RULES SUGGESTION
to the
ADVISORY COMMITTEE ON CIVIL RULES
and its
TPLF SUBCOMMITTEE

UNIFORM DISCLOSURE OF THIRD-PARTY LITIGATION FUNDING CONTRACTS IS NECESSARY TO INFORM JUDGES' AND PARTIES' KEY CASE MANAGEMENT DECISIONS

An Examination of TPLF Contracts Reveals Common Control Mechanisms that Can Affect the Litigation Process and Influence Substantive Outcomes

Transparency Doesn't Impose a Burden; It Lifts a Veil

September 3, 2025

Lawyers for Civil Justice ("LCJ")[1] respectfully reiterates its suggestion that the Advisory Committee on Civil Rules ("Advisory Committee") and its TPLF Subcommittee promulgate a rule requiring disclosure of third-party litigation funding ("TPLF") contracts.[2] Disclosure to courts and parties is necessary to inform case management and prevent misunderstandings caused by the control mechanisms in TPLF contracts that can alter the usual dynamics of litigation and resolution. A uniform disclosure rule would also relieve courts of having to expend judicial resources to decipher on an *ad hoc* basis whether a particular agreement should be disclosed in a particular case. The insurance disclosure requirement in Rule 26(a)(1)(A)(iv) is

[1] LCJ is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged in reforming federal procedural rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

[2] *See* Lawyers for Civil Justice and US Chamber of Commerce Institute for Legal Reform, Rule Suggestion, *It Is Time to Address the Patchwork of Inadequate Practices: How the Lack of FRCP Guidance Is Failing Courts and Parties Who Need a Uniform and Credible Procedure for Understanding Third-Party Litigation Funding Agreements*, Oct. 2, 2024, https://www.uscourts.gov/sites/default/files/24-cv-v_suggestion_from_lcj_and_ilr_-_rule_26_tplf.pdf.

the appropriate model. Like insurance agreements, TPLF contracts influence the conduct of litigation generally, far beyond the "claims and defenses" of a particular case.[3] A TPLF disclosure rule would provide judges with clear guidance, help all parties make informed strategic and settlement decisions based on a "realistic appraisal of the case,"[4] and help protect vulnerable plaintiffs, many of whom likely do not understand the instruments of control given to funders when named parties or their lawyers sign TPLF contracts.

The nine TPLF contracts discussed in this Rules Suggestion (and attached as Exhibits A-I) provide clear insights about the funding agreements that are common in federal courts today because they include contracts written and agreed to by the largest funders who are investing billions of dollars in federal court litigation as well as funders with fewer litigation investments.[5] Examining specific provisions—and understanding how they work separately and in combination—reveals how a rule requiring disclosure of TPLF contracts would provide courts and parties critical insight for managing their cases effectively.

Introduction

TPLF agreements give non-party funders specific mechanisms of control or significant influence over litigation and settlement decisions, in addition to the right to a portion of any proceeds from a judgment or settlement. Examining the funders' tools of control in TPLF contracts reveals how funders influence the course and outcomes of lawsuits in ways that courts and parties need to understand in order to manage litigation fairly and efficiently. The potency of these hidden control mechanisms may be startling—even "amazing"[6]—to those who encounter them for the first time, read boilerplate disavowals of control, or hear funders disclaim control over their funded cases.[7]

Some TPLF contracts expressly give non-party funders direct control over the litigation.[8] Other TPLF contracts ensure that funders have indirect—but still powerful—influence by obligating the funded plaintiffs and lawyers to pursue the claims (even if at some point they want to settle), to monetize equitable relief, and by allowing funders the "veto power" of discontinuing funding at any time.[9] Contracts may also give funders significant influence over plaintiffs' counsel, not

[3] The Advisory Committee rejected the notion that Rule 26(b) "relevancy" analysis should limit the disclosure of insurance agreements when it promulgated Rule 26(a)(1)(A)(iv). Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment. At the time, many courts were rejecting discovery requests for insurance agreements "reason[ing] from the text of Rule 26(b) that it permits discovery only of matters which will be admissible in evidence or appear reasonably calculated to lead to such evidence." *Id*. Those courts "avoid[ed] considerations of policy, regarding them as foreclosed." *Id*. The Advisory Committee concluded that the policy considerations transcend "relevancy" and necessitate the disclosure of insurance agreements.
[4] As the Advisory Committee said about disclosure of insurance coverage, a rule requiring disclosure of TPLF contracts "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." Fed. R. Civ. P. 26 advisory committee notes to 1970 amendment.
[5] *In re Fresh Acquisitions, LLC*, No. 21-30721-SGJ-11, 2025 WL 2231870, at *9 (Bankr. N.D. Tex. Aug. 5, 2025) (observing that even purported TPLF "experts" have "only seen a few actual litigation funding agreements").
[6] *Id.* at *5 ("the Litigation Funding Agreement here seemed rather amazing to the court").
[7] *See infra* Section IV.
[8] *See infra* Section I.
[9] *See infra* Section II.

only in the selection and replacement of counsel, but also by obligating the plaintiff to cooperate with counsel and enabling the sharing of success fees in ways that create and exacerbate conflicts of interest—all of which weaken the ability of often-vulnerable and unsophisticated plaintiffs to participate in, or even understand, their own cases.[10]

The Advisory Committee should take particular notice of provisions that can, unbeknownst to judges, shape substantive outcomes and undermine court orders. The contracts that require the plaintiff to pay the funder the monetary value of any injunctive relief or specific performance awarded[11] impose a strong disincentive against non-monetary relief that can skew the remedies presented to, and ultimately ordered by, the court. Some contracts mandate that the plaintiff and counsel provide all documents obtained in the course of litigation to the funders,[12] a provision inconsistent with most protective orders. And some contracts undermine court orders to pay costs and sanctions by obligating plaintiffs to pay all such penalties[13]—even where the misconduct being sanctioned originated with the funder or its selected-and-controlled counsel, not with the plaintiff. Absent disclosure of TPLF contracts, courts and litigants have no awareness of such provisions and no insight into how they might impact their cases. Indeed, courts and parties may not even know when such provisions are having an effect because TPLF contracts typically prohibit the plaintiff and counsel from divulging the existence of the agreement or discussing its terms. A rule requiring disclosure of TPLF contracts would aid judges by lifting the veil on provisions that courts otherwise do not know about.

The TPLF Subcommittee has asked: "What is the court to do with the information if the disclosure is required?"[14] The answer is: the court would not have to take any action because a rule requiring disclosure of TPLF contracts would provide courts and parties the information needed to manage cases effectively and reach a just result. Courts typically take no action in response to the disclosure of insurance agreements, which similarly inform courts and parties about the interests of a non-party who may have significant control over litigation and settlement decisions. Aristotle observed: "Knowledge of the fact differs from knowledge of the reason for the fact." Knowing that a plaintiff is not responding to settlement offers, or is demanding monetary damages rather than injunctive relief, is different from knowing that a non-party funder is preventing the plaintiff from considering settlement or requiring the plaintiff to pay the funder the monetary value of any non-monetary relief. Simple disclosure of the TPLF contract provides such knowledge, with no burden on judicial resources. In addition, if TPLF-related issues or problems do arise, prior disclosure ensures that courts will have the benefit of open and adversarial briefing in keeping with normal litigation procedure. Absent a disclosure rule, courts will continue to engage in *ex parte* communications about TPLF contracts, which places a heavy burden on judicial resources by putting the onus on judges to understand the agreements and how they work in practice.[15]

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[10] *See infra* Section III.
[11] *See infra* Section II.B.
[12] *See infra* Section V.
[13] *See infra* Section VI.
[14] Advisory Committee on Civil Rules, Agenda Book, Apr. 1, 2025, 272, https://www.uscourts.gov/sites/default/files/2025-03/2025-04-civil-rules-committee-agenda-book-final-updated-3.28.25.pdf.
[15] *See infra* Section VII.

The Subcommittee also asks: Will a disclosure rule cause more discovery motions and battles? The answer, informed by the experience of states with TPLF disclosure rules, as well as the long-term federal judiciary's experience with insurance contracts, is most likely "no." However, it depends on how the rule is written. A simple rule along the lines of Rule 26(a)(1)(A)(iv) requiring disclosure of agreements would provide a clear procedure and relieve courts and parties from disputes over TPLF disclosure. Conversely, a complex rule that lets some TPLF contracts remain secret, includes fact-specific prerequisites for discovery, or suggests a list of factors that weigh differently in every case, would inevitably lead to more litigation.

I. TPLF CONTRACTS CAN GIVE DIRECT CONTROL OVER LITIGATION AND SETTLEMENT TO NON-PARTY FUNDERS, AFFECTING COURTS AND PARTIES

A. Funders' Control Over Litigation Decisions Affects Case Management

Some TPLF agreements expressly give the funder the right to control litigation and direct counsel. For example, the ILP Funding Agreement[16] provides that "the Lawyers and ILP will determine what Claims should be pursued in the Proceedings" and that "ILP will give day-to-day instructions to the Lawyers on all matters concerning the Claims and the Proceedings and may give binding instructions to the Lawyers and make binding decisions on behalf of the Plaintiff in relation to the Claims."[17] These rights are reinforced by other provisions, including the requirement that the plaintiff instruct the lawyers to "comply with all instructions given by ILP,"[18] that ILP's "management services" include "providing day-to-day instructions to the Lawyers,"[19] and that the funder's discretionary decision to cease funding requires counsel to "discontinue the prosecution of the Claim."[20] The contract also gives ILP discretion over appeals.[21]

The Therium Chevron Funding Agreement[22] permits the lawyers in a class action case to do only three things without Therium's consent—join an additional party, add a new cause of action, and commence additional proceedings. It otherwise requires that "the Proceedings shall be prosecuted in accordance with the Project Plan" and "subject to Therium's prior agreement to any proposed variation of the Project Plan."[23]

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[16] Exhibit A, Litigation Funding Agreement between International Litigation Partners Ltd. and Laurence John Bolitho, March 13, 2014, ("ILP Funding Agreement").
[17] *Id.* at §5.1.
[18] *Id.* at §6.3.1 (although this is constrained to some degree by § 13, which restores some rights to the clients in the event that counsel identifies a conflict of interest, except with respect to settlement, which client never controls).
[19] *Id.* at §7.1.
[20] *Id.* at §5.3.
[21] *Id.* at §11.
[22] Exhibit B, Litigation Funding Agreement between Therium Litigation Funding, Jacqueline A. Perry QC, and Neil J. Fraser, Mar. 29, 2016, ("Therium Chevron Funding Agreement").
[23] *Id.* at §7.

The ramifications of such provisions are explicit in the Burford/Sysco Agreement,[24] which provides that, in the event of a breach by the funded plaintiff ("breach" being defined broadly[25]), the funder may take over the conduct and settlement of the litigation, including instructing or replacing counsel.[26] The contract contemplates that the funder will "act in the name of" the plaintiff—and requires the plaintiff to continue to appear "at any hearings" at the direction of the funder.

Disclosure of these types of provisions would help courts and parties understand why the named plaintiff may not be directing—or even participating in—the litigation. It would make courts and parties aware of any control exercised by a non-party with separate financial interests and strategic objectives for the case. Knowing about such an agreement allows the court to anticipate and avoid practical case management problems; for example, if a court knows that a non-party funder has significant control over litigation decisions, it may require the funder to attend status conferences in addition to the plaintiff who might not be able to participate meaningfully. Similarly, should a court impose costs or sanctions for discovery violations, knowledge that the funder was responsible for the sanctionable conduct will ensure that those sanctions will not be borne by a plaintiff who lacked authority under the TPLF contract to prevent the violation.

Further problems can occur when courts and parties are unaware that a TPLF contract may itself be the source of conflict. Courts ignorant of TPLF contractual provisions cannot detect when a disputed contract term, rather than something in the litigation, causes counsel's actions. Disputes between funders and plaintiffs about who gets to make particular litigation decisions may manifest as confusing delays, contradictory positions or statements, or counsel's apparent inability to act or explain an action or decision. A court might attribute such delays to typical client indecision when they actually reflect a covert, three-way struggle between plaintiff, counsel, and the non-party funder over contractual rights and obligations.

A simple disclosure rule for TPLF contracts analogous to that for insurance agreements would provide the necessary information to avoid these problems with no judicial action required. Judges would know not only who is "in the courtroom" but also how the non-party funder's actions may affect the court's case management. Indeed, courts have found good cause for TPLF disclosure when funders are involved in making decisions about the case.[27] In contrast, when TPLF contracts are concealed from the court and the parties, courts may be burdened with time-consuming disputes that could have been addressed early in the process or avoided altogether. Courts that do not consider TPLF contracts may never understand (even in retrospect) how these

[24] Exhibit C, Second Amended and Restated Capital Provision Agreement between The Counterparty and The Capital Providers, Dec. 22, 2020, ("Burford/Sysco Agreement").
[25] *Id*. at §12.2.
[26] *Id*. at §13.1.
[27] *See, e.g., MSP Recovery Claims Series, LLC v. Sanofi-Aventis U.S., LLC,* 2024 WL 4100379 at *6 (D.N.J. Sept. 6, 2024) (finding "good cause" for "discovery into litigation funding" where documents suggest that the funders "have intimate involvement in Plaintiffs' decision-making") (*citing* the holding in *In re: Valsartan NDMA Contamination Litigation*, 405 F. Supp. 3d 612, 615 (D.N.J. 2019), that good cause is satisfied where "a non-party is making ultimate litigation or settlement decisions, the interests of plaintiffs or the class are sacrificed or not being protected, or conflicts of interest exist").

contracts can impair the court's ability to execute good case management and thwart the parties' ability to navigate the litigation and resolve their disputes.

B. Funders' Control Over Settlement Affects Parties' Ability to Discuss Resolution—Impeding Proper Judicial Management

Some TPLF contracts expressly give the funder the right to accept or reject settlement offers. In the ILP/Bolitho Funding Agreement, the funded plaintiff cannot "discontinue, abandon, withdraw or settle" the litigation or "reject any Settlement offer made by any Defendant" without prior written consent from ILP.[28] The contract even prevents the funded plaintiff from having "any communication with any Defendant" or defense representative.[29] In the event that the funded plaintiff and the funder disagree about whether to settle the case, the contract provides that counsel will decide[30]—the same counsel who take direction from the funder.[31] Similarly, the Amendment to the Burford/Sysco Agreement[32] provides that the named party "shall not accept a settlement offer without the Capital Providers' prior written consent, which shall not be unreasonably withheld…."[33] A related provision states that the funded plaintiff "shall not … agree to settle or otherwise resolve any separate action, claim, suit, or arbitration" with any defendant in the underlying litigation if doing so would impact the funder's recoveries.[34] In the LMFS Funding Agreement,[35] the plaintiff "gives [funder] full and complete authorization to negotiate and accept any settlements of Claims" and "agrees to cooperate and consent to any settlement deemed reasonably [sic] by [funder]."[36] The agreement requires the plaintiff "to direct his/her attorney to settle Claims as directed by [funder] if so directed,"[37] and requires the funder's consent to dispose of or discontinue the claims.[38]

Most courts consider it good case management to ensure that decision makers are in the room, or at least available, during settlement conferences. Yet many courts do not realize that some TPLF contract provisions not only transfer settlement decisions to funders, but also often create conflicts between the plaintiff's interests and the funder's. The ILP Funding Agreement starkly

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[28] Exhibit A, ILP Funding Agreement at §6.2.
[29] *Id*. at §6.7.
[30] *Id*. at §13.5.
[31] *See infra* Section III.
[32] Exhibit D, Amendment No. 1 to Second Amended and Restated Capital Provision Agreement, Mar. 31, 2022, ("Amendment to Burford/Sysco Agreement").
[33] *See* Amendment to Burford/Sysco Agreement at §7(b)(v). This language is purportedly cabined by language providing that "the Capital Providers (and their respective Affiliates) shall have no right to exercise control over the independent professional judgment of its Nominated Lawyers and shall not seek to impose a commercially unreasonable result with respect to settlement," but *see infra* Section IV for a discussion of why the limitations present in this provision may be illusory. This amendment replaced a provision that required Sysco to give the funder "an opportunity to discuss such settlement offer prior to the Counterparty accepting or rejecting it" and provided that the funder "shall have no right to exercise control over the independent professional judgment of the Counterparty and its Nominated Lawyers and shall not seek to coerce the Counterparty and its Nominated Lawyers with respect to settlement." *See* Exhibit C, Burford/Sysco Agreement at §5.3(b)(v).
[34] Exhibit C, Burford/Sysco Agreement at §5.3(b)(x).
[35] Exhibit E, Litigation Funding Agreement between Litigation Management and Financial Services, LLC, and Vicki Mize, Nov. 1, 2016, ("LMFS Funding Agreement").
[36] *Id*. at §7(b).
[37] *Id*. at §7(c).
[38] *Id*. at §§2(b)(iii) and (iv).

illustrates this problem: the funded plaintiff cannot "discontinue, abandon, withdraw, or settle" litigation without ILP's written consent and is prohibited from having "any communication" with defendants or their representatives. Similarly, the Burford/Sysco agreement's prohibition that the funded party "shall not accept a settlement offer without the Capital Providers' prior written consent" puts the funder in control of settlement and ensures that any settlement meets the funder's definition of success.

Absent disclosure of TPLF contracts, courts cannot appreciate why settlement discussions stall, why plaintiffs are unable to respond to seemingly reasonable offers, or why cases continue to be litigated despite apparent willingness by the named parties to resolve their dispute. Defense counsel cannot effectively negotiate when the person across the table has no settlement authority and undisclosed non-parties with different interests and risk calculations are controlling decisions. Understanding settlement dynamics requires knowing whether funders have veto power over reasonable offers, minimum recovery requirements, or strategic reasons for prolonging litigation that have nothing to do with the underlying dispute (including interests in other "portfolio" cases). Courts and parties might misinterpret delays in responding to settlement offers as negotiating ploys when they actually reflect the time a non-party funder needs to evaluate and approve any potential agreement, or even to arbitrate or litigate disputes about the meaning of the TPLF contract in separate proceedings.

When a court is called upon to ensure that a settlement is fair and reasonable—for example, as Rule 23(e) requires in class actions—it cannot make that determination reliably without knowing whether a significant portion of the proceeds is being paid to a non-party and on what terms. Because the TPLF contract may preclude the plaintiff or counsel from disclosing the existence of funding or any details about the arrangement, mandating disclosure is the only way the court can obtain this important information.

II. TPLF CONTRACTS CAN GIVE NON-PARTY FUNDERS MEANINGFUL INDIRECT CONTROL AND INFLUENCE OVER LITIGATION AND SETTLEMENT

A. Obligating Named Parties to Pursue Claims Can Cause "Zombie Litigation"

Some TPLF agreements require the funded plaintiffs to continue pursuing their claims—in other words, the contracts are the plaintiffs' commitment to keep litigating even if, at some point in the future, they decide it would be time to settle or otherwise end the case. For example, the ILP Funding Agreement and the Therium Dominion Funding Agreement[39] require the plaintiff to "diligently prosecute the Proceedings."[40] Similarly, the Legalist Funding Agreement[41] requires the plaintiff "to continue to conduct its prosecution of the Claim(s)"[42] and the Longford Capital

[39] Exhibit F, Litigation Funding Agreement between Therium Finance AG IC and Dominion Minerals Corp, 2015, ("Therium Dominion Funding Agreement").
[40] Exhibit A, ILP Funding Agreement at §6.1.4; Therium Dominion Funding Agreement at §9.2.6(a).
[41] Exhibit G, Litigation Funding Agreement between Legalist Fund II, L.P. and DiaMedica Therapeutics Inc., Dec. 29, 2019, ("Legalist Funding Agreement").
[42] *Id*. at §6.3.

Agreement[43] requires the plaintiff to prosecute the claims.[44] A robust provision in the LMFS Funding Agreement provides:

> Following termination of this agreement by Claimant, Company, at its own risk and for its sole benefit may continue the proceedings without the participation of Claimant. Company shall be entitled to require Claimant to continue proceedings if Company does not wish to continue proceedings in its own name and if Company does not wish to disclose the fact that the proceedings are being funded.[45]

Such contractual obligations can create "zombie litigation"[46]—lawsuits that continue despite all named parties wanting to settle. Courts and parties need to know about such provisions so they can make informed decisions to prevent cases from "going zombie." For example, a court with this knowledge might require an earlier settlement conference, impose a more aggressive discovery schedule, or set a firm trial date. Opposing parties, factoring in this dynamic, might decide to make earlier and more serious settlement offers, or alternatively understand that settlement is futile and instead prepare for trial.[47] Either way, the court and parties will make better-informed strategic decisions if they understand whether the plaintiff has contracted away its ability to settle and must continue prosecuting the claims until a non-party funder says otherwise. Learning of these provisions by early disclosure is key; finding out after settlement negotiations have failed, or after the third trial date comes and goes, wastes the court's and parties' time while creating unnecessary delay and expense.

B. Obligating Plaintiffs to Monetize Equitable Relief Can Affect Judicial Rulings, Prolong Litigation, and Hinder Resolution

Some TPLF agreements require plaintiffs to maximize monetary recoveries over equitable relief including injunctions, specific performance, restitution, rescission, and declaratory relief. For example, the Litchfield Ventures contract with the Fresh Acquisitions Liquidating Trust[48] provides:

> If Forward Seller supports or accepts (to the extent such acceptance is within Forward Seller's power) any offer to Settle the Litigations that includes non-cash Litigation Proceeds, Forward Seller shall take all actions necessary to move the Court to cause the monetization of all such non-cash Litigation Proceeds, to obtain the cash value of such non-cash Litigation Proceeds as soon as practicable, and to cause the payment of the cash Litigation Proceeds received in accordance with this Agreement.[49]

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[43] Exhibit H, Funding Agreement between Longford Capital Fund I, LP, and Quest Patent Research Corporation, Mar. 11, 2014, ("Longford Capital Agreement").
[44] *Id*. at §8.1(b).
[45] Exhibit E, LMFS Funding Agreement at §6(b).
[46] *See* Steinitz, Maya, *Zombie Litigation: Claim Aggregation, Litigant Autonomy and Funders' Intermeddling* (November 01, 2024). Forthcoming in Cornell Law Review, 2025, Boston Univ. School of Law Research Paper No. 24-40, available at: https://ssrn.com/abstract=5054864 or http://dx.doi.org/10.2139/ssrn.5054864.
[47] Opposing parties might also decide to challenge the enforceability of the agreement.
[48] Exhibit I, Master Prepaid Forward Purchase Agreement by and between Litchfield Ventures, LLC, and Fresh Acquisitions Liquidating Trust, May 3, 2023, ("Litchfield Funding Agreement").
[49] *Id*. at §4.3.

The Therium Dominion Funding Agreement provides that if the plaintiff receives any recoveries "in non-monetary form," then it must pay the funder the market value of those recoveries, which is to be established by an independent expert (whose fees the plaintiff also must pay).[50] The Amendment to Burford/Sysco Agreement requires that the plaintiff "shall take such actions as are reasonable and appropriate to maximize the Proceeds received from each Claim, giving priority to cash Proceeds."[51] Similarly, the Burford/Sysco Agreement requires the named party to "use all commercially reasonable efforts to: (A) pursue such Claim and all of the Counterparty's legal and equitable rights arising in connection with such Claim; (B) bring about the reasonable monetization of such Claim through a Claim Resolution…."[52] The agreement gives effect to this provision by requiring the named party to "retain and remunerate the applicable Nominated Lawyers to prosecute such Claim vigorously in a commercially reasonable manner in order to bring about the reasonable monetization of such Claim through a Claim Resolution" and "cooperate with such Nominated Lawyers in all matters pertaining to such Claim (including providing documents and Information, appearing and causing others within the Counterparty's power to appear for examinations and hearings)."[53] The Legalist Funding Agreement goes even further and requires that the plaintiff "shall … pay … an amount equal to the Non-Monetary Claim Proceeds Fair Market Valuation,"[54] and the Longford Capital Agreement defines "Proceeds" to include the cash value of "injunctions" and non-monetary relief.[55]

These monetization requirements have the effect, and the intent, of skewing the plaintiffs' sought-after relief. If kept secret from the court and parties, they can prevent negotiated resolution and, ultimately, influence the court to fashion suboptimal relief. Judges kept in the dark about these provisions may be unaware that a non-party's interest in cash payments is precluding the parties from presenting options that the court would find just. Courts considering whether to grant equitable remedies need to understand that a TPLF contract may make such relief effectively worthless or even a burden to the nominal plaintiffs. The defending parties may have reasonable settlement offers rejected without knowing that the plaintiff is contractually bound to maximize monetary recovery to the exclusion of other considerations like avoiding future wrongdoing, preserving business relationships, or managing reputational concerns that might otherwise make settlement attractive to the nominal plaintiff. And the plaintiff who wants to accept a reasonable settlement offer—or would prefer less aggressive discovery tactics, streamlined motion practice, or resolution discussions—may be powerless in the face of the funder's insistence not to breach the duty to "maximize" proceeds. These provisions effectively allow funders to reframe any disagreement about settlement terms as a potential breach of contract, creating economic pressure that complicates judicial management, stymies settlement efforts, and supersedes even the plaintiffs' own judgment about the best resolution of the dispute.

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50 Exhibit F, Therium Dominion Funding Agreement at §13.
51 Exhibit D, Amendment to Burford/Sysco Agreement at §7(a).
52 Exhibit C, Burford/Sysco Agreement at §5.3(b)(i).
53 *Id*. at §5.3(b)(ii).
54 Exhibit G, Legalist Funding Agreement at §3.2.
55 Exhibit H, Longford Capital Agreement at §2.34.

C. The Funders' Right to Discontinue Funding Allows Funders to Control the Case and Resolution

TPLF contracts may allow the funder to withdraw funding with minimal or no restrictions. For example, the LMFS Funding Agreement states that the "[funder] shall be entitled to terminate this agreement in whole or in part without notice and to cease any further funding of [plaintiff's] Claims."[56] The Therium Dominion Funding Agreement similarly provides the funder with multiple paths to terminate funding. It limits the funder's commitment solely to the first tranche of funding, and gives the funder "sole discretion" to fund subsequent tranches, with a two-month exclusive option to do so.[57] In addition, it gives the funder the right to terminate the agreement unilaterally if it "ceases to be satisfied as to the merits of the Claim" or "reasonably believes that the Claim is no longer commercially viable."[58] It also provides that the funder can decide whether to fund or continue funding based on any "relevant" information whether or not material, giving the funder *carte blanche* to walk away at any time.[59] Some TPLF contracts provide notice, but no other restrictions. For example, the ILP Funding Agreement gives the funder "sole discretion" to "cease to fund any Claim" subject to 14 days written notice to the plaintiff[60] (and gives the funder equal discretion to terminate the funding agreement as a whole[61]) and the Legalist Funding Agreement allows the funder to terminate the agreement for any reason with 30 days written notice.[62]

These provisions, both independently and in conjunction with other control mechanisms, effectively give the funder veto power over every decision in a case, regardless of boilerplate language to the contrary. Plaintiffs and plaintiffs' lawyers who turn to funders to support litigation are vulnerable to threats of discontinued funding since they likely do not have the resources to litigate independently, let alone sue the funder (or defend the funder's suit) for breach of contract.[63] Disclosure of these provisions would inform judges' and parties' ability to manage funded cases because it allows an understanding not only of who is in control but also the ongoing potential for disputes between the named party and its funder—disputes occurring in an environment where plaintiffs may have no choice but to accede to funders' wishes about litigation strategy, settlement terms, or case management to avoid termination and potential breach-of-contract claims.

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[56] Exhibit E, LMFS Funding Agreement at §6(c).
[57] Exhibit F, Therium Dominion Funding Agreement at §2.
[58] *Id*. at §16.3.
[59] *Id*. at §6.2.
[60] Exhibit A, ILP Funding Agreement at §5.2.
[61] *Id*. at §18.1.
[62] Exhibit G, Legalist Funding Agreement at §8.2.4.
[63] One feature of some TPLF contracts—a two-month exclusive option to fund future tranches—may effectively preclude plaintiffs from finding alternative funding sources if time is of the essence, further increasing the funder's leverage.

III. TPLF CONTRACTS CAN GIVE NON-PARTY FUNDERS EFFECTIVE CONTROL OVER THE FUNDED PLAINTIFFS' RELATIONSHIP WITH COUNSEL

A. TPLF Contracts Can Interfere with the Attorney-Client Relationship

TPLF agreements can give non-party funders extraordinary powers over the plaintiffs' counsel. The Therium Dominion Funding Agreement obligates the plaintiff to:

- "follow the legal advice" of counsel, "including whether it would be appropriate to make or accept any offer to settle"[64] and makes the client liable for costs incurred "as a result of [the plaintiff's] failure… to co-operate with or follow the advice of" counsel;[65]

- instruct counsel to report to the funder if counsel believes the plaintiff has breached the funding agreement, including by "threatening to cease or ceasing" to engage that counsel, or by "failing to follow the advice" of counsel;[66]

- instruct counsel to provide a letter to the funder stating, *inter alia*, that counsel "has assumed a duty of care to Therium and its shareholders" with respect to information and advice provided to the funder prior to the execution of the funding agreement;[67] and

- instruct counsel to provide Therium with "copies of draft pleadings, witness statements, expert reports, and significant correspondence" prior to issue, clearly contemplating that the funder will have input into the contents of such materials.[68]

These provisions are not unique. The Burford/Sysco Agreement requires the plaintiff to "cooperate" with counsel;[69] the ILP Funding Agreement requires the plaintiff to "follow all reasonable legal advice given by" counsel;[70] and, under the Legalist Funding Agreement, "[t]he Plaintiff agrees to take and follow the legal advice of the Lead Counsel" excluding settlement.[71]

It is not a federal judge's job to police attorney ethics—that function belongs to bar associations and disciplinary authorities. However, courts and parties need to understand and plan for situations where TPLF contracts subvert the usual attorney-client fiduciary relationship. Such

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[64] Exhibit F, Therium Dominion Funding Agreement at §§9.2.8-9.
[65] *Id*. at §5.1.1.
[66] *Id*. at §9.3. This provision raises significant ethical duty issues by putting counsel in the position of informing their clients' potential adversaries (here, the funder) of claims the funder may have against counsel's client. In effect, this requires counsel to be more loyal to the funder than the counsel's client if a conflict of interest arises.
[67] *Id*. at §9.2.1 and appendix 2.
[68] *Id*. at §9.2.4.
[69] Exhibit C, Burford/Sysco Agreement at §5.3(b)(ii).
[70] Exhibit A, ILP Funding Agreement at §6.1.1. (mitigated somewhat by provisions that the plaintiff can "override" ILP's instructions to counsel, and in the event that counsel identifies a conflict of interest, the agreement contemplates that counsel will give preference to the plaintiff's interests, §13.
[71] Exhibit G, Legalist Funding Agreement at §6.4.

provisions fundamentally change how litigation decisions are made, creating case management challenges that affect all participants.

When courts issue case management orders, set deadlines and trial dates, or seek to resolve discovery disputes and pre-trial motions, they need to know whether they are dealing with traditional client-directed representation or something altogether different: a non-party-and-attorney-controlled relationship where the nominal plaintiff is out of the loop, lacking meaningful input into litigation strategy or resolution of his or her own case. For the other parties to the case, this scrambling of the traditional attorney-client relationship makes settlement negotiations and case planning far more complex. In class actions, this information is essential for courts making the Rule 23(e)-required determinations about the adequacy of the named plaintiff and the fairness of the proposed settlement.

Defense counsel cannot effectively factor in plaintiff motivations into their settlement evaluations and try to address them when the plaintiff is essentially a bystander, contractually obligated to defer to attorney judgment, particularly when that attorney may be receiving revisions of drafts from non-party funders (why else would the funders require drafts?) and the lawyer is instructed to report the plaintiff's suspected "breaches" of the TPLF contract to funders.[72]

B. Funders' Power to Prevent Change of Counsel Is Potent

TPLF contracts can give funders the ability to "lock in" a specific lawyer or firm, giving funders potent control over the case—since funders frequently provide designated counsel with repeat business or "portfolio" relationships. Most dramatically, the Therium Dominion Funding Agreement requires counsel to report to the funder if the client "breaches its obligations under this Agreement" by "threatening to cease or ceasing to" engage with counsel[73] and gives the funder the right to consent before new lawyers are engaged.[74] The Burford/Sysco Agreement bars the plaintiff from engaging new outside counsel unless it obtains the funder's "prior written consent… which consent shall not unreasonably be withheld."[75] It also bars the plaintiff from renegotiating its economic arrangement with its outside counsel, and further requires the funder's prior written consent to any economic arrangement with replacement counsel unless the terms

[72] Contractual provisions that purport to re-write the attorney-client relationship raise ethical and regulatory issues. Requiring clients to accede to the advice of counsel, rather than the other way around, instructing counsel to report their own ostensible client's possible breaches of a contract to a counterparty, and to provide otherwise privileged drafts of pleadings and other important documents to non-party funders prior to filing, raise serious questions about whether counsel is properly serving client interests. But these ethical issues can be addressed only if the proper authorities know about potentially problematic arrangements. A rule requiring disclosure of TPLF agreements would support the preservation of the ethics of the legal profession. With disclosure, TPLF-related ethical concerns could be identified and handled by appropriate authorities rather than concealed. If the FRCP continue to remain silent on disclosure—or to be understood not to allow it, as some courts interpret Rule 26(b)(1)'s definition of the scope of discovery—then unethical practices will be undetected and unaddressed. Importantly, an FRCP disclosure rule could save judges who discuss or review TPLF contracts *ex parte* from being put in the uncomfortable position of being the only disinterested persons privy to potentially unethical arrangements. Uniform disclosure of TPLF contracts would protect the judiciary by allowing sunshine to serve as a natural deterrent to unethical arrangements, lessening the possibility that funders and lawyers employ problematic control provisions in the first place.
[73] Exhibit F, Therium Dominion Funding Agreement at §9.3.2.
[74] *Id*. at §9.5.
[75] Exhibit C, Burford/Sysco Agreement at §§5.3(d-f).

are identical or inferior to the terms agreed to with previous counsel.[76] Along similar lines, the ILP Funding Agreement restricts the plaintiff from terminating or replacing counsel without the funder's prior written consent;[77] the Legalist Funding Agreement provides that "[t]he Plaintiff … will not engage a new attorney or law firm … to advise and/or represent the Plaintiff in connection with the Claim(s)" without 30 days prior notice and "without giving good faith consideration to the Funder's response;"[78] the Longford Capital Agreement defines replacing counsel as a "Material Adverse Event" that requires plaintiff to obtain Longford's prior written consent and mandates that any replacement counsel will be subject to "the same terms and provisions" as the letter attached to the contract;[79] and the Litchfield Funding Agreement provides:

> If New Counsel is replacing Current Counsel, Forward Seller [plaintiff] shall not engage such New Counsel unless and until such New Counsel and Forward Seller execute and deliver to Forward Purchaser [funder] an instruction letter in substantially the same form as the Current Counsel Instruction Letter or such other form approved by Forward Purchaser in writing in its sole discretion.[80]

Even when new counsel is allowed, TPLF contracts can enable funders to obstruct or delay onboarding of replacement counsel.

A non-party funder's ability to prevent, or dictate the terms of, a plaintiff's choice of new counsel is important for courts and parties to know. Courts managing litigation should be aware of counsel primarily serving the interests of a non-party rather than the named plaintiff in the case. When counsel takes positions seemingly contrary to client interests, courts need the information and tools to evaluate whether this reflects legitimate strategic judgment or funder relationships that the plaintiff cannot overcome. Courts should know that, if a funded plaintiff discovers conflicts of interest or becomes dissatisfied with counsel performance, the funder's contractual control over replacement counsel can prevent the plaintiff from obtaining truly independent representation. Opposing parties also need this information to assess whether they are dealing and negotiating with counsel loyal to the plaintiff, or whether counsel recommendations may be influenced by separate economic relationships with funders that create incentives including to prolong litigation or reject otherwise reasonable settlements.

C. The Sharing of Contingent Fees between Funders and Counsel Can Influence Judicial Management, Affect the Other Parties, and Aggravate Conflicts

Knowing how lawyers and non-parties propose to split contingency fees can be critical for courts and parties trying to avoid making case management and resolution decisions based on incorrect assumptions. Splitting contingency fees can create incentives and conflicts of interest that distort attorney decision-making. The Therium Dominion Funding Agreement's structure, where the client pays the contingent fee to the funder who then "shares" recoveries with counsel through a

[76] *Id.*
[77] Exhibit A, ILP Funding Agreement at §6.2.4.
[78] Exhibit G, Legalist Funding Agreement at §6.7.
[79] Exhibit H, Longford Capital Agreement at §8.3 and Exhibit D thereto.
[80] Exhibit I, Litchfield Funding Agreement at §5.2.

separate undisclosed agreement,[81] fundamentally alters counsel's economic incentives in ways that may diverge from the court's and other parties' expectations, as well as the funded plaintiff's interests. The Therium Chevron Funding Agreement requires the lawyers to "recover the maximum possible Contingency Fee," which is the lawyers' share of the proceeds, not the recovery to the class.[82] Having counsel's compensation depend on funder satisfaction rather than a preset percentage of plaintiff's recovery creates—and is intended to create—a strong financial incentive for counsel to prioritize funder preferences over client objectives.

The ramifications multiply when funders invest in multiple cases involving the same law firm and "cross-collateralize" those investments so profits from one case are used to cover expenses from another. Such payment schemes can aggravate potential conflicts of interest in numerous ways, including the calculation and timing of counsel's contingent fee. Some TPLF agreements diverge from the usual calculation of a contingent fee as a percentage of the overall recovery, with the result that funded counsel could receive a larger fee than normally permitted by ethical rules.[83] When funders cross-collateralize investments across multiple cases involving the same firm, counsel's incentives on any individual case will be skewed by the performance of other funded matters, creating litigation and settlement dynamics that courts and parties cannot understand or address without disclosure of the TPLF contract.

Any facet of litigation and resolution could be affected by TPLF compensation schemes. Funded counsel recommendations will inevitably be influenced towards economic arrangements that make certain outcomes more profitable than others, potentially affecting the timing and terms of settlement offers across multiple otherwise unrelated cases. Courts managing litigation, ordering settlement conferences, and evaluating discovery disputes need to have this information available since counsel's actions can reflect complex economic calculations rather than the case-specific client advocacy that courts ordinarily expect. Opposing parties also need this information since it alters litigation and settlement dynamics.

IV. THE "PROTECTIONS" AGAINST FUNDERS' CONTROL ARE OFTEN ILLUSORY AND CAN MISLEAD JUDGES AND PARTIES

A. Boilerplate Disavowals of Funder Control May Be Contradicted by Specific Contractual Provisions and Are Likely Unenforceable

While TPLF contracts may contain blanket representations that the funder is a passive investor and does not control the litigation or settlement, such provisions are frequently contradicted by other specific powers set forth in the agreement.[84] For example, the Therium Chevron Funding Agreement—the one that permits the lawyers to do only three things without funder consent[85]—states that "[n]othing in this Agreement entitles Therium to control the conduct of the Claim

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[81] Exhibit F, Therium Dominion Funding Agreement at Recital C.
[82] Exhibit B, Therium Chevron Funding Agreement at §3.1.3.
[83] The TPLF compensation in *Fresh Acquisitions* was "three multiplied by whatever the litigation funder funds . . ., plus a 12% return." *Fresh Acquisitions*, 2025 WL 2231870, at *5.
[84] A basic rule of contract construction is that "general words do not derogate from special." *Generalia specialibus non derogant,* BLACK'S LAW DICTIONARY (5th ed. 1979).
[85] *See supra* notes 22-23.

and/or the Proceedings." In other words, the disavowal of control in TPLF contracts is likely illusory.

Plaintiffs who seek funding to support their lawsuits are highly unlikely to have the resources to initiate collateral litigation to enforce their contractual rights. And even if the funded party can afford to litigate against the funder, they may not succeed—as happened in the dispute between Burford and Sysco, where an arbitral tribunal restrained Sysco from settling claims without Burford's consent despite multiple affirmations in the funding agreement that Burford did not control resolution.[86] The Burford/Sysco Agreement states that "the Capital Providers are each passive providers of external capital and have not become owners of, partners in, or parties to the claims or any part thereof or acquired any rights as to their control or resolution … the Counterparty remains in full control of the assertion and resolution of the claims." The contract also says that "the Counterparty shall have day-to-day and overall control over the conduct of, and responsibility for, the Claims and neither the Capital Providers nor their respective Affiliates shall exercise, or seek to exercise, any such control over the Claims."[87] In addition, that contract says the funder "shall not be entitled to control or direct the conduct of the Claims, or to require settlement thereof."[88] None of those hortatory phrases prevented Burford from taking legal action to prevent the parties' settlement, nor from undertaking to wrest control of the litigation for itself, in part based on the provisions in the TPLF contract that obligated the funded plaintiff to pursue and monetize the funded claims[89] and empowered the funder to step into the shoes of the plaintiff to control litigation and settlement in the event of a "breach" by the plaintiff.[90] Thus, in practice, the boilerplate disclaimers of control in TPLF contracts are not worth the paper they are printed on.

Yet funders continue to assert that they do not exercise control over the cases they fund. Andrew Cohen of Burford told an audience of judges at the Sixteenth Annual Judicial Symposium on Civil Justice Issues at the George Mason University Antonin Scalia Law School:

> And again, I don't know how to say this any more clearly, we don't control settlement. If we do, I know that Burford Capital as a funder is not subject to ethical rules because we're not a lawyer, but I am a lawyer, and I do take ethical rules seriously, and I would find it really loathsome to misrepresent that to a court.[91]

At the time of this statement, Burford was actively engaged in its high-profile legal campaign to enforce its contractual rights to prevent its client, Sysco, from consummating a settlement

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[86] *See* Behrens, Mark, *Third-Party Litigation Funding: A Call for Disclosure and Other Reforms to Address the Stealthy Financial Product that Is Transforming the Civil Justice System*, 34 Cornell J.L. & Pub. Pol'y 1, 8-9 (2024), https://community.lawschool.cornell.edu/wp-content/uploads/2025/03/Behens-final.pdf.
[87] Exhibit C, Burford/Sysco Agreement at §5.2(c).
[88] *Id*. at §5.2(b).
[89] *Id*. at §§5.3(b).
[90] *Id*. at 13.1(b).
[91] GEORGE MASON ANTONIN SCALIA LAW SCHOOL LAW & ECONOMICS CENTER, Judicial Education Program, Sixteenth Annual Judicial Symposium on Civil Justice Issues, *Panel 6: The Evolution of Third-Party Litigation Funding* at 1:08:00-1:08:22 (Oct. 10, 2022), https://masonlec.org/events/sixteenth-annual-judicial-symposium-on-civil-justice-issues/.

agreement in a lawsuit Burford funded.[92] Even today, despite the widespread knowledge of its legal maneuvering in the Sysco litigation, Burford still maintains that "Burford is a passive financier and does not control the legal assets in which we invest, except in extraordinary circumstances agreed to in advance by the client."[93]

Similar to the Burford/Sysco Agreement, the language in the Therium Funding Agreement purports to say "nothing in this Agreement shall permit [the funder] to override any advice" given by counsel to the funded plaintiff,[94] although this disavowal is pointedly "subject to [the funder's] rights to termination"—in other words, the funder always holds over the funded plaintiff's head the looming threat that it can walk away any time it chooses in the event of a dispute. Notably, this provision relates to advice of counsel and does not limit the funder's right to "override" any decision taken by the funded party. Therium nonetheless proclaims that funders "remain passive providers of capital."[95] The recent transfer of Therium's TPLF business also creates uncertainty about what practices new management will undertake.[96]

The current absence of a rule requiring disclosure of TPLF contracts increases the likelihood that federal judges and litigants will be deceived by boilerplate disavowals of funder control. Courts that take such disavowals at face value, or that substitute *ex parte* and *in camera* practices for disclosure of TPLF contracts, run a high risk of misunderstanding the funders' control mechanisms.

B. The Reasonableness Standard Is Ineffectual in Control Disputes

The "reasonableness" standard used in many TPLF contracts is also illusory as a purported limit on a funder's control. For example, the Amendment to Burford/Sysco Agreement provides that the funded plaintiff "shall not accept a settlement offer without the Capital Providers' prior written consent, which shall not be unreasonably withheld...."[97] Yet this provision did not prevent Burford from withholding its consent to a settlement agreement and taking legal action against its client to prevent the settlement,[98] action that a federal judge concluded "threaten[ed] the public policy favoring the settlement of lawsuits."[99] The vagueness of "unreasonably" as a standard for breach of contract makes it impractical to enforce, adding to the unlikelihood that funded plaintiffs would spend limited resources to enforce their interpretation of that word. Moreover, settlement offers typically require a prompt response and may be withdrawn if circumstances change. Thus, disagreements over "reasonableness," particularly if requiring arbitration or litigation, could give funders a "pocket veto" over settlements by delaying

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[92] *See In re Pork Antitrust Litigation*, 2024 WL 511890, at *1 (Mag. D. Minn. Feb. 9, 2024) (describing litigation), *aff'd*, 2024 WL 2819438 (D. Minn. June 3, 2024).
[93] Burford, https://www.burfordcapital.com/introduction-to-legal-finance/#faq (last visited Aug. 6, 2025).
[94] Exhibit F, Therium Dominion Funding Agreement at §9.7.
[95] Therium, https://www.therium.com/blog/litigation-funding-a-useful-tool-for-forward-looking-gcs-and-in-house-lawyers/ (last visited Aug. 6, 2025).
[96] *See Therium Retreats, Fortress Takes Control—Leaving Claimants and Investors Exposed to Financial Realignment* (June 17, 2025) https://knowsulu.ph/the-untold-sulu-story/inside-the-fortress-capital-control-and-the-quiet-collapse-of-therium ("Although Therium remains administratively party to existing contracts, its diminished role leaves claimants and law firms vulnerable to delays, contract revisions, or outright case abandonment").
[97] Exhibit D, Amendment to Burford/Sysco Agreement at §7(b)(v).
[98] Behrens, *supra* note 69, at 8-9.
[99] *Pork Antitrust*, 2024 WL 2819438, at *4.

responses to settlement offers until the window of opportunity has closed. Because the "reasonableness" standard may not be a meaningful check on a funder's ability to control litigation and resolution, it can be understood only in the context of the control mechanisms in the contract.

C. Plaintiffs Are Often Forbidden from Disclosing their Own Funding Arrangements

TPLF contracts often prohibit funded plaintiffs from disclosing the existence of their TPLF contract or its terms—even to the court—absent a court order. For example, the Burford/Sysco Agreement restricts the disclosure of "Confidential Information," which is defined to include "the nature, terms and existence of this Agreement," and "the existence of any relationship between the Counterparty and a Capital Provider or any of its Affiliates or Representatives."[100] In addition, the contract "obligate[s]" "each party … to keep confidential the existence and content of any arbitral proceedings initiated hereunder and any rulings or award"[101] (with limited exceptions). These provisions—gag rules that prevent plaintiffs from speaking up when they no longer control their cases—mean that courts and parties will not ordinarily learn of the existence of TPLF contracts, understand their impact on the case, or know when disputes arise about those contracts.[102] Passively waiting for a plaintiff to give notice about a TPLF contract will not work. A disclosure rule is essential to protect courts, parties, and the funded plaintiff themselves from issues caused by TPLF contract provisions.

V. TPLF CONTRACTS CAN UNDERMINE PROTECTIVE ORDERS BY GIVING NON-PARTY FUNDERS ACCESS TO CONFIDENTIAL DOCUMENTS

Some TPLF contracts give funders access to all documents relevant to the claims, including confidential and privileged documents. Such provisions are likely in conflict with protective orders and party agreements. For example, the Longford Capital Agreement gives Longford "Regular and Timely Disclosure of Important Documents" including "Deposition transcripts and discovery materials," "Key documents related to any material event or change in the prosecution of the Claims," and "Any documents related to possible settlement or other resolution of the Claims."[103] Similarly, the ILP Funding Agreement requires the plaintiff to instruct counsel to give the funder "a copy of all documents obtained from, or provided to, any Defendant in the Proceedings,"[104] and requires the plaintiff to provide "all information, documents and assistance" that the funder reasonably requests.[105] The LMFS Funding Agreement requires the plaintiff "to execute a separate power of attorney which shall entitle [funder] to request and view official and/or court documents."[106] The Therium Dominion Funding Agreement requires the plaintiff to

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[100] Exhibit C, Burford/Sysco Agreement at §8.2 and Exhibit A thereto.
[101] *Id*. at §29(g).
[102] For one example, *see Fresh Acquisitions*, 2025 WL 2231870, at *1 ("The court learned somewhat inadvertently—in response to its inquiries—that the Liquidating Trustee entered into a litigation funding agreement. . . . According to certain defendants . . ., this litigation funding agreement was hampering the prospect of settlement. . . . This court was surprised to hear about a litigation funding agreement.").
[103] Exhibit H, Longford Capital Agreement at Exhibit A.
[104] Exhibit A, ILP Funding Agreement at §6.3.5.
[105] *Id*. at §4.2.
[106] Exhibit E, LMFS Funding Agreement at §2(b)(vii).

instruct counsel to give the funder "any documents or information relating to the Claim and Proceedings."[107]

In *Valjakka v. Netflix*,[108] the court found that a lawyer violated its protective order by sharing highly confidential information with a TPLF company, including expert reports, information about source code, and financial data.[109] The lawyer acknowledged that the funder "had full access to [the defendant's] documents produced in discovery," but argued that the disclosures were within the scope of the protective order for reasons including that the funder met the order's definition of "a Professional Vendor."[110] The court found the lawyer's arguments "unavailing," that the defendant's "interests in preventing [the funder's] improper access to its confidential materials are incontestable," and that sanctions were merited.[111]

Courts and parties need to know when TPLF agreements grant non-party funders access to confidential and privileged documents because, as *Valjakka* demonstrates, such provisions undermine the effectiveness of protective orders and party stipulations on information sharing. Courts issuing protective orders, and parties stipulating to them or drafting their terms and scope, need to know when funder access rights exist, and to whom such obligations are owed, to ensure that any proposed stipulation or order is adequate to protect confidential information.

Moreover, parties producing sensitive documents in discovery should have the right to know that the requesting party has promised to share their confidential materials with a non-party litigation funder, especially since funders may have strategic motivations unrelated to the particular lawsuit, such as obtaining information related to other cases or gaining access to competitors' proprietary data and intellectual property. Only disclosure of the TPLF contract can allow producing parties to seek appropriate language in protective orders and to make objections to discovery requests when funder access would create unacceptable risks. Only disclosure of TPLF contracts will allow courts to consider such language and objections based on information rather than speculation.

Additionally, courts enforcing protective orders need to understand these arrangements because confidentiality violations—and any ensuing sanctions—may be the fault of non-party funders, not the nominal parties. Sanctions against non-parties for improper conduct require different enforcement mechanisms and potentially broader relief. An FRCP disclosure rule for TPLF contracts is necessary to provide courts and parties the information needed for fashioning and enforcing appropriate protective orders.

VI. TPLF CONTRACTS CAN INTERFERE WITH COURT RULINGS ABOUT COSTS AND SANCTIONS

Some TPLF contracts require the plaintiff to pay any court-ordered costs or sanctions—even if the plaintiff did not participate and could not prevent the funder and counsel from engaging in the sanctionable conduct. For example, the Therium Dominion Funding Agreement states that

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[107] Exhibit F, Therium Dominion Funding Agreement at §9.2.3.
[108] 2025 WL 2263684 (N.D. Cal. July 10, 2025).
[109] *Id*. at *2-3.
[110] *Id*. at 3.
[111] *Id*. at 4.

the funder is not liable for defense costs, fines, or penalties,[112] and requires the plaintiff to indemnify the funder against any amounts that either the client or the funder is ordered to pay to an opponent or becomes liable for by settling or discontinuing the suit.[113] Even more expansively, the Burford/Sysco Agreement provides that the funder shall not have "any obligation to fund any fees, expenses, or other sums in relation to any Claim" including "sums awarded against, or penalties incurred by, the Counterparty, including any costs orders, awards, interest, damages, expenses, or penalties against the Counterparty, nor to fund any legal fees or any other costs whatsoever incurred as a result of defending any counterclaim brought against the Counterparty in relation to any Claim or defending any enforcement or other proceedings against the Counterparty."[114] The Longford Capital Agreement also provides that the funder is not responsible for costs for fees associated with any adverse claims.[115]

These provisions can contravene court orders and undermine their purpose—while at the same time depriving plaintiffs of independent legal representation. By shielding funders who have control or material influence over litigation and settlement decisions from any potential costs and sanctions arising from their decisions, these arrangements can render a court order ineffective, futile, or even manifestly unjust. Such contractual provisions, when unknown to the court and parties, not only undermine the deterrent effect of cost-shifting rules and sanctions but also may encourage irresponsible litigation conduct since funders may benefit from, and cannot be held financially accountable for, discovery violations, frivolous motions, or other sanctionable behavior they may direct.

VII. AN FRCP DISCLOSURE RULE IS SUPERIOR TO *EX PARTE* COMMUNICATIONS ABOUT TPLF CONTRACTS

An FRCP rule requiring disclosure of TPLF contracts is superior to reliance on *ex parte* discussions or written filings about what are often lengthy and complex agreements with contradictory and even deliberately "opaque"[116] provisions. The only way to understand a TPLF contract is to read it, and the adversarial process is the best method for illuminating issues. Due process requires that significant matters be dealt with transparently with all parties having a meaningful opportunity to consider the issues and be heard. A court seeking to comprehend a TPLF contract through a secret, one-sided conversation with counsel for the funded party is highly unlikely to come away with an accurate understanding of how the contract can actually affect the process and substance of the case before it. The lawyer for the funded plaintiff has obvious incentives to emphasize boilerplate language disavowing control while minimizing the significance of the specific control mechanisms, especially where the lawyer has an ongoing relationship with the funder in another matter or even a whole "portfolio" of lawsuits, which is common today. Courts that conclude "there's nothing to see here" after an *ex parte* communication are taking a significant risk to their crediblity if a dispute later develops about the contract or the behavior of the funder or the lawyers, or if something untoward or unethical occurs. The Code of Judicial Conduct's strong admonition against *ex parte* communications reflects that they are inappropriate for substantive legal determinations such as contract

[112] Exhibit F, Therium Dominion Funding Agreement at §5.1.3.
[113] *Id*. at §8.2.
[114] Exhibit C, Burford/Sysco Agreement at §11(a).
[115] Exhibit Longford Capital Agreement at §3.3.
[116] *Fresh Acquisitions*, 2025 WL 2231870, at *9.

interpretation. A disclosure rule would relieve courts from the perceived need, risks, inadequacy, and burdens of *ex parte* communications about TPLF contracts by lifting the veil and, if needed, allowing the parties to advocate their interests related to those contracts in the open in keeping with the traditions of our adversarial system.

Conclusion

The Advisory Committee should promulgate a rule requiring disclosure of TPLF contracts similar to the insurance disclosure requirement in Rule 26(a)(1)(A)(iv). As with insurance contracts, TPLF disclosure is necessary not because it is "relevant" to any particular "claim or defense," but rather because TPLF contracts can affect the conduct of litigation as a whole. A TPLF disclosure rule will provide judges with an essential tool for effective case management: knowledge of how and when a non-party controls litigation and settlement decisions. A uniform rule would eliminate the burden of motion practice where one side seeks, and another party resists, disclosure of the contract, and it would ensure that judges need not examine TPLF contracts unless parties raise specific issues through normal briefing processes. Without Advisory Committee action, judges will continue either to be in the dark about potential problems created by TPLF contracts or will be forced to spend judicial resources (including in the inadequate practice of *ex parte* communications) deciphering complex funding agreements case by case without clear procedural guidance about when disclosure is required. The transparency provided by a rule requiring disclosure of TPLF contracts would lift a veil rather than impose a burden, creating a framework that removes uncertainty and unnecessary process from courts while adding the knowledge necessary for effective case management and successful settlement negotiations.