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Third Party Litigation Funding

Civil Justice and the Need for Transparency

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Third Party Litigation Funding:

Civil Justice and the Need for Transparency

Introduction

This is about far more than numbers, but the numbers are good place to begin—and indeed they tell an important part of the story. Litigation financing[1] is big business. According to one article at the end of 2017, the litigation finance industry is a $5 billion market in the United States.[2] The article notes that Burford Capital, the publicly traded third party litigation funding (TPLF) company that is the largest player in the U.S. market, had committed $488 million in TPLF markets in 2017 alone, and a $100 million investment in a single law firm's litigation portfolio; another TPLF company has made an eight-figure portfolio deal with a single law firm.[3] Burford itself states on its website that it has "$3.6 billion invested and available to invest in commercial litigation and arbitration," with a variety of different ways to finance, including single-case and portfolio financing.[4] The *Wall Street Journal* reported in July 2018 that litigation finance jobs are the new hot law job, mentioning companies that had made commitments of $136.6 million and $330.3 million (the latter to 38 investments, an average of nearly $8.7 million per investment), while another had raised $250 million in private equity.[5]

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1 Various phrases are used to describe this business. We use the term "Third Party Litigation Funding" (or TPLF) in this DRI white paper. Another example, the oft-cited American Bar Association Commission on Ethics 20/20 Information Report to the House of Delegates, February 2012 (ABA 20/20) uses "Alternative Litigation Finance" or ALF.

2 Natalie Rodriguez, Going Mainstream: Has Litigation Finance Shed Its Stigma?, Law360, December 12, 2017, available at https://www.law360.com/articles/992299. See also Roy Strom, In Growth Bid, Leading Litigation Financier Bulks Up Leadership, American Lawyer, May 7, 2018, available at https://www.law.com/americanlawyer/2018/05/07/in-growth-bid-leading-litigation-financier-bulks-up-leadership/, noting that Burford had reported making a record $1.34 billion in investment commitments in 2017, and that its stock price had nearly doubled within the past year. This is a growth industry.

3 *Id.*

4 http://www.burfordcapital.com/alm/.

5 Sara Rondazzo, *The New Hot Law Job: Litigation Finance*, Wall Street Journal, July 5, 2018, *available at* https://www.wsj.com/articles/the-new-hot-law-job-litigation-finance-1530783000.

As defined by ABA 20/20,[6] ALF (or TPLF as used here) "refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer."[7] While there a number of limitations on ABA 20/20, self-described in its own text and discussed further below, that definition is as good as any as a starting point.

But it is only a starting point, because emerging evidence suggests that unlike the situation evaluated in ABA 20/20 in 2012, TPLF continues to evolve from its original roots as a transaction between a *party* to a litigation and a funding entity.[8] Moreover, while the biggest TPLF entities insist that they do not have any control over litigation or settlement of matters that they finance, they zealously guard the confidentiality of their funding agreements so that neither the public nor litigation opponents can confirm that claim, while evidence mounts that at least some participants in the market actively solicit people who may not have otherwise filed lawsuits or maintain at least some control over the lawsuits they file, including participation in the selection of attorneys.

One such company is reported to have advertised offers to anyone with a qualifying "MeToo" sexual harassment claim to receive $100,000 in "angel funding" along with a referral to attorneys.[9] Another is reported to have placed ads on Craigslist trolling for potential plaintiffs, resulting in the eventual dismissal of ninety-nine "boilerplate lawsuits" alleging violations of the Americans with Disabilities Act—defended at considerable expense and risk by the defendants.[10] Both Reuters and the *New York Times* have reported on TPLF entities urging women to have unneeded surgery to enhance the values of their claims.[11]

Are these extreme cases of unethical entrants into an emerging marketplace? Perhaps. But they reveal that something more than merely "leveling the litigation playing field" or providing equal access to the courthouse is occurring, especially as more and more players enter the market and the financial incentives continue to increase. And

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6 ABA 20/20 is the Informational Report issued by ABA in February 2012. Many articles refer to an earlier *draft* of that Report, referred to as the "White Paper," and issued for comment in 2011.

7 ABA 20/20, at p. 1.

8 *Id*.

9 Rodriguez, *supra* note 2.

10 Debra Cassens Weiss, *Serial ADA suits operated like 'a carnival shell game,' depriving plaintiff of proceeds, judge says*, ABA Journal, July 13, 2017, *available at* http://www.abajournal.com/news/article/serial_ada_suits_operated_like_a_carnival_shell_game_depriving_plaintiff_of.

11 Alison Frankel and Jessica Dye, *Special Report: Investors profit by funding surgery for desperate women patients*, Reuters, August 18, 2015, *available at* https://www.reuters.com/article/us-usa-litigation-mesh-specialreport/special-report-investors-profit-by-funding-surgery-for-desperate-women-patients-idUSKCN0QN1QT20150818; Matthew Goldstein and Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, New York Times, April 14, 2018, *available at* https://www.nytimes.com/2018/04/14/business/vaginal-mesh-surgery-lawsuits-financing.html.

even among the more mainstream, more-likely-to-be-playfield-leveling TPLF transactions, numerous ethical and practical considerations abound, especially with the trend for TPLF transactions to be with the attorneys rather than the parties to the litigation, as disclosed by the big TPLF entities themselves. As one TPLF executive stated: "We make it harder and more expensive to settle cases."[12]

DRI believes that one of the most important ways to determine whether a given funding transaction is proper or improper—or somewhere in between—is through increased transparency. At a minimum, the existence and terms of any funding agreement ought to be promptly disclosed, in the same way that insurance policies available to defendants must be disclosed. Whether that disclosure will result in any further discovery will depend on the facts of the particular case. In some cases, disclosure will end with production of the funding agreement; in others, other discovery may be appropriate where the circumstances so warrant. That will be decided on a case-by-case basis, but the base line must be disclosure of the agreement itself.

DRI is uniquely placed to provide a dispassionate evaluation. DRI members primarily (but far from exclusively) represent defendants in civil litigation, but unlike all of the other participants in a litigated matter, DRI members do not have a personal financial stake in the outcome. To be sure, DRI members deeply care about the well being of, and often have close and long-standing relationships with, their clients. But unlike the plaintiff, the plaintiff's attorney retained with a contingency fee, the TPLF company, and yes, the defendant itself, the DRI member is not personally impacted by the litigation result. DRI's perspective is as a protector and detailed observer of the judicial system, buoyed by the vast experience of more than 20,000 members who are active daily in the trenches of state and federal civil courts.

Identifying the Issues

TPLF is not a monolith, given the wide variation in the participants and the types of deals. Nor is the capacity for disputes within or about the industry one-size-fits-all. Beyond the issue of the impact of TPLF on the litigation where the funding occurred, courts have been called upon to grapple with disputes between the TPLF company and the plaintiff or plaintiff's attorney that it funded, as well as between the TPLF company and its own investors.

Indeed, these types of intra-industry disputes can shed even more light on the nature of the industry, because while the law continues to develop (via legislation, case law, and local rules) on the disclosure of TPLF agreements in the funded litigation, those agreements are discussed in some detail in litigation within the industry—because the TPLF agreements are the very subject of the litigation itself.

Examples of intra-industry disputes:

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[12] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall Street Journal, March 21, 2018, quoting Allison Chock, chief investment officer of Bentham's U.S. division, *available at* https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600.

- *Shenaq v. AkinMears*—A Texas case where the chief business development officer of a plaintiff's law firm alleged that he had been fired to avoid paying him more than $4 million in commissions on over 14,000 medical mesh lawsuits he had acquired for the firm, alleging that the firm had secured $93 million in TPLF for its portfolio.[13]
- *Securities and Exchange Commission v. PLCMGMT LLC, dba Prometheus Law, James A. Catipay, and David A. Aldrich*—The SEC charged the TPLF company of raising $11.7 million from 250 investors over 3 years, promising ROI of between 100 percent and 300 percent, but only investing $4.3 million on actual investments.[14]
- *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756 (Minn.App. 2017)—Honor among participants? Funded plaintiff refused to pay the TPLF company the 60 percent annual interest called for in the TPLF agreement. The court ruled in favor of the underlying plaintiff, finding the TPLF agreement unenforceable as champertous under Minnesota law.[15]
- *Prospect Funding Holdings, LLC v. Saulter*, 2018 IL App (1st) 171277—After the funded plaintiff refused to pay under the TPLF agreement, based on Minnesota law rendering TPLF agreements unenforceable as champerty (*see, e.g., Maslowski, supra*), the TPLF company sued the underlying plaintiff's attorney. In addition to his client executing the TPLF agreement, the attorney had signed an "Attorney Acknowledgment" that he would honor a "letter of direction" signed by the client to hold any settlement funds received in the underlying case in a trust account, to be disbursed as required under the TPLF agreement. The *existence* of such a letter of direction and Attorney Acknowledgment is itself something worthy of comment—and something that would not have come to the public knowledge but for a lawsuit between the participants like this one. The court held that the attorney was not liable to the TPLF company either: he could raise champerty as a defense as well, and ethical rules for an attorney did not create a separate duty or cause of action in favor of the TPLF company against the attorney. But, the court did direct the appellate clerk to refer the attorney to the Illinois Attorney Registration and Disciplinary Commission for further investigation.

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[13] David Yates, *Tentative settlement reached in highly publicized AkinMears lawsuit*, SE Texas Record, November 11, 2015, *available at* https://setexasrecord.com/stories/510647677-tentative-settlement-reached-in-highly-publicized-akinmears-lawsuit.

[14] https://www.sec.gov/news/pressrelease/2016-72.html; substantial judgments were eventually entered against the respondents: http://regulatoryresolutions.com/case/securities-exchange-commission-v-plcmgmt-llc-et-al/.

[15] One of the interesting impacts of the development of TPLF is that it has brought back discussion of the hoary concepts of champerty, maintenance, and barratry, along with consideration of the application of usury principles given the often extremely high ROIs found in this area. Results have been mixed (*see* "Litigation Issues Arising from TPLF"), but it has presented a fertile area for further litigation and analysis.

These cases provide examples of the language sometimes used in TPLF agreements. Other cases establish that despite the assertions of TPLF companies that they do not have control over the litigation or its resolution,[16] reported decisions confirm that there are some occasions where the terms of the TPLF agreement did indeed give the TPLF company at least some measure of control.[17] This highlights the multivariable nature of the TPLF industry. It may well be that many TPLF companies carefully craft their agreements to disclaim any right to control. But there are clearly plenty of occasions where some manner of control or active participation occurs. And there is no way to know whether the funding agreement at issue is one where control exists or does not, whether the TPLF entity has become a participant in the litigation or is just a very interested bystander, unless the parties to the litigation have the opportunity to inspect the funding agreement.

And even these types of revelations from reported decisions where the funding agreement became an issue in the dispute are only the tip of the iceberg from an issue-spotting perspective. Legions of articles have been written over the past decade on various aspects of TPLF.[18] Notorious (and perhaps prurient) cases such as the oft-mentioned funding by billionaire Peter Theil of wrestler Hulk Hogan's lawsuit against Gawker,[19] or *Gbarabe v. Chevron Corp.*, the failed class action attempt arising out of a rig explosion in Nigeria,[20] present examples of possible abuse of the system, but offer the

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16 *See, e.g.,* Matthew Harrison and John Harabedian, *Claimants Shouldn't Be Forced To Disclose Litigation Funding*, Law360, June 11, 2018, *available at* https://www.law360.com/articles/1052279/claimants-shouldn-t-be-forced-to-disclose-litigation-funding ("Unlike an insurance company, a litigation funding company ordinarily does not control the litigation"). The authors are, respectively, an investment manager and legal counsel for Bentham IMF.

17 *See, e.g., Abu-Ghazaleh v. Chaul*, 36 So.3d 691 (Fla. App. 2009) (TPLF funder had control of litigation, including the final say over settlement agreements, and found liable for defendant's attorney fees and costs); *High Voltage Bevs., LLC v. Coca-Cola Co.*, 2010 U.S. Dist. LEXIS 141785, *48-49 (W.D.N.C. 2010), *accepted in part as to champerty ruling*, 2011 U.S. Dist. LEXIS 21423 (W.D.N.C. 2011) (creation of a new LLC in which the TPLF funder owned a majority interest, constituted control over the claim); *In re DesignLine Corp.*, 565 B.R. 341 (Bankr. W.D.N.C. 2017) (funding agreement provided that funding would not be provided all at once, required the trustee and her attorneys to go back to the funder on a quarterly basis to request additional funding, and required the trustee to consult with the funder on selection of counsel).

18 See, e.g., ABA 20/20, note 1, supra at notes 1–4; Kyle E. Bjornlund and Ryan W. Hanofee, How Third-Party Litigation Financing May Be Affecting Your Practice, For The Defense, July 2015 (citing many other earlier articles).

19 For one example of reporting on this case, *see* Derek Thompson, *The Most Expensive Comment in Internet History?*, The Atlantic, February 23, 2018, *available at* https://www.theatlantic.com/business/archive/2018/02/hogan-thiel-gawker-trial/554132/.

20 The funding agreement, calling for a ROI of 600%, was found discoverable. *Gbarabe v. Chevron Corp.*, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. 2016); one of a number of articles discussing the case—with a link to a copy of the funding agreement—can be found here: Ben Hancock, *How Jones Day Unmasked a Litigation Funding Deal and Won*, The Amer-

reason why knowledge of such arrangements can make a difference in the real world. TPLF raises issues of fairness to all participants, potentially changes the lawsuit dynamics for both discovery disputes (such as proportionality and cost shifting), and creates a host of potential attorney-ethics and privilege/work product issues on a number of levels, plus concerns regarding who has standing to assert such issues. TPLF companies assert that the level of scrutiny that they use before deciding to invest establishes that their activities tend to screen for meritorious rather than frivolous lawsuits,[21] but the evidence of cold contacts to potential claimants, Craigslist ads, and boilerplate lawsuits[22] demonstrates that this is not always the case.

Reasons Supporting Transparency

Like Long-Discoverable Insurance Information, TPLF Impacts Litigation and Settlement Evaluation

As noted above, most of what is known about TPLF agreements—at least in reported decisions—comes from intra-industry disputes between TPLF companies and the entities that they fund, where the terms of the TPLF agreements are themselves the subject of the litigation. Where, however, the issue is whether the litigation opponent of the funded party ought to be entitled to obtain the TPLF agreement, results are mixed.

In one oft-cited case, especially by the TPLF industry in defense of non-discoverability, the court reviewed the TPLF agreement *in camera*, determined that it did not give the TPLF company control over the litigation, and declined to order it turned over to the defendant.[23] Magistrate Judge Cole's opinion is comprehensive and well-written, but fails to take into account some quite important principles. Indeed, the opinion highlights the potential need for enactment of rules on the subject, and the trend towards such enactments.

No one disputes that TPLF changes the litigation dynamic, without regard to whether that is a positive or negative development (and that might vary from case to case). The question, initially, is whether all parties ought to be informed of that change as applied to a given litigation.

Among other things, Judge Cole in *Miller UK* decided that, following his *in camera* review, the TPLF agreement (referred to in the opinion as the "deal documents") would not be relevant to the claims or defenses in the lawsuit—the basic standard for determining discoverability under Fed.R.Civ.Pro. 26(b)(1).[24] But the Federal Rules also con-

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ican Lawyer, October 29, 2017, *available at* https://www.law.com/americanlawyer/sites/americanlawyer/2017/10/29/how-jones-day-unmasked-a-litigation-funding-deal-and-won/.

21 *See, e.g.,* Christopher P. Bogart, *Freshfields says that litigation funding improves the quality of litigation*, April 26, 2016, *available at* http://www.burfordcapital.com/blog/blog-freshfields-says-litigation-funding-improves-quality-litigation/.

22 *See supra* notes 9, 10, and 11.

23 *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 729 (N.D. Ill. 2014).

24 The Advisory Committee Notes to the 2000 Amendment of Subdivision (b)(1) say (emphasis added):

template at least initial discovery of one item that is almost never admissible in evidence or relevant to a claim or defense presented in the pleadings—the defendant's insurance policy. The reasoning behind such discovery applies with special force—indeed, perhaps additional force—to TPLF agreements. Judge Cole did not discuss this issue in *Miller UK*.

Fed.R.Civ.Pro. 26(a)(1)(A)(iv) requires, as part of a party's initial disclosures:

> [F]or 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.

Because of the reference to liability to satisfy judgments, the Rule clearly applies only to defendants. Notably, the Rule does not just require disclosure of the mere *existence* of the insurance agreement, but of a *copy* of the insurance agreement itself.[25] The 1970 Advisory Committee Notes regarding discovery of insurance policies (then pursuant to Rule 26(b)(2)) confirm that cases and commentators at the time were "sharply in conflict on the question of whether defendant's liability insurance coverage is subject to discovery in the usual situation when the insurance coverage *is not itself admissible and does not bear on another issue in the case*." (Emphasis added.) Resolving the issue "in favor of disclosure," the Advisory Committee based its decision as follows:

> 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.

These same concerns apply to TPLF. Even where the TPLF agreement gives no rights to control to the TPLF company and is not otherwise admissible in evidence—and as discussed herein that is not the case in many instances—disclosure permits counsel for both sides to make the same realistic appraisals of settlement and litigation strategy. For the same reasons that the insurance agreement itself, not just disclosure of its existence, is to be provided, TPLF agreements themselves should be provided to the defendants.

Some in the TPLF industry have suggested that the analogy to insurance policies is incorrect, because TPLF agreements are different from insurance agreements.[26] But

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> The Committee intends that the parties and the court focus on the *actual claims and defenses involved in the action*. . . The rule change signals to the court that it has the authority to confine discovery to the claims and defenses *asserted in the pleadings*, and signals to the parties that they have *no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings*.

25 TPLF companies assert that if TPLF is discoverable at all, it ought to be limited to the mere existence, but not the terms, of the TPLF agreement, lauding the recent ruling in *In Re: National Prescription Opiate Litigation*, United States District Court for the Northern District of Ohio, Case No. 1:17-MD-28094, Docket No. 383, May 7, 2018, that only the existence of the TPLF agreement need be disclosed. *See, e.g.,* Burford Capital, *Burford Capital comments on The Litigation Funding Transparency Act of 2018*, May 10, 2018, *available at* http://www.burfordcapital.com/blog/litigation-funding-transparency-act-2018/.

26 Harrison and Harabedian, *supra* note 16.

such arguments display a fundamental misunderstanding of the reasons that insurance agreements are discoverable, as well as of insurance itself. Indeed, the argument that "required disclosure of liability insurance policies ultimately helps the disclosing party—the insured defendant—by discouraging plaintiffs from pursuing even meritorious claims where there is little to no insurance coverage in place or, when plaintiffs do file claims, from demanding more than the policy limits"[27] is not only absurd, but contrary to the experience of most defense counsel. It can hardly be argued that it was the *defense* side of the litigation bar that was clamoring for a rule change to require mandatory disclosure of insurance.

It cannot be legitimately disputed that TPLF impacts the resolution of the lawsuit – that is the justification endorsed by TPLF entities for allowing funding in the first place. The amount of funding as well as its terms impacts settlement decisions. It is not by accident that virtually every set of mediation or settlement conference rules by mediation companies and federal magistrates, among other things, require that an insurance company representative with authority to participate in settlement discussions attend mediations and settlement conferences. The same is—or should be—equally true for representatives of the TPLF company. They have a direct financial stake, and more often than participants in the TPLF industry will admit, influence on resolution discussions. Even where they have limited to zero control over resolution, as the big TPLF players assert, they are in that instance akin to lienholders. Experienced defense counsel such as those who are DRI members are very familiar with situations where a settlement was held up, or even scuttled, where a lienholder's interest was so substantial that it too became part of the settlement negotiations—whether a workers' compensation lien or a medical lien. Regardless of the TPLF agreement terms regarding litigation and settlement control (or lack thereof), the financial arrangement between the plaintiff (or plaintiff's lawyer) and the TPLF entity has a direct and real impact on any settlement discussions—and all sides ought to be informed about it in making their litigation and settlement decisions.

TPLF Potentially Impacts Decisions by Courts and Juries on Issues in the Case

Beyond evaluations of how the parties' respective financial positions impact strategy decisions, however, is the impact that TPLF has on issues pending in the litigation itself. In this era of extensive and very expensive electronic discovery, the issue of who pays for that discovery is an increasingly relevant issue. Indeed, given that TPLF is more likely to be found in cases or portfolios of larger size, with a greater opportunity for a higher return on investment, the chances are also greater that e-discovery and cost-shifting issues will arise in TPLF-funded cases. Fed.R.Civ.Pro. 26(b)(1) expressly provides for consideration of the "parties' resources" as one of the factors in a proportionality analysis. Therefore, the financial resources of the plaintiff are directly relevant to decisions that will be made by the court.

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27 *Id.*

Who Pays for Discovery Costs?

The concept of shifting the costs of discovery compliance to the requesting party is not new. Fed.R.Civ.Pro. 26(c)(1)(B) expressly gives the court discretion to consider, among other things, "allocation of expenses" for the disclosure. This dates back to at least the 1970 Amendments to the Federal Rules, with the 1970 Advisory Committee Notes stating: "the courts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs."

Standards for cost shifting have been developed by case law. They typically include various factors, including: (1) the likelihood of discovering critical information; (2) the relative ability of each party to control costs and its incentive to do so; (3) the importance of the requested discovery in resolving the issues at stake in the litigation; and (4) the relative benefit to the parties of obtaining the information.[28]

Among the factors, therefore, is the ability of the plaintiff to afford the costs of responding to the discovery that it seeks. It is all too easy, and often the case, for a plaintiff to serve an extremely broad set of discovery requests, requiring substantial cost and effort by the defendant to respond. Cost-shifting, among other things, potentially incentivizes the plaintiff to craft more narrow requests that will incur less compliance cost. But in order for the court to determine the relative merits of the cost-shifting factors, the parties need to be able to address any funding available to the plaintiff that will assist in paying for the discovery it claims to need. And the only way to establish a record on that point is for the defendant to have access to the "deal documents" for the TPLF arrangement, and to have the opportunity to argue to the court that it is only fair that the plaintiff in a given case bear the full cost of compliance.

Thus, even the most non-controlling TPLF agreement is relevant to actual litigation decisions that a court will be called upon to make, even though the TPLF agreement will not eventually be admissible at the time of trial on the merits. Disclosure of only the existence of the TPLF agreement, but not its terms, will enable neither the defendant to argue nor the court to decide the impact of TPLF on whether the cost of discovery compliance ought to be shifted.

TPLF Sometimes Affects the Actual Evidence in the Lawsuit

And if disclosure of the TPLF deal documents is appropriate and relevant even where the TPLF agreement is relatively "clean"—that is, it does not impact the actual evidence in the lawsuit—disclosure is even more important in the many evolving situations

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28 *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 573 (N.D. Ill. 2004). *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (holding some or all of cost of burdensome discovery can be shifted to requesting party); *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*, 2013 WL 5348377, at *6 (N.D. Ill. Sept. 24, 2013) (ordering plaintiff to "foot the bill" for production of burdensome dialer data); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 428-29 (S.D.N.Y. 2002) (shifting cost of discovery due to substantial cost and burden).

where the TPLF entity does indeed have some measure of litigation or settlement control, or where the TPLF company's involvement actually impacts the evidence.

Consider, for example, the situation encountered by DRI TPLF Working Group member Francis H. Brown. Defending product liability claims asserting traumatic brain injuries, the TPLF company orchestrated assignment agreements between (1) the plaintiffs and the medical providers, and (2) the providers and the TPLF company. The TPLF company paid the medical providers 50 percent to 65 percent of the invoiced amount, but the TPLF agreement prohibited the plaintiffs from submitting their invoices to third-party payers (such as their health insurers), or from challenging the reasonableness of the billed amounts. Likewise, the medical providers were prohibited from disclosing to the *plaintiffs*, much less to the defendants, the amount that had actually been paid. In the lawsuit, the plaintiff then sought 100 percent of the medical bills from the defendant, seeking to make a profit on the difference.[29]

The opportunity for the TPLF arrangement to impact the actual evidence in the lawsuit is obvious. Beyond the impact on the evidence about damages, the presence of a TPLF deal like this one also implicates the credibility of the witnesses who will appear before the trier of fact. In *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*,[30] the Eleventh Circuit upheld admissibility of the TPLF agreement and activities as evidence of potential bias of the witnesses, as well as regarding their possible desire for additional and continued referrals of patients from the TPLF company. Clearly, it was only through transparency that this evidence-impacting situation came to light.

Or consider the advent of medical finance companies, or even of doctors who provide care on a lien-only basis—that is, they do not submit their invoices to the patient's own health insurer or other source (workers' compensation insurer, for example), but instead take a lien on any recovery that the patient/plaintiff might make against the defendant.[31] These too affect the actual evidence, the reasonableness determination as to medical expenses incurred, and the bias of the witnesses. Without disclosure of the TPLF agreement, these important facts would be hidden from the defendant—and the trier of fact.

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29 Francis H. Brown III and Marshall T. Cox, *Defending Against Personal Injury Claims Supported by Litigation Funding*, The Voice, Vol. 16 Issue 36, September 13, 2017, available at http://portal.criticalimpact.com/newsletter/newslettershow5.cfm?contentonly=1&content=258741&id=15751.

30 *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293 (11th Cir. 2018).

31 Clay Knowles, Rachel Reed and David Glustrom, *Medical Funding Companies: A New Problem for an Old Rule*, Georgia Defense Lawyers Journal, 2016, *available at* http://www.wachp.com/wp-content/uploads/2016/06/2016_GDLA_Law_Journal.pdf; Stephen Ellison, *Medical Liens: Necessary Evil Or Litigation Advantage?*, Plaintiff Magazine, April 2013, *available at* https://www.plaintiffmagazine.com/item/medical-liens-necessary-evil-or-litigation-advantage.

An object lesson on this issue is presented by a recent California decision, *Pebley v. Santa Clara Organics.*[32] Unlike some other jurisdictions,[33] California has held that a tort plaintiff is entitled to recover only the amount paid by the plaintiff's insurer rather than the full amount billed (but not paid) by the medical treater.[34] In *Pebley*, the plaintiff admitted that he had health insurance but chose not to invoke that insurance, thereby incurring the higher amount billed by the medical provider (on a lien basis—he did not receive payment before the lawsuit was over) rather than the lower amount that would have been paid by the insurer. The appellate court found that the plaintiff was not mandated to tender his claim to his insurer and was permitted to put in evidence—and recover if the jury so decided—the full amount charged by the lien doctor. DRI submitted an unsuccessful amicus in support of the petition for review to the California Supreme Court, which succinctly set out the issues arising from this form of TPLF.[35] Thus, in California and other states that permit lien doctors, an additional dynamic arises that potentially allows the plaintiff to manipulate the evidence, impacting the defendant and its exposure and resulting in a potential windfall for the plaintiff. As DRI's Amicus brief points out, such an approach encourages gamesmanship that ought to at least be subject to some level of scrutiny.[36]

In class action litigation, one of the issues is whether the class representative and class counsel are adequate to represent the class. Case law is split,[37] but even beyond the issue of discoverability addressed in those cases in the context of adequacy is the issue of whether putative class members are entitled to be told about the participation (and potential return on investment) of the TPLF entity in any recovery. Class actions, even more than other kinds of litigation, demand a certain amount of transparency. This is potentially even more important in those situations where the funding agreement is with the attorney, rather than with the proposed class representative. Should the putative class members and the court be advised that the proposed class attorney has a relationship with a TPLF company, and might that impact (one way or the other) the decision on whether to approve either the class itself or class counsel?

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32 *Pebley v. Santa Clara Organics*, 22 Cal.App.5th 1266 (Cal.App. 2018), *review denied* 2018 Cal. LEXIS 5831.

33 One example is Illinois. *See, e.g., Arthur v. Catour,* 216 Ill. 2d 72, 833 N.E.2d 847 (2005).

34 *Howell v. Hamilton Meats and Provisions, Inc.*, 52 Cal. 4th 541, 257 P.3d 1130 (2011).

35 DRI's Amicus brief is *available at* http://www.dri.org/docs/default-source/amicus-briefs/2018/amicus-petition---final.pdf?sfvrsn=6.

36 *Id.* at 4–5.

37 *Compare, Gbarabe v. Chevron Corp.*, 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. 2016) (funding agreement relevant to determination of adequacy of class representative) with *Kaplan v. S.A.C. Capital Advisors, L.P.*, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (funding agreement not discoverable because no question regarding class representatives' adequacy).

Litigation Issues Arising from TPLF

Champerty, Maintenance, and Barratry

As noted earlier (*see supra* note 15supra), TPLF has given rise to litigation over ancient legal doctrines that most practicing attorneys have rarely encountered, if at all. These include such doctrines as champerty, barratry, and usury (the latter because of the high returns on investment involved to TPLF agreements).

Maintenance is defined as "[i]mproper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no bona fide interest in the case; meddling in someone else's litigation."[38] Champerty is a subtype of maintenance and is defined as "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif., 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."[39]

"Barratry" is the practice of filing vexatious litigation. As the U.S. Supreme Court succinctly declared in *In re Primus*, 436 U.S. 412, 424 n. 15 (1978):

> Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.

From a pure definitional perspective, TPLF likely qualifies as champerty or barratry—especially given the repeat nature inherent in the fundamental underpinnings of the enterprise. But it is fair to say that there have been a wide variety of decisions on the actual application of these doctrines to TPLF.[40] Some jurisdictions, such as Minnesota,[41] continue to disallow TPLF agreements as champerty. Others either find that champerty is an outmoded and no longer a viable doctrine.[42]

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38 Definition, MAINTENANCE, Black's Law Dictionary (10th ed. 2014).

39 Definition, CHAMPERTY, Black's Law Dictionary (10th ed. 2014).

40 *See generally* Michael F. Aylward and Mary Craig Calkins, *Beyond Champerty: The Rise of Third Party Litigation Funding*, American College of Coverage and Extracontractual Counsel 2017 University of Michigan Law School Symposium, October 20, 2017, *available at* https://accec.memberclicks.net/assets/LawSchoolSymposium-UMich/accec_symposium_2017michigan_papers_beyondchamperty_aylwardcalkins.pdf.

41 *Maslowski v. Prospect Funding Partners LLC*, 890 N.W.2d 756 (Minn.App. 2017).

42 *See, e.g., Miller UK*, "Like Long-Discoverable Insurance Information, TPLF Impacts Litigation And Settlement Evaluation," supra discussing the trend towards narrowing and eliminating these doctrines, citing cases from around the U.S., in light of more modern methods of protecting the integrity of the litigation process, such as sanctions for frivolous litigation. 17 F.3d at 724–28. See also Aylward and Calkins, note 30, , collecting the trends, and *e.g., Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901, 905 (R.I. 2002), discussing the modern trend to abolish these doctrines as supplanted by such actions as malicious prosecution and abuse of process, as well as the code of professional responsibility for attorneys collecting cases.

Still other cases have applied unique aspects of either the TPLF agreement or the law of the particular state whose law applies to the dispute to determine whether these doctrines might apply. For example, even in a state where TPLF agreements are generally unenforceable as champertous, the particular agreement at issue was acceptable because repayment of the amount to the TPLF company was not contingent on the outcome of the litigation, although the repayment obligation was deferred until the litigation had ended; the same decision, though, voided as champertous a separate TPLF agreement that was contingent and called for an interest rate of 27.67 percent.[43]

A federal district court in Pennsylvania applied New York law (due to forum selection clauses in the TPLF agreements that some courts have refused to enforce on public policy grounds[44]) to determine that the TPLF agreement was not champertous because the transaction occurred *after* commencement of the lawsuit—and therefore was not for the intent of causing the action to be brought.[45] Consider whether that result would have been different in the medical mesh or ADA situation discussed in this white paper's Introduction, where an assertion might be made that but for the cold solicitations by the TPLF entities, no claims would have been brought.[46]

Who Has, or Should Have, Standing to Raise Issues About TPLF Agreements?

Justinian Capital SPC v. WestLB AG,[47] in some sense represents the classic example of a champertous arrangement. DPAG had invested over $200 million in notes, but did not want to bring suit for recovery arising from deterioration of the value of those notes due to political concerns. It therefore "assigned" the notes to Justinian Capital in return for payment of $1 million, but even that amount did not actually have to be paid by Justinian Capital to DPAG. Instead, the agreement was designed to give Justinian Capital standing to file the lawsuit against WestLB that DPAG itself preferred not to bring in its own name, with 20 percent of the proceeds of the lawsuit to be paid to Justinian Capital and the rest to DPAG.

Justinian Capital's existence as an involved entity was obvious (as is not always the case in more typical TPLF arrangements) since it was the named plaintiff in the lawsuit, and WestLB rightly wondered how it might have standing to file suit against it. For that reason, the lower courts allowed discovery on the subject of champerty. Following that discovery, WestLB sought summary judgment, which was granted and affirmed by New York's highest court. In so ruling, the court noted: "Here, the lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. Justinian's sole

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43 *Johnson v. Wright,* 682 N.W.2d 671, 677–78(Minn.App. 2004).

44 *Maslowski*, *supra* note 41.

45 *Obermayer Rebman Maxwell& Hippel LLP v. West*, 2015 U.S. Dist. LEXIS 172922, *7–8 (W.D. Pa. 2015), *aff'd*, 725 Fed.Appx. 153, 2018 U.S. App. LEXIS 4861 (3d Cir. 2018).

46 *Supra* notes 10 and 11.

47 *Justinian Capital SPC v. WestLB AG*, 65 N.E.3d 1253 (N.Y. 2016).

purpose in acquiring the notes was to bring this action and hence, its acquisition was champertous." *Justinian Capital*, 65 F.3d at 1257.

Thus, the New York Court of Appeals affirmed the underlying defendant's standing to discover and assert the existence and impact of the funding arrangement. Other courts are split on the issue, where it has been addressed at all, but logic and public policy suggest that defendants ought to be able to discover and raise any issue arising of a TPLF agreement.

One of the most remarkable things about disputes in the TPLF industry is that so many of the reported decisions arise in the context of disputes between the TPLF funder and the underlying plaintiff/TPLF-funding recipient. In these cases, the TPLF-funded plaintiff refuses to pay the agreed amount to the TPLF company—and quite often the underlying plaintiff seeks to void the agreement based on champerty. As discussed above, results have been mixed,[48] but the fact that these cases are intra-industry disputes between the funders and the funded itself suggests that the results are skewed.

The reason is that courts—even those that eventually find that the agreements are not enforceable as champerty or for some other reason—have good cause to look askance at a party who takes and uses the funder's money and then later seeks to avoid its own obligations to pay the funder under the agreement. Indeed, a few courts, such as *Prospect Funding Holdings, LLC v. Saulter*, [49] have referred the attorney to the disciplinary commission for investigation even as they ruled against enforcement of the TPLF agreement. *See also, e.g., Global Injury Funding, LLC v. Knight*, containing this interesting footnote:

> Unexplained by the Debtor's counsel, Lawrence S. Dressler (hereinafter, "Attorney Dressler"), is how he can now ethically argue that the Agreement is, *inter alia*, unconscionable, deceptive and predatory and therefore void when he was the same counsel who signed off on the Agreement originally, allowing it to be entered into by Knight. *See, e.g.*, New York State Bar Ass'n Committee on Professional Ethics, Opinion 769-11/4/03 ("If what is proposed [concerning a lawsuit financing transaction] is illegal,

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[48] In addition to cases already discussed, *see also, e.g, Global Injury Funding, LLC v. Knight*, 583 B.R. 191, 212-213 (Bankr. D. Conn. 2015) (assignment or lien on proceeds of personal injury action is invalid and unenforceable in bankruptcy proceedings); *Odell v. Legal Bucks, LLC,* 665 S.E.2d 767 (N.C. App. 2008) (not champertous because TPLF company had not sufficiently intermeddled); *Kraft v. Mason,* 668 So.2d 679 (Fla. App. 1996) (not champertous because plaintiff sought out the funder); *Merrill Lynch Mortgage Investors v. Love Funding Corp.,* 918 N.E.2d 889, 895 (N.Y. 2009) (not champerty unless "such claims would not be prosecuted if not stirred up . . ."); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87 (Tex. App. 2006) (underlying plaintiff asserted it should not have to pay the funding company its 150 percent return on investment); *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997) (common law doctrines of champerty, maintenance, and barratry not recognized in Massachusetts—after underlying plaintiff and attorney failed to advise TPLF funder of the underlying settlement); *Osprey, Inc. v. Cabana Limited Partnership*, 532 S.E.2d 269 (S.C. 2000) (abolishes champerty as a defense, but that does not mean that all such agreements are enforceable as written).

[49] *Prospect Funding Holdings, LLC v. Saulter*, 2018 IL App (1st) 171277.

> then it would be unethical for an attorney to recommend the action or assist the client in carrying it out.").[50]

Funded plaintiffs complain in some instances that they ought to be relieved from the obligation to pay the TPLF company because of the hardship that the agreement creates in handling the claim, even where the TPLF funder might not have control over the litigation itself. For example:

> Plaintiff argues that agreements such as the one in this case give litigation lenders a champertous level of control over the borrowers' lawsuits because they have a deleterious effect on the borrowers' abilities to settle their underlying claims. According to Plaintiff, a rational borrower is likely to reject any settlement offer that is less than the amount of the advance and accrued interest she owes to the lender, even if the settlement offer is perfectly reasonable. This is because the borrower will be required to pay her entire recovery to the lender, and will in effect receive nothing from the settlement. Instead, Plaintiff argues, the borrower will bring her claim to trial, because she at least has a chance of securing a larger recovery if she wins at trial. If the borrower loses at trial or only secures a small recovery, she is no worse off than she would have been had she accepted the settlement offer.[51]

We provide this lengthy quote because it so well captures the essence of one of the most important issues arising from TPLF—the impact of TPLF on whether a case is settled or tried. While the quote above is from a case where a funded plaintiff unsuccessfully sought to void the TPLF agreement, it is beyond legitimate debate that the settle/don't settle incentives affect the defendant—and the court system itself—just as much or more than they affect the funded plaintiff who, after all, already has the TPLF company's funding in its pocket. As a result of TPLF, cases may be tried that would not otherwise be tried. Defendants' evaluations are skewed, because resolution depends on an outside influence beyond analysis of the liability and damages facts.[52]

Therefore, one can appropriately question cases that suggest a defendant does not have standing to investigate the existence and terms of a TPLF agreement, or to assert its impact in the litigation either as a defense, and potentially as evidence where warranted. For example, the ruling in *Killian v. Millard*, 228 Cal.App.3d 1061 (Cal.App. 1991), that the defendant did not have standing to seek to void the syndication agreements or raise

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[50] Note 42, *supra* at n.2.

[51] *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 774 (N.C. App. 2008).

[52] Another excellent, if lengthy quote, albeit from the Massachusetts Land Court, captures the essence: "Such hidden funding can introduce a dynamic into a plaintiff's case—an agenda unrelated to the merits, a resistance to compromise—that otherwise might not be present and, unless known, cannot be managed or evaluated. Funding of a plaintiff's case by outsiders may be good or bad, but it clearly sets such cases apart. . . . The funding of this particular case may present no issues—and, contrary to Richmond's allegations, it may not involve Brooks Drug at all—but it surely a relevant subject to explore in discovery." *Conlon v. Rosa*, 2004 Mass. LCR LEXIS 56, *6-8 (Mass. Land Court 2004). *See also* ABA 20/20, *supra* note 6, at 27–29.

them as a defense can be seriously debated.[53] That court noted the split in jurisdictions on the standing issue,[54] but determined that those cases allowing standing to defendants were based on the question of whether the assignee truly had rights—along the lines of the determination by the New York Court of Appeals in *Justinian Capital* (which was decided some fourteen years later). That distinction—whether the TPLF is an assignee—is not the correct one to make. TPLF funding impacts the lawsuit even where there is no question that the named plaintiff has the right to bring the claim.[55]

Better reasoned (on the subject of standing) is *In re Complete Retreats, LLC*. [56] In the context of an adversary proceeding, the bankruptcy trustee sought approval of a funding arrangement in which the TPLF company would pay the Trust $1.25 million in exchange for assignment of the first $1.5 million of any recovery from the defendants, *plus 80 percent* of any additional recovery from the defendants. The defendants objected to the funding motion that, unlike TPLF agreements outside of bankruptcy proceedings, had to be approved by the bankruptcy court. Addressing standing, the court noted: "It is beyond peradventure that the [Defendants], who are parties in the Adversary Proceeding, are directly effected [sic] by the outcome of that proceeding and, therefore, have standing to challenge the Funding Motion."[57] [58]

The same is true in virtually every case where TPLF is added. Even in the most vanilla, no-TPLF-control, playfield-leveling, access-to-the-courthouse funding agreement, *all* of the parties to the lawsuit, not just the TPLF-funded plaintiff are directly affected by the outcome of the presence of TPLF in the case. These impacts are compounded further where the TPLF agreement is not quite so straightforward and has the possibility of impacting the evidence presented in the lawsuit. Therefore, notwithstanding the details of a particular state's law on the standards and applicability for champerty or barratry—or more modern claims such as abuse of process or malicious prosecution as mentioned by some states that have abolished champerty—the lawsuit

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53 The defendant had learned during discovery that the plaintiffs had financed their litigation through "syndication" by creating fifty "units" for sale at $10,000 per unit, in return for a percentage of the net profits of the lawsuit.

54 (*Id.* at 1606, fn 1).

55 Even in this situation, where the defendant was found to not have standing, the court evinced a concern about conflicts of interest arising from the syndication arrangement, mentioning the court's inherent authority to disqualify the plaintiff's attorney if appropriate.

56 *In re Complete Retreats, LLC*, 2011 Bankr. LEXIS 1417 (Bankr. D. Conn. 2011).

57 *Id.* at *8–9.

58 The court went on, however, to grant the funding motion, finding that the doctrine of champerty had never been adopted in Connecticut, that Trustee retained control of the litigation, and: "Equally significant is that by entering into the Funding Agreement, the Trustee will secure a minimum recovery for the Trust beneficiaries. Clearly, this is in the best interest of the estate." *Id.* at *10–12. Consider whether the same ruling would be made outside of the bankruptcy context, where the interest of the estate is not at issue in the same manner.

defendants ought to have the ability to raise the issues in an appropriate way. But to do that, they first have to have knowledge about the existence and terms of the particular TPLF agreement involved in their lawsuit.

Usury?

As discussed throughout this white paper, the amounts at stake and intended return on investment are quite large. It is not surprising, then, that issues of usury have occasionally arisen in TPLF disputes.

As with champerty, these disputes tend to be between the TPLF company and the TPLF-funded plaintiff, with the plaintiff seeking to void the TPLF agreement on the grounds of usury. And, as with champerty, the question of whether a given TPLF agreement is usurious depends greatly on the particular terms of the deal documents and the wide variations in state law. Also like champerty, many of the decisions indicate that the dispute is one between the parties to the TPLF agreement, not the defendant in the underlying funded lawsuit. Thus, standing to assert that the agreement is usurious is also sometimes an issue.

Most courts, though, have rejected assertions that TPLF funding runs afoul of state usury statutes or case law. One exception worth noting, though, is *Odell v. Legal Bucks, LLC*,[59] where the court applied North Carolina law to determine that the TPLF agreement, while not champertous, was unenforceable as usurious.[60] While the obligation to repay the funding was conditional on the plaintiff's recovery in the underlying lawsuit, where an "advance" was made "in expectation of reimbursement," the first element of the four North Carolina elements for a usury claim was met. The second element was met because there was an understanding that the principal funded amount "may" be returned to the funder. The third element was met because the parties did not dispute that the return on investment percentage (at least 40 percent and as much as 325 percent, depending on when the recovery was made) substantially exceeded that permitted by North Carolina statute. The fourth and last element—intent—was met by showing that the TPLF company intentionally charged more than the law allows.[61] The TPLF agreement, therefore, was void as usurious.

More typical, though, is *Obermayer Rebman Maxwell& Hippel LLP v. West*.[62]Applying New York law, the court found that usury principles did not apply unless the funding arrangement qualified as a "loan." The funding agreement, however, did not so qualify because unlike the rule in North Carolina, contingent rights are not loans. Because the

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59 *Odell v. Legal Bucks, LLC,* 665 S.E.2d 767 (N.C. App. 2008).

60 The court also allowed a claim under North Carolina's Consumer Finance Act, alleging that the TPLF company failed to advise here that she was entering into an unlawful contract, to stand, holding that the TPLF company "committed unfair and deceptive practices as a matter of law." *Id.* 665 S.E.2d at 782.

61 *Id*. 665 S.E.2d at 779.

62 *Obermayer Rebman Maxwell& Hippel LLP v. West*, 2015 U.S. Dist. LEXIS 172922, *8–13 (W.D. Pa. 2015), *aff'd*, 725 Fed.Appx. 153, 2018 U.S. App. LEXIS 4861 (3d Cir. 2018).

funding agreement was not a loan, it could not be usurious as a matter of law, according to the court.[63]

Application of usury laws, then, appears for the most part to depend on hyper-technical application of whether the funding is contingent or absolute, so as to qualify as a "loan." Courts for the most part have not evaluated whether the contingent recovery by the TPLF company is unreasonably high unless the agreement first so qualifies.

Despite this trend, most courts have yet to speak on the subject. Therefore, the issue of usury, dependent as it is on each state's law on the subject, potentially very much impacts the ability to resolve the underlying dispute.

Does the Collateral Source Rule Apply?

From the TPLF company's perspective, TPLF constitutes an investment in a lawsuit. TPLF is therefore "not in the nature of a traditional collateral source."[64] With the increasing prevalence of TPLF, courts have only recently begun to grapple with how the collateral source rule applies to TPLF arrangements involving the payment of a plaintiff's medical expenses.

Under the collateral source rule, an innocent tort victim's recovery may not be reduced, and a tortfeasor may not benefit, because of monies received from a third party without contribution from the tortfeasor.[65] The collateral source rule most commonly comes into play by allowing a plaintiff to recover from the defendant the full value of medical bills paid by the plaintiff's insurer while precluding the defendant from introducing evidence of the insurance benefits received by the plaintiff.[66] As a matter of policy, the collateral source rule is intended to prevent a tortfeasor from benefitting from a plaintiff's decision to purchase insurance.[67]

Medical benefits paid by an insurer after an accident require foresight by the plaintiff (or someone acting on his or her behalf) to procure insurance coverage and to pay premiums. In contrast, litigation funding is obtained only after the injury and requires

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63 *Accord, Kraft v. Mason,* 668 So.2d 679, 684 (Fla. App. 1996) ("A loan agreement is not usurious when payment depends on a contingency."); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 101 (Tex. App. 2006) (TPLF agreement not usurious, despite 150 percent return on investment, where the obligation to repay was contingent rather than absolute).

64 *Houston v. Publix Supermarkets, Inc.*, 2015 WL 4581541 at *2 (N.D. Ga. July 29, 2015); *aff'd*, *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293, 1299 (11th Cir. 2018).

65 *See, e.g.*, *Bozeman v. State*, 2003-1016 (La. 7/2/04), 879 So.2d 692.

66 *See Hoffman v. 21st Century N. Am. Ins. Co.*, 14-2279, 4 (La. 10/02/15); 209 So. 3d 702, 706 (the typical collateral source situation involves receipt of private insurance benefits), *reh'g denied* (12/7/15); See also *Ingerson v. Twentieth Century Fox Film Corp.*, 2003 WL 147771 at *8 (Cal. App. January 21, 2018) ("In a typical application, the collateral source rule applies to prevent a tortfeasor defendant from presenting evidence that an injured plaintiff's medical expenses have been paid by an independent source.")

67 *See*, *e.g.*, *Bozeman v. State*, 2003-1016 (La. 7/2/04), 879 So.2d 692, 698.

no pre-accident planning. As an investor in the plaintiff's lawsuit, a litigation funder seeks to maximize its investment return and profit through the plaintiff's success in the lawsuit. The incentives that motivate persons to obtain TPLF therefore are materially different from those that drive the acquisition of traditional insurance.

For this reason, the court in *Ortiviz v. Follin*, 2017 WL 3085515 (D. Colo. July, 2017), questioned whether the collateral source rule applied to payments made to a plaintiff's medical providers by a litigation funder. The *Ortiviz* court denied a motion to quash a subpoena seeking information about the details of a TPLF contract, finding that the discovery requested from the litigation funder would be allowed because there was "at least a fair basis" for concluding that the third-party funding arrangement "is not a collateral source."[68]

The injured plaintiff in *Ortiviz* entered into an agreement with Marrick Medical Finance LLC by which Marrick paid the plaintiff's medical bills at a discounted rate it had negotiated with the providers. In exchange, the plaintiff granted Marrick a lien on any future damages recovered from the defendants for the full, undiscounted amount of his medical bills. In its motion to quash the defendant's subpoena, Marrick relied on three earlier Colorado federal court decisions that held the amounts paid by litigation finance companies for medical treatment were inadmissible under the collateral source rule.[69]

The *Ortiviz* court found the litigation funding cases relied upon by Marrick to be distinguishable. The prior decisions assumed that the plaintiffs received a "benefit" when the litigation financing company negotiated bills on the plaintiffs' behalf. There was no indication in the earlier decisions that the plaintiffs remained liable for the billed amount of the medical expenses.[70] In contrast, the amount owed by the plaintiff for medical expenses was not reduced under the Marrick TPLF agreement. In denying the denying the motion to quash, the *Ortiviz* court found that "unlike an insurance carrier, Marrick did not compensate or indemnify [the plaintiff]."[71] While ruling that the documents sought by defendant from Marrick were discoverable, the *Ortiviz* court recognized that the information produced by Marrick may later be deemed to be inadmissible at trial under the collateral source rule.[72]

The decision to admit at trial evidence of the relationship between a plaintiff's treating physicians and a third-party litigation funder as an exception to the collateral source rule was affirmed by the Eleventh Circuit Court of Appeals in *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*[73] In *ML Healthcare*, a plaintiff claimed to have sustained serious personal injuries as a result of a slip and fall at a grocery store.

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68 *Id*. at *3.

69 *Id*. at *4, citing *Seely v. Archuleta*, 2011 WL 2883625, at *4 (D. Colo. July 18, 2011); *Robinson v. Terwilleger*, 2011 WL 1987619, at *2–3 (D. Colo. May 12, 2011); *Romero v. Allstate Fire & Cas. Ins. Co.*, 2015 WL 5321441, at *3 (D. Colo. Sept. 14, 2015).

70 *Id*. at *4.

71 *Id*. at *4.

72 The *Ortiviz* case was settled prior to any ruling by the district court as to the admissibility of evidence relating to the Marrick TPLF arrangement.

73 *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293 (11th Cir. 2018).

Prior to trial, the plaintiff sought to exclude any evidence of her relationship with ML Healthcare Services LLC and any evidence of the relationship between this third-party litigation funder and her doctors. The district court described ML Healthcare as a "litigation investment company that purchases medical bills from providers at a discount in order to finance medical treatment and litigation."[74] ML Healthcare referred the plaintiff to two doctors, who were members of the litigation funder's network of providers.[75] The defendant argued that admission of the evidence in question did not run afoul of Georgia's collateral source rule because ML Healthcare's payment of some of the plaintiff's medical bills was not being offered for the purpose of mitigating the plaintiff's damages to the extent of the TPLF's payments, but rather to attack the credibility of the plaintiff's doctors, and as evidence of the reasonable value of medical services provided to the plaintiff.

The trial court in the *ML Healthcare* case ruled that the collateral source rule did not bar evidence of the relationship between ML Healthcare and the plaintiff's doctors. According to the trial court, the jury was entitled to consider whether the treating doctors' desire to continue receiving referrals from ML Healthcare affected their causation opinions. The trial court also ruled that evidence of the discounted amount accepted by the healthcare providers was admissible and relevant to establish the reasonable value of medical services provided. After an eight-day trial, the jury returned in favor of the defendant. The plaintiff appealed the adverse verdict. ML Healthcare appealed the district court's decision not to quash two subpoenas issued by the defendant.[76]

In affirming the jury verdict and the trial court's discovery rulings, the Eleventh Circuit contrasted Georgia's collateral source rule with Alabama law on the same subject. Whereas collateral source payments received by a plaintiff were inadmissible without exception under Alabama law, Georgia law does not bar the admission of collateral source payments under all circumstances.[77]

The Eleventh Circuit found that the district court did not abuse its discretion by permitting evidence of ML Healthcare's payment arrangement to be admitted for the limited purpose of showing bias on the part of the doctors who testified. The defendant argued that the ML Healthcare funding arrangement created a potential for bias, arguing that if ML Healthcare referred a plaintiff to a doctor who did not provide a favorable causation analysis, ML Healthcare would find other doctors who would help the litigation funder win the case. The Eleventh Circuit recognized that for ML Healthcare's "business model to flourish, ML Healthcare needs the plaintiffs whom it subsidizes to

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74 *Houston v. Publix Supermarkets, Inc.*, 2015 WL 4581541 at *1(N.D. Ga. July 29, 2015); *aff'd*, *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293, 1299 (11th Cir. 2018).

75 The very fact that the TPLF company even had a network of medical providers demonstrates that the funder was doing something more than just providing funding, leveling the playing field, or providing access to the courts.

76 881 F.3d 1293, 1297 (11th Cir. 2018).

77 *Id*. at 1300.

win their lawsuits."[78] "[T]he fact that the evidence also implicates the collateral source rule does not render it irrelevant 'for impeachment purposes.'"[79]

The trial court also permitted the defendant to introduce evidence of ML Healthcare's payments to attack the reasonableness of the plaintiff's claimed medical expenses. However, at trial, the defendant did not cite the discounted payments made by ML Healthcare to support an argument that the medical expenses charged to the plaintiff were improperly inflated. The Eleventh Circuit concluded that it did not need to determine whether the trial court abused its discretion in admitting the evidence for the purpose of challenging the reasonableness of the medical expenses because there was a valid and independent reason to admit the evidence: to show bias.[80]

The Eleventh Circuit also rejected the plaintiff's challenge to the admission of the TPLF evidence as unduly prejudicial under Rule 403 of the Federal Rules of Evidence. While recognizing the potential prejudice arising from the use of the ML Healthcare evidence that runs afoul of Georgia's collateral source rule, the Eleventh Circuit held that the prejudice could be minimized by plaintiff's counsel taking steps to ensure that the jury completely understood that plaintiff remained liable for the full amount billed by her medical providers. In addition, the trial court instructed the jury on the collateral source rule and the rule's prohibition of reducing the plaintiff's damages based on the ML Healthcare payments. "[T]he district court's jury instruction was sufficient to ensure that the ML Healthcare evidence admitted to show bias on the part of plaintiff's doctors would not be used in an unfairly prejudicial manner in violation of Georgia's collateral source rule."[81]

The ruling of the district court in *Houston v. Publix Supermkts., Inc.*[82] regarding TPLF has been followed in two recent federal court cases in Georgia. In *Bramlett v. YRC, Inc.*, the court found that the collateral source rule did not bar discovery from a litigation funding company related to the TPLF arrangement with the plaintiff's treating physicians.

Rangel v. Anderson,[83] addressed the admissibility of a TPLF arrangement. In *Rangel*, the court denied a plaintiff's motion in limine to prohibit a defendant from offering evidence referencing Key Health, a medical lien funding company that had paid for the plaintiff's medical treatment. The *Rangel* court concluded that excluding evidence

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[78] *Id*. at 1302.

[79] *Id*. at 1301, quoting *Barrera v. E.I. DuPont de Nemours & Co., Inc.*, 653 F.2d 919, 921 (5th Cir. Unit A, 1981) (holding that "evidence, properly offered and clearly relevant for impeachment purposes, was improperly excluded simply because, under the Collateral Source Rule, it would have been inadmissible as direct evidence.")

[80] *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.,* 881 F.3d 1293, 1304 (11th Cir. 2018).

[81] *Id*. at 1303–04.

[82] *Houston v. Publix Supermarkets, Inc.*, 2015 WL 4581541 at *2 (N.D. Ga. July 29, 2015); *aff'd*, *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293, 1299 (11th Cir. 2018).

[83] *Rangel v. Anderson*, 202 F.Supp.3d 1361 (S.D. Ga. 2016).

regarding the Key Health TPLF funding arrangement "would not serve the underlying rationale of the collateral source rule."[84] Key Health had not paid or even reduced the plaintiff's medical bills. "[U]nlike an insurance company, Key Health's payments do not reduce Plaintiff's financial obligations."[85] The *Rangel* court also found that evidence of the TPLF arrangement was "highly relevant" for impeachment as to credibility and bias of the plaintiff's treating physicians. The court noted that the plaintiff's treating physicians had a "financial motivation to testify favorably for plaintiff" due to the potential for "receiving more case referrals from Key Health."[86] The *Rangel* court also reasoned that the TPLF arrangement was relevant to the jury's assessment of the reasonableness of the plaintiff's medical treatment and reasonable value of the medial services provided. "It appears Key Health has a motivation for plaintiff's medical bills to be higher . . . thus, the more procedures the plaintiff undergoes, the more money Key Health stands to make."[87]

The sample size of decisions concerning the application of the collateral source rule to TPLF of a plaintiff's medical expenses is too small to say that a general consensus exists. The existing case law provides some support for the argument that the collateral source rule is inapplicable to certain TPLF medical funding schemes. In those states allowing evidence of bias and the reasonableness of a plaintiff's medical bills as exceptions to the collateral source rule, there is a persuasive basis to allow discovery from a litigation funder concerning the TPLF arrangement with the plaintiff's doctors. If discovery is allowed, evidence of the TPLF arrangement may be admissible, depending on the specifics of the TPLF funding arrangement.

Ethics: Issue Spotting

One might assume that ethics issues arising from TPLF are limited to issues between plaintiff attorneys and their clients. And it is likely correct that the majority of analysis to date regarding ethics issues revolve around that relationship, involving such things as TPLF control—or lack thereof—over litigation strategy and decisions, waiver—or lack thereof—of attorney–client or work product privileges, and the like.

Further thought, however, suggests that the overall court system itself and the defendants are potentially impacted by these ethics issues, especially if a given TPLF agreement affects the evidence in the case or the decisions on whether a case will be settled or tried. Therefore, consideration of ethics issues arising from TPLF is important to all involved in the system.

The most oft-cited and comprehensive analysis of ethics issues arising from TPLF is the American Bar Association's 2012 Information Report, ABA 20/20.[88] The Commission on Ethics that wrote the Information Report itself described the limitations:

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[84] *Id*. at 1373.

[85] *Id*. at 1373.

[86] *Id*. at 1373–74.

[87] *Id*. at 1374.

[88] *See supra* note 6.

> The Working Group was directed to limit its consideration to the duties of lawyers representing clients who are considering or have obtained funding from alternative litigation finance suppliers. It did not consider social policy or normative issues, such as the desirability of this form of financing, or empirical controversies, such as the systemic effects of litigation financing on settlements (except insofar as this has an impact on the ethical obligations of lawyers), or the effect that alternative litigation finance may have on the incidence of litigation generally, or unmeritorious ("frivolous") lawsuits specifically. Nor did the Working Group consider legislative or regulatory responses to perceived problems associated with alternative litigation finance in the consumer sector, such as excessive finance charges or inadequate disclosure.[89]

Importantly, then, ABA 20/20 assumes that it is the *client* who enters into the TPLF agreement, not the attorney. But as we have seen, the trend in TPLF funding is away from individual client cases and toward funding of portfolios of cases being handled by attorneys—such that it is the attorney who obtains the funding, rather than the litigation plaintiff. Moreover, ABA 20/20 expressly disclaims any evaluation of risks and benefits of TPLF on the justice system as a whole or the impact on the resolution of cases. Even as to ethics issues, ABA 20/20 concludes that its work should not be regarded as finished: "This Informational Report is *meant as a beginning* to the U.S. legal profession's conversation about ALF through highlighting of associated ethics issues."[90]

The ABA has done the profession a true service, and provides an excellent guide through the ethics issues faced by attorneys whose clients are considering TPLF. But it must be viewed through the lens of its own self-stated limitations and used carefully within the scope of those limitations.

Like ABA 20/20, this DRI white paper includes some limitations on scope. It is not the purpose of this white paper to provide a detailed, in-depth analysis of every possible ethics issue that may arise in the context of TPLF. Rather, our focus is on providing some issue spotting and filling in some of the gaps from those that were outside the stated scope of ABA 20/20, as well as highlighting some developments that post-date the publication of ABA 20/20.

Continuing Relationship Between Attorney and TPLF Company

ABA 20/20 touches on the continuing relationship between an attorney and the TPLF company.[91] Even where it is the client, not the attorney, that is the party to the TPLF agreement, the existence of a continuing relationship between the attorney and the TPLF company creates a potential conflict of interest requiring, at least, informed consent by the client. For example, the TPLF company might be a source of referrals to the attorney. Or, it may pay a referral fee to the attorney for suggesting that the client use TPLF at all, and further suggesting that it consider using a particular TPLF company. As noted by ABA 20/20: "Even in the absence of an explicit agreement to refer clients, a lawyer with a long-term history of working with a particular ALF supplier may have

89 ABA 20/20 at 2.

90 *Id.* at 3 (emphasis added).

91 ABA 20/20 at 16–18.

an interest in keeping the supplier content, which would create a conflict under [Model] Rule 1.7(a)(2)."[92]

Moreover, as ABA 20/20 points out, the plaintiff's attorney may be negotiating the terms of the TPLF agreement on behalf of the client with the TPLF company. In such a situation, the lawyer must ensure that the client is adequately informed of the risk of the agreement, especially if the lawyer has his or her own financial interests in the outcome of those negotiations. Indeed, "even a requirement that the lawyer hold funds for payment to the supplier, in effect putting the lawyer in the role of escrow agent, may create a conflict of interest under Model Rule 1.7(a)(2)."[93] As discussed, *supra* ("Identifying the Issues"), many TPLF agreements include attorney acknowledgements that the attorney will ensure that payment will be made to the TPLF company of its share of any resolution proceeds. Such agreements would potentially seem to run directly afoul of the provisions of Model Rule 1.7(a)(2).

Again, though, ABA 20/20 assumed that the funding relationship was with the client, rather than the attorney. Where it is the attorney who enters into the agreement with the TPLF company, the issue is potentially compounded. Two recent New York ethics opinions shed light on this concern.

In Ethics Opinion 1145,[94] the managing partner of a law firm that represents plaintiffs in commercial litigation inquired as to the propriety of representing a client in litigation funded by a TPLF company in which the lawyer is an investor. Answering the question in the negative, the Committee concluded that this would implicate at least four conflict-of-interest rules: Rules 1.8(a) (business transactions with the client), 1.7(a)(2) (where professional judgment may be adversely affected by the lawyer's own financial or other personal interests), 1.8(e) (barring the attorney from advancing financial assistance to the client), and 1.8(i) (barring lawyers from acquiring a proprietary interest in the cause of action). Moreover, as to the latter two provisions, the Committee determined that even informed consent could not remedy the potential violation, and that the restrictions of these Rules are not subject to waiver. Therefore, the Opinion concluded that the attorney could not be an investor in the TPLF company that provided funding to the client.

Perhaps more salient, in light of the trend towards TPLF companies funding portfolios of a lawyer's cases rather than individual cases, is the opinion issued by the New York City Bar Association's Professional Ethics Committee, Formal Opinion 2018-5,

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92 *Id.* at 16–17. Similar conflicts of interest have been found by some courts where defense counsel has a long-standing relationship with an insurance company that hires it to defend insureds. *See, e.g., Allstate Insurance Company v. Carioto*, 194 Ill.App.3d 767, 389, 551 N.E.2d 382 (1st Dist. 1990).

93 *Id.* at 18, note 59.

94 Issued March 7, 2018 by the New York State Bar Association Committee on Professional Ethics, *available at* https://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=80508.

entitled "Litigation Funders' Contingent Interest in Legal Fees."[95] The Committee evaluated the question of the ethical issues arising from the TPLF company entering into an agreement with the attorney directly, where the TPLF company's recovery was to be paid out of, and contingent on, the attorney fees earned by the attorney in the funded matter(s). The Committee determined that such agreements violate Model Rule 5.4(a), which prohibits fee-sharing agreements with non-lawyers. Importantly, the Committee's analysis came to the same conclusion, regardless of the form of the agreement and regardless of whether the funding was non-recourse or with recourse—that is, the same determination applied even if the attorney was obligated to repay the funding company where there was no recovery in a given underlying case, as long as the amount of the repayment was not a fixed amount or rate of interest but, rather, depended on the amount of the lawyer's fee recovery.

Formal Opinion 2018-5 acknowledges that some New York courts have enforced TPLF agreements entered into by attorneys that may violate the ethical rules. But, as the Committee itself notes, that is because courts will not allow attorneys to use their own ethical violations as a basis for avoiding their contractual obligations.[96]

Note also that both of these ethics opinions evaluated situations involving individual cases. Funding of portfolios of cases raise at least these same concerns and perhaps additional ones since the attorney's ability to attract additional clients and personal income are impacted by his or her desire to keep the TPLF funder happy and obtain additional funding opportunities.

Moreover, while these issues at first blush appear to impact only the attorney who is funded (or whose clients are funded), they in fact affect the defendants, as well, and indeed the court systems where the funded litigation matters are filed. Court dockets are burdened. Defendants are required to defend matters and issues that may never have arisen but for the funding. The reputation of attorneys generally and the fairness of the court system itself are at issue when the business model of some attorneys includes funding plans that potentially run afoul of ethical rules.

Waiver of Privilege? Attorney–Client vs. Work Product

A distinction is necessary here: while most of this white paper has discussed the deal documents—that is, the TPLF agreement itself, this subtopic primarily concerns communications to and from the TPLF company about the underlying case itself. Note, though, that this is not exclusive—if the deal documents include communications about the merits of the funded case, this discussion applies to them, as well.

This topic overlaps with the discoverability issue discussed in "Litigation Issues Arising from TPLF," *infra*, but it originates as an ethical issue. In the due diligence pro-

95 Issued July 30, 2018, *available at* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees.

96 *See contra Prospect Funding Holdings, LLC v. Saulter*, 2018 IL App (1st) 171277, where the court refused to enforce the agreement, but referred the attorney to the disciplinary commission for investigation.

cess to determine whether a particular case or portfolio of cases ought to be funded, communications between the plaintiff's attorney and the TPLF company doing the evaluation about the merits of the case are common. Even after funding, it is common for the TPLF company to expect updates on the progress of the matter, even where the TPLF company does not claim to have any control over the decisions that are made in the matter.

Such communications, then, are not between the lawyer and the client, but rather between the lawyer and a stranger, a third party. While this is true throughout the case, it is especially true where the TPLF company is still in its due diligence process and has not yet decided whether to fund the case. Almost all of the cases that have considered the question have concluded that communications with the TPLF company constitute communications to a third party, and waive attorney–client privilege.[97]

It is worth noting that, with regard to privilege, one cannot correctly analogize communications between plaintiff's counsel and the TPLF company with communications between defense counsel and its client's insurer, the latter communication being generally considered privilege. There are important differences between the TPLF/attorney relationship and the insurer/attorney relationship. Probably most important of all, in most instances, the insurer has contractually undertaken the right and duty to defend the litigation. That is, the insurer undertakes to control—and pay for the defense, usually selecting defense counsel. This contrasts sharply with the oft-stated, but perhaps honored in the breach, position of those in the TPLF industry that they do not control or participate in the litigation for the plaintiff.

Moreover, the insurer's relationship with the insured *pre-exists* the incident giving rise to the lawsuit. When the lawsuit is filed, the insured tenders it to the insurer and the insurer hires defense counsel to represent the insured. TPLF agreements, however, almost always come into existence *after* the incident; indeed, some of the cases holding that a given TPLF agreement was not champertous emphasized this very point.[98] Thus, the insurer is an active participant in the claim, pursuant to a pre-existing contractual right and obligation, from its outset, whereas the TPLF company comes into the picture only at a later date (after the incident, and often after the lawsuit is filed).

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97 *See, e.g., Miller UK Ltd. v. Caterpillar, Inc.*, 17 F.Supp.3d 711, 733 (N.D.Ill. 2014) ("In conclusion, any documents otherwise protected by the attorney–client privilege that Miller shared with any prospective funder lost their protection under the attorney–client privilege when shared with the third party funders."); *see generally* ABA 20/20 at 24–25 ("Lawyers may not disclose confidential information to an ALF supplier without the client's informed consent; lawyers should warn clients about the risk of waiver of the attorney–client privilege (often as part of obtaining informed consent to disclose the information"), and at 34-35 ("Thus, under privilege law in most jurisdictions, sharing of privileged communications with an ALF supplier is a voluntary disclosure that may effect [sic] of the attorney-client privilege"—and concluding that the common interest doctrine will not usually prevent such waiver).

98 *See, e.g., Miller UK*, *supra*, 17 F.Supp.3d at 724–25; *Obermayer, supra*, 2025 U.S. Dist. LEXIS 17922 at *8; *Kraft, supra*, 668 So.2d at *8–9.

Ethical issues of professional independence arising from control are heightened as discussed above for those TPLF companies that have some form of pre-existing relationship (those that may have an ongoing relationship with the referring attorney or who have funded portfolios of cases to enable them to advertise or solicit additional cases[99] and, to some extent in ABA 20/20, in the context of client [rather than attorney] funding).

While, as noted, most courts have ruled that communications with the TPLF company waive attorney–client privilege, many have nonetheless protected the communications under the work product doctrine. ABA 20/20 does not discuss this issue in much detail,[100] but cases such as Miller UK do.[101] Such cases note that the goals and standards for attorney–client privilege and work product are different. Assuming that a given document qualifies as work product, the standard for waiver of work product protection is whether the disclosure to the third party "substantially increases the opportunity for potential adversaries to obtain the information."[102]

The work product doctrine, however, is fraught with important exceptions, including the substantial need exception of Fed.R.Civ.Pro. 26(b)(3). For example, the court in *Doe v. Soc'y of the Missionaries of the Sacred Heart*, [103] ruled that the documents were relevant because they could provide information relevant to the statute of limitations defense. While the court also found that many of the documents were immune from discovery as work product, it noted that others of the documents shared with the TPLF company did not contain attorney impressions or opinions (for example, an email communication with a public relations firm), while others could be redacted to delete the attorney impressions while still providing the date-specific information needed by the defendant.[104]

Consider as well those cases where there were cold calls from the TPLF company, where the TPLF company allegedly encouraged unnecessary surgery to increase the values of the claim, and other cases where the activities of the TPLF company actually affect the evidence in the case (such as where they cut deals on medical expenses and refer cases to the doctors). The court in *Miller UK* distinguished a case finding TPLF communications to be discoverable[105] on the ground that, in that case, the TPLF funder "had a direct financial stake in the case's outcome"—noting that the funder was there-

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[99] *See* discussion of *Shenaq v. AkinMears* in "Identifying the Issues," *supra*, for example.

[100] ABA 20/20 at 35–36.

[101] *Miller UK, supra,* 17 F.Supp.3d at 734–39. *See also, e.g., United States ex rel. Fisher v. Ocwen Loan Servicing, LLC,* 2016 U.S. Dist. LEXIS 32967, *12–18 (E.D. Tex. 2016).

[102] *Id.* at 736. Moreover, "[i]n contrast to the attorney-client privilege, the party asserting work product immunity is not required to prove non-waiver. The party asserting waiver has the burden to show that a waiver occurred." *Id.* at 737.

[103] *Doe v. Soc'y of the Missionaries of the Sacred Heart,* 2014 U.S. Dist. LEXIS 60799, *7–8 (N.D. Ill. 2014).

[104] *Id.* at *13–16.

[105] *Berger v. Seyfarth Shaw LLP*, 2008 U.S. Dist. LEXIS 88811 (N.D. Cal. 2008).

fore a potential witness in the case, but that Miller UK's funder was not.[106] But if the funder is a potential witness, or if bias or other admissible evidence is relevant, and the only way to obtain that evidence is to produce the documents of communications with the TPLF entity, one of the exceptions to the work product doctrine may well apply—or at least be in play for the court to determine.

Discoverability

Funding Agreements and Communications with the TPLF Company

Despite protestations from some of the bigger players in the TPLF industry, there is no legitimate dispute that the mere existence of a TPLF agreement in a case can have a significant effect on its eventual resolution, the amount incurred by all parties before that resolution is reached, and the length of time and resources that the court system itself must devote to such matters. And that is true where the TPLF company is found to have no control or other direct impact or involvement in the litigation; it is even more true where—as demonstrated in the many cases discussed in prior sections—the TPLF company has some measure of control over some aspect of the case, creates incentives or disincentives for the plaintiff regarding settlement, trolls for potential plaintiffs, develops continuing or referral relationships with lawyers or medical professionals, or creates a situation that impacts the actual evidence to be presented to the trier of fact.

Case law, not surprisingly, is not uniform on the discoverability of either the TPLF agreement itself (the "deal documents" as described in, for example, *Miller UK*) or the communications between the plaintiff or plaintiff's lawyer with the TPLF company either during the due diligence process or during the litigation itself post-funding.

Oft-cited *Miller UK* determined not to require production of the deal documents following an *in camera* inspection.[107] But, respectfully, that misses the point. First, the court did not give the defendant the opportunity to review the document itself (even under a protective order) and make arguments about its content and its impact on the litigation. Second, the issue is not solely whether the relationship is akin to insurer/insured—but rather whether the funding arrangement creates incentives for litigation choices, and like insurance, whether disclosure will allow the parties to make "realistic appraisals" of settlement and litigation strategy.[108]

Better reasoned, therefore, is *Gbarabe v. Chevron Corp.*:

> Plaintiff's proposal for *in camera* review of the agreement by the Court is inadequate because it would deprive Chevron of the ability to make its own assessment and argu-

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[106] *Miller UK*, 17 F.Supp.3d at 723.

[107] "I have reviewed *in camera* the agreement between Miller and its funder, and there is nothing in those agreements that remotely supports Caterpillar's attempt to equate Miller's funding agreement to the relationship between an insured and its insurer." 17 F.Supp.3d at 729.

[108] *See* discussion in "Like Long-Discoverable Insurance Information, TPLF Impacts Litigation and Settlement Evaluation," *supra*.

ments regarding the funding agreement and its impact, if any, on plaintiff's ability to adequately represent the class.[109]

There is, of course, a time and place for *in camera* inspections. Such inspections are particularly appropriate where issues of privilege or work product are being considered. But it is far less appropriate regarding the terms of the funding agreement itself, where attorney–client communications and attorney thoughts and strategies are much less likely to be included. And, to the extent that the TPLF company decides to include such potentially protected-from-disclosure provisions in the agreement itself, courts should not allow that choice to be a reason to deprive the defendant of the right to make its own arguments and to meet the same objectives for settlement and litigation strategy that require production of insurance policies to the plaintiff. If necessary, those parts of the funding agreement that contain otherwise-protected information can be redacted and subjected to in camera review by the court, but that is not a good reason to find that the rest of the deal documents, including the terms setting out the basics of the funding terms, regardless of whether there is control, and the like, should be produced.

One trial level state court has ruled that the financial terms of the funding agreement themselves might be protected by work product. *Charge Injection Technologies, Inc. v. E.I. Dupont de Nemours & Co.*, 2015 Del.Super. LEXIS 166 (Del.Super. 2015). The plaintiff argued, and the court agreed, that the financial terms (such as the dollar amount funded and the percentage of any recovery to be received by the TPLF company) somehow would reveal the mental impressions of the plaintiff's attorney as reflecting an assessment of the risk of the case. The court's discussion, however, never quite explains how it reached this conclusion. In what way does the amount invested provide information to the litigation opponent about the arguments and theories of the plaintiff? Citing an earlier Delaware case, *Carlyle Inv. Mgmt. LLC v. Moonmouth Co., S.A.*, 2015 De.Ch. LEXIS 42 (Del.Ch. 2015), the court posited that the agreement "more likely than not included discussions of the merits and potential litigation strategies." [110] But it is difficult to discern any basis for this assumption—or how the financial terms are akin to discussions of merits and strategies.

While most of the terms of TPLF agreements that can be reviewed are from intra-industry disputes between the TPLF companies and the entities that they funded or their investors, none of the reported decisions discuss provisions of the actual funding agreement that reflect attorney mental impressions about the merits or strategies. We suggest that it is incorrect to assume that the agreement itself (as distinct from due diligence or post-funding reports) qualify as work product.

As to communications with the TPLF company, most of the few courts that have considered the subject have determined that communications between the plaintiff's attorney and the TPLF company about the merits of the case under consideration con-

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[109] *Contra Kaplan v. S.A.C. Capital Advisors, L.P*, 2015 U.S. Dist. LEXIS 135031 (S.D.N.Y. 2015). Note, however, that the defendants appear to have only asserted relevance as to the impact of TPLF on the plaintiffs and putative class, and did not raise issues about the impact of TPLF on themselves, nor the Rule 26 issues discussed herein.

[110] *Id.* at *11.

stitute a waiver of attorney–client privilege, but nonetheless are protected by the work product doctrine.[111]

But, as discussed in "Waiver of Privilege? Attorney–Client vs. Work Product," *supra*, there may well be any number of occasions when the work product doctrine does not and ought not protect such communications, especially where there is evidence that the TPLF company is engaging in activity that can result in lawsuits being filed that have less-than-savory aspects[112] or where the evidence in the case itself is impacted.[113] The larger point is that one size does not fit all, and attorneys involved in litigation or policy-making on the issue of TPLF generally, and discoverability in particular, should take these types of issues into account in making appropriate arguments to the court or the policy-maker.

Trend Toward Discoverability?

Beyond the developing case law, most (but not all) federal and state jurisdictions have long required some form of disclosure regarding any entity that has a financial interest in the outcome of a litigated matter.

In April 2018, Wisconsin enacted an amendment to its civil procedure rules that requires disclosure of TPLF agreements. Wisc.Stat. §804.01(2)(bg) states:

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

There are two elements of particular note: (1) like insurance policies under Fed-.R.Civ.Pro. 26(a), TPLF agreements must be disclosed "without awaiting a discovery request," and (2) the party is required to "provide to the other parties" a copy of the actual agreement itself, not just identify the mere existence of the agreement or the identity of the funding entity. In this, at least from a statutory/regulatory/rules perspective, Wisconsin currently appears to stand alone, although (as discussed in "Funding Agreements and Communications with the TPLF Company," *supra*) some courts have required production of a copy of the agreement itself, as well.

The most comprehensive discussion and listing of the various federal and state requirements is contained in a memorandum dated February 7, 2018, by Patrick A. Tighe, Rules Law Clerk of the Advisory Committee on Civil Rules.[114] Mr. Tighe's mem-

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111 *See, e.g., Miller UK,* "Like Long-Discoverable Insurance Information, TPLF Impacts Litigation and Settlement Evaluation," *supra*; *United States ex rel. Fisher*, note 78, *supra*.

112 *See supra notes* 9–11.

113 *See* "TPLF Potentially Impacts Decisions by Courts and Juries on Issues in the Case," *supra*.

114 Mr. Tighe's memorandum ("Tighe") is part of a larger report by the Advisory Committee dated April 10, 2018. It consists of a memorandum and several appendices summarizing rules in federal circuit courts, federal district courts, and state statutes and regulations. A copy of the entire report is *available at* http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf; Mr. Tighe's report begins at 209.

orandum provides information and statistics about the disclosure requirements in each jurisdiction that had them as of November 30, 2017 (before the Wisconsin statute was enacted). As he notes, however, while many jurisdictions require disclosure of the existence of TPLF (and anyone else who has a financial interest), none of the rules that he cites required disclosure of the litigation finance agreement itself.[115]

Even the much discussed standing order issued by the Northern District of California in January 2017 only added: "In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."[116] Thus, although there is little doubt that a TPLF agreement would fall within the requirements already in existence (and indeed, Burford argued that identification of litigation funders was already required by the plain language of Northern District of California Local Rule 3-15[117]), and the new standing order was much publicized as a first-of-its-kind rule for TPLF disclosure,[118] note that it only requires disclosure of the identity of the funding entity—and only in class actions and similar lawsuits.

As also noted and summarized by Tighe, the purpose of these disclosure rules "is to assist judges with assessing possible recusal or disqualification,"[119] rather than for use in the litigation either as evidence (where appropriate) or to allow the parties to evaluate their settlement or litigation strategies.

Recent proposed federal bills follow in the footsteps of those noted by Tighe. H.R. 985[120] includes a proposed section entitled "Third-party litigation funding disclosure," but requires disclosure only in class actions, and only of the identity of the funder. In the Senate, S.2815,[121]introduced by Senators Grassley, Tillis, and Cornyn on May 10, 2018, goes a step further and, in DRI's opinion, in the right direction. Still limited to class actions and multidistrict litigation, it requires the plaintiff to disclose (without a request from the defendant) to the court and all parties, in writing, both the identity of the litigation funder and a copy of the TPLF agreement.

Combined with the developing case law, a trend towards transparency is discernable. Most courts already have rules requiring disclosure of the existence and identity

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115 *Id.* at 4 (p. 212 of the fuller report).

116 See Paragraph 19, available at file:///C:/Users/2560/Downloads/Standing_Order_All_Judges_1.17.2017.pdf.

117 Tighe, note 109, *supra* at 3, note 3.

118 *See, e.g,* Kevin LaCroix, *District Court Adopts First-of-its-Kind Litigation Funding Disclosure Requirement*, The D&O Diary, January 26, 2017, *available at* https://www.dandodiary.com/2017/01/articles/litigation-financing-2/district-court-adopts-first-kind-litigation-funding-disclosure-requirement/.

119 Tighe, *supra* note 109, at 5 (p. 213 of the fuller report).

120 The "Fairness in Class Action Litigation Act of 2017," *available at* https://www.congress.gov/bill/115th-congress/house-bill/985/text, passed the House on March 9, 2017, and is still pending in the Senate.

121 The "Litigation Funding Transparency Act of 2018," *available at* https://www.congress.gov/bill/115th-congress/senate-bill/2815/text.

of TPLF. Wisconsin's statute, the Senate bill, and some cases suggest that the agreement itself ought to be disclosed. Tighe's memorandum highlights the lack of uniformity of rules among the various state and federal jurisdictions. The trend towards transparency may be moving, but it is moving slowly.

Conclusion: DRI's Recommendations

DRI agrees with others on the defense side of litigation that the time has arrived for uniform rules and disclosure of TPLF agreements.[122] As the TPLF industry expands, and more and more parties enter the market on both the funder and recipient sides of the transaction, more and more ethical boundaries will be at risk. These transactions and issues impact more than the parties to the agreement, but the defendants and the court system, as well. It would be nice to believe that all such transactions will be clean and vanilla, that TPLF does nothing more than provide access to the courthouse and playing-field leveling for needy recipients who retain control over all aspects of their claims. Even in these circumstances, solid policy arguments support disclosure so that all parties can make reasoned judgments on strategy and resolution, just as plaintiffs can currently do because production of insurance information for defendants is mandated in most jurisdictions; that would truly level the playing field.

But as described in this paper and within the experience of many of DRI's 20,000 members, all too often the transactions are not clean and vanilla. Examples of suggesting unneeded surgeries, trolling for plaintiffs in advertisements, cross-referrals to attorneys and medical providers, manipulating potential trial evidence, and other practices are found in reported case law and published articles. These practices, and other potential practices not yet reported on, render the existence and terms of the agreements themselves and, where appropriate, communications with the TPLF companies, essential for the fairness of the justice system.

DRI, therefore, proposes that appropriate judicial and legislative authorities ought to be evaluating, and setting rules, requiring uniform disclosure of TPLF agreements to all parties in litigation where such transactions exist. Whether additional documents and communications ought to be disclosed will depend, as always in the realm of attorney–client privilege and the work product doctrine, on the circumstances of the particular case, given the wide variety of different agreements and fact patterns. But disclosure of the TPLF agreement itself is a precursor, because without that disclosure, it is impossible for a defendant or the court to determine whether any further circumstances exist that might justify (or not) investigation into additional documentation.

Further, disclosure should not be limited to class actions or MDL litigation. As numerous examples discussed in this white paper demonstrate, TPLF is found in much

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[122] *See, e.g., Request For Rulemaking to the Advisory Committee On Civil Rules*, Lawyers for Civil Justice, August 10, 2017, *available at* http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdl_cases_8-10-17.pdf, in the context of MDL litigation. A broader proposal, dated April 9, 2014, is *available at* http://www.lfcj.com/uploads/3/8/0/5/38050985/final_version_-_tplf_disclosure_letter_4_9_2014.pdf.

more common and mundane litigation, but has just as much impact (and perhaps more, given the far greater number of such types of litigation) on defense of claims and the judicial system as a whole.

The explosion of articles in the public and professional press establishes the growing nature of both the TPLF industry and the many issues it generates. Dialog and serious consideration of solutions, rather than stonewalling, is the best method of reaching consensus. DRI will gladly participate in this needed dialog.