# ETHICS: MORE MONEY, MORE PROBLEMS? THE USE OF LITIGATION FINANCE IN COMPLEX LITIGATION

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**More Money, More Problems? The Use of Litigation Finance in Complex Litigation**
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In the recent past, third-party litigation finance ("TPLF") was a resource used only by the occasional personal injury plaintiff. But TPLF has rapidly transformed into an industry with the capacity to affect nearly any party on any civil case. It is thus increasingly important to understand the role and risks of TPLF. To that end, this article chronicles (1) the evolution of TPLF, (2) the prevalence of TPLF, (3) the enforceability of contracts for TPLF, (4) the debate over TPLF, and (5) the ethical and discovery issues implicated by TPLF.

**The Evolution of Third-Party Litigation Finance**

Third-party litigation finance "refers to the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer."[1] TPLF "first emerged as an industry in the United States in the early 1990s, when a handful of small lenders began providing cash advances to plaintiffs involved in contingency fee litigation."[2] "These activities have become increasingly prominent in recent years, leading to significant attention in the legal and popular press, scrutiny by state bar ethics committees, and scholarly commentary."[3]

There are two main types of litigation funding: consumer funding and commercial funding. Consumer funding "typically involve[s] an individual person as the plaintiff, such as in personal injury or divorce proceedings."[4] The plaintiff "may urgently need funds or have another reason that makes contingency-fee arrangements untenable."[5] Consumer funding predates commercial funding, which started in the United States in the mid-2000s.[6]

"Commercial funding arrangements cover business-to-business disputes, class actions, and mass tort litigation."[7] Funded cases involve "areas like intellectual property, antitrust, business contracts, and commercial arbitration."[8] Commercial funders also sometimes finance a portfolio of suits, providing a "law firm[] with a large chunk of money in exchange for returns tied to a pool of cases."[9] Commercial funders tend to be sophisticated "hedge funds, banks, and other financial investors."[10] They conduct "extensive due diligence on individual cases and make sizeable financial investments"[11] in between "5 to 10 percent of the opportunities presented to them."[12]

1 ABA Comm'n on Ethics 20/20, Informational Report to the House of Delegates 1 (Feb. 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.

2 New York City Bar Prof'l Ethics Comm., Formal Opinion 2011-2: Third Party Litigation Funding (June 1, 2011), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2011-2-third-party-litigation-financing.

3 ABA Comm'n on Ethics 20/20, supra note 1, at 1.

4 Jayme Herschkopf, Third-Party Litigation Finance 3, Federal Judicial Center (2017), https://www.fjc.gov/sites/default/files/materials/34/Third-Party_Litigation_Finance.pdf.

5 Id.

6 Id.; Mary Ellen Egan, Other People's Money: Rise of litigation finance companies raises legal and ethical concerns, ABA Journal (Dec. 1, 2018), http://www.abajournal.com/magazine/article/litigation_finance_legal_ethic al_concerns.

7 Herschkopf, supra note 4, at 3.

8 Id. at 1.

9 Egan, supra note 6.

10 Victoria A. Shannon, Harmonizing Third-Party Litigation Funding Regulation, 36 Cardozo L. Rev. 861, 869 (2015).

11 ABA Comm'n on Ethics 20/20, supra note 1, at 6.

12 David Lat, A Peek Inside The Pipeline: How A Litigation Finance Deal Comes Together, Above the Law (Sept. 21, 2018), https://abovethelaw.com/2018/09/a-peek-inside-the-pipeline-how-a-litigation-finance-deal-comes-together/

Funders provide funds to both plaintiffs and defendants. In the former context, funders typically "pay a given amount of money to the plaintiff in exchange for a promise by the plaintiff to pay the [funder] that amount plus an additional amount (sometimes referred to as a 'fee') specified in the event of a positive outcome in the suit."[13] These funds are usually provided on a nonrecourse basis, meaning repayment is required only if the recipient prevails in the suit.[14]

TPLF for defendants is a newer and less common phenomenon.[15] Burford Capital, a large commercial funder whose stock is traded on the London Stock Exchange,[16] explains its funding of defendants as follows: "the litigation finance firm will pay the entire [or a substantial portion of the] cost of defending against a weak claim in exchange for some kind of multiplier or uplift based on predefined success."[17]

**The Prevalence of Third-Party Litigation Finance**

TPLF is currently estimated to be a $9 billion industry.[18] According to a 2019 survey from third-party funder Lake Whillans, 41% of lawyers have firsthand experience with a litigation finance firm and, of those who have used litigation finance, 81% said they would use it again.[19] In a 2018 survey by Burford of lawyers from the United States, the United Kingdom, and Australia, 77% of respondents agreed that litigation finance is growing. More telling, however, is that 72% of respondents who had not yet used litigation financing expected to do so in the future.[20]

A combination of factors is responsible for the growth of TPLF. First, fears about and experience with "worldwide market turmoil" have "inspired hedge funds, banks, and other financial investors to seek investments that are not directly tied to or affect by the volatile and unpredictable financial markets."[21] "As a new asset class, legal claims provide just that."[22] In fact, litigation can increase during a recession, making litigation funds a particularly desirable investment.[23] A second reason for the expansion of TPLF "is the public policy ideal of increasing access to justice for plaintiffs who otherwise could not afford to pursue a meritorious claim individually or through class actions."[24] Third, many "companies [are] seeking a means to pursue a claim or defense against a claim while also maintaining enough cash flow to continue conducting business as usual."[25] TPLF creates this option. And fourth, "companies facing bankruptcy or insolvency [are] seeking funding to pursue claims that may generate cash flow for their business or mitigate the risk of losing a 'bet-the-company' dispute."[26]

The Enforceability of Contracts for Third-Party Litigation Finance

Courts sometimes invalidate contracts for TPLF. In doing so, they typically rely on the doctrines of maintenance and champerty.

"Maintenance involves a party without a bona fide interest in a lawsuit nonetheless encouraging its litigation."[27] "Champerty" is a form maintenance.[28] It 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."[29]

"The doctrines of maintenance and champerty originated in the ancient Greek and Roman legal systems, evolved in the common law system of England during feudal times, and spread to other jurisdictions largely through the far-reaching British Empire."[30] During feudal times, "[t]he wealthy and powerful would 'buy up claims, and, by means of their exalted and influential positions, overawe the courts, secure unjust and unmerited judgments, and oppress those against whom their anger might be directed.''[31] This facilitated "bribery, corruption, and intimidation of judges and justices of the peace." In other words, champerty was "a 'means by which powerful men aggrandized their estates and the background was unquestionably that of private war."[32]

Maintenance and champerty were therefore outlawed to prevent "excessive litigation and frivolous claims" and to "safeguard against the extortion and oppression of

13 ABA Comm'n on Ethics 20/20, supra note 1, at 6-7.

14 Id.

15 Maya Steinitz, Whose Claim Is This Anyway? Third-Party Litigation Funding, 95 Minn. L. Rev. 1268, 1278 (2011); Herschkopf, supra note 4, at 1.

16 Egan, supra note 6.

17 Christopher P. Bogart, The reality of financing litigation defense, Burford (May 28, 2015), https://www.burfordcapital.com/blog/reality-financing-litigation-defense/.

18 Michael McDonald, Harvard Invests in Litigation Strategy That Has Posted Big Gains, Bloomberg (June 26, 2019), https://www.bloomberg.com/news/articles/2019-06-26/harvard-invests-in-litigation-strategy-that-has-posted-big-gains.

19 Lake Whillans & Above the Law, 2019 Litigation Finance Survey Report, https://lakewhillans.com/research/2019-litigation-finance-survey-report/.

20 Burford, 2018 Litigation Finance Survey, https://www.burfordcapital.com/2018-litigation-finance-survey/.

21 Shannon, supra note 10, at 869.

22 Steinitz, supra note 15, at 1283.

23 McDonald, supra note 18.

24 Shannon, supra note 10, at 869.

25 Id.

26 Id.

27 Herschkopf, supra note 4, at 7.

28 Id.

29 Steinitz, supra note 15, at 1286.

30 Shannon, supra note 10, at 874.

31 ABA Comm'n on Ethics 20/20, supra note 1, at 9 (citation omitted).

32 Osprey, Inc. v. Cabana Ltd. P'ship, 532 S.E.2d 269, 274 (S.C. 2000) (citation omitted).

indigent clients by wealthy funders."[33] Those responsible for maintenance or champerty could face both tort and criminal liability.[34]

Today, the use of these doctrines varies considerably by jurisdiction, but they "are 'most visible' as a contract defense."[35] A number of states, however, have limited or outright abandoned these doctrines. The ABA Commission on Ethics 20/20 explains why:

> [T]he modern doctrines of abuse of process, malicious prosecution, and wrongful initiation of litigation deal more directly with the problems that may have originally motivated the common law doctrine of champerty, since they provide victims of third-party interference a remedy when a third party promotes litigation that is based on fraudulent allegations or baseless legal theories. Given that existing ethical and legal obligations of lawyers and their clients are already supposed to ensure that litigation be conducted in good faith and non-frivolously, it is unclear why the historical concerns of the common law would justify today placing special burdens on litigation funded by third parties.[36]

As of 2012, "27 out of 51 jurisdictions" "permit[ted] some form of champerty."[37] In Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997), for example, the Massachusetts Supreme Judicial Court refused to invalidate a contract for TPLF, concluding that the state would no longer recognize the doctrines of champerty and maintenance. The court reasoned that "the champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining power."[38] "[O]ther devices . . . [now] more effectively accomplish these ends."[39]

Similarly, in Osprey, Inc. v. Cabana Ltd. P'Ship, 532 S.E.2d 269, 277 (S.C. 2000), the Supreme Court of South Carolina "abolish[ed] champerty as a defense" to a contract for TPLF. It concluded that "other well-developed principles of law can more effectively accomplish the goals of preventing speculation in groundless lawsuits and the filing of frivolous suits than dated notions of champerty."[40] These principles include sanctions under the rules of civil procedure, state law remedies for the filing of frivolous claims, and the doctrines of unconscionability, duress, and good faith.[41] Yet the court further explained that "abolition of champerty as a defense does not mean that all such agreements are enforceable as written."[42] Rather, courts should "enforce, modify, or set aside the financing agreement" after examining, among other factors:

> (1) whether the respective bargaining position of the parties at the time the agreement was made was relatively equal, (2) whether both parties were aware of the terms and consequences of the agreement, (3) whether the borrowing party may have been unable to pursue the lawsuit at all without the financier's help, (4) whether the financier would retain a disproportionate share of the recovery, and (5) whether the financier . . . offers unwanted advice or otherwise attempts to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit.[43]

Allowing TPLF funding is not a universal trend. Minnesota, for example, "represents those states which continue to rigorously apply" "champerty restrictions."[44] Indeed, as recent as 2019, the Minnesota Court of Appeals upheld the invalidation of a TPLF agreement after finding that the agreement violated public policy prohibitions against champerty and maintenance.[45] The court maintained that "champertous agreements have untoward economic effects on the legal system that can provide both improper incentives and disincentives to pursue and settle litigation."[46] Prohibiting these agreements thus "prevent[s] officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law."[47] See also Maslowski v. Prospect Funding Partners, LLC, 890 N.W.2d 756, 764 (Minn. Ct. App. 2017) (refusing to enforce a forum selection clause in favor of New York in a TPLF agreement because the clause was "an attempt to avoid Minnesota's long-established policy that agreements for champerty are unenforceable").

Apart from maintenance and champerty, "[t]he other primary way that parties may attack the enforceability of a litigation finance agreement is by labeling it usurious. Like the champerty inquiry, this inquiry will vary significantly

33 Shannon, supra note 10, at 874.

34 Herschkopf, supra note 4, at 7; Shannon, supra note 10, at 874.

35 Del Web Communities v. Partington, 652 F.3d 1145, 1154 (9th Cir. 2011) (citation omitted).

36 ABA Comm'n on Ethics 20/20, supra note 1, at 9.

37 Id.

38 Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997).

39 Id. at 1226-27.

40 Osprey, 532 S.E.2d at 277.

41 Id. at 277-78.

42 Id. at 278.

43 Id.

44 Steinitz, supra note 15, at 1289.

45 Maslowski v. Prospect Funding Partners, LLC, 27-CV-15-15143, 2019 WL 3000747 (Minn. Ct. App. July 8, 2019).

46 Id. at *4.

47 Id. at *5 (citation omitted).

from state to state."[48]

Moreover, some "states have begun to pass legislation relating to litigation finance."[49] State legislatures generally enact these regulations "for consumer funding situations, but depending on the language of the statutes, they may apply to commercial funding situations as well."[50] The regulations may, for example, require "funders to obtain licenses or post bonds," require certain disclosures in TPLF agreements, place "caps on financing amounts," require "rights of cancellation," and limit "how much control an investor may have over the court of the litigation."[51]

In short, the law governing TPLF is diverse and unsettled. Lawyers with cases involving TPLF and lawyers advising clients on the possibility of TPLF must always research the relevant jurisdiction's law on the enforceability of TPLF agreements.

**The Debate Over Third-Party Litigation Finance**

TPLF is a contentious topic, and the arguments for and against TPLF will likely influence a court's decision to enforce or invalidate a TPLF agreement. Below is a summary of the primary arguments of proponents and opponents of TPLF.

Opponents claim that TPLF "increases the number of cases brought, particularly weak ones," and "prolong[s] litigation [by] discouraging settlement or alternative dispute resolution."[52] TPLF discourages settlement because "[a] plaintiff who must pay a TPLF investor out of the proceeds of any recovery can be expected to reject what may otherwise be a fair settlement offer, hoping for a larger sum of money."[53] Opponents also argue that TPLF "direct[s] money away from the injured," "undercut[s] plaintiff and lawyer control over litigation," "constitute[s] champerty," "compromise[es] the attorney-client relationship," and "diminish[es] the professional independence of attorneys."[54]

The U.S. Chamber of Commerce argues that a "notorious example" demonstrating the harmful effects of TPLF "was the investment by a fund associated with Burford Capital Limited in a lawsuit against Chevron filed in Ecuadorian court alleging environmental contamination in Lago Agrio, Ecuador."[55] "In exchange for a percentage of any award to the plaintiffs," "Burford made a $4 million investment."[56] In 2011, the trial court in Ecuador "awarded the plaintiffs an $18 billion judgment."[57] Shortly thereafter, "Judge Lewis Kaplan of the Southern District of New York issued an injunction against the plaintiffs trying to collect on their judgment because of what he called 'ample' evidence of fraud on the part of the plaintiffs' lawyers."[58] Burford later abandoned the case. "Nevertheless, its year-long involvement . . . powerfully demonstrate[s] that TPLF investors have high risk appetites and are willing to back claims of questionable merit."[59]

For their part, proponents of TPLF insist that it "level[s] the playing field with resource-laden defendants" and "address[es] the staggering costs of litigation, which could prevent litigants with meritorious claims from bringing suit."[60] Through TPLF, litigants can "off-load risk, because the [funding] is non-recourse, which means parties owe nothing for unfavorable outcomes."[61] Proponents further maintain that TPLF "improve[s] the quality of litigation" and "lower[s] barriers to entry for qualified, but new, attorneys seeking to obtain leadership positions in class action or aggregate litigation."[62] Companies likewise benefit from TPLF, proponents argue, because TPLF allows "companies to [use their resources] to focus on their core business and leave the pursuit of their claims to others."[63] At any rate, proponents emphasize that TPLF is neither new nor revolutionary, given that "[c]ontingency fees and liability insurance" are universally accepted as, similar to TPLF, "models of shared ownership of legal claims."[64]

Burford, the funding company mentioned above, cites its decision to fund a defendant as an example of the benefits of TPLF in commercial litigation. In 2015, Gillette Company, "the world's largest razor company," filed suit against a startup founded by former Gillette employees.[65] The startup, ShaveLogic, "develops razor and shaving

48 Herschkopf, supra note 4, at 8; see also Formal Opinion 2011-2: Third Party Litigation Funding, supra note 2 (explaining that "courts have found that non-recourse litigation financing agreements violate usury laws").

49 Herschkopf, supra note 4, at 5.

50 Id.

51 Id. (citing as support Tenn. Code Ann. § 47-16-104; Me. Rev. Stat. tit. 9-A, § 12-104; Ind. Code Ann. § 24-12-3-1; and Vt. Stat. Ann. tit. 8, § 2254).

52 Herschkopf, supra note 4, at 1-2.

53 John H. Beisner & Gary A. Rubin, Stopping the Sale on Lawsuits: A Proposal To Regulate Third-Party Investments in Litigation 5, U.S. Chambers Institute for Legal Reform (Oct. 2012), https://www.instituteforlegalr eform.com/uploads/sites/1/TPLF_Solutions.pdf.

54 Herschkopf, supra note 4, at 1-2.

55 Beisner & Rubin, supra note 53, at 4.

56 Id.

57 Id.

58 Id.

59 Id.

60 Herschkopf, supra note 4, at 1-2.

61 Id.

62 Id.

63 Id.

64 Id. at 2.

65 Joshua Harris, Dispelling legal finance myths: A defense funding case study, Burford (Sept. 20, 2018), https://www.burfordcapital.com/blog/dispelling-legal-finance-myths-defense-funding-case-study/.

technology" for which it received a patent in 2014.[66] Gillette claimed that ShaveLogic and the former Gillette employees (collectively, "defendants") "misappropriated Gillette trade secrets," "engaged in unfair competition," and "breached their non-disclosure agreements with Gillette."[67] The defendants denied these claims and counterclaimed "that [Gillette] had intentionally interfered with ShaveLogic's business relations and engaged in unfair trade practices."[68]

But Gillette had deep pockets and ShaveLogic was a new company with little financial resources. Plus, ShaveLogic needed to devote those limited resources to developing its business. So Burford agreed to finance ShaveLogic's defense and counterclaims "on a non-recourse basis."[69] "If ShaveLogic prevailed in the litigation and maintained control of its patent and applications[,] Burford would earn its investment back and a return, to be paid from a combination of a settlement, if any, and/or future razor sales."[70] The court eventually issued a ruling favorable to the defendants, after which the parties reached an undisclosed settlement.

Burford contends that this case shows (1) that "litigation finance works for the defense as well as the pursuit of claims," (2) that "access to capital can support just outcomes when resources are asymmetrical," and (3) that TPLF is just as likely to stop frivolous litigation as it is further frivolous litigation.[71]

**Ethical and Discovery Issues Involving Third-Party Litigation Finance**

TPLF presents many possible ethical and discovery problems. These problems are considered in turn below.

A. Model Rule of Professional Conduct 1.7

Rule 1.7 provides that a lawyer has a conflict of interest if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer." A lawyer with such a conflict may continue representing a client only if the client gives informed consent in writing.

A lawyer with a practice of referring clients to third-party litigation funders "may have an interest in keeping the [funder] content, which would create a conflict under Rule 1.7."[72] What is more, a lawyer's mere "involvement in negotiating a [TPLF] contract" could create a conflict under Rule 1.7, as "the terms of the [TPLF contract] may have an impact on the lawyer's own interests."[73] Informed consent may therefore be necessary to continue the representation.

B. Model Rules of Professional Conduct 1.8, 2.1, and 5.4(c)

Rule 1.8 prohibits a lawyer from accepting "compensation for representing a client from one other than the client unless," in relevant part, "the client gives informed consent" and "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship." Rule 2.1 obligates a lawyer to "exercise independent professional judgment and render candid advice." Similarly, Rule 5.4(c) states 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 services."

Funds from third-party litigation funders often pay a lawyer's fees, thereby triggering the mandates of Rules 1.8, 2.1, and 5.4(c). Further, "to protect their investments and to maximize the expected value of claims," third-party litigation funders "may seek to exercise some measure of control over the litigation, including the identity of lawyers pursing the claims, litigation strategy to be employed, and whether to accept a settlement offer or refuse it and continue to trial."[74]

Lawyers faced with meddling funders "may reasonably believe that the funder's second-guessing of decisions made in the representation of the client is an unreasonable interference with the lawyer's professional judgment."[75]

On that basis, the lawyer may choose to withdraw from representation.

C. Model Rule of Professional Conduct 5.4(a)

Rule 5.4(a) bars a lawyer from "shar[ing] legal fees with a nonlawyer," subject to a few exceptions irrelevant here. A lawyer likely cannot, therefore, accept TPLF if repayment is contingent on the recovery of legal fees. For this reason, third-party litigation funders generally contract directly with the lawyer's client.[76] See also New York City Bar Prof'l Ethics Comm, Formal Opinion 2018-

66 Id.

67 Id.

68 Id.

69 Id.

70 Id.

71 Id.

72 ABA Comm'n on Ethics 20/20, supra note 1, at 16-17.

73 Id. at 17.

74 Id. at 22.

75 Id. at 23.

76 Steinitz, supra note 15, at 1292.

5: Litigation Funders' Contingent Interest in Legal Fees, (July 30, 2018) (concluding that it is unethical for a law firm to receive funding on a portfolio of cases if the results of cases within the portfolio determine the amount the law firm must repay the funder).

D. Confidentiality and Privilege

"As part of their underwriting process, [third-party litigation funders] . . . often require the lawyer to release information or to provide a litigation assessment referencing such information."[77] Responding to such inquiries from funders may involve the disclosure of confidential information, which Rule 1.6 allows only with informed consent or implied authorization. More importantly, attorneys must take precautions to avoid the disclosure of privilege communications. The failure to do so could result in a waiver of the attorney-client privilege.[78]

Attorneys involved with funders may argue that the disclosure of privileged communications is permissible under the common interest doctrine, "which functions as an exception to the rule of waiver by voluntary disclosure."[79] If applicable, the common interest doctrine would allow attorneys to share privileged communications with funders. But the law on the applicability of the doctrine to third-party funders is unsettled.[80] As a result, attorneys must research the law in the relevant jurisdiction. Attorneys should also predicate a client's informed consent to share information with a funder on "full disclosure of the risk of a loss of privilege."[81]

E. Mandatory Disclosure and Work Product Protection

"Because of the relative newness of litigation finance in federal courts and the lack of regulation surrounding it, it can sometimes be unclear how much information about the financing arrangement is discoverable and how much the judge might need to know in order to manage the case effectively."[82]

Opponents of TPLF support legislation or rules requiring the automatic disclosure of TPLF agreements.83 But few jurisdictions have created these rules. In 2018 Wisconsin became the first state to enact a law requiring automatic disclosure.[84] A standing order in the Northern District of California requires the disclosure of third-party funding in class actions.[85] And three United States senators recently introduced a bill that would require disclosure of details of third-party litigation funding in MDLs and class actions.[86] To date, however, no universal rules exist on the topic.

"Those in favor of disclosure point out that under the Federal Rules of Civil Procedure, defendants are required to disclose information about their insurance coverage at the outset of their case."[87] The same rationale could justify the disclosure of TPLF agreements. Even some proponents of TPLF favor mandatory disclosure, as it "let[s] the defendant know that the plaintiff has financial backing and can't be ground down through a war of attrition—and this can trigger faster settlements."[88]

Opponents of mandatory disclosure insist that "disclosure of litigation funding prejudices claimants and will result in costly 'discovery sideshows' that unnecessarily burden claimants and courts in a way that rarely arises in insurance coverage disclosures."[89]

For now, parties seeking or opposing disclosure of materials regarding TPLF are likely to dispute whether (1) the materials are relevant and (2) whether the materials are protected as work product. "Information about litigation funders may . . . be relevant," among other times, "when assessing fiduciary duties, calculating attorneys' fees," "ensuring effective case management," determining the appropriateness of class certification, or assessing a judge's own potential conflicts of interest.[90] Those opposing disclosure of relevant TPLF materials may argue that the TPLF materials were "prepared in anticipation of litigation" and are, therefore, protected as work product pursuant to Federal Rule of Civil Procedure 26(b)(3).[91]

In the end, it is incumbent upon attorneys seeking or opposing disclosure of materials regarding TPLF to research the relevant jurisdiction's laws on disclosure and protection of work product.

77 ABA Comm'n on Ethics 20/20, supra note 1, at 30.

78 Id. at 30-35.

79 Id. at 33.

80 Id. at 30-35; Herschkopf, supra note 4, at 23 n.35 (explaining that "federal courts have ruled on both sides of the issue" and providing list of cases).

81 ABA Comm'n on Ethics 20/20, supra note 1, at 32.

82 Herschkopf, supra note 4, at 9.

83 Jamie Hwang, Wisconsin law requires all litigation funding arrangements to be disclosed, ABA Journal (Apr. 10, 2018), http://www.abajournal.com/news/article/wisconsin_law_requires_all_litigation_funding_arrange ments_to_be_disclosed

84 Id.

85 Standing Order for All Judges of the Northern District of California ¶ 19, https://www.cand.uscourts.gov/siorders.

86 Republican Senators Reintroduce Litigation Funding Disclosure Bill, Litigation Finance Journal (Feb. 15, 2019), https://litigationfinancejournal.com/republican-senators-reintroduce-litigation-funding-disclosure-bill/.

87 Egan, supra note 6.

88 David Lat, Current And Future Issues In Litigation Finance, Above the Law (Mar. 15, 2019), https://abovethelaw .com/2019/03/current-and-future-issues-in-litigation-finance/.

89 Egan, supra note 6.

90 Herschkopf, supra note 4, at 9.

91 Id. at 12 n.26 (collecting cases); ABA Comm'n on Ethics 20/20, supra note 1, at 35-36.

# More Money, More Problems? The Use of Litigation Finance in Complex Litigation


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## Agenda

- Evolution and types of third-party litigation finance ("TPLF")
- Expansion of TPLF
- Enforceability of TPLF agreements
- The debate over TPLF
- Ethical and discovery issues



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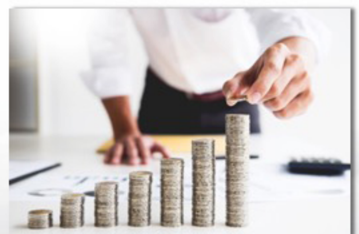
## Evolution and Types of TPLF

- Consumer funding started first
- Commercial funding followed
- Today, both plaintiffs and defendants receive TPLF





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## Prevalence of TPLF

- Bloomberg estimates TPLF to be $9 billion industry
- 41% of lawyers have firsthand experience with TPLF according to 2019 Lake Whillans survey
- 72% of lawyers who have not used TPLF expect to do so in near future



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## Some Reasons for Growth of TPLF

- Asset class not tied to economy
- Increases access to lawyers and courts
- Allows companies to maintain cash flow despite costly litigation



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## Enforceability of TPLF Agreements

- Common law prohibitions on champerty and maintenance may invalidate TPLF agreements
- Many jurisdictions are relaxing or abolishing these prohibitions
- Usury laws may apply
- Law is diverse and unsettled



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## Enforceability of TPLF Agreements

- *Saladini v. Righellis*, 687 N.E.2d 1224 (Mass. 1997)
  - "[T]he champerty doctrine is [no longer] needed to protect against the evils once feared: speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining power."



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## Enforceability of TPLF Agreements

- *Maslowski v. Prospect Funding Partners, LLC*, 27-CV-15-15143, 2019 WL 3000747 (Minn. Ct. App. July 8, 2019)
  - "[C]hampertous agreements have untoward economic effects on the legal system that can provide both improper incentives and disincentives to pursue and settle litigation."



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## The Debate over TPLF

**Opponents**

- Frivolous cases
- Discourages settlement
- Harms attorney-client relationship
- Deprives plaintiffs of recovery

**Proponents**

- Levels playing field
- Transfers risk
- Facilitates meritorious claims
- Allows companies to focus on business



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## Ethical and Discovery Issues

**Rule 1.7 on Conflicts of Interest**

- Referrals to funders
- Involvement in negotiating TPLF agreements



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## Ethical and Discovery Issues

<u>Rules 1.8, 2.1, 5.4(c)</u>

- Funder involvement in the case
- Obligation of lawyers to exercise independent professional judgment



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## Ethical and Discovery Issues

<u>Rule 5.4(a)</u>

- Prohibition on sharing legal fees with nonlawyers
- Some funders seek to fund law firm portfolios



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## Ethical and Discovery Issues

### Confidentiality and Privilege

- Funders need information to make investment decisions
- Rule 1.6 requires client consent to disclose
- Disclosure of privileged communication likely waives privilege
- Possible exception: common interest doctrine



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## Ethical and Discovery Issues

### Disclosure of TPLF Materials

- New rules requiring mandatory disclosure of TPLF agreements
- Federal Rule of Civil Procedure 26(b)(3)
  - Materials involving TPLF may receive work product protection



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# JASON A. LIEN
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Jason Lien focuses his litigation practice on representing clients from the construction, real estate, financial services, food, and railroad industries. He regularly appears in federal and state court on behalf of design-build firms, general contractors, architects, engineers, specialty contractors, property management companies, real estate owners, and lenders. A portion of Jason's practice also involves representing a major U.S. railroad in disputes throughout Minnesota and North Dakota.

Recognized by Chambers USA for construction law in 2016-2019, he is described as "an esteemed trial lawyer with a wealth of experience assisting with litigation mandates relating to construction defects and insurance coverage issues." Prior to joining Maslon in 2002, Jason honed his trial and appellate skills as a Naval Officer with the United States Navy Judge Advocate General's Corps, where he led hundreds of courts-martial, administrative hearings, and military appeals.

In addition to his litigation practice, Jason served as a member of Maslon's Governance Committee from 2017-2019 and as the committee's vice chair from 2018-2019. Jason was selected for inclusion on the 2015-2019 Minnesota Super Lawyers® lists and prior to that was recognized on the Minnesota Rising Stars lists.

Outside of the office, Jason is an avid triathlete and a two-time Ironman finisher.

**Areas of Practice**
- Appeals
- Business Litigation
- Competitive Practices/Unfair Competition
- Construction & Real Estate Litigation
- Insurance Coverage Litigation
- Tort & Product Liability
- Real Estate Condemnation & Eminent Domain

**Honors**
- Notable Practitioner in Minnesota for Construction, Chambers USA, 2018-2019
- Recognised Practitioner in Minnesota for Construction, Chambers USA, 2016-2017
- Recognized on Minnesota Super Lawyers® list, 2015-2019 (Minnesota Super Lawyers® is a designation given to only 5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)
- North Star Lawyer, Minnesota State Bar Association, 2015 (North Star Lawyer is a designation that recognizes members who provide 50 hours or more of pro bono legal services in a calendar year.
- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2006-2009, 2011-2012 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)

**Education**
- University of Minnesota Law School - J.D, cum laude, 1998
- Hamline University - B.A., cum laude, 1994; Political Science and Legal Assistance