Mandatory Disclosure Rules for Dispute Financing

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MANDATORY DISCLOSURE RULES IN DISPUTE FINANCING

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One of the most significant controversies in the field of dispute financing is whether financing agreements should be required to be disclosed during disputes, and, if so, to whom and to what extent. This volume collects pieces by five different authors with different perspectives on the need for mandatory disclosure rules.

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White Paper on Mandatory Disclosure in Third-Party Litigation Finance

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ABSTRACT

Third-party litigation finance (TPLF), in which non-parties in litigation give parties money in exchange for a beneficial interest in the outcome of the litigation, has increased rapidly in the United States over the past twenty years. Different markets have emerged involving consumer and corporate plaintiffs, and TPLF has also been adapted for use in mass litigation (class actions and multi-district litigation). As a result, observers and courts have proposed that TPLF be disclosed in litigation in a submission to the court. This paper reviews the arguments for disclosure (including the different ways in which disclosure could occur and the costs and benefits of disclosure). This paper argues that many of the arguments for disclosure are unproven or speculative. It argues that the costs to plaintiffs of disclosure may be high and that the benefits are likely to be low. It concludes that two limited types of disclosure may be justified, notwithstanding its conclusion that broad TPLF disclosure imposes unjustified costs on the civil justice system.

I. INTRODUCTION

A. DEFINING THIRD-PARTY LITIGATION FINANCE

Third-party litigation finance (TPLF) does not have a single meaning.[1] Most frequently, TPLF is used to refer to financial support of litigation by a stranger in exchange for a share of the proceeds generated by that litigation.[2] TPLF under this description is identical to the old common law practice of champerty.[3] However, TPLF may also refer to practices that are related, but not identical, to champerty.

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[1] *See* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 863 n.3 (2015) (discussing range of transactions included in definition of TPLF).

[2] Third-party litigation funding is the commercial financing of an individual or portfolio of lawsuits by a person or entity that is not a party to the litigation itself. Although contingency fees and insurance coverage also constitute forms of funding by non-parties, we use the term TPLF in this paper to connote funding provided by firms on a non-recourse basis, in exchange for a share of the settlement or judgment proceeds. Jasminka Kalajdzic, Peter Cashman, Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding,* 61 AM. J. COMP. L. 93, 111-12 (2013); *see also* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 718 (N.D. Ill. 2014) (TPLF is "where money is advanced to a plaintiff, and the funder takes an agreed upon cut of the winnings. If the plaintiff loses the case, the funder may get nothing.").

[3] *See* Lazar Emanuel, *Overall View of Litigation Funding Industry*, N.Y. LEGAL ETHICS REP., Feb. 1, 2011, http://www.newyorklegalethics.com/an-overall-view-of-the-litigation-funding-industry

Financial support of litigation by a stranger on a gratuitous basis, not in exchange for future proceeds and not motivated by a desire for profit, is maintenance.[4] Maintenance, although rare, is a form of TPLF.[5]

Some observers of the TPLF market use the term to refer to transactions between nonlawyers and lawyers where the nonlawyer advances capital to the lawyer in exchange for a future payment based on the lawyer's receipt of a fee, if and when that occurs.[6] This form of TPLF is neither champerty nor maintenance, because the third-party funder is not providing support directly to a party in litigation. Many commentators caution against treating capital advances to lawyers as identical to third-party investment in lawsuit through direct payments to litigants.[7] Although the legal and economic circumstances of capital advances to lawyers are a non-standard form of TPLF, they will be covered in this White Paper, although distinguished from standard TPLF, which involves a transaction with a party, not their lawyer.[8]

B. TPLF MARKETS

TPLF, when it is limited to champerty, is divided in the United States between the commercial and the consumer sectors.[9] In the former, funding is provided to a highly sophisticated litigant, usually a corporation, to help pay for the attorneys and their costs in a commercial dispute.[10] In the latter, funding is provided directly to individuals, most of whom have never engaged previously in litigation.

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4 *See* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48 (1935).

5 *See* Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 72 (2011).

6 *See* Lisa Rickard & Mark Behrens, *Third-Party Litigation Funding In U.S. Enters Mainstream, Leading To Calls For Reform*, FINANCIER WORLDWIDE, November 2016, https://www.financierworldwide.com/third-party-litigation-funding-in-us-enters-mainstream-leading-to-calls-for-reform ("Third-party litigation funders front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment."); Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. LEGAL ETHICS 253, 256 (2016) (arguing that capital advances to law firms can be a form of TPLF).

7 *See e.g.,* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 383 (2014) (capital advances to lawyers are "more different than alike" other forms of TPLF); Shannon, *supra* note 1 at 863 n.3.

8 For a complete discussion of capital advances to lawyers, *see* Anthony J. Sebok, *Selling Unearned Attorneys' Fees*, 2018 ILL. L. REV. 1207.

9 For a comprehensive review of the TPLF market, *see* Steven Garber, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS, RAND Institute for Civil Justice, Law, Finance, and Capital Markets Program Occasional Paper (2010).

10 *Ibid* at 13.

Importantly, consumer TPLF allows money to flow directly to the litigant, providing an important source of financial support during the pendency of litigation.[11] Funding contracts differ in type between the two sectors. Commercial TPLF usually pays the funder a percentage of the litigation proceeds upon resolution of the litigation.[12] In contrast, in consumer TPLF, the funder receives a payment based on monthly or semi-annual interest charges determined by the length of time to the resolution of the litigation.[13]

When TPLF is extended to include direct funding of lawyers, the form of the transactions are hard to generalize, because there is very little publicly available information about third-party funding of lawyers. The market seems to be divided into three types of transactions. First, there are transactions between funders who advance capital in exchange for a security interest in the unearned fee of a single case or a small number of identifiable cases.[14] Second, there are transactions between larger commercial funders and law firms in which capital advances are

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[11] *Id.* at 9. Wellfleet Advisors, a U.S. commercial TPLF consultancy, published a review of the market in 2019. It estimated that in 2019, "$2.3 billion was committed to commercial litigation finance transactions with a nexus to the U.S." Charles Agee and Gretchen Lowe, LITIG. FIN. BUYER'S GUIDE (Westfleet Advisors 2019) (https://assets.website-files.com/5d3219df242257de8146924c/5dd813e3cd97761 c9b70e0a0_Westfleet%20Buyers%20Guide%202019-11-17.pdf)

[12] In commercial litigation finance contract "the financier provides immediate capital to prosecute the case in exchange for a percentage of the future recovery." Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 937 (2015). But there is no "one size fits all" commercial litigation finance contract. Commercial funding is diverse and includes many different types of products. *See, e.g*. Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455 (2012) *and see* Shepherd & Stone, *Economic Conundrums in Search of a Solution* at 941-42 (on the use of "first money out" and "waterfall" payment structures).

[13] *See* Garber, *supra* note 9 at 9.

[14] The following courts have upheld the assignment of a security interest in an unearned contingent fee in exchange for a capital advance. Hamilton Capital VII, LLC v. Khorrami, LLP, 2015 NY Slip Op 51199(U), 48 Misc. 3d 1223(A), 22 N.Y.S.3d 137 (Sup. Ct.); Lawsuit Funding, LLC v. Lessoff, 2013 WL 6409971 (NY Sup. Crt. 2013); Kelly, Grossman & Flanagan, LLP v Quick Cash, Inc., 35 Misc. 3d 1205(A) (N.Y. Sup. Ct. 2012); PNC Bank v. Berg, No. 94C-09-208-WTQ, 1997 Del. Super. LEXIS 19, at *27 (Super. Ct. Jan. 31, 1997). In *Lessoff*, for example, the agreement "called for Plaintiffs to receive a portion of the contingent legal fee that Defendants were expected to receive if five specifically named lawsuits were adjudicated in favor of Defendants' clients." *Lessoff* at *2. In addition, in *Counsel F in. Servs. v. Leibowitz*, 2013 Tex. App. LEXIS 9252 (13th Dist. Ct. App.), the court recognized contract rights in an unearned contingent fee defined by the application of an interest rate to a fixed sum.

secured by "portfolios" of cases.[15] Third, there have been reports of TPLF provided to a law firm seeking to be appointed lead counsel in a class action.[16]

II. ARGUMENTS FOR DISCLOSURE

A. INTRODUCTION

It is crucial to distinguish at the outset the difference between proposals for disclosure of TPLF, in their various forms, and other proposals concerning the regulation or elimination of TPLF. Disclosure of TPLF relates to mandatory requirements concerning information about TPLF. The range of other proposals concerning the regulation and elimination of TPLF is vast, and beyond the scope of this White Paper. It should be noted, in passing, that some states prohibit all TPLF and some states have imposed limitations on only consumer TPLF, either as a matter of judicial interpretation or legislative enactment.[17] Some of the same groups that have called for disclosure have also called for other forms of regulation (or elimination) of TPLF.[18]

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[15] *See Bentham IMF Unveils New Portfolio Model for Litigation Funding,* Bentham IMF (Nov. 16, 2015), https://www.benthamimf.com/docs/default-source/default-document-library/portfolioannouncementclean.pdf?sfvrsn=2; *Burford Capital 2017 Annual Report* at 7, http://www.burfordcapital.com/wp-content/uploads/2018/03/BUR-28711-Annual-Report-2017-web.pdf; *See* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 409-10 (2017) (on portfolio TPLF).

[16] *See* Gbarabe v. Chevron Corp., No. 14-cv-00173, 2016 WL 4154849 (N.D. Cal. Aug. 5, 2016).

[17] *See* Prospect Funding Partners, LLC v. Williams, No. 27-CV-13-8745, 2014 Minn. Dist. LEXIS 2 (Dist. Ct. Hennepin County, Minn., May 5, 2014) (noting Minnesota's long-standing prohibition on TPLF). Oasis Legal Fin. Grp., LLC v. Coffman, 361 P.3d 400 (Colo. 2015) (placing consumer TPLF contracts under state consumer credit law). Four states have passed legislative limits on the cost of consumer TPLF: Ark. SB 882 (2015) (to be codified at Ark. Code § 4-57-109(a)(2)) (effective Apr. 1, 2015) (maximum rate of 17% per annum); Ind. Code 24-4.5-3-202 (effective July 1, 2016) (maximum rate of 36%); Tenn. Code Ann. § 47-51-101 et seq. (effective July 1, 2015) (maximum rate of 36% per year for a maximum of three years); and W. Va. Code §§ 46A-6N-9(a) (maximum rate of 18% per year) (effective June 5, 2019).

[18] U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009), http://www.instituteforlegal reform.com/research/selling-lawsuits-buying-trouble-the-emerging-world-of-third-party-litigation-financing-in-the-united-states

B. ARGUMENTS FOR DISCLOSURE IN COMMERCIAL TPLF

Arguments for disclosure of TPLF have arisen in two waves. In the first wave, defendants have attempted to obtain documents related to TPLF from adverse parties in litigation.[19] Typical of such a request was that of the defendant in *Miller UK Ltd. v. Caterpillar, Inc.*, who asked for "the actual contract with Miller's [the plaintiff] funder and those documents provided by Miller to it and any other third-party lender from which Miller sought funding for this case."[20] The reasons for requesting the documents were that they would be relevant to helping the defendant determine whether it had a defense of champerty under state law, who was the real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure ("FRCP"), and that the documents contained material relevant to the underlying issue of liability and damages.[21] Most courts that have been asked to enforce discovery motions to disclose TPLF-related documents have rejected the requests on the ground that the documents contain attorney work product, and the conditions for waiver of work product have not been satisfied per FRCP Rule 26(b)(3)(B).[22] On a number of occasions, courts have rejected discovery of TPLF-related documents on the ground that the requested documents were not relevant to the underlying litigation.[23]

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[19] *See* Grace M. Giesel, *Alternative Litigation Finance and the Work-Product Doctrine*, 47 WAKE FOREST L. REV. 1083 (2012); Grace M. Giesel, *Alternative Litigation Finance and The Attorney-Client Privilege*, 92 DENV. U.L. REV. 95 (2014).

[20] 17 F. Supp. 3d 711, 713 (N.D. Ill. 2014).

[21] *Ibid.* at 719 and 739–40.

[22] *Id*. at 736 ("Because the work-product doctrine serves to protect an attorney's work product from falling into the hands of an adversary, a disclosure to a third party does not automatically waive work-product protection."); *and see* Ala. Aircraft Indus. v. Boeing Co., No. 2:16-mc-01216-RDP (N.D. Ala., Feb. 9, 2018); Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., 2017 U.S. Dist. LEXIS 215773 (W.D. Pa. Dec. 19, 2017); Viamedia, Inc. v. Comcast Corp., 2017 U.S. Dist. LEXIS 101852 (N.D. Ill. June 30, 2017); Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd, 2016 U.S. Dist. LEXIS 188611, (S.D. Cal. Sept. 20, 2016); United States v. Homeward Residential, Inc.,2016 U.S. Dist. LEXIS (E.D. Tex. Mar. 15, 2016); United States v. Ocwen Loan Serv., LLC, 2016 U.S. Dist. LEXIS 32967, (E.D. Tex. Mar. 15, 2016); *In re*: Int'l Oil Trading Co., LLC, 548 B.R. 825, 832 (Bankr. S.D. Fla. 2016; Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., 2015 Del. Super. LEXIS 166 (Super. Ct. Mar. 31, 2015); Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A., 2015 Del. Ch. LEXIS 42 (Feb. 24, 2015); Devon IT, Inc. v. IBM Corp., 2012 U.S. Dist. LEXIS 166749 (E.D. Pa. Sep. 27, 2012); *Mondis Tech., Ltd. v. LG Elecs., Inc.,* 2011 U.S. Dist. LEXIS 47807 (E.D. Tex. May 4, 2011); *but see* Acceleration Bay LLC v. Activision Blizzard, Inc., 2018 U.S. Dist. LEXIS 21506 (D. Del. Feb. 9, 2018) (rejecting the argument that TPLF documents were protected under the work product doctrine).

[23] *See* Benitez v. Lopez, 2019 U.S. Dist. LEXIS 64532, at *2-3 (E.D.N.Y. Mar. 14, 2019) ("In this case, the financial backing of a litigation funder is as irrelevant to credibility as the Plaintiff's personal financial wealth, credit history, or indebtedness. That a person has received litigation funding does not assist the

The second wave has come in the form of proposals to amend state and federal law. Typical of these proposals is the following, which was proposed by the U.S. Chamber Institute for Legal Reform to FRCP 26(a)(1)(A) in 2017:

> a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, 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.[24]

This proposal is identical to one which the U.S. Chamber proposed in 2014 and 2016.[25] A nearly identical proposal was recently passed in Wisconsin:

<u>Third-party agreements.</u> 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.[26]

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factfinder in determining whether or not the witness is telling the truth."); In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 2019 U.S. Dist. LEXIS 160051, at *29 (D.N.J. Sep. 18, 2019) ("The Court finds that litigation funding is irrelevant to the claims and defenses in the case and, therefore, plaintiffs' litigation funding is not discoverable."); MLC Intellectual Property LLC v. Micron Technology, Inc, 2019 U.S. Dist. LEXIS 2745 at *2 (N.D. Ca. Jan. 7, 2019) ("The Court concludes that [defendant] is not entitled to the discovery it seeks because it is not relevant."); Yousefi v. Delta Electric Motors, Inc, 2015 U.S. Dist. LEXIS 180843, at *2 (W.D. Wash. May 11, 2015) ("Whether plaintiff is funding this litigation through savings, insurance proceeds, a kickstarter campaign, or contributions from [a] union is not relevant to any claim or defense at issue."). *and see* Miller, 17 F. Supp. 3d at 723.

[24] *See Letter from U.S. Chamber Institute for Legal Reform et al. to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts*, June 1, 2017, Appendix B, http://www.uscourts.gov/sites/default/files/17-cv-o- suggestion_ilr_et_al_0.pdf ("Chamber Letter").

[25] *See Report to the Standing Committee of the Advisory Committee on Civil Rules*, Dec. 6, 2017 at 247 ("Standing Committee Report").

[26] 2017 Assembly Bill 773 ("SECTION 12. 804.01 (2) (bg) is created to read"). The bill was signed into law on Apr. 2, 2018.

The proposal to amend Rule 26 has been explained in materials from various tort reform organizations which are publicly available. The letters from the U.S. Chamber and the Request for Rulemaking to the Advisory Committee on Civil Rules from Lawyers for Civil Justice raise multiple concerns about TPLF.[27] These sources suggest that disclosure would protect "the integrity of the adversarial process"[28] in the following ways:

1. Expose violations of laws against champerty, where they exist[29];

2. Expose violations of the prohibition against fee-splitting between lawyers and non-lawyers[30];

3. Expose agreements which create impermissible conflicts of interest between lawyers, funders and clients[31];

4. Expose conflicts of interests between judges and funders[32];

5. Expose efforts by funders to control litigation[33];

6. Expose contract terms that might "undermine" settlement[34];

7. Allow judges to weigh the resources available to parties to determine discovery[35];

8. Allow judges to know who the real party in interest is, if sanctions are imposed[36];

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[27] *See Chamber Letter and Request for Rulemaking to the Advisory Committee On Civil Rules*, Aug. 10, 2017, from Lawyers for Civil Justice, http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_request_for_rulemaking_concerning_mdl_cases_8-10-17.pdf ("Request for Rulemaking).

[28] *See* Chamber Letter at 11.

[29] *Ibid*.

[30] *Id.* at 13.

[31] *Id.* at 14.

[32] *Id*. at 15.

[33] *Id*. at 16.

[34] *Id*. at 18.

[35] *Id*. at 19. This is the "proportionality" test under FRCP Rule 26. *See* Hon. Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 2015 FED. CTS. L. REV. 19 (2015). The irony of defendants raising this argument will be explored below at text accompanying n.85.

[36] *Id.* at 19.

9. Allow judges to know whether a third party in addition to plaintiffs are interested in the result of a class or mass action[37];

10. Allow "parity of financial disclosure" similar to Rule 26's requirement that parties (usually defendants) disclose the existence and terms of liability insurance[38];

11. Allow the public to know whether a third party with a non-economic, social or political motive is using a party in litigation; in other words, to make it harder for someone like Peter Thiel to fund a lawsuit against a defendant like Gawker Media.[39]

As the Standing Committee of the Advisory Committee on Civil Rules noted in a report, some of the putative justifications for disclosure are moot if the problem that they are supposed to cure does not exist in practice, such as the problem that TPLF allows funders to control litigation (something funders deny) or undermine settlement (again, something funders deny).[40] Other justifications may be possible, such as conflict of interests between judges and funders where a judge owns shares in a commercial funder, or the risk that a TPLF contract is in violation of state law, but then there is a question of costs versus benefits — whether a rule that requires compulsory disclosure is worth the costs that it would impose.[41]

C. ARGUMENTS FOR DISCLOSURE IN CONSUMER TPLF

The arguments reviewed above for disclosure have been raised primarily by critics of commercial TPLF and have received responses from primarily commercial funders such as Burford and Bentham. Consumer TPLF would be affected by the disclosure rules proposed for Rule 26, and will be affected by the new disclosure rule adopted in Wisconsin, but the consumer TPLF companies have not expressed much of an opinion about disclosure. This may be for a number of reasons, the

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[37] *Id.* at 20.

[38] *Id.* at 22. Many of these points are repeated in the Request for Rulemaking at 9–10.

[39] *See* Andrew Ross Sorkin, *Peter Thiel Is Said to Bankroll Hulk Hogan's Suit Against Gawker*, N.Y. TIMES, May 25, 2016 at B3. According to sources present at the debate of the Wisconsin bill, the "Peter Thiel" problem was raised by proponents of the bill to convince some skeptics.

[40] Standing Committee Report at 248 ("Third-party funders meet [some of] these arguments by direct denial. None of them . . . are true.").

[41] *Ibid* at 250.

most significant that consumer TPLF firms are much more concerned with other changes to the law of TPLF that are separate from proposals concerning disclosure. Consumer TPLF companies are concerned with changes to the law that would treat TPLF contracts with consumers as loans or as advances subject to limits similar to those imposed by usury law or other consumer credit laws.[42] The automatic disclosure requirement adopted by Wisconsin will apply to a $2,500 consumer TPLF contract as well as a $2 million commercial TPLF contract, but it seems that this extra burden was not of great concern to the consumer TPLF companies. Their main concern was to remove from the bill language which would have defined TPLF as "lending," which might have brought their contracts within Wisconsin's usury law.[43] They were successful.[44] In West Virginia, the 2019 law that caps the price of consumer TPLF at 18% per annum also requires a mandatory disclosure; again, it appears that it is the price cap, not the mandatory disclosure, that led the consumer TPLF companies to oppose the legislation.[45] One reason that consumer TPLF firms may not be concerned with disclosure proposals is that the existence of TPLF may be of little or no interest to the adverse party, since TPLF contracts are based on templates and their terms reveal nothing about the underlying case or any lawyer's work product.[46]

Disclosure in the context of consumer TPLF can mean more than allowing adverse parties to know about the existence of a funding agreement and the content of that agreement. It can mean regulatory requirements that funders

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[42] *See, e.g.*, Jenna Wims Hashway, *Litigation Loansharks: A History of Litigation Lending and a Proposal to Bring Litigation Advances Within the Protection of Usury Laws*, 17 ROGER WILLIAMS U. L. REV. 750 (2012). The adoption of usury-type regulation has caused consumer TPLF firms to leave Colorado and Tennessee, states where they were once active. *See, e.g.,* Andrew G. Simpson, *Litigation Financing Firm Exits Tennessee As New Law Goes Into Effect*, INS. J., July 3, 2014, http://www.insurancejournal.com/news/southeast/2014/07/03/333772.htm

[43] John Breslin, *Judiciary Committee Approves Amended Legal Reform Bill In Wisconsin*, LEGALNEWS-LINE, Feb. 21, 2018, https://legalnewsline.com/stories/511348497-judiciary-committee-approves-amended-legal-reform-bill-in-wisconsin

[44] *Civil Justice Reform Passes Assembly, Held Up in the Senate*, WIS. MANUFACTURERS & COM., Mar. 1, 2018, https://www.wmc.org/uncategorized/civil-justice-reform-passes-assembly-held-up-in-the-senate/

[45] W.VA. CODE §46A-6N-6 (Third-party agreements) ("Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.").

[46] Further, given that consumer TPLF concerns cases that rarely go to trial (or even progress into significant discovery), it may be that, to the extent that funders are concerned that judges may respond to the existence of funding, the risk of judicial notice of consumer TPLF is extremely low.

provide information to the consumer. It can also mean regulatory requirements that funders provide information to a public agency (either state or federal).

On February 17, 2005, the Attorney General of the State of New York and nine New York-based consumer TPLF firms entered into an "Assurance of Discontinuance" agreement that resulted from negotiations between the Attorney General and the LFCs.[47] The main purpose of the N.Y. Agreement was to put into place certain disclosure requirements that TPLF firms would have to provide to consumers in the State of New York. The N.Y. Agreement imposed nine requirements, modeled after standardized credit card and mortgage applications. The key requirements were a clear statement of the financial terms of the agreement, including a statement of (a) the total amount being advanced; (b) an itemization of one-time fees broken out item by item (e.g., application, processing, attorney review, broker, etc.); (c) the annual percentage interest rate charged and how often interest compounds; and (d) the total amount the borrower will repay broken out by six-month intervals and carried forward to thirty-six months, including all fees and the minimum payment amount, as well as a five-business-day period to cancel the contract without suffering a penalty. It does not impose an upper limit on how much the funder can charge in interest, fees, or other costs.

Since 2005, the two major consumer TPLF trade organizations have adopted voluntarily codes of conduct that parallel the N.Y. Agreement.[48] Five states, Maine, Nebraska, Ohio, Oklahoma, and Vermont, have adopted disclosure laws that, with some variation, endeavor to provide consumers protection through forcing TPLF firms to provide information similar to that disclosed under the N.Y. Agreement.[49] Indiana has adopted a law with disclosure requirements similar to those of the N.Y. Agreement, but since it also has a cap on the price of consumer TPLF, the

[47] BUREAU OF CONSUMER FRAUDS AND PROTECTION, ATTORNEY GEN. OF THE STATE OF N.Y., ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15) 4-7 (2005) ("N.Y. Agreement"), available at https://www.mighty.com/blog/nyattorneygeneralplaintifffundingagreement

[48] *See The ALFA Code of Conduct*, AM. LEGAL FIN. ASS'N, https://americanlegalfin.com/alfa-code-of-conduct/ and *Industry Best Practices*, ALLIANCE FOR RESPONSIBLE CONSUMER LEGAL FUNDING, http://arclegalfunding.org/industry-best-practices/

[49] *See* ME. REV. STAT. ANN. tit. 9-A, § 12-101 (effective Jan. 1, 2008); NEB. REV. STAT. § 25-3302(1), (4) (effective Apr. 13, 2010); OHIO REV. CODE ANN. § 1349.55(A)(1) (effective Aug. 27, 2008); OKLA. STAT. tit. § 14A-3-801(6) (effective May 29, 2013) and 8 VT. STAT. ANN. tit.§§ 2251–2260 (effective July 1, 2016). Some of these legislative schemes also protect the consumer by forbidding certain substantive contract terms, such as prohibiting compounding interest monthly (e.g., Maine and Nebraska) or prohibiting mandatory arbitration (Vermont).

legislation is not seen primarily as a disclosure law, and it was only grudgingly endorsed by one of the two TPLF trade organizations.[50]

In addition to forcing a clear statement of existing contract terms, which is what the N.Y. Agreement does, disclosure could also include additional information not contained in the contract, and it could include disclosure to third parties other than the consumer or the defendant, such as a state or federal agency tasked with collecting information. Up to now, proposals under the heading of "disclosure," which have been promoted mostly by consumer TPLF trade groups, have focused on making existing contract terms as clear as possible. For example, the proposed legislation currently favored by ALFA in New York would require "an itemization of one-time charges; the maximum total amount to be assigned by the consumer to the company, including the funded amount and all charges; and a payment schedule to include the funded amount and charges, listing all dates and the amount due" at the end of six-month periods.[51]

Recent empirical research into the behavior of the consumer TPLF suggests that, while the price of consumer TPLF is not as high as its critics have suggested, the market is extremely opaque and consumer may not be receiving the same final price for the sale of their asset.[52] Disclosure of whether consumer TPLF companies have adjusted the final price charged to the consumer after the resolution of the consumer's lawsuit, and the actual average price charged to consumers, is something that consumers and regulators may benefit from knowing. Mandatory disclosure of this data is another form of disclosure, different from either the disclosure to adverse parties urged in the context of commercial TPLF and

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[50] IND. CODE 24-4.5-3-202 (effective July 1, 2016) (maximum rate of 36%) *and see* Victor Li, *Indiana and Vermont Regulate Consumer Litigation Funding,* ABA JOURNAL, July 7, 2016, http://www.abajournal.com/news/article/indiana_and_vermont_regulate_consumer_litigation_funding (on ARC's views of Indiana TPLF law)

[51] *See* Consumer Litigation Funding Act, S.B. S3651, 2019 Leg., Reg. Sess. (N.Y. 2019), introduced by Sens. Comrie and Ranzenhofer, February 11, 2019 *at* §899-GGG ("Disclosures"). The proposed legislation would also require consumer TPLF firms to report the "number of consumer litigation fundings" by each firm; a "summation of funded amounts"; the "annual percentage charged to each consumer where repayment was made" and these figures would be made available to the public. *Ibid* at 899-LLL ("Reporting").

[52] *See* Ronen Avraham & Anthony J. Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, 104 CORNELL L. REV. 1133 (2018) *and* Ronen Avraham & Anthony J. Sebok, *Americans Should Have The Proper Protections When Bringing Lawsuits*, THE HILL, Mar. 29, 2018, http://thehill.com/opinion/judiciary/380891-americans-should-have-the-proper-protections-when-bringing-lawsuits

disclosure of contract terms which has been the primary focus of consumer TPLF trade groups.

D. ARGUMENTS FOR DISCLOSURE OF LAW FIRM FINANCING

As noted above, proponents of disclosure of commercial TPLF argue that it would help enforce ethical prohibitions on fee-splitting.[53] This justification for disclosure has been challenged by some academic experts in legal ethics, who argue that it is highly unusual for the federal rules of procedure to be used to promote the enforcement of rules of professional responsibility, which are clearly the province of the states and (as in the case of so-called fee-splitting) may not mean the same thing in all states.[54]

Proponents of disclosure have additional arguments that do not depend on using federal rules of civil procedure to support or reinforce state law. They argue that in the context of mass and class federal actions, disclosure of third-party funding of law firms promotes the ends of the federal rules under which the lawyers operate.

In the context of class action, proponents of disclosure have argued that the existence of TPLF is necessary for a court to evaluate the adequacy of class counsel under FRCP 23(a)(4)'s adequacy-of-representation prerequisite.[55] The argument has found support in *Gbarabe v. Chevron Corp.*, where a lawyer seeking appointment as lead counsel was required to disclose the terms of a commercial TPLF agreement.[56] Furthermore, the same federal district court in which *Gbarabe* was decided has adopted a local rule requiring the disclosure of TPLF in cases

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[53] *See, e.g*. Chamber Letter at 13.

[54] *See* Letter to the Standing Committee, Sept. 26, 2017 from Professors W. Bradley Wendel and Anthony J. Sebok on Proposed Amendment to Rule 26. The New York City Bar Association's Working Group on Litigation Funding has issued a report which includes, among other recommendations, two competing recommendations about amendments to N.Y.R.P.C. 5.4(a) to allow law firm financing. *See Report to the President by the New York City Bar Association Working Group On Litigation Funding,* (February 28, 2020),
http://documents.nycbar.org/files/Report_to_the_President_by_Litigation_Funding_Working_Group.pdf One ("Proposal A") would require the client's informed consent to the financing, and therefore disclosure. Whether lawyer-directed TPLF should be disclosed to the client, either to enable informed consent or for some other purpose, is outside the scope of this essay.

[55] *See, e.g*., Chamber Letter at 21.

[56] 2016 U.S. Dist. LEXIS 103594 (N.D. Cal. Aug. 5, 2016).

brought under FRCP Rule 23.[57] At least one other federal district court is considering a similar step.[58] The motivation behind the disclosure rule adopted by the Northern District of California is not public, and there is reason to believe that the judges who adopted the rule were motivated by concerns beyond law firm finance in class actions, or only law firm finance.[59] In 2019, a bill was introduced in the United States Senate which would amend the portion of the United States Code pertaining to class actions to require disclosure of TPLF.[60] The bill's disclosure requirements are similar to those required by the Northern District of California. In a press release, the senators sponsoring the bill said that TPLF in class actions may create a risk of "conflicts of interest" which could be addressed by disclosure.[61]

Finally, some reformers have focused on disclosure in litigation connected to multi-district litigation, or MDLs.[62] The policy concern behind disclosure in connection with MDLs is — according to its proponents — the risk that TPLF companies are financing so-called "lead generators" or "aggregators."[63] The facts behind this concern are hard to evaluate, since the practices lumped under the terms "lead generator" or "aggregator" are vague and involve activities that may

[57] *See* Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (Jan. 2017), requiring that "in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."

[58] *See* Ben Hancock, *Bentham Hires Yetter Coleman Partner as It Expands to Texas*, TEXAS LAWYER, Feb. 21, 2017, https://www.law.com/texaslawyer/almID/1202779591965/Bentham-Hires-Yetter-Coleman-Partner-as-It-Expands-to-Texas/ ("Ron Clark, chief judge of the Eastern District of Texas, told TEXAS LAWYER that jurists in his division may follow the Northern District of California's lead and consider similar measures.").

[59] *See* Ben Hancock, *Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions*, THE RECORDER, Jan. 23, 2018, https://www.law.com/therecorder/almID/1202777487488/Northern-District-First-in-Nation-Mandates-Disclosure-of-ThirdParty-Funding-in-Class-Actions ("The court's Civil Rules Committee, chaired by Judge Richard Seeborg, had proposed a broader rule that would have required the automatic disclosure of funding agreements in any matter before the court" but it was narrowed.).

[60] The Litigation Funding Transparency Act of 2019, section 2 (introduced by Sens. Grassley (sponsor), Cornyn, Sasse and Tillis on Feb. 13, 2019).

[61] *Grassley Leads Lawmakers in Introducing Bill to Improve Transparency of Third Party Financing in Civil Litigation*, Feb. 13, 2019, https://www.grassley.senate.gov/news/news-releases/grassley-leads-lawmakers-introducing-bill-improve-transparency-third-party

[62] *See* Rules for Rulemaking at 10 - 11.

[63] *Ibid*.

be performed by lawyers and nonlawyers.[64] In general, these third parties help lawyers seeking to participate in MDLs of other mass actions find clients.[65] Unlike class actions, which may provide for more transparency (in theory) because of the fiduciary-type power of a federal judge under FRCP 23, MDLs are relatively opaque.[66] The connection between TPLF and disclosure is that if defendants and courts in MDLs can learn about the interest third parties have in lead generation, the risk of frivolous and fraudulent claiming will be reduced.[67] For this reason, the Lawyers for Civil Justice have, in addition to supporting the amendment to FRCP 26 proposed by the Institute for Legal Reform, proposed amending Rule 26 so that "any third-party claim aggregator, lead generator, or related business or individual, who assisted in any way in identifying any potential plaintiff(s)" would be disclosed.[68] The one fact that is missing from the policy arguments for

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[64] *See* Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG BUSINESSWEEK (Dec. 12, 2013), http://www.bloomberg.com/bw/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale (examining the mass tort lead generation business).

[65] *See* Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 360 (2016) ("[A]ttorneys litigating these cases assemble large inventories, usually with the assistance of a cottage industry of lead generation and referral firms.").

[66] *See* Elizabeth Chamblee Burch and Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation,* Colum. L. Rev. (forthcoming 2021), University of Georgia School of Law Legal Studies Research Paper No. 2020-22, Available at SSRN: https://ssrn.com/abstract=3610197 *and* Francesca Mari, The Lawyer Whose Clients Didn't Exist, THE ATLANTIC (May 2020).

[67] *See* Rule for Rulemaking at 11–12. At least one MDL court has allowed (limited) discovery of TPLF-related materials (although not necessarily the TPLF contracts themselves). *See* In re Am. Med. Sys.*,* 2016 U.S. Dist. LEXIS 84838 (S.D. W. Va. May 31, 2016) at *15:

> [M]uch of the information sought by AMS's subpoenas is relevant . . . AMS reasonably seeks to understand the motivation behind the plaintiffs' decisions to undergo corrective surgeries and how those surgeries were funded. A rational place to start is with the beginning of the money trail — the first entity interacting with the plaintiffs before the decision to have a corrective surgery is made.

[68] *See ibid* at 12:

> In order to provide transparency to courts and parties, the Committee should amend Rule 26(a)(1)(A)(i) to include the following required disclosure:
>
>> The name and, if known, the address and telephone number of each individual likely to have discoverable information…and if relevant, a disclosure of any third-party claim aggregator, lead generator, or related business or individual, who assisted in any way in identifying any potential plaintiff(s), and if relevant, the identification of any plaintiff that was recommended, referred, or otherwise directed to plaintiff's counsel based on a recommendation,

disclosure of TPLF financing in connection with lead generation in MDLs (or any litigation, for that matter) is the degree to which commercial or consumer TPLF firms finance companies (or lawyers) that specialize in identifying plaintiffs for mass tort cases — the question of whether (and how) to respond to the recent emergence of MDLs in the mass tort space should not be conflated with the question of whether TPLF is a casue of the former.

Despite the very tenuous connection between MDL lead generation and TPLF firms, the Advisory Committee on Civil Rules chose to continue to consider amendments to FRCP 26 in the context of MDLs.[69] Rather than endorse the disclosure recommendation urged by groups like the Institute for Civil Justice, the committee asked the Subcommittee on MDLs to gather more information about TPLF.[70] It is not clear why the question of disclosure of TPLF was given to the Subcommittee on MDLs.[71] It is also not clear that the committee views itself as limited in future discussions over FRPC 26 to disclosure relating only to MDLs (or class actions).[72] The only thing that is clear is that the Subcommittee on MDLs is

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> referral, or other information gathered from such a third party claim aggregator, lead generator, or related business or individual.

[69] *See* Amanda Bronstad, *Federal Rules Advisory Panel to Eye Litigation Financing—Sort Of*, NAT'L L.J., Nov. 8, 2017, https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/08/federal-judicial-panel-to-consider-litigation-financing-sort-of/ ("A federal judicial body plans to look into rules changes concerning disclosure of third-party financing of litigation—a move praised by the U.S. Chamber of Commerce—but the breadth of that probe could be limited.").

[70] *See* March 2018 Report of the Standing Committee to the Chief Justice:

> The advisory committee has received a suggestion to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of 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. . . . The committee referred the issue to the MDL subcommittee, since one of the MDL proposals discussed above explicitly calls for disclosure of third party financing agreements. Additionally, such funding agreements are often used in MDL proceedings. The subcommittee will study the issue in an effort to determine whether it is something that should be pursued.

[71] At least one member of the Advisory Committee held the view that TPLF is overrepresented in MDLs. *See* Draft Minutes, Civil Rules Committee, November 7, 2017 *in* Civil Rules Advisory Committee Agenda Book (Apr. 2018) at lines 692–93 ("A judge suggested that third-party funding seems to be an issue primarily in patent litigation and in MDL proceedings.").

[72] *See* Standing Committee Report at 250 (emphasis added):

> The Committee concluded that these questions can be delegated, at least initially, to the Subcommittee appointed to develop information about the MDL proposals. One of the MDL proposals explicitly incorporates the proposal for disclosure of third-party financing agreements. There is reason to believe that MDL litigation is one of

currently the institutional focal point of any future efforts to adopt new disclosure requirements on TPLF in the federal rules.

The Litigation Funding Transparency Act of 2019, discussed above, would also require automatic disclosure of any agreement which provides for payment to a commercial third party contingent upon proceeds being generated in a case within the jurisdiction of 28 U.S. Code § 1407, the federal law governing multidistrict litigation.[73] The policy justification for extending the scope of disclosure beyond class actions to MDLs in the Act is not clearly stated by its sponsors, but supporters of the Act have suggested that TPLF in MDLs "allows hedge funds to . . . charge sky-interest rates — sometimes up to 200 percent — and leave plaintiffs [in MDLs] with settlements of just pennies on the dollar."[74] This is not an argument for disclosure in MDLs *per se,* as opposed to disclosure in any federal case (which is what the proponents of changes in Rule 26 have recommended) and it is not clear how disclosure would address the evil of high costs of litigation financing to individual plaintiffs, since a federal judge has no authority to determine compensation for individuals in an MDL, although they can monitor the allocation of common benefit fees where there is an agreement by all parties to settle while a court retains jurisdiction under 28 U.S. Code § 1407.[75]

III. COST AND BENEFITS OF DISCLOSURE

A. INTRODUCTION

Before discussing the costs and benefits of disclosure of TPLF, it must be noted that there is little empirical data upon which to base an evaluation. As mentioned above, the only law or court rules specifically intended to require disclosure of

the prominent occasions for third-party funding. This Subcommittee's work will prepare the way for a determination whether third-party financing disclosure should be pursued.

[73] *See* The Litigation Funding Transparency Act of 2019, section 3.

[74] *See* Lisa A. Rickard, *Who's Behind The Curtain? Congress Needs To Require Third-Party Litigation Disclosure*, DES MOINES REGISTER, June 4, 2018.

[75] *See* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine To Justify Contingency Fee Caps in MDL Aggregate Settlements,* 26 GEO. J. LEGAL ETHICS 59, 59 - 60 (2013).

TPLF to the court and an adverse party are the recently enacted Wisconsin law and the local rule adopted by the Northern District of California.

Other local rules that require the disclosure of a party interested in the outcome of litigation, such as Federal Rule of Appellate Procedure 26.1 and Federal Civil Rule 7.1, which concerns corporate disclosure statements, have always existed, but the idea that they cover TPLF is new, paralleling the recent rise of TPLF in the market. The Advisory Committee reviewed existing local rules of federal circuit and district courts and concluded that some of these courts have versions of Rules 26.1 and 7.1 which require disclosure of funding, although none of them were drafted explicitly with that purpose and it is not clear whether these rules have been interpreted until now to require disclosure of TPLF.[76] The committee concluded that six federal appellate courts had local rules that extended Rule 26.1 in some way that might require disclosure of the existence of TPLF, such as the local rule in the Eleventh Circuit, which would require disclosure of must contain a complete list of all "persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal."[77] The same memorandum also noted that, while no other district court "has (yet) followed the Northern District of California's lead to identify expressly class action lawsuits as a civil action in which the disclosure of litigation funders is required. . . 23 other district courts require that parties identify litigation funders in any civil action under local rules related to Federal Rule of Civil Procedure 7.1."[78] These district courts, like the circuit courts, have local rules that extend Rule 7.1 and require disclosure of any person or entity (other than the parties to the case) that has a "financial interest in the outcome of the proceeding."[79] According to the memorandum, the "plain language of these local rules encompasses litigation

[76] *See* Memorandum from Patrick A. Tighe, Rules Law Clerk: Survey of Federal and State Disclosure Rules Regarding Litigation Funding, February 7, 2018 (hereafter "Survey of Disclosure Rules"). Appellate Rule 26.1 provides that "[a]ny nongovernmental party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."

[77] 11th Cir. L. R. 26.1-2(a) *and see* Andrew Strickler, *3rd-Party Funders Must Be Disclosed In 6 Fed. Appeals Courts*, LAW360, Mar. 27, 2018, https://www.law360.com/legalethics/articles/1026646/3rd-party-funders-must-be-disclosed-in-6-fed-appeals-courts

[78] *See* Survey of Disclosure Rules at 4, *supra* note 76. FRCP 7.1 provides in relevant part that any "nongovernmental corporate party must file 2 copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or states that there is no such corporation."

[79] Survey of Disclosure Rules at 4.

funders because a litigation funder will receive proceeds from the settlement or judgment if the contracting party prevails," but although some might require a description of the "nature of litigation funder's financial interest," none require disclosure of the litigation finance agreement itself, something the proposed amendment to Rule 26 would require.[80]

As the memorandum notes, the stated justification for the disclosure requirements in the circuit courts "is to help judges assess recusal and disqualification."[81] The disclosure requirements in the local rules in the district courts, similarly, are intended "to assist judges with assessing possible recusal or disqualification."[82] The memorandum notes that commercial TPLF companies have not, up to now, considered the disclosure rules discussed in the memorandum to require disclosure of TPLF, and the memorandum cites only one recent episode where TPLF was revealed as a result of court-ordered compliance with a version of Rule 7.1.[83] Further, although it would have been outside of the scope, the memorandum does not discuss how likely disclosure under the rules it reviewed would lead to recusal, since the memorandum does not purport to speculate about the likelihood that judges have relations with TPLF companies that would require recusal under current standards of judicial conduct.

While it is possible that the recent explosion of proposals for disclosure targeted at TPLF is intended to address a dramatic increase in the risk of conflict of interest that existing rules of court are inadequate to prevent, it is likely that the proponents of the new proposals have other ends in mind. As the next section will illustrate, the cost of complying with the proposed disclosure rules may increase, depending on their application by the courts. The possibility cannot be ignored that for many of the proponents of the new disclosure rules, uncertainty and excess costs of compliance is a feature, not a bug in the system they wish to create. That is, it may be the case that the goal is to adopt rules whose stated benefits are admittedly rarely realized, but whose real benefit is that they make every TPLF transaction more costly.

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[80] *Id*.

[81] *Id.* at 2.

[82] *Id.* at 5.

[83] *Id.* at 5–6 ("compliance with these local rules is difficult to ascertain"), *and see* Notice of Interested Parties, *Realtime Adaptive Streaming LLC v. Hulu*, LLC, No. 2:17-cv-07611-SJO-FFM, Dkt. No. 18 (C.D. Cal. Oct. 24, 2017).

B. COSTS OF DISCLOSURE

The costs of disclosure can be discussed in only the most general and speculative terms. Obviously, to the extent that some disclosure of TPLF is already required by existing law, it might be observed that the costs seem to be law and manageable, since TPLF is growing and, except for a few disputes over waiver of privilege, the costs of enforcing the current disclosure regime seem relatively low. But the relevant question is whether proposals for additional disclosure, either through the amendment of federal and state laws and local rules, will impose additional costs, and what those costs will be.

1. Direct Economic Costs

It is likely that mandatory disclosure rules will add economic costs to the parties in litigation. Parties receiving TPLF will have to take steps to comply with mandatory rules. It is possible that the direct financial costs will be low for consumer TPLF. For example, it may be that one reason consumer TPLF trade groups did not oppose the recent Wisconsin disclosure law in its final form is that they thought that it would be easy for lawyers to comply with the mandatory disclosure requirement by creating a standard document which would be triggered by a simple review of a client's file, automatically filled out by software, and filed electronically.

The direct financial costs in the context of commercial TPLF may be greater. The proposed changes to Rule 26 will create a rule which, at least initially, requires human judgment in its application. Needless to say, courts in multiple federal circuits and districts will have to interpret the rule, and that will take time to resolve contradictory judicial interpretations. There is no settled understanding of what sort of beneficial interest falls under the phrase "any person . . . [who] has a right to receive compensation contingent on, and sourced from, any proceeds of [a] civil action."[84] The divergent interpretations confronting a party is already indicated in the diversity of requirements adopted by federal district courts attempting to expand disclosure requirements under Rule 7.1.[85] Furthermore, as

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[84] This is taken from the amendment to Rule 26 proposed by the Institute for Legal Reform, *supra* note 24.

[85] [D]istrict courts vary in the type of financial interest that parties must disclose. Some require identifying any entity with "a financial interest" whereas others require disclosing only those entities with a "direct financial interest" or a "substantial financial interest.

Survey of Disclosure Rules at 6.

noted by some courts in the course of weighing relevancy, the speculative quality of defendants' rationales for discovery of documents connected with TPLF weigh *against* burdening the parties who hold the material, given FRCP Rule 26's stated concern that discovery be proportional.[86]

If the proposed disclosure rules are given their broadest possible application, then the financial consequences of reporting may be borne by parties who are not TPLF firms, and are far outside the scope of the policy concerns reviewed above that have motivated the proposed changes. To take a very real example, the recently adopted Wisconsin legislation, on its face, would require a plaintiff to disclose the identity and interest of any person with a contingent right to proceeds, including an insurance subrogree, or a claimant who took a bank loan with the litigation claim as security, or a personal loan among family members, or even a deferred healthcare fee to be paid with the proceeds of a personal injury lawsuit. While the direct cost of disclosure will be borne by the plaintiff (or, more likely, their attorney), collateral costs related to the exchange of information and the monitoring of the disclosure will be borne by the third parties.

2. Indirect Economic Costs

The indirect of economic costs of adding new disclosure requirements are very hard to measure. Any added cost to litigation reduces access to justice; this is a well-understood principle that motivates advocates and opponents of so-called tort reform, which is designed, in part, to make it more expensive for parties and their lawyers to bring lawsuits.[87] The direct costs of disclosure were canvassed in the previous section. The indirect costs include (a) increases in the cost of capital, for both parties and plaintiff's attorneys (if they have to substitute TPLF with advances) and (b) additional litigation expenses generated by pre-trial motion practice — specifically additional discovery requests — prompted by disclosure.[88]

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[86] *See, e.g.,* In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig, 2019 U.S. Dist. LEXIS 160051, at *32 ("Even if plaintiffs' litigation funding is marginally relevant, which is not the case, defendants' requested discovery would be denied because it is not 'proportional to the needs of the case.'") (*citing* Space Data Corp. v. Google LLC, 2018 U.S. Dist. LEXIS 228050 (N.D. Cal. June 11, 2018) at *1).

[87] *See, e.g.,* STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE (2015).

[88] Additional discovery costs are one reason that commercial TPLF firms opposed the Wisconsin disclosure legislation. *See* Ben Hancock, *Litigation Funding Deals Must Be Disclosed Under Groundbreaking Wisconsin Law*, NAT'L L.J., Apr. 04, 2018, https://www.law.com/2018/04/04/wisconsin-

As Professor Maria Glover has put it, "disclosure of the fact of funding, or anything relating to funding in relation to the court, is a bit of a tax on a funded party, and not something that we would require were there not funding available."[89]

Finally, it is possible that the true motivation behind many disclosure proposals is not only to increase direct and indirect costs of litigation, but to affect public opinion about the value and desirability of TPLF. One consequence of disclosure is the possibility of public access to the details of TPLF agreements. There may be a hope that, although most TPLF agreements might be of no interest to the press or the public at large, some agreements might contain terms or reflect motivations that might cast the whole TPLF sector in a bad light.[90]

3. Comparison With Other Disclosure Rules

It is very difficult to draw any conclusions about the direct economic costs of expanding disclosure of TPLF by comparing it to other disclosure laws and rules unconnected to TPLF. As mentioned above, the disclosure regime imposed by Federal Rule of Appellate Procedure 26.1 and Federal Civil Rule 7.1, which have, until now, been intended to help courts avoid conflicts of interest with the parties before them, seems to offer little useful guidance. The only other disclosure rule that might have relevance concerns the mandatory initial disclosure of liability insurance coverage under Rule 26(a)(1)(A)(iv). In 1970, the Committee amended Rule 26(b)(2) to require disclosure of a defendant's insurance coverage because it felt that "[d]isclosure 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."[91] Amendments to Rule 26 were adopted in order to help parties to make choices about conducting litigation

litigation-funding ("'This provision in the amended statute will, in all likelihood, increase the number of discovery disputes and thus the cost of litigation for both plaintiffs and defendants,' Allison Chock, the chief investment officer for Bentham IMF, said in an email.").

[89] See *Panel 4: Litigation Funding and the Federal Rules of Civil Procedure*, 12 N.Y.U. J.L. & BUS. 603, 630 (2016).

[90] While TPLF may be legal, it may also offend public opinion when used for certain ends. This may explain why, for example, Peter Thiel took every effort to conceal his TPLF arrangement in the litigation against Gawker by "Hulk" Hogan. *See* Ryan Mac, *Behind Peter Thiel's Plan To Destroy Gawker*, FORBES, June 7, 2016, https://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#5876242f30f4

[91] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 1970 amendment.

and to allow both sides to have (as much as possible) the same information about resources available for settlement.[92]

Leaving aside whether the same policy goals would be served by changing Rule 26 to require disclosure of TPLF as are served by requiring disclosure of liability insurance, a separate question can be asked about the burden imposed by the two disclosure regimes. The mandatory disclosure requirement of liability insurance in Rule 26 is much narrower in scope than the proposal to require mandatory disclosure of TPLF under discussion. As the Advisory Committee on Civil Rules noted:

> [D]isclosure is carefully limited to an agreement with "an insurance business." Other forms of indemnification agreements are not covered. Nor is discovery generally allowed into a defendant's financial position, even though both indemnification agreements and overall resources may have impacts similar to, or even exceeding, the impact of liability insurance.[93]

The proposed amendment to Rule 26 would extend to "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," and thus would extend to a far larger universe of materials.[94]

The significance of the more limited obligation in Rule 26's liability insurance disclosure requirement can be seen in the court's rejection of efforts by parties to go beyond the strict disclosure requirements of the rule to obtain documents related to the amount of a party's right to coverage. Courts have refused plaintiffs access under Rule 26 to an insurer's reservation of rights letter connected to a liability policy or an accounting of how much of the policy limits in a policy had been used for legal fees before an insured had assumed the cost of its own

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[92] Standing Committee Report at 248.

[93] *Id*.

[94] This is true about the Wisconsin law as well.

representation and secured new counsel.[95]The plain meaning of the Chamber's proposal — to require mandatory disclosure of "any agreement" involving litigation finance— would allow a defendant to obtain information about a plaintiff's litigation posture that courts prohibit plaintiffs from securing under the insurance disclosure requirements supporters of expanded disclosure for TPLF. Regardless of whether the additional burden is worth it, it must be admitted that the scope of the obligation will be greater for plaintiffs than defendants.

4. Costs to Lawyers

In addition to the direct and indirect costs of compliance detailed above, which assume that legal resources will have to be dedicated toward complying with, and interpreting, the obligations that TPLF disclosure rules would impose, there is an additional cost that is borne only by lawyers. Compliance assumes competent legal advice, which, of course, is the basic obligation of all lawyers.[96] Unless a lawyer chooses to limit her scope of representation and explicitly refuse to advise a client on compliance with new TPLF disclosure requirements, she will have to advise a client on compliance, and probably assist the client as well, by gathering materials and filing the relevant forms. None of this represents unusual legal work (as is evidenced by the fact that certain statements relating to liability insurance coverage is presumably compiled by lawyers under FRCP Rule 26(a)(1)(A)(iv) for defendants), but it represents an expansion of a lawyer's exposure to both discipline and malpractice liability. Failure by a lawyer to reasonably advise a client on new mandatory disclosure requirements may result in injury to the client, and therefore civil liability.[97] Failure by a lawyer to disclose any documents within the scope of a mandatory TPLF disclosure rule (or to amend after the fact a failure of a client to disclose) would open the lawyer up to discipline under Rule 3.3(a)(1).[98] Lawyers have already been sued (albeit unsuccessfully) by clients who

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[95] *See, e.g.,* Native American Arts, Inc. v. Bundy-Howard, Inc., No. 01 C 1618, 2003 WL 1524649 (N.D. Ill. Mar. 20, 2003) *and* Excelsior College v. Frye, 233 F.R.D. 583 (S.D. Cal. 2006).

[96] *See* Model Rules of Professional Conduct ("MRPC"), Rule 1.1 (Competence).

[97] Since no current proposal for expanded TPLF disclosure includes any preservation of privilege, it must be presumed that parties are waiving privilege with regard to the documents disclosed. By definition, then, a lawyer will have to provide adequate counsel to secure from her client informed consent for disclosure if it would lead to the waiver of evidentiary privileges or the release of confidential information protected under MRPC 1.6.

[98] MRPC Rule 3.3: Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

have been unhappy with their advice with regard to a TPLF contract.[99] Clearly, by expanding the exposure of lawyers to liability and discipline, additional costs (of care, self-insurance, and malpractice insurance) will be imposed on lawyers who have clients who seek TPLF.

B. BENEFITS OF DISCLOSURE

Like the costs of disclosure, the benefits are also speculative and hard to predict (or measure). The most commonly cited benefit is that by requiring TPLF to be disclosed at an early stage in litigation, judges will be able to recognize conflicts and recuse themselves.[100] This argument has found some traction in parallel debates that have occurred in international arbitration.[101] The parallel with international arbitration is not very useful, however, since international arbitration employs neutral decision-makers who are often drawn from practice, and who may have direct professional relations with TPLF firms. Judges in the United States, on the other hand, while sometimes connected to practice through previous employment, more often face recusal based on financial interests such as ownership of shares in a corporation whose interests will be affected by the outcome of a case before the judge.[102] Given the very small size of the TPLF market, and the even smaller number of publicly traded TPLF firms, the risk of financial interest through shareholding or other forms of investment among judges seems extremely low, and as yet, no one has produced any data to suggest that it is a problem of such scale that special amendments to existing law are required to address it.

A second benefit that has been cited is the specific role that disclosure of TPLF may play in insuring that a court may evaluate a lead counsel with complete information about its financial resources. This argument was the reason that the

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

[99] *See, e.g.,* Francis v. Mirman, Markovits & Landau PC, N.Y. Sup. Ct. Kings Cty., No. 29993/10 (Jan. 3, 2013).

[100] *See* Standing Committee Report at 249.

[101] *See* Maria Choi, *Third-Party Funders in International Arbitration: A Case for Protecting Communication Made in Order to Finance Arbitration*, 29 GEO. J. LEGAL ETHICS 883, 889 (2016) ("In response to the rising concerns about conflicts of interest, the IBA Guidelines on Conflicts of Interest were revised in October 2014 to include reference to third-party funders.").

[102] *See* Ziona Hochbaum, *Note, Taking Stock: The Need to Amend 28 U.S.C. § 455 to Achieve Clarity and Sensibility in Disqualification Rules for Judges' Financial Holdings*, 71 FORDHAM L. REV. 1669 (2003).

Northern District of California changed its local rules in connection with class action. It is hard to know whether class members will truly benefit from the new rule. Obviously, it is in no one's interest for a class to have inadequately capitalized counsel appointed, and to the extent that the rule causes a court to appoint a different lead counsel who would secure a better result for the class, the benefit, even if marginal, may exist. To the extent that the rule is used tactically by defendants to defeat the appointment of class counsel where none takes its place, it is not clear that the rule does work to the advantage of potential class members.

The remaining benefits seem to be directed toward using disclosure as a vehicle for the deterrence of conduct which is prohibited already under existing law. The argument that TPLF disclosure will expose violations of the prohibition of champerty in those states in which it is prohibited does not rely on the claim that disclosure will help improve the integrity of proceeding in which the disclosure occurs, but that it will help prevent wrongdoing that should never have been connected with the proceeding anyway. The same point can be made about the putative benefit of disclosure with regard to violations of the rules of professional responsibility by lawyers who allow third parties to interfere with their independent professional judgment in violation of MRPC 5.4(c).[103] TPLF can be provided without a lawyer violating her obligation of independent professional judgment to her client, and it is not clear why the exiting law — including the existing mechanisms for the discipline of lawyers who violate their obligations to the bar — are not sufficient to address violations of Rule 5.4(c), to the extent that they arise in the context of TPLF.[104]

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[103] MRCP Rule 5.4: Professional Independence Of A Lawyer

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

[104] It should be observed that violations of Rule 5.4(c) have been documented in the context of liability insurance contracts. *See* Douglas R. Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 283 (1994). Despite the well-documented risk of a lawyer violating her obligation to provide the client with independent professional judgment, Rule 26 was not amended to deal with that issue — just the issue of conflicts of interest and recusal.

IV. CONCLUSION AND RECOMMENDATIONS

Argument for most disclosure rules in TPLF faces two challenges. First, the problems the proposed rules aim to solve are not ones that seem important or pressing. For example, the risk that judicial conflict of interest due to stock ownership by judges in TPLF companies seems, at this point, mostly in the imagination of the proponents of the disclosure rules. Second, the costs of compliance with the disclosure rules may be large, depending on how the rules are framed and interpreted. As a result, the best course of action is caution, both in supporting disclosure and in designing disclosure rules. This paper will conclude by making two recommendations.

1. MAKE DISCLOSURE WORK FOR CONSUMERS

The most serious criticism of consumer TPLF is that consumers are not getting as much from their transactions with TPLF firms as they could. Proposals to set a price for how much a consumer TPLF firm must pay for a contingent portion of a consumer's litigation outcome are a form of price control, and price controls are often the last resort for those seeking to protect consumers. (Usury law is a form of price control.) There is no reason to believe — at this point — that markets cannot operate to set prices in this part of consumers' lives as they do in other parts of their lives. However, for markets to work, there must be transparency and information, and the current consumer TPLF sector lacks both.

Most consumer TPLF contracts are not transparent, since they include many contract terms that are difficult for consumers to understand and compare in order to shop around for the best deal for their lawsuit.[105] Simple pricing — without additional terms such as application fees which are paid only if the consumer's application is accepted by the funder and the lawsuit is eventually successful — would help consumers know how much the transaction will earn them, so that they can, if they wish, comparison shop. While some disclosure reforms supported by the TPLF industry call for disclosure, disclosure rules could go further by

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[105] *See* Avraham & Sebok, *An Empirical Investigation of Third Party Consumer Litigation Funding*, *supra* note 51. For a very preliminary exploration of the role of consumer protection in consumer legal finance from one of the authors, see Ronen Avraham, Lynn A. Baker, and Anthony J. Sebok, *The Anatomy of Consumer Legal Funding* (August 10, 2020). Cardozo Legal Studies Research Paper No. 618, U of Texas Law, Public Law Research Paper Forthcoming, U of Texas Law, Law and Econ Research Paper Forthcoming, Available at SSRN: https://ssrn.com/abstract=3670825

prohibiting certain pricing devices that could be replaced by simpler pricing mechanisms.

2. DISCLOSURE TO THE COURT SHOULD BE LIMITED AND IN CAMERA

To the extent that disclosure in commercial TPLF and TPLF in class actions and MDLs is valuable, it should be limited to the audience who needs to be informed: the court. None of the arguments presented by advocates for broad disclosure justify disclosure of funding documents to adverse parties. The cost of such disclosure has been reviewed above, and, while that cost can be contained, there seems to be no reason for the typical plaintiff to bear that cost at all. A simpler solution is to allow the court — and only the court — to examine the facts of the funding relevant to the court's needs and to determine, based on that preliminary inquiry, whether broader disclosure is warranted.

A good example of targeted disclosure is the order issued on May 7, 2018, in *In Re: National Prescription Opiate Litigation*.[106] Judge Dan Aaron Polster ordered any attorney who has obtained litigation financing to submit, ex parte and in camera, the identity of the financer and to affirm that the financing does not create any conflict of interests, undermine counsel's obligation of vigorous advocacy, affect counsel's independent judgment, give the lender any control over litigation strategy or settlement decisions, and affect party control of any settlement.[107] The order left open the possibility that discovery by adverse parties into TPLF agreements could occur under "extraordinary circumstances".[108]

Judge Polster's order is a good model for future legislation, but it also lays bare the weakness of the argument for law reform addressing disclosure of TPLF. At the most, legislation implementing Judge Polster's order would provide judges with another tool to monitor conflicts of interest. The meaning of "extraordinary circumstances" in Judge Polster's order is not clear, and although future opinions may illuminate it, it is unlikely that the judge intended this caveat to take up much

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106 MDL Docket No. 2804, No. 17-md-2804 (N.D. Ohio, Eastern Div.).

107 *Ibid.* The order also held that the work product doctrine could preserve privilege over certain communications between the plaintiffs and third-party funders. *Ibid* at 2, *citing* Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc. Judge Polster's approach was adopted in *In re Valsartan N-Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig*, 2019 U.S. Dist. LEXIS 160051 at *40.

108 *Id.*

of the court's time or produce significant benefits for the parties. In other words, Judge Polster's additional disclosure requirements are modest in both ambition and significance. They deserve support, but they are not intended to achieve more than a marginal increase in protection for the integrity of the judicial process. This is not a criticism of Judge Polster's order, but a recognition that an objective study of the issues raised by TPLF in MDLs entails the conclusion that there is little need for more than minor reform with regard to disclosure of TPLF.

Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements

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Litigation finance is the new and fast-growing practice by which a nonparty funds a plaintiff's litigation either for profit or for some other motivation. Some estimates placed the size of the litigation finance market at $50-$100 billion. Both proponents and opponents of this newly emergent phenomenon agree that it is the most important civil justice development of this era. Litigation finance is already transforming civil litigation at the level of the single case as well as, incrementally, at the level of the civil justice system as a whole. It is also beginning to transform the way law firms are doing business and it will increasingly shape the careers of civil litigators at firms small and large. Consequently, Congress, state legislatures, state and federal courts, bar associations, international arbitration institutions, foreign legislatures, and foreign courts are concurrently grappling with how to regulate litigation finance and what, if any, disclosure requirements to impose on such financing.

This Essay aims to turn the debate inside out by proposing to abandon the quest for a bright line rule and to instead adopt a flexible, discretionary standard: a balancing test. The Essay culminates in a specific proposal for the contours — the interests and factors — which judges and arbitrators should be empowered and required to weigh when deciding whether and what form of disclosure to require. More specifically, the Essay details and rationalizes the specific public and private interests and factors to consider, including the profile of the plaintiffs and their motive for seeking funding, the funder's profile and motivation, the case type and the forum, the subject matter of the litigation, the potential effect on the development of the law, the structure of the financing, the purpose of the contemplated disclosure, and the procedural posture of the case.

INTRODUCTION

Both critics and proponents of the newly emergent phenomenon of litigation finance agree that the practice is likely the most important development in civil justice of our time.[109] Litigation finance is transforming civil litigation at the case level as well as, incrementally, at the level of the civil justice system as a whole. It is beginning to transform the way law firms are doing business and will increasingly shape the careers of civil litigators at firms small and large. It is unsurprising, therefore, that litigation finance is of interest to legislatures and the courts. At the state and federal level, in the judiciary, the legislatures, and at bar associations, the question of the day is whether and how to regulate litigation finance. That debate, and this Essay, focuses, specifically, on regulation through disclosure of the financing.

In summary, litigation finance is the practice by which a nonparty funds a plaintiff's litigation either for profit or for some other motivation.[110] Last year, some estimates placed the size of the litigation finance market at $50-$100 billion.[111] This market in legal claims has attracted specialist firms, private equity, hedge funds, wealthy individuals, the public (through crowdfunding platforms), and sovereign wealth funds, among others, who are looking for high-risk high-reward investments or for a *cause célèbre*. The high-profile funding of Hulk Hogan's lawsuit against Gawker has created a firestorm of public and regulatory interest. The funding of the concussion litigation, #MeToo cases, and Stormy Daniels' lawsuit—to name but a few recent examples—have dominated headlines and conferences.

This Essay argues that the quest for a bright line rule by which to regulate disclosure of litigation funding is fundamentally misguided because it fails to account for the near-infinite variability of funding scenarios, which implicate widely different interests, pose different risks, and affect different constituencies in varying degrees. In other words, rules are a legal technology that simply cannot capture nor address the nuance, variability, and context-specificity that litigation

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[109] *See infra* Part II.

[110] For a fuller explanation of the myriad forms litigation finance takes, see *infra* Part III.

[111] *See* Brian Baker, *In Low-Yield Environment, Litigation Finance Booms*, MARKETWATCH (Aug. 21, 2018, 10:59 AM), https://www.marketwatch.com/story/in-low-yield-environment-litigation-finance-booms-2018-08-17 [https://perma.cc/FL5P-4HMD].

finance implicates. Instead of a bright line rule, this Essay proposes that legislatures and courts shift to a standard-based approach and adopt, specifically, a balancing test. A specific balancing test, including factors and interests to be weighed by courts on an *ad hoc* basis, is then offered.

The Essay progresses as follows. Part I contains a description of pending and recent legislation and regulations.[112] Part II explains what's at stake as litigation finance expands and is poised to reshape civil litigation, civil justice, and the legal profession.[113] Part III explains the reasons why finding a uniform approach to whether or not to mandate disclosure of litigation finance and if so in what form has proved so controversial and elusive.[114] In a nutshell, the problem is the high variability of funding scenarios. The variables are described and unpacked. Part IV explains the invisible common thread in the otherwise-divergent current regulatory and scholarly approaches: when not punting, they assume a rules-based approach.[115] It then suggests moving away from a search for a rule to the embrace of a standard.[116] Part V then suggests such a standard or, more specifically, a balancing test, spelling out interests and factors to weigh.[117]

I. THE FLURRY OF LEGISLATIVE AND REGULATORY ACTIVITY AIMED AT A DISCLOSURE REGIME

Overlapping, but incohesive and under-theorized, discourses on whether and in what way to require disclosure of litigation finance are taking place at the federal, state and international levels. This Part describes these processes, and the proposals on the table, in that order.

A. At the Federal Level

At the federal level, two battlegrounds over regulation of litigation funding are currently waged and they revolve around legislation that would target complex (class and mass) litigation, at one level, and a possible change to the Federal Rules

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[112] *See infra* Part I.
[113] *See infra* Part II.
[114] *See infra* Part III.
[115] *See infra* Part IV.
[116] *See infra* Part IV.
[117] *See infra* Part V.

of Civil Procedure ("FRCP"), on the other. With respect to the former, in May 2018, Senator Chuck Grassley, Chairman of the Senate Judiciary Committee, introduced the Litigation Funding Transparency Act of 2018 ("LFTA"), which aims "to increase transparency and oversight of third-party litigation funding in certain actions, and for other purposes."[118] The bill, reintroduced on February 13, 2019,[119] is a narrow, disclosure-only scheme that follows an earlier attempt to include litigation funding disclosure requirements as part of a broader push to restrict class actions—the unsuccessful Fairness in Class Action Litigation Act of 2017 ("FCALA").[120]

If adopted, LFTA would require disclosure of litigation funding arrangements in class actions and multidistrict litigation in federal courts to the court and to all parties.[121] LFTA's stated goal is to improve transparency and oversight of the litigation finance industry, so that the court and other parties are able to identify conflicts of interest and "know whether there are undue pressures and secret agreements at play that could unnecessarily drag out litigation or harm the interest of the claimants themselves."[122]

Critics of the bill, often large litigation funders, argue that the proposed legislation unjustifiably "mandat[es] broad disclosure to the defendant."[123] Instead, they suggest that disclosure should be limited to the court, to avoid "handing defendants an unfair advantage by getting a free look at plaintiffs' financial affairs."[124] Critics also argue that the bill would impose even greater difficulties to plaintiffs of limited economic means "by imposing more barriers to

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118 S. 2815, 115th Cong. (2018).

119 *See* Ross Todd, *Republican Senators Reintroduce Bill Pushing for Disclosure of Litigation Funding*, NAT'L L.J. (Feb. 13, 2019, 6:40 PM), https://www.law.com/nationallawjournal/2019/02/13/republican-senators-reintroduce-bill-pushing-for-disclosure-of-litigation-funding.

120 *See* H.R. 985, 115th Cong. (2017).

121 *See* S. 2815 §§ 2-3.

122 *See* Press Release, Comm. on the Judiciary, Grassley, Tillis, Cornyn Introduce Bill to Shine Light on Third Party Litigation Financing Agreements (May 10, 2018), https://www.judiciary.senate.gov/press/rep/releases/grassley-tillis-cornyn-introduce-bill-to-shine-light-on-third-party-litigation-financing-agreements.

123 *Burford Capital Comments on The Litigation Funding Transparency Act of 2018*, BURFORD CAPITAL: BLOG (May 10, 2018), http://www.burfordcapital.com/blog/litigation-funding-transparency-act-2018 [https://perma.cc/63XX-VMXT].

124 *See id*.

entry for claimants trying to bring meritorious lawsuits against massive corporations."[125]

With respect to amendments to the FRCP, as of this writing, the Advisory Committee on Civil Rules ("Advisory Committee") finds itself amidst dueling lobbying efforts by proponents and opponents of litigation finance, with the latter lobbying for a revision of the Federal Rules of Civil Procedure mandating disclosure while the former endorsing retention of the *status quo*.[126] The U.S. Chamber of Commerce, the nation's leading business lobby, which has for years led the battle to eliminate or at least restrict litigation funding,[127] recently renewed for the third time its call that federal courts require parties to disclose all litigation funding agreements—including the identity of the funder and the terms of the funding—at the outset of any case in federal court. It proposed a broad amendment to FRCP Rule 26 that would require disclosure of "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."[128]

Scholars have also trained their sights on the question of disclosure in litigation finance. For example, one scholar proposes that procedural rules be revised or reinterpreted to require any party supported by a third-party funder to disclose the identity of the funder to the judge *in camera* so the judge may determine if there is a financial conflict of interest.[129] Another suggestion is that a class relying

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[125] *See* Matthew Harrison, *The Litigation Funding Transparency Act of 2018*, BENTHAM IMF: BLOG (May 14, 2018), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/05/14/the-litigation-funding-transparency-act-of-2018.

[126] *See* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 345-460 (Nov. 2017), http://www.uscourts.gov/sites/default/files/2017-11-CivilRulesAgendaBook_0.pdf [hereinafter AGENDA NOVEMBER 2017].

[127] *See, e.g.*, JOHN H. BEISNER & GARY A. RUBIN, U.S. CHAMBER INST. FOR LEGAL REFORM, STOPPING THE SALE ON LAWSUITS: A PROPOSAL TO REGULATE THIRD-PARTY INVESTMENTS IN LITIGATION 2, 10, 14 (2012), https://www.instituteforlegalreform.com/uploads/sites/1/TPLF_Solutions.pdf; Harold Kim, *The Time for Litigation Funding Transparency Is Now*, U.S. CHAMBER INST. FOR LEGAL REFORM (Nov. 7, 2017), https://www.instituteforlegalreform.com/resource/the-time-for-litigation-funding-transparency-is-now [https://perma.cc/D3VT-KTHA].

[128] ADVISORY COMM. ON CIVIL RULES, AGENDA NOVEMBER 2017, *supra* note 126, at 345.

[129] *See* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 424-27 (2016). Sahani also argues that the current disclosure rules can be interpreted as

on third-party funding should be required to disclose the arrangement to the court for *in camera* review, and the decision-maker be provided at least the name of the funder.[130]

The Advisory Committee declined to take up a similar suggestion in 2014, but it left the door open for future regulation, with members noting that "[w]e do not yet know enough about the many kinds of financing arrangements to be able to make rules"[131] and that "third-party financing practices are in a formative stage. They are being examined by others. They have ethical overtones. We should not act now."[132] But more recently, in response to the latest advocacy for rule change, the Advisory Committee created a subcommittee tasked with considering the possibility of initial disclosure of third-party funders in multidistrict litigation.[133] The subcommittee recently reported that it "continues to gather information and has not yet attempted to develop recommendations about whether to consider possible rule amendments, or what amendments, if any, should be given serious study."[134]

Finally, federal courts, in typical common law fashion, have been weighing in on disclosure in litigation finance as various fact patterns increasingly come before them.[135] And while Congress is taking its time, district and appellate courts

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relating to third party funding specifically, that the term "resources" in FRCP 26(b)(2)(C)(iii) should be construed to include third-party funding and that language referencing third-party funding should be added to the lists under Rule 16(b)(3)(B) and Rule 16(c)(2) such that information about funding be disclosed as part of the rules-mandated pretrial conferences. Additionally, she suggests adding a new Rule 7.2. In the context of disclosure of third-party funding agreements for a claim for attorney's fees, she suggests enforcing disclosure under Rule 54(d)(2)(B)(iv) or revising it to include third-party funding. *See id.* at 416-34.

130 *See* Aaseesh P. Polavarapu, *Discovering Third-Party Funding in Class Actions: A Proposal for In Camera Review*, 165 U. PA. L. REV. ONLINE 215, 233-34 (2017) (suggesting an affirmative duty on parties to disclose third-party funding agreements for *in camera* review); *see also* Sahani, *supra* note 129, at 424.

131 ADVISORY COMM. ON CIVIL RULES, MEETING MINUTES 13 (2014), http://www.uscourts.gov/sites/default/files/fr_import/CV10-2014-min.pdf.

132 *Id.* at 14.

133 *See* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 139 (Nov. 2018), https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf.

134 *Id.* at 140.

135 *See, e.g.*, Lambeth Magnetic Structures, LLC v. Seagate Tech. (US) Holdings, Inc., Nos. 16-538, 16-541, 2018 WL 466045, at *6 (W.D. Pa. Jan. 18, 2018); United States *ex rel.* Fisher v. Ocwen Loan Servicing, LLC, No. 4:12-CV-543, 2016 WL 1031157, at *6-7 (E.D. Tex. Mar. 15, 2016).

are enacting rules to deal with disclosure. As of this writing, twenty-four out of ninety-four district courts require some sort of disclosure of the identity of litigation funders in a civil case. Some of the district courts require a party to disclose the nature of a litigation funder's interest in the case. District courts impose these enhanced disclosure requirements in a number of ways, with fourteen promulgating local rules mandating broader disclosure than what is required under FRCP Rule 7.1,[136] two using standing orders, and ten using local forms which require disclosure of litigation financiers.[137] In the case of appellate courts, six U.S. circuit courts of appeal have local rules requiring expanded disclosure of litigation funders beyond the requirements of Federal Rule of Appellate Procedure 26.1.[138] These circuit courts generally require a party to disclose any person or organization with a financial interest in the litigation. Beyond this, though, the rules of circuit courts vary in details, with different circuits having different rules regarding whether amici curiae must disclose litigation financing, whether disclosures are limited to certain types of appeals, and other such issues.[139] The stated purpose of these regulations is to assist judges with evaluating possible issues of recusal and disqualification and none require automatic disclosure in every civil case. [140]

B. At the State Level

State legislatures and courts have also, increasingly, taken up the issue of litigation finance regulation in recent years. Unlike federal regulation, which tends to come up in the context of commercial litigation funding or focus on class and mass

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136 The rule requires that "[a] nongovernmental corporate party must file two copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation." FED. R. CIV. P. 7.1(a).

137 *See* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 210-11 (Apr. 2018), https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [hereinafter AGENDA APRIL 2018].

138 The rule requires that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation." FED. R. APP. P. 26.1(a).

139 *See* ADVISORY COMM. ON CIVIL RULES, AGENDA APRIL 2018, *supra* note 137, at 209-10.

140 *See id.* at 210.

litigation, the focus at the state level is on consumer litigation funding.[141] Therefore, these regulatory efforts often focus on ensuring that agreements are in writing and contain terms with "common, everyday meanings to enable the average consumer who makes a reasonable effort under ordinary circumstances to read and understand the terms of the contract without having to obtain the assistance of a professional."[142]

Because the regulation of consumer funding is concerned with avoiding predatory lending-like practices, most of the state regulation is less germane to the current discussion, other than to demonstrate the prominence of the regulatory flurry around a phenomenon that is already altering the quantity, nature, and outcome of civil litigation and is poised to further do so in coming years. But some state-level developments are nonetheless worth noting in the current context. Specifically, in April 2018, Wisconsin enacted "a first-of-its-kind state law requiring litigants to disclose their outside legal funding arrangements."[143] The rule requires a party, "without awaiting a discovery request, [to] 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

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[141] *See* Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460-61 (2012) [hereinafter *The Litigation Finance Contract*] (explaining the common distinction between consumer litigation funding, which focuses on the funding of small personal claims for individual clients, and commercial litigation funding, which focuses on the funding of larger, higher value claims brought by more sophisticated parties, these parties often being business entities); *see also* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 382-83 (2014) (noting three main types of litigation financing: consumer litigation financing, commercial litigation financing, and lawyer lending); Anthony J. Sebok, *Litigation Investment and Legal Ethics: What Are the Real Issues?,* 55 CANADIAN BUS. L.J. 111, 114-15 (2014) [hereinafter *Litigation Investment and Legal Ethics*] (describing the differences between consumer and commercial litigation investment); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 864-65 (2015) (noting the different regulatory regimes imposed on commercial and consumer litigation financing).

[142] VT. STAT. ANN. tit. 8, § 2253(a) (2015); *see, e.g.*, ARK. CODE ANN. § 4-57-109 (2015); ME. REV. STAT. ANN. tit. 9-A, § 12-104 (2008); NEB. REV. STAT. ANN. § 25-3303 (2010); OHIO REV. CODE ANN. § 1349.55 (2008); OKLA. STAT. ANN. tit. 14A, § 3-805 (2013); TENN. CODE ANN. § 47-16-104 (2014); *see also* ADVISORY COMM. ON CIVIL RULES, AGENDA APRIL 2018, *supra* note 137, at 216-17 (discussing state legislation and regulations for regulating litigation funding through registration models and caps on rates and fees).

[143] Andrew Strickler, *Wis. Gov. Signs Legal Funder Transparency Rule*, LAW360 (Apr. 3, 2018, 9:26 PM), https://www.law360.com/legalethics/articles/1029480/wis-gov-signs-legal-funder-transparency-rule.

action, by settlement, judgment, or otherwise."[144] This is the first state regulation which imposes a broad mandatory disclosure requirement for litigants funded by third parties.[145]

Finally, like their federal counterparts, state courts have also been called upon to decide whether and how litigation funding should be disclosed.[146]

C. International and Foreign Regulatory Developments

The development of litigation finance in the United States represents an expansion of an industry that first took hold in domestic litigation in Australia and the United Kingdom, and then expanded in international arbitration.[147] In the realm of international arbitration, the most important development is the creation of "soft law" in the form of a Report by the International Council for Commercial Arbitration ("ICCA")-Queen Mary Task Force on Third-Party Funding in International Arbitration, which was finalized, after a very long and public deliberative process, in April 2018. It restates the general norm emerging in international arbitration of requiring disclosure of the existence and identity of funders for the purpose of arbitrators' conflicts check and confirms the emergent

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144 WIS. STAT. ANN. § 804.01 (2019).

145 *See* Strickler, *supra* note 143.

146 *See, e.g.*, Carlyle Inv. Mgmt. v. Moonmouth Co., C.A. No. 7841-VCP, 2015 WL 778846, at *8-9 (Del. Ch. Feb. 24, 2015) (litigation funding documents serve a dual litigation and business purpose, but should still be subject to work product confidentiality protections); Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., No. 07C-12-134-JRJ, 2015 WL 1540520, at *4 (Del. Super. Ct. Mar. 31, 2015) (since the payment terms in a litigation finance agreement were prepared in anticipation of litigation, and involved attorney mental impressions and litigation strategies, these terms should be subject to work product protection); Conlon v. Rosa, Nos. 295907, 295932, 2004 WL 1627337, at *2 (Mass. Land Ct. July 21, 2004) (the need to evaluate bias and credibility of the plaintiff weighs against holding litigation finance documents confidential).

147 *See* Leslie Perrin, *England and Wales*, *in* THE THIRD PARTY LITIGATION FUNDING LAW REVIEW 48, 48-58 (Leslie Perrin ed., 2d ed. 2018) (reviewing litigation financing in England and Wales); Nicholas Dietsch, Note, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 698-705 (2011); Jasminka Kalajdzic et al., *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 96-113 (2013); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275-86 (2011) [hereinafter *Whose Claim Is This Anyway?*]). *See generally* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2d. ed. 2017) (detailing third-party litigation funding in several countries and discussing the problems that may arise with litigation funding in international arbitration).

consensus that arbitrators have the authority to order such disclosure. But, likely due to the controversial nature of disclosure, the report refrains from "provid[ing] any new standards for assessing conflicts, but instead refers such issues to existing law, rules, and guidelines."[148] Arbitrators, thus, are left to decide on their own whether, to what extent, and under what conditions, further disclosure may be warranted.

In Australia, the first jurisdiction to legalize (indeed—actively foster) litigation finance, the existence of a litigation finance agreement needs to be disclosed, but the details of the agreement are likely privileged.[149] And in the United Kingdom, the existence of a litigation finance agreement and the identity of the litigation funder are not considered privileged information but the details of a litigation finance agreement generally are.[150]

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What pending proposals generally have in common is that, when they do not simply punt on the issue, they seek or assume bright-line rules on disclosure. The rest of the Essay questions this approach.

II. THE STAKES: WHY LITIGATION FINANCE IS UNDERSTOOD TO BE THE MOST IMPORTANT DEVELOPMENT IN CONTEMPORARY CIVIL LITIGATION

Critics and proponents alike agree that the rise of litigation finance in recent years is the single most important development in civil justice.[151] The following

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[148] *See* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 12 (2018), https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

[149] *See* Jason Geisker & Jenny Tallis, *Australia*, *in* THE THIRD PARTY LITIGATION FUNDING LAW REVIEW, *supra* note 147, at 1-11.

[150] *See* Perrin, *supra* note 147, at 53.

[151] *See, e.g.*, GEOFFREY MCGOVERN ET AL., THIRD PARTY LITIGATION FUNDING AND CLAIM TRANSFER 1 (2010) (ebook). More generally, "[w]e find ourselves in the second stage of a revolution in the financing of civil litigation . . . [c]ompared with the situation seventy-five years ago, the plaintiffs' bar is today better financed, both absolutely and relative to the defense bar." Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 183 (2011). Critics include the U.S. Chamber of Commerce, through its publications. *See, e.g.*, JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (2009),

paragraphs explain the main reasons the practice is so profoundly important and why it has generated so much interest among academics, lawyers, legislatures, the judiciary, the media, and the investment community.

A. Litigation Finance Implicates Foundational Questions of Civil Justice

The primary import of the industry is its propensity to increase the number of cases brought. This is either a positive or a negative depending on whether one focuses on the potential to increase access to justice for deserving but under-resourced plaintiffs, or on the potential to increase non-meritorious litigation.[152]

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https://www.instituteforlegalreform.com/uploads/sites/1/thirdparty litigationfinancing.pdf; BEISNER & RUBIN, *supra* note 127, at 1 (labeling litigation finance "a clear and present danger to the impartial and efficient administration of civil justice in the United States"); *Third Party Litigation Funding*, U.S. CHAMBER INST. FOR LEGAL REFORM, https://instituteforlegalreform.com/issues/third-party-litigation-funding (last visited Sept. 8, 2019) [hereinafter *Third Party Litigation Funding*]. Other critics include Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613 (2012) and Joanna M. Shepherd, *Ideal Versus Reality in Third-Party Litigation Financing*, 8 J.L. ECON. & POL'Y 593 (2012). Proponents include ABA Comm. on Ethics & Prof'l Responsibility, *see* Formal Opinion 484 (Nov. 27, 2018), N.Y. State Bar Ass'n Comm. on Prof'l Ethics, *see* Ethics Opinion 1104 (Nov. 15, 2016), and scores of scholars, *see, e.g.*, Susan Lorde Martin, *Litigation Financing: Another Subprime Industry That Has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615 (2007); Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65 (2010); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995); Sebok, *Litigation Investment and Legal Ethics*, *supra* note 141, at 111.

[152] For arguments that litigation finance is likely to increase non-meritorious litigation, see, for example, Jeremy Kidd, *Modeling the Likely Effects of Litigation Financing*, 47 LOY. U. CHI. L.J. 1239, 1258-60 (2016); Thomas J. Donohue, *Stopping the Litigation Machine*, U.S. CHAMBER OF COMM. (Oct. 31, 2016, 9:00 AM), https://www.uschamber.com/series/your-corner/stopping-the-litigation-machine; and *Third Party Litigation Funding*, *supra* note 151. For arguments that litigation is unlikely to increase non-meritorious litigation, see, for example, Molot, *supra* note 151, at 106-07; Shannon, *supra* note 141, at 874-75. More generally, for literature on the socially desirable level of litigation, see, for example, Richard L. Abel, *The Real Tort Crisis — Too Few Claims*, 48 OHIO ST. L.J. 443 (1987) and Nora Freeman Engstrom, *ISO the Missing Plaintiff*, JOTWELL (Apr. 12, 2017), https://torts.jotwell.com/iso-the-missing-plaintiff/ (book review) ("Using a number of methodologies, these researchers have, again and again, confirmed Abel's basic empirical premise. In most areas of the tort law ecosystem, only a small fraction of Americans seek compensation, even following negligently inflicted injury."). For a classic law and economics analysis of the suboptimal levels of litigation, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997); Nora Freeman Engstrom, *Re-Re-Financing Civil Litigation:*

An associated concern, relating to systemic effects on the courts, is what affects the availability of funding and liquidity of legal claims might have on how quickly cases settle.[153] But peel away this level of the debate and other, possibly even more profound, implications arise.

B. Constitutional, Human Rights, and Civil Rights Implications

The ability to bring a suit—an expensive enterprise under the best of circumstances—implicates constitutional, human, and civil rights. Access to justice is a human right, "guaranteed as a legal right in virtually all universal and regional human rights instruments, since the 1948 Universal Declaration, as well as in many national constitutions."[154] In the United States, the right to bring a suit is often further described as a form of free speech and participation in certain types of cases is understood to be an aspect of democratic participation.[155]

How Lawyer Lending Might Remake the American Litigation Landscape, Again, 61 UCLA L. REV. DISCOURSE 110 (2013) (describing the evolution of funding available to plaintiff-side personal injury firms and identifying the ways in which third party funders in this space may alter the American litigation landscape).

[153] *See* Steinitz, *Whose Claim Is This Anyway?*, *supra* note 147, at 1305-07. For empirical data on the subject, see Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third Party Consumer-Litigant Funding* 13 (Cardozo Legal Studies Research Paper No. 539, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3137247 (using a dataset of funding requests to find that in cases where the plaintiff was funded and the lawsuit was settled, 417 days was the median amount of time between the initial payment to the funder and settlement of the case and the funder being fully paid); David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1080-81, 1107 (2013) (finding that although data on settlements cannot be obtained, "that once defendants recognize the increased likelihood of litigation and the greater resources held by plaintiffs, they would be more likely to settle in equilibrium. While transitioning to that new equilibrium, there is another potential benefit from litigation funding: earlier resolution of the law."); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding — A Signaling Model*, 63 DEPAUL L. REV. 233, 235 (2014) (arguing that third-party litigation funding gives plaintiff(s) more time to come to a better settlement); Daniel L. Chen, *Can Markets Stimulate Rights? On the Alienability of Legal Claims*, 46 RAND J. ECON. 23, 49 (2015) ("[I]ncreased settlement may arise if litigation funding reduces the uncertainty of case outcomes. . . . Although settlement is not directly measured . . . the number of cases filed and the number of finalizations are positively associated with litigation funding, whereas the number of times parties are required to appear before court per case is negatively associated with litigation funding . . . .").

[154] Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, *in* ACCESS TO JUSTICE AS A HUMAN RIGHT 1, 2 (Francesco Francioni ed., 2007).

[155] *See, e.g.*, Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577-79 (2008) (arguing that trials further certain social and democratic aims such as giving a voice

Tellingly, the last time a vigorous debate erupted around "champerty" and "maintenance"—the traditional doctrines that barred, with some exceptions, the funding of a suit by a nonparty—was when civil rights organizations took on civil rights cases, including school integration cases, pro bono.[156]

And for defendants, the questions of who funds the plaintiffs' case, the motivation behind the funding, and whether or not the defendants get to request discovery from the funders or, even, join them as parties, are often framed as questions of defendants' due process rights.

C. Implication for the Organizational Structure of Law Firms and the Competition for Legal Services

Litigation finance, especially with the very recent advent of "portfolio funding"—funding tied to the performance of a portfolio of cases, rather than that of a single case, and provided directly to law firms[157]—is changing the competitive landscape of law firms and is poised to change the organization, governance, and finance of law firms.[158] For example, start-up and boutique firms are now able to effectively compete with so-called BigLaw and with established plaintiffs' firms for high-end work, including work that may require investment by the firm (e.g., contingency and *qui tam* cases). The availability of outside financing also vitiates the traditional workaround, developed when law firms had a monopoly over litigation finance, whereby law firms created consortia of firms, where only one or some provides lawyering, and the others were brought on board solely to provide

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to litigants to express their claims and providing a platform for the publication of wrongs that may have been incurred).

[156] *See The South's Amended Barratry Laws: An Attempt to End Group Pressure Through the Courts*, 72 YALE L.J. 1613, 1613 (1963).

[157] *See As the Funding Industry Evolves, Portfolio Financing Grows in Popularity*, BENTHAM IMF: BLOG (May 10, 2018), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/05/10/as-the-funding-industry-evolves-portfolio-financing-grows-in-popularity [https://perma.cc/53U7-CHB4]; Press Release, Burford, Burford Capital Announces Innovative Insolvency Portfolio Financing with Grant Thornton (May 4, 2016), http://www.burfordcapital.com/newsroom/burford-capital-announces-innovative-insolvency-portfolio-financing-grant-thornton; *Portfolio Litigation Funding*, WOODSFORD LITIG. FUNDING, https://woodsfordlitigationfunding.com/litigation-finance/portfolio-litigation-funding (last visited Feb. 18, 2018) [https://perma.cc/E3YK-YN53].

[158] For an in-depth discussion of these effects, see Maya Steinitz, The Partnership Mystique: Law Firm Finance and Governance in the 21st Century (forthcoming manuscript) (on file with author).

financing.[159] These changes will have cascading effects on how law firms finance and govern themselves.

D. Spillover Effects to Criminal Defense Finance

The financing of civil litigation, especially the modalities it takes, appears to have inspired modes of criminal defense funding. For example, following the development of the crowdfunding of litigation funding,[160] criminal defendants have followed suit with similar crowdfunding efforts.[161] And one may surmise that through sensitizing the public to litigation funding, with its attendant host of conflicts and other ethical challenges, in the civil justice arena, conflicts-ridden modes of funding in the criminal defense realm may become more palatable than they otherwise would have been.[162]

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159 *See* Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 475-76 (1998); Marc Galanter, *Case Congregations and Their Careers*, 24 LAW & SOC'Y REV. 371, 387 (1990).

160 *See infra* note 230.

161 Prominent current examples include Michael Cohen, Benjamin Netanyahu, and Rick Gates. *See Michael Cohen Truth Fund*, GOFUNDME (Aug. 21, 2018), https://www.gofundme.com/hqjupj-michael-cohen-truth-fund; *Netanyahu Rejects Decision Banning Tycoons from Funding His Legal Defense*, TIMES OF ISRAEL (Feb. 24, 2019, 9:16 PM), https://www.timesofisrael.com/netanyahu-rejects-decision-banning-tycoons-from-funding-his-legal-defense ("Legal representatives for Prime Minister Benjamin Netanyahu declared Sunday that the premier does not intend to accept a decision banning funding from wealthy associates of his legal defense in the three corruption cases he is facing."); Kathryn Watson, *Judge Chastises Rick Gates for Legal Defense Fundraiser Video*, CBS NEWS (Dec. 22, 2017, 1:01 PM), https://www.cbsnews.com/news/judge-chastises-rick-gates-for-legal-defense-fundraiser.

162 For examples of such controversial, potentially conflicts-ridden, forms of criminal defense finance by President Trump with respect to the legal bills of his family members and former and current staffers, see Summer Meza, *Trump's New Conflict of Interest Could Involve Paying Off Officials to Not Talk About Russia*, NEWSWEEK (Nov. 18, 2017, 9:33 AM), https://www.newsweek.com/trump-legal-fees-staffers-conflict-interest-715995 ("[R]ather than using campaign donations or charging the Republican National Committee, [President Trump] has created a fund to finance the legal bills of his former and current staffers — which could violate ethics laws if there's a chance it could influence their testimonies. . . . The RNC paid more than $230,000 for two of Trump's personal attorneys . . . . The Republican Party has shelled out even more for Donald Trump Jr., paying more than $500,000 in legal fees as he faces allegations of collusion . . . .").

The urgency of all of these questions is amplified when one considers the explosive growth of the industry in recent years, both nationally and globally, and the projections of further future growth as well as expansion into new areas.

Third-party funding, which until the beginning of this century was considered near-universally as a crime, a tort, or at least an ethical violation, has erupted into the mainstream and some estimates of the size of this global industry now place its market capitalization at $50-$100 billion.[163] Given the growing awareness of litigation finance, the fact that many areas of litigation, such as class and mass actions in the United States, have not yet been unlocked as "asset sub-classes," and the fact that various jurisdictions have only recently or not yet legalized the practice—by all estimates, litigation finance is poised to continue seeing robust growth in coming years.[164] This brings us to our next topic: the variability of litigation finance scenarios.

III. THE VARIABILITY OF LITIGATION FINANCE SCENARIOS

When assessing the suitability of the approaches currently contemplated, as outlined in Part I, it is important to understand the wide array of practices that fall under the rubric of "litigation finance" and the colorful cast of characters that are involved. Ultimately, the variability of litigation finance scenarios militates against a bright-line rule approach.

In 2016, litigation finance exploded into the public consciousness when billionaire Peter Thiel's funding of Hulk Hogan's lawsuit against Gawker became

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[163] *See* Baker, *supra* note 111. Of course, since almost all funders are privately-held, and since substantial numbers of financings are provided by ad hoc funders, not dedicated litigation financiers, definitive numbers are unavailable.

[164] *See, e.g.*, MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE 127-130 (2019) (discussing the rise of litigation finance and its growing prominence); Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 164-68 (2011) (discussing the growing global scale of litigation finance in jurisdictions such as Australia and England, and how countries such as Spain and Brazil offer untapped markets for third-party funding); Christopher P. Bogart, *What's Ahead in Litigation Finance?*, BURFORD: BLOG (July 17, 2017), http://www.burfordcapital.com/blog/future-litigation-finance-trends [https://perma.cc/3P8Q-RPD3] (arguing that litigation finance will experience robust growth in the coming years); *Litigation Finance Forecast: Six Trends to Watch in 2019*, BENTHAM IMF: BLOG (Jan. 2, 2019), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2019/01/02/litigation-finance-forecast-six-trends-to-watch-in-2019 [https://perma.cc/2KPG-BAA5] (predicting a surge in portfolio financing to fund more large-scale litigation).

public. Mr. Hogan (whose legal name is Terry Bollea), a retired professional wrestler, sued Gawker for, *inter alia*, invasion of privacy for publishing a video showing him having sex with a friend's wife.[165] In May 2016, reports surfaced that Mr. Thiel, a Silicon Valley mogul, funded the case. Reporting suggested, specifically, that he did so in order to satisfy a personal vendetta: Gawker had "outed" him as gay a decade earlier.[166] Bankrolling Hogan's claim was, according to news reports, his "revenge."[167] Revenge is indeed a dish best served cold: careful canvassing for a "good" plaintiff ultimately yielded a $140 million judgment in favor of Mr. Hogan. The large judgment pushed Gawker into bankruptcy.[168]

Because the funding in this case felled a news outlet, journalistic interest was heightened and the case generated significant coverage in the press which, in turn, led to increased calls to regulate the nascent but fast-growing litigation finance industry.[169] Specifically, the case drew attention to the issue of whether the

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[165] *See* Bollea v. Gawker Media, LLC, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *2 (M.D. Fla. Nov. 14, 2012).

[166] *See* Eugene Kontorovich, *Peter Thiel's Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST: THE VOLOKH CONSPIRACY (May 26, 2016, 5:19 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/; Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016),https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html.

[167] Manuel Roig-Franzia, *What Happens When Billionaires Battle Gossipmongers? Prepare for Explosions*, WASH. POST (Feb. 9, 2019, 4:00 AM), https://www.washingtonpost.com/lifestyle/style/what-happens-when-billionaires-battle-gossipmongers-prepare-for-explosions/2019/02/08/bb475576-2be8-11e9-b011-d8500644dc98_story.html. Thiel told the New York Times, "It's less about revenge and more about specific deterrence . . . . I saw Gawker pioneer a unique and incredibly damaging way of getting attention by bullying people even when there was no connection with the public interest." Sorkin, *supra* note 166.

[168] Gawker filed for bankruptcy on June 10, 2016. *See* In re Gawker Media LLC, 571 B.R. 612, 617 (Bankr. S.D.N.Y. 2017); *see also* Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016, 1:22 PM), http://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline/#181ed4b17e80.

[169] *See, e.g.*, Michelle Castillo, *Gawker to Pay Hulk Hogan at Least $31 Million to Settle Case*, CNBC (Nov. 8, 2016, 2:42 PM), https://www.cnbc.com/2016/11/02/gawker-settling-litigation-with-peter-thiel-hulk-hogan-for-undisclosed-amount.html (noting the founder of Gawker's thoughts on the legacy of the Gawker-Hogan litigation and the potential danger of "dark money" in litigation finance); Sorkin, *supra* note 166 (discussing the increased journalistic interest in third party funding); Martha C. White, *Peter Thiel vs. Gawker: Case Highlights World of 'Litigation Funding'*, NBC NEWS (May 29, 2016, 7:37 AM), https://www.nbcnews.com/business/business-news/peter-thiel-vs-gawker-case-highlights-world-litigation-funding-n581726 (discussing the growing practice of litigation finance).

existence of funding agreements, the terms of any agreement, and/or the identity of any funders should be public information.[170]

To add complexity and intrigue to this example, according to Forbes magazine, Gawker executives "agree[d] to sell a minority stake in the company to Russian billionaire Viktor Vekselberg and his company . . . . [T]he money was used, in part, to defend itself from ongoing litigation."[171] In other words, litigation finance was utilized on both sides of the 'v.' with questionable funding sources and motivations on both cases.

Other ripped-from-the-headlines examples of funded litigations include Stormy Daniels' crowdfunded litigation;[172] the NFL concussion cases;[173] and #MeToo cases.[174] Predatory lending practices on the consumer litigation finance part of the industry, often deployed when individuals of limited means have suffered a bodily injury and are seeking to finance personal injury cases, have also been in the news.[175] In the international and transnational realm, attention grabbers include funding in the bet-the-company and bet-the-region mass torts litigation between thousands of Ecuadorian residents of the Amazon and the oil

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170 This statement is based on more than a dozen calls from journalists received by the author in connection with the disclosure of the Thiel financing of the Hulk's case against Gawker.

171 Drange, *supra* note 168; *see* Tom Winter & Robert Windrem, *Who Is Viktor Vekselberg, the Russian Oligarch Linked to Trump Lawyer Michael Cohen?*, NBC NEWS (May 10, 2018, 6:22 AM), https://www.nbcnews.com/politics/donald-trump/meet-nice-russian-oligarch-linked-trump-lawyer-michael-cohen-n872716 (explaining that Vekselberg is possibly linked to money that has moved through companies he is associated with to Michael Cohen, President Trump's former personal lawyer and a convicted felon, and potentially paid to Stormy Daniels).

172 *See* Stephanie Clifford, *Clifford (aka Daniels) v. Trump et al.*, CROWDJUSTICE (Apr. 24, 2018), https://www.crowdjustice.com/case/stormy.

173 *See* Steven M. Sellers, *Troubled NFL Concussion Deal May Roil NHL Cases*, BLOOMBERG LAW (May 25, 2018, 4:06 AM), https://news.bloomberglaw.com/product-liability-and-toxics-law/troubled-nfl-concussion-deal-may-roil-nhl-cases.

174 *See* Matthew Goldstein & Jessica Silver-Greenberg, *How the Finance Industry Is Trying to Cash In on #MeToo*, N.Y. TIMES (Jan. 28, 2018), https://www.nytimes.com/2018/01/28/business/metoo-finance-lawsuits-harassment.html; Philippe A. Lebel, *Could a Litigation Finance Initiative Capitalize on #MeToo?*, NAT'L L. REV. (Nov. 14, 2017), https://www.natlawreview.com/article/could-litigation-finance-initiative-capitalize-metoo.

175 *See, e.g.*, Matthew Goldstein, *Judge Dismisses Federal Suit Accusing Firm of Defrauding 9/11 Responders*, N.Y. TIMES (Sept. 12, 2018), https://www.nytimes.com/2018/09/12/ business/september-11-attacks-nfl-concussion-settlements.html (discussing the practice of extending cash advances to people with pending cases such as 9/11 responders).

giant Chevron,[176] and the atypical, nonprofit funding by the Anti-Tobacco Trade Litigation Fund, created by Bloomberg Philanthropies and the Bill and Melinda Gates Foundation, which funded low- and middle-income countries that were defendants in the international investment arbitration against tobacco companies that claimed that regulations requiring plain packaging of tobacco products violated their rights under investment treaties.[177] A domestic corollary can be seen in the funding by Iowa agricultural groups of the defense of three state counties against pollution charges, through the following non-transparent structure:

> In March of 2016, documents revealed . . . that agricultural groups—including the Iowa Farm Bureau Federation, the Iowa Soybean Association, the Iowa Corn Growers Association (ICGA) and the Iowa Drainage District Association—secretly funded the defense of the Iowa lawsuit through a 501(c)3 nonprofit, the Agricultural Legal Defense Fund. According to Internal Revenue Service documents . . . fertilizer and other agricultural company officials make up the bulk of the nonprofit's officers and directors, including representatives from Smith Fertilizer, Monsanto Co., Growmark, Cargill, Koch Agronomics, DuPont Pioneer and the United Services Association.[178]

The list goes on and on, but these examples are sufficient to illustrate the key point upon which this Part will elaborate: the range of funding scenarios is vast and its vastness and variability is, arguably, the main reason those drafting proposed disclosure rules find it hard to settle on a noncontroversial formula. For

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[176] *See* Chevron Corp. v. Donziger, 833 F.3d 74, 134 (2d Cir. 2016); Steinitz, *The Litigation Finance Contract*, *supra* note 141, at 465-79.

[177] *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award, ¶¶ 12, 22 (July 8, 2016). For an explanation of third-party funding in that case as well as other forms of third-party funding of investment arbitration, see Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, OXFORD U. PRESS (Mar. 1, 2017), http://oxia.ouplaw.com/page/third-party-funders [https://perma.cc/LFF9-ML4K].

[178] Llewellyn Hinkes-Jones, *Open Records Request Exposes Rare Litigation Finance Document*, BLOOMBERG LAW (Feb. 23, 2017), https://www.bloomberglaw.com/product/blaw/document/X2CUA2PO000000 [https://web.archive.org/web/20170223223237/https://www.bna.com/iowa-pollution-suit-n57982084227/]. The report goes on to quote Michael Reck, an attorney with Belin McCormick P.C. in Des Moines, Iowa, one of the law firms representing the counties, as stating that such finance agreements are "not uncommon." *Id.*

example, our legal system arguably should treat providing access to justice very differently than it does using the courts as a vehicle for revenge. Similarly, as already acknowledged, average Joes and Janes should receive more protection (which may require disclosure to courts) than do sophisticated funded parties. And foreign governments and their agents acting as financiers may require a different level of scrutiny than a commercial entity, especially if the cases they invest in have national security or foreign relations implications.

Similarly, companies funding cases against their competitors should be treated differently than professional funding firms funding similar cases for a monetary profit. Politically-motivated funding, while distasteful to many, should be considered in light of First Amendment concerns not necessarily present in other types of cases. The consideration for disclosure in arbitration—generally a confidential forum but also one where the decision-makers are selected *ad hoc* by parties (i.e., do not have life tenure)—are different from courts which, in rule of law societies, are transparent and wherein judges are not jostling for their next appointment. And it appears as though the public may regard a news outlet as different from other types of defendants, especially if the litigation threatens to drive it out of business.

In other words, variables such as the motivation and likely effects of the funding, type of funder, type of funded party, type of defendant, subject matter of the case, and forum all matter. Further, simply classifying the funding by type does not dispose of the inquiry as to what type of and how much disclosure, if any, is appropriate. For example, arbitrators, who usually have a private practice and serve clients when they're not serving on a tribunal, may be more likely to have a conflict of interest than are judges, pointing in the direction of more disclosure in arbitration. However, arbitrators, unlike judges, are not empowered to protect the general public and are not expected or empowered to consider policy implications to the same extent as judges are, pointing in the direction of less disclosure.

And here is another example of the context-specificity needed. Even in international arbitration, one size does not fit all: the funding of a commercial claim brought by a commercial party does not, on its face, suggest transparency of funding is warranted. But the funding of an international arbitration involving, say, a boundary dispute or exploration rights does call for transparency as to who is pulling the purse strings because of the public interest involved in such matters. Finally, and again an example from international arbitration, at the beginning of the process disclosure of the identity of the funder aimed only at the tribunal may be all that is needed for conflicts check purposes. Conversely, at the end of a case when a panel needs to decide whether and to what extent to shift the cost of the proceeding to the losing party, disclosure of the funding terms to both the tribunal and opposing party may be warranted.[179]

The dizzying array of variables and variations suggests that: (i) judges and arbitrators should be empowered to inquire into funding and; (ii) the extent and form of this important inquiry should be left to the discretion of the individual decision-maker so she can engage in a thoughtful weighing of the intricate considerations as they pertain to the facts before her. The next Part brings the analysis full circle with a proposed balancing test.

IV. THE PROPOSAL: A BALANCING TEST

To properly account for the role of litigation finance in proceedings before them, judges and arbitrators should be given broad discretion to undertake a contextual analysis and should not be hamstrung by the kinds of all-or-nothing or otherwise bright-line rules currently contemplated. Nor, however, should they be left totally without guidance, even though, at present, it is understood that decision-makers such as judges or arbitrators have the authority to order disclosure. In short, the proper approach to the question of whether and what to disclose is a balancing test.

To simplify a vast debate in legal philosophy,[180] the distinction between rules and standards is as follows. "Rules" are rigid and constraining: "Once a rule has been interpreted and the facts have been found, then the application of the rule to

[179] *See* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 148, at 159.

[180] For jurisprudential classics on the rules/standards distinction and its implications, see, for example, H.L.A. HART, THE CONCEPT OF LAW 126-31 (1961); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 115-23 (1922); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 10-12 (1991); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 22-29 (1967); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1701 (1976). For examples of treatment of the distinction and its consequences from the law and economic tradition, see, for example, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

the facts decides the issue to which it is relevant."[181] Conversely, standards provide *discretion*. They seek to guide rather than dictate an outcome. To illustrate:

> Oliver Wendell Holmes and Benjamin Cardozo find themselves on opposite sides of a railroad crossing dispute. They disagree about what standard of conduct should define the obligations of a driver who comes to an unguarded railroad crossing. Holmes offers a rule: The driver must stop and look. Cardozo rejects the rule and instead offers a standard: The driver must act with reasonable caution.[182]

There are tradeoffs when choosing one approach over the other, but a standard is ultimately preferable to a rule in this context. The main advantage of rules is their predictability. The main advantage of standards is fairness through context-specificity. This is so because rules give law content *ex ante* whereas standards do so *ex post*.[183] Further, "[r]ules typically are more costly than standards to create, whereas standards tend to be more costly for individuals to interpret when deciding how to act and for an adjudicator to apply to past conduct . . . . [W]hen individuals can determine the application of rules to their contemplated acts more cheaply, conduct is more likely to reflect the content of previously promulgated rules than of standards that will be given content only after individuals act."[184] A standard, therefore, will provide less guidance to litigation financiers, attorneys, and parties than a rule would and, in that sense, could create costly uncertainty. The lack of a rule could even allow for undesirable behavior as actors explore, through trial (no pun intended) and error, what is and is not permissible.

Notwithstanding the costs of uncertainty and potentially undesirable behavior, a standard is the right approach to litigation finance disclosure because the sector and its best practices are still evolving and, more importantly, because no single

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181 Lawrence Solum, *Legal Theory Lexicon: Rules, Standards, and Principles*, LEGAL THEORY BLOG (Sept. 6, 2009, 9:40 AM), http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html [https://perma.cc/8EF4-SXLV]. Solum, like others, distinguishes between standards and principles but, for simplicity, I will follow Dworkin and limit the distinction to rules and standards. *See* Dworkin, *supra* note 180, at 22-29.

182 Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985) (footnotes omitted).

183 *See* Kaplow, *supra* note 180, at 559-60.

184 *Id*. at 557.

rule would be able to encompass the vast array of scenarios falling under the increasingly stretched definition of litigation finance. What rule, for instance, could adequately account for the difference between a corporate plaintiff whose legal costs are partially covered by a sophisticated investor who has arranged with the corporation's law firm to fund a portfolio of cases, on the one hand, and, on the other, a fired factory worker whose civil rights case is funded by a small startup focused on algorithm-driven investments in claims worth under one million dollars? And yet both of those are examples of litigation funding.

In the following Section I argue, more specifically, for a particular kind of standard: the balancing test. The reason for this recommendation is that "[i]n almost all conflicts . . . there is something to be said in favor of two or more outcomes. Whatever result is chosen, someone will be advantaged and someone will be disadvantaged; some policy will be promoted at the expense of some other."[185] A balancing test thus recognizes that, normatively speaking, litigation funding is, *ex ante*, neither "good" nor "bad" nor is its regulation (here, in the form of disclosure) "good" or "bad." It is context specific. This pragmatism, inherent to the judicial activity of balancing, is the reason why, while this legal technique has its detractors,[186] "[b]alancing tests are ubiquitous in American law. From the Due Process Clause to the Freedom of Speech and from the federal joinder rules to personal jurisdiction, U.S. law makes the outcome of legal disputes dependent on the balancing of various *interests* and *factors*."[187]

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[185] Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 Yale L.J. 1855, 2123 (1985). For an in-depth discussion of the benefits and perils of balancing tests, see, for example, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 943-44, 965-66 (1987) (discussing these modes of judicial decision making in the context of constitutional law). Litigation finance, *inter alia*, intertwines with the constitutional values of the right to have one's day in court and of due process.

[186] *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 636-49 (1988). *See generally* Aleinikoff, *supra* note 185 (discussing the rise in use of balancing tests and giving various critiques of balancing).

[187] Lawrence Solum, *Legal Theory Lexicon: Balancing Tests*, LEGAL THEORY BLOG (Dec. 10, 2017, 5:37 PM) (emphasis added), http://lsolum.typepad.com/legaltheory/2017/12/legal-theory-lexicon-balancing-tests.html [https://perma.cc/8AGY-WUQW].

A. The Proposed Balancing Test

In this Section, I will first outline the important interests of the public and of the parties at stake in litigation finance. Then, I will map those interests onto a series of concrete factors that judges and arbitrators should consider when deciding on disclosure.[188]

1. Interests

Whether and how a litigation is funded implicates public and private interests.[189] Specifically, the public has an interest in such matters as access to justice, the development of the law, the cost of civil justice, the level of litigation in society, whether systemically the "Haves" come out ahead in litigation, the length of time litigation takes, the extent of discovery the parties can afford/inflict, and the purposes for which the public good that is the justice system is being used (e.g., justice, compensation, third party profits, revenge, politics, policy, and so forth).[190] A special subset of public interest is the interests of the forum itself (usually, judicial economy). However, because the manner in which effects on the courts often feature in policy debates surrounding litigation finance, and due to the prevalence of arbitration which raises a separate set of concerns, I treat forum interests as a separate category. Finally, the private litigants, both the funded plaintiffs and the defendants who face them, have private interests which must be weighed. Some of those overlap with the public interests mentioned above—plaintiffs, for instance, have a stake in improved access to justice and plaintiffs and defendants both have an interest in efficient proceedings—but others exist

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[188] This is an expansion and an application of a taxonomy I first offered in a previous article. *See* Steinitz, *Whose Claim Is This Anyway?*, *supra* note 147, at 1302-03.

[189] Balancing tests often take the meta structure of balancing public versus private interests with different private and public interests falling under each category depending on the interests. A couple of examples include the balancing test for granting preliminary injunctions and the one for granting dismissal based on forum non conveniens. *See* 11A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.2 (3d ed. 2019); 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3828 (4th ed. 2019).

[190] For a discussion of how repeat players such as funders can affect whether the "Haves" or "Have-nots" come out ahead in litigation, see Steinitz, *Whose Claim Is This Anyway?*, *supra* note 147, at 1299-1302. For a similarly canonical explanation of why there is both too little and too much litigation due to the divergence of private and social incentives to sue, see Shavell, *supra* note 152, at 575-81.

independently. Any test relating to a component of litigation—its finance—should weigh all of these categories of interests.

I will first lay out those interests in more detail, and in the next Section, I will turn to a discussion of how those interests manifest in specific aspects of a litigation (or arbitration) that could be the subject of a decision-maker's attention when contemplating disclosure.

a. Public Interests

That the extremely high cost of litigation puts justice out of reach for most average Joes and Janes is the starting point for many a course in first year civil procedure. The public has an interest in reducing barriers to accessing the courts. Indeed, the global litigation finance industry first took hold in Australia and the United Kingdom when each jurisdiction legalized the practice as part of national access to justice reforms.[191] Disclosure requirements that are too cumbersome may depress the level of available funding, or raise its costs, or both, diminishing the benefits litigation finance contributes to access to justice.[192]

The expense of litigation imposes an additional cost—by increasing the homogeneity of parties it also increases the homogeneity of the issues presented to the courts. This means that some areas of the law get more judicial attention than others and consequently benefit from more iterative and nuanced development. The public has an interest in access to justice generally, but also an independent interest in the development of areas of law that may be less keenly pursued by the deep-pocketed litigants who can best afford to go to court. Litigation finance has the potential to add significant diversity to the pool of those able to afford to litigate, and therefore to increase the diversity of issues before the courts. But it holds the potential to do more than that. In terms of contribution to the development of the law and the question of who gets to affect judicial law-making, namely is it only the "Haves," or do the "Have-nots" get a chance to do so as well?:

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191 Michael Napier et al., CIVIL JUSTICE COUNCIL, IMPROVED ACCESS TO JUSTICE — FUNDING OPTIONS AND PROPORTIONATE COSTS 54 (2007); RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 40 (2009), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

192 *See* Avraham & Sebok, *supra* note 153, at 5-6, 30.

> By aligning structurally weak social players who make infrequent use of the courts (one-shotters) with powerful funders who make repeated use of the court system (repeat players), litigation funding may alter the bargaining dynamics between the litigating parties in favor of disempowered parties. It may thereby enable the litigation process to serve as a redistributive tool by society's have-nots as opposed to an (unwitting, perhaps) guardian of the status quo in favor of society's haves. In other words, it may allow these traditionally disempowered parties to "play for rules," i.e., to affect the content of legal rules determined by the courts.[193]

In addition to the general barrier to access to justice imposed by excessively expensive litigation, the high cost of particular parts of the process, especially discovery, opens the door to gamesmanship. The party with more resources has considerable leeway to decide whether, for instance, to "bury" the opposing party with document production or to overwhelm it with discovery requests. Over time, this has contributed to the assessment that the better-resourced party has an undeservedly higher chance of prevailing in any given case. This undermines the strong public interest in having courts that offer a level playing field. Litigation finance can redress that imbalance by equalizing the resources of parties thus making gamesmanship around costs a less effective strategy.

Not all public interests go the way of litigation finance, however. For instance, courts should be a place for the resolution of disputes and not a source of business profit. This is not to say that plaintiffs with legitimate claims should not be able to secure financial settlements or damages awards just because they need to pay financing costs in order to so do. (In this sense, financing litigation is the same as financing education, health care, and so forth through various forms of financing that carry fees). But it does mean that if in any single case, "portfolio" of cases, or category of cases, ultimately most of the recovery goes to the financiers (be they lawyers or third-party funders), rather than to compensate injured parties, deter bad behavior, or otherwise promote the traditional goals of the public good that is the civil justice system, judges can and should be able to take such factors into consideration as they already do, e.g., when supervising class action settlement. And this, in turn, may mean looking into the funding arrangements, including the

193 Steinitz, *Whose Claim Is This Anyway?*, *supra* note 147, at 1271-72.

financial terms, and if need be, determining who is the real party in interest in the case.[194]

In the same vein, litigation finance may, in any given case, stretch the already lengthy timeline of litigation. The efficiency of the justice system is of considerable public interest. If financed parties use the resources available to them to draw out a case that might otherwise have been withdrawn or settled, in order to extract more profit, especially when a finance agreement allows a funder to "vote" against settlement, the system risks becoming more inefficient and expensive for everyone. In other countries, especially those with civil law systems, judges have much more discretion than do American judges, constrained as they are by the Seventh Amendment, to throw out a case at almost any stage of the proceedings.[195] The lesser discretion enjoyed in that regard by U.S. judges increases the danger that funded parties and those backing them could impose inefficiencies on the process in their quest for profits.[196]

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[194] In this vein, I have argued elsewhere that consumer litigation funding regulation should ensure that plaintiffs are guaranteed a minimum of 50% recovery of tort claims. *See Lawsuit Lending: Hearing Before the N.Y. State S. Standing Comm. on Consumer Prot.*, (N.Y. 2018) (statement of Maya Steinitz, Visiting Professor of Law at Harvard Law School, Professor of Law at University of Iowa School of Law), https://www.nysenate.gov/transcripts/public-hearing-05-16-18-nys-senate-hearing-consumer-protection-finaltxt. *See generally* Maya Steinitz, *Letter to the Hon. Sen. Orrt (NYS Senate) Regarding Litigation Finance (Lawsuit Lending) (2018)* (Univ. of Iowa Legal Studies Research Paper No. 18-15, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238148 (arguing for a 50% minimum recovery requirement by addressing both the economics of the requirement and the normative arguments for it).

[195] *See generally* JAMES G. APPLE & ROBERT P. DEYLING, A PRIMER ON THE CIVIL-LAW SYSTEM 26-27 (1995) (outlining differences in the legal process between civil-law judges and American judges).

[196] For an example of a litigation finance agreement that grants control over settlement of consumer cases (low value cases brought on a volume basis), see Mize v. Kai, Inc., No. 17-CV-00915-NYW, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) and *Carton v. Carroll Ventures, Inc.*, No. CV 17-0037 KG/SCY, 2017 WL 8941281, at *4 (D.N.M. July 10, 2017). Both cases discuss a funding scheme by a funding entity which funded discrimination cases brought under the Americans with Disabilities Act. Under the scheme, the funding agreement purported to limit the plaintiffs' ability to discontinue the litigation or settle without the funder's prior consent as well as to require plaintiffs to settle if so directed by the funder. The funding agreement also had the effect of awarding plaintiffs $50 per case with all other proceeds going to the funder and attorney. For an example of a litigation finance agreement that grants control over settlement of a mass tort case to the funder, see the discussion of the funding in the Chevron-Ecuador environmental mass tort litigation in Steinitz, *The Litigation Finance Contract*, *supra* note 141, at 465-79.

Another, less obvious, element of this analysis is the public interest in data about this brand new, game-changing practice.[197] In the early days of the contingency fee, in the 1920s, the New York City bar and bench grew increasingly worried about contingency fee practices. In 1928, the bar associations for New York City, Manhattan, and the Bronx requested the Appellate Division of the First Judicial Department of the New York Supreme Court to investigate the matter. The Appellate Division entrusted Justice Wasservogel with the task and commissioned a report. The findings of this report led to a recommendation that attorneys be required to file a copy of the retainer agreements between the contingency lawyers and their clients, and an affidavit explaining how the retainer was obtained and affirming that the case had not been solicited by the attorney.[198]

The First Judicial Department implemented some of the report's recommendations, amongst them a requirement that plaintiffs' lawyers file so-called retainer statements that set out the terms of the attorney's compensation. Fast forward to 1955, and Justice Wasservogel was once again commissioned to produce a report on contingent fee practices and consider capping such fees. This second report was based on the retainer statements mandated by the 1929 regulations which were mined and resulted in a finding that 60% of retainers specified that 50% of any recovery went to the lawyers. The ultimate policy outcomes of this second, data-based report were that the First Judicial Department issued regulations that capped contingency fees in actions for personal injury or wrongful death at one-third.[199] The new regulations further required "that lawyers file with the court a 'closing statement' within fifteen days of receiving any money on behalf of a client, whether in judgment or settlement. The closing statement records '[t]he gross amount of the recovery, . . . [t]he taxable costs and disbursements, . . . [t]he net amount of the recovery actually received by

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[197] *See* Eric Helland et al., *Contingent Fee Litigation in New York City*, 70 VAND. L. REV. 1971, 1973-76 (2017) (describing the evolution of the requirement that lawyers in tort cases filed in New York file a copy of their retainer and a closing statement with pertinent information and how the data comprised of such disclosure affected the legislative cap on contingency fees in the state).

[198] *See id.* at 1972-74.

[199] *See id.* at 1974-75. Or a regulatory sliding scale. *See id.* at 1975.

the client, . . . [t]he amount of the compensation actually received or retained by the attorney' . . . ."[200]

In other words, what is now a core tenet of contingency fee practice in personal injury cases (at least in New York), namely a cap on attorney's fees, was a direct outcome of data-gathering and data-based policy-making.[201] The need for data in the context of litigation funding is particularly acute because of a feature of the commercial litigation funding industry universally overlooked in the disclosure debate: funding agreements almost always contain arbitration clauses.[202] This means that the public—be it consumers or legislatures—has no way to understand the reality of the practice and engage in fact-based consumerism, negotiation, and regulation.[203]

With this non-exhaustive list of public interests in place, let us turn to look at some of the private interests at play. Here, too, the discussing is not meant to be exhaustive.

b. Private Interests

The private parties to consider are the litigating parties—including individual plaintiffs, classes, and defendants—and the funders. (As a side note, another potential category of possible private parties whose interest should be weighed, but are beyond the scope of this Essay, are the investors who invest in litigation

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[200] *Id.* at 1975 (quoting the report) (internal quotation marks omitted). These closing statements, in turn, yielded Helland et al.'s article which contains invaluable findings including that "very few cases are resolved by dispositive motions; that litigated cases and settled cases have almost exactly the same average recovery; that median litigation expenses, other than attorney's fees, are 3% of gross recovery; that claims are disproportionately from poor neighborhoods; and that attorneys' fees are almost always one-third of net recovery, which is the maximum allowed by law." *Id.* at 1971.

[201] *See id.* at 1972-76.

[202] This observation is based on the author's extensive experience working with funders, plaintiffs, law firms, and investors, as well as on conversations with funding firms. Exceptions tend to occur only when the funding is provided by an *ad hoc* funder rather than a funding firm, which means that litigation over funding agreements in the courts are based on agreements that are unlikely to be the industry standard.

[203] The lack of data about the industry and its practices was a recurring theme during the public hearing on the regulation of consumer litigation funding held by the New York State Senate Standing Committee on Consumer Protection in May 2018. *See* NY Senate, *Public Hearing - Committee on Consumer Protection - 5/16/18*, YOUTUBE (May 16, 2018), https://www.youtube.com/watch?time_continue=245&v=y2hQNhpVJHk.

finance. These increasingly include pension funds, university endowments, and sovereign wealth funds.[204])

Plaintiffs' interests include access to justice and the wherewithal to withstand the long and expensive process of litigation on the individual case level (as distinct from the overall access to justice and average litigation length public concerns discussed in the previous Section). Plaintiffs' interests also include privacy in relation to their finances. As I like to tell my students to illustrate this last point, whether my mother-in-law is funding my slip-and-fall case and what kind of strings she attaches to such funding has never been considered of relevance in a litigation. That *status quo* is a good place to start the analysis, with deviations requiring affirmative justification.

Of course, defendants have countervailing interests, such as being able to pursue avenues reasonably calculated to lead to material information that may help expeditiously and fairly resolve the dispute and a right to know, and confront, the real party in interest in the case they are defending.

Finally, funders' interests should also weigh in the balance. These include intellectual property in the financial products they produce and a desire to keep the costs of doing business (assuming a for-profit funder) low.[205] The latter means a legitimate concern in avoiding being dragged into the discovery process, being joined as a party, or otherwise being the target of strategic satellite litigation.

c. Forum Interests

In addition to avoiding conflicts of interest on the part of the judges, which is a basic tenet of the rule of law, core concerns for the courts and the judicial system as a whole are the efficient resolution of disputes and the overall integrity of the system. These, too, may point towards limiting satellite litigation relating to litigation funding in the form of seeking discovery from funders or joining them as codefendants for purely tactical reasons, practices which may unnecessarily complicate and raise the cost of litigation. But it also includes empowering judges

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[204] *See* Sara Randazzo, *Litigation Financing Attracts New Set of Investors*, WALL ST. J. (May 15, 2016, 5:37 PM), https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262 ("Pension funds, university endowments, family offices and others have collectively pumped more than a billion dollars into the sector . . . .").

[205] By analogy, contingency fee agreements receive, under certain conditions, protection based on the same rational. *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 722-23 (2014).

to figure out, through disclosure, whether the funding terms inappropriately incentivize lengthening the litigation timeline as well as whether the funding arrangement, e.g. the composition of a portfolio, incentivize the filing of prima facie non-meritorious claims.[206] In the same vein, the judicial system also has an interest in preventing arrangement types—such as highly synthetic derivatives backed by contingent (or even speculative) litigation proceeds—that are likely to flood the courts with non-meritorious cases.[207]

2. Factors

Each of the interests discussed above can be mapped onto one or more concrete factors in any given litigation or arbitration. This is important, because judges and arbitrators should not be left to consider in the abstract whether disclosure, as a general concept, increases access to justice or diversity in legal issues, for example, but should instead be provided with guidance for how those interests might play out in specific litigation scenarios depending on their profile, as understood in light of the variables described above. The following Subsections describe those specific factors.

a. The Profile of the Plaintiffs and Their Motive for Seeking Funding

A plaintiff's profile and reasons for seeking funding are important because they bear on the extent to which interests such as access to justice are at stake. Funded plaintiffs may be consumers, start-up companies, established corporations, developing and developed nations, a lead plaintiff in a class action, or the class

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[206] Some market participants have suggested to me that some law firms and/or corporations are asking financiers to accept weak cases as part of a portfolio if they wish to obtain the right to finance the entire portfolio (or, in other words, if they wish to do the functional equivalent of taking an equity stake in the firm). If true, this is similar to the practice of bundling prime and subprime mortgages in mortgage-based securities. To highly simplify, the idea is that by first bundling and then "slicing" the bundles, securitization allowed for the shifting of risk of subprime mortgages from the originators and primary investors to the overall secondary market and the economy as a whole. Famously, the true costs of this practice were also externalized on the subprime borrowers who ended up in foreclosure, the taxpayers who needed to bail out banks and other entities, and the global economy as a whole. *See, e.g.*, Yuliya S. Demyanyk & Otto Van Hemert, *Understanding the Subprime Mortgage Crisis*, 24 REV. FIN. STUD. 1848, 1875-76 (2011); Steve Denning, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (Nov. 22, 2011, 11:28 AM), https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#36da42daf92f.

[207] Steinitz, *Whose Claim Is This Anyway?*, *supra* note 147, at 1318-22.

itself, to name but some examples. The degree to which disclosure-based court involvement and the rigors of the adversarial system should be brought to bear may differ based on such characteristics of the funded plaintiffs.

To further elaborate, an established corporation might seek litigation funding as a form of corporate finance. In this scenario, one might imagine a sophisticated corporation using third-party litigation funding as a way to shift litigation risk, to manage its balance sheet, or to obtain operating capital during a time when litigation otherwise limits access to capital. Conversely, parties who might otherwise lack the resources to withstand long and expensive trials, or even to bring their claims at all, may seek financing in order to be able to access the civil justice system.[208] These cases should not be treated alike for regulatory purposes. Further, consumers are generally understood to require a higher level of protection than do sophisticated entities. Similarly, members of a class are understood to need more court protection than, perhaps, both of the preceding categories.[209]

b. Funder's Profile and Motivation

Dispassionate for-profit litigation finance firms, secretive hedge funds, wealthy individuals, family members, non-profits, law firms providing pro bono services,

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[208] *See* Anthony J. Sebok, *Private Dollars for Public Litigation: An Introduction*, 12 N.Y.U. J.L. & BUS. 813, 813-14 (2016); Anthony J. Sebok, *Should the Law Preserve Party Control? Litigation Investment, Insurance Law, and Double Standards*, 56 WM. & MARY L. REV. 833, 894-95 (2015); Steinitz & Field, *supra* note 205, at 716; W. Bradley Wendel, *Paying the Piper but Not Calling the Tune: Litigation Financing and Professional Independence*, 52 AKRON L. REV. 1, 13-14 (2018); Christopher P. Bogart, *The Case for Litigation Funding*, BURFORD: BLOG (Oct. 11, 2016), http://www.burfordcapital.com/blog/case-litigation-funding [https://perma.cc/KLZ8-99VD]; Maya Steinitz, *Contracting for Funding in "Access to Justice Cases" Versus "Corporate Finance Cases,"* MODEL LITIG. FIN. CONT. (June 24, 2013), http://litigationfinancecontract.com/contracting-for-funding-in-access-to-justice-cases-versus-corporate-finance-cases [https://perma.cc/WFK4-PD6G].

[209] This was generally held to be the case, for example, in the September 11th litigation. *See* Transcript of March 19, 2010 Status Conf., *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100, Doc. No. 2037 at 54-55 (S.D.N.Y. Mar. 19, 2010). On the potential conflicts of interest that third party funding of class action may introduce, see Brian T. Fitzpatrick, *Can and Should the New Third-Party Litigation Financing Come to Class Actions?*, 19 THEORETICAL INQUIRIES L. 109, 115-23 (2018). *See generally* Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499, 509-16 (2014) (outlining issues that may arise if third-party litigation financing becomes frequent in class action suits in the United States).

political action committees (PACs), foreign governments (through sovereign wealth funds or otherwise), "crowds" funding via crowdfunding platform—all these are examples of litigation funders currently active in the market. These descriptors already hint at the wide variety of possible motivations for funding: profit, affecting rule-change for ideological or commercial reasons, assisting the indigent or a family member, hindering the competition, furthering foreign policy, opening up the courts to underrepresented claims or claimants, privately enforcing the law[210]—these and more may all be motivations for funding. Some motivations are, arguably, more worthy of protection than others. To take an extreme example, consider the firestorm that followed the Gawker case, where Hogan's backer seemed to be interested, troublingly, chiefly in revenge and where his target was a member of the Fourth Estate.

To make explicit what the foregoing illustration highlights—the type-of-funder factor overlaps (but is not coextensive with) the funders' motivation. The commercial funder envisioned in the previous paragraph will likely be somewhat constrained by reputational considerations—wanting to be known for screening and backing good cases and providing decent funding terms. It is also likely to be interested in profitable cases which, usually, will correlate with meritorious ones, and will likely be uninterested in vendettas, politics, foreign relations, and the like. For good and bad, it will also not be concerned with promoting the public interest. Conversely, not-for-profit funders may be concerned with (their version of) the public interest but, of course, what constitutes and furthers the "public's interest" is often a contested matter. A sovereign wealth fund or a foreign government may seek to advance foreign policy or military goals. A one-shot funder[211] may be interested in profit, hindering a competitor, revenge, fame, or politics. A PAC, or a politically-motivated wealthy individual, will probably wish to advance a political agenda. A "crowd" may be comprised of people motivated

[210] On third party funding's effect on private enforcement of law through class and mass action, see generally John C. Coffee, Jr., *Securities Litigation Goes Global*, LAW (Sept. 15, 2016, 12:00 AM), https://www.law.com/newyorklawjournal/almID/1202767289255/securities-litigation-goes-global/; Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third- Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 322-23 (2011).

[211] On the disparate use of litigation by "one-shotters" versus "repeat players" to advance goals beyond a win in a particular case, especially to affect changes in the law, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-114 (1974) [hereinafter *Why the "Haves" Come Out Ahead*].

by justice, politics, or profit. Interestingly, as the reaction to the Gawker case illustrates, maintenance—funding without a profit motivation—may be more problematic than champerty—funding for a profit—even though much of the contemporary consternation around the rise of litigation finance focuses on "profiteering" from others' claims and from the justice system.[212]

We should leave it to the discretion of the judge whether suspicion or evidence of certain motivations should factor into the decision of whether and how much to disclose of the funding arrangement. Similarly, the weight to be given to the type of funder, which *inter alia* hints at motivation, is also a factor to weigh in the balance.

c. The Case Type and the Forum

Individual litigation, class actions, mass actions, or arbitration (which can be domestic, international regarding commercial law, or international regarding investment law) implicate completely different issues which may call for court supervision and public interest-based transparency as to how a case is funded, by whom, in what manner, and for what goal.

For example, class and mass cases, wherein the lawyers rather than the clients drive and control the case, are very different from individual claims. In the class action context, in particular, members of the class are unnamed and may even be unknown.[213] Traditionally, courts exercise more supervision over such litigation including, critically, over settlements because of the myriad conflicts they entail and the scale of threat they present to defendants. The presence of third-party funding, in lieu of or in combination with attorney funding, is likely to exacerbate

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212 Champerty is defined as an "agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim" or, more pejoratively, 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." *Champerty*, BLACK'S LAW DICTIONARY (11th ed. 2019). It is a form of maintenance whereby "assistance in prosecuting or defending a lawsuit [is] given to a litigant by someone who has no bona fide interest in the case." *Id.* at *Maintenance*.

213 The writings on the conflicts of interest inherent in class and mass actions where the lawyers, rather than the clients, control the litigation are legion. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358-67 (1995); Samuel Issacharoff, *Class Action Conflicts*, 30 UC DAVIS L. REV. 805, 827-30 (1997); Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 597 (2003).

conflicts of interest in this context and so court involvement should be heightened as compared to individual cases.[214]

In another example, arbitration (excluding public international law disputes) is a private process conducted in a private forum. By its very essence, private adjudication behind closed doors involves less transparency than litigation in open courts. Further, arbitrators—privately appointed *ad hoc* to resolve a specific dispute based on the parties' agreement that they do so—are not a branch of the government entrusted with and required to safeguard the public interest in the same manner judges are. Arbitrators, therefore, may need to be more circumspect with the goals they wish to further in imposing disclosure.[215] But even here, more granularity and nuance are required than simply identifying the case type or the forum. For example, it is understood that international investment arbitration, in which a foreign investor sues a government for violation of a bilateral investment treaty, is a form of private adjudication of public disputes and as such arbitrators sitting in such matters must hew more closely towards both transparency and safeguarding public interests (generally[216] as well as specifically when it comes to disclosure of who is funding the arbitration, in what manner, and in furtherance of what goals[217]).

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[214] A commendable example is a recent procedural order by Judge Polster of the United States District Court for the Northern District of Ohio, discussed *infra* Section D of this Part.

[215] For the debates on the proper disclosure regime in international commercial arbitration, see Elizabeth Chan, *Proposed Guidelines for the Disclosure of Third-Party Funding Arrangements in International Arbitration*, 26 AM. REV. INT'L ARB. 281, 281-83 (2015); Jennifer A. Trusz, Note, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1673 (2013).

[216] For discussions of international investment arbitration as a form of public law and the attendant considerations arbitrators must consider, see generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1543-45 (2005); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 57, 71-73 (2011).

[217] For discussion of the proper disclosure regime in international investment arbitration, and how it differs from the desirable regime in international commercial arbitration, see Rachel Denae Thrasher, *Expansive Disclosure: Regulating Third-Party Funding for Future Analysis and Reform*, 59 B.C. L. REV. 2935, 2944-48 (2018); Frank J. Garcia, *The Case Against Third-Party Funding in Investment Arbitration*, INT'L INST. SUSTAINABLE DEV. (July 30, 2018), https://www.iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia [https://perma.cc/52YH-4EZU].

d. The Subject Matter

Funders have shown interest in cases spanning areas such as contracts, torts, antitrust, intellectual property, consumer protection, *qui tam*, individual and mass torts, human and civil rights, divorce, international commercial, and investment law—to name some common examples. The degree of disclosure desirable in these disparate areas of law is, arguably, different.

One can easily argue, for example, that transparency with respect to those pulling the purse strings and influencing legal argumentation, strategy, settlement, and precedent-making is much more important in international investment disputes, which are governed by public international law, involve the distribution of public money into private hands, and often adjudicate the validity of the conformity of regulation and legislation in the areas of environmental protection, workers' rights, and consumer protection with sovereigns' international obligation than it is in international commercial arbitration involving contracts between private parties.[218]

Similarly, divorce often implicates the third-party interests of minors. Therefore, who influences the course of such litigation and its outcome, and the court's ability to bring such potentially real party in interest forth is different than in, say, contract or even tort disputes.[219]

As these examples illustrate, the subject matter of the litigation should affect whether and what form disclosure of funding is appropriate.

e. Potential Effect on the Development of the Law

Famously, and as alluded to above, repeat players—like corporations, insurance companies, and third-party funders—can and do "play for rules," namely litigate rather than settle in order to change the content of the law.[220] And "[w]hile rule

[218] International investment law involves the protection of foreign investors from governments in the jurisdictions in which they invest. Rights of action are afforded only to the former, not the latter, and are granted in Bilateral Investment Treaties (hence, the public international law nature of the dispute). *See* KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 88-90 (2013).

[219] On divorce finance, see Jeff Landers, *Can't Afford Your Divorce? New Firms Specialize in Divorce Funding*, FORBES (Jan. 15, 2015, 3:24 PM), https://www.forbes.com/sites/jefflanders/2015/01/15/cant-afford-your-divorce-new-firms-specialize-in-divorce-funding/#29b3d2457715.

[220] *See* Galanter, *Why the "Haves" Come Out Ahead*, *supra* note 211, at 100.

change is a public good, it may be profitable for litigation funders to invest in rule change. This is because they manage a portfolio of litigation and, in particular, because they invest repeatedly and sequentially in certain categories of cases."[221] Investing in precedent, in other words, is as valuable for repeat players as is lobbying for legislative change:

> [G]oing to trial specifically in order to obtain rule change may be strategic for litigation funders . . . because the value of precedent is greater for them than it is for their one-shotter clients. Economists have argued that "when neither party is interested in precedent, there is no incentive to litigate, and hence no pressure on the law to change. When only one party is interested in precedent, that party will litigate until a favorable decision is obtained; the law in such cases will favor parties with such an *ongoing interest*."[222]

Not every case has the potential to set precedent and change the course of the law. But when a judge believes the case before her is of such nature, it is reasonable to suggest she takes that factor under consideration, when deciding whether, to what extent, and to whom disclosure is warranted. Under such circumstances probing, for example, who controls the litigation—whether it is the client or the funder—takes on a heightened significance.

f. The Structure of the Financing

The way financing is structured is, perhaps surprisingly, also an important factor to consider when deciding what degree of involvement by the decisionmaker is warranted.[223] For example, a case may be invested in passively or actively.

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221 Steinitz, *Whose Claim Is This Anyway?*, *supra* note 147, at 1312.

222 *Id.* at 1315 (quoting Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977)) (internal quotation marks added); *see also* Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 807 (1994).

223 This often-overlooked factor is, in fact, so important that its nuances and intricacies is a main reason that the ICCA–Queen Mary Task Force's soft law production effort ended up punting, rather than reaching, an agreed-upon guideline on disclosure. For a critique of the Task Force's grasp of the effects of deal structures, see Christopher P. Bogart, *Deeply Flawed: A Perspective on the ICCA-Queen Mary Task Force on Third-Party Funding*, BURFORD: BLOG (Oct. 6, 2017), http://www.burfordcapital.com/blog/icca-queen-mary-task-force-report-flaws [https://perma.cc/9NJK-XCLU]. For scholarship on different possible litigation finance structures, see generally Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. LEGAL ETHICS 253 (2016); Anthony J.

Namely, a funder may never get involved after initially vetting a case, requiring only to be informed of material developments. On the other end of the spectrum, a funder may be very involved, including in selecting the lawyers, dictating strategy, and controlling settlement decisions.[224] Historically, the greater the control by the funder, the greater the suspicion and protection exercised by courts (through the intricacies of the doctrine of champerty).[225]

By the same token, the funding of individual cases involves different considerations than does the rapidly-growing funding of portfolios of cases. In the latter investment structure, the funders often contract directly with the law firm and plaintiffs may not even be aware that their cases are being funded.[226] They may therefore not be aware of salient features of their case such as the resulting

Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice Between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831 (2013); Maya Steinitz, *Incorporating Legal Claims*, 90 NOTRE DAME L. REV. 1155 (2015); Steinitz & Field, *supra* note 205.

[224] In the Mize litigation, for example, the funder bargained for an explicit right to control settlement including a purported right to require the plaintiff to continue litigation and prohibit her from settling or withdrawing. *See* Mize v. Kai, Inc., No. 17-cv-00915-NYW, 2018 WL 1035084, at *5 (D. Colo. Feb. 23, 2018) ("The agreement purports to limit Ms. Mize's ability to 'discontinue the Claims with[out] the prior consent of [Litigation Management]' . . . and prohibits Ms. Mize from settling the case without prior consent of Litigation Management and requires Ms. Mize to settle if so directed by Litigation Management.").

[225] *See* Stan Lee Media, Inc. v. Walt Disney Co., No. 12-cv-02663-WJM-KMT, 2015 WL 5210655, at *2-3 (D. Colo. Sept. 8, 2015) (stating that due to an entity's funding and control of litigation there is "a colorable argument that [the entity] should be held to be a party to the underlying litigation"); Abu-Ghazaleh v. Chaul, 36 So. 3d 691, 693-94 (Fla. Dist. Ct. App. 2009) (finding that a funder could be a party to a suit despite not being named in pleadings if they had sufficient control). The same rationale applies to court scrutiny of the selection of class counsel, litigation conduct, and settlement in class action. *See generally* BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK (2d ed. 2012) (referencing the ways in which attorneys, not clients, control class actions and the consequent safeguards placed by the rules of procedure and the court to protect the class member-clients).

[226] *See* ROSS WALLIN, CURIAM, PORTFOLIO FINANCE AS A TOOL FOR LAW FIRM BUSINESS DEVELOPMENT (2018), https://www.curiam.com/wp-content/uploads/Ross-Wallin-Westlaw-Journal-Article.pdf [https://perma.cc/4QPR-WY6L] ("In portfolio finance transactions, a litigation finance company provides capital to a firm . . . in exchange for a negotiated share in whatever proceeds the firm receives from a portfolio of cases."). The September 11th case is an example of a case in which the plaintiffs had no idea of the funding until they were slapped with the fees for it. *See* Binyamin Appelbaum, *Investors Put Money on Lawsuits to Get Payouts*, N.Y. TIMES (Nov. 14, 2010), https://www.nytimes.com/2010/11/15/business/15lawsuit.html.

conflicts of interest and how the interest formula may affect their lawyers' recommendations on whether, when, and for how much to settle.[227]

And here is yet another example from this more-obscure and less self-evident factor: whether a funder is reserving the right to create derivatives tied to the litigation proceeds may have systemic effects on the courts and may therefore implicate a public interest that is otherwise not common with respect to how one finances her case.[228] To understand whether such a securitization prospect exists, decision-makers may need to see whether certain terms—such as a right to assign the claim or a portfolio of claims—are included in the funding agreement, especially if the agreement is a standard form developed by funders.

More broadly, certain structuring may render a litigation contract a security. In such a scenario, a whole host of securities regulation may come to bear.[229] And there may be additional crossover regulation implicated in other funding

[227] *See* N.Y. City Bar, Comm. on Prof'l Ethics, Opinion 2018-5 (July 30, 2018), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2018-5-litigation-funders-contingent-interest-in-legal-fees (reasoning that portfolio funding may conflict with attorneys' independence and independent judgment).

[228] *See* Steinitz, *Whose Claim Is This Anyway?, supra* note 147, at 1282-83 (discussing the potential systemic effects of litigation proceed-backed securities) ("[I]t is possible that in the foreseeable future we will also be witnessing the creation of a new form of securities — legal-claims-backed securities. Reportedly, some tort-litigation lenders are already in the practice of aggregating the claims they acquire and selling shares of the composite funds; that is, they are engaged in a rudimentary form of securitization. Further support of the proposition that securitization of this new asset class, namely legal claims and defenses, may be forthcoming in the near future can be gleaned from the fact that the first wave of litigation funding also generated a smattering of similar secondary trading in legal claims. A few lawsuits were syndicated during the 1980s, with some instances of syndication ending up in litigation. In addition, there is one case in which shares in future judgments have been traded on Nasdaq." (citations omitted)). For sources on the logic of bundling prime and subprime investments — be they mortgages or lawsuits — via securitization and the potential negative externalities such practices, if unchecked, can cause, including negative systemic effects, see *supra* note 206 and accompanying text.

[229] *See generally* Wendy Gerwick Couture, *Securities Regulation of Alternative Litigation Finance*, 42 SEC. REG. L.J. 5, 16-19 (2014); Wendy Couture, *Does Litigation Finance Implicate the Policies Underlying the Securities Laws?*, MODEL LITIG. FIN. CONT. (Oct. 7, 2013), http://litigationfinancecontract.com/does-litigation-finance-implicate-the-policies-underlying-the-securities-laws/ [https://perma.cc/K34H-VWH6] ("[L]itigation finance implicates the securities laws' policy of ensuring disclosure. Therefore, to the extent that a litigation finance contract satisfies the elements of an 'investment contract,' it should be subject to securities regulation."); Richard Painter, *The Model Contract and the Securities Laws Part III*, MODEL LITIG. FIN. CONT. (July 22, 2013), http://litigationfinancecontract.com/the-model-contract-and-the-securities-laws-part-iii [https://perma.cc/MZ8S-YB77].

scenarios such as when a litigation is crowdfunded since crowdfunding is subject to its own set of regulation.[230] The foregoing highlights the fact that various regulators (not only courts) may have an interest in the terms under which litigation is funded, the structure funding takes, and the systemic effects those might have on the civil justice system as a whole as well as on the investing public.

g. The Purpose of the Contemplated Disclosure

The purpose(s) for which disclosure is sought—which may evolve and change over the course of the litigation—can and should also affect not only whether disclosure is warranted and to whom but especially which part of a funding agreement should be disclosed.

If the purpose of disclosure is for a judge or arbitrator to check for conflicts, disclosing the identity of the funder (and possibly its parent entities) may suffice and could potentially be done *in camera*. If the purpose is to determine whether the funder is a real party in interest,[231] which the court might wish to subject to its authority or a party that should be granted a right to intervene, then the level of control obtained by the funder—which may be embedded in a host of provisions in the funding agreement[232]—may be relevant. In another example, if a party (e.g., a member of a class) or the court suspect a funder is engaged in the unauthorized practice of law, disclosure of the role afforded to the funder in the funding agreement will legitimately be in question, and may possibly come up through a so-called intervention.[233] When supervision of a settlement is in question, both

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[230] On the advent of crowdfunding, see generally Manuel A. Gomez, *Crowdfunded Justice: On the Potential Benefits and Challenges of Crowdfunding as a Litigation Financing Tool*, 49 U.S.F. L. REV. 307, 321-333 (2015); Ronen Perry, *Crowdfunding Civil Justice*, 59 B.C. L. REV. 1357, 1361-73 (2018). For regulation of crowdfunding generally, see, for example, 17 C.F.R. § 227.201 (2017) (outlining disclosure requirements).

[231] *See* FED. R. CIV. P. 17(a) ("An action must be prosecuted in the name of the real party in interest."). In *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009), a funder "was to receive 18.33% of any award" and "had to approve the filing of the lawsuit; controlled the selection of the plaintiffs' attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements." *Id.* at 693. Under those circumstances, the Court of Appeal of Florida held that the funder has achieved the status of "party" under Florida law irrespective of the fact that it was not so named in the pleadings. *Id.* at 693-94.

[232] The direct and, more interestingly, indirect ways funders can gain control over the litigation are discussed in Steinitz & Field, *supra* note 205, at 735-40.

[233] *See* 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1799 (3d ed. 2019) (explaining that intervention "enable[s] class members on the outside of

the degree of control and the funding formula may be fair game for scrutiny by a judge or members of a class.[234] Financial terms may also be relevant to determination of late-stage issues such as whether and how much fees to shift at the end of a case.[235]

The public interest in transparency with respect to understanding the scope and nature of the new, growing, and game-changing phenomenon of litigation finance could be another goal of disclosure.[236]

The purpose of requesting disclosure may be of an altogether different nature, though: abusive disclosure. Namely, requests for disclosure aimed at dragging a funder into discovery disputes or even into the main litigation as a party in order to prolong the litigation and raise its costs; to seek to find out the plaintiff's "reservation point"[237] at which it will settle not on the merits but because funding has been exhausted or for some other, non-merits-based reason; and to glean the

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the litigation to function as effective watchdogs to make certain that the action is fully and fairly conducted").

[234] Judge Hellerstein's decision in the September 11th case, discussed *supra* note 226, in which he held, when scrutinizing a settlement, that attorneys, rather than the plaintiffs, should absorb the costs of interest paid on loans used to finance the litigation, is an example of why and when the financial terms may need to be disclosed. For a further discussion of the fee controversy surrounding the case, see Mireya Navarro, *Already Under Fire, Lawyers for 9/11 Workers Are Ordered to Justify Some Fees*, N.Y. TIMES (Aug. 27, 2010), https://www.nytimes.com/2010/08/27/nyregion/27lawsuit.html.

[235] In international arbitration scholarship much ink has been shed, and some arbitral decisions have been issued, on the question of whether disclosure of funding is necessary in order for arbitrators to determine whether to shift fees (a norm in international arbitration which follows the so-called "British Rule" (loser pays) with respect to fee shifts). *See, e.g.*, Trusz, *supra* note 215, at 1677 (arguing that "institutions should expressly provide that the tribunal may not consider third-party funding in any decisions on costs or security for costs"). That scholarship and jurisprudence also discusses whether and to what extent disclosure is warranted at the beginning of the process in order to determine whether security of costs is warranted. *See, e.g.*, Chan, *supra* note 215, at 283 (arguing that an arbitral tribunal should be able to consider the funder's financial support and the terms of withdrawal for the funder when considering security for costs); Kelsie Massini, *Risk Versus Reward: The Increasing Use of Third Funders in International Arbitration and the Awarding Security for Costs*, 7 Y.B. ARB. & MEDIATION 323, 330-32 (2015) (arguing that it is beneficial for the funder to be disclosed at the start of the arbitration proceedings for security of costs purposes).

[236] *See supra* text accompanying notes 197–203.

[237] A "reservation point" is "the least favorable settlement that the client is willing to accept." LARRY L. TEPLY, LEGAL NEGOTIATION IN A NUTSHELL 81 (3d ed. 2016) (emphasis omitted). The reservation point is affected by factors other than the value of the negotiated asset and knowing an opposing party's reservation point enables a party to make the lowest offer that would be accepted.

type of proprietary financial products a funder has developed for competitive reasons that have nothing to do with the case at hand.

h. The Procedural Posture of the Case

The purpose for which disclosure is sought, as the discussion in the preceding Subsection implicates, bleeds into another factor: the procedural posture of a case. Funders have been known to step in and invest in a case before it is filed, after filing but before trial, after trial but before appeal, and after a final judgment or award has been rendered at the enforcement or collection stage.[238] The procedural posture can and should affect disclosure decisions.

For example, at the enforcement or collection stage, financial or control terms, which may have been relevant earlier in the proceedings, may no longer be relevant; still, the nature of the case and of the parties may continue to be relevant. And in another hypothetical, the very fact of funding, but nothing more, may be all that is needed when deciding whether a contender for the role of class counsel is "adequate" as required by FRCP Rule 23.[239]

B. An Iterative Inquiry

Further, I suggest that the proposed balancing test may be deployed, with appropriate modifications for timing and context and with due regard to cost, at any stage of the litigation or arbitration. The analysis could even be repeated at different stages of the litigation because, as the preceding Subsection explains, the applicable factors may be different leading to a different result as to whether, to what extent, and in what form to order any disclosure.

For instance, at the commencement of an international arbitration, the fact of funding and identity of the funder may be sufficient because the question at hand for a tribunal to decide is whether conflicts of interests exits. But at the end of the process, if the case has not settled, the tribunal may need to see the financial and control terms in order to decide whether and how much of the fees to shift under

[238] *See, e.g.*, *Commercial Litigation Funding*, BENTHAM IMF, https://www.benthamimf.com/what-we-do/commercial-funding (last visited Sept. 9, 2019) [https://perma.cc/2KFN-6NAQ] (stating that Bentham invests in claims at the pre-trial and trial steps, as well as during appeals and to help with judgment collections).

[239] *See* FED. R. CIV. P. 23(g)(1)(A)(iv). For the jurisprudential elaborations of these requirements, see JEROLD S. SOLOVY ET AL., 5 MOORE'S FEDERAL PRACTICE § 23.120 (2003).

the "loser pay" convention.[240] Financial provisions—e.g., how much funding has been committed and what formula is used to the divide the litigation proceeds—are regarded as particularly sensitive by many plaintiffs and funders and particularly open to strategic gaming by defendants who can "game" the litigation aiming to spend down the committed amount or trigger acceleration of interest.

The option to reevaluate can help prevent over-disclosure early on which may prove unnecessary if a case settles early.

C. Additional Disclosure Calibration Tools

At this point, it should be evident that disclosure is a process, not an event, and that decision-makers are faced with a spectrum of options, not with a "zero sum" decision.

At one end of the spectrum, a judge or an arbitrator may require disclosure *in camera* of the existence of funding only, with or without the mere identity of the funder included. At the other end of the spectrum, is the disclosure to the court, opposing party, and filing for the public record of the entire agreement. In the middle of the spectrum are such tools as the disclosure of certain provisions only and the redaction of others or the filing of a short, check-the-box closing statement. A decision-maker can create further gradations by either declining a disclosure without prejudice so that the matter can be revisited as the litigation progresses or, conversely, by imposing a continuing duty to disclose so that if the existence of funding or the identity of funders change throughout the life of the litigation a plaintiff is under an obligation to so disclose.

In addition to regarding the disclosure decision as one that can be revisiting later in the process, as suggested above, decisionmakers can make use of *in camera* and/or *ex parte* submissions, redactions, "attorney's eyes only" designations, filing all or parts of the funding agreement under seal, or requesting attorneys to certify representations about what an undisclosed agreement does or does not contain. In short, the basic tools generally available to moderate undesirable effects of discovery are all available in this context as well.

240 *See* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, *supra* note 148, at 159.

The final, concluding Section of this Part provides an example of well-calibrated, context-sensitive disclosure by a federal judge presiding over a multidistrict litigation ("MDL").

D. An Example: The Order Regarding Third-Party Contingent Litigation Financing in In re Nat'l Prescription Opiate Litigation

A commendable example of a nuanced judicial approach that appears to have taken into account the type of case, the funded parties, the procedural posture, the possible deal structure (and its effects on conflicts of interest) and that made use of tools such *ex parte* submissions and certification by the attorneys, is an order by Judge Polster of the United States District Court for the Northern District of Ohio, presiding over an MDL.

Preliminarily, it should be noted that Judge Polster both broadly defined "third-party contingent litigation financing" as "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 an MDL Case, by settlement, judgment, or otherwise,"[241] and surgically exacted that the term does not include "subrogation interests, such as the rights of medical insurers to recover from a successful personal-injury plaintiff."[242]

Next is the disclosure regime tailored by Judge Polster to the case at bar. "Absent extraordinary circumstances," he ordered, "the Court will not allow discovery into [third-party contingent litigation] financing,"[243] but "any attorney in any MDL Case that has obtained [third-party contingent litigation] financing shall:

- share a copy of this Order with any lender or potential lender.
- submit to the Court *ex parte*, for in camera review, the following:

 (A) a letter identifying and briefly describing the [third-party contingent litigation] financing; and

[241] Order Regarding Third-Party Contingent Litigation Financing, *In re* Nat'l Prescription Opiate Litig., No. 1:17-MD-2804, 2018 WL 2127807, at *1 (N.D. Ohio May 7, 2018).

[242] *Id.* at 1 n.1.

[243] *Id.* at 1.

> (B) two sworn affirmations—one from counsel and one from the lender—that the [third-party contingent litigation] financing does not:
>
> > (1) create any conflict of interest for counsel,
> >
> > (2) undermine counsel's obligation of vigorous advocacy,
> >
> > (3) affect counsel's independent professional judgment,
> >
> > (4) give to the lender any control over litigation strategy or settlement decisions, or
> >
> > (5) affect party control of settlement."[244]

In so ordering, without handing defendants an informational windfall, the court thus placed the burden of safeguarding legal ethics despite the complications of third-party funding, and potential liability in case of a failure to meet it, on the gatekeepers with the best view of whether problems exist or arise. And it also placed the lawyers, existing and potential funders on notice that the watchful eye of the court is upon them.

CONCLUSION

In sum, the quest for a disclosure rule has set policymakers on a wild goose chase that has led some to avoid or punt on the issue all together while leading others to propose disclosure regimes that are either over- or under-protective of the multiple stakeholders in this regulatory quandary—namely, plaintiffs, defendants, funders, the public, and the courts—and their varying complex and shifting interests. By reminding the legal community of the availability of standards, especially balancing tests, and by fleshing out the specifics of what such a balancing test might consist of in this context, I have endeavored to break the Gordian knot of the surprisingly difficult question of whether and how to structure a disclosure regime for litigation finance.

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[244] *Id.*

What's So New About Litigation Finance?

Disclosure and Regulation of a New Take on an Old Practice

By William C. Marra*

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Discussions of litigation finance frequently begin with the implicit or explicit assumption that litigation finance is something *new* — a decidedly modern and 21st-century method of financing litigation. This is particularly true for the debate about whether a mandatory disclosure rule should compel the automatic disclosure of litigation finance agreements at the outset of litigation. Many arguments in favor of mandatory disclosure of litigation investment agreements stress litigation finance's ostensible novelty, contending that mandatory disclosure is necessary to combat litigation funding's fresh and unique threat to a lawyer's ethical duties, to the champerty and maintenance laws, or to some other legal or ethical prohibition.[245]

This essay challenges the assumption that litigation finance or the risks it allegedly presents are particularly new or unique, and it demonstrates why undermining this faulty assumption goes a long way toward defeating many of the arguments in favor of mandatory disclosure of litigation finance agreements.

In one sense, of course, it is plainly true that modern litigation finance is new. The birth of contemporary "litigation finance" companies dates only to the 1990s in Australia and the United Kingdom.[246] In the United States, commercial litigation finance did not take off until the 2000s, when Credit Suisse launched an appeals funding business, and later when Bentham IMF, Juridica Investments, and Burford Capital entered the U.S. market.[247] When we talk about modern litigation finance companies, we are not talking about companies with the vintage of American Express, AT&T, or even Apple.

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[245] *See*, *e.g.*, Letter from Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts at 2, 7 (June 1, 2017) ("Chamber Letter") (advocating mandatory disclosure after casting litigation finance as a novel industry that has seen "[r]apid [g]rowth" and "a dramatic expansion" since 2014); Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 489 (2013) (describing litigation finance as a "relatively new phenomenon," in the course of arguing for increased regulation including mandatory disclosure). *See also*, *e.g.*, Letter from Charles E. Grassley, Chairman, U.S. Senate Judiciary Comm., & John Cornyn, Chairman, U.S. Senate Judiciary Comm., to Sir Peter Middleton, Chairman, Burford Capital (Aug. 27, 2015) (requesting information from practitioners about the "burgeoning industry" of litigation finance).

[246] Marco de Morpurgo, *A Comparative Legal & Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 360–61 (2011).

[247] *See*, *e.g.*, Lake Whillans, *The History and Evolution of Litigation Finance*, ABOVE THE LAW (Jan. 27, 2017), https://bit.ly/2olrxCc; Mattathias Schwartz, *Should You Be Allowed to Invest in a Lawsuit?*, N.Y. TIMES (Oct. 22, 2015), https://nyti.ms/369e4yv.

But in another sense, third-party litigation finance is not particularly new.[248] To see why, it's helpful to first define "litigation finance." At its broadest level, litigation funders provide capital to individuals or corporations in connection with legal claims.[249] Most commonly, a commercial litigation finance company helps a plaintiff-side claimholder meet the costs of litigation, including attorneys' fees and litigation expenses like expert fees, court filing costs, and travel expenses.[250] The funder pays some or all of those fees and costs, and in exchange, the funder is entitled to a portion of any case proceeds.[251] Litigation finance transactions are typically "non-recourse," which means that the funder's return is secured only by proceeds from the funded case(s).[252]

The truth is that non-parties to a case have been helping individuals and companies meet the often-exorbitant costs of litigation for decades and centuries, and they have frequently done so in exchange for a share of case proceeds. Our legal system has not simply permitted these methods of third-party financing — it has often actively encouraged them, recognizing that they are important ways to further access to the courts, particularly for those without the funds to self-finance litigation.

We don't have to search far and wide for examples. When a lawyer takes a case on contingency, litigating the case for no up-front charge in exchange for a share of case proceeds, she provides third-party financing. When an individual receives free legal services from a public interest organization, she benefits from third-party financing. When an employer pays an employee's legal fees, or when a parent pays an adult child's divorce costs, the employer and parent provide third-

[248] For an expanded version of the argument that modern litigation finance is not particularly "new," see Suneal Bedi & William C. Marra, *The Shadows of Litigation Finance*, 74 VAND. L. REV. __ (forthcoming 2021).

[249] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1276 (2011) (defining "litigation finance" as "the provision of funds by companies who have no other connection with the litigation"). *See generally* Anthony Sebok, *Litigation Investment and Legal Ethics: What are the Real Issues?*, 55 CAN. BUS. L.J. 111, 112 (2014).

[250] de Morpurgo, *supra* note 2, at 350–51 (2011) (defining litigation finance as "the specific practice in which a third party offers financial support to a claimant in order to cover his litigation expenses, in return for a share of damages if the claim is successful, or nothing is the case is lost").

[251] Mariel Rodak, Comment, *It's About Time: A Systems Thinking Analysis of the Litigation Finance Industry and Its Effect on Settlement*, 155 U. PA. L. REV. 503, 507 (2006).

[252] Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 713 (2014); Rodak, *supra* note 7, at 507.

party financing. These are just a few ways in which non-party funding of litigation is a bedrock feature of our civil justice system.

It turns out that third-party litigation finance is, and long has been, all around us. These modes of third-party financing are not all precisely the same as commercial litigation finance. But these are distinctions without a difference for purposes of the question whether third-party financing agreements should be the subject of mandatory disclosure rules.

This essay does not purport to review all the arguments for and against disclosure, either via mandatory disclosure or disclosure on a case-by-case basis. Instead, I focus on the debate about mandatory disclosure of funding agreements at the outset of litigation. At the federal level, the push for mandatory disclosure of funding agreements is happening both before the Federal Rules Committee and in Congress. Before the Federal Rules Committee, the United States Chamber of Commerce has requested a rule that requires the initial disclosure of "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."[253] In Congress, Senator Chuck Grassley has introduced the Litigation Funding Transparency Act in both 2018 and 2019, seeking to require the automatic disclosure, at the outset of class actions and multidistrict litigations, of both the identity of any party with a financial interest in the case (other than the named parties or counsel) and the funding agreement itself.[254]

These proposals would expand disclosure requirements in two ways. First, they would require broader disclosure of the *identity* of parties that are funding litigation than is currently required under the current rules.[255] And second, they would require the disclosure of the *funding agreement* itself.

[253] *See* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 345 (Nov. 2017), https://bit.ly/3j9VvzE; Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. DAVIS L. REV. 1073, 1078 (2019).

[254] Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019); Litigation Funding Transparency Act of 2018, S. 2815, 115th Cong. (2018); Steinitz, *Follow the Money*, *supra* note 9, at 1077.

[255] Federal Rule of Civil Procedure 7.1 currently requires litigants to disclose at the outset of litigation the identity of "any parent corporation and any publicly held corporation owning 10% or more of its stock," to allow judges to determine whether they should disqualify from a case. FED. R. CIV. P. 7.1(a)(1). *See also id.*, Committee Notes on Rule – 2002

The arguments in support of mandatory disclosure presume that the modern litigation finance industry represents a novel introduction of third-party funders into our legal system, presenting unique risks that require a new disclosure regime. Part I of this essay debunks this premise and demonstrates that our legal system has long permitted and indeed encouraged third parties to finance litigation to which they are not a party. The modern litigation finance industry is not different in kind from these other forms of third-party funding.

Part II of this essay then demonstrates that the leading arguments in support of mandatory disclosure — that litigation finance threatens a lawyer's independence, may involve unethical fee arrangements, may give rise to judicial conflicts of interest, and may involve champertous funding agreements — could just as easily be levied against the forms of third-party financing our legal system has long allowed. But we have not subjected these other forms of third-party financing to mandatory disclosure rules that require litigants to immediately disclose their third-party financing without regard to a showing of relevance, proportionality, and the absence of privilege. For example, litigants generally need not disclose whether their lawyers are working on a contingency fee, whether a family member is paying the costs of their divorce proceeding, or whether a third party is funding their lawsuit on a pro bono basis.

The upshot: it is very difficult to justify mandatory disclosure of modern "litigation finance" agreements provided by commercial or consumer litigation finance companies, when we have not required disclosure of the various other forms of third-party financing. And by resisting unnecessary mandatory disclosure for only one form of third-party financing — by refusing to essentially impose an indirect tax upon litigation finance — we help make our civil justice system more accessible to all Americans, allowing even those without millions of dollars in the bank to press their legal rights.

(stating that the rule "will support properly informed disqualification decisions in situations that call for automatic disqualification under [the Code of Conduct for United States Judges]." Some federal courts require by local rule expanded disclosure of entities with a financial interest in the case, though these rules are frequently limited to the disclosure of interests held by publicly held corporations only, and they do not require the disclosure of any underlying financing agreements. *See* Steinitz, *Follow the Money*, *supra* note 9, at 1079–80; ADVISORY COMM. ON CIVIL RULES AGENDA BOOK 209–29 (Apr. 2018), https://bit.ly/31mdf4u

I. LITIGATION FINANCE BY ANOTHER NAME

It's helpful to start with a simple question: Why do parties seek litigation finance? Two motivations usually drive the decision: *liquidity constraints* and *risk aversion*.[256]

First, with respect to liquidity constraints: Litigation is expensive.[257] The United States ranks 99th out of 126 countries for affordability and accessibility of civil justice.[258] Bringing even a straightforward breach of contract claim can cost hundreds of thousands, or even millions, of dollars. Not everyone has that kind of money. The illiquid can be the truly indigent — those without any money to their name — but it can also include those who have enough money to pay for second-rate counsel but not their first-choice lawyers. If claimholders are forced to rely *only* on their personal resources to bring a suit, those without sufficient liquidity will be forced to abandon their claims entirely, or to proceed with counsel who are not the right fit, perhaps because they lack sufficient expertise in the case's subject matter. If claimholders are permitted to obtain financing from others — whether from their counsel through contingency fee arrangements, or from third parties like commercial litigation funders —their ability to access the courts will be significantly enhanced.[259]

Second, with respect to risk aversion: Litigation is an uncertain endeavor. Claimholders must invest money today in the hope that a court will vindicate their claims and award them relief at some uncertain time in the future.[260] Risk sharing

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[256] For an expanded discussion of how liquidity constraints and risk aversion drive the decision to obtain litigation finance, see Bedi & Marra, *supra* note 4.

[257] *See* HON. JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2015) at 4, 11, https://bit.ly/2q73g1n (arguing that "in many cases civil litigation has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts").

[258] William C. Silverman & Madison Marko, *The Right to Counsel in Civil Proceedings: An International Perspective*, PROSKAUER ROSE LLP (Apr. 11, 2019), https://bit.ly/2Qf1ZQD

[259] W. Bradley Wendell, *Paying the Piper But Not Calling the Tune: Litigation Finance and Professional Independence*, 52 AKRON L. REV. 1, 9–10 (2018); *Lawsuit Funding, LLC v. Lessoff*, 2013 WL 6409971 (N.Y. Sup. Ct. 2013) ("[L]itigation funding allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation.").

[260] Joanna M. Shepherd & Judd E. Stone II, *Economic Conundrums in Search of a Solution: The Functions of Third-Party Litigation Finance*, 47 ARIZ. ST. L.J. 919, 927 (2015) ("Prosecuting litigation necessarily requires an immediate substantial capital investment for a remote future reward."); David M.

is an integral part of many endeavors in life, and few business owners bear the entire risk and cost of starting a company, launching a new product, or expanding into a new territory.[261] Just as companies frequently share risk for these ventures by raising equity, issuing debt, or obtaining other forms of financing, so too might they desire to offload some of the risk associated with litigating a case.[262]

As you might imagine, the twin problems of liquidity constraints and risk aversion have existed for centuries. More to the point, they long predate modern litigation finance. It should thus come as no surprise that it wasn't only ten or fifteen years ago that claimholders started to find ways to solve their liquidity or risk-tolerance problems.

In fact, we don't have to strain to find lots of ways in which third parties have long helped the indigent, the otherwise illiquid, or the risk averse bring meritorious legal claims. Sometimes, the non-party finances the claim in exchange for a stake in the outcome of the litigation, or for some other financial reason. In other instances, the non-party operates from a non-financial motive, which might include pure benevolence or the desire to shape the law in a particular way.

Here are just some ways third parties help finance a claimholder's litigation:

1. CONTINGENCY FEE LITIGATION

The contingency fee arrangement is such a bedrock part of our legal system that it is easy to overlook it as a form of third-party financing. Lawyers who work on a contingency fee do not charge their clients any fees for litigating their case. Instead, the lawyer works "for free," litigating the case but charging the client nothing up front.[263] Sometimes the lawyer even pays the (often-substantial) costs and disbursements associated with bringing a case, such as expert costs and court

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Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 76 (1983) (examining litigation as "the process as the investment of scarce resources to achieve a future result").

[261] *See generally* Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 369 (2009).

[262] Shepherd & Stone, *supra* note 16, at 923–24; Molot, *supra* note 17, at 369–70.

[263] *See* Restatement (Third) of the Law Governing Lawyers § 38, cmt. e (2000) ("Under a contingent-fee contract, however, a client who does not prevail is not liable to the lawyer for court costs and litigation expenses, unless the client agreed to pay them or nonrefundable advances by the lawyer of such costs and expenses are unlawful in the jurisdiction.").

filing fees.[264] The lawyer only gets paid on the back end, receiving a percentage of the recovery — usually between 30% and 40% — if the case succeeds.[265] But the lawyer receives nothing if the case fails.

Contingency fee arrangements are a form of third-party financing because lawyers are not parties to the case. These arrangements help solve a client's liquidity or risk-aversion problems. Imagine a small business owner has a breach of contract claim against her supplier, but either does not have enough money to pay a lawyer by the hour to litigate the case, or would rather not commit the company's depleted resources to litigation. Rather than turn away this prospective client, a lawyer may take the case on contingency, financing the case on behalf of the client in exchange for an expectation of payment when the case succeeds.

Where do lawyers get the money they need to litigate contingency-fee cases? Sometimes lawyers use their own money, but other times, they obtain bank loans secured in whole or in part by the law firm's receivables. In this latter scenario, the contingency fee litigation is financed both by the non-party lawyer and, in turn, by a non-party lender such as a bank. The bank expects its loan to be repaid by proceeds from the lawyer's cases.

Contingency fees were once outlawed under the ancient doctrines of champerty and maintenance, but those days are long over.[266] Indeed, the legal ethics rules expressly *permit* lawyers to take most types of cases on contingency, requiring only that the lawyer's percentage recovery cannot be excessive.[267] And contingency fee arrangements are frequently lauded as positive contributions to our legal system, for they allow claimants to advance meritorious claims even if they do not personally own sufficient resources to vindicate their legal rights.[268]

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264 *See* Restatement (Third) of the Law Governing Lawyers § 36(2) (2000).

265 *See* David A. Hyman et al., *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1566–68 (2015).

266 Michael K. Velchik & Jeffrey Y. Zhang, *Islands of Litigation Finance*, 24 STAN. J. L., BUS., & FIN. 1, 20–22 (2019).

267 *See* ABA Model Rule 1.5(c) ("A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law.").

268 *See, e.g.*, Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 727 (2010).

Contingency fee agreements are a close cousin of commercial litigation finance.[269] In both instances, someone who is not a party to the litigation agrees to front the costs of litigation in exchange for a share of case recoveries on the back end. Contingency fee financing, like commercial litigation financing, is non-recourse, in that the financier receives payment only if the case succeeds. Indeed, most commercial litigation finance agreements have a lawyer's contingency fee agreement baked into them, because funders typically finance only a portion of the lawyer's fees, asking the lawyer to fund the balance of the fees on contingency.

2. PUBLIC INTEREST ORGANIZATION LITIGATION

Public interest pro bono litigation is also a form of third-party financing. "Because financing litigation—particularly Supreme Court litigation—is well outside the means of the average citizen, civil liberties require coordination among funders to effect social change."[270] Public interest organizations like the NAACP, the ACLU, and the Rockefeller Foundation frequently provide free representation, paying an individual's legal fees and expenses on the client's behalf.[271]

Litigation by public interest organizations may come in two forms. First, the pro bono group's primary objective may be to set favorable legal precedent in an area. For example, an advocacy group may finance an individual's test case to establish a constitutional or statutory right that it hopes will apply to a broad class of individuals. In these instances, the advocacy group certainly wants to obtain victory for the named plaintiff, but its primary goal is to set legal precedent, usually at the appellate level, for a wide class of individuals. In this category of cases, the organization will often be disinclined to accept an early settlement that would resolve the case before it goes up on appeal.

Second, pro bono litigation may be designed primarily to achieve a favorable outcome for a particular client, with little regard to or expectation of setting favorable court precedent. For example, an immigrant-rights group may pay the legal costs of a refugee's application for asylum, with the principal goal being to

[269] Velchik & Zhang, *supra* note 22, at 19 (classifying contingency fee arrangements as a form of third-party financing); George Steven Swan, S.J.D., *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 834 (2001) (describing contingency fee arrangements as an "economic precedent for the nascent litigation funding industry").

[270] Velchik & Zhang, *supra* note 22, at 17.

[271] *Id.*

obtain relief for the particular client, not to litigate the case all the way to the United States Supreme Court. Similarly, an anti-death-penalty group may be more interested in sparing a death row inmate from execution than setting favorable precedent at the appellate courts.

Litigation sponsored by public interest organizations amounts to third-party financing because it allows an individual to advance a legal claim by relying on a third party to pay the often considerable fees and costs associated with bringing that claim.[272] Pro bono financing is frequently provided on behalf of the indigent, who lack the ability to hire lawyers to vindicate their legal rights. Even if the third-party public interest organization does not have a direct financial interest in the case, it may have an indirect financial interest, and it will certainly have a strong ideological interest in achieving a particular outcome.

Notably, pro bono litigation, like contingency fee litigation, was once attacked as violating the doctrine of maintenance.[273] For example, during the Jim Crow era, some southern states reinforced their existing maintenance and champerty statutes to impede the efforts of advocacy groups like the NAACP to bring civil rights litigation on behalf of poor African-Americans. It took a series of judicial decisions, most famously the Supreme Court's landmark *NAACP v. Button*, 371 U.S. 415 (1963), to defeat those lamentable efforts.[274]

3. Financing claims of friends, family, and employees

Another broad category of third-party funding occurs when an individual or entity pays the legal fees on behalf of someone they know, either through a family relationship, friendship, or employment relationship. For example, generous-minded individuals often pay legal fees on behalf of less-well-off family members or friends. The classic example is a parent who pays her adult child's divorce fees, or a wealthy benefactor who helps a friend who was injured in a car accident bring a civil claim against the reckless driver. While the financier typically does not expect a share of case proceeds in return, each of these examples amounts to a third party financing someone else's legal expenses.

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[272] *Id.*

[273] *See id.* at 18.

[274] *See id.*

In other instances, an employer may agree to finance the litigation costs incurred by an employee for actions the employee took on the job. The employer sometimes has a contractual duty to pay the litigation expenses and even to indemnify the employee for damages. For example, companies frequently pay the legal defense costs of directors or officers sued in their personal capacity for a breach of fiduciary duty. Similarly, state and federal governments typically pay the legal defense costs of officers sued for violations of constitutional rights under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

These arrangements are so commonplace that the legal ethics rules expressly contemplate and permit them too. In particular, ABA Model Rules 1.8 and 5.4 expressly permit lawyers to be paid their fee by someone other than the claimholder, notwithstanding the potential conflict of interest where the client's interests may diverge from the interests of the third party paying those legal fees.[275] The rules do not ban these potentially beneficial arrangements — they simply require that, in this circumstance, there may be "no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship."[276]

One possible distinction between commercial litigation funding and the employer- or family-based funding is that the commercial litigation funder has a direct financial stake in the outcome through a right to a share of case proceeds. But an employer or benefactor paying a litigant's legal fees may also have a financial stake in the outcome. For example, an employer may be directly or indirectly on the hook for any damages award against its employee, as is frequently the case for government employees. Benefactors may feel the need to financially support their friend or family member if that person is unable to recover sufficient funds in the litigation. And even if they do not have financial interests in the case, employers may have a strong interest in the legal outcome of

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[275] ABA Model Rule 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."); ABA Model Rule 5.4(c) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

[276] ABA Model Rule 1.8(f); *see also* ABA Model Rule 5.4, Cmt. [2].

the case, for the precedent set in the litigation may affect the employer's broader commercial or legal interests, while benefactors paying the legal costs of friends and family will certainly be emotionally invested in the case outcome.

4. Equity- or debt-based financing

When companies need money to launch a new product, expand into a new territory, or open a new marketing channel, they can find that money in their bank account, or they can raise the funds they need in the capital markets. Companies typically raise this money by selling *equity* (selling someone else an ownership interest in the company) or issuing *debt* (raising funds that must be paid back at a certain rate of return over time).[277] Few companies are able to self-finance their growth from Day One, so equity and debt financing are integral parts of the capital market system that allows our economic system to flourish.

When companies raise funds for general corporate purposes, one of those purposes may be to finance litigation. Litigation funders frequently meet with claimholders who took out loans against their business, or even mortgaged their property, to finance the cost of litigation, before they learned about commercial litigation finance. Sometimes the litigant secured equity or debt financing primarily for the purpose of using that money to finance litigation, and sometimes they had mixed motives — a little bit of the money would go to pay their lawyers, the rest to build a new plant or hire new workers.

While debt financiers often ask for collateral besides the proceeds of litigation, third-party investors or creditors frequently expect that the successful outcome of pending litigation will provide some or all of the resources that will make their investment a success. Like the contingency fee lawyer — and like the commercial litigation funder —these investors and creditors provide money to a corporation, expecting that part of their financing will be used to cover the costs of litigation, and further expecting that the return on their investment will come, in whole or in part, from litigation proceeds.

And as previously noted, it is not simply claimholders but also lawyers themselves who frequently obtain third-party debt-financing. While the ethics

[277] *See generally* Katherine Pratt, *The Debt-Equity Distinction in a Second-Best World*, 53 VAND. L. REV. 1055, 1059–60 (2000).

rules prohibit non-lawyers from owning an equity stake in a law firm,[278] contingency-fee lawyers frequently obtain bank loans backed in whole or in part by the firm's receivables. Third-party lenders to law firms thus effectively finance litigation to which they are not a party, with the expectation of obtaining their return on investment from the litigation.

II. IMPLICATIONS FOR DISCLOSURE

Although modern commercial litigation finance improves litigants' ability to access the courts, it has not received universal praise. Opponents of litigation finance, including the United States Chamber of Commerce's Institute for Legal Reform and some legislators, have attempted to limit the spread of litigation finance. As noted, they have pushed for the *automatic* disclosure of litigation finance agreements to both the court and defendants at the outset of litigation, without regard to whether those documents are relevant to the case, whether disclosure would be proportional, or whether the documents are protected by a legal privilege like the attorney-client privilege or the work product doctrine.

Proponents of mandatory disclosure advance a host of arguments to further their push for mandatory disclosure. This essay does not provide every possible response to those arguments. Instead, I highlight one crucial flaw: the arguments for mandatory disclosure of litigation funding can equally be used to support mandatory disclosure of the various forms of third-party financing just discussed — yet the law generally does not require automatic disclosure of these other mechanisms of third-party financing. Indeed, although some of these financing methods may be revealed during discovery after a showing of relevance and proportionality, many of us would bristle at the notion that they should always and everywhere be automatically disclosed at the outset of litigation. Just as we have long recognized that mandatory disclosure of these various other forms of arrangements is not necessary, there is no reason to require mandatory disclosure of commercial litigation finance.

[278] ABA Model Rule 5.4. Arizona recently became the first state to repeal Rule 5.4 and allow nonlawyer ownership of law firms. Sam Skolnik, *Arizona First State to OK Nonlawyer Ownership of Law Firms*, BLOOMBERG LAW (Aug. 28, 2020), https://bit.ly/2ZypdqZ

1. LAWYER-CLIENT CONFLICTS OF INTEREST

One of the leading arguments offered in favor of mandatory disclosure of litigation funding agreements is that litigation funders may create conflicts of interest for lawyers, inducing them to violate various ethical rules. One leading flavor of this argument, advanced by the Chamber of Commerce, is that litigation finance presents a "threat ... to the plaintiff's right to control his or her own claim" and creates "[t]he possibility of conflicts of interest among the plaintiff, the attorney, and the funder."[279] The Chamber has argued, without evidence, that funders might control litigation strategy or demand that counsel give fealty to the funder, putting the funder's interests above those of the claimholder.

To be sure, we can dispute the premise of this argument. Reputable litigation finance companies scrupulously adhere to the ethics rules and do not control litigation. But even assuming this were a legitimate concern, a comparable theoretical threat is present in just about all of the third-party financing agreements discussed in Part I.

Consider the contingency fee arrangement. Commentators have long recognized that "contingent fees in some situations may cause lawyers' and clients' interests to conflict."[280] Because a lawyer's contingency fee typically remains the same regardless of how much time and effort the lawyer invests in the case, a lawyer has an incentive "to work fewer hours on a case than a fully knowledgeable client paying an hourly rate would choose to have the lawyer work."[281] Likewise, a lawyer may have a financial incentive to settle a case early, potentially for a lower-than-optimal amount for her client, before investing a substantial amount of time and money in the case.[282] Some also argue that lawyers working on a contingency may be more likely to engage in unethical litigation conduct than those working on an hourly rate, since their ability to put bread on the table depends upon winning the case.[283]

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[279] Chamber Letter, *supra* note 1, at 14, 16.

[280] Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 670 (1995).

[281] *Id.* at 671.

[282] *Id.*

[283] 1 The Royal Commission on Legal Services, Final Report 177, 176–77 (1979) ("The fact that the lawyer has a direct personal interest in the outcome of the case may lead to undesirable practices including the construction of evidence, the improper coaching of witnesses, the use of professionally partisan expert

In other words, the argument that litigation finance may create conflicts of interest between claimholder, funder, and lawyer applies with at least as much force to contingency fee arrangements. In fact, the concern about conflicts is arguably *stronger* when attorneys work purely on a contingency, because the attorney gets paid nothing unless the case succeeds. Litigation finance mitigates this potential conflict. That's because in the most common form of litigation finance arrangement, the funder pays half or more of the lawyer's billable hours, giving the lawyer a steady stream of income throughout the case. Because litigation finance agreements allow lawyers to be compensated for a significant portion of the hours they bill on a case, funding mitigates a lawyer's incentive to minimize time spent on a case or to settle for a suboptimal amount early in the case.

A similar analysis applies to other forms of third-party financing. Imagine, for example, that an employer is paying an employee's legal fees. Imagine further that the employer is a longstanding client of the lawyer, but the lawyer does not have a long-term relationship with the employee. It is easy to see a potential threat to the lawyer's professional independence, as the lawyer may be tempted to satisfy the employer's desires rather than zealously represent the employee's interests. A similar dynamic can occur where a parent is paying for her child's divorce costs, or a generous benefactor is financing a friend's medical malpractice claim. If a third party holds the purse strings, a lawyer must be careful to resist the temptation to follow the third-party funder's wishes over those of her client.

Conflicts may also arise in pro bono litigation, particularly in "cause" litigation where the third-party financier does not simply seek relief for the named plaintiff but wants to establish favorable precedent, often at the appellate court or Supreme Court level. It is no secret that "political and ideological goals, rather than strictly monetary ones, often motivate clients in public interest cases."[284] Imagine, for example, that a union wishes to fund litigation on behalf of one of its employees. As the litigation progresses, the employee may wish to accept a generous settlement offer from the defendant, but this desire may conflict with the union's

witnesses (especially medical witnesses), improper examination and cross-examination, groundless legal arguments designed to lead the courts into error and competitive touting"), *quoted in* Painter, *supra* note 36, at 668.

[284] Susan D. Carle, *The Settlement Problem in Public Interest Law*, 29 STAN. L. & POL'Y REV. 1, 4 (2018).

desire to keep litigating the case in the hope of establishing favorable precedent.[285] Will the lawyer's advice to the employee be shaded by the lawyer's knowledge that the paying client — the union — wants to establish "the law of the land," or by the lawyer's own desire to be involved in a precedent-setting case? Ideological motivations can be stronger than monetary ones, and the fact that the third-party funder does not stand to immediately gain financially from a favorable outcome does not eliminate the possibility of a conflict.

Our legal system takes these threats to a lawyer's independence seriously — but it does not deal with these threats by requiring mandatory disclosure whenever a third party is paying the attorney's legal fees, or by requiring lawyers to disclose whenever they are working on a contingent fee. Instead, we trust lawyers to satisfy their ethical duties to maintain their independence and place the interests of their clients first, without allowing opposing counsel to peer over their shoulder to monitor compliance. For example, Model Rule 5.4(c) permits third parties to pay a lawyer's legal fees, but it provides that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Likewise, lawyers may work on a contingency fee, but when they do, they must maintain professional independence and put their clients' interest first.

The question for proponents of mandatory disclosure is why lawyers can be trusted to maintain their independence in all these other areas — contingency fee arrangements, third-party payor arrangements, pro bono litigation, and so on — but not in the context of commercial litigation finance. It is hard to see a satisfying answer, particularly where these other instances of third-party funding present at least as great, or even greater, theoretical conflicts of interest. Indeed, litigation finance companies, as repeat players in the market for legal services, have particularly strong incentives to adhere closely to the ethical rules requiring attorney independence, lest they garner a poor reputation in the market or bring the litigation finance profession into disrepute.

[285] *See id.* at 31–32 (discussing a New Hampshire Bar Association ethics opinion permitting the union to condition its payment for legal services on behalf of an employee on precluding the employee from settling without the union's permission or otherwise requiring the employee to reimburse the union for its legal expenses incurred). *See also* N.H. Bar Ass'n Ethics Comm., *Control of Settlement by Third Party Paying the Lawyer's Fees,* (Dec. 8, 1993).

2. UNETHICAL ATTORNEY FEE ARRANGEMENTS

Another argument often presented by proponents of mandatory disclosure is that mandatory disclosure is necessary because litigation finance agreements may violate the ethical rule against fee sharing. ABA Model Rule 5.4, like the analogues in most states, provides that a lawyer generally may not "share fees with a nonlawyer ...."[286] A "troubling ethical implication of [litigation finance]," the Chamber of Commerce has speculated, "is the tendency of some lawyers who enter into [litigation funding] arrangements to share their legal fees with the funder."[287] Proponents of mandatory disclosure have thus suggested that mandatory disclosure is necessary to allow a court and opposing party to preemptively check if the plaintiff's lawyer is violating the ethical rule against fee sharing.

As an initial matter, it is important to put this argument in context. Most litigation finance agreements are between the funder and the *claimholder*. These agreements, where the claimholder agrees to give a portion of her case proceeds to the funder, simply do not implicate Rule 5.4's prohibition against fee sharing. Only agreements between the funder and the *law firm* arguably implicate Rule 5.4. Thus what the Chamber's argument would require is not simply disclosure of the *client*'s litigation funding, but of any financing that the *law firm* receives to support its contingency fee practice. That would indeed be a very broad and intrusive requirement, and would seemingly have no stopping point. For example, would a law firm have to disclose its private bank loans, so that counsel from one law firm has an opportunity to scrutinize the finances of its competitor law firm?

In any event, the argument for disclosure based on speculative violations of Rule 5.4 fits poorly with how our legal system polices potential rule violations in connection with the broad range of other third-party financing agreements. Let's assume we can imagine hypothetical litigation finance agreements that may

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[286] ABA Model Rule 5.4(a). As noted, in August 2020 Arizona became the first state to eliminate Rule 5.4. Meanwhile, Utah has created a regulatory sandbox to allow nonlawyer ownership of law firms on a provisional basis, and other jurisdictions are looking at eliminating Rule 5.4 too. *See* Lyle Moran, *Utah embraces nonlawyer ownership of law firms as part of broad access-to-justice reforms*, ABA J. (Aug. 14, 2020), https://bit.ly/35wy5RB

[287] Chamber Letter, *supra* note 1, at 13.

violate the ethical rule against fee sharing. So too can we conjure other financing agreements that may violate ethical rules.

For example, contingent fee arrangements must be reasonable and not excessive.[288] But some contingency fee agreements may be unreasonable and excessive. Should contingency fee arrangements therefore be subject to mandatory disclosure?

Likewise, the model rules prohibit contingency fee arrangements in criminal cases, or in domestic relations cases where the lawyer's payment is contingent upon securing a divorce or a particular amount of alimony or support.[289] But some lawyers may enter into prohibited contingency fee agreements in these cases. Should litigants be required to disclose at the outset of litigation their retainer agreements in any criminal or domestic relations matter?

Once again, our legal system addresses potential violations of the ethical rules by trusting lawyers to enter into ethical fee agreements that comply with the lawyer's professional responsibilities. Lawyers are not required to lodge their retainer agreements with the court so that a judge and opposing counsel may scrutinize the arrangements to ensure that no provision of law or ethics has been violated. Why is litigation finance different? Indeed, if we trust lawyers to enter into ethical fee agreements when lawyers may be unethical about the return *payable to the lawyer*, it is hard to see why we should not trust them to be ethical when it comes to the return payable *to a third party*.

3. JUDICIAL CONFLICTS OF INTEREST

Another argument frequently put forward in support of the mandatory disclosure of litigation finance arrangements is that disclosure is necessary to avoid a possible judicial conflict of interest. The Chamber of Commerce has suggested that judges might have invested in litigation finance companies, or hedge funds operating as litigation funders, and disclosure is necessary for the judge to determine if she must recuse from the case.[290]

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[288] ABA Model Rule 1.5(c).

[289] ABA Model Rule 1.5(d).

[290] Chamber Letter, *supra* note 1, at 15. *See also* Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 423, 427 (2016) (advocating *in camera* disclosure of the identity of any funder to judges to determine financial conflicts of interest).

It is hard to believe a judge would find it prudent to invest in one of the few litigation finance companies that is traded on the public markets, much less in a privately held litigation finance company. In fact, it is already improper for judges to do so. The Code of Conduct for United States Judges prohibits judges from having financial or business relationships with "lawyers or other persons likely to come before the court on which the judge serves."[291] State laws typically contain the same prohibition.[292] There is little reasonable basis to assume a judge will have a financial conflict of interest because a litigation funder is involved in a case. And even if such a basis existed, this would justify at most disclosure *in camera* to the court of the identity of any funder — not disclosure to the defendant of both the identity of the funder *and* the funding agreement itself.

Even setting aside these points, the corporate disclosure rules do not require disclosure of every single potential financial or personal conflict of interest, let alone conflicts as phantom as a judge investing in a litigation finance company. For example, the federal rules only require corporate parties to "identif[y] any parent corporation and any publicly held corporation owning 10% or more of its stock."[293] Under these rules, a company need not disclose if another privately held company, or an investor such as a private equity fund or angel investor, has a financial interest in the company — notwithstanding the possibility that a judge might have investments in the private equity firm, or may be friends with the angel investor. For example, before Uber Technologies, Inc., went public, the federal rules only required the company to report in its briefs that it is a "privately held corporation" and that "[n]o parent corporation or publicly held corporation owns 10% or more of its stock" — despite the fact that probably hundreds of individuals or corporate entities (many of whom might be friends with a judge presiding over a case involving Uber) had a financial stake in the company.[294]

The committee notes to Federal Rule of Civil Procedure 7.1 have already resolved this aspect of the disclosure debate — and they have resolved it squarely against the Chamber's argument. Those notes explain that although "the

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[291] Code of Conduct for United States Judges, Canon 4, ¶ D.

[292] *See, e.g.*, N.Y. Judicial Law, Code of Judicial Conduct, Canon 4(D).

[293] FED. R. CIV. P. 7.1; *see also* FED. R. APP. 26.1(a).

[294] *See*, *e.g.*, Appellants' Joint Opening Brief at ii, *Mohamed v. Uber Technologies, Inc.*, No. 15-16178 (9th Cir. Oct. 21, 2015).

disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect."[295] The committee notes further recognize that "[u]nnecessary disclosure requirements place a burden on the parties and on courts," and that "[i]t has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a)."[296] There is no reason to upset this compromise and create a gerrymander that sweeps in only one additional — and especially unlikely — potential conflict of interest.

This point becomes particularly salient when viewed in light of the various forms of third-party financing arrangements identified above. It is possible that an anonymous benefactor who is friends with the judge has decided to fund a claimholder's case pro bono. It is also possible that a company in which the judge has an interest has provided debt financing to a litigant, with the expectation that the financing will be used at least in part to fund the litigation. But our legal system has not required onerous disclosures to catch these hypothetical but highly unlikely conflicts. It is hard to see why the extraordinary disclosure of litigation finance agreements is necessary when it presents at best a comparable likelihood of leading to a judicial conflict of interest than various other relationships for which we have not required mandatory disclosure.

4. AVOIDING VIOLATIONS OF CHAMPERTY AND MAINTENANCE LAWS

Another argument often advanced to prop up arguments for mandatory disclosure is that litigation funding agreements may violate the hoary prohibitions against champerty and maintenance. Champerty prohibits what Blackstone called "officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise," in return for a portion of case proceeds.[297] The Chamber argues that "if a party is being sued pursuant to an illegal (champertous) funding arrangement, the defendant has a right to know and presumably would have standing to challenge such an agreement as champertous under the applicable state law."[298]

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[295] Committee Notes on Rule, 2002, FED. R. CIV. P. 7.1.

[296] *Id.*

[297] 4 W. BLACKSTONE, COMMENTARIES *134–36. *See also In re Primus*, 436 U.S. 412, 424 n.15 (1978).

[298] Chamber Letter, *supra* note 1, at 13.

As an initial matter, the Chamber is wrong to claim that the defendant would have standing to challenge a funding agreement to which it is not a party. To the contrary, courts in almost all jurisdictions hold that defendants do not have standing to challenge allegedly champertous agreements entered into between the plaintiff and a third party.[299] Thus in most jurisdictions, the only party that should be able to challenge the agreement — the funded party — already has full knowledge of the funding contract (because it is a party to that contract). This point alone should dispose of this particular argument for mandatory disclosure.

Moreover, standard commercial litigation finance arrangements simply do not violate the doctrines of champerty and maintenance in most jurisdictions. "The consistent trend across the country is toward limiting, not expanding, champerty's reach."[300] Champerty is on the decline principally because of a growing belief that the doctrine is no longer necessary to cure the perceived evils it was devised to combat. Ethics rules more directly prohibit lawyers from filing frivolous claims or allowing third parties to control litigation. Thus a number of jurisdictions, like Massachusetts, Minnesota, and South Carolina, have entirely abolished champerty.[301] Other states prohibit champerty only insofar as someone "officiously intermeddles" in someone else's litigation to control and gin up frivolous litigation — and the decisions further recognize that funders are generally not officious intermeddlers.[302] Notably, the Chamber has sought mandatory disclosure in all jurisdictions, without regard to whether local law retains vestiges of champerty and maintenance law.

Even so, let us assume that a jurisdiction still recognizes champerty and maintenance, that it is arguable that litigation finance violates these prohibitions, and that a defendant would have standing to challenge that agreement. We can also imagine a whole host of other third-party financing agreements that might

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[299] *See, e.g.*, *Kipperman v. Onex Corp.*, 411 B.R. 805, 886 (N.D. Ga. 2009); *McMullin v. Borgers*, 806 S.W.2d 724, 735 (Mo. Ct. App. 1991); *Cone v. Benjamin*, 27 So.2d 90, 107 (Fla. 1946); *Sibley v. Alba*, 95 Ala. 191, 197-98 (1892).

[300] *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011).

[301] *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997); *Maslowski v. Prospect Funding Partners LLC*, 944 N.W.3d 235, 238 (Minn. 2020); *Osprey, Inc. v. Cabana Ltd. P'ship*, 532 S.E.2d 269, 277 (S.C. 2000).

[302] *See, e.g.*, *Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co.*, 2016 WL 937400, at *3–5 (Del. Super. Ct. Mar. 9, 2016); *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008); *Kraft v. Mason*, 668 So.2d 679, 683 (Fla. Dist. Ct. App. 1996).

violate these prohibitions, and especially the prohibition against maintenance, which forbids the mere "intermeddling" in another's suit, regardless of whether the third party will receive a portion of case proceeds in return. For example, a defendant's corporate financing agreements or its outstanding debts, or a civil rights plaintiff's receipt of pro bono funds from a third party may all conjure fact patterns where the champerty or maintenance rules may theoretically be violated.

But these theoretical concerns have not led to the automatic disclosure of any and all financing agreements, so that opposing counsel and courts may investigate whether someone in the case is violating the law. Why should litigation funding be treated any differently? Such idle suspicion of wrongdoing has never been found to warrant discovery — much less mandatory disclosure. As the United States Supreme Court has explained, "[j]udges are trusted to prevent 'fishing expeditions' or an undirected rummaging through bank books and records for evidence of some unknown wrongdoing."[303] New York law specifically requires that discovery must be conducted in a way that "prevent[s] unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the court."[304] It is hard to see why we should depart from this practice for only one form of third-party financing.

5. THE INSURANCE ANALOGY

The Federal Rules of Civil Procedure do require mandatory disclosure of insurance agreements where an insurer may be liable for any judgment against defendants.[305] Some opponents of litigation finance have seized on this fact, arguing that mandatory disclosure of litigation finance is necessary to eliminate the "current inequity" in the federal rules, whereby "defendants [are] required to disclose to opposing counsel their contracts with insurers, but plaintiffs [are] allowed to keep their funding arrangements under wraps."[306]

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[303] *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 531 (2009).

[304] N.Y. CPLR § 3103(a).

[305] FED. R. CIV. P. 26(a)(1)(iv).

[306] Letter From 30 In-House General Counsels to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts at 1–2 (Jan. 31, 2019).

The focus on the disclosure requirement for insurers ignores the many other forms of third-party financing discussed above where mandatory disclosure is *not* required. The world does not consist of only two types of third-party financing — i.e., insurance and commercial litigation finance. And the vast majority of third-party funding arrangements are *not* subject to mandatory disclosure. If plaintiffs were required to disclose their commercial litigation finance agreements, true "equity" would occur only if defendants were required to disclose all of their debt and equity sources of capital, and other plaintiffs were required to disclose any third-party funding or the terms of their lawyer's contingency fee arrangements. This would require a sea-change in our current mandatory disclosure regime.

The fact that insurance obligations must be disclosed speaks to the unique nature of defense-side insurance; it does not provide an argument for disclosure of other forms of third-party financing, including but not limited to commercial litigation finance. The comments to Federal Rule 26 make this point explicit and rebut any parallel between insurance and litigation funding. Those comments explain that insurance is unique because "insurance is an asset created specifically to satisfy the claim," "the insurance company ordinarily controls the litigation," "information about coverage is available only from defendant or his insurer," and "disclosure does not involve a significant invasion of privacy."[307]

None of these observations is true about litigation finance. Litigation funding is created *after* (not before) the claim exists. Funding does not exist to satisfy the claim — instead, it simply provides financing to the claimholder, usually to meet the legal fees and costs necessary to advance the claim. Funders do not control litigation. And disclosure would involve a very significant invasion of privacy and disclose key strategic information about the plaintiff's litigation strength.

This last point gets to the heart of the disclosure debate. Mandatory disclosure tells a defendant at least two critical pieces about the plaintiff's case. First, it discloses *whether* the plaintiff has funding — revealing both the strength of those plaintiffs who have funding, and the weakness of those who do not. Second, it discloses *how much* funding the plaintiff has — giving defendants great leverage once they know that plaintiffs are running out of funds. For example, if the defendant knows that the plaintiff has $2,000,000 in funding, the defendant has

[307] Fed. R. Civ. P. 26, Notes of Advisory Committee on Rules — 1970 Amendment.

a lot of leverage to reject a settlement offer proffered right about the time the defendant estimates the plaintiff has burned through that litigation budget.

III. CONCLUSION

While commercial litigation finance companies may be new, third-party financing of legal claims is not. Some of the most bedrock features of our civil justice system, including contingency fee litigation and pro bono litigation, are instances where third parties finance the often extraordinary costs of litigation. Other forms of third-party financing are less obvious but no less real, including third-party finance by employers, family, and friends, and even the raising of debt or equity. Sometimes the purpose of third-party financing is to obtain a portion of case proceeds or to achieve some other financial incentive, sometimes the funder seeks a "dividend" in the form of favorable legal precedent, and sometimes the funder simply wants to help someone else vindicate her legal rights.

This insight has important implications for the debate about mandatory disclosure of litigation finance agreements. Opponents of litigation finance have advanced various reasons for requiring mandatory disclosure, including fear that funding agreements will impair attorney independence, will enact unethical fee arrangements, will create judicial conflicts, or will violate legal prohibitions against champerty and maintenance. But these arguments apply with at least as much force, if not more, as the other forms of third-party finance discussed in this essay. There is no reason to require mandatory disclosure of litigation finance agreements, even as we have long recognized that mandatory disclosure of these various other forms of arrangements is not necessary.

Commercial litigation finance is a relatively modern development, but it has deep roots in our civil justice system. It is simply the latest in a long line of developments that have permitted increased access to the courts. There is no reason to uniquely shackle this one of many various forms of third-party financing.

Hey, Big Spender: Ethical Guidelines for Dispute Resolution Professionals when Parties Are Backed by Third-Party Funders

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A man without ethics is like a wild beast loosed upon this world.
— Albert Camus

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INTRODUCTION

This first-of-its-kind paper introduces ethical guidelines and suggested practices for dispute resolution providers and neutrals when third-party funders provide financial backing for parties in U.S. domestic arbitrations and mediations.[308] Sophisticated third-party funders have realized that litigation and dispute resolution are fast-growing, unregulated investment opportunities.[309] Seizing these opportunities, third-party funders are now making billions of dollars in profits through their strategic investments in domestic and global litigation and dispute resolution with few ethical rules or regulations to curtail their investment behavior.[310] Preferring to be secretive about the terms of their funding contracts and invisible in their work, third-party funders are flourishing, in large part, by operating below the regulatory radar.[311] The funders' behavior has been allowed

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[308] *See* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 129–74 (Wolters Kluwer 2d ed. 2017); Memorandum from Patrick A. Tighe, Rules Law Clerk to Ed Cooper et al. (Feb. 7, 2018), *in* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 209, 215 (2018), http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf [https://perma.cc/K9EB-QL3B]. Domestically, states have taken an inconsistent approach regarding third-party funding as evidence by states' statutes, case law and rules. Those states that have adopted any rules and regulations focus on disclosure in litigation and the boundaries of permissible funding arrangements. None of these rules and regulations address the ethical issues for dispute resolution providers and neutrals that arise when a party is receiving third-party funding.

[309] *See* John Breslin, *Funding Litigation a Billion-Dollar Business*, LEGAL NEWSLINE (Aug. 30, 2017), http://legalnewsline.com/stories/511198462-funding-litigation-a-billion-dollar-business [https://perma.cc/6XZH-GHJT]; Vanessa O'Connell, *Funds Spring Up to Invest in High-Stakes Litigation*, WALL ST. J. (Oct. 3, 2011), https://www.wsj.com/articles/SB10001424052970204226204576598842318233996 [https://perma.cc/69VW-ATNM].

[310] *See, e.g.*, sources cited *supra* note 1; *see also* Matthew Andrews, *The Growth of Litigation Finance in DOJ Whistleblower Suits: Implications and Recommendations*, 123 YALE L.J. 2422, 2428–29 (2014) (discussing how litigation funding is a lucrative, growing industry that invests in a range of cases including personal injury, employment discrimination, intellectual property, and other commercial disputes); GEOFFREY MCGOVERN ET AL., RAND INST. FOR CIVIL JUSTICE, THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER: TRENDS AND IMPLICATIONS FOR THE CIVIL JUSTICE SYSTEM 12 (2010), https://www.rand.org/pubs/conf_proceedings/CF272.html [https://perma.cc/QA2Z-J7U7] (reporting that third-party funding is a multibillion dollar industry).

[311] *See* NIEUWVELD & SAHANI, *supra* note 1, at 159–73 (indicating a growing minority of states that have statutes requiring disclosure in the litigation context); *see, e.g.*, Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1277–78 (2011) ("In international arbitrations, the reason for this expansion [of third-party funding] is partly a de facto absence of professional regulations that enables funders and attorneys to operate outside of the disciplinary reach of bar associations.").

to proceed invisible and unchecked because courts and dispute resolution providers and neutrals are too often unaware that a party is even receiving third-party funding. Such unawareness, however, presents a potential ethical minefield, not just for judges and litigators, but also for dispute resolution providers and neutrals.

A discordant chorus of courts,[312] business gurus[313] and legal scholars, slowly becoming aware of the potential ethical conflicts, have begun to voice concerns that third-party funders may be traversing proscribed ethical boundaries involving the practice of law. This growing group is calling for greater visibility, transparency and ethical scrutiny of third-party funding practice in litigation. Of course, when parties disagree, courts are the final arbiter of whether or not the practice of third-party funding is even legal.[314] However, once courts resolve the threshold issue of legality, there is growing support among the judiciary and legal community to require litigants to disclose if they are receiving economic support by a third-party funder.[315] Without such mandatory disclosure our legal system is

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[312] *Compare* Alison Frankel, *New York's Top Court Clamps Down on Shoestring Litigation Funders*, REUTERS (Oct. 28, 2016, 1:50 PM), http://www.reuters.com/article/us-frankel-litigation/new-yorks-top-court-clamps-down-on-shoestring-litigation-funders-idUSKCN12S2M3 [https://perma.cc/36TD-APAL] (describing recent N.Y. Court of Appeals decision that expanded the reach of champerty), *and* Kevin LaCroix, *Courts Throw Some Shade at Litigation Funding Arrangements*, D&O DIARY (Oct. 9, 2016), http://www.dandodiary.com/2016/10/articles/litigation-%20financing-2/courts-throw-shade-litigation-funding-arrangements/ [https://perma.cc/CA9H-H46P] (describing cases in which funding arrangements were recently nullified in both Pennsylvania and Delaware), *with Digging Didn't Help—Court Decision Supports Commercial Litigation Funding*, BENTHAM IMF (Feb. 12, 2014), http://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2014/02/12/digging-didn't-help---court-decision-supports-commercial-litigation-funding [https://perma.cc/8EWV-QMEP] (describing recent decision in the Northern District of Illinois that held confidential communications between party and funder were protected by work product doctrine).

[313] *See* Alison Frankel, *Business Lobby Calls for Federal Rules to Require Litigation Funding Disclosure*, REUTERS (June 2, 2017, 11:55 AM), http://www.reuters.com/article/us-otc-funding-idUSKBN18T2QR [https://perma.cc/UT2R-RJE7]. More than two dozen business groups including the U.S. Chamber of Commerce are advocating that the Federal Rules of Civil Procedure be modified to require parties to disclose if they are backed by third-party funders.

[314] *See* AM. BAR ASSOC. COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf [https://perma.cc/RS55-PQK4] [hereinafter ABA 20/20 REPORT].

[315] *See* Dorothy Murray & Edmund Northcott, *Thoughts on Disclosure of Third Party Funding*, LEXOLOGY (June 20, 2017), https://www.lexology.com/library/

unable to address the real and potential ethical concerns about how third-party funders are adversely affecting the attorney-client relationship, controlling settlement, and potentially posing conflicts of interest with all involved in the case.

Until now, such heated discourse in the United States about the ethics of third-party funders has focused primarily on the ethics of third-party funding in litigation, while only cursorily addressing the ethical issues of third-party funders in U.S. domestic arbitration, a quasi-litigation procedure.[316] Even more curious, the ethics of third-party funders in mediation, a party-directed procedure, has been conspicuously absent from the conversation. Since the lion's share of legal cases are resolved by dispute resolution settlement rather than court judgment,[317] it makes more sense that any discussion about the ethical conduct of third-party funders should address the ethical conduct of third-party funders in those dispute resolution procedures that help promote settlement. The presence of a third-party funder in a dispute resolution procedure may collide with the ethical obligations of dispute resolution providers and neutrals, unless affirmative steps are taken to

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detail.aspx?g=d01612dd-5a78-4f8a-ae6c-22ba3c064630 [https://perma.cc/VUA6-NVM4]; Jason D. Russell & Hillary A. Hamilton, *Third-Party Litigation Financing: Mandatory Disclosure on the Horizon?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Apr. 19, 2017), https://www.skadden.com/insights/publications/2017/04/thirdparty-litigation-financing-mandatory-discl ("Recent developments indicate that courts, rule committees and even Congress may be leaning toward mandatory disclosure of third-party litigation funding in civil litigation."). *But see* Sam Reisman, *Critics Pushing Back on 3rd-Party Funding Disclosure Rule*, LAW360 (June 21, 2017, 7:08 PM), https://www.law360.com/articles/935786/critics-pushing-back-on-3rd- party-funding-disclosure-rule [https://perma.cc/WW6H-XWXZ].

316 Our global brethren, however, have addressed the ethics of third-party funding in the context of international arbitration. This is discussed later in the section. *See generally* INT'L COUNCIL FOR COMMERCIAL ARBITRATION, REPORT OF THE ICCA-QUEEN MARY TASK FORCE ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (2018), http://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf [https://perma.cc/A27G-P34A] [hereinafter ICCA REPORT]

317 *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004); Patricia Lee Refo, *The Vanishing Trial*, 30 LITIG., Winter 2004, at 2 (2004), https://www.americanbar.org/content/dam/aba/publishing/litigation_journal/04winter_openingstatement.authcheckdam.pdf [https://perma.cc/W9X6-QXGX] (stating that approximately 1.8% of federal cases were actually decided by an adjudicated decision).

avoid the collision.[318] This paper fills in that information gap, expands the evolving discussion about the ethics of third-party funding, and refocuses on providing ethical guidance for dispute resolution providers and neutrals when litigation funders back parties in arbitration and mediation.

Our global brethren, who have long embraced litigation funding as an economic necessity to fund the escalating costs of litigation, have also begun to heed this warning and promulgate ethical rules to guide third-party funders' behavior in dispute resolution.[319] Globally, there are now legislative and regulatory initiatives that require greater transparency when litigation funders are providing financial backing for parties in international arbitration and mediation.[320] In the United States, however, there is ambivalence about the legitimacy of litigation funding.[321] This paper is the first proposal for coordinated ethical guidelines for alternative dispute resolution providers and neutrals to follow when third-party funders are backing parties in domestic arbitration and mediations.

In order to develop responsive ethical guidelines for working with third-party funders in dispute resolution, we must first grasp the complexities and nuances of third-party funders, and this paper provides that context. Part I chronicles the evolutionary role of third-party funders. It explains who third-party funders are, why they were once prohibited, and the many permutations in which they now exist. Part II provides an overview of two global initiatives that provide ethical guidance when litigation funders are backing parties in a dispute resolution procedure. Even though global legal regimes present different ethical challenges, it is instructive to take the international pulse on this emerging issue and see which ideas can be transported to the United States.

In Part III, the discussion focuses on the U.S. response to third-party funders by highlighting notable court decisions, the American Bar Association's Commission on Ethics 20/20 report, and public interest research on this emerging topic. Part III helps identify the U.S. areas of agreement and concern that need to be incorporated into any ethical guidelines and best practices for dispute resolution providers and neutrals. Part IV outlines suggested ethical guidelines and best

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[318] *See* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 426–28 (2017).

[319] *See generally* ICCA REPORT, *supra* note 9.

[320] *See generally id.*

[321] *See* NIEUWVELD & SAHANI, *supra* note 1, at 157.

practices for dispute resolution providers, arbitrators, and mediators to follow when parties are receiving third-party funding. This discussion concludes by recognizing that this paper is an overdue acknowledgment that third-party funders are backing parties in dispute resolution procedures and a recognition that additional ethical issues will emerge. The reader is left with additional questions that the dispute resolution community may want to consider as third-party funders continue to play an evolving role in dispute resolution.

I. THE EVOLVING ROLE OF THIRD-PARTY FUNDERS

The narrative about how third-party funding has evolved from a proscribed practice to an economic reality sheds light on the vestiges of concern about third-party funders that persist today. It also provides a historical context for readers to better understand the ethical concerns that should be addressed when third-party funders are backing a party in a dispute resolution mechanism.

Historically, legal systems have had a long-standing antagonism towards those third parties who try to inject themselves into the litigation of others. In large part, courts believed that adjudication should involve only the litigants and the judge, and courts feared that those outsiders who attempt to inject themselves in these legal proceedings do so solely because they have a nefarious purpose that would subvert the integrity of the justice system.[322] Such a hostile intrusion was considered harmful to both the individual litigants and the system as a whole. As you will read, that fear was founded. In legal systems dating back from ancient Greek and then Roman times, there was a commitment to safeguard justice by barring any outsider who attempted to inject himself between the litigants and the judge.[323] These outsiders took different forms. In the fifth and fourth centuries B.C., there were political clubs, known as sycophants, who would ban together and

322. *See* Marc DeGirolami, *On the Intellectual Origins of the Crime of Barratry*, MIRROR JUST. (Nov. 18, 2010), https://mirrorofjustice.blogs.com/mirrorofjustice/2010/11/on-the-intellectual-origins-of-the-crime-of-barratry.html [https://perma.cc/9BNJ-NAW7] (describing how champerty harmed the individual client and the legal system as a whole).

323. Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 50 (1935). There was a recognized primacy in the relationship between the litigants and the judge. *Id.* The litigant spoke directly to the judge. *Id.* Family and friends were encouraged to attend the court proceedings only as providers of moral support for the litigant. *Id.* It was considered a "serious fraud on the court" if a stranger attended, pretending to be a friend of the litigant. *Id.*

provoke litigation against their political adversaries.[324] Similar to the Greek sycophant, Romans had the calumniator—those who commenced baseless litigation for the sole purpose of agitating the government.[325]

This suspicion towards the intervention of outsiders to litigation continued into the Middle Ages and was codified into both the common law and old English statutes.[326] Barratry, champerty and maintenance are the codifications of three categories of proscribed interference into the legal system.[327] Barratry described the offense of those agitators who would provoke legal disputes.[328] Maintenance is the general term used to describe when an outsider to the litigation advances money to support an ongoing litigation without receiving a portion of the outcome.[329] Champerty, a type of maintenance, refers to an outsider to the litigation who advances money to support litigation with the understanding that he will receive in return for his contribution, a profit or portion of the proceeds.[330]

Over time, as legal systems strengthened their due process procedures to address these concerns, courts, in their wisdom, also began to realize that not all outsiders to litigation were a nefarious group, and that some outsiders even helped advance justice. Thus, a more nuanced approach to outsiders was warranted. In 1886, Judge Thayer in the *Dahms v. Sears* case opined that "[m]any of the evils which the law was intended to remedy have been overcome by countervailing circumstances that have arisen, and, in effect, have been extinguished."[331] With this more nuanced perspective, for example, it was recognized that maintenance could be re-characterized as an altruistic act that promotes social good by providing public interest groups needed funding to bring forward a worthy claim without the funders getting any money in return.[332] Yet even today, as the

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324.*Id.* at 49–51.

325.*Id.* at 53.

326.*See id.* at 57–58; *see also* S.J. Brooks, *Champerty and Maintenance in the United States*, 3 VA. L. REV. 421, 421–22 (1916).

327. Brooks, *supra* note 19, at 421.

328.*Id.* at 423.

329.*Id.*

330.*Id.*

331.*Id.* at 425 (quoting Judge Thayer in *Dahms v. Sears*, 11 P. 891, 898 (Or. 1886)).

332.Simon Fodden, *Barratry, Champerty, Maintenance, Oh My!*, SLAW (Sept. 20, 2011), http://www.slaw.ca/2011/09/20/barratry-champerty-maintenance-oh-my/ [https://perma.cc/G4K2-XV9N].

following sections illustrate, domestic and global courts still maintain a cautious approach to third-party funders. Vestiges of this mistrust continue to be evidenced in our modern-day law. Such legal doctrines as unconscionability in contract law, usury in consumer law and the laws regarding assignment of claims are examples of continued modern-day vigilance of third-party funders' actions.[333] Fueling this mistrust in part is the difficulty involved in discerning who is a funder and whether the funder is conducting himself within the permissible bounds of the law.

In its most elemental form, third-party funding involves a funding entity who provides financial support to a litigant in return for a share of the proceeds from a settlement or judgment.[334] However, third-party funders come in many forms: banks, hedge funds or individuals or entities that provides funding with the expectation of profits.[335] The variations that exist in different types of third-party funding are determinant in assessing whether the funding typology is legal and has a permissible business purpose.[336] Furthermore, the characterization of a third-party funder is important, because different disclosure and ethical obligations attach to each characterization.[337]

The contract between the funder and the litigant defines the financial relationship between the funder and the funded party, the funder's role in the management of the case, and the allocation of responsibilities between the funder and funded party. Yet, third-party funders resist disclosing these contracts, insisting that the contracts are proprietary.[338] The third-party funding contract varies from recourse to nonrecourse agreements.[339] Furthermore, there is no one

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333.*See* NIEUWVELD & SAHANI, *supra* note 1, at 136–37, 143–44.

334.*See* ABA 20/20 REPORT, *supra* note 7, at 1; Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 392 (2016).

335.Sahani, *supra* note 27, at 392; ICCA REPORT, *supra* note 9, at 50–51.

336.*See* Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 877–79 (2015).

337.*Id.* at 903–04.

338.*See* Victoria Shannon Sahani, *Blurred Lines Between Third-Party Funders and Law Firms*, KLUWER ARB. BLOG (Nov. 3, 2016), http://kluwerarbitrationblog.com/2016/11/03/blurred-lines-between-third-party-funders-and-law-firms/ [https://perma.cc/E6X8-SXYH] (citing to an emerging financial relationship in which the third-party funder is playing a more active role in the case).

339.ABA 20/20 REPORT, *supra* note 7, at 5–6. Recourse funding requires the funded party to pay the funder for the cost of money, regardless of whether the party prevails. *See id.* at typology of a third-party funder; consequently, each third-party funding agreement differs in purpose, form and context.[340] Even the name "third-party funder" may in many cases be a misnomer, because the funder, depending on the terms of the contract, is often not an actual party to the litigation.[341] Therefore, disclosure about the presence of funders and their contractual relationship with the litigant is relevant to dispute resolution providers and professionals who will be facilitating the settlement of the case.[342]

II. GLOBAL EXPERIENCE SHAPES ETHICAL RULES AND GUIDELINES

Our global brethren have embraced third-party funding as an economic necessity to fund the escalating costs of litigation and international dispute resolution.[343] Along with such cumulative experience with third-party funders, however, comes a heightened awareness about the potential ethical minefields that may occur when third-party funders participate. This heightened awareness has served as the global impetus to promulgate ethical rules and develop best practices for dispute resolution providers and neutrals that require greater transparency of third-party funders.[344] The global community recognizes that without these defined boundaries, third-party funders, untethered by rules or regulations,[345]

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6. Nonrecourse funding requires the funded party to pay the funder only if the funded party prevails. *Id.* at 7.

340.*See* Sahani, *supra* note 11, at 411–12; ICCA REPORT, *supra* note 9, at 47–48.

341.This author met with Alan Zimmerman, CEO and Legal Counsel of Law Finance Group, a funding provider, on June 19, 2017. During our conversation, Mr. Zimmerman noted how the term "third-party funder" is not an accurate label, because funders are not a party to the litigation.

342.*See infra* Part IV.

343.*See Third Party Funding in International Arbitration*, ASHURST (Sept. 4, 2018),

https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/ [https://perma.cc/DS2P-DNV4] (discussing the approaches to the legality of third-party funding taken by various jurisdictions, including those that embrace it, such as Hong Kong and Singapore, and those that have rejected it, such as Ireland); *see also* ICCA REPORT, *supra* note 9, at 17; Arbitration and Mediation Legislation (Third Party Funding) (Amendment), No. 6, (2017) Cap. 609, A137, § 98 (H.K.).

344.*See* sources cited *supra* note 36.

345.*See, e.g.*, THE ASSOCIATION OF LITIGATION FUNDERS OF ENGLAND AND WALES, CODE OF CONDUCT FOR LITIGATION FUNDERS (Nov. 2011), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Code+of+Conduct+for+Li will continue to ethically collide with lawyers, dispute resolution providers and neutrals, whose professional behaviors are defined by their respective ethical rules of conduct.[346] In order for mediators and arbitrators to follow-through on their ethical mandates about disclosure of conflicts of interest and impartiality, they must first be made aware that a third-party funder with whom they have had previous commercial transactions is now funding a participant in the current matter.[347]

This section highlights two global initiatives that are shaping the participatory boundaries of third-party funders in dispute resolution: the passage of Hong Kong's Bill 2016, Arbitration and Mediation Legislation,[348] and the ICCA-Queen Mary College of the University of London Task Force.[349] Although each initiative has different purposes, both share common threads. Both recognize that there needs to be disclosure about third-party funders in arbitration and mediation, and that failure to have disclosure will perpetuate ethical violations of dispute resolution tenets. Both recognize third-party funder is an umbrella term that describes many permeations of economic support, some legal and others of questionable integrity. And both initiatives call for greater oversight of third-party funders.

A. HONG KONG'S BILL 2016, ARBITRATION AND MEDIATION LEGISLATION

The passage of Hong Kong's Bill 2016, Arbitration and Mediation Legislation (Third-Party Funding) ("HK Bill 2016") on June 14, 2017, is the first global legislation that affirms the legitimacy of third-party funding in international dispute resolution.[350] This legislation synchronizes Hong Kong's Law on third-

tigation+Funders+(November+2011).pdf [https://perma.cc/7LVC-TQF2] (providing guidelines for funders about adequacy of funds and accuracy of promotional literature, including the requirement that litigation funding agreements ("LFAs") should include the litigation funder's role in settling the case and withdrawing from the funding agreement).

346.CATHERINE A. ROGERS, *Gamblers, Loan Sharks, and Third-Party Funders, in* ETHICS IN INTERNATIONAL ARBITRATION 177, 182 (2014).

347. *See* Sahani, *supra* note 27, at 401–02.

348.*See* Cap. 609, A137, § 98.

349.ICCA REPORT, *supra* note 9.

350.*See Bills Committee on Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016*, LEGIS. COUNCIL H.K. SPECIAL ADMIN. REGION CHINA, https://www.legco.gov.hk/yr16-17/english/bc/bc102/general/bc102.htm party funding in international dispute resolution with the practices of China's International Dispute Resolution providers by reaffirming that the common law offenses of maintenance and champerty do not apply to third-party funding in international dispute resolution.[351] Significantly, HK Bill 2016 applies not only to the conduct of third-party funders in international arbitration, but also in international mediation.[352] The HK Bill 2016 provides in its salient parts directives regarding the regulation and disclosure of third-party funders participating in arbitration and mediation.

The law requires that a Code of Practice be developed that provides "practices and standards" for third-party funders to follow.[353] The Code of Practice is currently in development by the HK government.[354] A third-party funded agreement must be in writing,[355] and must also explicitly state the risk and terms and include:

> (i)the degree of control that third party funders will have in relation to an arbitration [or mediation];
>
> (ii)whether, and to what extent, third party funders (or persons associated with the third party funders) will be liable to funded parties for adverse costs, insurance premiums, security for costs and other financial liabilities; and
>
> (iii) when, and on what basis, parties to funding agreements may terminate the funding agreements or third party funders may withhold arbitration funding.[356]

HK Bill 2016 also provides additional mandates that should be included in the Code of Practice for third-party funders to ensure ethical practice. For example,

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[https://perma.cc/B6K5-BJUT]. *See also* Cap. 609, A137, § 98E(a). It is important to emphasize that this applies only to domestic arbitration. Third-party funding is still prohibited in Hong Kong domestic litigation.

351.Cap. 609, A137, § 98K; *see also Third-Party Funding in International Arbitration*, *supra* note 36.

352.Cap. 609, A137, § 98F.

353.*Id*. § 98P.

354.Joseph Chung, *Draft Code of Practice for Third Party Funding of Arbitration and Mediation*, DEACONS (Oct. 26, 2018), https://www.deacons.com.hk/news-and-insights/publications/draft-code-of-practice-for-third-party-funding-of-arbitration-and-mediation.html [https://perma.cc/KY7X-FF7G].

355.Cap. 609, A137, § 98H.

356.*Id*. § 98Q(1)(b).

prior to a party entering into a third-party funding agreement, third-party funders should advise potential funded parties to consult with independent legal counselors before entering into the third-party funding agreement.[357] Third-party funders are required to have a "sufficient minimum amount of capital."[358] Moreover, third-party funders are required to have in place procedures to respond to "potential, actual or perceived conflicts of interest,"[359] and when complaints do arise, "effective procedures" and "meaningful remedies" to address those complaints.[360]

In large part, Hong Kong enacted this groundbreaking legislation to reinforce Hong Kong's stature as a leading center for international dispute resolution in the Asia-Pacific region.[361] The impact of this legislation is not limited to China, but rather establishes regulation and disclosure standards concerning third-party funders that can help shape the ethical contours of third-party funding in global dispute resolution.[362]

B. ICCA REPORT ADDRESSES THE ETHICAL ISSUES PRESENTED BY THIRD-PARTY FUNDERS IN INTERNATIONAL ARBITRATION

In 2013, the International Council for Commercial Arbitration ("ICCA") in collaboration with the Queen Mary College of the University of London formed a Task Force to provide "greater understanding about what third-party funding is and . . . the issues it raises in international arbitration."[363] In large part, the Task

357. *Id.* § 98Q(1)(c).

358. *Id.* § 98Q(1)(e).

359. *Id.* § 98Q(1)(f).

360. *Id.* § 98Q(1)(g).

361. LEGIS. COUNCIL, REPORT OF THE BILLS COMMITTEE ON ARBITRATION AND MEDIATION LEGISLATION (THIRD PATY FUNDING) (AMENDMENT), No. CB(4)1161/16-17, ¶ 8 (2016) (H.K.).

362. *See* Singapore Civil Law Act (Chapter 43) Civil Law (Third-Party Funding) Regulations 2017, c. 43, § 68. The Singapore Law followed on the heels of the Hong Kong Law, as each center tried to gain control of the international arbitration and mediation market. It is important to note that Singapore, like Hong Kong, does not permit third-party funding in domestic Singaporean courts. *See Third Party Funding of Arbitration in Singapore and Hong Kong: A Comparison*, ASHURST (Feb. 13, 2017), https://www.ashurst.com/en/news-and-insights/legal-updates/third-party-funding-of-arbitration-in-singapore-and-hong-kong-a-comparison/ [https://perma.cc/XQC3-UG7W].

363. ICCA REPORT, *supra* note 9, at 3; *see also id.* at 7 (describing the scope of the Task Force's work to include "analysis of specific issues that directly affect international

Force came together to address the reality that litigation funders were investing in international arbitration because such arbitrations were of high value and offered little opportunity for appeal.[364] Furthermore, there was concern that funders are able to structure their funding agreements by choosing choices of law and forums to avoid scrutiny of their investing practices.[365] In April 2018, the Task Force issued a Report on its findings.[366]

In order to accommodate "the range of existing third-party funding models" and anticipate new developments, the Report adopted a broad working definition of third-party funders and funding.[367]

The Report defines "third-party funding" as:

> [A]n agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,
>
> a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
>
> b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[368]

It goes on to define a third-party funder as:

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arbitration proceedings and are capable of being addressed at an international level (i.e., conflicts of interest, privilege, and costs and security for costs)").

364.*See, e.g.*, *id.* at 4 ("Since the Task Force was initially constituted in 2013 . . . . The funding market has expanded in several respects. The number of funded cases has increased significantly. The number and geographic diversity of third-party funders has also increased, with new entities continuing to enter the market and consequently increase the aggregate amounts available for funding."); *see also id.* at 25–27 (discussing the economics and return structures of third-party funding).

365.*See* Rebecca Mulder & Marc Krestin, *Third-Party Funding in International Arbitration: To Regulate or Not to Regulate?*, YOUNG ICCA BLOG (Dec. 18, 2017), http://www.youngicca-blog.com/third-party-funding-in-international-arbitration-to-regulate-or-not-to-regulate/ [https://perma.cc/XW7A-73YJ].

366. ICCA REPORT, *supra* note 9, at i.

367. *Id.* at 50.

368.*Id.* See also *id.* at 56–70 for a survey of existing definitions.

> [A]ny natural or legal person who is not a party to the dispute but who enters into an agreement either with a party, an affiliate of that party, or a law firm representing that party:
>
> a) in order to provide material support for or to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and
>
> b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[369]

In addition to the working definitions, the Task Force addressed four ethical issues that are raised when third-party funders provide support in international arbitration: (1) the potential conflicts of interest between the arbitrator and third-party funder; (2) how sharing information with a third-party funder might affect the attorney-client privilege; (3) whether there is a need for third-party funding to provide security for costs; and (4) how the presence of a third-party funder affects the allocation of costs.[370]

1. Conflicts of Interest Between the Arbitrator and Third-Party Funder[371]

The Report recognizes that the international arbitration community has become an insular club in which third-party funders, attorneys and arbitrators have ongoing contact.[372] Contributing to this insularity, attorneys on one case may switch hats and serve as an arbitrator on another case.[373] Adding to this insularity, third-party funders are increasingly tapping experienced attorney from this pool to work for the funders and serve on their advisory boards.[374] Despite some disagreement, the Report proposed "systematic disclosure" because "disclosure by the funded party of the existence and identity of funders is necessary so that

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369.*Id.* at 50.

370. *Id.* at 12.

371.*Id.* at 63, 81–115 (discussing the revision of the International Bar Association (IBA) Guidelines on Conflicts of Interest).

372.*See id.* at 82.

373.*See* Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1669–71 (2013).

374.ICCA REPORT, *supra* note 9, at 82.

arbitrators [can] make appropriate disclosures and decisions regarding potential conflicts of interest."[375] Accordingly, the Report calls for parties to "disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrator . . . as part of a first appearance . . . or as soon as practicable."[376] This proposal is "in keeping with global trends in regulation of third-party funding," consistent with an ICCA survey that found broad support for disclosure of third-party funding arrangements and funders,[377] and recognizes the many potential conflicts between arbitrators and funders that could arise in several circumstances.[378] Colleagues in the arbitrator's law firm might be working with the third-party funder on another matter.[379] In another example, the arbitrator could be the arbitrator on a case funded by the third-party funder, and then counsel on another case funded by the same third-party funder.[380] Without disclosure of these conflicts, the arbitrator's impartiality and commitment to maintaining an international arbitration of integrity would be called into question.[381]

2. Confidentiality and Attorney Client-Privilege[382]

Prior to deciding to fund a case, third-party funders gather information from the attorney and client to assess the viability of funding that case.[383] Is the sharing of that information done so in a way that waives the attorney-client privilege or is it done so in a way that protects the attorney-client privilege? As the Report notes, "[t]he rise of third-party funding has added new complexities to existing ambiguities about privilege in international arbitration."[384] The Report identifies three categories of information that implicate these complexities.[385] The first category is privileged information that is provided to a third-party at the "initial

375.*Id*. at 83.
376. *Id*. at 81.
377. *Id*. at 83.
378.*Id*. at 82.
379.*See id*. at 111.
380.*Id*. at 112.
381.*See id*. at 87.
382.*Id*. at 117.
383.*See id*.
384.*Id*. at 118.
385.*Id*. at 118–19.

due diligence phase"[386] and after it has committed to funding the party.[387] The second category involves the funding agreement itself.[388] The final category includes documents produced and held by the funder, such as the funder's assessment of the case, "documents relating to the negotiation of the funding agreement," and legal opinions on the strength of the case generated by the funder.[389]

The Report takes the position that the "existence of funding and the identity of a third-party funder is not subject to any legal privilege."[390] The specific provisions of a funding agreement, on the other hand, "may be subject to confidentiality obligations . . . and may include information that is subject to a legal privilege."[391] Production of these specific provisions should be ordered by the arbitral tribunal only "in exceptional circumstances."[392] Finally, on the question of waiver, the Report states that the mere fact that privileged information is furnished to a third-party funder should not waive the privilege, so long as the information was provided "for the purpose of obtaining funding or supporting the funding relationship."[393]

3. Allocation of Costs and Security of Costs[394]

The Report also examined how to respond to security of cost applications at the beginning of the arbitration and applications for allocation of costs at the end of the arbitration when one or both parties are funded by a third-party funder.[395]

As mentioned in the introduction of this article, the global legal regimes are different than the U.S. legal system. One glaring difference is that the English rule requires the losing party in litigation to pay the winner's attorney's fees, while

386.*Id*. at 118. The Report describes that phase as "where funding is first requested and the third-party funder requires information in order to decide whether or not to provide financing." *Id*.

387.*Id*. at 119.

388.*Id*.

389.*Id*.

390.*Id*. at 117.

391.*Id*.

392.*Id*.

393.*Id*.

394.*Id*. at 146.

395.*Id*.

the American rule followed in the United States requires each party to be responsible for its respective legal fees.[396] In arbitration, however, arbitrators may award costs in a different proportion than the "all or nothing" English rule would suggest.[397] In another departure from the distinction between the American and English rule, the Federal Arbitration Act provides that U.S. domestic arbitrators may enforce international arbitration awards that allocate costs in a manner different than the American rule.[398] Thus, some of the advances cannot be transported wholesale because of these differences.

However, these initiatives can also generate ideas about what should be included in U.S. ethical guidelines for dispute resolution providers and neutrals. Alternative Dispute Resolution ("ADR") providers and neutrals should consider requiring disclosure of third-party funding of a party participating in arbitration and mediation. Another consideration is what information can be shared with the other party because the attorney-client privilege has been waived and what information remains privileged. In another example, the awarding of third-party funding costs as part of the arbitration award may be one global practice that may be transported to the United States and have ethical ramifications.[399]

III. IN THE UNITED STATES, A SLOWER PULSE

In contrast to the welcome global embrace for third-party funders, the United States has maintained an ambivalent and cautious approach towards third-party funding. Domestically, U.S. courts have divided on the legality of third-party

396. Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327 (2013).

397. *See Counting the Costs of Arbitration*, BIRD & BIRD (Dec. 2005), https://www.twobirds.com/en/news/articles/2005/counting-the-cost-of-arbitration [https://perma.cc/7YYP-PWEG].

398.*See* 9 U.S.C. § 207 (2018).

399.*See* John Fellas, *Can Arbitrators Award Third-Party Funding Costs in International Arbitration?*, N.Y. L.J. (June 30, 2017), https://advance.lexis.com/api/permalink/4b4d371e-8751-4f20-8d3a-331c417074e4/?context=1000516 [https://perma.cc/ST4Q-TZ3T] (explaining how cost-shifting, in which the arbitrator orders the losing party to pay the costs of the prevailing party, is part of international arbitration. Litigation funding is now an included part of those costs. Mr. Fellas posits that the Federal Arbitration Act could also be interpreted to mean that costs include the cost of litigation funders.).

funders.[400] Some courts have abandoned barratry, champerty and maintenance, while other courts still rely on these prohibitions to help define permissible outsider conduct.[401] To this day, courts still frown upon those outsiders to litigation such as third-party funders who instigate, control, fund, and profit from litigation to which they are not a party.[402] The litigant-judge relationship remains sacrosanct.[403] One reason proffered for the U.S.'s hesitance about third-party funding is a long-held value that one shouldn't profit from another's harm.[404] This section will provide a snapshot of the U.S.'s reaction by highlighting three spheres of influence that are shaping the U.S.'s response to third-party funding: the courts, the American Bar Association, and public interest groups such as the Rand Institute and the U.S. Chamber Institute for Legal Reform.

A. SURVEY OF COURT RESPONSES

The U.S. courts have had a range of responses to third-party funders from acceptance,[405] conditional acceptance,[406] to outright rejection of the concept.[407] *Miller UK Ltd. v. Caterpillar, Inc.*[408] is an instructive case that highlights the layers of confidentiality issues raised by the presence of third-party funders. As a threshold issue, the court found that litigation funding is legal in Illinois, because the doctrines of maintenance and champerty "have been narrowed to a filament."[409] Moreover, the purpose of the funding in the case at bar was not "to promote strife or contention," but to provide needed economic backing to advance the party's claim.[410]

Instructive to our discussion, the court explained analogizing third-party funding to insurance is an inaccurate comparison because litigation funding and

400.*See* ABA 20/20 REPORT, *supra* note 7, at 9–12; MCGOVERN ET AL., *supra* note 3, at 11–12, 129 (discussing contemporary U.S. domestic court responses to third-party funding).

401. *See* ABA 20/20 REPORT, *supra* note 7, at 11–12.

402.MCGOVERN ET AL., *supra* note 3, at 23.

403.*See id.* at 10–11.

404.*Id.* at 23.

405.*See* ABA 20/20 REPORT, *supra* note 7, at 9–12.

406.*See* Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253, 1256 (N.Y. 2016).

407. *See, e.g.*, Johnson v. Wright, 682 N.W.2d 671, 677–78 (Minn. Ct. App. 2004).

408.17 F. Supp. 3d 711 (N.D. Ill. 2014).

409.*Id.* at 727.

410.*Id.* at 726.

insurance each create distinct financial relationships: "Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one."[411] With insurance, the relationship between insurer and insured is one of indemnification. The insurance company, as the subrogee, is "limited to reimbursement for what it paid its insured and no more."[412] In contradistinction, the relationship between a litigation funder and the party it funds is limited by the amount of funds the litigation funder has agreed to loan the fundee. The funder is not a subrogee and will not pay for the fundee's losses or indemnify the funder.[413]

The court also addressed whether privileged attorney-client information shared with a third-party funder waived that confidentiality privilege or remained privileged because the third-party funder shared a "common interest in the successful outcome of the litigation."[414] The court opined the sharing of information with litigation funders was not protected by the common interest doctrine, because the relationship was about money, not legal strategies or opinions.[415] However, the court found that even though the information shared with the third-party funder was not protected by the "common interest" doctrine, it was protected by the confidentiality agreement that was signed by the funder prior to receiving the privileged information.[416]

B. ABA COMMISSION ON ETHICS 20/20

The American Bar Association Commission on Ethics 20/20 Information Report to the House of Delegates (the "ABA 20/20 Report") focuses on how the third-party funders might ethically compromise the attorney-client relationship.[417] The Commission cautioned about potential ethical threats to lawyers' professional responsibilities in three areas. First, the lawyer should ensure that any third-party funding agreement or relationship does not compromise or disincentivize the lawyer's independent professional judgment in the attorney-client

411.*Id.* at 729.
412.*Id.*
413. *Id.*
414.*Id.* at 731–35.
415. *Id.* at 732–34.
416.*See id.* at 736–39.
417.ABA 20/20 REPORT, *supra* note 7, at 15–29.

relationship.[418] Thus, lawyers should avoid third-party funding agreements that attempt to overtake control of the case.[419] Second, the lawyer should take care that when the client or lawyer share privileged information protected by the attorney-client privilege with the third-party funder, the lawyer should take steps to protect that confidentiality.[420] Third, the lawyer should have an adequate understanding of how third-party funders work so that the lawyer may inform and counsel the client about any potential risks associated working with funders.[421]

Of particular interest to dispute resolution neutrals, the Commission raised that a contractual obligation with a third-party funder might influence a party's decision-making process regarding settlement.[422] Some agreements with third-party funders explicitly state that the funder has to approve the settlement.[423] Yet, even if the contractual agreement is silent on this point, the funded party may "implicitly" consider the funded amount in assessing whether the settlement number is adequate.[424]

The Commission recognized that because there are so many variations of third-party funding agreements, it is challenging to identify all the possible ethical issues for lawyers that may arise from these different permeations.[425] Moreover, as third-party funders continue to evolve and offer different types of financial support, new ethical challenges could emerge.[426] The Commission reinforced that the client, as a matter of agency law, has a right to delegate revocable settlement authority to other agents such as a third-party funder.[427] However, any agreement with a third-party funder should not interfere with a client's option of terminating the lawyer-client relationship at any time.[428]

418.*Id*. at 22.
419.*Id*. at 21.
420.*Id*. at 30.
421.*Id*. at 38.
422.*Id*. at 27.
423.*Id*.
424.*Id*. at 28.
425.*Id*.
426.*Id*. at 5.
427.*Id*. at 27.
428.*Id*. at 16.

C. PUBLIC INTEREST RESEARCH

1. The Rand Report—Third Party Litigation Funding[429]

In 2009, the UCLA-RAND Center for Law and Policy convened *Third-Party Litigation Funding and Claim Transfer: Trends and Implications for the Civil Justice System* (the "Rand Report"), the first U.S. symposium on third-party funding.[430] Bringing together representatives from the business, legal, academic, and not-for-profit communities, the group investigated how third-party funding will impact the civil justice system.[431] The group did not anticipate that third-party funders would provoke a rise in frivolous cases.[432] Rather, the group concluded that more research was needed on whether third-party funders could use risk analysis to identify and support more meritorious cases.[433] The group discussed the ethical concerns raised by third-party funders such as the confidentiality issues in the lawyer-client relationship.[434] Participants expressed that there exists sufficient elasticity in the existing ethical rules to accommodate these ethical concerns.[435]

In a noteworthy follow-up to the 2009 Rand Report, Steven Garber examined the economic, legal, and ethical issues related to third-party financing in the United States,[436] in particular its possible effects on the likelihood and timing of settlements.[437] First, Garber recognizes that disclosure of the mere existence of third-party funding may make the defendant more inclined to settle.[438] This is because "a defendant who knows that the plaintiff has [funding] may infer from

429.The Rand Corporation is a non-profit research organization which "is dedicated to making the civil justice system more efficient and more equitable." *Rand Institute for Civil Justice*, RAND CORP., https://www.rand.org/jie/justice-policy/civil-justice.html [http://perma.cc/4YPC-QL87] (last visited Feb. 22, 2019).

430.MCGOVERN ET AL., *supra* note 3, at 1.

431.*Id*. at iii.

432.*Id*. at 20.

433.*Id*.

434.*Id*. at 16.

435.*Id*. at 17.

436.*See generally* STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES (2010), https://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf [https://perma.cc/VK5V-BJEX].

437.*Id*. at 32.

438.*Id*.

the existence of [such funding] that the legal claim has legal merit or high economic value . . . ."[439] Second, Garber reasons that "the existence of a non-recourse loan to a plaintiff could impede settlements both early and late in the life of the underlying lawsuit, but promote settlements during a period of time in between."[440]

2. The U.S. Chamber Institute for Legal Reform[441]

The U.S. Chamber Institute for Legal Reform, a non-profit affiliate of the U.S. Chamber of Commerce and an advocacy group to promote civil justice reform, has taken on the issue of third-party funding.[442] Unlike the Rand Report, which offers a cautiously accepting approach to third-party funding, the U.S. Chamber Institute for Legal Reform has been banging the drums and warning that "the sky is falling" unless our legal system takes affirmative steps to protect against the "parade of horribles" that third-party funders may cause.[443] The Chamber warns that unchecked, third-party funders will promote frivolous litigation.[444] In a passionate letter joined by over two dozen other business organizations, the Chamber has also called for a revision of the Federal Rules of Civil Procedure to require that parties disclose in all civil cases when they receive backing from third-party funders.[445]

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439. Garber notes that this scenario is most plausible in the context of investments in commercial claims, however, because third-party funders in this context have rigorous claim-assessment procedures. *Id.* at 33.

440. *Id.*

441. JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD-PARTY LITIGATION FUNDING IN THE UNITED STATES (Oct. 2009), http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf [https://perma.cc/7WUH-P4KZ].

442. *About ILR*, U.S. CHAMBER INST. FOR LEGAL REFORM, https://www.institutefor legalreform.com/about-ilr [https://perma.cc/9YQN-2J2C] (last visited Feb. 24, 2018).

443. *See* BEISNER ET AL., *supra* note 134, at 4–5.

444. *Id.* at 5–7.

445. The Committee on Rules of Practice and Procedure has considered such a proposed amendment, once in 2014 and again in 2016. Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Practice and Procedure (Dec. 6, 2017), *in* ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 235, 247–51, https://www.uscourts.gov/sites/default/files/2018-01-standing-agenda-book.pdf [https://perma.cc/Z5TJ-VMHF]. On both occasions, the committee concluded that the topic was not "ripe." *Id.* at 247.

Although the Civil Rules Committee has yet to revise the Federal Rules of Civil Procedure, the concerns raised by the U.S. Chamber Institute for Legal Reform have been heeded. On January 17, 2017, the U.S. District Court for the Northern District of California required that parties in class actions must disclose whether they are receiving funding.[446] In an even bolder action, on April 3, 2018, Wisconsin enacted Wisconsin Act 235,[447] becoming the first state to require litigants in civil actions to disclose their litigation funding agreements whether or not they are asked to do so.[448] Then on April 10, 2018, the Civil Rules Committee issued a 50-state survey regarding third party-funding disclosure.[449]

Thus, even though the United States retains a cautionary approach to third-party funders, some states are recognizing the importance of disclosure and are beginning to enact statutes and court rules compelling disclosure.[450] The U.S. courts, however, have yet to reach consensus on the legality of third-party funders. The not-for-profits groups who have researched how litigation funders might impact litigation have focused their efforts on amplifying their concerns about how third-party funding could potentially erode the fabric of our justice system. However, while these well-intentioned organizations continue to pontificate about their concerns regarding third-party funders, the funders continue to participate in such dispute resolution processes as mediation and arbitration, invisible and unregulated. The next Part incorporates the expressed concern and

446.*See* Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement ¶ 19 (Nov. 1, 2018), https://cand.uscourts.gov/whaorders [https://perma.cc/Q9EL-4KJF]; Memorandum from Patrick A. Tighe, *supra* note 1, at 211.

447.WIS. STAT. § 804.01(2)(bg) (2018).

448.Expectedly, supporters of disclosure applauded this legislation while litigation funders voiced concerns that this legislation did not distinguish between disclosure requirements for consumer and commercial cases. Jamie Hwang, *Wisconsin Law Requires All Litigation Funding Arrangements to Be Disclosed*, A.B.A. J.: DAILY NEWS (Apr. 10, 2018, 10:45 AM), http://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrangements_to_be_disclosed/[https://perma.cc/3DMY-29XY]. While third-party funders have accepted disclosure as part of international practice, third-party funders continue to push back about efforts to require disclosure in the U.S. *See, e.g.*, *Mandatory Disclosure of Funders Would Further Clog Overburdened Court Dockets*, BENTHAM IMF (June 13, 2018), https://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2018/06/13/mandatory-disclosure-of-funders-would-further-clog-overburdened-court-dockets [https://perma.cc/G8PV-ULCT].

449.Tighe, *supra* note 1, at 209–29.

450.*See id.*

advances the discussion by suggesting affirmative steps that should be taken by dispute resolution providers and neutrals to address the ethical concerns presented by third-party funders' participation in dispute resolution.

IV. PROPOSED ETHICAL GUIDELINES AND BEST PRACTICES FOR U.S. DISPUTE RESOLUTION PROVIDERS, ARBITRATORS, AND MEDIATORS

In this Part, I offer ethical guidelines and best practice suggestions for ADR providers,[451] arbitrators, and mediators so that the dispute resolution profession may more responsively address the real and apparent ethical issues that arise when a third-party funder backs a party who is participating in a dispute resolution procedure.[452] The time has come for dispute resolution providers and neutrals to acknowledge the reality of third-party funding, take affirmative steps to maintain the integrity of dispute resolution practices, and consider the potential benefits third- party funders bring to settlement. Some observe and others ignore the reality that third-party funders are proliferating and backing participating parties in our arbitrations and mediations with greater frequency. This ignorance is untenable, for the presence of third-party funders that provide financial backing to dispute resolution parties may at times challenge the ethical obligations of dispute resolution providers and neutrals.

451.See generally CPR–Georgetown Comm'n on Ethics and Standards of Practice in ADR, Principles for ADR Provider Organizations (2002), https://www.cpradr.org/resource-center/protocols-guidelines/ethics-codes/principles-for-adr-provider-organizations/_res/id=Attachments/index=0/Principles-for-ADR-Provider-Organizations.pdf [https://perma.cc/958L-JSRT] for guidance on how ADR providers should provide quality information about the services they provide to avoid ethical issues that would impugn the integrity of the organization and the dispute resolution procedures it provides.

452.In this section, ADR providers include the courts as well as private providers. Litigants may actually mediate or arbitrate their dispute in three different contexts. First, some litigants may decide on their own to mediate or arbitrate their dispute once their legal dispute arises. In those cases, the litigants may opt to select their own private arbitrators or mediators either through a private ADR provider (administered process) or on their own. Second, the court may strongly recommend that litigants mediate or arbitrate their dispute once a legal action is commenced. Third, litigants may be obligated to mediate or arbitrate a dispute pursuant to contract.

An overarching interest of dispute resolution providers, arbitrators, and mediators when parties are backed by third-party funders is to obtain adequate relevant information about third-party funders so that ADR professionals can ensure that the dispute resolution process and any resulting settlement are procedurally and substantively fair and just.[453] In order to address this overarching interest, I offer three suggestions. First, dispute resolution providers and neutrals should require titrated disclosure about the relationship between the third-party funder and the party. Second, neutrals must be educated about how to work with third-party funders when they are backing any of the participating parties. Third, dispute resolution intake procedures, promotional materials, contracting forms, and other required paperwork need to be modified to gather relevant information about the third-party funder. I first explain these general suggestions and then tailor the application of each of these suggestions to the three different groups.

A. PROPOSAL ONE: TITRATED AND SEQUENTIAL DISCLOSURE ABOUT THE RELATIONSHIP BETWEEN THE THIRD-PARTY FUNDER AND PARTY

Disclosure remains a hotly contested and nuanced issue in which third-party funders tenaciously advocate for confidentiality of their contracting relationship with the party while those purveyors of justice, many untrusting of third-party funders, are demanding disclosure so that there is total transparency. Disclosure is not an all or nothing proposition; rather, it is a nuanced term that embraces what is disclosed, to whom disclosure is made, whether the information disclosed remains confidential, and at what phase of the dispute resolution procedure the information is to be disclosed. Acknowledging the apprehensions raised by third-party funders about disclosure and the dispute resolution profession's need for quality disclosure about third-party funders, I recommend that disclosure should be sequentially titrated and tailored to the different phases of the dispute resolution procedures. The information that is required to be disclosed should be based on the informational needs warranted at different phases of the given dispute resolution procedure. Moreover, such sequential, titrated disclosure helps

453.The measures for fair and just are measured differently in arbitration and mediation. *See* Judith L. Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503, 504–05 (1991).

avoid broad disclosure about the third-party funder in those instances when parties are not going forward with the dispute resolution procedure, or the information is not necessary.

1. Three Levels of Sequential Disclosure During the Contracting Phase of Arbitration and the Pre-Mediation Phase

a. Recommended Disclosure Level One

In the initial contracting phase between a party and the dispute resolution provider, arbitrator or mediator, disclosure about third-party funders should be limited to whether or not there is a third-party funder, and if there is, the names of those in the funder's organization. The rationale for disclosing the identity of the third-party funder is to ferret out early on in the dispute resolution process any potential conflicts that may exist between the third-party funder and the neutral.[454]

If there is a conflict, an ancillary issue that needs to be addressed at this phase is whether the conflict between the third-party funder and the neutral is a waivable one that first needs to be disclosed to the other party or is deemed to be a conflict that is not waivable. If those involved want the opportunity to waive the conflict, the identity and relationship of the funder must also be shared with the other party involved in the matter. Identifying conflicts doesn't necessarily mean disqualification. Customarily, when there is a conflict, conflicts can be waived at the consent of the parties.[455] Dispute resolution providers and neutrals can incorporate this level of disclosure into the existing conflict procedures used.

Another option is for dispute resolution providers to institute a per se rule that conflicts between the neutral and third-party funders cannot be waived. In that case, the identity of the third-party funder does not have to be disclosed. Dispute resolution professionals and providers have to decide on the rule they will choose to incorporate as part of their practice, and then notify parties about this rule.

I offer a cautionary note about considering the second option and instituting a per se ban on waiving conflicts. While some dispute resolution communities are large and have many dispute resolution professionals from which to select a

454. *See* ICCA REPORT, *supra* note 9, at 87.
455. *See id.* at 81–115.

neutral, some dispute resolution practice communities are insular and just have a finite number of neutrals. In those instances, it is common that arbitrations and mediations involve the same people, just wearing different hats. In those cases, neutrals and providers may want to consider the ramifications of making conflicts between neutrals and third-party funders conflicts that can't be waived.

b. Recommended Disclosure Level Two

Once conflicts between the third-party funder and neutral are addressed and it is decided that the parties wish to proceed with the dispute resolution procedure, an additional level of disclosure that clarifies the relationship between the third-party funder and participant needs to be made at the contracting phase. The importance of such disclosure is to allow the dispute resolution provider, arbitrator, and mediator to discern if the third-party funder is actually a party to the dispute resolution procedure. Of course, determining whether or not a funder is a party is controversial and is a label that third-party funders prefer to avoid.[456] However, our primary concern is to maintain the integrity of our dispute resolution procedures. Therefore, dispute resolution providers, arbitrators, and mediators must have knowledge of all the parties who are influencing and shaping the resolution of the dispute.

If the third-party funder is a party, then what is its level of participation in the dispute resolution procedure and the concomitant obligations that come with that participation? For example, if the third-party funder is funding a party in mediation, shouldn't that third-party funder also be required to sign a confidentiality agreement protecting the confidentiality of mediation communications? In another example, if a party is to proceed to agreement and the party's funding agreement shows that the third-party funder is actually now a party, should the third-party funder be required to participate in the arbitration?

i) Disclosure raises concomitant confidentiality issues if the third-party funder participates in mediation and arbitration.

An important sub-issue that should also be addressed when clarifying the relationship between the third-party funder and the party is clarifying which

456. NIEUWVELD & SAHANI, *supra* note 1, at 47–48 discusses whether third-party funding is characterized as a loan subjecting it to usury laws versus a loan.

information that the lawyer and party shared with the third-party funder remains confidential as part of the attorney-client privilege and which information was shared in a way that waives the privilege. Whether or not the information that is shared with a third-party funder is done so in a way that waives or protects the attorney-client privilege has procedural implications in mediation and procedural and evidentiary implications in arbitration.

When it is disclosed that a third-party funder is backing a mediation party, that relationship raises three issues about mediation confidentiality that dispute resolution professionals need to address to preserve the integrity of mediation. A threshold issue that dispute resolution professionals need to clarify is how the third-party funder should be characterized. This professional characterization is important, because depending on the characterization of the third-party funder, different confidentiality concerns have to be resolved. For example, if a third-party funder learns in the course of a mediation confidential information about the other party that could give the third-party funder a trading advantage, the third-party funder should be barred from trading on that information. The second issue to be addressed is whether the dispute resolution party will communicate with the funder about mediation communications, and because there is an expectation by all mediation participants that the mediation communications are to remain confidential, should the third-party funder be compelled to also sign a confidentiality agreement or should the confidentiality agreement be amended so that it allows the dispute resolution party to consult with the third-party funders as one of its experts? So in mediation, if the participating party has a contractual relationship with the third-party funder that requires sharing of information, consultation, and direction as the case progresses, then the mediator should also have the third-party funder sign a confidentiality agreement to protect mediation confidentiality.[457]

If the third-party funder happens to also be a hedge fund, extra mediation confidentiality protections are needed to protect mediation confidentiality and prevent insider training. We learn from bankruptcy mediations in which hedge funds participate that added ethical screens/walls are needed to secure the

457.See *id.* at 154, stating that Indiana, Nebraska and Vermont are states who have enacted legislation providing that the attorney-client privilege includes sharing privileged work product and communication with third-party litigation funders.

mediation communications.[458] Another wrinkle that dispute resolution professionals need to address is that hedge funds that are also third-party funders might learn confidential information in the mediation about the other party that the hedge fund uses to trade on.[459]

Unlike mediation, in arbitration, the arbitrator makes determinations and issues awards based on the evidence presented.[460] Therefore, it is important to ascertain whether information shared with the third-party funder is done so in a way that protects or waives the attorney-client privilege.

c. Recommended Disclosure Level Three

A third level of disclosure that may be necessary is the financial relationship between the third-party funder and the funded party. Although this information may be needed in both arbitration and mediation, the information is needed in each dispute resolution procedure for different reasons. In arbitration, the information may be needed either to assess the costs one party incurred to go forward with the arbitration or to ensure that the third-party funder has sufficient funds to follow-through on his funding obligations. The decision about when this disclosure should take place is context specific. For example, if the other party makes a motion at the beginning of the arbitration for a bond of sufficiency, then that information needs to be provided at the beginning of the arbitration process. However, if no such motion is made, then the request for such information might not be made until the end of the arbitration when the neutral needs to be informed about the actual costs, including the cost of third-party funding, that the party has incurred.[461]

458.*See* Charles Duhigg & Peter Lattman, *Judge Says Hedge Funds May Have Used Inside Information*, N.Y. TIMES: DEALBOOK (Sept. 14, 2011, 9:28 PM), https://dealbook.nytimes.com/2011/09/14/judge-says-hedge-funds-may-have-used-inside-information/ [https://perma.cc/UX9B-2UKV].

459.*See GM Judge Aims to Prevent Insider Trading by Distressed Debt Funds*, REUTERS (July 15, 2013), https://www.reuters.com/article/idUS162810420130715 [https://perma.cc/DXM4-WYTJ].

460.*Comparison Between Arbitration & Mediation*, FIN. INDUSTRY REG. AUTHORITY, https://www.finra.org/arbitration-and-mediation/comparison-between-arbitration-mediation [https://perma.cc/94Y3-R8EM] (last visited Mar. 3, 2019).

461.*See* ICCA REPORT, *supra* note 9, at 146.

In mediation, the information might be helpful to assess each party's commitment to yield a just result or to better understand the economics of a party's decision or ambivalence about settlement. Here again, the timing of the disclosure will be based on when this informational need arises. As one illustration, if a party needs to reimburse a third-party funder the borrowed amount, interest on that amount and an exponential return on any amount recovered, the party may be reluctant to accept what appears to the mediator, a reasonable settlement. Only when the party discloses the financial obligations to the funder might a mediator better understand the impasse and be able work with the parties in a more realistic way.

d. Recommended Disclosure Level Four

A fourth level of disclosure is the sharing of the third-party funder's objective assessment of the case. Because of their ability to create a matrix of information about the merits of the case with admirable objectivity, third-party funders are often considered to be super lawyers. Like other experts that are often part of arbitration and mediation processes, funders can be invited to share their analysis of the case, to provide evidence in the arbitration or to help address impasses in mediation. To date, third-party funders have resisted sharing their analysis of a case, insisting that their method of assessing whether a case is investment worthy is proprietary, and not to be shared with others. Going forward, however, as the push for greater transparency on the part of third-party funders gains momentum, dispute resolution professionals will have to work with third-party funders, as they work with other experts, to have third-party funders share their case analysis without disclosing all their proprietary methods.

B. PROPOSAL TWO: TRAINING FOR ADR PROVIDERS, ARBITRATORS, AND MEDIATORS

Professional dispute resolution training programs should be expanded to include education about the additional skills neutrals need to work with those parties backed by third-party funders. As was mentioned in the introduction of this paper, many dispute resolution professionals and providers are unaware that parties are backed by third-party funders even though increasing numbers of parties are receiving dispute funding. Yet, as this article has explained, such unawareness is creating an ethical minefield that potentially undermines the integrity of dispute resolution. Thus, a specialized training module is needed to heighten a neutral's awareness about third-party funders and to provide neutrals with the requisite skills needed to maintain a dispute resolution process of integrity.

The contents of such an additional training module should include the ethical issues that neutrals need to address when parties are funded; how to modify intake and process procedures to ferret out the existence of third-party funders; how to implement titrated levels of disclosure; strategies to help neutrals manage their own cognitive biases about third-party funders; how to incorporate the third-party funder's assessment of the case into the process; and skills to manage parties' own biases about third-party funders.

At this time, those ADR providers and trainers who are ahead of the curve and wish to develop a responsive training for neutrals will find more questions raised than answers provided. The scholarship surrounding third-party funding, to date, has centered on the ethics of the practice and the question of disclosure. The specifics of how disclosure of third-party funders might actually influence the dynamics with the neutral and participants, however, remain an unexplored area. In Part V of this paper, I raise these emerging questions and posit the possible dynamic shifts that third-party funders might spark arbitration and mediation.

V. HOW MIGHT DISCLOSURE IMPACT THE DYNAMICS OF THE DISPUTE RESOLUTION PROCESS

Once one or both parties disclose that they are receiving dispute funding, any conflicts emerging from that disclosure are addressed, and the dispute resolution process proceeds, the disclosure itself could also potentially shape the decision-making process of the neutrals and parties involved. Although there is no specific research on point, cognitive psychologists provide us with insights about how arbitrators, mediators, and disputants might be influenced by the knowledge that a dispute is receiving third-party funding.[462] Biases about

462. *See generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

third-party funding, the amount of funding that a party is receiving, and the terms of the funding agreement may all influence the dynamics in both arbitration and mediation.

A. EXPLICIT AND IMPLICIT BIAS ABOUT THIRD-PARTY FUNDING

Even though arbitrators and mediators are ethically mandated to be impartial,[463] they are also human beings who may have pre-existing ideas about the ethics of third-party funding. These pre-existing ideas or biases may cause the neutral to be explicitly or implicitly biased for or against third-party funders.[464] As with many biases, such bias could be formed and reinforced by the self-selected media and publications that the neutral has been exposed to about third-party funders.[465] For example, if a neutral is following the U.S. Chamber Institute for Legal Reform's concerted efforts to disallow third-party funders from operating "in the shadows," the neutral might be leery of funders.[466] However, if a neutral is enthusiastically following the success of hedge funds who are funding litigation, then the neutral might view funders more favorably.

Such biases, whether explicit or implicit, favorable or unfavorable, might influence how neutrals deviate from their ethical mandate of impartiality. Depending on the bias of the neutral, the neutral might then interpret the fact that a party is funded as an indication that the case at hand has enough merit to warrant investment or just an indication that the party needed money. Depending on the bias of the neutral, the neutral may consider the fact that a party is funded either as an indication of the level of commitment of the parties to go forward with the case or a vengeful step to drag the case on unnecessarily.

463.*See, e.g.*, CPR–GEORGETOWN COMM'N ON ETHICS AND STANDARDS OF PRACTICE IN ADR, *supra* note 144, at 10 ("The ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.").

464.Jean-Christophe Honlet, *Recent Decisions on Third-Party Funding in Investment Arbitration*, 30 ICSID REV.–FOREIGN INV. L.J. 699, 699–712 (2015) (citing a case in which arbitrator Dr. Gavin Griffith Q.C. was unsuccessfully challenged because of the negative views he expressed about third-party funders).

465.BANAJI & GREENWALD, *supra* note 155, at 164; *see also* DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 201–23 (Harper Perennial ed. 2010) (2008).

466.*See* BEISNER ET AL., *supra* note 134.

Cognitive psychologists explain that our biases are more likely to emerge in ambiguous situations where there are fewer rules to follow.[467] Thus, even though mediators and arbitrators might both be influenced by their biases about third-party funders, mediators might be more likely to be influenced by such bias.[468] The structure of the mediation process is more flexible and has less defined procedures than the arbitration process. For example, mediation may be conducted in joint meetings, private caucuses, or a combination of the two. Although the mediation parties, not the mediator, have the ultimate decision-making power, the mediator, in his role as a neutral, has greater discretion than an arbitrator about how to engage with the parties and influence the contours of the agreement the parties will reach.

On a subtler level, the dollar amount of the funding agreement might also unconsciously influence both the arbitrator's and mediator's shaping of a fair and just resolution. Cognitive psychologists educate about the power of anchoring, the undue influence that an initial number is given in subsequent decision making.[469] Thus, allocations of costs in arbitration and an acceptable settlement number might be unduly influenced by the amount of funding one or both parties are receiving. Might an arbitrator be influenced in making an award by the fact that one party has received a significant amount of backing by a third-party funder? Alternatively, if a defendant received a significant amount of backing by a third-party funder, might the arbitrator have greater sympathies for that defendant if the arbitrator issues an award that orders the defendant to pay for damages and costs? In mediation, how might the amount of the funding arrangements of the participants shape the mediator's prodding of a reasonable settlement?

Another yet unexplored issue is how, from the party's perspective, a party receiving funding calculates settlement decisions.[470] In part, the answer to this

467. Tversky & Kahneman, *supra* note 155, at 1124.

468. *See e.g.*, Gilat J. Bachar & Deborah R. Hensler, *Does Alternative Dispute Resolution Facilitate Prejudice and Bias? We Still Don't Know*, 70 SMU L. REV. 817, 821–22 (2017); *see also* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400–04; Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1587–94 (1991).

469. Tversky & Kahneman, *supra* note 155, at 1129.

470. ROBERT H. MNOOKIM, SCOTT R. PEPPET & ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEAL DISPUTES 112–13, 117–18 (2000) (describing how transaction costs can either deter or expedite settlement).

is likely based on the type of funding agreement that exists between a party and the funder. If a party has a recourse funding agreement in which the party is obligated to repay the funder for the borrowed money plus interest, it is reasonable to assume that such a financial obligation would be a consideration in the party assessing what a reasonable settlement would be. Might a party receiving an apology as part of that settlement might then devalue that apology if the party also has to repay the funder the borrowed money? Possibly, if a party has a nonrecourse loan, and doesn't have to repay the funder unless the party is victorious, the party may feel more empowered to proceed to judgment unless the settlement offer is as high as the expected litigated value.

Of course, disputants may have their own biases about third-party funders. If the disputant believes that third-party funders only back cases of merit, the disputant may be more inclined to settle once the disputant learns that the other party is receiving dispute funding.[471] However, if a disputant believes third-party funders are unethical scammers, the disputant may become less likely to settle and more determined to pursue her claim to vindication once the disputant learns the opposing side is receiving dispute funding.

Although this is an uncharted area, these are issues that dispute resolution professionals should be considering as they more actively engage with participants and the third-party funders who back them. Of course, neutrals need to become self-aware of their biases about third-party funders, along with all their other biases, so that the bias does not adversely influence the dispute resolution process. Such heightened awareness extends beyond the initial disclosure to see if there is a conflict with the neutral. Such heightened awareness extends throughout the mediation and arbitration.

B. PROPOSAL THREE: MODIFICATION OF DISPUTE RESOLUTION FORMS AND PROCEDURES THAT ACKNOWLEDGE THE POSSIBILITY OF THIRD-PARTY FUNDERS

One way to change the status quo practice of "don't ask, don't tell" that has allowed dispute resolution professionals to be unaware of the existence of third-party funders is to modify dispute resolution forms and procedures to actually ask

471.*See* GARBER, *supra* note 129, at 32.

if there is a third-party funder involved in the case. Dispute resolution forms and procedures should be modified to reflect an awareness that third-party funders may be backing one of the parties. For example, ADR providers' promotional materials, published rules and procedures could provide that experts, including third-party funders, may have a role in the given dispute resolution procedure. As mentioned above, dispute resolution professionals may include such a query as a regular part of their intake and contracting procedures.

CONCLUSION

The invisible practice of third-party funding is becoming increasingly visible. The time has come for dispute resolution providers and neutrals to see what they have yet to see before:[472] Third-party funders are shaping the practice of civil dispute resolution. Whether you believe this is an economic reality needed to address the escalating costs of conflict resolution or an evil that will erode our justice system, the dispute resolution profession must take affirmative steps to address the real and apparent ethical collisions between third-party funders and neutrals. This paper proposes ethical guidelines and best practices that provide for modification of dispute resolution providers' intake procedures, titrated disclosure of third-party funders, and training of neutrals. The goal is to help respond to the conflict and confidentiality concerns raised when third-party funders provide support for a party in arbitration or mediation.

This paper also appreciates that we are in the dawn of awareness about third-party funders. As a profession, it is challenging to speculate about what we don't know, but we must try.[473] Going forward, we will benefit from empirical research that clarifies how third-party funding shapes parties' decision-making about settlement. And of course, the looming overarching question is how third-party funders will influence the delivery of justice. This paper invites dispute resolution providers and neutrals to rethink their current practices, adapt, and work to create practices and guidelines that protect the integrity of the dispute resolution profession and the justice it provides.

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472. *Mark* 4:9 (NAB) ("Whoever has ears to hear ought to hear.").

473. "Change is the law of life and those who look only in the past or present are certain to miss the future." John F. Kennedy, President of the U.S., Address in the Assembly Hall at the Paulskirche in Frankfurt (June 25, 1963).

Please Ask, Please Tell: Disclosing Third-Party Funding in Mediation

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INTRODUCTION

This addendum re-ignites the discussion about third-party disclosure in dispute resolution that began in "Hey, Big Spender: Ethical Guidelines for Dispute Resolution Professionals when Parties Are Backed by Third-Party Funders,"[475] and advocates for mandatory third-party funding (hereinafter TPF) disclosure when funded commercial cases are mediated.

As increasing numbers of domestic TPF commercial cases opt for settlement in mediation, domestic Alternative Dispute Resolution (hereinafter ADR) providers have still failed to adopt policies or procedure that address TPF disclosure in mediation.[476] *Don't ask, don't tell.* Even though TPF disclosure is fast becoming a required part of global mediation practice,[477] the U.S. continues to ignore lessons from our global community about TPF disclosure in mediation. Instead, the U.S. is engaging in a polarizing debate about third party funding disclosure in litigation

[475] Elayne E. Greenberg, *Hey, Big Spender: Ethical Guidelines for Dispute Resolution Professionals when Parties Are Backed by Third-Party Funders,* 51 ARIZ. ST. L.J. 131 (2019). In that article, Professor Greenberg endorses TPF disclosure for both arbitration and mediation. This addendum focuses on the distinct reasons for TPF disclosure in mediation. The focus of TPF disclosure in mediation should not be misinterpreted to exclude the need for TPF disclosure in arbitration.

[476] *See generally* JUD. ARB. & MEDIATION SERVS., https://www.jamsadr.com (last visited Nov. 25, 2019); INT'L INST. FOR CONFLICT PREVENTION & RESOL., https://www.cpradr.org (last visited Nov. 25, 2019); AM. ARB. ASS'N, https://www.adr.org (last visited Nov. 25, 2019).

[477] *See, e.g.*, Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill, (2016) Cap. 1331, 1, § 1 (H.K.); Civil Law Bill (No 38 of 2016) (Singapore); Drew York, *Could Litigation Funding Disclosure Be Coming to Texas?*, JDSUPRA: TILTING THE SCALES (Mar. 20, 2019), https://www.jdsupra.com/legalnews/could-litigation-funding-disclosure-be-79839/ (discussing global trend towards disclosure).

that has become politicized,[478] legislated,[479] and litigated.[480] The dizzying and detracting consequences of such polarization have eclipsed the exploration of appropriate TPF mediation disclosure and have paralyzed any affirmative steps to promote disclosure in mediation. Maintaining the status quo threatens the integrity of mediation and comes at an irretrievable cost to funded parties.[481]

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478 *See, e.g.*, York, *supra* note 4 (discussing the status of TPF in Texas); Lisa Miller, *Perils of Third-Party Funding*, L.A. LAW., Mar. 2017, https://www.lacba.org/docs/default-source/lal-magazine/2017-test-articles/march2017testarticle.pdf (noting that the conversation about whether or not to have TPF disclosure in litigated courts in California was a hotly debated issue); John Freund, *Republican Senators Reintroduce Litigation Funding Disclosure Bill*, LITIG. FIN. J., (Feb. 15, 2019), https://litigationfinancejournal.com/republican-senators-reintroduce-litigation-funding-disclosure-bill *Compare* Brackett B. Denniston, III et. al., *Letter Re: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)*, INST. FOR LEGAL REFORM (Jan. 31, 2019), https://instituteforlegalreform.com/wp-content/uploads/media/TPLF_letter_1.31.19 .pdf (CEOS letter supporting disclosure), *with* Alison Frankel, *Litigation Funders Blast U.S. Chamber, GCs for Disclosure Push*, REUTERS (Feb. 25, 2019), https://www.reuters.com/article/ legal-us-otc-litfunding/litigation-funders-blast-u-s-chamber-gcs-for-disclosure-push-idUSKCN1QA2Z4 (arguing that this sentiment is disingenuous and merely a response to pressure to disclose).

479 *See, e.g.*, WIS. STAT. § 804.01(2)(bg) (2017-18) (requires the disclosure); N.D. CAL. CIV. LOCAL R. 3-15 (requiring disclosure of non-party interested entities or persons). The enacted rule allowed for more limited discovery than what was initially proposed. *See* Ben Hancock, *Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions*, RECORDER (Jan. 23, 2017), https://www.law.com/therecorder/almID/1202777487488/ Northern-District-First-in-Nation-Mandates-Disclosure-of-ThirdParty-Funding-in-Class-Actions/

480 *See, e.g.*, *In re* Valsartan N – Nitrosodimethylamine (NDMA) Contamination Prods. Liab. Litig., 405 F. Supp. 3d 612 (D.N.J. 2019) (denying defendant's broad discovery request of plaintiff's litigation funding agreements and documents, but allowing in-camera review of documents to assess if the litigation funder was controlling or advising the funded party); Space Data Corp. v. X, No. 16-cv-03260-BLF, 2017 U.S. Dist. LEXIS 22571 (N.D. Cal. Feb. 16, 2017) (defendants move to compel discovery of the board minutes in which the litigation funder was denied because the request was neither relevant or proportional) [Does this parenthetical match the citation? The cited source appears to be dealing with a motion to dismiss under 12(b)(6), not a motion to compel.]. The U.S. District Court for the Northern District of California denied as irrelevant defendant Micron Technology's demand that plaintiff MLC Intellectual Property disclose the identity of any third-party funder backing MLC's patent infringement lawsuit. MLC Intellectual Prop., LLC v. Micron Tech., Inc., No. 14-cv-03657, 2019 WL 118595 (N.D. Cal. Jan. 7, 2019) (denying defendant's request to disclose the identity of the funder backing the plaintiff because the request did not identify a specific showing of relevance).

481 *See, e.g.*, Greenberg, *supra* note 2.

This addendum refocuses back to the need for domestic TPF disclosure in mediation and brings to life the importance of TPF disclosure in mediation practice. In Section One, this discussion begins by distinguishing mediation from adjudicatory processes, showing how mediation's distinct values and purposes call for the adoption of TPF disclosure. Section Two will explain what is meant by disclosure. Once the identity of the TPF is disclosed, Section Three clarifies how third-party funders, with their enhanced settlement acumen, bring value-added benefits to the mediation table. Included in this section will be the views of an industry actor whose participation during in-person mediations helped facilitate the resolution of his firm's funded cases. This addendum then concludes with a renewed call to action to dispute resolution professionals, funded parties, and funders to implement practices and procedures that encourage TPF disclosure in mediation.

SECTION ONE

Third-party funding disclosure should become a required mediation practice to safeguard mediation's purpose, practice, and ethical underpinnings.[482] Unlike adjudicatory processes, mediation is a party-directed dispute resolution process that should require the disclosure of TPF to preserve mediation's transparency and to foster trust among mediation participants, distinguishing components of mediation's practice ethos.[483] Mediation, in its most basic form, is an assisted negotiation in which the mediator helps the parties reach a resolution to the presenting conflict, as the conflict is defined by the parties.[484] Although ADR processes like arbitration and mediation are confidential if the parties so desire, their confidentiality purposes are somewhat different.[485] What distinguishes

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[482] *See, e.g.*, Elayne E. Greenberg, *Ethical Compass: When the Empty ADR Chair Is Occupied by a Litigation Funder*, NYSBA N.Y. DISP. RESOL. LAW., Spring 2017, at 7; Greenberg, *supra* note 2.

[483] Andrea Maia, *Transparency Is a Necessary Requirement to Find the Way for the Best Agreement*, KLUWER MEDIATION BLOG (Oct. 25, 2012), http://mediationblog.kluwer arbitration.com/2012/10/25/transparency-is-a-necessary-requirement-to-find-the-way-for-the-best-agreement/; Joseph Folger, *Harmony and Transformative Mediation Practice: Sustaining Ideological Differences in Purpose and Practice*, 84 N.D. L. REV. 823 (2008).

[484] *See, e.g.*, *A Guide to the Mediation Process for Lawyers and Their Clients*, JAMS MEDIATION SERVS., https://www.jamsadr.com/mediation-guide (last visited Dec. 1, 2019).

[485] Compare the provisions for confidentiality at arbitration, *see, e.g.*, *AAA Statement of Ethical Principles*, AM. ARB. ASS'N, https://www.adr.org/StatementofEthicalPrinciples (last

mediation from adjudicatory processes such as arbitration and litigation is that mediation participants—protected with the cloak of confidentiality and guided by the skill of the mediator—collaborate to develop a party-directed resolution of the presenting issue in their case, as well as any underlying problems and ancillary issues.[486]

TPF disclosure in mediation is essential to promoting the candor, understanding, and problem-solving that are hallmarks of mediation conflict discourse.[487] Distinguishable from the conflict discourse in arbitration and litigation, mediation conversations, including conversations about TPF disclosure, are not cloistered by the procedural rules of evidence or discovery.[488] This frees mediation participants to engage in conflict conversations that are candid rather than positional rants.[489] In this unshackled milieu, mediation participants often discover that their conflict discourse evolves from conversations of blaming to conversations that help develop a deeper understanding of the problem and a willingness to collaboratively shape a responsive resolution to the problem at hand.[490] Evolving from this candor, deeper understanding, and collaboration that take place in mediation, mediation participants and the mediator begin to develop the trust needed to shape a durable, party-directed agreement.[491] As discussed more fully below, the

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visited Dec. 1, 2019) (arbitration is a private process that is not subject to public access such as litigation), with those for mediation, *see, e.g.*, Kimberly Taylor, *Mediation: Confidentiality and Enforceability of the Process*, JAMS (Apr. 6, 2015), https://www.jamsadr.com/blog/2015/ mediation-confidentiality-and-enforceability

[486] Taylor, *supra* note 12.

[487] Taylor, *supra* note 12; Greenberg, *supra* note 2.

[488] *See* David W. Henry, *Mediation as a Dark Art: A Mediator's Message to Parties Seeking to Settle the Difficult Case*, AM. BAR ASS'N (Mar. 22, 2014), https://www.americanbar.org/groups/ business_law/publications/blt/2014/03/02_henry/ ("[A] lawyer's knowledge of evidence and procedure is of little value.").

[489] Taylor, *supra* note 12.

[490] *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS § VI(A)(4) (AM. ARB. ASS'N 2005) ("A mediator should promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation."). *See generally* ERIC GALTON & LELA P. LOVE, STORIES MEDIATORS TELL (2012).

[491] *See, e.g.*, Richard Salem, *Trust in Mediation*, BEYOND INTRACTABILITY (July 2003), https://www.beyondintractability.org/essay/trust_mediation; Frances E. McGovern, *Trust and the SRBA Mediation*, 52 IDAHO L. REV. 335 (2016).

disclosure of TPF in mediation can contribute to the mediation conflict discourse by offering the funder's objective assessment of the case and suggesting workable options for settlement.

The disclosure of third-party funders at the beginning of the mediation is also implicitly required to preserve ethical mediation practice.[492] The Model Standards of Conduct for Mediators, the mediator ethical code that contours the ethical underpinnings of mediation, mandates that mediators oversee a mediation process that promotes party self-determination,[493] maintains mediator impartiality,[494] discloses real or perceived conflicts,[495] safeguards confidentiality,[496] and preserves the integrity of the process.[497] As one example, disclosure about the third-party funder would contribute to the scope of information mediation participants would need to give their meaningful informed consent to proceed with mediation and, ultimately, consent to any resolution. Mediation participants could not give their meaningful informed consent, the essence of party self-determination, if a funded party failed to disclose the identity of the funder.[498] Perhaps, once a mediation participant learns that the other mediation participant is funded, the unfunded participant may reassess her

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[492] *See, e.g.*, Greenberg, *supra* note 2.

[493] MODEL STANDARDS OF CONDUCT FOR MEDIATORS § I(A) (AM. ARB. ASS'N 2005) ("A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.").

[494] *Id.* § II(A) ("A mediator shall decline a mediation if the mediator cannot conduct a mediation in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.").

[495] *Id.* § III(A) ("A mediator shall avoid a conflict of interest during and after a mediation. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raise a question of a mediator's impartiality.").

[496] *Id.* § V(A) ("A mediator shall maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by the applicable law.").

[497] *Id.* § VI(A) ("A mediator shall conduct a mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.").

[498] *Id.* § I(A) ("Self-Determination").

evaluation of the case, reconsider if mediation is appropriate, rethink her mediation advocacy strategy, and re-evaluate the viable parameters of settlement.[499]

In a second illustration, TPF disclosure at the beginning of the mediation maintains the integrity of mediation by addressing any potential conflicts of interest that may exist among the funders, neutrals, and other mediation participants. If a funded party failed to disclose that fact to the mediator and the other mediation participants at the outset, the mediator participant might proceed with an unknown conflict of interest with the TPF. Even if the fact of funding was disclosed later in the mediation or discovered at the conclusion of the mediation, the integrity of the mediation process would be compromised and the basis of any agreement would be put at risk.[500] In a third example, disclosure of third-party funders allows mediators to structure a mediation process of integrity which "promotes . . . the presence of appropriate parties."[501] Third-party funders should be considered "appropriate parties" since the contractual agreement between third-party funders and the funded parties often requires, at a minimum, that the funded party consult and share information as the case proceeds to resolution. In mediation, "appropriate parties" is more of a term of art that includes anyone that might contribute to the mediation discussion and influence the settlement discussions.[502]

An unexplored ethical issue is whether, if at all, the disclosure of a third-party funder compromises mediator impartiality.[503] This author speculates that the

[499] *Id.*

[500] *Id.* § VI ("Quality of the Process").

[501] *Id.*

[502] *See, e.g.*, Mark J. Bunim, *A Twist in Standard Mediation: The Insurer Is at the Table,* N.Y.L.J. (July 29, 2010), https://www.law.com/newyorklawjournal/almID/1202463997409/a-twist-in-standard-mediation-the-insurer-is-at-the-table/# (raising the importance of having an insurance representative with settlement authority at the mediation table); DWIGHT GOLANN, SHARING A MEDIATOR'S POWERS: EFFECTIVE ADVOCACY IN SETTLEMENT (2013) (suggesting that during the pre-mediation phase, mediators should discuss with the attorneys who are the people needed to attend the mediation to help make the mediation successful); Greenberg, *supra* note 2 at 154 (explaining why mediators need to know about the relationship between the mediation party and their third-party funder).

[503] *Id.* § II(A) ("Impartiality"). When the author presented the idea of TPF disclosure in arbitration and mediation at conferences, neutrals raised repeated concerns about how such disclosure might affect their impartiality. Marc Goldstein? Marc Goldstein was one of

answer to this question depends on the individual mediator. As mentioned in the beginning of this article, the polarizing debate about third-party funders has publicly depicted third-party funders either as a needed-good that helps parties access justice, or as a modern-day version of the medieval justice evils of barratry, champerty, and maintenance. Thus, at this point in time, individual mediators may be swayed by information on either end of the spectrum, or maintain an agnostic stance about third-party funders.[504]

Thus, TPF disclosure in mediation comports and advances mediation's purpose and ethics. An unresolved question that is addressed in the next section is what should be the appropriate scope of TPF disclosure.

SECTION TWO

The elephant in the room and in this paper is, if there is mandatory third-party disclosure in mediation, what should be the scope of that disclosure? Disclosure is a not a binary analysis, but rather a complex inquiry that requires a nuanced examination of that which is disclosed and what, if anything, should remain confidential. Disclosure should be titrated and multi-level, consistent with the purpose, goals, and ethics of mediation.[505] First, the names of the funder should be disclosed to see if there is a conflict with the neutral provider or any other mediation participants.[506] Second, if there are no conflicts and/or any conflicts are waived and the mediation proceeds, the TPF should sign the mediation confidentiality agreements to preserve the confidentiality of mediation communications.[507] Third, as the mediation proceeds, the funded party should disclose the financial arrangement between the TPF and the funded party so that the mediator and the mediation participants better understand the funded party's economic considerations when considering settlement. Fourth, the TPF should disclose the funder's objective assessment of the case if it will help overcome any

those arbitrators I had discussed this with. Can I have the sentence without his name? I think so. I can just delete it.

[504] Although all judges, arbitrators, and mediators have biases, mediators' biases are more likely to emerge in a mediation setting because of mediation's informal structure and lack of procedural rules. *See, e.g.*, Greenberg, *supra* note 2 (citing to the work of Tversky & Kahneman, Banaji & Greenwald and Daniel Ariely).

[505] Greenberg, *supra* note 2.

[506] Greenberg, *supra* note 2.

[507] Greenberg, *supra* note 2.

impasses to settlement.[508] Addressing a concern expressed by TPFs, the disclosure of the TPF's cases assessment does not have to include any proprietary information. As with all expert assessments that assist mediation participants to make rational and objective assessments about their disputes, however, the disclosure of a TPF's case assessment could help mediation participants reassess the merits of their case.[509]

Some third-party funders, however, have maintained a stance against disclosure, arguing that any disclosure about third-party funders will threaten the third-party funder's proprietary work. Other funders, like Mr. Boaz Weinstein, co-founder and partner of Lake Whillans Litigation Finance, take a more reasoned approach to funding disclosure.[510] Mr. Weinstein expounded on his views about the disclosure:

" . . .we do not object to disclosure provided that (i) disclosure is limited to the fact of funding (i.e., that the fact that there is funding and the identity of the funder is disclosed), rather than the terms (i.e., the opposing party does not get to know the specific terms of funding such as amount, returns, priority, etc.); and (ii) disclosure is enacted as part of a broader 'holistic' regime that takes up not just the question of whether the identity of the funder is disclosed but also the question of what discovery is permitted regarding that funding. In other words, it does not make sense to us to examine the question of disclosure in isolation and then have lots of discovery battles over what documents can be obtained from the claimholder/funder regarding funding. While there is a substantial body of law that has been built up rejecting such forays, it would be best if there were clear guidance put in place at the same time as disclosure rules are put in place."[511]

Still others believe the answer to the scope of third-party disclosure depends on how you characterize third-party funders.[512] Some analogize third-party funding

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[508] *See* Greenberg, *supra* note 2 at 155 (discussing how the decision to disclose raises whether attorney-client privilege will be waived or preserved).

[509] Greenberg, *supra* note 2.

[510] Telephone interview with Boaz Weinstein, Co-founder and Partner, Lake Whillans Litig. Fin. (Nov. 15, 2019) [hereinafter "Phone conversation"] (notes of the conversation on file with author)).

[511] Email from Boaz Weinstein, Co-founder and Partner, Lake Whillans Litig. Fin., to author, (Nov. 26, 2019) (on file with author).

[512] *See, e.g.*, Victoria Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405 (2017); Charles Silver, *Litigation Funding Versus Liability Insurance: What's the Difference?*, 63

to insurance.[513] According to such thinkers, third-party funding, as with insurance, should be obligated to disclose the complete terms of their agreement[514] and be available to fully participate in settlement procedures such as mediation.[515] Amidst all these seemingly divergent opinions regarding disclosure, there appears growing consensus that if there is to be any disclosure, there should be disclosure just to check for any conflicts. Still, the major ADR providers have yet to take this first step. The next section shows how the in-person participation of a TPF in mediation not only advances mediation's ethics and purpose, but brings enhanced settlement skill to the mediation table.

SECTION THREE

When third-party funders participate in the in-person mediation, they bring to the mediation table their settlement acumen, a "value-added" benefit that helps mediation parties develop a more rational and realistic approach to settlement. Third-party funders are, in fact, "super lawyers" whose business success depends on accurately assessing the merits of a case seeking funding.[516] To date, however, third-party funders have not regularly participated in domestic in-person mediations, at a cost to funded-mediation participants. *Don't ask, don't tell.*

For some funded mediation participants and their funders, the discussion of having third-party funders actually attend the in-person mediation evokes the long-term negotiating tension between creating value and distributing value, the decision to share information or withhold information.[517] Because of this tension,

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DEPAUL L. REV. 617 (2014); Michelle Boardman, *Insurers Defend and Third Parties Fund: A Comparison of Litigation Participation*, 8 J.L. ECON. & POL'Y 673 (2012).

[513] *See, e.g.*, Silver, *supra* note 39. *But see* Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014) (distinguishing litigation funding from insurance).

[514] *See* Silver, *supra* note 39.

[515] Bunim, *supra* note 29.

[516] *See, e.g.*, Caroline Simson, *3rd-Party Funding Now a Top Alternative Choice for Lawyers*, LAW360 (May 16, 2019, 7:24 PM), https://www.law360.com/articles/1160547/3rd-party-funding-now-a-top-alternative-choice-for-lawyers; Sara Randazzo, *The New Hot Law Job: Litigation Finance,* WALL ST. J. (July 5, 2018), https://www.wsj.com/articles/the-new-hot-law-job-litigation-finance-1530783000

[517] ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 17 (2000) (Negotiators often remain blinded by the fear that if they disclose information, they will be exploited by the other side. This fear obstructs negotiators to appreciate how disclosure may create value in the negotiation.).

funded mediation participants and their funders may be apprehensive about disclosing that they are receiving third-party funding, in fear that the other participant will exploit that information to the other participant's advantage. Although savvy negotiators have conquered this fear by applying the principle of reciprocity in negotiations to test the goodwill of their negotiating counterpart and minimize the risk of sharing too much information,[518] some funded parties remain unconvinced. Moreover, even though some scholars have extolled the benefits of having third-party funders participate in mediation, some have discounted this sage as just an academic's verbal pontification.[519]

However, the real-life mediation participation experience of a respected third-party funder like Boaz Weinstein may help ameliorate that concern. Mr. Weinstein has opted to participate in mediation in those cases where the funded party requested his participation, and he thought his presence in the role of funder would be helpful.[520] "We are in favor of settlement and negotiated resolutions."[521] In those mediations in which he participated, Mr. Weinstein brought a "value-add" to the process.[522] Mr. Weinstein noted that as a mediation participant, third-party funders are rational decision-makers who have experience in settlement.[523] They have a fluency with numbers and understanding of the mediation process that help the parties fashion a realistic settlement. And the presence of the funder provides welcome support to the funded party.[524] Of course, as a mediation participant, Mr. Weinstein signed confidentiality forms so that the cloak of confidentiality was maintained.

Mr. Weinstein posits that, since a small minority of cases that apply for funding are actually funded, the mere disclosure that a party is funded signals that a case has merit.[525] Further, should the case not settle, the funded party has the capacity

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[518] ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 17 (2007).

[519] This author has received this concern in her presentations about the benefits of third-party disclosure.

[520] Phone conversation, *supra* note 37.

[521] Phone conversation, *supra* note 37.

[522] Phone conversation, *supra* note 37.

[523] Phone conversation, *supra* note 37.

[524] Phone conversation, *supra* note 37.

[525] Phone conversation, *supra* note 37.; Greenberg, *supra* note 2.

to follow through on the claim.[526] Mr. Weinstein recounted how it wasn't until one of his funded parties disclosed in mediation that he was funded, that the funded party's litigation claim was taken seriously.[527] The other party had erroneously thought that the plaintiff did not have the economic muscle to follow through on his claim, and this disclosure "changed the tenor" of the mediation.[528]

While further research is required to determine the true impact of TPF disclosure on parties' behavior, intuition and anecdotal evidence suggest that the disclosure and even direct participation of TPFs in mediation may bring substantial "value added" to settlement discussions. Hopefully, these contributions will help shape realistic and durable mediated agreements for parties

CONCLUSION

This is a renewed call to action for domestic ADR providers, mediators, attorneys who represent funded parties in mediation, and third-party funders themselves to reconsider the value of third-party disclosure in mediation and to take affirmative steps to promote TPF disclosure. The ethics, purpose, and practice of mediation require TPF disclosure in mediation. Moreover, the "value added" by third-party funders' participation in mediation optimizes the likelihood of realistic and durable settlements. *Please ask, please tell.*

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[526] Phone conversation, *supra* note 37.

[527] Phone conversation, *supra* note 37.

[528] Phone conversation, *supra* note 37.

Disclosure of Third-Party Funding in International Arbitration

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INTRODUCTION TO THIRD-PARTY FUNDING

Third-party funding has evolved into a ubiquitous "feature of modern litigation" that in some jurisdictions is "an accepted and judicially sanctioned activity perceived to be in the public interest."[529] Similarly, third-party funding has become even more prevalent in international arbitration, particularly considering the high dollar amount of most arbitral awards. In addition, several major arbitration seats have officially embraced third-party funding in international arbitration through legislation or court opinions, including Australia, England, and Wales, most of the states in the United States, Germany, the Netherlands, several provinces in Canada, Singapore, Hong Kong, South Africa, and Nigeria (indirectly).[530] Furthermore, there are many other jurisdictions where third-party funding may be happening, but no official governmental response has yet ensued.

This article proceeds as follows. The remainder of this introduction defines third-party funding, describes basic third-party funding transaction structures, and outlines the major debates surrounding the existence of third-party funding in international arbitration. Next, this article outlines the reasons and scope for disclosure and describes rules and guidelines for third-party funding as articulated by institutions, arbitral tribunals, domestic courts, treaties, and domestic legislation. This article then addresses third-party funders as custodians of confidential information and charges them with ensuring the legitimacy of the arbitration process and preventing arbitrator conflicts of interest. Finally, this article addresses the rising influence of "outcome-motivated" (or not-for-profit) funders, whose primary focus is something other than making a financial profit from the case.

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[529] Excalibur *Ventures v. Texas Keystone*, [2016] EWCA (Civ) 1144, paras. 1 and 31.

[530] *See generally* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (Wolters Kluwer, 2nd ed., 2017) (identifying laws addressing third-party funding or litigation funding in over 60 countries worldwide, including within the United States chapter all 50 states, the District of Columbia and Puerto Rico); Robert Wheal, Elizabeth Oger-Gross, Tolu Obamuroh & Gustav Lexner, *Third Party Funding in Arbitration: Reforms in Nigeria*, WHITE & CASE (Nov. 27, 2018), https://www.whitecase.com/publications/alert/third-party-funding-arbitration-reforms-nigeria ("The Bill . . . effectively legalizes [sic] TPF in arbitration (but not litigation) in an indirect fashion. It does so by including the costs of obtaining TPF as part of costs of arbitration. In other words, the Bill does not expressly state that TPF will be legal, but the consequence of including it as part of costs of arbitration logically means that the Bill has tacitly permitted TPF.").

DEFINING THIRD-PARTY FUNDING

Before proceeding further, it is crucial to articulate a working definition for the term "third-party funder," while also recognizing that any definition will necessarily be both underinclusive and overinclusive of the universe of entities that may rightly be called "third-party funders."[531] The Task Force on Third-Party Funding in International Arbitration, jointly organized by the International Council for Commercial Arbitration (ICCA) and Queen Mary University of London School of Law, is one of the most recent entities to promulgate a universal definition of third-party funding in its final report published in April 2018.[532] Although the Task Force's Report does not address all aspects, questions, and potential problems involving third-party funding, it does address a wide variety of pertinent issues, including definitions, disclosure, conflicts of interest, evidentiary privileges, costs and security for costs, investment arbitration, and general principles of best practice, as a starting point for a worldwide discussion of these issues. The Task Force dedicates Chapter 3 of its report to discussing the intricacies of the debate surrounding how to properly define third-party funding and provides more than one definition of third-party funding to address different contexts. In fact, the report does not settle upon a single definition of third-party funding, but rather the report articulates multiple nuanced definitions that may apply depending on the circumstances and characteristics of the situation.

This article adopts the following generalized definition articulated in Chapter 3 of the Task Force Report:

The term 'third-party funding' refers to an agreement by an entity that is not a party to the dispute to provide a party, an affiliate of that party or a law firm representing that party,

a) funds or other material support in order to finance part or all of the cost of the proceedings, either individually or as part of a specific range of cases, and

[531] *See* Victoria Anne Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV 861, 866 n.20 (2015) (discussing the difficulty in defining third-party funding and third-party funders).

[532] ICCA QUEEN MARY TASK FORCE REPORT ON THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (International Council for Commercial Arbitration 4th ed. 2018), http://www.arbitration-icca.org/publications/Third-Party-Funding-Report.html [hereinafter TASK FORCE REPORT].

b) such support or financing is either provided in exchange for remuneration or reimbursement that is wholly or partially dependent on the outcome of the dispute, or provided through a grant or in return for a premium payment.[533]

In essence, a "third-party funder" is an entity that is neither a party to the arbitration nor a party's legal counsel that "provides the financial resources to enable costly litigation or arbitration cases to proceed."[534] The third-party funder may provide such financing to a single party directly or to a law firm representing one or more parties in one or more disputes.[535] Unlike a traditional lender, if the funded party loses the case, the funder may not seek repayment from any other assets of the funded party.[536]

Finally, it is important to note that third-party funding is not only used by impecunious parties. There are many corporate entities that use third-party funding as a form of corporate finance to raise money for the company, allocate risk, maintain liquidity, or to smooth out the dispute resolution costs line item on the company's balance sheet, if the company finds itself with a steady stream of disputes.[537] Third-party funding can also take the form of a type of litigation expenses insurance, such as after-the-event or before-the-event insurance, for a financially sound individual or entity that may expect to be sued in the future.[538] Thus, it is not appropriate for an opposing party to apply for security for costs (e.g.,

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[533] TASK FORCE REPORT, *supra* note 4, at 50. Note that the Task Force addressed only international arbitration, so consumer third-party funding was not addressed in the report.
[534] *See* Association of Litigation Funders, *Litigation Finance: What is litigation funding*?, http://associationoflitigationfunders.com/litigation-finance/
[535] *Id*. ("Some members of the Association of Litigation Funders also provide financing to law firms wishing to manage their exposure to conditional fee arrangements in litigation work, and can offer financing against other litigation-related risks, such as a portfolio of litigation claims.").
[536] *Id*. ("In return, if the case is won, the funder receives an agreed share of the proceeds of the claim. If the case is unsuccessful, the funder loses its money, and nothing is owed by the litigant.").
[537] *See* Sherina Petit, James Rogers & Cara Dowling, *Third-Party Funding in Arbitration - the Funders' Perspective: A Q&A with Woodsford Litigation Funding, Harbour Litigation Founding and Burford Capital*, NORTON ROSE FULBRIGHT INT'L ARB. REP., no. 7, Sept. 2016, at 3 (on file with author).
[538] *See generally* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (Wolters Kluwer, 2nd ed., 2017) (explaining the use of after-the-event and before-the-event insurance in multiple jurisdictions).

posting a bond or letter of credit to cover any potential costs award against the losing party) simply because the opposing side has a third-party funder, unless there is additional evidence indicating that the funded party is also impecunious. This principle was articulated by the tribunals in the *RSM v. Saint Lucia*, *EuroGas v. Slovak Republic*, and *South American Silver v. Bolivia* cases, discussed later in this article.

The menu of possible third-party funding arrangements is complex, innovative, and ever-changing, so there are undoubtedly third-party funding arrangements not covered by the aforementioned definition.[539] Nevertheless, the definition from the Task Force Report, reproduced above, provides a reasonable, well-defined platform from which to describe how disclosure of third-party funding international arbitration operates.

THIRD-PARTY FUNDING TRANSACTION STRUCTURES

There are a seemingly endless number of structures and types of third-party funding, and the industry is devising new financial products at a rapid pace. Traditional (at this point, almost classic) third-party funding is structured as an investment in the costs of international arbitration that the funded party must repay to the funder plus some calculated amount of profit only if the funded party wins the case.[540] Most third-party funders, however, have created and deployed innovative, new financial products beyond this traditional structure. This article addresses third-party funding structures that fall roughly into three major categories. First, there are third-party funding structures in which the funder

[539] For example, in defense-side funding, the respondent typically does not recover any funds from the arbitration, unless the respondent lodges a successful counterclaim or is awarded costs against the claimant. *See* Victoria Anne Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 CARDOZO L. REV. 861, 876, 892, 894-895 (2015). Defense-side funding, however, is not nearly as common in international arbitration as claim-side funding, so this article focuses more on the role of third-party funders in claim-side funding of international arbitration. For an in-depth analysis of the problems of defining the terms "third-party funder" and "third-party funding," *see generally Chapter 3, in* TASK FORCE REPORT, *supra* note 4. Another example is third-party funding used as a type of corporate finance. *See* Sherina Petit, James Rogers & Cara Dowling, *Third-Party Funding in Arbitration - the Funders' Perspective: A Q&A with Woodsford Litigation Funding, Harbour Litigation Founding and Burford Capital*, NORTON ROSE FULBRIGHT INT'L ARB. REP., no. 7, Sept. 2016, at 3 (on file with author).

[540] *See* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 3 (Wolters Kluwer, 2nd ed., 2017).

remains a separate entity, as in traditional or classic third-party funding. Moreover, funders now regularly package those classic third-party funding investments into portfolios to hedge risk, as well as provide money directly to law firms to finance multiple cases that the law firm is handling.[541]

Second, some newer innovations involve a third-party funder becoming part of the funded party.[542] An example of this arrangement is when the third-party funder takes an equity stake in the funded party, via direct ownership or as a shareholder, in exchange for its investment.[543] Another example is the third-party funder and funded party creating a joint-venture entity or special-purpose entity into which the funded party transfers ownership of the claim; then, the newly created entity that owns the claims becomes the named party to the case.[544]

Third, in the future, this author predicts that third-party funders will increasingly take equity stakes in law firms or build their own law firms from inception.[545] There are already a few examples of this phenomenon in existence.[546] This will likely become increasingly common in the coming years as the legal profession becomes more corporatized and gains greater access to traditional methods of corporate finance that have existed for decades in the private sector.[547]

There are also other types of financial arrangements that could be classified as third-party funding. For example, non-profit funding involves an entity or individual funding a case (usually only a single case or party) for a reason other than profit, such as to bring about a specific outcome in the case or to support a particular industry, regulation, or political goal.[548] There are also types of before-

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[541] *See* Victoria Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in Investment Arbitration*, CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 33 (Christina L. Beharry ed., 2018), https://brill.com/abstract/book/edcoll/9789004357792/BP000010.xml (discussing not-for-profit funders)

[542] *See* Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TULANE L. REV. 405, 435-444 (2017) (discussing funder-party collaborations involving creating new corporate or partnership structures).

[543] *Id.*

[544] *Id.*

[545] *Id.* at 444-70 (discussing funder investment in law firms and ownership of law firms).

[546] *Id.*

[547] *Id.* at 408-09, 455 (describing the example of the United Kingdom's Legal Services Act 2007, c. 29 (Eng.) that took effect in 2013 allowing Alternative Business Structures, which enables external non-lawyer investors to hold minority stakes in law firms, and providing the example of one third-party funder, Burford, creating a new law firm under this law).

[548] *See* Victoria Sahani, Mick Smith & Christiane Deniger, *Third-Party Financing in*

the-event, after-the-event, legal expenses, or liability insurance policies — the main form of defense-side third-party funding — as well as defense clubs organized by certain industries, such as the shipowners industry.[549] Many of those types of financing for legal expenses predate the existence of classic third-party funding, even though they share similar characteristics.

In addition to these recognizable structures, the range of bespoke financial products that third-party funders offer — individualized and tailored to a particular client, case, or business need — will continue to morph and expand like a spider's web. The rate of change is such that, by the time this article is in print, there undoubtedly will be new types of third-party funding available that did not exist at the time of this writing.

DEBATING THE EXISTENCE OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

With such rapid expansion and adoption come increasing avenues for debate about the future of third-party funding. When third-party funding was newer, the arguments against its use in international arbitration included funder interference in the attorney-client relationship, waiver of evidentiary privileges for information disclosed to the funder, funders stirring up frivolous or dubious claims, funder influence over client settlement decisions, undisclosed conflicts of interest that funder participation may create, and lack of transparency, among other issues.[550] In recent years, there has been a widespread acceptance of third-party funding in international *commercial* arbitration — even among its harshest critics — albeit with heightened calls for disclosure of the existence and identity of funders in international arbitration, a position ultimately adopted by the final report of the aforementioned Task Force.[551] The argument that has prevailed in international commercial arbitration is that, essentially, claimants are entitled to

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Investment Arbitration, CONTEMPORARY AND EMERGING ISSUES ON THE LAW OF DAMAGES AND VALUATION IN INTERNATIONAL INVESTMENT ARBITRATION 48-50 (Christina L. Beharry ed., 2018), https://brill.com/abstract/book/edcoll/9789004357792/BP000010.xml (discussing not-for-profit funders).

549 *See* TASK FORCE REPORT, *supra* note 4, at 6, 9-10 (discussing traditional insurance that pays legal expenses and maritime arbitration defense clubs).

550 *See, e.g.,* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION 15-16 (Wolters Kluwer, 2nd ed., 2017).

551 *See* TASK FORCE REPORT, *supra* note 4, at 81.

the same access to justice regarding financial assistance with their arbitrations that respondents enjoy through their insurance companies and parent corporations. Thus, the future of third-party funding in international *commercial* arbitration appears to be relatively settled in favor of the continuation of the industry, with added disclosure requirements and other rules and regulations that will likely be adopted in future years.[552]

The current battleground regarding the propriety of third-party funding is in the realm of *investment* arbitration. Funding investment treaty arbitration is viewed as a fundamentally different proposition than funding commercial arbitration. In investment arbitration, the rigidity of the parties' roles may create lopsided funding incentives. When the investor and host state sign a separate contract, such as a concession agreement, they each have an equal opportunity to bring claims against each other according to their contractual dispute resolution method, which may be arbitration. Third-party funding in that context would be similar to international commercial arbitration.

When there is no pre-dispute arbitration clause or contract between the investor and the host state, however, the consent to arbitrate must be found in the bilateral or multilateral investment treaty ratified by the host state and the investor's home state. The investor is not a party to the treaty, so the investor's "written" consent is evidenced by the investor filing a claim under Articles 25 and 28 of the ICSID Convention or under the provisions of the investment treaty. The state is always the respondent, and it is extremely rare for investment treaties to provide express consent for host states to bring counterclaims, at least partly because the arbitral tribunal's jurisdiction over such counterclaims is dubious under traditional investment treaties.[553] Thus, third-party funders typically fund only investor-

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[552] *See, e.g.*, Tom Jones, *Kinnear Sheds Light on ICSID Rules Amendment*, GLOB. ARB, REV., (Apr. 6, 2018), https://globalarbitrationreview.com/article/1167749/kinnear-sheds-light-on-icsid-rules-amendment

[553] There is, however, at least one recent treaty that may provide jurisdiction for a host state to bring a claim against an investor in domestic litigation. *See* Tarcisio Gazzini, *The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties*, INVESTMENT TREATY NEWS (Sept. 26, 2017), https://www.iisd.org/itn/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/ (describing the innovations in this treaty, including putting obligations on investors to comply with the laws of the host state and providing a state the opportunity to sue an investor in the courts of its home country for violations of the treaty obligations). While this treaty does not allow for a state to bring an investment arbitration claim against an investor, the treaty does provide a judicial route through which the state may be

claimants in investment arbitrations brought exclusively under a treaty; respondent-side funding in investment treaty-based arbitrations is nearly nonexistent.[554] Because the funder is always paid from the funds of the respondent in any type of dispute resolution, then the funder is always paid with funds from the respondent state in investment arbitration. In essence, states are the sole payers in a system of third-party funding for investment treaty arbitration in which they are unable to enjoy a benefit equivalent to investors' benefits. Fundamentally, this is the opposite side of the access to justice issue that arises in commercial arbitration — this is access to justice for respondents rather than claimants — which highlights one of the underlying structural problems in investment treaty arbitration.[555]

This structural problem will likely receive at least a partial answer in the future with respect to third-party funding. The International Centre for the Settlement of Investment Disputes (ICSID) has added provisions regarding the disclosure of third-party funding in Rule 14 of its revised Rules of Arbitration and will include provisions requiring the disclosure of third-party funding at the outset of the case.[556] In addition, at least four investment treaties, described later in this article, have already included provisions requiring disclosure of third-party funding.

Finally, third-party funding was discussed during the 34th session of the UNCITRAL Working Group, and it is possible that Working Group III will address third-party funding in its future deliberations.[557] In sum, it appears that, for now, the resounding call for mandatory disclosure in both commercial and investment arbitration is the international arbitration community's way of gleaning more

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compensated for any wrongs the investor commits under the treaty. In addition, the treaty is silent regarding whether states may bring counterclaims against investors in investment treaty arbitration, which may open the door to jurisdiction over such claims. The effects of these provisions will be tested if a case is eventually commenced under the treaty.

[554] There may be at least one notable exception. Narghis Torres, Co-Founder and CEO of LexFinance (http://www.lex-finance.com/), publicly stated, at an event titled "Third-Party Funding in Investor-State Dispute Settlement" hosted by Columbia Law School on October 17, 2017, that his firm regularly finances respondent states in investment arbitration, https://www.youtube.com/watch?v=ZPCtpZfPigw

[555] For a discussion of access to justice in international arbitration, *see generally* Victoria Shannon Sahani, *A Thought-Experiment Regarding Access to Justice in International Arbitration*, ICCA CONGRESS SERIES, no. 20, (2019).

[556] *See* International Centre for Settlement of Investment Disputes (ICSID) Secretariat, *Working Draft #3: Proposals for Amendment of the ICSID Rules*, at 41, 91 (Aug. 2019).

[557] *See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), Rep. of Working Group III on the Work of Its Thirty-Fifth Session, U.N. Doc. A/CN.9/92935, para. 13 (2018).

information about the third-party funding industry to determine whether the industry should be further regulated at the international level.

PARAMETERS FOR DISCLOSURE OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

The major individuals and entities involved in international arbitration — parties, attorneys, arbitrators, law firms, arbitral institutions, and courts — are *publicly* invested in the success of the international arbitration system. Until recently, third-party funders were *privately* — some might even say *secretly* — invested in the international arbitration system. Over the past few years, however, calls for disclosure of the existence of third-party funding and the identities of third-party funders have led arbitral tribunals, arbitral institutions, and state governments to begin to craft and implement various disclosure rules for third-party funding. The following section provides a survey of those disclosure rules as they exist at the time of this writing.

REASONS FOR DISCLOSURE

Arbitral tribunals typically find out about third-party funding through either voluntary or mandated disclosure. There are various motivations for disclosure, types of information disclosed, and recipients of the information disclosed. With respect to motivations for disclosure, theoretically, there are four major categories of motivation for this disclosure; three are required, while one is discretionary. First, a tribunal may require a party to disclose its third-party funding at the request of the opposing side in conjunction with the opposing side's application for costs or security for costs, which is tied to the implementation of a "loser pays" rule, commonly known as the "English rule," on cost allocation at the conclusion of an international arbitration.[558]

Second, a tribunal may require such disclosure so that the arbitrators can check for financial, professional, or personal conflicts of interest related to the third-party funding.[559] In such cases, arbitral rules or guidelines may require disclosure

[558] *See, e.g.*, Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkm., ICSID Case No ARB/12/6, Procedural Order No. 3 (June 12, 2015); Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkm., ICSID Case No ARB/10/1.

[559] *See* IBA Conflict Guidelines, General Standard 6(b), 7(a), the Orange List (section 3.4),

by arbitrators, who in turn may require disclosure from the parties in the case in order to determine what the arbitrators need to disclose.[560] Such disclosure obligations may also arise under rules of professional ethics and professional responsibility for lawyers and arbitrators under national law or arbitral rules. Furthermore, some investment treaties require funded parties to disclose their funding in order to utilize any dispute settlement mechanisms detailed in the treaty.[561] Third, many publicly held corporations are required to disclose any "material transactions" under the laws of their home jurisdictions.[562] Depending on the nature of the funding arrangement, a publicly held corporation entering into a funding arrangement may meet the definition of a "material transaction" that would require disclosure.[563] Fourth, parties may voluntarily choose to disclose their own funding arrangements to the opposing side to have a strategic influence on settlement discussions or on the outcome of the case. This type of disclosure is discretionary, and its actual effect on settlements or outcomes is debatable.

SCOPE OF DISCLOSURE

Whether disclosure is ordered by the tribunal or voluntarily achieved, there can be considerable variation regarding what information is disclosed from case to case. The variation could be described as a sliding scale regarding how much or how little information is disclosed. The most basic disclosure would be simply the fact that a funding arrangement exists without further detail. Often the identity and contact information of the funder is disclosed along with the existence of the funding arrangement to assist arbitrators in checking whether a conflict of interest may exist. Less often, certain characteristics or terms of the funding agreement

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and the Non-waivable Red List (section 1).

[560] *See* IBA Conflict Guidelines, General Standard 7(a); International Chamber of Commerce (ICC), *Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration*, para. 24, (Oct. 30, 2017), https://iccwbo.org/publication/note-parties-arbitral-tribunals-conduct-arbitration [hereinafter, *ICC Note to Parties and Tribunals*].

[561] *See e.g., Comprehensive Economic and Trade Agreement*, arts. 8.1, 8.26 (Sept. 14, 2016), http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf

[562] Jonas Von Goeler summarizes these obligations as follows: "Importantly, the presence of a third-party funder may need to be disclosed for reasons *not linked to the arbitration proceedings*, namely to comply with public disclosure requirements imposed upon listed companies, and following disputes between the parties to the funding agreement ending up in state courts." *See* JONAS VON GOELER, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE 128 (Wolters Kluwer, 2016) (italics in original).

[563] *Id.*

may be disclosed. This could range from a few key details, such as whether the funder has agreed in advance to pay security for costs, to an outline of the terms of the full agreement. Far more infrequently, part or all of the written funding arrangement may be disclosed pursuant to a tribunal order.[564] This almost never happens voluntarily, unless the funding agreement is the subject matter of the dispute. Finally, the funder's valuation of the case is almost never voluntarily disclosed. Typically, the only way that the funder's valuation would be disclosed is if it is written into the funding arrangement and the full written arrangement is disclosed, which is also rare. Also, the funder's valuation may not be informative from a practical perspective, because such valuations are prepared knowing that they may be produced to the tribunal and the opposing side, and therefore, such valuations may be sanitized or abbreviated to avoid revealing too much information about the funder's decision-making process.

In addition, there are generally three categories of recipients of the disclosed information. The first recipients are usually the immediate participants in the arbitration, such as the tribunal, the opposing parties, and the parties' counsel. Second, the arbitral institution may receive disclosure of the funding arrangement if the funder is paying fees and costs directly to an institution, or to check conflicts of interest, if the institution will be appointing arbitrator(s) directly. Third, a governmental regulatory body may receive disclosure of the third-party funding arrangement, for example, if a publicly held corporation must disclose such an arrangement to regulators or investors as a material transaction.[565]

SOURCES OF AUTHORITY REGARDING DISCLOSURE OF THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION

Institutional Rules and Guidelines

The first guidance on third-party funding in international arbitration was issued in 2014. The 2014 International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) were revised to incorporate provisions to require parties to disclose the existence of third-party funding and

[564] *See infra* notes 586-593 and the accompanying text for a discussion of Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkm., ICSID Case No ARB/12/6, Procedural Order No. 3 (June 12, 2015).
[565] *Id.*

the identity of the funder to the arbitrators, who, in turn, are required to disclose any potential conflicts of interest to the parties and the arbitral institution.[566] Following such disclosure, an arbitrator may be required to decline an appointment or withdraw from a case, if the parties do not waive the conflict or if it is a conflict that cannot be waived.[567] Throughout the text, the IBA Guidelines define a third-party funder according to the attribute that funders "have a direct economic interest in the award."[568] As mentioned in the introduction to this article, the Task Force on Third-Party Funding in International Arbitration took a different approach to defining third-party funding, in part due to the challenges raised by variations in the interpretation of the phrase "direct economic interest" that arose in international arbitration discourse in the years following the issuance of the IBA Guidelines.

In December 2015, the International Chamber of Commerce (ICC) Commission on Arbitration issued a report entitled "Decisions on Costs in International Arbitration" that provided some guidance to arbitrators regarding third-party funding.[569] Notably, the commission provided a different definition of a third-party funder in its report than the definition in the IBA Guidelines: "A third-party funder is an independent party that provides some or all of the funding for the costs of a party to the proceedings (usually the claimant), most commonly in return for an uplift or success fee if successful."[570] The commission then provides the following guidance to tribunals: "Where a tribunal has reason to believe that

[566] *See supra* notes 559-560 and accompanying text.
[567] An example of a potentially unwaivable conflict might be if an attorney is serving as arbitrator in a case where Party A is funded by funder X and the same attorney is simultaneously serving as counsel to Party B in a different case in which Party B is funded by the same funder X. Because funder X is paying the attorney representing Party B in Party B's case, the attorney must avoid even the appearance of bias while serving as an arbitrator in Party A's case in which funder X is also participating. This is likely an unwaivable conflict, although it is not directly mentioned in the IBA guidelines. To be safe, the arbitrator in this hypothetical should withdraw from judging Party A's case. The conflict might be waivable, however, if instead the arbitrator served successively as counsel, *then* arbitrator, rather than simultaneously as *both* counsel and arbitrator in two cases involving funder X.
[568] *See* IBA Conflict Guidelines, General Standard 6(b).
[569] *See* ICC Comm'n on Arb., *Decisions on Costs in International Arbitration - ICC Arbitration and ADR Commission Report*, at 16-17 (Dec. 1, 2015),, http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/Decisions-on-Costs-in-International-Arbitration---ICC-Arbitration-and-ADR-Commission-Report/ [hereinafter *ICC Costs Report*].
[570] *Id.* at 17 n.44.

third-party funding exists, and such funding is likely to impact on the non-funded party's ability to recover costs if successful, the tribunal might consider ordering disclosure of such funding information as is necessary to ascertain that the process remains effective and fair for both parties."[571] The report also provides a worldwide survey of laws regarding disclosure of third-party funding[572] and a worldwide survey of cost provisions in all international arbitration rules.[573] In addition, the report recommends that an arbitrator consider discussing with the parties, among other things, "sensitive matters, such as whether there is third-party funding and any implications it may have for the allocation of costs, whether the identity of the third-party funder (which could be relevant to possible conflicts of interest) should be disclosed, and whether contingency, conditional or success fee arrangements have been agreed, and how the parties expect these matters to be considered in relation to the assessment of costs."[574]

Surprisingly, the International Chamber of Commerce (ICC) Court of Arbitration seems to have adopted a definition of third-party funder that more closely resembles the IBA Guidelines than the ICC Commission's Report. In its *Note to parties and arbitral tribunals on the conduct of the arbitration under the ICC Rules of Arbitration* (30 Oct. 2017 version), the ICC Court gives arbitrators the following guidance in Paragraph 24: "Relationships between arbitrators, as well as relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award, should also be considered in the circumstances of each case."[575]

The Singapore International Arbitration Centre (SIAC) was, arguably, the first arbitral institution in the world to adopt an explicit rule on third-party funding, which took effect on January 1, 2017.[576] Rule 24(l) gives an arbitral tribunal in an investment arbitration the power to order disclosure of third-party funding, including the details of the arrangement itself.[577] Similarly, the China International Economic and Trade Arbitration Commission (CIETAC) incorporated Article 27 into the CIETAC Investment Arbitration Rules, which took

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[571] *Id*. at 17, para. 89.
[572] *Id*. at 45-46.
[573] *Id*. at 49-55 (Appendix C: Relevant Provisions of Arbitration Rules).
[574] *Id*. at 7, para. 32
[575] *See ICC Note to Parties and Tribunals*, *supra* note 32, para. 24.
[576] *See* SIAC Investment Rules, r. 24(1).
[577] *Id*.

effect on October 1, 2017, requiring disclosure of third-party funding and allowing arbitrators to order disclosure of the third-party funding agreement and to issue cost orders relating to third-party funding.[578]

In its Working Paper #3, published in August 2019, the International Centre for Settlement of Investment Disputes (ICSID) has incorporated a new draft of Rule 14 in its arbitration rules and Rule 12 in its conciliation rules requiring disclosure of third-party funding to the ICSID Secretary-General in order to check for arbitrator or conciliator conflicts of interest.[579] The rule also states that the ICSID Secretary-General will transmit the notice to the parties and the arbitrators in order to assist in checking for conflicts of interest. ICSID is expected to finalize its rule revisions by early 2020.

ARBITRAL TRIBUNALS

Many tribunals have articulated principles regarding disclosure of third-party funding in international arbitration such that it would be impossible to describe every decision in this brief article. Instead, this article provides highlights regarding trends in how tribunals have addressed third-party funding in international arbitration. Most of the decisions discussed in this article are decisions in investment arbitration cases, due to the public nature of many investment arbitration awards and procedural orders. In contrast, most commercial arbitration awards remain private and, therefore, are unable to be included in this article's sampling.

In some cases, the funded party has voluntarily disclosed funding without any adverse consequences, such as in the UNCITRAL investment arbitration case *Oxus Gold plc v Republic of Uzbekistan*[580] in which the tribunal stated that the funding has no impact on the arbitral proceeding.[581] Sometimes, however, voluntary disclosure can be misunderstood by the opposing side.[582] In most cases, however,

[578] *See* CIETAC Arbitration Rules, art. 27.
[579] *See* International Centre for Settlement of Investment Disputes (ICSID) Secretariat, *Working Draft #3: Proposals for Amendment of the ICSID Rules*, at 41, 91 (Aug. 2019).
[580] *See* Oxus Gold plc v. Republic of Uzb., UN Comm'n on Int'l Trade Law, Final Award (Dec. 17, 2015).
[581] *See id.* para. 127 ("It is undisputed that Claimant is being assisted by a third party funder in this arbitration proceeding. The Arbitral Tribunal has mentioned this fact in its Procedural Order Nos. 6 and 7. However, this fact has no impact on this arbitration proceeding.").
[582] *See* Jonas von Goeler, *Third-Party Funding in International Arbitration and Its Impact*

the arbitral tribunal has ordered disclosure of the identity of the third-party funder and — more rarely — may also order disclosure of the terms of the funding arrangement. For example, a dispute regarding termination of the funding arrangement in the ICSID case *S&T Oil Equipment & Machinery Ltd v Romania* was litigated in the U.S. courts, which required disclosure of the terms funding arrangement in court litigation.[583] As a result of this dispute over the funding arrangement, the funder, Juridica, ceased paying S&T Oil's fees and costs in the ICSID case, and the ICSID tribunal ultimately terminated the proceedings due to this nonpayment.[584] In this case, the funding agreement was in dispute, so disclosure of its terms was appropriate.

In most cases, however, the funding agreement is not in dispute, so disclosure of its terms is not appropriate. For example, in the ICSID case *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, the tribunal ordered the claimant to reveal the identity of its third-party funder for the purposes of checking for arbitrator conflicts of interest, but did not require the claimant to disclose any of the terms of the funding arrangement.[585] In that case, the claimant had previously voluntarily disclosed that it was funded by a Luxembourg-based funder, but the claimant did not disclose the identity of that funder until ordered to do so by the tribunal.

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on Procedure, 127 (citing X v. Y and Z, ICC Case, Procedural Order of 3 August 2012, published in Pinsolle, CAH. ARB. (2013), 399-416) ("In the ICC case *X v. Y and Z*, for example, the claimant transferred a litigation funding agreement to the respondents without further explanation, leading counsel for the respondents to the assumption that '[t]his agreement was sent maybe by mistake'.").

[583] *See* S&T Oil Equipment & Machinery, Ltd, et al v. Juridica Investments Limited, et al, 456 Fed. Appx. 481, 2012 WL 2842, (5th Cir., 5 Jan. 2012) (requiring disclosure of funding arrangement to resolve a dispute between S&T and Juridica regarding termination of the third-party funding provided for the *ICSID case S&T Oil Equipment & Machinery Ltd v. Romania, ICSID* Case No ARB/07/13, Order to Discontinue Proceedings (16 July 2010)); Bernardo M. Cremades Jr., *Third Party Litigation Funding: Investing in Arbitration* (2011) 8 TRANSNATIONAL DISPUTE MANAGEMENT 12–15 (discussing these two S&T cases); Nate Raymond, *Litigation funding gone wrong*, THE AMERICAN LAWYER, (25 Apr. 2011), available at http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202492845664&slreturn=1law.com (discussing the U.S. Fifth Circuit case, *S&T v. Juridica*).

[584] *See supra* note 562.

[585] *See* EuroGas, Inc. and Belmont Resources, Inc. v. Slovak Republic, ICSID Case No ARB/14/14, Transcript of the First Session and Hearing on Provisional Measures, 145 (Mar. 17, 2015) ("We think that the Claimants should disclose the identity of the third-party funder, and that third-party funder will have the normal obligations of confidentiality.").

Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkmenistan, an ICSID case, provides a rare example of a tribunal ordering a claimant to disclose both the identity of the funder and the terms of the funding arrangement.[586] In doing so, the tribunal invoked its "inherent powers to make orders of the nature requested where necessary to preserve the rights of the parties and the integrity of the process." In April 2014, Turkmenistan had requested the tribunal to order the claimant to disclose whether it had engaged the services of a third-party funder, as well as the terms of that arrangement.[587] In Procedural Order No. 2, the tribunal refused the request and listed several reasons why a tribunal could justifiably order disclosure of third-party funding, such as "avoid[ing] a conflict of interest," "transparency," "identify[ing] the true party to the case," cost allocation, and protecting confidential information.[588]

One year later, Turkmenistan renewed its request for such disclosure to ensure that there were no conflicts of interests with the arbitrators or counsel in the case and to check whether the claimants were "still the actual owners of the claims in this arbitration."[589] In order to bolster its renewed request, Turkmenistan also cited the newly enacted General Standard 7(a) and the Explanation to General Standard 7(a) of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, which took effect in October 2014.[590] Turkmenistan also stated that it was considering applying for security for costs in the case due to the presence of the third-party funder.[591]

In Procedural Order No. 3, the tribunal decided to grant Turkmenistan's renewed request in order to "ensur[e] the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder" and because the claimant did not pay an order for costs in another related case.[592] It is important to note that the tribunal did not specify in its

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[586] *See* Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkm., ICSID Case No. ARB/12/6, Procedural Order No. 3 (June 12, 2015).
[587] *Id*. para. 1.
[588] Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd. Sti. v. Turkm., ICSID Case No. ARB/12/6, Decision on Jurisdiction, para. 50 (Feb. 13, 2015) (quoting Procedural Order No. 2).
[589] *See* Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v. Turkm., ICSID Case No ARB/12/6, Procedural Order No 3. para. 2 (June 12, 2015).
[590] *Id*. para 2.
[591] *Id*. para 2.
[592] *Id*. paras. 9-12. The other related case in which the claimant had not paid the costs ordered was Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkm., ICSID

procedural order which of the terms of the funding arrangement were required to be disclosed and which could stay confidential.[593] This creates uncertainty regarding whether such disclosure may unfairly disadvantage the disclosing party or unfairly advantage the party receiving the information.

Similarly, in the PCA case *South American Silver v. Bolivia*, Bolivia "request[ed] the Tribunal to order the Claimant to 'disclose the identity of the funder of this arbitration, as well as the terms of the funding agreement signed with him.'"[594] As in the *Muhammet Cap* case, it would appear that the parent company of the claimant had earlier voluntarily disclosed the existence of the third-party funding, but not the identity of the funder or the terms of the agreement.[595] Like Turkmenistan, Bolivia argued that it was seeking this disclosure and security for costs due to the economic difficulties of the claimant coupled with the existence of third-party funding.[596] Bolivia also cited the 2014 IBA Guidelines provision "that third-party funders should be equated with the funded party to verify the existence of conflict of interests, and that the funded party is obliged to disclose any relationship that exists between her (including third-party funders) and the arbitrators."[597] South American Silver (SAS) in its reply to Bolivia's request agreed to disclose the name of its funder but noted that "the terms of SAS's funding agreement are irrelevant to the issues in dispute in this arbitration and that the terms of that agreement are confidential, commercially sensitive, and that SAS and the funder would incur prejudice if the Tribunal ordered SAS to disclose the terms of the funding agreement."[598] With respect to Bolivia's application for security for costs, the tribunal adopted the standard articulated by the majority of the tribunal in *RSM v. Saint Lucia* and *EuroGas v. Slovak Republic* that the "the mere existence of a third-party funder is not an exceptional situation justifying security for costs."[599] In the end, the tribunal decided to order disclosure of the

Case No. ARB/10/1.

[593] *See* Jean-Christophe Honlet, *Recent Decisions on Third-Party Funding in Investment Arbitration*, 30 ICSID REV., no. 3, 2015, at 699-712.

[594] South American Silver Ltd. v. Plurinational State of Bol., PCA Case No. 2013-15, Procedural Order No. 10, para. 13 (Jan. 11, 2016).

[595] *Id.* para. 25.

[596] *Id.* para. 25.

[597] *Id.* para. 29.

[598] South American Silver Ltd. v. Plurinational State of Bol., PCA Case No. 2013-15, Claimant Opposition to Respondent Request for Cautio Judicatum Solvi and Disclosure of Information, paras. 38, 40 (Dec. 14, 2015).

[599] *Id.* para. 74 (citing EuroGas, Inc. & Belmont Resources, Inc. v. Slovak Republic, ICSID

name of the funder "for purposes of transparency, and given the position of the Parties" but determined that there was no basis to order disclosure of the terms of the funding arrangement.[600]

Domestic Courts

In terms of relevant domestic court disclosure standards, the courts of the United Kingdom have experienced an increase in cases related to the disclosure of third-party funding in domestic litigation as well as international arbitration. Specifically, with respect to disclosure of third-party funding in domestic litigation relating to an international dispute, the English High Court in *Arroyo & Ors v. BP Exploration Co (Colombia) Ltd.* took the view that parties with funding arrangements…are entitled to be treated in the same way as other parties to litigation…. All that the Existence of ATE [after-the-event insurance] arrangements adds to the case is that it gives these Claimants access to a fund… which they would otherwise not have. But there is no more reason for the Claimants to give disclosure of the details of their insurance fund in an ATE case than there would be for them to give disclosure of the funds in their savings accounts, or the funds available from non-ATE insurers.[601]

Thus, it appears that the English High Court applied the general rule that a party is not required to disclose its funding sources and declined to create an exception for third-party funding arrangements, such as after-the-event insurance (ATE).

United States courts have not yet had the opportunity to address third-party funding in an international arbitration, although there are numerous examples of domestic courts addressing litigation funding in purely domestic cases.[602]

Treaties

At the time of this writing, it appears that only one ratified treaty addresses disclosure of third-party funding. The Comprehensive Economic and Trade

Case No. ARB/14/14, Procedural Order No. 3 – Decision on Requests for Provisional Measures, para. 123 (June 23, 2015).

[600] *Id*. paras. 79, 80, 84.

[601] Arroyo & Ors v. BP Exploration Co. (Colombia) [2010] EWHC (QB) Case No. HQ08X00328, [48], [52].

[602] *See* LISA BENCH NIEUWVELD & VICTORIA SHANNON SAHANI, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION (Wolters Kluwer, 2nd ed., 2017) (presenting a 50-state survey of third-party funding laws in the United States).

Agreement (CETA), ratified by Canada and the European Union, contains provisions defining third-party funding and requiring that the funded party disclose to tribunal and the opposing party the name and address of the third-party funder at the time of the submission of the claim or at the time the funding agreement is concluded, whichever is sooner.[603] With respect to proposed treaties, a similar provision appears in the EU-Singapore Investment Protection Agreement, which has not yet been ratified.[604] In addition, the European Commission (EC) has proposed including provisions nearly identical to the CETA provisions in the Transatlantic Trade and Investment Partnership (T-TIP), which has not yet been concluded.[605] In addition, the current draft of the EU-Vietnam Investment Protection Agreement, Ch. 8, Ch. II, Sec. 3, Art. 2, contains a similar definition of third-party funding as "any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant."[606] Art. 11 provides for a similar disclosure requirement as CETA and the EC's proposed T-TIP provisions, except it also adds a required disclosure regarding the "nature of the funding arrangement."[607] It also requires that "the Tribunal shall take into account whether there is third-party funding" when making decisions regarding costs and security for costs.[608] The text of the EU-Vietnam Free Trade Agreement was published after the negotiations concluded on 1 February 2016, but the treaty has not yet been ratified.[609]

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[603] *See Comprehensive Economic and Trade Agreement*, arts. 8.1, 8.26 (Sept. 14, 2016), http://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf

[604] *See EU-Singapore Investment Protection Agreement*, art. 3.8, https://eur-lex.europa.eu/resource.html?uri=cellar:55d54e18-42e0-11e8-b5fe-01aa75ed71a1.0002.02/DOC_2&format=PDF#page=29

[605] *See* European Comm'n, Draft, *Chapter II*, *in Transatlantic Trade and Investment Partnership*, arts. 1, 8, http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf

[606] *See EU-Vietnam Investment Protection Agreement*, ch. 8, ch. II, § 3, art 2, https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157394.pdf

[607] *Id.* ch. 8, ch. II, § 3, art. 11.

[608] *Id.*

[609] *See Vietnam*, EUR. COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/vietnam/ ("The legal review of the negotiated text is currently on-going and will be followed by translation into the EU's official languages and Vietnamese. The Commission will then present a proposal to the Council of Ministers for approval of the agreement and ratification by the European Parliament.").

National Legislation

With respect to national statutes, on 10 January 2017, Singapore's parliament passed the Civil Law (Amendment) Bill No. 38/2016 permitting third-party funding in international arbitrations seated in Singapore as well as related court and mediation proceedings.[610] The bill abolishes the torts of champerty and maintenance but preserves the defense that a contract is against public policy or illegal under Singapore law. The bill expressly provides for an exception for third-party funding agreements, expressly stating that such agreements are not contrary to public policy or illegal. Courts will continue to have the power to inquire into the nature of the third-party funding, and future amendments to Singapore's Legal Profession (Professional Conduct) will require lawyers to disclose the existence of their clients' third-party funding arrangements and will prohibit lawyers from accepting commissions or referral fees from third-party funders.

Similarly, on 11 January 2017, in Hong Kong, the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016 was introduced into the Legislative Council for Second Reading.[611]This bill legalized third-party funding in international arbitrations and mediations seated in Hong Kong. Rather than abolishing the torts of maintenance and champerty, the bill instead carves out an exception for third-party funding of arbitration only, but not for domestic litigation. Like Singapore, the bill preserves the defense that a contract is against public policy or illegal under Hong Kong law. Disclosure of the existence of the funding and identity of the funder is required. The Bill also provides that an "authorized body" appointed by the Secretary of Justice will issue a "code of

[610] *See* Civil Law (Amendment) Bill No. 38/2016; *Key Bills Passed in Singapore, as Hong Kong Moves Towards Funding,* GLOB. ARB. REV. (Jan. 11, 2017), http://globalarbitration review.com/article/1079959/key-bills-passed-in-singapore-as-hong-kong-moves-towards-funding; *The Singapore Bills: a Detailed Look,* GLOB. ARB. REV. (Jan. 12, 2017), http://globalarbitrationreview.com/article/1079960/the-singapore-bills-a-detailed-look

[611] *See* Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill (2016), (proposed legislation), http://www.gld.gov.hk/egazette/pdf/20162052/es32016205213.pdf?cid=social_20170106_69214806&adbid=817404762849046528&adbpl=tw&adbpr=190964959%20; Press Release, Department of Justice, The Government of the Hong Kong Special Administrative Region, Third Party Funding of Arbitration: Amendments Proposed for Arbitration Ordinance and Mediation Ordinance (Dec. 28, 2016), https://www.doj.gov.hk/eng/public/pr/20161228_pr2.html; *Key Bills Passed in Singapore, as Hong Kong Moves Towards Funding,* GLOB. ARB. REV. (Jan. 11, 2017), https://globalarbitrationreview.com/article/1079959/key-bills-passed-in-singapore-as-hong-kong-moves-towards-funding

practice," after "consult[ing] the public," for third-party funders operating in Hong Kong, describes some of the provisions that would be included in this code of practice, and provides for a limited enforcement mechanism for "non-compliance with the code of practice." The Hong Kong government published its highly anticipated "Code of Practice of Third Party Funding of Arbitration" on 7 December 2018, and the code took effect on February 1, 2019.[612] Among other provisions, the code requires that a funder must remind the funded party of its obligation to disclose information about the funding.

It is likely that requests for disclosure relating to third-party funding arrangements in international commercial and investment arbitration will become more prevalent, and tribunals will be more likely to be granted such requests.[613] However, it is important to balance the need for transparency with the potential for one party to become advantaged or disadvantaged in the arbitration as a direct result of the information disclosed.[614] In addition, the non-funded party may be tempted to present dilatory requests or arguments to the tribunal following the disclosure.[615] Tribunals must be vigilant in order to ensure that the disclosure of third-party funding does not influence the flow or tone of the arbitral proceedings.

Although it did not directly address international arbitration, in January 2017, the United States District Court for the Northern District of California — the district in which many Silicon Valley-related disputes are heard — became the first U.S. federal court to adopt a rule requiring attorneys to disclose whether a third-party funder is involved in class actions.[616] The rule was later reworded to extend to all cases filed in the Northern District of California.[617] In April 2018, the

[612] Press Release, Government of the Hong Kong Special Administrative Region, Code of Practice for Third Party Funding of Arbitration Issued (Dec. 7, 2018), https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm; Code of Practice of Third-Party Funding of Arbitration (Dec. 7, 2018), https://gia.info.gov.hk/general/201812/07/P2018120700601_299064_1_1544169372716.pdf

[613] *See generally* Jean-Christophe Honlet, *Recent decisions on third-party funding in investment arbitration*, 30 ICSID REV., no. 3, 2015, at 699-712.

[614] *Id*.

[615] *Id*.

[616] *See* Ben Hancock, *Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions*, RECORDER, (Jan. 23, 2017, 10:07 PM), http://www.therecorder.com/home/id=1202777487488/Northern-District-First-in-Nation-Mandates-Disclosure-of-ThirdParty-Funding-in-Class-Actions

[617] *See* N.D. Cal. Civ. Ct. R. 3-15, https://www.cand.uscourts.gov/localrules/civil

State of Wisconsin became the first state (rather than a single court) to pass legislation that requires disclosure of third-party funding in all cases in Wisconsin courts.[618] Other states will likely follow suit. These examples chart a new path toward greater disclosure of the participation of third-party funders in domestic litigation, which other courts or arbitral institutions may choose to follow in the future.

DISCLOSURE-RELATED ROLES FOR THIRD-PARTY FUNDERS IN INTERNATIONAL ARBITRATION

Third-party funders serve several distinct roles in international arbitration that affect disclosure requirements under the applicable sources of authority, discussed earlier in this article. Those roles include serving as custodians of confidential and privileged information; preventing arbitrator conflicts of interest, thereby ensuring the legitimacy of the international arbitration system; and investing in claims for motivations other than profit-making.

NONDISCLOSURE: FUNDERS AS CUSTODIANS OF CONFIDENTIAL AND PRIVILEGED INFORMATION

Third-party funders receive confidential and privileged information about the funded party's case and are involved in maintaining the preexisting regime of non-disclosure of such confidential and privileged information. In this way, third-party funders could be said to be custodians of confidential and privileged information during the arbitration proceedings. Funders receive information from parties or law firms that they choose to fund, and those entities trust that the funder will maintain the secrecy of that information.[619] Funders also receive key information about the dispute-resolution system (both litigation and arbitration) and about particular cases from the parties or law firms that seek their services but whom they choose *not* to finance.[620] Funders ask potential clients to share a lot of

[618] *See* WIS. STAT. § 804.01(2) (2018); John Freund, *Wisconsin Becomes First State to Require Disclosure of Third Party Legal Funding*, LITIG. FIN. J. (Apr. 4, 2018) (on file with author).
[619] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 118.
[620] *See* Victoria Shannon Sahani, *The Impact of Third-Party Funders on the Parties They Decline to Finance*, KLUWER ARB. BLOG (Jul. 6, 2015), http://kluwerarbitrationblog.com/blog/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/

information about themselves and about their cases in order for the funder to decide whether to fund the party's case. Parties not only may share the merits of the cases with funders, but also they often will share their internal financial data and documents, trade secrets, business practices, governmental communications, and other information that may otherwise be protected by applicable privilege rules in their home jurisdictions.[621] Law firms will most certainly have to share information about their internal finances as well as information about the financial status — and perhaps even the likelihood of winning on the merits — of the cases the law firm is handling in its portfolio of cases.

With respect to individual parties, funders do not accept the vast majority of potential clients that cross their desks; the average acceptance rate for most funders hovers between 5% and 20%, with some funders accepting as few as 1% of the potential clients seeking funding.[622] This means that 80% to 99% of the parties that share information with funders will *not* receive funding from that funder, and those parties are trusting that those funders and their confidentiality agreements will ensure that the information will continue to be confidential and privileged beyond the encounter.[623] The estimated acceptance rate for law firm financing arrangements is unknown, but it is safe to presume that law firms that are declined financing probably have similar expectations and agreements with funders regarding confidentiality and privileges. Due to the large amount of sensitive information shared with funders by funded and non-funded entities alike, third-party funders have in some sense become de facto custodians of confidential information in international arbitration. The world will likely never know truly how much confidential and privileged information they shepherd.

So far, funders have done an exceptional job in maintaining the confidentiality of their clients' information and protecting the evidentiary privileges that their

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[621] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 118.
[622] *See* Victoria Shannon Sahani, *The Impact of Third-Party Funders on the Parties They Decline to Finance*, KLUWER ARB. BLOG (Jul. 6, 2015), http://kluwerarbitrationblog.com/blog/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/; Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 112.
[623] *See* Victoria Shannon Sahani, *The Impact of Third-Party Funders on the Parties They Decline to Finance*, KLUWER ARB. BLOG (Jul. 6, 2015), http://kluwerarbitrationblog.com/blog/2015/07/06/the-impact-of-third-party-funders-on-the-parties-they-decline-to-finance/; Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014).

clients may hold. This author has yet to hear of an unintended leak or disclosure of confidential or privileged information by a third-party funder. To maintain this level of information security, it is a best practice of the industry that third-party funders enter into a confidentiality agreement with the client or law firm at the outset of the financing.[624] Some third-party funders take the extra step of employing a law firm — separate and apart from the law firm representing the party in the case — to review and handle confidential or privileged information in order to help preserve any privileges or other evidentiary protections that may exist. The funder's law firm would interface with the client's law firm (or the client itself, if the client is a law firm); thus, the circle of confidentiality and privilege remains intact. Funders typically only pay the high cost of employing two separate law firms — the client's law firm as well as its own law firm — in cases where the claimed dollar amount is high enough to justify such expensive measures to protect evidentiary privileges or where the information is sensitive enough to justify such expensive measures. As an example, an arbitration involving a patent or trade secret infringement claim typically involves both high dollar amounts and sensitive client information, so employing two law firms may be justified.[625]

A few funders have advisory boards consisting of prominent attorneys and arbitrators to help them choose which cases to fund.[626] In those cases, the advice that the funders are seeking regarding whether the case should be funded relies upon the expertise of those heavily invested in the field of arbitration.[627] The funder must then expand the confidentiality and privilege arrangement to include

[624] *See generally, Chapter 5: Privilege and Professional Secrecy, in* TASK FORCE REPORT, *supra* note 4 (discussing best practices and principles with respect to preserving client confidentiality during a third-party funding arrangement); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711 (N.D. Ill. 2014) (discussing the efficacy of confidentiality agreements between third-party funders and clients in U.S. federal courts); Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 109.
[625] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 118.
[626] *See* Sherina Petit, James Rogers & Cara Dowling, *Third-Party Funding in Arbitration - the Funders' Perspective: A Q&A with Woodsford Litigation Funding, Harbour Litigation Founding and Burford Capital*, NORTON ROSE FULBRIGHT INT'L ARB. REP., no. 7, Sept. 2016, at 11 (on file with author) ("Parties may even benefit from this further analysis of the merits of their case (in addition to that already conducted by their legal advisors) — particularly where funders have seasoned arbitrators on their review boards.") (parentheses in original).
[627] *See, e.g.*, Leo Szolnoki, *Beechey To Advise Third-Party Funder*, GLOB. ARB. REV. (Nov. 5, 2013), http://globalarbitrationreview.com/news/article/32028/.

members of its advisory board, who then become part of the "circle of trust," as a certain famous movie character might say.[628] On the one hand, one could argue that the more people who know a secret, the less of a secret it becomes. On the other hand, given the extent of information-sharing with third-party funders, the information security in the third-party funding industry has thus far been impressively nonporous, which is a credit to third-party funders themselves. No doubt they all have a shared vested interest in maintaining the necessary veil of confidentiality and privileges, or else their business models will undoubtedly start to crumble.

There is a potential dark side to funders having access to this much confidential information, however. It is possible that a funder may use confidential information against a party in a subsequent arbitration, even without necessarily waiving any privileges or violating any confidentiality agreements.[629] While attorney ethics rules prohibit such use, there is no corresponding prohibition on funders themselves.[630] As a best practice, the confidentiality agreement between the funder and the funded party should include a provision prohibiting the funder from using the client's confidential information in any way beyond the funding arrangement itself. In addition, parties seeking funding should enter into a confidentiality agreement with a potential funder before sharing any information with that funder, including such a provision prohibiting the funder from using the client's confidential information in any way, even if no funding relationship ensues.

PROACTIVE DISCLOSURE: PREVENTING ARBITRATOR CONFLICTS OF INTEREST

While some funders may negotiate funding arrangements that allow them to influence or control the strategy or settlement of the funded party,[631] the clear

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[628] The movies MEET THE PARENTS (2000) and MEET THE FOCKERS (2004) contain various references to the "circle of trust," mostly made by Robert DeNiro's character, Jack Byrnes.
[629] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB. INT'L, no. 1, 2017, at 119.
[630] *Id.* (indicating that there is no prohibition on a third-party funder using information to the definition of a former client); *cf.* MODEL RULES OF PROF'L CONDUCT r. 1.9(c)(1) (AM. BAR ASS'N 2016) (prohibiting a lawyer from using a former client's information to the "disadvantage" of that former client).
[631] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB. INT'L, no. 1, 2017, at 115.

majority of funders know that maintaining an arms-length distance from the day-to-day management of the dispute is the best way to avoid conflicts of interest or other procedural indiscretions that may adversely affect the enforceability of the eventual arbitral award. Nevertheless, procedural problems can spawn from the mere revelation that a funder is involved in a case. For example, the mere presence of a funder could potentially create conflicts of interest for arbitrators and counsel.[632] This is particularly true in investment arbitration in which the legitimacy of the process is sometimes challenged by states and outsiders.[633]

The conflict of interest problem is more prevalent in arbitration than in litigation because of the nature of the role of the decision-maker. The "double hat" problem in international arbitration generally — that is, arbitrators serving as counsel and vice versa — can easily create conflicts of interest when funders are financing more than one case involving attorneys or arbitrators from the same law firm or chambers.[634] It is important to note that no arbitration rules impose disclosure obligations directly on third-party funders, even if they discover conflicts of interest during the due diligence process.[635] As mentioned earlier in this article, the existing disclosure rules all put the disclosure obligations on the parties, the arbitrators, and/or the legal counsel in the case; the rules do not require third-party funders to participate directly in disclosure. In contrast, in litigation, judges do not serve as legal counsel or knowingly invest in disputes. In theory, a financial conflict of interest could arise, however, if a judge owns equity in a publicly traded litigation funder, for example, in a retirement account or stock

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632 *See id.* at 116.
633 *See id.* at 115.
634 For an explanation of the double-hat problem, *see* Dennis H. Hranitzky & Eduardo Silva Romero, *The 'Double Hat' Debate in International Arbitration: Should Advocates and Arbitrators Be in Separate Bars?*, N.Y.L.J. (June 14, 2010), https://www.dechert.com/content/dam/dechert%20files/publication/2010/6/the-double-hat-debate-in-international-arbitration/070101031Dechert.pdf) ("It is commonplace in international arbitration, as in most domestic arbitration in the United States, for experienced practitioners who actively represent parties before arbitral tribunals to serve as arbitrators in other cases. Indeed, it is not unusual for an individual to represent a party in an arbitration administered by one of the larger international institutions . . . and at the same time serve as an arbitrator in another matter administered by the same institution. In recent years, this practice has come under fire from practitioners and parties alike, resulting in calls for new rules prohibiting counsel who represent parties in arbitrations from serving as arbitrators in other cases.").
635 Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 117.

portfolio. There have been no examples of this, to this author's knowledge, and in reality, judges are typically overly cautious to avoid creating financial conflicts of interest; therefore, it should be obvious to judges that they should not knowingly invest in litigation funders.

Even if the funder is not directly trying to control or influence the legal representation or the choice of arbitrator, there may be other ways in which the funder's participation may create conflicts of interest or influence the process. For example, funders may affect the timing and terms of settlement.[636] In addition, there has been at least one case involving a question of arbitrator bias in favor of or against a party's use of third-party funding. The claimant in *RSM Production Corporation v. Saint Lucia* challenged arbitrator Dr. Gavin Griffith due to his controversial statements regarding third-party funding in his Assenting Opinion.[637] The claimant's principal grounds for the challenge were as follows:

The description of third-party funders as "mercantile adventurers" and the association with "gambling" and the "gambler's Nirvana: Heads I win and Tails I do not lose" are, in Claimant's view, radical in tone and negative and prejudge the question whether a funded claimant will comply with a costs award. Additionally, Claimant derives from Dr. Griffith's determinations that his alleged bias against the funders extends to Claimant as the funded party as well. Claimant contends that the language used by Dr. Griffith cannot be qualified as a neutral discussion of the issues or a mere rhetorical emphasis.[638]

The other two arbitrators, Prof. Dr. Siegfried H. Elsing (President) and Judge Edward W. Nottingham (Co-arbitrator), rejected the challenge and articulated the following reasoning:

The expressions used by Dr. Griffith in his Assenting Reasons, such as "gambling," "adventurers" and the reference to the "gambler's Nirvana" are strong and figurative metaphors. However, in our view, these expressions primarily serve the purpose of clarifying and emphasizing the point Dr. Griffith purports to make, namely the paramount importance, in his opinion, of third-party funding of a

[636] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB. INT'L, no. 1, 2017, at 115.
[637] *See* RSM Production Corp. v. St. Lucia, ICSID Case No ARB/12/10, Decision on Claimant's Proposal for the Disqualification of Dr. Gavan Griffith QC (Oct. 23, 2014), IIC 662 (2014).
[638] *Id.* ¶ 42.

party in connection with a request for security for costs. We do not regard it to be established that these terms reveal any underlying bias against third-party funders in general or Claimant in particular. The means of expressing a point of view or articulating an argument may vary from one arbitrator to another, and different arbitrators possess varied characteristics, including their habits of drafting decisions and the wording used. As long as such wording does not clearly reveal any preference for either party, it cannot serve as a ground for a challenge.... As we require an objective standard to be met, Claimant needs to establish facts indicating Dr. Griffith's lack of impartiality. However, in this case, the facts presented are that Dr. Griffith issued his Assenting Reasons with the contents as described by Claimant. These facts, however, are as such not sufficient to constitute a lack of impartiality. The underlying arguments, as presented by Dr. Griffith and the wording, in our view, do not cast reasonable doubt upon Dr. Griffith's capacity to issue an independent and impartial judgment in the present arbitration.[639]

While this case is fascinating, this fact scenario is not the norm, because most arbitrators do not express strong opinions regarding third-party funding in their written awards or procedural orders.[640]

Other procedural mechanisms may be triggered by the presence of a funder. For example, the mere existence of funding may lead some opposing parties to file an application for security for costs, which is inappropriate absent additional circumstances suggesting that the party is impecunious independent of the funder.[641] Thus, the funder's participation can influence the assumptions that the opposing party or the arbitrators may have about the financial situation of the funded party. Increasingly, however, many solvent parties are using third-party funding as a risk allocation tool in their business strategy, so arbitrators will

[639] *See Id.* paras. 87, 90.
[640] The most recent public information regarding the status of this underlying merits case is that, on 21 November 2016, RSM applied for annulment of the merits award, which has not been made public. *See* RSM Production Corp. v. St. Lucia, ICSID Case No ARB/12/10, Procedural History (Oct. 23, 2014), IIC 662 (2014).
[641] *See* Alan Redfern & Sam O'Leary, *International Arbitration to Embrace Security for Costs*, 32 ARB. INT'L, no. 3, 2016, at 407-408; Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 115.

usually not agree with a party's argument that a funded party is assumed to be a fiscally challenged party who should be required to post security for costs.[642]

Furthermore, arbitrators do not have the power to make orders directly against third-party funders, because the third-party funders are not signatories to the arbitral agreement.[643] However, most jurisdictions allow courts to exercise jurisdiction over non-parties in certain circumstances — such as issuing a subpoena to a witness — so an arbitral tribunal may consider seeking the assistance of a court if it decides to make an order against a funder. However, the court will likely be reluctant to issue such an order against a funder except in an extreme or unusual circumstance.

It has been suggested that a funder could attempt to fund both sides of a dispute in order to hedge its investment or gain confidential information about the parties for use in a future arbitration.[644] Such a practice would be viewed by the international arbitration community as clearly unethical under customary international law norms — despite the lack of rules on such a practice — and this author is not aware of any example of this occurring in any case. By comparison, attorney ethics rules clearly prohibit attorneys from representing both sides of a dispute.[645]

Finally, as mentioned at the outset, funders have an overarching interest in ensuring the integrity of the procedure and the enforceability of the arbitral award, without which the funder will not be paid. Disclosure rules all help to ensure the integrity of the resulting award in the eyes of the court that might be asked to enforce the award.

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[642] *See* Sherina Petit, James Rogers & Cara Dowling, *Third-Party Funding in Arbitration - the Funders' Perspective: A Q&A with Woodsford Litigation Funding, Harbour Litigation Founding and Burford Capital*, NORTON ROSE FULBRIGHT INT'L ARB. REP., no. 7, Sept. 2016, at 3 (on file with author).
[643] *See* Alan Redfern & Sam O'Leary, *International Arbitration to Embrace Security for Costs*, 32 ARB. INT'L, no. 3, 2016, at 409.
[644] *See* Gary Shaw, *Third-Party Funding in Investment Arbitration: How Non-Disclosure Can Cause Harm for the Sake of Profit*, 33 ARB, INT'L, no. 1, 2017, at 119-20; Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 427 n.206 (2016).
[645] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7(a) (AM. BAR ASS'N 2016). In that respect, disputes are treated very differently than transactions. For example, many jurisdictions allow an attorney to represent parties on opposite sides of a routine transaction, such as the sale of real estate or an uncontested divorce.

PUBLIC DISCLOSURE: THE RISING INFLUENCE OF OUTCOME-MOTIVATED FUNDERS

While the vast majority of funders in international arbitration are for-profit, there are also many funders for which financial profit is not their primary motivation. Other motivations may include regulatory changes, precedent-setting, industry rule-making, or even vengeance. This nascent category of funders may be termed "not-for-profit funders"[646] or "ideological fund[ers]"[647] or outcome-motivated funders.[648] These funders are motivated to bring about a certain outcome in the case or a change in the law, rather than motivated by making a profit. Unlike traditional for-profit funders, outcome-motivated funders are often very keen to make their presence known to the tribunal, the opposing side, and sometimes even the general public or media, in the case, in hopes that the revelation will sway the outcome of the case.

There are many questions about such outcome-motivated funding that remain to be answered. Potential justifications for ordering disclosure of such funders may be similar to the justifications for disclosure of traditional funding, but there are some unique challenges that have yet to be fully uncovered and analyzed. Outcome-motivated funding may become more prevalent for respondents, because a return on investment is not required for this type of funding to be considered successful. For example, the Bloomberg Foundation and its Campaign

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[646] *See*, *e.g.*, Eric De Brabandere & Julia Lepeltak, *Third-Party Funding in International Investment Arbitration*, 27 ICSID REV., no. 2, 2012, at 379-98.

[647] *See, e.g.*, Eugene Kontorovich, Opinion, *Peter Thiel's funding of Hulk Hogan-Gawker litigation should not raise concerns*, WASH. POST, May 26, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/?noredirect=on&utm_term=.ff0b69feadb4 ("Anyone who donates to the ACLU or a Legal Aid fund is basically underwriting third-party litigation. Most recently, private profit-motivated litigation finance has emerged as an industry in its own right, unburdened by any concern over the old common law rules . . . . By current standards, Thiel's funding should raise no eyebrows — unless one also wants to revisit public interest litigation, class actions and contingent fees. Critics of Thiel's role in the Gawker case argue that it is particularly inappropriate because they think he is motivated by "revenge" over the gossip site's earlier publication of stories about his private life. But if the lawsuit is not frivolous, it is hard to see how the motivations of funders are relevant (or discernible). One would not say a civil rights organization could not accept donations from philanthropists angered by a personal experience with discrimination. All Thiel has done is cut out the middleman. Indeed, Thiel's conduct fits into the "public interest" or "ideological" litigation paradigm.").

[648] "Outcome-motivated funders" is a term coined by this author.

for Tobacco-Free Kids provided financial support and technical assistance to the government of Uruguay for its defense against the tobacco company Philip Morris in the ICSID case *Philip Morris v. Uruguay* in which Philip Morris challenged state regulations requiring plain packaging of tobacco products.[649]

In addition, many outcome-motivated funders and the parties they fund are inclined to voluntarily, and even publicly, announce their involvement in the case, perhaps to sway public opinion in their favor or to attract additional funding sources for their cause. For example, Bloomberg Philanthropies and the Bill & Melinda Gates Foundation have partnered together to create the Anti-Tobacco Trade Litigation Fund to help low- and middle-income countries finance their defenses against tobacco companies' claims under investment treaties.[650] Former New York City Mayor Michael Bloomberg also appeared in person at the January 2016 Annual Meeting of the Association of American Law Schools and pledged in his remarks that his foundation would support countries that did not have the financial means to defend against arbitrations brought by tobacco companies like Philip Morris.[651]

Regardless of the term adopted to describe this new category of funders, arbitral tribunals, and institutions, the majority of the disclosure rules summarized in this article incorporate definitions of third-party funding that include disclosure of these types of funders in addition to traditional for-profit funders in international arbitration. Hopefully, we may be able to assess the impact of outcome-motivated funding on international arbitration in the future, once more such cases become public.

[649] *See Historic Win for Global Health: Uruguay Defeats Philip Morris Challenge to Its Strong Tobacco Control Laws*, CAMPAIGN FOR TOBACCO-FREE KIDS (July 8, 2016), http://www.tobaccofreekids.org/press_releases/post/2016_07_08_uruguay; Philip Morris Brand Sàrl, Philip Morris Products SA, and Abal Hermanos SA v. Oriental Republic of Uru., ICSID Case No. ARB/10/7.

[650] *See The Anti-Tobacco Trade Litigation Fund from Bloomberg Philanthropies and the Bill & Melinda Gates Foundation*, CAMPAIGN FOR TOBACCO-FREE KIDS, https://www.global.tobaccofreekids.org/what-we-do/global/legal/trade-litigation-fund; Sabrina Tavernise, *New Global Fund to Help Countries Defend Smoking Laws*, N.Y. TIMES, (Mar. 18, 2015), https://www.nytimes.com/2016/03/19/health/new-global-fund-to-help-countries-defend-smoking-laws.html

[651] *See* Remarks of Michael Bloomberg, Opening Reception, Association of American Law Schools Annual Meeting, 7 Jan. 2016, https://www.aals.org/aals-newsroom/2016-aals-annual-meeting-highlights/

CONCLUSION

As illustrated in this article, disclosure rules relating to third-party funding in international arbitration are an important step toward dispelling widespread misconceptions about third-party funders. Because third-party funders do not directly take part in the international arbitration procedure itself (normally), they are not visible participants in the process. Yet, their behind-the-scenes influence makes them substantial, invisible stakeholders. Some observers take the view that arbitrators, institutions, and opposing parties should not inquire into a party's means to pay the costs of arbitration, which could be termed the "none of your business" approach. Others believe that it would be best for the arbitration system for third-party funders to expressly join the international arbitration community rather than exist on the outskirts or in the shadows. Regardless of where one falls on the spectrum of this debate, the disclosure rules summarized in this article are aimed at helping the international arbitration community improve its collective understanding of the complexities and nuances of third-party funders in international arbitration and ensure the legitimacy of the international arbitration system.

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