Third-Party Litigation Funding: A Review of Recent Industry Developments

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PROPONENTS of third-party litigation funding ("TPLF") believe the industry provides capital that plaintiffs and their counsel need to compete against seemingly deep-pocketed defendants, enables law firms to prosecute additional cases by sharing litigation risks with the funder, and empowers parties to hire counsel that may not typically accept contingency fee cases. Opponents of TPLF believe the practice is opaque and promotes the filing of frivolous lawsuits, increases litigation costs, and empowers funders to exert influence over litigation strategy and settlement discussions.

Regardless of one's view of TPLF, it is a growing, multi-billion-dollar industry that is reshaping litigation on a global scale.[1] The litigation finance industry is a five-billion dollar market in the United States alone.[2] In addition, third-party funding of international arbitrations is on the rise. "In the international arbitration sphere it is becoming 'the norm' for parties to at least consider seeking funding for part or all of their case."[3]

This article presents an overview of recent developments in the TPLF industry. In particular, this article: (1) provides an update on the status of TPLF in a number of countries of interest to International Association of Defense Counsel members, (2) addresses recent enactment of legislation in Hong Kong and Singapore allowing third party funding of arbitration, and (3) discusses the recent treatment of a number of the legal issues that can arise as a result of TPLF, including the disclosure or discoverability of TPLF arrangements and the applicability of the attorney-client privilege and/or work product doctrine to TPLF activity.

I. Analysis of Third-Party Litigation Funding Developments in Selected Countries

TPLF is well-established in a number of countries, including Australia, England, the United

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[1] Aspen RE, *Litigation Funding | Global Trends and Outlook*, available at https://www.aspen.co/globalassets/documents/reinsurance/whitepapers/litigation-funding.pdf; *see also* Anne Talcott, *Third-Party Litigation Funding In The United States: An Invitation for Fraud and Increased Litigation or Much Ado About Nothing?,* 11 IN-HOUSE DEF. Q. 26 (2016).

[2] David H. Levitt with Francis H. Brown III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI Center for Law and Public Policy, Third Party Litigation Funding Working Group, at 1 (2018), available at http://www.dri.org/docs/default-source/dri-white-papers-and-reports/third_party_litigation_10-17-18-(1).pdf?sfvrsn=2.

[3] Aspen RE, *Litigation Funding | Global Trends and Outlook*, *supra* note 1, at 8.

States, and Canada. In the following section we first focus on TPLF activity in those countries. We then address TPLF in certain countries where the market is less mature. Lastly, we discuss recent enactment of legislation in Hong Kong and Singapore providing for third-party funding of arbitration.

A. Representative Countries with Established TPLF Industries

1. Australia

TPLF has been in existence in Australia for more than two decades.[4] In the last decade, TPLF has played an increasingly significant role in large class actions, particularly securities cases.[5] A recent study found that almost 50% of federal class actions in the last six years were funded by third parties.[6]

An important factor driving TPLF in Australian civil litigation is the country's fee-shifting approach, whereby the losing party is typically responsible for paying some or all of the winning party's legal costs and other expenses.[7] Another factor driving TPLF in Australia is the country's prohibition on contingency fee arrangements.[8] This prohibition prevents Australian plaintiffs' attorneys from amassing the kind of "war chest" often used to fund significant litigation in countries such as the United States, where contingency fee arrangements are permitted.[9]

In recognition of the difficulties that cost-shifting creates in class action litigation, Australian commissions on law reform have recommended that contingency fees be permitted and a class action fund be created; however, the Australian government has yet to act upon those recommendations.[10] Financing arrangements in the class action context typically involve the funder's payment of counsel's legal fees and costs incurred in the litigation, and if the litigation is unsuccessful, indemnification of the funded party from any order to pay the opposing party's costs.[11] In return, the funder typically contracts to receive a percentage of the amount recovered if the litigation is successful, commonly in the range of 25-40%.[12] With approval from the courts, funders have exercised significant control

[4] Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding,* 61 AM. J. COMP. L. 93, 95 (2013).
[5] *Id.* at 97.
[6] Aspen RE, *supra* note 1, at 4.
[7] Kalajdzic, Cashman and Longmoore, *supra* note 4, at 98.
[8] *Id.* at 117.
[9] *Id.* at 117–118.
[10] *Id.* at 98.
[11] *Id.* at 100.
[12] *Id.*

over the conduct of Australian class actions.[13]

One of the indirect, and some argue undesirable, consequences of TPLF involvement in Australia has been the rise of limited "opt-in" classes. Because there is no class certification procedure or other mechanism that might result in a judicial order binding all class members to the funding agreement, litigation funders require class members to sign the agreement that entitles the funder to share in the proceeds in the event the litigation is successful.[14] This has resulted in the *de facto* creation of "opt in" classes, which limits the number of potential beneficiaries to those who have signed the agreement.[15] A recent decision by the Federal Court, however, has paved the way for eliminating the need for closed classes. In *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Ltd*, the court approved an application for the class action to be conducted on a common fund basis, enabling the funder's contingency fee to be borne by all class members who stand to benefit from the action, whether or not they have signed the agreement (with the potential for objecting members to opt out).[16] The court reserved the right to review and approve the rate of commission charged by the funder.[17]

There is no mandatory licensing or supervision of litigation funding in Australia. In a recent decision, the Full Federal Court held that funded class actions are managed investment schemes as defined in the Corporations Act of 2001.[18] As such, funders and their funding arrangements with clients would be subject to several regulatory requirements, including registration, licensing, conduct, and disclosure. But the Australian Federal Government reversed the decision, exempting funding arrangements from the Corporations Act.[19] However, funders and funding arrangements are monitored by the Australian Securities and Investments Commission ("ASIC"), which requires funders to have adequate procedures to manage conflicts of interest.[20]

[13] *Id.* at 139.
[14] *Id.* at 102.
[15] *Id.*
[16] Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148.
[17] *Id.* at para. 8.
[18] Brookfield Multiplex Ltd v. International Litigation Funding Partners Pte Ltd (2009) 180 FCR 111; (2009) 260 ALR 643; [2009] FCFCA 147.
[19] Kalajdzic, Cashman and Longmoore, *supra* note 4, at 110.
[20] Aspen RE, *supra* note 1, at 11.

2. United Kingdom[21]

TPLF is well-established in the United Kingdom.[22] TPLF is available for a wide range of disputes, including arbitrations.[23] The industry is not specifically regulated, although the Association of Litigation Funders provides a form of self-regulation.[24] Funders that are registered and based in the UK are also regulated by the Financial Conduct Authority, but the actual funding arrangements are not.[25] Courts have held that a litigation funder, even though it is not a party to the litigation, may be held liable for adverse costs.[26]

In a recent landmark decision, the High Court of Justice in London held that a prevailing party in arbitration could recover not only its legal costs, but also the £1.94 million that it was required to pay to its third party funder.[27] The court held that the arbitrator's power to include the funder's fee in the cost award stemmed from the language in section 59(1)(c) of the Arbitration Act of 1996 (permitting recovery of "other costs") and Article 3(1) of the ICC Arbitration Rules.[28] The specific facts of the case were relatively egregious, and the arbitrator had found that the losing party had deliberately put the other party in a position where it could not self-fund the arbitration. Therefore, it remains unclear how frequently arbitrators will award funding costs. The decision of the arbitrator as to whether to award costs owed to the funder is subject to an overall reasonableness requirement.[29] The court noted that the Civil Procedure Rules for litigation speak only of "costs" and therefore would not permit recovery of costs paid by the party to its funder.[30]

With respect to the mandatory disclosure of TPLF arrangements, UK law imposes no express obligation to disclose either the fact of litigation funding or the agreement itself to the opposing

[21] TPLF is also common in Scotland, particularly for personal injury claims. It is widely accepted in Germany, in part because the torts of maintenance and champerty do not exist under German law. Aspen RE, *supra* note 1, at 4. However, TPLF is banned in Ireland, where maintenance and champerty remain torts as well as criminal offenses. Ireland's Supreme Court has explicitly confirmed that commercial litigation funding would amount to maintenance and champerty and is therefore prohibited. *See Persona Digital Telephony Ltd & Sigma Wireless Networks Ltd v The Minister for Public Enterprise, Ireland and the Attorney General* [2017] IESC 27.

[22] Aspen RE, *supra* note 1, at 4.

[23] *Id.*

[24] *Id.* at 9.

[25] *Id.*

[26] *See, e.g.*, *Arkin v Borchard Lines Ltd and Ors,* [2005] EWCA Civ 655.

[27] *Essar Oilfield Services Ltd v Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm).

[28] *Id.*

[29] *Id.*

[30] *Id.*

party or the court.[31] However, courts have discretion to compel disclosure of the funder's identity in the context of an application for security for costs.[32] As to privilege, it is uncertain whether a party waives privilege by disclosing otherwise privileged documents to the third party funder; however, the documents will generally retain their privileged status as against the world, and the funder is prohibited from disclosing the documents to third-parties.

One recent commercial development of note in the TPLF industry involves criticism of the accounting practices of Burford Capital, the world's largest publicly traded provider of litigation finance. Traded on the London Stock Exchange, and with over $3 billion committed to the legal market, Burford is comprised of over 100 team members on three continents, including a staff of over fifty lawyers comprised of alumni from some of the world's top law firms. In summary, in August 2019 an investment firm contended that Burford had manipulated its financial results by misstating the value of the legal cases it had invested in and accounting for recoveries before having received recovery proceeds. The criticism resulted in a 50% drop in the value of Burford's shares. Burford maintains that its accounting practices are appropriate.

3. United States

TPLF is flourishing in the United States. The market for TPLF has developed in private litigation, class actions, and international arbitration.[33] Of course contingency fees are permitted in the U.S., but unlike in Australia, for example, parties in U.S. litigation typically pay their own legal costs. The high cost and often protracted duration of litigation in the U.S., coupled with the risk of netting a zero return, particularly if working on a contingency fee basis, have fueled the TPLF market.

This market includes both "consumer-litigation financing" and "commercial-litigation financing," as well as financing offered directly to law firms.[34] "Consumer-litigation finance deals primarily with personal-injury, divorce, and small claims in which the plaintiff is typically not well funded."[35] "Commercial-TPLF financiers normally provide funding directly to corporate plaintiffs in exchange for a share of the recovery, though funding may be extended to defendants as well."[36] Commercial-litigation financing has focused on

[31] Aspen RE, *supra* note 1, at 9.
[32] *Id.*
[33] *Id.* at 3.
[34] *Id.*
[35] Austin T. Popp, *Federal Regulation of Third-Party Litigation Finance*, 72 VAND. L. REV. 727, 736 (2019).
[36] *Id.* at 738.

disputes involving antitrust, intellectual property, and business-contract issues.[37]

Historically, many U.S. states recognized the common law torts or crimes of maintenance and champerty, which prohibited unconnected parties from funding litigation. "Maintenance is the act of a third party encouraging or maintaining litigation, usually by providing financial assistance. Champerty is a type of maintenance where a third- party funds litigation in return for a share of any judgment proceeds."[38] However, the consistent trend across the country is toward limiting the doctrines of maintenance and champerty in favor of permitting TPLF.[39]
There are a few notable outliers.[40] Also, a number of states have passed legislation regulating TPLF.[41] "These regulations seem principally aimed at consumer litigation finance, not commercial litigation finance."[42] For example, a number of states have imposed caps on the interest rates consumer litigation funders can charge consumers. However, commercial litigation funders believe that states' efforts to regulate the consumer litigation finance industry are also directed at the commercial litigation finance industry. To date, there has been no regulation at the federal level.

With respect to any requirement that a third-party litigation and/or arbitration funding arrangement be disclosed, an increasing number of courts across the country require disclosure of at least some funding arrangement details. The trend toward mandatory disclosure of at least some aspects of third-party arrangements is discussed in further detail below. Also discussed in further detail below are issues regarding privilege and confidentiality, as well as various ethical concerns, arising from TPLF.

4. Canada

TPLF in Canada has been in existence for more than a decade.[43] Like Australia, and unlike the United States, TPLF in Canadian

[37] *Id.*
[38] Aspen RE, *supra* note 1, at 2.
[39] American Bar Association ("ABA"), *Commission on Ethics 20/20: Informational Report to the House of Delegates* 11 (Feb. 2012) available at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf.
[40] In "Alabama, Colorado, Kentucky, and Pennsylvania, litigation finance is either severely restricted or altogether unlawful." *See* Popp, *supra* note 35, at 729-730.
[41] Patrick A. Tighe, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, in Advisory Committee on Civil Rules, *Agenda Book*, April 10, 2018, 209, 215–217, available at https://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.
[42] *Id.* at 215.
[43] Kalajdzic, Cashman, and Longmoore, *supra* note 4, at 113.

class actions "is publicly known and judicially approved."[44] Although contingency fees are permitted in Canada, Canada's cost-shifting regime has spurred the rise of TPLF to indemnify the funded party from adverse cost orders.[45]

Unlike Australian litigation funders, who often have a substantial strategic and advisory role in the cases they fund, Canadian funders do not appear to exercise any significant strategic control over their cases.[46] Under *McIntyre Estate v Ontario*[47] and *Schenk v Valeant Pharmaceuticals*,[48] a "funding agreement must not impair the lawyer and the client relationship or the lawyer's professional duties, and must not diminish the representative plaintiff's right to instruct and control the litigation."[49]

Canadian courts have a certification requirement for class actions and the "*de facto* regulator of TPLF" has become the class action judge.[50] Court approval of the funding agreement is required in class actions, and the court must be satisfied that the agreement is fair and reasonable to the class.[51] The attorney-client privilege may be waived by seeking court approval, even where this is done on an ex parte basis.[52] Canadian courts diverge on this issue, and the matter is decided on a case-by-case basis with no *per se* waiver rule.[53] There has yet to be significant movement toward legislative or regulatory reform of the TPLF industry in Canada.[54]

B. Representative Countries with Less Mature, but Growing, TPLF Industries

TPLF is widely accepted in Germany, in part because the torts of maintenance and champerty do not exist under German law.[55] TPLF is also common in Scotland, particularly for personal injury claims.[56] In the Netherlands, TPLF is a still small, but growing market, although it is not currently common outside the context of collective actions.[57] South Africa has also seen a rise of TPLF following the relaxation of rules against champerty in 2014.[58] The TPLF market is small but growing in Brazil, particularly in the

[44] *Id.* at 114.
[45] *Id.* at 117.
[46] *Id.* at 119.
[47] *McIntyre Estate v. Ontario (A.G.)* (2002), 61 O.R. (3d) 257.
[48] *Schenk v Valeant Pharmaceuticals* (2015) ONSC 3215.
[49] Aspen RE, *supra* note 1, at 10.
[50] Kalajdzic, Cashman, and Longmoore, *supra* note 4, at 122.
[51] Aspen RE, *supra* note 1, at 10.
[52] *Id.*
[53] *Id.*
[54] Kalajdzic, Cashman, and Longmoore, *supra* note 4, at 122.
[55] Aspen RE, *supra* note 1, at 4.
[56] *Id.*
[57] *Id.*
[58] *Id.*

arbitration context.[59] There are no prohibitions against TPLF in China, but currently the third-party litigation/arbitration market is not significant in China.

C. Enactment of Legislation Permitting Third-Party Funding of Arbitration in Hong Kong and Singapore

Hong Kong and Singapore, both prominent arbitration jurisdictions, each recently enacted legislation allowing third party funding of arbitration, likely in recognition that such was a necessary step to enhance their growth as arbitration hubs.[60] Both Hong Kong and Singapore still prohibit TPLF in litigation due to their retention of the common law doctrines of maintenance and champerty.[61] The courts have developed three narrow exceptions in which TPLF is permitted, including where the third party has a legitimate common interest in the litigation, where there is access to justice concerns, and in insolvency proceedings.[62]

In June 2017, the Hong Kong Legislative Council passed the Arbitration and Mediation Legislation (Third Party Funding) Ordinance ("Arbitration Ordinance"), which expressly permits third-party funding of arbitration and mediation.[63] Key provisions of the Arbitration Ordinance could not take effect until a code of practice for third-party funders was issued, which the Hong Kong Department of Justice finally handed down in December 2018.[64]

The Code of Practice for Third Party Funding of Arbitration ("Code") contains various requirements for funders relating to capital adequacy, maintenance of effective procedures for managing conflicts of interest, mandatory disclosures, confidentiality, and disclaiming control over the conduct of the arbitration "except to the extent permitted by law."[65] Additionally, the Code requires that

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[59] Tripp Haston, *Third-Party Disputes Finance – Global Survey of Key Markets*, Presentation to International Association of Defense Counsel, at 1 (July 10, 2018) (materials on file with author).

[60] *Id.* at 2.

[61] Aspen RE*, supra* note 1, at 5; Melody Chan, *Hong Kong*, in THE THIRD PARTY LITIGATION FUNDING LAW REVIEW, 78 (Leslie Perrin ed., 2017).

[62] Chan, *supra* note 61, at 79.

[63] Hong Kong Special Administrative Region, *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017*, Ord. No. 6 (2017).

[64] The Government of the Hong Kong Special Administrative Region, *Code of Practice for Third Party Funding of Arbitration,* (Dec. 7, 2018), available at https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm.

[65] The Government of the Hong Kong Special Administrative Region*, Code of Practice for Third Party Funding of Arbitration*, available at https://www.info.gov.hk/gia/general/201812/07/P2018120700601.htm.

the funding agreement state whether and for what grounds the funder may terminate the agreement (and its discretion to do so is limited to three delineated circumstances).[66] The agreement must also provide a neutral dispute resolution mechanism and effective procedures for addressing complaints.[67]

"Singapore is one of the world's leading international arbitration jurisdictions."[68] In 2017 Singapore passed legislation expressly permitting third party funding, but only for international arbitration and related proceedings.[69] The Civil Law Act of 2017 abolishes civil liability for the torts of maintenance and champerty in arbitration and outlines criteria that make a third party funding agreement permissible.[70] If the agreement does not fulfill the statutory requirements, it may still be unenforceable as void against public policy.[71] Various practitioner and institutional rules and guidelines have emerged, including, most significantly, those produced by the Singapore Institute of Arbitrators and Singapore International Arbitration Centre ("SIAC").[72] These guidelines cover similar topics as the Hong Kong Code.[73] The SIAC practice notes also provide that the arbitral tribunal may take into account the existence of a third party funding agreement in apportioning the costs of arbitration.[74]

II. Treatment of Certain Legal Issues Arising from Third-Party Litigation Funding

A. Disclosure of TPLF Agreements

Proponents of mandatory disclosure of TPLF arrangements in the United States in particular cite various rationales for disclosure, including the need to provide information to courts, arbitration tribunals, and counsel to assess potential conflicts of interest; the facilitation of "a fuller, fairer discussion of motions for cost-shifting in cases involving onerous e-discovery;" the relevance of a TPLF arrangement when a court is determining whether to impose sanctions or other costs on a party;

[66] *Id.*
[67] *Id.*
[68] Matthew Secomb and Adam Wallin, *Singapore*, in THE THIRD PARTY LITIGATION FUNDING LAW REVIEW, 125 (Leslie Perrin ed., 2017).
[69] *Id.* at 126.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 128.
[73] *Id.* at 128–132.
[74] Singapore International Arbitration Centre, *Practice Note PM – 01/17: on Arbitrator Conduct in Cases Involving External Funding*, at para. 10, available at http://www.siac.org.sg/images/stories/articles/rules/Third%20Party%20Funding%20Practice%20Note%2031%20March%202017.pdf.

and the ability of both parties to make a realistic and tangible assessment of the prospects of settlement.[75]

Several countries have rules mandating disclosure of certain funding arrangement information. In both Hong Kong and Singapore, a funded party must disclose the existence of a funding agreement and the identity of the funder on or before the commencement of the arbitration.[76] Notice must be given to all parties and the arbitral tribunal.[77] In Singapore, these disclosure requirements are contained in the Professional Conduct Rules, so they technically apply only to Singapore legal practitioners.[78] In practice, however, tribunals or courts can order disclosure of funding arrangements from all the parties to eliminate the risk of unequal treatment.[79]

In Canadian class actions, the funding agreement must be approved by the judge as part of the class certification procedure.[80] Australia requires the disclosure of a TPLF's identity and portions of the agreement in class actions.[81] In the context of international arbitration, most leading arbitration-administering organizations do not have specific rules regarding disclosure of third-party funding arrangements,[82] but the trend is to disclose at least the existence of a funding agreement and the identity of the third party funder.[83] At a minimum, this information is necessary for the arbitrator to evaluate potential conflicts of interest.[84]

In the United States, whether a TPLF arrangement is required to be disclosed differs from jurisdiction to jurisdiction. Courts that have addressed the issue have diverged in their conclusions. In *Kaplan v.*

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75 *See* Lisa A. Rickard, *TPLF Transparency: A Proposed Amendment to the Federal Rules of Civil Procedure*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (July 6, 2014), available at https://www.instituteforlegalreform.com/resource/tplf-transparency-a-proposed-amendment-to-the-federal-rules-of-civil-procedure; Lisa A. Rickard and Mark Behrens, *Transparency Needed as Third-Party Litigation Funding Enters the Mainstream*, International Association of Defense Counsel, Civil Justice Response Committee Newsletter, at 3 (Sept. 2016).

76 Chan, *supra* note 61, at 84; Secomb and Wallin, *supra* note 68, at 131.

77 Chan *supra* note 61, at 84.

78 Secomb and Wallin, *supra* note 68, at 132.

79 *Id.*

80 Aspen RE, *supra* note 1, at 10.

81 *See* Federal Court of Australia, *Practice Note CM 17: Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, available at https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/cm17.

82 Daniel T. Pascucci, *Discoverability of Third Party Funding Agreements in Arbitration – Part I*, THE NATIONAL LAW REVIEW (Jan. 30, 2019), available at https://www.natlawreview.com/article/discoverability-third-party-funding-agreements-arbitration-part-i.

83 Haston, *supra* note 59, at 5.

84 Pascucci, *supra* note 82.

S.A.C. Capital Advisors LP, a court in the Southern District of New York refused to allow the defendants in a putative securities fraud class action any discovery regarding the plaintiffs' litigation funder.[85] The court held that the defendants had not shown that the litigation funding documents were "relevant to any party's claim or defense."[86]

By contrast, in the proposed class action, *Gbarabe v. Chevron Corp.*, a Northern District of California court granted Chevron's motion to compel the disclosure of the plaintiff's funding agreement.[87] The plaintiff conceded the relevancy of the agreement, but argued that he was under a contractual obligation to preserve the confidentiality of the funder's identity and the terms of the agreement.[88] The Court held that the funding agreement was relevant to the Federal Rule of Civil Procedure 23 adequacy determination, and that Chevron was entitled to view the agreement itself "to make its own assessment and arguments regarding the funding agreement and its impact, if any, on plaintiff's ability to adequately represent the class."[89]

The Northern District of California was the first United States court to institute a standing order requiring the automatic disclosure of TPLF agreements in class actions.[90] As of February 2018, six U.S. Courts of Appeals have local rules which require identifying litigation funders.[91] Approximately 25% of all U.S. District Courts have local rules or forms that require the disclosure of third-party funding arrangements in civil actions.[92] The frequently stated purpose for these broader local rules is to assist judges with assessing possible recusal or disqualification.[93] State courts have not followed suit.[94]

A few states have passed legislation regulating TPLF, but to date only one, Wisconsin, has

[85] Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 VM KNF, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015).

[86] *Id.* The defendants there also argued that the documents were relevant to the Rule 23 adequacy determination, but the court agreed with the plaintiffs that "Rule 23(g) has never been held to call for any inquiry into class counsel's finances, absent a reason to doubt their resources" and that counsel's work to date demonstrated their financial resources were adequate.

[87] Gbarabe v. Chevron Corp., No. 14-CV-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016).

[88] *Id.*

[89] *Id.*

[90] Standing Order for All Judges of the Northern District of California Contents of Joint Case Management Statement, available at https://www.cand.uscourts.gov/news/210.

[91] The Third, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have local rules mandating disclosure. *See* Tighe, *Survey of Federal and State Disclosure Rules Regarding Litigation Funding*, *supra* note 41, at 219–221 (Appendix A).

[92] *Id.* at 210, 223–229 (Appendix B).

[93] *Id.* at 213.

[94] *Id.* at 215.

enacted a law requiring disclosure of TPLF arrangements.[95] At the federal level, the proposed Fairness in Class Action Litigation Act of 2017 contained a requirement that class counsel in any class action promptly disclose to the court and all parties the identity of any third-party "who has a contingent right to receive compensation from any settlement, judgment, or other relief obtained in the action."[96] The Act passed in the House of Representatives, but never made it to a vote in the Senate Judiciary Committee, let alone the full body.[97]

Finally, there have been calls to amend Federal Rule of Civil Procedure 26 to require a party to include in its initial disclosures any agreement under which any third person has a contingent right to any proceeds of the civil action.[98] To date, the Advisory Committee has taken a "wait and see" approach, opting to continue monitoring TPLF and its usage in the federal courts.[99] As a recent report by the Defense Research Institute Center for Law and Public Policy has observed, "[t]he trend towards transparency may be moving, but it is moving slowly."[100]

B. Impact of TPLF on Attorney-Client Privilege/Attorney Work Product Doctrines

The drive toward greater transparency in TPLF is, to some extent, in tension with the doctrines of attorney-client privilege and attorney-work-product protection. Litigation funders often conduct extensive due diligence prior to funding a litigation or case, and in the conduct of their evaluation may request documents and information that may otherwise be privileged or work-product protected.[101] Moreover, after a funder decides to invest in a case, it may require updates on the matter in order to monitor its investment.[102] The funder may also

[95] *Id.* at 215 & Table 1; WISC. STAT. § 804.01(2); *see also Wis. Gov. Signs Legal Funder Transparency Rule* LAW360 (April 3, 2018).

[96] Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 1722 (2017).

[97] Alison Frankel, *Class action reform isn't dead. It's just not coming from Congress*, REUTERS On the Case (Dec. 28, 2018), available at https://www.reuters.com/article/legal-us-otc-classaction/class-action-reform-isnt-dead-its-just-not-coming-from-congress-idUSKCN1OR1G1.

[98] *See* Rickard, *supra* note 75.

[99] Letter from Lisa A. Rickard, President of U.S. Chamber Institute for Legal Reform, to Rebecca A. Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, June 1, 2017, at 2, available at https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf.

[100] Levitt and Brown, *supra* note 2, at 32.

[101] Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 DENV. U. L. REV. 95, 102 (2014).

[102] *Id.* at 102–103.

want to participate in communications between the attorney and the client. The question then arises whether disclosure of such information to the funder waives the attorney-client privilege or attorney-work-product protection.

As a threshold matter, the applicability of these doctrines as defenses against an opposing party's discovery requests presupposes that the documents are relevant. If they are not relevant, then they are not discoverable regardless of whether they are privileged. A few courts have held that certain documents related to a plaintiff's financing, such as the funding agreement itself, are simply not relevant to any claim or defense of the parties—outside of the limited context when the defenses of champerty or maintenance are asserted, and therefore are not discoverable.[103] Other courts have found TPLF agreements are relevant to a genuine issue as to class action counsel's adequacy under Federal Rule of Civil Procedure 23 and therefore are discoverable.[104]

Of the courts that have reached the question of waiver of the attorney-client privilege, a majority have held that the disclosure of privileged information to a litigation funder waives the attorney-client privilege. Parties seeking to shield TPLF documents from disclosure often assert the "common interest" exception to waiver. But for the exception to apply, most jurisdictions require that the common interest be legal, not solely commercial, and that the communication be made to further that specific legal interest. A number of courts have held that funding documents do not satisfy that definition.[105] One scholar has

[103] *See* Kaplan v. S.A.C. Capital Advisors, L.P., No. 12-CV-9350 VM KNF, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015); Miller UK Ltd. v. Caterpillar, Inc., 17 F. Supp. 3d 711, 721 (N.D. Ill. 2014) ("The terms of Miller's actual funding agreement would seem to have no apparent relevance to the claims or defenses in this case, as required by Rule 26 as a precondition to discovery."); Benitez v. Lopez, No. 17-CV-3827-SJ-SJB, 2019 WL 1578167, at *1 (E.D.N.Y. Mar. 14, 2019) ("[T]he financial backing of a litigation funder is as irrelevant to credibility as the Plaintiff's personal financial wealth, credit history, or indebtedness. That a person has received litigation funding does not assist the factfinder in determining whether or not the witness is telling the truth. Furthermore, '[w]hether plaintiff is funding this litigation through savings, insurance proceeds, a kickstarter campaign, or contributions from the union is not relevant to any claim or defense at issue.'").

[104] *E.g. Gbarabe*, 2016 WL 4154849 at *2.

[105] *E.g.*, *Miller UK v. Caterpillar*, 17 F. Supp. 3d at 732–733 (N.D. Ill. 2014) (common interest exception did not apply because "there was no legal planning with third party funders . . . and Miller was looking for money from prospective funders, not legal advice or litigation strategies. The funders, for their part, were interested in profit."); Leader Techs., Inc. v. Facebook, Inc., 719 F. Supp.2d 373, 376 (D. Del. 2010); Berger v. Seyfarth Shaw LLP, No. C07-05279JSWMEJ,

suggested that rather than extending the current privilege doctrines to cover TPLF, a new free-standing privilege should be created specifically designed to encompass the TPLF scenario.[106]

With respect to the work-product doctrine, the trend is toward finding materials shared with a funder protected from discovery. "[W]ith few exceptions, courts have largely held that the funded party does not waive work-product protection of those materials by sharing information with the third-party litigation funder."[107] For example, in *Mondis Technology, Ltd. v. LG Electronics., Inc.*, the court held that documents prepared with the assistance of counsel and created with the intent of coordinating potential investors to aid in future possible litigation were protected by the work-product doctrine.[108] Other courts have come to the same conclusion.[109] The *Mondis* court also noted that although the documents were disclosed to third parties, they were disclosed subject to nondisclosure agreements that "did not substantially increase the likelihood that an adversary would come into possession of the materials."[110] In general, the "existence of non-disclosure agreements 'militates against a finding of waiver,' as well as the fact that the litigation financing companies have an incentive to protect the information from disclosure to the opposing party."[111]

Some courts have held that the work-product doctrine does not protect the TPLF agreement itself, because it does not contain the mental impressions of an attorney concerning the substance of the litigation.[112] It is worth noting that

2008 WL 4681834, at *2 (N.D. Cal. Oct. 22, 2008). *But see* Devon It, Inc. v. IBM Corp., No. CIV.A. 10-2899, 2012 WL 4748160, at *1 n.1 (E.D. Pa. Sept. 27, 2012) (concluding without extensive analysis that common interest doctrine applied because the funder, Burford Capital, and the plaintiff "have a common interest in the successful outcome of the litigation").

106 Giesel, *supra* note 101, at 143.

107 J. Maria Glover, *Alternative Litigation Finance and the Limits of the Work-Product Doctrine*, 12 N.Y.U. J.L. & BUS. 911, 923 (2016).

108 No. 2:07-CV-565-TJW-CE, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011).

109 *See* Carlyle Inv. Mgmt. L.L.C. v. Moonmouth Co. S.A., No. CV 7841-VCP, 2015 WL 778846, at *10 (Del. Ch. Feb. 24, 2015); Odyssey Wireless, Inc. v. Samsung Elecs. Co., Ltd, No. 315CV01735HRBB, 2016 WL 7665898, at *6 (S.D. Cal. Sept. 20, 2016).

110 *Mondis Technology*, 2011 WL 1714304, at *3.

111 Glover, *supra* note 107, at 925 (quoting Doe v. Soc'y of Missionaries of Sacred Heart, No. 11-CV-02518, 2014 WL 1715376, at *4 (N.D. Ill. May 1, 2014)).

112 *See* Montgomery Cty. v. MicroVote Corp., 175 F.3d 296, 304 (3d Cir. 1999); Murray v. Stuckey's Inc., 153 F.R.D. 151, 153 (N.D. Iowa 1993)). *But see* Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co., No. CV 07C-12-134-JRJ, 2015 WL 1540520, at *5 (Del. Super. Ct. Mar. 31, 2015) ("[T]he payment terms at issue in the Financing Agreement were prepared in anticipation of litigation and reflect the type of attorney

the work-product doctrine has several important exceptions, including the substantial need exception under Federal Rule of Civil Procedure 26(b)(3).[113] Therefore, it remains uncertain whether materials exchanged with a funder are subject to discovery.

Note that in the context of international arbitration, the IBA Rules on the Taking of Evidence in International Arbitration, although not binding, "are regarded as a 'gold standard,' and provide a workable set of rules for disclosure of documents."[114] "Article 9(2)(b) of the 2010 IBA Rules provides that the tribunal shall exclude from evidence or production any document where it considers there to be a 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.'"[115] Article 9(3) then lists a number of factors to be considered in determining whether "a legal impediment or privilege" exists.[116]

C. Ethical Considerations

TPLF arrangements raise various ethical issues that have been explored by a number of scholars and working groups. Below we describe a few key areas of concern that commentators have identified. The most often-quoted publication on the topic is the ABA Commission on Ethics' 2012 white paper detailing the impact of TPLF on legal ethics.[117] Much of the discussion tracks the ABA's conclusions on these issues.

1. Conflicts of Interest

TPLF has the potential to create conflicts of interest that jeopardize a lawyer's duties to the client. For example, a funding agreement that permits the funder to have veto power over the selection of counsel "may limit the client's right to terminate counsel in a manner that is inconsistent with Model Rule 1.16(a)." Similarly, funding agreements may restrict the client's absolute right to terminate a lawyer or to retain substitute counsel.[118] "[A] client and a lawyer cannot validly agree to a contract term that prohibits the client from discharging the lawyer."[119] However, a client may enter into a contract directly with the funder

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mental impressions and litigation strategies which are afforded nearly absolute protection from discovery under the work product doctrine.").

113 Levitt and Brown, *supra* note 2, at 27.

114 Meriam N. Alrashid, Jane Wessel, and John Laird, *Impact of Third Party Funding on Privilege in Litigation and International Arbitration*, 6 DISP. RESOL. INT'L 101, 121 (2012).

115 *Id.*

116 *Id.*

117 ABA, *Commission on Ethics 20/20*, *supra* note 39, at 15ff.

118 *Id.* at 21 (citing Model Rule 1.16(a)(3) and (c)).

119 *Id.*

that validly limits the rights the client would otherwise possess.[120]

2. Interference with the Counsel's Professional Judgment

The degree to which funders seek to exercise control over the litigation "has the potential to interfere with the lawyer's exercise of candid, objective, independent judgment on behalf of the client."[121] Funding agreements may include terms that entitle funders to exercise control over the identity of counsel, litigation strategies, and whether to accept or refuse a settlement offer.[122] These are not merely hypothetical concerns.

In one Florida case, the funder had the right "to approve the filing of the lawsuit; controlled the selection of plaintiff's attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel's bills; and had the ability to veto any settlement agreements."[123] The court deemed this level of control sufficiently extensive to warrant treating the funder as a "party" for purposes of a fee-shifting statute.[124] Such terms would impinge on the fiduciary nature of the lawyer-client relationship, but the ABA notes again that a client could legitimately contract directly with a funder to limit rights the client would otherwise have.[125] However, with the trend in TPLF away from individual client cases toward funding a portfolio of cases being handled by a particular attorney or law firm—"such that it is the attorney who obtains funding, rather than the litigation plaintiff"—the ethical concerns about contracts interfering with the lawyer's duties to the client persist.[126]

3. Indirect Influence on Litigation

Even where a funder does not claim a right to participate in the settlement decision, courts and commentators have expressed concern over how the existence of a funding arrangement may influence a party's decision as to whether to

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120 *Id.*

121 *Id.* at 22.

122 *Id.* Under Model Rule 1.2(a), the client retains authority to decide whether to settle a civil lawsuit. Notably, while the funding agreement itself may expressly disclaim any intent on the funder's part to exercise control over the decision whether to settle a lawsuit, reported cases demonstrate instances in which the funder attempted to influence the settlement decision even where the contract stated otherwise. *Id.* at 26.

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

124 *Id.* at 694.

125 ABA, *Commission on Ethics 20/20*, *supra* note 39, at 23.

126 Levitt and Brown, *supra* note 2, at 23.

accept a settlement offer.[127] "A plaintiff may be reluctant to accept what would otherwise be a reasonable settlement offer because of a contractual obligation to repay a [funder] a substantial portion of the proceeds of the settlement."[128] Conversely, a plaintiff concerned about an escalating obligation to repay contingent on the duration of the litigation may be overly incentivized to settle.[129] "Given the relatively shrouded nature of the practice of TPLF in the United States, lawyers are still grappling with the ethical challenges presented by these arrangements."[130]

III. Conclusion

Recent developments in the third-party litigation funding industry reflect its continued growth in many areas of the world. Legislation in Hong Kong and Singapore will likely usher in a new era of third-party funding of international arbitrations. This opaque industry will continue to pose challenges for defendants on a variety of fronts. Regulation of the industry is in its early stages, and for the foreseeable future, it will fall on courts to address the many legal issues the TPLF industry presents.

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[127] ABA, *Commission on Ethics 20/20*, *supra* note 39, at 27.
[128] *Id.*
[129] *Id.* at 27–28 (citing cases).
[130] Kalajdzic, Cashman and Longmoore, *supra* note 4, at 136.