

WHOSE CASE IS IT ANYWAY?: PROPOSED AMENDMENTS TO INDIANA'S THIRD-PARTY LITIGATION FINANCE DISCLOSURE STATUTES

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INTRODUCTION

Imagine being taken to court and learning that the lawsuit against you is not being funded by the opposing party or the opposing party's lawyer but by an investment firm or a sovereign wealth fund that views your case as an opportunity for a high investment return. Even worse, imagine this going on without you even knowing. To combat this problem, the Indiana General Assembly passed House Bill 1124 on April 20, 2023, which requires consumer claimants in civil proceedings to provide written notice to other parties and insurers if the claimant has entered a civil proceeding advanced payment (CPAP) agreement with a CPAP provider.¹ The statute also establishes that the existence and content of CPAP agreements entered into by consumer claimants are discoverable under the Indiana Rules of Trial Procedure.²

By passing this statute, Indiana joined only a handful of other states that have responded to the rapid growth of the third-party litigation finance (TPLF) industry by requiring disclosure.³ TPLF is an agreement between a non-party funder and a litigant or law firm, whereby the funder finances the lawsuit in exchange for an interest in the settlement or judgment amount.⁴ TPLF is distinct from contingency fee financing, where the lawyer is the one financing the lawsuit, and the economic incentive of the lawyer to achieve the largest award in the shortest period of time is directly aligned with the interests of the client.⁵ In 2021, TPLF was a \$17 billion industry, and it is projected to achieve an 8.7% compounded annual growth rate until the year 2028.⁶ The world's largest litigation funder, Burford Capital, announced in 2022 that it has worked with over 90% of the AmLaw 100 law firms, providing funding to the firms directly

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1. IND. CODE § 24-12-4-2 (2023).

2. *Id.*

3. Mark Popolizio, *Florida (and Other States) Take Aim at Regulating Third-Party Litigation Funding*, VERISK (Mar. 29, 2023), <https://www.verisk.com/insurance/visualize/florida-and-other-states-take-aim-at-regulating-third-party-litigation-funding/> [<https://perma.cc/SDM3-2VQP>].

4. U.S. GEN. ACCOUNTING OFFICE, GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA, AND TRENDS 5 (Dec. 20, 2022), *available at* <https://www.gao.gov/assets/gao-23-105210.pdf>.

5. *Skin in the Game: Litigating High-Stakes Matters on Contingency*, DOVEL & LUNER, <https://www.dovel.com/skin-in-the-game/> [<https://perma.cc/F3W4-JDKM>] (last visited Nov. 25, 2023).

6. Fan et al., US LITIGATION FUNDING AND SOCIAL INFLATION: THE RISING COSTS OF LEGAL LIABILITY, SWISS RE INST. 3 (Dec. 2021), <https://www.swissre.com/dam/jcr:7435a896-5f4b-463b-a1e6-7d4ec17db556/swiss-re-institute-expertise-publication-us-litigation-funding-and-social-inflation-december2021.pdf> [<https://perma.cc/832A-QQJK>] (explaining that at this growth rate, the TPLF industry will reach approximately \$31 Billion by the year 2028).

and to their clients.⁷ Investors like private equity firms, hedge funds, and sovereign wealth funds have been allured by TPLF for a variety of reasons.⁸ Returns on litigation are uncorrelated to general macroeconomic trends affecting other asset classes, and returns on investment have far outpaced both the S&P 500 and the average for private funds.⁹ Litigation investors have begun to employ artificial intelligence to search court dockets for cases that are worthy of investment.¹⁰

TPLF critics fear, among other things, that the involvement of third-party funding reduces the incentive for parties to find equitable results as efficiently as possible.¹¹ Proponents of TPLF champion its growth as a mechanism to provide access to justice for underfunded litigants who would otherwise be unable to pursue meritorious litigation.¹² It is likely that TPLF will be the subject of much debate in state and federal legislatures in the coming years.¹³

This Note argues that the Indiana General Assembly should amend Indiana's TPLF disclosure statutes to expand their scope. Part I of this Note provides an overview of the mechanics and history of the TPLF industry. Part II discusses the significance of TPLF, including the ethical concerns it raises and the proposed benefits it brings to the legal system. Part III then examines what is being done around the country at both the state and federal levels to regulate TPLF. Part IV details proposed amendments to Indiana's TPLF statutes. First, it argues that Indiana's disclosure statute should be amended to cover all parties in civil litigation—not just consumer claimants. Second, it argues that section five of Indiana's CPAP provider prohibitions statute should be amended to force funders to make a specific disclosure that they cannot participate in any strategic decisions relating to the litigation—not just settlement.

7. Emily Slater, *Law Firm Primer: How to Talk to Your Clients About Legal Finance*, BURFORD CAPITAL (Oct. 12, 2019), <https://www.burfordcapital.com/insights-news-events/insights-research/law-firm-primer-how-to-talk-to-your-clients-about-legal-finance/> [https://perma.cc/P22P-HLFH].

8. SWISS RE INST., *supra* note 6, at 10, 17.

9. *Id.*

10. Emily R. Siegel, *AI Helps Litigation Funders Mine Court Documents for Legal Gold*, BL (Mar. 1, 2024), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-news/BNA%200000018df11edc3fabedff7e59fc0001?bna_news_filter=bloomberg-law-news, [https://perma.cc/2S2Y-VFMQ].

11. SWISS RE INST., *supra* note 6, at 16.

12. Richard Levick, *Litigation Financing: A Controversial Industry Does Well by Doing Good*, FORBES (Aug. 27, 2019, 11:27 AM), <https://www.forbes.com/sites/richardlevick/2019/07/01/litigation-financing-a-controversial-industry-does-well-by-doing-good/?sh=501c43e56af2> [https://perma.cc/TU63-QSC5].

13. Julia Gewolb & Joshua Libling, *INSIGHT: The Fall of Champerty and the Future of Litigation Funding*, BL (June 16, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-the-fall-of-champerty-and-the-future-of-litigation-funding> [https://perma.cc/6C23-KBBL].

I. OVERVIEW OF THE MECHANICS AND HISTORY OF THE TPLF INDUSTRY

A. *Funding Structure/Forms of TPLF*

Litigation financing is generally provided on a non-recourse basis, meaning that if the investment does not generate a return, the funded party has no obligation to reimburse the funder.¹⁴ The main types of cases financed by third-party funders are complex commercial litigation and mass torts, with a smaller percentage of funding also going to individual personal injury plaintiffs.¹⁵ Litigation funding has become especially prevalent in intellectual property disputes, like patent infringement cases, due to the expense of bringing a case, the drawn-out litigation process, and the potential for large payouts.¹⁶ In 2021, 29% of all new litigation funding capital commitments were allocated to patent litigation; in 2022, that number was 21%.¹⁷ Mass torts are attractive to funders because of the potential for a large number of plaintiffs and large payouts.¹⁸ Commercial claimants are the primary beneficiaries of TPLF, and over two-thirds of settlement proceeds from cases funded by third parties go to commercial claimants.¹⁹

Some litigation funders provide funding directly to the lawyer or law firm.²⁰ Direct lawyer funding may be secured by a single claim or a diversified portfolio of claims.²¹ Direct lawyer funding allows lawyers and law firms to implement more flexible fee arrangements and achieve lower risk.²² Mass torts and commercial disputes, such as trademark infringements, contract breaches, and insurance claims, are some of the typical cases where lawyers or law firms may be funded directly.²³

Other funding arrangements are between the lawyer's client and the

14. SWISS RE INST., *supra* note 6, at 5.

15. *Id.* at 8.

16. Kelcee Griffis, *Litigation Finance Gains Traction in Patent Infringement Cases*, BL (Oct. 29, 2022, 4:46 AM), https://www.bloomberglaw.com/bloomberglawnews/ip-law/XESRQG1800000?bna_news_filter=ip-law#jcite [<https://perma.cc/K6VP-KRRL>].

17. *The Westfleet Insider: 2022 Litigation Finance Market Report* 6, WESTFLEET ADVISORS, <https://www.westfleetadvisors.com/wp-content/uploads/2023/02/WestfleetInsider-2022-Litigation-Finance-Market-Report.pdf> [<https://perma.cc/G2KY-YS7K>].

18. Emily R. Siegel & Kaustuv Basu, *Litigation Funders Bet Billions on Veterans' Toxic Water Claims*, BL (July 20, 2023, 5:01 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XAFO3U8S000000?bna_news_filter=us-law-week#jcite [<https://perma.cc/BS34-RC3N>] (explaining that litigation funders have committed almost \$2 billion to thousands of Marine Corps veterans suing the United States government for water contamination at Camp Lejeune, and the government has projected the claims to be worth over \$20 billion).

19. SWISS RE INST., *supra* note 6, at 8.

20. *American Bar Association Best Practices for Third-Party Litigation Funding* 4, AM. BAR ASS'N (Aug. 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/08/2020-am-resolutions/111a.pdf> [<https://perma.cc/D8S8-9ZWY>].

21. *Id.*

22. U.S. GEN. ACCOUNTING OFFICE, *supra* note 4, at 19.

23. SWISS RE INST., *supra* note 6, at 6.

funder.²⁴ Direct client funding allows litigants to offload the risk and expense associated with pursuing meritorious claims.²⁵ Clients receiving funding directly are generally individual plaintiffs with personal injury claims or corporate plaintiffs in commercial litigation.²⁶

Another form of litigation finance is judgment preservation insurance (JPI).²⁷ A party that secures a trial court judgment might purchase JPI to ensure that it will receive part of the judgment regardless of whether the result of the case is overturned at the appellate level.²⁸ For example, a plaintiff who wins a \$50 million judgment might purchase \$40 million in insurance coverage in exchange for a one-time premium payment of \$5 million.²⁹ If the appellate court vacates the judgment, the plaintiff will receive the insurance proceeds, and the plaintiff's net proceeds after subtracting the premium will still be \$35 million.³⁰ JPI provides litigants and litigation funders certainty that they will recover at least a portion of their trial court judgment.³¹

In September 2021, law firm Quinn Emanuel Urquhart & Sullivan obtained a \$185 million attorney's fee award in its representation of 150 health insurers suing the Government for the harm they had allegedly suffered as a result of Congress's decision not to fund portions of the Affordable Care Act.³² In January 2023, the trial court decision was vacated and remanded.³³ In rehearing the case, the trial court judge ordered Quinn Emanuel to disclose the JPI agreement it obtained, stating that the terms of the JPI "may be relevant to the court's task on remand if the policy provisions are inconsistent with the court's objective 'to ensure an overall fee that is fair for counsel and equitable within the class.'"³⁴

B. *The Fall of Champerty and the Growth of the TPLF Market*

"[T]he Western legal tradition largely prohibited third-party involvement in

24. AM. BAR ASS'N, *supra* note 20, at 7.

25. U.S. GOV'T ACCOUNTING OFF., *supra* note 4 at 19.

26. SWISS RE INST., *supra* note 6, at 6.

27. Ross Weiner, *Litigation, Profession Perspective – Judgment Preservation Insurance: Protecting Plaintiff's Awards*, BL (Apr. 2022), <https://www.bloomberglaw.com/external/document/XM3LAH4000000/litigation-professional-perspective-judgment-preservation-insura> [https://perma.cc/THG8-3M66].

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Health Republic Ins. Co. v. United States*, 156 Fed.Cl. 67 (Fed. Cl., 2021), *vacated*, 58 F.4th 1365 (2023), *remanded to* 169 Fed.Cl.408 (Fed. Cl., 2024).

33. *Health Republic Ins. Co. v. U.S.*, 58 F.4th 1365 (Fed. Cir., 2023).

34. Roy Strom, *Quinn Emanuel Must Turn Over Litigation Fee Insurance Policy*, BL (Jan. 30, 2024, 5:36 PM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%200000018d-5c64-d27b-addd-5c76d7970000> [https://perma.cc/3QM3-HYDM].

litigation since Roman law.”³⁵ In Medieval England, the doctrines of maintenance and champerty were developed to prohibit nobles and royal officials from using their position and influence to boost fraudulent legal claims in exchange for a percentage of the returns.³⁶ The common law doctrine of maintenance is when a non-party to litigation provides resources to a litigant.³⁷ Champerty is a subset of maintenance that involves a non-party financing a legal claim in exchange for a portion of the settlement or judgment.³⁸ The erosion of common-law champerty prohibitions began in the 1990s in the United Kingdom, Canada, and Australia.³⁹ Most of the American states that did prohibit champerty at one point have since limited the scope of the ban or abandoned it altogether.⁴⁰

C. Indiana Takes Action

In January 2023, members of the Indiana House of Representatives responded to this global trend by introducing additional regulations of TPLF.⁴¹ The bill passed both chambers of the legislature and was signed into law in April.⁴² Subsection (a) of the statute reads:

Except as otherwise provided in subsection (c), in a civil proceeding in which a consumer claimant is a party, the consumer claimant or the consumer claimant’s attorney shall provide to:

- (1) each of the other parties in the civil proceeding; and
- (2) each insurer that has a duty to defend another party in the civil proceeding;

written notice that the consumer claimant has entered into a CPAP contract with the CPAP provider.⁴³

35. *Champerty*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/champerty> [<https://perma.cc/W3YE-K9BC>] (last visited Oct. 20, 2023).

36. *Maintenance and Champerty*, NORTON ROSE FULBRIGHT (Sept. 2016), <https://www.nortonrosefulbright.com/en/knowledge/publications/bf0fd6fe/maintenance-and-champerty> [<https://perma.cc/SS8Z-F4QX>].

37. LEGAL INFO. INST., *supra* note 35.

38. *Id.*

39. Jeff Dunsavage, *Litigation Funding Rises as Common-Law Bans are Eroded by Courts*, THE TRIPLE-I BLOG (Dec. 29, 2020), <https://www.iii.org/insuranceindustryblog/litigation-funding-rises-as-common-law-bans-are-eroded-by-courts/#:~:text=Slow%20to%20take%20hold%20in%20U.S.&text=Some%20states%20have%20abandoned%20their,reach%20of%20the%20champerty%20laws> [<https://perma.cc/S6CX-DN7H>].

40. Julia Gewolb & Joshua Libling, *INSIGHT: The Fall of Champerty and the Future of Litigation Funding*, BL (June 16, 2020, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/insight-the-fall-of-champerty-and-the-future-of-litigation-funding> [<https://perma.cc/6C23-KBBL>].

41. *Actions for House Bill 1124*, IND. GEN. ASSEMBLY (Apr. 20, 2023), <https://iga.in.gov/legislative/2023/bills/house/1124/actions> [<https://perma.cc/33J8-3Q8D>].

42. *Id.*

43. IND. CODE § 24-12-4-2 (2023).

In addition to disclosure of the agreement, Ind. Code § 24-12-4-2 also establishes that the existence and contents of the CPAP contract are subject to discovery under the Indiana Rule of Trial Procedure.⁴⁴ Subsection (d) of the statute reads:

In a civil proceeding in which a consumer claimant is a party, the existence and contents of the CPAP contract are subject to discovery under the Indiana Rules of Trial Procedure by:

- (1) a party other than the consumer claimant; or
- (2) an insurer that has a duty to defend another party in the civil proceeding.⁴⁵

Notably, the Indiana statute applies only to consumer claimants in civil proceedings.⁴⁶ The Indiana Code defines “consumer claimant” as “an individual who is or may become a plaintiff, a claimant, or a defendant in a civil proceeding.”⁴⁷ The statute does not apply to commercial claimants, law firms, or parties using TPLF to defend against legal claims.⁴⁸ More details on this are provided in the state law comparative analysis *infra*.

Prior to the enactment of the written notice requirements of Ind. Code § 24-12-4-2, the Indiana General Assembly enacted multiple other CPAP statutes. Pertinent to this Note are code sections prohibiting CPAP providers from making strategic decisions in a civil proceeding⁴⁹ and requiring CPAP providers to disclose specific information to consumer claimants in their CPAP agreements.⁵⁰ Subsection (6) of the “provider prohibitions” statute reads:

A CPAP provider may not do any of the following:

.....

- (6) Make and decision, have any influence, or direct the consumer claimant or the consumer claimant’s attorney with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding, or make any decision with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding. The right to make these decisions remains solely with the consumer claimant and the attorney in the civil proceeding.⁵¹

44. *Id.*

45. *Id.*

46. *Id.*

47. IND. CODE § 24-12-1-1(7)(A) (2019).

48. IND. CODE § 24-12-4-2 (2023).

49. IND. CODE § 24-12-3-1(6) (2024).

50. IND. CODE § 24-12-4-1(3) (2019).

51. I.C. § 24-12-3-1(6) (2024).

Subsection (3) of the “required disclosures” statute states:

Each CPAP contract must contain the disclosures specified in this section, which are material terms of the contract. Unless otherwise specified, the disclosures must be in at least 12 point bold font and be placed clearly and conspicuously within the contract. The following disclosures are required:

....

(3) A notice informing the consumer claimant that the CPAP provider has no role in deciding whether, when, and how much the civil proceeding is settled for. ... The CPAP provider may seek updated information about the status of the civil proceeding but in no event may the provider interfere with the independent professional judgment of the attorney in the handling of the civil proceeding or any settlement.⁵²

Notably, the scope of the required disclosure is narrower than the scope of the prohibited conduct.⁵³ The “required disclosures” statute clearly covers settlement decisions and interference with the attorney’s judgment; however, the statute’s language makes it unclear how prohibition applies to non-settlement strategic decisions and what exactly constitutes “interference.”⁵⁴

II. THE SIGNIFICANCE OF TPLF AND THE ISSUES IT RAISES

A. *Reduced Incentive to Find Justice Efficiently*

TPLF disincentivizes settlement efforts and can unnecessarily prolong litigation. An executive at one of the world’s largest funders explained that the firm “make[s] [settling cases] harder and more expensive ...”⁵⁵ TPLF is associated with longer case timelines and larger award sizes.⁵⁶ Undisclosed TPLF obscures each litigant’s idea of what it might take to settle a lawsuit and can replace the incentive for lawyers to reach the most efficient solutions for their clients with an incentive to achieve the highest return for a litigation funder.⁵⁷ Additionally, litigants are incentivized to prolong litigation and reject

52. I.C. § 24-12-4-1(3) (2019).

53. I.C. § 24-12-3-1(6) (2024); § 24-12-4-1(3) (2019).

54. I.C. § 24-12-4-1(3) (2019).

55. *Now We Know Why Litigation Funders Make It “Harder and More Expensive to Settle Cases,”* U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Apr. 3, 2019), <https://instituteforlegalreform.com/blog/now-we-know-why-litigation-funders-make-it-harder-and-more-expensive-to-settle-cases> [https://perma.cc/L95T-VZ3T].

56. SWISS RE INST., *supra* note 6, at 2.

57. *What is Third-Party Litigation Funding and How Does it Affect Insurance Pricing and Affordability?*, INS. INFO. INST., 4 (Jul. 27, 2023), https://www.iii.org/sites/default/files/docs/pdf/triple_i_third_party_litigation_wp_07272022.pdf.

reasonable settlement offers when they know that a significant portion of the settlement amount will go to the funder.⁵⁸ In *Boling v. Prospect Funding Holdings, LLC*, Judge Greg Stivers of the United States District Court for the Western District of Kentucky noted that “an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan.”⁵⁹ The Court stated that the contract was contrary to Kentucky’s strong public policy favoring settlement of disputes.⁶⁰

While it is rare that a funder would have the authority to prolong a case by refusing a settlement offer itself, there are limited circumstances where this could occur. In *Sysco Corp. v. Glaz LLC*, Sysco entered a financing agreement with Burford Capital and its subsidiaries whereby Burford advanced over \$140 million to Sysco to pursue multiple antitrust claims.⁶¹ Sysco violated the terms of the financing agreement by assigning claims that had been funded by Burford to its customers.⁶² Sysco and Burford agreed to a settlement where Sysco was released from the breaches in exchange for granting Burford a limited consent right to settlements.⁶³ Shortly after this agreement was reached, Sysco negotiated reasonable settlements in some of the antitrust cases, but Burford obtained a temporary restraining order and sought a preliminary injunction prohibiting Sysco from settling the disputes.⁶⁴ The case was dismissed after Sysco agreed to give Burford full control of the lawsuit.⁶⁵ While funding arrangements such as this one are rare, and Indiana has outlawed funders from making any strategic decisions in litigation, this case illustrates the still present potential for decreased judicial efficiency when non-parties have a financial stake in a lawsuit. Sysco, the party who suffered the alleged harm, believed that the settlement offer was sufficient compensation for its injury, but the case continues to burden the court system and absorb public resources because the funder is not yet satisfied with its investment return.⁶⁶

Insurance companies are often the target of third-party-funded cases, and the costs of larger settlements and prolonged litigation will ultimately be borne

58. *Id.*

59. *Boling v. Prospect Funding Holdings, LLC*, 2017 WL 1193064, at *4 (W.D. Ky. 2017).

60. *Id.*

61. *Sysco Corp. v. Glaz LLC*, 1:23-cv-0145 (N.D. Ill. 2023).

62. *Id.*

63. *Id.*

64. *Id.*

65. Emily R. Siegel, ‘Everybody Wins’ as Sysco Hands Burford Control of Lawsuits, BL (July 3, 2023, 1:16 PM), https://www.bloomberglaw.com/bloomberglawnews/business-and-practice/X5E3L1PC000000?bna_news_filter=business-and-practice#jcite [<https://perma.cc/DZ5V-H24S>].

66. *Lawsuit Against Burford Gives a Peek Into the Secretive World of Litigation Funding*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Aug. 2, 2023), <https://instituteforlegalreform.com/blog/lawsuit-against-burford-gives-a-peak-into-the-secretive-world-of-litigation-funding/> [<https://perma.cc/DLG9-PFG6>].

by insurers and their policyholders.⁶⁷ The decreased availability of affordable insurance coverage could lead to a greater uninsured legal risk for individuals and commercial parties who can no longer afford coverage.⁶⁸ This increased risk will lead to higher prices of goods and services for consumers.⁶⁹

B. Ethical Concerns

1. Fee Splitting—Model Rule of Professional Conduct 5.4.—Some litigation financing agreements may violate Model Rule of Professional Conduct 5.4. Rule 5.4 ensures the professional independence of the lawyer by forbidding lawyers or law firms from sharing legal fees with nonlawyers, except for some clearly defined situations.⁷⁰ Additionally, Rule 5.4 prohibits a funder from directing or regulating the lawyer’s professional judgment in rendering legal services.⁷¹ This rule can be circumvented by contracting with the client directly; however, this ignores the principle of the rule.⁷² A lawyer owes a duty of loyalty to clients, and this obligation cannot be modified by a financing agreement with a third party.⁷³ Under Model Rule 1.8(f), a lawyer may accept compensation from a third party if the client gives informed consent and the funder does not interfere with the lawyer’s independent professional judgment.⁷⁴

Although the Model Rules of Professional Conduct are not a basis for civil or criminal liability, “since the rules do establish standards of conduct by lawyers, a lawyer’s violation of a rule may be evidence of a breach of the applicable standard of care.”⁷⁵ They provide guidance to lawyers and regulatory agencies responsible for policing lawyer misconduct.⁷⁶ Indiana courts, however,

67. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, SELLING MORE LAWSUITS, BUYING MORE TROUBLE 20 (Jan. 2020), https://instituteforlegalreform.com/wp-content/uploads/2020/10/Still_Selling_Lawsuits_-_Third_Party_Litigation_Funding_A_Decade_Later.pdf [https://perma.cc/8PKA-9YK3].

68. SWISS RE INST., *supra* note 6, at 13.

69. *Id.*

70. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR. ASS’N., 2023) (explaining that the situations where a lawyer can share legal fees with a non-lawyer are: “(1) an agreement by a lawyer with the lawyer’s firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer’s death, to the lawyer’s estate or to one or more specified persons; (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of rule 1.17, pay to the estate or other representative of the lawyer the agreed-upon purchase price; (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.”).

71. *Id.*

72. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 67, at 21.

73. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR. ASS’N., 2023).

74. MODEL RULES OF PRO. CONDUCT r. 1.8(f) (AM. BAR. ASS’N., 2023).

75. MODEL RULES OF PRO. CONDUCT CANON 20 (AM. BAR. ASS’N., 2023).

76. *Id.*

have not specifically addressed the application of Indiana's Rule of Professional Conduct 5.4 to litigation finance, though other states' attention to this issue may influence how Indiana deals with this anomaly.

State bar associations in New York, Maine, Utah, and Virginia have issued non-binding opinions holding that litigation finance agreements that provide compensation to a third party contingent on the lawyer's receipt of legal fees related to specific legal matters violate Model Rule of Professional Conduct 5.4.⁷⁷ While it is true that many litigation funding arrangements do not implicate Rule 5.4, the New York City Bar explained that when a lawyer's obligation to a litigation funder is secured only by the lawyer's performance in one or more specific cases, or where the amount of the lawyer's obligation to the funder is dependent on the amount of the lawyer's fees in a specific matter, the lawyer violates Rule 5.4.⁷⁸ The bar association carefully distinguished between traditional recourse loans, where the funder will be paid from the firm's general profits, and non-recourse litigation financing loans, where the funder's payment is tied to the lawyer's performance in a specific dispute.⁷⁹ The association notes that the direct link between payment and a specific dispute may incentivize the funder to influence the lawyer's professional judgment in that case.⁸⁰ As the Utah Ethics Advisory Committee noted when it considered this issue, the incentive of funders to influence lawyers in specific cases poses a threat to the fiduciary duty of client loyalty and independent professional judgment owed by a lawyer to a client.⁸¹

2. *Conflicts of Interest*.—Undisclosed TPLF can lead to hidden conflicts of interest.⁸² A judge should not have a financial stake in a case that the judge is assigned.⁸³ With the litigation funding industry being worth billions of dollars and some funds being publicly traded, it is increasingly likely that a judicial officer could have a financial stake in a lawsuit.⁸⁴ A deposition during the case of *In re Application of Chevron*,⁸⁵ a federal racketeering suit brought in the Southern District of New York, revealed that the special master presiding over the case had personal connections to both the founder and the former general

77. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 67, at 31.

78. *Formal Opinion 2018-5: Litigation Funders' Contingent Interest in Legal Fees*, N.Y. CITY BAR (July 30, 2018), <https://www.nycbar.org/reports/formal-opinion-2018-5-litigation-funders%EF%BF%BD%EF%BF%BD%EF%BF%BD-contingent-interest-in-legal-fees/> [<https://perma.cc/5P7W-53JB>].

79. *Id.*

80. *Id.*

81. *Utah Ethics Advisory Opinion Committee: Opinion No. 02-01*, UT STATE BAR (Feb. 11, 2002), <https://esquirebank.com/wp-content/uploads/2021/03/Utah-State-Bar-Opinion-No.-02-01.pdf> [<https://perma.cc/UH3Z-N65F>].

82. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 67, at 22.

83. *See Code of Conduct for United States Judges, Canon 2*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges#c> [<https://perma.cc/RT7L-4X9E>].

84. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 67, at 22.

85. *In re Application of Chevron Corp.*, No. 10 MC 00002 (LAK), 2010 BL 282992 (S.D.N.Y. Nov. 5, 2010).

counsel of one of the funders of the defendant.⁸⁶ The funder had also sent the special master a brochure about funding one of his cases.⁸⁷ The special master did not recuse himself, nor did the parties request his recusal, but the deposition illustrated that “it is imperative for lawyers to insist that clients disclose who their investors are.”⁸⁸

Lawyers could also have conflicting interests if, for example, the defense counsel has a financial stake in the third-party funder of the plaintiff. Comment 10 to Model Rule of Professional Conduct 1.7 states that “a lawyer’s own interests should not be permitted to have an adverse effect on the representation of a client,” and that “a lawyer may not allow related business interests to affect representation.”⁸⁹ A lawyer’s investment in a litigation fund that supports a party adverse to his or her client also poses a violation of Model Rule of Professional Conduct 1.8.⁹⁰ The rule states that a lawyer should not “knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client” unless the client receives full disclosure of the transaction and terms and gives informed consent to the lawyer’s involvement.⁹¹ When a conflict goes unrecognized, the lawyer cannot provide the client full disclosure of the transaction and terms, and the client is, therefore, unable to give fully informed consent.

3. *Frivolous Litigation.*—While it appears nonsensical for a litigation funder, primarily motivated by achieving investment returns, to fund litigation with little chance of payoff, financial leverage can make it worthwhile for a funder to invest in frivolous claims.⁹² When mixed into a portfolio of higher probability investments, long-shot cases give funders exposure to potentially huge returns for a relatively small initial investment—leading to significant expected returns.⁹³ The growing amount of money in the legal system facilitates this strategy, and one of the stated goals of the TPLF industry is to fund lawsuits that would not otherwise be brought.⁹⁴ Our existing contingency fee system already provides a mechanism for meritorious legal claims to be brought by claimants with few resources.⁹⁵

86. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 67, at 22.

87. Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1650 (2013).

88. *Id.*

89. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. at 10 (AM. BAR ASS’N 1983).

90. MODEL RULES OF PRO. CONDUCT r. 1.8(a) (AM. BAR ASS’N 1983).

91. *Id.*

92. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *Episode 4: How Courtrooms are Turned into Casinos with Page Faulk and John Beisner*, at 9:05 (Sept. 10, 2019), <https://institutelegalreform.com/PODCASTS/EPISODE-4-HOW-COURTROOMS-ARE-TURNED-INTO-CASINOS-WITH-PAGE-FAULK-AND-JOHN-BEISNER/> [<https://perma.cc/FKA2-EZL8>].

93. *Id.* at 9:35.

94. *Id.* at 8:05.

95. *Id.* at 8:40.

A recent example of this is the case of *Chevron Corp. v. Donziger*.⁹⁶ Prominent litigation funding firms Burford Capital, Woodsford Litigation Funding, and individual investor James Russel DeLeon helped fund a lawsuit against Chevron alleging it was responsible for environmental contamination in Lago Agrio, Ecuador.⁹⁷ Burford invested only \$4 million into the litigation, and while it is unclear what percentage of the final \$18 billion it was entitled to, it would not take a very large percentage to make for a colossal return on investment.⁹⁸ The Ecuadorian court awarded the plaintiffs \$9 billion dollars in damages, which turned into an \$18 billion dollar judgment after Chevron refused to issue a public apology.⁹⁹ The American lawyer who spearheaded the case was eventually found by the U.S. District Court for the Southern District of New York to have violated the Racketeer Influenced and Corrupt Organizations (RICO) Act.¹⁰⁰ The U.S. Court of Appeals for the Second Circuit affirmed this result, finding the legal team had engaged in coercion, fraud, and other illegal means in obtaining the Ecuadorian judgment.¹⁰¹

While there is no evidence the following case is unmeritorious, litigation between the Argentinian oil company YPF S.A. and the government of Argentina provides another illustration of the potential for massive returns on a relatively small litigation investment.¹⁰² Burford Capital's initial investment of \$16.6 million on behalf of YPF S.A. now entitles it to around \$6.2 billion dollars of a \$16 billion judgment that Argentina has been ordered to pay.¹⁰³ This is a 37,000% return on investment.¹⁰⁴ If an investor is calculating expected return as a return in a given scenario multiplied by the probability that scenario will occur, it is easy to see how the prospect of massive returns decreases the probability of recovery that is required to make an investment proposition attractive.¹⁰⁵

While a litigant filing frivolous claims could be subjected to sanctions, frivolous claims can also yield a financial return when they lead to nuisance-value settlements.¹⁰⁶ New York University law professor Samuel Issacharoff explained that funders are investing in cases against the city of New York

96. *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014).

97. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 67, at 12-13.

98. *Id.* at 13.

99. *Id.* at 12-13 (citing *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014)).

100. *U.S. Appeals Court Affirms RICO Judgment Against Lawyer Behind Fraudulent Ecuador Lawsuit*, CHEVRON (Aug. 8, 2016), <https://www.chevron.com/ecuador/press-releases/archive/appeals-court-affirms-rico-judgment-against-lawyer-behind-fraudulent-ecuador-lawsuit> [https://perma.cc/E6PF-NA8R].

101. *Id.*

102. Bob Van Voris et. al., *Argentina Ordered to Pay \$16 Billion in US Suit Over YPF*, BL (Sept. 8, 2023, 3:01 PM), <https://www.bloomberglaw.com/bloombergtterminalnews/bloombergtterminal-news/S0OKFBT1UM0W> [https://perma.cc/CB7C-227H].

103. *Id.*

104. *Id.*

105. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 92, at 9:35.

106. Jordan Rothman, *Advising A Client to Settle For Nuisance Value Can Be Tricky*, ABOVE THE LAW (Apr. 13, 2022, 5:03 PM), <https://abovethelaw.com/2022/04/advising-a-client-to-settle-for-nuisance-value-can-be-tricky/> [https://perma.cc/Z4MH-UFGM].

because they assume that the city will want to settle.¹⁰⁷ The comptroller for the City of New York has called TPLF “a business model that could potentially clear the way for bogus claims against the city.”¹⁰⁸ Frivolous lawsuits against government entities divert taxpayer dollars away from critical services into the pockets of litigation funders.¹⁰⁹ Similarly, frivolous lawsuits against business entities increase the operating costs of the business and lead to an increase in the prices of the goods and services offered to consumers.¹¹⁰

C. Proposed Benefits

1. *Flexible Financing Arrangements.*—TPLF firms offer significant benefits to commercial clients. In-house General Counsel are frequently unable to access the financing necessary to pursue meritorious litigation.¹¹¹ Financial officers generally want to spend money on the operating business, not pursuing litigation, which may not lead to a payoff until years in the future.¹¹² Legal expenses also affect a company’s bottom line profit and loss statement, reducing earnings.¹¹³ This can significantly impact the stock price of publicly traded companies. If for example, a publicly traded company spends \$10 million on a piece of litigation and the company is trading at a multiple of fifteen times earnings, the company’s market capitalization has just taken a \$150 million hit.¹¹⁴ Litigation finance allows the company to avoid this value decrease by offloading the financial burden and the risk of pursuing a meritorious lawsuit while still allowing the company to see a portion of the return.¹¹⁵

TPLF provides unique financing options to law firms. By providing financing directly to a law firm at the beginning of a lawsuit, TPLF enables law firms to offer clients more flexible fee arrangements.¹¹⁶ Firms can cover operating expenses and associate compensation with litigation funding, and be more willing to work for clients on a full or partial contingency basis.¹¹⁷ Law firms that are unwilling to work on a full contingency can now serve clients they would have had to turn away previously because the client could not afford

107. Shawn Cohen et al., *Inside the Cottage Industry That’s Fleecing NYC Taxpayers*, NEW YORK POST (Jan. 2, 2018, 5:16 PM), <https://nypost.com/2018/01/02/how-firms-are-getting-rich-on-the-surest-money-grab-in-nyc/> [https://perma.cc/7565-P6FF].

108. *Id.* (Andrew Plasse, a Queens attorney, explained that many of his clients did not even receive a significant portion of their settlement value because they were charged usurious interest rates by the litigation funder they were using.).

109. *Id.*

110. SWISS RE INST., *supra* note 6, at 17.

111. LAW, DISRUPTED, *Litigation Funding*, at 4:50 (Mar. 2, 2022), <https://law-disrupted.fm/litigation-funding/> [https://perma.cc/YA4D-WSGW].

112. *Id.* at 1:05.

113. *Id.* at 5:20.

114. *Id.* at 5:30.

115. *Id.* at 6:30.

116. *Id.* at 10:30.

117. *Id.* at 10:00.

hourly billing.¹¹⁸ Law firms can de-risk their litigation portfolio by sharing risk with litigation funders.¹¹⁹

Consumer claimants may also stand to benefit from the growth of the industry. Traditional bank lenders do not accept pre-judgment legal assets as collateral for loans.¹²⁰ Consumer TPLF allows claimants to accelerate prospective awards and receive payment years before the claimant would actually collect on a judgment.¹²¹ Personal injury claimants can use litigation funding to cover medical expenses associated with their injuries.¹²² Claimants can also use advanced payments from funders to cover the cost of living expenses, which is especially valuable for claimants who have lost their employment.¹²³

2. *Increased Access to Justice.*—Proponents of TPLF argue that third-party funding allows litigants to pursue claims with broader public policy implications.¹²⁴ Like plaintiff’s attorneys, litigation funders can be seen as holding businesses and governments to a higher level of accountability when the law has otherwise failed to do so.¹²⁵ Many litigation funders view themselves as crucial in pursuing social justice.¹²⁶ Prominent funders have prioritized environmental, social, and governance (ESG) cases with the goal of seeking justice for those who have been harmed by ESG breaches.¹²⁷ Rob Ryan, the CEO of Aristata Capital, a London-based litigation funder focusing on social and environmental damage, stated that the company’s goal is “to change corporate behavior in the long run” and that there are many claims the firm is interested in financing.¹²⁸ On the other side of the political spectrum, former Trump Justice Department attorney James Burnham started Vallecito Capital in 2023.¹²⁹ The firm manages \$50 million in assets and looks for cases with a

118. *Id.* at 10:23.

119. *Id.* at 10:19.

120. SWISS RE INST., *supra* note 6, at 5.

121. *Id.* at 6.

122. *Id.*

123. *Id.*

124. Natalie Runyon, *How Litigation Funding Drives Progress in the ESG Agenda*, THOMSON REUTERS (June 29, 2023), <https://www.thomsonreuters.com/en-us/posts/esg/litigation-funding-esg-agenda/#:~:text=Litigation%20funding%20%E2%80%94%20the%20payment%20by,increase%20access%20is%20to%20justice> [https://perma.cc/ZBK3-MNJK].

125. Levick, *supra* note 12.

126. *Id.*

127. John Freund, *A Snapshot of ESG in Litigation Funding*, LEGAL FUNDING J. (Aug. 18, 2022), <https://litigationfinancejournal.com/a-snapshot-of-esg-in-litigation-funding/> [https://perma.cc/8AZ9-NHN9].

128. Gautam Naik, *Hedge Funds Target ‘Catastrophic’ ESG Cases for Huge Returns*, BL (Jan. 9, 2024, 5:33 AM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberglaw-news/XFFR9I6G000000?bc> [https://perma.cc/KQ5U-F6YY].

129. Emily R. Siegel & Justin Wise, *Capital Flows Into Litigation Funds With Social Justice Impact*, BL (Feb. 2, 2024, 5:00 AM), https://www.bloomberglaw.com/bloomberglawnews/bloomberglaw-news/BNA%200000018d479bd1eaa7fdefdb55610000?bna_news_filter=bloomberglaw-news [https://perma.cc/2MVL-D9MJ].

“measurable social impact” and attractive financial returns.¹³⁰ Whether litigation funders’ use of the justice system as a vehicle for private enforcement of the law in pursuit of certain policy goals is a good or bad thing is beyond the scope of this Note. However, this aspect of TPLF implicates disclosure significantly and will be addressed in this context in the proposed amendments *infra* section IV.

III. WHAT IS BEING DONE – JURISDICTION-BY-JURISDICTION SOLUTIONS

There have been attempts to regulate TPLF at multiple different levels. There have been multiple proposals to amend the Federal Rules of Civil Procedure.¹³¹ TPLF disclosure legislation has been introduced by the Senate multiple times.¹³² Some federal courts have issued standing orders and amended their local rules.¹³³ State legislatures across the country have responded by passing a variety of statutes.¹³⁴

A. Attempt to Amend the Federal Rule of Civil Procedure

The first proposal to amend the Federal Rules of Civil Procedure to include a TPLF disclosure requirement was made in 2014 by the U.S. Chamber of Commerce Institute for Legal Reform.¹³⁵ The proposal was to include a TPLF disclosure requirement in Federal Rule 26, which requires other information to be disclosed by litigants.¹³⁶ That proposal was denied, as were many subsequent proposals by the Chamber and other industry groups.¹³⁷ A recent proposal to amend Federal Rule 26 to cover litigation finance agreements in May of 2023 was signed by thirty-five different industry groups.¹³⁸

130. Jimmy Hoover, *Ex-Supreme Court Clerks Find Big Money Opportunities in Litigation Finance*, LAW.COM (Oct. 23, 2023, 8:18 PM), <https://www.law.com/2023/10/23/ex-supreme-court-clerks-find-big-money-opportunities-in-litigation-finance/> [<https://perma.cc/DKQ6-TTJ2>].

131. *Another Effort to Amend Federal Rule 26 With A One-Size-Fits-All Litigation Finance Disclosure Requirement Does Not Persuade The Federal Rules Advisory Committee*, ABOVE THE LAW (Jan. 20, 2022), <https://abovethelaw.com/2022/01/another-effort-to-amend-federal-rule-26-with-a-one-size-fits-all-litigation-finance-disclosure-requirement-does-not-persuade-the-federal-rules-advisory-committee/> [<https://perma.cc/956M-V62M>].

132. *See* S. 2815, 115th Cong. (2018); *see also* H.R. 2025, 117th Cong. (2021).

133. *See Advisory Committee on Civil Rules*, U.S. CTS., 209 (Apr. 10, 2018), <https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf#page=209> [<https://perma.cc/9NYN-PYF3>].

134. Popolizio, *supra* note 3.

135. Hoover, *supra* note 131.

136. *Id.*

137. Mark Popolizio, *Several Industry Groups Renew Calls for a Mandatory TPLF Disclosure Rule as Part of the Federal Civil Rules of Procedure*, VERISK (June 9, 2023), <https://www.verisk.com/insurance/visualize/several-industry-groups-renew-calls-for-a-mandatory-tplf-disclosure-rule-as-part-of-the-federal-civil-rules-of-procedure/> [<https://perma.cc/AG5H-CM9Z>].

138. *Id.*

Federal Rule 16(c)(2) may be another avenue for federal courts to address the growth of litigation finance.¹³⁹ In September of 2022, a group of defense lawyers called Lawyers for Civil Justice joined the Chamber of Commerce in proposing an amendment to Federal Rule 16(c)(2).¹⁴⁰ The proposed amendment would give courts discretion to investigate third-party financing during pretrial conferences.¹⁴¹ The Advisory Committee has repeatedly denied proposals to amend the rules to address litigation finance, and there is no indication it plans to change its mind in the near future.¹⁴² Additionally, federal disclosure requirements would leave state courts unaffected, leading to forum shopping for jurisdictions where disclosure is not mandated.¹⁴³

B. Proposed Federal Legislation

On two occasions, the Senate has introduced legislation that would require the disclosure of third-party financing. The Litigation Funding Transparency Act of 2018 required disclosure of any commercial entity with a right to receive compensation in either class action lawsuits or multi-district litigation in federal courts.¹⁴⁴ The bill was not taken to a vote and died in that Congressional session.¹⁴⁵ It was reintroduced as the Litigation Funding Transparency Act of 2021 and again was not taken to a vote.¹⁴⁶

In September of 2023, a bipartisan group of senators introduced a bill that would mandate disclosure of funding received from a foreign funder or government in a civil action.¹⁴⁷ The Protecting Our Courts from Foreign Manipulation Act of 2023 is intended to protect American economic and national security by preventing foreign entities from flooding American companies with frivolous claims.¹⁴⁸ The bill also prohibits sovereign wealth funds and foreign governments from investing in civil litigation in Federal courts and requires the Attorney General to submit a report on the activities of foreign third-party litigation funding in Federal courts to the Committee on the Judiciary of the Senate and of the House of Representatives.¹⁴⁹ It is worth

139. *An Important but Rarely Asked Question: Amending Rule 16(c)(2) to Prompt Judges to Consider Inquiring about Financial Interests Created by Third-Party Litigation Funding*, LAWS. FOR CIV. JUST. & U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Sept. 8, 2022), https://www.uscourts.gov/sites/default/files/22-cv-m_suggestion_from_lcj_and_ilr_-_rule_16c2_0.pdf [https://perma.cc/WV85-9HH4].

140. *Id.* at 1.

141. *Id.* at 2.

142. Popolizio, *supra* note 137.

143. *Ferens v. John Deere Co.*, 494 U.S. 516, 527 (“An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws.”).

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

145. *Id.*

146. H.R. 2025, 117th Cong. (2021).

147. S. 2805, 118th Cong. (2023).

148. *Id.*

149. *Id.*

mentioning that in January of 2024, the Indiana General Assembly proposed an amendment to the provider prohibitions statute, which mirrors this proposed federal legislation.¹⁵⁰ Among other things, the amendment would prohibit a CPAP provider from funding a consumer claimant directly or indirectly funded by a person who does not reside in the United States or a corporation or entity not domiciled in the United States.¹⁵¹

C. Actions Taken by the Judicial Branch

Some federal courts have acted by amending their local rules or issuing standing orders requiring disclosure of third-party funders.¹⁵² As of 2018, six of the federal circuit courts and twenty-four of the federal district courts required disclosure of third-party funding.¹⁵³ This approach could lead to forum shopping between different federal districts and state courts that do not require disclosure.¹⁵⁴

D. State Law Comparative Analysis

1. Wisconsin.—In 2018, Wisconsin became the first state to pass a statute requiring disclosure of third-party funding arrangements to other parties.¹⁵⁵ The statute reads:

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.¹⁵⁶

The statute requires disclosure of the existence of a funding agreement in all civil cases and requires disclosure of the agreement itself.¹⁵⁷ In contrast to the Indiana statute, this statute is not limited to certain kinds of cases like those involving consumer claimants.¹⁵⁸

150. *Actions for House Bill 1160*, IND. GEN. ASSEMBLY, <https://iga.in.gov/legislative/2024/bills/house/1160/details> [<https://perma.cc/3YCR-7M9X>] (last visited Aug. 25, 2024).

151. *Id.*

152. U.S. CTS., *supra* note 133, at 209.

153. *Id.* at 210–11.

154. *Ferens v. John Deere Co.*, 494 U.S. at 527.

155. Jason D. Russell et al., *Show us the Money! Wisconsin Mandates Third-Party Litigation Finance Disclosure*, DAILY J. (Apr. 16, 2018), <https://www.skadden.com/-/media/files/publications/2018/04/wisconsinmandatesthirdparty litigationfinancedisclo.pdf> [<https://perma.cc/ZV9T-W8SD>].

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

157. Russell et al., *supra* note 155.

158. § 804.01(2)(bg) (2018).

2. *Montana*.—In May of 2023, Montana passed multiple statutes regulating TPLF in civil actions.¹⁵⁹ The statute covering disclosure to the court and discovery of the contract is very similar to Indiana’s statute, however it is broader in that it applies in all civil actions.¹⁶⁰ The statute on specific disclosures requires that the contract explicitly disclose that the client has a right to cancellation, a 25% cap on the amount of the settlement or judgment that the funder can receive, a disclaimer of any right to control the litigation by the funder, a disclosure establishing that the funding is non-recourse, and a disclosure that the client is entitled to a fully completed contract with no terms omitted prior to signing.¹⁶¹ The language of Montana’s required disclosure regarding decision-making reads:

The litigation financier agrees that it has no right to, and will not demand, request, receive, or exercise any right to, influence, affect, or otherwise make any decision in the handling, conduct, administration, litigation, settlement, or resolution of your civil action, administrative proceeding, claim, or cause of action. All of these rights remain solely with you and your legal representative.¹⁶²

Unlike Indiana’s required disclosure statute, this statute clearly specifies that the funder is prohibited from participating in all decision-making, not just settlement, and that decision-making authority rests not only with the attorney but also the client.¹⁶³

3. *Nevada*.—In 2019, Nevada passed multiple TPLF statutes.¹⁶⁴ Nevada’s regulation of TPLF is even narrower than Indiana’s because the statutes only target consumer funding transactions below \$500,000.¹⁶⁵ Nevada has a statute requiring funders to be licensed by the state¹⁶⁶—as does Indiana¹⁶⁷—and also requires funding contracts to contain certain disclosures that constitute material terms of the contract.¹⁶⁸ These required disclosures include financial information, such as the amount to be paid to the consumer and a payment schedule, and a clause where the funder acknowledges it will not play any part

159. See Mark Popolizio, *TPLF Disclosure Proposals are Introduced in Kansas, Mississippi, and Montana State Legislatures*, VERISK (Feb. 13, 2023), <https://www.verisk.com/insurance/visualize/tplf-disclosure-proposals-are-introduced-in-kansas-mississippi-and-montana-state-legislatures/> [https://perma.cc/VW4N-5P7W]; see also MONT. CODE ANN. § 31-4-107 (2024); see also MONT. CODE ANN. § 31-4-108 (2024).

160. MONT. CODE ANN. § 31-4-108 (2024).

161. MONT. CODE ANN. § 31-4-107(4) (1–5) (2024).

162. MONT. CODE ANN. § 31-4-107(4)(3) (2024).

163. *Id.*; see also IND. CODE § 24-12-4-1(3) (2019).

164. NEV. REV. STAT. § 604C.100 (2019).

165. *Id.*

166. NEV. REV. STAT. § 604C.320 (2019).

167. IND. CODE § 24-12-9-1 (2023).

168. NEV. REV. STAT. § 604C.360 (2019).

in determining “whether, when, and how much the legal claim is settled for.”¹⁶⁹

IV. PROPOSALS FOR AMENDMENT OF THE INDIANA STATUTE

A. *Expanding the Scope of the Indiana Statute*

The first proposal of this Note is to amend Indiana Code § 24-12-4-2 to cover all parties in civil litigation—not just consumer claimants. Seventy-five percent of TPLF investments go toward funding commercial litigation and mass torts.¹⁷⁰ In the United States, over two-thirds of the settlement value of cases funded by third parties went to commercial claimants.¹⁷¹ While the market value of the entire TPLF industry is \$17 billion, the two largest funders of commercial litigation alone have over \$6 billion in assets under management.¹⁷² The majority of the third-party funding in the legal system is removed from consumer claimants.¹⁷³

Concerns that TPLF will decrease judicial efficiency apply equally to funding for consumer and commercial claimants.¹⁷⁴ A commercial party that knows a significant portion of a settlement or judgment amount is going to a third-party funder could be incentivized to reject reasonable settlement offers and obtain the largest judgment possible for the company's owners.¹⁷⁵ Disclosure of third-party financing is equally likely to aid settlement efforts between commercial and consumer parties.¹⁷⁶ Although litigation funding differs from insurance coverage in that it cannot be used to satisfy a claim, the knowledge of third-party funding allows the lawyers on both sides to get a better idea of what it will take to settle a case.¹⁷⁷

Model Rule of Professional Conduct 5.4, which prohibits lawyers from sharing legal fees with nonlawyers,¹⁷⁸ is equally implicated by TPLF for commercial and consumer claimants. Since the large publicly traded litigation funders with the most investors almost exclusively fund commercial parties,¹⁷⁹ the concern that undisclosed TPLF will allow conflicts of interest to go

169. *Id.*

170. SWISS RE INST., *supra* note 6, at 2.

171. *Id.*

172. *Id.* at 8–9.

173. *Id.* at 8.

174. *Id.* at 16.

175. *Id.* at 20.

176. *Id.* at 22.

177. David Levitt, *Litigation Funding Disclosure Should be Mandatory*, DRI (Aug. 3, 2023), [https://www.dri.org/docs/default-source/center-law-public-policy/law360---litigation-funding-disclosure-should-be-mandatory-8-4-\(003\).pdf?sfvrsn=6](https://www.dri.org/docs/default-source/center-law-public-policy/law360---litigation-funding-disclosure-should-be-mandatory-8-4-(003).pdf?sfvrsn=6) [<https://perma.cc/VWY9-QND7>].

178. MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR. ASS'N 2023).

179. *See What We Do*, BURFORD CAP., <https://www.burfordcapital.com/what-we-do/> [<https://perma.cc/VJG3-3LWZ>] (last visited Nov. 26, 2023); *see also Who We Help*, OMNI BRIDGEWAY, <https://omnibridgetway.com/litigation-funding/dispute-funding/commercial> [<https://perma.cc/L462-58U2>] (last visited Nov. 26, 2023).

unnoticed should be even more prevalent with funding of commercial claims than consumer claims. While frivolous claims may be more common in consumer litigation, there is evidence that they occur in commercial cases as well.¹⁸⁰

As noted in the State Law Comparative Analysis, Wisconsin and Montana's litigation finance disclosure statutes apply to parties in all civil cases.¹⁸¹ Indiana should amend Indiana Code § 24-12-4-2 so that it also applies to the largest players in the TPLF industry: commercial claimants. I propose that Indiana amend Indiana Code § 24-12-4-2(a) to read:

Except as provided in subsection (c), in a civil proceeding in which a party has entered an 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 proceeds from the civil action, the party or party's attorney shall provide to:

- (1) each of the other parties in the civil proceeding, and
- (2) each insurer that has a duty to defend another party in the civil proceeding;

Written notice that the party has entered into a CPAP contract with a CPAP provider.

I also propose that Indiana amend Indiana Code § 24-12-4-2(d) to read:

In a civil proceeding in which a party has entered an 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 proceeds from the civil action, the existence and contents of the agreement are subject to discovery under the Indiana Rules of Trial Procedure by:

- (1) a party other than the party who entered the agreement; or
- (2) an insurer that has a duty to defend another party in a civil proceeding.

Additionally, the term "consumer claimant" should be replaced throughout sections (b) and (c) of the statute with a term that is inclusive of all parties that have entered CPAP agreements in civil proceedings. These amendments adopt the broader language of the Wisconsin statute, and they would achieve the goal of extending disclosure requirements to commercial parties.¹⁸²

180. *See* *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014).

181. *See* MONT. CODE ANN. § 31-4-107 (2024); *see also* WIS. STAT. § 804.01 (2018).

182. *See* WIS. STAT. § 804.01(2)(bg) (2018).

B. Expand the Scope of the Specific Disclosures Statute

This Note's second proposal is that the Indiana General Assembly vote to expand the scope of Indiana Code § 24-12-4-1(3) to require CPAP providers to make a specific disclosure that they are prohibited from engaging in any activity outlined in the "provider prohibitions" section—not just settlements or direct interference with the lawyer's judgment. While Indiana Code § 24-12-3-1 already prohibits funders from making any strategic decisions,¹⁸³ some parties might not be aware of the full scope of the prohibition—especially consumer claimants or members of a class action.¹⁸⁴ There are important strategic decisions outside of just whether or not to settle, including attorney selection, witness selection, and the many decisions that arise during motions practice.¹⁸⁵ Under the required disclosure statute, it is unclear to a claimant whether a funder could, for example, force the claimant to use a certain attorney since the disclosure only prohibits funder involvement in settlement decisions or a funder's interference with the "independent professional judgment of the attorney."¹⁸⁶ It is completely reasonable for a litigant using financing from a third party to assume the litigant has forfeited some decision-making authority, and unless the claimant has a detailed knowledge of the Indiana statute, the litigant will be unaware that the funder's involvement is prohibited by law.

It is also unclear under the current disclosure requirement what constitutes an interference with the "independent professional judgment of the attorney."¹⁸⁷ The term "interfere" implies opposition or obstruction of a person's goals.¹⁸⁸

183. IND. CODE § 24-12-3-1 (2024).

184. See Complaint at 4–5, *Murtaugh v. Goggin & Duckworth, P.C.*, No. 2:24-cv-00026-JFM (E.D. Pa. Jan. 3, 2024); see also Emily Siegel, *Worker Sues Over Litigation Funding He Claims He Didn't Agree to*, BL. (Jan. 3, 2024, 6:36 PM), https://www.bloomberglaw.com/bloomberglawnews/litigation-finance/BNA%200000018cd11bdce1a1edf75fa7e40001?bna_news_filter=litigation-finance [<https://perma.cc/37GK-M5K9>]. This case involves a plaintiff's attorney who used a client's legal claim as collateral for a high-interest loan from a litigation funder. The client had no knowledge of the funding agreement. The case serves as an extreme illustration of how lack of disclosure leads consumer claimants to be taken advantage of by litigation funders.

185. See Jasmine Roy, *Choosing an Attorney: 10 Things to Consider*, LAWDEPOT (Sept. 6, 2023), <https://www.lawdepot.com/resources/business-articles/choosing-an-attorney/> [<https://perma.cc/MY53-LAAM>]; see also *Choosing Witnesses for Your Court Cases*, FITCH AND STAHL L. OFF., <https://www.fitch-stahlelaw.com/choosing-witnesses-for-your-court-cases> [<https://perma.cc/5MGD-RFPL>] (last visited Aug. 25, 2024); see also *Motions Practice*, BL., <https://www.bloomberglaw.com/document/X83SK974000000> [<https://perma.cc/GFP2-T2RG>] (last visited Aug. 25, 2024).

186. IND. CODE § 24-12-4-1(3) (2019).

187. *Id.*

188. *Interfere*, DICTIONARY.COM, <https://www.dictionary.com/browse/interfere>, [<https://perma.cc/339H-HBS2>] (last visited Aug. 25, 2024) (defining "interfere" to mean "to come into opposition, as one thing with another, especially with the effect of hampering action or procedure.").

The language of the disclosure makes it unclear whether a funder can contribute to litigation strategy in a way that is not adverse to the attorney's judgment and not related to the settlement.¹⁸⁹ Given that TPLF is a relatively new industry that many consumers know little about and the threat that funder decision-making poses to judicial efficiency, the Indiana General Assembly should amend the language of the specific disclosure requirement to combat reasonable assumptions by claimants and clarify exactly what level of involvement a funder is forbidden from taking.¹⁹⁰ I recommend that Indiana amend Indiana Code § 24-12-4-1(3) to clarify the full scope of actions a funder is prohibited from engaging in and adopt language similar to that used by the Montana legislature.¹⁹¹ The required disclosure of section (3) should read:

A notice informing the party that the CPAP provider has no right to, and will not demand, request, receive, or exercise any right to, influence, affect, or otherwise make any decision in the handling, conduct, administration, litigation, settlement, or resolution of your civil action, administrative proceeding, claim, or cause of action. All of these rights remain solely with you and your legal representative.

C. The Amendments Minimally Detract from the Proposed Benefits of TPLF

The argument that TPLF is crucial to increase access to justice for underfunded litigants loses force after considering that litigation funders are often paid before the litigants receive any of the proceeds at all.¹⁹² If the litigant then has to pay the lawyer on a contingency, the remaining amount of money could be even smaller.¹⁹³ Additionally, over two-thirds of the settlement value in cases funded by third parties goes to commercial parties who have the means to pursue the litigation but determine it is in their best financial interest not to divert capital from the operating business.¹⁹⁴

The attempt of some funders to serve a regulatory function and privately enforce certain areas of the law to reach their policy goals supports enhanced disclosure requirements.¹⁹⁵ It is a core principle of the American legal system that sunlight is the best disinfectant.¹⁹⁶ Transparency in the enforcement of the

189. *See* § 24-12-4-1(3) (2019).

190. *What You Need to Know About Third Party Litigation Funding*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Feb. 7, 2023), <https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding/> [<https://perma.cc/7GTY-G3FH>].

191. MONT. CODE ANN. § 31-4-107 (2024).

192. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 190.

193. *Id.*

194. SWISS RE INST., *supra* note 6, at 2.

195. U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 92, at 14:55.

196. Eira Tansey, *Sunlight as the Best Disinfectant?*, LIBLOG (Feb. 5, 2018), <https://libapps.libraries.uc.edu/liblog/2018/02/sunlight-as-the-best-disinfectant/> [<https://perma.cc/AWD9-9R4G>].

laws is a required condition for a well-functioning democracy.¹⁹⁷ The more information the public has about the use of litigation funding to pursue policy goals, the less likely the chance it will be used in a way that is contrary to the will of the people.¹⁹⁸

While disclosure requirements could negatively impact funders—by, for example, diminishing the value of research that makes TPLF profitable¹⁹⁹—the main economic benefits for clients remain intact.²⁰⁰ Commercial parties can still offload the risk and expense of pursuing a meritorious claim, while consumers can receive funds lent against the legal claim as collateral.²⁰¹ The primary purpose of the judicial system is to adjudicate controversies fairly and efficiently, not to create a litigation environment that is most profitable for funders.²⁰²

CONCLUSION

In April 2023, the Indiana General Assembly passed Indiana Code § 24-12-4-2. By passing the statute, Indiana joined a handful of other states who have mandated third parties to disclose the existence and contents of third-party funding arrangements. The Indiana statute applies only to consumer claimants and varies significantly from disclosure statutes passed by other states.

This Note has argued that the scope of Indiana Code § 24-12-4-2 should be extended to all parties in civil proceedings. This argument is supported by concerns that undisclosed TPLF reduces the incentive for litigants to find justice efficiently, leads to violations of the Model Rule of Professional Development 5.4, allows conflicts of interest to go unnoticed, and leads to frivolous litigation. The Note also argued that Indiana Code § 24-12-4-1(3) should be amended to expand the scope of the required disclosure and clarify its language. The proposed amendments are low-cost regulations that come without significant compliance costs. Disclosure can remedy many of the concerns posed by TPLF critics and have little, if any, effect on the benefits that TPLF can bring to the judicial system. Amending the statute would increase transparency and efficiency in Indiana courts and better reveal the effects of this rapidly growing industry.

197. *Id.*

198. See U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 92, at 15:40.

199. Keith Sharfman, *The Economic Case Against Forced Disclosure of Third Party Litigation Funding*, NYSBA (Feb. 11, 2022), <https://nysba.org/the-economic-case-against-forced-disclosure-of-third-party-litigation-funding/> [<https://perma.cc/H878-K2ZB>].

200. See U.S. GOV'T ACCOUNTING OFF., *supra* note 4, at 18–19.

201. LAW, DISRUPTED, *supra* note 111, at 6:30.

202. See *Court Role and Structure*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> [<https://perma.cc/S8HS-QNM8>] (last visited Aug. 25, 2024).