U.S. Chamber of Commerce
Institute for Legal Reform

COMMENTS ON R-25-0003 PETITION TO AMEND RULE 8, RULES OF CIVIL PROCEDURE

The U.S. Chamber of Commerce Institute for Legal Reform ("ILR")[1] respectfully submits these comments regarding the Petition to Amend Rule 8, Rules of Civil Procedure to add a new subsection (j) that would require certain disclosures when a civil action is subject to a litigation funding agreement. For the reasons explained below, ILR wishes (a) to express its general support for transparency of third-party litigation funding ("TPLF") agreements and (b) to urge that two revisions be made to the proposed text of subsection (j) of the proposed amendment to Rule 8 to better effectuate the policies underlying the amendment.

Introduction

TPLF is a rapidly growing business model in which non-parties invest in litigation by paying money to a plaintiff or his/her counsel in exchange for an interest in proceeds from the lawsuit. At present, virtually all TPLF activity in U.S. courts, including in Arizona, occurs in secrecy because there is no generally applicable national statute or rule requiring disclosure.[2] Moreover, to the extent defendants seek this information through ordinary discovery, plaintiffs (and their funders) generally resist strenuously, and courts often do not compel production of the requested information. Thus, the existence of TPLF in a particular civil action typically becomes known to the court and the parties only if there is compliance with a local rule or standing order requiring disclosure (or a public dispute emerges between the plaintiff and the funder).

Despite this secrecy, it is clear that the amount of litigation being funded by non-party investors has grown by leaps and bounds over the last decade. According to one industry report, during 2024, litigation funders had $16.1 billion in assets under management in the U.S.[3] An analysis conducted in 2022 by Texas A&M University shows that from 2015-2021, at minimum, almost 25% of patent lawsuits in the U.S. were funded by third parties.[4] And a study conducted

---

1 ILR is a program of the U.S. Chamber of Commerce dedicated to championing a fair legal system that promotes economic growth and opportunity. The Chamber is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and it is dedicated to promoting, protecting and defending America's free enterprise system. Page Faulk, ILR senior vice president, legal reform initiatives, was appointed to the Alternative Business Structures Task Force by then-Chief Justice Robert Brutinel. On July 3, 2024, Chief Justice Ann A. Scott Timmer issued Administrative Order No. 2024-136, ordering the Task Force to examine third-party funding of civil litigation.

2 *See* James Anderson, *Is Increased Transparency into Litigation Financing on the Horizon?*, National Law Review (Jan. 15, 2020), https://www.natlawreview.com/article/increased-transparency-litigation-financing-horizon.

3 The Westfleet Insider, *2024 Litigation Finance Market Report*, https://www.westfleetadvisors.com/wp-content/uploads/2025/03/WestfleetInsider-2024-Litigation-Finance-Report.pdf.

4 Joshua Landau, *IP Litigation Financing Protects Investors, Not Inventors*, Bloomberg Law (Oct. 31, 2022), https://news.bloomberglaw.com/us-law-week/ip-litigation-financing-protects-investors-not-inventors.

by the Government Accountability Office ("GAO") suggests that the number could be significantly higher.[5]

While public attention to TPLF has often focused on the patent and business-to-business litigation space, litigation investors have increasingly become entrenched in other aspects of our civil justice system, including the mass torts arena in both federal and state courts.[6] Flush with cash, plaintiffs' lawyers and their investors are able to work with claim aggregators (also known as lead generators) to drum up clients and claims. "Advertising is the main method to find claimants, and it's handled by an ecosystem of lawyer-specific ad agencies . . . ."[7] These companies engage in aggressive marketing and sell the names of potential claimants to plaintiffs' counsel.[8] Millions of dollars have been spent on such efforts to fuel litigation involving a wide array of topics, including talcum powder, military earplugs, baby formula and weedkillers.[9] For example, litigation funding and aggressive advertising on television, radio and social media effectively turned the 3M Combat Arms Earplug litigation into the largest mass tort in U.S. history, generating close to 300,000 claimants.[10] As one member of the plaintiffs' bar put it, "[f]ive or seven years ago, a tort like 3M would have been 50,000 claimants . . . . Now it's [more than] 275,000 claimants because of innovations around digital marketing and origination, the technology to absorb that type of volume, and capital."[11] Because hearing loss and tinnitus have many causes and become increasingly common with advancing age,[12] plaintiffs' lawyers were able to amass a large volume of claims and exert enormous settlement pressure on the defendant.

---

5 GAO, *Report to the Ranking Member, Subcommittee on Intellectual Property, Committee on the Judiciary, U.S. Senate – Intellectual Property: Information on Third-Party Funding of Patent Litigation*, GAO-25-107214, at 14 (Dec. 2024), https://www.gao.gov/assets/gao-25-107214.pdf.

6 *See* Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 Rev. of Lit. 143, 143 (2021) ("mass tort claims pending in [multi-district litigations] constitute the fastest growing sector of those seeking assistance" from third-party litigation funders); *see also* Maya Steinitz, *Follow the Money? A Proposed Approach for Disclosure of Litigation Finance Agreements*, 53 U.C. Davis L. Rev. 1073, 1075 (2019) ("This market in legal claims has attracted . . . private equity [and] hedge funds . . . looking for high-risk high-reward investments . . . .").

7 Roy Strom, *Camp Lejeune Ads Surge Amid "Wild West" of Legal Finance, Tech*, Bloomberg Law (Jan. 30, 2023), https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech (such investors "view mass torts as an increasingly lucrative asset class, and are likely to bet even more money on similar cases to diversify their holdings").

8 *Id.*

9 *Id.*

10 *See, e.g.*, Nate Raymond, *3M Owes $58 Million to Two Veterans in Latest Combat Earplug Trials*, Reuters (Mar. 26, 2022), https://www.reuters.com/legal/litigation/jury-says-3m-owes-50-mln-us-army-veteran-latest-earplug-trial-2022-03-25; Informational Brief of Aearo Technologies LLC at 38, *In re Aearo Techs. LLC*, No. 22-02890-JJG-11, ECF No. 12 (S.D. Ind. July 26, 2022) ("Aearo Informational Brief").

11 Roy Strom, *Camp Lejeune Ads Surge Amid "Wild West" of Legal Finance, Tech*, Bloomberg Law (Jan. 30, 2023), https://news.bloomberglaw.com/business-and-practice/camp-lejeune-ads-surge-amid-wild-west-of-legal-finance-tech.

12 National Institute on Deafness and Other Communications Disorders, Tinnitus, https://www.nidcd.nih.gov/health/tinnitus.

In light of the increasingly pervasive usage of TPLF, an increasing number of states are enacting laws that require disclosure of TPLF agreements. In 2023, for example, Montana enacted a TPLF law that requires disclosure of all TPLF agreements in civil cases, requires TPLF companies to register with the Secretary of State, prohibits usury fees, and limits the funders' share of a plaintiff's recovery.[13] West Virginia and Wisconsin likewise mandate automatic disclosure of TPLF agreements in all civil cases.[14] Indiana enacted a law that dictates the disclosure of TPLF usage, prohibits funders from accessing proprietary data, and bans them from influencing or controlling lawsuits.[15] And most recently, Georgia passed legislation that requires the funder to register, restricts the influence of the funder in actions where the funder provided funding and makes any litigation financing agreements discoverable in the underlying lawsuit.[16] In sum, states have become active in adopting policies intended to increase the transparency of TPLF agreements and usage.[17]

ILR supports disclosure requirements that would make TPLF arrangements more transparent. However, to be effective, any such rule should require disclosure of the existence of funding, the identity of the investors, the identity of any foreign funding sources, ***as well as the production of the underlying TPLF agreements***. Absent the revelation of this most basic information, TPLF will continue to operate sub rosa, hiding potential conflicts of interest and other ethical issues, such as improper fee-splitting between lawyers and non-lawyers. Further, unless TPLF becomes more transparent, courts will continue to be left in the dark about whether an outside entity is steering a plaintiff's litigation and settlement decisions—a dynamic that is highly relevant to settlement negotiations, the adequacy of counsel in class actions and potential cost-shifting obligations. And absent a disclosure rule, there remains a real risk that foreign competitors (indeed, potential adversaries) may be engaging in clandestine efforts to use U.S. courts to undermine U.S. national or economic security.

To lessen these serious risks and for multiple additional reasons, a TPLF disclosure rule is essential to the fair, efficient and ethical functioning of Arizona civil litigation. The reasons why ILR believes that the proposed Rule 8(j) should be adopted (with two important amendments) are as follows:

---

13 Mont. Code Ann. § 31-4-108.

14 W. Va. Code Ann. § 46A-6N-6; Wis. Stat. Ann. § 804.01(2)(bg).

15 Ind. Code Ann. § 24-12-3-1.

16 Ga. S.B. 69 (effective Jan. 1, 2026).

17 Notably, the Arizona legislature is considering two distinct bills related to transparency around TPLF. *See* Kiera Riley, *Competing Bills Focus on Identifying Third-Party Funders of Lawsuits*, Arizona Capitol Times (Apr. 5, 2025), https://azcapitoltimes.com/news/2025/04/05/competing-bills-focus-on-identifying-third-party-funders-of-lawsuits/. However, that should not dissuade the Court from proceeding as it sees fit with respect to amending Rule 8.

1) **<u>The Court Should Amend Rule 8 To Require TPLF Disclosure</u>**

a. <u>Enabling Assessment Of Who May Exercise Control Or Influence Over Litigation</u>

A disclosure requirement would provide Arizona courts and parties information about whether TPLF companies are exercising control or influence over litigation. As our judiciary has explained, "[t]he public has an interest in knowing the names of the litigants, and disclosing the parties' identities furthers openness of judicial proceedings." *Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014) (citations omitted). This is why courts have a high bar for permitting parties to litigate under pseudonyms and one reason why Ariz. R. Civ. P. 17(b)(1) requires that "[a]n action must be prosecuted in the name of the real party in interest."[18] As discussed above, TPLF contracts can give non-parties control over litigation decisions and a portion of any settlement or other payout, essentially making the funder a party in interest. The court and defendants are entitled to know the identity of these players.

TPLF companies frequently dismiss such concerns by asserting that they do not control litigation strategy. However, the few TPLF agreements that have come to light demonstrate that, unsurprisingly, TPLF entities actually can and do exercise various forms of control and influence over the litigation matters in which they invest.

For example, in *Boling v. Prospect Funding Holdings, LLC*, the U.S. Court of Appeals for the Sixth Circuit concluded that the terms of the funding agreements involved in a personal injury lawsuit "effectively g[a]ve [the TPLF entity] substantial control over the litigation."[19] In particular, two of the agreements permitted the funder to require the plaintiff to execute documents or pay filing fees to protect the funder's interest. Another agreement provided that "[i]f the Proceeds [from settlement] are insufficient to pay the Prospect Ownership Amount in full, [Prospect] shall receive all of the Proceeds."[20] Such a provision undoubtedly influenced the plaintiff's ability to settle his case since he was required to accommodate [the funder's] flat fee, which accrued with interest.[21] And "[a]ll four Agreements limited [the plaintiff's] right to change attorneys without [the funder's] consent, otherwise [the plaintiff] would be required to repay [the funder] immediately."[22]

Notably, a report by the American Bar Association's House of Delegates repeatedly recognizes and emphasizes the inherent risk of funder control, warning against such control over

---

18 Ariz. R. Civ. P. 17(b)(1).

19 *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 579 (6th Cir. 2019).

20 Purchase Agreement ("*Boling* Purchase Agreement") § 6.1, *Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, ECF No. 1-3 (Ex. C to Compl.) (W.D. Ky. filed June 19, 2014); *see generally Boling v. Prospect Funding Holdings, LLC*, No. 1:14-CV-00081-GNS-HBB, 2017 U.S. Dist. LEXIS 48098 (W.D. Ky. Mar. 30, 2017), *aff'd*, 771 F. App'x 562 (6th Cir. 2019).

21 *Boling* Purchase Agreement at 1.

22 *Boling*, 771 F. App'x at 580.

the litigation itself and even over expenses associated with the lawsuit.[23] Indeed, even when a funder's efforts to control a plaintiff's case are not overt, the existence of TPLF funding may subordinate the plaintiff's own interests in the resolution of the litigation to the interests of the TPLF investor. Disclosure of the existence of funding, the nature of the funding, and the circumstances surrounding any right of the funder to approve litigation decisions or settlement would simply give courts the necessary information to assess who actually controls a civil action. Notably, these aspects of disclosure, and particularly the circumstances surrounding any right of the funder to approve litigation decisions or settlement, could only be discovered through the disclosure of the funding agreement itself.[24]

More recent cases continue to reinforce this trend. Most notably, Sysco Corporation filed a series of antitrust class actions against various poultry and meat suppliers that it financed with more than $140 million provided by Burford Capital ("Burford").[25] When Sysco agreed to give its customers a piece of the antitrust claims in 2022, however, Burford allegedly objected and required that the funding agreement be changed to give Burford the right to review and reject settlement offers, provided Burford's consent is not "unreasonably withheld."[26] Once Sysco began receiving settlement offers it found to be reasonable, Burford allegedly sought to obstruct further settlement negotiations, fearing the amounts were too low.[27] Burford instituted proceedings to enjoin Sysco from finalizing settlements, and an arbitral panel granted an *ex parte* temporary restraining order in Burford's favor.[28]

These allegations, if true, contradict Burford's repeated public statements that it does ***not*** exercise any control or influence over the lawsuits it finances.[29] But more importantly, they

---

23 *See* ABA, *Best Practices for Third-Party Litigation Funding*, at 11, 12, 13, 15 (Aug. 2020), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/111a-annual-2020.pdf.

24 For example, according to a Bloomberg News article, Arizona-based Pravati Capital includes in its TPLF contracts triggers for immediate repayment obligations if any case in a funded portfolio is settled, a situation that could cause attorneys to accelerate or delay settlements in a manner that is not necessarily in the best interests of their clients. Valerie Bauman & Roy Strom, *Clients Cry Foul Over Litigious Litigation Finance Company* (Nov. 17, 2021), https://news.bloomberglaw.com/business-and-practice/clients-cry-foul-over-litigious-litigation-finance-company. That article also asserts that Pravati TPLF contracts require firms to provide regular financial and case reports to Pravati about matters that are funded. If those reports are not timely provided, according to Bloomberg, that "default" may trigger immediate repayment obligations, providing Pravati with leverage to exercise control over funded litigation matters. These provisions of the Pravati TPLF agreements came to light only as a result of a dispute between Pravati and a law firm about the underlying agreement.

25 *In re Pork Antitrust Litig*., MDL No. 3031, 2024 U.S. Dist. LEXIS 97801, at *5 (D. Minn. June 3, 2024).

26 *See* Amended Petition to Vacate Arbitration Award ¶ 40, *Sysco Corp. v. Glaz LLC*, No. 1:23-cv-01451 (N.D. Ill. filed Mar. 20, 2023), ECF No. 18.

27 *See id.* ¶¶ 30-40.

28 *See id.* ¶¶ 41-58.

29 *See, e.g.*, https://www.burfordcapital.com/how-we-work/with-law-firms/ ("We act as passive investors ***and do not control strategy or settlement decision-making***, and our capital is almost always provided as a non-recourse investment, shifting risk from the firm to Burford.") (emphasis added); https://www.burfordcapital.com/insights/insights-container/byline-pli-legal-finance-post-covid/ ("If the matter wins, they can expect a meaningful share of the remaining damages, and if it loses, they keep any capital advanced, locking in a minimum outcome. In both scenarios, ***the company maintains control of its litigation***—and considerably more control over its finances.")

(cont'd)

prove precisely why a rule requiring disclosure and production of TPLF agreements in civil litigation is necessary. Indeed, there may be hundreds of plaintiffs in Sysco's position where funders may have the authority to exercise veto power against the will of the plaintiff, which not only raises serious ethical issues, but also threatens to deter reasonable settlement and needlessly prolong litigation. Automatic disclosure of TPLF agreements guards against these significant risks by making the fact of such TPLF investments transparent and subjecting funders' representations of non-control to the adversarial process. In short, it provides a backstop against the type of potential abuse alleged in the *Sysco* case.

Burford and Sysco eventually settled their dispute. Although most of the details of the settlement remain confidential, one aspect that was publicly disclosed is that Sysco agreed to assign its claims to an affiliate of Burford. The fact that Sysco had to assign its claims to a Burford affiliate just to get out of a series of lawsuits Burford insisted on litigating raises serious questions about the extent of Burford's control and influence over the actions. Indeed, the defendants in the underlying litigation mounted legal challenges to the substitution of the Burford affiliate as a plaintiff.

U.S. District Judge John Tunheim (D. Minn.) affirmed a magistrate judge's denial of the requested substitution, reasoning that it "threaten[ed] the public policy favoring the settlements of lawsuits."[30] As the court put it, "Sysco and Burford's conduct is precisely the kind of conduct of which courts are wary."[31] The requested substitution "resulted from their attempt to resolve [a] dispute over whether" Sysco (the plaintiff) or Burford (the investor) "should ***control*** this litigation."[32] While Judge Tunheim refused to "approve such conduct,"[33] other judges will have no way of even knowing whether such conduct is at play in their cases unless there is a requirement that TPLF arrangements (including their terms) be disclosed as a matter of course.

In short, the limited TPLF arrangements that have become public confirm that litigation investors do in fact exercise control or influence over the cases they finance. A disclosure requirement that includes the funding agreement would ensure that all parties and the court have visibility into the persons or entities calling the shots in the litigation.

(emphasis added); https://www.burfordcapital.com/insights/legal-finance-101/ ("Reported use of legal finance—also called litigation finance or litigation funding—has doubled in recent years, as companies and law firms increasingly recognize the benefits of gaining better control over legal budgets and risk ***without ceding control of litigation decision-making or settlement***.") (emphasis added); https://www.burfordcapital.com/insights/insights-container/how-do-law-firms-use-portfolio-finance/ ("[T]he use of legal finance generally does not alter control of decision-making or attorney-client relationships. Burford makes a portfolio deal directly with the firm, but Burford's role is that of a passive investor. Therefore, ***Burford does not control the litigation or settlement strategy and decision-making***, except when agreed to by our client.") (emphasis added); https://www.sec.gov/Archives/edgar/data/1714174/000110465920081137/filename1.htm ("Unlike in our legal finance business, where we are ***financing a client who retains decision-making authority in the litigation*** . . . .") (emphasis added).

30 *In re Pork Antitrust Litig.*, 2024 U.S. Dist. LEXIS 97801, at *13.

31 *Id.* at *14.

32 *Id.*

33 *Id.*

b. <u>Providing The Court And Parties With Information Highly Relevant To Settlement Efforts</u>

A disclosure requirement would facilitate fair and efficient settlements by ensuring that all persons or entities that have a direct financial interest in a case and can exert influence or control over it are known and are appropriately factored into any settlement efforts. Moreover, the absence of any rule requiring identification of TPLF participants in a case cannot be squared with the long-standing requirement that defendants disclose "any insurance policy, indemnity agreement, or suretyship agreement under which another person may be liable to satisfy part or all of a judgment entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Ariz. R. Civ. P. 26.1(a)(10). Indeed, knowing who has control over decisions regarding resolution is critical to making sure that the right people are involved in any court-ordered mediation or other settlement effort. A party that must pay a TPLF entity a portion of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. Indeed, as an executive of a prominent TPLF company has acknowledged, litigation funding "make[s] ***it harder and more expensive to settle cases***."[34] This is so in part because the party may seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity, and a third party-funder may, in fact, insist that the party do so.

Notably, in the *Sysco* case, the plaintiff attempted to resist this pressure, but ultimately chose to assign its claims to a Burford affiliate when the investor insisted that the litigation ***not*** be resolved outside court. While this represents one of the most egregious examples of a litigation investor attempting to exercise veto power over settlement decisions, investors can also undermine settlement efforts by structuring their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements.

This occurred in *Chevron Ecuador*, a racketeering suit filed by Chevron Corporation against Steven Donziger, who had fraudulently helped secure an $18.2 billion judgment in a different lawsuit filed against Chevron in Ecuador on behalf of Ecuadorians allegedly harmed by the company's drilling practices. Discovery revealed that Burford had provided the funding for the underlying suit against Chevron. The funding agreement between Donziger and Burford included a "waterfall" repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award.[35] Under the agreement, Burford would receive approximately 5.5% of any award, or about $55 million, on any amount starting at $1 billion. However, if the plaintiffs settled for less than $1 billion, the investor's percentage would actually go up.

Other agreements that have come to light—including in the patent context—have confirmed this business model. One agreement that (perhaps inadvertently) became public was

---

[34] Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J. (Mar. 21, 2018), https://www.wsj.com/articles/lawsuit-funding-long-hidden-in-the-shadows-faces-calls-for-more-sunlight-1521633600 (emphasis added).

[35] *See* Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 1:11-cv-00691-LAK-RWL, ECF No. 356-2 (S.D.N.Y. filed Nov. 29, 2011).

entered into by Gamon Plus, Inc. and the TPLF funder Gerchen Keller Capital ("Gerchen Keller") in or around February 2016.[36] Under that agreement, Gerchen Keller was to provide approximately $1.5 million in funding for Gamon's pursuit of patent claims against Campbell Soup, including payment of certain attorney fees. Gerchen Keller was to be paid two times the amount of its initial investment, plus 20% of any additional proceeds gained from the litigation.

While TPLF has made it harder to settle many business-to-business and patent cases, its usage in the mass torts arena has had an even more pernicious effect. Indeed, one of the key reasons mass tort cases yield very substantial dividends for attorneys and their outside investors is that the sheer number of cases filed in a given mass tort controversy imposes enormous pressure on businesses to settle, regardless of the merits of the underlying claims. "[T]he bigger [a mass torts litigation] gets, the less individualized scrutiny each claim will realistically receive, creating incentives for ever more claims to be filed," and exerting significant pressure on defendants to settle cases.[37]

Nowhere was this dynamic more apparent than in the 3M Combat Arms Earplug litigation. As has been suggested by the overseeing court and others, litigation funders invested considerable money in that controversy, particularly to pay for advertising that would generate claims.[38] Because the military has maintained comprehensive records of earplug issuance, each use, and the overall health of each soldier while using the earplugs alleged to be defective, the parties in that federal MDL proceeding were able to undertake a rigorous assessment of a subset of filed claims. In 2021, a random sample of 500 claimants designated as "Wave 1" plaintiffs were required to produce evidence supporting their claims.[39] Of that group, 126 (25.2%) reportedly produced no evidence and dropped out of the case, and nearly 75% of the Wave 1 plaintiffs apparently had no record of ever having used Combat Arms earplugs (65% of whom reported using different hearing protection devices altogether).[40] Of the subset of claimants that had used the earplugs in question, 85% reportedly had "normal hearing" according to the World Health Organization's criteria during the periods they alleged they had used the products.[41]

If these statistics are even remotely representative of the broader claims pool, the 3M Combat Arms Earplug litigation was rife with baseless lawsuits that clearly were not adequately vetted by counsel before they were filed. Presumably, this was at least in part due to the fact that the litigation funding-driven claimant recruitment efforts were so overwhelmingly successful that some counsel simply did not bother to adequately investigate their claims before filing. Indeed, that appears to have become a business model for some counsel: use litigation funding money to

---

36 *See* Funding Agreement Between Gerchen Keller Capital and Gamon Plus Inc. et al. (Feb. 2016).

37 Nora Freeman Engstrom, *The Lessons of Lone Pine*, 129 Yale L.J. 2, 24 n.94, 29, 32 (2019).

38 *See* Emily R. Siegel, *3M Lawsuit Investors Ordered to Be Unmasked Amid $6 Billion Deal*, Bloomberg Law (Aug. 30, 2023), https://news.bloomberglaw.com/business-and-practice/3m-lawsuit-investors-ordered-to-be-unmasked-amid-6-billion-deal.

39 *See* Case Management Order No. 31 (Wave Order #1), *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19-md-02885-MCR-HTC, ECF No. 2304 (N.D. Fla. Nov. 22, 2021).

40 *See* Aearo Informational Brief at 38.

41 *Id.* at 40.

generate as many claims as possible, do little to vet or develop those claims, and then wait for settlement money to flow. In the earplug litigation, the huge number of pending claims appears to have had the effect desired by plaintiffs' counsel and their investors, as 3M reached a $6 billion deal to resolve the more than 260,000 claims in the proceeding.[42]

A disclosure requirement would apprise courts and defendants in mass tort cases about which counsel may be using the "use TPLF to attract numerous claims but do no work" business model and whose claims may therefore be highly suspect. As a result, disclosure may discourage use of that reprehensible approach. But even if it does not, a rule mandating production of TPLF arrangements would ensure that defendants and courts in mass tort, patent and other cases understand the funding arrangements and thus are equipped to better calibrate settlement initiatives. Further, transparency would allow courts to structure settlement protocols with greater potential to succeed by, for example, conducting mediations attended by litigation investors with influence or control over settlement decisions.

c. <u>Providing The Court And Parties With Information Highly Relevant To Class Certification</u>

Disclosure of TPLF arrangements is also highly relevant in class actions, particularly in evaluating Ariz. R. Civ. P. 23(a)(4)'s adequacy-of-representation requirement. Judge Susan Illston of the U.S. District Court for the Northern District of California recognized that point in *Gbarabe v. Chevron Corp.*,[43] a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. The court evaluated the federal analogue to Rule 23(a)(4) and granted the defendant's motion to compel the disclosure of the funding agreement.[44] As the court explained, the "funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."[45] Class actions already raise significant concerns because the individual members of a putative class have little or no ability to control their own claims. Adding a funder to the equation only increases the risk that litigation decisions fail to take account of the putative class members' best interests. Indeed, the funding agreement in *Gbarabe* demonstrates this point, containing several key provisions that suggest the funder's desire to influence the course of the litigation.

For example, in addition to the funding and repayment provisions previously discussed, the agreement in *Gbarabe* referred to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only

---

42 Emily Field, *3M Strikes $6B Deal In Combat Earplug Litigation*, Law360 (Aug. 29, 2023), https://www.law360.com/articles/1715917. The involvement of TPLF in the 3M MDL is just one of many examples of outside investors bankrolling mass tort litigation. Another notable example is the ongoing MDL proceeding in the U.S. District Court for the District of New Jersey involving allegations related to cosmetic talc powder. Public disclosures and reporting indicate that a significant number of the talc lawsuits are being funded by outside investors. *See* Sujeet Indap, *Johnson & Johnson Settlement Shows the New Stakes in Litigation Finance*, Financial Times (May 20, 2024), https://www.ft.com/content/abd5bf98-378f-4322-b930-68c9b410e783.

43 *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).

44 *Id.*

45 *Id.* at *5-6.

identified experts.[46] The agreement specifically barred the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent."[47] Further, another provision required that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[48] These sorts of provisions potentially undermine the adequacy of representation required by Ariz. R. Civ. P. 23(a)(4) for class actions, providing another important reason for requiring the disclosure of TPLF agreements, the nature of the financial interest at issue and whether the funder has control over litigation or settlement decisions.[49]

In recognition of the relevance of TPLF to the adequacy element of class certification in particular, the U.S. District Court for the Northern District of California adopted its own TPLF disclosure requirement. That court added to its "Standing Order For All Judges" a provision requiring that "[i]n any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."[50]

d. <u>Making Available Information Highly Relevant To Proportionality And Cost Shifting</u>

The disclosure of TPLF arrangements would also aid courts in deciding questions related to discovery costs and potential sanctions. As amended several years ago, Ariz. R. Civ. P. 26(b)(1) states that the scope of discovery shall be "proportional to the needs of the case, considering . . . ***the parties' resources*** . . . and whether the burden or expense of the proposed discovery outweighs its likely benefit."[51] Unlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and profit from litigation. Thus, the existence of TPLF is relevant to the proportionality element in determining the appropriate scope of discovery. TPLF companies are well-heeled strangers to a case who willingly buy into the litigation hoping to profit from its successful prosecution. For purposes of the resources element of the proportionality requirement contained in Rule 26(b)(1), a TPLF company that has bought a stake in a case should be considered as part of the "parties' resources." It should not be allowed to hide in the shadows behind a relatively impecunious plaintiff.

---

46 Litigation Funding Agreement §§ 1.1, 10.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, ECF No. 186-4 (Ex. 13) (N.D. Cal. filed Sept. 16, 2016).

47 *Id.* § 10.1.

48 *Id.* § 10.2.4.

49 Ultimately, the district court denied certification in *Gbarabe* on several grounds, including adequacy of representation. Although the court did not expressly tie the TPLF agreement to its ruling on adequacy, it did find that plaintiffs' counsel "failed to diligently prosecute this case"—a failure the court suggested may have been linked to their struggle in securing funding early on in the litigation. *See Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628, at *7 n.7, *35 (N.D. Cal. Mar. 13, 2017).

50 Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (Jan. 2017).

51 Ariz. R. Civ. P. 26(b)(1) (emphasis added).

Additionally, because a funder is effectively a real party in interest, it should bear responsibility (to the same degree as any other party) for any wrongdoing in the prosecution of a case and any resulting judicial imposition of sanctions or costs. For example, in *Abu-Ghazaleh v. Chaul*, a Florida state appeals court held that TPLF investors (an individual and company) that controlled the litigation qualified as parties to the lawsuit and therefore became liable for the defendant's attorneys' fees and costs.[52] The state statute at issue in that case specifically authorized the levy of attorneys' fees on the plaintiffs where the claim advanced was "without substantial fact or legal support."[53] The court found that the plaintiffs' claim was bereft of such legal or factual support. The court then determined that the TPLF investors were liable for the attorneys' fees because they were essentially parties to the litigation (and the named plaintiffs were financially unable to pay such fees, which is often the case). The court reached this conclusion by scrutinizing the agreement entered into by the plaintiffs and the TPLF investors, which provided that they were to receive 18.33% of any award the plaintiffs received and gave them "final say over any settlement agreements proposed to the plaintiffs."[54] As evidenced by *Abu-Ghazaleh*, if courts are put on notice that a third party is financing the underlying litigation and are aware of the terms of the funding agreement, they will be in a much better position to determine how to impose sanctions or other costs, if such costs are warranted in a given case.

e. <u>Ensuring Compliance With Ethical Obligations, Particularly The Avoidance Of Conflicts Of Interest</u>

By identifying persons/entities with a stake in the outcome of the litigation, disclosure requirements would allow courts and counsel to ensure compliance with ethical obligations. One of the most important ethical duties of both courts and parties is to avoid conflicts of interest. As one commentator succinctly explained:

> [Since] some [funding] entities are multibillion- and multimillion-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held [funding] entities, the web of personal relationships judges [or other judicial officers] have could be impacted as well, leading to unintentional appearances of impropriety.[55]

Judges are required to recuse themselves from cases in which they have a conflict of interest.[56] The possibility that a TPLF contract could create a conflict necessitating recusal is not hypothetical. According to Westfleet Advisors, "82% of law firm lawyers say they use legal finance," and that finance can come from public companies, private companies, family offices,

---

52 *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Dist. Ct. App. 2009).

53 *Id.* at 694 (citation omitted).

54 *Id.*

55 Tripp Haston, *The Missing Key to 3rd-Party Litigation Funding*, Law360 (Feb. 7, 2017), https://www.law360.com/articles/888716/the-missing-key-to-3rd-party-litigation-funding.

56 A.R.S. Sup. Ct. Rules, Rule 81, Code of Jud. Conduct, Rule 2.11.

and individuals both here and abroad.[57] Absent an express rule requiring disclosure of TPLF agreements, judges do not have the information they need to make recusal decisions.

A prime example of this problem arose during the *Chevron Ecuador* case previously discussed.[58] During a deposition in that proceeding, plaintiffs' counsel Steven Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.[59] Upon being ordered to answer the question by the special master assigned to the case, Donziger disclosed that the funder was Burford—one of the largest funders in the world.[60] The special master then disclosed that he was a former co-counsel with the founder of Burford, who at one time sent the special master a brochure about funding one of Burford's cases.[61] The special master also disclosed that he was friends with Burford's former general counsel.[62] The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.[63] Nonetheless, as the special master recognized, the deposition "prove[d] . . . that it is imperative for lawyers to insist that clients disclose who the investors are."[64]

These sorts of provisions can blur the line separating lawyers from non-lawyers and undermine the attorney-client relationship that is at the core of our civil justice system. The only way for judges and parties to understand and avoid conflicts of interest is disclosure of TPLF contracts.

In addition, witnesses also can have conflicts of interest arising from TPLF arrangements. Ariz. R. Evid. 607 allows parties to challenge the credibility of a witness who is being paid and/or has a direct interest in the outcome of the case. Parties are deprived of this opportunity when they do not know about the existence of TPLF agreements.

Requiring disclosure of the identity of litigation investors and mandating disclosure of the actual terms of funding agreements would provide courts and parties with information necessary to prevent potential conflicts of interest. In short, a disclosure requirement would promote ethical litigation in Arizona courts.

f. <u>Uncovering Potential National And Economic Security Risks</u>

While TPLF raises a number of serious questions related to our civil justice system, one that has only recently begun to receive meaningful attention is whether TPLF threatens U.S.

---

57 https://askabouttplf.com/?p=10699#:~:text=The%20possibility%20that%20a%20TPLF,family%20offices%2C%20and%20individuals%20both.

58 Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 Geo. L.J. 1649, 1650, 1658 (2013).

59 *Id.* at 1650.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.* (citation omitted).

national and economic security. As Professor Maya Steinitz of the Boston University School of Law warned over a decade ago, foreign sources, such as sovereign wealth funds ("SWFs") like the China Investment Corporation, could file "suit against an American company in a sensitive industry such as military technology" and over the course of that litigation, receive "highly confidential documents containing proprietary information regarding sensitive technologies from the American defendant-corporation."[65] More recently, in 2023, Senator John Kennedy (R-LA) highlighted similar concerns in a letter to Chief Justice John Roberts and former Attorney General Merrick Garland, warning that "by financing litigation in the United States against influential individuals, corporations, or highly sensitive sectors, a foreign actor can advance its strategic interests in the shadows since few disclosure requirements exist in jurisdictions across our country."[66] Senator Kennedy's expressed concerns are not limited to foreign-controlled litigation funders operating in the U.S., but also to ***indirect*** foreign financiers—that is, foreign entities (e.g., SWFs) that may funnel cash through U.S.-based litigation funders and thereby potentially exercise behind-the-scenes direction as to certain lawsuits.[67]

Several other prominent federal legislators have also voiced concerns regarding the risk of foreign influence exerted through litigation funding activity, including Senators John Cornyn (R-TX) and Thom Tillis (R-NC). In a July 11, 2024 letter to the Committee on Rules of Practice and Procedure of the U.S. Judicial Conference, those Senators warned that "[l]itigation funding is an available weapon for foreign investors to attack domestic businesses" and that "[f]oreign adversaries could use litigation funding mechanisms to weaken critical industries or obtain confidential materials."[68]

U.S. Senators Rick Scott (R-FL) and Marco Rubio (R-FL) (now U.S. Secretary of State) echoed these concerns in letters to the chief judges of Florida's federal district courts in November 2023. In those letters, they "highlight[ed] the dangers of foreign [TPLF] and the need

---

[65] Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1270 (2011). Another early warning on this score came from an ILR publication: Michael E. Leiter, John H. Beisner, Jordan M. Schwartz & James E. Perry, *A New Threat: The National Security Risk of Third Party Litigation Funding*, ILR Briefly (Nov. 2022), https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf ("[A] foreign adversary could encourage and exploit commercial disputes involving U.S. companies to advance their national interests in a variety of ways.").

[66] Press Release, U.S. Senator John Kennedy, *Kennedy Urges Roberts, Garland to Take Action to Protect National Security From Foreign Actors Meddling in U.S. Courts* (Jan. 9, 2023), https://www.kennedy.senate.gov/public/press-releases?ID=1FBC312C-94B8-409B-B0A3-859A9F35B9F5; Letter from Senator John Kennedy to Honorable Merrick Garland & Honorable John Roberts (Jan. 6, 2023), https://www.kennedy.senate.gov/public/_cache/files/0/7/077acc52-6622-453b-b9a5-bbecd358e136/32C50A661400A5B670DC1D48B8D75E73.letter-to-ag-garland-cheif-justice-roberts.pdf.

[67] *See* Press Release, U.S. Senator John Kennedy, *Kennedy, Manchin Introduce Bipartisan Protecting Our Courts from Foreign Influence Act to End Overseas Meddling in U.S. Litigation* (Sept. 14, 2023), https://www.kennedy.senate.gov/public/2023/9/kennedy-manchin-introduce-bipartisan-protecting-our-courts-from-foreign-manipulation-act-to-end-overseas-meddling-in-u-s-litigation.

[68] Letter from Senators John Cornyn & Thom Tillis to H. Thomas Byron III (July 11, 2024), https://www.uscourts.gov/sites/default/files/24-cv-m_suggestion_from_senators_cornyn_tillis_-_rule_26_tplf.pdf.

for more transparency in the federal judiciary as it relates to this matter."[69] They explained that litigation funding can originate from several foreign sources, including SWFs, and may influence both the nature and direction of a litigation through often undisclosed financial contributions. They further noted that the most concerning outcome would be that "these foreign funders have the potential to provide hostile foreign actors with sufficient sway to exert undisclosed influence on litigation moving through the federal judiciary."[70]

These concerns were discussed in a December 2023 report by the bipartisan House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party. In that report—*Reset, Prevent, Build: A Strategy to Win America's Economic Competition with the Chinese Communist Party*—the Select Committee recommended that Congress "[d]etermine, and then establish, what guardrails are needed to address the possibility of foreign adversary entities obtaining sensitive IP [intellectual property] through funding third-party litigation in the United States."[71] The Select Committee also recommended "requir[ing] enhanced disclosures for foreign adversary entities and provid[ing] judges with the authority to require enhanced disclosures for certain entities under foreign adversary entity control regarding their funding, and, when appropriate, ownership and connection with the foreign adversary government and dominant political party."[72]

Executive branch personnel at both state and federal levels have also voiced growing concern about the risks spawned by foreign-sourced financing of U.S. litigation. For example, in December 2022, fourteen state attorneys general submitted a letter to the U.S. Department of Justice, bemoaning the secrecy surrounding TPLF and questioning what former U.S. Attorney General Merrick Garland and other top officials were doing to ensure that the practice is not threatening U.S. national security interests.[73]

During a December 2023 speaking engagement, Evan Turgeon, the Chief of the Foreign Agents Registration Act ("FARA") Unit at the Department of Justice, addressed this important topic in detail.[74] Among other things, Mr. Turgeon discussed FARA's application to foreign-

---

69 Press Release, U.S. Senator Marco Rubio, *Rubio, Scott Push for Transparency for Foreign Third Party Litigation Funding in U.S. Courts* (Nov. 3, 2023), https://web.archive.org/web/20250111011234/https://www.rubio.senate.gov/rubio-scott-push-for-transparency-for-foreign-third-party-litigation-funding-in-u-s-courts/.

70 *Id.*

71 House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party, *Reset, Prevent, Build: A Strategy to Win America's Economic Competition with the Chinese Communist Party* (Dec. 12, 2023), at 21, https://selectcommitteeontheccp.house.gov/sites/evo-subsites/selectcommitteeontheccp.house.gov/files/evo-media-document/reset-prevent-build-scc-report.pdf.

72 *Id.*

73 *See generally* Letter from Honorable Christopher M. Carr (GA), Honorable Jason Miyares (VA) et al. to U.S. DOJ re: Threats Posed by Third-Party Litigation Funding (Dec. 22, 2022), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2022/pr22-55-letter.pdf.

74 *See generally* Robert Kelner, Brian Smith & Alexandra Langton, *DOJ Officials' Remarks Signal New Trends In FARA Activity*, Law360 (Dec. 14, 2023), https://www.law360.com/articles/1776917/doj-officials-remarks-signal-new-trends-in-fara-activity.

sourced funding of litigation in the U.S. And quite critically, he specifically identified three potential risks of "undisclosed and undiscoverable" foreign-sourced funding of U.S. litigation:

- Foreign entities doing business in the U.S. may seek to create a competitive advantage as compared to their U.S. competitors by tying up U.S. companies in lengthy and expensive court cases.

- Foreign funders of U.S. litigation may gain access to proprietary and sensitive commercial information through litigation discovery.

- Foreign adversaries may fund litigation on political issues that are divisive within the U.S. public.[75]

While the secrecy typically surrounding TPLF makes it impossible to ascertain the precise extent and objectives of foreign-sourced litigation funding in the United States, recent examples make clear that the influx of cash is creating precisely the sorts of national security concerns about which academics and public servants have warned.

A recent lawsuit against ExxonMobil is the most recent example of how foreign interests can exploit the U.S. legal system to advance their own economic and political agendas. An Australian billionaire and owner of Fortescue Energy allegedly used his nonprofit subsidiary, the Intergenerational Environment Justice Fund ("IEJF"), to fund litigation in the United States against ExxonMobil to benefit his rival business ventures. That case accused ExxonMobil of misleading the public about its plastics recycling initiatives. In response, ExxonMobil filed a countersuit in the U.S. District Court for the Eastern District of Texas against the parties to the initial action, alleging defamation, business disparagement, tortious interference, and civil conspiracy.[76] The countersuit alleges that the private domestic entities, whose lawsuits allegedly are funded and influenced by the IEJF, have engaged in a coordinated smear campaign against ExxonMobil to undermine its advanced recycling initiatives and harm its business reputation. It also accuses the IEJF, a subsidiary of the Australian billionaire's Minderoo Foundation, of orchestrating this campaign to serve his own business interests. According to the complaint, the IEJF hired the California law firm Cotchett, Pitre & McCarthy to sue ExxonMobil and to recruit U.S.-based environmental nonprofits to serve as the named plaintiffs in the case and thus act as proxies for its agenda. The complaint further alleges that in an advisory opinion, the DOJ FARA Unit concluded that the Cotchett firm was required to register as a foreign agent under FARA, an action that ultimately revealed the foreign influence behind the lawsuit. Notably, IEJF's involvement would not have been known but for the transparency that was required by complying with FARA.

In this case, the IEJF's funding of the suit against ExxonMobil raises significant concerns about the motivations underlying the litigation. As ExxonMobil's complaint points out, the IEJF is closely tied to the Australia-based Fortescue Energy, a company that directly competes with

---

75 *Id.*

76 Complaint, *ExxonMobil Corp. v. Bonta*, No. 1:25-cv-00011, ECF No. 1 (E.D. Tex. filed Jan. 6, 2025), https://s3.amazonaws.com/jnswire/jns-media/09/bd/20843388/ExxonMobil_v_Bonta.pdf.

ExxonMobil in the hydrogen energy market. By funding litigation that could harm ExxonMobil's business, the complaint alleges that IEJF is using the U.S. legal system as a tool for Fortescue Energy to gain a competitive advantage. In addition, this example highlights how foreign-sourced TPLF can have significant economic and national security implications. If successful, the litigation against ExxonMobil could force the company to scale back its advanced recycling operations, disrupting supply chains, harming American workers, and increasing costs for American consumers. Moreover, the case could set a dangerous precedent for other foreign entities to use TPLF to target U.S. companies in strategic industries, such as energy and technology.

In another example, Purplevine IP Operating Co., Ltd. ("Purplevine"), a China-based firm that markets itself as a one-stop IP service provider, is financing at least four intellectual property lawsuits in U.S. courts against Samsung Electronics Co. and a related subsidiary.[77] Despite the absence of broadly applicable TPLF disclosure requirements, Purplevine's role in the Samsung litigation was involuntarily disclosed during litigation due to an unusual standing order that the judge overseeing the case—Chief Judge Colm Connolly of the U.S. District Court for the District of Delaware—had instituted, which required certain basic disclosures about TPLF usage.[78] That required disclosure, plus follow-up inquiries and facts that emerged at trial, revealed a tangled relationship between Purplevine and the patent claims at issue and suggested that Purplevine may have received and relied upon privileged, confidential and highly sensitive information in bankrolling Staton Techiya, LLC's patent infringement claims against Samsung.[79] Although the patent technology at issue related to sound systems and thus did not directly implicate national security concerns per se,[80] the alleged misappropriation of discovery and other confidential litigation materials in the case illustrates the kind of misconduct that could unfold when a foreign entity chooses to fund litigation involving sensitive technology (e.g., semiconductors) critical to U.S. national security.

Finally, the *New York Post* recently reported that members of the international gang MS-13 have been working with Russian gangsters to orchestrate fraudulent personal-injury lawsuits

---

[77] Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg Law (Nov. 6, 2023), https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties; https://www.purplevineip.com/en/.

[78] *See* Plaintiff's Statement Regarding Third-Party Litigation Funding Arrangements, *Staton Techiya, LLC v. Harman Int'l Indus., Inc.*, No. 1:23-cv-00801-JCG, ECF No. 7 (D. Del. filed Aug. 24, 2023).

[79] *See* Samsung's Motion for Leave to Amend Answer & Counterclaims to Join Purplevine & PV Law as Counterclaim Defendants at 5-6, 14-15, *Staton Techiya, LLC v. Samsung Elecs. Co.*, No. 2:23-cv-00319-JRG-RSP, ECF No. 65 (E.D. Tex. filed June 13, 2024).

[80] *See generally* Complaint, *Staton Techiya, LLC v. Harman Int'l Indus., Inc.*, No. 1:23-cv-00801-JCG, ECF No. 1 (D. Del. filed July 25, 2023). An apparent relationship between Purplevine and Chinese consumer electronics giant TCL Corp. raises further questions about whether it or any other foreign actors are investing in U.S. litigation for questionable purposes—i.e., to undermine competitors, including in sensitive industries. *See* Emily R. Siegel, *China Firm Funds US Suits Amid Push to Disclose Foreign Ties*, Bloomberg Law (Nov. 6, 2023), https://news.bloomberglaw.com/business-and-practice/china-firm-funds-us-lawsuits-amid-push-to-disclose-foreign-ties.

in U.S. courts.[81] According to that article, MS-13 members have been recruiting plaintiffs—often undocumented Hispanic migrants—to fake workplace injuries. Reportedly, some of these plaintiffs come to the United States for the sole purpose of serving as plaintiffs in these lawsuits. Those plaintiffs are then subjected to unnecessary surgeries performed by surgeons involved in the conspiracy, all to create damages and place settlement pressure on defendants. The Russian groups are suspected of running litigation lending firms that finance those fraudulent lawsuits. The lawsuits have generated lucrative settlements, often over $1 million each, the bulk of which ends up in the hands of the MS-13 operatives and Russian gangsters. Such activity creates threats to national security and the U.S. economy.[82] In short, it is clear that foreign actors, including those with ties to regimes that are hostile to the United States, are using TPLF for various purposes. Disclosure of these arrangements is thus critical to preserving our national security.

2) <u>Suggested Revisions To Proposed Rule 8(j)</u>

We appreciate the recognition of the need for TPLF transparency in Arizona courts and believe that two revisions are necessary to effectuate the amendment's purpose of increasing TPLF transparency.

a. <u>Suggested Revisions To Rule 8(j)(2)(A)'s Exclusion Of Loans From Disclosure Requirement</u>

For the most part, we agree with the proposed Rule's exclusion from the disclosure requirement of "loans . . . that require repayment regardless of the outcome of the litigation." *See* proposed Rule 8(j)(2)(A). Law firms often use market rate (that is, standard interest) credit lines to pay their bills for day-to-day litigation costs on pending matters. In those instances, banks or other financial institutions are simply lending the law firms money (much as they do with other businesses), having no intention of investing in or receiving a direct return from any

---

[81] Brad Hamilton & Georgia Worrell, *MS-13, Russian Mobsters Use Migrants in Elaborate Injury Scam — Even Getting Spinal Surgery to Pull it Off*, N.Y. Post (June 16, 2024), https://nypost.com/2024/06/16/us-news/ms-13-russian-mobsters-use-migrants-in-elaborate-injury-scam-even-getting-spinal-surgery-to-pull-it-off-sources.

[82] Published reports also indicate that certain Russian billionaires have financed lawsuits through their investment firms in an effort to evade international sanctions. According to a Bloomberg Law investigation, a company named A1, a subsidiary of a Russian investment company called Alfa Group, has spent about $20 million in ongoing bankruptcy cases in New York and London on behalf of a Russian agency seeking to recover assets that were embezzled from a Moscow bank. In fact, after three A1 directors were sanctioned in the UK, the three sanctioned directors sold A1 for about $900 to another A1 director who had not been sanctioned. The director who purchased A1, admitted in a bankruptcy proceeding that he purchased A1 because of a "'complicated geopolitical situation' potentially affecting the litigation." Emily R. Siegel & John Holland, *Putin's Billionaires Dodge Sanctions by Financing Lawsuits*, Bloomberg Law (Mar. 28, 2024), https://news.bloomberglaw.com/litigation-finance/putins-billionaires-sidestep-sanctions-by-financing-lawsuits. The Bloomberg investigation led to questions in Congress, and then-Deputy Treasury Secretary Wally Adeyemo testified at a Senate hearing that careful scrutiny should be given to the use of litigation finance in the U.S. by foreign actors. Adeyemo noted that "[o]ne of the challenges we have . . . is that these Russian oligarchs have become quite expert at trying to avoid our sanctions . . . [a]nd from what I've seen, [TPLF] is one of the several ways they're trying to do that." Emily R. Siegel, *Russian Use of Litigation Finance Needs Scrutiny, Treasury Says*, Bloomberg Law (Apr. 10, 2024), https://news.bloomberglaw.com/business-and-practice/russian-use-of-litigation-finance-needs-scrutiny-treasury-says.

specific litigation matters. Disclosure of such arrangements would serve no purpose, as the lenders are not playing any meaningful role in the lawsuits.

The proposed exception language in Rule 8(j)(2)(A), however, sweeps too broadly and would allow non-disclosure of considerable TPLF activity, defeating the fundamental purpose of the Rule. That is because in recent years, TPLF entities have begun financing litigation by agreeing to provide law firms with loans bearing a high interest rate (often in the 25% per annum range) in exchange for receiving collateralized interests in the attorney fees the firm will receive from the litigation matters specified in the arrangement.[83] In short, rather than taking a potentially very profitable non-recourse interest in a lawsuit, the TPLF entities are now often obtaining their very substantial profits from TPLF activity through sizable interest payments on large loans (sometimes involving millions of dollars, particularly in the mass tort context).[84] These loans may cover the hundreds of cases that a firm has in a particular mass tort proceeding (e.g., the 3M Combat Arms Earplug matter discussed previously). Alternatively, these may be "portfolio" loans, covering all or most of the cases a law firm has pending in a variety of controversies. Ensuring disclosure of such arrangements is critical because the size of and interest rates for such loans give the TPLF entities considerable leverage over the borrowing law firm.[85] For example, depending on the terms of the arrangement, the lender could call the loan (that is, demand immediate repayment) or decline to provide additional money needed to litigate. Alternatively, if the litigation is taking longer than expected to conclude, the TPLF entity could refuse to grant extensions on repayment obligations. The TPLF entity could use such leverage to dictate, among other things, the timing and amounts of settlements, all to serve its own interests (not those of the plaintiffs on whose behalf the litigation was filed in the first place). For the reasons outlined above, the court and other parties need to know if an undisclosed party is essentially controlling or strongly influencing the conduct of the litigation (or can exert the power to do so).

With all of the foregoing in mind, we suggest that section (j)(2)(A) of the proposed rule be revised to state that the definition of "Third Party Litigation Funding Agreement" does not include "a loan, agreement, contract, or arrangement to pay expenses that requires repayment regardless of the outcome of the litigation, *unless the repayment amount includes an interest rate in excess of the greater of (i) 7 percent or (ii) a rate equal to twice the annual average yield on 30-year United States Treasury securities*."

---

[83] Emily R. Siegel, *Mass Tort Lawyers Trapped in Cycle of Debt as Cases Drag On*, Bloomberg Law (Nov. 18, 2024), https://news.bloomberglaw.com/business-and-practice/mass-tort-lawyers-trapped-in-cycle-of-debt-as-cases-drag-on ("Loans to law firms often come with double-digit interest rates that can exceed 20%. The deals typically mature after three to four years. If cases aren't resolved by that time, borrowers are forced to restructure the loans—with pricey concessions to lenders—or refinance with a new lender.").

[84] *Id.*

[85] *See* Erin Joyce, *Pitfalls to Avoid with Litigation Funding*, Advocate Magazine (Mar. 2021), https://www.advocatemagazine.com/article/2021-march/pitfalls-to-avoid-with-litigation-funding ("If, as a requirement to obtain and maintain a litigation-funding loan, the lender dictates the course of the litigation, there is a serious risk that the attorney's professional judgment might be impaired.").

b. Suggested Revisions To Rule 8(j)(4)'s Provisions Regarding The *Ex Parte* Submission Of TPLF Agreements

We suggest that the proposed rule be revised to *require* the disclosure of TPLF agreements to *all parties*, while allowing the producing party in a particular case to seek from the court for good cause shown a protective order blocking or limiting production of the TPLF agreement. In other words, the default position would be that TPLF agreements must be produced, but based on the circumstances of a particular case or the contents of the agreement in that case, the producing party to the court could request that the agreement not be provided at all, be provided only to the court on an *ex parte* basis, or be produced to the court and all parties with some portions redacted.

Limiting production of information about TPLF arrangements to *ex parte* communications with the court regarding TPLF terms or *in camera* inspections of TPLF materials is inconsistent with the stated purpose of the proposed amendment. For starters, that approach would deprive the courts and parties of the standard adversarial process needed to understand critical provisions that can affect everyone in the litigation. The parties are in the best position to assess the practical impact of TPLF on the litigation and to inform the court of any issues raised by specific TPLF agreements. This is particularly true in the context of TPLF agreements, which may be extremely complicated and voluminous. Judges might not have the necessary insights into the ways that specific provisions, particularly with respect to control, might affect a litigation. Accordingly, as with all matters, courts would benefit from considering any potential issues with the full benefit of the standard adversarial system.

In camera review of TPLF agreements or *ex parte* communications regarding those agreements also hinders the development of case law standards about what constitutes problematic non-party participation and control. It is also contrary to the way that courts handle virtually every other aspect of litigation and frustrates the goal of transparency around legal proceedings. And as Rule 2.9 of the Arizona Code of Judicial Conduct makes clear, *ex parte* communications are permissible only in a discrete set of circumstances, none of which cover the examination and interpretation of contracts. Finally, it is critical that defense counsel have access to the actual TPLF agreements for many of the same reasons that insurance information is required to be disclosed to the parties—i.e., because the disclosure of such information "will enable counsel for both sides to make the same realistic appraisal of [a] case, so that settlement and litigation strategies are based on knowledge and not speculation."[86]

For these reasons, we suggest revising Rule 8(j)(3) to include an additional requirement that *"[t]he certificate regarding third-party litigation funding must . . . attach, subject to any court orders, a copy of the third-party litigation funding agreement and any related agreements."* We also propose revising Rule 8(j)(4) to state only the following: *"For good cause shown, the court may order additional disclosures regarding the third-party litigation funding agreement, any related agreements, and any information disclosed in the certificate."*

[86] Fed. R. Civ. P. 26(a)(1)(A)(iv) advisory committee's note to 1970 amendment.

* * *

In sum, the funding arrangements that have become public demonstrate that TPLF can inject into a civil lawsuit conflicts of interest, interfere with a plaintiff's control over his/her lawsuit, frustrate settlement efforts and even potentially undermine national and economic security. The only way to know whether a particular litigation funding arrangement presents any of these serious concerns—in an individual case or on a systemic level—is for the existence and terms of the agreement to be disclosed to the other side and the court. Accordingly, ILR urges that Rule 8 be amended as proposed, subject to the additional revisions discussed in Section 2 above.

Sincerely,

Page C. Faulk
Senior Vice President, Legal Reform Initiatives
U.S. Chamber of Commerce
Institute for Legal Reform
1615 H Street, NW
Washington, D.C. 20062
Phone: 202-463-5602
pfaulk@uschamber.com