



→ an expert panel examines the promise and peril of third-party litigation financing

Third-party litigation finance has captured the attention of litigants, the courts, and the academy across the globe. It has the potential to substantially impact civil litigation as we know it by expanding funds available to litigants to pursue claims. And as investments in it soar, the courts, Congress, state legislatures, federal and state rules committees, and the organized bar are examining and, in some cases, addressing the trend.

Two kinds of funding are of most interest. First, in the past decade, a multibillion-dollar industry has developed to fund large-scale business litigation via non-recourse loans in which repayment is contingent on the outcome and includes a stake in the ultimate recovery. The high-profile opioid litigation — and the presiding judge’s decision last year to require ex parte disclosure to the court regarding third-party funding to plaintiffs

— brought further publicity to large-scale business litigation funding. Second, there is a parallel industry of “consumer” litigation funding, in which entities purchase non-recourse interests in individuals’ personal injury claims in exchange for immediate liquidity, sometimes leading to disputes over enforceability. Such purchases of assignments of individual former players’ claims in the NFL concussion litigation, where claimants alleged mental capacity issues, present an intriguing example. And there may be gray areas between these two types of funding, as in the financing of employment discrimination claims.

Litigation has always involved financing — whether via bank loans to law firm or law firms’ implicit non-recourse loans to clients inherent in contingency fees. What makes these forms of third-party finance different?

To start, modern litigation finance involves non-recourse financing in

exchange for purchase of an interest in a claim or outcome. General bank loans, by comparison, may include only an overall security interest in total law firm or party receivables. And unlike law firm contingency fees, where the lawyer’s identity is known and bar ethics rules apply to the lawyer, the third-party funder is anonymous to the other parties and the court. Finally, in this context, there are concerns that third-party funders could exercise control over the financed party’s conduct of the litigation.

To shed light on some of the questions surrounding third-party litigation, *Judicature* assembled a group of prominent stakeholders — from both sides of the class action and multidistrict litigation (MDL) bar, the largest business litigation funder, the academy, and the federal judiciary. Their conversation follows; it has been edited for clarity and length. Find the full version at judicature.duke.edu. ▶

THE PANEL



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If you have entities out there that are going to purport to be regulators, we at least ought to know who they are.

ICHEL: Ernie Getto, since you are a managing director at the largest litigation funder, let me start by asking you: What are the potential upsides to modern third-party business litigation finance?

GETTO: Well, there are several. I'd say the first is leveling the playing field for claimants, which in turn aids the societal role of litigation to deter wrongful conduct. It also provides businesses with a way to finance or monetize litigation assets — meaning potential claims — that might otherwise go unutilized. And it provides opportunities for a more diverse group of lawyers to lead major litigation. Law firms have essentially no other way of raising capital due to the ethics rules about nonlawyer ownership of law firms, and litigation finance provides that vehicle. Finally, for investors, it provides an investment that may escape correlation with some of the usual [stock and bond] investment avenues or criteria.

ICHEL: There are a lot of litigation funders out there. Is there more specialization today?

GETTO: Yes, I think so. There are some that specialize in international arbitration and others that focus on U.S. litigation. There are some who are more active in Australia than they are in other venues. We [Burford] are pretty much active everywhere. There was a time when we didn't get involved with patent litigation, but we do now in a major way, and it is hard for me to conceive of a business-to-business dispute that we wouldn't get involved in.

ICHEL: What kinds of concerns are raised by third-party litigation finance?

BEISNER: Let me make clear at the outset that I am not against it per se. But there's a need to shed a brighter light on the use of third-party funding — there needs to be more transparency about what's going on in this arena. Without seeing the funding agreement or knowing who the funder is, we don't know who this anonymous third party is or how they might be controlling the claim.

For example, consider the recent decision in *Boling*.¹ Reviewing a litigation funding agreement, the court concluded, "the terms of the Agreements effectively give [the litigation funders] substantial control over the litigation."² And the court went on to note that "these kinds of conditions raise quite reasonable concerns about whether a plaintiff can truly operate independently in litigation."³ There is also the *White Lily* case,⁴ which is pending now in the Southern District of New York, where the complaint alleges that the litigation funder, as part of the contractual agreement, required that the funder's own attorney be added as counsel of record in the litigation to protect the funder's interest in the case.

In none of these cases was any of this information disclosed until disputes arose between the funder and the plaintiff, which required that the contracts be revealed. So right now, we really don't know who is controlling the litigation where funders are involved, absent some sort of accidental disclosure. We also can't confirm with certainty whether the use of funding encourages more litigation,

since we don't know which new cases are funded and which are not. But because this kind of funding makes it free or near-free to litigate, one must assume funding prompts the filing of riskier cases that wouldn't otherwise be filed. Of course, more litigation can amount to a large societal cost.

But we also have portfolio funding, where funders invest in a wide array of cases being handled by a particular law firm — some stronger, some weaker — on the assumption that this provides investment leverage — that if one or two of the litigations in which a funder invests is a success, it will cover some others that weren't great investments. Portfolio funding carries a risk that you'll be launching a lot of additional highly speculative litigation that should never have been filed.

The other concern I have is the potential for conflicts between the funder and the defendants. And we can't know if those conflicts exist if we don't know who the funder is.

I think there can be a legitimate debate about whether the use of litigation for th[e] regulatory purpose [of forcing greater corporate accountability] is appropriate, but I'll leave that aside. The point most relevant to this discussion is that if you have entities out there that are going to purport to be regulators, we at least ought to know who they are. They should not be allowed to function in secrecy. When the plaintiff's bar purports to take on this function, we know who they are. Their names are on the lawsuits. But it's a problem, I think, if you have litigation finance entities that are making

decisions about what sort of litigation ought to be filed and against whom, purportedly in this private enforcement role.

Let me give you one example. I'm a hedge fund and I invest a substantial amount of money in Company A. Then I decide maybe it'd be a good idea to enhance my investment in Company A by using my litigation finance arm to engage in some of this regulatory litigation activity against Company B, which is the primary competitor of Company A. There needs to be some disclosure of this obviously anti-competitive activity. But right now, the litigation funders are arguing strenuously that all of the finance arrangements are privileged work product and that the federal courts ought to be concealing those relationships — that the courts should ensure those arrangements are not revealed.

SEEGER: I don't want to give my friend John Beisner a hard time here, but the concept of encouraging meritless litigation is the argument that seems to always come up, and I'm not sure exactly what people are talking about when they say that. The concept that a funder would invest in a plaintiff's grouping of cases is not new. A complainant's law firm has a number of cases, some hit, some don't. Well, welcome to the plaintiff's practice. That's what a plaintiff's practice is all about.

We bring cases sometimes that do very well and the plaintiffs do well. Oftentimes we bring cases that don't do so well and the plaintiffs don't do so well. So where is the incentive for a funder of a plaintiff's lawyer to get involved? It's got to go through a whole process. There's a judge involved here, too. You can bring a case if you want, but if it's meritless, it's going to be thrown out.

The other argument John [Beisner] is talking about is this idea that funders are involved in the decisions the lawyers make. I'm pretty confident that a lot of my colleagues in the plaintiff's bar are really careful about the provisions in these agreements. They know that years ago, it came to light that some lending agreements had provisions allowing lenders to second-guess settlements, and they are cautious about that. My understanding is a lot of that bad practice has been cleared out.

I don't have an issue at all with plaintiff's law firms obtaining financing from any legitimate source they can get it from, and that's not changing the playing field in any real meaningful respect. I've been doing plaintiff's work for about 30 years now, before litigation funders came along. Plaintiff's lawyers mortgaged their houses, they borrowed against their stock investments, they borrowed money from other law firms who could afford to loan it to them. This is really not a new concept that they might need financial assistance to bring a case. And I wouldn't assume that just because a particular law firm needs funding that that is somehow a reflection on the merits of the case.

I can give you an example of lawyers who were well underfunded, had to borrow money, brought very meaningful cases that changed society and the way companies make products and do things like that and got meaningful recoveries for their clients — and they had to borrow money to do it.

The converse to that, obviously, is the plaintiff's firm could have been wiped out. And I can give you examples of cases that have wiped out really good plaintiff's practices.

BEISNER: To Chris [Seeger]'s first point, the newspapers are filled with

stories of frivolous lawsuits that have been filed following litigation funding. The Ecuadorian Chevron litigation and the related Donziger cases are good examples; the latter were declared by the Second Circuit to be RICO violations.⁵ There was a *New York Times* story about a year ago about litigation funders financing unnecessary surgery so women could file stronger claims in the vaginal mesh litigation.⁶ There was a *New York Post* article last year about funders using investments to encourage the filing of dubious claims against the city of New York.⁷ And there was a *Forbes* article back in October of 2015 about litigation funding being used to finance advertising for claims that weren't fully investigated.⁸

But if you pour that kind of money in the system, you encourage risk-taking on the part of attorneys that wouldn't be there if they were deciding about investing their own sweat equity in the matter as opposed to betting somebody else's money on the outcome.

To Chris's second point, I don't think we can say that provisions allowing the funder control were sort of mistakes that were made by funders a long time ago that are no longer occurring. Since we have no disclosure, we can't know. The Bentham best practices document calls those kinds of control provisions potential best practices.⁹ That's a major funder and that is a current view. And the cases I mentioned earlier where control provisions came to light are not ancient history. These are all recent cases. This is not just a couple of mistakes that people were making some years ago during transition periods. There are numerous new entities coming into this market every day, and some of them with more experience doing this than others. But my suspicion is that it's very hard for anybody to say what is or is not in these ►

agreements across the board, because they're all secret, and I don't think there's anybody with the view of what's in all of them.

GETTO: I don't think anything I say is going to allay John [Beisner]'s concern about frivolous cases being filed as a result of litigation funding. But when you take a look at how things work in the real world, at least in the commercial litigation funding world that Burford and others operate in, I think there's a misconception when you talk about litigation funding in the abstract. There is this idea that a plaintiff decides that he or she has a claim, wants to bring it, gets counsel, and then counsel goes and finds a litigation funder who agrees to fund the case. And then the case is filed. When, in fact, a very significant portion of Burford's investments are made in cases that have been pending, even some that are on appeal. A huge percentage of what we do are cases that are past motions to dismiss, that are past motions for summary judgments, some of which are on appeal. So the idea that this business is rife with frivolous cases just isn't right when you look at the real world. When Burford does a portfolio, typically no case goes into the portfolio without our looking at it. And in fact, we may do an open-end portfolio with a firm, where cases that have yet to be filed can be added to the portfolio, I guess is the best way to put it. And before a case comes into the portfolio, we look at it and approve it. So the idea that we've got a mix of totally frivolous cases and a couple of good ones just isn't right.

Finally, I'm personally aware of cases that were about to be brought, but were not brought, after we did our due diligence and pointed out that they weren't good cases. They really

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didn't have merit. So our due diligence resulted in those cases not being brought. This area is not susceptible to the generalization that John [Beisner] and some others have made.

ICHEL: [Chris Seeger and Professor Issacharoff, you've both dealt with the NFL concussion litigation, which involved consumer lenders who bought up individual claims in exchange for cash liquidity to the claimants. What are the pros and cons of this form of financing?](#)

ISSACHAROFF: This area is like many areas of consumer finance. It both has its benefits and its real risks. On the benefit side, people who are injured, people who are victims to some kind of a tortious activity are oftentimes in financial strains. They may be poor to start with, or they may have an adverse financial reaction to whatever was after the litigation. So what do they have that can carry them through the period of the litigation, going to the ultimate settlement or a trial victory, hopefully, or appellate victory? Oftentimes they don't have a lot of personal resources, and so the anticipated recovery on their litigation is the main asset that they have. So being able to borrow against it is a form of liquidity which is not available otherwise to poor people. And that's true in all sorts of areas of consumer finance, starting with loan sharks, moving to pawn brokers, and going all the way to lines of credit against your home and things of that sort.

The difficulty in this area is the classic problem of consumer finance in that there is not bargaining equality between lender and borrower. And this is the reason why areas such as payday lending and things of that sort are pretty heavily regulated. As a law school professor working in the first year, I teach cases such as *Fuentes v. Shevin*, or *Williams v. Walker-Thomas Furniture*, which raise issues about how to think about the problem of unconscionability in contract. And when adults contract in that way — seemingly knowingly but at such disadvantageous terms — we start to think that the regulatory response is needed. In this litigation finance area, we're dealing with credit to the litigants. This looks a lot like advances on tax returns. It looks a lot like payday lending. It is somewhat of a gamble on the lender side, no doubt. But oftentimes there's a desperate quality to the litigants who may not understand what they are signing. And as Chris [Seeger] just mentioned, we start seeing these contracts entered into that, were they standard loan contracts, would run afoul of the usury laws in every single state. So they are drafted by the lender as a purchase and sale agreement or something of that sort in order to get around usury statutes. And that's a concern.

The other side is that because the borrowers in litigation financing can be individual litigants, there is a question about whether a note holder has a priority in the litigation itself. In these satellite litigations, the lenders tried to

use their contractual relations with a litigant to divest control of the ongoing supervisory role over, first, an ongoing MDL proceeding and, then, a set of class actions. That was the technical issue that was before the Third Circuit, and the Third Circuit in the NFL concussion litigation had to define the boundaries of what individuals could contract into.¹⁰

And frankly I thought the Third Circuit did a very sensible job. It basically held that, so long as the supervisory court is in charge of the money and in charge of the litigants, no private contract can divest that supervisory court of its authority. Once the money is paid out to the claimant, the claimant can enter into any contractual relationship that the claimant wants to.

SEEGER: I agree. There was a capacity issue as well in the NFL concussion litigation because the injuries that we asserted that the NFL caused — in part by keeping information from the players about concussions — led to neurocognitive problems. Lenders were only loaning money because they assumed they would get a recovery. But the only way to get a recovery was for the plaintiff to show he had dementia, Parkinson's, Alzheimer's, or ALS. So those are pretty significant injuries. Several of those implicate your cognitive ability to even understand what you're doing. So there were lawyers involved about the capacity of those entering into those agreements and who needed to approve them.

I felt like this issue had to be put in front of Judge [Anita] Brody [Eastern District of Pennsylvania] for a couple of reasons. One was that we had this anti-assignment provision, and it was there to protect our clients. The second was, who was looking after these plaintiffs, if they had neu-

rocognitive problems? Was there a lawyer involved? And was there a lawyer signing off on agreements that were effectively assignments, knowing there was an anti-assignment provision in the agreement? And if they were, why? I wanted to satisfy myself, at least, that there wasn't some kind of other arrangement going on, like a referral relationship between lenders and certain law firms.

I think it is just like the Wild West right now, and it really is ripe for some type of a regulatory intervention. It's worth pointing out that this specifically came to my attention because the Consumer Financial Protection Bureau went after one of the lenders, before Judge [Loretta] Preska in the Southern District of New York,¹¹ because the agency had seen evidence that the lender was basically ripping off not just NFL players, but victims of the 911 compensation fund.

ICHEL: [What sorts of rules are already out there that require disclosure to the litigation court or to the other parties of the presence or terms of a litigation funding agreement?](#)

BEISNER: About a year ago, the Federal Judicial Center [FJC] reviewed local procedural rules at the federal level with respect to disclosure. And I think some of us were surprised to see that a number of our federal courts, in local rules, already require disclosure of third-party funding. The FJC concluded that most federal courts of appeals — and that 24 of our 94 district courts — require it for appeals before them.¹² Now, I should hasten to add, these are not rules that are specifically aimed at third-party funding — they are the rules that require disclosure of party interests in claims in order for judges to determine if they have conflict. The

FJC's view was simply that third-party funding is covered by the way these local rules were phrased. And all that these rules require is the disclosure of the identity of the funder, not the actual funding agreements themselves.

But I think the main takeaway is that there is some level of disclosure that at least arguably is already required. The Northern District of California added to its local general order a requirement that litigation funding must be disclosed in class actions. And I'm seeing with increasing frequency that some form of disclosure is being required by individual judges, particularly in MDL proceedings. But in any event, I think the awareness of funding and the possibility of requiring disclosure is in the air or out there at the moment — but frankly, it's at best sort of a crazy quilt of requirements, and not a consistent rule across the board.

At the moment, there are several proposals for uniform TPLF disclosure rules. On the federal legislative front, there is Senate Bill 471, which would require disclosure of funding agreements and identification of the parties to such agreements in all federal court class actions and in all federal court mass tort MDL proceedings.¹³ Back in March 2017, the House of Representatives passed HR 985, which mandated similar disclosures in class actions only.¹⁴ And then in the federal court rulemaking system, I think most of the attention at the moment is on a proposal that's presently before the Advisory Committee on Civil Rules that would require disclosure for both the identity of any litigation funders and the funding agreements themselves, in all civil litigation. If it is adopted in the form in which it was proposed, it would become part of Federal Rule of Civil Procedure 26, making such information an element of the initial disclosures ►

required under that rule, but would not provide for any further inquiry.¹⁵

I think that many of us who believe that that disclosure would be appropriate view it as being somewhat analogous to the requirement that defendants disclose insurance coverage, which the rules were amended to include more than 40 years ago. They're not exactly the same, but the insurance disclosure was meant to provide more information to all litigants about the litigation, including whether the insurance company was committed to provide counsel to the defense of the litigation and what money might be available for settlement under the coverage. Rule 26 requires disclosure of the full agreement, not just the identity of the insurer. I think those of us in favor of TPLF disclosure feel that the disclosure of litigation funding agreements would sort of just "even up" that disclosure requirement by including funding disclosure, too. Disclosure of insurance agreements tells plaintiffs' counsel about third-party resources that the defendant has secured to assist in defending a lawsuit and the identity of the insurers who are involved in the litigation to provide those resources, and disclosure of litigation funding would balance the available information by requiring plaintiffs to tell defense counsel about the third-party resources they have secured to prosecute the case and the identity of the funders who have bought a piece of the litigation.

I know some concerns have been raised about whether disclosing those agreements would also disclose work product. But as with the disclosures about insurance agreements, a party would always be entitled to go to the court and say that there were some aspects of a mandatory disclosure that involved the disclosure of privileged information.

If it isn't important information for litigating the case or settling it, why do you need to know that?

ICHEL: What's the view from the funders' side — should disclosure of these kinds of litigation funding agreements be required?

GETTO: I don't think so, no. Litigants aren't generally required to disclose information about their finances that isn't relevant to the merits. I think the same rule should apply to parties who take litigation funding. There's no rationale for singling them out.

I think John [Beisner] indicated in his comments that many of the rules that he talks about aren't specifically aimed at litigation funding. I think at this point, there's only one state, Wisconsin, which requires the disclosure of funding¹⁶ — and, as John said, the Northern District of California requires disclosure in class actions.¹⁷ And there isn't any federal rule that requires disclosure of funding. Most of the rules you cite just don't apply to litigation funding. There's also no required disclosure, for example, in the UK, Australia, and other jurisdictions outside of class action context.

Finally, litigation funders in the commercial area are passive. They don't control strategy; they don't control settlement. And there are a lot of good reasons for that. Among them, that it would just be bad business to do so. Getting between a lawyer and his or her client is frankly just dumb, and for that reason alone, it's not done. But I'm unaware of any commercial litigation funder in business today of any size that is anything other than passive in these investments.

Judge [Dan] Polster, in the opioid case,¹⁸ required that disclosure of the fact of funding be made to him and him

alone. He got a statement from everybody involved that the funders were not controlling the case. And that's all that's necessary. If you require disclosure of the amount invested, that just ends up tilting the playing field again. The defendant will know the limits of the plaintiff's assets, and then will just aim for attrition and exhaustion.

The insurance analogy that John [Beisner] made is deeply flawed. Insurance is an asset created before a claim exists and is designed specifically to pay the defendant's costs. And it makes sense for that information to be disclosed so that the plaintiff can make a decision about whether the litigation is worth pursuing in the first place. On the other hand, litigation funding is an aspect created once a claim exists. So it does reflect work product, and many courts have looked at this issue and agreed.

And litigants just aren't required to produce that information. Chris Seeger doesn't have to, when he files a case, produce his bank line or disclose his contingent agreement, or disclose any other form of funding that is involved. So litigation funding is no different from all of those things. None of it is relevant to the merits at all. The only party who really may have a need to know is the judge, to assess whether there may be a conflict of some kind.

SEEGER: From the perspective of a plaintiff class action attorney, I agree 100 percent with what Ernie [Getto] said, because what kept going through my head as John [Beisner] was describing the reasons why he thinks this needs to be disclosed, including the name of the lender, is: If it isn't import-

ant information for litigating the case or settling it, why do you need to know that? And I know this gets said a lot, but again, I think when you've been doing this long enough, you realize that what it really comes down to is corporations' desire to know whether you've got the staying power to litigate against the big defendant companies in big cases. And there are many different ways of getting at that information.

There's no good purpose served by the amount of information that John [Beisner] is saying should be disclosed. And let me give you an example that doesn't relate to financing, but has come up in cases. We had experts who have been associated with universities and institutions and hospitals intimidated by pharmaceutical companies because they've agreed to be involved as experts for plaintiffs and litigation. I've got concrete examples of this, where professors or doctors who have privileges at certain hospitals have been told, "If you want to remain welcome here, you might want to think twice about being an expert for plaintiffs." That's outside the context of financing, but I could see it coming up with financing, too.

There is nothing good that can come out of the information that John [Beisner] is saying needs to be disclosed. It's completely different from insurance, and those arguments have been made. So why do you need to know it? If I sue one of John [Beisner]'s clients, do I need to know where they're getting their cash from? I mean, I assume some of it comes from the products they sell, but they may have a bank line or some other form of credit, too.

ICHEL: What if the particular funding outfit did have a control provision inside the agreement that would allow them to steer the litigation?

SEEGER: When an MDL or a class action is before a judge and the judge is effectively building a virtual law firm to litigate the case, he or she has every right to know who it is they're appointing to various positions. I think the specific question Judge Polster asked in the opioid litigation was whether any of the plaintiffs' lawyers applying for a position had arranged for funding that was contingent upon the outcome of that litigation.¹⁹ Now, I don't know who answered yes to it. I do know that people had to disclose that in camera. I think that's totally appropriate. And it may or may not have gone into the reasons as to who he did or did not appoint. I don't know that, but Judge Polster, I thought, asked a really good question, and it was relevant to him. And again, I don't have any insight into this, but maybe if the person answered, "Yes, I've arranged for financing that is non-recourse as to the partners. It is specific to this litigation and will be paid out of the funds from the litigation," maybe then he had some follow-up questions for that person.

But you can see why a judge would want that information. The judge has a responsibility in a class action or MDL as a fiduciary for the class. And they have a responsibility to appoint lawyers who are going to be solely focused on the right outcome in that case. So that's it. That's a whole different thing. John Beisner's clients don't need that information though. There's nothing good that would be served by them getting it.

ISSACHAROFF: We've talked about two different kinds of finance: One is for the consumers and one is for the lawyers handling litigation. On the consumer side, the main thing that we're concerned about is exploitation, and that's always the problem with

payday loans, or high interests that come from loan sharks or pawn shops or anything else. And in that context we say yes, disclose the terms. In the credit card context, for instance, we might put a box of standard information for the consumer to see. But when you're dealing with the business side of this, the part of the market that Ernie [Getto] is such a big player in, the exploitation issue drops out. That's not what we're concerned about. We're concerned about the integrity of the court process. And the consideration should change.

One additional distinction between litigation funding and insurance is that you do not have anything approaching the subrogation rights that are standard in insurance policies. So one of the reasons to require disclosure in that context, from the court's perspective, is that the insurance agreement may reveal who's running the show in the litigation and who are the real parties in interest. In the litigation funding context, there may be analogies that give the same kinds of control as subrogation, but not quite so explicitly as a subrogation agreement. And I think the court has an interest in knowing that, and there's nothing inappropriate in my mind in Judge Polster asking that that be disclosed to him as a condition of serving as part of the leadership of the opioid MDL. The difficulty in the large MDL is that the broad order requires all lawyers in the litigation to disclose, even if they are not in leadership positions. And it's just going to be hard for the MDL leadership to have access to all that information.

But leaving that aside, is there a strategic imbalance here if the information is disclosed to the defendants? I am less concerned when there's an investment in the entire book of business because that looks very much like the ►

way law firms typically establish a line of credit with banks. And I am not particularly impressed by the distinction of whether a law firm raises money through debt or through equity.

I am more concerned with the investment in individual cases, because I think the temptation to try to control the outcome of particular litigations is greater in that context, because there's more of a kind of speculative field; this idea of, "I'm talking this case, but not that case." It's the same as investing in an individual stock versus a mutual fund. At that point, I think that the court has more of an interest in disclosure than it would in a law firm that is just generally funded.

BEISNER: It's true that litigants normally are not required to disclose the source of their funding with respect to people who are on the record before the court — that is, the named parties to the action and their counsel. But what we're talking about here is an inquiry concerning parties that have, in essence, acquired a stake in the litigation. This is the situation where the funder has purchased part of the claim and paid for a contingent interest in the outcome of the litigation. It seems to me that where you have a third party that has acquired an interest like that, that's a different issue because they're not visible before the court in any way, and they own part of the case.

I don't buy Ernie [Getto]'s argument that insurance is all that different because it's an asset acquired before a risk arises. What difference does that make? It's a resource a party has available to aid in litigating the matter. And it simply isn't true that insurance is always purchased before the risk arises. Sometimes companies buy insurance after the litigation is brewing.

I am more concerned with the investment in individual cases, because I think the temptation to try to control the outcome of particular litigations is greater in that context, because there's more of a kind of speculative field; this idea of, "I'm talking this case, but not that case." It's the same as investing in an individual stock versus a mutual fund.

Sam, I think you really got to the nub of it when you said that insurance disclosure is about who's running the show and that's the reason you want that out there.

Going back to the Sixth Circuit's decision in the *Boling* case, the court makes the point that it is important to know if there is funding involved "because an injured party may be disinclined to accept a reasonable settlement offer where a large portion of the proceeds would go to the firm providing the loan."²⁰ It's a part of the reality of the litigation that all the parties, not just the court, need to be able to litigate with full information, which I think is the purpose of the insurance disclosure rule and is a strong justification for having full disclosure of litigation funding.

SEEGER: I guess the question then becomes: Isn't most of what John [Beisner] wants satisfied by the judge asking for the disclosure? Because I don't think many people have a big issue with that. So I understand John would like to go a little bit further and would love to have all the gory details of the funding agreement and who the funder is, but if the question is simply whether it's there and contingent on the litigation those questions can be asked by a judge. And if the judge is satisfied that it's just the lawyer that you're dealing with and there's nobody outside

the room "pulling that person's strings," so to speak, that should be enough.

ICHEL: There's some consensus here that perhaps whether to require disclosure is a determination that could be made by the presiding judge in a particular case on an ex parte basis. But should defense counsel have access to the disclosure as well?

BEISNER: Yes. For the same reason that information on insurance agreements is provided to all parties — so that everyone understands what's going on in the litigation. I think it's critical for defendants to have that information as well. That's part of maintaining an equal playing field. I think the concern I have is that I just keep hearing this mantra that, "Well, the funders are not exercising control here. And if they just tell the court that, then that should be sufficient." Yet every real, signed agreement that is presently on the record before the Advisory Committee on Civil Rules — all have control provisions in them. These are not old agreements; these are agreements from recent years.

ICHEL: Judge St. Eve, you're on this standing committee on federal rules. Where do things stand on the disclosure proposal issue?

ST. EVE: The issue of third-party financing and third-party funders has really just started to percolate in the federal courts in the last few years. I think if you had asked most federal judges about third-party financing five years or so ago, nobody would have an understanding of what it really means. Now these issues are starting to come into the courts, though more at the district courts so far than at the appellate courts. And I expect we'll be getting some more answers to some of these questions in the future as the litigation proceeds.

You're seeing a couple of things in the federal courts now. John [Beisner] touched on some of these. There are local rules that can be read to cover litigation funding both at the circuit court level and at the district court level. But the purpose of the rules that have been in place for a while was not to require disclosure so that you could find out if there were conflicts, or who else was calling the shots in the litigation. It was really for judges to determine if they had to recuse in a particular case. The focus more recently in some of the orders that we've been seeing from courts has been on the issue that we are discussing today. The Northern District of California, as was mentioned earlier, is the one district that has a specific standing order for all judges within that district requiring that, in class actions, the identity of any person that's providing funding be turned over.

There are approximately 20 other districts that have rules that could arguably be interpreted to require that the identity of third-party funders be disclosed, but they're in different contexts. I would advise attorneys who are practicing in various jurisdictions throughout the country to make sure that they take a close look, not just at the local rules of this specific district,

but also at standing orders and even local forms. Also, you need to look at an individual judge's standing orders because those vary throughout the country.

There is a subcommittee on the standing civil rules committee that is looking at these precise issues. Judge Bob Dow out of Chicago [Northern District of Illinois] is chairing that subcommittee. Its focus has been on rules for MDL cases, including whether or not there should be a rule addressing third-party financing. Judge Dow and his subcommittee have been traveling all over the country getting input from the plaintiff's bar, the defense bar, academics, and a host of others trying to determine what the appropriate proposal is. It has come up in the context of their work that a third-party funding disclosure rule may be appropriate even outside the context of the MDL.

As you may know, the rules committees all have to go through the standing rules committee, and the standing rules committee has to approve new rule proposals before they go out for public comment and before they are sent to the Supreme Court. At our June standing committee meeting, the civil rules committee reported on where they are on these issues. They do not have a specific proposal yet, but I anticipate within the next year or so that they will have some specific proposals. Whether or not they will end up proposing a rule, either in MDL cases or in all cases, that requires disclosure of such third-party funding is yet to be determined. The subcommittee is not done with its work.

ICHEL: [Is there a notable recent example of a judge addressing third-party funding that illustrates the issues we have been discussing?](#)

ST. EVE: These funding agreements, the ones that I have seen at least, are extremely complicated and sophisticated and voluminous. Judge Polster in the opioid litigation not only required the documents be disclosed to him *ex parte*, but also required both the lawyer and the third-party financier to submit sworn affidavits with respect to a potential conflict of interest. The affidavits had to affirm that the third-party financing agreements did not (1) create any conflict of interest for counsel, (2) undermine counsel's ethical obligation of vigorous advocacy, (3) affect counsel's independent professional judgment, (4) provide the financier with any control over litigation strategy or settlement decisions, or (5) affect any party's control of settlement.²¹ I thought that was a good way to get at the point that these documents are very sophisticated and complex and not something that judges are used to seeing on any kind of routine basis. Putting the onus on the third-party financier and the lawyers to make sworn representations will assist courts in making their determinations regarding potential conflicts of interest.

ICHEL: [Having a third-party funder agree to provide funding often means sharing counsel information about the case in order for the funder to do its due diligence. Judge St. Eve, can you address the issues lawyers might face when analyzing whether a litigation funder will waive work product or attorney-client privilege protection?](#)

ST. EVE: There's an excellent case that was issued by Magistrate Judge [Jeffrey] Cole in 2014, in the Northern District of Illinois, called *Miller UK Limited v. Caterpillar*.²² It discusses both the attorney-client privilege issue as well as the work product protection issue. Those two issues have been ►

analyzed differently by the courts, and there seem to be more cases on work product protection than on attorney-client privilege. The question the courts are looking at is whether or not the documents at issue are really covered by the work product protection. First: Are they documents that were prepared because of some claim that was likely to lead to litigation? And second: Did the disclosure of any documents protected by the work product privilege to the third party waive that work product privilege? When it comes to the work product protection analysis, the focus is whether the waiver or the disclosure of the information has substantially increased the opportunity for potential adversaries to obtain the information, because the point of the work product protection is to keep this work product out of the hands of an adversary in litigation, as opposed to disclosing it to any type of third party.

Most of the courts have found that third-party financing documents or analysis for third-party financiers focusing on the merits of claims are covered under work product protection. And one thing that the courts particularly look at is whether or not the third-party financier and the lawyer or the client had a nondisclosure agreement or a confidentiality agreement in place when the documents were turned over. The courts analyzing this seem to give extra protection or to be more inclined to find a protection if such an agreement is in place. With the work product protection issue though, lawyers still need to remember that there are some exceptions to the work product, including a substantial need exception that could apply even if their protection is in place.

As to attorney-client privilege, there aren't a lot of cases that have looked at

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this particular issue in the context of third-party financing. The first question is, obviously: Were they prepared in anticipation of litigation? And then, second, if so, were they disclosed to third parties? Generally, disclosure to a third party will waive the attorney-client privilege. But lawyers have been arguing about, and some courts have looked at, whether or not the common interest doctrine would nonetheless protect these documents if they're turned over to a third party. This doctrine is generally an exception to waiver, where the party that created the document and the party that it's being shared with have some type of common legal interest. What that interest has to be, or how strong it has to be, can differ by circuit, but that has been the focus of what courts have looked at.

ICHEL: Wouldn't this be the paradigmatic common interest privilege case, since the lender will only have a return on its funding if there is recovery by the funded clients?

ST. EVE: This is where the definition of how the courts have construed common interest comes in. Because if you look at some of the case law out there, the focus is on this question. And some courts have found that sharing with the third-party financier does not pertain to a legal interest — it pertains to financial interest. So the definition of how circuits look at the common interest doctrine will guide lawyers on what they should argue before courts.

ICHEL: What are some of the most important attorney ethics guideposts that need to be considered by counsel when there is a third-party funder involved in a litigation?

ST. EVE: Under the model rules, attorneys have to exercise their own independent legal judgment when advising a client. And if there is a third-party funder that is pulling the strings or having an impact on that judgment, certainly that is something the client has to be aware of and should likely have to consent to. I understand that Ernie [Getto] has said that the agreements that his firm works with don't do this, but I don't think that's necessarily the case in all of these third-party financing agreements. So independent legal judgment is essential in the foundation of a lawyer's ethical obligation.

ISSACHAROFF: I agree. I think that a client has the right to know who has an interest in his or her case; that's fundamental to any kind of disclosure obligation that an attorney owes to his or her client. And therefore if there is litigation funding — just as if there's a referral fee or any kind of arrangement with the counsel brought in to handle appeals, or anything of that sort — then that's something that the client has the right to know. I think that that falls within the customary boundaries of ethical responsibilities in an attorney-client relationship. I think the harder issue is: What are the ethical boundaries on the kinds of financing arrangements that can be entered into?

ICHEL: Let me ask all our panel members: What is your main takeaway on the topic of litigation finance, generally?

GETTO: First, that litigation finance promotes fairness when even the most well-heeled plaintiffs or plaintiff’s lawyers are increasingly out-gunned on the cost of litigation. Secondly, the suggestions from special interests that sophisticated commercial parties and their lawyers can’t protect their own interests unless they get disclosure of litigation financing are just plain wrong. And finally, to the extent that the court needs to ensure that the independence of lawyers and the interests of plaintiffs are protected in large-scale litigation, Judge Polster’s order in the opioids case is exactly the way to go.

ISSACHAROFF: We have radically restructured the entire market for legal services over the past generation

or two. It would be shocking to discover that the market had changed and the forms of finance had not. I think it’s a new world. There will be transitional pains that will be abusive, but I tend to be optimistic that more good than bad will come out of it.

BEISNER: If a person or entity decides to invest in litigation to buy a piece of a lawsuit, that fact should be disclosed and the terms of that investment should be disclosed. And if all of the positive things about litigation finance that have been stated on this call are actually true, no one should fear having to give that disclosure.

SEEGER: There is great potential for mass harm in the area of pharmaceuticals, airplane crashes, and consumer products more generally. So the cases have to be brought. In the Vioxx litigation, the FDA estimated that there

were 140,000 heart attacks in the general population related to Vioxx. There were less than 30,000 claims brought in the MDL. That means many people never even sought refuge in the courts to remedy a harm. Last point: Something has to be done about predatory lending to consumers. Either regulators have to step in, or lawyers who handle these cases together with judges have to do a better job trying to protect them against some of those practices.

ST. EVE: This is a new and developing area, and it’s just making its way into the courts. I think we will see a lot more of these issues and additional issues coming forward and get more law and guidance in this area, including in the ethical area.

Read the full transcript of this discussion at judicature.duke.edu.

¹ *Boling v. Prospect Funding Holdings, LLC*, 771 F. App’x 562 (6th Cir. Apr. 25, 2019).

² *Id.* at 579.

³ *Id.* at 580.

⁴ *White Lilly, LLC v. Balestriere PLLC*, No. 1:18-cv-12404 (S.D.N.Y. filed Dec. 31, 2018).

⁵ *Chevron Corp. v. Donziger*, 833 F.3d 74, 131–40 (2d Cir. 2016); See Theodore J. Boutros, Jr., *Ten Lessons from the Chevron Litigation: The Defense Perspective*, 1 STAN. J. COMPLEX LITIG. 219 (2013).

⁶ Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women into Often-Unneeded Surgery*, N.Y. TIMES, APR. 14, 2018.

⁷ Shawn Cohen, Julia Marsh, Rich Calder & Bruce Golding, *Inside the Cottage Industry That’s Fleecing NYC Taxpayers*, N.Y. POST, JAN. 2, 2018.

⁸ Dan Fisher, *Lawsuit Details How Law Firms Borrow and Pay Millions to Get Mass Tort Cases*, FORBES, OCT. 20, 2015.

⁹ BENTHAM IMF, CODE OF BEST PRACTICES (Jan. 2017), https://www.benthamimf.com/docs/default-source/default-document-library/code-of-best-practices-2018.pdf?sfvrsn=e44fd6cd_24.

¹⁰ See *In re: NFL Players’ Concussion Injury Litig.*, 923 F.3d 96 (3d Cir. 2019).

¹¹ *RD Legal Funding, LLC*, 332 F. Supp. 3d at 729.

¹² PATRICK A. TIGHE, MEMORANDUM: SURVEY OF FEDERAL AND STATE DISCLOSURE RULES REGARDING LITIGATION FUNDING at 2 (Feb. 7, 2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/04/Panel-5-Survey-of-Federal-and-State-Dis->

closure-Rules-Regarding-Litigation-Funding-Feb.-2018.pdf.

¹³ Litigation Funding Transparency Act of 2019, S. 471, 116th Cong. (2019–2020).

¹⁴ Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. Res. 985 (2017–2018).

¹⁵ See Letter from U.S. Chamber Institute for Legal Reform, *et al.*, to Rebecca A. Womeldorf, Sec’y of the Comm. on Rules of Practice and Procedure of the Admin. Office of the U.S. Courts at Appendix B (June 1, 2017), https://www.uscourts.gov/sites/default/files/17-cv-o-suggestion_ilr_et_al_0.pdf.

¹⁶ 2017 WIS. ACT 235 § 12 (eff. Apr. 5, 2018) (“Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.”).

¹⁷ N.D. CAL. L.R. 3-15(a)(1) (“The Certification must disclose any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities other than the parties themselves known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding.”). See also

Standing Order for All Judges of Northern District of California – Contents of Joint Case Management Statement at 2 (eff. Jan. 17, 2017), http://cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges_1.17.2017.pdf (“Disclosure of Non-party Interested Entities or Persons”).

¹⁸ *In re: Nat’l Prescription Opiate Litig.*, No. 1:17-md-2804, 2019 WL 1274555 (N.D. Ohio Mar. 20, 2019).

¹⁹ Order Regarding Third-Party Contingent Litigation Financing at 1–2, *In re: Nat’l Prescription Opiate Litig.*, No. 1:17-MD-2804 (N.D. Ohio May 7, 2018) (ECF No. 383) (“The Court now ORDERS that any attorney in any MDL Case that has obtained [third-party contingent litigation] financing shall: . . . submit to the Court *ex parte*, for in camera review, the following: (A) a letter identifying and briefly describing the [third-party contingent litigation] financing; and (B) two sworn affirmations – one from counsel and one from the lender – that the [third-party contingent litigation] financing does not: (1) create any conflict of interest for counsel, (2) undermine counsel’s obligation of vigorous advocacy, (3) affect counsel’s independent professional judgment, (4) give to the lender any control over litigation strategy or settlement decision, or (5) affect party control of settlement.”).

²⁰ *Boling*, 771 F. App’x at 580.

²¹ Order Regarding Third-Party Contingent Litigation Financing, *supra* note 25, at 1–2.

²² *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014).