (2016)

As TPLF continues to grow, more funders have emerged and more patent litigators have begun to embrace it. As civil litigation claims are generally viewed as a non-correlated asset (i.e., not rising or falling with the market), they are attractive to funders trying to hedge market risk while maintaining above-market returns (in the patent space, anything more than a 20% internal rate of return ("IRR")).[25] From 2010 to 2021, third-party funding of patent litigation steadily grew from almost no detectable amount to more than 30% of cases being known as funded.[26] In 2022, per industry reports that likely capture less than half of all funding, patent litigation comprised 21% of all capital commitments from third-party funders.[27] Per them, at least 44 investment firms actively acknowledge funding suits,[28] with many funding patent litigation suits.[29] The same reports note investment firms collectively managed a known $13.4 billion and planned to invest $3.2 billion for new deals (per what deals the report had access to).[30] On average, these active funders invested $8.6 million in each deal.[31]

Undoubtedly, TPLF has been a boon for the volume of commercial litigation being brought, and has spawned a whole industry around the new asset class, though there is continuing concern about the industry's lack of transparency.[32] These litigation funders largely enjoy

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[25] *See* Ryan Davis, *Patent Suits Mostly Stayed Level in 2022, Yet Appeals Fell*, LAW360 (Feb. 15, 2023, 12:14 AM), law360.com/articles/1573847 [https://perma.cc/UZX5-ZSL6] (interviewing attorney Jason Balich of Wolf Greenfield & Sacks PC, who notes that "patent litigation is totally independent from the stock market" and that contributes to "all of the interest in litigation funding" in part "because it is sort of a constant return, no matter what happens in the larger economy").

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[27] Ray, *supra* note 5, at 5; WESTFLEET ADVISORS, *supra* note 8, at 6.

[28] *Id.* at 3.

[29] Patrick Wingrove, *Litigation Funders See 'Huge and Sustained Uptick' in IP Business*, MANAGINGIP (Mar. 13, 2022), https://www.managingip.com/article/2a5d0zxo7uj1lvlshiozl/litigation-funders-see-huge-and-sustained-uptick-in-ip-business [https://perma.cc/4YKY-UMUQ].

[30] WESTFLEET ADVISORS, *supra* note 8, at 3.

[31] *Id.* at 5.

[32] *See* Michael Menapace, *Why Third-Party Litigation Funding Should Be More Transparent*, BLOOMBERG L. (Jan. 30, 2023, 3:00 AM), https://news.bloomberglaw.com/us-law-week/why-third-party-litigation-funding-should-be-more-transparent [https://perma.cc/7BW5-4X7W] (noting that funders "minimize[] justifiable concerns that litigation funding may be harming the legal system").

anonymity,[33] even from the judges their cases were brought before, generally keeping funding arrangements, organizational status, and ownership and details of control—or lack thereof—private.[34] These arrangements have now come under scrutiny from courts, government, scholars, and the public for, among other things, potential conflicts of interest, appearances of control, and ethical concerns in the litigation.[35]

Judges, governmental officials, defendants, and the public rarely know if a third-party funder is backing a plaintiff. According to a recent Government Accountability Office ("GAO") report on litigation funding, no government body is aware of who funds these cases, who controls or influences them, or what promises are made to investors.[36] And in recent testimony before the House Oversight Committee, Professor Maya Steinitz, who is the leading scholar on TPLF, testified that "there are no laws that directly require" disclosure of third-party litigation financing, that the "total number" and rate of return are "private information," and that "without regulation there is no way" to determine the extent of litigation finance.[37]

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[33] *See Leslie Stahl,* Litigation Funding: A multibillion-dollar industry for investments in lawsuits with little *oversight, 60 Minutes (CBS,* July 23, 2023, 7:00 PM), *available at* https://www.cbsnews.com/news/litigation-funding-60-minutes-transcript-2023-07-23/ (noting that "in most cases, litigation funders remain anonymous in court").

[34] *See* Fed. R. Civ. P. 7.1(a)(1) (outlined the limited filing requirements for party disclosure, which do not include disclosure of funding agreements, corporate structure, control, or other such party-specific information).

[35] *See Maya Steinitz*, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements,* 1073 UC Davis L. Rev. 53 at fn. 88 (2019) (noting the various objections and concerns litigation funding may raise, and also noting that "under such circumstances probing, for example who controls the litigation—whether it is the client or the funder—takes on a heightened significance"); *see, e.g.,* Andrew E. Russel, *Chief Judge Connolly Orders Briefing on Court's Authority to Issue Its Standing Order re Disclosure Statements*, IPDE (Oct. 17, 2022), https://ipde.com/blog/2022/10/17/chief-judge-connolly-orders- briefing-on-courts-authority-to-issue-its-standing-order-re-disclosure-statements/ [https://perma.cc/3Y9J-X4KR].

[36] Melissa Karsh & Nishant Kumar, *Fortress Seeks $400 Million for Second Fund Focused on Patents*, BLOOMBERG L. (Apr. 7, 2021) (demonstrating fund success at a reported 20%); *Tecumseh Alternatives, LLC, IP Fund*, TECHUMSEH ALTS., https://img1.wsimg.com/blobby/go/faefed50-9db1-48bb-be8d- bb4789659250/downloads/Tecumseh%20-%20Intellectual%20Property%20Fund%20Deck.pdf?ver=1618519775392 [https://perma.cc/UA6X-MF65] (slightly less). Burford, for its part, reports that it clears around a 20% IRR on settlements across all litigations, but does not differentiate in public materials between patent and general litigation funds; in public materials it touts an overall IRR of 30%, which, adjusted, they report at 24% (in 2020), varying little from year-to-year, and on particular matters, generally 19-21%. *See* BURFORD CAPITAL, 2021 FY ANNUAL REPORT 42 (2021), https://www.burfordcapital.com/media/2679/fy-2021-report.pdf; GAO REPORT, *supra* note 21.

[37] A brief testimonial exchange between Professor Steinitz and Representative Tim Burchett is as follows:

Patent litigation adds a wrinkle. Uniquely, the practice of using holding-company LLC NPEs in patent cases to defray risk adds an additional layer of complexity that makes it even more difficult to identify who controls or directs the litigation.[38] This secrecy is often by design; NPEs have in the past elected to dismiss cases entirely rather than disclose the identity and structure of their funders in the courts.[39] In other cases, some have voluntarily or selectively disclosed funding—say, a local university's retirement fund—ostensibly when it provides some benefit to them to do so.[40]

This lack of transparency can harm investors, who take what little insight into their investments they have from the funds themselves and often cannot use outside parties, consultants, or public reports to assess whether their investments are in fact sound. Indeed, one recent example,

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Q: Are there federal laws that require the disclosure of third-party litigation financing?

A: Currently there are no laws that directly require that, no.

Q: Do you know the total number of litigation investors operating in the US?

A: No, the total number is not known.

Q: Do you generally know the rate of return for these investors?

A: No, that is also private information. …

Q: Without federal regulations is it possible to determine the extent to which non-US persons or entities are engaged in third-party litigation funding?

A: No, without regulation there is no way to do so.

U.S. House of Representatives, *Unsuitable Litigation Oversight of Third-Party Litigation Funding* (Sept. 13, 2023 hearing), recording available at *https://oversight.house.gov/hearing/unsuitable-litigation-oversight-of-third-party-litigation-funding/*.

[38] *See infra* Section IV.B.1. and accompanying text.
[39] Mann, *supra* note 5.
[40] *See, e.g.,* Nathalie Allen Prince and David Hunt, *Increasingly Mandatory Litigation Disclosure of Third-Party Litigation Funding, Financier Worldwide*, Nov. 2018, *available at https://www.financierworldwide.com/increasingly-mandatory-disclosure-of-third-party-funding-in-arbitration* (noting, in the UK context, that "In investment arbitrations, some funded parties have made voluntary disclosures," citing a funder's press release related to Oxus Gold v. Uzbekistan, but noting it is "not common, with most parties option not to disclose").

Validity Capital,[41] demonstrates the risk investors bear in seeking these high returns in a volatile, undisclosed private market. TowerBrook Capital, the private equity firm that helped launch Validity Capital, decided recently to discontinue financing it, purportedly because the company "wasn't creating enterprise value apart from cases," leading to layoffs of over half the staff,[42] seemingly leading to them wrapping up the fund. Woodsford Group Ltd., the UK-based leader who maintaining a whole portfolio of litigation financed claims, announced recently it was selling off its portfolio of US legal claims to focus on large class-action suits.[43] Others—write-downs by SpectralLegal ($100m), Novatis, and VFS Legal Limited (owing $40m as it entered bankruptcy) in the more-disclosed UK litigation finance markets—further demonstrate some real-world concern as to the soundness of investments.[44] Yet simultaneously, other investors are plunging headlong into such investments—like a recent $552 million lending deal with Pogust Goodhead based on ESG-related class action lawsuits in Brazil and the EU related to mining and "Dieselgate" claims.[45] As of late 2023, at least to the authors, there does seem to be anecdotal

[41] *See* Roy Strom, *Litigation Funder Cuts Staff as Backer Slashes Future Commitment*, BLOOMBERG L., June 2, 2023, *available at* https://news.bloomberglaw.com/business-and-practice/litigation-funder-cuts-staff-as-backer-slashes-future-commitment. Validity was forced to cut most of its staff, downsize, and apparently wind down or at least reduce its investments after Towerbrook Capital pulled out; it is unclear from public reports if they are still operating. See also TowerBrook Capital Cuts Investment with Validity; Funder to Lay Off Over Half its Staff, Litigation Finance Journal, June 2, 2023 (paywalled), *available at* https://litigationfinancejournal.com/towerbrook-capital-cuts-investment-with-validity-funder-to-lay-off-over-half-its-staff/.

[42] *Id.*

[43] *See* Emily Siegel, *Litigation Funder Woodsford Seeks Portfolio Sale in Market Shift,* Bloomberg, Sept. 15, 2023, *available at https://news.bloomberglaw.com/business-and-practice/litigation-funder-woodsford-seeks-porfolio-sale-in-market-shift*.

[44] *See* John Hyde, *Legal Funder SpectaLegal plunges from $100m war chest to potential strike-off*, Law Gazette, Oct. 4 2023, *available at https://www.lawgazette.co.uk/news/legal-funder-spirals-from-100m-war-chest-to-imminent-closure/5117439.article?utm_source=litigationfinanceinsider.com&utm_medium=newsletter&utm_campaign=funder-closes-down-shop-legal-unicorn-secures-552-million-investment* (discussing losses at litigation funders SpectaLegal, Novatis, and VFS Legal have all lead to the UK equivalent of bankruptcy, and detailing the U.S. investor Waterfall Legal Management's involvement with SpectraLegal: noting that "the tightening of the claims market, the failure to capitalise on certain areas of claims, and the slowing down of the civil justice process has cast a long shadow over the litigation finance market.").

[45] Tom Fish, *Pogust Goodhead Inks $552m Litigation Investment Deal*, Law360 https://www.law360.com/environmental/articles/1727873/pogust-goodhead-inks-552m-litigation-investment-deal.

evidence of an increased emphasis on less risky, more-likely-to-settle class action suits over other forms of investment, though the markets are opaque on this point.

Courts, investors, and state governments have occasionally—fitfully—sought to emend this lack of transparency. The most common proposals are for simple disclosures, either to a governmental body or to a court or decisionmaker hearing a funded dispute. This often includes disclosure of litigation funding agreements. Examples of state laws regulating non-commercial litigation funding, and some regulating and requiring disclosure of commercial litigation in certain states, abound.[46] Judges, as we will discuss below, often require standing or ad hoc disclosures. Investors, for their part, have occasionally sued funders, asking for disclosure and relief when the investments fail to live up to the promised returns.[47] And the Judicial Conference Advisory Committee on Civil Rules ("Advisory Committee") is examining proposals that would amend the Federal Rules of Civil Procedure ("FRCP") to include a TPLF disclosure requirement.[48] This TPLF disclosure requirement would expand on existing disclosure requirements based on corporate structure and holdings.[49] One comment the Advisory Committee considered compared the Committee's previous debate about insurance agreement disclosures to the current debate

[46] For a partial list of various state regulations and state judicial disclosure rules, *see generally* Allen Matkins Leck Gamble Mallory & Natsis LLP, *Characterization of Litigation Funding Loan Proves Costly to Litigation Finance Lender*; Burford Capital, *Litigation Funding Comparable Guide*; Woodsford, *Litigation Funding: United States—and Other Key Jurisdictions*; and GAO REPORT, *supra* note 21, at 1.

[47] In one example, RCR Tomlinson forward inked a class action litigation funding agreement with Burford Capital and Omni Bridgeway just before the company's stock collapsed; the investors, almost five years on, sued and accused the funds and the firms they used for the class action of dragging out negotiations, delaying settlement, and billing in such a way to try to recoup their loss. *See* Jenny Wiggins, *Investors Question Delays in RCR Lawsuit,* Financial Review (Aug. 2, 2023), *available at* https://www.afr.com/companies/infrastructure/investors-question-delays-in-rcr-tomlinson-lawsuit-20230731-p5dsng. In another, food producer Cycso sued Burford for, it claimed, not letting it settle a funded claim. *See* Editorial Board, *The Litigation Financing Snare,* The Wall Street Journal, March 21, 2023, available at https://www.wsj.com/articles/burford-capital-litigation-financing-sysco-lawsuit-boies-schiller-a4b593fb.

[48] *See infra* Section IV.B. and accompanying text.

[49] *Id.*

about TPLF disclosures.[50] Although some dismiss this comparison per differences between insurance and litigation financing, new TPLF developments, especially those arising in the context of patent litigation, challenge existing preconceptions about litigation financing and make the comparison worth re-evaluating.

This Article analyzes TPLF disclosure requirements in the context of patent litigation. Part II examines the history of TPLF in Europe, Australia, and the United States. Part III provides an overview of TPLF laws, regulations, and caselaw in the United States with a focus on Texas, California, and Delaware. Part IV describes NPEs and explains why patent litigation financing is on the rise. Part V begins by providing context about TPLF disclosures before looking to the Advisory Committee's debate about insurance disclosures as it relates to the current debate about TPLF disclosures, concludes concludes that uniform federal judicial disclosure requirements are long overdue, and proposes amendments to Federal Rules of Civil Procedure 26 and 7. Part VI briefly concludes.

I. A Brief History of Litigation Financing in Common-Law Systems

Non-party money has long influenced judicial systems. In the U.S., candidates in state judicial elections receive donations from partisan organizations to fund their campaigns,[51] and wealthy donors and other third parties often fund special interest groups that file amicus briefs at the Supreme Court.[52] In the United States, contingency fee arrangements have historically allowed law firms to "front" the costs of litigation, effectively working for free contingent upon being paid

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[50] MEMORANDUM FROM HON. DAVID G. CAMPBELL, ADVISORY COMM. ON CIVIL RULES, TO HON. JEFFREY S. SUTTON, CHAIR, COMM. ON RULES OF PRACTICE AND PROCEDURE 4 (Dec. 2, 2014), http://www.uscourts.gov/file/17932/download.

[51] Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1262 (2013).

[52] Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J. FORUM 141, 146 (2021).

from the proceeds of a case;[53] though they are often regulated here. Contingency fee arrangements were effectively barred from contentious matters in the United Kingdom until 2012; they are now regulated.[54] Today, many litigants finance their claims, directly or indirectly, through a myriad of financial products to help them achieve their business and legal goals.[55] In this regard, many view litigation financing as just the latest way non-party money influences the judicial system.

The modern litigation financing regime arose following the slow elimination of the champerty and maintenance doctrines at common law in the U.S..[56] These two common law doctrines long restricted outside interests in legal claims.[57] Litigation financing first emerged in England and Australia after the legislature and judiciary in each of these countries helped abolish champerty and maintenance.[58] Once litigation financing gained a foothold in these countries, it quickly became regulated, either through common law, or by their governments—a bit more tightly in the end in the UK than in Australia.[59] By comparison, the U.S. has trended toward abolishing and replacing champerty and maintenance state-by-state.[60] Litigation financing in the

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[53] *See generally* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998) (describing the history of contingency fees in the United States).

[54] Section 45 of the Legal Aid, Sentencing, and Punishment of Offenders Act of 2012 lifted the ban on contingency arrangements in contentious civil proceedings but launched a regulatory process governing their use; they are now regulated heavily by the The Damages-Based Agreements Regulations of 2013, UK Statutory Instruments, 2013 No. 609, *available at* https://www.legislation.gov.uk/uksi/2013/609/contents/made. *See* Legal Aid, Sentencing, and Punishment of Offenders Act of 2012, UK Public General Acts, 2012 c.10, Part 10, Section 45, *available at* *https://www.legislation.gov.uk/ukpga/2012/10/section/45*.

[55] *See* INS. INFORMATION INST., WHAT IS THIRD-PARTY FUNDING AND HOW DOES IT AFFECT INSURANCE PRICING AND AFFORDABILITY 7, triple_i_third_party_litigation_wp_07272022.pdf (iii.org).

[56] *See infra* Section I.C. and accompanying text.

[57] Leslie Perrin, England and Wales, in THE THIRD PARTY LITIGATION FUNDING LAW REVIEW 48, 48-58 (Leslie Perrin ed., 2d ed. 2018) (reviewing litigation financing in England and Wales); Nicholas Dietsch, Note, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 698-705 (2011); Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 96- 113 (2013); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-86 (2011).

[58] *A Brief History of Litigation Finance*, PRACTICE, Sept.–Oct. 2019, https://clp.law.harvard.edu/knowledge-hub/magazine/issues/litigation-finance/a-brief-history-of-litigation [https://perma.cc/B6H5-PPQ2].

[59] *See generally* Steinitz, 95 MINN. L. REV., at 1275-86.

[60] *See generally* Burford Capital, *Litigation Funding Comparable Guide*; Woodsford, *Litigation Funding: Unitied States—and Other Key Jurisdictions*.

United States has never been regulated by the federal government, but some states have ltigation financing regulations.[61]

A. Maintenance and Champerty

Maintenance and champerty are two longstanding common-law doctrines at the heart of the debate over third-party litigation financing.[62] Maintenance is the "[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case."[63] Champerty is maintenance coupled with "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."[64] A common-law doctrine closely related to maintenance is barratry, the "[v]exatious incitement to litigation."[65] In other words, "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."[66]

At English common law, there were two types of maintenance: manutenentia ruralis and manutenentia curialis.[67] Manutenentia ruralis (maintenance in the country) involved "assist[ing] another in his pretensions to certain lands, or stir[ing] up quarrels and suits in the country in relation to matters wherein he was in no way concerned."[68] Manutenentia curialis (maintenance in a court of justice) involved "officiously intermeddled in a suit . . . by assisting either party with money or otherwise, in the prosecution or defense of any suit."[69] This type of maintenance has three species:

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[61] *See FN 59, supra.*
[62] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 4.
[63] *Maintenance*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[64] *Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[65] *Barratry*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[66] In re Primus, 436 U.S. 412, 424 n.15 (1978).
[67] Percy H. Winfield, *History of Maintenance and Champerty*, 35 L.Q. REV. 50, 50 (1919).
[68] H. A. Wood, Annotation, *Offense of Barratry; Criminal Aspects of Champerty and Maintenance*, 139 A.L.R. 620 § 2.b.2.
[69] *Id.*

maintaining a suit without regard for the thing in suit (maintenance); maintaining a suit in exchange for part of the thing in suit (champterty); and attempting to corrupt or influence a jury to favor one side over the other (embracery).[70] One of the earliest maintenance statutes prevented the King's officers from profiting off lawsuits,[71] while another forbade lords of the court and their stewards from supporting lawsuits with the intent of extorting settlements.[72] These statutes provided civil and criminal remedies;[73] lawmakers directed them at "maintainers who held official positions"[74] as a means to prevent profiteering and abuse.

Today, champerty remains the most common bar to TPLF in common law jurisdictions, even though a growing number of countries and states have created exceptions for TPLF or abolished champerty altogether.[75] Financing a lawsuit in exchange for a portion of the litigation proceeds directly violates most laws of champerty.[76] In contrast, TPLF rarely violates laws of barratry, because funders usually become involved after a dispute arises.[77]

B. TPLF in Australia

Litigation financing in Australia is heavily intertwined with class action litigation. In the early 1990s, Australia legalized domestic class action lawsuits, and several Australian states decriminalized maintenance and champerty.[78] These contemporaneous developments prompted several funders to start funding class action lawsuits,[79] and funders—who vote with their wallets—

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[70] *Id.*
[71] Percy H. Winfield, *History of Maintenance and Champerty*, 35 L.Q. REV. 50, 59 (1919).
[72] *Id.* at 60.
[73] *Id.* at 65.
[74] *Id.* at 64.
[75] *See infra* Section II.B–C and accompanying text.
[76] Nathan Crystal, *Litigation Finance: An Overview of Issues and Current Developments (Part I)*, S.C. LAW., May 2017, at 12, 13.
[77] *Id.*
[78] *See, e.g., The Maintenance, Champerty and Barratry Abolition Act* 1993 (NSW) ss 3. 4; *Wrongs Act* 1958 (Vic) s 32; *Crimes Act* 1958 (Vic) s 322A.
[79] Because all opt-in plaintiffs request to be part of the class action, it is easier for financiers to identify all the plaintiffs in the class action and gather the necessary signatures for a litigation funding agreement directly with all plaintiffs*Id.*

realized that TPLF was effective in the class action context.[80] Eventually, the High Court of Australia in *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* recognized class action TPLF as legal, holding that it was "[not] contrary to public policy or leading to any abuse of process."[81]

After *Fostif*, the Australian courts started to scrutinize TPLF while the Australian government pursued a legislative agenda that helped expand litigation financing. In *Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pty Ltd.*, the Federal Court of Australia opened the door to TPLF regulation in when the court held that TPLF arrangements constituted managed investment schemes within the meaning of Section 9 of the Corporations Act.[82] Consequently, these managed investment schemes could only be registered[83] and managed by a public company holding an Australian Financial Services License (AFSL).[84] However, the Australian Parliament passed several regulations shortly after the Court's decision that exempted litigation funders from the regulatory obligations associated with managed investment schemes so long as the funders managed conflicts of interest.[85]

In response to growing calls for TPLF regulation, the Australian government significantly expanded regulatory requirements for litigation financing. In 2020, the Federal Treasurer of Australia announced that litigation funders would be required to hold an ASFL after August 22, 2020.[86] Additionally, the decision forced funders to comply with the managed investment scheme

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[80] Unlike class actions in the United States, which have an opt-out (or "open") structure, class actions in Australia have an opt-in (or "closed") structure *Id.*
[81] *Campbells Cash and Carry Pty Ltd v. Fostif Pty Ltd* [2006] 229 CLR 386, 434 (Austl.).
[82] *Brookfield Multiplex Funds Management Pty Ltd v. International Litigation Funding Partners Pty Ltd* [2009] 180 FCR 11 (Austl.).
[83] Section 601ED of the Corporations Act, where any of the criteria in Section 601ED(1) are met, subject to Sections 601ED(2) and (2A).
[84] Section 601FA of the Corporations Act.
[85] Corporations Amendment Regulation 2012 (No. 6) (Cth).
[86] Australian Law Reform Commission, Integrity, Fairness and Efficiency – An Inquiry into Class Action Proceedings and Third-Party Litigation Funders (report No. 134, January 2019).

regime under Chapter 5C of the Corporations Act.[87] However, this part of the treasury's regulation was indirectly struck down by the Full Court of the Federal Court of Australia in 2023 when it reversed its earlier decision in *Multiplex* by holding that TPLF arrangements are not managed investment schemes.[88] In response to this decision, the Australian government proposed amendments to the Corporations Regulations 2001 that would exempt litigation funders from the managed investment scheme provisions of the Corporations Act.[89] This longer existence and regulation of funded claims in Australia contrasts with the United Kingdom, which lagged behind Australia in adoption.

C. TPLF in the United Kingdom

One can trace the modern litigation finance regime in the United Kingdom back to the 1967 Criminal Law Act, which decriminalized maintenance and champerty.[90] This opened the possibility that the courts or the legislature would allow third-party litigation financing in certain contexts. In the 1990s, Parliament passed the Courts and Legal Services Act, which legalized no-win, no-fee conditional fee agreements ("CFAs").[91] This "spared clients from necessary legal fees they could not afford and enabled lawyers to earn 'success fees' on top of their typical rates."[92] By legalizing CFAs, Parliament also implicitly legalized TPLF because funders could enter CFAs

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[87] *Id.*
[88] *LCM Funding Pty Ltd v. Stanwell Corporation Limited (Stanwell)* [2022] FCAFC 103 (Austl.).
[89] Jason Geisker & Dirk Luff, *The Third Party Litigation Funding Law Review: Australia*, THE LAW REVIEWS (Dec. 8, 2022), https://thelawreviews.co.uk/title/the-third-party-litigation-funding-law-review/australia#footnote-167-backlink.
[90] Criminal Law Act of 1967, UK Public General Acts1967 c. 58 *available* at https://www.legislation.gov.uk/ukpga/1967/58/contents; Lake Whillans, *The History and Evolution of Litigation Finance*, ABOVE THE LAW (Jan. 27, 2017, 11:11 AM), https://abovethelaw.com/2017/01/the-history-and-evolution-of-litigation-finance/ [https://perma.cc/ZQS9-K7NS].
[91] *Id.*; *see* The Courts and Legal Services Act 1990, UK Public General Acts, 1990, c. 41, *available at https://www.google.com/search?q=Courts+and+Legal+Services+Act&oq=Courts+and+Legal+Services+Act&gs_lcrp=EgZjaHJvbWUyBggAEEUYOTIHCAEQABiABDIHCAIQABiABDIHCAMQABiABDIHCAQQABiABDIICAUQABgWGB4yCAgGEAAYFhgeMgYIBxBFGEDSAQc0MDhqMGo3qAIAsAIA&sourceid=chrome&ie=UTF-8*.
[92] *A Brief History of Litigation Finance*, *supra* note 28.

with plaintiffs where the funder finances the lawsuit in exchange for a portion of the judgment.[93] In 1999, Parliament passed the Access to Justice Act, a law that expanded litigation financing by allowing prevailing litigants to "pass success fees and insurance premiums associated with CFAs onto their opponents"[94] under the United Kingdom's "loser pays" rule.[95] Additionally, the Act introduced after-the-event ("ATE") insurance to protect litigants against losses in unsuccessful cases.[96]

At the turn of the century, several appellate courts began ruling on aspects of litigation financing. In the 2003 decision *R (Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions (No 8)*, the England and Wales Court of Appeals ("Court of Appeals") declared that third-party litigation financing was not "contrary to public policy under the vestigial remnants of the law of champerty."[97] Shortly thereafter, the Court of Appeals in *Arkin v Borchard Lines Ltd (Nos 2 and 3)* held that funders should "be potentially liable for the costs of the opposing party *to the extent of the funding provided*" under the "loser pays" rule.[98] This so-called "*Arkin* cap" was later held to not always apply in cases with funders.[99]

Although TPLF had not been *per se* federally regulated in the UK, the UK Supreme Court recently held that TPLF is subject to *existing* regulations. In the 2023 decision *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others*, the UK Supreme Court held that most litigation funding agreements are damage-based agreements that must comply with

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[93] Lake Whillans, *supra* note 48.
[94] *Id.*; Access to Justice Act of 1999, UK Public General Acts, 1999 n.2, *available at* https://www.legislation.gov.uk/ukpga/1999/22/contents.
[95] *See* Mark S. Stein, *The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal*, 71 CHI.-KENT L. REV. 603, 603 (1995) (discussing how the losing party pays the other party's legal costs in the United Kingdom).
[96] Lake Whillans, *supra* note 48; Access to Justice Act, *supra* note 100.
[97] R (Factortame Ltd) v. Secretary of State for Transport, Local Government and the Regions (No 8) [2002] EWCA (Civ) 932 [91], [2003] QB 381 [91] (Eng.).
[98] Arkin v Borchard Lines Ltd (Nos 2 and 3) [2005] 1 WLR 3055 [41] (Eng.).
[99] Chapelgate Credit Opportunity Master Fund Ltd v Money and others [2020] EWCA Civ 246.

the Damages Based-Agreements Regulation 2013.[100] Prior to the Court's decision, most funders assumed litigation financing agreements were not damages-based agreements, and therefore not regulated under the regulatory regime for damages-based agreements.[101] Consequently, the decision immediately rendered many litigation funding agreements unenforceable and barred most litigation funding agreements in opt-out collective proceedings before the Competition Appeal Tribunal, as well as capped recovery.[102] This all stands in contrast to the more recent adoption of litigation finance in the United States.

D. TPLF in the United States

Shortly after TPLF first appeared in Australia and the United Kingdom in the mid-1990s, third-party attempts to finance claims began to crop up in United States courts.[103] The first known instance of third-party litigation in the United States involved Wild West Funding, a business started by Las Vegas entrepreneur Perry Walton that engaged in predatory litigation financing with high-interest rate loans to plaintiffs.[104] This type of litigation financing was short-lived, as the loans were generally subject to state usury laws—that is, laws that prohibit high-interest rate loans.[105] To avoid these laws, funders began to fund plaintiffs' cases in exchange for a partial financial interest in the judgment.[106] This new style of funding where plaintiffs are not obligated to repay

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[100] R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others, [2023] UKSC 28 [72] (Eng.)
[101] Robert Wheal et al., *Upheaval in the Litigation Funding Industry: UK Supreme Court Rules That Many Litigation Funding Agreements are Unenforceable*, WHITE & CASE (Aug. 2, 2023), https://www.whitecase.com/insight-alert/upheaval-litigation-funding-industry-uk-supreme-court-rules-many-litigation-funding.
[102] Judgment, paragraph 13; Competition Act 1998, c. 4, § 47C(8) (Eng.).
[103] Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 362 (2011).
[104] Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and A Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750, 754 (2012).
[105] *Id.* at 761–72
[106] *Id.* at 754.

the investor if a lawsuit is unsuccessful has become commonly known as "non-recourse financing."[107]

As third-party litigation financing became more prevalent, it grew more sophisticated, dividing into to two subindustries: first, consumer lawsuit funding and then later, commercial lawsuit funding.[108] Consumer litigation finance generally involves an action brought by individual plaintiffs: personal injury, divorce, small claims, as well as single-plaintiff class action and toxic tort litigation.[109] Commercial litigation finance typically involves larger, business-related disputes such as antitrust, intellectual property, and breach of contract claims.[110] Indeed, institutional funders began to experiment with litigation financing some forty years ago in personal injury cases.[111] By the early 2000s, some large institutional lenders, private equity firms, and publicly traded investment companies began to experiment with large-scale commercial litigation funding with some success.[112]

In 2005, the then-recently formed American Legal Finance Association ("ALFA"), an industry group representing the interests of litigation funders, published the ALFA Code of Conduct.[113] The ALFA recently created the code to formalize ethical standards, fair business practices, and rules around transparency and disclosure in the litigation finance industry.[114] Today,

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[107] Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 735 (2019). *See also* BLOOMBERG L., LITIGATION FINANCE SURVEY 2021 1–11 (2021), https://assets.bbhub.io/bna/sites/7/2022/04/Bloomberg-Law-Litigation-Finance-Market-Survey-2021.pdf (noting 96% of litigation deals financed are non-recourse).
[108] Popp, *supra* note 61, at 735.
[109] *Id.* at 736–37.
[110] *Id.*
[111] *Legal Finance in the United States: How it Started*, YIELDSTREET (July 24, 2017), https://www.yieldstreet.com/resources/article/litigation-finance-in-the-united-states/ [https://perma.cc/NW8G-PYE9].
[112] *Id.*.
[113] *The ALFA Code of Conduct*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/alfa-code-of-conduct/ [https://perma.cc/TN5M-HV9J].
[114] *Id.*. *See also* ASS'N LITIGATION FUNDERS, CODE OF CONDUCT FOR LITIGATION FUNDERS 1–5 (2018) (discussing a code of conduct for litigation funders in the United Kingdom).

the ALFA includes thirty-three member companies, most of which are firms focusing on consumer litigation financing.[115] Accordingly, some of the largest U.S. commercial litigation finance firms, including Burford and Omni Bridgeway, are not ALFA members[116]—unsurprising given the ALFA's focus on financing personal injury claims and other types of consumer, rather than commercial, litigation.[117] More recently, the large commercial litigation financers have established the International Legal Finance Association ("ILFA"), another global trade group focusing on lobbying and public relations in litigation finance.[118] The ILFA has yet to release any sort of code of ethics or model contract.

Several larger publicly traded companies helped spearhead the growth of modern litigation financing in the United States. In 2006, investment bank Credit Suisse established its Litigation Risk Strategies group, and became one of the first known investment firms to finance commercial litigation.[119] Credit Suisse eventually spun off the Litigation Risk Strategies group into Parabellum Capital, which has become one of the largest litigation finance companies in the United States.[120] After 2010, a wave of U.S. firms began funding commercial litigation.[121] Most of these firms hired lawyers to underwrite the financing, but some of these firms exclusively use computers to underwrite the financing.[122] Today, estimates suggest the United States accounts for more than

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115 *ALFA Member Companies*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/alfa-membership/alfa-member-companies/ [https://perma.cc/VS6C-3VLT].
116 *Id.*
117 W. Hunter Huffman, *A Great and Profitable Clause: Why the New York City Bar Association Says It Is Time to Pay Attention to Investors Behind the Curtain*, 98 N.C. L. REV. 973, 981 (2020).
118 Sara Merken, *Litigation Finance Firms Join Forces to Counter Skeptics in Lobbying,* (Sept. 8, 2020, 5:30 PM), https://www.reuters.com/article/litigation-finance-firms-join-forces-to/litigation-finance-firms-join-forces-to-counter-skeptics-in-lobbying-pr-push-idUSL1N2G528Y [https://perma.cc/NW8G-PYE9].
119 *A Brief History of Litigation Finance*, *supra* note 28.
120 Jennifer Smith, *Credit Suisse Parts with Litigation Finance Group*, WSJ (Jan. 9, 2012, 6:13 PM), https://www.wsj.com/articles/BL-LB-41680 [https://perma.cc/5M84-RUQU].
121 GAO REPORT, *supra* note 21.
122 *See* Patience Haggin, *VCs Back Tech-Driven Litigation Finance*, WSJ (Aug. 24, 2017, 7:30 AM), https://www.wsj.com/articles/vcs-back-tech-driven-litigation-finance-1503574201 [https://perma.cc/K3T2-GN63] (discussing how Legalist Inc. uses algorithms to evaluate claims and fund commercial litigation).

half of all global litigation financing,[123] and about 20% of all U.S. capital commitments from third-party funders may be dedicated to patent litigation.[124]

II. TPLF Laws, Regulations, and Caselaw in the United States

In the absence of any historic need for federal TPLF regulation, most restriction happened in the states at common law. Since 2019, Congress has proposed several bills to regulate TPLF, but none have yet received any significant traction.[125] Meanwhile, states have adopted a patchwork of different approaches to TPLF regulation, some more heavy-handed than others.[126] But many of these state regulations are limited to certain claims, or are not strictly enforced.[127]

Contemporaneously, courts have helped shape the TPLF landscape. State-specific caselaw and *ad hoc* standing orders related to TPLF disclosure have influenced where funded plaintiffs decide to file a lawsuit.[128] Funded patent litigants should be familiar with the advantages and

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[123] IRINA FAN ET AL., US LITIGATION FUNDING AND SOCIAL INFLATION: THE RISING COSTS OF LEGAL LIABILITY 3 (Alison Browning ed., 2021).

[124] WESTFLEET ADVISORS, *supra* note 8, at 3; *see also infra* Section II.B. (discussing why litigation financers fund patent litigation).

[125] *See* The Litigation Funding Transparency Act of 2018, 115th Cong. Ed. Sess. (Grassley, R.-Iowa) (with co-sponsors Thom Tillis (R-N.C.), John Cornyn (R-Texas) and Ben Sasse (R-Neb.) *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.judiciary.senate.gov/imo/media/doc/115.xxx%20-%20 Litigation%20Funding%20Transparency%20Act%20of%202018.pdf The Litigation Funding Transparency Act of 2021, 117th Cong. 1st Sess. (Grassley, D. *available at* chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.grassley.senate.gov/imo/media/doc/Litigation%20Funding%20Transparency%20Act%20of%202021.pdf; Protecting Our Courts from Foreign Manipulation Act of 2023 (Manchin, D-W.Va., Kennedy, R-La.)

[126] Burford Capital, *Litigation Funding Comparable Guide*; Woodsford, *Litigation Funding: United States—and Other Key Jurisdictions.*

[127] *See* Lis Bench NIEUWVELD & VICTORIA SHANNON, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION, at 144-59 (2012) (discussing a 51-jurisdiction survey of the patchwork of laws on third-party litigation funding in the United States as of early 2012); Heather Morton, *Litigation or Lawsuit Funding Transactions 2014,* LEGISLATION, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jun. 4, 2014), http://www.ncsl.org/research/financialservices-and-commerce/litigation-funding-transactions-2014-legislation.aspx (listing proposed and passed legislation state by state).

[128] *See* RPX, Judge Connolly's Disclosure Push in Delaware Forces Top Filer to Change Course, Feb. 22, 2023, *available at* https://www.rpxcorp.com/data-byte/judge-connollys-disclosure-push-in-delaware-forces-top-filer-to-change-course/ (detailing how some were already avoiding the forum as little as five months after the standing order first issued).

disadvantages of filing cases in Texas, California, and Delaware, the top three states for patent litigation.[129]

A. TPLF Laws and Regulations

Some federal agencies have the power to require disclosure or regulate TPLF in certain circumstances. The Securities and Exchange Commission's ("SEC") has the authority to oversee the financial industry, including publicly traded litigation funders.[130] Recently, the SEC established rules requiring private equity firms to confidentially report to the agency the percentage of their capital deployed for litigation financing.[131] At the same time, recourse litigation financing is also subject to regulations from the Consumer Finance Protection Bureau ("CFPB")"depend[ing] on the specific facts and circumstances."[132] In 2017, the CFBP alleged that a funder engaged in deceptive and abusive acts and practices in violation of the Consumer Financial Protection Act of 2010 by requiring funded consumers to repay the funding at a large premium.[133] But unless Congress passes federal TPLF legislation or the White House otherwise directs agencies' priorities, agencies will likely continue to regulate TPLF only in limited circumstances.

Both chambers of Congress have introduced bills related to TPLF disclosure requirements. In 2019, Senator Chuck Grassley twice introduced the Litigation Funding Transparency Act of 2019, a law that would have required funded litigants to disclose the funder's identity and the

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[129] *See* RPX, *West Texas and Delaware Topped the Venue Rankings in 2022 Despite Significant Upheavals*, Feb. 1, 2023, https://www.rpxcorp.com/data-byte/west-texas-and-delaware-topped-the-venue-rankings-in-2022-despite-significant-upheavals/.
[130] GAO REPORT, *supra* note 21, at 23.
[131] Amendments to Form PF to Require Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers and to Amend Reporting Requirements for Large Private Equity Fund Advisers, 87 Fed. Reg. 9106 (Feb. 17, 2022) (to be codified at 17 C.F.R. pts. 275, 279).
[132] GAO REPORT, *supra* note 21, at 24–25.
[133] Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, No. 1:17-cv-00890 (S.D.N.Y. filed Feb. 7, 2017).

TPLF agreement for class actions and multi-district litigation.[134] Although both bills died in committee, Representative Darrell Issa reintroduced the same bill in 2021.[135] Since then, the focus has shifted to foreign involvement in litigation financing. In 2023, Senators John Kennedy and Joe Manchin introduced the Protecting Our Courts from Foreign Manipulation Act of 2023. The bill requires a litigant funded by a foreign funder to disclose the identity of the funder and the contents of the TPLF agreement.[136] The bill also bans sovereign wealth funds and foreign governments from participating in litigation financing as third-party funders.[137] Nevertheless, states will retain the power to regulate TPLF until these bills are passed.

State TPLF laws vary widely. A handful of states have laws regulating litigation financing.[138] These state laws may, inter alia, require funders to disclose certain funding terms in their financing agreements, impose registration or reporting requirements on funders, or limit the interest rates and fees funders can charge consumers.[139] Some states have passed draconian laws requiring funded litigants to file their TPLF agreements with the state, or even pre-approved, and for all funders to register with the state.[140] Other states have no TPLF laws whatsoever,[141] but several of these states are considering TPLF bills in their respective state legislatures.[142]

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[134] Litigation Funding Transparency Act of 2018, S. 2815, 115th Cong. (2018) Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019).
[135] Litigation Funding Transparency Act of 2021, H.R. 2025, 117th Cong. (2021).
[136] Protecting Our Courts from Foreign Manipulation Act of 2023, S. __, 118th Cong. (2023). *See also* Carr et al., Threats Posed by Third-Party Litigation Funding 1 (2023), https://law.georgia.gov/press-releases/2022-12-22/carr-urges-federal-government-protect-us-courts-foreign-interests.
[137] *Id.*
[138] *See* Ark. Code Ann. § 4-57-109; Me. Rev. Stat. Ann. tit. 9-A, art. 12; Neb. Rev. Stat. §§ 25-3301 - 25-3309; Nev. Rev. Stat. ch. 604C (2021); Ohio Rev. Code § 1349.55; Okla. Stat. tit. 14A, art. 3, pt. 8; Tenn. Code. Ann. tit. 47, ch. 16; Vt. Stat. Ann. tit. 8, ch. 74; W. Va. Code. ch. 46A, art. 6N; Wis. Stat. § 804.01(2)(bg).
[139] GAO REPORT, *supra* note 21, at 49–50.
[140] *See, e.g.*, S.B. 269, 68th Leg. (Mont. 2023) (stating that "a consumer or the consumer's legal representative shall, without awaiting a discovery request, disclose and deliver' the litigation financing contract to all parties involved in the litigation, including all parties and their legal representatives, courts or tribunals, and insurers "with a pre- existing contractual obligation to indemnify or defend a party to the civil action.").
[141] GAO REPORT, *supra* note 21, at 45–46 (indicating the states that do not have TPLF laws by omission).
[142] Mark Popolizio, *Florida (and Other States) Take Aim at Regulating Third-Party Litigation Funding*, VERSIK (Mar. 29, 2023) (describing state legislatures that have introduced bills that would regulate or ban third party litigation funding).

B. Funding Where It Matters: TPLF in Texas, California, and Delaware

The vast majority of patent cases are brought in Federal Court in Texas, California, and Delaware. State courts, for their part, have long regulated champerty in the United States at common law and, more recently, via modified state statutes.[143] The different state regulations are less relevant for funders investing in patent litigation because as Federal rights nearly all patents are tried in federal courts. The result is a fraught interaction between state regulations, state common law, federal application of the state laws, and federal preemption, which mostly results in no state regulations applying.[144]

The vast majority of federal patent litigation is brought in just three states' federal districts, for a myriad of forum- and judge-shopping purposes.[145] And in Texas, Delaware, or California, state common law and statutory rules may apply, or otherwise influence, the law and practice of federal courts.[146] Based on these interactions—or the lack thereof—federal district courts in Texas and California appear to provide fewer disclosure requirements for funders.[147] Comparatively, Delaware is an outlier.[148] (Although it might offer some solace to those opposed to disclosure requirements that Delaware state law permits some funding arrangements.)[149] These jurisdictions are markedly different compared to states where the practice is outright banned or strict agreement registration systems require funders to record agreements with a state authority prior to filing suit.[150]

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[143] Popp, *supra* note 61, at 745.
[144] *See* Camilla A. Hrdy, *Getting Patent Preemption Right*, 24 J. INTELL. PROP. L. 307 (2017) (discussing preemption issues that arise in patent law).
[145] *See e.g.*, Micah Quigley, *Simplifying Patent Venue*, 87 U. CHI. L. REV. 1893 (2020) (discussing general changes in patent venue selection after *TC Heartland*).
[146] LEX MACHINA, *supra* note 2, at 7.
[147] *See infra* Section III.B.1–2 and accompanying text.
[148] *See infra* Section III.B.3 and accompanying text.
[149] *Id.*
[150] GAO REPORT, *supra* note 21, *supra* note 7, at 49–50.; Robin Davis et al., *United States – Other Key Jurisdictions*, *in* LITIGATION FUNDING 2023 13–19 (Steven Friel & Jonathan Barnes eds., 2022).

1. *TPLF in Texas Courts*

Although barratry[151] remains illegal[152] in Texas state courts, the common law has never fully incorporated the doctrine of champerty.[153] Among the limited courts that have dealt directly with this issue publicly, at least one Texas state court has held that one litigation funding agreement between an investor and a petroleum company did not violate public policy.[154] The court reasoned that the agreement did not "prey on financially desperate plaintiffs," did not "give third parties control over litigation in which those parties have no interests at stake," and did not "prolong litigation by inhibiting plaintiffs from settling lawsuits."[155] Nevertheless, the Texas State Bar generally advises lawyers representing clients on a contingency fee basis not to enter into litigation funding agreements with lending companies.[156]

As litigation financing became more common in the state, the various courts began to address (and be called to address) whether the identity of the funder and the contents of the TPLF agreement should be disclosed in court.[157] Several federal courts in Texas have concluded that they may protect litigation funding documents subject to a non-disclosure agreement under the work-product doctrine.[158] But at least one federal court ordered the disclosure of a litigation

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[151] *See* State Bar of Tex. v. Kilpatrick, 874 S.W.2d 656, 658 n.2 (Tex. 1994) ("Barratry is the solicitation of employment to prosecute or defend a claim with intent to obtain a personal benefit.").
[152] Tex. Penal Code Ann. § 38.12; Tex. Gov't Code Ann. § 82.0651.
[153] *See* Bentinck v. Franklin, 38 Tex. 458, 468 (1873) ("[T]here is no act of the legislature of Texas, and no rule of law established by her courts, which defines such an offense as champerty at common law.").
[154] Anglo-Dutch Petroleum Int'l, Inc. v. Haskell, 193 S.W.3d 87, 104 (Tex. App. 2006).
[155] *Id.*
[156] *See* Texas Bar Opinion No. 576 (concluding that the proposed arrangement was "tantamount to fee splitting").
[157] *See, e.g.*, Letter to the Honorable Nathan Hecht, dated Nov. 8, 2022, Texas Civil Justice League (urging the Texas Supreme Court to adopt disclosure rules modeled on Judge Connolly's order, noting "we support mandatory disclosure of the existence of third-party funding agreements for both consumer and commercial litigation to all parties in the litigation" at least because it would "put the court and parties on notice a funding company's interest in the outcome of the case without intruding into the realm of attorney work product, litigationstrategy, or the specific amount of funding involved," and also because "would also help illuminate whether certain third-party funding arrangements violate Rule 5.04 of the Texas Disciplinary Rules or Professional Conduct.").
[158] *See*, *e.g.*, U.S. v. Ocwen Loan Servicing, 2016 WL 1031157, at *6 (E.D. Tex. Mar. 15, 2016) (finding that litigation funding documents between a realtor and a litigation funder would be used to assist future or ongoing litigation and

funder's identity as relevant, while also holding that communications with that funder remain confidential.[159] Consequently, Texas courts, which tend to take patent cases to trial quicker than most courts, may be seen as a preferable venue for NPEs that do not want to disclose financial interests.[160]

2. TPLF in California Courts

California has outlawed barratry,[161] but the state "never adopted the common law doctrines of champerty or maintenance."[162] In turn, the California Supreme Court recognized that California has "no public policy against the funding of litigation by outsiders" and to hold otherwise would prevent "free access to the courts . . . with an assiduous search for unnamed parties."[163] Therefore, litigation funding agreements are and have long been enforceable in California.[164]

Once litigation financing became more common, the courts next addressed whether the TPLF agreements should be disclosed in court. In 2018, the Northern District of California issued a standing order requiring class action representatives to disclose "any person or entity that is funding the prosecution of any claim or counterclaim" at the initial stages under Rule 3–15, or, if arising later, in connection with a party's Case Management Statement.[165] But California courts

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that a non-disclosure agreement reduced the chances the funding documents would come into an adversary's possession); Mondis Tech. Ltd. v. LG Elecs., Inc., 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) (finding that litigation funding documents between an NPE and a litigation funder would be used to aid future litigation and that a non-disclosure agreement reduced the chances funding documents would come into an adversary's possession).

[159] *See* U.S. v. Homeward Residential Inc., 2016 WL 1031154, at *5–*6 (E.D. Tex. March 15, 2016) (finding the names of the litigation funders relevant to the claim under the Local Rules but protecting the litigation funding information is protected under the work product doctrine).

[160] Rick Frenkel & Cecilia Sanabria, *How Litigation Funding Disclosure Rules Affect NPE Filings*, BLOOMBERG L. (Nov. 21, 2022, 3:00 AM), https://news.bloomberglaw.com/us-law-week/how-litigation-funding-disclosure-rules-affect-npe-filings [https://perma.cc/KVB3-PAJ7].

[161] *See* Cal. Penal Code § 158 ("[B]arratry is the practice of exciting groundless judicial proceedings.").

[162] Abbot Ford, Inc. v. Superior Ct., 741 P.2d 124, 141 n.26 (Cal. 1987).

[163] Pac. Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 597 (Cal. 1990).

[164] *See* California Bar Opinion No. 14-0002 (discussing how champerty and maintenance are not barriers to litigation financing in California).

[165] Standing Order for All Judges of the North District of California Contents of Joint Case Management Statement (N.D. Cal. Nov. 1, 2018) (only applies to class-action lawsuits).

have refused to extend this disclosure requirement to individual plaintiffs.[166] And like Texas courts, California courts have also concluded that they will protect litigation funding agreements subject to non-disclosure agreements under the work-product doctrine.[167] Consequently, NPEs that do not want to disclose financial interests may prefer California over Delaware, though not over Texas.[168]

3. TPLF in Delaware

Delaware state courts have long recognized, and continue to observe, the doctrines of champerty and maintenance.[169] However, at least one Delaware court has recognized that litigation financing does not amount to champerty or maintenance.[170] The court reasoned that the TPLF agreement did not impermissibly grant the funder control over the litigation amounting to "officious intermeddling" or an "assignment of a claim."[171]

As more plaintiffs opted into TPLF arrangements, discovery disputes surrounding TPLF agreements became more common. Some Delaware judges have prevented witnesses from testifying about funding agreements[172] and denied discovery requests where the defendant failed to establish relevancy.[173] Others have ordered discovery where the defendant successfully

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[166] *See* MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-CV-03657-SI, 2019 WL 118595, at *2 (N.D. Cal. Jan. 7, 2019) (concluding that a plaintiff did not need to identify its third-party funder to comply with local rules).
[167] *See* Odyssey Wireless, Inc. v. Samsung Electronics Co., 2016 WL 7665898, at *5–*6 (S.D. Cal. Sept. 20, 2016) (acknowledging that the funding agreement was created in anticipation of litigation and the funder had a common interest in the litigation); *see also* Space Data Corporation v. Google LLC, No. 16–CV–03260, 2018 WL 3054797, at *1 (N.D. Cal. June 11, 2018) (concluding that a plaintiff's discussions with a potential funder were not relevant and therefore not discoverable).
[168] Frenkel & Sanabria, *supra* note 97.
[169] *See* Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. CV N07C-12-134-JRJ, 2016 WL 937400, at *3 (Del. Super. Ct. Mar. 9, 2016) (affirming that Delaware continues to recognize champerty and maintenance).
[170] *Id.* at *4–*5.
[171] *Id.*
[172] *See* AVM Techs., LLC v. Intel Corp., No. CV 15-33-RGA, 2017 WL 1787562, at *3 (D. Del. May 1, 2017) (concluding that the funding arrangements were irrelevant to testimony about a patent licensing agreement).
[173] *See* United Access Techs., LLC v. AT&T Corp., No. CV 11-338-LPS, 2020 WL 3128269, at *2 (D. Del. June 12, 2020) (The defendant "failed to articulate how [the funding materials] . . . are relevant to the specified claims or defenses of *this* case.").

established relevancy.[174] Delaware courts, like Texas and California courts, have also recognized that communications with funders *may* be protected from discovery under the work-product doctrine[175] but have also allowed discovery into communications and funder work product.[176]

Apart from discovery disputes involving TPLF agreements, at least one Delaware Judge is requesting the identifies of third-party funders. In 2022, the District Court of Delaware's Chief Judge Colm F. Connolly issued a standing order in his cases requiring litigants before him to disclose the "identity, address, . . . [and] place of formation" of the funder, the extent to which the funder's approval is needed for "litigation or settlement decisions," and a "brief description of the nature of the [third-party funder's] financial interest."[177] The Court based the nearly-identical order on a similar standing order in place in the District of New Jersey and enforced ad hoc by other federal judges.[178] In response to the order, some NPEs have refused to file new cases in the District of Delaware, for fear of drawing Judge Connolly.[179]

As litigation financing becomes more commonplace, courts in Texas, California, and Delaware will likely continue to address discovery and disclosure disputes related to litigation financing. Courts will likely remain divided over whether TPLF agreements are discoverable,

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174 *See* Cirba Inc. v. VMWare, Inc., C.A. No. 19-742-GBW (D. Del. Apr. 18, 2023) (finding evidence about litigation funding discoverable because it is relevant to the value of the asserted patents).

175 *See* Carlyle Investment Management v. Moonmouth Co., 2015 WL 778846, at *9 (Del. Ch. Feb. 24, 2015) ("[L]itigants should [not] lose work product protection simply because they lack the financial means to press their claims on their own"); *see also* Walker Digital, LLC v. Google, Inc., 2013 WL 9600775, at *1 (D. Del. Feb. 12, 2013) (claimant and funder share a common legal interest and communications are protected by attorney–client privilege and the work-product doctrine).

176 *See* Leader Technologies Inc. v. Facebook Inc., 719 F. Supp. 2d 373, 377 (D. Del. 2010) (finding no common interest between a funder and a plaintiff); Acceleration Bay LLC v. Activision Blizzard, Inc., No. CV 16-453-RGA, 2018 WL 798731, at *3 (D. Del. Feb. 9, 2018) (finding no common interest because there was no "written agreement at the time of the communications" and the funding documents were provided "before any agreement was reached between the Plaintiff and [Defendant], and before any litigation was filed").

177 Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022) (does not apply to all judges).

178 Civ. L. R. 7.1.1 (D. N.J. June 21, 2021).

179 Patrick Muffo, *NPE Showcase – District of Delaware Update*, JDSUPRA (Mar. 10, 2023), https://www.jdsupra.com/legalnews/npe-showcase-district-of-delaware-update-9368059/ [https://perma.cc/WE3M-ZW9B].

especially if the case involves patent infringement. Additionally, courts will likely continue experimenting with standing orders related to litigation financing. These developments will likely affect where funded litigants choose to litigate.

III. NPEs and TPLF

At first blush, patent litigation is, perhaps, not the ideal candidate for litigation financing.[180] In recent years, though, it has become far more commonplace, and given the frequency and amount of money judgments emanating from certain federal courtrooms is now seen as a high-risk, high-reward proposition.[181] While commenters see it as overly complex and volatile, there are many incentives and statutory benefits plaintiffs have in patent litigation, such as the lack of any intent requirement,[182] the economic nature of patent damages,[183] and the relative ease of establishing venue, standing, and other justiciability doctrines.[184] The common practice of plaintiffs assigning their patents to a single-member NPE shell company offers several strategic advantages and simplifications personal and other commercial litigation may lack.[185] Accordingly, patent litigation has in recent years grown by leaps and bounds as a robust target for litigation financing.[186]

A. The Rise of NPEs[187]

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[180] Kelcee Griffis, *Litigation Finance Gains Traction in Patent Infringement Cases*, Bloomberg L. (Oct. 20, 2022), https://news.bloomberglaw.com/ip-law/litigation-finance-gains-traction-in-patent-infringement-cases [https://perma.cc/D4LY-MY7G], (quoting Westfleet Advisors managing partner Charles Agee that "Patent cases are very expensive," and "also fairly risky when compared with other types of commercial litigation").
[181] *Id.*
[182] Hilton Davis Chem. Co. v. Warner-Jenkinson Co., 62 F.3d 1512, 1527 (Fed. Cir. 1995) (*en banc*), *rev'd on other grounds*, 520 U.S. 17 (1997) (classifying direct infringement as a "strict liability" offense).
[183] *See* Kamaldeep Singh, *Calculating Damages During Patent Litigation*, Copperrod Intell. Prop. (Mar. 18, 2020), https://www.copperpodip.com/post/2020/03/18/calculating-damages-during-patent-litigation [https://perma.cc/Q6G6-QN2Y] (describing methods for calculating damages in patent litigation).
[184] *See* Peter S. Menell et al., Patent Case Management Judicial Guide (3rd ed. 2016) (discussing venue, standing, and other justiciability doctrines in patent law).
[185] *See infra* Section III.A. and accompanying text.
[186] Angela Morris, *Patent Litigation Finance Skyrockets in Past Three Years*, IAM (Mar. 10, 2023), https://www.iam-media.com/article/patent-litigation-finance-skyrockets-in-past-three-years [https://perma.cc/7RXA-8A96].
[187] For additional background and information, see generally FTC, Patent Assertion Entity Activity,

Non-practicing shell companies are a widely used strategy among claimants[188] and have heavily influenced modern patent litigation.[189] NPEs are defined as "[a] person or company that acquires patents with no intent to use, further develop, produce, or market the patented invention."[190] NPEs—often pejoratively referred to as "patent trolls"—provide extra protection against veil-piercing inquiries threatening their limited liability protection.[191] They thus serve as a liability shield, as well as offer tax incentives, and they simplify plaintiff-side strategy, often preventing or at least hindering retaliatory countersuits.[192] NPEs date as far back as the late 1800s, when patent attorney George Selden filed a patent for a "road engine" and used his holding company, the Association of Licensed Automobile Manufacturers, to enforce his patent.[193] Today, approximately 60% of all patent litigation stems from NPEs, and most of these suits target high technology—i.e., computer, device, and software—companies.[194] Licensors, aggregators, or litigation funders set up many NPES—some of whom acquire patent portfolios from bankrupt or insolvent companies—who seek to enforce these patents in litigation campaigns, then reinvest

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[188] Will Kenton, *What is a Shell Corporation How It's Used, Examples and Legality*, INVESTOPEDIA (July 17, 2022), https://www.investopedia.com/terms/s/shellcorporation.asp [https://perma.cc/Y664-E39D].

[189] *See generally* Matthew M. Welch, *Patent Trolling: Shining A Light Under the Bridge*, 20 WAKE FOREST J. BUS. & INTELL. PROP. L. 1 (2019).

[190] *Nonpracticing Entity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[191] Michael Hopkins, *Starving the Troll: Using the Customer Suit Exception to Deter Abusive Patent Litigation*, 10 BROOK. J. CORP. FIN. & COM. L. 249, 270 (2015).

[192] Michelle Aspen, *Revisiting the Liability Framework in Patent Infringement to Improve Patent Quality*, UNIFIED PATENTS (June 6, 2022), https://www.unifiedpatents.com/insights/2022/6/6/revisiting-the-liability-framework-in-patent-infringement-to-improve-patent-quality#:~:text=However%2C%20the%20type%20of%20plaintiffs%20often%20backed%20by,secure%20from%20fee-penalties%20arising%20from%20bringing%20frivolous%20claims [https://perma.cc/HPE5-T5U8].

[193] Robert H. Resis, *History of the Patent Troll and Lessons Learned*, INTELL. PROP. LITIGATION, Winter 2006, at 1, 2, https://bannerwitcoff.com/_docs/library/articles/HistoryOfPatentTroll.pdf.

[194] *2022 Patent Dispute Report*, *supra* note 5.

profits into the next purchase and entity.[195] Nevertheless, many NPEs[196] frame their ensuing litigation as a David-versus-Goliath battle to hold large companies accountable.[197] Of course, operating companies also employ holding companies to defray risk and simplify offensive suits against competitors.[198] Some NPEs employ file-and-settle tactics by sending demand letters to a large swath of defendants and asking for lump-sum licensing fees below the cost of litigation.[199]

Some file-and-settle NPEs follow the *modus operandi* of IP Edge, one of the most active NPE aggregators.[200] This involves incorporating a new LLC for each patent portfolio and listing an unaffiliated individual as the sole managing member.[201] The newly named owner typically has no online presence and no previous experience with IP management.[202] The LLC's headquarters is a virtual office, like a post office box or a virtual address rented online, located in the judicial district where the lawsuit is filed.[203] And while litigants must disclose parent organizations with a financial interest in the litigation,[204] NPEs often state they do not have any parent organization,

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[195] *See, e.g.*, Joe Mullin, *World's Biggest Patent Troll Saves Kodak from Bankruptcy*, ARS TECHNICA (Dec. 19, 2012, 11:07 AM), https://arstechnica.com/tech-policy/2012/12/worlds-biggest-patent-troll-saves-kodak-from-bankruptcy/ [https://perma.cc/5Q2A-YTJE] (describing how NPE Intellectual Ventures purchased 1,100 of Kodak's patents for $525 million).

[196] *See* Matthew Bultman, *3rd-Party Funding Finding a Home in Patent Litigation*, LAW360 (Sept. 29, 2014, 4:22 PM), https://www.law360.com/articles/959672/3rd-party-funding-finding-a-home-in-patent-litigation [https://perma.cc/KN23-GFB7] (explaining how Intel used the funding information to dispel a SME's David vs. Golliath narrative).

[197] *See* Bernard Stamler, *Battles of the Patents, Like David v. Goliath*, N.Y. TIMES (Feb. 21, 2006), https://www.nytimes.com/2006/02/21/business/businessspecial2/battles-of-the-patents-like-david-v-goliath.html [https://perma.cc/E48Z-8DLR] (describing patent litigation against big tech companies in David vs. Goliath terms). *See also* Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571, 1587 (2009) (explaining how it can be difficult to distinguish NPEs from litigants that are actual underdogs).

[198] Kenton, *supra* note 126.

[199] Scott Burt, *It's Time to Stand Up to Patent Trolls!*, WIPO MAG. (Feb. 2015), https://www.wipo.int/wipo_magazine/en/2015/01/article_0002.html [https://perma.cc/26S3-NXAC].

[200] *IP Edge LLC*, RPX CORP., https://insight.rpxcorp.com/entity/1034412-ip-edge-llc [https://perma.cc/E7B5-NKJY]

[201] David B. Conrad & Lance Wyatt, *Judge Connolly's New Standing Order Requiring Disclosure Behind Patent Assertion Entities Is Showing It Has Teeth*, FISH & RICHARDSON (Aug. 24. 2022), https://www.fr.com/judge-connollys-new-standing-order-requiring-disclosure-behind-patent-assertion-entities-is-showing-it-has-teeth/ [https://perma.cc/2JBT-P5BU].

[202] *Id.*

[203] *Id.*

[204] Fed. R. Civ. P. 7.1(a)(1).

either hiding ownership behind a web of other corporate entities, or relying on private contracting, ostensibly in an attempt to obfuscate ownership.[205] This obscures counterclaims for fees and may insulate the organizing entities from liability.[206]

But anonymity is just one of many reasons litigants prefer using patent holding companies to sue. These NPEs afford plaintiffs several important tax and strategic advantages. Because NPEs do not have any products, and therefore no lost profits, NPE litigants often seek inflated royalties.[207] Non-capitalized NPE shell companies also pass through licensing revenue, maintain no assets or working capital, and use insolvency to avoid sanctions and increasingly common (but rarely collected) fee-shifting awards.[208] NPEs are also tax-advantaged,[209] and can handle discovery requests far more easily than corporate defendants.[210] Other plaintiffs use shell companies to conceal the identity of the parent company and shift legal liability to the shell company's managing member.[211] The Federal Trade Commission also notes NPE shell companies can interfere with licensing agreements because they "obscure the identity of the individuals and entities that share in [NPE] licensing proceeds." This "frustrate[s] the licensee's ability to determine whether it has already licensed the claimed technology through a cross-license or other arrangement with another

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[205] Conrad & Wyatt, *supra* note 138.

[206] Jeremy Oczek, *Strategies to Battle NPEs: Lessons from the Front Lines*, JDSUPRA (April 30, 2014), https://www.jdsupra.com/legalnews/strategies-to-battle-npes-lessons-from-41913/ [https://perma.cc/YMX5-TEHS].

[207] Bob Goodlatte, *Inflated Damages and Secret Funding Distort Patent Litigation*, BLOOMBERG L. (Feb. 17, 2023), https://news.bloomberglaw.com/us-law-week/inflated-damages-and-secret-funding-distort-patent-litigation [https://perma.cc/JR47-4SJQ]; William F. Lee, A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 CORNELL L. REV. 385, 388–89 (2016).

[208] Christine Armellino & Robert Frederickson, *Examining* Octane Fitness *Five Years On*, IP WATCHDOG (April 29, 2019, 4:15 PM), https://ipwatchdog.com/2019/04/29/examining-octane-fitness-five-years/id=108693/ [https://perma.cc/5CXP-WEH7]. *See, e.g.*, Iris Connex, LLC v. Dell, Inc., 235 F. Supp. 3d 826 (E.D. Tex. 2017) (describing how a patent litigant created a shell company for the purpose of avoiding personal liability for attorney's fees and sanctions). *See also* Adam Shartzer & Josh Carrigan, *Patent Fee-Shifting Often Leaves Prevailing Parties Unpaid*, LAW360 (Dec. 8, 2022, 4:07 PM), https://www.law360.com/articles/1556062/patent-fee-shifting-often-leaves-prevailing-parties-unpaid [https://perma.cc/CFM6-2JKP] ("NPEs account for almost 90% of the cases where fees were assessed, but never paid.").

[209] Kenton, *supra* note 126.

[210] *See* Oczek, *supra* note 143 (noting that NPEs, unlike operating companies, have fewer documents and witnesses).

[211] *See infra* note 218 and accompanying text.

party."[212] NPEs may negotiate new non-exclusive license agreements that are more favorable to the NPE than previously negotiated license agreements to exploit this informational asymmetry—or in some cases, where the party is unaware it is already licensed.[213]

B. TPLF and Patent Litigation

Patent litigation benefits more from TPLF than other types of commercial litigation, and there may be a greater need for it for several reasons. Because most plaintiffs are NPEs that incorporate LLCs for each litigation campaign (*i.e.*, a series of lawsuits, generally against different defendants), plaintiffs typically pay fewer, if any, fees if they lose the lawsuit, thus truly limiting liability and making it safer to assert more questionable claims.[214] This means patent litigation funders have very little risk of *additional* losses or awards than if they invested in other types of litigation, such as contract disputes or bankruptcy proceedings, or other alternative investments.[215] More importantly, though, funders are likely attracted to eye-popping judgments and the *potential* of collecting (or at least being awarded damages) to the tune of ten figures.[216]

While appellate courts have historically reversed mega judgments at higher rates from the Federal Circuit, the presence and availability of judgment insurance has made litigation financing investments less of an all-or-nothing proposition.[217] The availability of patent assets for license or sale—350,000 U.S. patents issue very year, and thousands are sold annually—further encourages

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[212] FEDERAL TRADE COMM'N, PATENT ASSERTION ENTITY ACTIVITY: AN FTC STUDY 52–53 (2016), https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.
[213] *Id.* Prospective licensees should ensure the licensing agreement contains a "most-favored clause" to prevent the licensor from granting more favorable license terms to competitors. JORGE CONTRERAS, INTELLECTUAL PROPERTY LICENSING AND TRANSACTIONS THEORY AND PRACTICE 238 (2022).
[214] Shartzer & Carrigan, *supra* note 146.
[215] *See* Andrew A. Stulce & Jonathan D. Parente, *Demystifying the Litigation Funding Process*, BLOOMBERG L. (June 16, 2021, 3:00 AM), https://news.bloomberglaw.com/us-law-week/demystifying-the-litigation-funding-process [https://perma.cc/XM8W-MWT6] (discussing how most funders pay fees and damages out of pocket if the plaintiff does not prevail).
[216] Singh, *supra* note 3.
[217] Matthew Grosack et al., *Emerging Trends in Litigation Risk Insurance*, INS. J. MAG. (Mar. 7, 2022), https://www.insurancejournal.com/magazines/mag-features/2022/03/07/656822.htm [https://perma.cc/RSB9-6C6A].

investment.[218] Funders also say they find patent litigation attractive because there was less competition among funders for clients in the early 2020s compared to other types of commercial litigation.[219] Currently, some claim a handful of funders have the expertise to model costs, outcomes, and expected damages,[220] though more funders seem to be in the process of launching or managing funds or campaigns.[221]

As patent TPLF continues to grow and the market saturates, we see additional trouble ahead in the markets, as less-sophisticated funders chase these attractive paper returns. For example, scholars have suggested a saturation of litigation finance means funders are likely to back more questionable claims that firms otherwise would have rejected for contingency or traditionally financed companies.[222] Put another way, market saturation and competition for claims will require riskier bets to satisfy necessary deal flow—i.e., financial models promising these returns require them to bring a certain amount of portfolios and claims in a certain timeframe. Finally, patent litigation, more so than other types of commercial litigation, can, in theory, far better align the interests of the funder and plaintiff.[223] The arms-length nature of NPEs' business practices means that creative funders can structure contracts to align the incentives of law firms, patentholders, and funders. For example, a funder can purchase a financial interest in the plaintiff's patent, so the

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[218] *See* Promoting and Respecting Economically Vital American Innovation Leadership Act, 118th Cong. S. __ (2023) (reducing post-grant patent challenges); FEDERAL TRADE COMM'N, *supra* note 211, at 89.

[219] Edward Truant, *Intersection of Litigation Finance and Patent Litigation*, LITIG. FIN. J. (Sept. 17, 2020), https://litigationfinancejournal.com/intersection-of-litigation-finance-and-patent-litigation/ [https://perma.cc/V8RY-W64B].

[220] *Id.*

[221] *See e.g.*, *Erso Capital Launches Additional $500M Litigation Fund Dedicated to Patent Disputes*, ERSO CAPITAL (Sept. 28, 2022), https://ersocap.com/erso-capital-launches-additional-500m-litigation-fund-dedicated-to-patent-disputes/ [https://perma.cc/9U8C-K99M] (describing the new fund and the demand for funding patent litigation).

[222] *See, e.g.*, Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 627–29 (2012) (arguing that litigation financing will increase the number of high-value frivolous claims and lawyers' rent-seeking behavior); Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 675 (2011) (contending that litigation finance will increase the cost and amount of litigation, as well as affect substantive law inefficiently).

[223] *See* Hopkins, *supra* note 128, at 270 (discussing the layers of separation).

funder is more invested in the success of the litigation;[224] or the funders can offer firms and inventors financial support along the way, in order to align incentives.[225]

Plaintiffs and funders may benefit from more certainty when bringing litigating patent claims in forums with patent expertise. Federal courts in Texas are now infamous for their local rules speeding patents to trial.[226] And the Northern District of California, for its part, has local rules for patent litigants that address the timeline for infringement and invalidity contentions, declaratory judgments, and claim construction.[227] By contrast, while the District of Delaware does not have local patent litigation rules, it has plenty of experience and a lengthy docket filled with patent litigation. And the court's default standard for fiscovery requires plaintiffs to produce infringement contentions and claim charts, while defendants must produce invalidity contentions and the core technical documents related to the accused products.[228] The Northern District of California, the District of Delaware, and the Western and Eastern Districts of Texas afford parties some procedural certainty over districts with less patent suit experience.[229] Similarly, funders in Europe may benefit from some certainty the newly created United Patent Court, a venue that may offer plaintiffs shorter times to trial, more efficient evidence-gathering procedures, larger damages

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224 Truant, *supra* note 155.

225 *See* Matthew Oxman, *Aligned Incentives: The Key Ingredient of Client-Directed Litigation Funding*, LEX SHARES https://www.lexshares.com/resources/aligned-incentives [https://perma.cc/A8QA-224P] (discussing provisions in the financing agreement that can lead to better alignment).

226 *See* Miranda Y. Jones, *Patent Litigation in the Southern District of Texas is on the Rise*, PORTER HEDGES (Jan. 21, 2021), https://www.porterhedges.com/patent-litigation-law-blog/patent-litigation-in-the-southern-district-of [https://perma.cc/PG4S-PG5D] (discussing the effect of patent local rules in the Eastern District of Texas, the Western District of Texas, and the Southern District of Texas).

227 *Patent Local Rules*, U.S. DIST. CT. N. DIST. CAL. (Nov. 4, 2020), https://www.cand.uscourts.gov/rules/patent-local-rules [https://perma.cc/VCP8-8H7P].

228 *Default Standard for Discovery*, U.S. DIST. CT. D. DEL., https://www.ded.uscourts.gov/default-standard- discovery [https://perma.cc/2239-MXJM].

229 Jason W. Wolff et al., *Patent Local Rules: Knowing Them Well Can Make Litigating Your Case Smoother*, FISH & RICHARDSON (April 22, 2020), https://www.fr.com/patent-local-rules-knowing-them-well-can-make-litigating-your-case-smoother/ [https://perma.cc/8LNE-7WBL].

awards, and high-quality decisions from seasoned IP judges.[230] This predictability, if it comes to pass, would allow funders to better estimate the cost to fund claims in these jurisdictions.

The litigation funding of claims, quite obviously, incentivizes claimants to pursue litigation over out-of-court resolution. First, plaintiffs benefit from a statutory presumption of patent validity.[231] This means that even if the claims are purportedly questionable, the defendant bears a high to prove the claims are invalid.[232] The unsure state of damages law and enforcement means that courts may award plaintiffs windfall judgments well exceeding the costs of litigation.[233] Although appeals courts are regularly are reversed on appeal, many plaintiffs can acquire judgment preservation insurance to defray risk and to ensure they retain a portion of the original judgment if the appellate court reverses it.[234] Many funders are also willing to finance patent litigants pursuing an International Trade Commission ("ITC") injunction[235] instead of a District Court judgment.[236] ITC litigation can be preferable for funders because the proceedings must be resolved

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[230] Lion Meartin et al., *Casting a Worldwide Net: How Litigation Funders Can Leverage Europe's New Unified Patent Court*, LIT. FINANCE J. (Mar. 14, 2023), https://litigationfinancejournal.com/casting-a-worldwide-net-how-litigation-funders-can-leverage-europes-new-unified-patent-court/ [https://perma.cc/S7LZ-WNJE].

[231] *See* 35 U.S.C. § 282(a) (West, Westlaw current through P.L. 117-179):

> A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim. The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.

See also Berkheimer v. HP Inc., 881 F.3d 1360, 1370 (Fed. Cir. 2018) (recognizing that fact issues may preclude courts from resolving early validity contentions).

[232] *Compare* Microsoft Corp. v. I4I Ltd. P'ship, 564 U.S. 91, 95 (2011) (holding an invalidity defense must be proved by clear and convincing evidence), *with* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 557 (2014) ("patent-infringement litigation has always been governed by a preponderance of the evidence standard").

[233] Truant, *supra* note 155. *See also supra* Introduction and accompanying text; Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93, 105 (2016) (increasing future patent judgments by lowering the standard for willful infringement).

[234] Grosack et al., *supra* note 154.

[235] Unlike District Courts, the ITC does not award damages. The main remedy is an exclusion order, enforced by U.S. Customs, that bars affected products from entering the United States. 19 U.S.C. § 1337 (West, Westlaw current through P.L. 117-179).

[236] Matt Rizzolo & Hyun-Joong, *Opportunities Abound in Patent Litigation Funding at the ITC*, LAW360 (Nov. 6, 2019, 2:27 PM), https://www.law360.com/articles/1217276/opportunities-abound-in-patent-litigation-funding-at-the-itc [https://perma.cc/8BMK-6HDM]

quickly,[237] complainants usually prevail when the investigation proceeds to a decision on the merits,[238] and the exclusion order can result in large settlements.[239]

Although litigation financing is a *relatively* new practice in patent law, a growing number of firms and patent owners are securing funding for patent litigation. NPEs remain the most prolific beneficiaries of patent litigation funding,[240] whether as a *pre hoc* applicant or as a *post hoc* vehicle for recovery. For example, Fortress's credit division agreed to loan Uniloc up to $26 million to bankroll its patent licensing and patent litigation campaigns in exchange for a portion of its revenue from settlements, royalties, and other patent payments, and a default secured by the patents should they fail to timely pay back the loan.[241] Similarly, Magnetar Capital has used their subsidiary Atlantic IP to fund multiple ITC and district court actions against several large technology companies that they mostly resolved in multimillion-dollar settlements.[242] Practicing plaintiffs, universities, and individual inventors are also securing funding. For example, i4i, with the backing of NW Patent Funding Corporation, prevailed in a $300 million David-versus-Goliath patent litigation suit against Microsoft after that case was appealed all the way to the Supreme Court.[243] Similarly, University of California, Santa Barbara, with the backing of Longford Capital,[244] is

[237] *See id.* at § 1337(b)(1) ("The Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation. To promote expeditious adjudication, the Commission shall, within 45 days after an investigation is initiated, establish a target date for its final determination.").
[238] Matt Rizzolo & Hyun-Joong, *supra* note 237.
[239] *See, e.g.*, Jan Wolfe, *Arista to Pay $400 million to Cisco to Resolve Court Fight*, REUTERS (Aug. 6, 2018, 11:02 AM), https://www.reuters.com/article/us-cisco-arista-settlement/arista-topay-400-million-to-cisco-to-resolve-court-fight-idUSKBN1KR1PI [https://perma.cc/N7UW-JVZH] (describing how Arista Networks agreed to pay Cisco Systems $400 million after Cisco obtained exclusion orders in two ITC cases).
[240] *2022 Patent Dispute Report*, *supra* note 5.
[241] Matthew Bultman, *Uniloc's Funding Deal With Fortress Spurs Litigation Setbacks*, BLOOMBERG L. (Jan. 5, 2021, 4:56 AM), https://news.bloomberglaw.com/ip-law/unilocs-funding-deal-with-fortress-spurs-litigation-setbacks [https://perma.cc/8XD7-ENJU].
[242] Charlie Taylor, *Irish Patent Firm in Multimillion Dollar Settlement with Tech Giants*, IRISH TIMES (Jan. 8, 2021, 5:46), https://www.irishtimes.com/business/technology/irish-patent-firm-in-multimillion-dollar-settlement-with-tech-giants-1.4452627 [https://perma.cc/EEL2-JA54].
[243] Jack Ellis, *Patent Litigation as an Asset Class*, IAM, November/December 2012, at 43, 43.
[244] *Partnering with Universities to Advance Innovation*, LONGFORD CAPITAL MGMT., https://www.longfordcapital.com/university-initiative [https://perma.cc/D2B2-6ZCR].

pursuing ITC and district court litigation campaigns against several U.S. lightbulb retailers for allegedly infringing its filament LED lighting patents.[245] Investment in sympathetic plaintiffs like universities, environmental causes, and small competitors are likely to increase as the litigation funding industry continues to mature.[246]

IV. Patent Litigants Should Be Subject to TPLF Disclosure Requirements

State-level maintenance and champerty laws once effectively prohibited litigation financing, but they certainly don't today. A growing number of states no longer recognize champerty and maintenance, and while other states that continue to with limited champerty and maintenance doctrines nonetheless permit litigation financing.[247] Instead of prohibiting litigation financing, a growing number of states and courts are regulating it.[248] Currently, one of the most popular regulations being added at the state level is a simple disclosure requirement.[249]

The U.S. has long considered disclosure requirements. Although most United States courts do not have disclosure rules specifically addressing litigation financiers, many individual courts already require third parties to disclose any financial interest in the litigation.[250] Academics, advocacy groups, policymakers, and practitioners have all called on Congress and courts to pursue uniform TPLF disclosure requirements.[251] Notably, the Advisory Committee considered whether the justification for insurance disclosures are equally applicable to TPLF disclosures.[252]

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[245] Rizzolo, *supra* note 172; *UC Santa Barbara Seeks to Authorize Retailers and Suppliers of Patented Filament LED Lighting Technology*, U.C. SANTA BARBARA, https://filamentpatent.ucsb.edu/#campaign [https://perma.cc/EMW6-KLXX].

[246] *See* Nathan Runyon, *How Litigation Funding Drives Progress to the ESG Agenda*, REUTERS (June 30, 2023, 11:35 AM) https://www.reuters.com/legal/legalindustry/how-litigation-funding-drives-progress-esg-agenda-2023-06-30/ (interviewing funders engaging in funding ESG-related claims and noting that "Use of litigation funding in ESG-related claims is likely to expand" in "public interest litigation that targets governments or public agencies for failing to implement or enforce environmental regulations, social welfare policies, or human rights obligations.").

[247] Davis et al., *supra* note 88, at 13–19.

[248] *See supra* Section III.A and accompanying text; *infra* Section V.A. and accompanying text.

[249] *See infra* Section V.A. and accompanying text.

[250] *Id.*

[251] *Id.*

[252] MEMORANDUM FROM HON. DAVID G. CAMPBELL, *supra* note 54, at 4.

At the time disclosure advocates compared insurance disclosure to TPLF disclosures, funders responded by arguing the comparison was inadequate.[253] To support this contention, funders explained that (1) funders do not "ordinarily" control the litigation; (2) most litigation finance agreements are not relevant to the merits and should be undiscoverable; (3) information related to litigation financing affects strategy but not settlement; and (4) courts have construed the insurance disclosure requirement narrowly.[254] However, new anecdotal evidence challenge these arguments and support the case for disclosure requirements.[255]

A. Court Disclosures: The Simple Solution

Litigation funding disclosures come in two flavors: disclosures revealing the identity of the funder and disclosures revealing the contents of the litigation funding agreements. Many courts have rules for the former but not the latter. Approximately half of the federal circuit courts[256] and one-quarter of the federal district courts[257] require publicly-owned third parties with a financial interest in the outcome of the litigation to disclose their interest before the court to help resolve conflicts of interest. Similarly, Administrative Law Judge Cameron Elliot issued corporate disclosure orders in three ITC investigations to help identify corporations that possess an

[253] BOGART, *infra* note 282, at 13.
[254] *Id.* at 13–14.
[255] *See infra* Section V.B. and accompanying text.
[256] 3rd Cir. L. R. 26.1.1(b); 4th Cir. L. R. 26.1(2)(B); 5th Cir. L. R. 28.2.1; 6th Cir. L. R. 26.1(b)(2); 10th Cir. L. R. 46.1(D); 11th Cir. L. R. 26.1-1(a)(1); 11th Cir. L. R. 26.1-2(a).
[257] Ariz. Form – Corporate Disclosure Statement; C.D. Cal. L. R. 7.1-1; N.D. Cal. L. R. 3-15, Standing Order for All Judges of the N.D. Cal.; S.D. Cal. L.R. 41.1; M.D. Fla. Interested Persons Order for Civil Cases (does not apply to all judges); N.D. Ga. L.R. 3.3; S.D. Ga. L. R. 7.1; N.D. Iowa L. R. 7.1; S.D. Iowa L. R. 7.1; Md. L. R. 103.3(b); E.D. Mich. L. R. 83.4; W.D. Mich. Form – Corporate Disclosure Statement; Neb. Form – Corporate Disclosure Statement; Nev. L. R. 7.1-1; E.D. N.C. L. R. 7.3; M.D. N.C. Form – Disclosure of Corporate Affiliations; W.D. N.C. Form – Entities with a Direct Financial Interest in Litigation; N.D. Ohio L. Civ. R. 3.13(b); S.D. Ohio L. R. 7.1.1; E.D. Okla. Form – Corporate Disclosure Statement; N.D. Okla. Form – Corporate Disclosure Statement; N.D. Tex. L. R. 3.1.(c), 3.2(e), 7.4; W.D. Va. (Form – Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation); W.D. Wis. (Form – Disclosure of Corporate Affiliations and Financial Interest).

ownership interest in the complainant.[258] Other courts like the Northern District of California,[259] District of New Jersey,[260] and the District of Delaware[261] have issued orders requiring parties to identify third-party litigation financiers, which indicates that these courts believe this information is highly relevant to court disputes. And although disclosures of litigation financing agreements are typically resolved during discovery,[262] federal judges in Florida,[263] Ohio,[264] and Maryland[265] issued a case management order forcing plaintiffs in multi-district class action lawsuit to disclose their litigation financing agreements. Notably, the judge in Florida also barred the plaintiffs' lawyers from approving or participating in funding arrangements and subjected all future litigation funding agreements to the court's approval.[266]

Academics, advocacy groups, policymakers, and practitioners have advocated for disclosure requirements to address TPLF's shortcomings. Law Professor Maya Steinitz proposed a balancing test that would allow courts and arbitrators to contextually assess whether the case warrants disclosure of the funding agreement.[267] The balancing test considers (1) the profile of the plaintiffs and their motive for seeking funding, (2) the funder's profile and motivation, (3) the case type and forum, (4) the subject matter, (5) the potential effect on the development of law, (6) the structure of the financing, (7) the purpose of the contemplated disclosure, and (8) the procedural

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[258] *See* U.S.I.T.C. Inv. Nos. 337-TA-1323 (Certain Video Processing Devices and Products Containing the Same), -1332 (Certain Semiconductors and Devices and Products Containing the Same); and -1340 (Certain Electronic Devices, Semiconductor Devices, and Components Thereof).
[259] Contents of Joint Case Management Statement, *supra* note 104.
[260] Civ. L. R. 7.1.1 (D. N.J. June 21, 2021).
[261] Order Regarding Third-Party Litigation Funding Arrangements, *supra* note 114.
[262] *See infra* Section IV.B.2 and accompanying text.
[263] Case Management Order No. 61 (N.D. Fla. Aug. 28, 2023)
[264] In re Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).
[265] Case Mgmt. Order Regarding Model Leadership Appls. for Consumer Track at 2-3, In re Marriott Int'l Customer Data Sec. Breach Litig., MDL No. 19-md-2879, ECF No. 171 (D. Md. filed Apr. 11, 2019).
[266] Case Management Order No. 61 (N.D. Fla. Aug. 28, 2023) (citing concerns about "predatory lending practices").
[267] Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1092 (2019). *See also* Anusheh Khoshsima, *Malice Maintenance Is "Runnin' Wild" A Demand for Disclosure of Third-Party Litigation Funding*, 83 BROOK. L. REV. 1029, 1048 (2018) (arguing for a disclosure requirement because funders can have malicious ulterior motives).

posture of the case.[268] The U.S. Chamber of Commerce's Institute for Legal Reform ("ILR") has advocated for changes to require parties to disclose TPLF arrangements at the outset of litigation.[269] The ILR posits that a mandatory disclosure requirement will, among other things, minimize conflicts of interest, help ensure plaintiffs have control over the litigation, and help facilitate more realistic settlement negotiations.[270] Others like Senator Patrick Leahy, the former chairman of the Senate Subcommittee on Intellectual Property, have recently advocated for TPLF disclosures in patent litigation cases to address ethics concerns and national security questions.[271] These calls for disclosure requirements will continue to grow as more people realize that TPLF is prone to abuse.

The Advisory Committee is presently considering several proposed amendments to the FRCP that would require litigants to disclose information related to TPLF agreements. The Lawyers for Civil Justice and the ILR submitted proposals urging the Advisory Committee to amend Rules 16[272] and 26,[273] both of which do not require litigants to disclose any information

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[268] Steinitz, *supra* note 188, at 1102–13.

[269] U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, SELLING MORE LAWSUITS, BUYING MORE TROUBLE: THIRD PARTY LITIGATION FUNDING A DECADE LATER 26 (2020). *See also Disclose Third Party Litigation Funders*, LAWYERS FOR CIVIL JUSTICE, https://www.lfcj.com/disclose-third-party-litigation-funding.html [https://perma.cc/PH5K-C9X9] (arguing that disclosure requirements prevent "financial conflicts of interest and unnecessary case management challenges").

[270] INSTITUTE FOR LEGAL REFORM, *supra* note 190, at 27.

[271] Patrick Leahy, *Shine Light on Third-Party Litigation Funding of US Patents*, BLOOMBERG L. (Apr. 28, 2023, 3:00 AM), https://news.bloomberglaw.com/us-law-week/shine-light-on-third-party-litigation-funding-of-us-patents [https://perma.cc/XZ43-9U8H]. *See also* Michael B. Mukasey, *Patent Litigation Is a Matter of National Security*, WALL ST. J. (Sept. 11, 2022), https://www.wsj.com/articles/patent-litigation-is-a-matter-of-national-security-chips-andscience-act-intellectual-property-theft-lawsuit-technologyscammers-manufacturing-11662912581 (discussing the potential national security risks associated with foreign third-party funding of patent litigation).

[272] LAWYERS FOR CIVIL JUSTICE & U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, AN IMPORTANT BUT RARELY ASKED QUESTION: AMENDING RULE 16(C)(2) TO PROMPT JUDGES TO CONSIDER INQUIRING ABOUT FINANCIAL INTERESTS CREATED BY THIRD-PARTY LITIGATION FUNDING 1 (2022).

[273] LISA A. RICKARD ET AL., RENEWED PROPOSAL TO AMEND FED. R. CIV. P. 26(A)(1)(A) 1 (June 1, 2017), https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf.

related to third-party funding.[274] The proposed Rule 16 amendment[275] would "assist judges who may find good reasons to inquire about the presence of non-party financial rights to proceeds in their cases while still preserving their complete discretion to make that decision only when appropriate on a case-by-case basis."[276] Similarly, the proposed Rule 26 amendment[277] would help courts identify possible unethical conduct that would otherwise "'erode the integrity of the adversary process.'"[278] At the very least, disclosure advocates urge the Advisory Committee to implement the proposed Rule 26 amendment for one-year as part of a pilot project.[279] Litigation funders, however, oppose the ILR's proposed FRCP amendments because the concerns the IRL raises are allegedly "wrong" and "not persuasive."[280]

The debate surrounding TPLF regulations has largely centered on disclosure requirements because other forms of regulation are unrealistic or ineffective. Amending attorneys' ethics rules to prohibit lawyers from accepting litigation financing would not be unrealistic because the American bar Association, the organization that creates and publishes the ethics rules for lawyers,

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[274] *See* Fed. R. Civ. P. 16, 26.
[275] The proposed Rule 16 amendment would amend section 16(c)(2) and require the court to "[c]onsider whether any person (other than named parties or counsel of record) has a right to compensation that is contingent on obtaining proceeds from the civil action, by settlement, judgment or otherwise." LAWYERS FOR CIVIL JUSTICE, *supra* note 196, at 8.
[276] *Id.* at 2.
[277] The proposed Rule 26 amendment would amend section 26(a)(1)(A) and allow parties to access "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" without a discovery request. LISA A. RICKARD ET AL., *supra* note 197, at 33.
[278] *Id.* at 11 (quoting New York v. Solvent Chem. Co., 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996)).
[279] ADVANCED MEDICAL TECHNOLOGY ASSOCIATION ET AL., PROPOSED FED. R. CIV. P. 26(A)(1)(A)(V) (Sept. 28, 2021), https://www.uscourts.gov/sites/default/files/21-cv-u_suggestion_from_28_companies_-_rule_26_third_party_litigation_funding.pdf.
[280] CHRISTOPHER P. BOGART, RESPONSE TO RENEWED PROPOSAL TO AMEND FED. R. CIV. P. 26(A)(1)(A) 1 (Sept. 1, 2017), https://www.uscourts.gov/sites/default/files/17-cv-xxxxxx-suggestion_burford_0.pdf. *See also* Keith Sharfman, *The Economic Case Against Forced Disclosure of Third Party Litigation Funding*, N.Y. ST. B.J., March/April 2022, at 36, 38 (arguing that opposing counsel should not be privy to litigation finance agreements because the information allows the opposing counsel to draw adverse inferences).

has indicated that TPLF is permissible.[281] Self-regulation through organizations like ALFA or the Association of Litigation Funders is ineffective because only a small number of funders are members of these organizations.[282] By comparison, uniform disclosure requirements would be realistic and effective because existing disclosure rules have already proved to be effective at revealing funder impropriety.[283]

B. Comparing Insurance Disclosures and TPLF Disclosures

As the debate between opponents and proponents of TPLF disclosure requirements continues, the Advisory Committee should reexamine its justifications for previous FRCP amendments. In 1970, the Supreme Court approved amendments to the FRCP requiring litigants to disclose insurance agreements.[284] The Advisory Committee acknowledged judges and commentators were "sharply in conflict on the question [of] whether [a] defendant's liability insurance coverage is subject to discovery."[285] Nevertheless, the Advisory Committee urged the Judicial Conference to amend the FRCP and add a provision covering insurance agreement disclosures during discovery:

> Disclosure of insurance coverage will 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. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.[286]

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[281] *See generally* Am. Bar Ass'n, AMERICAN BAR ASSOCIATION BEST PRACTICES FOR THIRD-PARTY LITIGATION FUNDING 1–22 (2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.
[282] GAO REPORT, *supra* note 21, at 43–44.
[283] *See infra* Section V.B.1.ii and accompanying text.
[284] Fed. R. Civ. P. 26 advisory committee's note to the 1970 amendment.
[285] Fed. R. Civ. P. 26 advisory committee's note to the 1970 amendment.
[286] *Id.*

Although litigation financing did not exist at the time the Advisor Committee amended Rule 26 to cover insurance agreement disclosures, the ILR correctly argues the Committee's rationale for amending the insurance rules applies to TPLF disclosure requirements.[287]

Liability insurance and litigation financing are two sides of the same coin. While liability insurance is defendant-oriented and litigation financing is mainly plaintiff-oriented, both exist to help parties prevail in court at the cost of ceding some control to financiers.[288] And because the funding agreements are confidential, the only way litigants adverse to insured or funded parties could learn about the structure of these funding arrangement outside of a court order is by requesting copies of the funding agreement from the insurer of the third-party financier.[289] Although insured or funded parties may argue that requesting this information amounts to an invasion of privacy that harms their interests,[290] self-interest is not a sufficient defense against disclosure.[291] Because of the similar affects insurance agreements and third-party financing have on litigation, it follows that courts would similarly oversee such arrangements.

Agreements for insurance policies and third-party litigation financing may also share similar characteristics. Insurers sometimes settle a claim for damages by advancing the insured a non-recourse, interest-free "loan" that the insured party only repays if the insured party recovers from the tortfeasor.[292] Similarly, litigation financing agreements are non-recourse financing

[287] LISA A. RICKARD ET AL., *supra* note 197, at 22.
[288] *See infra* Section III.B.1. and accompanying text.
[289] Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.").
[290] *See* Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2840 (2012) (explaining how insurance providers and litigation financers are self-interested because they do not have a fiduciary duty to the party receiving financing). *See also* Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63 DEPAUL L. REV. 617, 645 (2014) (describing how insurance providers and litigation financers are self-interested by drawing a comparison to Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003)).
[291] *See infra* Section III.B.3. and accompanying text.
[292] Stephen S. Boynton, *The Myth of the "Loan Receipt" Revisited Under Rule 17(a)*, 18 S.C. L. REV. 624, 625 (1966).

arrangements that advance the funded party's legal fees in exchange for a portion of the funded party's recovery.[293] Courts sometimes may be critical of these non-recourse financing arrangements, treating this money as a "payment," and classifying the insurer as a real party-in-interest in the litigation.[294] Similarly, some courts dealing with litigation financers are asking whether the funders are the real parties in interest in the litigation.[295] Of course, these similarities make the comparison between insurance disclosures and TPLF disclosures more palatable.

Not everyone, however, agrees with the ILR's assessments of litigation financing. Litigation financier Burford Capital cites four reasons why the ILR's comparison between insurance disclosures and TPLF disclosures is inappropriate: (1) funders do not "ordinarily" control the litigation; (2) most litigation finance agreements are not relevant to the merits and should be undiscoverable; (3) information related to litigation financing affects strategy but not settlement; and (4) courts have construed the insurance disclosure requirement narrowly.[296] The following Subsections respond to each of these points in the context of patent litigation.

1. Control Over the Litigation

Disclosure advocates and opponents strongly disagree over whether funders exercise control over the litigation.[297] Funders insist that the funding agreements are structured to afford litigants control over the litigation but refuse to disclose the agreements to opposing counsel during discovery.[298] However, several of Chief Judge Colm Connolly's recent evidentiary hearings in the District of Delaware provide some anecdotal evidence about how funders structure these agreements and whether funders abide by the terms in these agreements.[299] Judge Connolly found

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[293] Popp, supra note 107, at 735.
[294] *Id.*; *see* Fed. R. Civ. P. 17(a)(1) ("An action must be prosecuted in the name of the real party in interest.").
[295] *See* Memorandum, *infra* note 167, at 1–2.
[296] BOGART, *supra* note 282, at 13–14; LISA A. RICKARD ET AL., *supra* note 275, 16–18.
[297] *Id.* at 15–16.
[298] BOGART, *supra* note 282, at 13–14; *see infra* Section V.B.2.i and accompanying text.
[299] *See infra* Section V.B.1.ii and accompanying text.

that MAVEXAR, a funder affiliated with IP Edge, essentially controlled the litigation even though the funding agreement theoretically afforded the litigants control over important decisions.[300] Consequently, Judge Connolly alleged that several lawyers representing funded patent litigants likely violated the Model Rules.[301]

i. The Funder's Argument

Although insurers can appoint and direct counsel for the insured,[302] funders claim they generally cannot control the litigation.[303] To support this claim, funders point out that financing agreements normally include provisions that affirm the plaintiff's right to control the litigation.[304] Indeed, one such provision included in a funding agreement drafted by Aloe Investments Limited, a subsidiary of Burford Capital, explicitly disclaims the right to control the litigation:

> [Aloe] is not, and does not by virtue of entering into this Agreement become, a party to the Litigation Claim nor does [Aloe] have any rights as to the direction, control, settlement or other conduct of the Litigation Claim ... [and Funded Litigant] retains the unfettered right to settle the Litigation Claim at any time for any amount.[305]

Consequently, many lawyers conclude that accepting funding from a litigation funder will not add a decisionmaker to the litigation.[306]

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300 Russel, *infra* note 321.
301 Memorandum, *infra* note 331, at 40.
302 James M. Fischer, *Insurer or Policyholder Control of the Defense and the Duty to Fund Settlements*, 2 NEV. L.J. 1, 1 (2002).
303 BOGART, *supra* note 282, at 13–14
304 *See* Sean Thompson et al., *United States*, *in* THIRD PARTY LITIGATION FUNDING REVIEW 226 (Leslie Perrin ed., 3d ed. 2019) ("Sophisticated funders typically disclaim any right to control litigation or settlement for ethical and regulatory reasons.").
305 Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. CV N07C-12-134-JRJ, 2016 WL 937400, at *4 (Del. Super. Ct. Mar. 9, 2016).
306 *See* Maria-Vittoria Carminati, *Five Common Misconceptions About Litigation Funding*, AM. BAR ASS'N (Feb. 22, 2022), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2022/five-common-misconceptions-about-litigation-funding/ [https://perma.cc/H29B-YJGX] (explaining that the litigation funder is not an additional decision maker in the litigation). *See also* Am. Bar Ass'n, *supra* note 194, at 22 ("The litigation should be managed and controlled by the party and the party's counsel.").

Even if funders do not keep their word, other rules and laws theoretically deter funders from controlling the litigation. The Model Rules state lawyers cannot accept third-party compensation for representation unless "(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to the representation of a client is protected."[307] Similarly, the Association of Litigation Funder's Code of Conduct prohibits members from "influenc[ing] the Funded Party's solicitor or barrister to cede control or conduct of the dispute to the Funder."[308] And of course, funders that exercise too much control over the litigation risk violating laws of champerty and maintenance in jurisdictions where they remain applicable.[309]

Nevertheless, some courts have analyzed TPLF agreements that grant the funder control or extraordinary influence over the litigation and settlement discussions. In an environmental class-action litigation brought by indigenous Ecuadorians against Chevron, the funding agreement between Burford Capital and the class action members "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'" – lawyers "selected by the Claimants with the Funder's approval."[310] And in *Boling v. Prospect Funding Holdings, LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in that matter "effectively g[a]ve [the TPLF entity] substantial control over the litigation," including terms that

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[307] Model Rules of Pro. Conduct R. 1.8(f) (Am. Bar Ass'n 2020).
[308] ASS'N LITIGATION FUNDERS, *supra* note 114, at 1–5 (2018).
[309] *See e.g.,* In re DesignLine Corp., 565 B.R. 341 (Bankr. W.D.N.C. 2017) (holding that a litigation financing arrangement constituted champerty because the agreement granted the funder significant control over the litigation.)
[310] Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 472 (2012). *See* Petition to Vacate Arbitration Award, Sysco Corp. v. Glaz LLC, No. 1:23-cv-01451 (N.D. Ill. filed Mar. 8, 2023), ECF No. 1. (alleging that "Burford is blocking Sysco from executing [antitrust] settlements and forcing Sysco to continue to litigate against its will").

"may interfere with or discourage settlement" and otherwise "raise[d] quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."[311]

ii. Enter MAVEXAR

Limited court disclosure requirements clearly demonstrate that not all funders or funding arrangements are so self-disciplined as to afford clients complete control over litigation strategy and settlement discussions. During an evidentiary hearing following Judge Connolly's April 2022 standing order on third-party financing,[312] the court revealed that a funder, not its clients, controlled the litigation strategy and settlement discussions.[313] The hearing revealed a funder connected to IP Edge named MAVEXAR approached salesperson Mark Hall and restauranter Hau Bui about a chance to make "passive income" through an "investment" opportunity.[314] MAVEXAR convinced Hall and Bui to each create an NPE, Nimitz and Mellaconic respectively, transfer IP Edge's patents to the newly created entities, and assume legal liabilities if the litigation was unsuccessful.[315] MAVEXAR, in turn, would fund the NPEs' litigation campaigns in exchange for a share of the proceeds.[316] Nimitz agreed to receive a mere 10% of any recovery while Mellaconic agreed to receive only 5%.[317] Although Hall and Bui acknowledged they *could*

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[311] Boling v. Prospect Funding Holdings, 771 F. App'x 562, 579-80 (6th Cir. 2019). *See also* Compl. ¶ 35, White Lilly, LLC v. Balestriere PLLC, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018) (describing a funding agreement allowing funders to choose plaintiff's counsel); Litigation Funding Agreement, § 1.1, Gbarabe v. Chevron Corp., No. 14-cv-00173-SI, Dkt. No. 1864 (N.D. Cal. filed Sept. 16, 2016) (prohibiting plaintiff's lawyers from engaging co-counsel or experts without the funder's consent).
[312] Order Regarding Third-Party Litigation Funding Arrangements, *supra* note 114.
[313] Andrew E. Russell, *A Wild Hearing: Chief Judge Connolly Flips Over Rock, Finds Mavexar LLC Crawling Around, Controlling Patent Litigation and Giving Hapless Patent Owners Just 5-10%*, IPDE (Nov. 4, 2022), https://ipde.com/blog/2022/11/04/a-wild-hearing-chief-judge-connolly-flips-over-rock-finds-mavexar-llc-crawling-around-controlling-patent-litigation-and-giving-hapless-patent-owners-just-5-10/ [https://perma.cc/P3AA-L7YQ].
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Id.*

override MAVEXAR's litigation decisions, the funder effectively "controlled the retention of the attorneys, the selection of targets, the pleadings, the litigation strategy, and the settlements."[318]

MAVEXAR's relationship with Nimitz and Mellaconic is problematic for several reasons. Judge Connolly suggested the attorneys for Nimitz and Mellaconic likely violated Model Rules 1.4(b)[319] and 1.2(a)[320] because decisions about the litigation were communicated to Linh Dietz, a third-party affiliated with IP Edge, not Hall or Bui.[321] The lawyer for Nimitz and the lawyer for Mellaconoic did not contact Hall and Bui before they filed their cases and each lawyer did not communicate with their client about settlement negotiations.[322] Additionally, Judge Connolly also questioned whether Hall and Bui effectively assigned the case to MAVEXAR thereby granting MAVEXAR legal control over the litigation.[323] The patent assignment to Hall and Bui may be invalid because MAVEXAR fraudulently procured the assignment[324] or because Hall and Bui did not provide valid consideration for the patent rights granted in the assignment.[325]

Judge Conolley's hearings provide a snapshot of a growing trend that threatens to harm unsuspecting clients involved in the litigation. The available data suggest third-party funders finance thousands of patent infringement suits filed by NPEs.[326] Patent owners and plaintiffs may

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[318] *Id.*
[319] MODEL RULES OF PRO. CONDUCT R. 1.4(b) (Am. Bar Ass'n 2020) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").
[320] Model Rules of Pro. Conduct R. 1.2(a) (Am. Bar Ass'n 2020) ("A lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.").
[321] Memorandum at 40, Nimitz Techs. v. CNET (D. Del. filed Aug. 30, 2021) (No. 12-1247-CFC), 2022 WL 17338396, at *15.
[322] Memorandum, *supra* note 224, at 50, 74.
[323] *See id.* at 1–2 (suggesting that Hall and Bui may not be the real parties in interest in the litigation).
[324] *Id.* at 75. *See also* Complaint at 13–14, Queryly, LLC v. Hitel Techs., LLC (E.D. Tex. Dec. 16, 2022) (No. 2:22-CV-476, D.I. 1) (citing Connolly's memorandum to argue that IP Edge fraudulently assigned a patent to a titular assignee).
[325] Memorandum, *supra* note 224, at 44, 46.
[326] *At Least 25% of the Last 3 Years NPE Litigation Caused by Litigation Investment Entities (LIEs)*, UNIFIED PATENTS (Feb. 21, 2023), https://www.unifiedpatents.com/insights/2023/2/21/litigation-investment-entities-the-investors-behind-the-curtain [https://perma.cc/K8S6-SFUP].

not realize the risks associated with these funding arrangements. If the litigation is unsuccessful, the NPE owners must spend thousands of dollars to cover the defendant's attorney fees.[327] Although attorneys sometimes explain this risk to the NPE owners, these people are largely lured into a false sense of security by assurances that the claim will succeed. Most NPE owners, many of whom do not have legal expertise, have no reason to question these assessments because they often know the attorneys that work for the parent NPE or the funder.[328]

A uniform disclosure requirement that at least allows all federal courts to review the funding agreements will deter funders from controlling the litigation. Currently, funding agreements are generally not publicly available[329] and funders can subvert disclosure by funding lawsuits in jurisdictions that do not have disclosure requirements.[330] A uniform disclosure requirement for federal courts will ensure that the courts scrutinize most funding agreements.[331] For most funding agreements, prudent judges will recognize whether the agreement grants the funder control over the litigation. However, if a judge is uncertain whether the agreement grants the funder control over the litigation, the judge can question the funder about the agreement.[332] Regardless, the court can discipline the lawyers on the funders payroll for violating the Model Rules if the court finds that funders control the litigation.[333] Consequently, this threat of discipline will deter lawyers from working with funders that seek to control the litigation.

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[327] Memorandum, *supra* note 224, at 42–43
[328] Russell, *supra* note 218.
[329] Only a small number of litigation funding arrangements are publicly available as part of Securities and Exchange Commission filings. *See, e.g.*, https://www.sec.gov/Archives/edgar/data/1282631/000155837017006679/nlst-20170701ex102d59feb.htm.
[330] Robin Davis et al., *supra* note 150, at 131–134.
[331] *See* U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PART INVESTMENTS IN LITIGATION 10 (2012), https://instituteforlegalreform.com/wp content/uploads/2020/10/TPLF_Solutions.pdf. (speculating that most TPLF flows into cases heard in federal courts). The Government Accountability Office suggested that state and federal courts could gather data to learn how litigants use TPLF in state and federal courts. GAO REPORT, *supra* note 21, at 17.
[332] Russell, *supra* note 218.
[333] *Id.*

2. Relevance of Disclosing Funding Agreements

Funders and disclosure advocates also disagree over whether litigation funding agreements should be disclosed to all litigants.[334] Funders argue that most courts that have heard discovery disputes involving TPLF agreements have held that the agreements are not discoverable.[335] However, funding agreements may be relevant to the litigation and warrant disclosure.[336] If the dispute involves patent litigation, the funding agreements may be relevant to the value of the patents-in-suit among other reasons.[337] Some of Judge Conolley's patent litigation cases also illustrate that TPLF agreements may be relevant to identify and address conflicts of interest between the funder and the litigant.[338]

i. The Funder's Argument

Funders point out that courts have long treated discovery requests for insurance agreements differently than discovery requests for litigation funding agreements.[339] Before 1970, many courts disagreed over whether insurance agreements were discoverable.[340] Today, there is more consensus among the courts about whether litigation funding agreements are discoverable, as some courts find litigation funding agreements not discoverable for lack of relevance or protected under attorney-client or work-product privilege.[341] Some estates even enacted statutes clarifying that litigation funding agreements do not undermine attorney-client privilege or work-product.[342]

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[334] BOGART, *supra* note 282, at 6; LISA A. RICKARD ET AL., *supra* note 275, 9–11.
[335] Agee et al., *infra* note 348.
[336] *See infra* note 356 and accompanying text.
[337] *See infra* note 359 and accompanying text.
[338] Russell, *infra* note 369.
[339] BOGART, *supra* note 282, at 13–15.
[340] Fed. R. Civ. P. 26 advisory committee's note to the 1970 amendment.
[341] *See* Charles M. Agee et al., LITIGATION FUNDING AND CONFIDENTIALITY: A COMPREHENSIVE ANALYSIS OF CURRENT CASE LAW 3–4 (2021), https://www.westfleetadvisors.com/wp-content/uploads/2021/09/Westfleet_Litigation_Funding_and_Confidentiality_2021.pdf (finding judges prohibited or limited the discovery of litigation funding documents in 83% of cases where this issue was raised).
[342] Ind. Code Ann. § 24-12-8-1; Neb. Rev. St. § 25-3301; Vt. Stat. tit. 8, § 2255.

Indeed, the most common reason for denying a party's request to discover litigation funding documents is the work-product doctrine, followed by relevancy issues, and then attorney--client privilege.[343] Many jurists believe that work-product protection applies to at least some contents in the funding agreement.[344] Although the relevancy threshold for discovery is very low, many courts also believe litigation funding documents are not relevant to the action underlying the litigation.[345] By contrast, few courts believe attorney-client privilege can help protect litigation funding documents from discovery unless narrow exceptions like the common interest doctrine or the agency doctrine are relevant.[346]

Nevertheless, courts are more inclined to find that litigation funding agreements are discoverable if the case involves patent litigation.[347] Litigation funding documents may be relevant to refute an NPE's David-versus-Goliath narrative, assess the value of the patents-in-suit, impeach the credibility of the witness receiving compensation through the litigation, and identify possible relationships between the jurors and the funder.[348] Agreements also may be central to resolving key issues like validity, infringement, damages, royalty rates, and pre-suit diligence.[349] Although there is no shortage of reasons why litigation funding agreements may be relevant, the argument that litigation funding agreements are relevant to the litigation and therefore discoverable because they help resolve disputes about the value of the patents-in-suit resonates most with courts.[350]

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[343] *Id.* at 11.
[344] *Id.* at 18.
[345] *Id.* at 12.
[346] *Id.* at 14.
[347] *See* Impact Engine, Inc. v. Google LLC, No. 19-cv-1301-CAB-DEB, 2020 U.S. Dist. LEXIS 145636, at *4 (S.D. Cal. Aug. 12, 2020) (recognizing that "courts have generally ruled that litigation funding agreements and related documents are relevant and discoverable in patent litigation").
[348] Cont'l Cirs. LLC v. Intel Corp., 435 F. Supp. 3d 1014, 1019 (D. Ariz. 2020).
[349] Acceleration Bay LLC v. Activision Blizzard, Inc., No. CV 16-453-RGA, 2018 WL 798731, at *3 (D. Del. Feb. 9, 2018).
[350] *See, e.g.*, Cirba Inc. v. VMWare, Inc., No. CV 19-742-LPS, 2021 WL 7209447, at *3 (D. Del. Dec. 14, 2021); Gamon Plus, Inc. v. Campbell Soup Co., No. 1:15-CV-08940, 2022 WL 18284320 (N.D. Ill. May 26, 2022); Electrolysis Prevention Sols. LLC v. Daimler Truck N. Am. LLC, No. 321CV00171RJCWCM, 2023 WL 4750822, at *5 (W.D.N.C. July 24, 2023) (allowing discovery to assess the value of the patents-in-suit).

i. Disclosing Funding Agreements to Uncover Conflicts of Interest

One important but often overlooked reason funders may need to disclose funding agreements to the court is to resolve judicial conflicts of interest.[351] Historically, the judiciary has struggled to address conflicts of interest in courtrooms.[352] Judges sometimes neglect their ethical duty to disclose conflicts of interest.[353] A 2021 Wall Street Journal investigation found hundreds of federal judges frequently failed to recuse themselves from cases where they had a financial interest.[354] Many judges also fail to recuse themselves from cases where friends or family are involved in the litigation, or even disclose the fact; indeed, in 2019 the ABA issuing new guidance on this point suggesting this is the norm.[355] These same concerns about conflicts of interest also hold true when a litigant is backed by a third-party funder. A judge that holds stock in large, publicly funders like Burford Capital could have several conflicts of interest if the judge has a large docket of cases backed these funders.[356] Similarly, a judge could have conflicts of interest if the judge hears cases backed by funders and the judge's friends or family are affiliated with the funders. In both cases, disclosing the funding agreement would help the judge identify and manage these conflicts of interest.

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[351] *See* MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-CV-03657-SI, 2019 WL 118595, at *2 (recognizing that funding agreements could be discoverable when there is "a specific, articulated reason to suspect bias or conflicts of interest").

[352] *See generally* James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95 (2013).

[353] *See* Model Rules of Judicial Conduct R. 2.11 ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."). *See also* Gene Quinn*, If PTAB Judges Can Decide Cases Involving Former Defense Clients USPTO Conflict Rules Must Change*, IP WATCHDOG (May 2, 2017, 9:15 AM), https://ipwatchdog.com/2017/05/02/ptab-judge-former-clients-uspto-conflict-rules/id=82765/ [https://perma.cc/7G5R-PPCZ] (discussing conflicts of interest among administrative patent judges at the United States Patent and Trademark Office).

[354] James V. Grimaldi et al., *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WSJ (Sept. 28, 2021, 9:07 AM), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421 [https://perma.cc/TWC5-NJG7].

[355] *See* American Bar Association, Formal Opinion 488 (Sept. 8, 2019) (""Judges need not disqualify themselves if a lawyer or party is an acquaintance, nor must they disclose acquaintanceships to the other lawyers or parties" but noting that it "depends on the nature of the relationship" and is an issue "committed to" the judge's discretion).

[356] LISA A. RICKARD ET AL., *supra* note 275, 15–16. *See also* Menapace, *supra* note 18 (discussing how disclosure can reveal if a judge owns stocks in a litigation finance company).

Of course, disclosure requirements can also help the court identify conflicts of interest between the funder and the client.[357] For example, another evidentiary hearing before Judge Connolly revealed the owner of Backertop LLC, an NPE suing for patent infringement, was married to an attorney who worked for MAVEXAR.[358] Like the other cases MAVEXAR financed, MAVEXAR essentially controlled the litigation for the NPE owner.[359] Although MAVEXAR supposedly only provides non-legal services to clients, the owner of Backertop, who did not have her own legal counsel, testified that her husband helped create Backertop and advised her to sign MAVEXAR's financing agreement.[360] These actions seem to implicate the Model Rules.[361] Because many NPE owners are unrepresented or have limited contact with lawyers, the litigation funders fill the void and render legal services. The clients may be under the illusion the funders will act in their best interest, but in reality, the funder has the authority to direct the litigation to advance its own interests rather than those of the client.[362]

One drawback of Judge Connoley's standing order on third-party funding is that the party seeking to disclose the agreement must show that a conflict of interest (or some other issue) exists because of the arrangement, but this conflict may not be readily identifiable unless the funded party discloses the agreement.[363] Funded parties before Judge Connolly are only required to

[357] *See* MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-CV-03657-SI, 2019 WL 118595, at *2 (recognizing that funding agreements could be discoverable when there is "a specific, articulated reason to suspect bias or conflicts of interest").
[358] Andrew E. Russell, *Standing Order Hearings: Court Questions Head of NPE LLC Who Is Married to Attorney at Mavexar*, IPDE (Nov. 10, 2022), https://ipde.com/blog/2022/11/10/latest-from-the-litigation-funding-hearings-court-rejects-privilege-between-mavexar-and-npe-asks-veil-piercing-questions/# [https://perma.cc/5VUE-PBT3].
[359] *Id.*
[360] *Id.*
[361] *See* Model Rules of Pro. Conduct R. 4.3 (Am. Bar Ass'n 2020) ("[A] lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.").
[362] *See* Lucian Pera & Michael Perich, *It Can Be Risky For Litigators To Advise On Litigation Funding*, LAW360 (Mar. 6, 2020, 2:33 PM), https://www.law360.com/articles/1249341/it-can-be-risky-for-litigators-to-advise-on- litigation-funding [https://perma.cc/UT4S-JEJS] (explaining that conflicts likely arise when the funder is providing legal advice to the client).
[363] Russell, *supra* note 369.

identify the funder, explain whether funder approval is necessary for litigation or settlement decisions, and describe the financial interest of the funder if such approval is required.[364] These preliminary disclosures may not provide enough information to uncover conflicts of interest. Indeed, Judge Connolly only learned about a potential conflict of interest between the owner of Backertop and the lawyer for MAVEXAR after he reviewed the funding agreement and held an evidentiary hearing.[365] Disclosing the funding agreements at the outset would minimize judicial inefficiency by helping ensure that conflicts of interest are identified and addressed immediately.

3. The Effects on Settlement Discussions and Litigation Strategy

Funders dismiss the role of TPLF disclosures in facilitating settlement discussions and instead emphasize that such disclosures will adversely affect the plaintiff's litigation strategy.[366] Funders argue that litigation financing and insurance agreements serve different purposes in the context of settlement discussions.[367] They also argue that disclosing the TPLF agreement would prejudice the plaintiff by proving the defendant insight into the case's strengths and weaknesses.[368] However, these arguments are incorrect. TPLF disclosures will help facilitate settlement discussions by minimizing the information asymmetry between the plaintiff and the defendants.[369] Additionally, these disclosures will not unduly prejudice the plaintiff because defendants can already draw inferences about the strengths and weaknesses of the plaintiff's case if they know funders back the plaintiff.[370]

i. The Funder's Argument

[364] Order Regarding Third-Party Litigation Funding Arrangements, *supra* note 177.
[365] Russell, *supra* note 369.
[366] BOGART, *supra* note 282, at 14.
[367] *Id.*
[368] *Id.*
[369] *See infra* Section V.B.3.ii and accompanying text.
[370] *See infra* Section V.B.3.iii and accompanying text.

While funders stress that disclosing insurance agreements can mutually benefit plaintiffs and defendants and affects both parties equally, disclosing litigation funding agreements only has the potential to harm plaintiffs.[371] Although the Advisory Committee noted that disclosing insurance coverage can facilitate settlement discussions,[372] disclosure opponents argue that disclosing information in litigation funding agreements does not produce the same effect on settlement discussions because litigation funding is not "an asset created specifically to satisfy the claim."[373] Insurance policies, unlike TPLF agreements, only cover settlements that are within the policy limits.[374] In the absence of any funding limits, disclosure opponents also argue that disclosure requirements would allow defendants to draw inferences about the strengths and weaknesses of the plaintiff's case.[375] These agreements include important information about the claim structure (single-case or portfolio), the nature of the funding (recourse or non-recourse), the funding terms (funding commitment, budget, and counsel compensation), and the return and waterfall proceeds.[376] Consequently, defendants allegedly stand to gain an unfair strategical advantage that unduly prejudices the plaintiff if the plaintiff discloses the agreement.

i. Settlement Discussions

Legal scholarship and peer-reviewed studies suggest that litigation financing helps induce settlement. Robert Fuqua notes that "pairing [a plaintiff] with a funder delivers a more credible trial threat, and this could incentivize a defendant to settle a case on the merits instead of using

[371] The following discussion focuses on a funded plaintiff and a non-funded defendant because this is the most typical TPLF scenario.
[372] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 1970 amendment.
[373] BOGART, *supra* note 201, at 14 (quoting Fed. R. Civ. P. 26(b)(2) advisory committee's note to 1970 amendment).
[374] *Id.*
[375] *Id.* at 14.
[376] Thompson, *supra* note 213, at 224–25.

delay tactics."[377] Similarly, Samuel Antill and Steven Grenadier found that litigation financing discourages defendants from overspending on defense leading to faster settlement.[378] However, these settlement negotiations could still nevertheless breakdown because of the information asymmetry between the funded plaintiff and the defendant.[379]

Disclosure requirements will help further facilitate settlement discussions by minimizing the information asymmetry between the plaintiff and the defendant. The funded plaintiff, unlike the defendant, has complete knowledge of the terms in the TPLF agreement. Notably, this agreement specifies how much money a funder is willing to invest in the litigation, which is generally calculated as a portion of the estimated damages.[380] Disclosing this information to a defendant would likely lead to a more just and reasonable settlement because the defendant can confirm the plaintiff's "threat credibility."[381]

ii. Litigation Strategy

Disclosure requirements will not undermine funded plaintiffs' litigation strategy because defendants can already draw inferences about the strengths and weaknesses of the plaintiff's case if they know funders back the plaintiff. Litigation financiers initiate a rigorous underwriting process of the plaintiff's claim before they agree to invest millions of dollars to fund patent litigation.[382] Consequently, financers only fund patent infringement claims with a high probability

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[377] *See* Robert B. Fuqua, *How Litigation Funders Have Improved the Quality of Settlements in America*, HARV. NEGOT. L. REV., Aug. 2020, at 1 (discussing how pairing with a funder can encourage a defendant to settle a case on the merits). *See also* Menapace, *supra* note 18 (explaining how disclosing litigation finance agreements can help with pre- trial resolution).

[378] Samuel Antill & Steven R. Grenaider, *Financing the Litigation Arms Race*, 149 J. FIN. ECON. 218, 229 (2023).

[379] Lucian Ayre Bebchuck, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 409 (1984).

[380] Fuqau, *supra* note 395, at 1.

[381] *See* Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 522 (2006) (describing how litigation financing "gives the plaintiff the resources and 'threat credibility' to carry her claim to trial").

[382] *The Underwriting Process in Litigation Funding Explained*, GLS CAPITAL, https://www.glscap.com/the-underwriting-process-in-litigation-funding-explained/.

of succeeding.[383] In other words, these cases have many strengths and very few weaknesses. Disclosing the contents of the financing documents that do not address the litigation strategy, therefore, should generally not prejudice the plaintiff because the funding agreement and the terms it contains merely reflect the funder's belief that the plaintiff's case a strong likelihood of success on the merits.[384] If, however, the court believes the financing documents contain privileged information, it can redact the parts of the agreement protected by privilege before permitting disclosure.[385]

4. Limiting Rule 26 Disclosures to Insurance Agreements

Funders and disclosure advocates disagree over whether the Advisory Committee should include a TPLF disclosure requirement under the list of required Rule 26 disclosures outlined in subsection (a)(1)(A).[386] Funders emphasize that the Advisory Committee has rebuffed previous attempts to amend Rule 26 and include a TPLF disclosure requirement.[387] However, litigation financing has had more time to develop since the Advisory Committee last considered those proposals. These developments provide evidence of how some funders operate and structure their funding agreements.[388] This evidence helps disclosure advocates justify why a disclosure requirement for funding agreements falls within the scope and purpose of Rule 26.[389] Nevertheless,

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383 ROBERT DAVIS & DAN KESACK, A PRACTICAL GUIDE TO PATENT LITIGATION FUNDING 4–6, https://woodsford.com/wp-content/uploads/sites/3/2022/09/A-Practical-Guide-to-Patent-Litigation-Funding.pdf (describing factors funders considering before funding patent litigants that necessarily limit the number of cases funders will finance).
384 *See* ADVANCED MEDICAL TECHNOLOGY ASSOCIATION ET AL., PROPOSED FED. R. CIV. P. 26(A)(1)(A)(V) 9-10 (March 27, 2019), https://www.uscourts.gov/sites/default/files/19-cv-i-suggestion_advanced_medical_et_al_0.pdf. (noting that information about funding resources is not strategic information).
385 Agee et al., *supra* note 235, at 19.
386 BOGART, *supra* note 282, at 14–15; LISA A. RICKARD ET AL., *supra* note 275, at 22.
387 Memorandum from Hon. David G. Campbell, *supra* note 48, at 4.
388 *See supra* Section V.B.1.ii and accompanying text.
389 *See infra* Section V.B.4.ii and accompanying text.

the Advisory Committee could also incorporate a disclosure requirement under Rule 7.1, the rule for corporate disclosures, if changing Rule 26 proves unfeasible.[390]

i. The Funder's Argument

Funders also stress the 1970 amendments to Rule 26 only addressed the *legally relevant* information in insurance agreements.[391] Historically, courts have construed Rule 26(a)(1)(A)(iv) narrowly.[392] The Advisory Committee also clarified that non-public personal and financial information in the insurance agreements were beyond the scope of the insurance disclosure requirement.[393] More recently, the Advisory Committee refused to adopt proposals that would amend Rule 26(a)(1)(A)(iv) and require the disclosure of funding agreements designating the proposals "premature."[394] Law Professor Shannon Sahani argued the Advisory Committee made the correct decision because the proposal "did not align with the purpose and goals of Rule 26 and could have led to satellite litigation."[395] She also points out that, unlike insurers, most litigation funders do not pay the underlying judgment.[396]

ii. Support for Disclosure Requirements Under the Federal Rules of Civil Procedure

The 1970 amendments to Rule 26 limited the new disclosure requirement to insurance agreements, which were of concern at the time. Thus, Rule 26 is the most appropriate section in the FRCP for a TPLF disclosure requirement, because TPLF agreements are in many ways highly

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390 *Id.*
391 *See, e.g.*, BOGART, *supra* note 282, at 14–15.
392 *See, e.g.*, Excelsior Coll. v. Frye, 233 F.R.D. 583, 586 (S.D. Cal. 2006) (recognizing that Rule 26 does not require the production of all agreements relating to insurance); Native Am. Arts, Inc. v. Bundy-Howard, Inc., No. 01 C 1618, 2003 WL 1524649, at *2 (N.D. Ill. Mar. 20, 2003) (denying a motion to compel discovery of an insurer's reservation of rights letter).
393 Fed. R. Civ. P. 26 advisory committee's note to the 1970 amendment.
394 Memorandum from Hon. David G. Campbell, *supra* note 48, at 4.
395 Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 414 (2016). *See also* Aaseesh P. Polavarapu, *Discovering Third-Party Funding in Class Actions: A Proposal for in Camera Review*, 165 U. PA. L. REV. ONLINE 215, 231 (2017) (discussing how the Advisory's Committee's refusal to amend Rule 26 was correct because of the dissimilarities between third-party funding and insurance agreements).
396 Sahani, *supra* note 272, at 231.

relevant to the litigation. Until recently, litigation financers operated in relative secrecy, and the public, the courts, and the government knew very little about how funders structured their financing agreements.[397] This forced defendants seeking litigation funding agreements in discovery—to the extent they even knew they existed—to speculate about why the agreements might be relevant to the litigation.[398] But you cannot know what you do not know. Some patent litigation disputes involving NPEs reinforce why the TPLF agreements may be relevant to the litigation. Judge Connolly's evidentiary hearings have shed light on the ethical issues that can arise when NPEs are funded by third parties in complete anonymity, despite attempts by NPEs to avoid or attack his standing order. [399],[400] And parties have been hard at work identifying an extensive network of NPEs and their affiliate subsidiaries that third parties fund, helping to dispel the David-versus-Goliath sense that has been a cornerstone of both policy arguments and trial narratives.[401] At the very least, this information should:

> 1) limit overbroad or abusive discovery requests from the funders that go too far or waste the parties' time asking for irrelevant documents, and
>
> 2) make it more straightforward and less fraught for litigants to justify TPLF-related discovery requests on grounds related to control, conflicts of interest[402] and trial narratives.[403] Overall, courts will, we hope, become more willing to allow discovery requests for TPLF agreements, and will do so in a

[397] *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 719 (2014) (noting how litigation financing contracts are confidential and only some come to light in litigation).
[398] *See e.g.*, Ashghari-Kamrani v. United Servs. Auto. Ass'n, No. 2:15-CV-478, 2016 WL 11642670, at *4 (E.D. Va. May 31, 2016); Colibri Heart Valve LLC v. Medtronic CoreValve LLC, No. 820CV00847DOCJDEX, 2021 WL 10425630, at *4 (C.D. Cal. Mar. 26, 2021) (preventing discovery because the reasons cited were too "speculative").
[399] *See supra* Section IV.B.2. and accompanying text.
[400] *See* Mellaconic IP LLC v. Timeclock Plus, LLC, No. 22-244-CFC, 2023 WL 3224584, at *6 (D. Del. May 3, 2023) (denying a plaintiff's motion to set aside Connolly's standing order). *See also* In re Nimitz Techs. LLC, No. 2023-103, 2022 WL 17494845, at *3 (Fed. Cir. Dec. 8, 2022) (denying petitions to challenge Conolley's standing order).
[401] *Litigation Investment Entities*, *supra* note 232.
[402] MLC Intell. Prop., LLC v. Micron Tech., Inc., No. 14-CV-03657-SI, 2019 WL 118595, at *2
[403] Cont'l Cirs. LLC v. Intel Corp., 435 F. Supp. 3d 1014, 1019 (D. Ariz. 2020).

uniform and fair way, as we all learn more about the funders and how they structure and execute these agreements.

Even if the committee again declines to amend Rule 26, other rules in the FRCP provide support for a TPLF disclosure requirement. Judge Connolly, for example, found support for his standing order on third-party funding under Rule 7.1.[404] Rule 7.1 requires non-governmental corporate parties involved in the litigation to "identif[y] any parent corporation and any publicly held corporation owning 10% or more of its stock or "state[] that there is no such corporation."[405] It also requires parties involved in the litigation to disclose their citizenship if the action is based on diversity jurisdiction.[406] However, Rule 7.1 notably "does not prohibit local rules that require disclosures in addition to those required by Rule 7.1, i.e., disclosure related to corporate owners and investors.[407] The Advisory Committee noted, "[d]eveloping experience with local disclosure practices . . . may provide a foundation for adopting more detailed disclosure requirements by future amendments of Rule 7.1."[408] Thus, an amendment to Rule 7.1 provides the best alternative avenue for including a TPLF disclosure requirement into the FRCP if the Advisory Committee decides disclosure does not align with the purpose and goals of Rule 26.

We think both are necessary, both the clarify the presence and scope of such agreements, and to ensure the parties' and courts' time aren't wasted with requests that go too far (or not far enough) and don't address the concerns identified herein. Two short amendments to Rules 26 and 7 would require 1) the disclosure of TPLF agreements and 2) a corporate statement identifying the funders. Either would be a step forward in regularizing and streamlining the processes and the

[404] Memorandum, *supra* note 224, at 3.
[405] Fed R. Civ. P. 7.1(a)(1).
[406] Fed R. Civ. P. 7.1(a)(2).
[407] Memorandum, *supra* note 224, at 3 (quoting Fed R. Civ. P. 7.1 advisory committee's notes to 2002 amendment).
[408] Fed R. Civ. P. 7.1 advisory committee's notes to 2002 amendment.

industry and would serve the goals policymakers and parties have identified without offering avenues to discovery abuses.

iii. Proposed Amendment to Rule 26 – Duty to Disclose

Rule 26, Governing Discovery requires corporate disclosure statements from nonparties, and has long had, under section (1)(A), a subsection (iv) requiring disclosure of any insurance agreement related to and contingent upon the litigation:

> *(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.*

We propose adding a subsection (v):

> *(v) for inspection and copying as under Rule 34, any agreement under which a third-party business may offer a non-recourse loan with recovery based in any part on a possible judgment in the action.*

iv. Proposed Amendment to Rule 7.1 – Disclosure Statement

Additionally, Rule 7 has, under section 1, a requirement for filing an upfront disclosure statement, which must be filed by certain nongovernmental corporations. It is currently limited to a statement that:

> *(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or*
> *(B) states that there is no such corporation.*

We propose adding a subsection (B), and moving current subsection (B) to (C):

> *(B) identifies any person or entity that is not a party offering funding for some or all of the party's attorney fees and/or expenses to litigate this action on a non-*

recourse basis in exchange for (1) a financial interest that is contingent upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal loan, bank loan, or insurance, or
(C) states that there is no such corporation.

This language is consistent with orders or requests that many judges have required, including the New Jersey and Judge Connolly standing orders, without going overboard and captures both the spirit and letter of legitimate players in the TPLF industry. This will limit the publicly filed information to the identity of the funder (but not the investors) under 7.1, and would allow the agreement, like with insurance agreements, to be filed under seal.

It should serve to regularize disclosures and prevent expensive discovery that is both under- and over-inclusive on the issue and should serve to regularize the industry and help generate emerging standards of good behavior, preventing the kind of uneven ad hocery that has roiled the UK litigation funding industry, and push the industry past infancy and into a set of common standards that regularize the practice.

V. Conclusion

The U.S. is long overdue for a federal TPLF disclosure requirement. The current ad hoc, patchwork regime allows funders to subvert local disclosure rules by backing lawsuits in jurisdictions that do not have such rules, while also falling prey to over-disclosure and litigation tactics in others, further encouraging unsavory behaviors like forum- and judge-shopping. A federal TPLF disclosure requirement would improve judicial efficiency, streamline the industry, and help ensure that most funders are held to account, while regularizing the practice. Such a requirement would minimize information asymmetries between the parties and help facilitate settlement discussions. Additionally, it would also help the court identify and address legal and ethical issues stemming from funder control of the litigation and conflicts of interest, among others. Regardless of how such a requirement is implemented, whether by the Advisory Committee, Congress, or common practice in the courts, the legal and financial system will greatly benefit from a more transparent TPLF industry.