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RISK-FILLED RISK AVERSION:
THE TROUBLING NATURE OF THIRD PARTY LITIGATION FINANCING ARRANGEMENTS IN THE CONTEXT OF AGGREGATE CLAIMS

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I. INTRODUCTION

Imagine a reality where the justice system operates like a stock exchange. Envision that system as permitting investors to buy percentages of a plaintiff's harm as an investment opportunity. Further, contemplate that system as employing algorithmic tools to determine the likelihood of a lawsuit's success for financing purposes. Now look around. On August 22, 2016, Eva Shang, a Harvard attendee turned entrepreneur, unveiled her startup—Legalist—for a crowd of potential investors in Mountain View, California.[1] Legalist is a litigation

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[1] Joshua Hunt, *What Litigation Finance is Really About*, THE NEW YORKER, (Sept. 1, 2016),

finance company that uses a technologically-driven method to select, vet, and invest in litigation.[2] Legalist, unlike its competitors,[3] uses an electronic algorithm "to calculate the likelihood that a lawsuit will succeed, the company then invests in cases it deems promising. If a plaintiff it has funded prevails, Legalist takes a percentage of the winnings—usually between twenty-five and thirty percent [sic]."[4]

The reality is that our judiciary has shifted. Legalist, and litigation finance start-ups like it, are the most recent in a twenty-year-string of advances made in third-party litigation finance ("TPLF" or "litigation lending"). The age-old doctrines of maintenance and champerty[5] are all but forgotten,[6] and an

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http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about.

[2] LEGALIST, http://www.legalist.us (last visited Nov. 17, 2016).

[3] Legalist is one of many finance firms across the globe investing in U.S. litigation. *See also*, JURIDICA, http://juridica-aml.com (last visited Nov. 17, 2016); BURFORD CAPITAL LTD., http://www.burfordcapital.com (last visited Nov. 17, 2016); CREDIT SUISSE, http://www.credit-suisse.com/us/en.html (last visited Nov. 17, 2016); AMERICAN LEGAL FUNDING, http://www.americanlegalfunding.com (last visited Nov. 17, 2016); ADVOCATE CAPITAL, INC., http://www.advocatecapital.com (last visited Nov. 17, 2016); COUNSEL FINANCIAL, http://www.counselfinancial.com (last visited Nov. 17, 2016); EVERGREEN FUNDING GROUP, http://www.evergreen-funding.com (last visited Nov. 17, 2016); LAW FINANCE GROUP, INC., http://www.lawfinance.com (last visited Nov. 17, 2016); OXBRIDGE FINANCIAL GROUP LLC, http://www.oxbridgefg.com (last visited Nov. 17, 2016); RAPID FUNDS, http://rapidfunds.com (last visited Nov. 17, 2016); RD LEGAL CAPITAL, http://www.legalfunding.com (last visited Nov. 17, 2016); VIA LEGAL FUNDING, http://www.vialegalfinance.com (last visited Nov. 17, 2016).

[4] Hunt, *supra* note 4; *see also* Kalajdzic et. al., *infra* note 11, at 131 (quoting a Baker McKenzie representative stating that the "typical [investors fee] would be between twenty and fifty percent of the damages, with a cap of three to four times the legal costs advanced by the funder").

[5] *See* 14 C.J.S. *Champerty and Maintenance* §§ 1-2 (2017) (defining maintenance and champerty as claims of "officious intermeddling").

[6] *See generally* ABA COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE, 11-12 (2012), *available at*

investment-based litigation finance system has replaced them.[7] While the dramatic shift to embrace litigation financing may seem bizarre in a vacuum, there is no doubt that the stated motivations of the litigation lending movement are meritorious.[8] It is undeniable, however, that the bedrock of the movement—for-profit capital investment—is potentially disagreeable in this context due to its propensity to raise ethical, evidentiary, adversarial, and representational concerns.

TPLF works fine for the individual plaintiff. If an individual chooses to sell her potential recovery from a suit, why should our justice system prohibit it? American legal principals allow individuals to sell their structured settlements in favor of buy-out incentives.[9] Moreover, our judiciary encourages risk/reward type sophistication when determining the value of a lawsuit.[10] The economic foundation on which all legal decisions are made incentivizes unique problem solving

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https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf. (reporting that 27 out of 51 U.S. jurisdictions now permit some form of champerty or maintenance in situations of third party funding).

[7] *Id.*

[8] *See* Jasminka Kalajdzic, Peter Cashman, and Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 AM. J. COMP. L. 93, 94 (2013) (citing *New York City Bar Gives Thumbs Up to Litigation-Funding*, THOMSON REUTERS NEWS & INSIGHT (June 20, 2011), http://archive-com.com/page/481471/2012-10-19/http://newsandinsight.thomsonreuters.com/Legal/News/2011/06.

[9] *See generally* J.G. WENTWORTH, https://www.jgwentworth.com (last visited Nov. 17, 2016); PEACHTREE FINANCIAL, http://www.peachtreefinancial.com (last visited Nov. 17, 2016); SELL MY ANNUITY, http://www.sellmyannuity.net/ (last visited Sept. 12, 2017).

[10] *See generally* FED. R. CIV. P. § 13 (codifying the practice of crossclaim and counterclaim practice); 1 ALT. DISP. RESOL. § 7:1 (3d ed. 2016) (identifying the duties arising from arbitration agreements).

techniques to promote judicial frugality.[11] Separate from "individual TPLF," however, is third-party *aggregate* litigation finance ("TPALF")—the next step for litigation financiers.[12] While it is true that the costs associated with aggregate litigation are far more than those associated with individual litigation, so too are the complications that arise during multi-party, multi-jurisdiction lawsuits. For numerous reasons, applying TPLF to the practice of aggregate litigation fails to comport with the established legal norms in the U.S. The legal issues that arise when investors attempt to finance aggregate claims include—e.g. the exacerbation of privilege and confidentiality concerns inherent in complex litigation; the ability for aggregate defendants and other improper parties to invest in their opposing party claims; and the advancement of non-party interests—distinguish themselves as particularly unjustifiable.

This article will explore the above-mentioned deficiencies of permitting TPLF in the aggregate context and ask whether applying litigation finance to aggregate claims is worth the risk of violating U.S. ethical and evidentiary rules, diluting adversarial principals, and creating representational concerns. Part I will outline the rise of litigation finance in the U.S. and briefly identify representative instances of individual TPLF and TPALF here in the states. Part II will identify three primary concerns presented by the creation of third party lending arrangements in aggregate litigation and briefly explain why each threatens the legitimacy of aggregate litigation. Finally, Part III proposes a blanket prohibition on TPALF arrangements pending the implementation of a

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[11] *See generally* 4 AM. JUR. 2D *Alternative Dispute Resolution* § 7 (2016) (discussing mediation-arbitration arrangements); *See* Thomson Reuters Practical Law, Settlement Release of Claims Agreement. PRACTICAL LAW LABOR & EMPLOYMENT (2016).

[12] *See* Kalajdzic et. el., *supra* note 11, at 127 (explaining that while the TPLF market in the U.S. is a few decades old, "there does not appear to have been a reported instance of TPLF in the class actions context.")

comprehensive regulatory scheme accounting for the concerns facing aggregate litigation lending.

II. THE SPARK THAT IGNITED LITIGATION LENDING

> In the early history of law, there was a strong feeling not only that . . . the judges and two litigants [] were necessary [for a legal dispute] but that there must be no one else and that anyone who intruded himself between the judge and the parties could only mean mischief.[13]

Problematically however, individuals who appeared before their peers "flanked by supporters" were traditionally believed to have "dignity and power," whereas individuals "not so supported" appeared traditionally "miserable" and "wretch[ed] in the literal sense of both words."[14] For this and similar reasons, early legal systems created a caveat to the judge and two litigant rule to allow "intervention on behalf of another."[15] Throughout legal history, these third party intervenors (litigation speculators) have been looked upon with suspicion.[16] In feudal England, Parliament developed the doctrines of "maintenance" and "champerty" to circumvent these suspicions.[17] As was to be expected, English influence on U.S. law fostered the adoption of maintenance and champerty as a part of the early U.S. common law.[18]

Champerty is defined as the "officious intermeddling in a suit by a stranger by maintaining or assisting either party with money or otherwise to prosecute or defend it."[19] Maintenance

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[13] Max Radin, *Maintenance by Champerty*, 24 CAL. L. REV. 48 (1935) (detailing the development of maintenance and champerty).
[14] *Id.* at 49. (discussing early Greek judiciaries and judiciaries throughout the middle ages).
[15] *Id.* (this encompassed the attorney and various other supporters).
[16] *See generally id.*
[17] *Id.* at 70.
[18] *Id.*
[19] 14 C.J.S. *Champerty and Maintenance* § 1 (2016) ("[i]n order to establish a prima facie case of champerty, three elements must exist:

"is an officious intermeddling in a suit that in no way belongs to the intermeddler, by maintaining or assisting either party with money or otherwise, to prosecute or defend it."[20] The purpose of these doctrines was to deter "financial overreaching by a party of superior bargaining position" and disincentivize the "bringing of frivolous lawsuits."[21] With the development of the statutory law in the U.S., however, "maintenance [was] lost [to] such specific torts as slander, libel, conspiracy, [and] malicious prosecution."[22] And, the antiquated doctrine of champerty has been almost completely outmoded by the contingency fee, a public policy against excessive fee recovery, sanctions for misconduct, and the doctrines of unconscionability, duress, and good faith.[23] Even without maintenance and champerty, U.S. courts have been able to consider the excessiveness of fee arrangements and whether financiers impermissibly influence the outcome of a lawsuits. Ultimately, the development of the U.S. statutory law posed whether the doctrines of maintenance and champerty were necessary.

As Justice Oliver Wendell Holmes said more than a century ago,

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[24]

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the party involved must be one who has no legitimate interest in the suit; the party must expend its own money in prosecuting the suit; and the party must be entitled by the bargain to share in the proceeds of the suit" *quoting* WFIC, LLC v. LaBarre, 148 A.3d 812, 818 (Pa. Super. Ct. 2016)).

[20] *Id.* at § 2.

[21] Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997).

[22] Radin, *supra* note 16, at 59.

[23] Saladini, 687 N.E.2d at 1227.

[24] O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (Jan. 8, 1897).

As a reflection of Justice Homes's sentiment, many states have made the determination to abolish, repeal, or ignore[25] the doctrines of maintenance and champerty. The shift mirrors the "change in [the societal] attitude toward the financing of litigation"[26] and represents the realization that "agreements to purchase an interest in an action may actually foster resolution of [] dispute[s]."[27] Some jurisdictions still prohibit maintenance and champerty in some capacity, but the majority of U.S. jurisdictions have recognized the social utility of third party litigation funding arrangements.[28]

As a product of the deregulation of litigation lending,[29] and in conjunction with the American contingency fee, a system of TPLF developed within the United States to capitalize on the practicality and profitability of legal risk-shifting agreements.

A. UNITED STATES TPLF AND A FAILED ATTEMPT AT TPALF

[25] In some states maintenance was never adopted or has been abandoned. *See, e.g.*, Mathewson v. Fitch, 22 Cal. 86, 95 (1863); Fastenau v. Engel, 240 P.2d 1173, 1174-1175 (Colo. 1952); Grant v. Stecker & Huff, Inc., 1 N.W.2d 500, 501 (Mich. 1942); Bentinck v. Franklin, 38 Tex. 458, 472-73 (1873). In others, the doctrine has been given very narrow interpretation. *See, e.g.,* Brown v. Bigne, 28 P. 11, 13 (Or. 1891); Thurston v. Percival, 1 Pick. 415, 416-17 (1823); *See generally* ABA, *supra* note 9.

[26] Saladini, 687 N.E.2d at 1226.

[27] *Id.*

[28] Andrew Hananel & David Staubitz, *The Ethics of Law Loans in the Post-Rancman Era*, 17 GEO. J. LEGAL ETHICS 795, 801 (2003-2004) (pointing to New York, Pennsylvania, and Oklahoma as three of the jurisdictions that either statutorily prohibit maintenance and champerty or do so as a part of their common law); *see also* ABA, *supra* note 9.

[29] Kalajdzic et. al., *supra* note 11, at 134-35 (explaining the deregulation of maintenance and champerty in the U.S. in comparison to that of other countries, such as Australia. In Australia, maintenance and champerty are no longer torts or criminal offenses. By contrast, the United States has relatively few judicial decisions addressing these issues directly.); *See also* ABA, *supra* note 9.

As the legislative and judicial predisposition towards litigation lending changed in the United States, so too did the perception of foreign and domestic investors. Among the most explicit litigation financiers entering the U.S. market over the last two decades are Juridica, Burford Capital Ltd., American Legal Capital, Advocate Capital, Inc., Counsel Financial, Evergreen Funding Group, Law Finance Group, Inc., Oxbridge Financial Group LLC, Rapid Funds, RD Legal Capital, and Via Legal Funding.[30] In addition to the bevy of litigation finance firms saturating the market, individual investors[31] and novel start-ups, such as Legalist, regularly affect U.S. litigation.[32] "Investors are pumping unprecedented sums of money into financing litigation, lured by the prospect of payoffs untethered to economic or market conditions."[33] "To litigation funders, a lawsuit is [now] more than a dispute; it is an asset, just like any other receivable."[34] In its 2015 annual report, a representative of Burford Capital LLC, a publicly traded global finance firm, acknowledged that, "It may seem strange to think of litigation [as an asset], but if one strips away the drama and collateral dynamics associated with the litigation process, a litigation claim is nothing more than an effort to get money to change hands."[35]

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[30] Steven Garber, *Alternative Litigation Financing in the United States*, RAND INSTITUTE OCCASIONAL PAPER, 13, 23 (2010) (in 2010, at least four new litigation funders entered the market); *see* William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, N.Y. TIMES (Apr. 30, 2012), http://dealbook.nytimes.com/2012/04/30/looking-to-make-a-profit-on-lawsuits-firms-invest-in-them/.

[31] Sorkin, *infra* note 40.

[32] Lisa Rickard and Mark Behrens, *Opinion: 3rd-Party Litigation Funding Needs Transparency*, LAW360 (Oct. 17, 2016) http://www.law360.com/articles/852142/opinion-3rd-party-litigation-funding-needs-transparency (discussing TPLF trends).

[33] *Id.*

[34] *Id.*

[35] *Id.*; Problematically only a few states have enacted legislation restraining the otherwise untethered practice of TPLF. *See* OHIO REV. CODE ANN. § 1349.55 (2009) (allowing restricted TPLF and striking down the Ohio Supreme Court case of Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003) where the

While the intricacies of each litigation lending arrangement may vary dramatically across the spectrum of litigation lending cases (many of which are never revealed), the case of *Boella v. Gawker Media, LLC*[36] offers a representative instance of how TPLF works in some U.S. jurisdictions. Terry Gene Boella (a/k/a Hulk Hogan) sued Gawker Media in 2012 for releasing, without his consent, footage of an adulterous encounter between himself and a married woman.[37] A Florida jury awarded Boella $140 million in personal injury damages for invasion of privacy.[38] Unbeknownst to the judge, jury, opposing counsel, or Gawker, however, Boella received pre-trial financial support from an outside investor to insure that he could go the distance with Gawker.[39] Tech billionaire Peter Thiel invested $10 million in Boella's lawsuit, providing him with the funding to oppose the profitable online media company.[40] Thiel described his interest in financing Boella's claim as a "philanthropic" venture against journalistic bullying and underscored that he did not "expect to make any money from [the investment]."[41] Due to Thiel's negative personal relationship with Gawker, however,[42] some believe that the Silicon Valley billionaire had a potential agenda driven by

Court found an arrangement of maintenance that disincentivized settlement practices); *see also* 9-A ME. REV. STAT. ANN. Tit. 9-A, §§ 12-104, 12-106.

36 Boella v. Gawker Media, LLC, 913 F. Supp. 2d. 1325 (M.D. Fl. 2012).

37 *Id.* at 1326.

38 Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, THE N.Y. TIMES, (May 25, 2016), http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html?r=0.

39 *Id.*

40 *Id.* (Thiel is Silicone Valley entrepreneur, a co-founder of PayPal and one of the first investors in Facebook).

41 *Id.*

42 *Id.* (In 2007, Gawker's *Valleywag* blog published an article headlined "Peter Thiel is totally gay, people" essentially "outing Thiel as gay." Owen Thomas, *Peter Thiel is totally gay, people*, GAWKER: VALLEYWAG, Dec. 19, 2017, http://gawker.com/335894/peter-thiel-is-totally-gay-people).

revenge, personal dislike, or principal.[43] While Thiel denies that his investment in Boella's claim was retaliatory, it is more likely that his personal dealings with Gawker had some role to play in his decision making process.[44]

The Boella-Thiel arrangement has many characteristics typical of an American TPLF agreement. In general, an agreement of this type is fairly simple,[45] requiring only that an investor evaluate the risk of an individual lawsuit and propose a return for her support, usually in a nonrecourse loan.[46] It involves only an investor and a holder of a claim.[47] Its details remain shrouded in secrecy, as the general terms were revealed only after the conclusion of litigation.[48] The expediency with which such arrangements can be made is surprising. In TPLF determinations, "funders minimally screen claims to determine whether to offer funding" in a routinized business model "handling a high volume of similar cases without much, if any, individualized treatment"[49] With the success and profitability[50]

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[43] *Id.*

[44] *Id.* (Regardless, we will never know. Due to the lack of TPLF regulation, there is no requirement that the motives of third party investors be discussed or investigated).

[45] Legalist, *supra* note 6 (visit the website of any litigation lender and you will find that it promises a "cash now" pledge in return for a nonrecourse promise to pay a percentage of the potential damage award); It should be noted that the nonrecourse nature of litigation loans, while not the subject of this article, is key to bypass usury (lending money at an unusually high rate) law.

[46] *See generally* Deborah R. Hensler, *Third-Party Financing of Class Action Litigation in the United States: Will the Sky Fall?*, 63 DEPAUL L. REV. 499 (2014).

[47] *See id.* at 501-02. (outlining a distinction between individual tort lending and commercial lending).

[48] S*ee* Fausone v. U.S. Claims, Inc., 915 So. 2d. 626 (Fl. 2005) (representing a situation where the litigation lending arrangement was revealed because the holder of the claim refused to pay the investor); Sorkin, *supra* note 41 (Thiel's involvement in the Gawker litigation only revealed itself after the jury verdict. The existence of many of these arrangements are likely never reveled).

[49] Hensler, *supra* note 49, at 502.

[50] *Id.* (noting that investors are drawn to the market by its potential for high rates of return per claim on a large volume of loans).

of TPLF in the U.S., such as the Theil-Boella one, investors now have an eye toward expanding TPLF to aggregate and commercial claims.

Due to the secrecy (and potentially the uncertainty) of litigation lending arrangements, there are few examples of American litigation lending in the aggregate context.[51] One such example, however, exists in the form of the Ecuadorian environmental damages litigation against Chevron—*Aguinda v. Texaco, Inc.*[52] In *Aguinda*, the U.S. District Court for the Southern District of New York refused to certify a class on behalf of Ecuadorian residents of the Amazon.[53]

> After nine years of litigation in federal court, the suit was dismissed on forum non conveniens. Two years later, a new suit arising out of the same factual allegations was filed in Ecuador by a group of Ecuadorians that included some of the original class representatives . . . . [T]he provincial court in Sucumbíos, Ecuador issued an $18 billion judgement against Chevron, which was upheld (although ultimately slashed in half) by Ecuador's appellate court. By 2010 Chevron was back in the U.S. courts, pursuing charges of fraud in the Ecuadorian litigation, seeking a preemptive injunction against enforcement of the Ecuadorian judgment, and ultimately bringing RICO charges against [plaintiffs' counsel]. . . . In late 2010, with plaintiffs' attorney [] apparently having depleted his resources and the Ecuadorian

[51] Hensler, *supra* note 49, at 505 ("It appears that only one class action initiative in the United States has secured third-party litigation financing"); Kalajdzic et. at., *supra* note 11, at 127 (stating that "there does not appear to have been a reported instance of TPLF in the class actions context").

[52] Hensler, *supra* note 49, at 505 (citing Aguinda v. Texaco, Inc., 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. Apr. 11, 1994)).

[53] *Id.* (citing Aguinda v. Texaco, Inc., 945 F. Supp. 625, 626–27 (S.D.N.Y. 1996), *vacated*, Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998)).

> provincial court in Sucumbíos yet to deliver its judgment, Patton Boggs received $4 million in funding from third-party litigation financer Burford Capital Ltd. to take over the case. Patton Boggs LLP, a fifty-year-old Washington, D.C. firm that describes itself as a "public policy" law firm with roots in international trade and business law, agreed to represent the Ecuadorian plaintiffs on a contingency fee basis. . . . Burford was said to have committed a maximum of $15 million to the litigation and reportedly hedged its investment by selling the initial $4 million share to another entity. A year later, Burford announced that it would not invest further in the Ecuadorian litigation. . . . Chevron's lawyers filed a letter dated September 2011 from Burford to [the plaintiffs' attorney] accusing him and the plaintiffs of fraud, pursuant to Chevron's ongoing RICO litigation against [the plaintiff's attorney]. Burford subsequently charged that [a member of Patton Boggs, LLP] had provided the firm with a misleading analysis of the case.[54]

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[54] *Id.* (citing citing Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001), *aff'd as modified*, 303 F.3d 470 (2d Cir. 2002); Chevron Corp. v. The Republic of Ecuador, PCA Case No. 34877, UNCITRAL Arbitration, Interim Award (Dec. 1, 2008), *available at* http://www.italaw.com/sites/default/files/case-documents/ita0150.pdf; citing also, Chevron Corp. v. The Republic of Ecuador, PCA Case No. 2009-23, UNCITRAL Arbitration, Claimant's Notice of Arbitration (Sept. 23, 2009), *available at* http://www.italaw.com/sites/default/files/case-documents/ita01550.pdf; PRESS RELEASE, AMAZON WATCH, CHEVRON GUILTY VERDICT UPHELD BY ECUADOR APPELLATE COURT, Jan. 4, 2011, *available at* http://amazonwatch.org/news/2012/0104-chevron-guilty-verdict- upheld-by-ecuador-appellate-court; Steven Donziger, et al., *Rainforest Chernobyl Revisited: The Clash of Human Rights and BIT Investor Claims: Chevron's Abusive Litigation in Ecuador*, HUM. RTS. BRIEF, Winter 2010, at 8; Patrick Radden Keefe, *Reversal of Fortune*, NEW YORKER, January 9, 2012, at 38; Michael Goldhaber, *The Global*

The attempted application of TPLF to the aggregate Boggs-Burford arrangement left in its wake lawsuits against the plaintiffs and the original plaintiffs' counsel, Steven Donziger, for fraud; tortious interference allegations against Chevron for improperly influencing the class investor, Burford;[55] and substantial monetary and public-image losses for the investor, Burford.[56]

While the Burford TPALF arrangement seems like an exaggerated worst-case scenario for TPALF investors,[57] it illustrates the complex array of issues that arise when applying TPLF to aggregate litigation. The utter failure of the Burford arrangement, one of the only public instances of TPALF in the U.S.,[58] has deterred many investors from "flock[ing] to [] high-

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Lawyer: Latest Twists in Chevron's Amazon Case Run Through Latin America, AM. LAW. (Nov. 12, 2012), http://www.americanlawyer.com/digestTAL.jsp?id=1202578138704&The_Global_Lawyer_Latest_Twists_in_Chevrons_Amazon_Case_Run_Through_Latin_America); Alison Frankel, *Can Ecuadorean Plaintiffs Keep Funding Case Against Chevron?*, REUTERS (Dec. 12, 2011), http://blogs.reuters.com/alison-frankel/2011/12/12/can-ecuadorean-plaintiffs-keep-funding-case-against-chevron/; Roger Parloff, *Litigation Finance Firm in Chevron Case Says It Was Duped by Patton Boggs*, CNN MONEY, Apr. 17, 2013, http://features.blogs.fortune.cnn.com/2013/04/17/burford-patton-boggs-chevron-suit/).

[55] *Id.* quoting James Tyrell, Jr., Paton Boggs, LLP, "Chevron made it clear that there would be repercussions if [Burford] continued [its] funding.").

[56] *Id.* (these arrangements are secretive that we may never know of the exact value of the losses sustained by Burford).

[57] *See* Tyler W. Hill, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 YALE L.J. 484, 528 (2015) (providing a sarcastic recognition of the negative value suit by a TPALF proponent).

[58] *See also* Binyamin Appelbaum, *Betting on Justice; Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES (Nov. 15, 2010). (Describing the non-class World Trade Centre Respiratory Illness lawsuit brought on behalf of ground zero workers funded by Counsel Financial in the form of a loan to Napoli Bern LLP. The case eventually settled for $712.5 million, and the lenders earned approximately $11 million).

value mass litigation against multinational corporations."[59] However, the success of TPALF in Australia, Canada, and the U.K.,[60] and the profitability of individual TPLF arrangements in the U.S, has encouraged investors and scholars alike to rationalize TPALF practice with U.S. law.[61] Even though the particular effect TPLF and TPALF arrangements have had on the U.S. market is difficult to quantify due to their secretive nature, the "marked increases in the number of funders entering the market" over the last decade clarifies that the litigation lending business is booming.[62]

III. TRANSITIONING FROM TPLF TO TPALF

In theory, the same reasoning that applies to TPLF should also apply to TPALF arrangements. Although champertous, TPALF arrangements, like their individual TPLF counterparts, radiate at least a modicum of social usefulness.[63] Unlike TPLF arrangements, though, TPALF agreements implicate ethical, evidentiary, adversarial, and representational concerns not contemplated in the individual TPLF context.

In theory, there are four categories of investment within the world of U.S. litigation finance.[64] The first category is TPLF

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[59] Hensler, *supra* note 49, at 507 (stating "Juridica has consistently stated that it will not provide financing for class action lawsuits").
[60] *See generally*, Kalajdzic et. al., *supra* note 11 (for the differences in U.S., Canadian and Australian TPLF).
[61] *See generally supra* note 3 (for several scholarly attempts to rationalize TPALF with U.S. law).
[62] Kalajdzic et. al., *supra* note 11, at 127.
[63] *See* Saladini v. Righellis, 687 N.E.2d 1224, 1226 (Mass. 1997) (explaining the social usefulness of litigation lending arrangements).
[64] Other authors propose that only three distinct categories of TPLF arrangements exist. *But see* Kalajdzic et. al., *supra* note 11, at 128-29 (citing Maya Steinitz, *Whose Claim is this Anyway?: Third Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011); Garber, *supra* note 33; Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1306 (2012); ABA, *supra* note 9, at 7).

"fee investing."[65] TPLF fee investing occurs when an investor personally finances an attorney or her law practice in return for a percentage of the attorney's fees in a case. Second, TPLF "relief investing" occurs when an individual claim holder sells a portion or all of her potential relief to an outside investor to shift the risk of loss.[66] Third, TPALF "fee investing" usually occurs in the class action context when class counsel receives funding from a third party investor to survive class certification and/or litigation.[67] In return, the outside investor receives a percentage of the attorney's contingency fee.[68] Finally, TPALF "relief investing" only differs from TPLF relief investing in scope.[69] Where TPLF relief investing involves one claim holder with one claim, TPALF relief investing is repeated many times with many aggregate claim holders.

Each of these investments, while similar, pose their own unique legal hurdles when contemplated in the context of a U.S. based lawsuit.[70] For example, TPALF fee investing arrangements, if revealed, may have implications on a judge's lead counsel determination, either positively or negatively.[71] TPLF fee investment arrangements, do not affect a judge's

[65] *Id.* at 128 (referring to this type of investing as "loans to lawyers or law firms").
[66] *Id.* (referring to this type of loan as a "nonrecourse loan made directly to [the] plaintiff").
[67] *Id.* (referring to this type of loan as "funding of complex or commercial claims").
[68] *See generally id.*
[69] *Id.* (Kalajdzic *et. al.* either contemplates this category of investment within TPLF "relief investing" or fails to recognize the separation between aggregate plaintiffs and individual plaintiffs. I bifurcate here to reflect the fundamental differences in aggregate plaintiffs and individual plaintiffs as well as the distinct issues that arise when applying TPLF to each).
[70] *See generally id.* (explaining the differences between the U.S., Australian, and Canadian approach to TPALF, including Canadian TPLF disclosure requirements and the Australian abolishment of the contingency fee and its use of a "loser pays" adversarial system).
[71] *Id.* at 133-34 (citing a conversation with Ralph Sutton, CEO of Bentham Capital, stating that when a law firm discloses its need for third party financing to support its representation, it impairs its chances of being selected as lead counsel in a class action).

determination of counsel. Similarly, the individual consent of the claim holder exists as an ethical barrier in TPLF relief investing arrangements.[72] However, due to the nature of aggregate claims, an attorney entering into a TPALF relief investing arrangement should be required to gather the consent of all similarly situated claimants before entering into the arrangement.[73]

While there are deficiencies in TPLF fee and relief investing (category one and two),[74] the shift away from maintenance and champerty toward litigation lending acts as society's recognition and acceptance of those deficiencies. However, TPALF fee and relief investing arrangements present countless insufficiencies that cannot be overcome by the social utility of risk sharing arrangements. Difficulties such as the perpetuation of false class support and the risk of higher recovery for undeserving classes,[75] and the political attack on contingency fee litigation remain in the background of almost every TPALF discussion.[76] The most glaring concerns that TPALF arrangements implicate, however, are (A) the exacerbation of privilege and confidentiality issues inherent in

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[72] *See generally* ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY § 1.6 (explaining that client information can be shared with a third party with the informed consent of the client).

[73] *See generally id.*; Hensler, *supra* note 49, at 515 (proposing that judicial oversight and Rule 23(e)(3) could cure this specific perplexity).

[74] Specifically, the traditional normative concerns about maintenance and champerty, and the lack of transparency inherent in these arrangements. *See* Rickard et. al., *supra* note 35.

[75] *See* Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1200 (2013) (recognizing what Professor Hensler calls the "in terrorem effect of class actions" and their propensity to affect the settlement of frivolous class actions); *but see* Hensler, *supra* note 49, at 511 (theorizing the non-existence of a rise in frivolous class action settlements).

[76] *See* JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD PARTY LITIGATION FUNDING IN THE UNITED STATES (2009), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/thirdpartylitigationfinancing.pdf; *see also* Hensler, *supra* note 49, at 511-12 (acknowledging, and rejecting, similar TPALF concerns).

aggregate litigation; (B) the ability of aggregate defendants and other improper parties to invest in their opposing party's claim; and (C) the advancement of non-party interests to the detriment of claim holder.

A. THE EXACERBATION OF PRIVILEGE AND CONFIDENTIALITY CONCERNS INTRINSIC IN COMPLEX LITIGATION

Investing is not gambling. Gambling requires only that an individual hedge a bet relying on luck and/or chance for a return. Investing requires thoughtful analysis of information. Investopedia explains that

> [t]rue investing doesn't happen without some action on [the part of the investor]. A 'real' investor does not simply throw his or her money at any random investment; he or she performs thorough analysis and commits capital only when there is a reasonable expectation of profit. Yes, there still is risk, and there are no guarantees, but investing is more than simply hoping Lady Luck is on your side.[77]

The larger the risk (aggregate claims are structurally risk laden), the more information an investor must gather to make a comfortable investment. Litigation investment is no different.[78] Capital investments by sophisticated investors, which are the type of investors that would be interested in funding an

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[77] Investopedia Staff, *Investing 101: What Is Investing?,* INVESTOPEDIA (2017), http://www.investopedia.com/university/beginner/beginner1.asp#ixzz4PxLviQsz.

[78] This Article primarily focuses on "for-profit investing," and, as a default position, presumes as much of third-party litigation financing. The author does recognize that all investing is not based on capital profit. Spirted advocates eager to subsidize religious, ethical, and moral movements - regardless of capital profit - may invest in litigation to achieve a non-capital outcome. This type of "nonprofit investing", however, seems rare amid the profit driven litigation lenders entering the U.S. TPLF market. *See supra* note 6.

aggregate claim, are driven by the availability of data and information. Ethical and evidentiary concerns arise when the data and information sought by investors is confidential and/or privileged.

i. ETHICAL CONCERNS PRESENTED BY THE DISSEMINATION OF CONFIDENTIAL AGGREGATE INFORMATION

In the individual TPLF context many of the ethical woes presented by the privilege and confidentiality doctrines can be cured by giving notice to, and receiving consent from, the claim holder.[79] Distributing notice and receipt of consent, however, become painstakingly challenging in the context of TPALF fee investing, and insufficient in the context of TPALF relief investing. The Model Rules of Professional Conduct require that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."[80] The rule does not distinguish between aggregate and individual claimants, thus if privileged information is disseminated in an aggregate fee investing arrangement, the attorney must first have consent from all affected claimants. When there are hundreds (if not thousands) of claimants across numerous jurisdictions with varying degrees of interest in the claim, notifying and receiving consent from all claim holders before entering into an information/data based fee investing arrangement is very unlikely, but necessary under the ethical rules.[81]

The relationship that develops between a claim holder and a relief investor may also require consent from other similarly situated claimants. Depending on the identity of the investor, the motivations behind the relief investing arrangement, the information/data required by the investor,

[79] *See* ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY § 1.6 (including an exception to disclose confidential information with consent of the client).
[80] *Id.*
[81] *Id.*

and the characteristics of all other similarly situated claimants, the relief investing arrangement could severely disadvantage other claimants.[82] To avoid conflict among aggregate claimants, consent is required of all claimants before distinct information/data based TPALF relief investing arrangements may be entered into.[83]

ii. EVIDENTIARY CONCERNS PRESENTED BY THE DISSEMINATION OF CONFIDENTIAL INFORMATION

In their article *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, Professor Jasminka Kalajdzic, Dr. Peter Cashman, and Alana Longmoore characterize the integrity of the lawyer-client relationship primarily as an "ethical concern."[84] While the intervention of a third party into the attorney-client relationship raises ethical issues (discussed in PART II. A. i.),[85] these arrangements present equally problematic evidentiary concerns. Violating the ethical duty of confidentiality and/or the breach of privilege might cause formal disciplinary proceedings by the American Bar Association,[86] but the evidentiary implications of breaching confidentiality and privilege will produce a legal malpractice lawsuit.[87]

It is axiomatic within the legal profession that all communications between the attorney and client are protected by the *attorney-client privilege*.[88] Likewise, all documents

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[82] *See id.* at 1.7 (stating "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest"); *See also* Part II C.

[83] *Id.* at 1.7(b)(4); *See generally* MoneyForLawsuits V LP v. Rowe, 2012 U.S. Dist. LEXIS 43633 (E.D. Mich. March 29, 2012) (as an example of a relief investing arrangement within an aggregate claim).

[84] Kalajdzic et al., *supra* note 11, at 134.

[85] *See* ABA, *supra* note 92.

[86] *Id.* at 8.4.

[87] John T. Seale, *Legal Ethics: A New Column*, 42 LA. B. J. 283 (1994) (briefly discussing the distinction between misconduct and malpractice).

[88] FED. R. EVID. 502.

prepared in anticipation of litigation are protected as confidential by the *attorney work product doctrine*.[89] All attorney-client communications and work product created in anticipation of litigation are protected from discovery.[90] A privilege does not exist, however, for attorney-investor or investor-claimant communications, nor does there exist a doctrine to protect investor work product from prying eyes. In theory, when an attorney propagates privileged or confidential information to an investor it becomes discoverable.[91]

Clever attorneys have attempted to circumvent discovery by utilizing the "common interest exception" to the attorney-client privilege. The common interest doctrine was originally contemplated to "permit[] represented parties who shared a common *legal* interest to exchange privileged information in a confidential manner for the purpose of obtaining legal advice without waiving the attorney-client privilege" (emphasis added).[92] This exception was usually reserved to allow co-defendants an opportunity to exchange privileged information.[93] The extension of the common interest exception to third-party litigation funders has been met with mixed reactions. In *Leaders Technologies, Inc. v. Facebook, Inc.*, the United States District Court for the District of Delaware rejected "the common interest exception to [the] attorney-client privilege and ordered disclosure of documents shared with funders during discussions about potential TPLF arrangements."[94] In *Mondis Technology Ltd. v. LG Electronics,*

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[89] *Id.*; ABA, *supra* note 90.
[90] FED. R. EVID. 502.
[91] Kalajdzic et. al., *supra* note 11, at 136 (noting that confidentiality and nondisclosure agreements do not insulate information from discovery).
[92] Katherine Traylor Schaffzin, *An Uncertain Priviege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. PUB. INT. L.J. 49 (2005).
[93] *Id.* at 51.
[94] Kalajdzic et. al., *supra* note 11, at 137 (citing Leader Technologies, Inc. v. Facebook, Inc., 719 F. Supp. 2d 373 (D. Del. 2010)); *see also* Bray & Gillespie Management LLC v. Lexington Insurance Co., 2008 WL 5054695, 2 (M.D. Fla. 2008).

Inc., the United States District Court for the Eastern District of Texas "found that disclosure of such documents to potential funders did not waive work product privilege."[95] The "question of whether any communication with the [investor] would be protected by privilege is also unsettled"[96]

In a recent article, the CEO of Burford Capital, Christopher P. Bogart, shrugged off the evidentiary concerns presented by disclosing confidential information to litigation financiers.[97] According to Bogart, "several decisions have recently confirmed that work product shared with a litigation financier under a confidentiality agreement remains privileged."[98] While facially true, Bogart's statement must be contextualized. Bogart as the chief executive officer of one of the largest litigation financing firms in the world obviously harbors a bias toward the subject. More problematically, Bogart's self-serving article fails to mention the existence of conflicting case law, and runs contrary to statements by other litigation investment firms that have indicated that they do not actively seek access to information within the scope of the attorney-client privilege when performing due diligence prior to funding a claim.[99] Regardless of its context, Bogart's article reveals an important aspect of TPLF (and logically TPALF) arrangements - both proponents and opponents of TPALF recognize that

[95] Kaljdzic et. al., *supra* note 11, at 137 (citing Mondis Technology Ltd. v. LG Electronics, Inc., 2011 WL 1714304 (E.D. Tex. May 4, 2011)).

[96] Kaljdzic et. al., *supra* note 11, at 136 (citing Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co., 6:07CV222-ORL-35KRS, 2008 WL 5054695, at *2 (M.D. Fla. Nov. 17, 2008).

[97] Christopher P. Bogart, *The Case for Litigation Financing*, 42 LITIG. 46, 49 (2016).

[98] *Id.*

[99] *See* AMERICAN BAR ASSOCIATION, COMMENTS TO ALTERNATIVE LITIGATION FINANCING WORKING GROUP ISSUES PAPER, AMERICAN BAR ASSOCIATION COMMENTS (2011), https://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/comments_on_alternative_litigation_financing_issues_paper.authcheckdam.pdf (ALFA, Juridica and Oasis Legal Finance have all indicated that they do not seek access to information covered by the attorney-client privilege when performing due diligence prior to funding a claim).

investors cannot accurately calculate risk without the dissemination of privileged and/or confidential information.[100] Whether this dissemination subjects attorneys and claimants to the risk of evidentiary exposure is far more unclear than Bogart suggests. As with many aspects of litigation lending, this uncertainty becomes even more indefinite when considered in the vacuum of TPALF where extensive case law does not exist.

B. REVOLUTIONIZING RISK MITIGATION THROUGH IMPROPER INVESTMENT

The lack of transparency that defines almost every TPLF and TPALF arrangement in the U.S.[101] makes it almost impossible to determine who is actually investing in litigation. In his article *Auctioning Class Settlements*, Professor Jay Tidmarsh identifies "five types" of potential TPALF investors, which he calls bidders.[102] First, and most obvious, law firms may choose to invest their internal resources to continue litigation.[103] Second, private equity firms (i.e. litigation lenders) could emerge as a potential class of investors engaged in the financing of claims.[104] Third, consumer advocacy groups or other nonprofit groups may invest in a claim with an interest in regulating the defendant's conduct.[105] Fourth, the defendant's competitors may invest in a plaintiff's claim to affect the economic market in which the defendant and the competitor

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[100] S*ee generally* Hensler, *supra* note 49, at 518 (recognition TPALF's incompatibility with the doctrines of privilege and confidentiality by a TPALF supporter); *see also* Bogart, *supra* note 109, at 49.
[101] Kalajdzic et. al., *supra* note 11, at 128 (distinguishing between disclosure requirements in Canada and the lack of such requirements in the U.S.).
[102] Jay Tidmarsh, *Auctioning Class Settlements*, 56 WM. & MARY L. REV. 227, 257 (2014) (Professor Tidmarsh identifies 5 categories of "bidders" but the same categories can be used to identify the types of "investors" that may pursue TPALF).
[103] *Id.*
[104] *Id.*
[105] *Id.*

operates.[106] And, finally, the defendant itself may invest in a plaintiff's claim to more effectively allocate risk.[107]

As a fundamental principal of law in common law countries—including the United States—legal disputes must be adversarial.[108] If any investor, other than a law firm, finances a legal claim, it should raise suspicion of whether that investor has an ulterior motive, including—but not limited to—pecuniary gain, for her involvement in the lawsuit. The potential for adversarial abuse has grown exponentially with the introduction of litigation lending in the United States, because litigation lending firms may be owned by multinational corporations[109] or operate under various subsidiaries,[110] the probability of someone with a non-adversarial or economic incentive to exist on both sides of the transaction is more likely than ever.

Professor Tidmarsh, in discussing his proposition of a class settlement auction,[111] simply dismisses the notion that a defendant would want to bid against her own settlement offer,

[106] *Id.*

[107] *Id.*

[108] *But see* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Stems: France, Italy, and Germany*, 87 YALE L. J. 240 (1977) (distinguishing common law judiciaries from *inquisitorial judiciaries* where the court takes an active role in investigating facts).

[109] *See* Binyamin Applebaum, *Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 14, 2010, http://www.nytimes.com/2010/11/15/business/15lawsuit.html?pagewanted=all&_r=0. (disclosing that Counsel Financial is believed to be owned by Citigroup); *but see* counselfinancial.com (failing to mention its relationship to Citigroup).

[110] *See* BURFORD CAPITAL, LLC, http://www.burfordcapital.com/burford-capital-llc-2016/ (last visited Sept. 12, 2017). (stating that it operates through subsidiaries in numerous countries. Note that the website fails to outline the distinctions between Burford entities).

[111] Tidmarsh, *supra* note 116 (discussing the investment by a defendant in a plaintiff's claim in the vacuum of his proposed class settlement auction scheme and not in the context of investment generally).

therefore existing on both sides of the transaction.[112] While fairly nuanced, however, such a proposition is not unheard of. In hostile business takeovers, corporate raiders (i.e. hostile investors) purchase shares directly from individual shareholders to circumvent negotiations with an unfavorable board of directors.[113] This allows the corporate raider (the investor) to acquire an otherwise un-acquirable asset. Analogously, when settlement negotiations break down in aggregate claims, aggregate defendants may consider purchasing portions of the lawsuit to force settlement or mitigate risk at a more favorable cost. For example, assume that Aggregate Class A sues Company C. Company C offers a $10 million settlement to the members of Aggregate Class A, but due to the resiliency of class counsel and a majority of class members, Aggregate Class A decides that it wants to take the lawsuit to trial. Company C may approach risk averse individual members of the class and purchase portions of the class claim at the rate of its settlement, or below, to reduce its overall exposure to negative judgement or to influence the pendency of litigation from both sides of the claim. By creating similar interests on each side of a dispute, aggregate defendants can bypass the common law requirement of adversarial adjudication.

Similar incentives exist for market competitors to invest against aggregate defendants. Suppose a smartphone manufacturer (such as Samsung) is sued for product defectiveness. Market competitors (such as Apple) may seize the opportunity presented by high cost, high profile aggregate litigation to deal an economic blow to a market opponent. "Competitors may have a legitimate reason to pursue a claim against the defendant. For example, the defendant may be engaged in slipshod practices that are negatively affecting the

[112] *Id.*

[113] This usually occurs after merger/acquisition offers have been rejected by the board. *See generally* Cheff v. Mathes, 199 A.2d 548 (Del. 1964) (as a representative instance of an attempted hostile takeover).

industry."[114] On the other hand, "the purpose of the suit may be nefarious: a better financed competitor may see an opportunity to drive up the defendant's costs through prolonged litigation, or even to bankrupt the company."[115] As professor Tidmarsh explains "In theory, abuse of process and antitrust laws prevent [nefarious litigation,][116] but proving an illegitimate motive is difficult and would consume significant resources."[117]

To harmonize TPALF with the adversarial nature of common law jurisdictions, professor Deborah Hensler suggests that judicial oversight and the requirements of Rule 23(e)(3) would deter improper parties from investing in aggregate claims.[118] Professor Hensler's suggestion, although novel, contains integral flaws. First, Rule 23(e) only applies to class action settlements.[119] If the aggregate claim is a non-class action,[120] or if it does not involve "settlement, voluntary dismissal, or compromise" then Rule 23(e) does not require the disclosure of funding arrangements.[121] Second, even when a TPALF arrangement exists in the context of a class action and under the pretense of settlement, dismissal, or compromise, judiciaries have no reason to suspect that an impermissible funding arrangement exists, and no mechanism for compelling disclosure of such an arrangement. The threat of post hoc reprimands fails to provide a real reprimand for the discovery of these inappropriate TPALF arrangements. Therefore, Rule 23(e)(3) fails to curtail inappropriate funding arrangements.

Because no regulatory effort has been made to

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114 Tidmarsh, *supra* note 116, at 258 (citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972)).
115 *Id.*
116 *Id.* (citing Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 472 (7th Cir. 1982)).
117 *Id.*
118 Hensler, *supra* note 49, at 515.
119 FED. R. EVID. 23(e).
120 AMERICAN LAW INSTITUTE, PRINCIPALS OF LAW: AGGREGATE LITIGATION, §1.02 (2010) (giving various non-class aggregate claims including: derivative law suits, inventory settlement, and bankruptcy proceedings).
121 FED. R. EVID. 23(e).

safeguard TPALF arrangements from inappropriate intervention, and because Rule 23(e)(3) lacks the inclusivity and disciplinary authority to curtail the interposition of such arrangements, the intervention of aggregate defendants and market competitors into aggregate litigation lending arrangements poses a considerable threat to the adversarial nature of litigation in the U.S. [122]

C. CREATING CONFLICTS: THE ADVANCEMENT OF NON-PARTY INTERESTS TO THE DETRIMENT OF THE CLAIM HOLDER (THE AGENCY COST PROBLEM)

The TPLF movement signifies an improved access to justice for claimants and attorneys without the financial fortitude to oppose deep-pocketed corporations.[123] The TPLF access to justice movement relies, to some extent, on the belief that most attorneys have limited financial means and limited risk appetites.[124] TPALF proponents theorize that economic incentives to settle "smother some potentially meritorious claims in their infancy because lawyers are unable or unwilling to front the costs required to pursue them in court."[125] Some scholars have referred to this failure to achieve a claims potential as the "agency cost" of aggregate representation.[126] When a principal holds an asset and places it in the hands of an agent, the agent may have an "incentive to maximize personal profit rather than the profit of the principal."[127] In the litigation context, the principal is the client, the asset is the legal claim, and the agent is the attorney. Attorneys are presumed to settle claims at lower negotiated values due to their own pecuniary

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[122] *Id.*
[123] *See generally* Hill, Hensler, Tidmarsh, Kalajdzic, Lyon *supra* note 3 (for a list of articles referring to TPLF as an access to justice movement); *see also* Carlyn Kolker, *New York City Bar Gives Thumbs Up to Litigation-Funding*, NAT'L LEGAL NEWS FROM REUTERS, June 20, 2011.
[124] Hill, *supra* note 3, at 486.
[125] *Id.* at 500.
[126] Tidmarsh, *supra* note 116, at 233.
[127] *Id.*; *see also* Hill, *supra* note 68, at 503.

interests in risk laden claims. These "low-ball" assessments occur to the detriment of the claimant. TPALF supporters speculate that injecting third party investors/bidders into the representational equation will incentivize the accurate appraisal of aggregate claims and encourage meritorious claims to proceed through litigation.[128] While the accessibility of alternative funding is admittedly practical, further privatization of aggregate litigation finance would likely amplify the agency problem characteristic in legal representation.

By introducing a greater number of interests—let alone nonrecourse financial interests—into the class funding calculus,[129] TPALF arrangements create a greater incentive to settle at the lowest rate of profit. Aggregate litigation finance parallels two comparable markets in the U.S. First, TPALF is almost identical to the U.S. securities market.[130] The New York Stock Exchange (NYSE), the NASDAQ (an "over the counter market"), and other securities exchanges provide a platform for trading risk and reward for capital just like litigation lending. Like litigation lending, securities trading ranges from safe investments, such as an investment in government bonds,[131] to riskier investments, such as speculation in unproven start-up companies.[132] Regardless of the medium, both litigation financiers and stock traders know "any sale that results in a gain is a good sale."[133] Millions of stocks are purchased and sold daily on the floor of the NYSE when it becomes profitable for the investor.[134] The reasoning is simple, stockholders generally hold little more than a pecuniary interest in the security and

[128] Hill, *supra* note 68, at 504; Tidmarsh, *supra* note 116, at 240.
[129] *Supra* note 48.
[130] *See generally* U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/rules.shtml (last visited Sept. 12, 2017) (unlike litigation lending, the securities market is regulated).
[131] Parallel to TPLF arrangements.
[132] Parallel to TPALF arrangements.
[133] Sham Gad, *When to Sell Stocks,* INVESTOPEDIA, July 7, 2017, http://www.investopedia.com/articles/stocks/10/when-to-sell-stocks.asp.
[134] *Id.* (this is called "day trading").

investors are not generally inclined to risk maturation when profit is on the line.[135] There is no reason to believe that litigation lenders would operate with any less precision or commitment to the fiscal "bottom line."

Second, litigation lending is eerily similar to the payday loan market.[136] In the payday loan market, entities[137] provide funds to relatively unsophisticated people whose personal circumstances are so strained that they find it attractive to promise not-yet-received income for a reduced cash amount to immediately help meet current needs.[138] These loans often have an interest rate of 40% or more.[139] Litigation lending works in an analogous way, targeting claimants and attorneys with little to no capital (or desire for risk). These individuals are enticed by the promise of up-front capital for a percentage of their potential recovery/fee. Because these litigation loans are nonrecourse and inherently risky, the lender can avoid usury laws and recover a robust fee for their investment.[140]

Due to the pecuniary nature of TPALF arrangements, litigation lending is more likely to exacerbate the advancement of non-party interests, than any other form of investment in the U.S. While the judicial agency problem is no doubt an issue for

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[135] *See generally id.*

[136] Page C. Faulk, U.S. Chamber Inst. For Legal Reform, Presentation on Third-Party Litigation Financing (executive summary available at http://www.wial.com/wwcms/wp-content/uploads/2012/09/Litigation-Loans.pdf); *See also* Hensler, *supra* note 49, at 501 (stating that "others have analogized this part of the litigation financing industry to the subprime mortgage market." (citing Susan Lorde Martin, *Litigation Financing: Another Subprime Industry that has a Place in the United States Market*, 53 VILL. L. REV. 83 (2008)).

[137] *See generally*, CHECK INTO CASH, Inc., https://checkintocash.com (as an example of just one pay day loan corporation offering cash advances, title loans, and payday loans).

[138] Hensler, *supra* note 49, at 501.

[139] Jessica Silver-Greenberg and Peter Eavis, *Service Members Left Vulnerable to Payday Loans*, N.Y. TIMES, Nov. 21, 2013, *available at* http://dealbook.nytimes.com/2013/11/21/service-members-left-vulnerable-to-payday-loans/.

[140] Hensler, *supra* note 49, at 501.

many litigants, attorneys are at the very least subject to the rules of professional conduct and must operate within the confines of their duties as a fiduciary to the claimant.[141] Securities speculators are subject to SEC regulation and oversight.[142] And, even payday loan lenders must operate within the confines of usury laws and the oversight of the Consumer Financial Protection Bureau.[143] TPALF operates with far less regulation and without many of the restrictions placed on other forms of investment. Its propensity to raise representational concerns is, at least potentially, far greater than that of the current representational financing model.[144]

IV. PROPOSING PROHIBITION

Many have praised the growth of litigation lending for obvious, and some not-so-obvious,[145] reasons. Before the equitable principals of TPLF can be extended to aggregate claims, lawmakers must address the elephant in the room—U.S. law and TPALF are characteristically incompatible. Though TPLF arrangements may require individual consent or unilateral disclosure to cure most compatibility quandaries,

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141 *See generally* MODEL CODE OF PROF'L CONDUCT (AM. BAR ASS'N 2016).

142 *See generally* SEC, *supra* note 145.

143 *See generally* CONSUMER FINANCIAL PROTECTION BUREAU, http://www.consumerfinance.gov.

144 Ralph Lindeman, *Third-Party Investors Offer New Funding Source for Major Commercial Lawsuits*, 0 BUREAU OF NAT'L AFFAIRS: DAILY REP. FOR EXECUTIVES 42, (Mar. 5, 2010), https://fulbrookmanagement.com/third-party-investors-offer-new-funding-source-for-major-commercial-lawsuits./ (last visited Sept. 12, 2017) ("there are no local court rules that would require the disclosure of the details of a financing arrangement between a litigant and a third party").

145 Aviva O. Will, *Litigation Finance Can Help Break the Glass Ceiling*, LAW360, (July 15, 2015), https://www.law360.com/articles/679036/opinion-litigation-finance-can-help-break-the-glass-ceiling (an article by Burford Capital's Managing Director proposing that litigation finance can help bridge the gender salary gap in the legal profession).

TPALF would require a substantial rewriting of many ethical, evidentiary, adversarial, and representational rules.

Unlike in Canada, where lending laws require the disclosure of litigation financiers, theoretically curing the privilege and confidentiality concerns intrinsic in aggregate claims, U.S. law does not demand (or, in most jurisdictions, even contemplate) transparency in litigation lending arrangements.[146] Distinct from jurisdictions where financing arrangements exist as an alternative to contingency fees, such as Australia, attorneys in the United States regularly rely on contingency fees to recover their expenses.[147] Similarly, where other jurisdictions, such as the U.K., operate under a "user pays" model of fee recovery, U.S. law typically uses an attorney's fee award as a punitive measure. Unlike in Canada, Australia, and the U.K., litigation funding is neither congruent with, nor necessary, to the operation of U.S. jurisprudence.

To harmonize TPLF with the incompatible components of U.S. aggregate law, many practitioners and scholars have proposed regulatory schemes and concepts to help bridge the gap. Professor Jay Tidmarsh has proposed a class settlement auction whereby investors bid against the defendant's highest settlement offer and if successful, stand in the place of the claimants in pursuit of their claim.[148] Professor Deborah Hensler has argued that the concerns with TPALF are over-exaggerations and that minor tweaks to U.S. law could account for the totality of those concerns.[149] Tyler Hill proposed a pre-litigation sale of claim equity to combat the agency cost of aggregate representation.[150] While each proposal is more novel than the last, none account for the risks associated with the practice of litigation lending in the current unregulated provisional period. As the CEO of a major litigation lending

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[146] Kalajdzic et. al., *supra* note 11, at 128 (distinguishing between disclosure requirements in Canada and the lack of such requirements in the U.S.).
[147] *Id.* at 138-39.
[148] Tidmarsh, *supra* note 116.
[149] Hensler, *supra* note 49.
[150] Hill, *supra* note 68.

firm recently admitted, "there are valid questions to ask about how [litigation lending] is used, and questions litigators need to ask before they engage with a financier."[151] By engaging in the unregulated practice of litigation lending, financiers and loan recipients are merely converting the risk of adverse judgment into the risk of ethical, evidentiary, adversarial, and representational violations. Until a regulatory/legal structure is adopted in the U.S. that accounts for the totality of the concerns presented by TPALF, a blanket prohibition on TPALF arrangements is needed to protect attorneys/claimants and foster a healthy environment for aggregate litigation lending to grow.

A comprehensive prohibition on TPALF arrangements may seem extreme to proponents of litigation lending, however pendency prohibition makes sense. First, temporary prohibition assumes the eventual acceptance of TPALF. Proponents of TPLF believe "there is no serious debate [that] litigation finance is here to stay."[152] Many investment firms and startups have waged substantial bets on the success of litigation lending. By acknowledging the need for regulation, one ultimately recognizes that litigation lending is a legitimate tool of equity. Second, equity need not be sacrificed in the interim between non-regulation and legal recognition. Risk-averse attorneys and claimants may still rely on the existence TPLF in non-aggregate claims, institutional non-recourse lending, law firm lending, and other less institutionally offensive forms of financing. Contextually, the prohibition should only affect financing arrangements in aggregate claims and only for a controlled period. Finally, the temporary proscription of TPALF arrangements should motivate legislators and lobbyists to develop a comprehensive strategy addressing the non-conformity of TPALF with U.S. law. By prohibiting aggregate claimants and their attorneys from entering into third-party lending arrangements until legislation catches up to the practice, opponents and proponents of TPALF are encouraged

151 Bogart, *supra* note 111, at 47.
152 Bogart, *supra* note 111, at 47.

to direct efforts toward influencing legislation where determinations have a broad proactive influence, as opposed to judiciaries where determinations are characteristically retroactive and narrow.

V. CONCLUSION

In a society that recognizes the social utility of litigation lending arrangements, the traditional normative concerns of maintenance and champerty are contemplated with less vigor. Where maintenance and champerty once stood, a system of third-party litigation lending has grown. For many, the shift represents a systematic balancing of the proverbial scale. For others, litigation lending commercializes the practice of law to the point of non-recognition. Regardless, extending TPLF to aggregate claims exacerbates many concerns presented by individual litigation lending and raises many new ones. This article set out to answer the question of whether applying TPLF in the aggregate context is worth the risk. It concludes that is not worth that risk because litigation lending exacerbates privilege and confidentiality issues; because of the ability of aggregate defendants and other improper parties to circumvent the adversarial nature of U.S. law by investing in their opposing party's claim; and because of the representational concerns in advancing non-party interests to the detriment of the claimant.