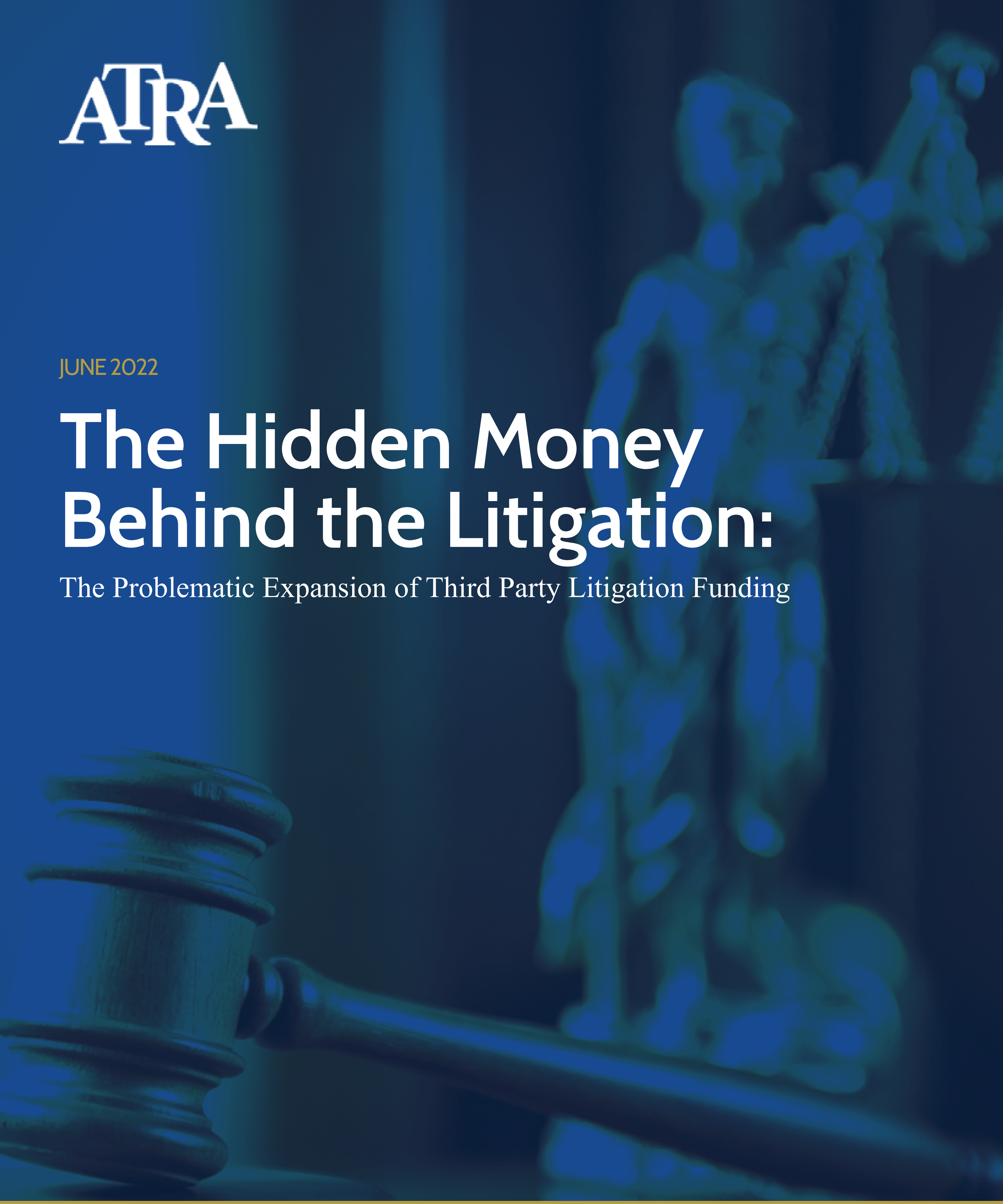

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The Hidden Money Behind the Litigation:

The Problematic Expansion of Third Party Litigation Funding

American Tort Reform Association

Third Party Litigation Funding

Third party litigation funding (TPLF) is the practice of investors buying an interest in the outcome of a lawsuit. It has quickly become a multi-billion dollar industry.[1] TPLF comes in several forms that present distinct issues and require different solutions, but they share three commonalities:

- The funder has a financial interest in the ultimate resolution of the lawsuit.
- The involvement of an outside funder raises ethical issues, such as who is driving or influencing the litigation, directly or indirectly.
- The presence of an outside funder, and its entitlement to a portion of a plaintiff's recovery, can complicate the ability to fairly resolve disputes and drive up settlements and awards.

Types of Litigation Funding

This paper focuses on three forms of TPLF. The first type, **"big-ticket" lawsuit lending**, typically involves hedge funds and private equity companies. These companies specialize in financing mass tort litigation, commercial and intellectual property litigation, or a broader portfolio of cases handled by a law firm. When these cases are resolved, the lawsuit lender is usually entitled to a percentage of the recovery, much like a contingency-fee.

The second form, **"fast-cash" lawsuit lending**, resembles the payday loan industry. These litigation funders target the poor and injured, offering "cash today" to plaintiffs in personal injury lawsuits. A consumer may use this loan for living or other expenses while he or she awaits a settlement or judgment. When the litigation concludes, the lender is entitled to repayment of the loan, interest, and fees from the recovery, often at extraordinarily high interest rates and with excessive fees. A relatively small loan, over the course of the litigation, can siphon all or a substantial portion of a vulnerable consumer's recovery.

Within this second category, a subset of companies focus on providing funding to plaintiffs for medical expenses. A *New York Times* expose revealed, for example, how a network of marketers, lawyers, doctors, and litigation funders solicited women to bring lawsuits alleging complications from pelvic mesh implants. As part of the recruitment process, the marketers reportedly told women that they have a defective mesh implant that needs to be removed immediately. The marketers then worked with litigation finance companies to provide plaintiffs with high-interest loans to pay for the questionable surgery. The procedure was often performed by doctors, associated with the marketers, who charged high rates to drive up settlement values.[2]

The final form of lawsuit lending discussed in this paper is the use of **"letters of protection,"** under which a healthcare provider agrees to defer collection of its bills for medical care during the patient's litigation. In exchange, the healthcare provider is entitled to have its full invoiced rates paid out of the settlement or judgment. While letters of protection can have legitimate purposes, they are often misused today to inflate damages by seeking billed prices that no one ever pays. The result is that jurors are misled with inflated rates, the lawyer and healthcare provider receive a windfall, and the plaintiff pays the price.

Ethics Rules and Laws Have Traditionally Constrained TPLF

In each form of TPLF, an outside party invests in a lawsuit and takes a stake in the outcome. These arrangements may complicate the ability to fairly resolve the dispute and hide conflicts of interest or potentially unethical or illegal conduct. A funder operating behind the scenes may directly or indirectly influence the course of the litigation. For these reasons, attorney ethics rules and state laws have traditionally prohibited the outside financing of litigation. In recent years, however, these rules have been relaxed or not consistently enforced.

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1 Mary Novacheck, Expert Analysis: *Time for Sunshine on 3rd-Party Litigation Funding*, Law360, July 23, 2018 (reporting that an annual survey sponsored by one of the largest litigation funders, Burford Capital, found in 2017 that use of third-party financing for litigation has increased exponentially: 28% over the prior year and 414% since 2013, and that, at that time, more than one third of U.S. law firms reporting using litigation funding).

2 Matthew Goldstein & Jessica Silver-Greenberg, *How Profiteers Lure Women Into Often-Unneeded Surgery*, N.Y. Times, Apr. 14, 2018.

Champerty has long prohibited outside parties from funding the litigation of others. Champerty is an arrangement under which a stranger to a lawsuit agrees to help pursue a litigant's claim in exchange for a portion of the case's proceeds.[3] Courts traditionally considered such agreements void and unenforceable, reasoning that the bar stops "officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law."[4] While some state courts have relaxed or abolished champerty rules, about half of states continue to apply the doctrine in some form.[5]

Rule 5.4 of the American Bar Association's Rules of Professional Conduct is intended to protect the professional independence of lawyers. It prohibits law firms from offering ownership or other investment interests to non-lawyers. Under this rule, a lawyer or law firm may not share legal fees with a non-lawyer except in limited situations that are not applicable to TPLF. This rule also prohibits lawyers from entering partnerships with non-lawyers if the partnership's activities consist of the practice of law. In addition, a lawyer may not permit a person who pays the lawyer to provide legal services for another to direct or regulate the lawyer's professional judgment.

Most states have adopted ethics rules based on the ABA model. In 2021, however, Arizona became the first state to eliminate its version of Rule 5.4.[6] While the goal of this change was to increase access to representation for low and middle-income residents by allowing alternative forms of legal service providers, the elimination of the rule opens the door to direct funding of law firms by investors.[7]

Usury laws have long protected consumers from predatory lenders. They prohibit lenders from charging borrowers excessive rates of interest on loans. State usury laws set varied maximum rates depending on the type of loan (credit card companies are subject to other regulations). In many states, the maximum rate for the typical loan is between eight and ten percent annually.

The TPLF industry often claims it is exempt from safeguards governing consumer lending because their members offer "nonrecourse loans," meaning a loan recipient does not need to repay the loan if the litigation does not result in a settlement or judgment. When courts have invalidated lawsuit loans or created uncertainty as to their enforceability, the American Legal Financing Association, the lobbying group representing fast-cash lenders, has sought to overturn such decisions.[8] They have pushed legislatures to legalize lawsuit lending subject to weak regulations.

Solutions

As described in more detail in this paper, legislators should:

- Require disclosure of lawsuit lending agreements to the court and the parties.
- Reject proposals to legalize fast-cash lawsuit lending in exchange for weak regulations.
- Prevent attorneys and medical clinics from misusing "letters of protection" to inflate damages for medical costs, and instead allow juries to determine damages based on amounts ordinarily accepted as payment for a procedure.

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3 Some states have codified the prohibition on champerty. *See, e.g.,* Ky. Rev. Stat. 372.060 ("Any contract, agreement or conveyance made in consideration of services to be rendered in the prosecution or defense, or aiding in the prosecution or defense, in or out of court, of any suit, by any person not a party of record in the suit, whereby the thing sued for in controversy or any part thereof, is to be taken, paid or received for such services or assistance, is void."); N.Y. Jud. Law § 489 (prohibiting entities from assigning many forms of funding "for the purpose of bringing an action").

4 *Rancman v. Interim Settlement Funding Corp.,* 789 N.E.2d 217, 2019-20 (Ohio 2003) (quoting "14 Corpus Juris Secondum (1991), Champerty and Maintenance, Section 3).

5 *See* Jacqueline Sheridan, Champerty and Maintenance in the Modern Era, Dismore & Shohl LLP, Jan. 22, 2016, http://www.dinsmore.com/champerty_and_maintenance_modern_era/ (indicating that, according to a 2010 survey, 28 jurisdictions continue to apply the champerty doctrine with varying limitations) (citing Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 98-99 (2011)).

6 *In the Matter of Restyle and Amend Rule 31; Adopt New Rule 33.1; Amend Rules 32, 41, 42 (Various ERs from 1.0 to 5.7), 46-51, 54-58. 60 and 75-76,* No. R-20-0034 (Ariz. Aug 27, 2020) (effective Jan. 1, 2021).

7 *See Litigation Finance Companies Eye Law Firm Ownership in Arizona*, Bloomberg Law, Nov. 29, 2021.

8 For example, after the Ohio Supreme Court ruled that lawsuit loan agreements are void as champerty, see *Rancman*, 789 N.E.2d at 221, the ALFA successfully lobbied the state legislature to overturn that decision. *See* Carol Langford, *Betting on the Client: Alternative Litigation Funding is an Ethically Risky Proposition for Attorneys and Clients*, 49 U. San Francisco L. Rev. 237, 249 (2015) (citing Ohio Rev. Code 1349.5).

"In most courts, ***TPLF arrangements are not disclosed*** during litigation and remain ***hidden from public scrutiny***."

Big-Ticket Lawsuit Lending: Driving Speculative Mass Tort and Other Litigation

Hedge funds, institutional investors, and public and private companies have poured billions of dollars into funding litigation. The lawsuit-investment industry is rapidly growing, with startup businesses joining the fray, seeing a lucrative opportunity.[9] Courts, litigants, and the public know very little about these hidden arrangements.

Third-party litigation funders front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment. Investors are attracted by the prospect of a substantial return on their investment. This form of litigation funding extends to a wide range of cases, including commercial and intellectual property disputes, but it is particularly concerning in mass tort and class action litigation.[10]

This form of TPLF played a part in the case that the *Wall Street Journal* named the "legal fraud of the century."[11] In an action brought against Chevron abroad on behalf of Ecuadorians allegedly harmed by the company's drilling practices, Steven Donziger, and his team had secured an $18 billion judgment against the energy company.[12] When he needed fresh money to seek to collect on the Ecuadorian judgment in a U.S. court, Donziger turned to Burford Capital, a publicly-traded global firm focused on litigation funding. Burford initially invested $4 million with the promise of additional payments to follow.[13] As a condition of its funding, Burford required the involvement of a closely-tied lawyer at Patton Boggs. In return for its investment, Burford would receive 5.545% of the settlement, but no less than $55.5 million.[14] To its credit, Burford terminated the funding agreement about one year later, as concerns about the litigation swirled. In 2014, a federal judge in New York barred enforcement of the judgment, finding it was secured through fraudulent evidence, judicial bribery, witness tampering, and even ghostwriting the judgment.[15] Donziger was later found in criminal contempt of court[16] and suspended from the practice of law.[17]

TPLF can hide the true motivations behind a lawsuit. A well-known example is Terry Gene Bollea's lawsuit against the website Gawker Media. Bollea, better known as Hulk Hogan, brought an invasion of privacy lawsuit against the website for release of an explicit tape that featured him. A St. Petersburg jury awarded Bollea $140 million,[18] which eventually led Gawker to bankruptcy.[19] Only through media coverage was it revealed that Peter Thiel, a billionaire with his own contentious relationship with Gawker, had secretly bankrolled this litigation.[20] Some have expressed concern that this arrangement "gives

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9 *See, e.g.*, Matt Wirz, The 26-Year-Old Dropout Lapping the Hedge-Fund Field, Wall St. J., Apr. 26, 2022.

10 According to a recent Swiss Re analysis, mass tort litigation led TPLF investments in 2021, at 38%, followed by commercial litigation (37%) and personal injury litigation (25%). Swiss Re Inst., US Litigation Funding and Social Inflation 8 (Dec. 2021).

11 Editorial, *Legal Fraud of the Century*, Wall St. J., Mar. 4, 2014.

12 *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff'd* 833 F.3d 74 (2d Cir. 2016).

13 *See Donziger,* 974 F. Supp. 2d at 474-81.

14 Steven Mufson, *Patton Boggs Becomes Mired in an Epic Legal Battle with Chevron Over Jungle Oil Pits*, Wash. Post, June 29, 2013.

15 *See Donziger*, 974 F. Supp. 2d at 558-60.

16 *United States v. Donziger*, Nos. 19-CR-561, 11-CV-691, 2021 WL 3141893, at *86 (S.D.N.Y. July 26, 2021).

17 *In the Matter of Steven R. Donziger*, 80 N.Y.S.3d 269 (App. Div. 2018).

18 The award consisted of $115 in compensatory damages and $25 million in punitive damages. Nick Madigan, *Jury Tacks On $25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. Times, Mar. 21, 2016.

19 Michael M. Grynbaum, *Thiel Makes a Bid for Gawker.com, a Site He Helped Bankrupt,* N.Y. Times, Jan. 12, 2018.

20 Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, Forbes, June 21, 2016.

other billionaires a blueprint for how to silence media outlets they dislike."[21] In another case, questions arose as to whether individuals and entities affiliated with the Chinese Communist Party had funded a defendant's litigation expenses in a contract dispute with a company that was closely tied to a prominent Chinese dissident.[22]

TPLF can create litigation, not just fund it. For example, an outsider's financial investment in a case may be used to cover the cost of mass tort lawsuit advertising that has surged in recent years and the call centers that handle the responses. These ads often urge viewers who have taken a prescription drug, been treated with a medical device, or used a consumer product to "call right now" because "you may be entitled to substantial compensation." Even when sound science does not support these suits, mass tort lawyers and their investors understand that if they quickly generate thousands of claims tying a widely used product to a common illness, the targeted company will face strong pressure to reach a global settlement. That settlement will result in a substantial payout to both the contingency-fee lawyers and investors.

As discussed earlier, TPLF raises a number of ethical concerns, such as a threat to a lawyer's ability to exercise independent judgment in cases where the funder can influence litigation or settlement decisions. The presence of an unknown third-party with a stake in the outcome can change what is essentially a two-party negotiation into a multi-party process with a "behind-the-scenes" influencer. As a TPLF company executive has acknowledged, litigation funding "make[s] it harder and more expensive to settle cases."[23]

In most courts, TPLF arrangements are not disclosed during litigation and remain hidden from public scrutiny. TPLF operates with little to no transparency, making it difficult to know who has an interest in the outcome of the litigation.

Litigants should know if their efforts to settle cases may be complicated by an entity that is not in the room. In addition, judges and litigants should be aware of potential conflicts of interest or ethical violations that are now wrapped in a veil of secrecy. Disclosure of litigation funders can also help courts oversee litigation that is filed or prolonged for improper purposes.

Solutions

- Require disclosure of TPLF agreements. This should include not only the presence of TPLF and the identity of the funder, but the funding agreement itself. Disclosure of the agreement allows the parties and court to know whether an outside funder may be calling the shots in the litigation.
  - The Federal Advisory Committee on Civil Rules is considering a proposal, supported by ATRA and others, to require automatic disclosure of TPLF agreements in all civil actions in federal courts. This is consistent with federal rules that mandate automatic disclosure of insurance agreements in litigation because this transparency enables counsel on both sides to evaluate the case and influences decisions about settlement and trial.[24] While the Committee continues to actively consider this proposal, it has been pending for nearly five years as the use of TPLF has expanded.
  - Meanwhile, federal district courts in Delaware and New Jersey have taken action to require parties to disclose the identity of any litigation funder, whether the funder may influence litigation decisions or settlements, and the nature of the funder's financial interest in the litigation.[25] The Northern District of California has adopted a similar disclosure requirement in class action litigation.[26]
  - State legislatures and courts can act. In 2018, Wisconsin became the first state to require a party to automatically disclose any TPLF agreement.[27]
- Allow use of discovery to investigate the nature of litigation funding and its influence on the litigation.
- Hold TPLF funders and plaintiffs jointly liable for any costs and sanctions stemming from the lawsuit to discourage frivolous claims.

21 *Id.* The propriety of the litigation funding arrangements became an issue in Gawker's bankruptcy proceeding. *See In re Gawker Media LLC*, 2017 WL 2804870 (Bankr. S.D.N.Y. June 28, 2017) (ordering disclosure of litigation financing agreements as necessary to determine whether Thiel and others had entered a conspiracy to destroy Gawker's business).
22 *Eastern Profit Corp. Ltd. v. Strategic Vision US, LLC*, 2020 WL 7490107 (S.D.N.Y. Dec. 18, 2020).
23 Jacob Gershman, *Lawsuit Funding, Long Hidden in the Shadows, Faces Calls for More Sunlight*, Wall St. J., Mar. 21, 2018.
24 Fed. R. Civ. P. 26(a)(1)(A)(iv) and Adv. Comm. Notes – 1970 Amendment.
25 Standing Order Regarding Third-Party Litigation Funding Arrangements (D. Del. Apr. 18, 2022); Disclosure of Third-Party Litigation Funding, D. N.J. Civ. R. 7.1.1 (June 21, 2021).
26 Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement (N.D. Cal. Nov. 1, 2018).
27 *See* Wis. Code § 804.01(2)(bg).

“...Companies that promote these arrangements often claim they are ***not subject to lending laws that ordinarily protect consumers....***”

Fast-Cash Lawsuit Lending: Preying on the Injured and Complicating Settlement

A second segment of the lawsuit lending industry targets vulnerable consumers who have experienced an injury–a car accident or a slip-and-fall, for example–and offers them quick cash that will be repaid out of their settlement or judgment. Websites and social media ads offer “cash for lawsuits” or pre-settlement funding or loans. What consumers may not realize is that these arrangements often come with extraordinarily high payday-loan type rates that can devour an injured person’s settlement.

There is little true risk involved in most of these cases. Lenders know it is almost certain that the consumer will receive a settlement from the defendant or its insurer before they offer the loan. It is just a matter of time, during which the lender profits from the high interest rate.

For example, Oasis Financial offers consumers $500 to $100,000 in “no risk” pre-settlement financing within 24 hours of approval.[28] A representative of the lawsuit lender recently indicated that her company’s average interest rate on lawsuit loans is about 66% per year and that 85% to 90% of the cases they fund result in a settlement or judgment.[29]

An example of the impact on those who are enticed to take such loans is the case of Christopher Boling, who was seriously injured in Kentucky in 2009 when a gas can ignited. He sued the manufacturer of the can, claiming it was defective. During the litigation, he took out four lawsuit loans totaling $30,000. The loans accrued interest at a rate of 4.99% per month. That may seem low to a consumer, but, when compounded monthly, Mr. Boling was subject to an effective annual rate of nearly 79%. When the lawsuit settled five years later, the outstanding balance on the loans was over $340,000, more than eleven times the amount he had borrowed–and likely a substantial part of the settlement that he would have received as compensation for his severe burns.[30]

The companies that promote these arrangements often claim they are not subject to lending laws that ordinarily protect consumers like these because they offer “nonrecourse loans,” meaning that the companies are only repaid out of the settlement or judgment, similar to an attorney’s contingency fee. Their rates and fees exceed levels permitted by state usury laws.

From a civil justice perspective, these types of arrangements are also problematic. They drive up settlement demands and complicate the ability of parties to resolve litigation. A person who has taken out a lawsuit loan must not only calculate how much of his or her settlement will go to his lawyer for attorneys’ fees and costs (which may be 35%, 40% or more), but consider how much of what remains will then be siphoned away to repay the lawsuit loan.

In addition, once a plaintiff takes out a lawsuit loan, he or she may not be able to walk away from the litigation, even if it turns out that the lawsuit should not have been brought in the first place. Abandoning the lawsuit can subject a consumer to immediate repayment of the entire loan obligation (with interest and fees).

These arrangements can also encourage litigation, as some people who may not have otherwise sued may be enticed by the prospect of fast cash. Consumer lawsuit lending operates in dubious legal territory. For instance, in Christopher Boling’s case, a federal appellate court found his lawsuit loan agreements

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28 *See* Oasis Financial, https://www.oasisfinancial.com/, last visited May 5, 2022.
29 Oral Testimony of Kimberly Halvorsen, Senior Counsel, Oasis Financial, Before the Maine Committee on Health Coverage, Insurance and Financial Services, in Opposition to LD 1956, Feb. 15, 2022 (discussing Oasis Financial’s experience in Maine since 2017).
30 *See Boling v. Prospect Funding Holdings, LLC*, 771 F. App’x 562 (6th Cir. 2019).

unenforceable.[31] Lawsuit lending, the Sixth Circuit found, violates Kentucky's prohibition on "champerty," which does not allow parties to have a financial interest in litigation aside from the parties and their lawyers. This prohibition, the court observed, reflects Kentucky's "strong public policy against such assignments," which is "intended to prevent the injured party from being compelled to prosecute a claim that he may not wish to prosecute," "may interfere with or discourage settlement," and "encourages and multiplies litigation."[32] The loan agreements also "clearly violated" the state's usury law, which generally does not allow an APR above 8%.[33] The court invalidated the agreement and required the consumer to repay the lender only the principal and the lender's costs, $34,625 (as opposed to $340,000).[34]

As a result of well-reasoned court rulings such as this, the cash-for-lawsuits industry is engaged in a nationwide advocacy effort to legalize their business model. They have developed and pushed for legislation that would license and loosely regulate consumer lawsuit lenders in exchange for carving themselves out of usury and champerty laws. In some states, proposals supported by the cash-for lawsuits industry include no limits on fees or interest rates at all. Other states have taken the better approach of applying the state's usury law to such loans[35] or setting a maximum interest rate specifically for lawsuit lending agreements.[36]

Solutions

- Reject legislation that would legalize the consumer lawsuit lending industry in exchange for licensing and loose regulation.
- If a state law permits consumer lawsuit lending, subject the industry to generally-applicable state usury laws and lending regulations. For example, Arkansas subjects TPLF to the maximum rate for loans permissible under the state's usury laws, 17%.[37]
- Require automatic disclosure of consumer lawsuit lending agreements to the parties and the court. In 2019, West Virginia adopted a disclosure requirement for consumer lawsuit lending arrangements, an annual fee cap of 18%, and other safeguards.[38]
- Legislators in several states have introduced bills along these lines in recent years, including Kansas, Maine, Missouri, Ohio, and Rhode Island.[39]

"A person who has taken out a lawsuit loan must not only calculate how much of his or her settlement will go to his lawyer . . . but consider how much of what remains will then be ***siphoned away to repay the lawsuit loan."***

31 *See id. at* 579.
32 *Id.* at 579-80.
33 *Id.* at 582-84 (affirming district court's ruling and finding the interest rate provided in the lawsuit loan agreements "far exceeded the permissible statutory rate" set by the usury statute).
34 *Id.* at 566, 584; *see also* Angela Underwood, Lawsuit Asks If Companies Funding Litigation Are Breaking Florida Law, Legal Newsline, Jan. 24, 2018 (reporting that, in Florida, a recipient of two lawsuit loans totaling about $11,000 from Certified Legal Funding reportedly was subject to a 51% interest rate, a $600 processing fee, and a $345 origination fee).
35 *See* Ark. Code Ann. § 4-57-109.
36 *See, e.g.*, Ind. Code Ann. § 24-12-4.5-2; Nev. Rev. Stat. § 604C.310; Tenn. Code Ann. § 47-16-110; W. Va. Code Ann. § 46A-6N-9.
37 Ark. Code Ann. § 4-57-109(b)(1).
38 W. Va. Code Ann. § 46A-6N-6.
39 *See* S.B. 152 (Kan. 2021); L.D. 1956 (Maine 2022); H.B. 2771 (Mo. 2022); S.B. 94 (Ohio 2021); H. 7414 (R.I. 2022).

> “These agreements are often struck by the plaintiff’s attorney with familiar doctors who have a ***considerable history treating patients involved in litigation.***”

Letters of Protection: Manipulating the Courts, Misleading Juries, and Inflating Damage Awards

Letters of protection present another pathway for outsiders to take a financial stake in an injured party’s lawsuit, usually with the aim of manipulating the valuation of medical treatment expenses that the jury will hear in order to inflate the potential recovery. These arrangements also increase the financial risk to the injured party, who remains financially responsible for the cost of the treatment and may be required to pay inflated prices for medical services that otherwise would have been resolved by healthcare insurance.[40]

A letter of protection is a contract between an injured party and a treatment provider in which the doctor or clinic agrees to defer charges for healthcare services and take payment from proceeds of the plaintiff’s settlement or jury award with a defendant targeted for causing the injury.[41] These agreements are often struck by the plaintiff’s attorney with familiar doctors who have a considerable history treating patients involved in litigation.[42] Under this arrangement, no request for payment is submitted to any healthcare insurer or government program like Medicare or Medicaid that covers the plaintiff.

In those rare occasions when the injured party has no available insurance, a letter of protection arrangement may provide a means for securing treatment that otherwise would not be available. But in the much more common situation in which the injured person actually has healthcare coverage or is eligible for benefits through a public program, the letter of protection arrangement sidesteps the substantial discounts mandated by private insurance, Medicare and Medicaid, and allows the healthcare provider to attach an extremely high price to the medical services.[43] Plaintiffs’ lawyers and physicians acting on a letter of protection also have an incentive to push the client to undergo unnecessary or excessive treatment: doing so drives up damages and the lawyer’s percentage-based contingent fee, the healthcare provider is reimbursed for the treatment at a highly profitable rate, and the injured party receives the medical care with no co-pay responsibility or other immediate out-of-pocket cost.

Letters of protection agreements often appear in states that focus on the sums paid or owed to the plaintiff’s physicians to determine what may be awarded as medical expenses damages. For example, in Texas, damages are limited to the sums “actually paid or incurred” for the plaintiff’s treatment.[44] Similarly, Florida reduces recoveries for claimed medical expenses by the amounts disallowed or written off by the insurer or government program.[45] Letters of protection seek to dodge these limitations and inflate recoverable medical expense damages by preventing the routine healthcare payment mechanisms from running their course, which avoids enforcement of contractual discounts or disallowed charges and ensures that healthcare charges remain owing at the

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40 *See Carnival Corp. v. Jimenez*, 112 So.3d 513, 517 n.3 (Fla. 2d Dist. Ct. App. 2013) (“[T]ypically if the client does not obtain a favorable recovery, the client is still liable to pay the providers’ bills.”).

41 *Aglogalou v. Dawson*, 2022 WL 125320, at *1 (M.D. Fla. Jan. 13, 2022).

42 For example, in *Alvarez Crespo v. Home Depot U.S.A., Inc.*, 2016 WL 3854585, at *3 (S.D. Fla. July 15, 2016), some of the medical providers who treated the plaintiff indicated “their practices are conducted entirely through letters of protection.”

43 *See, e.g., id.* at *3 (“Plaintiff does have insurance (either private insurance or Medicaid), yet has chosen to proceed under a letter of protection rather than seek insurance reimbursement for his medical bills.”). A recent trip-and-fall suit provides an example of the considerable difference between the full “chargemaster” rate and the much lower Medicare rate: the initial billed expense of $106,087.08 was reduced more than 80% by Medicare, to $19,973.89. *Dial v. Calusa Palms Master Ass’n, ___ So.2d ___*, 2022 WL 1261150, at *3 (Fla. Apr. 28, 2022) (Polston, J., concurring).

44 Tex. Civ. Prac. & Rem. Code §41.0105.

45 Fla. Stat. Ann. § 768.76(1) (establishing post-trial set-off procedure for collateral source payments); *Goble v. Frohman*, 901 So. 2d 830, 833 (Fla. 2005) (contractual write-offs qualify as a collateral source payment that must be set-off).

time of trial and do not attain the status of "actually paid." Letters of protection consequently prevent juries from ever understanding that the plaintiff's treatment charges could have been resolved for a small fraction of the claimed amount, if only the providers had submitted them to the plaintiff's healthcare insurer.

As with other types of third-party litigation funding, letters of protection also have the effect of giving outsiders an interest in a lawsuit's outcome. By holding the plaintiff's treatment charges until the case is resolved, rather than submitting them for payment to the insurer or covering program, healthcare providers take a direct financial stake in the litigation and stand to benefit by receiving an extremely high rate for the care given if the plaintiff receives a maximum recovery.[46] Courts recognize that this interest in inflating the award makes it more likely that the physician will testify favorably for the plaintiff due to that financial interest.[47] As an alternative to retaining the plaintiff's guarantee of payment, the provider may sell the account receivable to a third party.[48] The purchaser pays the treatment provider a discounted amount to acquire the right to recover on the medical invoice at its full value. But regardless of who ultimately holds the receivable, the right to recover for treatment provided under a letter of protection injects a stranger's interests into the litigation, resulting in diminished control of the injured party over litigation direction and settlement terms.[49]

Solutions

- Exclude medical expense evidence that exceeds the amount for which the charges could be satisfied if submitted to the claimant's available healthcare coverage. Statutes enacted in Montana in 2021 and Iowa in 2020 accomplish this aim.[50]
- Allow discovery into the providers' billing practices for similar treatment covered under private health insurance or government-sponsored programs, and permit the jury to consider evidence that the plaintiff's medical providers and other physicians in the geographic area ordinarily accept substantially smaller payments for the same treatment plaintiff received when there is no letter of protection in place.[51]
- Require production of letters of protection that the plaintiff has entered, to enable cross-examination about the treatment provider's financial interest in the outcome of the trial.[52]

46 *See In re K & L Auto Crushers, LLC*, 627 S.W. 3d 239, 254 (Tex. 2021) (recognizing that "the providers who treated [the plaintiff] invested themselves in the outcome of this case and the amount of damages recovered[.]"); *Jimenez,* 112 So. 3d at 520 ("Undeniably, the existence of the letter of protection gave Dr. Smith a financial interest in the outcome of Ms. Jimenez's personal injury action.").

47 *See Torres v. Wal-Mart Stores East, L.P.*, 555 F.Supp.3d 1276, 1296 (S.D. Fla. 2021) ("[A] treating physician under a letter of protection may be more partial towards the plaintiff); Alvarez Crespo, 2016 WL 3854585, at *2 (letter of protection agreement "is evidence that a physician is more likely to testify favorably on behalf of a plaintiff because of that financial interest in the case.").

48 *See, e.g., Medical Lien Mgmt., Inc. v. Frey*, 2013 WL 5720334, at *1 (M.D. Fla. Oct. 21, 2013) (lawsuit arising from an injured party's refusal to pay medical lien company that purchased right to recover value of treatment provided under letter of protection).

49 *See Gershman, supra* n. 23.

50 Iowa Code Ann. § 622.4; Mont. Code Ann. § 27-1-308(3)(b).

51 *See In re K & L Auto Crushers, LLC*, 627 S.W. 3d at 251 (directing that discovery be allowed into providers' negotiated rates with private insurers and public programs for medical services similar to what the plaintiff received); Sykes v. Vixamar, 830 S.E. 2d 669, 675 (N.C. Ct. App. 2019) (allowing discovery into hospital's lien resolution practices and indicating that "courts should freely admit this evidence at trial."); *Aglogalou,* 2022 WL 125320, at *4 (permitting discovery of treating physician's insurance reimbursement rates for same procedures the plaintiff received).

52 *See In re Central Oregon Truck Co.*, ___ S.W.3d ___, 2022 WL 1434661, at *1 (Tex. May 6, 2022) (ordering discovery addressing the existence of letters of protection).

"Letters of protection consequently ***prevent juries from ever understanding*** that the plaintiff's treatment charges could have been resolved for a small fraction of the claimed amount…."

Conclusion

Third party litigation funding has flourished in recent years due to the loosening of legal ethics constraints that traditionally prevented such arrangements. As TPLF expands, it threatens the integrity of the civil justice system and its ability to fairly decide disputes.

Each of the three types of arrangements examined in this paper inject the financial interests of an outsider into the litigation. Behind the scenes, a third party may pay for television commercials to generate a new mass tort with the hope that the sheer number of claims will pressure a jackpot global settlement or fund a lawsuit with ulterior motives. “Fast cash” lawsuit lending arrangements entice those who are injured to take loans subject to excessive interest rates and fees, making it difficult for a plaintiff to agree to a reasonable settlement because most of the money will go to his or her contingency-fee lawyer and the lender. Lawsuit lending arrangements, including “letters of protection,” have led some doctors and clinics that work hand-in-hand with plaintiffs’ attorneys to charge extremely high rates and even encourage unnecessary or excessive medical treatment to drive up damage awards.

Since there is no obligation to disclose TPLF arrangements in most courts, these concerns are often hidden from the judge, the parties, and the public. State legislatures and courts can address these concerns by, at minimum, requiring disclosure of TPLF arrangements. They should also reject proposals that would further legitimize or expand the lawsuit lending industry and adopt laws that prevent manipulation of the legal system.

American Tort Reform Association